

## THE LAW OF PERSONS AND FAMILY LAW

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### LEGISLATION

#### CHILDREN'S ACT

The Children's Act 38 of 2005 is one of the most important and far-reaching pieces of legislation in the area of the law of persons and family law in recent South African history. It radically changes aspects of the law of parent and child and extends the rights and protection that children enjoy. It also codifies aspects of the law of parent and child.

The Act is an amended version of selected provisions of the draft Children's Bill that the Department of Social Welfare published for comment in 2002. That draft Bill was itself an amended version of the draft Children's Bill that was attached to the South African Law Commission's *Report on the Review of the Child Care Act Project 110* (2002). When the Children's Bill 70 of 2003 was tabled in Parliament, constitutional concerns about its mixed national and provincial nature caused its withdrawal. The parts that have implications for provincial government were excised from the Bill, and the parts that have implications for national government were resubmitted under the same title — the Children's Bill 70 of 2003. A substantially pruned version of the excised provisions was later submitted to Parliament as the Children's Amendment Bill 19 of 2006. The Children's Amendment Bill eventually became the Children's Amendment Act 41 of 2007, which is discussed below in this chapter, while version 70D of the Children's Bill was eventually enacted as the Children's Act. Sections 1–11, 13–21, 27, 30, 31, 35–40, 130–4, 305(1)(b) and (c), 305(3)–(7), 307–11 and 313–15, and the second, third, fifth, seventh, and ninth items of Schedule 4 of the Children's Act came into operation on 1 July 2007 (Proc 13 GG 30030 of 29 June 2007). The scope of these sections is such that a detailed discussion of all of them is impossible here. I shall merely alert the reader to selected issues.

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As is usual, section 1 contains definitions. Section 2 sets out the objectives of the Act. They include promoting the preservation and strengthening of families; giving 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 his or her best interests considered of paramount importance in every matter concerning him or her; giving effect to the obligations 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; strengthening and developing community structures which can assist in providing care and protection for children; protecting children from discrimination, exploitation, and any other physical, emotional, or moral harm or hazards; providing care and protection to children who are in need of care and protection; and recognizing the special needs of children with disabilities.

Section 6 establishes a child-centred approach in respect of all legislation, proceedings, and state measures relating to children. The section sets out general principles that 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 (s 6(1)). 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 child's fundamental rights, the best interests of the child standard that is set out in section 7 of the Act, and the rights and principles that are contained in the Act (s 6(2)(a)). In addition, section 9 requires that the standard that the child's best interest is of paramount importance must be applied in all matters concerning a child's care, protection, and well-being. Thus, in keeping with the instruction in section 28(2) of the Constitution of the Republic of South Africa, 1996, the Act places great emphasis on the best interests of the child. (Section 28(2) of the Constitution provides that the child's best interests must be of paramount importance in every matter concerning the child.) Other general principles include 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 (s 6(3)). This principle links up with section 10, which 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, and provides that the child's views must be given due consideration. Another general principle stated in section 6 is that 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 (s 6(5)).

Section 7 contains an exhaustive list of factors that must be taken into consideration in determining the best interests of a child. Even though section 7(1) requires only that the listed factors must be considered when a provision of the Children's Act requires the best interests of the child standard to be applied, the general principle in section 6(2)(a) (see above) entails that the factors must be considered in all proceedings, actions, or decisions in a matter concerning a child, and not only those in terms of the Children's Act. The listed factors include 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; 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; the likely effect on the child if any of his or her circumstances were to change; the child's age, maturity, stage of development, gender, background, and any other relevant characteristic of the child; the child's physical and emotional security; the child's intellectual, emotional, social, and cultural development; 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; any family violence involving the child or a family member of the child; and which action or decision would avoid or minimize further legal or administrative proceedings regarding the child.

Section 11 stipulates specific factors that must receive due consideration in matters concerning a child who has a disability or suffers from a chronic illness, and provides that such a child has the right not to be subjected to medical, social, cultural, or religious practices that are detrimental to his or her health, well-being, or dignity.

Section 13 entitles every child to access to information on health promotion, sexuality, reproduction, his or her health status, and the prevention and treatment of ill-health and disease. It also affords the child the right to confidentiality regarding his or her

health status and the health status of his or her parent, caregiver, or family member, unless maintaining confidentiality is not in the child's best interests.

Section 14 empowers every child to bring and to be assisted in bringing a matter to court. Thus, it re-affirms the right of access to court that section 34 of the Constitution confers on everyone, and relates it specifically to children. Generally, a minor does not have the capacity to litigate independently. The common law provides that the guardian of an infans (a minor below the age of seven years) must litigate on the infans' behalf, while a minor over the age of seven years may litigate with his or her guardian's assistance, or the guardian may litigate on the minor's behalf (see, for example, DSP Cronjé & Jacqueline Heaton *The South African Law of Persons* 2 ed (2003) 87 and 102; CJ Davel & RA Jordaan *Law of Persons* 4 ed (2005) 61 and 92–5; *Boberg's Law of Persons and the Family* 2 ed by Belinda van Heerden, Alfred Cockrell & Raylene Keightley (general eds) & Jacqueline Heaton, Brigitte Clark, June Sinclair & Tshepo Mosikatsana (1999) ch 24). Even though the common law already regulates the minor's capacity to litigate, section 14 confers a statutory entitlement to assistance in legal proceedings on every child. The assistance that the section refers to does not necessarily mean that the child is entitled to legal representation. If a curator ad litem is appointed for the minor, the curator will indeed be a legal representative, but this is not the essence of what section 14 has in mind. I submit that section 14 means that if the child is over the age of seven years, he or she has the right to insist on having his or her limited capacity to litigate supplemented by means of the assistance of a guardian, a curator ad litem, or the High Court. (Compare CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* loose-leaf (2007) 2-19, who contends that section 14 'links up with s 28(1)(h) of the Constitution' and affords the child the right to legal representation.) As section 14 refers to '[e]very' child, one can argue that it further amends the common law by conferring limited capacity to litigate on an infans and entitling him or her to assistance that will supplement such limited capacity. I doubt, however, whether this implication of the use of the word 'every' is in line with the intention of Parliament. It would be most odd if Parliament intended to bestow limited capacity to litigate on an infans while leaving the rule that an infans has no capacity to act intact.

Section 15 lists the persons who may approach the court to enforce the rights that children enjoy in terms of the Bill of Rights

and the Children's Act, while section 16 provides that every child has responsibilities appropriate to his or her age and ability towards his or her family, community, and the state. Section 17 lowers the age of majority from 21 to eighteen years.

Chapter 3 of the Act (ss 18–41) deals with parental responsibilities and rights. (For a detailed discussion and analysis of chapter 3, see Jacqueline Heaton 'Parental Responsibilities and Rights' in Davel & Skelton *op cit* at 3-1–3-45.) The term 'parental responsibilities and rights' is the statutory replacement of what was traditionally called 'parental authority' or 'parental power'. The term 'parental responsibilities and rights' refers to the responsibilities and rights that are cited in section 18 (s 1(1)). Section 18(2) defines these 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. The first three elements — care, contact, and guardianship — roughly match the components of parental authority — custody, access, and guardianship. 'Care' refers to the following:

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

'Contact' connotes 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 (s 1(1)). Section 1(2) further provides that in addition to the meaning assigned to the terms 'custody' and 'access' in any law and at common law, the

terms must be construed also to connote 'care' and 'contact' as defined in the Act. Put differently, 'custody' acquires the additional meaning that the Act gives to 'care', and 'access' acquires the additional meaning that the Act gives to 'contact'. The intention of Parliament with this provision was probably to avoid the necessity of having to effect changes to all Acts that use the terms 'custody' and 'access'. It is interesting to note, however, that even in enacting the Children's Act, its drafters were inconsistent in their use of the terms 'care' versus 'custody', and 'contact' versus 'access' (see Heaton *op cit* at 3-37–3-38n5).

'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 (s 18(3)). Any guardian may exercise guardianship independently and without the consent of the other guardian(s), subject to the requirement of joint consent for the juristic acts that are listed in section 18(3), by any order of a competent court, or by any other law (s 18(4) and (5)).

Sections 19–24 and 27 and chapter 15 deal with the ways in which parental responsibilities and rights can be obtained. Of these provisions, only sections 19–21 and 27 were brought into operation on 1 July 2007. Section 19 provides that a biological mother acquires full parental responsibilities and rights as soon as she gives birth. This rule applies regardless of whether the mother is married or unmarried, but it does not apply if she is a surrogate mother. Also, if the mother is a minor and neither she nor the child's biological father has guardianship of the child, her guardian is the child's guardian. In so far as fathers are concerned, the Act distinguishes between married and unmarried fathers. Section 1(1) defines 'marriage' in broad terms that include civil, customary, and religious marriages. Furthermore, in terms of section 13(2) of the Civil Union Act 17 of 2006, civil unions are also covered by the term 'marriage'. Thus a man is considered to be a married father if he and the child's mother are, or were, the parties to a civil, customary, or religious marriage, or a civil union at the time of the child's conception or birth, or at any intervening time (s 20). A married father has full parental responsibilities and rights in respect of his child (*ibid*). Section 21 effects a radical change to our law of parent and child by conferring automatic parental responsibilities and rights on certain unmarried fathers. An unmarried father acquires full parental responsi-

bilities and rights if he lives with the child's mother in a permanent life-partnership when the child is born. Regardless of whether or not he has ever lived with the child's mother, he also acquires full parental responsibilities and rights if he consents to being identified, or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or has attempted in good faith to contribute to the child's upbringing and maintenance for a reasonable period (on the difficulties regarding interpreting the phrases 'permanent life-partnership' and 'reasonable period' see Heaton *op cit* at 3-11). A dispute between the child's parents as to whether the father meets the above requirements must be referred for mediation.

Section 27 deals with the appointment of a successor to a sole guardian or sole holder of care (see also s 72(1)(a)(ii) of the Administration of Estates Act 66 of 1965). In terms of section 27, a parent who has sole guardianship or sole care may appoint a person in his or her will to act as the child's guardian or to be vested with the child's care after his or her death. The appointed person must be fit and proper to exercise guardianship or care.

In the main, sections 30–5 govern the exercise of parental responsibilities and rights by more than one person. Section 30, *inter alia*, provides that co-holders of parental responsibilities and rights may exercise their responsibilities and rights without each other's consent unless the Children's Act, any other law, or a court order provides otherwise. The Act specifically requires the joint consent of all the child's guardians for the child's marriage, adoption, or removal from South Africa, an application for a passport for the child, and the alienation or encumbrance of the child's immovable property (s 18(5) read with s 18(3)(c)). A further restriction that section 30 imposes is that a co-holder may not surrender or transfer his or her parental responsibilities and rights. Co-holders may, however, agree that one of them will exercise any or all parental responsibilities and rights on behalf of other co-holder(s). Thus, for example, a married father may not waive his parental responsibilities and rights and transfer them to the child's mother, but he may authorize her to exercise them on his behalf. However, an agreement in which a co-holder authorizes 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, and he or she remains 'competent and liable' to exercise them. Thus, a person cannot escape his or her parental responsibilities simply by authorizing somebody else to exercise them on his or her behalf.

Section 31 deals with major decisions involving the child. It specifies, *inter alia*, that decisions in respect of which a holder of parental responsibilities and rights must give due consideration to the views and wishes of all co-holders of parental responsibilities and rights. It further requires that, before taking certain decisions, a person who holds parental responsibilities and rights must give due consideration to the child's views and wishes, bearing in mind the child's age, maturity, and stage of development. The latter provision, read with section 10 of the Act, is in keeping with the obligation that article 12 of the Convention on the Rights of the Child imposes on South Africa — to give every child who is capable of forming his or her own views the right freely to express those views in all matters that affect him or her and to have due weight attached to those views, taking his or her age and maturity into account (on the overlap between ss 10 and 31(1), see Heaton *op cit* at 3-28–3-29).

Section 35 criminalizes the refusal to allow certain holders of parental responsibilities and rights to have contact with the child or to exercise their parental responsibilities and rights. It also criminalizes the prevention of the exercise of contact or parental responsibilities and rights.

Section 36 deals with the presumption of paternity in respect of a child who is born of an unmarried mother. It provides that a man is presumed to be the father of a child who is born of an unmarried woman only if it is proved that the man had sexual intercourse with the child's mother at a time when the child could have been conceived. This section re-casts the presumption of paternity in respect of unmarried fathers that section 1 of the Children's Status Act 82 of 1987 created. One of the differences between the two provisions is that the presumption in the Children's Act operates 'in the absence of evidence to the contrary which raises a reasonable doubt', while the presumption in the Children's Status Act operated 'in the absence of evidence to the contrary'. Requiring 'evidence to the contrary which raises a reasonable doubt', as section 36 of the Children's Act does, is not only a departure from the approach that was adopted in respect of section 1 of the Children's Status Act, but also from the normal rule regarding the burden of proof in civil matters — proof or rebuttal on a balance of probabilities. This is also the burden of proof that operates in respect of the presumption *pater est quem nuptiae demonstrant*. The differentiation that is created by requiring evidence to the contrary 'which raises a reasonable doubt' may be unconstitutional (see Heaton *op cit* at 3-39).

Section 37 of the Children's Act is a weaker version of section 2 of the Children's Status Act, which compelled the court to presume, until the contrary was proved, that a person's refusal to submit himself or herself or a child to blood tests was 'aimed at concealing the truth concerning the paternity of that child'. Section 37 of the Children's Act merely instructs the court to warn the party of the effect that the refusal might have on his or her credibility.

Section 38 retroactively confers full parental responsibilities and rights on an unmarried father who marries the child's mother after the child's birth, while section 39 states that a child who is conceived or born of a voidable marriage which is annulled is treated like a child whose parents' valid marriage is terminated by divorce.

Sections 40–1 deal with children who are conceived by artificial fertilization. Section 40 provides that a child who is born as a result of the artificial fertilization of a spouse using a donor gamete or donor gametes is, for all purposes, regarded as the spouses' child as if their gametes were used for the artificial fertilization. Put differently, the donor's (or donors') biological contribution to the child is ignored. The section further provides that both spouses are presumed to have consented to the artificial fertilization. By virtue of section 13 of the Civil Union Act, the same rules apply if the child is born as a result of the artificial fertilization of a civil union partner. Section 40 of the Children's Act also provides that, regardless of the marital status of the birth mother, she is regarded to be the child's mother, unless she is the child's surrogate mother. It also provides that no rights, responsibilities, duties, or obligations arise between the child and the gamete donor or the blood relations of the gamete donor, unless the donor is the child's birth mother or her husband (or civil union partner) at the time of the artificial fertilization. Section 41(1), however, entitles the child or his or her guardian to access to medical and other non-identifying information concerning the gamete donor(s).

Sections 130–3 govern HIV testing and confidentiality of the child's HIV/AIDS status. Sections 130 and 132 lay down strict requirements for submitting a child to an HIV test and require proper pre- and post-test counselling for the child if he or she is sufficiently mature to understand the benefits, risks, and social implications of the test. If the child's parent or caregiver knows about the test, he or she must also receive pre- and post-test

counselling. Section 133 protects the child's right to confidentiality regarding his or her HIV/AIDS status and permits disclosure of his or her HIV/AIDS status without consent in limited circumstances only.

In terms of section 134, a child who has turned twelve may independently buy condoms or receive free condoms on request. The child may 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. A child who obtains condoms, contraceptives, or contraceptive advice is entitled to confidentiality.

Section 305 creates various offences. The offences that were brought into operation on 1 July 2007 relate to violating the child's right to confidentiality regarding his or her HIV/AIDS status, refusing to provide a child over the age of twelve with condoms, child abuse; child abandonment; child neglect; failing to provide a child with adequate food, clothing, lodging, and medical assistance while being able to do so; and the commercial sexual exploitation of a child.

Sections 307–11 deal with the delegation and assignment of powers and duties, while sections 313 and 314 deal with the amendment and abolition of existing laws, and transitional matters. The items of Schedule 4 of the Act that were brought into operation on 1 July 2007 contain the repeal of section 1 of the General Law Further Amendment Act 93 of 1962, and the repeal of the whole of the Age of Majority Act 57 of 1972, the Children's Status Act, the Guardianship Act 192 of 1993, and the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

#### CHILDREN'S AMENDMENT ACT

The Children's Amendment Act 41 of 2007 is not yet in operation. When it does come into operation it will amend the Children's Act 38 of 2005 by inserting various provisions into it and effecting consequential amendments. As is the case in respect of the sections of the Children's Act that came into operation on 1 July 2007, the scope of the Amendment Act is such that a full discussion of all the provisions is impossible within the context of the present chapter.

Section 4 of the Amendment Act inserts chapters 5 (ss 76–90) and 6 (ss 91–103) into the principal Act. Chapter 5 governs

partial care for children. Partial care refers to taking care of more than six children on behalf of their parents or caregivers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement with the parents or caregivers, regardless of whether the person who provides the partial care receives a reward for doing so (s 76). However, partial care does not refer to care by a school as part of tuition, training, and other school activities, taking care of a boarder in a school hostel or other school residential facility, or care by a hospital or other medical facility as part of medical treatment (*ibid*). Chapter 5 provides for the creation of a comprehensive national strategy aimed at ensuring an appropriate spread of partial care facilities, the determination of national norms and standards for partial care provision and funding of provincial partial care facilities, and registration of partial care facilities. Section 89 contains a particularly noteworthy provision. It requires that serious injury to, the abuse of, and the death of a child in partial care must be reported to the Provincial Head of the Department of Social Development. In the event of the child's death, the death must also be reported to a police official and the child's parent, guardian, or caregiver. The imposition of the duty to report is most welcome, but it does strike one as strange that it is only in the case of the child's death that the report must also be made to the child's parent, guardian, or caregiver.

