

CHAPTER 4

CHANGES TO CURRENT LAW AND THE REASONS FOR THESE CHANGES

4 1 INTRODUCTION

Already in 1993¹ it was clear that a South African Constitution should include a Bill of Rights. There was debate over which rights children should have. Needless to say the rights of children were enshrined in the South African Constitution.² It once again became necessary to amend the Child Care Act³ and this was done in 1996.⁴

The Amendment Act of 1996 made it "obligatory for a children's court to inform a child 'who is capable of understanding' at the commencement of any proceeding that he or she has the right to request legal representation at any stage of the proceeding".⁵ The Child Care Amendment Act 96 of 1996 was an attempt to

¹ De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289.

² S 28 of Act 108 of 1996.

³ 74 of 1983.

⁴ 30 October 1996. This amendment is discussed by Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: Does it Improve Children's Rights in South Africa?" 1996 *SAJHR* 649. Other than the Child Care Amendment Act of 1996, the Child Care Act has been amended many times in the past: Child Care Amendment Act 86 of 1991; Abolition of the Restriction on the Jurisdiction of Courts Act 88 of 1996; Welfare Laws Amendment Act 106 of 1997; Adoption Matters Amendment Act 56 of 1998 and Child Care Amendment Act 13 of 1999.

⁵ Sloth-Nielsen and Van Heerden (1996 *SAJHR* 650): the problem here was that many children are "not capable of understanding" as they are too young, and what must be done if the court refuses legal representation? The authors also state that it is unclear what the responsibility of the Children's Court is when the child requests legal representation. The authors question whether a "frivolous" request can simply be denied. Another question raised is what should be done in the instance where a child refuses legal

refashion, on an interim basis, a statute for children in the new South Africa.⁶ When the Amendment Act was passed it was necessary "... to begin the process of rewriting the Child Care Act in its entirety".⁷ In *Fraser v Children's Court, Pretoria North*⁸ the constitutionality of section 18(4)(d) of the Child Care Act, which stipulated that it was unnecessary to obtain the consent of an unmarried father to adoption, was questioned. Since then the Natural Fathers of Children Born out of Wedlock Act⁹ has been enacted.

Despite these changes it became clear that a comprehensive Children's Statute, encompassing all the existing aspects of law dealing with children, should be

representation? Should the court consider whether the best interests of the child require legal representation, although the child has refused such representation? Sloth-Nielsen and Van Heerden conclude that "[i]t would appear not: subs (4) of s 8A merely states that 'a children's court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the state, should the Children's court consider it to be in the best interest of such child'. It would therefore appear that legal representation was discretionary." S 8A(3) also made provision for a parent to appoint a legal practitioner to represent his or her child, if this is considered by the court to be in the best interests of the child. "This interesting addition flies in the face of express concerns about the potential for a conflict of interests, where parents (who may akin to defendants in a removal enquiry) are empowered to appoint a legal representative for the child": Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650. S 8A(4) made provision for legal representation at State expense, and s 8A(5)–(6) provides for an evaluation of the appointment of a representative from the Legal Aid Board, in order to ascertain whether the costs of the legal representation can be recovered from parents or guardians: Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650. Sloth-Nielsen and Van Heerden conclude that the new provision which empowered Commissioners of Child Welfare to arrange the appointment of a legal representative for the child, but that "in the final analysis the Act may not bring about substantial increases in the level of child representation in the Children's Court because of the overt emphasis on cost considerations; there is the risk that this factor will prove more compelling than the possibility of 'substantial injustice' to the child". See also Sloth-Nielsen and Van Heerden "New childcare and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261.

⁶ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 654. Some improvements were that marriage now included customary unions and marriages concluded in accordance with religious law and the term illegitimate child was replaced with child born out of wedlock. S 2 of the Births and Deaths Registration Amendment Act 40 of 1996 made provision for children born of religious or customary unions to be registered as children born out of wedlock instead of illegitimate.

⁷ Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265.

⁸ 1997 2 BCLR 152 (CC).

⁹ Act 86 of 1997.

drawn up.¹⁰ This would not only bring all legislation dealing with children in line with the South African Constitution and international instruments¹¹ but would also clarify many aspects of our law. In 1998 an Issue Paper dealing with the scope of the proposed law reform was published by the Law Commission.^{12 13} This was followed by a consultative process during which workshops were hosted by the

¹⁰ “A key concern was that piecemeal amendments to comply with constitutional imperatives and ratification of the CRC would not resolve deep-seated concerns about the content and application of the current South African child law”: South African Law Commission Issue Paper 13 Project 110 *The Review of the Child Care Act* First Issue Paper (18 April 1998) par 1 2.

¹¹ Such as the CRC. “Since South Africa ratified the Convention on the Rights of the Child, a great deal of work has been done to prepare the ground for change in the lives of children. The Constitution, with its crucial section 28 on the rights of the child, is in place. Legislation has been passed. More is envisaged. Policies have been developed. Important partnerships between government and society have been forged ... the challenge will be to implement the measures for which this framework provides. There is much to be done. There are still many problems and areas of great disadvantage and inequity. There is also still a need to stimulate the economic growth without which the best laid plans will flounder. But, whatever the hurdles that lie ahead, a start has been made and it is time to move on to the next stage. The building blocks are ready, and now the house in which our children will live, learn and grow to be the future citizens of South Africa must be built”: *Initial Country Report South Africa Convention on the Rights of the Child* (1997) 111. For a discussion of the relevant provisions of the CRC, see 3 1 1 1 1 above. For a brief analysis of whether the Children’s Act complies with the provisions of the CRC, see 4 5 2 2 below.

¹² Now the South African Law Reform Commission.

¹³ Sloth-Nielsen and Van Heerden “The Political Economy of Child Law Reform: Pie in the Sky?” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 107, 110. Prior to this a conference was held in 1996 during which the redrafting of the Child Care Act was discussed. The concern raised during the conference, by Loffel, was that “[t]he [then] present state of our legislation results in children being pulled between different parts of the legal system, falling through the cracks, or being traumatized by components which are not designed with the needs and developmental stages of children in mind”. Conference Report *Towards Redrafting the Child Care Act* 1996 Community Law Centre, UWC 11. The conference also stressed the fact that “[t]here are also important lessons to be learned from the Children’s Act 33 of 1960 which, although eurocentric and archaic in the present context, was in its own way a visionary document. Its two notable features were the intersectoral nature of the drafting process and the holistic vision which the Act reflected. The 1983 Child Care Act, on the other hand, sacrificed this sensitivity to administrative convenience” and that “[w]e need legislation that is thoroughly attuned to our country’s needs, with the benefit of a state-of-the-art review of children’s legislation elsewhere in the world”. The concern was also raised, by Msutha (12) that “where the objectives of two pieces of legislation are different or in conflict, the practical consolidation of those laws into one law will not necessarily address the question of harmonisation”. In the discussion that followed the practicality that certain issues relating to children are the responsibility of different departments of Government, was also raised. The conference also stressed that “[t]he law must be seen holistically within the context of the Convention and the Constitution. Composite legislation will not solve all these difficulties. It is not always feasible or even desirable to deal with all aspects under one piece of composite legislation.”

project committee of the South African Law Commission.¹⁴ Notable trends that emerged were firstly, the democratisation of the family, the change of the meaning of the term family in South Africa, as well as the concept of primary caregiver, guardian and parent, and that nowadays one has to look at who is responsible for the "day-to-day care of the child, rather than any formal legal arrangement".¹⁵ There has also been a move away from parental rights or power to parental responsibility.¹⁶ Secondly, customary and religious laws must be assimilated with civil law. Thirdly, the new statute had to regulate State intervention in child care protection matters and had to determine who gets to participate in family relationships. Fourthly, better resources, structures and institutions for children had to be looked at.¹⁷ Increasingly, there has been "... recognition of African values and traditions in developing South African family and child law and policy".¹⁸

¹⁴ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 112.

¹⁵ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 113: The Welfare Laws Amendment Act provided for a child support grant to be paid to the child's "primary caregiver".

¹⁶ See further the discussion of this aspect at 3 1 1 3 above.

¹⁷ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 117. For a discussion of revenue realities, see 120–127.

¹⁸ Sloth-Nielsen and Van Heerden "Putting Humpty Dumpty back together again: towards restructuring Families and Children's Lives in South Africa" 1998 *SALJ* 156, 164. For many years the "traditional" family has no longer been the only form of the family found in South Africa. This fact has been recognised not only in academic circles but by laypersons as well, see eg Van Wyk "Ons nuwe Gesinne" Augustus 2003 *Sarie* 50–54. Where the author states (51): "[d]ie definisie van die woord gesin het veel wyer geword as 'n paar dekades terug". See addendum B for an example of the form used in a small informal survey which was conducted in 2004 and 2005 with the aim of determining what the public understands the terms guardianship, custody, access (as they were then known), parental authority and parental responsibilities to mean. The survey was conducted within the municipal boundaries of Pretoria and Cape Town, although the respondents may have resided outside of these boundaries. The aim of the survey was not to conduct a scientifically correct analysis but rather to obtain public opinion or an idea of the public's understanding of the abovementioned terms. It is important to know what the public understands certain terms to mean, in order to determine what impact changing the terminology will have, if any. Many of the respondents did not think that parents have guardianship over their children, but instead

Divorce has often been seen as only being for the wealthy.¹⁹ The Family Advocate's offices are entrusted to take care of the best interest of the child²⁰ but

thought that the term guardianship referred to when a third party (other than a parent) was appointed in the place of a parent as “a honorary parent to a child” when there was no parent for the child or where parents were unable to look after the child. One respondent stated this concept as follows: “[w]hen neither of the parents is involved and guardianship of the child has been granted to a third party eg a relative.” Another stated that guardianship was when one of the parents died and then the other one becomes the guardian. Some respondents also defined guardianship as “looking after other people’s children”. The only answer that was near to the legal definition of guardianship was “[j]y dra die verantwoordelikheid vir jou eie of aanneem kinders se wel en wee” and that the guardian is a “protector of children”. From the majority of the answers it was clear that the respondents were not aware that parents are also guardians of their children. Generally respondents thought that guardianship is only granted by the courts to third parties. The concept of custody seemed to be better understood by the respondents who described the term as “kids live with whoever has custody”, “one party gets custody of kids [after divorce]. To look after them, protect, feed, clothe and love them and cherish them”, “right granted by the courts to look after the children”, “caring for child”. Many of the respondents said that the term custody also only applied “after a divorce, when you get the children”. The term access was generally understood to mean “visitation”, “to have contact with children”, “to be able to see your child”, “right to see/get in touch with children, [when] one is not living with [them] eg in cases of divorce”. One of the respondents defined access as “availability” and another as “letting the parents see the children as often as possible”. The term access was defined by the respondents as a right of the parent rather than the right of a child. The respondents were asked whether they would like to see changes made to the meanings of these terms, only one respondent commented on this aspect and said that “parental responsibility should be stated clearly so that more people can understand it fully, that even if one parent is divorced that they also have some parental responsibility to the kids”. The respondents also generally regarded the term parental authority to mean to “discipline children, teach them right from wrong”, “to exercise authority over the children in terms of discipline, instructions given”, “authority vested in a parent to direct his or her child’s life”, “right to set boundaries for children and to enforce same”, “to guide and restrict child to stay within house rules and behaviour”. One of the respondents defined parental authority as “bringing the children up right and educating them” whereas at the opposite end of the spectrum, another respondent defined parental authority as “control over kids”. Parental responsibility was defined as “looking and caring after the children to the best of your ability”, “to set clear examples of how an adult should live, work and socialise [*sic*] – a goal for a child to work to”, “duties that come with being a parent”, “doing everything to take care of the family”, “the responsibility exercised by the parent for the general well-being of the child e.g. health, support, clothing, housing, guidance etc”, “to be responsible for the welfare, health, education, love of the minor child/children”, “raising children in a law abiding and Christian manner”. From this survey it appeared that the majority of the respondents had some correct idea of what custody and access entails. However, most of the respondents were unclear as to the full meaning of the term guardianship; this may be due to the term not generally being used by the lay person to refer to a parent’s relationship with his or her child. The Children’s Act 38 of 2005 will change the term access to “contact” and the term custody to “care”. The public should be educated about the meanings of these new terms as well as the general provisions of the Children’s Act.

¹⁹ “Usually only the wealthy are able to command the necessary assistance to lay before the judge what they feel to be in their child’s best interests”: Burman, Durman and Swanepoel “Only for the Wealthy? Assessing the Future for Children of Divorce” 2000 *SAJHR* 535.

are often affected by a lack of finance and human resources.²¹ It was clear that mechanisms to assist parties at divorce and so to protect the best interests of children had to be implemented.

The Discussion Paper on the Children's Bill dealt with the status of children, including the rights of children, the best interests of the child standard²² and parental rights and responsibilities. Secondly, the paper dealt with child abuse, neglect and protection. Thirdly, the Discussion Paper focused on groups of children in especially difficult circumstances.²³

It is clear from the above discussion that the time was right for a comprehensive Children's Statute to be developed in South Africa.²⁴ The Children's Bill²⁵ was

²⁰ For a discussion of criteria used by family counsellors, see Africa, Dawes, Swartz and Brandt "Criteria used by Family Counsellors in Child Custody Cases: a Psychological Viewpoint" in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 122–144.

²¹ Burman, Durman and Swanepoel 2000 *SAJHR* 536. For an examination of the role of the office of the Family Advocate, including a comparative study of the offices of the Family Advocate in Cape Town, Port Elizabeth, Grahamstown and East London, see Glasser "Custody on Divorce: Assessing the Role of the Family Advocates" in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 108–119. In the conclusion of her examination Glasser (118) points out that "it is not so much the economic and demographic profiles of the people using the office that have a bearing on the quality of the service offered by the office, but rather the office organization ... staff ... expressed frustration at their structural constraints ... What is also clear is that the family advocates are currently not trained to assess interpersonal relationships or the emotional needs of the child. They also do not possess the skills necessary to interview children or people at risk, and only a few are capable of mediating between warring parents." Glasser (119) also expresses concern that the Family Advocate does not have any specialised skills outside of law. For a discussion of the role of the Family Advocate, see further at 4 4 8 below.

²² See 3 5 above for a discussion of this standard.

²³ Such as street children and those living with aids.

²⁴ See the "Memorandum of the Objects of the Children's Bill, 2003" at 83 of the Bill.

²⁵ Bill 70 of 2003, reintroduced, then Bill 70B and then Bill 70D of 2003. Now the Children's Act 38 of 2005. Two bills were envisaged, a s 75 and a s 76 Bill. See further at 4 4 1 below in this regard. Bill 70D of 2003 became the Children's Act 38 of 2005 on 19 June 2006, when the President assented to the Act. The Children's Act is not in effect yet. This will

introduced to make provision for clarity in South African law regarding certain aspects of our law pertaining to children and to provide a comprehensive Children's Statute.

In the discussion that follows the work of the South African Law Commission²⁶ in developing this new law will be discussed. The role played by the South African Constitution as well as international documents will be examined. The relevant provisions of the Children's Bill and the Children's Act will be examined, especially the sections relating to parental authority, guardianship, care and contact as well as the best interests of the child and the role of the Children's Court, as well as the High Court as the upper guardian of all minors. Public opinion regarding whether the public thinks changes are necessary will also be mentioned.

4 2 THE SOUTH AFRICAN LAW REFORM COMMISSION

4 2 1 Introduction

“The challenge facing the Commission [was] to develop a systematic and coherent approach to child law: an approach which is consistent with constitutional and international law obligations of equity, non-discrimination, concern for the best interests of the child, participation of children in decisions

occur by means of proclamation in the *Government Gazette*. This is expected to take place in 2008.

²⁶ Now the South African Law Reform Commission.

affecting their interests and protection of children in vulnerable circumstances.”²⁷

In this section the reasons why changes were required in the current law and what these changes should be, with specific reference to parental authority and responsibility,²⁸ guardianship,²⁹ care,³⁰ contact,³¹ the best interests of the child³² and the role of the Children’s Courts as well as the High Court as upper guardian of all minors,³³ will be examined in light of the findings and recommendations of the South African Law Reform Commission.³⁴

²⁷ Discussion Paper 103 on the *Review of the Child Care Act* Project 110 ch 2 par 2 1.

²⁸ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 3 below. For an analysis of the content of parental authority in South African law, see 3 1 1 above. The paradigm shift that has taken place in South African law, where parental power has become parental responsibility, is dealt with at 3 1 1 3 above. The concept of parental responsibilities and authority as found in the Children’s Act 38 of 2005 is discussed at 4 4 3 below.

²⁹ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 4 below. For a discussion of the meaning of guardianship in Roman law, see 2 2 5 above. For an overview of guardianship in Germanic law, see 2 3 2 above and the Roman Dutch law, see 2 3 4 above. The current definition of guardianship in terms of South African law is discussed in 3 2 above. The concept of guardianship as found in the Children’s Act is explained in 4 4 4 below.

³⁰ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 5 below. The meaning of custody (care) in Roman law is explained in 2 2 5 above. The Germanic law definition of custody is discussed at 2 3 1 above, and the Roman Dutch law at 2 3 4 above. The current South African law understanding of the term custody is analysed at 3 3 above. The concept of care as found in the Children’s Act is discussed in 4 4 5 below.

³¹ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 6 below. Access (contact) in Roman law is looked at in 2 2 5 above. The concept as found in Germanic law is briefly explained at 2 3 1 above. The term access as found in current South African law is analysed in 3 4 above. The concept of contact as found in the Children’s Act is analysed in 4 4 6 below.

³² The Law Commission’s findings and recommendations in this regard are discussed at 4 2 7 below. See further 3 5 above for a discussion of the best interests of the child standard in South African law and 4 4 7 below for the concept as found in the Children’s Act.

³³ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 8 below. See further 3 6 above for an overview of the High Court’s role as upper guardian of children as found in current South African Law. A discussion of the role of the Children’s Court and the High Court as found in the Children’s Act is found at 4 4 8 below.

³⁴ In most instances these findings and recommendations will be discussed chronologically.

4 2 2 The object and purpose of the changes

Initially the South African Law Commission “considered simply referring the existing Act, but it became evident from the failing system that far more meaningful changes were needed”.³⁵ In 1998 the South African Law Commission published the *Review of the Child Care Act* First Issue Paper.³⁶ The aim was to allow people and bodies who wanted to make comments or suggestions regarding reforming the current law to do so with sufficient background information so that the submissions could be focussed.³⁷ This paper was also workshopped extensively.³⁸ Chapter 1 of the First Issue Paper clearly states the reasons behind the need for change, other than constitutional imperatives and legal obligations flowing from international conventions.³⁹ The fact that South African children are “in an extremely vulnerable situation” due to “the breakdown in family life” as well as “deep-rooted poverty and unemployment” and “apartheid policies” was emphasised.⁴⁰

The aim of this project was a:

³⁵ Zaal, Social Development Portfolio Committee, 6 June 2001 *Child Care Act Review*: briefing by the South African Law Commission.

