Chapter 4

Judicial interference with parental authority in South African law

1 INTRODUCTION

This chapter consists of an overview of judicial interference with parental authority. In South Africa, the only form of state intervention into parental authority, is judicial interference with parental authority. In addition to the High Court's common-law power as upper guardian of minors to interfere with parental authority in certain circumstances, there are various statutory enactments in terms of which the courts can interfere with parental authority and even terminate it.

Judicial interference with parental authority can take various forms:

- The High Court in its capacity as upper guardian of all minors may deprive a parent of all the aspects of parental authority (ie of the whole parental authority).[1] The Divorce Act 70 of 1979[2] empowers the High Court to do so in cases of divorce, and the Matrimonial Affairs Act 37 of 1953[3] empowers the High Court do so in cases where the child's parents are divorced, or in cases where they are *de facto* living apart without the benefit of divorce or judicial separation. However, this authority of the High Court can also be exercised in circumstances other than those mentioned above, in terms of the High Court's common-law authority as upper guardian of all minors to interfere with parental authority. An example that comes to mind is where

1 Spiro *Parent and child* 265.

2 S 6(3). Also see ch 4 par 3.3 below.

3 S 5(1). Also see ch 4 par 3.1 below.

the court returns a baby who had been "mixed up" at birth to its biological parents.[4]

- The High Court as upper guardian of all minors may deprive a parent of only one aspect of parental authority (ie guardianship or access).[5] This is also possible in terms of the Divorce Act (in cases of divorce), in terms of the Matrimonial Affairs Act (in cases where the child's parents are divorced, or are living apart without the benefit of divorce or judicial separation), and in other cases in terms of the common-law authority of the High Court as upper guardian of all minors.

  Moreover, where the children's court removes a child in need of care from the parental home in terms of the Child Care Act 74 of 1983, 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.[6]

- The High Court as upper guardian of minors has the authority to regulate the incidents of parental authority (eg access), which has the effect of interfering with the custodial rights of the custodian parent.[7]

- The High Court has the authority, in certain circumstances, to interfere with specific decisions of the parent of a child (which decisions the parent is entitled to make in terms of either his or her guardianship[8] or custody[9] of the child), to overrule the parent's decision, and to substitute the parent's decision with an appropriate order.

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4 *Petersen v Kruger* 1975 4 SA 171 (C). Also see ch 4 par 2 below.

5 Spiro *Parent and child* 265.

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

7 See, in general, ch 3 par 4.3.4 above.

8 See, in general, ch 3 par 4.2 above.

9 See, in general, ch 3 par 4.3 above.

Examples of interference with decisions made by the parent in terms of his or her guardianship are the following: First of all, the High Court can overrule the parent's decision not to submit his or her child to blood tests in order to determine the child's paternity, and compel the parent to submit the child to blood tests.[10] Another example is when the High Court overrules the parent's decision not to consent to the marriage of the child.[11] A last example is when the High Court or the Master of the High Court authorises the alienation or mortgage of the child's immovable property in terms of the Administration of Estates Act 66 of 1965.[12] A last example is when the High Court overrules the parent's refusal to consent to a blood transfusion on their child on religious grounds.[13]

An example of interference with a decision made by a parent in terms of his or her custody is the case where the High Court overrules the parent's decision that his or her child may not have contact with a certain third party.[14]

Irrespective of which form the interference with parental authority takes, the criterion is always the best interests of the child.[15]

2 THE COMMON-LAW AUTHORITY OF THE HIGH COURT AS UPPER GUARDIAN OF MINORS

10 See ch 4 par 2.3 below.

11 See ch 4 par 3.2 below.

12 See ch 4 par 3.4 below.

13 *Hay v B* 2003 3 SA 492 (W).

14 See ch 3 par 7.3.2 above.

15 S 28(2) of the Constitution. Also see Cronjé & Heaton *Family* 216.

2.1 Historic origin

As indicated above[16] the authority of the High Court as upper guardian of minors originated in Germanic law, specifically in the Frankish empire (fifth to ninth centuries AD). Initially the *princeps* was the upper guardian of all minors. Later the courts exercised a right of control over minors (known as *obervormundchaft*), and was recognised as upper guardian of minors. This Frankish practice was received in Holland (where the Court of Holland assumed the function) and the rest of the Netherlands in the middle ages.[17] In South Africa, it was received as part of the Roman-Dutch law.