Chapter 6 deals with early childhood development and the provision of early childhood development services and programmes. Early childhood development is 'the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age' (s 91(1)). The early childhood development services regulated by chapter 6 are those that are provided on a regular basis to children up to school-going age by a person other than a parent or caregiver (s 91(2)). An early childhood development programme is a programme that is structured within an early childhood development service to provide learning and support appropriate to the child's age and stage of development (s 91(3)). A comprehensive national strategy aimed at securing a properly resourced, co-ordinated, and managed early childhood development system must be created, early childhood development programmes must be provided and funded at provincial level, national norms and standards must be determined, and early childhood development programmes must be registered.

Section 5 of the Amendment Act inserts part 1 (ss 4–10) and part 4 (ss 135–41) into chapter 7 of the principal Act. Part 1 deals with the child protection system. It requires the development of a comprehensive inter-sectoral strategy aimed at securing a properly resourced, co-ordinated, and managed national and provincial child protection system and child protection services. Child protection services include services relating to supporting children's court proceedings, the implementation of court orders, prevention programmes, early intervention programmes, reunification of children in alternative care with their families, integration of children into alternative care, placement of children in alternative care, adoption, investigation and assessment in cases of suspected child abuse, neglect, or abandonment, child removal, the drawing up development plans and permanency plans for children who have been removed or are at risk of being removed, and other social work services that may be prescribed in terms of the regulations that are to be issued under the Act (s 105(5)). Child protection services are to be provided and funded at provincial level and must be properly managed and maintained and comply with national norms and standards (s 105). Section 110 obliges a wide range of people (including teachers, nurses, medical and legal practitioners, psychologists, social service professionals, social workers, labour inspectors, traditional health practitioners, traditional leaders, ministers of religion, and religious leaders) to report suspected child abuse or neglect, and the suspicion that the child is in need of care and protection.

Part 4 of chapter 7 deals with child-headed households, unlawful removal or detention of children, child safety at places of entertainment, child labour, child exploitation, and applications to terminate, suspend, restrict, or circumscribe parental responsibilities and rights. The provisions regarding termination, suspension, restriction, and termination of parental responsibilities and rights and those regarding child-headed household are particularly noteworthy. In terms of section 135(1), the Director-General or the Provincial Head of the Department of Social Development, or a designated child protection organization may apply to a High Court, a divorce court in a divorce matter, or a children's court for an order suspending, terminating, restricting, circumscribing, or transferring any or all of a person's parental responsibilities and rights. The application may be brought without the consent of the child's parent or caregiver if the child is older than seven years and has been in alternative care for more than two years, is older

than three but younger than seven years and has been in alternative care for more than a year, or is three years or younger and has been in alternative care for more than six months (s 135(2)). When considering the application, the court must be guided by the principles that are set out in chapters 2 and 3 of the Children's Act and take into account all relevant factors, including those that are specified in section 136(b) (s 136). (On the principles in chapters 2 and 3 (ss 6–41), see the discussion above.) Section 136(b) specifies the following factors: the need for the child to be permanently settled, preferably in a family environment, taking into consideration the child's age and stage of development; the success or failure of any attempts that have been made to reunite the child with the person whose parental responsibilities and rights are being challenged; the relationship between the person and the child; the degree of commitment the person has shown towards the child; whether there was any contact between the parent and the child in the preceding year; and the probability of arranging an adoption for the child or having the child placed in another form of alternative care.

In view of the sharp increase in the number of AIDS orphans and children who are taking responsibility for other children, the official recognition and regulation of child-headed households is overdue. In terms of section 137(1), a Provincial Head of the Department of Social Development may recognize a household as a child-headed household if the parent, guardian, or caregiver is terminally ill, has died, or has abandoned the children in the household, no adult family member is available to provide care for the children in the household, a child over the age of sixteen years has assumed the role of caregiver in respect of the children in the household, and recognition of the household as a child-headed household is in the best interests of the children in the household. If a household is designated as a child-headed household this does not mean that the child who heads the household is left to his or her own devices, for the household must function under the general supervision of an adult designated by a children's court, an organ of state, or a non-governmental organization determined by the Provincial Head of the Department of Social Development (s 137(2)). The supervising adult must be fit and proper to perform the supervisory function and must perform the duties that are prescribed in relation to the specific household (s 137(3)). He or she may, however, not take any decisions regarding the household and the children in it.

without consulting the child who is the head of the household, and the other children. The other children's age, maturity, and stage of development must be taken into account (s 137(6)). The child who is the head of the household may take all day-to-day decisions relating to the household and the children in it, and he or she may collect and administer any grant or assistance to which the household is entitled (s 137(5)(a) and (7)). If the supervising adult was designated by an organ of state or a non-governmental organization, he or she is accountable to that organ of state or non-governmental organization in respect of money he or she collects and administers for the child-headed household (s 137(5)(b)). If the child who is the head of the household is dissatisfied with the way in which the supervising adult performs his or her duties, the child may report the adult to the organ of state or the non-governmental organization. The other children in the household may also report the supervising adult, but their age, maturity, and stage of development must be taken into account in evaluating the matter (s 137(8)).

Section 7 of the Amendment Act inserts chapter 8 (ss 143–49) into the principal Act. Chapter 8 is devoted to the regulation of prevention and early intervention programmes. Prevention programmes are, *inter alia*, designed to preserve a child's family structure; develop appropriate parenting skills and the capacity of parents and caregivers to safeguard the well-being and best interests of their children; promote appropriate inter-personal relationships within the family; provide psychological, rehabilitation, and therapeutic programmes for children; prevent the neglect, exploitation, abuse, or inadequate supervision of children and other failures in the family environment to meet children's needs; prevent the recurrence of problems in the family environment that may harm children or adversely affect their development; divert children from the child and youth care and criminal justice systems; and avoid the removal of children from the family environment (s 144(1)). These programmes are provided in order to strengthen and build the capacity and self-reliance of families to address problems that may, or are bound to, occur in the family environment and may lead to statutory intervention if they go unchecked (s 143(1)). Early intervention programmes are designed to serve the same purposes as prevention programmes, but in the case of early intervention the programmes are provided to families where children have already been identified as being vulnerable to or at the risk of harm or removal

into alternative care (s 143(2)). Chapter 8 provides for the creation of national and provincial strategies aimed at securing the provision of prevention and early intervention programmes, the determination of national norms and standards for such programmes, provision and funding of provincial programmes, and court-ordered early intervention.

Section 10 of the Amendment Act inserts chapters 11–14 into the principal Act. Chapter 11 (ss 167–79) deals with alternative care. Alternative care refers to foster care, care by child and youth care centres following an order of a court in terms of the Children's Act or the Criminal Procedure Act 51 of 1977, and temporary safe care (s 167). Temporary safe care means care in an approved child and youth care centre, shelter, or private home, or any other place where a child can safely be accommodated pending a decision or court order concerning his or her placement, but it excludes a prison or police cell (s 1). The maximum period for which a child may be in temporary safe care or be kept or retained at any place or facility is six months, unless a court places the child in alternative care (s 167(2)). Chapter 11 also governs the approval of persons, places, and premises for the provision of temporary safe care, the granting of permission for the child temporarily to leave the place where he or she is in alternative care, absconding from alternative care, and the transfer, removal, and discharge of a child who is in alternative care. Section 178 imposes a duty to report serious injury to, or the abuse or death of a child in alternative care that is similar to the duty that is contained in section 89 (see above).

Chapter 12 (ss 180–90) governs foster care. The purposes of foster care are to protect and nurture children by providing them with a safe, healthy environment with positive support, promoting the goal of permanency planning by working towards family reunification or connecting children to other safe and nurturing family relationships that are intended to last a lifetime, and respecting the individual and the family by demonstrating respect for cultural, ethnic, and community diversity (s 181). A court may place a child in foster care with a non-family member or a family member other than the child's parent or guardian, or in a registered cluster foster care scheme (s 180(3)). Chapter 12 also stipulates the requirements that a foster parent or cluster foster scheme must meet, governs the management of cluster foster care, specifies the maximum number of children who may be placed in foster care with a person (six children (s 185(1)) or in cluster

foster care (more than six children (s 185(2)), governs the duration and termination of a foster care placement, the reunification of the child with his or her biological parent, and the responsibilities and rights of foster parents. Section 184 is a particularly interesting provision. It requires that before a court places a child in foster care, it must take a designated social worker's report about the child's cultural, religious, and linguistic background and the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care into account. A child may be placed with a foster parent from a different cultural, religious, and linguistic background only if there is an existing bond between the person and the child, or a suitable and willing person with a similar background is not readily available to provide foster care. This provision is presumably founded on the notion that it will be easier to effect reunification of the child with his or her parent(s) if the child remains within the same cultural, religious, and linguistic community.

Chapter 13 (ss 191–212) governs child and youth care centres. These centres are similar to the institutions that are currently known as children's homes, places of safety, secure care facilities, schools of industries, and reform schools, and are regulated by the Child Care Act 74 of 1983. A child and youth care centre is a facility for the provision of residential care to more than six children outside the family environment in accordance with a residential care programme suited for the children in the facility (s 191(1)). It excludes a partial care facility, drop-in centre, boarding school, school hostel, or other residential facility attached to a school, prison, and any other establishment which is maintained mainly for the tuition or training of children, unless the establishment provides court-ordered tuition or training to children (*ibid*). Child and youth care centres must provide therapeutic programmes designed for the residential care of children (s 191(2)). They may also offer other programmes (s 191(3)). All programmes must be submitted to the Provincial Head of the Department of Social Welfare for approval (s 191(4)). Chapter 13 further provides for the creation of a national and provincial strategy aimed at ensuring an appropriate spread of child and youth care centres, the determination of national norms and standards for these centres, the provision and funding of provincial centres, and the establishment, registration, operation, and management of child and youth care centres.

Chapter 14 (ss 213–27) governs drop-in centres. A drop-in centre is a facility that provides basic services aimed at meeting the emotional, physical, and social development needs of vulnerable children (s 213(1)). A drop-in centre must offer at least one of the following services: the provision of food, school attendance support, assistance with personal hygiene, or laundry services (s 213(2)). It may also offer guidance, counselling, and psycho-social support, social and life skills programmes, educational programmes, recreation, community services, school holiday programmes, primary health care in collaboration with the local health clinic, liaison with and referral to social workers or social service professionals, programmes for the promotion of family preservation and reunification, computer literacy programmes, outreach services, and prevention and early intervention programmes (s 213(3)). Chapter 14 further provides for the creation of a national and provincial strategy aimed at ensuring an appropriate spread of drop-in centres, the determination of national norms and standards for these centres, the provision and funding of provincial centres, and the registration of centres. Section 226 imposes a duty to report serious injury to, or the abuse or death of a child in a drop-in centre that is similar to the duties created by sections 89 and 178 (see above).

Section 13 of the Amendment Act inserts additional offences into section 305 of the principal Act and amends other offences.

#### **CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT**

With the exception of chapters 5 and 6, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into operation on 16 December 2007 (GN 1224 GG 30599 of 14 December 2007). A discussion of the Act falls mainly within the scope of the chapter on Criminal Law. But in respect of the law of persons and family law it should be mentioned that the Act creates specific crimes relating to children and mentally disabled persons, and provides that children under the age of twelve years and mentally disabled persons are incapable of consenting to a sexual act (chaps 3 and 4, ss 57 and 68(1)(a)). Further, section 56(1) provides that the existence, or former existence, of a marriage or other relationship between the accused and the complainant is not a defence to a charge of rape, compelled rape, sexual assault, compelled sexual assault, or compelled self-sexual assault. Section 56(1) thus, *inter alia*,

re-enacts the abolition of the marital rape exemption, which was originally contained in section 5 of the Prevention of Family Violence Act 133 van 1993.

Although section 60 of the Act is not directly applicable to paternity disputes, it should have implications in that context. Section 60 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. As far as proof of sexual intercourse in paternity disputes is concerned, the then Appellate Division held in *Mayer v Williams* 1981 (3) SA 348 (A) that the evidence of a mother who alleges that a particular man is the father of her child should be carefully scrutinized. The court referred to the cautionary rule in respect of sexual offences and stated that it could see no reason why the same rule should not be applied in civil proceedings. In view of the abolition of the cautionary rule in respect of sexual offences, the decision in *Mayer v Williams*, in respect of the application of the cautionary rule to women's testimony in paternity suits, should no longer be followed.

Finally, it should be noted that the schedule to the Act amends section 1 of the Choice on Termination of Pregnancy Act 92 of 1996. Read with section 2(1)(b) of the Choice on Termination of Pregnancy Act, the result of this amendment is that a termination of pregnancy may now, *inter alia*, be performed between the thirteenth and 21st week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the woman was the victim of rape or compelled rape, or is a girl who is older than twelve but younger than sixteen years and was the victim of consensual sexual penetration.

#### PENSION FUNDS AMENDMENT ACT

In terms of section 7(7)(a) of the Divorce Act 70 of 1979, a spouse's pension interest is deemed to be part of his or her assets upon divorce. Thus, pension interests are included for purposes of dividing the spouses' assets and when calculating the value of a spouse's estate for purposes of maintenance. In terms of the definition in section 1 of the Act, a 'pension interest' is —

'(1) the benefit to which the spouse who is a member of a pension fund that is not a retirement annuity fund would have been entitled had he or she terminated his or her fund membership on the date of the divorce;

(2) equal to all the contributions of the spouse who is a member of a retirement annuity fund up to the date of the divorce, together with annual simple interest on those contributions calculated at the rate that is prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975.'

Section 7(8)(a)(i) of the Divorce Act empowers the court to order the fund to pay any part of the pension interest which is due to the spouse of a fund member directly to the non-member spouse when the pension benefit accrues to the member (on the difference between a 'pension interest' and a 'pension benefit', see the discussion of *Elesang v PPC Lime Ltd & others* 2007 (6) SA 328 (N) below). Prior to the coming into operation of the Pension Funds Amendment Act 11 of 2007 on 13 September 2007 (Proc 26 GG 30297 of 13 September 2007), a member's pension normally accrued to him or her upon resignation, retrenchment, dismissal, or retirement. The non-member spouse thus had to wait until that time to get his or her portion of the member spouse's pension. The non-member spouse was not entitled to any growth or interest that accumulated on his or her portion prior to the date on which the portion was paid to him or her. Section 28 of the Pension Funds Amendment Act changed this position by amending section 37D of the Pension Funds Act 24 of 1956. The crux of the amendment is that, for the purposes of section 7(8)(a) of the Divorce Act, the pension benefit of a member who is getting divorced is deemed to accrue to him or her on the date of the divorce. The non-member spouse (including a civil union partner: see the definition of 'spouse' in section 1 of the Amendment Act) accordingly no longer has to wait until the member's resignation, retrenchment, dismissal, or retirement to get his or her portion of the member's pension. The non-member has a 60-day period after the date of the divorce within which he or she may elect to receive his or her portion in cash, or to have it transferred to an approved pension fund of his or her choice. The fund must pay the non-member or transfer his or her portion within 60 days of the non-member's having made his or her election. If the fund takes longer than 60 days, the non-member is entitled to interest on the amount.

Tax on the non-member's portion is also deemed to accrue on the date of the divorce and is deducted from the member's pension (see the amendment of s 37D of the Pension Funds Act by s 4(1)(b) of the Revenue Laws Amendment Act 35 of 2007, which, in terms of s 4(2) of the latter Act, is deemed to have come

into operation on 13 September 2007). The tax is withheld by the fund and is paid over to the South African Revenue Service when the non-member's portion of the pension is paid to him or her or transferred into the fund that he or she selected.

As the amendment of section 37D of the Pension Funds Act improves the financial position of the non-member spouse by entitling him or her to receive his or her portion of the member spouse's pension earlier, it is welcome. Unfortunately, the Pension Funds Amendment Act does not expressly indicate whether the amendment applies to divorce orders that were granted before 13 September 2007. The Pension Funds Adjudicator has held that the amendment applies regardless of the date on which the divorce order was made (*Cockcroft v Mine Employees Pension Fund PFA/WE/11234/06/LS; Lessing v Evergreen Pension Fund & another PFA/GA/19440/2007/RM*), but most funds are unwilling to apply the amendment to divorce orders that were granted prior to 13 September 2007, as they argue that the Amendment Act does not sanction retroactive application of the amendment. Parliament recently published the Financial Services Laws General Amendment Bill 21 of 2008 which, *inter alia*, seeks to clarify the position. Clause 14(d) of the Bill expressly includes divorce orders that were granted prior to 13 September 2007 within the ambit of the amendment.

#### SUBORDINATE LEGISLATION

In terms of Proc 13 GG 30030 of 29 June 2007, certain sections of the Children's Act 38 of 2005 came into operation on 1 July 2007. Those sections are discussed above in this chapter.

