

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 62

PROJECT 100

**THE GRANTING OF
VISITATION RIGHTS TO GRANDPARENTS OF
MINOR CHILDREN**

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(ii)

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

The Honourable Mr Justice H J O van Heerden (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
Prof C R M Dlamini, SC
Prof D J Joubert
Mr J E Knoll
Mr G G Smit
Mr J A Venter

The Secretary is Mr W Henegan. The Commission's offices are on the 8th Floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA
0001

Telephone: (012) 322-6440

Fax : (012) 320-0936

The project leader responsible for this project is Mr G G Smit.

HIERDIE WERKSTUK IS OOK AFRIKAANS BESKIKBAAR.

PREFACE

This working paper was prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The working paper is being published in full so as to provide persons and bodies wishing to comment or make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made, the Commission will assume that the commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make verbal representations to the Commission should submit a brief summary of his or its proposed representations together with a request to be heard by the Commission, in writing.

It would be appreciated if written comments, representations or requests could reach the Commission by 30 March 1996 at the address appearing on the previous page. Please contact the researcher if you are unable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is Mr W F Schröder. The project leader is Mr G G Smit.

HIERDIE WERKSTUK IS OOK IN AFRIKAANS BESKIKBAAR.

SUMMARY OF RECOMMENDATIONS

The Commission is of the opinion that the present common law position in terms of which parents have the exclusive right to decide to whom and under what circumstances to grant access rights or visitation rights, does not in all cases meet the current needs of society and that adjustment of our law by way of legislation regarding this matter is necessary.

Although this investigation initially dealt only with the visitation rights of grandparents the Commission is of the opinion that this matter should not be limited to that category of persons. There may be special circumstances where someone else, for example an uncle or aunt, godparents or even friends and neighbours, could claim visitation rights with regard to a minor child.

There is also an increase in "extended" families. These are families where one or both of the parties have gone through a divorce and have married again. A stepfather for example may have a special relationship with his stepchild and after the death of the mother or a subsequent divorce the biological father or mother may deny the stepfather access to the child.

Also in the case of adoption there may be circumstances under which it would be in the best interest of the child to grant access rights to a person with whom the child has a special relationship.

The Commission recommends the legislation in the Annexure and although it is in the form of an independent Bill, it should be incorporated in the legislation recommended in the Commission's report on a father's rights in respect of his illegitimate child.

- * If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to court for an order granting him or her access to the child and the court may grant the application on such conditions as the court thinks fit.

(v)

- * Any other person who alleges that there exists between him or her and a minor child any particular family tie or relationship which makes it desirable in the interest of the child that he or she should have access to the child, may, if such access is denied by the person who has parental authority over the child, apply to court for an order granting him or her access to the child and the court may grant such application on such conditions as the court thinks fit.

- * The court shall not grant access to a minor child unless it is satisfied that it is in the best interest of the child.

- * The court may refer any application to the Family Advocate referred to in section 1 of the Mediation in Certain Divorces Matters Act, 1987 (Act No. 24 van 1987), for investigation and recommendation.

- * The provisions of section 4(3) of the Mediation in Certain Divorces Matters Act, 1987 (Act No. 24 van 1987), shall mutatis mutandis apply with regard to proceedings concerning the application by grandparents or other interested persons for access to a minor child as contemplated in this section.

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Petersen en 'n ander v Kruger en 'n ander 1975 4 SA 171 (K)

Rowan v Faifer 1953 2 SA 705 (E)

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Hoge Raad 25 Junie 1993, NJ 1993, 628

CHAPTER 1

ORIGIN OF THIS INVESTIGATION

1.1 As early as 1975 in the case of *Mimkon v Ford*¹ the following was said with regard to the granting of visitation rights to grandparents of minor children:

It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.²

1.2 In December 1990 Mr D M van Onselen, a Durban attorney and chairman of the recently established organisation The Unmarried Fathers' Fight Action, known as "Tuff", submitted to the Commission a substantiated petition for the reform of the law regarding a natural father's rights in respect of his illegitimate child. According to Mr Van Onselen the organisation is of the opinion that the current legal position is both unreasonable and unfair, especially where the father of the illegitimate child pays maintenance for his child, while having only dubious locus standi: in respect of legal proceedings involving the child and no established right of access and custody to such a child.

