

The Constitutional Interpretation of the “Best Interests” of the Child and the Application

by thereof by the Courts

By

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A mini dissertation submitted for the degree of Master of Laws (LLM) in

Management and Development Law

At

University of Limpopo

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ABSTRACT

The “best interests” of the child means considering the interests of the child before a life changing decision is made. The decision makers are required to take into consideration the child’s “best interests” before making a decision concerning the child; hence, the requirement that the “best interests” of the child are of paramount importance in every matter concerning the child. It is a principle developed from the common law that is used to assist the Courts and other institutions in the decision making process in matters affecting children. Institutions and Courts balance these interests in arriving at their decisions. The Courts have a wide discretion on what the “best interests” of a child are and effect should be given to these interests. The Courts have to apply the “best interests” of the child based on the facts of the particular case and simultaneously protect the rights of the child as enshrined in the Constitution. There is no “cast in stone” formula to be followed. Another difficulty is that children’s rights have to be protected in concurrence with those of his or her parents. So, there should always be a balancing of interests of the child and the other interested parties including parents.

DECLARATION BY STUDENT

I, **MAMMULE PETER CHIDI**, declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Master of Laws (LLM) in Management and Development Law (LLMDEV) has not been previously submitted by me for a degree at this university or any other university; that it is my own work and in design and execution; all material contained herein has been acknowledged.

Signed

Date.....

MAMMULE PETER CHIDI

DEDICATION

To my late parents, **MATSIMELA BERNARD CHIDI** and **MARTHA RAMADIMETJA CHIDI** thank you; though your departure was very much early for me; you should have waited to see how I replicate your genes on this mother earth.

ACKNOWLEDGEMENTS

God Almighty, this wisdom I have comes from you. I am who I am because you stood by me; you are the wind beneath my wings. *Ga ke tsebe ke tla go leboga ka eng; gobane tse ntle ga ke na tsona tseo nka go kgahlisago ka tsona; sehlabelo sa ka ke nna ka sebele. Morena wa ka o sebo, se tšhabelo ebile o modiša wo bolo wa ka.* (I don't know how to thank you; I don't have gold and silver to please you; I offer myself as a sacrifice to you. Lord you are my fortress and my great shepherd).

I am grateful to a number of people who, both directly and indirectly, assisted me in the preparation and completion of this mini-dissertation. To mention just a few; **Mrs DAISY SEROKA**; **Ms JOYCE MANAKANA** and **Ms TAFADZWA MANOZHO** who efficiently assisted me in typing the dissertation. **Dr GHA SPIJKER**, who guided me all the way through; I am grateful to you my supervisor.

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11. Criminal Law (Sentencing) Amendment Act 38 of 2007
12. Criminal Law Amendment Act of 105 1997
13. Criminal Procedure Act 51 of 1977, as amended
14. Income Tax Act 58 of 1962
15. Magistrates' Courts Act 32 of 1944, as amended
16. Maintenance Act 99 of 1998
17. Pension Funds Act 24 of 1956, as amended
18. Promotion of Administrative Justice Act 3 of 2000
19. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
BCLR	Butterworths Constitutional Law Reports
LAWSA	The Law of South Africa
PELJ	Potchefstroom Electronic Law Journal
SACR	South African Criminal Law Reports
SAJHR	South African Journal on Human Rights
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER ONE: INTRODUCTION

1.1 Background to the study

The “best interests” of the child refers to considering the interests of the child before decisions affecting his or her life are made.¹ The decision makers are required to take into consideration the child’s “best interests” before making a decision that concerns them. Thus the “best interests” of the child are of primary importance in all matters concerning the child. The “best interests” is a principle developed from the common law that is used to assist the Courts and other institutions in the decision making process in all matters affecting children. Institutions and Courts balance these interests in arriving at their decisions. In addition to the common law principles, Section 7 of the Children’s Act² provides a list of factors to be taken into account when applying the “best interests” of the child standard. However, Section 7 must be measured against Section 28 (2) of the Constitution³ to determine its Constitutional validity. Section 28 (2) on the other hand cannot be restricted to a fixed list of factors.

1.2 Significance of the research

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC).⁴ Article 3(1) of the UNCRC States that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the interests of the child shall be a primary consideration.”

¹ Dausab Y ‘The “best interests” of the child’ (2010) 2 *Namibia Law Journal*.

² Act 38 of 2005.

³ The Constitution of the Republic of South Africa Act 108 of 1996.

⁴ Adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990 in accordance with article 49 (1). South Africa ratified the UNCRC on 16 June 1995.

The genesis of the children's Constitutional rights in the South African context cannot be discussed without examining the UNCRC, more specifically article 3 (1). While children's rights are set forth in a number of international legal instruments, the UNCRC is the most authoritative acceptance. The African Charter on the Rights and Welfare of the Child (ACRWC)⁵ in article 4(1) provides that:

"In all actions concerning the child undertaken by any person or authority, the "best interests" of the child shall be the primary consideration."

On the other hand, Section 28 (2) of the Constitution provides that:

"A child's "best interests" are of paramount importance in all matters concerning the child".

Whereas section 6 (2) of the Children's Act States that:

"All proceedings, actions or decisions in a matter concerning a child must: respect, protect, promote and fulfil the child's rights as set out in the Bill of Rights, the "best interests" of the child standard set out in Section 7 and the rights and principles set out in this Act, subject to any lawful limitation."

There are significant differences with respect to meaning, context and the interpretation of the provisions of the aforementioned instruments and statutes.

This research will discuss the relevant provisions in the UNCRC and ACRWC regarding the "best interests" of the child in addition to Section 28 (2) of the Constitution and the Children's Act.⁶

⁵ OAU Doc. CAB/24.9/49 (1990), entered into force on 29 November 1999. It was signed by the Republic of South Africa on 10 October 1997 and ratified on 7 January 2000.

⁶ Act 38 of 2005.

1.3 Aim of the research

The purpose of the research is to analyse the relevant provisions in the international and regional instruments, as well as national laws of South Africa pertaining to the “best interests” of the child.

Therefore, this study has the following aims:

- (i) To provide a structured overview (background) of the “best interests” standards and identify which provisions provide for a higher standard.
- (ii) To discuss and analyse the relevant national provisions in the South African national legislation.
- (iii) To discuss and analyse a number of Court cases in order to determine how the principle of the “best interests” of the child is applied by the Courts and whether the application thereof is consistent with the Constitution.

1.4 Research methodology

The research methodology to be adopted here will be literature study. The researcher will digest information from different sources; critically evaluate it and present conclusions in a concise and logical manner. The research is library-based and reliance is placed on materials such as case law; electronic sources; international and regional instruments; journals; legislations and textbooks.

1.5 Chapters outline and limitation of study

The study comprises seven chapters which are outlined as follows:

- Chapter One is the introductory chapter setting the background to the study.
- Chapter Two will focus on the analyses of the Constitutional framework with specific reference to the meaning of the child; children’s Constitutional rights; protection and autonomy; as well as social, cultural and religious practices.

- Chapter Three will concentrate on the “best interests” of the child and the application thereof by the Courts.
- Chapter Four will deal with parental responsibilities and rights;
- Chapter Five will discuss the adoption of children;
- Chapter Six will focus on the child’s right to be heard; and
- Chapter Seven will deal with general conclusions.

The study will concentrate on issues that are contentious and always come to Court for adjudication. The study will not deal with all the issues relating to the children’s rights as contained in Section 28 (1); the “best interests” of the child is specifically provided for Section 28 (2). Considerable concentration in this study is the relationship between the “best interests” of the child and the rights of other family members; more in particular parents of the child. However, the “best interests” of the child outside family environment, such as schools and community life is also debated herein.

CHAPTER TWO: CONSTITUTIONAL FRAMEWORK

2.1 Introduction

The child, as a legal subject, has rights that must be respected and protected by all. In the Constitution, the rights of everyone are entrenched in the Bill of Rights. Children are also entitled to all Constitutional rights in so far as the context allows them to apply to children. The special rights of the children are contained in Section 28 (1) of the Constitution. Section 28 (2) of the Constitution specifically provides that the child's "best interests" are of paramount importance in every matter concerning the child.

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC).⁷ Article 3(1) of the UNCRC states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the interests of the child shall be a primary consideration."

The African Charter on the Rights and Welfare of the Child (ACRWC)⁸ in article 4(1) provides that:

"In all actions concerning the child undertaken by any person or authority the "best interests" of the child shall be the primary consideration."

When comparing article 3(1) of the UNCRC with article 4(1) of ACRWC, one discovers that the reach of the "best interests" of the child is limited to decisions concerning the child.

The Court in *S v M (Centre for Child Law as Amicus Curiae)* (hereafter referred to *S v M*)⁹ held that the word paramount is emphatic and stronger than the phrase 'primary

⁷ Ibid.

⁸ Ibid.

⁹ 2008 (3) SA 232(CC),249 para 25

consideration' referred in the international instruments, that is, UNCRC and obviously the ACRWC. Visser¹⁰ states that something is literally of paramount importance when it has "more importance than anything else" or is of supreme importance. The researcher concurs with this definition of the word paramount. There is no doubt about the importance of the "best interests" principle; further that it has been turned into a Constitutional imperative. However, its exact meaning is not constitutionally defined and requires judicial interpretation. Thus, this study deals with the Constitutional interpretation of the "best interests" of the child and the application thereof by the Courts.

2.2 Meaning of "A Child"

In South Africa, a person is a living human being. The Constitution, in protecting the right to life,¹¹ does not go beyond the details than stating that everyone has the right to life. In other jurisdictions such as the United States of America, the right to life begins from conception. The American Convention on Human Rights,¹² in article 4 (1) thereof, provides that:

"Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his/her life."

The understanding of this article, 4 (1), is that the right to life is protected the moment a child is conceived. The ACRWC in article 2 defines a child as a human being below the age of 18 years. In South African law, a child relates to a person under the age of 18 years.¹³ The Children's Act in Section 17 states that a child, whether male or female,

¹⁰ Visser P J 'Some aspects on the "best interests" of a child principle in the context of public schooling' (2007) *THRHR* 70, 461.

¹¹ Section 11 of the Constitution.

¹² Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, on 22 November 1969.

¹³ Section 28 (3) of the Constitution.

becomes a major upon reaching the age of 18 years. Before the Constitution and the Children's Act were introduced, the age of majority in South Africa was 21 years.¹⁴ This change in the reduction of the age of majority from 21 years to 18 years, however, did not take away the rights that children were entitled to before the amendment by Section 17.

In *Shange v MEC for Education, Kwazulu-Natal*¹⁵ it was decided that:

“As indicated, Section 28(2) of the Constitution protects the rights of children. The Children's Act must therefore be read in such a manner as to not interfere with any accrued rights of a child. Accordingly, on a proper interpretation of Section 17 of the Children's Act read with the relevant provisions of the Prescription Act, a child whose cause of action arose before the commencement of Section 17 of the Children's Act is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have had, had the age of majority not been changed.”

The fact that the South African law gives a definition of a child after birth does not mean that an unborn child is not afforded legal protection in the country. South Africa has adopted the Roman-Dutch law rule of *nasciturus pro iam nato habetur quotiens de commodo eius agitur*, meaning that the foetus is regarded as having been born at the time of conception whenever it is to the foetus' advantage, provided that the child is subsequently born alive.¹⁶ In the case of *Christian League of Southern Africa v Rall*¹⁷ the legal question before Court was whether the life of the foetus was threatened with termination. That implies that the *nasciturus* rule does not confer legal personality on the foetus, and that there is no room for the extension of the *nasciturus* rule to protect certain interests of the foetus. In the context of South African common law, it is accepted that legal personality begins at birth. The South African common law recognised the following three requirements for the application of the *nasciturus* fiction.¹⁸

¹⁴ Section 1 of the Age of Majority Act 57 of 1972, as repealed.

¹⁵ 2012 (2) SA 519 (KZD), 527, para 32.

¹⁶ *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA), 228 para 39.

¹⁷ 1981 (2) SA 821 (O).

¹⁸ *Christholm v East Rand Proprietary Mines Ltd* 1909 TH, 297.

1. The application of the *nasciturus* fiction is subject to the condition that it must be to the advantage of the unborn child. This requirement will be met if both the child and third person, for example, a parent are jointly benefited. However, the benefit should not be solely in favour of the other person.
2. The benefit must accrue to the *nasciturus* after the date of conception.
3. The *nasciturus* must be born alive.

In *Christian Lawyers Association of SA and Others v Minister of Health and Others*¹⁹ the Court stated that:

“There is no express provision affording the foetus (or an embryo) legal personality or protection. It is improbable that the drafters of the Constitution would not have made express provision thereof had they intended to enshrine the rights of the unborn child in the Bill of Rights, in order to cure any uncertainty in the common law and in the light of case law denying the *foetus* legal personality. One of the requirements of the protection afforded by the *nasciturus* rule is that the *foetus* must be born alive. There is no provision in the Constitution to protect the *foetus* pending the fulfilment of that condition.”

In *S v Mshumpa*²⁰ an unborn baby, whose mother was in the 38th week of her pregnancy, was shot through her mother’s abdomen, resulting in the death of that baby. The Court rejected the arguments of the prosecution and decided that:

“The present definition of the crime of murder is that it consists in the unlawful and intentional killing of another person. That has always been understood as requiring that the person killed had to be born alive. In terms of the present application of the definition of murder, the killing of an unborn child by a third party thus does not amount to murder. The Constitution does not expressly confer any fundamental rights, most importantly the right to life, on an unborn child. As far as I am aware no South African court has ever held that an unborn child that was not born alive holds any right in its unborn State.”

¹⁹ 1998 (4) SA 1113 (T), 1121-1122.

²⁰ 2008 (1) SACR 126 (E), paras 53-55.

2.3 Children's Constitutional rights

The genesis of the children's Constitutional rights in the South African context cannot be discussed without examining the UNCRC, more specifically article 3 (1). While children's rights are set forth in a number of international legal instruments, the UNCRC is the most authoritative acceptance. However, the United States of America, and South Sudan are not affected by this universal treaty, as these countries are not signatories thereto.

The UNCRC has highlighted the fundamental human dignity of all children, the urgency of ensuring their protection, well-being, survival and development, and the concept of children as bearers of human rights.²¹ The Committee on the Rights of the Child identified the following four general principles:

- The "best interests" of the child shall be a primary consideration in all actions affecting children (Article 3);
- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status (Article 2);
- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6); and
- Children should be assured the right to express their views freely and their views should be given "due weight" in accordance with the child's age and level of maturity (Article 12).

The UNCRC also recognises that children, generally, can play a more active role in decision making within the family life. Article 12 specifically recognises that children are individuals in their own right, and should be afforded the opportunity to express their

²¹ UNHCR Guidelines on Formal Determination of the "best interests" of the Child Provisional Release, May 2006 <http://unhcr.org/refworld/pdfid/46a076922.pdf> accessed on 19 October 2012.

own views in matters affecting them. Their views should be given due weight in accordance with the age and maturity of the child.²²

Section 28 (1) of the Constitution lists a number of fundamental rights that every child is deemed to have, namely; every child has the right:

- (a) to a name and nationality from birth;
- (b) to family care of parental care, or to appropriately alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practice;
- (f) not to be required or permitted to perform work or provide services that:
 - (i) are inappropriate of that child's age;
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under Sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:
 - (i) kept separate from detained persons over the age of 18 years;
 - (ii) treated in a manner, and kept in conditions, that takes account of the child's age;
- (h) to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustices would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

It is in the "best interests" of the child that a set of rights be endorsed by the State and acknowledged by the community. The State has a regulatory role as far as the rights of the child are concerned. While the obligation to ensure that all children are properly

²² M Bekink 'Child Divorce: A Break from Parental Responsibilities and Rights due to the Traditional Cultural Practices and Beliefs of Parents' (2012) *PELJ* 15 <http://dx.doi.org/10.4314/pej.v15i/> accessed on 6 19 October 2012.

cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so. This was confirmed by the Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)*²³ where it was held that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection as contemplated by Section 28.

The children receive Constitutional protection of rights in two ways. First, like any person in (terms of the general provisions of the Bill of Rights) as stated in Section 8 of the Constitution. The Bill of Rights applies to all law, that is, common law, legislation, Court decisions and customary law.²⁴ Secondly, through the protection afforded by the rights applicable only to children in Section 28; circumstances that augment to complications arise from the need to balance the rights and interests of children with the rights and interests of other family members and the needs of society in general. The inclusion of the “best interests” standard in the Constitution has stimulated the hope that the parent or family-centred system of indigenous law would be replaced with child-centred legal rules. In addition, the Courts would use children’s fundamental Constitutional rights to improve their legal and social circumstances.²⁵

The application of rights to children arises in a triangular relationship between the child, his/her parents and the State. The main duties to respect, protect, promote, and fulfil most of the rights guaranteed in Section 28 rests on the parents or legal guardians of children. It is only when the parents fail to protect the rights of the child that the duty to respect, protect, promote and fulfil most of the rights rests on the State.²⁶ For instance, the right of every child to shelter as stated in Section 28 (1) (c) places a duty in the first

²³ 2003 (2) SA 363 (CC), 375-376, para 24.

²⁴ Van Heerden B *et al* *Boberg’s Law of Persons and Family* (1999), 11.

²⁵ T L Mosikatsana: ‘Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights Under the Final Constitution’ 1998 (3) *Michigan J of Race and Law* 341, 345, 354, 355 and 399.

²⁶ *Minster of Health And Others v Treatment Action campaign and Others* (No 2) 2002 (5) SA 721 (CC), 750 para 79.

place on the parents or legal guardians to provide shelter before that duty can be applied to the State.

Section 28(1) (c), plainly provides that when the parents do not fulfil their common law and statutory obligations, the State has a duty to step in and support the children.²⁷ The Court in *Government of the Republic of South Africa v Grootboom*²⁸ held that:

“The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that Section 28(1) (c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.”

The Court went further to find that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by Section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in Section 28.²⁹ This is correct as child maintenance is enforced through State resources such as maintenance Courts.³⁰

The question arises as to what would become of the children who have parents but are poverty stricken; how will they enjoy the rights contained in Section 28 (1) (c). The Court in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*³¹ came to the rescue of such children by finding that:

“The State is obliged to ensure that children are accorded the protection contemplated by Section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical

²⁷ Currie I and de Waal J *The Bill of Rights Handbook* (2005), 611.

²⁸ 2001 (1) SA 46 (CC), 82 para 77.

²⁹ Ibid para 78.

³⁰ Maintenance Act 99 of 1998.

³¹ 2002 (5) SA 721 (CC), 750 para 79.

treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.”