Proclamation 1224 GG 30599 of 14 December 2007 brought chapters 1–4 and 7, and the schedule to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 into operation as from 16 December 2007. Selected aspects of this Act are mentioned above in this chapter.

Proclamation 26 GG 30297 of 13 September 2007 brought the Pension Funds Amendment Act 11 of 2007 into operation on 13 September 2007. The Act is discussed above in this chapter.

General Notice 820 GG 30253 of 7 September 2007 repeals and replaces the rules regulating the conduct of proceedings in the Orange Free State Provincial Division of the High Court with effect from 1 August 2007. Although the rules relate to procedural issues and thus fall within the ambit of the chapter on Civil and

Constitutional Procedure and Jurisdiction, one aspect will be mentioned here. Rule 43 of the Uniform Rules of Court applies whenever a spouse applies for interim maintenance, a contribution towards costs, or interim access or custody of a child pending a matrimonial action. Rule 11 of the new rules of conduct in the Orange Free State Provincial Division requires that both parties and their attorneys must be present at court on the morning of the hearing of the rule 43 application. They must 'attempt to resolve the disputes between them, and, if possible . . . settle the divorce action'. If they succeed in reaching a settlement, the court before which the rule 43 application was set down will hear the divorce action. This rule is yet another example of the emphasis on settlement rather than adversarial litigation in family matters.

## DRAFT LEGISLATION

### *Choice on Termination of Pregnancy Amendment Bill*

For the most part, the provisions of the Choice on Termination of Pregnancy Amendment Bill 21 of 2007 correspond to those of the Choice on Termination of Pregnancy Amendment Act 38 of 2004. The 2004 Amendment Act gave registered nurses who have undergone the prescribed training the same powers to perform terminations of pregnancy as registered midwives who have undergone the prescribed training (s 7). The Amendment Act also transferred the power to take decisions regarding the facilities where terminations may be performed from the Minister of Health to the Member of the Executive Council for Health in the various provinces (ss 2–5). The Amendment Act also allowed facilities that have a 24-hour maternity service to perform terminations up to and including the twelfth week of the gestation period without seeking the approval of the Member of the Executive Council for Health (s 2), and criminalized the unlawful termination of a pregnancy and the termination of or allowing the termination of a pregnancy at an unapproved facility (s 6). In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), the Constitutional Court declared the 2004 Amendment Act invalid on the ground that Parliament 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 eighteen months (until 16 February 2008) to give Parliament an opportunity to engage in the required process and

to enact the Amendment Act afresh in accordance with the Constitution. As a result of this judgment, Parliament drafted the Choice on Termination of Pregnancy Amendment Bill of 2007. The only differences between the wording of the 2007 Amendment Bill and the 2004 Amendment Act are that references to the Nursing Act 33 of 2005 have been substituted for the Nursing Act 50 of 1978 (clause 1 of the Bill; s 1 of the Act), and that clause 7 of the Bill contains the phrase 'except in the circumstances contemplated in s 2(1)(c)', which did not appear in section 7 of the 2004 Amendment Act. Thus the only substantial difference is that a registered nurse is not permitted to perform a termination of pregnancy in the circumstances contemplated in section 2(1)(c) of the Choice on Termination of Pregnancy Act.

The 2007 Amendment Bill became the Choice on Termination of Pregnancy Amendment Act 1 of 2008, which came into operation on 18 February 2008 (Proc 213 GG 30790 of 18 February 2008).

#### *Jurisdiction of Regional Courts Amendment Bill*

The main object of the Jurisdiction of Regional Courts Amendment Bill 48 of 2007 is the extension of the jurisdiction of the regional divisions of the magistrates' courts. The Bill is covered in the chapter on Civil and Constitutional Procedure and Jurisdiction. For purposes of the law of persons and family law, it should be noted that the Bill empowers regional divisions to hear and decide divorce and nullity cases, cases relating to customary marriages, and matters arising from such cases (see the proposed insertion of s 29(1B)(a) into the Magistrates Courts Act 32 of 1944 by clause 5 of the Bill). The regional divisions of the magistrates' courts will have the same jurisdiction as the High Court, but only magistrates who have completed a prescribed training course in civil adjudication will have the power to preside (see the proposed insertion of ss 12(6) and 29(1B)(b) into the Magistrates Courts Act by clauses 3(d) and 5 of the Bill). The presiding officer will have the power to summon two assessors to act as advisors on factual questions (see the proposed insertion of s 29(1B)(c) into the Magistrates Courts Act by clause 5 of the Bill). Family advocates and family councillors who have been appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 will be deemed also to have been appointed in respect of the regional divisions and will thus have the same powers to investigate and to make recommendations regarding

the interests of children that they enjoy in the High Court (see the proposed insertion of s 29(1B)(d) into the Magistrates Courts Act by clause 5 of the Bill). As the draft section 29(1B)(b) of the Magistrates Act states that a regional division which hears a divorce or nullity case or a matter in terms of the Recognition of Customary Marriages Act 120 of 1998 has 'the same jurisdiction as any High Court in relation to such matter', it is arguable that regional courts will also have the power to make orders for interim maintenance, custody, or access, and orders for contributions towards costs pending matrimonial proceedings in terms of rule 43 of the Uniform Rules of Court, even though the Uniform Rules normally apply only to proceedings in the High Court. Separate rules apply to proceedings in the magistrates' courts (see GN R1108 GG 2103 of 21 June 1968 as amended). As magistrates' courts do not currently have jurisdiction in respect of divorces, the magistrates' courts rules obviously do not contain an equivalent of rule 43 of the Uniform Rules.

Finally, it should be noted that the divorce courts which were established in terms of section 10 of the Administration Amendment Act 9 of 1929 (the former so-called Black divorce courts, which have been opened to all races) will be merged with and become part of the regional divisions (clause 7(2)). The rules in respect of these divorce courts will remain in force until they are repealed or amended. The rules of these divorce courts do contain an equivalent of rule 43 of the Uniform Rules of Court — rule 32 (GN R1454 GG 19458 of 9 November 1998). These divorce courts will thus continue to have the power to make interim orders until their rules are amended or repealed.

#### *Draft Regulations in Terms of the National Health Act*

At present, the harvesting and donation of sperm and ova for purposes of artificial fertilization are regulated by the Human Tissue Act 65 of 1983 and the regulations issued in terms of this Act. Chapter 8 of the National Health Act 61 of 2003 will eventually govern these matters. Draft regulations regarding the regulation of artificial fertilization in terms of the National Health Act were published for comment in General Notice R8 GG 29527 of 5 January 2007.

#### *Draft Regulations in Terms of the Older Persons Act*

In October 2007, the Minister of Social Development published a notice indicating his intention to make regulations in terms of

section 34 of the Older Persons Act 13 of 2006 (Notice 1263 *GG* 30355 of 12 October 2007). The notice invited interested parties to submit comments on the proposed regulations within 30 days. The draft regulations were subsequently published in General Notices 1327–30 *GG* 30408 of 2 November 2007. These general notices again gave interested parties 30 days to comment.

General Notice 1327 contains the draft regulations relating to chapter 2 of the Act. These draft regulations contain minimum norms and standards for acceptable levels of community-based care and support services, and minimum norms and standards for residential facilities for older persons. They further regulate contracts between the Department of Social Development and service providers and financial awards to service providers.

General Notices 1328 and 1329 contain the draft regulations relating to chapters 3 and 4 of the Act. The draft regulations relating to chapter 3 deal with the registration of community-based care and support services, arrangements prior to the termination of such services, training and registration of caregivers, the various levels of services which will be provided, and the minimum norms and standards these services must meet. The draft regulations relating to chapter 4 regulate registration of residential facilities, service level agreements between residents and service providers, minimum norms and standards for admission of persons to residential facilities, levels of care and support services that are to be provided in residential facilities, minimum service standards, and the running and administration of and recordkeeping by residential facilities. Incidentally, the draft regulations relating to chapter 4 do not contain a regulation 8. This error is probably due to the incorrect re-numbering of clauses during the process of revising the draft regulations prior to their publication.

General Notice 1330 contains the draft regulations relating to chapter 5 of the Act. These draft regulations contain detailed measures to prevent and combat the abuse of older persons and to promote the rights of residents of residential facilities and of older persons who do not reside in such facilities. These measures include keeping a complaints and an incident register at every residential facility and keeping a register of persons who have been convicted of abusing an older person. Service providers and operators of residential facilities are compelled to take various additional measures to prevent and combat the abuse of older persons, including implementing the National Elder Abuse Protocols which are contained in Annexure B of the draft regula-

tions. The regulations further limit and regulate the restraining of older persons, and require residential facilities to keep a register of all incidents of restraining.

## CASE LAW

### CHILDREN

#### *Abduction*

The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 made the Hague Convention on the Civil Aspects of International Child Abduction part of our domestic law. When item 8 of Schedule 4 of the Children's Act 38 of 2005 comes into operation, the Hague Convention on the Civil Aspects of International Child Abduction Act will be repealed. However, chapter 17 and Schedule 2 of the Children's Act will re-enact most of the provisions of the Act and again incorporate the Hague Convention into our domestic law.

One of the main objects of the Hague Convention is to achieve the prompt return of children who have been wrongfully removed to, or are wrongfully retained in a contracting state (art 1(a)). A child's removal or retention is wrongful if it is in breach of rights of custody attributed to a person, institution, or any other body in terms of the law of the contracting state in which the child was habitually resident immediately before his or her removal or retention, and the rights of custody were actually being exercised at the time of the removal or retention, or would have been exercised but for the removal or retention (art 3). Subject to certain exceptions, the court in the contracting state to which the child has been wrongfully removed or in which he or she is wrongfully retained is compelled to order the child's immediate return.

In *S v H* 2007 (3) SA 330 (C), the court had to grapple with the issue of whether, and when, a South African court acquires rights of custody for purposes of the Hague Convention. In this case a young child had been removed from South Africa. The child was born in South Africa of unmarried parents who were living together at the time of his birth. The child's mother later terminated her relationship with the child's father and left for Switzerland, taking the child with her. Prior to her departure, she informed the father that she was going to visit her family, but shortly after her arrival in Switzerland she informed him that she

was not returning to South Africa. At the time of the child's removal, custody proceedings were pending in the Cape High Court. After the child's removal, the father approached the Cape High Court for an order which, *inter alia*, declared that, for purposes of article 3 of the Hague Convention, the court was 'an institution or any other body' to which rights of custody could be attributed, and that the court had actually acquired rights of custody. The mother opposed the application. She argued that, because the father had not yet brought an application in terms of the Hague Convention in Switzerland and the Swiss authorities had not yet requested a determination regarding the wrongfulness of the child's removal, his application was premature and the South African court lacked jurisdiction. Griesel J rejected this contention. He held that the father was entitled to approach the court for a declaratory order regarding the legal position even though he had not yet launched an application in terms of the Hague Convention in Switzerland. Griesel J further held that the court had rights of custody at the time of the child's removal because, at that time, custody proceedings were pending before it. He held that a court usually acquires rights of custody when service takes place in pending proceedings. In the present case, pleadings had already closed and the court thus had rights of custody. Griesel J accordingly made the declaration that the father sought.

It should be noted that since the coming into operation of section 21 of the Children's Act, an unmarried father who lives with the child's mother at the time of their child's birth automatically has full parental responsibilities and rights. As such a father now personally has rights of custody, he no longer has to make out a case that the court has acquired rights of custody, like the father in *S v H* had to do.

In *Central Authority (South Africa) v A* 2007 (5) SA 501 (W), the issue was how a very young child's habitual residence must be determined for purposes of the Hague Convention. The child was seventeen months old at the time of his removal from Australia. His parents were an unmarried couple who lived together in Australia at the time of his birth. The child's mother was South African, while his father was habitually resident in Australia. After the relationship between the parents broke down, the child's mother returned to South Africa, bringing the child with her. The child's father then sought an order declaring that the child had to be returned to Australia. The mother denied that the child was

habitually resident in Australia and that the Hague Convention required the child's return to that country. Jajbhay J pointed out that the Hague Convention does not define the term 'habitual residence'. He referred to *Senior Family Advocate, Cape Town, & another v Houtman* 2004 (6) SA 274 (C), where it was held that a child's habitual residence is determined with reference to his or her parents' shared intention, and that, if the parents have different intentions, the child's habitual residence is determined by establishing whether the child has a factual connection to the contracting state, and has cultural, social, and linguistic knowledge of the contracting state. Jajbhay J further pointed out that in the present case the child's very young age made it difficult to determine his cultural, social, and linguistic knowledge of Australia. Jajbhay J held that in circumstances such as these, the child's habitual residence depends on his or her parents' habitual residence at the time of his or her removal. Where the parents have a common habitual residence, their habitual residence is also the child's. He further held that habitual residence refers to the customary residence prior to removal. On the facts of the case, Jajhbay J concluded that the child was habitually resident in Australia. He ordered the child's return to that country.

As was indicated above, the Hague Convention recognizes exceptions to the rule regarding the child's mandatory return. These exceptions are also known as defences. One of the defences is that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation (art 13(b)). The court may also refuse to order the child's return if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his or her views into account (art 13).

*Family Advocate v B* [2007] 1 All SA 602 (SE) concerned both of these defences. In this case, the child's mother had brought him to South Africa from England in breach of his father's rights of custody. The mother resisted the application for the child's return on the ground that the father had a history of committing domestic violence against her and the child. The child was also opposed to returning to England. On the evidence, the court found that the domestic violence that the father had perpetrated was so serious that the mother had had to leave the communal home and seek refuge elsewhere. Also, an English court had limited the father's contact with the child. The child's curator ad

item and the experts who submitted reports to the South African court all agreed that the child should not be returned to England. The court also took the boy's evidence and views into account and found that although he was only seven years old he was mature for his age. The court concluded that the child would be placed in an intolerable situation if his return were ordered, and that he was sufficiently mature for the court to take his opposition to returning to England into account. Thus, both defences applied. The application for the child's return was accordingly dismissed.

In *Family Advocate Port Elizabeth v Hide* [2007] 3 All SA 248 (SE), the defence regarding a grave risk of harm or an intolerable situation for the child was also raised. The mother further raised the defence that the person, institution, or body who cared for the child was not actually exercising custody rights at the time of the child's removal, or consented to or subsequently acquiesced in the child's removal (art 13(a)). As the court rejected the latter defence on the facts of the case, the present discussion focuses solely on the defence relating to placing the child at a grave risk of harm or in an intolerable situation. In this case, the child had been wrongfully retained in South Africa after being brought to this country from England. The evidence established that the parents had committed physical and emotional abuse against each other. The mother had kneed the father in the groin and the father had retaliated by pushing her out of the way. He had also kicked her on the shin once and had threatened to kill her. The court concluded that the abuse was not of such gravity that the child would be at grave risk of harm or be placed in an intolerable situation if he were returned to England. The court accordingly ordered the child's return to England. It further ordered the father to obtain a mirror order in England providing, inter alia, for the provision of suitable accommodation for the child and his mother in England, the payment of maintenance for the child, the payment of the child's travelling expenses, and an interdict restraining the father from assaulting, threatening, harassing, or abusing the mother and entering her place of residence or employment.

The apparently lenient attitude to domestic violence in respect of establishing the defence under article 13(b) in *Family Advocate Port Elizabeth v Hide* is disconcerting. This approach is, however, in line with the outcome of the Constitutional Court's decision in *Sonderup v Tondelli & another* 2001 (1) SA 1171 (CC).

In *Sonderup*, the Constitutional Court, very encouragingly, held that where there is an established pattern of domestic violence, even if the violence was not directed at the child, the child's return may very well place the child at grave risk. However, the court then disappointingly concluded that although the mother in the particular case had been assaulted at least once and had twice obtained protection orders against the child's father, there was insufficient evidence that there would be a grave risk for the child if the court ordered the child's return.

#### *Access or Contact*

In *Kleingeld v Heunis & another* 2007 (5) SA 559 (T), a grandfather sought access to his minor grandchild against the wishes of the child's parents. The court confirmed the principle of our law that a grandparent does not have an inherent right of access, but that he or she may approach the High Court in its capacity as upper guardian for an order awarding access to him or her if this is in the best interests of the child (see also *Townsend-Turner & another v Morrow* 2004 (2) SA 32 (C)). But the courts are slow to interfere with parents' decision not to allow access, especially if the facts do not indicate that the parents are not exercising their parental responsibilities and rights in the child's best interests. In the present case there was no reason to interfere with the parents' decision and the court accordingly dismissed the grandfather's application.

