Chapter 3

The concept “parental authority” in South African law

1  DEFINITION OF BASIC CONCEPTS

In this chapter (and the rest of the thesis) the concepts competences, rights, powers, duties and obligations are regularly used. I consequently first define these concepts, and draw some distinctions.

In legal science the word “right” is often used to denote different meanings. In order to avoid confusion and inconsistency, the concepts “rights”, “competences” and “powers” will be used in this thesis to indicate the different meanings that can be assigned to the concept “right” as set out below.

The first concept that will be dealt with, is “right”. This term is used to indicate a subjective right, that is the legal relationship between a legal subject and a legal object, for example: “I have a right (eg ownership) to my car”. Subjective rights are classified with reference to the different types of legal objects to which the rights relate. The following five classes of subjective rights are distinguished:

- real rights (ie a right to a thing eg a car)
- personality rights (ie a right to personality property eg dignity)
- personal rights (ie a right to performance eg payment of maintenance)
- immaterial property right (ie a right to immaterial property eg a work of art)

1  Van Zyl & Van der Vyver Inleiding 413. Also see ch 3 par 7.3.1 below for a more detailed discussion.

2  Joubert Grondslae 120 et seq; 1958 THRHR 112 et seq; Neethling et al Delict 52.
Chapter 3 The concept “parental authority”

- personal immaterial property rights (i.e., a right to personal immaterial property, e.g., credit-worthiness).

A competence (kompetensie) can be defined as a “juridiese in-staat-wees; dit wil sê, die vermoë om ‘n bepaalde wyse aan die regsverkeer deel te neem”, for example: “A sixteen-year old person has the right to make a will”. This concept is distinguished from the concept “power” (inhoudsbevoegdheid, or beskikkings- en genotsbevoegdheid), which can be defined as that which a legal subject may do (or is entitled to do) with or in respect of the legal object by virtue of his or her subjective right to that object, for example: “An owner has a right to drive her car”.

It is further necessary to define the concepts “obligation” and “duty”. An obligation or duty (regsverpligting), in its general meaning, means that the person who carries the obligation has to behave in a certain way, and if he or she fails to do this, the person is struck with a sanction in the sense of a compulsory legal consequence. Van Zyl & Van der Vyver distinguishes inter alia the following obligations or duties: First, the obligation that rests on third parties not to interfere with the object of a legal subject’s subjective right. Secondly, the special obligation that rests on a debtor to perform towards a creditor. This type of obligation forms part of the reverse side of a personal right or right to performance.

3 Van Zyl & Van der Vyver Inleiding 414.
4 Du Plessis Introduction 141; Joubert Grondslae 119; 1958 THRHR 111; Van Zyl & Van der Vyver Inleiding 414.
5 Van Zyl & Van der Vyver Inleiding 436.
6 Van Zyl & Van der Vyver Inleiding 437.
7 Both the terms “obligation” and “duty” are used to denote this type of obligation (Du Plessis Introduction 140, 152-153). Also see ch 3 par 7.3.1 below.
8 Only the term “obligation” is used in this instance (Du Plessis Introduction 144). Also see Van Zyl & Van der Vyver Inleiding 327.
2 DEFINITION OF PARENTAL AUTHORITY

The definition of parental authority most used is that of Spiro, who defines parental authority as the sum total of rights and duties of parents in respect of minor children arising out of parentage. Elsewhere he says the following:

“The parental power involves, it is considered, a vinculum iuris between parent(s) and child, containing as it does rights of the parent(s) with corresponding duties of the child and duties of the parent(s) with corresponding rights of the child.”

He adds that parental authority is not identical to the relationship between parents and children. The parent-child relationship is wider than parental authority. Parental authority is only one aspect of the parent-child relationship. A parent-child relationship can exist without the parent necessarily having parental authority in respect of the child. A natural father of an extra-marital child, for example, does not possess parental authority in respect of the child although other aspects of the parent-child relationship, such as the prohibited degrees of relationship for the purpose of marriage, are recognised by law. Or, the parental authority may have come to an end by reason of the child having reached the age of majority, whereas other aspects of the parent-child relationship, such as the duty of support, may continue.

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9 Spiro Parent and child 36. Also see Cronjé & Heaton Family 197, who defines parental authority as the sum total of the rights and duties of parents in respect of their minor children; and Schäfer Family par E23, who sees parental authority as a collective term for the myriad of rights and duties that vest in a parent, and, occasionally, in a non-parent, and which exist in respect of the person and estate of a minor child. Van der Vyver & Joubert Persone- en familiereg 592 regard these rights as competences derived from the objective law. Also see ch 3 par 7.1 & 7.2 below.

10 In this chapter, the term “minor” indicates a person under 21 years of age, while an infans is a child under the age of 7 years (Spiro Parent and child 16). Unless specifically indicated otherwise, a “minor” includes a child under the age of 7 (an infans).

11 Spiro Parent and child 30.

12 Spiro Parent and child 30.
Owing to the shift in emphasis in modern law from the rights of the parent to the interests of the child, parental authority is today concerned more with duties than with powers or rights.\(^{13}\) It is no longer a power which is exercised for the benefit of the parents, but rather a complex of duties and responsibilities which should be carried out in the interest of the minor child.\(^{14}\)

For this reason, the definition given by Visser and Potgieter,\(^{15}\) which is a combination of the definitions of parental authority by Spiro\(^{16}\) and Lee and Honoré,\(^{17}\) should be welcomed. Visser and Potgieter define parental authority as the sum total of rights, responsibilities and duties of parents with regard to their minor children, and which rights, responsibilities and duties must be exercised in the interests of such children. In view of the aforementioned, the term parental authority (\textit{ouerlike gesag}) is preferred over the term parental power (\textit{ouerlike mag}).

The discussion paper of the South African Law Commission on the review of the Child Care Act 74 of 1983 issued in 2002 contains the draft Children’s Bill (hereinafter referred to as the “draft Children’s Bill”) proposed by the Commission (published as part of the discussion paper). On 12 August 2003, the Department of Social Development published its own draft Children’s Bill (hereinafter referred to as “Social Development’s draft Children’s Bill”) for comment.\(^{18}\) They indicated their intention to table it in Parliament during 2003. However, at the time of completion of this thesis, it had not been tabled yet. Except where expressly indicated, the provisions of the Law Commission’s draft Children’s Bill,

\(^{13}\) Van Heerden \textit{et al} (eds) \textit{Boberg} 657-658.

\(^{14}\) Lee & Honoré \textit{Family} par 137. Also see ch 2 par 5 above.

\(^{15}\) Visser & Potgieter \textit{Introduction} 199.

\(^{16}\) Spiro \textit{Parent and child} 36.

\(^{17}\) Lee & Honoré \textit{Family} par 137.

and Social Development’s draft Children’s Bill are similar.

It should be noted that the draft Children’s Bill envisages introducing the concept “parental responsibilities and rights”, which is defined as the responsibility and right to care for the child, to have and maintain contact with the child, and to act as the guardian of the child.19

3 THE ACQUISITION OF PARENTAL AUTHORITY

Both parents20 of a child born from a valid marriage (ie a legitimate child)21 acquire

19 SA Law Commission Review. Also see clause 1 of the draft Children’s Bill proposed by the Commission (Social Development’s draft Children’s Bill contains a similar clause (clause 1)). “Parental responsibilities and rights” are defined as “the responsibility and the right - (a) to care for the child; (b) to have and maintain contact with the child; and (c) to act as the guardian of the child”.

20 The parental authority of both parents of legitimate children is identical in content (Guardianship Act 192 of 1993 s 1(1)). S 1(1) provides as follows: “Notwithstanding anything to the contrary contained in any law or the common law, but subject to any order of a competent court with regard to sole guardianship of a minor child or any right, power or duty which any person has or does not have in respect of such minor, a woman shall be the guardian of her minor children born out of a marriage and such guardianship shall be equal to that which a father has under the common law in respect of his minor children”.

21 This rule that confers parental authority on both parents of a child only if they are validly married seems to contravene the equality clause in the Constitution of the Republic of South Africa 108 of 1996 s 9 (hereinafter “Constitution”). It can certainly be argued that this rule discriminates unfairly against parents who are not validly married, but are involved in a permanent life partnership. An analogy can certainly be drawn with the decision in Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC), where members of a permanent same-sex life partnership were regarded as similar to spouses for the purpose of joint adoption of children. Also see ch 3 fn 40, 44, 59 & 156 below. The draft Children’s Bill drawn up by the South African Law Commission envisages to make it possible for any person having an interest in the care, well-being or development of a child (eg a parent’s life partner) to apply to a court for an order assigning to him or her full or specific parental responsibilities or rights. Social Development’s draft Children’s Bill contains a similar provision (see ch 3 par 4.3.4 below). The Law Commission recently published a discussion paper on domestic partnerships (Domestic partnerships). In this discussion paper they propose various draft Bills aimed first of all at allowing same-sex life partners to conclude civil unions (with all the consequences of a valid marriage), and secondly at recognising the legal status of same-sex partnerships as well as partnerships between persons of the opposite sex, by allowing the partners to register that partnership. This lastmentioned draft Bill envisages regulating the patrimonial consequences of registered partnerships, the status of children born of registered partners,
parental authority over that child.\textsuperscript{22} A legitimate child can be defined as a child whose natural parents were lawfully married to each other at the conception or birth of that child, or at any time between conception and birth.\textsuperscript{23} As a result of the operation of the presumption that a man is the father of his wife’s children (\textit{pater est quem nuptiae demonstrant}), this will also be the case when the man is not the child’s biological father, except if it is proven that he is indeed not the father of the child.\textsuperscript{24}

The South African Law Commission has proposed in the draft Children’s Bill that a person may have either full or specific parental responsibilities and rights in respect of a child.\textsuperscript{25} Furthermore, the draft Children’s Bill proposes that the mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child,\textsuperscript{26} and that the biological father of a child has full parental responsibilities and rights in respect of the child if he is married to the child’s mother, or if he was married to her at the time of the child’s conception, or birth, or at any intervening time.\textsuperscript{27}

Children born as a result of a voidable marriage remain legitimate after the annulment of

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\end{itemize}
the marriage.\textsuperscript{28} Children born from putative marriages are legitimate.\textsuperscript{29} So are children born to married couples as a result of artificial insemination of the woman with the consent of both spouses. This is the case even when donor sperm or ova, or both donor sperm and ova have been used for the artificial insemination of the woman.\textsuperscript{30} A child who is born as a consequence of artificial fertilisation of a woman who is a partner in a same-sex life partnership is now also deemed to be the same-sex partners’ legitimate child.\textsuperscript{31}

The birth of an extra-marital child vests the parental authority over that child in the child’s mother in terms of the maxim \textit{een moeder maakt geen bastaard}.\textsuperscript{32} If the mother of an extra-marital child is a minor, the guardianship of that child will vest in the mother’s guardian, while the custody of the child will vest in the mother.\textsuperscript{33} When an extra-marital child is legitimated, the parental authority over that child is transferred from the mother alone to both parents.\textsuperscript{34} Legitimation takes place if the child’s parents marry each other at any time

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\item \textsuperscript{28} Children’s Status Act 82 of 1987 s 6.
\item \textsuperscript{29} \textit{M v M} 1962 2 SA 114 (GW); \textit{Moola v Aulsebrook} 1983 1 SA 687 (N); \textit{Ngubane v Ngubane} 1983 2 SA 770 (T); \textit{Makholiso v Makholiso} 1997 4 SA 509 (Tk).
\item \textsuperscript{30} Children’s Status Act s 5(1)(a). S 5(1)(b) creates a rebuttable presumption that both the married woman and her husband have given the required consent.
\item \textsuperscript{31} In \textit{J v Director-General, Department of Home Affairs} 2003 5 BCLR 463 (CC) the Constitutional Court found that s 5 of the Children’s Status Act discriminates unfairly against same-sex life partners on the ground of their sexual orientation and that the discrimination cannot be justified in terms of s 36 of the Constitution. It ordered the unconstitutionality to be cured \textit{inter alia} by striking out the word “married” and reading in the phrase “or permanent same-sex life partner” in several places in s 5.
\item \textsuperscript{32} \textit{F v L} 1987 4 SA 525 (W); \textit{B v P} 1991 4 SA 113 (T); \textit{S v S} 1993 2 SA 200 (W); \textit{B v S} 1995 3 SA 571 (A); \textit{T v M} 1997 1 SA 54 (A).
\item \textsuperscript{33} Children’s Status Act s 3(1). The South African Law Commission has proposed in the draft Children’s Bill that, if the child’s mother is an unmarried child (ie person under the age of 18) and the child’s father does not have full parental responsibilities and rights, or has no parental responsibilities and rights in respect of the child, the guardian of the mother has those parental responsibilities and rights in respect of the child that guardian has in respect of the mother (clause 31). Social Development’s draft Children’s Bill contains a similar provision in clause 19.
\item \textsuperscript{34} Cronjé & Heaton \textit{Family} 198; Van der Vyver & Joubert \textit{Persone- en familiereg} 597.
\end{itemize}
after the birth of the child, even though they could not have legally married each other at the time of the child's conception or birth.\textsuperscript{35} The aforementioned is not the only way in which legitimation of extra-marital children can take place. A child can also be legitimated by adoption.\textsuperscript{36}

Finally, parental authority is acquired by means of adoption.\textsuperscript{37} According to the Supreme Court of Appeal, adoption is a legal process through which existing parental authority is terminated and is vested in the adoptive parent or parents.\textsuperscript{38} It is regulated by the Child Care Act.\textsuperscript{39} A child can be adopted by a husband and his wife, or by two same-sex life partners jointly.\textsuperscript{40} In such case the parental authority over the child is terminated and transferred to both the adoptive parents. Secondly, children can be adopted by a widower or widow or unmarried or divorced person.\textsuperscript{41} In such case the parental authority over the

\textsuperscript{35} Children's Status Act s 4. The draft Children's Bill contains a similar provision in clause 50, and Social Development's draft Children's Bill contains a similar provision in clause 38.

\textsuperscript{36} Cronjé & Heaton \textit{Persons} 76.

