

# Change to the age of majority: General impact and some consequences for the interpretation of wills

## 1. Introduction

On 1 July 2008, the age at which a person attains majority was lowered from 21 years to 18 years. Section 17 of the *Children's Act* stipulates that: "A child, whether male or female, becomes a major upon reaching the age of 18 years." This change is consistent with the Constitution,<sup>1</sup> which defines a child as a person under the age of 18 years.<sup>2</sup> The department of social development motivated this change as follows:

Between 18 and 21 you're neither a child nor an adult. The Children's Act of 2005 clarifies that grey area and brings [it] in line with section 28(3) of the Constitution. Now any person under 18, unless married or emancipated by order of court, is a child and any person over 18 is an adult.<sup>3</sup>

The obvious consequence of this change is that 18-year-olds will now be able to enter into contracts, get married, vote and/or even emigrate without their parents' permission. However, this change is not without shortcomings. Young adolescents between 18 and 21 years of age are thereby deprived of the protection afforded to them by law,<sup>4</sup> while there are still limitations based on age excluding them from certain juristic acts.<sup>5</sup> This change also created discrepancies in the South African legal system regarding age as a factor influencing a person's status. In terms of a "special trust", an 18-year-old is afforded protection because of his age, but in terms of a "bewind trust", that same 18-year-old has the capacity to terminate the "protection" created for him, on the basis of his newly acquired majority status.<sup>6</sup> Such contradictions

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1 *Constitution of the Republic of South Africa*, Act 108 of 1996.

2 This is in keeping with various international conventions signed and ratified by government. See for example the United Nations' *International Convention on the Rights of the Child*.

3 <<http://www.southafrica.info>>. (accessed on 18/11/2009).

4 A 19-year-old major's claim may prescribe. See Boezaart (Davel) 2008:250.

5 The effect of section 9 of the *Firearms Control Act*, no. 60 of 2000, is that a person must be 21 years of age or older to possess a firearm.

6 A "special trust" in terms of section 1 of the *Income Tax Act*, 58 of 1962, will remain a special trust until the youngest beneficiary attains the age of 21. The trust will cease to be a special trust in that year's assessment. On the other hand, if a "bewind trust" was created *mortis causa*, an 18-year-old (major) can claim the transfer of his inheritance from the trust, irrespective of the fact that the trust has a provision to the effect that the property should be held in the trust until the beneficiary reaches a specific age, for example 25 (and on condition that no provision for a gift-over has been made, should the beneficiary fail to comply). See Du Toit 2007:179-180 and Kernick 2008:50-52.

affect legislation and cause legal uncertainty. Some of the consequences relevant to the law of succession and the administration of estates will be discussed in this article.

## 2. The effect of age on the status of a legal subject

In South African law, a natural person is referred to as a legal subject<sup>7</sup>. A legal subject is defined as the bearer of capacities, subjective rights and legal duties.<sup>8</sup> Every legal subject has legal subjectivity (this pertains to the characteristic of being a legal subject in legal intercourse), which entails, *inter alia*, the capacity to act (i.e., the capacity to enter into legal transactions/juristic acts).<sup>9</sup> Status is the sum total of a legal subject's capacities, and differs from legal subject to legal subject.<sup>10</sup> The legal subject's age will influence his status; and various changes in status occur between birth and majority (and reaching the age of 21, unfortunately).<sup>11</sup> The legal subjectivity of a natural person originates at birth;<sup>12</sup> therefore, age commences at birth.<sup>13</sup> Every legal subject has legal capacity, but an *infans* (from birth to 7 years) has no personal capacity to act; and a minor (from birth until the age of 18 years)<sup>14</sup> has limited capacity to act in most cases. A major (18 years of age or older) has full capacity to act. The law prescribes a general age limit, in order to protect a child<sup>15</sup> from his own inability to make a mature assessment of his own situation, and grants full capacity to act to those who are in possession of both the necessary intellectual ability and the ability to judge.<sup>16</sup> A minor is a person under the age of 18. Majority and minority refer to stages in a person's lifetime. In *Santam Versekeringsmaatskappy Bpk v Roux*,<sup>17</sup> the court found that the word "minor" refers to a person who has not yet attained a specific age limit. Minority is terminated when a person turns 18. "Mondigheid" and "onmondigheid" refer to the question as to whether a person is able to manage his own affairs or

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7 A juristic person is also a legal subject.

8 Davel *et al.* 1999:15.

9 Davel *et al.* 1999:16-17.

10 Davel and Jordaan 2005:1-6.

11 According to the *Wills Act*, 7 of 1953, a competent witness is a person of the age of fourteen years or older (section 1); and every person of the age of sixteen years or older may make a will (section 4).