2.4 Protection and autonomy

Section 9 of the Constitution gives equal protection and non-discrimination. Children fall within the category of everyone that must receive equal treatment and protection. Children are therefore entitled to the right to privacy, the right to freedom of religion, belief and opinion, the freedom of expression and the right to freedom of association. As a general rule, children’s rights call for special protection for children. However, children should not receive less protection than adults would in the same circumstances. It should be noted that children are separate human beings and not extensions of their parents; hence they are individual right bearers.³² The protection towards children was shown in the case of *Christian Education South Africa v Minister of Education*³³ where Court held that:

“The State is further under a Constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents’ religious practices.

Some of the measures which are included in the Children’s Act are Children’s Courts, national child protection register, institutions for the reception and care of children and mechanisms to combat child abduction by family members and trafficking of children.³⁴ Children’s Courts have jurisdiction to adjudicate any matters involving the protection of children, (that is, their wellbeing, maltreatment, abuse, neglect, degradation or exploitation, the temporary safe care of children in need of care, in places of safety other

³² Boezaart T *Child Law in South Africa* (2009), 276.

³³ 2000 (4) SA 757 (CC), 780 para 40-41.

³⁴ Chapters 4, 7, 9, 17 and 18 of the Children’s Act.

than prisons and police cells, pending the placement of children concerned by a Court order).

The Children's Act in Section 151 (1) empowers the Children's Court; if it appears from testimony before it that a child is in need of care and protection, to order that a social worker investigate the matter and report back within 90 days. In addition, Section 151 (7) requires the person who has removed a child to give notice of that fact to the child's parent, guardian or care-giver and the provincial Department of Social Development. However, in *C And Others v Department of Health And Social Development, Gauteng, And Others*,³⁵ the Court declared both Sections 151 (7) and 152 (7) of the Children's Act unconstitutional in that the sections fail to provide for a child who has been removed in terms of those sections and placed in temporary safe care to be brought before the Children's Court for a review of the placement or temporary safe care. The Court then made a finding that the sections are read as though the following appears:

“(d) within 48 hours, place the matter before the Children's Court having jurisdiction for a review of the removal and continued placement of the child, give notice of the date and time of the review to the child's parent, guardian or care-giver, and cause the child to be present at the review proceedings where practicable”

The Court found the aforesaid sections unconstitutional as they provided for the removal and placement of the child without automatic review. This decision of the Court is logical and good law as the parent, guardian or care-giver has interest in the wellbeing of the child; their rights as parents are adversely affected. Therefore, the removal must be subject to review in terms of the legislation dealing with administrative reviews.³⁶

³⁵ 2012 (2) SA 208 (CC), para 85.

³⁶ Section 6, of the Promotion of Administrative Justice Act 3 of 2000.

The issue of children choosing their own lifestyle and religion is complicated, in that a balance should always be struck between the interests of the children, parents and the State. The limitation of these rights becomes more difficult to justify as a child grows older, since the responsibilities of parents and the State towards a child are linked to the child's age and stage of development. The interests of children to exercise their autonomy must, therefore, be seen in the context of the relationship of dependence that exists between child and parent.

In *Christian Lawyers Association v Minister of Health And Others (Reproductive Health Alliance as Amicus Curiae)*³⁷ it was stated that the final decision of the young women (below the age of 18 years) to decide whether or not to consult with their parents, guardians or family members regarding termination of their pregnancies rests with them (young women). However, the medical practitioner or midwife who performs a termination must inform the young women of their rights under the Choice on Termination of Pregnancy.³⁸ It is submitted that the decision of the Court on this matter is consistent with the Constitution. The Act promoted the interests of the child as it was flexible and recognised that decisions taken to terminate pregnancy would depend on a girl's intellectual, psychological and emotional maturity, rather than her age. It is also consonant with Section 12 (2) of the Constitution as it provides that:

“Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body.”

³⁷ 2005 (1) SA 509 (T), 528.

³⁸ Act 92 of 1996.

Section 12 (2) makes no reference to the age of the person who makes the decision concerning reproduction; consequently, it cannot be said that girls under the age of 18 years do not have a right to terminate their pregnancies.

In the Western Cape Court³⁹ a 16 year-old Millerton schoolgirl, sought to be freed from her parents to live semi-independently from them. The Court granted her request not to be sent to a boarding school but to reside with a host family. It was found that she had the intellectual, psychological and emotional maturity to express an autonomous opinion on her future.

2.5 Social, cultural and religious practices

In order to do justice to this topic of social, cultural and religious practices properly, it is crucial that the general principles applicable to the topic be stated. Section 15 (1) of the Constitution guarantees everyone's right to freedom of conscience, religion, thought, belief and opinion. Section 31 of the Constitution also deals with cultural, religious and linguistic communities and the individual's associational right to practice religion in association with others, it provides thus:

- (1) "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:
 - (a) to enjoy their culture, practice, their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The right in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

Section 9 (1) guarantees everyone's equality before and equal protection and benefit of the law, read with section 9 (3) which proscribes unfair discrimination against anyone on the grounds of, amongst others, religion, conscience and belief.

³⁹ <http://www.legalbrief.co.za/article.php.story=2010061009145843> accessed on 19 October 2012.

Freedom of religion implies the right to choose a religion, as well as the right to choose not to adhere to any religion. In *S v Lawrence; S v Negal; S v Solberg*⁴⁰ Justice Chaskalson P (as he then was) borrowed the definition of the essence of the concept of freedom of religion from the Canadian Courts as:

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”

Freedom of religion therefore includes the right to:⁴¹

- (a) have a belief;
- (b) express that belief publicly; and
- (c) manifest that belief by worship and practice, teaching and dissemination.

After having accepted that the freedom of religion includes the right not to be forced or coerced to join or practice certain acts, the question now is whether the children may be forced to join or practice the religion of their parents. The answer to this question is in the negative, as children are entitled to the same rights as any other persons in this country.

In *Allsop v McCann*,⁴² the case concerned the application by a custodian parent for an interdict to restrict the participation of the parties' minor children in certain religious practices while in the non-custodian parent's care. The applicant had been baptised in the Anglican Church; the respondent was and remained a Roman Catholic. The parties had been married, and the children were baptised in the Roman Catholic Church. The applicant sought an interdict to prevent the children from attending the Roman Catholic Church; while they spent weekends with the respondent and to prevent them receiving

⁴⁰ 1997 (4) SA 1176 (CC), 1208-1209, para 92.

⁴¹ Currie I and Johan de Waal *The Bill of Rights Handbook*, 339.

⁴² 2001 (2) SA 706 (C), 713G-H, 715D-E.

any education in the Roman Catholic religion. She alleged that on the weekends during which the respondent exercised his rights of access he compelled the children to attend a Roman Catholic Church service and that this not only undermined her religious instruction of the children, but also caused the younger child, aged seven, considerable distress.

The Court gave due regard to the “best interests” of the child and held that:

“What is also important, in my view, is that Section 28 of the Constitution provides that children have the right to parental care (subsection (1) (b)) and that in terms of Section 28 (2) a child’s “best interests” are of paramount importance “in every matter concerning the child”. The non-custodian parent has in terms of the consent paper in this case, and the Constitution, not only a duty to provide parental care to the child, but the child has a right to receive that parental care. Neither parent can dictate what religion, if any, the children will eventually adopt, but each is, in my view, entitled to provide religious instruction. Only when religious instruction offered or provided by a non-custodian spouse conflicts with that decided upon by the custodian spouse would a problem arise. Conflicts are not difficult to envisage, for example, between Jewish and Christian parents, or Christian and Muslim. The children will, of course, eventually be entitled to follow whichever religion they wish, and seeing something of the Roman Catholic Church; as well as the more informal view of religion adopted by their mother will place them in an eminently good position to decide for themselves. If applicant could show any harm being caused to the children by their present attendance on the limited basis which it does occur in the Roman Catholic Church, there might be more to the case.”

The Court decided the facts on the two way approach:

- (a) Firstly, on the approach that the children are bearers of rights themselves; therefore neither parent can choose a religion for them; and
- (b) Secondly, that the “best interests” of the children are of paramount importance, it will, therefore, be checked as to whether the conduct of the

respondent in attending church services with them is of any harm to the children.

In *Kotze v Kotze*⁴³ the parties entered into a settlement agreement regulating their divorce action. The Court granted the divorce but refused to sanction a paragraph contained in the settlement agreement relating to a minor. The paragraph stated that both parties undertake to educate the minor child in the Apostolic Church and undertake that he will fully participate in all the religious activities of the Apostolic Church. The Court rejected the paragraph by reasoning that:

“The paragraph not only imposes reciprocal obligations on the parties, but also imposes a duty on the minor child to engage fully in the religious activities of a particular church.”⁴⁴

The Court continued to hold that:

“I am also not bound by such agreement. In this context it is often stated that it is ‘useful’ (if not essential) to ensure that a child belongs to a church, or adheres to a religion and partakes in its activities, so that it can, at a more mature age, at that stage exercise its free choice. There is a fallacy in this argument. If a child is forced, be it by order of the parents, or by order of Court, to partake fully in stipulated religious activities, it does not have the right to his/her full development, a right which is implicit in the Constitution.”

The Court concluded that the proper approach is to investigate what would be in the “best interests” of the child. That a child is subject to parental control, and is also entitled to an education. This may involve the teaching of religion in whatever form, such as history of religion and ethics. In fact, to enable one to have a balanced view of life and its meaning, a wide knowledge of the topic is no doubt desirable. Such teachings must, however, firstly not deprive the parents of the right and opportunity to monitor the child’s educational progress from time to time and to make appropriate adaptations. And, secondly, it must not place the child under obligations which effectively deprive it of

⁴³ 2003 (3) SA 628 (T).

⁴⁴ Ibid 629.

his/her right to choose any religious belief, or the absence thereof, openly, and without fear and constraints.⁴⁵

The researcher is of the view that the problem with the approach of the Court is that it ignores the communal grouping and the *ubuntu* concept as understood in South Africa today. The child cannot grow in isolation and determine for him or her which religion or belief to follow which directly conflicts with that of the parents. Religion is a very much sentimental issue and some families fall apart due to differing religious views. Moyo⁴⁶ states that the child stands not as an individual, but as family member. She/he serves the family and *vice versa*. The individual interests of the child and those of the family are inseparably interwoven. Since the family is a resource for the child, it is thought in his or her interests for him or her to support it and to maintain family bonds. This stands in sharp contrast to international law which emphasises the primacy of the child's individual interests.

This view is also supported by the Court in the decision of *S v M*⁴⁷ where Sachs J held that:

“Indeed, one of the purposes of Section 28 (1) (b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary care-givers that individuals make moral choices for which they can be held accountable.”

⁴⁵ Ibid 632.

⁴⁶ Moyo A “Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the “best interests” of the child” (2012) *AHRLJ* Vol12 1, 145.

⁴⁷ Ibid 252 para 34.

The children's rights to autonomy were accepted in *MEC for Education, Kwazulu-Natal, And Others v Pillay*.⁴⁸ In this case, a 16 year old girl, Sunai, was wearing a nose stud at school in expression of her Hindu culture and religion, a practice with which she identified. The Court held that the school was able to reasonably accommodate her by way of exception to its code of conduct, and should do so. The Court further remarked that children of the girl's age should increasingly be taking responsibility for their own actions and beliefs.⁴⁹ This approach is consonant with Section 10 of the Children's Act which provides that:

"Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

The problem with social, cultural and religious practices is that the adults and/or parents assert that they are doing these things for the child's own good, irrespective of the child's "best interests". In *Hay v B and Others*,⁵⁰ the parents of a minor child refused to consent to a surgeon to administer blood transfusion on the child on account of religious beliefs. The paediatrician brought an urgent application to Court for an order authorising her to administer a blood transfusion to an infant, the child of the first and second respondents. The Court held that:

"It is the upper guardian of all minors and, where it is in the "best interests" of such minor to receive medical treatment, an order that the minor receive such treatment is appropriate notwithstanding the refusal by the minor's parents to consent to such treatment."

Another example of social, cultural and religious practices involves corporal punishment. In terms of the common law, South African parents have the right to subject their children to moderate and reasonable chastisement. This chastisement may take the form of corporal punishment which must be restrained and reasonable. The Court will

⁴⁸ 2008 (1) SA 474 (CC).

⁴⁹ Ibid para 56.

⁵⁰ 2003 (3) SA 492 (W), 495.

take at least the following factors into consideration in deciding whether or not the punishment is equitable and fair:⁵¹

- (a) The nature of the offence;
- (b) The condition of the child, physically and mentally;
- (c) The motive of the person administering the punishment;
- (d) The severity of the punishment, that is, the degree of force applied;
- (e) The object used to administer the punishment;
- (f) The age and sex of the child; and
- (g) The build of the child.

In *Christian Education SA v Minister of Education*,⁵² the Constitutional Court had to determine whether the prohibition against corporal punishment violated the rights of parents who, in line with their religious convictions, had consented to its use. The Court upheld the prohibition and found that corporal punishment is a violation of the legal rights of the pupil to human dignity, freedom of security of person and protection from maltreatment, neglect, abuse or degradation. The Court quoted⁵³ with approval the statement in *S v Williams and Others*⁵⁴ which indicated that:

“The deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involved an element of cruelty in the system that sanctioned it. The activity is planned beforehand; it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed, in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger, in alien surroundings. The juvenile is, indeed, treated as an object and not as a human being.”

⁵¹ Pete S ‘To Smack or not to Smack? Should the Law prohibit South African Parents from Imposing Corporal Punishment on their Children’ (1998) *SAJHR* 14, 444.

⁵² 2000 (4) SA 757 (CC).

⁵³ *Ibid*, 783 para 44.

⁵⁴ 1995 (3) SA 632 (CC).

2.6 Conclusion

The rights of the child in this country are entrenched in the Bill of Rights, which compels respect and promotion by all. South Africa has also ratified international and regional instruments, such as the UNCRC and ACRWC, which protects and promotes the rights and “best interests” of the child. The ratification and signing of international and regional instruments by the country’s government puts South Africa in line with the outside world on the issue of children; which is very much applauded. However, the “best interests” of the child is not new to this country as it was developed from the common law.

It has been shown in this chapter that in essence, the UNCRC and ACRWC compel institutions to consider the “best interests” of the child; however, the word paramount in Section 28 (2) is much stronger. Therefore, State institutions, private bodies and individuals are compelled to give due consideration to the “best interests” of the child before they can take decisions which affect the child.

The children receive Constitutional protection in terms of the general provisions of Section 8 as contained in the Bill of Rights and through the specific provisions of Section 28 of the Constitution. Children should therefore receive equal protection like adults would in the same circumstances. It should be noted that children are separate human beings and not extensions of their parents; hence they are individual right bearers. Children enjoy each of the fundamental rights in the Constitution that are granted to everyone as individual bearers of human rights.⁵⁵

It has been shown further with reference to cases that children cannot be forced to join or practice any culture or religion of their parents. They are entitled to the right to privacy, freedom of expression, freedom of conscience, belief or thought. Thus, they can choose the lives they want to live on their own; however, the overriding factor is whether what they choose is in their “best interests”.

⁵⁵ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC), 1439 para 38.

CHAPTER THREE: “BEST INTERESTS” OF THE CHILD

3.1 Defining the “best interests” of the child and “paramount importance”

3.1.1 “Best interests” of the child

Generally an “interest” means advantage, benefit or concern. The Court in *B v M*⁵⁶ interpreted the “best interests” by holding that:

“It is appropriate to have regard to the term “best” which introduces a comparative quality. It includes as definitions, excelling all others in quality”, “most advantageous” and “most appropriate”. Two distinctions are drawn: first between that which is considered to be consonant with the child’s welfare and that which is not; secondly, between those interests which are more advantageous to a child than others which are less advantageous. It, of course, develops that a combination of factors - some neutral, some less advantageous and even some seemingly advantageous - may together approximate or combine to form a child’s “best interests”.

One cannot but agree more with the above finding; it is inclusive in showing advantage to the child, while also reflecting the balance that is required in the determination of the “best interests” of the child.

Therefore, the reference to “best interests” in Section 28 (2) should mean that whenever necessary, all the relevant interests in a given situation must be ascertained on the available evidence. This must include naturally the interests of the child.⁵⁷ The “best interests” principle’s indeterminate nature cause the social workers, psychologists, lawyers and other experts to arrive at different conclusions about what is in the “best interests” of the same child.⁵⁸

⁵⁶ 2006 (9) BCLR 1034 (W), 1067 para 142.

⁵⁷ Visser P J’ Some aspects on the “best interests” of a child” principle in the context of public Schooling’ (note 10 above), 461.

⁵⁸ Schäfer L *Child Law in South Africa Domestic and International Perspectives* (2011), 155.

Every child has the right that his or her “best interests” are of paramount importance in every matter concerning the child. This means considering the child’s “best interests” before a decision affecting his or her life is taken. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is a developed common law principle that was used to assist the Courts and other institutions in the decision making process. The institutions and the Courts balance interests in arriving at decisions. These interests are sensitive as they often relate to family status in matters of divorce, maintenance, and care for the child.⁵⁹ The “best interests” of the child is a universal standard which had its origins in family law, but which has now spread to all other areas of the law to be a guiding principle in decisions to be made about children.⁶⁰

The “best interests” of the child is established as the determining factor in decisions relating to guardianship, access and custody of children in private law and the rule is entrenched in the Constitution.⁶¹ It is entrenched in the Constitution as provided for in Section 28 (2). In order to determine what is in the “best interests” of the child Section 7 of the Children’s Act provides a list of factors to be taken into account when applying the “best interests” of the child standard. It must be stressed that the factors listed in Section 7 are not exhaustive as the determination depends on the circumstances of each particular case.

In terms article 3 (1) of the UNCRC it is stated that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

⁵⁹ Dausab Y ‘The “best interests” of the child’ (2010) *Namibia Law Journal* 2.

⁶⁰ Skelton Ann ‘The development of a fledging child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2009), *AHRLJ*, volume 9, 2, 486.

⁶¹ Clark B ‘Golden Thread? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law’ 2000 (11) 1, 3.

administrative authorities or legislative bodies, the “best interests” of the child shall be a primary consideration. A similar provision is contained in article 4 (1) of the ACRW.

The Constitution in Section 28 (2) provides for the paramountcy of the “best interests” of the child. The word paramount in Section 28 (2) provides better protection to children than the UNCRC and ACRWC.