\textsuperscript{37} See, in general, Cronjé & Heaton \textit{Family} 198-204; Spiro \textit{Parent and child} 61-78; Van der Vyver & Joubert \textit{Persone- en familiereg} 597-607.

\textsuperscript{38} \textit{Naudé v Fraser} 1998 4 SA 539 (SCA); 1998 8 BCLR 945 (SCA).

\textsuperscript{39} Ss 17-27.

\textsuperscript{40} Child Care Act s 17(a). Note that, in \textit{Du Toit v Minister of Welfare and Population Development} 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC) the Constitutional Court declared s 17(a) of the Child Care Act to be unconstitutional since it did not allow partners in a permanent same-sex life partnership jointly to adopt children. The court held that the provision contravened s 9 of the Constitution, since it discriminated against the applicants on the grounds of sexual orientation and marital status. It further violated the best interests of the child as protected by s 28 of the Constitution. The court ordered that this section be read as though the words “or by the two members of a permanent same-sex life partnership jointly” appear immediately after the word jointly. The South African Law Commission has proposed in the draft Children's Bill (clause 258(1)(a)) that the following persons should be allowed jointly to adopt children: a husband and wife, partners in a domestic conjugal life-partnership, or other persons sharing a common household and forming a family unit. Social Development’s draft Children’s Bill contains a similar provision in clause 231(1)(a). Also see ch 3 fn 21 above, and ch 3 fn 44, 59 & 156 below.

\textsuperscript{41} Child Care Act s 17(b). Similar provisions are contained in the draft Children’s Bill (clause 258(1)(b)), and in Social Development’s draft Children’s Bill (clause 231(1)(b)).
child is terminated and transferred to the single adoptive parent. Thirdly, a child can be adopted by a married person whose spouse is the parent of the child.\textsuperscript{42} In such case the parental authority over the child is transferred from the spouse alone to both the spouse and the adoptive parent. The South African Law Commission has proposed that it should be expressly provided that a child can be adopted by the biological father of a child born out of wedlock.\textsuperscript{43}

The adoption order terminates all rights and obligations existing between the child and any person who was his or her parent prior to such adoption, except in cases where the child is adopted by a person who is married to one of the child’s biological parents, or whose same-sex life partner is one of the child’s biological parents.\textsuperscript{44} The adopted child is for all purposes regarded as the legitimate child of the adoptive parent, as if that child was born to that parent during the existence of a valid marriage.\textsuperscript{45}

4 THE INCIDENTS OF PARENTAL AUTHORITY

4.1 Introduction

As a general rule, parental authority includes control over the estate and juristic acts of the

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  \item The so-called “step-parent adoptions” (Children’s Status Act s 17(c)). Similar provisions are contained in the draft Children’s Bill (clause 258(1)(c)), and in Social Development’s draft Children’s Bill (clause 231(1)(c)).
  \item Clause 258(1)(d) of the draft Children’s Bill, and clause 231(1)(d) of Social Development’s draft Children’s Bill.
  \item Child Care Act s 20(1). In Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC) the court ordered that this section should be read as though the words “or permanent same-sex life partner” appear immediately after the word “spouse”. Also see ch 3 fn 21 & 40 above, and fn 59 & 156 below.
  \item Child Care Act s 20(2). Similar provisions are contained in clause 267(3) of the draft Children’s Bill, and in clause 240(3) of Social Development’s draft Children’s Bill.
\end{itemize}
child (guardianship) and control over the child’s person (custody). The duty of support is today not regarded as a separate component of parental authority. Van der Vyver & Joubert regard it as a component of the parent’s control over the child’s person. As the duty of supports can exist after parental authority is terminated, this view cannot be correct. I am of the opinion that it is more appropriate to see the duty of support as an aspect of the broader parent-child relationship, not of parental authority.

Parental authority is often referred to as “natural guardianship”. During marriage, custody and guardianship is shared by both spouses. When divorce leads to the severance of custody from the remaining incidents of parental authority, a natural guardian who has been deprived of custody retains (joint) control over the child’s estate and juristic acts, while the other parent has control over the child’s person. Van Heerden uses the term “residuary guardianship” to denote natural guardianship minus custody. De Vos suggests the terms “plenary guardianship” where it includes custody, and “reduced” or “depleted guardianship” where custody is excluded.

For purposes of this thesis, the term “parental authority” (instead of “natural guardianship”) will be used to denote guardianship (ie control over the child’s estate and juristic acts) and custody (ie control over the child’s person), and the term “guardianship” will be used to

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46 Cronjé & Heaton Family 204 et seq; Van der Vyver & Joubert Persone- en familiereg 607 et seq; Visser & Potgieter Introduction 206 et seq.

47 See ch 3 par 5 below.

48 Van der Vyver & Joubert Persone- en familiereg 607 et seq.


50 In Roman-Dutch law, guardianship of the child vested in the child’s father. See ch 2 par 4.2 above. However, in South African law today, parents have equal guardianship in respect of their children. See ch 3 fn 20 above and the Guardianship Act s 1(1). See further ch 3 par 4.2.1 below.

51 Van Heerden et al (eds) Boberg 661.

52 De Vos 1962 Acta Juridica 156.
indicate natural guardianship which excludes custody.

It should be noted that the South African Law Commission has proposed in the draft Children’s Bill that the concepts “parental responsibilities” and “parental rights” be used. According to the Bill, parental responsibilities in relation to a child means the responsibility to care for the child, to have and maintain contact with the child, and to act as the guardian of the child. Parental rights in relation to a child means the right to care for the child, to have and maintain contact with the child, and to act as the guardian of the child.53

4.2 Guardianship

4.2.1 Introduction

Guardianship refers to the capacity to administer the child’s estate on his or her behalf, and to assist the child in the performance of juristic acts. At common law (ie Roman-Dutch law as set out earlier54), although both parents of a child born from a valid marriage shared parental authority in respect of that child, the father’s authority was superior to that of the mother. The guardianship of the child vested in the father solely. The mother was confined to participation with the father in the custody of the child, although the father’s authority prevailed when there was difference of opinion between the mother and father in respect of which action to take.55

The Guardianship Act56 provides that a woman is the joint guardian of her minor children born from a valid marriage, and that such guardianship is equal to that which a father has

53 Draft Children’s Bill clause 1. A similar provision is contained in Social Development’s draft Children’s Bill (clause 1).
54 See ch 2 par 4.1 & 6.2 above.
55 Calitz v Calitz 1939 AD 56 at 62-63.
under the common law.\textsuperscript{57} This provision establishes the principle of equal guardianship. However, a court may grant one parent sole guardianship, in which case the principle of equal guardianship will no longer apply. Furthermore, the court may make an order limiting or terminating any right, power or duty which a parent has by virtue of guardianship.\textsuperscript{58} The Act further provides that, subject to any order of a competent court to the contrary, either the father or mother is competent to exercise any right or power, or carry out any duty arising from guardianship independently and without the consent of the other. However, unless a competent court orders otherwise, the consent of both parents is necessary in respect of the contracting of a marriage by the minor child, the adoption of the child, the removal of the child from the Republic by one of the parents or by a third person, the application for a passport by one of the parents in which the minor is indicated as a child of the prospective passport holder, and the alienation or encumbrance of immovable property (or any right thereto) belonging to the child.\textsuperscript{59}

The draft Children’s Bill compiled by the South African Law Commission envisages the replacement of the provisions of the Guardianship Act with a new set of rules in terms of which both the mother and the father of a legitimate child has full parental responsibilities and rights (including guardianship) in respect of that child.\textsuperscript{60} The draft Bill also makes it possible for certain persons (ie the father of an extra-marital child) to acquire parental responsibilities and rights in relation to a child automatically, by entering into an agreement

\textsuperscript{57} S 1(1).

\textsuperscript{58} Ibid.

\textsuperscript{59} S 1(2). In Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC) the Constitutional Court ordered that the words “or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child” appear immediately after the word “marriage” in this section. S 1(2) will thus now read as follows: “[w]henever both a father and mother have guardianship of a minor child of their marriage or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child ... the consent of both parents shall be necessary in respect of ... the contracting of a marriage by the minor child” (my emphasis). Also see ch 3 fn 21, 40 & 44 above, and ch 3 fn 156 below.

\textsuperscript{60} Draft Children’s Bill clauses 31 & 32 (Social Development’s draft Children’s Bill clauses 19 & 20).
with the child’s mother, or by means of a court order.\textsuperscript{61}

In terms of the draft Children’s Bill, guardianship in relation to a child means administering and safeguarding the child’s property and property interests, assisting or representing the child in administrative, contractual and other legal matters, or giving or refusing any consent required by law in respect of the child, including consenting to the child’s marriage, adoption, departure or removal from the Republic, application for a passport, and consenting to the alienation or encumbrance of any immovable property.\textsuperscript{62}

The mother of an extra-marital child is the guardian of that child, except when she is a minor. In the latter case guardianship of the child will vest in the mother’s guardian.\textsuperscript{63} Since the coming into operation of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997\textsuperscript{64} on 4 September 1998 the High Court has been vested with the statutory power to award (sole or joint) guardianship to the father of an extra-marital child.

4.2.2 Administration of the child’s estate

The minor (including the \textit{infans}) is the owner of all assets in his or her estate, regardless of the source. The guardian only administers the property, and he or she has no usufructuary rights over it, except if the testator who bequeathed the property to the child stipulated that this would be the case.\textsuperscript{65} The administration of the child’s estate includes the competence to receive money and property on behalf of the child, settle debts, sell

\textsuperscript{61} See ch 3 par 4.3.4 below.
\textsuperscript{62} Draft Children’s Bill clause 1; Social Development’s draft Children’s Bill clause 1.
\textsuperscript{63} Children’s Status Act s 3(1)(a).
\textsuperscript{64} See ch 3 par 4.3.4 below in this regard.
\textsuperscript{65} Cronjé & Heaton \textit{Family} 206; Spiro \textit{Parent and child} 97, 103-104; Van der Vyver & Joubert \textit{Persone- en familiereg} 611-612.
property, make purchases and investments, alienate and register immovable property, conclude contracts and perform other juristic acts. The guardian must at all times act as a *bonus et diligens paterfamilias*.

The aforementioned position regarding the minor’s capacity to own assets differs from the position in Roman-Dutch law. The position in Roman-Dutch law regarding the minor’s capacity to own assets was as follows: *Peculium profecticium* (property derived from the father or given to the son with the intention of conferring a benefit on the father) belonged to the father, but the child could manage it with the father’s consent. Property not derived from nor acquired for the father (known as *peculium adventicium* in Roman law) belonged to the son, but the father retained management of the property, except if his control had been expressly excluded. However, a considerable amount of legal development took place in the field of *peculium* in Roman-Dutch law. First of all property that had been donated by a father to his child, did not form part of the *peculium profecticium* (ie property that belonged to the father), but of the *peculium adventicium* (ie the property of the minor). The parent was not entitled to the usufruct over property not derived from, nor acquired for the father (in Roman law known as *peculium adventicium*), unless the person by whom the property had been conferred had expressly granted the usufruct to a parent, or the parent needed the usufruct for the maintenance and upbringing of the child.

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66 The Administration of Estates Act 66 of 1965 s 80 provides that a parent or guardian may not burden or alienate any immovable property belonging to the child without the consent of the Master of the High Court or the court. The master may at any time authorise the alienation (or mortgage) of such property if the value of the property does not exceed the amount determined by the minister from time to time by notice in the *Government Gazette*, and the alienation (or mortgage) is in the minor’s interests. If the value of the property exceeds the determined amount, the court must consent. See Van der Vyver & Joubert *Persone- en familiereg* 613-614. Also see ch 4 par 3.4 below.

67 *Van der Byl v Solomon* (1877) 7 Buc 25; *Van Rooyen v Werner* (1892) 9 SC 425; *Wood v Davies* 1934 CPD 250 at 255-256; *Ex parte Misselbrook: In re Estate Misselbrook* 1961 4 SA 382 (D) at 385D-386A; Cronjé & Heaton *Family* 206; Lee & Honoré *Family* para 147-148; Schäfer *Family* par E 33; Van der Vyver & Joubert *Persone- en familiereg* 613; Van Heerden et al (eds) *Boberg* 688-689.

68 See ch 2 par 4.5 above.
Spiro\textsuperscript{69} indicates that the distinction between \textit{peculium profecticium} and \textit{peculium adventicium} still features in the reported cases.\textsuperscript{70} As mentioned earlier, \textit{peculium profecticium} was property derived from the father or given to the son with the intention of conferring a benefit on the father (excluding property donated by a father to his child). Every other property would fall in the category of \textit{peculium adventicium}. Spiro says the following:\textsuperscript{71}

\begin{quote}
"Since \textit{[peculium adventicium]} belongs clearly to the child, it is only necessary to ascertain whether the present law still knows of property of children other than \textit{[peculium adventicium]}, in other words, whether there are still different classes of property of children."
\end{quote}

Although the courts on occasion, when asked to authorise the alienation or mortgaging of immovable property belonging to the minor,\textsuperscript{72} took into account the origin of the property (ie whether the minor had acquired it from the parents or from persons other than the parents), this was merely one of the factors considered in the exercise of their judicial discretion. Moreover, according to Spiro it really constituted a recognition of the legal ownership vesting in the minor concerned. It is thus clear that this aspect of Roman-Dutch law (ie the minor’s capacity to own assets) has undergone further development in South African case law.

The guardian is entitled to use the income of the capital (or the capital itself if the income is inadequate) in the child’s estate for the maintenance of the child. The guardian is under no circumstances entitled to the child’s income or capital for his or her personal use. If a child is maintained by and lives with his or her parents, the parent is entitled to use as

\textsuperscript{69} Spiro \textit{Parent and child} 94.

\textsuperscript{70} See eg \textit{Ex parte Estate Gates} 1919 CPD 162; \textit{Ex parte Brink} 1948 4 SA 273 (O) at 274; \textit{Ex parte Joubert} 1949 2 SA 109 (O).

\textsuperscript{71} Spiro \textit{Parent and child} 94.