#### *Adoption*

*Ex parte Leask* [2007] 4 All SA 1018 (D) is an application for the rescission of an adoption order that was granted some 21 years earlier. The child was adopted by his grandparents. After the adoption, the child and his biological mother retained contact and at times even lived in the same house. The biological mother later emigrated to Australia with her husband and their daughter. The adopted child, who was then an adult, also wanted to emigrate to Australia. He would be entitled to admission into Australia if it could be shown that he was his biological mother's natural and legal child and dependent upon her for support. The adoption obviously posed an obstacle, as adoption terminates the legal relationship between an adopted child and his or her biological parents (s 20 of the Child Care Act 74 of 1983). Thus the adopted child was no longer his biological mother's legal child. He, his adoptive parents, and his biological mother sought

to have the adoption order rescinded. The court held that it had no jurisdiction to rescind an adoption. The court stated that the Child Care Act 'represents a complete codification of the law relating to adoption' (para [13]). This dictum is in line with the decision of the Constitutional Court in *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC) para [30] — that the children's courts 'are the sole authority empowered to grant orders of adoption'. In *Leask*, the court further pointed out that the Child Care Act permits rescission on specific grounds only. Those grounds appear in section 21 of the Act. None of them applied in the present case (paras [9] and [14]). Moreover, the Act does not allow rescission of an adoption order by agreement. Nor does it allow rescission after a child became a major (para [15]). The court, correctly, concluded that there was no ground on which the adoption order could be rescinded. Even the power of the High Court as upper guardian of all minors could not be invoked, as the adopted child was already a major. In an obiter dictum, Morley AJ expressed doubts about whether the High Court's power as upper guardian at all empowers the court to set aside an adoption order.

*De Gree & another v Webb & others (Centre for Child Law as amicus curiae)* 2007 (5) SA 184 (SCA) is an appeal against an unsuccessful application for an order awarding sole guardianship and custody of a South African child to foreign spouses and authorizing them to remove the child from South Africa. The child was abandoned as a newborn baby. The first and second respondents are the child's foster parents and the appellants are their long-standing friends. The appellants, who are American citizens, wanted to adopt the child. As they were advised that pending the finalization of the Children's Act 38 of 2005 no regulations governed inter-country adoptions, and because they were informed that an inter-country adoption would not be ordered in South Africa because the policy of the Department of Home Affairs did not permit such adoptions, they approached the High Court as upper guardian of all minors for an order awarding sole guardianship and custody to them and authorizing the child's removal from South Africa so that they could adopt her in the United States of America. The High Court dismissed their application on the ground that they wanted the court to sanction an alternative route to inter-country adoption, which would not be in the best interests of the child. The High Court further held that it was bound by the decision in *Minister of Welfare and Population*

*Development v Fitzpatrick* (supra) that only children's courts may grant adoption orders.

The Supreme Court of Appeal was sharply divided on whether or not the appeal should be allowed. By a majority of three to two, it dismissed the appeal. Four separate judgments were written — two for the majority, and two for the minority. Theron AJA, with whom Snyders AJA concurred, delivered the first of the majority judgments. Ponnan JA agreed with Theron AJA's conclusion that the appeal should be dismissed but delivered a supplementary judgment. Heher JA and Hancke AJA each delivered a dissenting judgment.

In her judgment, Theron AJA agreed with the court below that adoption falls under the exclusive jurisdiction of the children's court (para [9]). She further, correctly, rejected the contention by the appellants' counsel that the legal consequences of a sole guardianship and custody order and an adoption order are the same (para [13]). She further stated that granting an order for sole guardianship and custody with a view to concluding an adoption in a foreign country 'circumvents local adoption law and falls short of the standards and safeguards provided by such law' (para [15]). This contravenes the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which require that the child must enjoy standards and safeguards that are equivalent to those that apply in respect of a national adoption (art 21(c) of the Convention and art 24(c) of the Charter). Theron AJA pointed out that South Africans who want to adopt a child must apply to the children's court. She held that there 'is no good reason why an alternate route, via the High Court, should be available to foreigners, particularly when there are policies and procedures in place, in the children's court, to deal with inter-country adoption' (para [15]). She then dealt with the issue of whether the High Court should use its inherent jurisdiction as upper guardian to make the order the appellants sought on the ground that the order would serve the child's best interests. She held that granting the order would sanction an inter-country adoption without the safeguards and protections that are imposed by domestic and international law in order to protect the child's best interests (para [17]). She also rejected the appellants' contention that the order they sought was the only avenue open to them because of the legal advice they had received and the policy of the Department of Home Affairs. She held that the legal advice was incorrect and that the

evidence did not prove the existence of the alleged departmental policy (paras [19]–[20]). She also dealt with the principle of subsidiarity, which stipulates that domestic child-care and adoption measures should be given preference over inter-country adoption. She pointed out that, in line with this principle, article 21 of the Convention provides that inter-country adoption may be considered as an alternative means of child-care if the child cannot suitably be cared for locally. Article 24(b) of the Charter protects the principle of subsidiarity in even stronger terms, for it provides that inter-country adoption should be considered only as ‘the last resort’. Theron AJA held that despite the fact that our domestic legislation does not expressly provide that the principle of subsidiarity must be applied, section 39(1)(b) of the Constitution obliges the court to take the principle into account when assessing the best interests of the child, because the principle is well established in international law (para [12]; s 39(1)(b) of the Constitution requires a court, tribunal, or forum which interprets the Bill of Rights to consider international law). To ensure compliance with the principle of subsidiarity in the present case, it had to be established that the child could not be cared for through foster care, adoption, or other suitable care in South Africa (para [22]). The burden to establish this rested on the appellants. On the facts, Theron AJA was not satisfied that the appellants had discharged this burden (para [24]). She accordingly dismissed the appeal.

Ponnan JA, in his supplementary concurring judgment, held that the procedure and form which the appellants had chosen to press their claim entailed failure. What the appellants ultimately sought was an inter-country adoption, but they attempted to obtain it under the guise of another application. He held that although the High Court as upper guardian indeed has the power to make an order for sole guardianship and custody, the court was actually being asked to sanction an inter-country adoption, which it could not do because such an order would fly in the face of South Africa’s obligations in terms the Convention and the Charter. He held that the essential premiss of these international instruments is the paramountcy of the child’s best interests, and that the procedure which the appellants had chosen did not provide for the safeguards that were essential to ensuring that the child’s best interests are paramount in the case of an inter-country adoption. These safeguards include an inquisitorial procedure of the nature envisaged in the Child Care Act. Ponnan JA

also held that even though the provisions of the Children's Act which will eventually govern inter-country adoptions (chap 16 and Schedule 1, which contains the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption) are not yet in operation, regard must be had to the fact that the Act envisages that all applications for sole custody and sole guardianship by foreigners will be treated as inter-country adoptions. (Section 25 of the Act provides that when a non-South African citizen applies to the High Court for guardianship of a child in terms of section 24, the application must be regarded as an inter-country adoption.) Ponnan JA held that the court should be slow to approve a procedure that ignores the international safeguards and standards contained in the Hague Convention, even if these safeguards and standards do not as yet form part of our domestic law. He also held that, in a case such as the present, a curator ad litem should have been appointed for the child. He further found that the facts of the case did not show that the requirements entailed by the principle of subsidiarity were properly met.

Delivering the first of the two minority judgments, Heher JA stated that the best interests of the child 'overwhelmingly favoured' granting the application and allowing the appeal (para [29]). He stated that, as upper guardian, the High Court is obliged to investigate all matters concerning the child's best interests. In deciding whether to make an order, the court must balance all the relevant aspects affecting the child's interests, including the public interest regarding South Africa's obligations in terms of international instruments and the policy of the Department of Home Affairs. He stated that the court below had not properly balanced the factors regarding the child's interests. He acknowledged that the principle of subsidiarity also had to be considered, but stated that this principle 'does not exist in a vacuum' (para [68]). In dealing with subsidiarity, Heher JA reduced its relevance to taking the child's religious and cultural background into account in finding a suitable placement or adoptive parents for the child in South Africa. As the child in the present case had been abandoned as a newborn baby, Heher JA found that she had the same religious and cultural background as her foster parents and the appellants. On this reasoning, he concluded that the circumstances of the case 'very largely reduced' the importance of the principle of subsidiarity (*ibid*). He further stated that, as upper guardian, the High Court has the

power to decide whether an adoption applicant meets 'the substance of the requirements' that the Child Care Act sets for an adoption (para [73]). He proceeded to determine whether such substance had been met, and found that the appellants had satisfied the court of at least as much as they would have had to in an adoption application in the children's court. He concluded that 'the level of the child's best interest . . . is comfortably exceeded' (para [77]) and that the order which the appellants sought should have been granted.

Delivering a very brief separate dissenting judgment, Hancke AJA stated that the child's interests were 'being held to ransom for the sake of legal niceties' (para [99]). In his view, the appellants had produced evidence that satisfied the requirements of domestic adoption law and the Hague Convention. He saw no advantage to the child in having the applicants rehash the evidence in the children's court, where they could not reasonably be expected to make a better case than they had done in the present application (paras [101] and [102]).

As the majority of the court had dismissed the appeal, the appellants then appealed to the Constitutional Court. The decision of the Constitutional Court (*AD & another v DW & others (Centre for Child Law as amicus curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) will be discussed in the 2008 Annual Survey.

One certainly feels empathy for the appellants and the child for the difficult position in which they found themselves as a result of the incorrect legal advice and information regarding departmental policy that the appellants had received. Their difficulties did not arise because they were unwilling to apply for an inter-country adoption under the Child Care Act or because the appellants maliciously attempted to endanger the child's best interests by applying for the order they sought. The appellants used what they, incorrectly, thought was the only procedure available to them. But because they chose the wrong procedure, their application was doomed. As the majority of the Supreme Court of Appeal held, the procedure they chose does not meet the standards and safeguards imposed by international instruments and international law (including the principle of subsidiarity), and thus does not properly protect the child's best interests (on the reasons why the procedure the appellants chose creates a conflict with international instruments and international law, see further Julia Sloth-Nielsen & Benyam D Mezmur '(Illicit) Transfer by *De Gree'* (2007) 11 *Law,*

*Democracy and Development* 81, esp at 88–97). The judgments of the majority thus reflect the correct approach and place greater emphasis on the best interests of the child within the context of inter-country adoptions than the minority judgments do.

This is not to say that the majority judgments are beyond reproach. One point of criticism that will be mentioned here relates to the interpretation of Theron AJA and Ponnan JA of the implications of the Children's Act — and section 25 in particular — for applications for guardianship by foreigners (for other points of criticism, see P Moodley 'Unravelling the Legal Knots Around Inter-country Adoption in *De Gree v Webb*' 2007 (3) *Potchefstroom Electronic Law Journal*; Sloth-Nielsen & Mezmur op cit at 81).

Theron AJA stated that the coming into operation of the Act will result in applications for guardianship 'being governed by s 24 of the Children's Act which provides that such applications may be made to the high court' (para [10]). She continued: 'However, s 25 limits the application of s 24 to South African citizens and provides that a guardianship application by non-South African citizens must be regarded as an inter-country adoption' (para [10]). Theron AJA did not expressly hold that sections 24 and 25 will altogether exclude the High Court's power to make guardianship orders in favour of foreigners, but her statement implies this.

Ponnan JA went much further. He stated that '[t]he procedure adopted by the appellants will . . . be expressly proscribed once the Act comes into force' (para [93]). Clearly, this view is incorrect, because the Act does not abolish the common-law power of the High Court as upper guardian of all minors and thus does not oust its power to award (sole) guardianship to a foreigner if this is in the child's best interests. However, it is highly likely that the High Court will in future, in the run-of-the-mill case, insist on foreign applicants making use of the inter-country adoption mechanism in the Children's Act rather than approaching it for an order for sole guardianship and custody (see also Jacqueline Heaton 'Parental Responsibilities and Rights' in Davel & Skelton op cit at 3-20).

#### *Children's Rights in the Context of Sentencing*

In *S v Myburgh* 2007 (1) SACR 11 (W), the court had to sentence an offender who had indecently assaulted children and had committed public indecency involving children. This case is discussed in more detail in other chapters of the *Annual Survey*.

For present purposes, the court's approach towards taking the child's rights in terms of section 28 of the Constitution into account is important. The court held that in deciding on the appropriate sentence in a case like this, it should consider section 28(1)(d) of the Constitution (at 15h). (Section 28(1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse, and degradation.) The court found that the serious abuse and degradation that the victims had suffered should be taken into account. The court, however, further pointed out that the recognition of the rights of the victims did not imply that the rights and interests of the offender should be ignored (at 16a). This approach is not contentious and is in line with Constitutional Court decisions such as *Sonderup v Tondelli & another* 2001 (1) SA 1171 (CC); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others* 2004 1 SA 406 (CC); and *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 539 (CC), 2008 (3) SA 232 (CC)).

*S v M* (supra) also dealt with children's rights in the context of sentencing. Here, however, the rights of the children of the offender were at issue. A single mother was convicted of fraud and sentenced to imprisonment. She was the primary caretaker of her three sons, aged eight, twelve, and sixteen. The present offence was not her first. She had previously been convicted of fraud and was sentenced to a fine coupled with a term of imprisonment suspended for five years. Three years later she was again charged with fraud. While out on bail, she committed further fraud. This was the present offence of which she was convicted. She was sentenced to four years' imprisonment even though a court-requested report recommended that she be sentenced to correctional supervision. She appealed against her conviction and sentence. The High Court partly overturned her conviction and converted her sentence to one of imprisonment which could be changed to correctional supervision once she had served eight months in prison. She unsuccessfully applied for leave to appeal against her sentence. Her subsequent petition to the Supreme Court of Appeal for leave to appeal was also unsuccessful. She then approached the Constitutional Court, which granted leave to appeal. The Chief Justice directed that the parties address three issues. For purposes of the present chapter, the first issue — the scope of 'the duties of the sentencing court in the light of section 28(2) of the Constitution of the Republic of South Africa, 1996 and any relevant statutory

provisions when the person being sentenced is the primary caregiver of minor children' (para [5]) — is the most important.

Delivering the judgment of the majority, Sachs J first set out the sentencing approach that is embodied in *S v Zinn* 1969 (2) SA 537 (A). An exposition of this part of the judgment is unnecessary for present purposes. What is more important is the judge's view on how section 28 of the Constitution (the children's rights clause) must be integrated into the sentencing process if the offender is a primary caregiver. He held that the 'normative force' of section 28 is not limited to that of 'a general guideline to the courts' (para [14]). He stated that the Constitutional Court had held that 'section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce' (para [14]; s 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child, while s 28(1) lists particular rights enjoyed by a child). Sachs J referred to the broad ambit of section 28 and stated that 'just as law enforcement must always be gender sensitive, so must it always be child sensitive; . . . statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and . . . courts must function in a manner which at all times shows due respect for children's rights' (para [15]). The import of the principles of the United Nations Convention on the Rights of the Child must also be taken into account, as these principles inform section 28 of the Constitution (para [17]).

Sachs J further stated that section 28 requires 'the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk' (para [20]). Where the disruption of the family is inevitable, the state must minimize the consequent negative impact on the children as far as possible (*ibid*). He referred to section 28(1), which 'provides for a list of enforceable substantive rights'. He specifically highlighted section 28(1)(b), which entitles every child to family care or parental care, or appropriate alternative care when removed from the family environment (para [21]). He further pointed out that section 28(1) is not exhaustive of children's rights, as section 28(2) entitles the child to paramountcy of his or her interests in every matter concerning the child. He warned that 'the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular' (para [23]). He acknowledged the problems with the concept the 'best interests

of the child', such as its indeterminacy, the different interpretations of the concept by the various professions, and the fact that historical, cultural, social, political, and economic factors influence the interpretation of the concept in different countries. Despite the criticism of the concept, Sachs J expressed support for its application (para [24]).

He then referred to the difficulty of establishing 'an appropriate operational thrust for the paramountcy principle' (para [25]). He indicated, correctly, that although the word 'paramount' in section 28(2) is emphatic and is '[c]oupled with the far-reaching phrase "in every matter concerning the child"', this does not mean 'that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations' and that section 28(2) is not subject to limitation (paras [25], [26], and [42]). This view is in keeping with past Constitutional Court judgments. He warned that '[i]f the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2)' (para [25]). The correct approach, then, is to apply the 'paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests' (*ibid*).

Sachs J then considered how the rights of children should be taken into account specifically in the context of sentencing their primary caregiver. He stated that, as in all matters concerning children, the facts of each case will determine the outcome (para [28]). He held that a practical way of ensuring that section 28 is sensibly applied is to read section 28(2) with section 28(1)(b). Taken together, these subsections oblige the sentencing court to establish whether the proposed sentence will have an impact on a child, independently to consider the child's best interests, to attach appropriate weight to those interests, and to ensure that the child will be taken care of if the primary caregiver is imprisoned (paras [32]–[33], and [42]). Thus, 'focused and informed attention' must be given to the interests of the children at appropriate moments in the sentencing process in order to 'ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk' (para [33]). He emphasized that the issue was not whether a parent should be allowed to use his or her children as a pretext for escaping the consequences of his or

her misconduct, for the interests that are at stake are those of the offender's children, not the offender. Accordingly it is not the severity for the caregiver should he or she be separated from his or her children because of his or her imprisonment that is the issue, but the 'indirect but potentially very powerful impact' the imprisonment may have on the children (para [41]; see also para [42]). Also, it is not the offender's imprisonment per se that violates the interests of his or her children. It is the imprisonment of the children's primary caregiver without paying special attention to the children's interests that violates their interests (para [35]). Sachs J listed guidelines which, in his view, 'will promote uniformity of principle, consistency of treatment and individualization of outcome' (para [36]). These guidelines impose a duty on the sentencing court to find out whether the offender is a primary caregiver. If the ordinary approach in *Zinn* indicates that imprisonment is the proper punishment, the offender must be sentenced to imprisonment even if he or she is a primary caregiver. If there are a range of suitable sentences, the court must 'use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose' (para [36]; see also para [39]). If a custodial sentence is to be imposed, the sentencing court must consider how the offender's children will be cared for while their primary caregiver is in prison (para [39]).