1.3 Since 1987 the rights of the natural father of an illegitimate child have featured repeatedly in case law. The matter has also been referred to by academics in articles that

1 322 A. 2d 199, 204 (NJ 1975).

2 P S Fernandez Grandparents Access: A Model Statute Yale Law and Policy Review 1988 109.

have appeared in legal journals. The Commission therefore decided to include an investigation into the rights of fathers of illegitimate children in its programme.³ The investigation has been completed and draft legislation has been recommended.

1.4 The Bill confirms the common law position for the most part but seeks to effect legal certainty and to establish guidelines on the basis of which the courts may settle disputes of this nature. It is proposed that a court on application to it by the natural father of a child born out of wedlock may grant the father an order giving him access rights to the child on the conditions the court determines. The court rules on the application in accordance with the best interests of the child. The court takes the following factors into account:

- (a) The relationship between the mother and the natural father;
- (b) the relationship of the child to the mother and the natural father or to either of them or to another person;
- (c) the effect that separating the child from the mother or the natural father or from any other person is likely to have on the child;
- (d) the attitude of the child with regard to the granting of access to the natural father;
- (e) any other fact that in the opinion of the court should be taken into account.

1.5 The Bill makes provision for the court to request the assistance of the Family Advocate.

1.6 Provision is also made for a court on application to it by the natural father of a child born out of wedlock to issue an order granting custody or guardianship of the child to the said father.

3 Project 79 Report on the rights of a father in respect of his illegitimate child, July 1994.

1.7 After the publication of the working paper and report concerning the rights of a father in respect of his illegitimate child the Commission received several telephone and written requests to investigate the granting of access rights (visitation rights) to grandparents of children.

1.8 The working committee of the South African Law Commission at its meeting on 3 and 4 August 1995 considered the representations and an investigation concerning the visitation rights of grandparents was approved as part of the Commission's investigation into the law of persons and the family (project 100).

1.9 As an example of the problem that grandparents have in this regard the following representation by a grandmother is given: Her son and daughter-in-law were divorced eighteen months before her son died in a car accident. The daughter-in-law in the divorce received custody of the minor children and the son was granted guardianship over the children. After the death of the son the grandmother was allowed to see her grandchildren only once. The daughter-in-law then moved and broke all contact with the grandmother. At the inquest into the son's death the daughter-in-law told the grandmother that she would not be allowed to visit the children and that she should not try to make contact by telephone.

1.10 The grandmother contacted several bodies, including FAMSA and Life Line, but without success and she therefore decided to approach the Commission in view of the investigation concerning a father's rights in respect of his illegitimate child.

CHAPTER 2

CURRENT LEGAL POSITION

2.1 This investigation deals with the way in which parents exercise their parental powers over their children and it is therefore important to have a brief look at what is meant by the terms parental powers, custody and guardianship.

PARENTAL POWERS

2.2 Parental authority is the collective term for the legal capacity, rights and obligations that a parent has towards his child, the child's estate and the legal actions of the child.⁴ At the birth of a legitimate child parental powers vest in the mother and the father of the child, while in the case of an illegitimate child these rights vest only in the mother of such child.⁵

2.3 In the case of the adoption of the child the parental powers are transferred to the adoptive parent⁶ and the child is for all purposes deemed to be the legitimate child of the adoptive parent.

2.4 On the death of one parent the parental authority vests in the surviving parent and such parent cannot be deprived of his or her parental authority by the appointment of a testamentary guardian unless a court had previously granted sole guardianship to the deceased

4 J D van der Vyver & D J Joubert **Person- en Familiereg** 1991 3de uitgawe Juta: Johannesburg 592 (hereinafter referred to as **Personereg**).

5 I D Schäfer **Family Law Services** 1988 service edition 20 Section E. Butterworths: Durban (hereinafter referred to as **Family Law**).