3.1.2 “Paramount importance”

The word “paramount” literally means when something is more important than anything else or of supreme importance. So, this would mean that the other competing interests will be disregarded to an extent that they are incompatible with due recognition being given to the “best interests” of the child.⁶² The paramount position of a child’s “best interests” must be measured by application of existing legal principles. This refers to interpret existing law to allow for the paramount importance of a child’s “best interests” to be given effect.⁶³

In *Laerskool Middelburg en ‘n Ander v Departementshoof, Mpumalanga Department van Onderwys, en ‘n Ander*⁶⁴ it was held that:

“In the light of the foregoing, the Court had to balance the interests of the first applicant school, and specifically its right to fair administrative action which had undeniably been violated by the respondents, against the interests of the learners who were dragged into this unpleasant dispute by the conduct of the respondents. Although the applicants argued that Section 28 (2) created no fundamental right, but only afforded priority/precedence to a child in the weighing-up of conflicting interests, Section 28(2) indeed established that the fundamental right of every child had to take first place in the balancing of conflicting rights of fighting parties (and thus also the fighting parties’ claim

⁶² Visser P J ‘Some aspects on the “best interests” of a child principle in the context of public schooling’ *THRHR* 462.

⁶³ *Ibid.*

⁶⁴ 2003 (4) SA 160 (T), 178 B-C.

to fundamental rights and the maintaining of such rights). The applicants' interests had to yield to those of the minors."

However, even though the "best interests" of the child are of paramount importance in every matter concerning the child, they do not trump other provisions of the Bill of Rights. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*⁶⁵ the Court stated that:

"The approach adopted by this Court is that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. And Section 28 (2) of the Constitution does not 'trump' other provisions of the Bill of Rights. This Court has held that Section 28 (2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with Section 36."

In *B v M*,⁶⁶ the Court stated that:

"A child's "best interests" is the pre-eminent consideration amongst all other considerations. However, the Legislature did not intend the "best interests" of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's "best interests" are the only factor to be considered or the sole determinant of the exercise of a court's discretion. The "best interests" principle is the paramount consideration within the hierarchy of factors but it is not always the only factor receiving consideration in matters concerning children."

⁶⁵ 2004 (1) SA 406 (CC), 432A-C.

⁶⁶ *Ibid*, 1068 para 146.

3.2 The Constitutional interpretation and the application thereof by the Courts

3.2.1 Background

As already mentioned *supra*, the paramount position of a child's "best interests" must be measured by application of existing legal principles. This refers to interpret existing law to allow for the paramount importance of a child's "best interests" to be given effect.

Section 28 (2) provides that a child's "best interests" are of paramount importance in every matter concerning the child. It is the provisions of this section that is the subject of interpretation herein. But before the interpretation of Section 28 (2) is considered, the researcher will refer to the supremacy of the Constitution to an extent that it gives guidance to the judicial interpretation of Section 28 (2).

Section 1(c) of the Constitution provides that:

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism; and
- (c) Supremacy of the constitution and the rule of law.

It follows that the supreme Constitution, underpinned by universally accepted values and norms, is the fundamental law of the land. In interpreting the law, the most important rule of interpretation is to establish the purpose of the legislation and to give effect to it in the light of the Bill of Rights.⁶⁷ The purposive approach to interpretation is preferred, as it is the one in which the provisions of the Bill of Rights must not be

⁶⁷ Botha C *Statutory Interpretation An Introduction for Students* (2009), 66.

construed in isolation, but rather in their context which includes, *inter alia*, the language of the provision in question.⁶⁸

It is accepted that the child's "best interests" is used to interpret the protection of children's rights as contained in Section 28 (1); thus Section 28 (1) and Section 28 (2) are read together.⁶⁹ For instance *Bannatyne v Bannatyne*⁷⁰ the Court stated that:

"The right in question in children's maintenance matters is contained in Section 28 of the Constitution. Children have a right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance. While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, 30 there is an obligation on the State to create the necessary environment for parents to do so. As reflected in the preamble to the Act, our country has committed itself to giving high priority to the constitutional rights of children. It has provided the legal infrastructure through the Act thereby giving effect to the imperative contained in Section 28 of the Constitution. The Act is a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of parents' obligations to maintain their children."

To support the statement by C Botha⁷¹ the Court in *Daniels v Campbell NO and Others* (hereafter referred to as *Daniels v Campbell*)⁷² held that:

"Courts are therefore under an obligation, where possible, to construe legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Bill of Rights is a cornerstone of our constitutional democracy. It enshrines the rights of all people in our country and affirms the foundational values of human dignity, equality and freedom. Courts must give expression to these foundational values when construing any legislation. They must interpret legislation so as to give effect to these fundamental values and to the specific provisions of the Bill of Rights which encompass them.

⁶⁸ W A Joubert *et al* *LAWSA* 2ed Vol 5 part 4 LexisNexis (2012), 24 para 16.

⁶⁹ S Woolman *et al* *Constitutional Law of South Africa* (2012), 47-31.

⁷⁰ *Ibid* 375-376, paras 24-25.

⁷¹ Botha C *Statutory Interpretation An Introduction for Students* (note 67 above).

⁷² 2004 (5) SA 331 (CC), 351 para 45.

Legislation must now be seen through the prism of the Constitution. The Constitution provides the context within which all legislation must be understood and construed.”

In *Zondi v MEC for Traditional and Local Government Affairs and Others*⁷³ Court stated that:

“Thus, where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of Section 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster. This approach to the construction of a statute is consistent with the approach to constitutional interpretation which has been developed by this Court that, where possible, legislation must be construed consistently with the Constitution. And this approach to constitutional interpretation is consistent with Section 39 (2) of the Constitution.”

Accordingly, the statement that Section 28 (2) by implication creates a right for a child to have his or her “best interests” given the fullest possible effect is very correct. Even though there is no mention of the word right in Section 28 (2), it has to be read with Section 28 (1) as it promotes the spirit, purport and objects of the Bill of Rights.

3.2.2 The constitutional interpretation and the application thereof by the Courts

This means refers to how something was interpreted with reference to the Constitutional Court cases. In this discussion it means how the “best interests” was interpreted with reference to the Constitutional Court cases. The application thereof by the Courts refers to how the “best interests” right was applied by the Courts; herein the Courts would include decisions of the High Courts and Constitutional Courts.

⁷³ 2005 (3) SA 589 (CC), 622 para 102.

The researcher will therefore discuss how the “best interests” of the child principle was interpreted and applied with reference to various decided cases. This task is by no means easy, as the Courts have to treat each case on its own merits.⁷⁴

Section 28 (2) creates a self-standing right; this was held in the case of *Minister of Welfare and Population Development v Fitzpatrick and Others*⁷⁵ (hereinafter referred to as *Fitzpatrick*) that:

“Section 28 (1) is not exhaustive of children’s rights. Section 28 (2) requires that a child’s “best interests” have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of Section 28 (2) cannot be limited to the rights enumerated in Section 28 (1) and Section 28 (2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in Section 28 (1).”

In the above case of *Fitzpatrick* the Court decided that Section 18 (4) (f) of the Child Care Act⁷⁶ violated Section 28 (2) of the Constitution. Section 18 (4) (f) proscribed the adoption of a child born from a South African citizen by persons who are not South African citizens or are persons who qualify for naturalisation, but have not yet applied. The Court held that the “best interests” of a child could lie in its adoption by non-South Africans.⁷⁷

Another remarkable illustration of Section 28 (2) as an independent right is the case of *Sonderup v Tondelli and Another*⁷⁸ (hereinafter referred to as *Sonderup*) where it was found that:

“Section 28 (2) of the Constitution provides that a child’s “best interests” are of paramount importance in every matter concerning the child, while Section 36 of the Constitution provides that the rights in the Bill of Rights can be limited by a law of general

⁷⁴ *Fletcher v Fletcher* 1948 (1) SA 130 (A), 130-148.

⁷⁵ 2000 (3) SA 422 (CC), 428 para 17.

⁷⁶ Act 73 of 1983, as repealed.

⁷⁷ *Fitzpatrick* *ibid* para 19.

⁷⁸ 2001 (1) SA 1171 (CC)

application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve this purpose.”

In the above case of *Sonderup*, the Court had to decide on the unconstitutionality of The Hague Convention on Civil Aspects of International Child Abduction Act⁷⁹ and it was found that it did not violate Section 28 (2) of the Constitution. The Court based its finding on the following:

“That in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident.”

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*⁸⁰ the Court found that:

“Section 28 (2) fulfils at least two separate roles. The first is as a guiding principle in each case that deals with a particular child. The second is as a standard which to test provisions or conduct which affect children in general. The “best interests” principle also applies in circumstances where a statutory provision is shown to be against the “best interests” of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case. A court may declare the scheme to be contrary to the “best interests” of the child in terms of Section 28 (2), and therefore invalid.”

The above decision of the Court confirms the paramount principle of the “best interests” of the child.

⁷⁹ Act 72 of 1996.

⁸⁰ 2013 BCLR 1429 (CC), 1448 paras 69-71.

Section 28 (2) has been invoked to justify an expansive interpretation of the powers of a Children’s Court and the High Court’s review jurisdiction. This is confirmed by the decision of the Court in *Swarts v Swarts en Andere*⁸¹ where it was held that:

“Once it is clear that the Maintenance Court, which is a specialised court of the Magistrate’s Court, has the capacity to amend or revoke the provisions of a Rule 43 order in connection with maintenance, no legally valid argument can in principle exist why the Children’s Court, which is also a specialised Magistrate’s Court, cannot under appropriate circumstances amend or revoke the provisions of a Rule 43 order in respect of custody of a child. Any other view would be contrary to the “best interests” of the child or children in question, and would therefore be contrary to the provisions of section 28 of the Constitution.”

Section 28 (2) requires the law to make the best possible effort to avoid where possible any breakdown of family or parental care that may put children at risk. This was stated in *S v M*.⁸² In this case, the Court has laid down guidelines that a balance exists which require that all relevant circumstances must be considered. The facts were that a mother of three (03) children was convicted of fraud in the Regional Court and sentenced to four (04) years direct imprisonment. On appeal the sentence was converted to one of imprisonment under Section 276 (1) (i) of the Criminal Procedure Act,⁸³ that is, correctional supervision. The effect of this change was that after she would serve eight (08) months’ imprisonment, the Commissioner for Correctional Services could authorise her release under correctional supervision. The Constitutional Court, however, granted the appeal and substituted the sentence as follows:

“The accused is placed under correctional supervision in terms of Section 276 (1) (h) of the Criminal Procedure Act for three years, which correctional supervision must include the following:

- (i) She performs service to the benefit of the community for ten hours per week for three years, the form of such service and the mode of supervision to be determined by the Commissioner for Correctional Services; and

⁸¹ 2002 (3) SA 451 (T), 462E-F.

⁸² Ibid 246 para 20.

⁸³ Act 51 of 1977, as amended.

- (ii) She undergoes counselling on a regular basis with such person or persons and at such times as is determined by the Commissioner for Correctional Services.”

The main issue before the Constitutional Court was the duties of the sentencing court in the light of Section 28 (2) of the Constitution. It is submitted that the reason for this issue to be entertained by the Court was on the basis that the care-giver was sentenced to direct imprisonment and; the three children will be without a care-giver for a period of at least eight (08) months. So, this borders on the line of violating Section 28 (1) (b) which protects that the rights of the child to family care, parental care, or appropriate alternative care when removed from family environment. In deciding on this issue the Court held that:

“Thus, it is not the sentencing of the primary care-giver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”⁸⁴

The Court was faced with a problem of applying the triad in sentencing as it was decided in *S v Zinn*⁸⁵ in the light of Section 28 (2). The factors to be considered in sentencing are the crime, the interests of society, and the personal circumstances of the offender. It is accepted that the Courts must sentence the offenders in accordance with the law, and where the law requires the offender to be imprisoned due to the severity of the offence, that is what must be done. However, the sentencing court must consider the interests of children if the sentence would affect them.⁸⁶

This is to give effect to the provisions of Section 28 (2) which provide that:

⁸⁴ Ibid para 30.

⁸⁵ 1969 (2) SA 537 (A).

⁸⁶ *S v M (Centre for Child Law as Amicus Curiae)* SA 232 (CC) para 35.

“A child’s “best interests” are of paramount importance in every matter concerning the child.”

The words in “every matter concerning the child” are applicable to the facts in the case of *S v M*, in that the sentence affects the children, for their care-giver would be removed from them. Therefore, the Court is obliged to sentence the care-giver while taking into consideration the “best interests” of the child right; as every forum, institution and Courts are obliged to interpret the existing law in a way that promotes the spirit, purport and objects of the Bill of Rights.⁸⁷

The Court went further to give the following guidelines depending on the facts of each case:

- (a) “A sentencing court should find out whether a convicted person is a primary care-giver whenever there are indications that this might be so.
- (b) A probation officer’s report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- (c) If on the *Zinn*-triad approach, the appropriate sentence is clearly custodial and the convicted person is a primary care-giver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the care-giver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.”⁸⁸

⁸⁷ *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) para 45.

⁸⁸ *S v M* para 36.

What is of importance also is the meaning of the care-giver; which was defined as in *S v M*⁸⁹:

“A primary care-giver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.”

By contrast with *S v M* the Court in *MS v S (Centre for Child Law as Amicus Curiae)*⁹⁰ expanded the enquiry where the care-giver is to be sentenced. The Court stated that:

“It is incumbent on the Courts to start their analysis from the basis of the “best interests” of the children, as mandated by Section 28 of the Constitution, not just the mere interests of the children. If there appears to be a partner of a primary care-giver, the question should then be whether that partner can provide adequate care under section 28 (1) (b) of the Constitution or whether there is evidence that that parent is inclined to neglect the children’s needs, contrary to Section 28 (1)(d) of the Constitution.”

Based on that finding the Court held that:

“Mrs S is not the children's sole care-giver. She is not almost totally responsible for their care. Despite heartache and turbulence, well captured in her evidence and in the social workers’ reports, Mrs S is united with the father of her children. He is their co-resident parent. And he is willing to care for them during her incarceration. Although he works long hours, there is nothing to indicate that he will not be able to engage the childcare resources needed to ensure that the children are well looked after during his absence at work. A non-custodial sentence is therefore not necessary to ensure their nurturing. And a custodial sentence will not inappropriately compromise the children’s “best interests”. The sentencing court in my view properly balanced out the constitutional interests at stake.”

Terblanche⁹¹ states that most of the other rights in Section 28 give effect to the “best interests” principle (e.g. the rights to parental or appropriate alternative care, to basic

⁸⁹ *S v M* para 25.

⁹⁰ 2011 (2) SACR 88 (CC), 102 para 48.

⁹¹ Terblanche SS ‘The Child Justice Act: A Detailed Consideration of section 68 as a point of departure with respect to the sentencing of young offenders’ (2012) *PELJ* 15,445.

nutrition and other services, protection from maltreatment, neglect, abuse or degradation, and so on). In addition, children are obviously also entitled to the other Constitutional rights in the Bill of Rights.

In *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)*,⁹² the applicants brought an application for confirmation of declarations of statutory invalidity made by the High Court. The Court struck down various provisions of the Criminal Law Amendment Act⁹³ (“the minimum sentence act) in the form it took after amendment by the Criminal Law (Sentencing) Amendment Act⁹⁴ (the Amendment Act). The impugned sections make minimum sentences applicable to offenders aged 16 and 17 at the time they committed the offence. The High Court found these sections inconsistent with the provisions of the Bill of Rights pertaining to children. The applicants also bring the application on the basis that all 16 and 17 year old children may be at the risk of being sentenced under the new provisions. Furthermore, the application is brought on behalf of the children already sentenced under the new provisions which the High Court did not grant.

A child’s “best interests” play a vital role in the interpretation of any statutory provision affecting child offenders. It is a consideration that must be given practical effect whenever a question is asked as to the purpose of a specific provision in the Child Justice Act.⁹⁵ As is normally the case, what is actually in the “best interests” of a child offender during the sentencing process can be established only through careful analysis of all of the facts relevant to the matter at hand.⁹⁶ It is submitted that this is the correct interpretation of the “best interests” of the child principle.

⁹² 2009 (2) SACR 477 (CC).

⁹³ Act 105 of 1997, as amended.

⁹⁴ Act 38 of 2007.

⁹⁵ Act 75 of 2008.

⁹⁶ Terblanche SS *The Child Justice Act: A Detailed Consideration of section 68 as a point of departure with respect to the sentencing of young offenders* (2012) PELJ (note 91 above), 445.

The Court in *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)*⁹⁷ in considering the “best interests” of the child in the sentencing process made a distinction between child offenders and adults. It was then held that:

“These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults; they are more vulnerable to influence and pressure from others; and, most vitally, they are generally more capable of rehabilitation than adults. These are the premises on which the Constitution requires the Courts and parliament to differentiate child offenders from adults. We distinguish them because we recognize that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognize that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence, we afford children some leeway of hope and possibility.”

One cannot but agree with the finding of the Court to the extent that children commit crimes due to influence from various sectors. It is submitted that in punishing children, the sentencing authority must not be too harsh, but accept that children are rehabilitated more easily than adults. Children may, after rehabilitation, become better persons and very useful to the community. The authority for this statement is found in section 3 (b) of the Child Justice Act which states that:

“The child should not be treated more severely than an adult would have been under similar circumstances.”

The researcher commends the finding of the Court that the Constitutional injunction that a child's “best interests” are of paramount importance does not preclude sending child offenders to jail. It means that the child's interests are more important than anything else, but not that everything else is unimportant. The entire spectrum of considerations

⁹⁷ Ibid 490 para 27-28.

relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.⁹⁸

Finally, it appears that Courts have a wide discretion on what the “best interests” of the child are and how effect should be given to these interests. This was shown in the case of *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development*⁹⁹ where the Court held that:

“These provisions therefore deny the assistance to some citizens, while affording benefits to other citizens. What is more, they fail to take sufficient account of Section 28 (2) of the Constitution. The exclusion of the children from these benefits cannot therefore be reasonable and justifiable in terms of section 36.”

3.2.3 Limitation of the “best interests” of the child right

Section 7 (3) of the Constitution provides that:

“The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill.”

Section 36 (1) of the Constitution provides that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

⁹⁸ *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)*, para 29.

⁹⁹ 2004 (6) BCLR 569 (CC), 616 para136.

It is trite that Courts in applying section 36 (1) are required to undertake a proportionality enquiry in the course of which they consider some of the factors listed in paragraphs (a) - (e).¹⁰⁰ The limitation of the right must be in the “best interests” of the child. This was demonstrated in *Sonderup*¹⁰¹ where the Hague Convention on the Civil Aspects of International Child Abduction (hereafter referred to as the Convention) was found to satisfy the long-term interests of children. However, the Court discussed the question whether the children’s short-term interests were not satisfied by the Convention; that such limitation is justifiable in terms of Section 36 of the Constitution.

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*¹⁰² the Court considered the limitation of the “best interests” of the child right in a case of publication of child pornography and held that:

“The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The State must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.”