³⁶ Issue Paper 13, Project 110 (18 April 1998).

³⁷ Preface of the *Review of the Child Care Act* First Issue Paper.

³⁸ Preface of the *Review of the Child Care Act* First Issue Paper.

³⁹ Such as the *United Nations Convention on the Rights of the Child* (1989). See par 31–33 for a discussion of why international institutions are useful in developing a framework for laws about children. For a discussion of the relevant provisions of various international conventions, see 3 1 1 above. For a discussion of the provisions of the CRC, see 3 1 1 1 1 and for the provisions of the ACRWC, see 3 1 1 1 3.

⁴⁰ Ch 1 par 1 1. See also the introduction of the *Discussion Paper 103 of the Child Care Act*.

“comprehensive review of the Child Care Act and all other South African legislation affecting children, together with the common law and religious laws relating to children in this country ... [and to] develop ... new appropriate and far reaching legislation which will take into account not only the present realities but also the future social, political and economic constraints of the society which it aims to serve.”⁴¹

The *Discussion Paper on the Review of the Child Care Act*⁴² covered a wide range of issues, such as when childhood begins, children’s rights and responsibilities, the best interests of the child and the principles underpinning the new Children’s Statute.⁴³ It also deals with the shift away from parental power to parental responsibility as well as the acquisition and termination of parental responsibility. Additionally it looks at religious and customary laws affecting children and it proposes a new court structure with extensive powers.⁴⁴ The Discussion Paper “contain[s] clear legislative proposals for inclusion in ... a comprehensive Children’s Bill”⁴⁵ but does not contain a draft Bill. The Discussion Paper contains the Commission’s “preliminary recommendations and finding”.⁴⁶

⁴¹ Ch 1 3. The Commission had a vision for “[a]ccessible, appropriate, consistent and empowering legislation for the children of South Africa ... in harmony with the intersecting framework of international law and the South African Constitution”: par 2 1.

⁴² Project 110.

⁴³ *Media statement by the South African Law Commission on the Release of the Discussion Paper on the Review of the Child Care Act* Project 110 (19 December 2001) 1.

⁴⁴ Amongst other things. *Media statement by the South African Law Commission on the Release of the Discussion Paper on the Review of the Child Care Act 2*.

⁴⁵ 3: After the publication of the Discussion Paper there was first a consultation process and workshops were held before the draft Bill was drawn up.

⁴⁶ “Executive Summary” Project 110: *Review of the Child Care Act 1*.

The vision of the Commission was “a single comprehensive statute for South Africa’s children”.⁴⁷ The Commission’s vision was that the new Children’s Statute would “enables a child’s growth and development within a family environment and protect ... children in vulnerable situations”.⁴⁸ The Commission recommended that the new statute must go beyond the existing Child Care Act⁴⁹ and must include provisions on parental rights and responsibilities, surrogacy, artificial insemination and the age of majority, amongst others.⁵⁰

The Commission recommended “objects for the new Children’s Statute, amongst these is to promote the well-being of children, to provide services and means for promoting the sound development of children and to develop and strengthen community structures which provide care for children”.⁵¹ Additionally, the Commission suggested that the new statute should contain certain general principles and guidelines. Amongst these are that any decision made regarding a child must be in the child’s best interest, that children must be brought up in a stable family environment,⁵² that consideration must be given to a child’s views,⁵³ that a child must be treated fairly and equally and that the child’s inherent dignity

⁴⁷ “Executive Summary” Project 110, 1: “[t]he commission decided on a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application and the realization that social welfare and other services for children in South Africa will continue to need massive injections of resources in the foreseeable future in order to fulfill the basic needs of the most vulnerable members of our society.”

⁴⁸ “Executive Summary” Project 110, 2.

⁴⁹ Act 74 of 1983.

⁵⁰ “Executive Summary” Project 110, 2. The Commission did not recommend that the following legislation be repealed and incorporated into the Children’s Statute: Divorce Act 70 of 1979; South African Schools Act 84 of 1996; Maintenance Act 99 of 1998; Domestic Violence Act 116 of 1998: ch 2 par 2.

⁵¹ “Executive Summary” Project 110, 4–5.

⁵² Or an environment closely resembling a family environment.

⁵³ “[B]earing in mind the child’s age and maturity.”

must be respected, in any proceedings involving a child a conciliatory and problem-solving approach should be followed and a confrontational approach avoided.⁵⁴ The Discussion Paper⁵⁵ stated that the goal “is to respect the responsibilities of parents, families and communities as regards their rearing of the young, and to provide a legislative and policy environment in which the state is supportive of family life”. The Commission also stated in the Discussion Paper that the scope of a new Children’s Statute must “be all embracing and include all children’s issues ... [and] should be the core law in all aspects of the life of children and should set the minimum standards to which all laws affecting children must conform”.⁵⁶ The Commission received submissions that indicated that the diversity of family forms and “parental”-child relationships existing in South Africa should be recognised.⁵⁷

4 2 3 Parental authority and responsibilities

4 2 3 1 From Parental Power to Parental Responsibility

The silence of the Child Care Act on the relationship between a child and his or her parents was a serious shortcoming of the Act and the issue had to be dealt with in terms of common law. Common law focuses on the traditional nuclear family whereas:

⁵⁴ “Executive Summary” Project 110, 5–6.

⁵⁵ Discussion Paper 103 *Review of the Child Care Act* Project 110: ch 2 par 2 2.

⁵⁶ Discussion Paper 103 *Review of the Child Care Act* Project 110: ch 2 par 2 5.

⁵⁷ Ch 2 par 8 2 3: Discussion Paper 103 *Review of the Child Care Act* Project 110.

“[t]he nature of the family has changed so much in recent times that this approach is no longer relevant, often families are headed by children and children are raised by people other than their biological parents. Yet, in practice the High Court rarely allocates guardianship to a non-biological parent as its focus is still on the traditional nuclear family”⁵⁸

The Law Commission recommended that the term “parental powers” should be replaced by “parental responsibilities”.⁵⁹ In 2004 the change of the concept of parental power to parental responsibilities was seen as the “care principle underlying the child”.⁶⁰ The reason given for this change was that “[t]he word ‘power’ seemed to imply a power relationship and power over a child, whereas the word ‘responsibility’ referred more to obligations that the parent had in taking care of the child”.⁶¹

In 1998 the Law Reform Commission⁶² stated the following:

“[I]n developing the model proposed for a children’s code for South Africa ... [t]he oval is to respect the responsibilities of parents, families and communities as regards the rearing of the young, and to provide a legislative and policy environment in which the State is supportive of family life.”⁶³

⁵⁸ Social Development Portfolio Committee: 2001-06-06.

⁵⁹ *Ibid.*

⁶⁰ Social Development Portfolio Committee: *Children’s Bill Briefing* 2004-08-05.

⁶¹ *Ibid.*

⁶² *The Review of the Child Care Act: First Issue Paper* (18 April 1998) Issue Paper 13 Project 110.

⁶³ Issue Paper 13 Project 110 par 2.2.

The Commission recognised that women bear an unequal burden with respect to child care and child rearing and that there is a need for “substantive equality”.⁶⁴ They were also aware of the global shift away from the concept of parental power to parental responsibility.⁶⁵ The Commission’s aim was to “assist to plan a legal system which is sensitive to local experiences in South Africa and which takes into account technological advances in the sphere of assisted reproduction and family formation”.⁶⁶

4 2 3 2 Recommendations

4 2 3 2 1 General

Preliminary recommendations made in the Discussion Paper on the *Review of the Child Care Act* were, amongst others “... that more than one (even more than two) persons be allowed to acquire and manage parental rights and responsibilities, or components thereof, in respect of the same child at the same time”⁶⁷ and that mothers and married fathers acquire such rights and

⁶⁴ Van Heerden (Conference Report *Towards Redrafting the Child Care Act* 1996 Community Law Centre UWC 14) raised this concern already in 1996 when she stated “that it is important to remain acutely aware of the differences in real or substantive equality and formal equality. While we have a strong equality clause in our Constitution, and while that clause is further strengthened by its application between private individuals, substantive equality must take cognisance of the lived experience of people. This is pertinent when considering the position of the father of the extra-marital child. The lived experience of many women is that they bear the entire burden of bringing up and supporting their children, often with very little input and assistance from the father.”

⁶⁵ *Ibid.*

⁶⁶ Par 2 2. See also par 4 2 3 of Issue Paper 13 Project 110, dealing with family life.

⁶⁷ *Media Statement by the South African Law Commission on the Release of Discussion Paper on the Review of the Child Care Act* (hereinafter referred to as Media Statement) 3.

responsibilities automatically while certain unmarried fathers and other persons would have to apply to court for such.⁶⁸

The Commission⁶⁹ dealt with the parent-child relationship. The Commission advised that the diversity of family forms and parent-child relationships in South Africa must be recognised and that the best way to do this would be to expressly prohibit unfair discrimination against children on the grounds set out in section 9(3) of the Constitution, and on the ground of family status, nationality of the child or his or her parents, legal guardian, primary caregiver or any family member.⁷⁰ The Commission also recommended that the common law concept of “parental power” be replaced with “parental responsibility” and that a balance be found between the responsibilities of parents and the rights of parents.⁷¹ The Commission further recommended that the terms “access” be replaced with the term “contact”, that “custody” be replaced with “care”, and that the term “guardianship” remain “guardianship”. The Commission also made recommendations regarding the acquisition of parental rights and responsibilities, and suggested that the mother of a child should in all instances have parental rights and responsibilities in respect of her child,⁷² and a child’s father should

⁶⁸ Another recommendation was: “... that the Common law defence of the right of reasonable chastisement to a charge of assault be repealed in order to protect children from serious breaches of physical integrity, which will in effect make some forms of parental chastisement a criminal offence”: *Media Statement* 3.

⁶⁹ Discussion Paper *Review of the Child Care Act* Project 110 ch 8.

⁷⁰ Amongst others. The Commission also recommended that a definition of “family member” should be included in the new statute and that such definition should be relationship-focussed, and contain a non-traditional approach to family relations: *Executive Summary* 17.

⁷¹ *Executive Summary* 17–18.

⁷² *Executive Summary* 19: where such mother is an unmarried minor and the child’s father does not have parental rights and responsibilities then the person(s) who has parental rights

acquire automatic parental rights and responsibilities “if [he] is married to the child’s mother or was married to her at the time of the child’s conception”.⁷³ The Commission also recommended that the new statute “should provide for a procedure whereby such a father can acquire parental responsibility by entering into an agreement with the mother”.⁷⁴

4 2 3 2 2 Unmarried fathers and other caregivers

The Commission also recommended that certain unmarried fathers should be vested with parental responsibility automatically. These categories should include the following:

“(a) the father who has acknowledged paternity of the child and who has supported the child within his financial means; (b) the father who, subsequent to the child’s birth, has cohabited with the child’s mother for a period or periods which amount to not less than one year; (c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods, which amount to not less than one year whether or not he has cohabited with or is cohabiting with the mother of the child.”⁷⁵

and responsibility in respect of the child’s mother should have rights and responsibilities in respect of that mother’s child.

⁷³ *Executive Summary* 18.

⁷⁴ *Executive Summary* 19. The “father” referred to here is the unmarried father.

⁷⁵ *Executive Summary* 20.

The Commission recommended “... that the partner in a domestic relationship who does not have parental rights and responsibilities in respect of a child can acquire such rights and responsibilities either by agreement in the prescribed form with the other mother, or an application to the court”.⁷⁶

The Commission also recommended that:

“... any caregiver who is not a biological parent of a child who is concerned with the care, welfare and development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that this will be in the best interests of the child concerned”.⁷⁷

The Commission further recommended:

“that a biological parent who has no parental rights or responsibility or only limited parental responsibility and rights, should be able to apply to the same forum in order to obtain parental responsibility and rights, or certain components thereof.”⁷⁸

The Commission was also of the view that the legal position of a person who has *de facto* care of the child but does not have parental responsibility must be spelt

⁷⁶ *Executive Summary* 20.

⁷⁷ *Executive Summary* 20.

⁷⁸ *Executive Summary* 21.

out in the new statute.⁷⁹ Another recommendation of the Commission was that, even where no application for parental rights and responsibilities has been made that if a court believes, in the course of any proceedings before it, that it will be in the child's best interests to make such an order, it may do so.⁸⁰

The Commission was also of the opinion that more than one person may have parental responsibilities for the same child and such persons may act alone without the other(s) in fulfilling those responsibilities.⁸¹ The Law Reform Commission also recommended that parents must be given the option of registering their parenting plans⁸² with the court or the Family Advocate.⁸³ The Commission recommended that wilful failure of a person, having parental rights and responsibilities, to fulfil such rights and responsibilities should constitute a criterion for finding a child to be in need of care. The court may also terminate all or some of the parental rights and responsibilities of a parent, where, after enquiry, the court finds it necessary to do so.⁸⁴

⁷⁹ *Executive Summary 21.*

⁸⁰ *Executive Summary 21.*

⁸¹ Except that the consent of all persons must be obtained when: "(a) the child wishes to conclude marriage; (b) the child is to be adopted; (c) the child is to be removed from the Republic; (d) an application is made by or on behalf of the child for a passport; and (e) the immovable property or any right to immovable property belonging to the child is to be alienated or encumbered": *Executive Summary 22.* These exceptions are the same as those which we now have in the Guardianship Act. The current definition of guardianship was discussed in 3 2 above.

⁸² Parenting plans may deal with the care of the child, contact between the child and another person, the appointment of a parent-substitute, maintenance and any other aspect of parental responsibility: *Executive Summary 23.*

⁸³ *Executive Summary 23.*

⁸⁴ *Executive Summary 23.*

4 2 3 2 3 Definition of family

In the Discussion Paper some respondents said that a definition of “family unit” or “family group” should be included in the statute. Others proposed that the concept “parental responsibility” should be defined and that a non-exhaustive list of guidelines of what “parental responsibility” includes should be found in the Children’s Statute.⁸⁵ It was also made clear that legal recognition of family forms should not only be based on biological parenthood but that the wide variety of kinship and community care should be taken into consideration.⁸⁶

The Commission recommended that a non-discrimination clause should be in the statute, to prevent discrimination against children on the grounds as set out in section 9(3) of the Constitution, in order to recognise the diversity of family forms and parent-child relationships.

The Commission also proposed a definition for “family member” as being:

- “(a) a parent, grandparent, brother, sister, uncle or aunt of the child;
- (b) the child’s guardian or any other person who is legally responsible for the care and welfare of the child;
- (c) any primary caregiver of the child;

⁸⁵ Discussion Paper 103 ch 8 par 8 2 3.

⁸⁶ Discussion Paper 103 ch 8 par 8 2 3.

- (d) any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which significantly resembles a family relationship”.⁸⁷

4 2 3 2 4 Defining parental rights and responsibilities

The Commission⁸⁸ also dealt with the shift from “parental power” to “parental responsibility”. The fact that “the common law concept of ‘parental power’ is outmoded and unsatisfactory”⁸⁹ was emphasised and that “a balance should be struck between the responsibilities and rights and powers of parents needed to fulfil those responsibilities”.⁹⁰ The respondents believed that the new Children’s Statute should contain a clear definition of parental rights⁹¹ and that “[p]arental rights should include rights that parents can exercise against their children, the other parent, third parties and the state”.⁹² A suggestion was also made regarding the definition of parental responsibility.⁹³

⁸⁷ Discussion Paper 103 ch 8 par 8 2 3.

⁸⁸ Discussion Paper 103 ch 8 par 8 3.

⁸⁹ Discussion Paper 103 ch 8 par 8 3 1.

⁹⁰ Ch 8 par 8 3 1: The Commission cautioned that “[c]are should be taken to avoid new legislation becoming ‘parent-unfriendly’”.

⁹¹ Provided that it is clear that such rights are not absolute: ch 8 par 8 4 4. However, it is questionable whether any right can be absolute. Logic says that a right cannot be absolute, the relationship between rights may limit a right and the formulation of a right itself may imply a limitation. Even the rights contained in the South African Constitution are not absolute: Kleyn and Viljoen *Beginner’s Guide for Law Students* (2002) 250–251.

⁹² Ch 8 par 8 4 4.

⁹³ Provided that it is clear that such rights are not absolute: Discussion Paper 103 ch 8 par 8 4 4, here it was also said that “[p]arental responsibility means the responsibility a parent has in relation to a child, including – (a) safeguarding and promoting the child’s health, development and welfare; (b) providing direction or guidance in a manner appropriate to the stage of development of the child; (c) providing an appropriate environment to foster respect for diversity, community and the environment; (d) maintaining personal relations and regular, direct contact with the child if he or she is not living with the parent; and (e) acting as the child’s legal representative, but only insofar as compliance is practicable and based on the

Regarding the changing of terms such as “guardianship”, “custody” and “access” some respondents felt that it would be unwise to replace these terms.⁹⁴ Others thought that the wording would not make people act differently although such a change would emphasise parental responsibilities instead of rights.⁹⁵ Concern was also expressed that it could be difficult to manage the exercise of parental responsibility where several people exercise it simultaneously⁹⁶ and suggestions were also made that, in such instance, a formal contract should be drawn up and made an order of court.⁹⁷ A suggestion was made that where parental responsibility is exercised by several people, that each person should be able to act alone, without consent of the other party except where the decision is a major decision.⁹⁸ The Commission was in favour of defining parental rights and responsibilities as:

best interests of the child. A parent has those rights which are necessary to fulfil his or her parental responsibility, including the right – (a) to have the child living with him or her or otherwise to regulate the child’s residence; (b) to direct or guide the child’s upbringing in a manner appropriate to the child’s stage of development; (c) if the child is not living with him or her, to maintain personal relations and regular, direct contact; and (d) to act as the child’s legal representative but only insofar as those rights are exercised in a manner consistent with the constitutionally recognized rights of the child”. Additional parental rights suggested were “to protect the child from abuse and neglect, discrimination, oppression, violence and exposure to physical or moral hazards; – to provide guidance, care, assistance and maintenance to the child to ensure the survival and development of the child; – the right to have a say in all matters related to the well-being of the child; – the right to access to and custody of the child where it is in the best interests of the child; and – the right to have access to information regarding the development of the child where the child is not living with the parent concerned.”

⁹⁴ See also the discussion in n 18 above of the mini-survey conducted regarding the meaning of these terms and the public’s understanding of them.

⁹⁵ Discussion Paper ch 8 par 8 4 4, 224.

⁹⁶ Discussion Paper ch 8 par 8 4 4, 225.

⁹⁷ Discussion Paper ch 8 par 8 4 4, 227.

⁹⁸ A major decision was said to be “... any decision involving a significant change to the child’s – (a) social, educational or physical environment; (b) physical, spiritual or psychological integrity; or (c) legal status; including, but not limited to: (i) consenting to the child’s emigration or relocation, (ii) determining the child’s religion, (iii) determining the child’s education, and (iv) consenting to the child’s medical treatment”: Discussion Paper par 8 4 51, 228–229.