6 Section 20(2) of the Child Care Act 74 of 1983.

parent.⁷ A father may, however, appoint someone to act as guardian in conjunction with the mother.⁸

2.5 Section 1(2) of the Guardianship Act⁹ currently states that both parents are competent to exercise any parental powers and duties independently of each other and without consent of the other. If there is a dispute between the parents over the exercise of these rights the Supreme Court as upper guardian of all minors will have to decide on the matter.¹⁰

2.6 Parental authority entails various aspects of control over a child. It includes guardianship, which in turn encompasses control over the child's estate and assistance in legal proceedings. "Custody" refers to control over the person of the child.¹¹ The term "guardianship" may however also be used to indicate what could replace parental control if the child still needs protection after parental control has been terminated for some of other reason.¹²

2.7 Parental powers are terminated by the death of the child, by the death of a parent, by the attainment of majority by the child, by an adoption order or by a court order that terminates those powers.¹³

7 I D Schäfer **Family Law** 18.

8 Section 5(4) of the Matrimonial Affairs Act 37 of 1953.

9 192 of 1993.

10 I D Schäfer **Family Law** 18.

11 P Q R Boberg The Law of Persons and the Family 1985 Juta: Cape Town 459 (hereinafter referred to as Persons).

12 E Spiro **Law of Parent and Child** 4th edition Cape Town: Juta 1985 Juta: Cape Town 42 and 43 (hereinafter referred to as **Law of Parent and Child**).

13 I D Schäfer **Family Law** 26.

2.8 Furthermore it is clear that children are protected against their parents by mechanisms in both common law and statute. The statutory provisions are found in the Divorce Act,¹⁴ the Matrimonial Affairs Act,¹⁵ the Child Care Act,¹⁶ the Prevention of Family Violence Act¹⁷ and the Mediation in Certain Divorce Matters Act.¹⁸ For the purposes of this investigation reference will be made only to the protection of the court as upper guardian of all minors.

COURT AS UPPER GUARDIAN

2.9 In its capacity as upper guardian of all minors the Supreme Court has the common law authority to interfere with the exercising of parental powers if the court is of the opinion that such interference will be in the child's interest.¹⁹

2.10 It is clear that the court will interfere with these parental powers only if the child's interests require that it should be done. From studying the case law²⁰ it is clear that the circumstances under which a court will interfere with the parental rights will mainly be cases where the child's life, health and morals are endangered by the exercise of these powers.

2.11 It is clear from later cases²¹ that the court's power to interfere with the rights of parents is not limited to the above-mentioned three grounds and that any ground that relates to the child's welfare can serve as a reason for the court's interference. In the Petersen-case

14 70 of 1979.

15 37 of 1953.

16 74 of 1983.

17 133 of 1993.

18 24 of 1987.

19 See P Q R Boberg *The Law of Persons and the Family* 1977 Juta Johannesburg 412 (hereinafter referred to as **Persons**).

20 Calitz v Calitz 1939 (A) 56, Van der Westhuizen v Van Wyk & ander 1952 2 SA 119 (GW), Rowan v Faifer 1953 2 SA 705 (E) en Petersen en 'n ander v Kruger en 'n ander 1975 4 SA 171 (K).

21 Petersen en 'n ander v Kruger en 'n ander 1975 4 SA 171 (K).

Mr Justice Van Winsen clearly states:²² "For the Court the interests of the child are paramount, but the rights of the parents should also be taken into account." (Our translation)

2.12 In B v P²³ Mr Justice Kirk-Cohen indeed stressed the fact that a father of an illegitimate child, like any other party, may approach the court for an order to gain access to the child, thereby limiting the mother's custody of the child.²⁴

2.13 In F v B²⁵ Mr Justice Kriek came to the conclusion that the court will not interfere with the parental authority of the mother of an illegitimate child except in exceptional cases.²⁶

2.14 It is also clear that on the death of one of the parents the parental powers vests fully in the other parent unless a court had previously granted "sole guardianship" to the deceased²⁷ in which case the deceased could have appointed a testamentary guardian.²⁸

2.15 That the courts will not lightly interfere with the parental powers is clear from the judgments. In Bam v Bhabha²⁹ the court even decided that a daughter of seven years old who had spent virtually her whole life with her grandparents had to go back to her mother since the court was satisfied that the mother would properly care for the child.

22 At 173.

23 1991 4 SA 113 (T).

24 At 115A.

25 1988 3 SA 948 (D & C).

26 At 950 F-G.

27 P Q R Boberg **Persons** 315.

28 Landmann v Mienie 1944 54 OPD 59.

29 1947 4 SA 798 (A).