Sachs J found that the regional magistrate had failed to make sufficient enquiries and properly apply her mind to the duties flowing from 's 28(2) read with s 28(1)(b)'. This failure had carried through to the High Court, which had likewise failed to make proper enquiries. Sachs J concluded that the appropriate sentence would be to backdate the prison sentence the offender had already served, suspend the rest of the sentence of imprisonment, and impose a correctional supervision order. The appeal accordingly succeeded.

Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Skweyia, and Van der Westhuizen JJ concurred in Sachs J's judgment.

Madala J delivered a dissenting judgment. He accepted 'without reservation' that the best interests of the child must be taken into account when a court has to consider sentencing a primary caregiver (para [122]). He supported the rationale for this approach as set out in Sachs J's judgment and reiterated that 'the duties of the courts are to be imbued with a child centred approach and the courts must as a rule, judiciously consider a

child's interests' (*ibid*). On the evidence, Madala J was of the view that the sentence of imprisonment that had been imposed by the High Court was correct.

Nkabinde J and Navsa AJ concurred in Madala J's judgment.

Although the approach that Sachs J adopted in respect of the duties of a court that sentences a primary caregiver is welcome, I do not agree with the outcome of the case — the release of the mother on correctional supervision. As the mother was a repeat offender who had committed serious crimes, imprisonment would have been a more appropriate sentence. In this regard, I prefer the decision of the minority of the court.

Be that as it may, for present purposes the more interesting aspects of the case are those that relate to Sachs J's views on section 28. I strongly support his emphasis on a child-centred approach in regard to sentencing. The same applies to his emphasis that the focus of the duty to consider the implications of imprisonment is the interests of the offender's children and not those of the offender. I also support his view that, in the case of sentencing a parent, section 28(1)(b) and 28(2) of the Constitution must be read and applied together.

However, a problematic aspect of his judgment is that it lacks clarity and conveys a degree of confusion regarding the nature of section 28(2) and, specifically, the issue of whether it confers a separate, enforceable constitutional right. In respect of section 28(1), Sachs J unequivocally states that it 'provides for a list of enforceable substantive rights' (para [21]). Unfortunately his statements regarding section 28(2) are much less clear. At times he suggests that section 28(2) indeed confers a separate constitutional right, but mostly when he refers to section 28(2) in the same breath as a right he links it to section 28(1), or simply refers to 'section 28'. For example, he cites *De Reuck v Director of Public Prosecutions* (*supra*), *Sonderup v Tondelli* (*supra*), *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC), and *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) as authority for the view that 'section 28(2), read with section 28(1)', establishes a 'set of children's rights that courts are obliged to enforce' (para [14]). And in the first sentence of paragraph [26] he states that 'section 28' does not trump 'other rights'. Later in the same paragraph he does make a statement that is restricted to section 28(2) and implies that it embodies a right: He refers to *De Reuck* and states that the court held that section 28(2) does not assume dominance

over 'other constitutional rights'. After quoting from *De Reuck* he returns to referring to the whole of section 28 and uses the phrase 'section 28 rights'. However, later in the same paragraph he states that the ambit of the child's best interests (s 28(2)) can be limited '[l]ike all rights in the Bill of Rights'. Mostly, however, when Sachs J refers to the paramountcy of the best interests of the child he calls it a 'principle' (paras [23], [24], [25], [36], and [42]). Once he refers to it as an 'injunction' (para [26]). And once he refers to the whole of section 28 as creating 'enforceable legal rules'. The problem with his mixed terminology is that a right is not the same as a principle, an injunction, or a legal rule, and the implications of the differences between these concepts are significant. As Elsje Bonthuys ('The Best Interests of Children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23) shows, our courts have not yet properly grappled with the nature of section 28(2). (See also Tess McLaren "'The Best Interests of the Child": A Right or a Principle?' 2005 *Responsa Meridiana* 119). It is a pity that Sachs J's judgment adds to the confusion regarding the nature of section 28(2).

#### *Costs Order Against Minor*

In *Tshona v Principal, Victoria Girls High School, & others* 2007 (5) SA 66 (E), a sixteen-year-old girl brought an urgent application for the setting aside of her expulsion from a school hostel at Victoria Girls High School. She launched the application with the assistance of her parents. She had been expelled because of various violations of the hostel's rules. The details regarding her misconduct, the disciplinary proceedings into her misconduct, and her expulsion are unimportant. The significant part of the decision relates to the costs order that was made. Usually, if a court makes a costs order against a minor, it is the minor who is liable. This is the position regardless of whether the minor litigated with the assistance of his or her guardian, or whether the minor's guardian litigated on the minor's behalf. In exceptional instances the court may order the minor's guardian to pay the costs of the proceedings either alone or jointly and severally with the minor. Such an order is 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 (see, for example, *Re Estate Potgieter* 1908 TS 982;

*Jacobs v Kegopotsimang* 1937 GWL 43; *Taylor v Lucas* 1937 TPD 405; *Grobler v Potgieter* 1954 (2) SA 188 (O); *Ex parte Hodgert* 1955 (1) SA 371 (D); *Ex parte Bloy* 1984 (2) SA 410 (D)). In *Tshona*, the applicant and her legal representative made reckless and false allegations that the school principal was dishonest and had maliciously manufactured evidence against the applicant. The applicant's legal representative also adapted 'his argument in order to suit the exigencies of the situation without regard to the actual facts' (at 77H; see also at 83D). The applicant's parents 'made common cause with the scurrilous attacks launched by the applicant upon the integrity of not only the first respondent [the school principal] but also, by implication, the other members of the school governing body' (at 82I–J). They also allowed the making of statements that they had not received certain notices regarding disciplinary issues while the evidence overwhelmingly established the opposite (at 82–3). The court held that the fact that the applicant's parents were merely assisting her 'did not . . . afford them licence to make common cause with wild, intemperate and unsubstantiated allegations of fraud, forgery and dishonesty on the part of high office-holders at the school' (at 83H). As a mark of the court's disapproval of the parents' conduct, it made a costs order against the applicant and her parents jointly and severally.

#### *Custody or Care*

In *K v M* [2007] 4 All SA 883 (E), the unmarried parents of a five-year-old girl shared custody of the child until their relationship broke down. During the subsistence of her parents' relationship, the child spent Monday to Friday during school terms at her father's house in East London and the rest of her time with both parents at her mother's house in King Williams' Town. When at her father's house, she attended a playschool in East London. After the breakdown of her parents' relationship, her mother withdrew her from the playschool in East London and enrolled her at a playschool in King Williams' Town. Her father was bitterly opposed to this. He approached the High Court for an order in terms of the now repealed Natural Fathers of Children Born out of Wedlock Act 86 of 1997 awarding custody to him from Monday to Friday during school terms so that he could re-enrol her at the playschool in East London. (The Children's Act 38 of 2005 repealed the Natural Fathers of Children Born out of Wedlock Act: see above in this chapter.) He alleged that he could provide better pre-school education for the

child in East London than her mother could provide in King Williams' Town. He submitted that if the court found that he could actually provide superior education, the custody order he requested should be made. Consequent to the father's application, the family advocate, assisted by a family councillor, investigated the best interests of the child and recommended that her mother retain full custody.

Leach J found that it was common cause that the child's mother and father were loving, kind, and responsible parents who enjoyed a sound relationship with their child and were able to adequately care for and accommodate her and her three-year-old sister. Although Leach J was prepared to accept that the education that the child's father could provide was superior, he rejected the father's contention that his ability to provide a superior education entitled him to custody. Leach J held that although education is an important factor, it is not the only factor to be considered. All relevant factors must 'be placed into the scales and weighed up' (at 890b). He reiterated — as has been done every so often — that each case is unique and must be decided in accordance with its particular facts and circumstances. Ultimately the court must make a value judgement regarding what is in the child's best interests. In making this value judgement, the court must bear all relevant considerations in mind and not elevate any one factor to a level of overriding importance (at 891d-f).

In making his value judgement in this particular case, Leach J emphasized maternity. Invoking the right not to be subject to unfair discrimination on the ground of gender (s 9(3) of the Constitution), the child's father argued that maternity does not place the mother in a better position than the father. Leach J explained the approach that the courts had to adopt in respect of maternity as a factor. He referred to the maternal preference, which entails that mothers are preferred as custodians as it is simply assumed that they make better caretakers of children, particularly young children. He stated that the maternal preference 'has been diluted' because of changing circumstances, such as the dual breadwinner family and fathers' increased involvement in the day-to-day care of their children (at 892b-c). He cited some of the South African cases that reflect the shift away from the maternal preference (*Van der Linde v Van der Linde* 1996 (3) SA 509 (O); *Madiehe (born Ratlhogo) v Madiehe* [1997] 2 All SA 153 (B); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O)). He then held that although there are no fixed rules, and it

'would be wrong to approach the question of custody as being an issue to be axiomatically determined by a principle placing a mother at an advantage in a custody dispute, it is also necessary to give recognition to the fact that there is often no one who can quite take the place of a child's mother or whose presence and natural affection can give a child the sense of security and comfort that a child derives from its own mother, this being an important factor in the normal psychological development of a healthy child' (at 892e–g). He cited *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC), where the Constitutional Court held that, especially in the case of a young child, the biological relationship of a mother with the child she nurtured during pregnancy and possibly suckled after birth gives rise to a special bond between them. Leach J held that acknowledging this special bond does not amount to unfair discrimination (at 893b). But he stressed that

'the issue of maternal advantage is not to be elevated to a rule in any form which can be construed as placing any sort of onus upon a father to establish negatives on the part of the mother justifying a departure from the norm by awarding custody to him. The essential and overriding issue is the best interests of the child, this being the issue of paramount importance which is enshrined in section 28(1) [sic] of the Constitution' (at 893g–h).

(Leach J clearly had section 28(2) of the Constitution in mind.) Thus, in considering the best interests of the child, the court may have regard to maternity but may not afford undue weight to it and turn it into the only consideration (at 893h and 894d–e).

Leach J then turned to the 'doctrine' of same-sex matching — placing sons with their fathers and daughters with their mothers. In the past, same-sex matching was favoured particularly in respect of mother-daughter placements. The mother-daughter placement was also the context in which Leach J supported same-sex matching. He concluded that, in the present case, the child's sex as well as her young age favoured her mother (at 894e). He further took into account that the child has a three-year-old sister and a fifteen-year-old half-sister with whom she has a close family bond. He also took into account that the child's father had, for about a year since the breakdown of his relationship with the mother, not had de facto custody. Leach J was of the view that granting custody to the father would unnecessarily disrupt the child's circumstances (at 894–5). Taking everything into account, Leach J concluded that the only factor that favoured the father

was the child's superior educational opportunities in East London and this was insufficient to entitle the father to custody. Leach J accordingly dismissed the application.

That making a decision regarding the best interests of the child involves a value judgement was confirmed by the Supreme Court of Appeal in *P v P* 2007 (5) SA 94 (SCA). The issue of the maternal preference was also covered in this case. Here custody of children aged eleven and fifteen years was in dispute. When the children's parents got divorced, Chetty J, sitting as a single judge in the Eastern Cape, heard the matter. Two clinical psychologists prepared reports and testified at the trial. They diagnosed the children's mother as suffering from borderline personality disorder. The family advocate, assisted by a family counsellor, also conducted an enquiry and submitted a report, and the family counsellor testified at the trial. The family advocate further called a third clinical psychologist to testify at the trial. The latter clinical psychologist submitted that in view of 'the mother's "ego strength", psychiatric history and previous style of coping while she was a full-time mother and housewife with considerable domestic support, she might well not be able to cope with the stress of being a single parent and of managing a household, a job and finances' (quoted in para [9]). A psychiatrist who had treated the mother some six years earlier also testified at the trial. He had diagnosed her as suffering from, inter alia, borderline personality traits with generalized personality disorder, panic disorder, and recurrent major depression. All the experts and the family counsellor recommended that custody be awarded to the father. The family advocate accordingly made the same recommendation. Despite these recommendations, Chetty J awarded custody to the mother because he was unimpressed with the various experts and their testimony. The father unsuccessfully appealed to the full bench of the Eastern Cape Provincial Division of the High Court. With special leave, he then appealed to the Supreme Court of Appeal. His appeal was directed, inter alia, against the custody order.

Van Heerden JA delivered the unanimous decision of the Supreme Court of Appeal. She pointed out that the constitutionally entrenched fundamental principle in all matters concerning a child is that the child's best interests must be paramount. She held that '[d]etermining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment, based on its findings of

fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children' (para [14]). Referring to previous decisions of the Supreme Court of Appeal, she pointed out that because a value judgement is involved, an appeal court will not easily second-guess the findings and conclusions of the trial court. This is especially so if the trial court's conclusions were largely based on findings regarding the credibility of witnesses. She held that the approach that the full bench had adopted in considering the appeal against the decision of the trial court was in line with this rule (para [14]). As the father contended that the trial court and the full bench had misdirected themselves in their assessment of the expert evidence, Van Heerden JA dealt with and applied the principles regarding the admissibility and evaluation of expert evidence. She concluded that the courts' rejection of the expert evidence was justified on the facts of the case. She pointed out that two of the clinical psychologists had largely premised their recommendations on their incorrect 'factual finding' that the parents' housekeeper was the children's primary caretaker. The family advocate had proceeded from the same premiss. Also, the psychiatrist who had treated the mother had last had contact with her some years before the trial and thus could not express a meaningful opinion on her condition at the time of the trial. And some of the experts lacked objectivity and were unable to make obvious concessions under cross-examination. Van Heerden JA further indicated that, on the evidence, the trial court and the full bench had been of the opinion that even though the mother suffered from personality problems, she had managed to keep her depression under control with medication, and that, although there would be new stresses on her as a divorced woman and single parent, 'neither her personality problems nor these new stresses would impact on her parenting ability to such an extent that it would not be in the best interests of the children to continue being cared for by her' (para [23]). Van Heerden JA accordingly found that neither the trial court nor the full bench had misdirected itself.

Because Chetty J had stated that maternal deprivation would inevitably have adverse consequences for the children's development and had cited *Dunsterville v Dunsterville* 1946 NPD 594 in support of this view, Van Heerden JA also dealt with the maternal preference. She pointed out that the value systems and societal beliefs underpinning the maternal preference and tender-years principle have been challenged in more recent cases.

(In terms of the tender-years principle, mothers are the preferred custodians of young children.) The courts have emphasized that parenting is a gender-neutral function and that it should not be assumed that mothers are necessarily better at caring for children. Van Heerden JA did not go as far as saying that Chetty J's reliance on *Dunsterville* and his apparent approval of the maternal preference was incorrect or misplaced. She simply stated that his reliance on *Dunsterville* should be viewed in the light of the more recent approach which is consistent with the equality clause enshrined in section 9 of the Constitution (para [26]). She accordingly dismissed the appeal.

In so far as the statements in the above two cases about the maternal preference are concerned, there can be no doubt that, from a constitutional perspective, maternity may no longer be the sole factor in deciding custody (or care, as it is known in terms of the Children's Act: see above in this chapter). (See further DSP Cronjé & Jacqueline Heaton *South African Family Law* 2 ed (2004) 164; Jacqueline Heaton 'Family Law and the Bill of Rights' in *Bill of Rights Compendium* loose-leaf (1998) issue 16 ¶ 3C29.) However, as is clear from both cases, judges still attach a great deal of weight to maternity. It is self-evident that awarding custody to a mother is not *per se* incorrect. Nor is it incorrect to take the role that a mother has played in her child's life into account. What is disconcerting is that some judges still rely too heavily on the mere biological link between mother and child to justify making a custody award in favour of the mother.

### *Delictual Accountability*

*Green v Naidoo & another* 2007 (6) SA 372 (W) concerns the *actio de pauperie* and the delictual accountability of an *infans* (a child below the age of seven years). A four-year-old girl was bitten by a dog. Her father sued the owner of the dog for damages. The issue arose as to whether the little girl had provoked the dog. The court reiterated the well-known principle of our law that an *infans* cannot be held liable for an act she may have performed (at 378H). This case is discussed in more detail in the chapter on Law of Delict.

### *Maintenance*

*Forssman v Forssman* 2008 (2) SA 144 (W) concerns an appeal against an increase in child maintenance that had been ordered by the maintenance court. When the parties got divorced the

father (the appellant) was ordered to pay maintenance for the child. The mother (the respondent) was also making a contribution to the child's maintenance. A few years after the divorce, the maintenance court ordered an increase in maintenance. The appellant appealed to the High Court against the size of the increase. He alleged that the maintenance court should have adopted the approach in *Acutt v Acutt* 1990 (4) SA 873 (ZS) and that, on this approach, a lower increase should have been ordered. The approach in *Acutt* is that the net income of the parents after tax is combined and then divided by five to obtain the amount which is to be used for the child's maintenance. The duty to fund this amount is allocated between the parents on a pro rata basis according to their respective incomes. On appeal, the High Court stated that *Acutt* related to an application for maintenance pendente lite and that the approach in that case was probably better suited to such applications than to maintenance applications upon or after divorce. The approach in *Acutt* nevertheless 'has considerable practical appeal in resolving maintenance issues, even after the parties have been divorced' (para [34]). The court pointed out that the approach in *Acutt* focuses solely on the parties' income and ignores their expenses. The court concluded that the appellant could not attempt to reduce his maintenance obligation towards his child by relying on the fact that he had expenses relating to unspecified maintenance obligations towards his children from another marriage and expenses relating to an arbitrarily fixed amount for expenses regarding the household he was sharing with another woman. The court held that even if the fact of his maintenance obligations to his other children were taken into account, the amount that the maintenance court had ordered him to pay was not excessive. In respect of the amount that the appellant paid to his companion, the court held that the fact that she and the appellant had arbitrarily decided on an amount of R7 000 could not be used to prejudice his child. The court also found that if the approach in *Acutt* were correctly applied in the present case, the appellant would have to pay a higher amount of maintenance than he was ordered to pay. The court concluded that the maintenance court's decision was 'entirely appropriate' (para [42]), and dismissed the appeal with costs.