“A parent has in relation to his or her child the right and responsibility –

- (1) to care for his or her child;
- (2) to have and maintain contact with his or her child; and
- (3) to act as guardian for his or her child.”⁹⁹

The Commission proposed what the formulation of the management of parental rights and responsibilities should specify.¹⁰⁰ This proposal can be regarded as a

⁹⁹ Discussion Paper par 8 4 5 3, 233–236.

¹⁰⁰ Discussion Paper par 8 4 5 3, 233–236: “(1) More than one person may have parental responsibility for the same child at the same time. (2) Where more than one person have parental responsibility and parental rights in respect of the child at the same time, each of them may act alone and without the other (or others) having such parental responsibility and parental rights in meeting that responsibility and exercising those rights except where this Act or any other law requires the consent of more than one person in any matter affecting the child. (3) A person who has parental responsibility and parental rights in respect of a child may not surrender or transfer that responsibility or those rights to any other person, but may arrange for some or all thereof to be met by one or more persons, including a person who already has parental responsibility for the child concerned, acting on his or her behalf. (4) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any of his or her parental responsibility for the child concerned. (5) Subject to any order of a competent court to the contrary or any right, power or duty which a person has or does not have in respect of a child, the consent of all persons who have parental responsibility and parental rights in respect of the child shall be necessary in respect of – (a) the contracting of a marriage by the child; (b) the adoption of the child; (c) the removal of the child from the Republic of South Africa by one of the parents or any other person; (d) the application for a passport by or on behalf of the child; (e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the child. (6) Whenever any person who has parental responsibility and parental rights in respect of a child is reaching any major decision which involves the child, that person must give due consideration – (a) to the views and wishes of the child, if the child wants to express such views and wishes and has reached an age and stage of maturity where he or she is capable of expressing such views and wishes in a meaningful manner, and (b) to the views of any other person who has parental responsibility and parental rights in respect of the child and who wants to express such views. (7) For purposes of subsection (6) ‘major decision’ involving a child means – (a) in relation to a child, any decision – (i) in connection with any matter referred to in subsection (5); (ii) relating to contact with or care or guardianship of the child, including a decision as to the appointment of a parent-substitute under section 20(1) and (2); (iii) which is likely to change or affect the child’s living conditions, education, health, personal relations with parents or family members or, generally, the child’s welfare; in a significant manner; and (b) in relation to any other person having parental responsibility in respect of the child, any decision which is likely to have a material effect on the fulfillment by such person of his or her parental responsibility or the exercise of his or her parental rights in respect of a child, including a decision as to the appointment of a parent-substitute ...” See also the discussion of the paradigm shift from parental rights to parental responsibility at 3 1 1 3 above, the explanation of the nature and content of parental authority currently in South African law at 3 1 1 2 above, as well as the

step to the revolutionary change which has taken place in the parent-child relationship in South Africa.

The Commission also recommended that a provision be made in the new statute for the appointment of “parent-substitutes” in the event of a parent’s death and the assignment of parental rights and responsibilities where the child has no parent.¹⁰¹

provisions of international conventions governing the parent-child relationship at 3 1 1 1 above, and the sources referred to there.

¹⁰¹ Discussion Paper ch 8 par 8 4 5 4, 236–238: The Commission recommended that the following provisions be included: “(1) A parent who has parental responsibilities and parental rights in respect of his or her child may appoint another individual (hereinafter referred to as a ‘parent-substitute’) to have parental responsibilities and parental rights in respect of the child in the event of the parent’s death, provided that – (a) such appointment shall be of no effect unless it is made in writing and signed by the parent; (b) the parent-substitute shall have only those aspects of parental responsibilities and parental rights which the parent, at the time of death, had (or would have had if he or she had survived until after the birth of the child); and (c) any parental responsibilities and parental rights (including the right to appoint a parent-substitute under this section) which a surviving parent has in respect of a child shall subsist with those which the parent-substitute has under or by virtue of this Act. (2) A parent-substitute may appoint another individual to take his or her place (with the same parental responsibilities and parental rights in respect of the child) in the event of the former’s death, provided that – (a) such appointment shall be of no effect unless it is made in writing and signed by the person making it; and (b) the provisions of paragraphs (b) and (c) of subsection (1) above shall apply *mutatis mutandis* to such appointment. (3) An appointment of a parent-substitute under subsection (1) or (2) above shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with either other intention. (4) If two or more persons are appointed as parent-substitutes, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept appointment, even if both or all of them do not accept the appointment. (5) An appointment made under subsection (1) or (2) above revokes an earlier such appointment (including one made in an unrevoked will) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the latter appointment is to appoint an additional parent-substitute. (6) Subject to subsection (7) below, the revocation of an appointment made under subsection (1) or (2) above (including one made in an unrevoked will) shall not take effect unless the revocation is in writing and signed by the person who made it. (7) For the avoidance of doubt, an appointment made under subsection (1) or (2) above in a will is revoked if the will itself is revoked. (8) Without prejudice to any of its powers in terms of other sections of this Act, the court may, at any time after the death of the person who has appointed a parent-substitute under subsection (1) or (2) above, terminate such appointment, or vary, restrict or limit in any way the parental responsibilities and parental-rights of the parental-substitute thus appointed; (a) on the application of any person who has parental responsibility for the child; (b) on the application of the child concerned, with the leave of the court; (c) on the application of any other interested person, or (d) of its own

Some comments received¹⁰² were that “equal emphasis [should be placed] on the rights and responsibilities of fathers of children born out of wedlock”;¹⁰³ others felt that the current legal position, in respect of unmarried fathers, should not change. Yet others felt that such legal position should be changed.¹⁰⁴ Some respondents believed that unmarried fathers should automatically have parental rights and responsibilities whereas others felt that if a natural father showed interest in a child’s life he should have preference in obtaining parental rights and responsibilities.¹⁰⁵ Certain respondents argued that the child has a right not to be discriminated against on the grounds of the marital status of his or her parent. Others argued that very few unmarried fathers have any real interest in their children born out of wedlock.¹⁰⁶ The majority of respondents said that automatic parental responsibilities for unmarried fathers are not acceptable.¹⁰⁷ A

accord in any proceedings affecting the child, if the court considers this to be in the best interests of the child concerned.”

¹⁰² Comparative law will be discussed in ch 5 below.

¹⁰³ Discussion Paper ch 8 par 8 5 2 3, 263.

¹⁰⁴ Discussion Paper ch 8 par 8 5 2 3, 263–264.

¹⁰⁵ Discussion Paper ch 8, 265.

¹⁰⁶ Discussion Paper ch 8, 266.

¹⁰⁷ Discussion Paper ch 8, 267. See also Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622 635 where the father’s rights movement is examined and criticised. Bonthuys states that “[t]he movement is based on the two ideologies of formal equality between parents and the ‘new’ fatherhood and has as its aim the redefinition of the interests of the child to enhance the legal status of fathers. In other words, formally equal parental rights are defined as being in the best interests of children. Supporters do not argue for the legal enforcement of equal caring *responsibilities* for fathers and mothers, nor is the ideology of new fatherhood supported by empirical evidence indicating shared responsibility for child-care during partnerships.” Bonthuys (635–636) also cautions that “[r]eaching back to an era in which genetics determined rights represents a return to the ideology of a time when the strong were free to abuse the weak in the privacy of their homes without interference from the law. Ultimately, a return to biology as a standard will therefore be to the detriment of those who are most vulnerable in the family and society. The distinction between private and public is resurrected as the biological takes precedence over the social, so masking the rights of woman and children.” Bonthuys is correct in being cautious about automatically giving rights to parents based on biology or genetics. It is submitted that the Children’s Act does safeguard against biology being used to denigrate the rights of children, by providing in s 7 that the best

number of respondents believed that the law should not confer rights and responsibilities on the unmarried father automatically but should provide for the acquisition of rights and responsibilities by the unmarried father.¹⁰⁸ Suggestions were made that automatic parental responsibilities should be given to “fathers who [were] living with the mother at the time of the child’s birth; fathers who register the child’s birth jointly with the mother; and fathers who voluntarily acknowledge themselves to be such”.¹⁰⁹ Others suggested that certain unmarried fathers should not automatically have parental rights and responsibility, for example where the father had been convicted of the rape of the mother.¹¹⁰

The Commission’s recommendations were that “the mother of a child should in all instances have parental rights and responsibilities in respect of her child”,¹¹¹ and that the child’s father should acquire automatic parental rights and

interests of the child are of paramount importance. This is also stressed in s 28(2) of the South African Constitution.

¹⁰⁸ Discussion Paper ch 8, 268. Davel and Van der Linde “Die Suid-Afrikaanse Regskommissie se Aanbevelings Rakende Ouerlike Verantwoordelikheid en die Ongetroude Vader: Ophelderinge Vanuit die Nederlandse Reg” 2002 *Obiter* 162, 174 also state that this is in line with the developments in Europe and should be welcomed. The authors also suggest that including (and describing) the recognition of the rights and duties of unmarried fathers in legislation will lead to greater legal certainty in our law. See also 3 4 3 above for a discussion of the right of access of fathers of children born out of wedlock in terms of current South African law, and 4 4 6 below for the contact rights of such fathers as found in the Children’s Act. The position in Ghana is discussed at 5 2 1 2 3 below. The Kenyan provisions are dealt with at 5 2 2 2 3 below. The Ugandan position is explained at 5 2 3 2 3 below. The UK position is mentioned at 5 3 2 3 below. See also n 30 at 5 2 1 2 2 for the position in the Netherlands.

¹⁰⁹ Discussion Paper ch 8, 271.

¹¹⁰ Discussion Paper ch 8, 271.

¹¹¹ Discussion Paper ch 8 par 8 5 2 4, 272: “Where the child’s mother is an unmarried minor and the child’s father does not have parental rights and responsibilities in respect of the child, the Commission recommends that the person(s) who has parental responsibilities in respect of the child’s mother should have parental rights and responsibilities in respect of that mother’s child.”

responsibilities if he is married¹¹² to the child's mother or was married to her at the time of the child's conception.¹¹³ The Commission recommended that the statute should provide a procedure where a father could acquire parental responsibilities by entering into an agreement with the child's mother,¹¹⁴ and where there is no parental agreement and the unmarried father does not have automatic parental responsibility, the father should be able to apply to an appropriate forum for this.¹¹⁵ The Commission also recommended that certain categories of unmarried fathers should automatically be vested with parental responsibility. This is where the father has acknowledged paternity of the child and supported the child, where the father has cohabitated with the child's mother for a period or periods which amount to at least a year, where the father has cared for the child for a period or periods which amount to no less than twelve months.¹¹⁶

Regarding partners¹¹⁷ in a domestic relationship the Commission recommended that partners who do not have parental rights and responsibilities can acquire such by means of an agreement with the other partner or by an application to court.¹¹⁸

¹¹² Marriage to include marriages in terms of customary or religious law.

¹¹³ Discussion Paper ch 8 par 5 2 4, 273.

¹¹⁴ And that such an agreement must be in the prescribed form and registered.

¹¹⁵ And show that this will be in the best interests of the child: Discussion Paper ch 8 par 8 5 2 4, 273.

¹¹⁶ Discussion Paper ch 8 par 8 5 2 4, 273–274. See also 4 2 3 2 2 above where this recommendation was first mentioned.

¹¹⁷ Whether of the same sex or opposite sex. The Civil Union Act 170 of 2006 now regulates civil unions of same sex partners.

¹¹⁸ Discussion Paper ch 8 par 8 5 2 4, 274. The commission recommended that the following provisions be included in the Children's Statute: (274–277) "**Automatic acquisition of**

Regarding the acquisition of parental responsibility by persons other than biological parents,¹¹⁹ some of the comments and submissions received were that the extended family should “have the first preference” of acquiring parental responsibility and that bodies such as churches and children’s homes should be able to acquire parental responsibility in respect of a child.¹²⁰ Certain classes of

parental responsibilities and rights (1) Unless a court orders otherwise and subject to subsection (2), a child’s mother has parental responsibility and parental rights in respect of her child. (2) If the child’s mother is an unmarried minor and the child’s father does not have parental responsibilities and parental rights in respect of the child as contemplated in subsection (4), the person or persons who have parental responsibility in respect of the child’s mother have, in respect of the child, the parental responsibility and parental rights that they have in respect of the child’s mother. (3) Unless a court orders otherwise, a child’s father has parental responsibility and parental rights in respect of his child if he is married to the child’s mother or was married to her at the time of the child’s conception or birth or at any time between the child’s conception or birth. **Acquisition of parental rights and parental responsibilities by unmarried father** (1) Where a child’s father is not married to the child’s mother and was not married to her at the time of the child’s conception or birth or at any time between the child’s conception or birth, and provided it is in the best interests of the child – (a) the court may, on the application of the father, order that he shall have parental responsibility for the child; (b) the father and the mother may by agreement (‘a parental responsibility agreement’) provide for the father to have parental responsibility for the child. (2) Where a child’s father and mother were not married to each other at the time of the child’s conception or birth or at any time between the child’s conception or birth, but have subsequent to the birth of the child cohabited for a period or periods which amount to no less than twelve months, or where the father has acknowledged paternity of the child, or has maintained the child to an extent that is reasonable, given his financial means, such father shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child: Provided such a father has established a paternal relationship with the child. (3) Where an unmarried father has cared for his child, with the informed consent of the child’s mother, on a regular basis for a period or periods which amount to not less than twelve months, such father shall have acquired parental responsibility for the child, regardless of whether such father has cohabited with or is cohabiting with the mother of the child. (4) This section does not affect the duty of an unmarried father of a child to contribute towards the maintenance of the child. **Acquisition of parental rights and parental responsibilities by partners in a domestic relationship** (1) Provided it is in the best interests of the child – (a) a court may, on application of a partner in a domestic relationship, order that such parent shall have parental rights and responsibility for the child; (b) the partners in a domestic relationship may by agreement (‘a parental responsibility agreement’) provide for the partner who does not have parental rights or responsibility for the child, to acquire such rights and responsibilities. **Parental responsibility agreement** (1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Regulations. (2) A parental responsibility agreement may only be brought to an end by an order of the court made on application – (a) of any person who has parental responsibility for the child; or (b) the child himself or herself with leave of the court, regard being had to the child’s age and understanding.”

¹¹⁹ The comparative review will be discussed below in ch 5.

¹²⁰ Discussion Paper ch 8 par 8 5 3 3, 301.

non-biological parents, who should be able to acquire parental rights and responsibilities, were identified, these included adoptive parents, legal guardians, stepparents, foster parents, relatives and “social parents”.¹²¹ The Commission recommended that any caregiver¹²² “who takes care of the welfare or development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that it will be in the best interests of the child concerned”.¹²³ The Commission also recommended “that there should be no differentiation in the manner in which different categories of (non-biological) caregivers may acquire parental responsibility and rights”.¹²⁴

¹²¹ *Ibid.*

¹²² “Not being the biological parent of the child.”

¹²³ “Such caregivers should not be able to acquire parental responsibility and parental rights simply by entering into an agreement with the biological parent or parents”: Discussion Paper ch 8 par 8 5 3 4,308.

¹²⁴ Discussion Paper ch 8 par 8 5 3 4, 308–309. The Commission proposed that the following sections be included in the Children’s Statute: **“Court may assign parental responsibilities and rights in respect of child** (1) A court within whose area of jurisdiction a child is domiciled or ordinarily resident may, on application of any person, including an application by the father of the child, make an order granting the applicant specified parental responsibilities and parental rights in respect of the child, subject to any conditions which the court may determine. (2) An application referred to in subsection (1) shall not be granted – (a) unless the court is satisfied that it is in the best interest of the child; and (b) until the court has considered the report and recommendations of the Family Advocate, where an enquiry contemplated in section 20 was instituted. (3) For the purposes of subsection (2) the court may cause any investigation which it may deem necessary to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance. (4) If it appears to a court in the course of proceedings in respect of an application contemplated in subsection (1) that an application for the adoption of the child concerned has been made, the court – (a) must request the Family Advocate to furnish it with a report and recommendations; and (b) may suspend the first-mentioned application on the conditions it may deem appropriate. (5) In considering an application referred to in subsection (1), the court must, where applicable, take the following circumstances into account: (a) the relationship between the applicant and the child’s mother or father, as the case may be, and, in particular, whether any of them has a history of violence towards the other or towards the child, or of abusing the child; (b) the relationship of the child with the applicant and the child’s mother or father, as the case may be, or with proposed adoptive parents (if any) or with any other person; (c) the effect that separating the child from the applicant or the child’s mother and father, as the case may be, or proposed adoptive parents (if any) or any other person is likely to have on the child, if such separation is likely to result from granting the application; (d) the opinion of the child to the granting of

Regarding parenting plans¹²⁵ comments and submissions received included that persons with parental responsibility should be free to contract these responsibilities.¹²⁶ It was also stated that “these plans should be subject to scrutiny by a forum”,¹²⁷ and that a unique South African model of particular plans should be developed.¹²⁸ The Commission recommended that parents “be encouraged to agree about matters concerning their child rather than to seek court orders”.¹²⁹ Another recommendation that the Commission made was that parenting plans must be recognised in the new statute and that parents must be given the option to register their parenting plan at court.¹³⁰ The Commission

the application; (e) the degree of commitment that the applicant has shown towards the child, and, in particular, where the applicant is the father of the child, the extent to which the applicant has contributed towards the expenses incurred by the mother in connection with the birth of the child and towards the maintenance of the child; and (f) any other fact or circumstance that, in the opinion of the court, should be taken into account. (These factors are very similar to the factors currently considered under the Natural Fathers of Children Born out of Wedlock Act. This Act is discussed in 3 2 5 above.) (6) The court may appoint a legal practitioner, if needs be at state expense, to represent the child at the proceedings and may order the parties to the proceedings or any one of them to pay the costs of the representation. **Care of child by person without parental responsibilities or parental rights** (1) A person who cares for a child, but who does not have parental responsibilities or parental rights in respect of such child, has the responsibility to do what is reasonable in all the circumstances – (a) to safeguard the child’s health, welfare and development; and (b) to protect the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical or moral hazards. (2) The person contemplated in subsection (1) who cares for a child shall have all the parental rights and parental responsibilities which are reasonably necessary for fulfilling or carrying out the care function referred to in the subsection, and in particular, the parental right and parental responsibility to consent to any medical examination or medical treatment of the child where such consent is required of a person having parental responsibility in respect of the child, but which cannot reasonably be obtained in the circumstances prevailing. (3) A court may limit or restrict any responsibility, right or power which a person contemplated in subsection (1) has in terms of this section. (4) This section applies to persons who have permanent, temporary or partial care of a child.”

¹²⁵ For a comparative review, see ch 5 below.

¹²⁶ “[S]ubject to consultation and the best interests of their children”: Discussion Paper ch 8 par 8 6 3, 320.

¹²⁷ Discussion Paper ch 8 par 8 6 3, 320.

¹²⁸ Discussion Paper ch 8 par 8 6 3, 321: others believed that the Australian model should be followed.