2.16 In Horsford v De Jager and Another³⁰ too, young children had lived apart from their mother with their uncle and aunt for a period of five and a half years. It was evident that the children were very happy. The court took cognisance of the fact that the children would undergo a major emotional disturbance due to the fact that they were placed in the care of the mother, but nevertheless granted the mother's application.

2.17 In Petersen en 'n ander v Kruger en 'n ander³¹ Mr Justice Van Winsen came to the conclusion that the courts in these cases have set a guideline for "cases where the advantages, material as well as immaterial, that the child enjoyed at the foster-parent, more or less weighs equal to those the child would be able to enjoy with his natural parents and where they were of the opinion that the transfer would not cause the child permanent pshycological damage."³² (Our translation)

2.18 As far as the exercising of the power of the court as upper guardian is concerned it is clear from the case S v L³³ that the court's powers in this regard are not unlimited. This necessarily means that the court cannot intervene simply because the court is of the opinion that it differs from the decision of the parent.³⁴

2.19 In the exercising of these powers the court may deprive any of the parents of their parental powers and may vest them in the other parent or even in a third party.³⁵

2.20 With regard to the granting of parental powers to third parties Professor I D Schäfer³⁶ comes to the following conclusion:

30 1959 2 SA 152 (N).

31 1975 (4) SA 171 (K).

32 At 176.

33 1992 3 SA 713 (E).

34 I D Schäfer **Family Law** 27.

35 See in this regard Short v Naisby 1955 3 SA 572 (D) and Wehmever v Nel 1976 4 SA 966 (W).

36 **The Law of Access to Children** 1993 Butterworths: Durban 39.

For persons other than the natural guardian or custodian there is no inherent right to access. But if guardianship and custody can be awarded to a person other than the natural guardian and natural custodian then there is no reason why access should not be similarly awarded to any person other than the natural guardian or custodian, provided this is in the best interest of the child. Thus, a stepparent for example, would be able to obtain an order for access to a stepchild; also a relative or even a concerned neighbour or benefactor.

2.21 From this opinion it is clear that a grandparent could apply to court for such an order. The question arises whether the same result that has been found in cases of access rights to fathers of illegitimate children would not again arise. Different courts could, due to uncertainty, give different judgments and could again leave this matter in uncertainty.

CHAPTER 3**COMPARATIVE STUDY**

3.1 Although it is certain that the South African Law has a Romanisch and Germanic link with the Continental systems, it is evident from available literature that the granting of visitation rights to grandparents has been accepted in American law for quite some time.

The United States of America

3.2 In accordance with American common law grandparents had no visitation rights with regard to their grandchildren and only a moral obligation forced parents to allow grandparents visitation rights.³⁷ According to A M Moody it was in response to the high divorce rate that grandparents were increasingly granted visitation rights.³⁸

3.3 Currently all fifty states have statutes that give grandparents a remedy should they be denied access to their grandchildren.³⁹ The statutes can be divided into three main categories, namely.⁴⁰

- (i) Legislation providing limited rights to grandparents on the prerequisite that either the death of one parent, divorce or stepparent adoption has taken place or is pending.
- (ii) Legislation providing for reasonable visitation rights to grandparents without the additional condition of a pending or threatening divorce.

37 AM Moody Constitutional Questions regarding Grandparent Visitation and Due Process Standards *Missouri Law Review* vol 60 1995 206.

38 *Missouri Law Review* 207.

39 PS Fernandez *Yale Law and Policy Review* Grandparents Access: A Model Statute 1988 109-136.

40 R S Victor *Trial* Grandparents and Stepparent rights - assuring visitation to the child's extended family January 1989 vol 25 55-57.

- (iii) Legislation providing for liberal visitation rights to grandparents and other persons who have had a significant relationship with the child, which is deemed to be in the best interest of the child.