3.3 “Best interests” of the child before the enactment of the Children’s Act

Prior to the enactment of the Children’s Act, the Court considered the list of factors developed in the case of in *McCall v McCall*.¹⁰³ In this case the parties were divorced and

¹⁰⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 436 para 104.

¹⁰¹ 2001 (1) SA 1171 paras 29-36.

¹⁰² 2004 (1) SA 406 (CC), 434 para 63.

¹⁰³ 1994 (3) SA 201 (C).

signed a consent paper relating to care for minor children. Justice King held that in determining what is in the “best interests” of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance. And also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as nuance, the Court established following criteria:

- (a) The love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;
- (b) The capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- (c) The ability of the parent to communicate with the child and the parent’s insight, understanding of and sensitivity to the child’s feelings;
- (d) The capacity and disposition of the parent to give the child the guidance he or she requires;
- (e) The ability of the parent to provide for the basic physical needs of the child;
- (f) The ability of the parent to provide for the educational wellbeing and security of the child;
- (g) The ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- (h) The mental and physical health and moral fitness of the parent;
- (i) The stability or otherwise of the child’s existing environment with regard to the desirability of maintaining the *status quo*;
- (j) The desirability or otherwise of keeping siblings together;
- (k) The child’s preference, if the Court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- (l) The desirability or otherwise of applying the doctrine of same-sex matching; and
- (m) Any other factor that is relevant to the particular case with which the Court presides.

In *Duncombe v Willies*¹⁰⁴ the father of the children was a member of the Jehovah's Witnesses and the mother was a member of the Catholic Church and the minor children were attending a Catholic School. The Court granted the mother sole guardianship and sole custody of the minor children pending the mother's instituting action for such relief. In granting the order, Milne, DJP said:

“Furthermore, it seems to me undesirable and against the interests of the children that they should from their father on the one hand receive positive proselytising education in one faith, whereas, on the other hand, the whole religious basis of the schools which they attend is on a completely different and inconsistent basis. That would be to put them in a conflict situation which I do not consider to be in their “best interests”.

In *Pinion v Pinion*¹⁰⁵ the Court found that even if the parents succeed ultimately in resolving their differences by discussion, it will not be practically possible to conceal those differences from the minor, particularly as he/she grows older. It is imperative that a child should know, in such a situation, with which parent the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.

3.4 “Best interests” of the child with specific reference to section 7 and 9 of the Children’s Act

The Children’s Act reinforces statutory common law principle of the “best interests” of the child. The Children’s Act gives effect to Section 28 (2) of the Constitution that the child’s “best interests” are of paramount importance in every matter concerning the child. In order to guide the process of determining what is in the “best interests” of the child, Section 7 of the Act sets out a long list of factors which the Courts need to take into account when determining the “best interests” of the child. In *Cunningham v Pretorius*¹⁰⁶ the Court held that it must be guided principally by the “best interests” of the child. Courts must carefully weigh and balance the reasonableness of the primary

¹⁰⁴ 1982 (3) SA 311 (E), 317 E-F.

¹⁰⁵ 1994 (2) SA 725 (D), 731.

¹⁰⁶ Case: 31187/08 (NG), unreported.

caregiver's decision to relocate, taking into account the practical and other considerations on which such a decision is based, the competing advantages and disadvantages of relocation, and, finally, how relocation will affect the child's relationship with the non-primary care-giver.

Section 7 provides a similar but more detailed list of factors as compared to the *McCall v McCall* decision.

- (1) Whenever a provision of this Act requires the "best interests" of the child standard to be applied, the following factors must be taken into consideration where relevant, namely:
 - (a) The nature of the personal relationship between:
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances,
 - (b) The attitude of the parents, or any specific parent, towards:
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) The capacity of the parents, or any specific parent, or of any other care-giver or person to provide for the needs of the child, including emotional and intellectual needs,
 - (d) The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) both or either of the parents or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
 - (f) The practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
 - (g) The need for the child:
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
 - (h) The child's:
 - (i) age, maturity and stage of development;

- (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
 - (i) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - (i) Any disability that a child may suffer;
 - (j) Any chronic illness from which a child may suffer;
 - (k) The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a carrying family environment;
 - (l) The need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) Any family violence involving the child or a family member of the child; and
 - (l) Which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.
- (2) In this section, "parent" includes any person who has parental responsibilities and rights in respect of a child.

Although Section 7 is similar to the list developed in the *McCall* case, there are a few differences. First, Section 7 has a wider application compared with the *McCall* list. Its application is not limited to parents but apply equally to a care-giver or any relevant person in the child's life. Secondly, unlike the *McCall* list, Section 7 does not include same-sex life partners. However, one still has to bear in mind that Section 7 (a) stipulates the importance of the nature of the personal relationship between the child and parent, any other care-giver or relevant person. Thirdly, Section 7 does not specify the ability to provide economic security but puts a strong emphasis on the emotional, intellectual and spiritual well-being and stability of the children. Section 7 does not include child preferences. Section 7 (g) does include the child maturity and development stage, which

are often the criteria to consider when taking children's wishes into account, but it does not specifically mention the wishes of the child.

Section 7 (1) should be read with Section 28 (2) of the Constitution. In *Jooste v Botha*¹⁰⁷ the Court concluded that:

“But Section 28 (2) has a much wider formulation. Its wide formulation is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That can clearly not have been intended. In my view, this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.”

Section 9 of the Children's Act provides that:

“In all matters concerning the care, protection and well-being of a child the standard that the child's “best interests” are of paramount importance must be applied.”

The Court interpreted and applied the “best interests” in *Fitzpatrick*¹⁰⁸ stating that:

“However, the “best interests” standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. It is standard and should be flexible as individual circumstances will determine which factors secure the “best interests” of a particular child.”

This interpretation is consistent with the manner in which the Court applied Section 28 (2) in *Fraser v Naude and Others*¹⁰⁹ where it was held:

“The matter concerns the status and well-being of the young adopted child. The interests of the child are paramount. We are conscious of the importance of such an issue and of the strong emotions to which it has given rise. All the parties to this litigation have suffered as a result of the prolonged proceedings. But, even if the application for leave to appeal were to be granted, and Mr Fraser were ultimately to succeed in his application to have the adoption order set aside, it would not be the end of the matter. The adoption

¹⁰⁷ 2000 (2) SA 199 (T), 210.

¹⁰⁸ Ibid 429 para 18.

¹⁰⁹ 1999 (1) SA (CC), 1, 5, para 9.

proceedings would have to be re-opened and the dispute could again drag itself out through the Courts. Continued uncertainty as to the status and placing of the child cannot be in the interests of the child.”

3.5 Relationship between “best interests” of the child principle *vis -a- vis* other rights

The children’s rights as specifically cited in the Bill of Rights are not limited to those mentioned in Section 28. The provision that South Africa is an open and democratic society based on human dignity, equality and freedom, makes it clear that in the case of a conflict of Constitutional interests, human dignity and equality will be the primary consideration.¹¹⁰ In *S v M*¹¹¹ it was found that it was difficult to establish an appropriate operational thrust for the “paramountcy” principle; that the “paramountcy” principle was not to be applied in a way that demolishes other valuable and constitutionally protected interests.

According to Friedman and Pantazis,¹¹² Section 28 (2) appears to be aimed at addressing the vulnerability of children, and ensuring that their rights do not, frequently, have to give way to the rights of others.

The authors argue, correctly it is submitted, that:

“Section 28 (2) involves a weighing up process of the various interests of children in order to decide what is best for them. In addition, a child’s interests have a leg up *vis-à-vis* other rights and values.”

The inclusion of the “best interests” principle in the Constitution has drastically changed the common law position. In *President of the Republic of South Africa and Another v*

¹¹⁰ Robison J A ‘Children’s Rights in the South African Constitution’ (2003) *PELJ* 61, 33.

¹¹¹ *Ibid* 249 para 25-26.

¹¹² Friedman A and Pantazis A ‘Children’s Rights’ in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman *Constitutional Law of South Africa* (2012), 31.

*Hugo*¹¹³ the Court held that a release of all fathers would have meant that a very large number of men prisoners would have gained their release. As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the president's purpose as the release of mothers. In addition, the release of a large number of male prisoners in the current circumstances where crime has reached alarming levels, would almost certainly have led to considerable public outcry. In the circumstances, it must be accepted that it would have been very difficult, if not impossible, for the President to have released fathers on the same basis as mothers. If he was obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all. The Court went further to State that the release of mothers would in many cases have been of real benefit to children which was the primary purpose of their release. The impact of the remission on those prisoners was to give them an advantage.

The Court in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; and South African Human Rights Commission v President of the Republic of South Africa*¹¹⁴ (hereafter referred to as *Bhe*) found Section 23 of the Black Administration Act¹¹⁵ and the customary law rule of primogeniture in its application to intestate succession unconstitutional in so far as it unfairly discriminated against born from unmarried parents daughters to qualify as heirs in the intestate estate of their deceased father. The Court found that the customary rule of primogeniture violated the Constitution's equality provisions in Section 9, the right to human dignity in Section 10 and the rights of children under Section 28 of the Constitution.

The Court held that children could not be subjected to discrimination on grounds of sex and birth in terms of Section 9 of the Constitution. The customary law rule of

¹¹³ 1997 (4) SA 1 (CC), 25, para 46-47.

¹¹⁴ 2005 (1) SA 580 (CC), 624 para 100.

¹¹⁵ Act 38 of 1927, as amended.

primogeniture prevented all female children from inheriting intestate and significantly curtailed the rights of born from unmarried parents male children in this regard.¹¹⁶

In its consideration of the Constitutional rights of children implicated in this case,¹¹⁷ the Court gave special attention to the question whether the differential entitlements of children born within marriage and those born from unmarried parents constitutes unfair discrimination.¹¹⁸ In so far as the answer to this question could be based on the interpretation of Section 28 and other rights in the Constitution, the Court held that the provisions of international law must be considered because South Africa is a party to a number of multilateral agreements designed to strengthen the protection of children.¹¹⁹ In the general context of according natural fathers equal rights to those of mothers, the court made the following important comments:¹²⁰

“The European Court on Human Rights has held that treating children born from unmarried parents differently to those born within marriage constitutes a suspect ground of differentiation in terms of article 14 of the ACRWC. The United States Supreme Court, too, has held that discriminating on the grounds of illegitimacy is illogical and unjust.”

In describing the position of children born from unmarried parents children in South Africa, the Court concluded that:¹²¹

“The prohibition of unfair discrimination on the ground of birth in Section 9 (3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child’s biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, children born from unmarried parents did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus when Section 9 (3) prohibits unfair

¹¹⁶ *Bhe* para 88.

¹¹⁷ *Ibid* paras 47-59.

¹¹⁸ *Ibid* para 54.

¹¹⁹ *Ibid* para 55.

¹²⁰ *Ibid* para 56.

¹²¹ *Ibid* para 59.

discrimination on the ground of birth, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed unfair unless it is established that it is not.”

Cheadle¹²² holds the view that the “best interests” standard is, however, not without limitation. If statutory provisions or rules of the common law are inconsistent with the “best interests” of the child, such inconsistency may be found to be justified under the provision of Section 36 of the Constitution. This is supported by the decision of *LS v AT and Another*,¹²³ where it was held that, on the assumption that the provisions of the Hague Convention on the Civil Aspects of International Child Abduction,¹²⁴ were inconsistent with the short term “best interests” of the child, that such inconsistency was justifiable in an open and democratic society based on human dignity, equality and freedom.

3.6 Conclusion

The application of the “best interests” principle is a child-centred approach aimed at protecting the needs and entitlements of children. The unique circumstances of a particular child will then determine the different factors to consider in securing the “best interests” of that child. The way in which the “best interests” of the child principle is interpreted and applied by the Courts, is influenced by factors such as culture, social, political and economic conditions and the value systems of the relevant decision maker. This is so as the “best interests” principle is not and has never been given exhaustive content, but that it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the “best interests” of a particular child. Furthermore, the list of factors competing for the core of “best interests” of the child is almost endless and will depend on each, particular, factual situation. Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred

¹²² Cheadle H, *et al South African Constitutional Law: The Bill of Rights*, (2002), 531.

¹²³ 2001 (2) BCLR 152 (CC).

¹²⁴ Adopted by the United General Assembly on 25 October 1980 and Ratified by the Republic of South Africa on 15 December 1995.

approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the “best interests” of the child concerned.¹²⁵ It is on this basis that there should be a predominant focus on the “best interests” of the child, as this may obscure the interests of other parties¹²⁶.

It has never been easy to determine what the “best interests” of the child are. The inclusion of the “best interests” of the child in Section 28 (2) reflects the right direction into which South Africa is moving, that is, towards the promotion and protection of the children’s rights. The enactment of the Children’s Act, is an indication that the country is on par with her international counterparts. The “best interests” principle has often been used to articulate the parental rights and interests. The task of deciding what is in the “best interests” of the child is a very tough and complex one. No one can predict the future; hence the caution. Every effort should, therefore, be made by all of those involved to jealously search for the “best interests” of the child. We are living in a changing society that if founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms is attainable. The social and religious beliefs of the society should not overlook the rights and interests of the child. The child is a human being with full rights and interests that must be promoted and protected. It is suggested that the “best interests” principle should not be used to mediate the rights of other family members. It is necessary to compel the full and proper consideration of the Constitutional rights of children alongside of the rights of other family members.

¹²⁵ *S v M* 248, para 24.

¹²⁶ Bonthuys E “‘best interests’ of Children in South African Constitution’ (2005) *Int J Law Policy Family* doi; 10.1093/lawfam/ebi022 accessed on 08 November 2012.

CHAPTER FOUR: PARENTAL RESPONSIBILITIES AND RIGHTS

4.1 Parental responsibilities in terms of section 18 of the Children's Act

4.1.1 Background

In terms of the common law, parents have parental authority over their children. This authority gives parents, powers, duties and responsibilities in respect of their minor children and the children's property. The parental authority with regard to the minor children on account of parenthood must be exercised in the "best interests" of the children with due regard to the rights of the children.¹²⁷

By reason of their parental authority parents have the right and are obliged to support their minor children financially and to provide for their educational needs, to care for them, and control their estates (guardianship).¹²⁸

In the case of *H v I*¹²⁹ the Court held that:

"The applicant had established (a) that his daughter (a 17 year old girl) was immature and gullible; (b) that further association with the respondent, a 23-year-old man, was adverse to her interests; (c) that the applicant had not waived or abandoned his parental right to interfere with his daughter's choice of associates; and (d) that the respondent had knowingly defied the applicant's parental authority, and wished to persist therein."

In the case of *L v H*¹³⁰ the Court had to determine, among others, whether the applicant was exercising his authority in a reasonable manner. The Court then found on the facts that:

"Regarding the respondent as a person, the applicant alleges that he is emotionally unstable, that he has an uncontrollable temper and that it is common knowledge that he has been admitted to hospital on two occasions for apparently taking an overdose of

¹²⁷ Visser P J and Potgieter JM *Introduction to Family Law* (1997), 1999.

¹²⁸ Ibid.

¹²⁹ 1985 (3) SA 237 (C).

¹³⁰ 1992 (2) SA 594 (E), 598-599.

drugs. I am satisfied, on the undisputed facts, that it cannot be said that the applicant's exercise of his parental power and control over K, and his insistence that the respondent should not communicate with her, is unreasonable”.

Section 1(1) of the Children’s Act uses the term parental responsibilities and rights instead of parental authority. Parental responsibilities and rights include caring for the child, maintain contact with the child, acting as the child’s guardian, and contributing to the child’s maintenance.¹³¹

Parental responsibilities and rights in terms of section 18 of the Children’s Act are viewed in a much broader sense than under the previous parental dispensations and old ways are significantly altered. The current focus is on the right of the child to parental care, and not parental powers.¹³² This statement was shown in the case of *Forssman v Forssman*¹³³ where the dispute was about the increase of the maintenance amount.

The Court held that:

“We find the learned Magistrate’s decision concerning maintenance to be entirely appropriate. Her decision takes into account the “best interests” of the child and it fully recognises parental responsibilities as they have now been enshrined in the Children’s Act. We are fully cognisant of the fact that the Children’s Act was not applicable at the time when the Magistrate rendered her decision. However, the parental responsibilities and rights as recorded in Section 18 of the Children’s Act appear in any event too largely in accordance with the obligations of parents under the common law.”

Section 18 (1), provides that a person may either have full or specific parental responsibilities and rights in respect of a child. However, subsection (2) gives a detailed description of the parental responsibilities and rights, which provides that:

“(2) The parental responsibilities and rights that a person may have in respect of a child, including the responsibility and the right-

- (a) to care for the child;
- (b) to maintain contact with the child;

¹³¹ Section 1(1) read with section 18 (2) of the Children’s Act.

¹³² Sadie H and Corrie L A *Practical Approach to the Children’s Act* (2010), 34.

¹³³ [2007] 4 All SA 1145 (W), 1150 para 42.

- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.”

The researcher will now discuss paragraphs (a) to (d) individually hereunder.

4.1.2 The responsibility and right to care for a child

In terms of the common law, care means to have control and supervise the child’s daily life. It includes caring for the child, supporting, controlling the child’s life on a day-to-day basis, and assuming responsibility for the child’s upbringing, health and education as well as the physical and emotional safety.¹³⁴

The Court in *Governing Body, Gene Louw Primary School v Roodtman*¹³⁵ held that:

“At common law a parent (or other person) who has the custody of a minor child is entrusted with the care of the child’s person and the decision-making power in respect of the child’s day-to-day life, upbringing and education.”

A useful description of the position of the custodian parent is given by the judgment of Gubbay J in *Matthee v MacGregor Auld and Another*¹³⁶ where it was held that:

“The custodian parent has, therefore, the right and duty to regulate the life of the child; to choose and establish his residence; to resolve with whom he should be allowed to associate; to direct the lines on which his secular education should proceed, including the choice of the school; to devise upon his religious instruction; to determine what medical advice, supervision or assistance should be sought in the event of his becoming ill or sustaining an injury.”

The person, who has care, enjoys a broader discretion in respect of the exercise of the responsibilities and rights covered by care. Depending on the child’s age, maturity and

¹³⁴ Cronjé DSP and Heaton J *South African Family Law* (2004), 279.

¹³⁵ 2004 (1) SA 45 (C), 51-52.