¹²⁹ Discussion Paper ch 8 par 8 6 4, 324.

¹³⁰ Discussion Paper ch 8 par 8 6 4, 325.

stated that “parents should¹³¹ simply be encouraged to prepare parenting plans. Where appropriate in consultation with the child involved and to agree about matters concerning the child rather than to seek court orders.” Regarding the termination of parental responsibility¹³² comments and submissions received were that parental responsibility orders should be changed by a court order, and that this should be done “[w]here parent(s) abdicate their responsibility; [w]here parent(s) abandon or abuse their children; [w]hen a child is given up for adoption

¹³¹ “[I]n the majority of cases”: Discussion Paper ch 8 par 8 6 4, 325.

¹³² Discussion Paper ch 8 par 8 6 4, 325: The Commission did not recommend “that all parenting plans be lodged with some authority or court, or that all such plans be scrutinized by such authority or court”. The Commission recommended the inclusion of the following provision: “(1) A parenting plan is an agreement that (a) is in writing; (b) is or was made between the parents of a child; and (c) deals with a matter or matters mentioned in subsection (2). (2) A parenting plan may deal with one or more of the following: (a) the care of the child, including decisions as to with whom the child is to live; (b) contact between the child and another person or other persons; (c) the appointment of a parent-substitute for the child; (d) maintenance of a child; (e) any other aspect of parental responsibility for the child. **Parents encouraged to reach agreement in the form of a parenting plan.** The parents of a child are encouraged: (a) to agree about matters concerning the child rather than seeking an order from a court; and (b) in reaching their agreement, to regard the best interest of the child as the paramount consideration. **Registration of parenting plan in a court.** (1) Subject to this section, a parenting plan may be registered in a court having jurisdiction. (2) To apply for registration of a parenting plan – (a) an application for registration of the plan must be lodged in accordance with the Regulations; and (b) an application must be accompanied by a copy of the plan, the information required by the Regulations, and (i) a statement to the effect that the plan was developed after consultation with a Family Advocate and which is signed by the Family Advocate; or (ii) a statement to the effect that the plan was developed after family and child mediation and which is signed by the mediator involved. (3) Subject to subsection (4), the court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to whom the plan relates. (4) In determining whether it is appropriate to register the parenting plan, the court – (a) must have regard to the information accompanying the application for registration; and (b) may have regard to all or any of the matters set out in section XY. **Court power to set aside, vary, or suspend registered parenting plans.** The court in which a parenting plan is registered may set aside, vary or suspend the plan, and its registration, if the court is satisfied – (a) that the concurrence of any party was obtained by fraud, duress or undue influence; or (b) that the parties (including the child) want the plan set aside, varied or suspended; or (c) that it is in the best interest of the child to set aside, vary or suspend the plan.” For a discussion of the current law, see ch 3 above. For a comparative review, see ch 5 below.

or placed in a place of safety,”¹³³ or where an applicant can show that continued parental responsibility¹³⁴ is not in the best interests of the child.

It was also suggested that parental authority should be automatically terminated in certain instances¹³⁵ and that a child reaching the age of majority should not automatically end a parent’s duty of support in certain instances.¹³⁶

The Commission recommended¹³⁷ that “provision should be made for the revocation of parental responsibility and parental rights should it be decided to confer parental responsibility or parental rights upon all parents or even third parties”,¹³⁸ and that the revocation of parental responsibility and rights should be done through a court process. Where parents have for example, been found guilty of trafficking their children for purposes of sexual exploitation, their parental rights and responsibilities should be terminated, pending an enquiry.¹³⁹

The Commission proposed that the following provision should be included in the new Children’s Statute:

¹³³ Discussion Paper ch 8 par 8 6 4, 337.

¹³⁴ Or incidents thereof.

¹³⁵ Discussion Paper ch 8 par 8 7 3, 339: death of the child or parent; attainment of majority; adoption (excluding second parent adoption); rescission of an adoption order, or by an order of court.

¹³⁶ These are where the child is dependent on his parent or parents for support; where the child cannot reasonably be expected to support himself; and where the child has an expectation that the support will continue beyond majority.

¹³⁷ Discussion Paper ch 8 par 8 7 4, 340–342.

¹³⁸ Discussion Paper ch 8 par 8 7 4, 341.

¹³⁹ Discussion Paper ch 8 par 8 7 4, 342.

“A court may, after an enquiry, make an order suspending or terminating any or all parental responsibility or parental rights which any person has in respect of a child and may restrict, define or direct the fulfillment of any such responsibility or the exercise of any such right by such person if in the opinion of the court it is in the best interest of the child to do so.”¹⁴⁰

4 2 4 Guardianship

In 1998 the fact that some practices¹⁴¹ of customary law are not in line with the paramountcy of the “best interests of the child principle” in all matters concerning children as required by the Constitution and the Convention on the Rights of the Child¹⁴² were discussed. The Commission recommended that guardianship should mean:¹⁴³

“the responsibility (and right) to administer and safeguard the child’s property; to assist and represent the child in contractual, administrative and legal matters; and to give or refuse any consent which is legally required in respect of the child. In the latter case and in certain clearly defined instances, such as where a child wishes to marry, where the child is to be adopted, or is to be removed

¹⁴⁰ Discussion Paper ch 8 par 8 7 4, 342.

¹⁴¹ For example that if bridewealth is paid that upon divorce fathers will retain guardianship over their children.

¹⁴² Discussion Paper ch 8 par 8 3 3. Religious laws affecting children were discussed by the Commission Issue Paper 13 Project 110, 9.

¹⁴³ *Executive Summary* 19.

from the Republic, etc. the consent of all persons who hold guardianship rights will be required”.¹⁴⁴

The Commission also recommended that the new statute must make provision for the appointment of testamentary “parent-substitutes” in the event of a parent’s death.¹⁴⁵

4 2 5 Care

The question was raised whether the term “primary care giver” would apply to a child-headed household and whether such child would then carry full parental responsibility. It was stated that limited rights and responsibilities were involved in the case of the caregiver, not full parental responsibility.¹⁴⁶ Robinson¹⁴⁷ dealt with “care” in light of the South African Constitution and specifically section 28(1)(b).¹⁴⁸ Robinson stated that “[b]y using the word *care*, the Constitution radically deviates from the *authority* notion of the common law,”¹⁴⁹ and that:

¹⁴⁴ See par 8 4 5 2 of the South African Law Commission’s *Report on the Children’s Bill*.

¹⁴⁵ *Executive Summary* 19.

¹⁴⁶ Social Development Commission: 2004-08-05.

¹⁴⁷ “The Child’s Right to Parental and Family Care: Some Brief Remarks” 1998 *Obiter* 329.

¹⁴⁸ This section deals with the right to family care, parental care, or appropriate care when removed from the family environment.

¹⁴⁹ 1998 *Obiter* 333. Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116, 130: “In our view ‘care’ itself connotes that responsibility is vested in one parent only. We would prefer the expressions ‘joint parental responsibility’ and ‘residential placement’ ... the impression that custody deprives one parent of parental responsibility and parenting functions should be eliminated.” It is submitted that the view held by Bekker and Van Zyl that the terms “joint parental responsibility” and “residential placement” are more neutral terms than the word “care” is correct.

“[t]he use of the concept of care, clearly denotes an acknowledgment that children are vulnerable and lack maturity of judgment and experience [and] the concept of care consequently has a radically different basis, namely that the parent-child relationship is to be defined in terms of the care that is owed to the child to assist him or her to overcome its own vulnerability and lack of maturity relating to judgement and experience”.¹⁵⁰

Robinson concluded that new values must be incorporated into our law and in doing so international and foreign law will have to be relied on.¹⁵¹

The Commission recommended that the term “care” should include the following:

“[T]he responsibility (and right) to create, within his or her capabilities and means, a suitable residence for the child and living conditions that promote the child’s health, welfare and development; to safeguard and promote the well-being of the child; to protect the child from ill treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical and moral hazards; to safeguard the child’s human rights and fundamental freedoms; to guide and direct the child’s scholastic, religious, cultural and other education and upbringing in a manner appropriate to the stage of development of the child; to guide, advise and assist the child in all matters that require decision making by the child, due regard being had to the child’s age and maturity; to

¹⁵⁰ Robinson 1998 *Obiter* 333. Robinson also states that “family” includes the nuclear and the extended family and that the recognition of the extended family will be in the best interests of children: 335. See also the discussion of access by interested persons other than parents in 3 4 4 as well as the definition of a family and the child’s right to a family in 3 1 2 4.

¹⁵¹ Robinson 1998 *Obiter* 339.

guide (discipline) the child's behaviour in a humane manner; and generally, to ensure that the best interest of the child is the paramount concern in all matters affecting the child."¹⁵²

4 2 6 Contact

The view has long been held that certain persons other than the child's parent should have access to (contact with) such children.¹⁵³

The Working Paper originated after the publication of the Working Paper and Report concerning the rights of a father in respect of his illegitimate child.¹⁵⁴ The Commission was requested¹⁵⁵ to investigate the granting of access right to the grandparents of minor children. In 1995¹⁵⁶ an investigation concerning these rights was approved.¹⁵⁷

The Commission explored the current law dealing with parental powers¹⁵⁸ and concluded that there is no inherent right of access for persons other than the natural guardian or custodian. The Commission could also find no reason why

¹⁵² *Executive Summary* 18; South African Law Commission's *Report on the Children's Bill* par 8 4 5 2, 231–232.

¹⁵³ See 3 4 4 above.

¹⁵⁴ *Working Paper 62 Project 100* par 1 7.

¹⁵⁵ Both in writing and telephonically.

¹⁵⁶ 1995-08-03 to 1995-08-04. This resulted in the Commission publishing the working paper in 1996.

¹⁵⁷ *Working Paper 62 Project 100* par 1 8. For an example of the type of problems faced by grandparents, see par 1 9.

¹⁵⁸ 2 2 1–2 19, see also the discussion of parental authority in 3 1 2 and the paradigm shift from parental rights to parental responsibility in 3 1 2 3.

access should not be awarded to some party other than the child's natural guardian.¹⁵⁹

The Commission was worried that although a grandparent should be allowed to apply for an order allowing visitation rights that different courts could give different judgments and that this would lead to uncertainty.¹⁶⁰

The Commission¹⁶¹ concluded that the present common law did not meet the current needs of society¹⁶² and that our law must be adjusted by way of legislation.¹⁶³ The Commission also made it clear that visitation rights should not be limited to grandparents.¹⁶⁴

The Commission also found that stepparents may have a special relationship with a stepchild and should be allowed to have access to the child, and that in the case of adoption access rights may need to be granted to a person with whom the child has a special relationship.¹⁶⁵ The point of departure, at all times, must be the best interests of the child.¹⁶⁶ The Commission also said that such

¹⁵⁹ Provided that this is in the best interests of the child: *Working Paper 62 Project 100* par 2 20. See further the recommendations of the Commission that are quoted below, in this paragraph.

¹⁶⁰ *Working Paper 62 Project 100* par 2 21.

¹⁶¹ After doing a comparative study, which will be dealt with in the following chapter, ch 5 below.

¹⁶² *Working Paper 62 Project 100* par 4 1. See also 3 4 4 above for the current South African law regulating access by interested third parties, including grandparents, to children.

¹⁶³ *Working Paper 62 Project 100* par 4 4.

¹⁶⁴ "There may be special circumstances where someone else, for example an uncle or aunt, grandparents or even friends and neighbours, could claim visitation rights with regard to a minor child": *Working Paper 62 Project 100* par 4 5. See also par 4 6 as well as the discussion in par 4 4.

¹⁶⁵ *Working Paper 62 Project 100* par 4 8.

¹⁶⁶ *Working Paper 62 Project 100* par 4 10.

applications could be dealt with by the family courts, but until these are established the High Court should deal with such matters.¹⁶⁷ The Commission concluded that this legislation should be incorporated in legislation dealing with a father's rights in respect of his illegitimate child.¹⁶⁸ The Commission recommended that "contact" should "include ... the responsibility (and right) to maintain personal relations and to have direct access to the child on a regular basis".¹⁶⁹

In 1996 the South African Law Reform Commission published a Working Paper on the granting of visitation rights to grandparents of minor children. The Commission recommended the following rights:

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

¹⁶⁷ *Working Paper 62 Project 100* par 4 11.

¹⁶⁸ *Working Paper 62 Project 100* par 4 11. For the proposed Bill, see Annexure A of the Working Paper at 23–24.

¹⁶⁹ *Executive Summary 18*, South African Law Commission's *Report on the Children's Bill* par 8 4 5 2, 232.

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

- A court should not grant access to a minor child unless it is satisfied that it is in the best interest of the child.
- The court may refer any application to the Family Advocate ... for investigation and recommendation.
- The provisions of section 4(3) of the Mediation in Certain Divorce Matters Act ... shall *mutatis mutandis* apply with regard to proceedings concerning the application by grandparents or other interested persons for access to a minor child as contemplated in this section.”¹⁷⁰

4 2 7 Best interests of the child standard

The Law Reform Commission has made it clear that the best interests of the child should be the determining factor in decisions relating to guardianship, custody and access.¹⁷¹ In the *Discussion Paper on the Review of the Child Care*

¹⁷⁰ Summary of *Recommendation: South African Law Commission Working Paper 62 Project 100: "The Granting of Visitation Rights to Grandparents of Minor Children."* See also the discussion of the access rights of interested third parties other than parents in par 3 4 4 above.

¹⁷¹ See for example South African Law Commission Issue Paper 13 Project 110, *The Review of the Child Care Act First Issue Paper* (18 April 1998) par 2 20. The best interests of the child standard is discussed in 3 5 above. Guardianship is dealt with in 3 2 above, custody in 3 3 above and access in 3 4 above.

Act¹⁷² the Commission analysed the constitutional protection given to children's rights in section 28 of the Constitution. The Commission made it clear that a list of criteria to help in determining the best interests of a child should be included in a new Children's Act.¹⁷³

In chapter XIV of the *Discussion Paper*¹⁷⁴ the Commission focused on the care and protection of children caught up in the divorce or separation of their parents and stipulated that section 6(4) of the Divorce Act¹⁷⁵ should be used more often and extended to allow an interested third party to support¹⁷⁶ a child experiencing difficulties during his parents' divorce or separation. Provision must also be made for hearing and recording the child's views.¹⁷⁷

A further recommendation was that conflict should be reduced between divorcing and separating parents, that both parents should continue to be involved in the child's life and that because the terms "custody", "sole custody", "guardianship", "sole guardianship" and "access"¹⁷⁸ promote a sense of winners and losers these

¹⁷² South African Law Commission Discussion Paper 103 Project 110, *Review of the Child Care Act* ch 3.

¹⁷³ *Executive Summary* 6; Discussion Paper ch 5. See especially pars 5 2 and 5 3 which stipulate that, amongst other principles, underpinning the Children's Act are the best interests of the child and the child's right to participate in decision making about his or her life.

¹⁷⁴ Discussion Paper 103 Project 110.

¹⁷⁵ Act 70 of 1979, which empowers a court to appoint a legal practitioner to represent a child at divorce proceedings. See also Davel in Nagel (2006) 28.

¹⁷⁶ Be allocated temporary rights and responsibilities in respect of the child concerned.

¹⁷⁷ *Executive Summary* 58.

¹⁷⁸ In the Divorce Act 70 of 1979.

should be replaced. “Custody” must be replaced with “care” and “access” with “contact”.¹⁷⁹

The Commission also recommended that, so long as it is in the best interest of the child concerned, South African law should apply to all children in South Africa and harmful religious and cultural practices should be prohibited¹⁸⁰ and that “it should be clear that the best interests of all children, including those living under a system of customary law, are the paramount consideration”.¹⁸¹

In the *Discussion Paper* the criteria used to determine the best interests of the child, as dealt within the cases of *McCall v McCall*¹⁸² and *Märtens v Märtens*,¹⁸³ were explored.¹⁸⁴ The Commission also stressed that such a list of criteria must

¹⁷⁹ *Executive Summary* 58. The Commission also said that the law should encourage parents to enter into shared parenting (joint custody) plans.

¹⁸⁰ *Executive Summary* 86; the *Discussion Paper* 103 Project 110. Ch 21 dealt with customary law affecting children and recommended that a general non-discrimination clause should be included in the Children’s Act.

¹⁸¹ *Executive Summary* 89.

¹⁸² 1994 3 SA 201 (C). See 3 3 3 1 above for a discussion of this case.

¹⁸³ 1991 4 SA 287 (T). See 3 5 2 2 1 4 for a discussion of this case.

¹⁸⁴ *Discussion Paper* ch 5 par 5 3. The court also did a comparative study of other legal systems. The criteria suggested were the following: (1) Subject to subsection (3), in determining what is in the child’s best interests by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the matters set out in subsection (2) must be considered. (2) Public or private social welfare institutions, the courts, administrative authorities and legislative bodies must consider: (a) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that are relevant to the weight it should give to the child’s wishes; (b) the nature of the relationship of the child with each of the child’s parents and with other persons; (c) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person, with whom he or she has been living; (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis; (e) the capacity of each parent, or of any other person to provide for the needs of the child, including emotional and intellectual needs; (f) the child’s maturity, sex and background (including any need to maintain a connection with the extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant; (g) the need to protect

remain an open-ended list, as the best interests of the child standard has undergone and will undergo further refinement.¹⁸⁵ The best interests of the child standard is also included by the Commission in the list of children's rights and responsibilities that they suggested should be included in the new Children's Act.¹⁸⁶

4 2 8 The role of the courts

In the past, the Law Commission has recommended that the issue of guardianship, custody and divorce be dealt with in the same court in the interests of saving money.¹⁸⁷ The Law Society of South Africa has made a submission that:

the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; or (iii) inappropriate or harmful relationships; (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; (i) any family violence involving the child or a member of the child's family; (j) that there should be no preference in favour of any parent or person solely on the basis of that parent or person's gender; (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; (l) any other fact or circumstance that is relevant. (3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, is likely to be prejudicial to the welfare of the child. (4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

¹⁸⁵ Discussion Paper ch 5 par 5 3. It is submitted that the Commission's recommendation that the list must be open-ended, as the best interests of the child standard must be flexible and adaptable to the changing needs of society, is correct. See also the discussion on the best interests of the child standard in 3 5.

¹⁸⁶ Discussion Paper ch 5 par 5 4. The best interests of the child standard has been clearly provided for in the Children's Act: see 4 4 7 below.

¹⁸⁷ *Social Development Portfolio Committee*: 2001-06-06.