\textsuperscript{72} See the cases quoted in ch 3 fn 70 above.
much of the child’s earnings as was spent on the child’s maintenance.\textsuperscript{73}

A person donating or bequeathing property to a child may exclude the property from the administration of either or both parents by appointing a curator nominate to administer the donation or bequest on behalf of the child after the donor’s or testator’s death. The same purpose could be achieved by creating a trust with the child as beneficiary.\textsuperscript{74}

Guardians may not exceed their powers and must hand over to the child everything which belongs to the child at the termination of their guardianship. Guardians are not entitled to compensation for the administration of the child’s estate.\textsuperscript{75}

\textbf{4.2.3 Assistance in performing juristic acts}

An infans, that is a child below the age of seven years, has no capacity to act whatsoever. An infans cannot conclude juristic acts\textsuperscript{76} even with the assistance of his or her guardian. The guardian has to act for the infans and on his or her behalf.\textsuperscript{77} The same applies to litigation. Where an infans has to perform juristic acts regarding his or her estate, the guardian can conclude contracts regarding the estate in the child’s name. In certain

\textsuperscript{73} Van Rooyen v Werner (1892) 9 SC 425 at 429; Chinnia v Dunna 1940 NPD 384 at 386; Cronjé & Heaton Family 206; Spiro Parent and child 96, 101; Van der Vyver & Joubert Persone- en familiereg 612.

\textsuperscript{74} Cronjé & Heaton Family 206; Lee & Honoré Family par 148; Schäfer Family par E 33.

\textsuperscript{75} Spiro Parent and child 103-104.

\textsuperscript{76} A juristic act can be defined as a voluntary act (\textit{wilshandeling}) to which the law attaches the very consequences envisaged by the person or persons performing them. Examples are conclusion of contracts, making of wills, accepting inheritances, \textit{et cetera}. From the above it is clear that both unilateral and multilateral juristic acts can be distinguished. In the case of a unilateral juristic act the expression of will of only one person is necessary to bring about the juristic act (eg the making of a will), whereas in the case of a multilateral juristic act the expressions of will of two or more persons are necessary to bring about the juristic act (eg a contract) (Van Zyl & Van der Vyver \textit{Inleiding} 504-507).

\textsuperscript{77} Buttar v Ault 1950 4 SA 229 (T) at 239A-D; \textit{Ex parte Hulton} 1954 1 SA 460 (C) at 466H-467A; Cronjé & Heaton Persons 86-87.
instances, for example where the guardian concludes a contract regarding the maintenance of the child, the contract can be concluded in the guardian’s name who can in turn claim any expenses from the child’s estate. If the child is involved in litigation, the guardian can act as plaintiff or defendant in the child’s name.\textsuperscript{78}

A minor between the ages of 7 and 21 has limited capacity to act. A minor between the ages of 7 and 21 generally needs his or her guardian’s assistance to perform juristic acts.\textsuperscript{79} Where a child who has limited capacity to act has to perform juristic acts regarding his or her estate, the guardian can firstly, as in the case of the \textit{infans}, conclude juristic acts on the child’s behalf. The juristic act performed by the guardian on behalf of the child must be possible and in the interests of the minor. Juristic acts pertaining to the child’s personal life, for instance the making of a will or the conclusion of a marriage, cannot be performed by the guardian on behalf of the child.

Secondly, the child can act in his or her own name, assisted by his or her guardian in the conclusion of all juristic acts, which means that the guardian must consent to the act in question, or the guardian can ratify the agreement after it has been concluded. Consent may be given expressly or tacitly. If, for instance, the guardian is aware of an agreement that the minor has concluded and raises no objection, it can be accepted that he or she tacitly consents to it. Litigation can be handled in the same way. Should the guardian give his or her consent for juristic acts which are to the child’s detriment, the court can set the transaction aside by means of \textit{restitutio in integrum}. No hard and fast rule exists as to how detriment is determined. Whether the transaction in question, usually a contract is to the minor’s detriment is dependent on the particular circumstances of the case. \textit{Restitutio} means that each party must return to the other party whatever he or she received in terms of the contract, and also the proceeds or any advantage derived from the contract and,

\textsuperscript{78} Van der Vyver & Joubert \textit{Persone- en familiereg} 614.

\textsuperscript{79} \textit{Dhanabakium v Subramanian} 1943 AD 160; \textit{Edelstein v Edelstein} 1952 3 SA 1 (A); Cronjé & Heaton \textit{Persons} 87 \textit{et seq}.
where delictual requirements are complied with, must also compensate the other party for any loss suffered as a result of the contract. In some instances the guardian’s consent is insufficient, and consent from, for example, the other parent (in the case of marriage), the court or the Master of the High Court (for the alienation of immovable property), or the Minister of Home Affairs (for certain marriages) is also required. 80

A guardian’s assistance or consent to a juristic act in which the guardian’s own interests are at stake, will be valid only if the guardian acted openly and in good faith. 81

4.3 Custody

4.3.1 General

Custody separated from guardianship is that part of parental authority that relates to the person of the child. 82 Normally both parents have equal custodial rights and obligations in respect of their legitimate children. This state of affairs is affected when the parents obtain a divorce, 83 when the children’s court has found that the child is a child in need of care, 84

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81 Peffers v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1965 2 SA 53 (C) at 56B-G.

82 Engar and Engar v Desai 1966 1 SA 621 (T) at 626A-D.

83 Since the parents live apart after divorce, the court must make a suitable custody order in terms of section 6 of the Divorce Act 70 of 1979. See in general Cronjé & Heaton Family 182-187; Van der Vyver & Joubert Persone- en familiereg 616 et seq.

84 The Child Care Act s 14(4) sets out the criteria the children’s court must consider when it has to determine if the child is a child in need of care in an inquiry in terms of section 13(3) of the same Act, so as to decide whether the child has to be removed from the custody of its parents. Should the children’s court decide that the child is a child in need of care, it may inter alia order that the child be placed in the custody of a foster parent, in a children’s home, or in a school of industries (s 15). Where a child has been placed in any custody other than the custody of its parent or guardian, the parent or guardian is divested of his or her right of control over and custody of the child (s 53(1)). Guardianship, however, remains with both parents (s 53(3)). See further in this regard ch 5 par 2.8 below.
or when one parent dies.  

Custody may also be affected when the parents live apart, or when a child under the age of 18 is convicted of an offence. The mother of an extra-marital child has exclusive custody of that child. Since the coming into operation of the Natural Fathers of Children Born out of Wedlock Act on 4 September 1998, the High Court has been vested with a statutory power to award sole or joint custody to the father of an extra-marital child.

4.3.2 Content of custody

The custodian parent has the right to have the child live with him or her and to choose the child’s residence, the right to control the child’s daily life, the duty to provide protection, the right and duty to decide all questions relating to the child’s education, protection, and well-being.

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85 When one parent dies, the custody of the child goes to the surviving parent. It is only when sole custody has been granted to the one parent that this parent can appoint a custodian to the exclusion of the surviving parent in his or her will. See ch 3 fn 86 below.

86 Section 5(1) of the Matrimonial Affairs Act 37 of 1953 provides that the court may make any custody (or guardianship or access) order which it deems fit on the application of either parent of a minor child who are married but live apart. This includes an order granting either parent the sole custody of the minor, if this would be in the interests of the minor. An order with regard to a minor whose parents are living apart will lapse if the parents become reconciled and live together again. This will take effect on the date on which the parents commence living together again (s 5(2)). A parent to whom sole custody of a minor has been granted (in terms of either the Divorce Act s 6(3) or the Matrimonial Affairs Act s 5(1)) may by testamentary disposition appoint any person to be vested with the sole custody of the minor (s 5(3)(a)).

87 The Criminal Procedure Act 51 of 1977 s 290(1)(b) stipulates that a court in which a person below the age of 18 is convicted of an offence may, instead of punishing the child for the offence, order that the child be placed in the custody of any suitable person.

88 B v S 1995 3 SA 571 (A) at 575D-E.

89 See ch 3 par 4.3.4 below in this regard.

90 Spiro Parent and child 296.

91 Cronjé & Heaton Family 208; Hahlo Husband and wife 394.

92 Van der Vyver & Joubert Persone-en familiereg 610-611.
training and religious upbringing, and the right to decide with whom the child may associate.

The courts have on occasion decided that the custodian parent also has the right and the duty to decide what medical advice, supervision and assistance are to be obtained if the minor is injured or becomes ill. This is the result of the view that consent to medical treatment and surgical operations is closely related to the child’s person, and not to his or her estate or juristic acts. If this view is followed, the consent of the custodian parent should be sufficient. However, Spiro is of the opinion that the mother, who has been awarded custody only, is not entitled to consent to a surgical operation which is performed with serious danger to the child’s life, unless the need for the operation is so urgent that the consent of the father cannot be obtained in time. This statement suggests that consent to surgical operations is a not a component of custody, but of guardianship. I support the former view. However, if consent to medical operations is seen as a component of guardianship, it should be remembered that, in terms of the Guardianship Act, both parents now have equal guardianship over their legitimate children. Spiro’s statement will thus only hold true in cases where a court has expressly granted sole guardianship to the father under any circumstances (not only after divorce).

In the draft Children’s Bill, the South African Law Commission proposes that the term “custody” be replaced with the term “care”, which includes the following in relation to a

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93 Dreyer v Lyte-Mason 1948 2 SA 245 (W) at 250-252; Niemeyer v De Villiers 1951 4 SA 100 (T); Kustner v Hughes 1970 3 SA 622 (W); Nugent v Nugent 1978 2 SA 690 (R); Dunscombe v Willies 1982 3 SA 311 (D); Allsop v McCann [2000] 3 All SA 475 (C); 2001 2 SA 706 (C).

94 Vucinovich v Vucinovich 1944 TPD 143 at 146-147 Fraser v Fraser 1945 WLD 112 at 116; Myers v Leviton 1949 1 SA 203 (T) at 209 et seq; Wolfson v Wolfson 1962 1 SA 34 (SR) at 37C-38D.

95 Oosthuizen v Rix 1948 2 PH B65 (W) at 152-153; Kustner v Hughes 1970 3 SA 622 (W) at 625B-D; Ben-Yishai v Ben-Yishai 1976 2 SA 307 (W) at 308A-C.

96 Spiro Parent and child 297. Also see Hahlo Husband and wife 394; Bloom v Von Christierson 1961 2 PH B23 (D) at 55-56; Child Care Act s 39 and 53(4).
child.97

“(a) within available means, providing the child with -
   (i) a suitable place to live;
   (ii) living conditions that are conducive to the child’s health, well-being and development; and
   (iii) the necessary financial support;
(b) safeguarding and promoting the well-being of the child;
(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical and moral harm or hazards;
(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the rights set out in chapter 3 of [the draft Children’s Bill];
(e) guiding and directing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
(f) guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child’s age, maturity and stage of development;
(g) guiding the behaviour of the child in a humane manner;
(h) maintaining a sound relationship with the child; and
(i) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child.”

4.3.3 Discipline and chastisement

In order to fulfil their custodial duties, it may be necessary for parents to discipline their children to enforce the necessary obedience from them. This can be done by means of moderate and reasonable chastisement (including corporal punishment, if necessary).98

97 Draft Children’s Bill clause 1; Social Development’s draft Children’s Bill clause 1.

98 R v Janke & Janke 1913 TPD 382 at 385; Du Preez v Conradie 1990 4 SA 46 (B)at 51E-F.
Whether chastisement is reasonable is determined with reference to the following:\textsuperscript{99}

- the nature and seriousness of the offence
- the degree of punishment or violence applied
- the physical and mental condition of the child
- the sex, age and build of the child
- the nature of the instrument used in punishment
- the object and motive of the person who punishes.

A parent who exceeds the bounds of moderation, or who acts with improper or ulterior motives, may face civil and criminal liability. Civil liability may take the form of liability to pay compensation for infringement of bodily integrity. Criminal liability may take the form of a charge of assault, assault with intent to do grievous bodily harm, indecent assault, culpable homicide or murder.\textsuperscript{100} The onus to prove that the chastisement was excessive rests on the person who alleges this.\textsuperscript{101}

A parent may also delegate the right of chastisement to another person,\textsuperscript{102} for example a step-parent. However, the parent cannot delegate any right greater than which he or she has. The limitations that bind the delegating parent also bind the person to whom the right of chastisement has been delegated.\textsuperscript{103}

\textsuperscript{99} Van der Vyver & Joubert \textit{Persone- en familiereg} 610; Visser & Potgieter \textit{Introduction} 206-207; \textit{R v Janke & Janke} 1913 TPD 382 at 385-386; \textit{Du Preez v Conradie} 1990 4 SA 46 (B) at 51J-52E.

\textsuperscript{100} \textit{R v Janke & Janke} 1913 TPD 382 at 385-386, 392; \textit{Du Preez v Conradie} 1990 4 SA 46 (B) at 52E; Heaton 1987 \textit{THRHR} 398-411.

\textsuperscript{101} \textit{Hiltonian Society v Crofton} 1952 3 SA 130 (A).

\textsuperscript{102} Previously, parents could delegate their right of chastisement to teachers. That is no longer possible, since the South African Schools Act 84 of 1996 s 10(1) abolished corporal punishment in schools.

\textsuperscript{103} \textit{Du Preez v Conradie} 1990 4 SA 46 (B) at 52F-53B; Heaton 1987 \textit{SACC} 52.
Note that corporal punishment was abolished from South African public life in 1997. It may no longer be imposed as a sentence by a court of law, or used as a means of enforcing discipline in schools and prisons. All that remains of this form of punishment is the common-law right of parents to chastise their children. Some authors

Labuschagne argues that corporal punishment teaches children to use violence to solve problems, and that corporal punishment stimulates child abuse. He indicates that research has shown that there is a connection between corporal punishment and juvenile delinquency, that corporal punishment is an ineffective tool in eliminating undesirable conduct in children, and that corporal punishment is psychologically prejudicial to children.

Pete argues that, whether corporal punishment is administered by a stranger or by a loving parent, it is a punishment aimed at the deliberate infliction of pain and terror, and that this is sufficient to render it “cruel, inhuman or degrading”. He adds that the values which underlie the Constitution conceive of the parent-child relationship as a relationship which excludes all forms of violence. He also argues that corporal punishment is in conflict with the ideas of peace, harmony and dignity contained within international human rights instruments. Pete is of the opinion that South Africa should become the seventh country to ban corporal punishment (the first six being Sweden, Norway, Denmark, Finland, Sweden, Norway, Denmark, Finland, Finland, Sweden, Norway, Denmark, Finland, Sweden, Norway, Denmark, Finland).