¹³⁶ 1981 (4) SA 637 (Z) at 640D – F.

stage of development, the person who has the care of the child must give due consideration to any views and wishes expressed by the child before a decision is taken which affects the child.¹³⁷ For instance in *Petersen en 'n Ander v Kruger en 'n Ander*¹³⁸ the Court stated that:

“It is the basis of our system of law that, subject to certain limitations, the natural parents have the right of control and custody of a child. The aforementioned limitations flow from the authority conferred on the Court as upper guardian of all children to limit the parental rights in respect of a child where the interests of the child require it. The circumstances where-under a Court would feel called upon to interfere with parental rights of control and custody, exists where the exercise of such rights could endanger the life, health or morals of the child. The authority of the Court to interfere with rights of parents in respect of their child is not limited to the three named grounds; any ground which is related to the welfare of the child can serve as a reason for interference by the Court. To a Court the interests of the child are the most important, but the rights of the parents must not be left out of account.”

However in *Jackson v Jackson*¹³⁹ Scott JA in a dissenting judgment held that:

“It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the “best interests” of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts.”

¹³⁷ Heaton J *South African Family Law*, (2010) 284.

¹³⁸ 1975 (4) SA 171 (C).

¹³⁹ 2002 (2) SA 303 (SCA), 318 para 2.

The Children's Act does not use the word "custody", but the word "care" is used. However, care is defined far more broadly than custody.¹⁴⁰

In terms of Section 1 (1) of the Children's Act, care has been defined to include:

- (a) Within available means, providing the child with:
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support.
- (b) Safeguarding and promoting the well-being of the child;
- (c) Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) Respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's rights set out in the Bill of Rights and the principles set out in the Act;
- (e) Guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and state of development;
- (f) Guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) Guiding the behaviour of the child in a humane manner;
- (h) Maintaining a sound relationship with the child;
- (i) Accommodating any special needs that the child may have; and
- (j) Generally, ensuring that the "best interests" of the child is the paramount concern in all matters affecting the child.

The above definition of care illustrates that care extends beyond the common law definition of custody.¹⁴¹ In *Wheeler v Wheeler*¹⁴² the Court clarified the position with

¹⁴⁰ Boezaart T *Child Law in South Africa* (2009), 65.

¹⁴¹ *Wheeler v Wheeler* [2011] 2 All SA 459 (KZP).

¹⁴² *Wheeler v Wheeler* [2011] 2 All SA 459 (KZP) 465, paras 26-28.

regard to the extension of the common law concept of custody and care. The Court held that:

“What the legislature sought to achieve was to bring the common law concepts in line with statutory ones. Because most elements of custody and access are shared by care and contact respectively, this subsection effectively means that the Legislature, in a rather clumsy way, has equated custody and access to care and contact respectively. Custody can be used interchangeably with care, and access with contact. This in turn means that the use of the common law concepts would not be wrong. However, the new terminology must be used in pleadings and Court orders.”

4.1.3 The responsibility and right to maintain contact with a child

The term contact refers to the right and privilege to see, visit, spend time with, and have contact with the child.¹⁴³ For example, in *Kok v Clifton*¹⁴⁴ the Court held that:

“It is common place that it is in the interests of the child of divorced parents that it should not be estranged from either parent; the child should not be placed in such a position as to lose affection for either of its parents, nor that should either of the parents lose affection , as well as interest in the child.”

The concept of contact is child-centred, as it is the child’s right to have contact with his or her parent.¹⁴⁵ This is a shift from the concept of a parent’s right of access to a child. Scott JA in *T v M*¹⁴⁶ stated that:

“Generally speaking, it can be accepted that once a natural bond between parent and child (whether legitimate or illegitimate) has been established it would ordinarily be in the “best interests” of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child

¹⁴³ Heaton J *South African Family Law*, 280.

¹⁴⁴ 1955 (2) SA 326 (W), 330.

¹⁴⁵ Boezaart T *Child Law in South Africa*, 67.

¹⁴⁶ 1997 (1) SA 54 (A), 60 B.

demands that it be deprived of the opportunity of maintaining contact with the parent in question”.

While the parent exercises the right of contact with child, he or she exercises temporary powers that are exercised by the custodial parent.¹⁴⁷ However, the Court in *Wicks v Fisher*¹⁴⁸ in upholding the Constitutional rights of children, more in particular Section 28 (2) held that:

“Whilst I am mindful of the fact that a custodian parent has rights which prevail over those of a non-custodian parent, especially in respect of a child born out of wedlock, and I have been reminded that the modern trend is to move away from this concept, I am satisfied that, even if I err in this regard, and I do not believe that I have, the interests of the child are of overriding importance. As I have said, I am mindful of the modern trend in custody and access issues relating to illegitimate children, according rights to the father of an illegitimate child not recognised at common law. However, I am enjoined in terms of our Constitution to develop the common law to promote the objects of the Bill of Rights.”

In *P v P*¹⁴⁹ the Court established the criterion to be used in determining what custody arrangement will be in the “best interests” of the child. In this case, Van Heerden JA held that:

“The fundamental principle consistently applied by South African Courts in custody disputes, as indeed in all matters concerning children, is now entrenched in Section 28 (2) of the Constitution. Determining what custody arrangement will serve the “best interests” of the children in any particular case involves the High Court making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children. A Court is not looking for the ‘perfect parent’; doubtless there is no such being. The Court’s quest is to find what has been called the least detrimental available alternative for safeguarding the child’s growth and development.”¹⁵⁰

¹⁴⁷ Heaton J *South African Family Law* , 280.

¹⁴⁸ 1999 (2) SA 504 (N), 510.

¹⁴⁹ 2007 (5) SA 94 (SCA).

¹⁵⁰ *P v P* 2007 (5) SA 94 (SCA), 99-102 paras 14 and 24.

In the main, contact refers to maintaining a personal relationship with the child and communicating with the child on a regular basis if the child lives with someone else. Communication with the child may occur in various forms, for example, by visiting the child or the child visiting the parent, or through telephone calls, telefaxes, letters, video, video calls, electronic mail and mobile text messages.¹⁵¹

However, the Court in *V v V*¹⁵² stated that the right which a child has to have access to his/her parents is complemented by the right of the parents to have access to the child. Then it is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is, therefore, not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child.

4.1.4 The responsibility and right to act as the child's guardian

Guardianship refers to that portion of parental responsibilities and rights which relates to the administration and control of the child's estate and the capacity to assist or represent the child in legal proceedings or to perform juristic acts.¹⁵³ Generally, guardianship vested in the father of a child born within marriage, or the mother of a child born outside marriage.¹⁵⁴ This was confirmed in *Hill v Hill*¹⁵⁵ where the Court stated that:

“It should be remembered that as natural guardian of his children his rights to determine their religious upbringing were superior to those of his wife.”

¹⁵¹ Section 1 (1) of the Children's Act.

¹⁵² 1998 (4) SA 169 (C), 189.

¹⁵³ Heaton J *South African Family Law*, 283.

¹⁵⁴ Visser PJ and Potgieter J M *Introduction to Family Law* (1997), 208.

¹⁵⁵ 1969 (3) SA 544 (RAD), 547 A.

However, it is trite that the exercise of parental power is always subject to the right of the High Court as upper guardian of the children to interfere so as to ensure and enforce what is in the “best interests” of the children.¹⁵⁶

A Court granting a decree of divorce may, in terms of Section 6 (3) and 8 (1) of the Divorce Act,¹⁵⁷ grant, among others, sole guardianship to one of the parents. However, the Court must take into consideration the “best interests” of the children when making an order with regard to guardianship. For instance, in *Nugent v Nugent*¹⁵⁸ the Court held that:

“Upon dissolution of a marriage by the Court it becomes necessary to determine, which party should have the custody of the children. The paramount consideration is what is best in the interests of the children.”

In further application of the “best interests” of the child principle, the Court went further to state that:

“The real position that emerges from all the authorities is that the interests of the children are the paramount or the sole consideration in determining questions concerning or arising from disputes relating to custody. In applying this principle, the Court will not give effect to parental power or any other right enjoyed by a parent at common law during the subsistence of a marriage. Upon dissolution of the marriage, it is stating the obvious that only one parent can be entrusted with the custody of the children of the marriage, while the other parent can only be granted such access as is in the interests of the children.”

The above decision was also confirmed by the Court in *Shawzin v Laufer*¹⁵⁹ where it was stated that the dominant issue for decision was the “best interests” of the children and not the marital status of the parties.

¹⁵⁶ Visser P J and Potgieter J M *Introduction to Family Law*, (1997) 214.

¹⁵⁷ Act 70 of 1979.

¹⁵⁸ 1978 (2) SA 690 (R), 692 B.

¹⁵⁹ 1968 (4) SA 657 (A), 668 H.

The initial statement, *supra*, that guardianship refers to the administration and control of the child's estate and the capacity to assist or represent the child in legal proceedings or to perform juristic acts, is restated in Section 18 (3) of the Children's Act.

It is submitted that, however, the Children's Act itself does not entirely resolve the problem with regard to which Court has jurisdiction to assign guardianship of the child on a person. This is based on the following sections which do not give certainty on the issue. Section 22 (4) (b) provides that:

"Subject to subsection (6), (a) parental responsibilities and rights agreement takes effect only if -

(b) made an order of the High Court, a divorce Court in a divorce matter or the Children's Court, on application by the parties to the agreement."

Section 24 (1) provides as follows:

"Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant."

Section 23 (1) states that:

"Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce Court in divorce matters or the Children's Court for an order granting to the applicant, on such conditions as the Court may deem necessary."

However, the Court in *Ex Parte Sibisi*¹⁶⁰ resolved the issue by giving due regards to the "best interests" of the child and held that:

"On considering all of the evidence, I am satisfied that it is in the interests of the minor child that his guardianship, as well as the other rights envisaged in the relief sought, be granted to the applicant. Consequently, intervention by the Legislature may be necessary in this regard to clarify the jurisdiction, not only of Children's Courts, but also divorce Courts, to determine the guardianship of children."

Thus, the Court disregarded the confusion caused by the Legislature in favour of the "best interests" of the child. This is consonant with the provision that the Court is obliged

¹⁶⁰ 2011 (1) SA 192 (KZP), 195 paras 14-15.

to take into consideration the “best interests” of the child right; as every forum, institutions and Courts are obliged to interpret the existing law in a way that promotes the spirit, purport and objects of the Bill of Rights.¹⁶¹

In relocation cases, the Courts must not only consider the parent’s interests but check whether those interests are compatible with the “best interests” of the child. For instance, in *F v F*¹⁶² the Court held that:

“While attaching appropriate weight to the custodian parent’s interests, Courts must, however, guard against ‘too ready an assumption that the custodian’s proposals are necessarily compatible with the child’s welfare. The reasonableness of the custodian’s decision to relocate, the practical and other considerations on which such decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must be carefully scrutinised by the Court in determining whether or not the proposed move is indeed in the best interests of the child.”

It is submitted that the decision maker must always consider the factors listed in Section 7 (1) of the Children’s Act. Above all, the Court must give due regard to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development.¹⁶³

In *Van Deijl v Van Deijl*¹⁶⁴ Young J held that the interests of the minor mean the welfare of the minor and the term ‘welfare’ must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children and their wishes in the matter cannot be ignored.

¹⁶¹ *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC), para 45.

¹⁶² 2006 (3) SA 42 (SCA), 50 para 13.

¹⁶³ Section 31 (1) of the Children’s Act.

¹⁶⁴ 1966 (4) SA 260 (R) 261.

4.1.5 The responsibility to contribute to the child's maintenance

It is trite that a child is entitled to be maintained by his or her parents and that they are jointly obliged to provide the child with everything that the child (he or she) reasonably requires for its proper living and upbringing and includes the provision of food, clothing, accommodation, medical care and education.¹⁶⁵ This common law position has not been changed by the Children's Act or the Constitution.

Section 28 (1) (b) of the Constitution specifically provides that:

“Every child has the right-
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment.”

By implication, this section imposes a duty on both parents to maintain and support the child. Maintenance does not only embrace the necessity of life, such as food, clothing and shelter, but also extends to education and care in sickness.¹⁶⁶ This statement was also confirmed in *Du Toit v Du Toit*¹⁶⁷ where the Court held that:

“Uit die voorgaande is dit baie duidelik dat die verpligting om te onderhou verskillende komponente behels en hierdie komponente is minstens die voorsiening van voedsel, kleding, herberg, mediese behandeling en geleerdheid.

The parent's maintenance duty towards the child is part of the parental responsibilities and rights, though not limited to it. The maintenance duty exists although the parent has no parental responsibilities and rights over the child.¹⁶⁸ This concept was applied with regard to Section 28 (1) (b) and the “best interests” of the child in the case of *Heystek v Heystek*¹⁶⁹ where the Court held that:

¹⁶⁵ *Herfst v Herfst* 1964 (4) SA 127 (WLD), 130C-H. It is also in accordance with Sections 15 and (2) of the Maintenance Act 99 of 1998.

¹⁶⁶ L Van Zyl *Handbook of the South African Law of Maintenance* (2005), 3.

¹⁶⁷ 1991 (3) SA 856 (O), 861C.

¹⁶⁸ Section 21 (2) of the Children's Act.

¹⁶⁹ 2002 (2) SA 754 (T), 757A-C.

“The inevitable concomitant of a marriage in community of property is the shared responsibility of both spouses for the maintenance of the common household, which, in this case, certainly includes the applicant’s children since the respondent had and has consortium with the children’s mother. Whilst the marriage subsists and until divorce is decreed, the consortium prevails. In the circumstances, the respondent is to provide maintenance for the applicant even if portion of that maintenance is utilised for the children. By virtue of Section 28 (1) (b) of the Constitution, every child in this country has a right to parental care. There is also the Constitutional imperative encapsulated in Section 28 (2) that the child’s “best interests” are of paramount importance. It assumes a vital role in all matters where there is a child. Thus, parental care is not confined to natural parents but extends to step-parents, adoptive parents and foster parents.”

It is submitted that the judgment is applauded considering that the Constitutional right of parental care and the paramountcy of the “best interests” of the child require an attitudinal shift from an archaic parent and child relationship, which formed the bedrock of the common law, to the rights of the child, which includes parental care and family care. Thus the common law needs to be aligned to serve the Constitutional imperatives of the child in a diverse democratic society. In the final analysis, by virtue of Section 8 (1) of the Constitution, the Court as the upper guardian of every child in this country must be mindful of the child's rights since the shift is from the tradition of parental authority and duty of support to parental and family care.¹⁷⁰

In *MB v NB*¹⁷¹ the facts were briefly that the plaintiff, a widow, was married to the defendant. The plaintiff had two children at the time of the marriage and the defendant agreed and made the arrangements in concert with the plaintiff to adopt her son, though the adoption was not completed. The defendant also agreed that the son would take his surname. The parties also together enrolled the son at a private school. During the divorce proceedings the plaintiff claimed, *inter alia*, maintenance for the son. The defendant contested that he was not obliged to maintain the plaintiff’s son as he was not the biological parent. The Court Stated that:

¹⁷⁰ Ibid

¹⁷¹ 2010 (3) 220 (GSJ), 227 para 21.

“To find that the defendant is obliged to pay SB’s school fees I do not have to conclude that he was *de facto* adopted, that such a relationship is or should be recognised under the operative statute, or even that he is under a general duty to maintain the boy. It is enough that I conclude, as I have, that the defendant held himself as SB’s father; that both SB and his mother relied on this representation; and that, in pursuit of the obligations implicit in this ostensible relationship, the defendant joined with the plaintiff in deciding to place SB in St Andrew’s College and undertaking to pay the school fees that the decision entailed. To find that, in such circumstances, the defendant bears the obligation to contribute towards SB’s private-school tuition gives due recognition to the Constitutional rights and protections to which children are entitled in terms of the clause in the Bill of Rights I have cited above. The defendant had in effect promised to do this, and the law would be blind if it could not hold him to his promise.

This decision confirms the old African tradition which is still relevant that *ngwana ke wa dikgomo e sego madi* (a cow begets a child not blood).

Parental care is not confined to natural parents, but extends to step-parents, adoptive parents, foster parents and grandparents. Practically, when neither of the natural parents is able to support the child, the duty of support passes to the child’s grandparents. In terms of the common law, the maternal and paternal grandparents of a child born from married parents are obliged to support him/her, if the child’s parents are unable to do so. In the case of a child born from unmarried parents, whose parents are unable to support him/her, the common law provides that the maternal grandparents have a duty of support towards the child, but not the paternal grandparents.¹⁷²

The above-mentioned common law rule was corrected by the Court in *Petersen v Maintenance Officer, Simon’s Town Maintenance Court*¹⁷³ where it was held that:

“In my view, the common-law rule as interpreted in *Motan*, and in particular the differentiation between the duty of support of grandparents towards children born in wedlock and extra-marital children, constitutes unfair discrimination on the ground of

¹⁷² L Van Zyl *Handbook of the South African Law of Maintenance* (2005) , 13.

¹⁷³ 2004 (2) SA 56 (C), 65 para 21-22.

birth and amounts to an infringement of the dignity of such children. The common-law rule is also clearly contrary to the “best interests” of extra-marital children. It follows, in my view, that it violates the Constitutional rights of extra-marital children, and in particular the rights enshrined in Sections 9, 10 and 28 (2) of the Constitution. It remains to be considered whether this violation of the constitutional rights of extra-marital children is justifiable under Section 36 of the Constitution. This would be the case if the violation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I am of the view that if the importance and purpose of the common-law rule are weighed against the nature and extent of the gross infringement caused by the said rule, there is no justification for the retention of the common law rule. In this regard it should be borne in mind that extra-marital children are a group who are extremely vulnerable and their Constitutional rights should be jealously protected.”

This judgment is commendable as it upholds the “best interests” of the child. It is further submitted that the decision of the Court is consonant with the provisions of Section 39 (1) and (2) of the Constitution which provides that:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum-
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The duty to support a child also extends to siblings, that is, brothers, sisters, half-brothers and half-sisters. There are conflicting views on the issue that a child born from married parents does not carry the burden of supporting his or her brother or sisters born from unmarried parents. In a measure to maintain and protect the “best interests” of the child, the Court in *SS v Presiding Officer, Children’s Court, Krugersdorp and Others*¹⁷⁴ stated that:

¹⁷⁴ 2012 (6) SA 45 (GSJ), 56-57.

“The law relating to the duty of support can be summarised as follows: Biological parents of children, whether married or unmarried, have a duty of support. Adoptive parents are considered the parents of a child once the adoption is concluded, and have a duty of support. This is also true of children conceived by artificial fertilisation and surrogacy arrangements. Both maternal and paternal grandparents, regardless of whether the mother and father were married, have a duty of support. Siblings have a duty of support. Step-parents generally do not have a duty of support, but have been found to have a limited duty of support in narrowly defined circumstances. Aunts and uncles bear no responsibility to support their nieces and nephews. In determining whether any person has a legal duty of support in respect of a minor child, cognisance must also be taken of customary law. Fathers and mothers, whether married or unmarried, have a legal duty of support to support their children. However, the definitions of ‘orphan’ and ‘abandoned’ reduce the number of situations where the father or mother of a child will be ‘readily evident’ as a source of support. If the whereabouts of the father are easily ascertainable, but the child is not being cared for by the father, for example, where the father lives in another town, then foster care with the current care-giver may be the most suitable option depending on the facts. In such instances, the Children's Courts may be assisted in their determination, by considering the factors set out in Section 7 of the Children's Act, to determine the “best interests” of the child.”