#### CURATOR

In *Road Accident Fund v Mdeyide & another* 2007 (7) BCLR 805 (CC) (also reported as *Road Accident Fund v Mdeyide*

(*Minister of Transport Intervening*) 2008 (1) SA 535 (CC)), a blind, illiterate, and innumerate man lodged a claim against the Road Accident Fund after the expiration of the period that is stipulated by the Road Accident Fund Act 56 of 1996. The constitutionality of the provisions of the Act regarding the prescription of claims was attacked. What should be noted in the present context are the Constitutional Court's statements regarding the plaintiff's capacity to litigate. In view of the facts of the case, the court pointed out that the plaintiff might well not have capacity to litigate, as he probably was of unsound mind. The plaintiff's attorney and the court below had failed to address the question of the plaintiff's capacity to litigate. The Constitutional Court pointed out that if the plaintiff was of unsound mind at the time of the trial, the entire proceedings in the trial court might be void and the validity of the plaintiff's instructions to his legal representative would also be a matter of doubt. The court held that an investigation into the plaintiff's soundness of mind should have been held in terms of rule 57 of the Uniform Rules of Court. Had the investigation shown that the plaintiff was of unsound mind, a curator would have been appointed for him and he would then have enjoyed the protection of a much longer prescription period. As a result of the uncertainty about the plaintiff's soundness of mind, the court made an order which, *inter alia*, remitted the matter to the High Court for an inquiry in terms of rule 57.

This case serves as a warning to all practitioners and High Courts to pay closer attention to the capacity to litigate of parties who suffer from serious disabilities and those who may be of unsound mind. Even if the capacity to litigate of a party who suffers from a serious disability or is possibly of unsound mind is not expressly questioned by one of the litigants, the practitioners who are acting for the parties and, particularly, the court should be mindful of the possibility that an investigation in terms of rule 57 might be required.

## DIVORCE

### *The Division of the Joint Estate*

*Corporate Liquidators (Pty) Ltd & another v Wiggill & others* 2007 (2) SA 520 (T) relates to a dispute arising out of a settlement agreement to which full effect was not given by the parties. The first respondent and her husband had obtained a divorce some years before the present case came before the court. Upon their

divorce, the court incorporated their settlement agreement into the divorce order, in terms of section 7(1) of the Divorce Act. The settlement agreement provided that a certain encumbered erf that fell into the joint estate would be subdivided. The proposed portion 1 of the subdivided erf would be transferred to the first respondent as an unencumbered property. The remainder of the erf would be transferred to her husband, but would be subject to a life-long usufruct in favour of the first respondent's parents (the second and third respondents). The spouses agreed that they would jointly be liable for the costs of the subdivision and transfer. The subdivision and transfer never occurred. After the divorce, the mortgage bond over the undivided erf was paid off but not cancelled. The first respondent's former husband then borrowed more money under cover of the bond. He later remarried in community of property. After his remarriage, the joint estate of him and his new wife was sequestrated and the second appellant was appointed the trustee of the insolvent estate. The first respondent fruitlessly attempted to convince the second appellant to give effect to the settlement agreement. The second appellant's attitude was that, as the terms of the settlement agreement were never given effect to, the first, second, and third respondents had only personal rights against the insolvent estate.

The first respondent approached the court below for an order compelling the trustee and the liquidating business that employed him to give effect to the settlement agreement. The court below ordered the appellants to subdivide the erf and transfer portion 1 to the first respondent and the remainder into the insolvent estate, subject to a usufruct in favour of the second and third respondents. It held that upon divorce, the first respondent had acquired ownership of portion 1, that the subdivision and transfer of portion 1 were mere formalities, and that portion 1 did not fall into the insolvent estate. The appellants appealed to the full bench of the Transvaal Provincial Division of the High Court.

Delivering the judgment of the full bench, Hartzenberg J held that, upon divorce, the bound or 'tied' co-ownership that spouses who are married in community of property have in respect of the assets in their joint estate changes to free co-ownership (para [13]). This dictum is correct and in line with *Ex parte Menzies et uxoris* 1993 (3) SA 799 (C), on which Hartzenberg J relied heavily. He further held that, upon divorce, the joint estate is divided

immediately and ownership of the assets that are allocated to each spouse automatically vests in each of them. In the case of immovable property, registration is not a prerequisite for the vesting of ownership (paras [16]–[17]). Hartzenberg J agreed with the court below that, in the present case, the process of subdivision could be equated with the transfer of immovable property into the names of the former spouses, and that the steps regarding subdivision ‘were mere formalities to give effect to the intention of the parties’ (para [17]). This argument is flawed, for, in terms of the rules of the law of property and the provisions of section 24 of the Deeds Registries Act 47 of 1937, subdivision is not a mere formality, and the registration of an undivided portion of immovable property is impermissible (see Pieter Bakker ‘Nature of Ownership in Immovable Property of the Joint Estate on Divorce’ (2007) 70 *THRHR* 515 at 520). Hartzenberg J further held that the first respondent was the owner of an unencumbered portion 1 of the as yet undivided erf. This part of Hartzenberg J’s judgment also goes against the rules of the law of property, in that one person cannot have individual ownership over part of an undivided asset while another person has individual ownership over another part of the same undivided asset (see further Bakker *op cit* at 518 and 520.) Hartzenberg J stated that the first respondent was entitled to the cancellation of the bond over portion 1 and to the transfer of the unencumbered portion into her name, as she had never encumbered her portion of the erf (paras [18] and [20]). He ordered the second appellant to give effect to the settlement agreement by ensuring that the erf be subdivided and that portion 1 be transferred to the first respondent.

In so far as the provision in the settlement agreement that the first respondent and her former husband would share the costs of the subdivision and transfer was concerned, Hartzenberg J held that the former spouses’ obligations to pay the costs were obligations of their individual post-divorce estates. As the first respondent’s former husband was insolvent, his obligation ranked as a concurrent claim against the insolvent estate (para [20]). Hartzenberg J sought to solve the practical problem regarding payment that arose as a result of the insolvency, by ordering the first respondent to provide all the funds for the subdivision of the erf, the cancellation of the bond, and the registration of the transfer of the two portions of the erf. He further declared that the appellants must recognize the first respondent as a concurrent creditor against the insolvent estate for half of these expenses (para [21]).

In respect of the claim of the second and third respondents, Hartzenberg J correctly found that their right to the usufruct did not automatically vest in them when their daughter and her former husband got divorced. So they acquired merely a personal right to obtain the usufruct. Because of the insolvency of their former son-in-law and his new wife, the second and third respondents now merely had a concurrent claim for the value of the usufruct against the insolvent estate (para [22]). Hartzenberg J accordingly found that the court below had erred in ordering the appellants to transfer the remainder of the erf into the insolvent estate, subject to a usufruct in favour of the second and third respondents. The appeal succeeded in part. Mavundla J and Ranchod AJ concurred in Hartzenberg J's judgment.

#### *A Hindu Marriage Cannot be Dissolved by Divorce*

*Singh v Ramparsad & others* 2007 (3) SA 445 (D) relates to an ill-conceived attempt to have a Hindu marriage recognized in terms of South African law. Essentially, the plaintiff, who was married to the first defendant in terms of Hindu religious law, wanted to obtain a divorce. But Hindu religious law does not recognize divorce. So the plaintiff could not obtain a divorce in terms of her religion. She approached the court for an order declaring that, on a constitutional interpretation, the Marriage Act 25 of 1961 recognizes the solemnization and legal validity of religious marriages, or that it does not preclude the recognition of the solemnization and legal validity of such marriages. Alternatively, she sought an order declaring section 11(3) of the Act to be unconstitutional to the extent that it precludes the solemnization and legal validity of religious marriages that are not solemnized in terms of the Act. (Section 11(3) provides that the unauthorized solemnization of a marriage in accordance with religious rites or formularies is not an offence if the marriage ceremony does not purport to effect a valid marriage.) The plaintiff further sought to have her Hindu marriage declared legally valid. What the plaintiff actually wanted, it seems, was to somehow have her Hindu marriage turned into a civil marriage so that she could obtain a secular divorce in terms of the Divorce Act. As an alternative to all of the above, she sought an order declaring that, on a constitutional interpretation, the Divorce Act applies to religious marriages and that her marriage falls within the ambit of the Act. She further asked the court to dissolve her marriage in terms of the Divorce Act and to make an order for token maintenance in her

favour. Although Patel J correctly dismissed her action, with costs, his judgment is flawed in some respects.

Patel J correctly pointed out that the Marriage Act does not proscribe religious marriages, and that it allows persons to enter into a marriage that is solemnized in terms of religious rites by a duly appointed marriage officer of the parties' religious preference. If their religious marriage is solemnized in this way, it is valid in terms of the Marriage Act and can later be dissolved in terms of the Divorce Act. Patel J, however, incorrectly stated that registration as a marriage officer 'is open to members of all faiths' (para [34]; see also para [45]). Section 3(1) of the Marriage Act permits the designation of a person as a marriage officer only 'for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion'. This list does not cover all religions practised within South Africa, and the section may, for that reason, be unconstitutional (see Jacqueline Heaton 'Family Law and the Bill of Rights' in *Bill of Rights Compendium* (loose-leaf, issue 16) ¶ 3C17). The possible unconstitutionality of the exclusion of the officials of certain religions from appointment as marriage officers does not affect the present case, however, for Hindu religious officers solemnize marriages in accordance with the rites of an Indian religion and thus they do fall within the ambit of the list in section 3(1).

Patel J further stated that if a religious marriage is solemnized in terms of the Marriage Act, it is 'both secular and religious' (para [34]). By this he meant that the marriage acquires the dual validity of a civil marriage and a religious marriage; in other words, the civil marriage and the religious marriage exist side by side. If the marriage has dual validity, the civil marriage can subsequently be dissolved in terms of the Divorce Act, but the religious marriage will not necessarily be terminated by the secular divorce order that is granted in terms of the Divorce Act — the specific religion to which the parties subscribe may not allow divorce at all (as in the present case), or it may set additional requirements for the dissolution of the religious marriage (for example, in the case of Jewish marriages). In the latter instance, the religious marriage continues to exist unless it is dissolved in accordance with the rules of the particular religion. Put differently, granting a secular divorce order in terms of the Divorce Act does not free the spouses from the bonds of their religious marriage if the religion prohibits divorce or sets additional requirements for the dissolution of the religious marriage. It is important to bear in mind that

in the present case the issue of dual validity could not arise at all, for the plaintiff and her husband entered into one type of marriage only — a religious marriage. The court does not have a common-law or statutory power to convert one type of marriage into another, and the Constitution does not confer this power on the court, either. Thus, even if the court were to recognize the plaintiff's religious marriage, it would still be only the Hindu marriage that is recognized. Such recognition would not confer the consequences of a civil marriage on the religious marriage or give it dual validity; in other words, obtaining an order declaring her Hindu marriage to be valid would not turn the plaintiff's religious marriage into a civil marriage, or into any other type of marriage that could be dissolved by divorce. The marriage would remain a Hindu marriage, which cannot be dissolved by divorce because of the rules of Hindu religious law. This issue was precisely the one that the plaintiff failed to grasp. The only way in which she could obtain the right to have her Hindu marriage dissolved by divorce would be if she successfully attacked the non-recognition of divorce in Hindu religious law. And, as Patel J correctly pointed out, the issue of whether a particular religion should permit divorce is not the type of matter a South African court will entertain, since it involves entanglement in religious doctrine, and our courts 'have tried assiduously not to get entangled in doctrinal issues' (para [50]). Patel J correctly concluded that, on the basis of the doctrine of non-entanglement, 'it is not for the court to pronounce the parties as being divorced if they elected to practice a faith and took vows which do not countenance divorce' (para [51]).

In arguing her point about the alleged unconstitutionality of the Marriage Act and the Divorce Act, the plaintiff stated that the non-recognition of her Hindu marriage for purposes of these Acts violated her rights to equality and dignity (ss 9 and 10 of the Constitution). This is tantamount to arguing that all forms of marriage must have the same consequences and, thus, that uniformity of marriage laws is the only constitutionally acceptable option. In view of section 15(3)(a) of the Constitution, which, *inter alia*, permits legislation recognizing 'marriages concluded under any tradition, or a system of religious, personal or family law', such an argument is clearly wrong. The plaintiff also referred to the Recognition of Customary Marriages Act and pointed out that even unregistered customary marriages are valid (see s 4(9)). She argued that the non-recognition of her unregistered Hindu

marriage unfairly discriminated against her. Patel J rejected the latter argument for various unconvincing reasons, which I shall not repeat here, because they are unimportant in so far as the main problem with the plaintiff's argument is concerned — that she lost sight of the fact that the recognition of her Hindu marriage would not enable her to dissolve the marriage, as it would not turn it into a marriage that can be dissolved in terms of the Divorce Act. Patel J concluded that the plaintiff's attack on the constitutionality of the Marriage Act and the Divorce Act had to fail, as she did not prove that the non-recognition of her religious marriage by these Acts offended her dignity or equality. Also, she failed to show that her dignity, 'if it was indeed lost, would be regained if a secular decree of divorce was granted' (para [53]). With regard to the latter statement it must again be borne in mind that a secular divorce could not be obtained at all, as the plaintiff never entered into a marriage that could be dissolved by means of a secular divorce.

Finally, I should like to deal with Patel J's references to common-law marriages. He stated that although religious marriages 'lack legal validity [they] are regarded as lawful marriages in terms of the common law' (para [37]); in other words, the common law does not prohibit these marriages. He then referred to *Ryland v Edros* 1997 (2) SA 690 (C) and *Amod v Multilateral Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA), where the law came to the aid of what he called spouses in marriages 'under the common law' (para [38]), dependants in a 'common-law marriage' (para [40]), and spouses 'married by common law' (para [43]). The terminology Patel J used is problematic, for marriage under or by the common law does not form part of our law. In South Africa we have civil marriages (which must meet the requirements of the common law and the Marriage Act), marriages and civil partnerships under the Civil Union Act (which must meet the requirements of this Act), customary marriages (which must meet the requirements of the Recognition of Customary Marriages Act), and religious marriages (which must meet the requirements of the particular religion, and are only partly recognized unless they also meet the requirements of the common law and the Marriage Act and thus qualify as civil marriages, too). The term 'common-law marriage' is sometimes used in our law, but then it refers to a cohabitation relationship (nowadays called a life partnership), but this was

clearly not the sort of relationship that Patel J had in mind. What he presumably did have in mind were religious marriages that lacked official recognition.

### *Interim Maintenance*

In *Bruni v Bruni* [2007] 3 All SA 139 (W), the court simultaneously dealt with two applications flowing from an earlier order for interim maintenance that had been made in terms of rule 43 of the Uniform Rules of Court. In one application the wife to whom interim maintenance had to be paid sought an order committing her husband to prison for contempt of court on the ground of his alleged failure to comply with the maintenance order. In the other application, the husband sought the variation of the order for the payment of interim maintenance in terms of rule 43(6). (Rule 43(6) empowers the court to vary an existing rule 43 order 'in the event of a material change taking place in the circumstances of either party'.)

Relying on *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), Berger AJ held that the burden of proof in the contempt application rests on the wife. She has to prove beyond reasonable doubt that her husband has deliberately and in a mala fide way refused to obey the order for payment of interim maintenance. If there is a dispute of fact between the parties, as in the present case, the matter must be decided on the facts that are stated by the respondent (the husband in this case), together with those that the applicant avers and the respondent does not deny. The court accordingly concluded that unless the allegations or denials of the husband were far-fetched or untenable, the contempt proceedings had to be decided on his version of the facts (para [20]). On the facts of the case, Berger AJ found that the wife had proved beyond reasonable doubt that her husband was in contempt in respect of part of the arrears, but not in respect of all of them.

In so far as the husband's application in terms of rule 43(6) was concerned, Berger AJ indicated that the husband bore the burden of proving, on a balance of probabilities, that the material change in circumstance that rule 43(6) requires, has taken place. On the facts, the judge concluded that the husband had discharged this burden. The judge reduced the interim maintenance from R48 500 per month to R25 000 per month. The reduced amount was backdated to 1 March 2005. In respect of the conviction on the charge of contempt of court, the husband was

sentenced to 30 days' imprisonment, suspended on condition that he pay all the arrear maintenance within six months. Berger AJ further ordered that the amount of the arrears had to be calculated by using the reduced amount of interim maintenance as from 1 March 2005. Each party was ordered to pay his or her own costs.