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104 Abolition of Corporal Punishment Act 33 of 1997 s 1.
105 South African Schools Act s 10(1).
106 Correctional Services Second Amendment Act 79 of 1996.
109 S 12(1)(e) of the Constitution provides that every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Also see S v Williams 1995 3 SA 632 (CC).
110 Pete 1998 SAJHR 450.
111 Pete 1998 SAJHR 447.
Van Heerden argues that not only is corporal punishment incompatible with the Convention on the Rights of the Child (1989), but it also violates the provisions of sections 10 (the right to dignity), 12(1) (the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources, as well as the right not to be treated or punished in a cruel, inhuman or degrading way), 28(1)(d) (the right of the child to be protected from maltreatment, neglect, abuse or degradation), and 28(2) (the paramountcy of the best interests of the child) of the Constitution.

However, it should be kept in mind that the question is whether corporal punishment of children by their parents is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I share the view of Heaton, who submits that the purpose of corporal punishment to correct the child’s behaviour (ie an essentially educational purpose) renders corporal punishment reasonable and justifiable. She adds that the response that some parents use corporal punishment for sadistic purposes is not good enough to render all instances of parental corporal punishment unconstitutional. Furthermore, a blanket ban on corporal punishment would not eliminate the practice, and would require policing to enforce it. As Benatar states:

“... once one has to devote resources to policing a ban, one might as well use these resources to enforce a more refined regulation of the practice [than a blanket ban].”
Chapter 3 The concept “parental authority”

The South African Law Commission has refrained from abolishing corporal punishment by parents in the draft Children’s Bill. However, “care” (what is currently known as custody) is defined as including “guiding the behaviour of the child in a humane manner”.\(^{117}\) The Commission further proposes that a person who has control of a child (including a person who has parental responsibilities and rights in respect of the child) must respect to the fullest extent possible the child’s right to physical integrity as conferred by the Constitution. It is further proposed in the draft Bill that the common-law defence of reasonable chastisement available to the aforementioned persons in any court proceedings be abolished.\(^ {118}\) The last-mentioned provision was omitted from Social Development’s draft Children’s Bill.

4.3.4 Access

The Supreme Court of Appeal regards access as a separate incident of parental authority.\(^ {119}\) This is so despite the fact that some authors have suggested that access is an incident of custody.\(^ {120}\) However, Schäfer\(^ {121}\) points out that these two points of view can be reconciled since custody is a subtraction from natural guardianship (ie parental authority), while access, in turn, is a subtraction from custody. I support Schäfer’s view.

\(^{117}\) Draft Children’s Bill clause 1; Social Development’s draft Children’s Bill clause 1.

\(^{118}\) Draft Children’s Bill clause 142; Social Development’s draft Children’s Bill clause 139.

\(^{119}\) In B v S 1995 3 SA 571 (A) Howie JA says that “[a]ccess, like custody, is an incident of parental authority” (575D-E).

\(^{120}\) Schäfer Access 25. Yet another viewpoint is that of Van Zyl J in Van Erk v Holmer 1992 2 SA 636 (W), who does not believe that access to a child should necessarily be regarded as an incident of parental authority. In the case of legitimate children it can be so regarded, but where a father of an extra-marital child has been granted access, it cannot be said that access is an incident of parental authority, since it cannot be said that the court is conferring parental authority upon the father (647F-G). In my view, Van Zyl J lost sight of the fact that conferring a component of parental authority on a parent does not amount to conferring the “whole” parental authority on a person. The mere fact that it is possible to award custody and guardianship to different spouses confirms this.

\(^{121}\) Schäfer Access 31.
Chapter 3

Access is an incident of parental authority, as part of custody. It is this also an incident of custody. Both the aforementioned views are therefore correct. It seems only logical to discuss access under the heading “custody”.

The concept access can be defined as “a general right to see and speak to the child and enjoy its company while it is in the continued custody of the custodian spouse”. If an order is made granting one parent custody, the non-custodian parent is entitled to reasonable access to the minor child or children of the marriage. Access can be granted to a non-custodian parent of a legitimate child by a court acting either in terms of the Divorce Act or the Matrimonial Affairs Act. Even when no order of court is made the parent of a legitimate child has reasonable access. The extent of access is determined by the test of reasonableness. Access is regarded by the Supreme Court of Appeal as the right of the child, and not the right of the parent.

The South African Law Commission has proposed in the draft Children’s Bill that the term “access” should be replaced with the term “contact”. “Contact”, in relation to a child means maintaining a personal relationship with the child, and if the child lives with someone else,

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122 Oosthuizen v Rix 1948 2 PH B65 (W) at 152.
123 Marais v Marais 1960 1 SA 844 (C).
124 S 6(3) provides *inter alia* that a court granting a decree of divorce may, in regard to the access to a minor child of the marriage make any order which it may deem fit.
125 S 5(1) provides *inter alia* that any provincial or local division of the [High] Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the access to the minor, make any order which it may deem fit.
126 Lecler v Grossman 1939 WLD 41 at 44.
127 See in general Schäfer *Access* 41 *et seq*.
128 B v S 1995 3 SA 571 (A) at 582A-B. Also see Dunscombe v Willies 1982 3 SA 311 (D) at 315H-316B; Schäfer *Access* 31-33. Schäfer prefers “to speak of the privilege of access, a privilege that is only exercisable when it is in the interests of the child, and not as a right, whether of the parent or the child” (32).
communication on a regular basis with the child in person (including visiting the child or being visited by the child), or communication on a regular basis with the child in any other manner, including through the post or by telephone or any other form of electronic communication.\textsuperscript{129}

Where particulars of access of a non-custodian parent have not been specified in the original court order, the custodian parent, who controls the daily life of the child, has the right to determine in what way the non-custodian parent may exercise access.\textsuperscript{130} When the parties are unable to decide on the question of reasonable access, the courts are called upon to decide the issue.\textsuperscript{131} The court will not readily interfere with the exercise of the custodian parent’s discretion. The court will only interfere if the exercise by the custodian parent of his or her right of control is contrary to the best interests of the child.\textsuperscript{132} If it is in the interests of the child to do so, the court may make an order refusing the non-custodian parent access to his or her children.\textsuperscript{133}

Custody of an extra-marital child vests in the child’s mother. Since the father acquires no parental authority in respect of his extra-marital child, and access is seen as one of the incidents of parental authority, the father acquires no inherent right of access in respect of his child.\textsuperscript{134} However, the father may apply for reasonable access to his child. His

\begin{itemize}
\item \textsuperscript{129} Draft Children’s Bill clause 1; Social Development’s draft Children’s Bill clause 1.
\item \textsuperscript{130} Calitz \textit{v} Calitz 1939 AD 56; Marais \textit{v} Marais 1960 1 SA 844 (C); Kustner \textit{v} Hughes 1970 3 SA 622 (W).
\item \textsuperscript{131} Kok \textit{v} Clifton 1955 2 SA 326 (W) at 329H-330A.
\item \textsuperscript{132} Segal \textit{v} Segal 1971 4 SA 317 (C).
\item \textsuperscript{133} See in general Schäfer \textit{Access} 115 \textit{et seq}.
\item \textsuperscript{134} F \textit{v} L 1987 4 SA 525 (W) at 527H-J; B \textit{v} P 1991 4 SA 113 (T) at 114E; S \textit{v} S 1993 2 SA 200 (W) at 203G-204E; B \textit{v} S 1995 3 SA 571 (A) at 575D-J; T \textit{v} M 1997 1 SA 54 (A) at 57H; Wicks \textit{v} Fisher 1999 2 SA 504 (N) contra Van Erk \textit{v} Holmer 1992 2 SA 636 (W), where Van Zyl J held that the time had arrived for the recognition of inherent rights of access for fathers to their extra-marital children, which rights can only be removed if the access is shown to be contrary to the best interests of the child (649I-650A). The Van Erk decision was rejected by the Supreme Court of Appeal in B \textit{v} S 1995 3 SA 571 (A).
\end{itemize}
application will only succeed if he can prove that access will be in the best interests of the child, and that it will not unduly interfere with the mother’s right of custody.  

In a report published in 1994, the South African Law Commission proposed a Bill in terms of which the existing position is retained: Although the unmarried father has no inherent right of access, he can approach the court with an application for access. The guideline is the best interests of the child. When evaluating this application, the court must take into consideration certain specified factors. The Law Commission based its recommendations on the following reasons: First of all, awarding the unmarried father an inherent right of access would put the mother of the child in an untenable position in cases where the natural father exercises his rights to the detriment of the child. She would have to approach the court and make a case for the limitation or suspension of the natural father’s right of access, and she would have to bear the cost of the application. Secondly, the existing legal position has evolved over centuries against the background of the realities of society. The Law Commission was not aware of any change having taken place that would justify an inversion of that legal position.

The Natural Fathers of Children Born out of Wedlock Act came into operation on 4 September 1998. It generally corresponds to the Law Commission’s recommendations, although the recommendations have been refined and extended. The Act provides that the High Court may, on application by the natural father of a child born out of wedlock, grant the natural father access rights to, and/or custody and/or guardianship of the child on the

\[135\] B v P 1991 4 SA 113 (T) at 117F; B v S 1995 3 SA 571 (A) at 577B-C. Formerly, following the decision in Docrat v Bhayat 1932 TPD 125, the view was held that the father does not have a stronger claim than any other suitable person, but in more recent judgments the courts have decided that the unmarried father is favoured over strangers because of his biological relationship with the child and genetic factors - see Chodree v Vally 1996 2 SA 28 (W) at 32E; Bethell v Bland 1996 2 SA 194 (W) at 209G; Palmer 1996 SALJ 579.

\[136\] SA Law Commission Illegitimate child.

\[137\] SA Law Commission Illegitimate child 81.
conditions determined by the court. The court may not grant the application unless it is satisfied that it is in the best interests of the child, and until the court has considered the report and recommendations of the Family Advocate in terms of section 3 (if any). When considering the application the court must take certain factors into account, for example the attitude of the child in relation to the granting of the application and the degree of commitment that the applicant has shown towards the child.

Since the coming into operation of the Bill of Rights in the interim and final Constitutions many authors have argued that this position is discriminatory against fathers (on the grounds of their marital status and sex), mothers (on the grounds of their marital status and sex), and children (on the ground of their social origin and birth). This discrimination not only applies to access by a father to his extra-marital child, but also encompasses guardianship, custody and adoption. The position furthermore infringes

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138 S 2(1).
139 S 2(2).
140 S 2(5).
142 Which is prohibited by section 9 of the Constitution.
143 Heaton Bill of Rights par 3C32.2; Palmer 1996 SALJ 580; Pantazis 1996 SALJ 8 15-16. Wolhuter 1997 Stell LR 70 agrees that fathers of extra-marital children are unfairly discriminated against on the ground of marital status, but doubts whether they are unfairly discriminated against on the ground of sex or gender.
144 Heaton Bill of Rights par 3C32.2; Sinclair & Heaton Marriage 119.
145 Discrimination on the grounds of social origin and birth are prohibited by the Constitution s 9(3) & (4). Also see Heaton Bill of Rights par 3C32.2; Kruger 1996 THRHR 514; Pantazis 1996 SALJ 8; Sinclair & Heaton Marriage 121-126; Wolhuter 1997 Stell LR 70.
146 Sinclair & Heaton Marriage 122. Previously, section 18(4)(d) of the Child Care Act provided that the mother’s consent to the child’s adoption is sufficient. In Fraser v Children’s Court, Pretoria North 1997 (2) SA 261 (CC) the court held that this provision is inconsistent with the interim Constitution, and is therefore invalid to the extent that it dispenses with the father’s consent to the adoption of an extra-marital child in all circumstances. The court
the child’s right to parental care.\(^\text{147}\)

Some authors argue that the constitutionality of the existing legal position can be rectified by granting unmarried fathers inherent rights of access to their children.\(^\text{148}\) However, not everyone agrees that this is the solution. Various arguments are raised against granting unmarried father inherent rights of access.\(^\text{149}\) One argument is that the current position does not discriminate unfairly against unmarried fathers on the ground of sex and marital status, since the substantive inequality which characterises the division of labour within the unmarried family justifies the maternal preference and the casting of the burden onto the father to approach a court for an order granting him rights of access if the mother refuses to allow him access.\(^\text{150}\) Another argument is that since the recognition of inherent rights of access for the unmarried father would shift the onus of proof onto the mother to show that the best interests of the child demanded that no right of access be allowed, this would place an unnecessary burden on the mother who may find it difficult to obtain access to a court.\(^\text{151}\)

Some of these authors propose alternative solutions to the problem. Some argue that the

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\(^\text{147}\) S 28(1)(b) of the Constitution entrenches every child’s right to family care or parental care, or appropriate alternative care when removed from the family environment. See Heaton *Bill of Rights* par 3C32.2; Pantazis 1996 *SALJ* 12.


\(^\text{151}\) Clark 1992 *SAJHR* 569.
unmarried father should succeed in his application for an order granting him access to his child only if he can prove that he accepts the responsibilities of parenthood, or that he is “willing and able to act” as a father.\(^{152}\) Others require, in addition to this, proof of an established relationship between the father and his child.\(^{153}\) It should be pointed out that these authors see proof of an established relationship between father and child as prerequisite for the granting of rights of access to that father after termination of the relationship,\(^{154}\) and not as a reason justifying the recognition of an inherent right of access to that father. What they are thus in effect saying is that only unmarried fathers who were involved in a cohabitation relationship with the mother of the child (and the child), or at least had frequent contact with the child, are entitled to be awarded access to that child (upon application to the court) after termination of the cohabitation relationship. Sonnekus and Van Westing put it as follows:\(^{155}\)

“Werklike betrokkenheid van die vader by die buite-egtelike kind se welsyn en ontwikkeling en die bestaan van ’n liefdesband tussen vader en kind is voorvereistes vir die verlening van toegangsbevoegdhede aan daardie vader na beëindiging van die samewoningsverhouding.”