Persons who are liable and ordered to pay maintenance sometimes fail to abide by the maintenance orders to the prejudice of the children. It then becomes difficult for maintenance officer to enforce the orders as some of the liable persons have resigned from their employments. However, Section 26 (4) of the Maintenance Act¹⁷⁵ provides that:

“Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefits shall be liable to be attached or subjected to execution under any warrant of or any order issued or made under this chapter in order to satisfy a maintenance order.”

¹⁷⁵ Act 99 of 1998, as amended.

In interpreting Section 26 (4) of the Maintenance Act read with Section 37A (1) of the Pension Funds Act¹⁷⁶ the Court in *Magewu v Zozo and Others*¹⁷⁷ clarified the position by giving effect to the “best interests of the child. The facts in this case were briefly as follows: - the applicant and first respondent were previously in a romantic relationship. They are the natural parents of the minor child. The parties terminated their relationship in 1996, and were unable to come to any agreement regarding the child’s maintenance. The applicant had difficulty ensuring that the monthly maintenance obligations were met by the first respondent. She applied and was granted an emolument order in terms of which first respondent’s employer, Telkom, was obliged to deduct the monthly maintenance from the first respondent’s salary and make payment to the applicant. The applicant received notification dated 13 August 2003 that the first respondent had left the employ of Telkom and accordingly the employer could no longer be bound by the emolument order in place as from August 2003. The applicant then brought the application before Court as she wished to secure the pension fund benefits so as to ensure that the first respondent would comply with the maintenance order.

The question to be decided by the Court was whether the law allows for the securing of pension fund benefits to secure the future maintenance obligation of a person.

Section 37A (1) provides that:

“Save to the extent permitted by this Act, the Income Tax Act¹⁷⁸ and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be able to be attached or subjected to any form of execution under a judgment or order of court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment

¹⁷⁶ Act 24 of 1956, as amended.

¹⁷⁷ 2004 (4) SA 578 (C), 584 para 15.

¹⁷⁸ Act 58 of 1962, as amended.

debtor's financial position in terms of Section 65 of the Magistrates' Courts,¹⁷⁹ and in the event of a member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend any benefit in pursuance of such contributions, or part thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.”

Though the first respondent was not in arrears with his maintenance payments, the Court interpreted Section 26 (4) of the Maintenance Act and Section 37A (1) of the Pension Funds Act with due regard to the “best interests” of the child right in a manner that promotes the spirit, purport and object of the Bill of Rights. It was then held that:

“The Maintenance Act does not create a closed list of mechanisms available in law to assist children who have claims of maintenance and their specific situations are not expressly set out in the Act. Section 2 (2) of the Maintenance Act provides that it may not be interpreted so as to derogate from the common law duty of support relating to the liability of persons to maintain other persons. In this instance, it is clear that the applicant’s case may not fall flat due to the fact that the first respondent is not currently in arrears. Nicholson J correctly set out that Courts may not adopt a *non possumus* approach where a fund is available and may be used to secure the right to maintenance for children. In any event, there seems to be no reason, in logic, why such an order should not be made having regard to the “best interest” of the child.”

Robinson¹⁸⁰ states that the form of application in Section 8 (2) reflects the so-called indirect application of the Bill of Rights. In this instance, a dispute is resolved by interpreting a statute or developing the common law so as to promote the spirit, purport and objects of the Bill of Rights through the operation of ordinary law. When the Bill of

¹⁷⁹ Act 32 of 1944, as amended.

¹⁸⁰ Robinson J A “Children’s rights in the South African Constitution” (2003) *PELJ* 6, 1, 22.

Rights is directly applied, however, the question is whether there is any inconsistency between the Bill of Rights and the law or conduct in question. If so, such law or conduct unjustifiably violates the Bill of Rights and a remedy provided for by the Constitution will be given to the applicant. It is submitted that the author gives effect to the Constitutional imperatives contained in Section 28 (2) that the child's "best interests" are of paramount importance in all matters concerning the child.

The right to parental care was clearly espoused in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)*.¹⁸¹ In this case, the Constitutional Court dealt with the entrenched rights of children in Section 28 of the Bill of Rights, and the law relating to maintenance.

Mokgoro J held that:

"Children have the right to proper parental care. It is universally recognised in the context of family law that the "best interests" of the child are of paramount importance. While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so."

The Court went further to hold that:

"The State must provide the legal and administrative structure necessary to achieve the realisation of rights in Section 28. The Maintenance Act is recognised as part of the State's infrastructure 'designed to provide speedy and effective remedies at minimum costs for the enforcement of parents' obligations to maintain their children."

Where a child loses a parent and intends to claim damages for loss of support, the child may invoke the provisions of Section 28 of the Constitution read with Section 15

¹⁸¹ 2003 (2) SA 363 (CC), 375-376.

of the Children's Act or any relevant section thereto.¹⁸² In the case of *M v Minister of Police*¹⁸³ the facts were that the plaintiffs are the mothers of two minor children who have instituted action for damages suffered by them as a result of the unlawful death of their husband, and father of the minors. The deceased who was the family care-giver or breadwinner, died after sustaining serious injuries during detention by the police. The plaintiffs are claiming in their personal capacities as mothers and natural guardians of the deceased's minor. The defendant in this case is the Minister of Police.

With regard to the meaning of "care", the Court stated that:¹⁸⁴

"Section 1 of the Children's Act outlines the concept of family care or parental care as Stated in section 28 (1) (b) of the Constitution. The claim of loss of support in terms of the common law of delict, for compensation for loss as a result of the death of a parent, is applied restrictively to address the child's rights to material or financial support."

The Court furthermore held that:¹⁸⁵

"The content of the right to parental care goes further than just the need to financial support. From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor."

In the end, the Court came to a conclusion that:¹⁸⁶

"Our Constitution provides for Constitutional right to family care or parental care. The Children's Act has provided a wider meaning to child care in Section 1. In terms of this definition, and as a general concept, parental care will thus include the provisions of Section 28 (1) (b), (c) and (d) of the Constitution. These rights, like all other rights, deserve Constitutional protection and enforcement. An infringement of these rights by third parties, where it results in damages, should be compensated for. Any claim arising out of an infringement of that right, must be based on the provisions of Section 28 of the Constitution read with the relevant provisions of the Children's Act. A party intending to

¹⁸² *M v Minister of Police* 2013 (5) SA 622 (GNP).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* 629, para 20.

¹⁸⁵ *Ibid* 630, para 22.

¹⁸⁶ *Ibid* 637-638 paras 52-53.

claim damages on behalf of a child for loss of parental care as a result of the unlawful death of a parent, should also base such claim on Section 28 of the Constitution read with the relevant provisions of the Children's Act, depending on which specific right or rights are alleged to have been infringed. The cause of action for these Constitutional damages should be stated in terms of Section 15 of the Children's Act, as appropriate relief in the form of a claim for compensation arising out of loss of parental care."

It is submitted that this case reflects a good development and interpretation of Section 1 of the Children's Act in relation to the protection of children's rights as stated in Section 28 of the Constitution.

4.2 Acquisition of parental responsibilities and rights of mothers

Generally, a child's biological mother automatically has parental responsibilities and rights of the child to whom she gives birth, irrespective of whether the child is born from married or unmarried parents.¹⁸⁷ In cases where there is an accidental switch of children the determining factor is the "best interests" of the child. This was illustrated in the case of *Petersen en 'n Ander v Kruger en 'n Ander*¹⁸⁸ where a child was born to the applicants and the defendants on the same day and in the same hospital. The name of the applicants' child was David and that of the defendants' Monray. It later became clear to the applicants that the child, who had been handed to them in the hospital as their child, was in fact not their natural child. Blood tests performed on both children as well as the applicants and defendants proved that the applicants were in fact the parents of the child who had been handed to the defendants. The applicants claimed the return of their child, who was then about two years of age. In granting the application Van Winsen AJ held that:¹⁸⁹

"Dit lê aan die grondslag van ons regstelsel dat, onderhewig aan sekere beperkinge, die reg van beheer en toesig oor 'n kind aan sy natuurlike ouers toekom. Die beperkinge

¹⁸⁷ Section 19 (1) of the Children's Act.

¹⁸⁸ 1975 (4) SA 171 (C).

¹⁸⁹ Ibid 173.

hierbo na verwys vloei voort uit die gesag aan die Hof as oppervoog van alle kinders verleen om, waar die belange van 'n kind dit veries, die ouerlike regte ten opsigte van sy kind in te kort. 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.”

The rule that a woman automatically has parental authority of the child to whom she gives birth, regardless of whether the child is born from married or unmarried parents applies even if the child is born as a result of surrogate motherhood or artificial insemination.¹⁹⁰ However, in all the circumstances, the “best interests” of the child must be given effect thereto. In the case of *Ex Parte WH and Others*¹⁹¹ the Court was constituted to consider an application in terms of Section 295 of the Children’s Act for the confirmation of a surrogacy application by a same-sex couple, and to determine and provide guidelines on how similar applications should in future be dealt with. In deciding on this matter, the Court touched on Sections 297 and 298 of the Children’s Act. The Court stated that:

“Prior to the enactment of the Act the position with regard to the acquisition of parental responsibilities in relation to the child by the commissioning parents, was that the mother who gave birth to the child and her husband, if married, were regarded as the parents of the child. Therefore, the commissioning parents could only become the legal parents if they followed adoption procedures. The result of this was that where the surrogate mother changed her mind and did not wish to consent to the adoption of the baby; she could do so irrespective of the genetic origin of the child. This issue was clearly a concern as it could impact directly on the “best interests” of the child as uncertainty regarding the parents could impact negatively on the child. In terms of section 297 (b) and (c) of the Act the surrogate mother has to hand the child over as soon as is reasonably possible after the birth, and neither she or her partner or relatives have any right of parenthood or care. The “best interests” of the child are furthermore addressed, in that the agreement may not be terminated after the artificial fertilisation has taken place.”

¹⁹⁰ Cronjé DSP and Heaton J *South African Family Law* (2004), 265.

¹⁹¹ 2011 (6) SA 514 (GNP), 527-528 paras 56-59.

With regard to the termination of the surrogate motherhood agreements and the rights of the mother, the Court went on to hold that:¹⁹²

“Section 298 (2) of the Act dictates that the Court must terminate the confirmation of the agreement upon finding, after notice to the parties and a hearing, that the mother has voluntarily terminated the agreement and that she understands the effect of the termination, and a Court may issue any other appropriate order if it is in the “best interests” of the child. In the light of the fact that the Court can issue an appropriate order, the Court will be in a position to ensure that the “best interests” of the child are protected on termination of the agreement. The “best interests” principle has not been given an exhaustive content, but the standard should be flexible as individual circumstances will determine the “best interests” of the child. Thus, when a Court considers the question of the “best interests” of the child, care should be taken that the rights of the commissioning parents in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁹³ are not violated by unnecessary invasion of the privacy of commissioning parents or by setting the bar too high for parents whose only option is to have a child by way of surrogacy. This will entail a value judgment by the Court taking into consideration the circumstances of the particular case.”

This issue also touches on cases of same-sex life partners and artificial insemination. Thus, if the woman is in a same-sex life partnership or the child is born as a result of artificial fertilisation, the child is considered to be the couple’s legitimate child, and the woman’s same-sex life partner automatically acquires parental authority over the child.¹⁹⁴

In the case of *J v Director General, Department of Home Affairs and Others*¹⁹⁵ same-sex life partners had twins as a result of artificial insemination. The twins were conceived through *in vitro* fertilisation of the ovum of one of the women with donor

¹⁹² *Ex Parte WH and Others* 2011 (6) SA 514 (GNP), 527-528 paras 60 -63.

¹⁹³ Act 4 of 2000.

¹⁹⁴ Cronjé DSP and Heaton J *South African Family Law*, (2004) 265.

¹⁹⁵ 2003 (5) SA 621 (CC).

sperm. The fertilised ovum was implanted in the other woman, who gave birth to the twins. The same- sex life partners wanted to have the twins registered as their children, with the birth mother being indicated as their “mother” and the other woman as their “parent”. The Home Affairs refused to register the children’s birth in this manner, hence the application before the Court. The applicants also attacked the constitutionality of Section 5 of the Children’s Status Act,¹⁹⁶ which rendered children born as a result of artificial insemination legitimate if the birth mother is married. But Section 5 prohibited the situation if the mother is a partner in a same-sex or heterosexual life partnership.

The Court considered the “best interests” of the child and decided that:

“Section 5 unfairly discriminates between married persons and the applicants as permanent same-sex life partners. The section is accordingly inconsistent with Section 9 (3) of the Constitution which prohibits the State from discriminating directly or indirectly against anyone on the ground of sexual orientation. It is unfairly discriminatory to deprive the first applicant of such recognition. In my opinion, the provisions of Section 5 of the Children’s Status Act are clearly in conflict with the provisions of Section 9 (3) of the Constitution. It is clear from the report of the *curatrix ad litem* that the order made of the High Court also meets the interests of the two children of the applicants in this case as Section 28 (2) of the Constitution requires.”

It is submitted that the effect of the above judgment is that the child is deemed to be the same-sex life partners’ legitimate child and is registered under the surname of either partner.

4.3 Acquisition of parental responsibilities and rights of fathers

A person may have either full parental responsibilities and rights, comprising care, contact, guardianship and maintenance, or only one or more of these components.¹⁹⁷ It should be noted that the researcher is using the words “a person” and not the father as

¹⁹⁶ Act 82 of 1987, as repealed.

¹⁹⁷ Section 18 (1) of the Children’s Act.

Section 18 of the Children’s Act by reference to “a person” includes mothers, fathers and others having parental responsibilities and rights.

A biological father of a child who neither is nor was married acquires full responsibilities and rights if:

- (a) At the time of the child ‘s birth he lives with the mother in a permanent life-partnership; or
- (b) He consents or successfully applies to be identified as the child’s father or pays damages in terms of customary law, and he contributes for a reasonable period to the child’s upbringing or maintenance.¹⁹⁸

It is submitted that an unmarried father automatically acquires the rights set out in Section 21 if the aforesaid requirements are met, without the need to get Court order.¹⁹⁹

The Court interpreted the principle of parental responsibilities and rights of fathers with due regard to the “best interests” of the child in an unreported case of *Botha v Dreyer*.²⁰⁰ In this case, the applicant sought an order directing the respondent and her minor daughter to subject themselves to DNA tests for the purpose of determining whether the applicant is the biological father of the minor daughter born on 8 November 2007. In the event that the DNA tests establish that the applicant is indeed the biological father then in terms of prayer 2 of the notice of motion, he sought a declaration that he is entitled to full parental rights and responsibilities. Similarly, in the event of a positive result, he asks for an order directing the parties to proceed to prepare a parenting plan as provided for in Section 34 of the Children’s Act.

In determining the issue before Court, Justice Murphy stated that the rule is that:²⁰¹

“The preponderance of authority favours the proposition that a Court, in the exercise of its power as an upper guardian of all minors, is entitled to authorise a blood test on a

¹⁹⁸ Section 21 (1) (a) and (b) (i) – (ii) of the Children’s Act.

¹⁹⁹ Sadie H and Corrie L *A Practical Approach to the Children’s Act* (2010), 37.

²⁰⁰ Case: 4421/08 (GNP) 395 (unreported).

²⁰¹ *Ibid* para 19.

minor, despite objections by a custodian parent. In deciding whether it should do so, the Court must act in what it considers to be the “best interests” of the child.”

The researcher agrees with the Court’s reasoning that the truth should be ascertained in the interests of all the parties involved. This is a reflection of the balancing effect in determining the “best interests” of the child. To this it was stated that:

“Just as Courts deploy methods of compulsion to arrive at the truth in a variety of causes, there should be no overriding reason in principle or policy impeding the exercise of their inherent power and authority, as upper guardian or otherwise, to order scientific tests in the interests of discovering the truth and doing complete justice to all parties involved in a suit. A general rule is that the discovery of truth should prevail over the idea that the rights of privacy and bodily integrity should be respected.”

The Court further stated that:²⁰²

“In ordering both the guardian and the minor to submit to tests, the Court accepted that in litigation of this kind the child’s interests are the most important but not the sole factor to be taken into account. The child’s interests must be balanced against other objective considerations such as the pursuit of truth, the demands of reality and the appropriate interdependence and interaction between a child and his family and blood relations. The court’s own sense of priority required the discovery of truth in that case to outweigh or trump the idea of privacy.”

The finding by the Court that where there are competing rights, that is the rights of the parents and the child, the “best interests” of the child should take precedent is applauded. The Court stated that:

“Section 28 (2) stipulates that a child’s best interests are of paramount importance in every matter concerning the child. This, to my mind, is a strong indication where the competing interests of a parent’s privacy/dignity and the child’s interests are at stake that the latter should trump the former unless there are compelling reasons to the contrary. Moreover, in terms of Section 8 (1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State. It

²⁰² Ibid para 28.

follows that there is a duty on all Courts to ensure that the common law conforms to the Bill of Rights in the rights and duties that it confers.”

The Court made a very important determination that it is not required that the “best interests” of the child standard must be applied before the rights in terms of Section 21 will be awarded to an unmarried father. These rights are conferred upon him automatically if the requirements of Section 21 are met. Accordingly the Court held:²⁰³

“This significant change in policy towards the rights and responsibilities of unmarried biological fathers brings added importance to the need for scientific determinations of paternity. Now, once paternity is established, the rights and responsibilities are automatic with the precise nature and content being subject to mediation, review and ultimately a parenting plan. Once paternity is established the parties become co-holders of parental responsibilities and rights on an equal footing. The fact remains: unmarried fathers are entitled to be co-holders of those responsibilities and rights and no case needs to be made out that it will be in the “best interests” of the child to bestow them. The eventual precise determination of the extent of a co-holder’s responsibilities and rights by the various methods envisaged in the statute, of course, will take account of the “best interests” of the child at that stage.”

4.4 Termination, extension, suspension and restriction of a person’s parental responsibilities and rights.

Section 28 of the Children’s Act, in particular, deals with the Court-ordered termination, extension, suspension or restriction of parental responsibilities and rights.

In terms of Section 28 (3), a co-holder of parental responsibilities and rights in respect of the child and any other person having a sufficient interest in the care, protection, well-being or development of the child may apply to the High Court, for an order suspending for a period, or terminating, any or all of the parental responsibilities and rights.