2.2 Guidelines for interference with parental authority by the High Court

In *Calitz v Calitz*[18] the Appellate Division (now known as the Supreme Court of Appeal) decided that, in cases where no divorce or judicial separation had been granted, it could deprive a father of the custody of his child (and award it to the child's mother) only on special grounds. These special grounds include *inter alia* danger to the child's life, health or morals.[19]

Calitz is regarded as the *locus classicus* on the circumstances in which the High Court is entitled to interfere with parental authority in any case. In spite of the Appellate Division's express decision in a later case[20] that the rule formulated in *Calitz* should be limited to cases where the spouses are married and the wife deserted her husband (as happened in the *Calitz* case), the rule was later applied in cases where the child had only one parent

16 See ch 2 par 3.6 above.

17 Huebner *History* 659; Van Apeldoorn 1938 *THRHR* 180; Van Heerden *et al* (eds) *Boberg* 500 fn 7; Wessels *History* 423-424. See further Labuschagne 1992 *TSAR* 353.

18 1939 AD 56.

19 At 63.

20 *Bam v Bhabha* 1947 4 SA 798 (A) at 806. Also see Spiro *Parent and child* 259.

and the court had to decide on awarding custody of the child to a third person.[21]

Although it can be argued that the phrase "which include *inter alia*" in the rule in *Calitz* (ie that the court was only entitled to interfere with parental authority on special grounds, which include *inter alia* danger to the child's life, health or morals) implied that these special grounds were not limited to cases where there was danger to the child's life, health or morals, the court later took pains in qualifying the rule in *Calitz*. It was decided in a number of cases (discussed below) that interference with parental authority was only justified on special grounds, but that these special grounds were not limited to cases where there was danger to the child's life, health or morals. The grounds mentioned in *Calitz* are thus only examples of such special grounds, and each case should be judged on its own merits.

In *Short v Naisby*[22] the applicant was the grandmother of two children. The children were born from a marriage between the applicant's son and the respondent. When the applicant's son and the respondent were divorced, custody of the children was awarded to their father (the applicant's son). However, he had in the meantime committed suicide, resulting in the respondent (who had remarried) becoming entitled to custody. The court held that it had no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its authority as upper guardian of all minors, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but these are not the only grounds on which the court will interfere. Each case should be considered on its own merits, the paramount consideration being the best interests of the child.[23]

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21 *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW) at 120H; *Short v Naisby* 1955 3 SA 572 (D) at 575B-C.

22 1955 3 SA 572 (D).

23 At 575A-C.

In *Horsford v De Jager*[24] the applicant had obtained a divorce from her former husband on the ground of his adultery, and had been awarded custody of the children. The children had been living with their aunt and uncle since the divorce (for 5½ years). The children's mother then applied for an order that the children be returned to her. The court held that he could not deprive the applicant of her custody, except on special grounds. While special grounds include danger to the child's life, health or morals, they are not the only grounds on which the court will interfere. Finding that it would be in the interests of the children to be returned to their mother, and granting the application, the court held as follows:[25]

> "In the present case the question which, it seems to me, I must ask myself, is whether the interests of the children demand that I should vary the order of the Court in the applicant's favour, deprive her of the custody of the children and leave them where they are. That, in my opinion, would amount to good cause or special grounds."

In *September v Karriem*[26] the plaintiff claimed the return of her minor illegitimate child from the defendant. She alleged that the defendant was wrongfully, unlawfully and against her will detaining the child. In her plea, the defendant admitted the detention and refusal to restore, but pleaded that the plaintiff should not be allowed to exercise guardianship and custody over the child, as she is not a fit and proper person to exercise such guardianship and custody, and it is not in the interests of the child to be removed from the defendant's home and returned to the plaintiff. The plaintiff took exception to this plea, alleging that it disclosed no defence or cause of action. The plaintiff claimed that she is the child's mother, natural guardian and lawful custodian, and the court has to power to deprive her of such guardianship and custody.

Quoting with approval from *Short v Naisby*, the court held that the grounds stated in the

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[24] 1959 2 SA 152 (N).

[25] At 154C-D.