I cannot accept the abovementioned arguments. It places the unmarried father in an almost impossible position, especially in those cases where the mother of the child refuses to allow him any contact with his child. I support the view that the existing legal position regarding access between the unmarried father and his child amounts to unfair discrimination, and that it infringes the child’s right to parental care. As a matter of fact, I am of the view that the best interests of the child demand that not only inherent access rights, but full parental authority be awarded to the father of an extra-marital child if he and

\(^{152}\) Clark 1992 *SAJHR* 569; Labuschagne 1995 *TSAR* 164; Wolhuter 1997 *Stell LR* 65.


\(^{154}\) Sonnekus & Van Westing 1992 *TSAR* 248; Wolhuter 1997 *Stell LR* 77.

the mother of the child are involved in a permanent life partnership.\textsuperscript{156}

The draft Children’s Bill proposed by the South African Law Commission envisages the replacement of the provisions of the Natural Fathers of Children Born out of Wedlock Act by a new set of rules which \textit{inter alia} automatically confers parental responsibilities and rights on certain fathers of extra-marital children. In terms of the draft Children’s Bill the father will automatically have parental responsibilities and rights if he lived with the mother at any time after the child’s birth for a period of at least 12 months or for periods which together amount to at least 12 months, or cared for the child with the mother’s informed consent for a period of at least 12 months or for periods which together amount to at least 12 months. A father who falls outside these categories can acquire parental responsibilities and rights by entering into a formal agreement with the mother, setting out the responsibilities and rights conferred on him. The agreement takes effect only if it is registered with the family advocate or made an order of court on application by the parties to it. Once this has been done the agreement may be amended or terminated only by court order.\textsuperscript{157}

In terms of the draft Children’s Bill, other persons, such as grandparents or a parent’s life partner, can obtain parental responsibilities and rights only by means of a court order assigning full or specific parental responsibilities and rights to them. This procedure is also available to the father of an extra-marital child. When deciding on such an application, the court must consider the following factors:\textsuperscript{158}

\textsuperscript{156} An analogy can be drawn to the decision in \textit{Du Toit v Minister of Welfare and Population Development} 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC), where members of a permanent same-sex life partnership were regarded as similar to spouses for the purpose of joint adoption of children. Also see ch 3 fn 21, 40, 44 & 59 above.

\textsuperscript{157} Draft Children’s Bill clauses 33 & 34; Social Development’s draft Children’s Bill clauses 21 & 22.

\textsuperscript{158} Draft Children’s Bill clause 35. Social Development’s draft Children’s Bill contains a similar provision in clause 23, although factor (4) was added.
“(a) the relationship between the applicant and the child, and any other relevant person and the child;
(b) the degree of commitment that the applicant has shown towards the child;
(c) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child;
(d) any other fact that should, in the opinion of the court, be taken into account.”

In terms of the draft Children’s Bill, the assignment of parental responsibilities and rights to one person does not affect the parental responsibilities and rights that another person has in respect of the child. The mother of an extra-marital child does not, for example, lose her parental responsibilities and rights simply because the court assigns parental responsibilities and rights to the child’s father. If more than one person has parental responsibilities and rights each of them may, in principle, exercise those responsibilities and rights without the other person’s consent, although there are some transactions for which the consent of all persons who are co-holders is required. A co-holder of parental responsibilities and rights may apply to court for an order suspending, terminating, extending or circumscribing any or all of someone’s parental responsibilities and rights. Such an application may also be made by any other person who has a sufficient interest in the care, protection, well-being or development of the child, or a family advocate or representative of any interested organ of state. With the court’s consent, the application may even be made by the child or someone acting in the child’s interest.

5. THE DUTY OF SUPPORT

5.1 Basis of and requirements for duty of support

Spiro is of the opinion that the duty of support arises out of a natural affection flowing from

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159 eg the contracting of a marriage by the child (draft Children’s Bill clause 42; Social Development’s draft Children’s Bill clause 30).

160 Draft Children’s Bill clause 39; Social Development’s draft Children’s Bill clause 27.
the blood relationship between the parent and child. He adds that “[t]he duty is not based on an implied contract nor on the parental power as such and may be said to exist by operation of law”.\textsuperscript{161} I support Spiro’s view.

The requirements for the existence of the duty of support are:\textsuperscript{162}

- The person who claims support must have inadequate means to support himself or herself.\textsuperscript{163}
- The person who is obliged to pay maintenance must be able to do so.\textsuperscript{164}
- The relationship between the parties must be of such a nature that the law imposes a reciprocal duty of support between them.\textsuperscript{165}

5.2 Children in respect of whom duty of support exists

Since the duty of support is based on blood relationship,\textsuperscript{166} it exists in respect of both legitimate\textsuperscript{167} (including adopted) and extra-marital children, but not in respect of

\begin{itemize}
\item \textsuperscript{161} Spiro \textit{Parent and child} 385. Also see Cronjé & Heaton \textit{Family} 210.
\item \textsuperscript{162} See Cronjé & Heaton \textit{Family} 210; Lee & Honoré \textit{Family} par 157; Spiro \textit{Parent and child} 392 \textit{et seq}; Van der Vyver & Joubert \textit{Persone- en familiereg} 630; Van Heerden et al (eds) \textit{Bobberg} 233-234.
\item \textsuperscript{163} \textit{Grobler v Union Government} 1923 TPD 429 at 431; \textit{Gliksman v Talekimsky} 1955 4 SA 468 (W) at 469D-E.
\item \textsuperscript{164} \textit{Oberholzer v Oberholzer} 1947 3 SA 294 (O) at 297; \textit{Ncubu v National Employers General Insurance Co Ltd} 1988 2 SA 190 (N) at 194D.
\item \textsuperscript{165} \textit{Ex parte Pienaar} 1964 1 SA 600 (T); \textit{Ex parte Jacobs} 1982 2 SA 276 (O) at 279.
\item \textsuperscript{166} Spiro \textit{Parent and child} 385.
\item \textsuperscript{167} It must be kept in mind that adopted children are for all purposes whatsoever regarded as the legitimate child of the adopted parents (Child Care Act s 20(2)). Also see ch 3 par 3 above.
\end{itemize}
stepchildren\textsuperscript{168} or children-in-law.\textsuperscript{169}

The duty of support arises with the birth of the child and continues independent of parental authority until the child is in a position to support himself or herself. The duty of support can thus still exist after parental authority has been terminated through attainment of the age of majority, declaration of majority in terms of the Age of Majority Act 57 of 1972, or the marriage of the child.\textsuperscript{170} On the other hand, parental authority can still continue after the duty of support has come to an end. As soon as the child earns enough or has sufficient means to support himself or herself, the parental duty of support comes to an end.\textsuperscript{171}

5.3 Persons on whom duty of support rests

Both parents have a duty to support their natural children, legitimate or extra-marital, according to their respective means.\textsuperscript{172} The duty of support does not come to an end at divorce. After divorce both parents are still obliged to maintain their dependent legitimate children in proportion to their respective means. The court granting the divorce will ensure that suitable arrangements are made for the children’s maintenance.\textsuperscript{173} The non-custodian parent is usually ordered to contribute a certain periodic amount towards the maintenance

\textsuperscript{168} Mentz \textit{v} Simpson 1990 4 SA 455 (A) at 460B-C; Heysstek \textit{v} Heystek 2002 2 SA 754 (T).

\textsuperscript{169} Cronjé \& Heaton \textit{Family} 213; Visser \& Potgieter \textit{Introduction} 210.

\textsuperscript{170} Cronjé \& Heaton \textit{Family} 210-211; Cronjé \& Heaton \textit{Persons} 103 \textit{et seq}; Lee \& Honoré \textit{Family} par 159; Van Heerden \textit{et al} (eds) \textit{Boberg} 246-247, 461 \textit{et seq}; \textit{Ex parte Jacobs} 1982 2 SA 276 (O) at 278C-H; Gliksman \textit{v} Talekinsky 1955 4 SA 468 (W). In the latter case the court ordered the father of a widowed daughter with six children who was not in a position to support herself or her children, to contribute towards the daughter’s maintenance.

\textsuperscript{171} Cronjé \& Heaton \textit{Family} 210.

\textsuperscript{172} Lamb \textit{v} Sack 1974 2 SA 670 (T) at 671G-672C; Jodaiken \textit{v} Jodaiken 1978 1 SA 784 (W) at 788H-789A.

\textsuperscript{173} Divorce Act s 6(1).
of the children.\textsuperscript{174}

The duty of support is terminated by the death of the child, but not by the death of the parent. The child has a claim for maintenance against the deceased parent’s estate. When the parent’s estate is divided, the child’s maintenance claim has preference above heirs and legatees, but not above creditors.\textsuperscript{175} The child’s claim for maintenance against the parent’s estate will not succeed if the child is able to support himself or herself, either by means of an inheritance from the parent or other sources, or through his or her own earnings.\textsuperscript{176}

If the parents are incapable of supporting their children, but the grandparents are, grandparents on both sides in the case of legitimate children, but only grandparents on the mother’s side in the case of extra-marital children,\textsuperscript{177} are obliged to support their grandchildren.\textsuperscript{178} There is no duty of support on the estate of a grandparent after his or her death.\textsuperscript{179} Brothers and sisters are obliged to support one another according to their respective means if their parents and grandparents are incapable of doing so.\textsuperscript{180}

Legitimate children are obliged to support their parents and grandparents if the parents can no longer support themselves while the children are able to do so. Children are

\textsuperscript{174} See in general Cronjé & Heaton \textit{Family} 189 et seq; Hahlo \textit{Husband and wife} 407 et seq.

\textsuperscript{175} \textit{Ex parte Zietsman: In re Estate Bastard} 1952 2 SA 16 (C); \textit{Barnard v Miller} 1963 4 SA 426 (C).

\textsuperscript{176} \textit{Ex parte Zietsman: In re Estate Bastard} 1952 2 SA 16 (C).

\textsuperscript{177} \textit{Motan v Joosub} 1930 AD 61. Fourie J recently ruled in the Cape High Court that the distinction between the duty of support of grandparents towards children born in wedlock on the one hand, and extra-marital children on the other hand, "constitutes unfair discrimination on the ground of birth and amounts to an infringement of the dignity of such children" under the constitution (\textit{Petersen v Maintenance Officer} 2004 2 BCLR 205 (C)).

\textsuperscript{178} \textit{Gliksman v Talekinsky} 1955 4 SA 468 (W); \textit{Ex parte Jacobs} 1982 2 SA 276 (O).

\textsuperscript{179} \textit{Barnard v Miller} 1963 4 SA 426 (C).

\textsuperscript{180} \textit{Miller v Miller} 1940 CPD 466 at 469; \textit{Ex parte Pienaar} 1964 1 SA 600 (T) at 606A.
Chapter 3 The concept “parental authority”

obliged to contribute according to their respective means.\(^{181}\) An extra-marital child is obliged to support his or her mother and maternal grandparents.\(^{182}\) An extra-marital child apparently also has to support his or her natural father.\(^{183}\) This duty is not extended to any other relatives on the father’s side,\(^{184}\) with the exception of the parental grandparents.\(^{185}\)

### 5.4 The extent of the duty of support

The extent of the duty of support depends on the circumstances of each case. Support not only includes the necessities of life such as food, clothing and accommodation, but also extends to medical care and education. The extent to which maintenance must be provided is determined by the standard of living and the social and financial position of the family (or the claimant if he or she lives alone\(^ {186}\)).\(^ {187}\) In the case of extra-marital children, the extent of support depends on the mother’s standard of living alone.\(^ {188}\)

If a parent has continued to support a child who is in a position to support himself or

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\(^{181}\) Oosthuizen v Stanley 1938 AD 322; Stander v Royal Exchange Assurance Co 1962 1 SA 454 (SWA); Pike v Minister of Defence 1966 3 SA 127 (Ck) at 132E-F; Barnes v Union and SWA Insurance Co Ltd 1977 3 SA 502 (E).

\(^{182}\) Lee & Honoré Family par 160; Van der Vyver & Joubert Persone- en familiereg 629.

\(^{183}\) Lee & Honoré Family par 160; Van der Vyver & Joubert Persone- en familiereg 629; contra Spiro Parent and child 404.

\(^{184}\) Van der Vyver & Joubert Persone- en familiereg 629; contra Lee & Honoré Family par 160 fn 2.

\(^{185}\) Petersen v Abrahams 2003-11-12 (unreported).

\(^{186}\) In Gliksman v Talekinsky 1955 4 SA 468 (W) at 470C-D the court held that where the claimant has already reached majority and lives on his or her own, it is the claimant’s standard of living, and not that of the parents, that is taken into consideration.

\(^{187}\) Cronjé & Heaton Family 211; Lee & Honoré Family par 158; Van der Vyver & Joubert Persone- en familiereg 607-611. In Mentz v Simpson 1990 4 SA 455 (A) at 459B-C it was decided that a parent’s duty to provide his or her child with sufficient education may include university training if the child’s intellectual capacity and the family’s financial means justify such education.

\(^{188}\) Van der Vyver & Joubert Persone- en familiereg 628.
herself, the parent will have a right of recourse against the child’s estate for reasonable maintenance expenses. However, the parent has to prove that he or she incurred the expenses as the child’s guardian, and that he or she did not intend to donate the expenses to the child.\textsuperscript{189} Although a donation is not generally presumed, little proof is required to satisfy a court that the parent intended to make a donation to his or her child.\textsuperscript{190}

6 \hspace{1em} THE TERMINATION OF PARENTAL AUTHORITY

Parental authority is terminated in one of the following ways:\textsuperscript{191}

- the death of the parent
- the death of the child
- the attainment of majority by the child (This takes place not only when the child reaches the age of 21, but also upon the marriage of the child and upon declaration of majority in terms of the Age of Majority Act.)\textsuperscript{192}
- the adoption of the child\textsuperscript{193}
- the rescission of an adoption order\textsuperscript{194}
- a court order.\textsuperscript{195}

\textsuperscript{189} Spiro \textit{Parent and child} 388; Van der Vyver & Joubert \textit{Persone- en familiereg} 630.