### *Maintenance*

Two cases that were reported during the year under review dealt with the issue of whether an ex-wife's remarriage terminates her ex-husband's duty to pay maintenance to her in terms of the settlement agreement the spouses concluded upon divorce. Section 7(1) of the Divorce Act empowers the court which grants a divorce to incorporate the divorcing couple's settlement agreement into the divorce order. If the spouses do not enter into a settlement agreement, or if the court does not deem it fit to include their agreement in the divorce order, the court may make a maintenance order in favour of either spouse in terms of section 7(2) of the Act. The latter order may operate for any period of time until the death or remarriage of the maintenance recipient.

In *Odgers v De Gersigny* 2007 (2) SA 305 (SCA), the terms of an unincorporated settlement agreement were at issue. The settlement agreement provided that the husband would pay maintenance to his wife for 24 months, and included a non-variation clause. Two months after the divorce, the wife remarried. Her former husband then stopped paying maintenance. She successfully sued him in the magistrate's court. After unsuccessfully appealing to the Natal Provincial Division of the High Court, he appealed to the Supreme Court of Appeal. He argued that maintenance implicitly entails that the duty to pay terminates upon the maintenance recipient's death or remarriage. He relied on *Van der Vyver v Du Toit* 2004 (4) SA 420 (T) para [19], where it was held that a husband who is liable for maintenance in terms of section 7(1) of the Divorce Act remains liable for his former wife's maintenance after her remarriage only 'if he has expressly waived his rights to be relieved from liability' upon her remarriage. If the husband did not do so, his duty to pay maintenance 'should automatically terminate upon remarriage or death' (*ibid*). Put differently, in *Van der Vyver* the court held that, in principle, the duty to pay maintenance terminates automatically upon the former wife's remarriage. The court further held that the intention of Parliament in respect of section 7(2) of the Divorce Act can be

used to interpret settlement agreements that are incorporated in terms of section 7(1) and to establish the intention of Parliament with regard to section 7(1). In *Van der Vyver*, the court concluded that since section 7(2) provides that the duty to pay maintenance comes to an end, at the latest, when the maintenance recipient dies or remarries, Parliament could never have intended that a woman should continue receiving maintenance from her ex-husband after her remarriage, unless the settlement agreement expressly permitted this. In *Odgers*, the husband further relied on *Glass v Santam Insurance Ltd* 1992 (1) SA 901 (W). There it was held that a widow's damages for loss of support are calculated only up to the time of her remarriage, as she suffers no loss after remarriage.

Delivering the judgment of the Supreme Court of Appeal, Maya JA rejected the husband's reliance on *Glass* on the ground that that case did not relate to an agreement to pay maintenance and so dealt with a situation that was entirely different from the one in *Odgers*. Although Maya JA did not mention this, it should also be borne in mind that *Glass* no longer reflects the law, for it was overturned in *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA). In *Ongevallekommissaris*, the Supreme Court of Appeal held that a widow's remarriage did not terminate her loss and did not disentitle her to damages for the period after her remarriage. The prospect or possibility of a remarriage was, however, a factor that was taken into account in calculating the amount that was awarded to her.

Although the settlement agreement in *Odgers* was never incorporated into the divorce order and so section 7(1) was not at issue, Maya JA distinguished between a duty of support that arises in terms of section 7(1) and one that arises in terms of section 7(2). She pointed out that section 7(1) contains no limit regarding the duration for which the parties may bind themselves. She further held that, in the case of a settlement agreement, the terms of the agreement must be interpreted to determine when the duty to pay maintenance comes to an end. This interpretation is done in accordance with the principles that apply to the interpretation of contracts. She rejected the approach to the interpretation of settlement agreements that was adopted in *Van der Vyver* and approved that adopted in *Hodges v Coubrough* 1991 (3) SA 58 (D). In the latter case it was held that the field of interpretation of contracts was very different from the field of interpretation of statutes, because in the case of a statute the

intention to be ascertained is that of Parliament, which legislates in general terms and with general effect, while in the case of a contract it is the intention of individuals, who need not 'reckon with the common law', 'worry about issues of policy', or be concerned 'if the party who is maintained under their arrangements turns out to be better off than somebody else's widow' that is at issue (*Hodges* at 66F–G). Maya JA pointed out that in the present case the husband did not allege that the settlement agreement contained an implied contractual term to the effect that his duty to pay maintenance would terminate upon his former wife's remarriage. She further held that an implied term that the duty comes to an end when the maintenance recipient remarries cannot be implied in the face of a directly conflicting term in the parties' agreement. She held that the express terms of the agreement left no room for implying a conflicting provision terminating the duty upon the maintenance recipient's remarriage. The appeal was accordingly dismissed.

The second case regarding the effect of a wife's remarriage on her former husband's maintenance obligation is *Welgemoed v Mennell* 2007 (4) SA 446 (SE). Here the settlement agreement had been incorporated into the divorce order. The agreement provided that the husband would pay maintenance to his wife until her death. It was silent on her remarriage. Some five years after the divorce the wife remarried. In this case, too, the husband relied on *Van der Vyver v Du Toit* (supra) and applied for a declaratory order that the remarriage had relieved him of his duty to pay maintenance. As in *Odgers*, the husband was unsuccessful.

Selikowitz J pointed out that the common-law duty of support between spouses comes to an end when the marriage comes to an end, and that the law relating to maintenance after divorce is to be found in sections 7 and 8 of the Divorce Act. Section 7(1) does not limit the period for which maintenance may be ordered. It is only in terms of section 7(2) that the period is limited with reference to the maintenance recipient's death or remarriage. Selikowitz J rejected the decision in *Van der Vyver* on the ground that the court had erred by failing to appreciate the difference between section 7(1) and (2), and relying on the legislator's intention in respect of s 7(2) 'to import words which . . . had been deliberately left out by the legislator' in respect of section 7(1) (at 449H). He further held that the fact that the wording of section 7(2) limits the duration of the maintenance order that the court may make, and indicates that section 7(1) does not limit the

parties' freedom to agree that maintenance will be paid 'beyond remarriage and, indeed, beyond death' (at 449J). He further pointed out that in the event of the maintenance recipient's remarriage the maintenance debtor could approach the court for the variation, suspension, or rescission of the maintenance order in terms of section 8 of the Divorce Act. If the maintenance debtor did so, the court would have to decide whether the remarriage constitutes sufficient reason for such variation, suspension, or rescission. Selikowitz J concluded that section 8 makes it unnecessary to seek to infer that remarriage automatically terminates the duty to pay maintenance in terms of an incorporated settlement agreement.

Selikowitz J further rejected the view that the duty to pay maintenance automatically terminates upon the maintenance recipient's remarriage unless the maintenance debtor has waived such termination. He stated that the termination the court relied on in *Van der Vyver* 'is not to be found in our common law' (at 450F). He again pointed out that, in so far as spouses are concerned, the common-law right to maintenance comes to an end upon termination of their marriage. Therefore, the right to maintenance which is at issue in the case of a settlement agreement is one that flows from the agreement that was incorporated in terms of section 7(1). He concluded that, unless the incorporated agreement affords the liable party the right to do so, section 7(1) does not allow the liable party to stop paying maintenance when the maintenance recipient remarries. He held that since the settlement agreement in the present case unambiguously provided that maintenance was payable until the maintenance recipient's death, there was no basis on which a term could be implied to the effect that the duty to pay terminates upon the maintenance recipient's remarriage. He further held that the law does not imply such a term either. But as the husband had not waived his right to apply for the rescission, suspension, or variation of the maintenance order, he could in the future approach the court in terms of section 8 of the Divorce Act.

The decisions in *Odgers* and *Welgemoed* are correct (compare JC Sonnekus 'Verlengde Onderhoudsaansprake na Hertroue — 'n Verpakte Geleentheid ter Aansluiting by Internasionale Beste Praktyk' 2007 TSAR 35). The courts properly grasped the difference between the foundation of the duty of support that arises by virtue of a settlement agreement and the duty that arises by virtue of an order that is made in terms of section

7(2) of the Divorce Act. In so far as the duty of support arising from an incorporated settlement agreement versus the duty arising from section 7(2) is concerned, the difference is that section 7(1) applies to a duty that has a contractual foundation, while section 7(2) applies to a duty that has a statutory foundation. The mere fact that a settlement agreement that is incorporated in terms of section 7(1) acquires the force of an order of court does not eliminate this difference. As the basis of the duty of support to which section 7(1) applies differs completely from the basis of the duty to which section 7(2) applies, there is no justification for importing the 7(2) limitations into section 7(1). There is also no indication that Parliament intended such importation. Although it is true that the provisions of section 7(2) often play a role in determining the respective bargaining positions which couples adopt when they negotiate their settlement agreement, the rule, factors, and limitations that section 7(2) contains do not automatically apply to section 7(1) (Jacqueline Heaton 'Termination of Post-divorce Maintenance for a Spouse or Civil Union Partner in Terms of a Settlement Agreement' (2007) 70 *THRHR* 641 at 649; cf L Neil van Schalkwyk 'Dood en Hertrouwe as Beëindigingswyses van Onderhoudsbevele Tussen Eggenotes Ingevolge die Wet op Egskeiding 70 van 1979' 2002 *De Jure* 144 at 148–9).

The reasons for rejecting the imposition of the limitations in section 7(2) onto a contractual duty to pay maintenance apply with greater force to an unincorporated settlement agreement (as in the case of *Odgers*) — in the case of an unincorporated settlement agreement even section 7(1) is not an issue (for a more detailed analysis of the conflicting judgments on the effect of the maintenance recipient's remarriage on post-divorce maintenance, see Heaton op cit (*THRHR*) at 641 et seqq).

Finally, although I support the decision in *Welgemoed v Menneel*, it should be noted that Selikowitz J's remarks regarding the parties' capacity to agree that maintenance will be payable beyond death can clearly relate only to the maintenance debtor's death, for the entitlement to maintenance vests in a particular natural person and is not transferable to his or her estate (see *Hodges v Coubrough* (supra); Heaton op cit at 644 and 647; Sonnekus op cit at 360; Van Schalkwyk op cit at 144).

*Georghiades v Janse van Rensburg* 2007 (3) SA 18 (C) also deals with post-divorce maintenance. In this case, the issue was the variation of the period for which the maintenance was payable

in terms of an incorporated settlement agreement. In terms of that agreement, the respondent had to pay €200 per week to the applicant for a period of three years or until her remarriage, whichever event occurred first. Before the end of the three-year period the applicant approached the court in terms of section 8 of the Divorce Act for an order varying the maintenance order by extending the duration of the duty to pay maintenance to an indefinite period until her death or remarriage, whichever event occurs first. The court dismissed the application with costs.

Griesel J stated that by allowing the rescission, variation, and suspension of a maintenance order for 'sufficient reason', section 8 creates an exception to the general rule that an order of court is final and immutable (para [13]). He referred to the fact that the maintenance order in the present case resulted from a settlement agreement which dealt not only with maintenance but also with the division of the couple's assets. He stated that a settlement agreement is a 'composite, final agreement ... purporting to regulate *all* the [parties'] rights and obligations inter se upon divorce' (para [16], original emphasis). He favoured a conservative approach to the variation of maintenance clauses in settlement agreements, because, in his view, varying only one aspect of a settlement agreement would 'fly in the face of the time-hallowed principle that "[t]he court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered"' (para [16]; the quote is from *Laws v Rutherford* 1924 AD 261 at 264). He also referred to the principle of *pacta servanda sunt*. He further quoted with approval from *Claassens v Claassens* 1981 (1) SA 360 (N), where Didcott J stated that settlement agreements were arrived at by means of a negotiating process which involved give and take, and that the maintenance which was eventually agreed upon could seldom be isolated from matters such as the division of property and child maintenance. Griesel J also cited with approval the view in *Reid v Reid* 1992 (1) SA 443 (E), that section 8 should be construed to affect the principle of *res judicata* as little as possible. Based on this authority and a 1981 case note in which Professor Hahlo (HR Hahlo 'Non-variation Clauses in Maintenance Agreements: A Commentary on *Claassens v Claassens*' (1981) 98 SALJ 330) argued that the power of variation should be exercised only in exceptional circumstances, Griesel J concluded that the settlement agreement in the present case reflected a package deal, indicating the parties' desire to effect a

clean break. In circumstances such as these, Griesel J held, the court should 'be slow to find that "sufficient reason" exists for the variation of the original maintenance order' (para 20).

Griesel J then considered, and rejected, the applicant's contention that she had signed the agreement subject to an unexpressed reservatio mentalis — that she did not intend to waive her right to apply for an extension of the period for which maintenance is payable should she still require maintenance after three years (para [21]). Griesel J also dealt with counsel's comparisons of the present case to other cases dealing with the waiver of the right to claim variation in terms of section 8. He distinguished *Purnell v Purnell* 1989 (2) SA 795 (W) from the present case on the ground that *Purnell* dealt with an order in terms of section 7(2), while the present case concerns a settlement agreement that was incorporated into the divorce order in terms of section 7(1). In respect of *Girdwood v Girdwood* 1995 (4) SA 698 (C), *Davis v Davis* 1993 (1) SA 621 (C), and *Hoal v Hoal* 2002 (3) SA 209 (N), which dealt with waivers in settlement agreements and where the courts did not find waivers to be present, he stated that these cases offer limited assistance, because every case must be considered on its own facts (para [26]). He further attempted to distinguish *Girdwood* and *Davis* from the present case on the ground of their facts. In *Girdwood* and *Davis*, the parties agreed that maintenance was payable until the wife's remarriage or death and that the settlement agreement constituted a full and final settlement of all the issues between the parties. (In *Girdwood* the parties also provided for the termination of maintenance in the case of cohabitation.) In both *Girdwood* and *Davis* the court found that the applicants had not waived their right to claim an increase in maintenance. Griesel J, rather puzzlingly, stated that there was 'a distinct difference between a consent paper where provision is made for payment of maintenance in a fixed amount until the former spouse's death, remarriage or co-habitation . . . and a consent paper that provides for payment of a fixed amount of maintenance and, in express terms, for a limited period, as here' (para [26]; original emphasis). It is not clear what the 'distinct difference' is that the judge had in mind — in both instances the duration of the duty to pay maintenance is fixed with reference to the occurrence of a particular event. In the first instance, the event is the former wife's death, remarriage, or cohabitation; in the second, the expiry of a specific period.

Griesel J also referred to and distinguished *Hoal v Hoal*, where the settlement agreement provided for the payment of rehabilitative maintenance for a period of 24 months. It also provided that the parties would have no further claims against each other and that they waived and abandoned any further claims against each other. Griesel J stated that the essential difference between *Hoal* and the present case was that the present agreement provided that the payment of maintenance 'shall cease' after three years. He held that the word 'cease' is clear and unambiguous. The word refers to stopping, ending, coming to an end, being at an end, and no longer existing. The terms of the settlement agreement thus left 'no room for the possibility that the period of the duration of the maintenance obligation can be extended' (para [30]). Griesel J accordingly concluded that the applicant had failed to show sufficient reason for variation, and had waived her right to claim maintenance beyond the three-year period.

In so far as Griesel J's finding of a waiver of the right to invoke section 8 is concerned, it should be noted that our courts are by no means unanimous on what constitutes such a waiver. Similarly worded clauses have resulted in diametrically opposed decisions (see, for example, *Polliack v Polliack* 1988 (4) SA 161 (W); *Davis v Davis* (supra); *Luttig v Luttig* 1994 (1) SA 523 (O); *Girdwood v Girdwood* (supra); *Hoal v Hoal* (supra)). But on the facts of the present case Griesel J's finding of a waiver is correct. The word 'cease' clearly and unambiguously indicates that the maintenance obligation terminates after three years. The word indicates that at the time of entering into their settlement agreement the parties had a definite termination date in mind. They agreed on the maximum duration of the duty to pay maintenance. Agreeing on the maximum duration of the duty implies the exclusion of the possibility of applying for an extension of that duty; in other words, it implies a waiver of the right to apply for the extension of the duration of the duty. The terms of the settlement agreement left 'no room for the possibility that the period of the duration of the maintenance obligation can be extended' (para [30]).

As Griesel J found that the applicant had waived her right to invoke section 8, his statements about section 8 and the matter of a 'sufficient reason' for variation are obiter. It should still be noted that his preference for allowing variation only in exceptional circumstances sets a much stricter test than the requirement of 'sufficient reason' does.

Finally, Griesel J's unquestioning support of the principle of holding parties to the terms of their settlement agreement is troubling. Settlement agreements are arrived at by way of a process of give and take, but women often have to give much more than they take. There are many reasons for the gender inequality that often exists in settlement negotiations and that results in skewed agreements. These reasons include women's frequent undervaluation of their entitlement to property and maintenance, their generally lower tolerance for conflict and risk, and the fact that the negotiations frequently involve a trade-off between money and post-divorce custody or care, with women being willing to sacrifice their own financial welfare for the sake of getting custody or care of, or more maintenance for, their children (on these and other problems regarding negotiating settlement agreements, see Jacqueline Heaton 'Striving for Substantive Gender Equality in Family Law: Selected Issues' (2005) 21 *SAJHR* 547 at 566–8).