“rejected implementation of the Bill if the current structures, staff at the courts and the Family Advocate remained the same. There was a necessity for a dedicated Family Court ... urgent attention [must] be given to the problems and shortcomings before the Bill was promulgated ... practical problems, such as understaffing and a lack of training, were highlighted.”¹⁸⁸

In 1998 the Law Commission¹⁸⁹ discussed the role of Children’s Courts and the fact that they are “not really as specialized as their name suggests”. The Commission recommended that the position of Children’s Court assistant be reactivated and given an expanded role and that section 8A of the Child Care Act be put into operation¹⁹⁰ and that legal representation, at State expense, should be provided for a child in proceedings under the new statute, in certain

¹⁸⁸ *Social Development Portfolio Committee: 2004-08-11; Children’s Bill: Public Hearings* (available at <http://www.pmg.org.za>). It is submitted that the concerns expressed by the Law Society are correct. If the current structures of the courts and the Family Advocate remain the same it is doubtful whether the Children’s Act would have any real effect in practice. Practical problems such as excessive workload and understaffing at the courts and the offices of the Family Advocate must be addressed in order for the Act to have a true effect on the practical implementation of children’s rights in civil proceedings in South Africa.

¹⁸⁹ *Issue Paper 13 Project 110 The Review of the Children’s Act First Issue Paper* (10 April 1998) par 7 2 1.

¹⁹⁰ This section “[makes] it obligatory for a children’s court to inform a child (who is capable of understanding) at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding”: *Executive Summary 7*. S 8A was meant to provide children with legal representation in proceedings under the Child Care Act but it never came into operation. Zaal and Skelton (“Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children’s Courts” 1998 *SAJHR* 539, 540) believe that s 8A was an attempt to bring the Child Care Act in line with art 12 of the CRC. See also 3 1 2 1 1 for a discussion of the CRC and the child’s right to be heard, as well as Sloth-Nielsen and Van Heerden “Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa” 1996 *SAJHR* 247, 250; Barratt “The Child’s Right to be Heard in Custody and Access Determinations” 2002 *THRHR* 556; “The Best Interest of the Child’ – Where is the Child’s Voice” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 145–157.

circumstances¹⁹¹ and if substantial injustice would otherwise result that the court must order legal representation for the child, at State expense.¹⁹²

The Commission recommended a new court structure to serve the needs of children.¹⁹³ The three main recommendations of the Commission were that the Children's Courts be renamed and given a wider jurisdiction,¹⁹⁴ that all courts must use the flexible system of parental responsibilities,¹⁹⁵ and that practitioners working in courts must be more effectively trained and utilised in the future.¹⁹⁶ The Commission also recommended that the Children's Courts have the power to order a person to undergo mediation, counselling or assessment if this is in the best interests of the child concerned; the power to make a personal accountability order;¹⁹⁷ the power to award delictual damages on behalf of a child at the end of a care or alternative placement hearing;¹⁹⁸ the power to award short-term State maintenance grants; the power to arrange extra-curial and non-

¹⁹¹ "(a) Where it is requested by the child; (b) where it is recommended in a report by a social worker or an accredited social worker; (c) where it appears or is alleged that the child has been sexually, physically or emotionally abused; (d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contest the placement recommendation of a social worker who has investigated the circumstances of the child; (e) where two or more adults are contesting in separate applications for placement of the child with them; (f) where any other party besides the child will be legally represented at the hearing; (g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance; (h) in any other situations where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child": *Executive Summary* 7.

¹⁹² *Executive Summary* 7–8: Where the court denies the child the right to such legal representation the court must enter into the minutes of the court proceedings the reasons for its decision not to order that such legal representation be provided for that child.

¹⁹³ Discussion Paper 103 Project 110 ch 23.

¹⁹⁴ And that the functions not be reduced in any way.

¹⁹⁵ Rather than merely guardianship, custody and access.

¹⁹⁶ *Executive Summary* 95–96.

¹⁹⁷ That a person who has failed in his or her care obligations towards the child must appear before court to defend the claims or show good cause for failure.

¹⁹⁸ For example where the abuser of a child was a party at such hearing.

adversarial decision-making;¹⁹⁹ and the power to allocate some or all parental responsibilities to any suitable person.²⁰⁰ The Commission also suggested that the Children's Courts be renamed "Child and Family Courts", that the current Children's Courts be converted to "Level One Child and Family Courts" and, as resources can be made available, a smaller network of "Level Two Child and Family Courts" should be set up. These Level Two Courts should deal with complex or time-consuming matters. These Level Two Courts will serve as a Court of Appeal in respect of the Level One Courts.²⁰¹

4 3 THE DRAFT CHILDREN'S BILL

A draft Children's Bill was published on 17 October 2002. The wording of the Bill closely followed that suggested by the Law Commission in *The Review of the Child Care Act*.²⁰² The aim of the suggested legislation was "to provide a single comprehensive statute dealing with a wide range of issues affecting children, and to ensure that children's constitutional and international human rights guide all legal proceedings that involve children".²⁰³

¹⁹⁹ Sometimes involving the extended family, such as mediation, counselling or family group conferences: *Executive Summary* 97–98.

²⁰⁰ *Executive Summary* 98. Other powers would be to monitor, sanction and direct support for in community placements of children, and to be a forum for persons to bring applications to the State who feel that they have wrongfully been refused permission to set up a care centre or early childhood development programme for children.

²⁰¹ *Executive Summary* 98; Discussion Paper 103 Project 110 ch 24, 9.

²⁰² Discussion Paper 103 Project 110.

²⁰³ Bonthuys and Mosikatsana "Law of Persons and Family Law – Law Reform: Children and Child Care" 2002 ASSAL 195.

The draft Children's Bill makes provision for the participation of both family members and children in proceedings affecting such children by giving them an opportunity to express their views.²⁰⁴

The best interests of the child are protected and factors that must be taken into account to determine the best interests of the child are listed.²⁰⁵ The draft Bill also proposed the award of a universal child-support grant and proposed court-ordered and informal kinship care grants.²⁰⁶

The Bill refers to custody as "care" and to access as "contact".²⁰⁷ "Parent" includes "caregivers".²⁰⁸ The rights of fathers of children born out of wedlock to acquire parental rights and responsibilities are also dealt with.²⁰⁹ Parental plans are provided for.²¹⁰ The views expressed by a co-holder of parental rights and

²⁰⁴ S 9(5), 9(6) and 9(8).

²⁰⁵ S 10. S 142(2) proposes that the common law defence of reasonable chastisement, which is available to parents accused of assaulting their children, should be abolished. For criticism see Bonthuys and Mosikatsana 2002 *ASSAL* 197.

²⁰⁶ Ss 341, 342 and 343; Bonthuys and Mosikatsana 2002 *ASSAL* 197. For a discussion of the local government's responsibilities for children, see Matthias and Zaal "Local Government Responsibilities for Children Revisited: An Evaluation of the Approach Taken in the 2002 Draft Children's Bill" 2003 *SALJ* 477.

²⁰⁷ S 1. It is uncertain "... whether including a parental responsibility to have contact with the child ... will be sufficient to overcome judicial reluctance to enforce access at the behest of a child": Bonthuys and Mosikatsana 2002 *ASSAL* 197. See also *Jooste v Botha* 2000 2 SA 199 (T), discussed above in 3 1 2 2, where the court held that a child cannot request a court to order that his father provide him with affection. In the *Jooste* case the father of the child also did not have any contact with the child, but only provided maintenance for the child. The court did not order that the child should have contact with the father. The court, incorrectly, held that the father of the child, who was born out of wedlock, was not a parent in terms of s 28 of the Constitution. It remains to be seen whether South African courts will enforce access at the behest of the child in the future.

²⁰⁸ S 10(2) and s 16.

²⁰⁹ S 33–34.

²¹⁰ S 46(1)(b).

responsibilities and those of older children must be considered in “any major decision involving the child”.²¹¹

The relevant provisions of the draft Bill, and whether, and how, these provisions differ from those of the Children’s Bills and the Children’s Act will be discussed below.²¹²

4 4 THE CHILDREN'S ACT²¹³

4 4 1 Introduction

In this section the object and purpose of the Act will be set out. The sections dealing with parental authority and responsibilities; guardianship; care (currently known as custody); contact (currently known as access), as well as the standard of the best interests of the child and the role of the Children’s Courts as well as the High Court will be examined. This discussion will focus predominantly on the wording of the sections of the various Bills as well as the provisions of the

²¹¹ S 43.

²¹² In par 4 4 dealing with the Children’s Act.

²¹³ The first version of the Bill that will be discussed is Bill 70 of 2003. Then Bill 70B will be examined and then the final version of the Bill, which is Bill 70D. Bill 70D is now the Children’s Act 38 of 2005. In the discussion that follows the versions of the Bill will be discussed in the order in which they are mentioned in this footnote. Where the wording of all versions of the Bill is the same only the wording of the first version will be discussed and then it will be mentioned that the wording is the same in all versions.

Children's Act that are relevant to this discussion. The importance of these provisions will be highlighted.²¹⁴

The memorandum on the objects of the Children's Bill of 2003²¹⁵ specifies that the Bill deals with part of the envisaged Children's Act. Initially the Bill was supposed to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a "mixed" Bill including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. The consolidated Bill was split. Thus the current Act only deals with matters in terms of section 75 of the Constitution. Once the current Act is enacted an Amendment Bill,²¹⁶ dealing with the matters applicable to provincial

²¹⁴ This is important considering that it is new legislation. The wording of the draft Bill will be compared with that of the other versions of the Bill as well as the Children's Act. Note that the age of majority in terms of the Bill will be 18 and no longer 21: s 17. Whether this decision is wise is debatable. However, this provision does comply with s 28(3) of the South African Constitution, which defines a child as a person under the age of 18 years. A minor older than 18 years may also independently consent to an operation being performed on him or her: s 39(4) Child Care Act 74 of 1983. A minor may witness a will at the age of 14 and make his or her own will as from the age of 16: s 1 and s 4 of the Wills Act 7 of 1953. A minor aged 16 may be a mutual bank depositor: s 88 Mutual Banks Act 124 of 1993. As from the age of 18 a minor may take out a life insurance policy on his or her own life: s 52 Long-term Insurance Act 52 of 1998. A minor may also choose his or her own domicile as from the age of 18: s 1(1) of the Domicile Act 3 of 1992. A minor aged 18 may also apply at the High Court for a declaration of majority: s 2 of the Age of Majority Act 57 of 1972. Cronjé and Heaton *The South African Law of Persons* (2003) 78 have questioned why the age of majority is still 21 and not 18 years. It is submitted that the lowering of the age of majority from 21 to 18 years of age is in line with the Constitution and the CRC, as well as the trend – as evidenced in the legislation referred to – to give minors aged 18 various powers in terms of statute. However, concern should be expressed that minors currently aged 19 to 21 years will lose their common law protection, in the sense that they will now have full capacity to contract in all matters. S 40 of the draft Bill dealt with the extension of parental responsibilities and rights after a child reaches 18 years of age, however this provision is no longer found in the Children's Act. There are also no similar provisions found in any of the versions of the Children's Bills.

²¹⁵ 83 of the Bill.

²¹⁶ The Children's Amendment Bill B19 of 2006 is scheduled for parliamentary hearings in October 2006: Jamieson and Proudlock (eds) "Children's Amendment Bill: Progress Update"

government, will be introduced. At that time the provisions which deal with welfare services will be introduced.²¹⁷

It is clear that existing legislation²¹⁸ no longer protects children adequately and is not in keeping with the realities of current social problems in South Africa. South Africa has also acceded to various international conventions and the principles of these have to be incorporated into local legislation.²¹⁹ New proposals to address lacunas in the present situation include provision for the participation of children in matters affecting them; extension of the rights of unmarried fathers; and provision for a High Court procedure to allow people other than the child's parents to gain rights and responsibilities with regard to the child. There is also provision made to protect children. The Act also emphasises and provides for both parental responsibilities and rights and provision is made for parenting plans in certain instances.²²⁰

15th Sept 2006 Children's Institute 2. The Children's Amendment Bill "provide[s] for partial care of children, early childhood development, alternative care; youth shelters [and] create[s] new offences related to children" (preamble). Corporal punishment is also regulated by the Bill, not by criminalising it but by stating that the child's right to physical integrity must be protected (s 139(1)) and that programs which promote "appropriate discipline at home and school must be given across the country" (s 139(4)).

²¹⁷ See Proudlock "Children's Bill – the Road Ahead" July/August 2004 *Children First* <<http://www.Childrenfirst.org.za/shownews?mode=content&id=22207&refto=4323>> accessed on 2006-05-12, for an explanation and detailed table of the sections which will be dealt with in the s 75 Bill and those that will be dealt with in the s 76 Bill. As an analysis of welfare services falls outside the scope of this discussion, these provisions will not be dealt with here.

²¹⁸ Such as the Age of Majority Act 57 of 1972; Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993; the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. See Addendum A for a list of legislation that will be repealed by the Children's Bill.

²¹⁹ Children's Bill *Memorandum of the Objects of the Children's Bill* 2003, 83.

²²⁰ *Memorandum on the Objects of the Children's Bill*: A chapter to formally regulate surrogate motherhood is also introduced.

4 4 2 The object and purpose of the Children's Act

The preamble of the Children's Bill²²¹ stated that the object of the Bill is:

“[T]o define the rights and responsibilities of children, to define parental responsibilities and rights; to determine principles and guidelines for the protection of children and the promotion of their well-being; to regulate matters concerning the protection and well-being of children; to consolidate laws relating to the welfare and protection of children; and to provide for matters connected therewith.”²²²

The preamble of Bill 70B of 2003 as well as Bill 70D of 2003 differs from the above-mentioned preamble in that it does not state that it will consolidate laws relating to the protection and welfare of children.²²³ The preamble of the Children's Act²²⁴ reads the same. These preambles state that the object of the Bill, now Act, is:

“To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define

²²¹ Bill 70 of 2003.

²²² The preamble of the draft Bill differs in that it says the same except “to regulate matters concerning the protection and well-being of children, *especially those that are most vulnerable*” (own emphasis). It also states “to provide for incidental matters” whereas the Bill says “matters connected therewith”. For an evaluation of the Children's Bill and the rights of women, and particularly a discussion on the prohibition of virginity testing in children, see Commission on Gender Equality “Submission to the Select Committee on Social Services Children's Bill [B 70B-2003]” 2005-10-01.

²²³ The reason for this is that welfare matters relating to children will be included in the Bill at a later stage.

²²⁴ Act 38 of 2005.

parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create new offences relating to children; and to provide for matters connected therewith."

The preamble of Bill 70B also stated that "in terms of the Bill of Rights as set out in the Constitution, everyone has inherent dignity and the right to have their dignity respected and protected". However, this has been removed in Bill 70D which states that "every child has the rights set out in section 28 of the Constitution". The statement in Bill 70D is narrower than that in Bill 70B and focuses exclusively on the rights of children, which is in line with the aim of the Children's Act.²²⁵

²²⁵ The original intention of the Children's Bill was to be an all encompassing legislation covering child law. See 4.2 above. The rest of the preamble states: "WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person; [then the section which differs in the two versions of the Bill is found]; AND WHEREAS, the State must respect, protect and fulfil those rights [in Bill 70B: fulfil the rights in the Bill of Rights]; AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities; AND WHEREAS the United Nations has in The Universal Declaration of Human Rights proclaimed that children are [childhood is, in Bill 70B] entitled to special care and assistance; AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child [Bill 70B did not include the ACRWC] and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children; AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious

It is clear from the preamble that the object or purpose of the Children's Act²²⁶ is to be an all-encompassing legislation²²⁷ regulating children's affairs.²²⁸ Although originally the Bill dealt with the protection; well-being and welfare of children,²²⁹ this discussion will concentrate on the sections dealing with the rights and responsibilities of children as well as parental responsibilities and rights.

Section 2 of Bill 70 of 2003, reintroduced, states its objects:

- “(a) [T]o make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection for children;

development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding.” The changes made in the preamble of Bill 70D were necessary. The change from “childhood” to “children” prevents confusion as children are defined as being under the age of 18 years in the Bill. The ACRWC also needed to be inserted as it definitely has an influence on South African law. Certain provisions of the ACRWC have also been incorporated into the Children's Bill, see further 4 5 3 below.

²²⁶ Once in force.

²²⁷ Areas omitted from the Bill will be inserted by way of an Amendment Bill, which will be dealt with in terms of the procedure prescribed by s 76 of the Constitution.

²²⁸ A child is defined as meaning a person under the age of 18 years: s 1. This is in line with the provisions of the CRC, see 3 1 1 1 1 above. Three decades ago Spiro proposed that the legislator keep pace with the times and stated that “[b]earing in mind that a person is entitled to vote at the age of 18 years and must at that age serve his country, to give but a few examples, one asks: should he not be elevated to the status of an adult in all respects? Or, at least, should not a committee of inquiry be appointed in South Africa?”: Spiro “The Nearly Adult Minor” 1976 *SALJ* 200, 204. Clearly, the idea of childhood ending at the age of 18 in South Africa is not a new one. Of course, the CRC also states that a person is a child until the age of 18, which has certainly made it easier for the Legislature to incorporate the age of 18, instead of the traditional 21, as the age of majority into the Children's Act.

²²⁹ These provisions will now be added to the Children's Act at a later stage. This is explained at 4 4 1 above.

- (c) to protect children from maltreatment, abuse neglect, degradation discrimination, exploitation and any other physical and moral harm or hazards;
- (d) to provide care and protection to children who are in need of care and protection;
- (e) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; and
- (f) generally, to promote the protection, development and well-being of children."²³⁰

The provisions of Bills 70B and 70D differ from that mentioned above. Section 2 of these Bills states that the objects of the Bill, now Act, are:

- “(a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely–

²³⁰ This section is repeated in the *Memorandum and Object of the Children's Bill* par 3 at 83 of the Children's Bill. See also “General Notice Department Publication of Explanatory Summary of the Children's Bill” GN 3–4 GG 25346 vol 458 of 2003-08-13: “The aim of the Bill is to replace the Child Care Act, 1983 (Act No 74 of 1983) and to deal with other matters pertaining to children. The main objects of the Bill are – (a) to make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children; (b) to strengthen and develop community structures which can assist in providing care and protection for children; (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards; (d) to provide care and protection for children who are – (i) suffering from maltreatment, abuse, neglect, degradation, discrimination, exploitation or any other physical and moral harm or hazards; or (ii) in need of care and protection; (e) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; and (f) generally, to promote the protection, development and well-being of children.” The draft Bill differed in that s (2)(d) stipulated “to provide care and protection for children who are – (i) suffering from maltreatment, abuse, neglect, degradation, discrimination, exploitation or any other physical and moral harm or hazards; (ii) in need of care and protection; or (iii) in especially difficult circumstances.” Only s 2(d)(ii) remained in the Bill.

- (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of the child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual and emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities have; and
- (i) generally, to promote the protection, development and well-being of children."

Rosa and Proudlock²³¹ propose that the objects of the Bill be amended to include as one of the objects of the Bill "[t]o assist families to care and protect their children" and to provide not only for the care and protection of children but also

²³¹ "Submission Number 2 on the Children's Bill" 27 July 2004 Children's Institute, UCT 41.

for the “treatment “of children. They also recommend that the objects of the Bill provide for the promotion of the well-being of “all” children.