\textsuperscript{190} Stark \textit{v} Fisher 1935 SWA 53 at 59; Vermaak \textit{v} Vermaak 1945 CPD 89. Also see Spiro \textit{Parent and child} 388.

\textsuperscript{191} Cronjé & Heaton \textit{Family} 215; Spiro \textit{Parent and child} 245-382; Van der Vyver & Joubert \textit{Persone- en familiereg} 626.

\textsuperscript{192} Cronjé & Heaton \textit{Persons} 103 \textit{et seq}; Spiro \textit{Parent and child} 245-251; Van Heerden \textit{et al} (eds) \textit{Boberg} 232, 450 \textit{et seq}, 461 \textit{et seq}, 497 \textit{et seq}.

\textsuperscript{193} See ch 3 par 3 above.

\textsuperscript{194} The rescission of the adoption order has the consequence of terminating the parental authority of the adoptive parents and restoring the parental authority of the person or persons who had parental authority of the child at the time of the adoption (Child Care Act s 21(8)).

\textsuperscript{195} See ch 5 par 2 below.
The South African Law Commission has proposed in the draft Children’s Bill that the age of majority be lowered to 18 years.\textsuperscript{196} However, the draft Children’s Bill makes provision for the extension by a court of parental responsibilities and rights of a person in respect of a child for a period of not more than three years after that child has reached the age of 18 years, if special circumstances exist with regard to the protection and well-being of that child to warrant such an extension. An application like this must be made before the child reaches the age of 18 years, and may be brought by the child, the parent or primary caregiver of the child, any other person who has parental responsibilities and rights in respect of the child, or the Director-General of Social Development or the head of social development in a province.\textsuperscript{197}

Termination of parental authority by means of a court order comprises three forms. First, the draft Children’s Bill makes provision for a co-holder of parental responsibilities and rights in respect of a child to apply for an order suspending or terminating (or extending or circumscribing) any or all of the parental responsibilities and rights which a specific person has in respect of a child. Such application may also be made by any other person having a sufficient interest in the care, protection, well-being or development of the child, or a family advocate or representative of any interested organ of state. With the court’s consent, the application may even be made by the child or someone acting in the child’s interest. When considering the application the court must take the following factors into account:\textsuperscript{198}

\begin{quote}
(a) the relationship between the child and the person whose parental responsibilities and rights are challenged;
(b) the degree of commitment that person has shown towards the child;
(c) any other fact that should, in the opinion of the court, be taken into account.
\end{quote}

\textsuperscript{196} Draft Children’s Bill clause 29; Social Development’s draft Children’s Bill clause 17.
\textsuperscript{197} Draft Children’s Bill clause 40; Social Development’s draft Children’s Bill clause 28.
\textsuperscript{198} Draft Children’s Bill clause 39. Social Development’s draft Children’s Bill contains a similar provision in clause 27, although factor (3) was added. Also see ch 4 par 3.8 below.
Secondly, the High Court in its capacity as the upper guardian of all minors, or in terms of certain statutory provisions (eg the Divorce Act) may deprive a parent of some or all the aspects of parental authority.¹⁹⁹

Thirdly, one of the statutory provisions in terms of which the court (in this case, the children’s court) can interfere with parental authority, is the Child Care Act. Where the children’s court removes a child in need of care from the parental home in terms of the Child Care Act, the parent is temporarily deprived of his or her custody of the child, but retains his or her rights of access to, and guardianship over the child.²⁰⁰ Removal of a child from the parental home by the children’s court can thus be regarded as a termination of only some of the aspects of parental authority by means of a court order.

7 THE LEGAL NATURE OF PARENTAL AUTHORITY

7.1 General

Few attempts have been made thus far in South African legal literature to explain the legal nature of parental authority. Van Heerden argues that, since parental authority is today concerned more with duties than with powers, it can be described as an office in the nature of a trust.²⁰¹ According to Van der Vyver and Joubert²⁰² and Joubert²⁰³ parental authority does not flow from a subjective right of a parent over his or her child, but it is a competence (kompetensie) awarded to parents by the objective law. Apart from the

¹⁹⁹ For a detailed discussion of interference with parental authority in terms of the common-law jurisdiction of the High Court as upper guardian of minors, and in terms of various statutory provisions, see ch 4 below.

²⁰⁰ Child Care Act s 53. See, in general, ch 5 par 2 below.


²⁰² Van der Vyver & Joubert Persone- en familiereg 592. See ch 3 par 7.2 below.

abovementioned attempts to explain the legal nature of parental authority, there have been attempts to explain parental authority (or its incidents) solely with reference to the doctrine of subjective rights.\textsuperscript{204}

### 7.2 Parental authority as a competence derived from the objective law

As indicated above,\textsuperscript{205} some authors argue that parental authority does not flow from a subjective right or rights of a parent over his or her child, but that it is a competence awarded to parents by the objective law. The relationship between the law in subjective and objective (normative or positive) sense is relevant here. The following brief explanation will suffice for the purposes of this general discussion. While the objective law is a system of rules and norms, the law in subjective sense is a system of relations between legal subjects. The system of norms forms the objective law, while the system of relations between legal subjects forms the law in subjective sense. In terms of the law in subjective sense a legal subject has a subjective right to a legal object, as well as against other legal subjects.\textsuperscript{206}

As indicated above, parental authority is regarded by Van der Vyver and Joubert as a competence awarded to parents by the objective law. A competence (\textit{kompetensie}) can be defined as a “juridiese in-staat-wees; dit wil sê, die vermoë om op ‘n bepaalde wyse aan die regsverkeer deel te neem”.\textsuperscript{207} This concept is distinguished from the concept “power” (\textit{inhoudsbevoegdheid, or beskikkings- en genotsbevoegdheid}), which can be defined as that which a legal subject may do (or is entitled to do) with the legal object by

\textsuperscript{204} See ch 3 par 7.3 below.

\textsuperscript{205} See ch 3 par 7.1 above.

\textsuperscript{206} Du Plessis \textit{Introduction} 130 \textit{et seq}; Van Zyl & Van der Vyver \textit{Inleiding} 412 \textit{et seq}. Also see ch 3 par 7.3.1 below.

\textsuperscript{207} Van Zyl & Van der Vyver \textit{Inleiding} 414.
virtue of his or her subjective right. The doctrine of subjective rights will be dealt with below.

### 7.3 Parental authority and the doctrine of subjective rights

As indicated above, some authors attempt to explain the legal nature of parental authority with reference to the doctrine of subjective rights. These attempts have been prompted by a number of court decisions in recent decades in which courts have been asked by parents to grant interdicts preventing third persons to come into contact with their children. After a general discussion of the doctrine of subjective rights, these decisions will be dealt with. Thereafter the different viewpoints of authors attempting to explain the legal nature of parental authority with reference to the doctrine of subjective rights will be critically analysed.

#### 7.3.1 The doctrine of subjective rights in general

The doctrine of subjective rights originated from the notion that the law comprises not only a system of norms, but that human beings also have rights against others. This notion is found in legal conviction, legal history, and the struggle of human beings to maintain, against other human beings and the state, what is rightfully theirs.

According to the doctrine of subjective rights, all legal subjects are holders of subjective rights. Every subjective right is characterised by a dual relationship: firstly the relationship

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208 Du Plessis Introduction 141; Joubert Grondslae 119; 1958 THRHR 111; Van Zyl & Van der Vyver Inleiding 414.

209 See ch 3 par 7.3.1 below.

210 Joubert 1958 THRHR 100.

211 A legal subject can be defined as an entity that can function as subject in the law (Van der Vyver & Joubert Persone- en familiereg 36 et seq; Van Zyl & Van der Vyver Inleiding 373).
between the legal subject and the object of the right (the subject-object relationship); secondly between the legal subject and all other legal subjects (the subject-subject relationship).\textsuperscript{212}

The subject-object relationship provides the legal subject with the powers of enjoyment, use and disposal in respect of a legal object (inhoudsbevoegdheid, or beskikkings- en genotsbevoegdheid).\textsuperscript{213} The content of these powers is determined by the norms of the objective law. The subject-subject relationship implies that the legal subject may enforce his or her powers over a legal object against all other legal subjects, and that a duty rests on all other legal subjects not to infringe upon the subject-object relationship.\textsuperscript{214}

Subjective rights are classified with reference to the different types of legal objects to which the rights relate. The following five classes of legal objects are distinguished: \textsuperscript{215}

- Things, that is tangible physical objects such as a car or a farm. The right to a thing is called a real right.
  Personality property, that is aspects of the human personality such as bodily integrity, dignity and feelings. The right to personality property is called a personality right.
- Performance, that is human acts or conduct which may legally be claimed from another, such as payment of the amount owing by the debtor, rendering of services by an employee and delivery by the seller of the thing sold. The right concerned is called a personal right. The right to maintenance is an example of a personal right.
- Immaterial property, that is intangible objects of the human mind, intellect

\textsuperscript{212} Joubert Grundslae 119; 1958 THRHR 104 et seq; Neethling et al Delict 50-51.
\textsuperscript{213} See ch 3 par 7.2 above.
\textsuperscript{214} Joubert Grundslae 119; 1958 THRHR 111; Neethling et al Delict 50.
\textsuperscript{215} Joubert Grundslae 120 et seq; 1958 THRHR 112 et seq; Neethling et al Delict 52.
and activity which are expressed in an outwardly perceptible form, such as a work of art or an invention. The right concerned is called an immaterial property right.

- Personal immaterial property, that is intangible products of the human mind which are connected with the personality, such as earning capacity and credit-worthiness. The right concerned is called a personal immaterial property right.\(^{216}\)

Nothing prevents the further development of the doctrine of subjective rights. Subjective rights develop when the law recognises existing individual interests as being worthy of protection. The law does thus not create individual interests but merely recognises interests which exist even before recognition takes place. Accordingly the quality of these interests cannot be deduced from legal norms, but must be established with reference to their actual nature.\(^{217}\) Before the law will recognise an individual interest as a legal object in terms of the doctrine of subjective rights, it must first of all be of value to the holder of the right,\(^{218}\) and secondly, it must have such a measure of independence that it is possible to dispose of it and enjoy it.\(^{219}\)

### 7.3.2 Developments in case law

Traditionally only the first four classes of rights are recognised (Universiteit van Pretoria v Tommie Meyer Films 1977 4 SA 376 (T)). However, Neethling \textit{et al} \textit{Delict} 52-53 identified a possible fifth category of rights, ie personal immaterial property rights.\(^{216}\)

Neethling 1987 \textit{THRHR} 316 \textit{et seq}; Neethling \textit{et al} \textit{Delict} 53 \textit{et seq}.\(^{217}\)

Joubert \textit{Grondslae} 119-120; 1958 \textit{THRHR} 112; Labuschagne 1990 \textit{THRHR} 560-561; Van der Vyver \& Joubert \textit{Persone- en familiereg} 9 \textit{et seq}. Following Dooyeweerd, these authors require that a legal object must have economic value. Economic value in this sense is not necessarily equal to market value, but includes a \textit{pretium affectionis} (sentimental value). Since economic value cannot be a requirement for all objects (aspects of personality do not have economic value), and since the requirement of economic value will inhibit further development, Neethling \textit{et al} call for the abolition of this requirement (Neethling \textit{Persoonlikheidsreg} 15 fn 117; Neethling \textit{et al} \textit{Delict} 54 fn 75).\(^{218}\)

Joubert \textit{Grondslae} 120; Neethling \textit{et al} \textit{Delict} 54.\(^{219}\)
In a number of decided cases, parental authority, or at least certain of its incidents, were expressly or by implication equated with or regarded as species of subjective right(s) of the parents.

In *Meyer v Van Niekerk* the Transvaal Provincial Division of the Supreme Court (now known as the High Court) had the opportunity to decide whether the father of a minor daughter could, in terms of his parental authority, forbid a third person to come into contact with his daughter, and enforce this prohibition in a court of law. The applicant's 20-year-old daughter had had regular contact with the respondent, a married man, but there was no evidence that the respondent did anything against her will.

The court stressed that unless such a right (i.e., the right of a parent to forbid a third person from coming into contact with the child) existed against third parties, there could be no question of an interdict. The court further held that there was nothing in Roman-Dutch sources indicating that such a right existed against third parties. As a matter of fact, the right in question corresponds with the Roman concept of *patria potestas*. However, this concept was not received in the Netherlands, where German customs continued to exist unchanged. German customary law knew nothing of the absolute rights awarded to the *paterfamilias* in Roman law, and German society was much more free and open than its Roman counterpart.

The court added that the mental and moral education of a child, which are important components of parental authority, clearly diminishes progressively as the child matures, until they consist of nothing more than advice. Parental authority may thus include the authority to act against third parties who interfere with these components, but this will only be the case where a very undeveloped young child is concerned, one who still lives with

220 1976 1 SA 252 (T).