²⁰³ Ibid paras 39-43.

When considering such application, the Court must take into account the “best interests” of the child, the relationship between the child and the person whose parental responsibilities and rights are being challenged. The degree of commitment that the person has shown towards the child and any other fact that should, in the opinion of the Court, is taken into account.²⁰⁴

The applicant in *C v L*²⁰⁵ had a three year old son with the respondent. The parties were unmarried but they had a relationship for two years. They separated when the applicant fell pregnant. After the birth of the child, the respondent visited the child whenever he wanted to and attempted to initiate a relationship with him. Gradually, the respondent started to visit on an informal basis and odd times, which became of concern to the applicant. The respondent did not keep to the parenting plan nor did he contribute financially towards maintaining the child. The applicant then correctly so decided to approach the Magistrate’s Court in terms of Section 29 (1) for termination of parental responsibilities under certain circumstances.

The applicant alleged in her application before the Children’s Court that it would be in the “best interests” of the child to have the respondent’s parental responsibilities and rights removed from the child’s life.

The Children’s Court referred to the case of *V v V*²⁰⁶ where it was stated that:

“The child’s rights are paramount and need to be protected, and situations may well arise where the “best interests” of the child require that action is taken for the benefit of the child, which effectively cuts across the parents’ rights.”

After considering the second family advocate’s report and the conduct of the respondent for failure to honour the Court order relating to arrangements and meetings, it was ordered that the respondent’s parental responsibilities and rights be terminated.

²⁰⁴ Section 28 (4) of the Children’s Act.

²⁰⁵ Case: 14/1/4-54/10, (10-2-2012) Children’s Court (unreported).

²⁰⁶ 1998 (4) SA 169 (C),189 B-C.

4.5 Conclusion

Parental responsibilities and rights are seen in a much broader sense in terms of the Children's Act than in the previous parental authority system. The present emphasis is on the right of the child to parental care, and not parental powers like before. Parental authority is now divided into care and contact, as reflected in Section 1 (1) of the Children's Act. The parental responsibilities and rights are no longer confined to the biological parents only; other persons may acquire parental responsibilities and rights in respect of the child. Unmarried fathers and grandparents may have full or specific parental rights regarding the child.

Maintenance is no longer only the responsibility of the biological parents; in the event the biological parents are not able to maintain and support the child, the grandparents are also liable for the child's maintenance. The child's "best interests" are the most important factor to be considered.

CHAPTER FIVE: ADOPTION OF CHILDREN

5.1 General

Adoption is a very old tradition which can be traced back to the ancient Israel in the Bible.²⁰⁷ Moses was placed amongst the reeds on the bank of the Nile River in a papyrus basket, and was discovered by Pharaoh's daughter who rescued and raised him.

In law, adoption is a formal legal process by means of which parental authority over a child is terminated and vested in another person, namely the adoptive parent.²⁰⁸ The Court in *Naude v Fraser*²⁰⁹ defined adoption as:

“The legal process through which the rights and obligations between a child and its natural parent or parents are terminated, and a new parental relationship enjoying full legal recognition is created between the child and its adoptive parent or parents. Following upon adoption, the child is deemed to be the legitimate child of the adoptive parent or parents as if it were born from a lawful marriage. Adoption thus supplants the rights of natural parents in favour of adoptive parents, while severing a child's rights in respect of the former and transferring them to the latter. It is a process which calls for a delicate balance to be struck when considering and weighing up the respective interests of all the parties concerned, subject always to the “best interests” of the child being paramount.”

The Court stressed that the proviso is always the “best interests” of the child being paramount in adoption applications.

²⁰⁷ Good News Bible Exodus 2:1-10 (2000).

²⁰⁸ DSP Cronjé and J Heaton *South African Family Law*, (2004) 268.

²⁰⁹ 1998 (4) SA 539 (SCA), 548-549.

5.2 Purposes of adoption

Adoption provides a child with a constitutionally entrenched form of care and protection that is incomparable with any form of permanent alternative placement in securing stability in a child's life.²¹⁰ It is therefore submitted that the purpose of adoption must be to give the child care and protection which will be stable. This complies with Section 28 (1) (b) of the Constitution which provides that:

"A child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment."

This was confirmed by the Court in *SW v F*²¹¹ where it was held that:

"The provisions of Section 30 of the Constitution²¹² (Interim Constitution) regarding a child's right to parental care referred not only to the care of natural parents, and that such right was not a bar to an adoption order. The Child Care Act²¹³ specifically protected the right to care of children in need of care by, for example, making provision for foster care or adoption in cases where the care of the natural parents was lacking or inadequate."

It is submitted that the purpose of adoption, generally, should be to give the adopted child the benefits which he or she does not have due to the circumstances the child find him or herself in; for instance, in cases where the child does not have parents or was abandoned.

In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*²¹⁴ the Court stated that:

"Recognition of the fact that many children are not brought up by their biological parents is embodied in Section 28 (1) (b) of our Constitution which guarantees a child's right to

²¹⁰ Boezaart T *Child Law in South Africa*, (2009) 133.

²¹¹ 1997 (1) SA 796 (O), 802G-H.

²¹² The Constitution of the Republic of South Africa Act 200 of 1993.

²¹³ Act 74 of 1983.

²¹⁴ 2003 (2) SA 198 (CC), 206 para 18.

family care or parental care. Family care includes care by the extended family of a child, which is an important feature of South African family life. It is clear from Section 28 (1) (b) that the Constitution recognises that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.”

5.2.1 The Adoptable Child

Any adoptable child may be adopted jointly by a husband and wife, partners in a permanent domestic life-partnership or any other persons sharing a common household and forming a permanent family unit.²¹⁵ A child is adoptable in any of the following circumstances:²¹⁶

- (1) He or she is an orphan and has no guardian or care-giver who is willing to adopt him or her;
- (2) The whereabouts of the child’s parent or guardian cannot be established;
- (3) The child has been abandoned;
- (4) The child’s parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; and
- (5) The child is in need of a permanent alternative placement.

The Court interpreted Sections 230, 233 and 242 of the Children’s Act in *Centre for Child Law v Minister of Social Development*.²¹⁷ The facts were that a child who was four years old, his mother was previously married to his biological father, but his mother moved out of the common home while she was still expecting the child. The mother subsequently got divorced from the child’s father and later applied for sole guardianship of the child. The application was not opposed by the father. When the child was 15 months old, she met her current husband and they got married some time thereafter. A daughter was recently born from the marriage. The child’s step-father wanted to secure

²¹⁵ Bradfield G *et al Wille’s Principles of South African Law* (2011), 194.

²¹⁶ Section 230 (1) (b) to (3) of the Children’s Act read with the definition in section 1 (1).

²¹⁷ Case: 21122/13 (GNP) unreported.

this child's position in the family and decided that he wished to adopt him. The child's biological father consented to the adoption.

The applicant, Centre for Child Law, launched an application before Court seeking an order in the following terms:

- (a) Declaring that Section 230 (3) of the Children's Act does not preclude a child from being adoptable in instances where the child has a guardian and where the person seeking to adopt is the spouse or permanent life-partner of the guardian of the child;
- (b) Declaring that section 242 of the Children's Act does not automatically terminate all the parental responsibilities and rights of the guardian of a child whose spouse or permanent domestic life-partner seeks to adopt the child.

With regard to the issue of adoptable child the Court decided that:

"Where a non-custodian parent has consented to an adoption of his or her child, as happened in the case of such parent must, in my view, be taken to have abandoned the child as contemplated in Section 230 (3) (c). "Abandoned", in relation to a child, is defined in Section 1 of the Children's Act to mean, *inter alia*, a child who has obviously been deserted by the parent, guardian or care-giver of the child. The definition does not require that the child must be abandoned by both parents. The primary meaning of the verb "desert" in the Shorter Oxford English Dictionary is "give up, relinquish, and leave". A further meaning given is "forsake, abandon (a person or thing having a claim upon one)". These definitions clearly apply to the situation where a non-custodian parent consents to the adoption of his or her child by the spouse or a person who is the permanent domestic life-partner of the custodian parent of the child. It follows that in such circumstances, the child is adoptable within the meaning of Section 230 (3) (c)."

The Court went further to find that:

"In terms of the definition of "abandoned" in Section 1 of the Children's Act, a child is also taken to have been abandoned where the child, for no apparent reason, has had no contact with the parent, guardian or care-giver for a period of at least three months. Again, the definition does not require that the child must have had no contact with both parents for the said period. It is also not required that the whereabouts of that parent

cannot be established. If the child therefore has, for no apparent reason, had no contact with his biological father for a period of not less than three months, he will, for that reason also, be adoptable. In a case where a child's biological parent or guardian has not consented to the adoption of the child by a step-parent because his or her whereabouts cannot be established, as in the case of the minor child in this case, such a child will be adoptable in terms of Section 230 (3) (b) of the Children's Act. The section does not require that the whereabouts of both parents and guardians cannot be established. Such a child will further be adoptable in terms of Section 230 (3) (a) if the child has, for no apparent reason, had no contact with that parent or guardian for a period of not less than three months."

5.2.2 Persons who may adopt child

A child can be adopted by:²¹⁸

- (a) "Jointly by-
 - (i) a husband and wife;
 - (ii) partners in a permanent domestic life-partnership;
 - (iii) other persons sharing a common household and forming a permanent family unit;
- (b) by a widow or widower, divorced or an unmarried;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock; or
- (e) by the foster parent of the child."

The meaning of who can adopt the child was interpreted in the case of *Du Toit and another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*²¹⁹ where the Court held that:

"Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so in conflict with the principle enshrined in Section 28

²¹⁸ Section 231 (1) of the Children's Act.

²¹⁹ 2000 (2) SA 198 (CC), 208 para 22.

(2) of the Constitution. It is clear from the evidence in this case that, even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions of the Child Care Act thus deprive children of the possibility of a loving and stable family life as required by Section 28 (1) (b) of the Constitution. This is a matter of particular concern given the social reality of the vast number of parentless children in our country. The provisions of the Child Care Act thus fail to accord paramountcy to the “best interests” of the children and I conclude that, in this regard, Section 17 (a) and (c) of the Act are in conflict with Section 28 (2) of the Constitution.”

The Court in interpreting the provisions of Section 230 gave due regard to the “best interests” of the child as it appears clearly in the judgment, where it was held:²²⁰

“An interpretation of the aforesaid sections of the Children’s Act in a way which permits the adoption by step-parents in the circumstances mentioned, promotes this constitutional right. Section 28 (2) of the Constitution further provides that a child’s best interests are of paramount importance in all matters concerning the child.”

The Court has extended and properly clarified the issue of spouses or domestic life-partners who are legible to adopt a child, by finding that:²²¹

“Therefore, Section 230 (3) of the Children’s Act does not preclude a child from being adoptable merely because the child has a parent or guardian who cares for the child and the person seeking to adopt the child is the spouse or permanent domestic life-partner of the child’s parent or guardian.”

5.2.3 The “best interests” of the child in relation to the adoption of children

Before granting an application for an adoption order the Children’s Court must be satisfied that the adoption is in the “best interests” of the child; this is the important factor to be considered in adoption applications.²²² Section 239 (1) (b) (ii) of the

²²⁰ *Centre for Child Law v Minister of Social Development* Case: 21122/13 (GNP) para 8.

²²¹ *Centre for Child Law v Minister of Social Development* Case: 21122/13 (GNP) para 13.

²²² Bradfield G *et al* *Wille’s Principles of South African Law* (2011), 196.

Children's Act prescribes that adoption must contain information that the adoption is in the "best interests" of the child.

In applying this rule, the Court in *In Re XN*²²³ considered an application for adoption in terms of Section 240 of the Children's Act which was short of the required letter by the Provincial Head of the Department of Social Development recommending adoption, as required in terms of Section 239 (1) (d) of the Children's Act.

The facts in this case were that the step-father (the applicant), a citizen of Trinidad was married to the mother of the child. All the screening procedures were followed and the applicant was found to be a suitable prospective adoptive parent. The child who was 10 years old was in favour of being adopted by the applicant and taking his surname. The family was relocating to Trinidad.

The problem encountered by the Commissioner of Children's Court at the time the application was considered was the absence of the required letter by the provincial head of social development recommending the adoption of the child in terms of Section 239 (1) (d). The designated social worker who was dealing with the matter requested the letter several times to no avail.

As the "best interests" of the child are paramount, the Commissioner of the Children's Court decided not to stay the proceedings in the "best interests" of the child pending the letter. Consequently, the Commissioner of the Children's Court condoned the non-compliance with the provisions of Section 239 (1) (d) letter as permitted in Section 48 (a) of the Children's Act and granted the application in the absence of the letter. The proceedings were referred to the High Court on special review.

Based on the facts of the case and the way the Commissioner of Children's Court decided on the matter, the Court held that:²²⁴

²²³ 2013 (6) SA 153 (GSJ).

²²⁴ *Centre for Child Law v Minister of Social Development* Case: 21122/13 (GNP) ,161 para 22.

“Having considered all of the foregoing, the application for the adoption of the child was evaluated carefully by the child commissioner in terms of Section 240 of the Children’s Act, taking into account all of the relevant factors, the profile of the adoptive parent, and the “best interests” of the child, the latter being considered with Section 28 (2) of the Constitution. The child commissioner granted the adoption, thus bringing about a speedy and effective resolution of the matter which was imperative in the circumstances of the case. It was in the “best interests” of the child to do so.”

The above decision is in line with what was said in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*²²⁵ that:

“I conclude therefore that from start to finish, the forum most conducive to protecting the “best interests” of the child had been the Children’s Court. Although the jurisdiction of the High Court to hear the application for sole custody and sole guardianship had not been ousted as a matter of law, this was not one of those very exceptional cases where bypassing the Children’s Court procedure could have been justified. It follows that the question of the “best interests” of Baby R in relation to adoption was not one to be considered neither by the High Court, nor at a later stage by the Supreme Court of Appeal, but a matter to be evaluated by the Children’s Court. The question was not strictly one of the High Court’s jurisdiction, but of how its jurisdiction should have been exercised.”

5.2.4 The required consent

It is the essential requirement of adoption that both parents whether married and not must give consent. However, if the parent is an unmarried minor, he or she is assisted by his or her guardian; and by any other person who holds guardianship in respect of the child.²²⁶ If the child to be adopted is 10 years or older, he or she must also consent to the adoption. This will also be the case if the child is younger than 10 years but he or

²²⁵ 2008 (3) SA 183 (CC),194 para 34.

²²⁶ Section 233 (1) (a) and (b) of the Children’s Act.

she is of such an age, maturity and stage of development to understand the implications of such consent.²²⁷

In deciding on this issue of consent the Court in *Fraser v Children's Court, Pretoria North, and Others*²²⁸ held that:

“The anomalous examples which I have discussed in the preceding paragraphs expose the undesirability of a blanket rule which (subject to Section 19) either automatically gives to both parents of a child a right to veto an adoption or a blanket rule which arbitrarily denies such a right to all fathers who are or were not married to the mother of the child concerned.”

In clarifying the issue further the Court stated that:²²⁹

“The statutory and judicial responses to these problems are therefore nuanced, having regard to the duration of the relationship between the parents of the children born out-of-wedlock, the age of the child sought to be given up for adoption, the stability of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reasons why the relationship between the parents has not been formalised by a marriage ceremony and generally what the best interests of the child are.”

5.2.5 Inter-country adoption

Inter-country adoption takes place within the regulatory framework of the UNCRC, ACRWC and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (“the Convention”).²³⁰ It is a global trend that entails

²²⁷ Section 233 (1) (c) (i) and (ii) of the Children’s Act.

²²⁸ 1997 (2) SA 261 (CC), 275 para 28.

²²⁹ *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC), 281-282 para 43.

²³⁰ The Hague Convention of 29 May 1993, South Africa acceded to this Convention on 08 July 1997. In terms of section 256 (1) of the Children’s Act the Hague Convention on Inter-country Adoption is in force in the Republic and its provisions are a law in the Republic.

the adoption of a child by parents of any nationality in circumstances where the child is compelled to change his or her country of residence. Section 256 (1) of the Children's Act introduced the Convention in this country (South Africa) to be in force together with its provisions.

The Convention applies if a child who is habitually resident in one Convention country (that is, the State of origin) either after his or her adoption in the State of origin by a person who is habitually resident in the receiving State, or for the purposes of obtaining such a person in the receiving State or the State of origin.²³¹

The issue of inter-country adoption arose before the Court in the case of *AD and Another v DW (Centre for Child Law; Department for Social Development)*.²³² In this case, an American couple found a newly born Baby R abandoned in an open land in Roodepoort.

She was placed in the foster care of the first and second respondents, nationals of the United States of America resident in South Africa, who were the founders and managers of a sanctuary for children in need of care. The applicants, friends and former fellow congregants of the first and second respondents, are also citizens of the United States. On visiting the first and second respondents in South Africa, they met Baby R, established a relationship with her, and resolved to adopt her, if possible. This case stems from the legal difficulties they encountered in trying to effect an inter-country adoption.

The couple approached the High Court for an order for guardianship and custody of the child instead of the Children's Court. Their application was dismissed and they then sought relief from the Constitutional Court. The Constitutional Court decided this application with due regard to the "best interests" of the child. The Court held that:²³³

²³¹ Ibid article 2 (1).

²³² *AD and Another v DW (Centre for Child Law; Department for Social Development)* 2008 (3) SA 183 (CC).

²³³ *AD and Another v DW (Centre for Child Law; Department for Social Development)*, 192 para 29.

“With or without the necessary information, the High Court was correct in holding that the appropriate route for the proposed inter-country adoption was to bring proceedings for adoption in the Children's Court and not to pursue a sole custody and sole guardianship order in the High Court. On the facts of this case the decision of the High Court to decline the application for sole custody and sole guardianship cannot be faulted. If after applying to the Children's Court, the applicants were later to feel that departmental policy as understood and applied by the presiding officer at the Children's Court had resulted in a violation of Baby R's “best interests” as protected by Section 28 (2) of the Constitution, their remedy would have been to take the matter on review to the High Court.”

It is submitted that the Children's Court would have had the sufficient opportunity of obtaining *viva voce* evidence of expert witnesses, such as social workers and receiving relevant reports to deal with this matter. However, Sections 22, 23 and 24 of the Children permit an application for guardianship to be brought before the High Court and not exclusively the Children's Court. As the researcher has already argued earlier supported by the decision of *Ex Parte Sibisi*, the determining factor is the “best interests” of the child.