Their proposal that one of the objects of the Bill should be “[t]o assist families to care and protect their children” is welcome.²³² Unfortunately, this provision was not included in the Children’s Act.

Two of the aims of the Bill²³³ are “to strengthen and develop community structures which can assist in providing care and protection for children”.²³⁴ This is also found in Bills 70B and D as well as in the Act,²³⁵ and “to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic”.²³⁶ This is also found in Bills 70B and D, as well as in the Children’s Act.²³⁷

The Bills’ compliance with relevant international instruments will be discussed below.²³⁸ Another aim is “generally to promote the protection, development and well-being of children”.²³⁹ Bills 70B and D do not contain this provision. They do, however, indicate that one of the objects of the Bill is to give effect to certain

²³² Especially considering the tremendous pressure which families are under in South Africa due to poverty, and the influence of HIV/AIDS on the family structure. See further Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2006, 44.

²³³ Bill 70 of 2003, reintroduced.

²³⁴ S 2(b).

²³⁵ S 2(e).

²³⁶ S 2(e).

²³⁷ S 2(c).

²³⁸ Par 5 below.

²³⁹ S 2(f).

constitutional rights of children.²⁴⁰ These objects are clearly important when examining the Bill in light of the influence that it will have²⁴¹ on the relationship between parents and children. Two of the objects of the Bill which were added to Bill 70B, Bill 70D and the Act are the promotion of the preservation and strengthening of families²⁴² and the recognition of the special needs which children with disabilities may have.²⁴³ The addition of the promotion of the strengthening and preservation of families as one of the objects of the Act is welcomed.²⁴⁴

Once in force, the Children's Act must be implemented by organs of State in the national, provincial and local spheres of government.²⁴⁵ The State must also take reasonable measures within its available resources to achieve the progressive realisation of the object of this Act.²⁴⁶ The Children's Act²⁴⁷ states:

“Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the

²⁴⁰ S 2(b): these are the right to family or parental or alternative care; the right to social services; the right to protection from maltreatment and abuse; as well as the fact that the best interests of the child are of paramount importance in every matter concerning the child.

²⁴¹ Once an Act.

²⁴² S 2(a).

²⁴³ S 2(h).

²⁴⁴ Although the Act still does not specifically state that the child has a right to a family. See further 3 1 1 4 above and 4 4 7 2 below where the child's right to a family is discussed.

²⁴⁵ Where applicable: s 4(1). This implementation must be done “in an integrated, co-ordinated and uniform manner”.

²⁴⁶ S 4(2). This was not found in the draft Bill. Instead the national policy framework, in s 5, was referred to.

²⁴⁷ As well as Bill 70D: s 4(2).

maximum extent of their available resources²⁴⁸ to achieve the realization of the objects of this Act.”

It is thus clear that financial provision must be made by the State to implement this Bill, once it is law. However, this section clearly recognises “that competing social and economic needs exist”.²⁴⁹ Bill 70 of 2003, reintroduced, stated that the State must “take *reasonable* measures with its *available* resources to achieve the *progressive* realisation of the objects of this act”. The State is not forced to acquire outside resources or take unreasonable measures to implement this Act. The realisation of the objects of the Act must be “progressive”, not immediate.²⁵⁰

²⁴⁸ “The inclusion of the words ‘maximum extent’ before ‘available resources’ is a major victory for children. This means that all departments need to prioritise children when they are making decisions about budgets and the allocation of resources. These words come from Article 4 of the UN Convention on the Rights of the Child and are aimed at ensuring that children’s issues are prioritised in budget decisions”: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

²⁴⁹ S 4(2).

²⁵⁰ S 3 of the Bill deals with conflicts with other legislation. Bill 70 of 2003, reintroduced, stated that: “(1) In the event of a conflict between a section of this Act and – (a) other national legislation relating to the protection and well-being of children, the section of this Act prevails [in Bill 70B this has been removed]; (b) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution. (2) In the event of a conflict between a regulation made in terms of this Act and – (a) an Act of Parliament, the Act of Parliament prevails; (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution. (3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval. (4) In this section ‘regulation’ means – (a) a regulation made in terms of this Act; and (b) a rule regulating the proceedings of children’s courts in terms of section 52(1) [Bill 70B states section 52, the rest is the same].” The draft Bill contained s 3(4)(a)–(c). S 3(4)(b) stated that “regulation” also meant “the national policy framework referred to in s 5”. S 3 of Bill 70D of 2003, and the Children’s Act states that: “(1) In the event of conflict between a section of this Act and – (a) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and (b) a municipal by-law relating to the protection and well-being of children, the conflict must be

Bills 70B and D, as well as the Children’s Act, state that the spheres of government must take “*reasonable* measures to the *maximum* extent of their *available* resources to achieve the realisation of the objects of this act”. The words “*reasonable* measures” and “*available* resources” are still used. However, the term “*maximum* extent” of the available resources has been added. Thus, the State must make use of available resources to their maximum extent. There is still no obligation on the State to acquire outside resources or to take any measures to implement the acts that are not “reasonable”. The word “progressive” has been removed in Bills 70B and D and the State must now ensure the “realisation of the objects of the act” instead of the “progressive realisation” of these objects. This latter change in terminology is welcomed as it closes a loophole which was in the Act, by means of which the State could have reneged its obligations in terms of the Act by claiming that it was implementing the “progressive realisation” of the Act.²⁵¹

resolved in terms of section 156 of the Constitution. (2) In the event of a conflict between a regulation made in terms of this Act and – (a) an Act of Parliament, the Act of Parliament prevails; (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution. (3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act which affect a province, to the National Council of Provinces for approval. (4) In this section ‘regulation’ means – (a) a regulation made in terms of this Act; and (b) a rule regulating the proceedings of children’s courts in terms of section 52.”

²⁵¹ The word “progressive” means “making a continuous forward movement[;] increasing steadily or in degrees ... advancing in social conditions or efficiency ... favouring or showing rapid progress or reform”: *Oxford Advanced Learner’s Dictionary* (1992) 996. The meaning of the word “progressive” has been taken, in the context within which it is used, to mean “increasing steadily or in degrees”.

4 4 3 Parental responsibilities and rights

4 4 3 1 General

A parent is defined in the Act²⁵² as including the adoptive parent of a child but excluding:

- “(a) the biological father of a child conceived through the rape or incest with the child’s mother;

²⁵² S 1. The same definition was found in Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D. The draft Bill definition was also the same. In Bill 70 of 2003, reintroduced, provision was made for the appointment of a “parent substitute”. A “parent-substitute” is defined as “a person appointed in terms of section 26” [in the draft Bill this was section 38]. Section 26 of Bill 70 of 2003, reintroduced: “(1) A parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person his or her responsibilities and rights in respect of the child in the event of his or her death. (2) An appointment in terms of subsection (1) – (a) must be in writing and signed by the parent; (b) may form part of the will of the parent; (c) replaces any previous appointment, including any such appointment in a will, whether made before or after this section took effect; and (d) may at any time be revoked by the parent by way of a written instrument signed by the parent. (3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child – (a) after the death of the parent; and (b) upon the parent-substitute’s express or implied acceptance of the appointment. (4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise. (5) A parent-substitute acquires only those parental responsibilities and rights – (a) which the parent had at his or her death; or (b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child. (6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child. (7) In this section ‘parent’ includes a person who has acquired parental responsibilities and rights in respect of a child.” There is no provision made for the appointment of a “parent-substitute” in Bill 70B or Bill 70D of 2003, nor in the Children’s Act. Instead, s 27 provides for the appointment by a parent who is the sole guardian of a child of a person as a guardian in the event of the parent’s death. This appointment must be contained in a will. It is interesting to note that a party, in relation to a matter before the Children’s Court, is defined as: “(a) a child involved in the matter; (b) a parent of the child; (c) a person who has parental responsibilities and rights in respect of the child; (d) a primary care-giver of the child; (e) a prospective adoptive or foster parent or kinship care-giver of the child; (f) the department or the designated child protection organisation managing the case of the child; or (g) any other person admitted or recognised by the court as a party”.

- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.”

From this definition of a parent it is clear that the interests of the child and protection of the child were also taken into account during the formulation of the definition. The fact that a rapist will not be regarded as a parent should be applauded.²⁵³ A parent whose responsibilities and rights in respect of a child have been terminated will also no longer be regarded as a “parent”. Considering that such parental rights and responsibilities are only terminated in extreme cases, such as abuse, this definition protects the child.

Parental responsibilities and rights are defined in Bill 70 of 2003, reintroduced, as meaning:

“the responsibility and the right –

- (a) to care for the child;
- (b) to have and maintain contact²⁵⁴ with the child; and

²⁵³ However, a question that needs to be addressed is what will happen if the rapist marries the child’s mother? Strictly speaking, according to s 1 of the Bill he will not be regarded as a “parent”. Whether, and how, this can be applied in practice is open to debate.

²⁵⁴ S 1(2): “In addition to the meaning assigned to the terms ‘custody’ and ‘access’ in any law, and the common law, the terms ‘custody’ and ‘access’ in any law must be construed to also mean ‘contact’ and ‘care’ as defined in this Act. This clause ensures “that the jurisprudence behind the terms ‘access’ and ‘custody’ [are] retained for interpretation purposes while ensuring that the courts could shift to adopting the new terms ‘care’ and ‘contact’ when interpreting other laws such as the Divorce Act”: Jamieson and Proudlock “Children’s Bill

- (c) to act as the guardian of the child.”²⁵⁵

The definition of parental responsibilities and rights is defined in Bills 70B and 70D, as well as the Children’s Act, as meaning the responsibilities and rights referred to in section 18. Section 18(2) states that the parental responsibilities and rights²⁵⁶ that a parent has in respect of a child:

“include[s] the responsibility and the right –

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.”

Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

²⁵⁵ S 1. In the draft Children’s Bill these were defined separately although their definition was the same.

²⁵⁶ Sloth-Nielsen (“The Rights and Responsibilities of Parents-Guiding Principles” May/Apr 2005 *Children First* 20–21) examines the principles underlying the (then) Children’s Bills chapter on parental rights and responsibilities and identifies guiding themes which lead to this shift from the concept of parental power to parental responsibilities. Amongst the guiding themes are the “need to modernise large tracts of the law relating to children’s role within the family ..., to reflect the shift from outmoded concepts of parental power and absolute control over children, to a legal framework that reflected their rights and responsibilities, as mandated both by the CRC and section 28(1)(b) of the Constitution ..., to promote inclusivity ... to accommodate as far as possible the diversity of family forms in South Africa, ensuring that the traditional bias toward the nuclear family was limited ... to start from a non-pathological premise – not to see all families as dysfunctional, but rather to start out from the perspective that most children are loved by their parents or care-givers, and that the basics of law supporting children and their family life should support this ... the possibilities of allocating different aspects of parental responsibility to adults who are exercising different roles and functions towards individual children creates a future which is characterised by enhanced flexibility, and a move away from the rigid assignment of ‘custody’ and ‘access’ to one or other parent only ..., redressing the historically disadvantaged position in our society often suffered by single mothers, whilst at the same time moving a step closer to democratisation of the family ... to take cognisance of other law reform initiatives such as the Customary Marriages Act of 1998.”

Subsection (d) was added to Bills 70B and 70D. Maintenance is an important part of parental responsibility and rights and it was necessary for it to be added to the definition of this concept as contained in the Children's Act.²⁵⁷

Of importance here is that the parent has the "*responsibility* and the *right*"²⁵⁸ to care; contact and guardianship.²⁵⁹ It is clear that parental responsibility is emphasised throughout the Act. The Children's Act always mentions "responsibilities and rights" of parents.²⁶⁰ Section 18(1) of the Children's Act²⁶¹ stipulates, "[a] person may have either full or specific parental responsibilities or rights in respect of a child".²⁶²

The Act specifies who has full parental responsibilities and rights, with reference to mothers and married as well as unmarried fathers. Section 19(1)²⁶³ states that "[t]he biological mother of a child, whether married²⁶⁴ or unmarried, has full

²⁵⁷ See further the discussion of maintenance at 3 1 1 5 above and 4 4 3 2 below.

²⁵⁸ Own emphasis.

²⁵⁹ These definitions will be discussed individually below.

²⁶⁰ See eg ss 18, 19, 20, 21, 22, 23 and 27 of Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D (excl s 27 in Bill 70D).

²⁶¹ The same provision was found in Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D.

²⁶² S 30 of the draft Bill stated the same thing.

²⁶³ Bill 70 of 2003 reintroduced, as well as Bill 70B and Bill 70D.

²⁶⁴ Marriage in the Bill "means a marriage – (a) recognised in terms of South African law or customary law; or (b) concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married persons or spouse must be construed accordingly": s 1 of Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D of 2003. Thus the position of children of spouses married in terms of customary or religious law is no longer unfavourable or uncertain. S 2 of the Births and Deaths Registration Amendment Act 40 of 1996 also extended the definition of marriage to include customary marriages. The Child Care Amendment Act 96 of 1996 introduced this. S 38 of the Children's Act: "A child born of parents who marry each other after the birth of the child must for all purposes be regarded as a child born of parents married at the time of his or her birth. (2) Subsection (1) applies despite the fact that the parents could not have legally married each other at the time of

parental responsibilities and rights in respect of the child".²⁶⁵

Section 20²⁶⁶ specifies that:

conception or birth of the child." S 39(1) specifies that the rights of a child born or conceived of a voidable marriage will not be affected by the annulment of that marriage. S 39(2) of the Children's Act stipulates: "No voidable marriage may be annulled until the relevant court has inquired into and considered the safeguarding of the rights and interests of a child of that marriage. (3) Section 6 of the Divorce Act and section 4 of the Mediation in Certain Divorce Matters Act apply with the necessary changes required by the context in respect of such a child as if the proceedings in question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce. (4) Section 8(1) and (2) of the Divorce Act, with the necessary changes as the context may require, applies to the rescission or variation of a maintenance order, or an order relating to the care or guardianship of, or access to, a child, or the suspension of a maintenance order or an order relating to access to a child, made by virtue of subsection (3) of this section. (5) A reference in any legislation – (a) to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of the Divorce Act must be construed as a reference also to a maintenance order or an order relating to the care or guardianship of, or access to, a child in terms of that Act as applied by subsection (3); (b) to the rescission, suspension or variation of such an order in terms of the Divorce Act must be construed as a reference also to the rescission, suspension or variation of such an order in terms of that Act as applied by subsection (4). (6) For purposes of this Act, the father of a child conceived in a voidable marriage where such marriage has been annulled is regarded to be in the same position as the father of a child who has divorced the mother of that child." S 40 deals with the rights of children conceived by artificial fertilisation. S 40(1)(a) stipulates: "[w]henver the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses were used for such artificial fertilisation. (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent. (2) Subject to section 296 [290 in the reintroduced Bill], whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman. (3) No right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete or gametes have been used for such artificial fertilisation and the blood relations of that person, except when – (a) that person is the woman who gave birth to that child; or (b) that person was the husband of such woman at the time of such artificial fertilisation." S 41 governs access to information concerning genetic parents.

²⁶⁵ S 19(2): "If the biological mother of the child is an unmarried child and the child's father does not have full parental responsibilities and rights or has no parental responsibilities and rights in respect of the child, the guardian of that mother has those parental responsibilities and rights in respect of the child which that guardian has in respect of that mother [Bill 70B and Bill 70D state instead: 'the guardian of the child's mother is also the guardian of the child']. (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement." S 31 in the draft Bill dealt with this aspect.

²⁶⁶ Of the Act and all three versions of the Bill.

“[t]he biological father of a child has full parental responsibilities and rights in respect of the child –

- (a) if he is married to the child’s mother; or
- (b) if he was married to her at –
 - (i) the time of the child’s conception;
 - (ii) the time of the child’s birth; or
 - (iii) any time between the child’s conception and birth.”²⁶⁷

This section is in line with our current common law.²⁶⁸

Section 21 deals with the parental responsibilities and rights of unmarried fathers. Clause 21(1) of Bill 70, reintroduced, stipulated that the biological father

²⁶⁷ S 32 of the draft Bill read the same. In terms of this section a father has full parental rights and responsibilities to a child if he was married to the child’s mother. Hole “Separations Without Divorce: the Law Must Change to Protect Non-Custodian Parents and their Children” 2000 <http://www.derebus.org.za/scripts/derebus_s.pl?ID=4714&index=200010_articles&hi...> accessed on 2003-05-21, expresses concern as to how a father who is not yet divorced but is separated from his spouse may enforce custody and submits that such a father should be permitted to make use of s 1(1) of the General Law Further Amendment Act 93 of 1962 to enforce his right of access. It is submitted that the Children’s Act provides that a father of children born from his marriage has full parental rights and responsibilities to such children and will be able to bring a court application, in terms of the Children’s Act, to enforce his parental rights and responsibilities. S 15 of the Act regulates the enforcement of rights in the Children’s Act and provides that a child who is affected or involved in the matter to be adjudicated may approach the court for an order granting appropriate relief, including a declaration of rights. S 23 also provides that anyone having an interest in the care, well-being and development of the child may apply to the High Court (or a Divorce Court in divorce matters or the Children’s Court) for an order granting the applicant contact with the child or care of the child. When the father of a child born in wedlock applies to the court in order to enforce his parental rights and responsibilities he will not be granted “new” rights by the court. Instead the rights which he already has in terms of s 20 of the Act will be enforced by the court. The court will however place the best interests of the child first in any decision and may limit the exercise of such parent’s rights where this is in the best interests of the child. S 28 provides for an application to be brought to terminate, extend, restrict, or suspend parental responsibilities and rights. S 29 regulates the procedure that the court will follow when an application is brought in terms of s 28. How these sections will be applied in practice remains to be seen.

²⁶⁸ Cronjé and Heaton *South African Family Law* (2004) 265. See also par 3 2 2 2 above.

of a child.²⁶⁹

- “... acquires full parental responsibilities and rights in respect of the child –
- (a) if at any time after the child’s birth he has lived with the child’s mother –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months;
 - (b) if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother’s informed consent –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months”.²⁷⁰

This provision of the Bill was “particularly controversial”.²⁷¹ The controversy existed because a father who lived with the mother of the child could acquire full parental rights and responsibilities over the child, even where he no longer plays

²⁶⁹ “Who does not have parental responsibilities and rights in respect of the child in terms of section 20.”

