

Family politics and the parent-child relationship

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Summary

The family-unit did, in one form or another occur since the beginning of man's existence. The aim of the unit was to sire children and to provide for them until they reached maturity. To realise this provisional aim, a decision making process was required. The child and her parents' individual interests can generate conflict where decisions have to be made regarding various questions, for example: which church the child should attend and or whether she should attend any church; which school a child should be enrolled in; with whom the child may associate and with whom not; if the child may use contraceptives, and whether an adolescent female may of her free will request or reject an abortion. Henceforth it must be kept in mind that the decision making process, i.e. family politics, is unique for each parent-child relationship.

Various social, economic and cultural factors can influence the handling of conflict in the decision making process. Furthermore, fundamental rights can influence the decision making process differently in respectively the common law parent-child relationship and the customary law parent-child relationship. Central to the latter situation is the fact that fundamental rights recognise individual rights, while customary law is founded in communalism. It is furthermore important to note that the nature of the parent-child relationship is not neutral, but is determined by historical and social elements within the community.

There are various statutory provisions in terms of which courts can intervene in the exercise of parental authority and can even terminate it, over and above the fact that the courts possess a common law competence as upper guardian. However, no law expressly grants the court the power to intervene in the parent-child relationship where conflict arises within the decision making process. The courts only have the authority to intervene in the parent-child relationship in the event of physical maltreatment or molestation of a child, in divorce proceedings, and where consent must be granted for a minor's marriage. Even the family advocate is employed as mediator only in divorce matters. The court as common law upper guardian of minors, will only intervene in the parent-child relationship if it is of the opinion that such a step is in the interests of the child and it will therefor not be done lightly.

The current constitutional provisions regarding children in a multi-cultural society has brought about changes in the parent-child relationship. Reading together sections 9 and 28 of the 1996-constitution puts it beyond doubt that any child under the age of 18 years is a person possessing fundamental rights. The state is drawn in as a third party in the parent-child relationship and must ensure that the interests of the child, that is fundamental rights, are guaranteed. Section 28 of the 1996-constitution goes further than section 30 of the 1993-constitution and provides a description for the meaning of parental care. The reference to family care, parental care and appropriate alternative care in the 1996-constitution can be indicative of the fact that the changed relationships wherein children find themselves within the community (other than the nuclear family) are recognised. The constitutional provisions also causes a change of emphasis in the parent-child relationship. The emphasis changes from the parent's rights and responsibilities to the rights that a child may claim. The child can enforce her rights against the state and her parents. The yardstick which determines whether the child is entitled to its constitutional rights, is in whether such a claim would be in the best interests of the child. If the child approaches the High Court as the common law upper guardian to enforce her rights, or to strike a balance in the decision making process, the state must supply the child with the necessary legal representation.

Due to the relevant constitutional provisions, the parent-child relationship can no longer be considered to be regulated merely by rules of authority, but the emphasis has shifted to the promotion of the child's interests. The best interest of the child must thus be the guiding principle in all legal proceedings. It implies further that the South African family law approach to balancing the decision making process within the parent-child relationship has also changed