3.4 Although legislation exists in the different states the courts themselves have plunged this matter into further uncertainty. There seems to be no consensus in the various jurisdictions on the circumstances under which third-party visitation may be granted.⁴¹ A number of courts have denied grandparents' petitions due to lack of what is called statutory authority.⁴² These courts reinforced their decisions by referring to parents' constitutional rights in child-rearing and caring. Two courts have gone so far as to have denied grandparents' petitions on constitutional grounds, under circumstances that would have been permitted by statute. Furthermore two courts have found that the state's "parents patriae power", i.e. the state's responsibility to look at the welfare and wellbeing of children, is more important and superseded the parents' rights.⁴³

3.5 Where originally the statutes attempted to maintain an already existing relationship between grandparent and grandchild upon divorce or death of one of the child's parents, there is now a trend to grant visitation rights to intact families that have not been influenced by death or divorce and even to allow the creation of a relationship between the grandparent and grandchild.⁴⁴

3.6 Statutes also allow visitation rights by any person regardless of whether there is a biological relationship between the persons.⁴⁵

41 S V Schoonmaker III, W H Narwold, R Hatch, K Goldthwaite Constitutional Issues Raised by Third-Party Access to Children *Family Law Quarterly* vol xxv Spring 1991 95 et seq.

42 *Family Law Quarterly* 1991 107-108.

43 *Family Law Quarterly* 1991 108.

44 *Missouri Law Review* 1995 207.

45 *Missouri Law Review* 1995 209.

3.7 In cases where the child has been adopted there seems to be no certainty about the desirability of granting visitation rights to the biological grandparents of the child. E M Burns⁴⁶ sees the matter as follows:

"... allowing grandparents to petition for visitation with a child who has been adopted by strangers or who has been placed with an adoption agency certainly cannot promote the child's best interests, if it is in the best interests of that child to be adopted or to begin a fresh, new life in a new family."

The writer is also against the idea of interfering with the decisions of parents regarding who should have access to their children in cases where they are still married and remain living together. In this regard she declares:

"There also remains a serious constitutional question as to whether grandparents should be allowed to petition the court for visitation with a grandchild who remains living with his married parents.

The Constitution recognizes a parent's fundamental right to the companionship, custody, care and management of his or her child. The recognition of this right certainly justifies a presumption that a child's mother and father together will act in the child's best interests. Absent the dissolution of the parents' marriage partnership, they should be left free from state interference in making parenting decisions absent some showing that their parenting decisions violate the law."⁴⁷

3.8 On the other hand there is also a plea for what is called "wide-open grandparent visitation statutes".⁴⁸ This entails that:

"Visitation statutes should be wide-open, allowing all grandparents to seek visitation with their grandchildren. No bright-line test, such as whether or not a family is intact, should be utilized. Rather, all grandparents should have standing to at least file under a state statute."⁴⁹

46 *Family Law Quarterly* vol xxv number 1 Spring 1991 81.

47 *Family Law Quarterly* vol xxv number 1 Spring 1991 81.

48 S Harping *University of Cincinnati Law Reform Wide-open Grandparent Visitation Statutes: Is the door closing?* vol 62 Spring 1994 1659-1694.

49 *University of Cincinnati Law Review* 1994 1694.

3.9 Regardless of the provisions of the legislation the overriding principle for deciding disputes regarding access rights or visitation rights of grandparents and other third parties will be the best interest of the child. P A Hintz⁵⁰ came to the following conclusion after analysing the statutes of the State of Wisconsin:

"However, the statute also recognizes that all grandparents are not created equal and that, in certain situations, visitation still is not appropriate. By doing so, the legislation correctly insures an unwavering commitment to the best interests of the child standard, a standard which has implicitly governed since the beginning of visitation struggles and should continue to govern."

3.10 There also seems to be no agreement among writers about the contents of legislation regarding access rights or visitation rights for grandparents. Mark Moody came to the following conclusion:⁵¹

"Because the 'child is not a mere creature of the state,' whether a child should visit his or her grandparents should be a decision for the parents of that child. State legislatures should not suppose that the court system can, or should, make better decisions than the parents of the child regarding grandparents visitation, regardless of the conflicts giving rise to the parents' decision to terminate contact between the grandparents and the grandchild. Instead, the state should intervene only when a parental decision threatens the health or safety of the child or threatens to produce a severe negative impact on society."

3.11 S N Harping⁵² sees the solution as follows:

"But, considering the very personal nature of family relationships, and the fact that no two situations are identical, a bright-line test is inappropriate; there is a need for some discretion and flexibility, tempered by legislatively established criteria, on the part of the courts. Case-by-case handling is required."

50 **Wisconsin Law Review** Grandparents' Visitation Rights following Adoption 1994 483 at 510.

51 **Missouri Law Review** 1995 219.