5.2.6 Conclusion

Adoption provides a child with a constitutionally entrenched form of care and protection that is incomparable with any form of permanent placement in securing stability in a child's life. It is submitted that, therefore the purpose of adoption must be to give the child care and protection which will be stable. This corroborates with the provisions of Section 28 (1) (b) of the Constitution, which provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

The rider in all adoption applications is the “best interests” of the child. In this chapter, it has been shown that any person who satisfies the requirements of Section 231 may adopt a child. Even in cases where the formalities for the adoption application have not been complied with, the application for adoption may be granted if it is found to be in the “best interests” of the child to grant such application.

Inter-country adoptions which are regulated by the Children's Act and the international Convention, they seek to protect the adoptable child by ensuring, *inter alia*, that inter-country adoptions take place in the "best interests" of the child. The inter-country adoptions are conducted in a responsible and protective manner with the aim of eliminating the various abuses which have been associated with inter-country adoptions. The Court as the upper guardian of children has to ensure that the procedures are not violated in matters concerning the child.

When a qualified person intends to adopt a child, the application should only be effected to safeguard the wellbeing and the "best interests" of the child.

CHAPTER SIX: CHILDREN'S RIGHT TO BE HEARD

6.1. General

Although every natural person has legal capacity from the moment of birth to perform juristic acts, it is only conferred upon him or her at a later stage. The person who performs juristic acts must be able to express the will and judgment, and being able to understand and appreciate the nature and consequences of the acts. This is the same criteria used to capacity to litigate.²³⁴ The law differentiates between minors and adults with regard to capacity to perform juristic acts.²³⁵ The capacity to litigate is the judicial capacity that enables a person to act as plaintiff or defendant in a civil action.²³⁶

In this chapter, the right and capacity of the child to express views; due consideration for the views expressed by the child; capacity to litigate; and legal representation will be discussed.

6.1.1 The right to express views

Section 15 (1) of the Constitution provides that:

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

It is submitted that this section does not refer to adults or persons of a particular age, but everyone including children. In *Kotze v Kotze*²³⁷ the Court rejected as a fallacy the view that it is useful for the child to belong to a church, or adheres to a religion and partakes in its activities, so that it can, at a more mature age, exercise its free choice.

²³⁴ Bradfield G *et al Wille's Principles of South African Law*, (2011), 173.

²³⁵ Boezaart T *Law of Persons* (2010), 8.

²³⁶ Boezaart T *Law of Persons* (2010), 8.

²³⁷ 2003 (3) SA 628 (T).

The illustration of this point was made in *MEC for Education, Kwazulu-Natal, and Others v Pillay*²³⁸ where Langa CJ where it was stated that:

“Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education*²³⁹ the Court held in the context of a case concerning children that their ‘actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure. That is true for this case as well. The need for the child’s voice to be heard is perhaps even more acute when it concerns children of Sunali’s age who should be increasingly taking responsibility for their own actions and beliefs.”

The Court went on to find that:²⁴⁰

“The nose-stud was not worn for fashion reasons but was inserted as part of a traditional ritual and an expression of her religious and cultural identity. I am accordingly convinced that the practice was a peculiar and particularly significant manifestation of her South Indian, Tamil and Hindu identity. It was her way of expressing her roots and her faith. While others may have expressed the same faith, traditions and beliefs differently or not at all, the evidence shows that it was important for Sunali to express her religion and culture through wearing the nose-stud.”

It follows that children are entitled to express their views and that their views must be respected.

²³⁸ 2008 (4) SA 474 (CC), 494E-G.

²³⁹ 2000 (4) SA 757 (CC).

²⁴⁰ *MEC for Education, Kwazulu-Natal, and Others v Pillay* 2008 (4) SA 474 (CC), 505 paras 89-90.

6.1.2 Due consideration for the views expressed by the child

Section 10 of the Children's Act provides that:

“Every child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

In *Central Authority v MV (LS Intervening)*²⁴¹ the Court in refusing the application for the return of the child to the United States of America, gave due consideration to the affidavit of the child and held that:

“Not only does article 13 of the Convention (Hague Convention on the Civil Aspects of International Child Abduction (1980) require it, but Section 10 of the Children's Act requires that I must give due consideration to the views expressed by the child, and allow it to participate in the matter before me, obviously with due regard to the child's age, maturity and stage of development.”

In the case of *Ford v Ford*²⁴² the Court in dismissing the appellant's appeal relating to the application for relocation to the UK with the minor child considered the views of the child. The Court held that:

“A Court must of course take a child's wishes into account where the child is old enough to articulate his or her preferences. It is true that S was considerably older than at the commencement of the proceedings, but I am not convinced that the course proposed by the respondent was proper. The respondent himself mentioned in one of his affidavits in the earlier proceedings that the litigation was causing S stress, that she had occasionally queried having to attend the interviews with the experts and was not 'particularly comfortable' with the exercise. This is understandable. If S found interaction with professionals (who are trained in child psychology and possess the requisite skill and sensitivity to conduct the relevant enquiry) daunting, it is then only logical to expect an

²⁴¹ 2011 (2) SA 428 (GNP), 439, para 26.4.

²⁴² [2006] 1 All SA 571 (SCA).

encounter with five strange judges, ill-equipped to deal with the situation, to be thoroughly intimidating. Such an exercise clearly would not bear much, if any, fruit. It seems to me that, if either of the parties considered that there was a need to submit additional evidence in this regard, the proper route to follow would have been to have had S interviewed by appropriate professionals, as was done previously, and to seek to place that evidence before the Court.”

In *C and Others v Department of Health And Social Development, Gauteng, and Others*²⁴³ the Court held that:

“Section 28 (2) of the Constitution requires an appropriate degree of consideration of the “best interests” of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child’s “best interests”. Accordingly, the impugned provisions of the Children’s Act inflict a limitation on the right in Section 28(2), in that they do not provide for adequate consideration of the “best interests” of the child.”

The Court impressed on the authorities to allow the child on his or her own to make representations with regard to the removal. The researcher submits that this is good law as the wishes of the child will be considered.

Section 31(1) of the Children’s Act compels the parents and any person having parental responsibility to take the views of the child into account whenever a decision concerning the child has to be made. However, the child’s age, maturity and stage of development must be considered in this regard. For those children who have capacity to consent, it means that their views and decisions carry authoritative value and they must be respected, unless it is not in their “best interests”. In *HG v CG*²⁴⁴ the Court held that:

“It will be gleaned from the foregoing that Rauch and Wessels, contrary to the express provisions of Sections 10 and 31 of the Act, which recognise a child’s right to be heard in

²⁴³ 2012 (2) SA 208 (CC), 223 para 27.

²⁴⁴ 2010 (3) SA 352 (ECP), 361 para 17.

any major decision involving him/her, advocate that their voices not be heard. I find this astonishing. By all accounts the children are of an age and maturity to fully comprehend the situation, and their voices cannot be stifled, but must be heard. The children's point of view is in direct conflict with their recommendations and this no doubt actuated them to suggest that they be relieved of the responsibility of deciding with which parent to live."

In *Meyer v Gerber*²⁴⁵ the Court gave due consideration to the letter and affidavits of the minor child in arriving at the decision that the decree of divorce be amended to award custody to the minor child. The Court held that:

"Na my oordeel behoort hierdie Hof wel deeglik kennis te neem van BG se standpunt. Dit is uit die stukke duidelik dat dit nie iets is wat oornag by hom posgevat het nie - dit was 'n langdurige en goedorwoë proses wat onder andere tot die skrywe van 'n brief aan sy moeder aanleiding gegee het - 'n skrywe wat hy myns insiens op 'n volwasse, verantwoordelike en regverdige wyse hanteer het en 'n skrywe waarin hy sy moeder baie beleefd maar tog ferm behandel, maar terselfdertyd sy stiefpa bedank omdat hy onder andere baie soos sy pa was. Met ander woorde, dit is nie 'n emosionele eenogige en irrasionele uiting van sy frustasies of kwellinge nie - dit dra ook die stempel van 'n gewigtige besluit waarin hy lank bepeins en gedink het en nie iets wat hy op die ingewing van die moment die lig laat sien het nie. Ander aspekte wat hierin nie uit die oog verloor moet word nie is die feit dat nieteenstaande die feit dat hy sy skoolhoof te Benoni in sy vertrouwe geneem het oor sy persoonlike probleme nie, hy nogtans hard gewerk het en baie goed presteer het - die optrede, myns insiens, van 'n volwasse en verantwoordelike jongman. Hy kon net sowel besluit het om in sy eindeksamen swak te vaar ten einde sy voorneme om die skool te verlaat verder te onderstreep. In al die omstandighede is ek dus van oordeel dat applikant daarin geslaag het om op 'n oorwig van waarskynlikheid aan te toon dat dit in BG se beste belang sal wees as die Hofbevel van 17 November 1994 gewysig word om sy bewaring aan die applikant toe te wys."

It is submitted that this is the proper approach, as the maturity would form the basis of the child's preference. A child may be of a particular age but may not be able to make an appropriate decision.

²⁴⁵ 1999 (3) SA 650 (O), 656.

The above is also restated by Section 6 (5) of the Children's Act provides:

“A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of the child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.”

It is clear that the parent cannot arbitrarily take any decision involving the child without first considering the expressed views of the child. This does not mean that the parent or a person holding parental responsibilities must just consider any view, even if the expressed view of the child is to the prejudice of the child. The “best interests” of the child must be central to all the views expressed.

6.1.3 Capacity to litigate

It is often said that a minor does not have the capacity to act as a party to a lawsuit, in other words, to act as plaintiff, defendant, applicant or respondent in a Court action. This is, however, not correct. In most cases, as far as civil matters are concerned, a minor has limited capacity to litigate and can, therefore, with the assistance of his parents or guardian issue summons or be summonsed, or the parent or guardian can institute action on his behalf. In exceptional cases, a minor has the capacity to litigate.

In *Perkins v Danford*²⁴⁶ the appellant was the unsuccessful defendant in an action instituted against him by the respondent as plaintiff in the Magistrate's Court. At the time of the institution of the action, the plaintiff was a minor and the citation in the summons records that she is duly assisted by her legal guardian. However, her legal guardian was, at that time, divorced from her father and she was not awarded guardianship of the minor child. Therefore, the allegation that she was assisted by her legal guardian was not correct at the time of the institution of the action. The Court held that:

²⁴⁶ 1996 (2) SA 128 (C), 133B-C.

“It is the function of this Court as upper guardian of minors to protect the interests of minors, and not to frustrate actions instituted by minors on purely technical grounds. The action should, therefore, be allowed to proceed, although the plaintiff would be advised to consider the viability of the action on the pleadings as they stand.”

In *Vista University, Bloemfontein Campus v SRC, Vista University*²⁴⁷ the Court held that:

“It is an accepted principle of our law that a minor cannot sue or be sued without the assistance of his/her guardian. This Court is, however, the upper guardian of minors. As judge of this Court I am consequently the upper guardian of minors, including those who are students at the Vista University and, in that capacity, I must also protect the innocent students who will benefit from the order which I propose to make. I accept that it would be virtually impossible to cite all the minor students duly assisted by and/or to give notice to their respective guardians. I, therefore, as upper guardian, accept that responsibility in this instance for the reasons which I have set out, and in the order which I propose to make, shall make provision for those students who are minors and who may feel aggrieved by the order to oppose it on the return day, duly assisted by their respective guardians.”

Section 14 of the Children’s Act provides that:

“Every child has the right to bring, and to be assisted in bringing, a matter to a Court, provided that matter falls within the jurisdiction of that Court.”

The interpretation of Section 14 is that each child has access to court, whether by means of direct access, such as when a guardian institutes the action for and on behalf of a minor, or by an indirect means, such as when a legal representative is appointed for the child.²⁴⁸ Section 18 (3) (b) places a corresponding duty upon parents and guardians to represent children and to assist them in legal matters.

²⁴⁷ 1998 (4) SA 102 (O), 104E-G.

²⁴⁸ T Boezaart *Law of Persons*, (2010), 57.

In *FB and Another v MB*²⁴⁹ the Court held that:

“Section 14 of the Children’s Act does not prescribe the manner in which a child is entitled to bring a matter to a Court nor the way in which he or she is entitled to be assisted. Nothing stated in this section, in my view, places any constraint upon this Court to determine the manner in which a child is to bring a matter before it or the way in which the child should be assisted. The paramount consideration in determining such issues remains the “best interests” of the child concerned. A request by a child to be assisted in legal proceedings by his or her own legal representative will, however, in my view, only be refused in exceptional circumstances since the child concerned, particularly where he or she is a party to the proceedings, will otherwise be placed in a worse position than all other natural or legal personae that enjoy such right.”

Section 14 grants *locus standi* to children to bring matters to Court. Where this is not possible the child may be assisted in bringing the matter to Court. That implies that anyone acting in the “best interests” of the child will similarly have *locus standi* to act on behalf of the child.²⁵⁰ This view is correct as Section 14 clearly stipulates that every child has the right to bring, and to be assisted in bringing, a matter to a Court, provided that matter falls within the jurisdiction of that Court.

6.2 Legal representation

Section 28(1) (h) of the Constitution provides that:

Every child has the right to-
(h) have a legal representative assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantive injustice would otherwise result.

The researcher submits that this subsection is an extension of the right of an accused person in criminal matters to legal representation at State’s expense. The rider is that if substantial injustice would otherwise result, to civil cases in litigation affecting children.

²⁴⁹ 2012 (2) SA 394 (GSJ), 396 para 13.

²⁵⁰ Sadie H and Corie L *A Practical Approach to the Children’s Act*, (2010), 30.

The wording of Section 28 (1) (h) requires that substantial injustice would result, but it could be impossible to decide that substantial injustice would result. Therefore, in order to give the right a meaningful content it could be proper in making the decision to find that in the absence of legal representation substantial injustice would probably result.

The Court interpreted Section 28 (1) (h) in the case of *Soller NO v G and Another*²⁵¹; which the custody of a 15-year-old boy who, himself, sought a variation of custody order. The judgment deal with the appointment of a legal practitioner to represent the interests of a child in terms of the provisions of Section 28 of the Constitution. The Court held that:

“Section 28(1) (h) envisages a ‘legal practitioner’ who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client, present them with logical eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1) (h) does not allow for the appointment of a social worker, or psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. Neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador. In short, a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.”

In essence, the legal representative should realise that he or she would face the reality of having to choose between representing the client's wishes, or rather do what is in the “best interests” of the child and, therefore, make sure that the Constitutional principles of substantial injustice are not to be breached. It is submitted that the decision in this case, that the legal practitioner expresses the views and perspective of the child, gives due regard to the “best interests” of the child.

²⁵¹ 2003 (5) SA 430 (W), 438 para 26-27.

In *Du Toit And Another v Minister of Welfare And Population Development And Others (Lesbian And Gay Equality Project As Amicus Curiae)*,²⁵² the Constitutional Court appointed Advocate Stais to act as *curator ad litem* to represent the interests of the children who were the subject of the application and also other children born and unborn who may be affected by the Court's order. The Court went further to hold that:

“In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a Court is obliged to appoint a curator to represent the interests of children.”

Section 6 (4) of the Divorce Act²⁵³ provides that the Court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation. Unfortunately, in practice, this provision is seldom invoked during the divorce proceedings, which results in the children's “best interests” not being well placed before Court.

In *Brossy v Brossy*²⁵⁴ the Court stated that:

“It is primarily a question of recognising the child as an autonomous individual who's right to express views and to be heard should be tested against the nature of the dispute and the role that the child can play in adding a significant dimension to the dispute. It is no longer the case that children should be seen and not heard.”

It is submitted that this case resonances the rule that when determining the “best interests” of the child the circumstances of each case must be viewed.

In *Legal Aid Board v R and Another*,²⁵⁵ the Legal Aid Board brought an urgent application in order to secure the appointment of a senior attorney to represent the

²⁵² 2000 (2) SA 198 (CC), 201 para 3.

²⁵³ Act 70 of 1979.

²⁵⁴ Case:602/11 [2012] 151 (SCA). Unreported.

²⁵⁵ 2009 (2) SA 262 (D), 276 para 40.

interests of the minor child in the custody case. The application was supported by the child's father and opposed by the second respondent, her mother. The Court stated that the position is that:

“Where the requirements of Section 28 (1) (h) of the Constitution are satisfied in respect of a child or children, the Legal Aid Board is obliged in terms of Section 3 of the Legal Aid Act to provide that child or those children with legal assistance. Whilst in many circumstances it will be desirable for the Legal Aid Board to consult with the child's guardian, or both the child's parents, before granting legal assistance, there is no provision of law that requires it to do so. However, the Courts have been unable to find any legal provision or rule of law that requires the Legal Aid Board to seek the approval of either the child's guardian or the Court before granting legal assistance to a child under section 28 (1) (h) of the Constitution.”

It is submitted that this judgment echoes the view point that the Courts do not consider the conflicts of the parties, rather what is in the “best interests” of the child; that the wishes of the child should be considered and where necessary legal assistance should be provided at State's expense. This is the confirmation of the notion that children, like all other inhabitants of this country, must be protected and enjoy rights as well.

6.3 Conclusion

The Constitution limits the child's right to have a legal practitioner assigned to the child to judicial proceedings where the child would be directly affected by the outcome. This right to participate in legal proceedings is limited to representation by a legal representative. However, Section 10 of the Children's Act extends the right of participation by providing that:

“Every child that is of such an age, maturity and stage of development to be able to participate in any matter concerning the child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

The researcher submits that it is clear from the discussions above that the Children's Act extends the right of participation to include all other forums. It is recommended that the right of the child to litigate or participate in legal proceedings should be accommodated in the absence of a legal representative. This will be serving the "best interests" of the child, considering the age, maturity and mental development of the child.

CHAPTER SEVEN: GENERAL CONCLUSIONS

This study indicates that the children's rights as set out by the Constitution in Section 28 (2) are in line with international standards as stated in UNCRC as well as ACRWC. In all the statutes and international instruments the "best interests" of the child are seriously protected as they are of paramount importance.

However, this study has also shown that the application thereof by the High Courts does not always follow the principles set by the Constitutional Court decisions. The reason for this discrepancy can be found in the philosophy of social context. Legal philosophy teaches us that normative law is the combination of community norms, values and beliefs.

In South Africa, before the advent of democracy in 1994, the total community was used to dogmatic leadership where children rarely had rights. Some of the presiding officers, including judges were not trained to enforce children's rights. Within their own "distorted" social context, although sincere, they came to the wrong conclusions as shown above in the study. The problem with the Courts' application of the "best interests" principle is that they rely mostly on the *stare decisis* rule; whereas the circumstances of each particular case must determine whether the decision to be taken is in the "best interests" of the child.

It is the hope of the researcher that this study will help to rectify the situation in the "best interests" of the children of this country, the Republic of South Africa, which is founded on human dignity principles, the achievement of equality and the advancement of human rights and freedoms and the supremacy of the Constitution and the rule of law.

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