²⁷⁰ S 21(2): “This section does not affect the duty of a father of a child to contribute towards the maintenance of the child.” Clause 33(2) of the draft Bill stipulated that the father “acquires parental rights and responsibilities” whereas clause 21 of the Children’s Bill says “acquires *full* parental rights and responsibilities” (own emphasis). Clause 33 of the draft Bill also contained the following: S 33(c) “Upon confirmation by a court of a parental responsibilities and rights agreement in respect of the child in terms of section 34” or s 33(d): “if, and to the extent that, parental responsibilities and rights have been granted to him by an order of court.” It is clear that the approach of the draft Bill was more cautious than that of the Bill. According to the Children’s Bill 70 of 2003, reintroduced, if a father lived with the child’s mother after the child’s birth “for periods which together amount to no less than 12 months” he acquires full parental responsibilities and rights in respect of the child. Thus, if after the child is born he lived with the mother for a month, “disappears” for six months, then lived with her for another three months, and so on until he has stayed with her for periods which amount to no less than twelve months he has full parental responsibilities. There should be a distinction made between the father who goes to work in another town and returns on a regular basis and one who comes and goes willy-nilly! The Law Commission had previously stated that “the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role”: *Report of the Law Commission on the Children’s Bill* ch 8. “The Parent-Child Relationship” 2003, 246.

²⁷¹ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45.

a role in the child's life.²⁷² Yet, it could also be argued that if unmarried fathers are not granted automatic rights over their children that this amounts to unfair discrimination.²⁷³ Rosa and Proudlock²⁷⁴ identify that:

“[s]ection 21 appears to be a middle ground between providing automatic [parental rights and responsibilities] for all unmarried fathers, and providing the opportunities and encouragement for fathers to play a stronger caring and support role in the lives of their children.”²⁷⁵

However, they also emphasise that uncertainty may arise if the decision as to whether the conditions listed in section 21 have been met only rests with the mother and father concerned.²⁷⁶ The authors propose that the acquisition of parental rights and responsibilities by an unmarried father should be confirmed

²⁷² *Ibid.*

²⁷³ Based on gender and marital status: s 9 of the South African Constitution and see Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45.

²⁷⁴ *Ibid.*

²⁷⁵ See also the case of *Fraser v Children’s Court, Pretoria North* 1997 2 BCLR 153 (CC) and 3 4 3 above. “The *Fraser* case ... tried carefully to balance the rights of biological fathers and mothers and considered that a nuanced approach which accommodated the different roles that mothers and fathers can and do play, was necessary in today’s context where men hold unequal socio-economic power. Neither a blanket provision in support of the rights of all unmarried fathers to veto adoption of their children nor a blanket provision against was the answer to the problem. Instead the court stressed that the guiding principle in each case must be the best interests of the child and that the onus should remain on the unmarried father to approach the court as placing this onus on women who did not have equal power in South Africa and who were bearing the burden of child care responsibilities, would not be reasonable and fair”: Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45-46. The *Fraser* case, as well as the *Van Erk v Holmer* decision resulted in the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 being passed.

²⁷⁶ “Due to the power imbalance in South African society being weighted against women, mothers may be disadvantaged because in reality the fathers are likely to make the decision as to whether the conditions exist or not thereby putting the burden on the mother to challenge the situation in Court if she believes that the conditions do not exist”: Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 46.

by an order of court²⁷⁷ and that the burden of proof should be on the unmarried father.²⁷⁸

Clause 21 of Bill 70B and Bill 70D stipulates.²⁷⁹

- “(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –
- (a) if at the time of the child’s birth he is living with the mother in a permanent life-partnership; or
 - (b) if he, regardless of whether he has lived or is living with the mother –
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father **or pays damages in terms of customary law**²⁸⁰
 - (ii) **contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and**
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the

²⁷⁷ High Court, Divorce Court or Children’s Court.

²⁷⁸ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 46.

²⁷⁹ The provisions which are contained in Bill 70D (which is now Act 38 of 2005) but not in Bill 70B, have been written in bold.

²⁸⁰ “Such a father must also show that he has contributed to the upbringing of the child and that he has paid maintenance before he acquires rights and responsibilities [as stipulated in s 21(1)(b)(iii)]”: Jamieson and Proudlock “Children’s Bill Progress Update” 13 March 2006 Children’s Institute, UCT 6.

child for a reasonable period.”²⁸¹

This section may go some way to improving the lot of unmarried fathers who are involved in a long-term relationship with the child’s mother.²⁸² If there is a dispute between the biological mother of the child and the biological father as to whether the father fulfilled the conditions in section 21(1) “the matter must be referred to mediation to a family advocate, social worker, social service professional or other suitably qualified person”.²⁸³

²⁸¹ S 21(2): “This section does not affect the duty of a father to contribute to towards the maintenance of the child.” Already in 1996 Van Heerden cautioned that “[t]he lived experience of many women is that they bear the entire burden of bringing up and supporting their children, often with very little input and assistance from the father. Thus a possible result of giving the monopoly of rights to the father of the extramarital child is its undermining effect on the position of the mother. It has been the experience of other countries that it is necessary to question whether the individual asking for those rights has in fact demonstrated and is willing to demonstrate commitment to his child”. However, Van Heerden also states that “[c]hildren’s rights cannot be seen in isolation from the rights of women. Just as children have rights, so do mothers and indeed fathers. There is a very important balancing act to be performed in this regard. One cannot simply focus on the rights of the child to the exclusion of the interests of the people whose wellbeing impacts substantially on the wellbeing and upbringing of the child”: Conference Report *Towards Redrafting the Child Care Act 1996* Community Law Centre, UWC 15. It is submitted that the provisions of the Children’s Act has tried to address these concerns by stipulating that the father must have contributed (or attempted to contribute) to the child’s upbringing and maintenance for a reasonable period. By including the time period as a “reasonable period” the Legislature has left room for the court to apply the legislation to the current facts at hand. The courts are able to apply the Act to the specific circumstances. The inclusion of a “reasonable period” is welcome. Proudlock *et al* caution that “parenting involves much more than simply acknowledging paternity and financially supporting the child. Therefore, we recommend that the father must have demonstrated a commitment to be a parent to the child by caring for the child ... before being vested with parental responsibilities”: “Submission on the Child Care Act Discussion Paper: Submission to the South African Law Commission” 2002, 25. Van der Linde and Davel (“Die Suid-Afrikaanse Regskommissie se Aanbevelings Rakende Ouerlike Verantwoordelikhede en die Ongetroude Vader: Ophelderinge Vanuit die Nederlandse Reg” 2002 *Obiter* 162, 174) state that the possibility of an unmarried father (father of a child born out of wedlock) acquiring parental rights and responsibilities by acknowledging paternity is in line with developments in Europe and is welcome.

²⁸² In many instances such fathers are involved in the day-to-day raising and care of their children, yet in terms of common law do not acquire parental responsibilities and rights with regards to the child only due to the fact that they are not married to the child’s mother. See further 3 2 2 3 above.

²⁸³ Clause 21(3)(b) of Bill 70B and Bill 70D. “Any party to the mediation may have the outcome of the mediation reviewed by the court”: Clause 21(3)(b) of Bill 70B and Bill 70D. S 21(4) stipulates that this section applies regardless of whether the child was born before or after

The Act also makes provision for the biological father of a child²⁸⁴ to enter²⁸⁵ into an agreement with the child's mother,²⁸⁶ providing for the father to acquire such parental responsibilities and rights as are set out in the agreement.²⁸⁷ Bills 70B and 70D and the Children's Act also make provision for "any other person having an interest in the care, well-being and development of the child"²⁸⁸ to enter into such an agreement with the child's mother. Only the High Court will be able to confirm such an agreement where it relates to the guardianship of the child.²⁸⁹ Such an agreement will have to contain certain particulars and be in a prescribed format.²⁹⁰ A parental responsibilities and rights agreement will only take effect if registered with the Family Advocate or made an order of the High

the Act commences. "Subsections (3) and (4) added introducing dispute resolution mechanisms if a dispute arises between the mother and father. This involves approaching the family advocate or a social worker for mediation as a first step and the court as a second step." Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 2. See 4 4 8 below for a discussion of mediation.

²⁸⁴ "[W]ho does not have parental responsibilities in terms of either section 20 or 21": clause 22(1) of the draft Bill, clause 22(1)(a) of Bill 70B and Bill 70D. Clauses 22(1) and 34(1) of the draft Bill deal with this aspect and state the same as in Bill 70 of 2003, reintroduced.

²⁸⁵ The term "*may* enter into an agreement" is used (own emphasis).

²⁸⁶ "[O]r other person who has parental responsibilities and rights in respect of the child."

²⁸⁷ S 22(2): "The mother or other person who has parental responsibilities and rights in respect of the child may only confer by agreement upon the biological father of the child those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such agreement." All three versions of the Bill read the same.

²⁸⁸ Clause 22(1)(b) of Bill 70B and Bill 70D. Bill 70 of 2003, reintroduced, only made provision for the biological father of a child who does not have parental rights and responsibilities to enter into an agreement with the child's mother. No provision was made for "any other person having an interest in the care well-being and development of the child" to do so.

²⁸⁹ Clause 22(3) of Bill 70 of 2003, reintroduced, clause 22(7) of Bill 70B and Bill 70D.

²⁹⁰ Format prescribed by regulation: clause 22(4) of Bill 70 of 2003, reintroduced "in the prescribed format and contain the prescribed particulars": clause 22(3) of Bill 70B and Bill 70D.

Court, a Divorce Court²⁹¹ or the Children's Court.²⁹²

The Children's Act also makes provision for "[a]ny person having an interest in the care, well-being or development of a child" to apply to the High Court; a Divorce Court²⁹³ "or the children's court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child".²⁹⁴ The Act²⁹⁵ stipulates in section 23(1) that anyone having an interest in the care or development of the child may apply to the High Court, or a Divorce Court,²⁹⁶ or the Children's Court for an order granting the applicant contact with the child or

²⁹¹ In a divorce matter. Clause 34(4)(a)(i) of the Children's Bill 70 of 2003 says it must be registered with a child and family court registrar or made an order of court whereas s 34 of the draft Bill stated "a court". Clause 22(4) of Bill 70B and Bill 70D: "Subject to subsection (6), a parental responsibilities and rights agreement only takes effect if – (a) registered with the family advocate; or (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."

²⁹² "On application by the parties to the agreement": clause 22(5)(a) of Bill 70 of 2003, reintroduced; clause 22(4)(b) of Bill 70B and Bill 70D. Clause 22(5)(b) of Bill 70 of 2003, reintroduced, stipulates that such agreement may be amended or terminated only "by an order of the High Court, divorce court or a children's court on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court". Clause 22(6)(a) of Bill 70B and Bill 70D states that: "(a) a parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court". Clause 22(6)(b) of Bill 70B and Bill 70D stipulates that: "[a] parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with the leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court".

²⁹³ Clause 23(1) of Bill 70 of 2003, reintroduced, referred to "divorce cases", whereas Bill 70D refers to "divorce matters". Clause 35 of the draft Bill said the same as in Bill 70 of 2003, reintroduced.

²⁹⁴ Clause 23(1) of Bill 70 of 2003, reintroduced. Clause 23(2): "only the High Court may issue an order that relates to the guardianship of a child." Clause 23(4): "In the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court – (a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interest of the child concerned; and (b) may suspend the first-mentioned application on any conditions it may determine."

²⁹⁵ As well as Bill 70B and Bill 70D.

²⁹⁶ In divorce matters.

care of the child. This stipulation is narrower than that found in Bill 70 of 2003, reintroduced, which referred to the assignment of “full or specific parental responsibilities or rights in respect of the child”. Guardianship is dealt with separately in Bill 70B and Bill 70D, which state²⁹⁷ that “[a]ny person having an interest in the care, well-being and development of a child may apply to the High Court²⁹⁸ for an order granting guardianship of the child to the applicant”. These sections in the Children’s Act are needed, as now any person who has an “interest in the care, well-being and development of a child” may apply to court for an order regarding contact with the child, care of the child, or guardianship of the child. This will go a long way in relieving the current difficulties faced by social parents or grandparents of children.²⁹⁹

Clause 23(3) of Bill 70 of 2003, reintroduced, lists factors which the court must take into account when considering such an application. These are:

- “(a) the relationship between the applicant and the child, and any other relevant person and the child;
- (b) the degree of commitment that the applicant has shown towards the child;
- (c) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child;
- (d) the best interest of the child; and

²⁹⁷ In s 24(1).

²⁹⁸ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 47, express concern that the High Court retains its jurisdiction as the upper guardian of all minor children. They submit that this reduces the accessibility of the courts for all and that the High Court, Divorce Court and Children’s Court should have jurisdiction to assign and terminate all parental rights and responsibilities, which includes guardianship.

²⁹⁹ See further 3 4 4 above where the position of interested third parties was discussed.

- (e) any other fact that should, in the opinion of the court, be taken into account.”³⁰⁰

In clause 23(2) of Bill 70B, Bill 70D and section 23(2) the Children’s Act, the same factors are mentioned in regard to applying for an order regarding contact with the child or care of the child. When applying for guardianship of a child the court takes the best interests of the child into account; the relationship between the applicant and the child, as well as the relationship between any other relevant person and the child; and any other fact which the court thinks should be taken into account.³⁰¹

Clause 23(5) of Bill 70 of 2003, reintroduced, and clause 23(4) of Bill 70B, Bill 70D of 2003, as well as section 23(4) of the Children’s Act makes it clear that “[t]he assignment of parental responsibilities and rights to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child”.³⁰²

³⁰⁰ (d) and (e) have been added to the list of factors as it was stated in clause 35(2) of the draft Bill.

³⁰¹ It is surprising that one of the factors which are not taken into account in applications for guardianship is “the degree of commitment that the applicant has shown towards the child”, which is taken into account in applications for care of the child, or for contact with the child. However, the court may take any other fact into account which in its opinion should be taken into account, so it is assumed that the court will take the degree of commitment shown towards the child into account, as a guardian who is not committed will not be able to perform their task adequately. See also the discussion of the current law regulating guardianship at 3.3 above.

³⁰² Clause 35(4) of the draft Bill read the same. Clause 24(3) of Bill 70B and Bill 70D: “In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

When looking at clause 23(3) of Bill 70 of 2003, reintroduced, and clauses 23(2) and 24(2) of Bill 70B, Bill 70D and sections 23(2) and 24(2) of the Children's Act one is reminded of the criteria, listed in *McCall v McCall*,³⁰³ which is used to assess which parent is more able to ensure the child's spiritual, emotional, moral and physical welfare. Clause 23(3)(a) and (b) of Bill 70 of 2003, reintroduced, and subclause 23(2)(b) to (c) of Bill 70B and Bill 70D are much the same criteria except that they are stated more broadly. The fact that the court has emphasised that the best interest of the child must be taken into account is in line with our Constitution and international documents.³⁰⁴ The Legislature has been wise by stipulating that one of the factors that must be taken into account is "any other fact that should, in the opinion of the court, be taken into account".³⁰⁵ This will make the Children's Act practical, as the Legislature could never foresee every factor that should be taken into account.

The Children's Act also covers persons claiming paternity. Provision is made for the unmarried father to apply for an amendment to the registration of birth, identifying him as the father of the child, if the mother consents to the amendment.³⁰⁶ If the mother refuses to consent³⁰⁷ the father may apply for an

³⁰³ See further 3 3 3 1 above where this case was discussed.

³⁰⁴ S 28(2) of the South African Constitution; art 3 of the CRC and art 4(1) of the ACRWC. The best interests of the child standard is explained in 3 5 above. The provisions of the CRC governing the parent-child relationship are discussed in 3 1 1 1 1 above. The relevant provisions of the ACRWC are dealt with in 3 1 1 1 3 above.

³⁰⁵ Clause 23(3)(e) of Bill 70 of 2003, reintroduced; clauses 23(2)(e) and 24(2)(c) of Bill 70B, Bill 70D and s 23(2)(e) and s 24(2)(c) of the Children's Act.

³⁰⁶ Clause 26(1)(a) of Bill 70B, Bill 70D and s26(1)(a) the Children's Act. This provision was also found in clause 25(1)(a) of Bill 70 of 2003, reintroduced, and clause 37 of the draft Bill.

³⁰⁷ Or cannot give consent as she is deceased, or incompetent due to mental illness, or cannot be located.

order confirming his paternity.³⁰⁸

The Act also makes provision for a parent who is the sole natural guardian, and has parental responsibilities and rights in a child to appoint a person as a parent-substitute in the event of his or her death.³⁰⁹ This section has been applauded

³⁰⁸ Clause 25(1)(b) of Bill 70 of 2003, reintroduced; clause 26(1)(b) of Bill 70B and Bill 70D. Clause 25(2) Bill 70 of 2003, reintroduced, and clause 26(2) of Bill 70B and Bill 70D: "This section does not apply to (a) the biological father of a child conceived through the rape of or incest with the child's mother; or (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation." S 37(2) of the draft Bill read the same. Clause 36 of Bill 70 of 2003, reintroduced, and clause 36 of Bill 70B and Bill 70D: "If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child." Clause 37 of all three versions of the Bill: "If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party."

³⁰⁹ Clause 26 of Bill 70 of 2003, reintroduced: "(1) a parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person his or her parental responsibilities and rights in respect of the child in the event of his or her death. (2) An appointment in terms of subsection (1) – (a) must be in writing and signed by the parent; (b) may form part of the will of the parent; (c) replaces any previous appointment, including any such appointment in a will whether made before or after this section took effect; and (d) may at any time be revoked by the parent by way of a written instrument signed by the parent. (3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child – (a) after the death of the parent; and (b) upon the parent-substitute's express or implied acceptance of the appointment. (4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise. (5) A parent-substitute acquires only those parental responsibilities and rights – (a) which the parent had at his or her death; or (b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child. (6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child. (7) In this section 'parent' includes a person who has acquired parental responsibilities and rights in respect of a child". Clause 27 of Bill 70B and Bill 70D reads slightly differently: "(1)(a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent. (b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with care of the child in the event of the death of the parent. (2) An appointment made in terms of subsection (1) must be contained in a will made by the parent. (3) A person appointed in terms of subsection (1) acquires guardianship or care, as the case may be, in respect of a child – (a) after the death of the parent; and (b) upon the person's express or implied acceptance of the appointment. (4) If two or more persons are appointed as guardians or

as making provision for parents to appoint caregivers for their children “through a mechanism that is easily accessible and does not require the courts”.³¹⁰

Application may be made to the High Court, a Divorce Court or a Children’s Court to terminate, restrict or suspend parental responsibilities and rights. When the court considers such an application it must take certain factors into account.³¹¹ When considering such an application the court may order that a report and recommendations of the Family Advocate, social worker or other

vested with the care of the child, any one or more or all of them may accept the appointment except if the appointment provides otherwise.” It is uncertain why subclause (6) is not used in Bills 70B and D. The Children’s Act stipulates that this appointment must be contained in a will and not in a separate agreement: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

³¹⁰ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 47. However, the authors caution that “there is an increased need for education of people in order to ensure that they make provision for their children upon their death. Mere legislation is not enough.” The authors also submit that the child in charge of a child-headed household should also acquire parental responsibilities and rights in order to exercise these for the care of the children in the household and that if there is a relative living nearby that such relative may also acquire parental rights and responsibilities, even if he or she is not living with the children concerned.