12 See Davel and Jordaan 2005:11, for a discussion on the origin of legal subjectivity.

13 In *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T) 1114, Judge McCreath made it clear that a foetus is not a "child" of any "age". The rights afforded by Section 28 of the *Constitution* apply to all children. The status of the foetus under common law is uncertain; but under the *Constitution*, the foetus is not a legal *persona*.

14 Cronjé and Heaton 2003:79 state that the word "minor" includes *infans*.

15 Although the *Children's Act* lowered the age of majority, Boezaart (Davel) 2008: 253-254 states that a change in the attitudes of people is still called for when dealing with children. There should be a "mind-shift" from a protective approach to an empowering approach, with the latter being mandatory in the application of the *Children's Act*.

16 Davel and Jordaan 2005:52-55.

17 1978 (2) SA 856 (A) 863G-866B.

not<sup>18</sup> — a “mondige” person (a person with majority status<sup>19</sup>) has acquired the full capacity to act, but is not necessarily a major.<sup>20</sup> Prior to 1 July 2007, a person could attain majority status by turning 21, by marriage, or by means of a declaration of majority by a court, in terms of the *Age of Majority Act*. The *Children’s Act* repealed the *Age of Majority Act*, with the consequence that majority status can now only be attained by virtue of age or marriage.<sup>21</sup> The South African Law Commission rejected the proposal of making provision for a 16-year-old to attain majority status by making application to the court to be declared a major.<sup>22</sup> In *Meyer v The Master*,<sup>23</sup> the court found that a fourteen-year-old boy, who had become “mondig” (attained majority status) by way of a marriage, was not, in fact, a major. It was stipulated in the will that a certain amount of money should be deposited with the Master of the High Court until the child reached the age of majority. The court found that in terms of this stipulation in the will, he could receive the money only when he turned 21.<sup>24</sup>

### 3. The capacity of a minor to inherit

The legal subject’s age will influence his status, but will not affect his capacity to inherit. Thus, all beneficiaries who are alive when the estate “falls open” (the moment of *delatio*) are capable of inheriting (in terms of testate or intestate succession).<sup>25</sup> A beneficiary is a person<sup>26</sup> upon whom the testator’s legacy devolves, and can be any person, regardless of whether he has the capacity to act or not. This means that a minor has the capacity to inherit (thus, he is invested with *testamenti factio passiva*).<sup>27</sup> Even the interests of unborn beneficiaries are protected<sup>28</sup> — although the unborn is not a legal subject, his interests are kept in abeyance. The division of the estate will be postponed until the birth of the foetus; and if the child is born alive, he will be able to benefit from the estate. A beneficiary has a choice in terms of whether to accept the benefit or not; and a parent or guardian must adiate the benefit on behalf of a minor.

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18 Davel and Jordaan 2005:54.

19 See Davel *et al.* 1999:57 – an emancipated minor does not have majority status.

20 Davel and Jordaan 2005:54-55.

21 Davel and Jordaan 2005:97.

22 Boezaart (Davel) 2008:247.

23 1935 SWA 3,7.

24 Davel and Jordaan 2005:54.

25 De Waal and Schoeman-Malan 2008:114; Corbett *et al* 2001:121.

26 This does not necessarily refer to a natural person. See Corbett *et al.* 2001:119.

27 De Waal and Schoeman-Malan 2008:114-131.

28 The interests of a beneficiary who is already conceived at the moment of *delatio*, but not yet born, will be protected by the *nasciturus* fiction in section 2D(1)(c) of the *Wills Act*. See Davel and Jordaan 2005:13, for a discussion on the application of the *nasciturus* fiction.

#### 4. The inheritance of a minor in practice

The executor responsible for the administration of a deceased estate must select the method of liquidation. This should be done in consultation with the beneficiaries and family of the deceased. In *The heirs Hiddingh vs de Villiers and Others*,<sup>29</sup> the court found that “liquidating an estate” was achieved “when it is reduced into possessions, cleared of debts and other immediate outstandings and so left free for enjoyment by the heirs”. There are important factors to be considered by an executor in the selection of a suitable method of liquidation. These include the assets in the estate, the stipulations of the will and the status of the heirs.<sup>30</sup> Methods of liquidation comprise the awarding and handing over of assets in specie (which means that the assets are handed over in the same form as that in which they have been left behind by the deceased), or a partial or total sale of assets. Award in specie is preferable, since it is in the best interest of the beneficiaries; but situations may arise where this method cannot be applied (for example, where a beneficiary who is to receive an asset is a minor). However, Wiechers and Vorster<sup>31</sup> state:

The mere fact that a person does not have legal capacity himself is not sufficient grounds to realise an asset, except where an award in specie would really be impossible...