[26] 1959 3 SA 687 (C).

Calitz case were not exhaustive. The court held as follows:[27]

> "If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the child demand such interference, it should be at large to act in the manner best fitted to further such interests. This may mean that the child should be taken from the custody and control of one or other or both parents and be given to a stranger. ... It seems to me that the Court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. ... All these are matters of the greatest relevance which will assist the trial Court in its determination of what is in the best interests of the child."

In *Petersen v Kruger*[28] two babies had been "mixed up" shortly after birth. The mistake came to light about a year later and was confirmed by means of blood tests on the applicants, the respondents and both children. The applicants wanted their own son (Dawid) restored to them, although they were willing to keep and bring up the respondents' son (Monray) as well as their own if the respondents did not want Monray restored to them. When the respondents refused to part with Dawid, the applicants applied for an order obliging the respondents to restore the child (who was then two years old). Finding that it would not be detrimental to Dawid's physical, moral or psychological welfare if he were handed over to his natural parents, the court granted the application. Van Winsen AJP stated the following:[29]

> "Die omstandighede waaronder 'n Hof hom geroepe sou voel om met die ouerlike reg van beheer en toesig in te meng bestaan waar die uitoefening van sodanige regte die lewe, gesondheid of sedes van die kind in gevaar kon stel. ... Uit latere gewysdes ... blyk dat die gesag van die Hof om met die ouers se regte ten opsigte van hul kind in te meng nie beperk is tot die genoemde drie gronde nie; enige grond wat op die welsyn van die kind betrekking het kan as rede vir die Hof se inmenging dien."

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27 At 689 A, E-H.

28 1975 4 SA 171 (C).

29 At 174A-B.

Whether the test in *Calitz* needed qualifying or not, the aforementioned decisions should be welcomed. The courts made it very clear that special grounds are present when the interests of the child demand the interference.[30] In so doing they shifted the emphasis from "special grounds" and "danger to the child's life, health or morals" to the interests of the child as paramount consideration.

2.3 Examples of interference with parental authority by the High Court as upper guardian of minors

The High Court as the upper guardian of all minors will interfere with the exercise of any of the incidents of parental authority if the interests of the child so require.[31] The statutory authorities have virtually superseded the common-law ones, particularly as regards legitimate children.[32] However, it should be kept in mind that the inherent common-law authority of the High Court as upper guardian of all minors form the historical background to its present statutory authorities in relation to children. Moreover, there are still areas in which this common-law authority forms the sole basis for intervention by the court.[33]

The High Court as upper guardian of minors may *inter alia* make the following orders in terms of its common-law jurisdiction:[34]

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30 *Horsford v De Jager* 1959 2 SA 152 (N) at 154C-D; *September v Karriem* 1959 3 SA 687 (C) at 689H; *Ex parte van Dam* 1973 2 SA 182 (W) at 185D; *Petersen v Kruger* 1975 4 SA 171 (C) at 174B; *Coetzee v Singh* 1996 3 SA 153 (D) at 154B-H.

31 Bosman & Van Zyl in Robinson (ed) *et al Children* 56-57; Cronjé & Heaton *Family* 215; Schäfer *Family* par E 41; Van der Vyver & Joubert *Persone- en familiereg* 620-623; Van Heerden *et al* (eds) *Boberg* 500-501; Visser & Potgieter *Introduction* 212. Also see Kruger 1994 *THRHR* 304.

32 Cronjé & Heaton *Family* 216; Lee & Honoré *Family* par 154 fn 2; Spiro *Parent and child* 259; Van Heerden *et al* (eds) *Boberg* 499.

33 Van Heerden *et al* (eds) *Boberg* 500.

34 See, in general, Kruger 1994 *THRHR* 306 *et seq*.

- At common law, the High Court has the authority to deprive the natural guardian of a child of his or her guardianship, and to award guardianship to any other person. The High Court may thus deprive the father of a legitimate child of his guardianship, and award sole guardianship to the child's mother.[35]

- The High Court as upper guardian also has the authority to appoint a guardian for a child that has no guardian.[36]

- The High Court has the authority to award joint guardianship of an extra-marital child to the child's mother and a third person (eg the mother's employer).[37]

- The High Court has the authority to deprive one or both of a child's parents of custody of the child, and award custody to any third person.[38] An order like this will only be granted in exceptional circumstances.[39]

The High Court naturally also has the authority to deprive a parent of custody of a

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35 *Ex parte Powrie* 1963 1 SA 299 (W) at 303A-B. Before the coming into operation of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, the court could in terms of its common-law authority deprive the mother of an extra-marital child of her guardianship, and award guardianship to the child's father (*Ex parte van Dam* 1973 2 SA 182 (W) at 184H-185B).