52 **University of Cincinnati Law Review** 1994 1694.

The Netherlands

3.12 J M T Labuschagne of the University of Pretoria⁵³ indicates that the development of grandparents' visitation rights went through different phases. Initially in the Netherlands it was referred to as visitation rights and currently the parental visitation right is linked to the question whether a family relationship exists in terms of section 8 of the European Convention on the Rights of Man (EVRM).

3.13 Section 8 of the EVRM reads as follows:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3.14 In the Netherlands the Hoge Raad has expressly decided a blood relationship as such does not establish a right of association.⁵⁴ According to J M T Labuschagne amendments to the "Burgerlijk Wetboek" in the Netherlands are currently pending in which the proposed section 377(1) reads as follows:

"Onverminderd het bepaalde in artikel 377a, kan de rechter op verzoek een omgangsregeling vaststellen tussen het kind en degene die in een nauwe persoonlijke betrekking staat tot het kind en die bloedverwant in de tweede graad is van het kind of die het kind anders dan als ouder als behorende tot het gezin gedurende ten minste een jaar heeft verzorgd en opgevoed. De rechter wijst het verzoek af, indien het belang van het kind zich tegen toewijzing verzet."

53 **De Jure** Hoge Raad 25 Junie 1993, NJ 1993, 628 - omgangsreg van grootmoeder met kleinkind 1994 422-425 (hereinafter referred to as J M T Labuschagne **De Jure** 1994).

54 J M T Labuschagne **De Jure** 1994 424.

3.15 It is clear from the proposed section that the yardstick that will apply will also be the best interest of the child.

England

3.16 Initially grandparents in England could in terms of the Domestic Proceedings and Magistrates' Court Act 1978⁵⁵, the Guardianship of Minors Act 1971⁵⁶ and the Children Act 1975⁵⁷ apply to court in order to gain access rights to their grandchildren.⁵⁸ In accordance with this legislation grandparents had an automatic right to apply for right of access to their grandchildren.⁵⁹

3.17 In terms of the Children Act 1989 grandparents currently have the right to apply to court in cases where family proceedings are already pending. Family proceedings are defined widely, effectively covering all applications concerning a child.⁶⁰

3.18 Under section 10(2) of the Act leave may also be sought even though there are no other applications or proceedings pending. Section 10(2) reads as follows:

10(2) The court may also make a section 8 order with respect to any child on the application of a person who -

- (a) is entitled to apply for a section 8 order with respect to the child; or

55 Section 14.

56 Section 14A.

57 Section 34(1)(a).

58 For a discussion of the position under that legislation see G. Douglas and N Lowe Grandparents and The Legal Process *Journal of Social Welfare Law* No. 1 1990 at 89 et seq (hereinafter referred to as *Journal of Social Welfare Law*).

59 S M Cretney and J M Masson *Principles of Family Law* 1990 5th edition Sweet and Maxwell London 556 footnote 62.

60 *Journal of Social welfare Law* 1990 104.

- (b) has obtained the leave of the court to make the application.⁶¹

3.19 If the applicant (grandparents) has been granted the necessary relief they may apply for a section 8 order. Section 8 reads as follows:

Residence, contact and other orders with respect to children

8. - (1) In this Act -

"a contact order" means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;

"a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

"a residence order" means an order settling the arrangements to be made as to the person with whom a child is to live; and

"a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(2) In this Act "a section 8 order" means any of the orders mentioned in subsection (1) and any order varying or discharging such an order.

(3) For the purposes of this Act "family proceedings" means any proceedings -

(a) under the inherent jurisdiction of the High Court in relation to children; and

(b) under the enactments mentioned in subsection (4),

but does not include proceedings on an application for leave under section 100(3).

(4) The enactments are -

(a) Parts I, II and IV of this Act;

(b) the Matrimonial Causes Act 1973;

(c) the Domestic Violence and Matrimonial Proceedings Act 1976;

(d) the Adoption Act 1976;

(e) the Domestic Proceedings and Magistrates' Courts Act 1978;

61 N Gravells Sweet & Maxwell's Family Law Statutes 5 edition 1992 (hereinafter referred to as Family Law Statutes).

- (f) sections 1 and 9 of the Matrimonial Homes Act 1983;
- (g) Part III of the Matrimonial and Family Proceedings Act 1984.