A guardian or parent<sup>32</sup> may accept the asset in specie on behalf of a minor, pending majority. It is submitted that persons who were 18 years of age or older on 1 July 2007 will be entitled to receive their assets in specie, depending on the nature of the assets concerned. If such an asset is a firearm, the major person will be obliged to wait until he is 21 years old before he becomes entitled to take possession of that asset. The executor has an obligation to ensure that the beneficiary has obtained the necessary licence before the asset is handed over to him. The *Firearms Control Act* requires a competency certificate for the granting of a licence for a firearm; and section 9 of the Act stipulates that a person must be 21 years of age or older in order to qualify for such a certificate. An 18-year-old person is old enough to get married, buy a house and have children; yet he cannot inherit (or buy) a firearm to protect his family. Certain exceptions are specified in the Act (if compelling reasons can be cited, a person under 21 may apply), and the purpose of the Act is acknowledged; but it remains a limitation in respect of the status of a major.

Another method of liquidation is a section 38 take-over by a surviving spouse in terms of the *Administration of Estates Act*<sup>33</sup> (which does not happen often in practice). It entails the payment of money into the estate by the surviving spouse. The money is then used to pay out the other heirs in order to retain the family home. This option is normally taken in cases where minor children are involved. A final method of liquidation entails the conclusion of a redistribution agreement. Where minor beneficiaries are involved, the Master must ensure

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29 9 SC 208(PC): 308.

30 Wiechers and Vorster 2002:5-3.

31 Wiechers and Vorster 2002:5-5.

32 See Chapter 3 of the *Children's Act* with regard to parental responsibilities and rights.

33 Act 66 of 1965.

that such an agreement does not prejudice the minors in any way.<sup>34</sup> Persons between the ages of 18 and 21 are now excluded from this protection.<sup>35</sup> If the assets have been sold by an executor, or if the inheritance consists of cash assets, the *Administration of Estates Act* provides that money to which a minor becomes entitled (under a will<sup>36</sup>) must be paid into the Guardian's Fund with the Master.<sup>37</sup> The purpose of such a fund, as explained by judge Steyn<sup>38</sup>, is related to the fact that, from early on in history, authorities in western communities have been concerned about the vulnerability of minors and their property. Steps were therefore taken with a view to the advancement and protection of their interests and property; and these steps culminated in the institution of the office of the Master and the establishment of the Guardian's Fund.

The money may, however, be paid to the guardian of such a minor only if it has been secured to the satisfaction of the Master, and only in the absence of an express provision to the contrary in the will.<sup>39</sup> This stipulation is obviously aimed at preventing the abuse of funds to which the minor will become entitled. In cases where the possibility exists that a minor may become entitled to benefits, it has also become common practice to include standard trust clauses in wills, in order to prevent funds from ending up in the Guardian's Fund with the Master, owing to the guardian's inability or unwillingness to furnish security to the satisfaction of the Master. The wording of such a clause would typically resemble the following:

I direct that should any beneficiary be under the age of (21/23/25 years/majority), such beneficiary's inheritance shall be held in trust by my trustee ... [here, the powers of the trustee are usually spelt out]. When the beneficiary attains the age of (21/23/25 years/majority) the trust shall terminate and the capital, as it then exists, shall be paid to him or her.

Three different scenarios have been observed in practice.

In the first place, the will stipulates 21 years as the age at which the trust is to terminate, in a will that was signed prior to 1 July 2007. Two interpretations are possible.

On the one hand, it has been argued that the testator stipulated a specific age, which happened to coincide with the age of majority, and that it was his clear intention that the beneficiary should only receive the inheritance at that age. On the other hand, it has been argued that the testator's intention was clearly that the beneficiary should receive the inheritance at the earliest possible date at which he/she would legally be able to deal with it, that that date used to coincide with the beneficiary's 21<sup>st</sup> birthday, but that that date coincides with the beneficiary's 18<sup>th</sup> birthday since 1 July 2007. The problem with the latter interpretation is that the will clearly stipulates a specific age, and that our law makes it very clear that the primary basis according to which the intention of the

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34 Wiechers and Vorster 2002:5-16.

35 See Boezaart (Davel) 2008:250-254.

36 Or in terms of the law of intestate succession.

37 Section 43(6).

38 *Ex Parte Smith* NO 1976 (2) SA 95 (O) at 98.

39 Section 43(2).

testator must be determined, is that of the words used in the will. In *Robertson v Robertson's Executors*,<sup>40</sup> Judge Innes emphasises this point:

Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And, when these wishes are ascertained, the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.

Our law of succession has been clearly stated over the years, reflecting a reluctance to enter the murky territory of surmise as to what the testator really intended.<sup>41</sup> Therefore, it is submitted that where the will stipulates 21 years, regardless of when the will was signed, the only acceptable interpretation is that it was the testator's intention that the trust should terminate at that age. This position is fortified by the fact that section 17 applies where the instrument refers to "minority" or "majority" but not when the other instrument refers to a specific age.<sup>42</sup>

In the second scenario the will stipulates a specific age above 21 years, and it is clear that the testator intended the beneficiary to receive the trust assets at that particular age.<sup>43</sup> No other interpretation can be regarded as acceptable.