36 *Wehmeyer v Nel* 1976 4 SA 966 (W) at 969D.

37 *Ex parte Kedar* 1993 1 SA 242 (W). In this case the rules of the school where the child's mother (a domestic worker) and her employer wanted to enrol the child, required the child's parent or guardian to possess property in the proximity of the school before the child would be admitted to the school. To enable the applicants to enrol the child in the school, joint guardianship was awarded to them.

38 *September v Karriem* 1959 3 SA 687 (C) at 689A; *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 2 SA 699 (T) at 707C-D.

39 *Blume v Van Zyl and Farrell* 1945 CPD at 50; *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW) at 120H; *Short v Naisby* 1955 3 SA 572 (D) at 575B-C; *Horsford v De Jager* 1959 2 SA 152 (N) at 154B-C. An example of exceptional circumstances can be found in *Ex parte Sakota* 1964 3 SA 8 (W), where guardianship and custody of a child whose father was serving a jail sentence after murdering the child's mother, were awarded to the child's uncle.

child in favour of the other parent, but, since this authority is mostly regulated by legislation, it is seldom exercised in terms of common law.[40]

- The High Court may, in its capacity as upper guardian of minors, issue a declaratory order regarding the status of the child, for instance to confirm that the child was born legitimate or illegitimate, or that an adoption order is void due to some or other defect.[41]

- The High Court, in its capacity as upper guardian, can accept the responsibility of assisting minor children in litigation.[42]

- The High Court in its capacity as upper guardian of all minor children, has an inherent common-law jurisdiction to *mero motu* review the so-called "protection orders" granted by a magistrate's court in terms of the Domestic Violence Act 116 of 1998,[43] as such orders directly concern the interests of minor children within its area of jurisdiction.[44] This authority is analogous to the authority of the High Court

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40 The Matrimonial Affairs Act (s 5(1)) regulates this authority in cases where the spouses are divorced, or in cases where they are *de facto* living apart without the benefit of divorce or judicial separation, while the Divorce Act (s 6(3) read with s 1) regulates the court's authority during divorce, or in cases where a divorce action is pending. Also see ch 4 par 3.1 & 3.3 below.

41 *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 2 SA 699 (T). Also see Van der Vyver & Joubert *Persone- en familiereg* 623.

42 This happened in *Vista University, Bloemfontein Campus v Student Representative Council, Vista University* 1998 4 SA 102 (O), where an order was sought interdicting all students enrolled at Vista University's Bloemfontein campus from committing certain acts which interfered with the normal functioning of the university. The court assumed that the majority of the students were minors, resulting in their having limited capacity to litigate. The court, in its capacity as upper guardian, was willing to accept responsibility for assisting all the minors in the litigation. This was done to protect the interests of the innocent students who wanted the normal functions of the university to continue. The court made the order sought.

43 See ch 4 par 3.6 below.

44 *Narodien v Andrews* 2002 3 SA 500 (C) at 506F.

to review orders made by the children's court in terms of the Child Care Act.[45]

- The High Court lastly has the authority, in certain circumstances, to interfere with specific decisions of the parent of a child, to overrule the parent's decision, and to substitute the parent's decision with an appropriate order.[46] In recent years, the High Court was often asked to exercise this authority to interfere with a parent's decision not to subject his or her child to blood tests in order to prove paternity. Some divisions of the High Court have expressed a willingness to compel a parent to subject his or her child to blood tests in spite of the parent's refusal, if the interests of the child require this.[47]

  However, in *S v L*[48] the court doubted whether it could simply overrule the parent's refusal to consent to blood tests. The court added that its authority as upper guardian was not unlimited, but that it was limited to cases where the parent was unable properly to exercise his or her functions. The court further held that it was not entitled, as upper guardian of minors, to interfere with the parent's decision simply because it did not agree with the decision.[49]

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45 At 506G-H. Also see Van Heerden *et al* (eds) *Boberg* 454-457, 644-645; Spiro *Parent and child* 364-366.