3.20 Section 34(3) also allows grandparents to apply for a contact order in cases where the child had been placed in care.⁶² In England too the yardstick is the best interest or welfare of the child.⁶³

Canada

3.21 In Canada a federal statute, the Divorce Act of 1985,⁶⁴ stipulates that any person with the leave of the court may apply for access and the application may be granted if it is in the best interest of the child.⁶⁵

3.22 In cases other than divorce the provincial legislation prevails. Section 21 of the Children's Law Reform Act⁶⁶ of Ontario, for example, provides that any person may seek access. It is not a prerequisite that divorce or other proceedings are pending between the parents. The only requirement is the existence of a sufficient interest in the child that would be evidenced by "a relationship of parenting, care or supervision; a tenuous connection is not enough."⁶⁷

62 **Journal of Social Welfare Law** 1990 104.

63 Ibid 106.

64 Divorce Act, SC, 1986 C4.

65 Section 16 of the Act.

66 RSO 198, C68.

67 F Kaganas and C Piper Grandparents and the Limits of the Law **International Journal of Law and the Family** vol 4 no. 1 April 1990 30.

OTHER LEGAL SYSTEMS

3.23 In France⁶⁸ too, grandparents and third parties are granted visitation rights. In Switzerland grandparents are granted visitation rights in terms of section 279 of the Swiss Civil Law Code. Only in exceptional circumstances are visitation rights granted to third parties.⁶⁹ Similar rights are granted in Belgium.⁷⁰

3.24 In Australia the principle underlying the Family Law Reform Bill (No. 1) of 1994 is that children have a right to have contact with both parents on a regular basis as well as with other persons that make a contribution to their care, welfare and development.⁷¹ The Australian Law Commission also recommended⁷² that the proposed clause 60 should be amended as follows:

"Any legislation which refers to the child's right of contact with parents and significant others should be qualified by the proviso 'where it is in the child's best interests'."

68 Section 371-4 of the French Civil Law Code.

69 J Sosson *The Legal Status of Step-Families in Continental European Countries* in John Eckelaar and Peter Sarcevic **Parenthood in Modern Society - legal and social issues for the twenty-first century** 1993 Martinus Nijhoff Publishers Dordrecht at 396 and 398 (hereinafter **Parenthood in Modern Society**).

70 *Ibid.*

71 Clause 60B of the Bill.

72 In their report *For the sake of the kids - Complex contact cases and the Family Court Report 73 1995* at 31.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.1 It is clear from the preceding discussion that the present common law position in terms of which parents have the exclusive right to decide to whom and under what circumstances grant access rights or visitation rights, does not in all cases meet the current needs of society.

4.2 In contrast with the United States of America, where parental powers enjoy protection as a fundamental right, the South African Constitution does not provide the same protection.

4.3 As is discussed previously it is clear that the South African courts in the past have been reluctant to interfere with these traditional parental powers.

4.4 The Commission is of the opinion that adjustment of our law by way of legislation regarding this matter is necessary.

4.5 Although this investigation initially dealt only with the visitation rights of grandparents the Commission is of the opinion that this matter should not be limited to that category of persons. There may be special circumstances where someone else, for example an uncle or aunt, godparents or even friends and neighbours, could claim visitation rights with regard to a minor child.

4.6 In our society where both parents are generally expected to work, it often happens that the "traditional" parental powers in accordance with which the day-to-day existence of the child is governed, is devolved to another person. Therefore there may be circumstances where a special relationship between a child and someone else develops over time, which relationship in changing circumstances may require that visitation rights to the child be given to the other person.

4.7 There is also an increase in "extended" families. These are families where one or both of the parties have gone through a divorce and have married again. A stepfather for example may have a special relationship with his stepchild and after the death of the mother or a subsequent divorce the biological father or mother may deny the stepfather access to the child. L D Wardle⁷³ indicates that:

Traditionally, the courts have given custody to the biological parent. Recently, however, there has been a trend in the other direction if the child lived with the step-parent long enough that he has become the child's 'psychological parent'. Some courts have held that step-parents who act *in loco parentis* acquire special rights regarding visitation with the ex-step-child.'

4.8 Also in case of adoption there may be circumstances under which it would be in the best interest of the child to grant access rights to a person with whom the child has a special relationship.