221 At 254D-E.

222 At 254H-255D.
her parents, still goes to school, and still has to be educated and disciplined in a very direct way. The court concluded that the applicant had no enforceable right against the respondent.\textsuperscript{223}

In \textit{Coetzee v Meintjies}\textsuperscript{224} the same court rejected a similar application. The appellant applied in the court \textit{a quo} for an order prohibiting the respondent to come into contact with his son. His application was rejected by the court \textit{a quo}, and he appealed against this decision. The appellant’s son was 20 years and 3 months old at the time of the application, and was involved in a sexual relationship with a divorced woman ten years older than him.\textsuperscript{225}

The court stressed that it was asked to act, not as upper guardian, but as a court of law that had to interdict a wrongful act.\textsuperscript{226} When dealing with a young child, it is undeniably part of parental authority to decide with whom the child may associate. Any person interfering with this authority commits an \textit{iniuria} that can be interdicted by a court.\textsuperscript{227} Hiemstra J referred to the following passage from \textit{Meyer v Van Niekerk supra}:\textsuperscript{228}

\begin{quote}
“Dit is dus ... moontlik dat in die geval van ‘n heel onontwikkelde jong kind, wat nog in die huis van haar ouers woon, op skool is en nog direk opgevoed en getugtig moet word, die ouerlike gesag ‘n vaderlike mag inhou wat selfs die teenhanger het dat teenoor derdes wat daarop inbreuk maak, opgetree kan word.”
\end{quote}

Although Hiemstra J agreed that contempt for the parent’s authority could in certain
circumstances constitute an *iniuria* against the parent, he did not agree with the decision of Coetzee J in *Meyer v Van Niekerk supra* that the point of departure should be the age or degree of maturity of the child. He indicated that the point of departure should rather be the degree in which the parent maintained or relinquished his or her parental authority. Where the parent diminished the extent of his or her authority by sending the child to university, as happened in the present case, there could be no question of an *iniuria*. The court added that, should the interdict be allowed, it would be impossible to enforce, and accordingly refused the application.229

*Gordon v Barnard*230 is the first reported case in which an application for the interdict under discussion was successful. The applicant’s daughter was 18 years old and still lived with her parents. Although she had passed standard 8 and had been working for three years, the applicant retained close parental control over her conduct, friends and activities. This is evident from the fact that she was not permitted any close relationships with men, and that she was not allowed to go out without a chaperone.231 Steyn J accepted the point of departures of both *Meyer v Van Niekerk supra* and *Coetzee v Meintjies supra* when he decided the following:232

“I am prepared to accept ... that applicant in order to obtain relief must establish an *iniuria* committed against him. In other words, he must prove that he is still exercising parental authority over his daughter which has as its counterpart the right to exact restraint against third parties who might bring this power into serious question or contempt or who encroach upon it ... I am also prepared to accept that the right of a parent to exercise custody and control over a child ‘is a dwindling right which the Courts will hesitate to enforce against the child the older he is. It starts with a right of control and ends with little more than advice’.”

229 At 262D-H.
230 1977 1 SA 887 (C).
231 At 888A-C.
232 At 889G-H.
Steyn J considered the critical questions to be the following: Is the parental power and control over the child extant, and if so, what is the extent and content of that power and control? A further subsidiary question is the following: Is the parental power reasonably exercised? Steyn J explained that the court would not grant an interdict in support of any grossly unreasonable exercise of parental authority.\(^\text{233}\) The court concluded that the respondent’s conduct was a direct and unlawful challenge of the applicant’s authority and amounted to an *iniuria*. Furthermore it could not be said that the applicant had acted in a grossly unreasonable or unduly oppressive manner in respect of his supervision and control of his daughter.\(^\text{234}\)

A similar application was made by the father of a 17-year-old daughter in *H v I*.\(^\text{235}\) Van den Heever J accepted in *H v I* that the test to be applied was that given in *Gordon v Barnard* supra, namely whether the applicant was still exercising parental authority over his child, which had as its counterpart the right to exact restraint against third parties who encroach upon this power.\(^\text{236}\) However, the court refused to accept, as was done in *Coetzee v Meintjies* supra, that the mere fact that the child was no longer under the parental roof always justified “an inference that the father [had] permanently abandoned his right to object to the child’s associates. It must depend on the facts in each case”.\(^\text{237}\) Van den Heever J concluded that, in the present case, the applicant had not waived or abandoned his right to interfere with his daughter’s choice of associates. Since the respondent had knowingly defied the applicant’s parental authority, the interdict had to be allowed.\(^\text{238}\)

\(^{233}\) At 890A.

\(^{234}\) At 890F-G.

\(^{235}\) 1985 3 SA 237 (C).

\(^{236}\) At 245E-F. The court in *H v I* did not refer to the third question stated by Steyn J in *Gordon v Barnard* 1977 1 SA 887 (C) at 890A, namely the question whether the parent is exercising the parental authority in a reasonable manner.

\(^{237}\) At 245A.

\(^{238}\) At 248H-J.
Chapter 3  The concept “parental authority”

The last reported case on this issue is that of L v H.\textsuperscript{239} In this case the father of an 18-year-old daughter applied for an interdict restraining the respondent, who was also 18 years old, to come into contact with his daughter. The applicant’s daughter was involved in a sexual relationship with the respondent, as a result of which she became pregnant.

After referring to Meyer v Van Niekerk supra and Coetzee v Meintjies supra, the court expressed the same reservation to the Coetzee decision as was expressed by Van den Heever J in H v I supra, namely that the fact that a minor child has left home to attend university did not necessarily result in the guardian parent losing his or her right to determine the child’s choice of associates.\textsuperscript{240}

The court further referred to Gordon v Barnard supra, where it was decided that the following three critical questions had to be answered in such a case, namely: (1) Is the parental power and control over the child extant? (2) If so, what is the extent and content of that power and control? (3) Is such power reasonably exercised? In the case under discussion Zietsman AJP devoted the rest of the judgment to answering these three questions, and came to the conclusion that the applicant had at no stage relinquished his parental power and control over his daughter, that he had at all times exercised full control over her and was entitled to determine with whom she may associate, and that the applicant’s exercise of his parental power and control over his daughter had been reasonable. The application was thus successful and the interdict was allowed.\textsuperscript{241}

7.3.3 Authors’ comments on parental authority and the doctrine of subjective rights

Following the abovementioned decisions, authors have attempted to explain the legal

\textsuperscript{239} 1992 2 SA 594 (E).

\textsuperscript{240} At 596I-597G.

\textsuperscript{241} At 597H-599E.
nature of parental authority with reference to the doctrine of subjective rights. The courts have stressed that interference with parental authority (specifically the parent’s authority to decide with whom the child may associate) by third parties is sometimes an iniuria which can form the basis of an interdict, without identifying the specific interest of the plaintiff that is worthy of protection. Since a private-law action based on iniuria can in principle only be instituted if a legally recognised personality interest of the plaintiff has been infringed, and wrongfulness in the case of personality infringement is, as a general point of departure, the result of the infringement of a subjective right, authors have attempted to identify the specific personality right that is encroached upon by the third party’s contempt for the parent’s authority.

Some authors regard parental authority (or its components), or the rights flowing from parental authority (eg the right of chastisement) as subjective rights (personality rights) of the parent.

Other authors, while acknowledging the view that parental authority as such is not a subjective right, but a competence derived from the objective law, argue that certain

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242 Universiteit van Pretoria v Tommie Meyer Films 1977 4 SA 376 (T); Neethling Persoonlikheidsreg 61-62. Also see Sonnekus 1978 TSAR et seq.

243 In Universiteit van Pretoria v Tommie Meyer Films 1977 4 SA 376 (T) the court pointed out that “[d]ie onregmatigheid by persoonlikheidskrenking en vermoënsbenadeling is, by wyse van basiese uitgangspunt gestel, geleë in die aantasting van ’n subjektiewe reg. Hierdie uitgangspunt sluit nie die bestaan of ontwikkeling van ander onregmatigheidskriteria vir besondere gevalle en behoeftes uit nie. Sonder om daarop in te gaan, wys ek net op norm-of pligskending as aanvullende kriterium” (387A-B). But see Neethling Persoonlikheidsreg 67 fn 167, who indicates that, although wrongfulness may also be constituted by the breach of a legal duty, this approach may generally be disregarded as of little relevance for the purposes of the law of personality protection. Also see ch 3 par 7.4 below.

244 such as Van Zyl & Van der Vyver Inleiding 411 fn 15, Labuschagne 1990 THRHR 557; 1993 THRHR 428 and Scott 1977 TSAR 169 (see ch 3 par 7.3.3.1 below).

245 such as Sonnekus 1977 TSAR81; 1978 TSAR78 and Neethling Persoonlikheidsreg 235-236 (see ch 3 par 7.3.3.2 below).
subjective rights (personality rights) can flow from parental authority. Contempt for parental authority infringes the parent’s feelings of dignity, security in the family, and piety towards his or her child. The protected interest is, according to these authors, not the authority of the parent, but his or her feelings towards his or her authority and/or family.

The different personality rights identified by the abovementioned two groups of authors will be dealt with below.

7.3.3.1 Parental authority (or the rights flowing from parental authority) as personality right

Some authors, such as Van Zyl and Van der Vyver, and Labuschagne, argue that some of the incidents of parental authority (eg the right of access of the non-custodian parent), should be recognised as subjective rights. Others, such as Scott, regard the rights flowing from parental authority (eg the right of chastisement of the parent) as subjective rights.

Van Zyl and Van der Vyver mention the possibility that certain family law phenomena, for example the right of access of a divorced parent where custody has been awarded to the other parent, may be recognised as subjective rights. They are of the opinion that in these instances certain personality aspects of the child should be legally recognised as the object of the parent’s subjective right (personality right):

“In hierdie gevalle gaan dit nie om die ‘prestasie’ van die kind nie, maar om die bevoegdheid van

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246 In my view, it is better to say that these subjective rights flow from the parent-child relationship (including maintenance), of which parental authority is but one component.

247 Van Zyl & Van der Vyver Inleiding 411 fn 15.

248 Labuschagne 1990 THRHR 557; 1993 THRHR 428.

249 Van Zyl & Van der Vyver Inleiding 411 fn 15.
die ouer om op ‘n bepaalde wyse oor sekere persoonlikheidsaspekte van sy kind te beskik, en wel op ‘n wyse wat vir hom behoeftebevredigend is. Tentatief is ons van mening dat in hierdie gevalle bepaalde persoonlikheidsaspekte van die kind vir sy ouer juridies geobjektiveer word, maar nie op so ‘n wyse dat die kind, soos ‘n skuldenaar, teenoor sy ouer moet ‘presteer’ nie.”

Labuschagne\textsuperscript{250} also argues that the right of access of the unmarried father (he calls it a \textit{omgangsreg}) is a personality right that has aspects of the child’s personality as object. These aspects mainly include the development of the child’s personality and values. He rejects the view of Dooyeweerd that economic value is a requirement for all legal objects, and that aspects of another human being’s personality cannot be recognised as legal object.\textsuperscript{251}

Scott indicates that the concepts “parental authority” (\textit{ouerlike gesag}) and “rights flowing from parental authority” (\textit{ouerlike gesagsregte}) should be clearly distinguished.\textsuperscript{252} According to Scott, parental authority refers to the relationship between parent and child, and encompasses all the rights and duties that exist between parent and child, as well as parental competences. The concept “parental authority” not only includes rights flowing from parental authority, but also the duties of the parent, the rights and duties of the minor, and the competences of the parent (such as guardianship and custody). He adds:\textsuperscript{253}

“Indien die vraag ... eintlik is of ouerlike gesag ‘n subjektiewe reg van die ouer ten opsigte van sy minderjarige kind omvat, moet ‘n mens hierdie reg identifiseer en hierdie reg ook onderskei van die pligte van die ouer en die reg van die minderjarige wat ander subjektiewe regte mag behels en betrek.”

Scott thus argues that the duty to care for the child (\textit{versorgingsplig}) of the parent is not

\begin{footnotesize}
\begin{enumerate}
\item Labuschagne 1993 \textit{THRHR} 429.
\item Labuschagne 1990 \textit{THRHR} 560-561.
\item Scott 1977 \textit{TSAR} 169 \textit{et seq.}
\item Scott 1977 \textit{TSAR} 171-172.
\end{enumerate}
\end{footnotesize}
a right flowing from parental authority, but a subjective right of the child, namely his or her right to maintenance, which is a personal right. The parent is compelled to deliver performance, namely maintenance. Furthermore, one of the rights flowing from parental authority is the right of chastisement of the parent, with the duty of obedience of the child as reverse side. This right awards the parent the power to rear the child mentally, morally, socially and religiously. This right of the parent can, according to Scott, possibly be seen as the subjective right of the parent to the mental, moral and religious upbringing of the child, which is brought about when the parent exercises his or her right of chastisement. This right will only be protected if it is exercised in a reasonable manner, and the court as upper guardian of minors will interfere if the parents exercise their rights to the detriment of the child.\textsuperscript{254}

Scott is of the opinion that the rights flowing from parental authority can possibly be classified as personality rights, since the objects of these rights are aspects of the minor child’s personality “wat in ‘n mindere of meerdere mate die persoonlikheid van die ouer self verteenwoordig”. He regards the social, moral, mental and religious upbringing of a child as part of the personality aspects of the parent.\textsuperscript{255}

The abovementioned arguments firstly lose sight of the fact that the rights flowing from parental authority (\textit{ouerlike gesagsregte}) are not subjective rights, but competences derived from the objective law. Dooyeweerd pointed out that “... [H]et vaderlijk gezag, de bevoegdheid private rechtshandelingen te verrichten enz. zijn principieel \textit{competentiebevoegdheden, maar geen subjectieve rechten}. Zijn hebben geen rechtsobject.”\textsuperscript{256}

\textsuperscript{254} Scott 1977 \textit{TSAR} 172.

\textsuperscript{255} Scott 1977 \textit{TSAR} 173.

\textsuperscript{256} Dooyeweerd \textit{Wetsidee} 333-334. Also see Sonnekus 1977 \textit{TSAR} 83; Sonnekus & Van Westing 1992 \textit{TSAR} 242-243; Van der Vyver & Joubert \textit{Persone- en familiereg} 592.
A second point of criticism is that the abovementioned authors all come to the conclusion that the personality aspects of another person (the child) can be the object of a personality right of the parent. Scott attempts to evade this conclusion by arguing that the personality aspects of the child represent the personality of the parent. This conclusion is unconvincing. Scott possibly succeeded in identifying the personality interests of the child that are worthy of protection, but not those of the parent. Personality rights have a very personal interest of the subject as object. The interests are so closely related to the legal subject that they originate at birth and come to an end at death. A personality interest of the child can thus not be the object of the parent’s personality right.

7.3.3.2 The parent’s personality right to feelings of dignity, security in the family and piety towards the child

Sonnekus acknowledges the view that the rights flowing from parental authority are not subjective rights, but competences derived from the objective law. However, he argues that contempt for parental authority infringes a parent’s personality right to his or her feelings of security in the family. According to Sonnekus, the protected interest is not the authority of the parent, but his or her feelings towards his or her authority and/or family.

257 Also see ch 3 par 7.4 below, where the explanation of the legal nature of parental authority with reference to subjective rights is criticised in general.

258 Scott 1977 TSAR 173.

259 as pointed out by Labuschagne 1993 THRHR 428.