46 Van der Vyver & Joubert *Persone- en familiereg* 622. In *Davy v Douglas* 1999 1 SA 1043 (N) an extra-marital child was subsequently adopted by the mother's husband, without the knowledge of the child's natural father. The natural father applied for rescission of the adoption order. He wanted to have the child evaluated by a clinical psychologist appointed by him. The mother and her husband, who had already submitted the child for evaluation by their own clinical psychologist, refused the father's request. The father thereupon approached the High Court for an order compelling the mother and her husband to make the child available for evaluation. The court held that it was in the child's interests also to be evaluated by the father's psychologist and granted the order.

47 *Seetal v Pravitha* 1983 3 SA 827 (D) at 862C-863A, 864A-B; *M v R* 1989 1 SA 416 (O) 420D-421G; *O v O* 1992 4 SA 137 (C) at 139H-I.

48 1992 3 SA 713 (E).

49 At 720I, 721E-J. See further Kruger 1994 *THRHR* 308, 310-311.

In *Hay v B*[50] a paediatrician brought an urgent application for an order authorising her to administer a blood transfusion to a baby whose parents had refused to consent to the blood transfusion on religious grounds. The court stated that the best interests of the child are the most important factor to be considered when balancing or weighing competing rights and interests concerning children. The court further held that the religious beliefs of the baby's parents could not override their baby's right to life. The parents' reasons for withholding consent to medical treatment should not be ignored and should be given proper consideration but in the present case the baby's interests in receiving the blood transfusion outweighed the reasons the parents advanced in opposing the blood transfusion. The court therefore authorised the blood transfusion.

3 STATUTORY AUTHORITY OF THE HIGH COURT

3.1 The Matrimonial Affairs Act 37 of 1953

The Matrimonial Affairs Act[51] provides as follows:

> "... the [High] Court may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of

[50] 2003 3 SA 492 (W).

[51] S 5(1).

> such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent."

It is clear that in terms of the abovementioned provision the High Court may, on application of either parent of a legitimate minor, make any order which it may deem fit in regard to the custody or guardianship of, or access to, the minor. The court may also, in these cases, grant either parent the sole guardianship or sole custody of the minor if in the court's opinion it would be in the interests of the minor to do so.

The legislator's intention with the abovementioned provision is to award the court the discretion to interfere with parental authority

> "... which *Calitz v Calitz, supra*, held it had not got, namely jurisdiction to deprive the father of the custody of his minor child if it be in the interests of the minor to do so, notwithstanding the absence of any legal warrant [ie a divorce or judicial separation] ... for making a separate home".[52]

In is thus clear that the court has this authority in cases where the child's parents are divorced, or in cases where they are *de facto* living apart without the benefit of divorce or judicial separation.[53] In applications like the above the best interests of the child are the decisive consideration.[54]

3.2 The Marriage Act 25 of 1961

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52 *Hassan v Hassan* 1955 4 SA 388 (D) at 393C-E.

53 Spiro *Parent and child* 333, 257*et seq*, 267 *et seq*; Van Heerden *et* al (eds) *Boberg* 511.

54 *Fortune v Fortune* 1955 3 SA 348 (A).

The Marriage Act 25 of 1961[55] authorises the High Court to consent to the marriage of a minor in cases where the parent, guardian or commissioner of child welfare, without adequate reason and contrary to the interests of the minor, refuses to consent to the marriage. The court will not lightly overrule the parent's decision not to consent to the marriage of the minor: serious consideration will be given to the objections of the parents.[56] The two requirements in section 25(4) (without adequate reason and contrary to the interests of the minor) are complementary and should not be considered separately. The court should furthermore consider all the circumstances applicable to each case.[57]

3.3 The Divorce Act 70 of 1979

The Divorce Act[58] provides that a court (ie the High Court or a divorce court) granting a decree of divorce may make any order which it may deem fit in regard to the maintenance, custody or guardianship of, or access to, a minor child of the marriage. The court may, in particular, grant either parent the sole guardianship or sole custody of the minor if it would be in the interests of the child to do so.