4.9 The above-mentioned is not an exhaustive list of examples that could be relevant when visitation rights or access rights to minor children are considered. It is, however, clear that each case will have to be considered on its own merits and by taking all relevant considerations into account it has to be decided if it will be in the best interest of the child that access rights or visitation rights should be granted.

4.10 When one has to decide about legislation and the principles that would form the core of such legislation it is important not to lose sight of the fact that during the 44th session of the United Nations General Assembly a convention on the rights of the child was adopted.⁷⁴ The South African Government also ratified this Convention on 29 January 1993. Of particular importance is section 3 of the Convention, which reads as follows:⁷⁵

73 The Evolving Rights and Duties of Step-parents: Making New Rules for New Families in *Parenthood in Modern Society* 1993 at 379.

74 General Assembly Resolution 44/25 of 20 November 1989.

75 For the text, see Directorate of Human Rights *Human Rights in International Law* Strasbourg: Council of Europe Press 1992 at 118.

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

From the above-mentioned it is clear that the point of departure is the best interest of the child.

4.11 The Commission is of the opinion that the present procedure whereby an application may be heard only in the Supreme Court is unnecessarily expensive and time-consuming, and that these matters should be heard by the family court. In this regard the Magistrates' Courts Amendment Act 120 of 1993 should not be lost sight of in this regard.⁷⁶ In fact, this legislation provides for the establishment of family courts in a lower court structure which could not but involve cost savings and promote accessibility. The Commission believes that there is no impediment to the family court adjudicating matters concerning access rights to children. Such access rights should be available on application to anyone who is able to make out a case in the interest of the child. However, these family courts still have to be established, and, in the Commission's opinion, until such time as the family court has been incorporated in the existing court structure the matter belong in the Supreme Court.⁷⁷ A minor amendment is all it would take to devolve this jurisdiction on the family court later.

4.12 The Commission is further of the opinion that the court should be able to make use of the Family Advocate referred to in section 1 of the Mediation in Certain Divorce Matters Act 24 of 1987 for any investigation it deems necessary.

76 Published **Government Gazette** 14986 of 20.7.1993.

77 In this regard see Editorial "Divorces in the lower courts: taking justice to the people" 1993 **De Rebus** at 732 and K Stassen "Restructuring of the lower courts" 1993 **De Rebus** at 767.

RECOMMENDATIONS

The Commission recommends the legislation in the Annexure. Although it is in the form of an independent Bill, it should be incorporated in the legislation recommended in the Commission's report on a father's rights in respect of his illegitimate child.

PROPOSED BILL ON THE GRANTING OF VISITATION RIGHTS TO GRAND-PARENTS AND OTHER INTERESTED PERSONS

BILL

To regulate the visitation rights of grandparents and other interested persons in respect of minor children.

To be introduced by the Minister of Justice

BE IT ENACTED by the President and the Parliament of the Republic of South Africa as follows:

Definitions

1. In this Act "court" means a division of the Supreme Court or a family court established in terms of section 2(k) of the Magistrates' Court Act, 1944 (Act No. 32 van 1944), within whose area of jurisdiction a child is domiciled or normally resides.

Application for access to minor child

2. (1) If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to court for an order

granting him or her access to the child and the court may grant the application on such conditions as the court thinks fit.

(2) Any other person who alleges that there exists between him or her and a minor child any particular family tie or relationship which makes it desirable in the interest of the child that he or she should have access to the child, may, if such access is denied by the person who has parental authority over the child, apply to court for an order granting him or her access to the child and the court may grant such application on such conditions as the court thinks fit.

(3) The court shall not grant access to a minor child as contemplated in subsection (1) or (2) unless the court is satisfied that it is in the best interest of the child.

(4) For the purposes of subsection (1) or (2) the court may refer any application to the Family Advocate referred to in section 1 of the Mediation in Certain Divorces Matters Act, 1987 (Act No. 24 van 1987), for investigation and recommendation.

(5) The provisions of section 4(3) of the Mediation in Certain Divorces Matters Act, 1987 (Act No. 24 van 1987), shall mutatis mutandis apply with regard to proceedings concerning the application by grandparents or other interested persons for access to a minor child as contemplated in this section.

Short title and commencement

3. This Act shall be called the Access to Minor Children by Interested Persons Act, 19.....

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