260 Joubert Grondsdae 123-136. Also see Sonnekus 1978 TSAR 77.

261 Sonnekus 1977 TSAR 83.

262 Sonnekus 1977 TSAR 86; 1978 TSAR 78.
Sonnekus bases his argument on the interests approach of Roscoe Pound.\(^{263}\) Pound recognises the interests that relate to domestic relations. According to Pound’s interests approach, the personality interests of the parents become relevant when the law creates norms to protect the integrity of the family relationship.\(^{264}\) As far as the interests of parents are concerned, Pound distinguishes the interests of parents in their children that are protected against third parties, from the interests of the parents in regard to the children themselves (eg the duty of support). The first-mentioned encompasses the following:

- The interests of parents in the society\(^{265}\) and custody and control of their children.
- The interests of parents in the chastity of a female child, which is closely connected to the honour of the family and the self-respect and mental comfort of the parent.
- The interests of parents in the services of their children.

Sonnekus also refers to Pollak,\(^{266}\) who argues that the first and third claims are indeed recognised as interests that are worthy of protection in South African law. He attributes the less clear protection of the first claim to the fact that it is in essence a personality interest, whereas the third claim is a claim of substance (ie a patrimonial interest), which is more easily secured through rules of law and judicial machinery. The second claim is not protected in our law, since Roman-Dutch law allowed an action for seduction only at the

\(^{263}\) Pound *Jurisprudence* 68-85. Also see Sonnekus 1977 *TSAR* 85-86.

\(^{264}\) Sonnekus 1978 *TSAR* 77.

\(^{265}\) This is comparable with the spouses’ interest in the *consortium* of the marriage. Just as spousal *consortium*, parental/filial *consortium* could be seen to comprise elements of a material and non-material nature: the former would include the right of support, the latter the right to comfort and society. Just as spousal *consortium* is protected against interference by third parties (in cases of adultery and enticement), compensation could be sought for loss of parental/filial *consortium* in cases of interference by third parties (Church & Parmanand 1987 *CILSA* 236).

\(^{266}\) Pollak 1930 *SALJ* 253-255. Also see Sonnekus 1977 *TSAR* 86.
instance of the seduced woman and not at the instance of her parents.

However, Sonnekus argues that since the second claim clearly also affects the parent’s personality interests, namely his or her dignity, the above-mentioned interests of parents in respect of their children are all personality interests.\(^\text{267}\)

Sonnekus indicates that, analogous to the protection of a spouse’s feeling of security in marriage in our law, the parent’s personality right to his or her feelings of security in the family should be recognised and protected.\(^\text{268}\) As a matter of fact, he is of the opinion that the decision of Steyn J in *Gordon v Barnard supra* confirms the recognition and protection of this right in our law.\(^\text{269}\) The content and extent of this right will depend on the factual circumstances of each case. Where the minor is close to majority, lives on his or her own and acts independently, the parent’s personality rights in respect of his or her child will be of limited extent. The personality rights of the parents are limited by the interest of the child to act independently in the social sphere. This, in turn, is no absolute interest, but is limited by the child’s limited powers of judgment.\(^\text{270}\)

Neethling also argues that in the case of interference with parental authority, the parent’s feelings of dignity are at stake. He adds that other feelings of the parent, more specifically feelings of piety towards the child, can also be relevant here.\(^\text{271}\)

Although it is not wrong to identify the actions of third parties that interfere with the parent-

\(^{267}\) Sonnekus 1977 *TSAR* 86.

\(^{268}\) *Ibid*.

\(^{269}\) Sonnekus 1978 *TSAR* 78.

\(^{270}\) Sonnekus 1977 *TSAR* 86-87; 1978 *TSAR* 78-79.

\(^{271}\) Neethling *Persoonlikeidsreg* 235-236. Joubert *Grondslae* 86-97 (par (c)) also recognises the possibility that feelings of dignity as personality right can include feelings of dignity in the family.
child relationship as an infringement of the parent’s personality rights in his or her own personality (feelings of dignity and piety), this approach is in my view inadequate to explain the nature of the parent-child relationship \textit{inter se}.\footnote{272}

\section*{7.4 A few comments on the attempts to explain the legal nature of parental authority with reference to the doctrine of subjective rights}

The legal nature of parental authority cannot be sufficiently explained solely with reference to the doctrine of subjective rights. Parental authority as it exists in South African law, is not based on the absolute control of the \textit{patria potestas} of Roman law, but on the \textit{mundium} concept of German customary law. In German customary law, children who were not capable of protecting themselves and their communities with arms, were regarded as \textit{pars domus} of their father. The physical helplessness of the child was therefore the reason for the establishment of the \textit{mundium} in German law, and thus parental authority had to be exercised for the benefit of the child and not the father.\footnote{273}

For this reason parental authority in South African law should be seen as a measure that exists for the protection of the child. This measure of protection should be exercised in the interests of the protected person, namely the child. To enable the parent to exercise his or her authority and meet his or her obligation to protect the child, the parent has certain competences and is entitled to exercise certain rights, and has certain duties. It is important to keep in mind that these competences, rights and duties flow from the parent’s obligation to protect the child and act in his or her best interests.

I think that Hiemstra J lost sight of this fact in \textit{Coetzee v Meintjies},\footnote{274} when he held that

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\footnote{272}{See ch 3 par 7.4 below.}

\footnote{273}{Studiosus 1946 \textit{THRHR} 33-34, 36; Wessels \textit{History} 417, 421. Also see ch 2 par 3 & 5 above.}

\footnote{274}{1976 1 SA 257 (T).}
where the parent diminished the extent of his or her authority (e.g., by allowing the child to go to university), there could be no question of interference with parental authority by third parties. Hiemstra J thus held that the parent relinquished his or her authority to decide with whom the child may associate, and he or she thus loses the capacity to act against third parties interfering with parental authority.\textsuperscript{275} This decision creates the impression that it is only the parent’s decision whether he or she wishes to exercise the competences and rights flowing from parental authority or not, that determines whether these rights exist. The interests of the child are not taken into account.

A more acceptable point of view can be found in \textit{Gordon v Barnard supra}, where Steyn J accepted, with reference to \textit{Hewer v Bryant}\textsuperscript{276} that the right of a parent to exercise custody and control over a child “is a dwindling right which the Courts will hesitate to enforce against the child the older he is. It starts with a right of control and ends with little more than advice”.\textsuperscript{277} If the age and maturity of the child, as opposed to the decision of the parent, is accepted as the point of departure, the interests of the child are taken into account. As the child matures, the demands created by the interests of the child diminish until the child reaches such a state of maturity that it is no longer necessary to require, in the interests of the child, that his or her parent decide with whom the child may associate.

Cockrell\textsuperscript{278} adds a constitutional perspective to this argument. He argues that a child is the bearer of a constitutional right to privacy, and that where the child has sufficient emotional and intellectual maturity to make rational choices about his or her intimate friends, any

\textsuperscript{275} At 262F.

\textsuperscript{276} [1969] 3 All ER 578 (CA).

\textsuperscript{277} \textit{Gordon v Barnard} 1977 1 SA 887 (C) at 889H. Also see \textit{Meyer v Van Niekerk} 1976 1 SA 252 (T): “Die verstandelike en sedelike opvoeding van ’n kind … is duidelik iets wat progressief verminder in verhouding met die rypwording van die kind totdat dit, in geval van verstandelik normale en nie-afwykende kinders, verval tot blote wyse raad en advies, wat selfs afgewys mag word in die laaste jare van onmondigheid” (257A).

\textsuperscript{278} Cockrell \textit{Bill of Rights} par 3E31.
attempt by the parent to second-guess that choice should be held to amount to an unjustified violation of the child’s rights.

Authors who attempt to explain parental authority solely with reference to the subjective rights of the parent, can easily lose sight of the fact that these rights flow from an obligation to protect the child and act in his or her best interests. Subjective rights exist primarily in the interests of the legal subject who is the holder of that right. When the competences and rights flowing from parental authority, on the other hand, are exercised, the primary consideration should always be the interests of the child, and not the interests of the parent. This is in accordance with the international trend to shift the emphasis from parental authority to parental responsibility, and from rights to obligations. It is trite law that, since the interests of the child are affected, a parent is not entitled to waive or abandon parental authority as a whole, or any of the incidents thereof. It is thus unacceptable to link the existence or not of parental rights only to the wishes of the parent, and not the interests of the child.

However, from my view that the doctrine of subjective rights is not sufficient to explain the nature of the parent-child relationship, does not follow that the doctrine of subjective rights has no value in the protection of the parent-child relationship against interference by third parties. As a matter of fact, as Neethling correctly points out, it is not wrong to identify the actions of third parties that interfere with the parent-child relationship as an infringement of the parent’s personality rights in his or her own personality (feelings of dignity and piety). This approach is entirely compatible with the South African approach to the protection of the personality rights of parents, and the theoretical basis on which it rests. However, in my view this approach is inadequate to explain the nature of the parent-

279 See ch 3 fn 19 above. For the position in Scotland, see ch 7 par 2 below. For the position in terms of the envisaged new children’s statute in South Africa, see ch 3 par 4.1 above.

280 Spiro Parent and child 43-45. Also see Scott 1977 TSAR 175.

281 See ch 3 par 7.3.3.2 above.
child relationship _inter se_.

I cannot accept the view of Van der Vyver and Joubert\(^{282}\) that parental authority gives rise to subjective rights for the parent in aspects of the child’s personality, or the view of Scott\(^{283}\) that the “right of chastisement” awards the parent the power to rear the child mentally, morally, socially and religiously. Scott adds that this right of the parent is a subjective right of the parent to the mental, moral and religious upbringing of the child, which is brought about when the parent exercises his or her right of chastisement. It is difficult to understand how one can argue that the power to rear the child is brought about only when the parent exercises his or her right of chastisement (which is understood as punishment, usually corporal punishment). Neither the power to rear the child nor the right of chastisement can be seen as subjective rights of the parent. It is attempts to equate competences with subjective rights that lead to this type of artificial argument.

Furthermore, Scott\(^{284}\) equates the duty to care for the child (_versorgingsplig_) of the parent with the child’s right to maintenance (which is a subjective (personal) right). It is true that the parent’s duty to support the child is the reverse side of the child’s subjective right to performance (personal right), the performance being the payment of maintenance.\(^{285}\) This subjective right can stem from the parent-child relationship, or from other sources (like marriage or contract). However, the parent’s duty to care for the child (_versorgingsplig_) is in my view much wider than the duty to support the child. It is in my view incorrect to equate these two concepts, or even to confuse the duty to support the child with parental authority.

In summary: some of the rights that are based on or flow from the parent-child relationship,
although not necessary part of parental authority, can be subjective rights of the parent or child, and enjoy the normal protection afforded such rights against third parties. Examples are the child’s personal right to maintenance, and the parent’s personality right to feelings of dignity and piety towards the child. However, due to the special relationship between parent and child, parental authority is a complex of competences, rights and duties. The nature of this complex cannot sufficiently be explained solely with reference to the doctrine of subjective rights.

7.5 The legal nature of parental authority: conclusion

Due to the special relationship between parent and child, parental authority is a unique legal concept. Since parental authority in South African law is based on the *mundium* concept of German customary law, it exists for the protection of the child. This measure of protection should be exercised in the interests of the protected person, namely the child. To enable the parent to exercise his or her authority and meet his or her obligation, the parent is, in terms of the norms of the objective law, entitled to certain competences and rights, and has certain duties. It is important to keep in mind that these rights flow from the parent’s obligation to protect the child and act in his or her best interests. Spiro’s statement that parental authority creates a *vinculum iuris* comprising of rights and duties for both parent and child, should be understood against this background.

The legal nature of parental authority can thus best be described as a complex of certain competences, rights and duties derived from the norms of the objective law. This complex exists for the protection of the child, and vests the parent with certain rights to enable the parent to fulfil his or her obligation to protect the child and to act in his or her best interests. Parental authority can be protected against interference by third parties by means of delictual remedies.

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286 See, in general, Kruger 2003 *THRHR* 277.
8 SUMMATIVE CONCLUSIONS

In this chapter I discussed the content and legal nature of parental authority. From this discussion, it is clear that parental authority in South African law should be seen as a measure that exists for the protection of the child. To enable the parent to exercise his or her authority and meet his or her obligation to protect the child, the parent has certain competences and is entitled to exercise certain rights, and has certain duties. It is important to keep in mind that these competences, rights and duties flow from the parent’s obligation to protect the child and act in his or her best interests.\(^\text{287}\)

Various protective measures exist to ensure that parental authority is exercised in the interests of the child. First, parental authority is protected against interference by third parties by means of delictual remedies.

Secondly, parental authority is protected against interference by a person holding responsibilities in respect of a child by means of the provision in the draft Children’s Bill in terms of which a co-holder of parental responsibilities and rights in respect of a child can, in certain circumstances, apply for an order suspending or terminating (or extending or circumscribing) any or all of the parental responsibilities and rights which a specific person has in respect of a child.\(^\text{288}\)

Thirdly, one of the statutory provisions in terms of which the court (in this case, the children’s court) can interfere with parental authority, is the Child Care Act. Where the children’s court removes a child in need of care from the parental home in terms of the Child Care Act, the parent is temporarily deprived of his or her custody of the child, but

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\(^{287}\) See ch 3 par 7.4 above.

\(^{288}\) Draft Children’s Bill clause 39. Social Development’s draft Children’s Bill contains a similar provision in clause 27, although factor (3) was added. Also see ch 3 par 6 above & ch 4 par 3.8 below.
retains his or her rights of access to, and guardianship over the child. Removal of a child from the parental home by the children’s court can thus be regarded as a termination of only some of the aspects of parental authority by means of a court order.

The second and third measures referred to above are examples of the so-called state intervention measures, that is protective measures which, by means of judicial interference with parental authority, ensure that parental authority is exercised in the interests of the child. In the next chapter (chapter 4) I explore judicial interference in general (ie by means of the common-law jurisdiction of the High Court as upper guardian of minors, and by means of specific statutory procedures). In chapter 5 I investigate judicial interference with parental authority in terms of one of these specific statutory procedures, namely the Child Care Act.

289 Child Care Act s 53. See, in general, ch 5 par 2 below.