The Divorce Act provides as follows:[59]

> "A decree of divorce shall not be granted until the court-
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> (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and

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55 S 25(4).

56 *Allcock v Allcock* 1969 1 SA 427 (N) at 429E-430B; *Kruger v Fourie* 1969 4 SA 469 (O) at 473A-B.

57 *B v B* 1983 1 SA 496 (N) at 501.

58 S 6(3) read with s 1.

59 S 6(1).

(b) if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4 (1)."

The general principle that only the children's best interests should be taken into account when the consequences of divorce, in so far as the children are affected, are being considered, is not expressly stated in the Act. However, this principle is clear from the wording of section 6(1).[60]

3.4 The Administration of Estates Act 66 of 1965

The Administration of Estates Act 66 of 1965[61] places a restriction on the parent's authority to consent to the alienation or mortgage of his or her child's immovable property. This section provides that a parent or guardian may not alienate or mortgage any immovable property belonging to the child without the consent of the High Court or the Master of the High Court.

It further provides that the master may at any time authorise any alienation of immovable property belonging to a minor, if the value of the particular property to be alienated does not exceed the amount determined by the Minister of Justice from time to time by notice in the *Government Gazette*,[62] and the alienation would be in the interest of the minor.[63] The master also has the authority to authorise a mortgage of such immovable property up to the same amount, if the mortgage is necessary to preserve or improve the property, or for the maintenance, education or other benefit of the minor. Where the value of the property

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60 Cronjé & Heaton *Family* 181.

61 S 80.

62 This amount is currently set at R100 000 (GN R2333 GG 15308 of 1 December 1993).

63 S 80(1). Also see Van der Vyver & Joubert *Persone- en familiereg* 613-614 & ch 3, fn 53 above.

exceeds this amount, the consent of the High Court is required.[64]

3.5 The Natural Fathers of Children Born out of Wedlock Act 86 of 1997

Since the High Court has the capacity, in terms of this Act, to award guardianship over or custody of an extra-marital child to the child's father in certain circumstances, which order would interfere with the parental power of the mother of the child, this Act is also an example of a statutory provision in terms of which the court can interfere with parental authority.[65] The proposals of the South African Law Commission in the draft Children's Bill, and their effect on the Natural Fathers of Children Born out of Wedlock Act will be dealt with below.[66]

3.6 The Domestic Violence Act 116 of 1998

Yet another example of a statutory provision in terms of which the magistrate's court or family court can interfere with parental authority is the Domestic Violence Act.[67] This Act provides that a court that issues a protection order against someone may refuse that person contact with a child, or order contact on such conditions as it may consider appropriate, if the court is satisfied that it is in the best interests of the child. If such a person is a child's parent, this protection order will interfere with his or her rights of access to, or custody of the child.

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64 S 80(2).

65 See ch 3 par 4.3.4 above.

66 See ch 4 par 3.8 below.

67 S 7(6) read with s 1.

3.7 The Child Care Act 74 of 1983

This Act contains various provisions which authorise the children's court to interfere with parental authority. First of all, the child removal procedures contained in the Act[68] make provision for the removal of children to places of safety pending an investigation by the children's court. These provisions will be dealt with below.[69]

Secondly, the authority to dispense with parental consent to medical treatment or an operation of his or her child[70] in terms of the Child Care Act,[71] can be regarded as interference with the exercise of parental authority. The Act first of all provides for the substitution of parental consent to an operation or medical treatment in cases where the parent cannot be found, or is unable to give the required consent due to mental illness, or is deceased, or refuses consent. In such cases any medical practitioner who is of the opinion that it is necessary to perform an operation upon the child, or to submit the child to any treatment which may not be given without the consent of the child's parent or guardian, must report the matter to the Minister of Welfare and Population Development. If the Minister of Welfare and Population Development is satisfied that the operation or treatment is necessary, he or she may consent thereto in lieu of the parent.[72] Furthermore,

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68 Ss 11-16.

69 See ch 5 par 2 below.

70 "Child" is defined as any person under the age of 18 years (Child Care Act s 1).