#### *Pension Benefits*

In *Elesang v PPC Lime Ltd & others* 2007 (6) SA 328 (NC), the applicant was married in community of property. She instituted divorce proceedings against her husband. At the time, her husband had already resigned from his employment and had so become entitled to payment of a withdrawal benefit from the provident fund of which he was a member. The withdrawal benefit was the spouses' main (or possibly even their only) asset. In the divorce proceedings the applicant claimed half of the withdrawal benefit and maintenance for the couples' minor child. While the divorce proceedings were pending, the applicant obtained a rule nisi ordering her husband to pay half of the withdrawal benefit into her attorney's trust account pending the finalization of the divorce. She indicated that her husband had failed to provide financial assistance for their child and that she feared that he would squander the withdrawal benefit to her detriment and that of their child. Her husband did not oppose the relief sought. On the return date, the provident fund opposed the confirmation of the rule nisi. The fund argued, *inter alia*, that the applicant was not entitled to a share of her husband's pension interest in terms of section 7(7) and (8) of the Divorce Act, because her husband was no longer a member of the provident fund. The fund further argued that section 37A(1) of the Pension Funds Act 24 of 1956 precludes payment of any part of the withdrawal benefit into the

applicant's attorney's trust account, because the section permits payments only to a pension fund member, the non-member spouse, and/or the member's dependants.

The court distinguished between a 'pension interest' and a 'pension benefit'. Olivier J correctly stated that subsections (7) and (8) of section 7 relate only to a 'pension interest'. In terms of section 7(7), a spouse's pension interest is deemed to be part of his or her assets upon divorce, while section 7(8), *inter alia*, empowers the court to order the fund to pay any part of a member's pension interest which is due to his or her spouse directly to the spouse when the pension or annuity accrues to the member. She held that the term 'pension interest' connotes only an interest that had not yet accrued by the time of the divorce (see the definition of 'pension interest' in s 1 of the Divorce Act). Thus a 'pension interest' does not refer to a withdrawal benefit that accrues prior to divorce. In the present case, the applicant's husband's withdrawal benefit had accrued to him when he resigned from his employment. So there was no longer a pension interest to which section 7(7) and (8) could apply (paras [13] and [18]).

But this did not mean that the applicant was not entitled to a share of the withdrawal benefit. Olivier J pointed out that while a 'pension interest' relates to an unaccrued interest, a 'pension benefit' relates to an interest that has accrued and has become part of the pension fund member's estate (para [20]). Since the spouses in the present case married in community of property, the husband's pension benefit forms part of their joint estate, which they own in equal undivided shares (*ibid*). Olivier J pointed out that, in principle, the applicant would be entitled to half the net value of the joint estate when the estate is divided upon divorce (para [21]). She further emphasized that the applicant was not claiming payment of her half share of the joint estate prior to divorce. All she wanted was payment of half of the withdrawal benefit into her attorney's trust account in order to protect her interests in the joint estate pending the finalization of the divorce (para [24]). Olivier J found that the applicant had proved a reasonable apprehension of irreparable harm if the rule nisi was not confirmed. The applicant had shown that she was receiving no co-operation from her husband in the divorce proceedings, that he had failed to respond to requests to secure half of the withdrawal benefit, that he was neglecting his maintenance obligations towards his child, that he had deprived the child of

medical support, and that she feared that he would squander the withdrawal benefit (paras [25]–[26] and [34]–[37]). Olivier J accordingly concluded that the applicant was entitled to the relief she sought. The judge further ventured the opinion that the applicant might have been entitled to request an order securing the whole of the withdrawal benefit pending the divorce, for the whole withdrawal benefit formed part of the joint estate (para [25]).

Olivier J also rejected the argument for the provident fund that section 37A(1) of the Pension Fund Act bars payment of half the withdrawal benefit into the applicant's attorney's trust account. Section 37A(1), *inter alia*, prohibits the reduction, transfer, cession, pledging, hypothecation, and attachment of a pension benefit except in certain specified instances, but it permits the pension fund to pay a pension benefit or part of it to the dependant(s) of the member or beneficiary, or to a guardian or trustee for the benefit of such dependant(s). Olivier J held that the payment of the withdrawal benefit into a trust account pending the finalization of the divorce does not have 'the effect, at this stage, of reducing, transferring, ceding, pledging, hypothecating, or subjecting the benefits in any way envisaged in those provisions [s 37A(1)]' (para [41]).

## MARRIAGE

### *Customary Marriage*

*Kambule v The Master & others* 2007 (3) SA 403 (EC) (also reported as *Kambule v Master of the High Court & others* [2007] 4 All SA 898 (C)) is a sequel to *Wormald NO & others v Kambule* 2006 (3) SA 562 (SCA), [2005] 4 All SA 629, which was discussed in the 2005 *Annual Survey* 169–71. In *Wormald*, the Supreme Court of Appeal ordered a woman (the applicant), who was allegedly the deceased's customary wife in terms of the Transkei Marriage Act 21 of 1978, to vacate a house belonging to the deceased after his death. The alleged customary marriage was never registered in terms of the Act. The Supreme Court of Appeal held that even if the applicant was the deceased's widow at customary law, this did not entitle her to occupy the house. It further indicated that if the applicant could prove that she and the deceased were the parties to a valid customary marriage, she would have a maintenance claim against the deceased's estate. The applicant lodged a maintenance claim in terms of section 2

of the Maintenance of Surviving Spouses Act 27 of 1990, but the executor refused the claim. The applicant then instituted the present proceedings in terms of section 35(10) of the Administration of Estates Act seeking, *inter alia*, an order compelling the executor to amend the first and final liquidation and distribution account by admitting her claim for maintenance. The legal issues the court had to decide were whether the parties' failure to register the customary marriage rendered the marriage invalid, and whether the applicant qualified as a survivor in terms of the Maintenance of Surviving Spouses Act.

Pickering J held that it was unnecessary to decide whether the non-registration of a customary marriage under the Transkei Marriage Act rendered it invalid, because the Recognition of Customary Marriages Act 120 of 1998 validated all marriages that were validly concluded in terms of customary law prior to 15 November 2000 (the date on which the 1998 Act came into operation). Pickering J based this conclusion on section 2(1) of the Recognition of Customary Marriages Act, which provides that a marriage which is valid at customary law and exists at the date of the coming into operation of the Act is for all purposes recognized as a valid customary marriage. Section 1 of the Act defines 'customary law' as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. Neither section 2(1) nor section 1 requires that a customary marriage must be registered. Pickering J accordingly concluded that if the applicant and the deceased entered into a customary marriage, non-registration would not affect its validity.

With regard to the argument that the applicant could not have entered into a valid customary marriage with the deceased because the deceased was a party to a civil marriage with another woman, the court correctly held that the Transkei Marriage Act allowed the deceased to enter into a customary marriage during the subsistence of a civil marriage, provided that the civil marriage was out of community of property. The civil marriage that the deceased had concluded was out of community of property and thus he had the capacity to enter into a customary marriage. Pickering J held that this rule was not altered by section 10(1) and (4) of the Recognition of Customary Marriages Act, as neither subsection applies retroactively. (In terms of these provisions, the parties to an existing civil marriage may not enter into another civil marriage or into a customary

marriage. Nor may either of the parties to a customary marriage enter into a civil marriage with another person. But they may enter into a civil marriage with each other, provided that the husband's other customary marriages are first dissolved.)

Pickering J further held that if the applicant could prove that she and the deceased were the parties to a customary marriage, she would fall within the definition of 'survivor' in terms of the Maintenance of Surviving Spouses Act, as this was the proper, constitutionally acceptable interpretation of section 2(1) of the Act. Thus both legal issues were decided in favour of the applicant. The court referred the matter for the hearing of oral evidence on the issue of whether the applicant and the deceased had entered into a customary marriage, and for the determination of the remaining issues between the parties.

#### *Marriage in Community of Property*

*Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (C) and 2007 (6) SA 283 (SCA) are the judgments of the trial court and the Supreme Court of Appeal relating to a claim for patrimonial damages arising out of an intentional injury that a husband inflicted on his wife, to whom he was married in community of property. These judgments have been superseded by the subsequent decision of the Constitutional Court in this matter. The Constitutional Court's decision was reported last year (*Van der Merwe v Road Accident Fund* 2006 (6) BCLR 682 (CC)).

#### *Muslim Marriage*

Muslim marriages are not yet fully recognized by our law. Several Acts afford the same protection to civil and religious marriages, and the courts have also extended limited recognition to Muslim spouses and surviving Muslim spouses — mostly those in de facto monogamous Muslim marriages. (*Khan v Khan* 2005 (2) SA 272 (T) is a notable exception where a maintenance claim was recognized in respect of a de facto polygynous Muslim marriage. On this decision, see 2005 *Annual Survey* 171–4.

*Ismail v Ismail & others* 2007 (4) SA 557 (E) does not alter this position in any way. In this case, the first and second respondents were the parties to a civil marriage. During the subsistence of the civil marriage, the husband (the first respondent) entered into a Muslim marriage with another woman (the applicant). The applicant and first respondent entered into a 99-year lease in respect of immovable property owned by the first and second respon-

dents. The lease was never registered. The first and second respondents later put the property up for sale and attempted to evict the applicant. The applicant then sought and obtained an interdict precluding the sale of the property. On the return day of the rule nisi, the court granted the applicant an order interdicting the sale of the property 'until [the respondents] have made available an alternative place of abode' for her (at 562I). The court concluded that the terms of the lease and the background to its conclusion indicated that the parties intended to give the applicant the right to live in the property for the rest of her life (at 561F–G). The court stipulated that the applicant must be given the same rights that she enjoys in terms of the lease but in respect of 'an alternative adequate home' in which she can run her business and which is in a similar area to the immovable property she occupied under the lease (at 563A–B).

*Ismail v Ismail* is also discussed in the chapter on the Law of Property (Including Real Security). In the present context, it must be emphasized that the decision does not constitute authority for the view that a spouse who is married in terms of Islamic law enjoys the same right to occupy the matrimonial home that a spouse enjoys if he or she is a party to a civil marriage. The right to occupy the matrimonial home is a *sui generis* and invariable consequence of a civil marriage. During the subsistence of a civil marriage, both spouses are entitled to live in the matrimonial home, irrespective of whether they are married in or out of community of property, and irrespective of which of them owns or rents the property. As a rule, neither of them may eject the other from the home without providing suitable alternative accommodation (see, for example, *Badenhorst v Badenhorst* 1964 (2) SA 676 (T); *Owen v Owen* 1968 (1) SA 480 (E); *Whittingham v Whittingham* 1974 (2) SA 636 (R)). These rules apply equally to the parties to a civil union: section 13 of the Civil Union Act equates civil unions and civil marriages. It is important to note that in *Ismail v Ismail* the court's decision was not based on any extension of the right to occupy the matrimonial home to Muslim spouses. The decision was based purely on the factual circumstances regarding the lease that the applicant and first respondent concluded.

#### SAME-SEX RELATIONSHIPS

*Gory v Kolver NO & others (Starke & others Intervening)* 2007 (4) SA 97 (CC) was decided prior to the coming into operation of

the Civil Union Act 17 of 2006, which permits heterosexual and same-sex couples to enter into a marriage or civil partnership that has the same consequences as a civil marriage. (The Act came into operation on 30 November 2006.) The facts in *Gory* were that two men had lived together in a permanent life-partnership until one of them died. The life partners had shared their household expenses and had undertaken reciprocal duties of support. The deceased had died intestate. After his death, a dispute arose between his parents and his permanent life partner (the applicant) as to who of them were his intestate heirs. His parents claimed that they were his sole intestate heirs in terms of the Intestate Succession Act 81 of 1987, while the applicant alleged that he was the deceased's sole intestate heir. The dispute eventually came before Hartzenberg J in the Transvaal Provincial Division of the High Court (*Gory v Kolver NO and others* 2006 (5) SA 145 (T)). Hartzenberg J held that the applicant was the deceased's sole intestate heir. He declared section 1(1) of the Intestate Succession Act unconstitutional in so far as it failed to provide for an automatic right of inheritance for a surviving permanent same-sex life partner. He read the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' into section 1(1) after the word 'spouse'. He limited his order to intestate estates that had not yet been wound up. As a statutory provision was declared unconstitutional, the case had to be referred to the Constitutional Court.

The Constitutional Court, in a unanimous judgment that was delivered by Van Heerden AJ, pointed out that section 1(1) confers rights of intestate succession on spouses while withholding them from same-sex life partners. She held that, in view of the fact that same-sex life partners are not allowed to enter into a legally recognized marriage, their exclusion from intestate inheritance rights in respect of each other's estates amounts to unfair discrimination on the ground of sexual orientation, which falls foul of section 9(3) of the Constitution (para [19]). She further held that, in view of the recent South African jurisprudence on permanent same-sex life-partnerships, the exclusion of surviving partners in permanent same-sex life-partnerships in which the partners had undertaken reciprocal duties of support violated the rights to equality and dignity (ss 9 and 10 of the Constitution). She specifically cited *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1

(CC), *Satchwell v President of the Republic of South Africa & another* 2002 (6) SA 1 (CC), and *Du Toit & another v Minister of Welfare and Population Development & others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC), in which the court had extended various benefits that were formerly reserved for spouses to same-sex permanent life partners. She pointed out that the respondents did not attempt to justify the limitation of sections 9 and 10 of the Constitution, and she was of the view that there was no justification for the limitation (para [19]). Although she replaced the High Court's order with a different order, the terms of her order regarding the unconstitutionality of section 1(1) and her reading-in order essentially correspond to the High Court's declaration of unconstitutionality and its reading-in order. However, she held that the order of constitutional invalidity and the reading-in order should operate retroactively as from the date of the coming into operation of the Constitution — 27 April 1994. She imposed limitations aimed at reducing the risk of disruption in the administration of deceased estates and protecting the position of bona fide third parties (para [66]).

The decision in *Gory v Kolver* is discussed in other chapters, too. For present purposes it should be emphasized that the coming into operation of the Civil Union Act did not render decisions such as *Gory v Kolver* superfluous or irrelevant. The protection that the Civil Union Act affords to life partners applies only to those couples who meet the requirements that the Act sets for the recognition of their relationship as a civil union. This includes solemnization (s 4). Permanent same-sex life partners who fall outside the ambit of the Civil Union Act (for example, as they have not had their union solemnized) can still lay claim to the protection that was extended to same-sex couples by decisions such as *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (supra); *Satchwell v President of the Republic of South Africa* (supra); *J & another v Director General, Department of Home Affairs, & others* 2003 (5) SA 621 (CC), and *Gory v Kolver* (*Gory* para [28]). The ironic — and probably unconstitutional — consequence of this state of affairs is that same-sex life partners currently enjoy legal protection in more circumstances than heterosexual life partners do, for permanent same-sex life partners enjoy legal protection (albeit limited in scope) even if their relationship does not qualify as a civil union (see also Pierre de Vos 'The "Inevitability" of Same-sex Marriage in South Africa's

post-Apartheid State' (2007) 23 SAJHR 432 at 462; Liz Picarra '*Gory v Kolver* NO 2007 (4) SA 97 (CC), (2007) 23 SAJHR 563 at 565). The Constitutional Court has denied legal recognition to heterosexual life partners on the ground that the law may justifiably distinguish between married and unmarried persons (*Volks NO v Robinson & others* 2005 (5) BCLR 446 (CC)). But in the case of same-sex permanent life partners, the Constitutional Court has insisted that the absence of a legally recognized marriage does not justify their exclusion from specific spousal benefits (see, for example, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (supra); *Satchwell v President of the Republic of South Africa* (supra); *Gory v Kolver* (supra)). When the Civil Union Act came into operation, the Constitutional Court's argument that same-sex life partners should not be excluded from spousal benefits because they are barred from entering into a legally recognized marriage became redundant. Now, same-sex life partners are allowed to enter into a legally recognized marriage or civil partnership, just as heterosexual life partners are. The right to equality before the law and equal protection and benefit of the law and the right to be free from unfair discrimination (s 9(1) and (3) of the Constitution) require that the law treat heterosexual and same-sex life partners whose relationships fall outside the scope of the Civil Union Act the same. Since the prohibition on same-sex marriage has fallen away, there does not seem to be any justification for the preferential treatment of same-sex permanent life partners.

#### WRONGFUL LIFE, WRONGFUL BIRTH, AND THE TERMINATION OF PREGNANCY

*Stewart & another v Botha & another* 2007 (6) SA 247 (C), 2007 (9) BCLR 1012 deals with an action for wrongful life and wrongful birth. The case is discussed in the chapter on Law of Delict. For purposes of the present chapter, it is noteworthy that Louw J referred to the Choice on Termination of Pregnancy Act 92 of 1996 in the context of sanctity of life. He pointed out that the Act erodes the sanctity of life argument by permitting a pregnant woman 'to choose non-life for her potentially deformed child' (at 256G). He further indicated that the Act had withstood two constitutional challenges (*Christian Lawyers of South Africa & others v Minister of Health & others* 1998 (4) SA 1113 (T); *Christian Lawyers Association v Minister of Health & others (Reproductive Health Alliance as amicus curiae)* 2005 (1) SA 509 (T)), but that

the Constitutional Court has not yet had an opportunity to make a pronouncement on its constitutionality.

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