In the third scenario the will stipulates that the trust will exist until the minor reaches majority. The only meaning that reasonably can be attached to such a stipulation in the will is that the testator's intention was that the beneficiary should receive the assets on the earliest date on which he/she may legally deal with those assets without the assistance of another person, which is now at the age of 18.

What remains to be answered is whether the age of majority at the time of execution of the will or on the date of the testator's death should be applied.

In *Minister of Education and Another v Syfrets Trust Ltd and another*,<sup>44</sup> Griesel J applied public policy as it existed more than 80 years after the testator had executed his will in the 1920s. Relying on the judgment by Rabie CJ in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*<sup>45</sup> (a case in which the question was whether a contract in restraint of trade was against the interests of society), the court found that it had to apply public policy as it had existed when the question arose and not as it existed when the will was executed. Although the case was about the application of section 9 of the *Constitution*, and giving effect or not to the provisions of a will as measured against the Bill of Rights in Chapter 2 of the *Constitution*, it is submitted that the same

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40 1914 AD 503 at 507.

41 This problem can be even more complicated if the testator referred to a specific age in the will and used terminology such as "majority" in that same document.

42 <<http://www.southafrica.info/services/rights/childact-030707.htm>.> (accessed on 18/11/2009).

43 Sometimes the testator may believe that the minor beneficiary will not be able to deal with the assets in a prudent way until he reaches a more mature age, for instance 23 or 25 years.

44 2006 (4) SA 205 (C) at 206.

45 1984 (4) SA 874 (A) at 891.

principle applies to the interpretation of wills in general. Simple logic also suggests that, in the case of the interpretation of a testamentary disposition where there always will be a real chance that many years may pass before effect is given to the provisions contained in the document, such interpretation can only be done under the law as it stands at the time when the interpretation is done and not as at the time when the will was executed. Furthermore, it is submitted that the age at which a person attains majority is certainly also an expression of public policy by the legislature.<sup>46</sup>

In addition, it is appropriate to mention *Gardener v Whitaker*.<sup>47</sup> In this case the retrospectivity of legislation was discussed. The court held that where the retrospective operation of a statute is beneficial, the presumption against retrospectivity cannot apply. This decision, for our purposes, implies that the provisions of the Children's Act may apply retrospectively provided the effect thereof is beneficial. Acquiring inheritance at the age of 18 instead of 21 is certainly beneficial. Hence, seeing as inheriting at 18 instead of 21 is certainly beneficial for the heir and legal uniformity, one would say that section 17 applies retrospectively. Therefore, one could say that a will, completed before the commencement of the Act, that refers to majority should be read through the prism of the Act as if the Act was in operation then.

It is further submitted that any argument that the testator intended for the benefits should not be available to the beneficiary before the erstwhile majority, namely the age of 21 years, would be reinterpreted in the light of section 28 of the Constitution and section 17 of the *Children's Act*. If the testator intended the benefit to devolve at the age limit of 21, it should have been clearly stipulated as such.

## 5. Conclusion

Prior to the passing of the *Children's Act*, a minor attained majority at the age of 21. Immediately after midnight on the day on which such a person's 21<sup>st</sup> birthday dawned<sup>48</sup>, all limitations based on age fell away.<sup>49</sup> This is currently not the position in respect of a major who has attained his 18<sup>th</sup> birthday.

The purpose of section 17 of the *Children's Act* is to clarify the "grey area" between the ages of 18 and 21. Boezaart (Davel)<sup>50</sup> states:

Logic requires that if eighteen years is old enough to be an adult in terms of the Constitution, which is the supreme law, then surely eighteen is old enough in all the areas of private law as well.

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46 In the *Syfreys* case at p215, the testator included stipulations in his will, executed in the 1920's, that were ruled to be contrary to the provisions of section 9. The Court ruled that the Bill of Rights in the Constitution now forms the basis of the *boni mores* and as such limits freedom of testation as it has always done.

47 1995 (2) SA 672 (E) 679.

48 However, the exact moment of birth can also be relevant in certain circumstances — see Davel and Jordaan 2005:55.

49 Davel and Jordaan 2005:53.

50 Boezaart (Davel) 2008:253.

In the case of the interpretation of wills any testator who feels that 18 is too young to allow an heir unfettered capacity to deal with an inheritance, retains the freedom and the power to alter the provisions of his/her will to stipulate a later age at which the trust should terminate and the benefit of the inheritance pass to the erstwhile minor.

On the basis of the foregoing, it is submitted that 18 should be deemed old enough in all areas of law and for the purposes of legal certainty; that all law should be consistent with the Constitution; and that a person aged 18 years or older should be recognised as an adult.



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