71 S 39.

72 S 39(1). The discussion paper of the South African Law Commission on the review of the Child Care Act issued in 2002 contains the draft Children's Bill (hereinafter referred to as the "draft Children's Bill") proposed by the Commission. 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. They indicated their intention to table it in Parliament during 2003. Except where expressly indicated, the provisions of the Law Commission's draft Children's Bill, and Social Development's draft Children's Bill are similar. The draft Children's Bill proposed by the South African Law Commission provides that if a child has been abandoned, or the parent or primary care-giver of the child refuses to give consent, or is physically or mentally incapable of giving consent, or is deceased or cannot readily be traced, a child and family court may consent to the medical treatment of or surgical operation on the child (clause 135(5) of the draft

the Act provides for consent to an operation or medical treatment on a child by the medical superintendent of a hospital or the medical practitioner acting on his or her behalf. This consent may be given if the superintendent is of the opinion that the operation or medical treatment is necessary to preserve the life of the child or to save the child from serious and lasting physical injury or disability, and that the need for the operation or treatment is so urgent that it ought not to be deferred for the purpose of consulting the parent or guardian.[73]

Lastly, the authority of the children's court to dispose of parental consent to adoption can be regarded as interference with parental authority. The Child Care Act authorises the court to dispense with parental consent to adoption in certain circumstances, for instance where the parent has deserted the child or his or her whereabouts are unknown,[74] or where the parent is withholding his or her consent unreasonably.[75] Heaton indicates that in cases like these the legislator attempts to create a balance between the rights and interests of the parent, and the interests of the child.[76]

3.8 The draft Children's Bill

Children's Bill). Social Development's draft Children's Bill contains a similar provision in clause 129(5), although it provides that a *High Court or children's court* may consent to the treatment or operation. It further requires that the parent's or primary care-giver's consent must have been *unreasonably* withheld.

73 S 39(2). The draft Children's Bill contains a similar provision (clause 135(4)), and Social Development's draft Children's Bill contains a similar provision (clause 129(4)).

74 S 19(b)(ii).

75 S 19(b)(vi). The South African Law Commission has proposed the following provision in clause 266 of the draft Children's Bill: If a parent withholds consent for the adoption of a child, a child and family court may despite the absence of such consent grant the adoption order if the court finds that consent has been withheld unreasonably, and the adoption is in the best interest of the child. In determining whether consent is being withheld unreasonably, the court must take into account all relevant factors, including the nature of the relationship between the child and the person withholding consent during the last two years, and any findings by a court in this respect, and the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future. Social Development's draft Children's Bill contains a similar provision in clause 239, although "child and family court" is replaced by "children's court".

76 Heaton *Adoption* 171.

The discussion paper of the South African Law Commission on the review of the Child Care Act issued in 2002 contains the draft Children's Bill proposed by the Commission. It should be noted that the draft 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.[77] The 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.[78] In terms of the proposals, the following persons have parental responsibilities and rights in respect of a child:

- The mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of that child.[79]

- The biological father of a 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, has full parental responsibilities and rights in relation to that child.[80]

- Certain fathers of extra-marital children automatically obtain parental responsibilities and rights in respect of their 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

77 SA Law Commission *Review*. Also see clause 1 of the draft Children's Bill proposed by the Commission, and clause 1 of Social Development's draft Children's Bill.

78 Draft Children's Bill clause 30; Social Development's draft Children's Bill clause 18.

79 Draft Children's Bill clause 31; Social Development's draft Children's Bill clause 19.

80 Draft Children's Bill clause 32; Social Development's draft Children's Bill clause 20.

which together amount to at least 12 months.[81]

- Fathers who fall 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 child and family court registrar 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.[82]

- 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 an application for such an order the court must consider the following factors:[83]

  "(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; and
  (d) any other fact that should, in the opinion of the court, be taken into account."

The draft 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

81 Draft Children's Bill clause 33; Social Development's draft Children's Bill clause 21.

82 Draft Children's Bill clause 34; Social Development's draft Children's Bill clause 22.

83 Draft Children's Bill clause 35; Social Development's draft Children's Bill clause 23.

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:[84]

> "(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."

Both the Child Care Act and the proposed draft Children's Bill contain provisions relating to child protection, which will be discussed in the next chapter (ch 5).

[84] Draft Children's Bill clause 39; Social Development's draft Children's Bill clause 27. Also see ch 3 par 6.