³¹¹ Clause 28(2) of Bill 70 of 2003. For clarity the full text of clause 27 and clause 28 of Bill 70 of 2003, reintroduced, will be quoted here. S 27: “(1) A person referred to in section 28 may apply to the high court, a divorce court in a divorce matter or a children’s court for an order – (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child. (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of responsibilities and rights in respect of the child to the applicant in terms of that section.” Clause 28(1) and (2) of Bill 70B, Bill 70D and s 28(1) and (2) of the Children’s Act reads the same, as well as clause 39 of the draft Bill. S 28: “(1) An application for an order referred to in section 27 may be brought – (a) by a co-holder of parental responsibilities and rights in respect of the child; (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child; (c) by the child, acting with leave of the court; or (d) in the child’s interest by anyone person, acting with leave of the court; (e) by a family advocate or the representative of any interested organ of state. (2) When considering an application referred to in section 27 the court must take into account – (a) the relationship between the child and the person whose parental responsibilities and rights are being challenged; (b) the degree of commitment that the person has shown towards the child; (c) the best interest of the child; and (d) any other fact that should, in the opinion of the court, be taken into account.” Clause 39 of the draft Bill said the same, clause 27(2)(c) and (d) were not included in the draft Bill. In clause 28(4) of Bill 70B and Bill 70D the factors are the same but the first factor is the best interests of the child.

person be submitted or that an investigation be done or that a specific person must give evidence.³¹² The court may³¹³ “appoint a legal practitioner to represent the child at the court proceedings”.³¹⁴

³¹² Clause 29(1)(5) of Bill 70 of 2003, reintroduced; clause 29(5) of Bill 70B and Bill 70D.

³¹³ The submission is made that it is doubtful that this discretionary power is in line with art 12 of the CRC.

³¹⁴ Clause 29(6)(a) of Bill 70 of 2003, reintroduced. Clause 29(6)(a) of Bill 70B also said that the court may appoint a legal practitioner to represent the child at the court proceedings. S 29(6)(a) of Bill 70D qualifies this further by stating that “[t]he court may, subject to section 55 – (a) appoint a legal practitioner to represent the child at the court proceedings”. Clause 55(1) of Bill 70B: “Where a child is involved in a matter before the children’s court and is not represented by a legal representative of his or her own choice and at his or her own expense, the court *must* refer the child to the Legal Aid Board ...” (own emphasis). S 55(1) of Bill 70D states that “[w]here a child is involved in a matter before the children’s court is not represented by a legal representative, *and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter* to the Legal Aid Board ...” (own emphasis). Unfortunately the inclusion of the words “and the court is of the opinion that it would be in the best interests of the child to have legal representation” has taken the issue of legal representation for children one step back. According to various international documents children are entitled to be heard, and to legal representation. This is not in the discretion of the court. See further 3 1 1 1 1 above for a discussion of the relevant provisions of the CRC, as well as n 190 above and n 472 below. Bill 70D also does not contain provisions which were found in Bill 70B, namely clause 55: “(2)(a) A child may request the court to appoint a legal practitioner to represent him or her in such matter. (b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment. (3) If no legal practitioner is appointed in terms of subsection (2)(a) the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding of the child’s right to legal representation. (4) If no legal practitioner is appointed [in accordance with the above] the court may order that a legal practitioner be assigned to the child, by the state, and at state expense, if substantial injustice would otherwise result” and, subsecs (5)–(6), if the court declines to issue an order for the appointment of a legal practitioner at State expense it must record its reasons, and if the court makes such an order the clerk of the Children’s Court must request the Legal Aid Board to instruct such legal practitioner. Although the provisions contained in Bill 70B were also not perfect, as the court still had a discretion whether to appoint a legal practitioner or not, as the word “may” is used, the child’s right to legal representation was better protected in Bill 70B due to the court having to record its reasons for non-appointment of a legal practitioner at State expense, and the court having to inform the child and parents of the child’s right to legal representation, as well as the fact that it is made clear that the child may request the court to appoint a legal practitioner to represent him or her in the matter. Gillwald “Address by Ms Cheryl Gillwald (MP), Deputy Minister for Justice and Constitutional Development, at the Training Workshop for Justice Centre Staff on Legal Representation for Children, Centurion Lake Hotel, 30 May 2001” <<http://www.info.gov.za/speeches/2001/010709345p1001.htm>> accessed on 2006-05-14, states that the “one issue that came up time and again was the need to improve drastically the available legal representation for children” and that the child justice system should be transformed into a justice system that is child-sensitive. She also stresses that our law reform represents “a fundamental break with the past and a paradigm shift in the outlook and priorities for the administration of justice now and in the

The court may order the parties, or any of them, or the State³¹⁵ to pay the costs of such representation.³¹⁶ Section 10 of the Act³¹⁷ provides for child participation. It states 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

future”. Although Gillwald was referring to legal representation of children in criminal matters, it is submitted that children should be represented in civil matters as well. Children should have legal representation in hearings where a decision is to be made regarding their guardianship, care or contact. Our Divorce Courts and Children’s Courts should also become “child-sensitive” and a paradigm shift should occur in the priorities in cases involving the guardianship, care and contact of children. See further the discussion of the child’s right to be heard and legal representation at 3 1 1 1 1 above.

³¹⁵ “[I]f substantial injustice would otherwise result” in clause 29(6)(b) of all three versions of the Bill.

³¹⁶ For ease of reference, the contents of s 29 are quoted here: "(1) An application in terms of (clause 22(5)(a)(ii) or (b), 23(1), 25(1)(b) or 27(1) in Bill 70 of 2003, reintroduced) sections 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the high court, a divorce court in a divorce matter or a children’s court as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident. (2) An application in terms of section 24 [clause 23(1) for the assignment of full parental rights and responsibilities or to act as guardian of a child: in Bill 70 of 2003, reintroduced] for guardianship of the child must contain reasons as to why the applicant is not applying for the adoption of the child. (3) The court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interest of the child. (4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapters 2 [and 3: Bill 70 of 2003, reintroduced] to the extent that those principles are applicable to the matter before it. (5) The court may for the purposes of the hearing order that – (a) a report and recommendations of a family advocate, a social worker or other suitably qualified person [other professional person: Bill 70 of 2003, reintroduced] must be submitted to the court; (b) a matter specified by the court be investigated by a person designated by the court; (c) a person specified by the court appear before it to give or produce evidence; or (d) the applicant or any party opposing the application pay the costs of any such investigation or appearance. (6) The court may subject to section 55 – (a) appoint a legal practitioner to represent the child at the court proceedings; and (b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation. (7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to [a children’s court for decision: in Bill 70 of 2003, reintroduced] a designated social worker for investigation in terms of section 155(2).”

³¹⁷ The provision in Bill 70B and Bill 70D is the same.

in an appropriate way and views expressed by the child must be given due consideration.”³¹⁸

Provision is made in the Children’s Act for co-holders of parental responsibilities and rights. Section 30(1) stipulates that more than one person may have parental responsibilities and rights in the same child. When exercising such responsibilities and rights each co-holder may act without the consent of the other, except where this Act, any other law or an order of court provides otherwise.³¹⁹

According to Bill 70 of 2003, reintroduced, certain acts may not be concluded without the consent of all persons having parental responsibilities and rights in the child.³²⁰ These are:

- “(a) The contracting of a marriage by the child;
- (b) the adoption of the child;
- (c) the departure or removal of the child from the Republic;
- (d) the application for a passport by or on behalf of the child; or
- (e) the alienation or encumbrance of immovable property belonging to the

³¹⁸ See further the discussion at 4 4 7 below on the rights of the child.

³¹⁹ S 30: “(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf. (4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.” All three versions of the Bill read the same.

³²⁰ Unless this Act, or an order of court, provides otherwise.

child including any right to or interest in immovable property.”³²¹

This clause is not contained in Bill 70B, Bill 70D or the Children’s Act. Instead, section 18(5) of the Children’s Act stipulates that the consent of all persons having guardianship is necessary for the matters set out in section (3)(c). These matters are the same as those listed in clause 30(5) of Bill 70 of 2003, reintroduced.³²²

The Act specifies that in major decisions involving the child³²³ the views and wishes of the child³²⁴ must be taken into account.³²⁵

Provisions regarding the contents, formalities and amendment or termination of parenting plans are found. Section 33 specifies that if co-holders of parental responsibilities and rights are experiencing difficulties in exercising such

³²¹ Clause 30(5): Compare these to the rights of a guardian discussed in par 3 2 above. The definition of guardianship, as contained in the Children’s Act is discussed below in 4 4.

³²² Except that the words “including any right to or interest in immovable property” have been removed. See further the discussion of guardianship in 3 2 above. As well as the Law Reform Commission’s proposals relating to guardianship in 4 2 4 above.

³²³ That is, in connection with a matter listed in clause 30(5) of Bill 70 of 2003, reintroduced. According to Bill 70B and Bill 70D in connection with matters listed in clause 18(3)(c), “in matters affecting contact between the child and a co-holder of parental rights and responsibilities; regarding the assignment of guardianship or care in respect of the child to another person in terms of s 27; or a decision which is likely to significantly change or to have an adverse effect on the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being”. Social parents or third parties with whom the child has established a relationship should have been included in the list together with “parent or family member”.

³²⁴ “Bearing in mind the child’s age, maturity and stage of development”: clause 31(1) of Bill 70B, Bill 70D and s 31(1) of the Act.

³²⁵ S 31(2)(a): The views of any co-holder of parental responsibilities and rights must also be taken into account in any decision which is likely to change, or have a significant adverse effect on, the co-holder’s exercise of parental responsibilities and rights in respect of the child. Clause 43 of the draft Bill contains the same provision as clause 31 of the other versions of the Bill.

responsibilities and rights they must first try to “agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child”³²⁶ before asking for the court’s intervention.

“A parenting plan may determine any matter in connection with parental responsibilities and rights, including –

- (a) where and with whom the child is to live;
- (b) the maintenance of the child;
- (c) contact between the child and –
 - (i) any of the parties; and
 - (ii) any other person; and
- (d) the schooling and religious upbringing of the child.”³²⁷

Such a parenting plan must comply with the best interest of the child standard.³²⁸ When preparing a parenting plan parties must seek assistance from the Family Advocate, a social worker or psychologist or they may seek mediation through a social worker or other appropriate person.³²⁹ It is laudable that the Legislature has tried to curb unnecessary litigation by insisting that parties first attempt to agree on a parenting plan before seeking court

³²⁶ Clause 33(1) of Bill 70 of 2003, reintroduced; s 33(2) of Bill 70B, Bill 70D and s 33(1) of the Act. The wording of s 45(1) of the draft Bill is also the same.

³²⁷ S 33(3) of the Children’s Act, clause 33(2) of Bill 70 of 2003, reintroduced. Clause 33(3) of Bill 70B and Bill 70D. Clause 45(2)(d) of the draft Bill also included “guardianship of the child” as one of the matters which could be included in the parenting plan.

³²⁸ “[A]s set out in section 6”: clause 33(3) of Bill 70 of 2003. “[A]s set out in section 7”: clause 33(4) of Bill 70B and Bill 70D. The wording of clause 45(3) of the draft Bill is the same as Bill 70 of 2003, reintroduced.

³²⁹ Clause 33(4) of Bill 70 of 2003 reintroduced. The wording of clause 45(4) of the draft Bill is the same. Clause 33(5) of Bill 70B, Bill 70D and s 33(5) of the Act.

intervention.³³⁰ However, not all parties would be able to afford the services of a private social worker or psychologist, or “other appropriate person”.³³¹ The Family Advocate’s office will need to be equipped with additional financial resources as well as additional personnel to deal with the extra workload that will arise from the implementation of this section. A parenting plan must be in writing and signed by the parties,³³² it must also be registered with a Family Advocate or made an order of court.³³³ A registered parenting plan can only be amended by a court order.³³⁴

³³⁰ Clause 33(1) of Bill 70 of 2003, reintroduced; clause 33(2) of Bill 70B and Bill 70D.

³³¹ Why the Bill does not stipulate that mediation can take place through a suitably qualified private legal professional is uncertain.

³³² Clause 34(1)(a) of Bill 70 of 2003, reintroduced, and Bill 70B and Bill 70D. Clause 46(1)(a) of the draft Bill reads the same.

³³³ S 34(1)(b) of the Act and all three versions of the Bill. Clause 34(2) of Bill 70 of 2003, reintroduced: “An application ... for registration of a parenting plan must – (a) be in the format and contain the particulars prescribed by regulation; and (b) be accompanied by – (i) a copy of the plan; and (ii) a statement by – (aa) a family advocate, social worker or psychologist contemplated in section 33(4)(a) that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (bb) a social worker or other appropriate person contemplated in section 33(4)(b) that the plan was prepared after mediation by such social worker or person.” Clause 46(1)(a) of the draft Bill said that it must be registered with a child and family court registrar or made an order of court. By specifying that the application must “be in the format and contain the particulars prescribed by regulation” the Bill lacks accessibility for the general public, as the layperson would not know what or where these particulars are. However, by stipulating that the particulars will be prescribed by regulation the Bill allows room for change in the practical application of the Bill, if it is found at a later stage that changes to the way these plans are drawn up are needed. Clause 34(2) and (3) of Bill 70B and Bill 70D: “An application by co-holders contemplated in section 33(1) [this is where co-holders agree on the parenting plan] for the registration of the parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by a copy of the plan. (3) An application by co-holders contemplated in section 33(2) [where the co-holders experience difficulty in agreeing on the plan] for the registration of a parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by – (i) a copy of the plan; and (ii) a statement by – (aa) a family advocate, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (bb) a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person.” Where the agreement are amicable they can be presented to the court directly, where they result from a dispute a statement from a qualified person who helped draw up the agreement must accompany the agreement: Jamieson and

4 4 3 2 Maintenance

Part of the definition of parental responsibilities and rights is the responsibility and right to care for the child.³³⁵ Care, in relation to a child, is defined as, within available means, providing a child with a suitable place to live and ensuring that the child's living conditions are conducive to the child's development, health and well-being. Care also means providing the necessary financial support.³³⁶ From these definitions it is clear that part of parental responsibilities and rights is to care for the child. Part of caring for a child encompasses providing maintenance for such child. This is in line with our current law regulating the duty of a parent to maintain their child.³³⁷

Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 14.

³³⁴ Clause 35(1) of Bill 70 of 2003, reintroduced: "A registered parenting plan may be amended or terminated only by an order of court on application – (a) by the co-holders of the parental responsibilities and rights; (b) by the child, acting with leave of the court; or (c) in the child's interest, by any other person acting with leave of the court. (2) Section 29 applies to an application in terms of subsection (1)." Clause 47 of the draft Bill said the same. Clause 35(1) of Bill 70B stipulates that a parenting plan registered with the Family Advocate may either be amended or terminated by the Family Advocate when the co-holders of parental rights and responsibilities apply for this. Clause 35(2) of Bill 70B states that when a parenting plan was made an order of court it may only be amended by an order of court, on application by the co-holders of parental responsibilities and rights; by the child acting with the leave of the court; or in the interests of the child, by any person acting with the leave of the court. Section 29 applies to an application in subsec (2). Clause 34(4) and (5) of Bill 70D: "(4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan. (5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application by the co-holders; the child; or someone acting in the child's interest, with the leave of the court."

³³⁵ Clause 1 of the Children's Bill 70 of 2003, reintroduced; clause 18(2) of Bill 70B and Bill 70D. Parental responsibilities and rights were discussed in par 4 3 above. The current law regarding maintenance was discussed in par 3 1 2 5 above.

³³⁶ Clause 1 of the Children's Bill, all three versions of the Bill read the same. The rest of the definition of care emphasises that the child must be kept safe from maltreatment. See further par 4 5 below.

³³⁷ See 3 1 2 5 above for a discussion of the current law regulating maintenance.

The Children's Act also clearly stipulates that fathers of children born out of wedlock have a duty to maintain such children.³³⁸ This is in line with our current common law. One of the factors that the court will look at, when an application is brought for the assignment of parental responsibilities and rights, is the extent to which the applicant contributed to the maintenance of the child.³³⁹

Provision is made in the Act for parental responsibility and rights agreements to be entered into.³⁴⁰ The content of a parenting plan can include the maintenance of the child.³⁴¹ This provision is similar to the current situation where parties can enter into a settlement agreement upon divorce and provision is made in such settlement agreement for the maintenance of the children. The parenting plan provided for in the Children's Act will, however, be able to be used even when there is no divorce action and where parties are not married.

4 4 4 Guardianship

Clause 1 of the Children's Bill, reintroduced, defined a guardian as "a parent or other person who has guardianship of a child". Section 1 of the Children's Act³⁴²

³³⁸ S 21(2): "This section does not affect the duty of a father of a child to contribute towards the maintenance of the child", all three versions of the Bill read the same.

³³⁹ As well as the expenses in connection with the birth of the child: s 23(2)(d) of the Children's Act, all three versions of the Children's Bill read the same.

³⁴⁰ Clause 22 of all three versions of the Children's Bill as well as s 22 of the Children's Act deal with this aspect. See also 4 4 7 2 below for a discussion of these provisions.

³⁴¹ Clause 33(2)(b) of the Children's Bill, reintroduced; clause 33(3)(b) of Bill 70B and Bill 70D.

³⁴² As well as Bill 70B and Bill 70D.

defines guardianship as “guardianship as contemplated in section 18”. According to the Children’s Act guardianship³⁴³ means to:

- “(a) administer and safeguard the child’s property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including –
 - (i) consent to the child’s marriage;
 - (ii) consent to the child’s adoption;
 - (iii) consent to the child’s departure or removal from the Republic;
 - (iv) consent to the child’s application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.”³⁴⁴

This definition compares favourably to the existing legal definition of a guardian in South African law. A guardian currently is someone who administers a minor’s estate and assists the minor in legal proceedings and the performance of juristic acts. This includes consenting to the minor’s marriage, adoption, departure from

³⁴³ In relation to a child.

³⁴⁴ S 18(3) of the Children’s Act, clause 18(3) of Bill 70B and Bill 70D. In clause 1 of the Children’s Bill, reintroduced (the wording was slightly different eg “administering” was used instead of “administer” but otherwise the content was the same as in the later versions of the Bill); clause 1 of the draft Bill reads the same. See also clause 30(5) of the Children’s Bill, reintroduced, which specifies when the consent of all persons having parental responsibilities and rights is required. These instances are the same as those specified in the definition of guardian.

South Africa, application for a passport and the alienation of the minor's property.³⁴⁵

4 4 5 Care

Chapter 1 of the Children's Act defines care in relation to a child as including:

- “(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 fulfillment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;³⁴⁶
- (e) guiding, directing and securing³⁴⁷ the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

³⁴⁵ Cronjé and Heaton *South African Family Law* 277. See further the discussion of the current definition of guardianship in 3 2 above.

³⁴⁶ Bill 70 of 2003, reintroduced, read “and the rights set out in Chapter 3 of this Act”.

³⁴⁷ Bill 70 of 2003, reintroduced, read “guiding and directing” only. The addition of the word “securing” emphasises the importance of ensuring that the child is educated.

- (f) guiding, advising and assisting the child in decisions to be taken by the child, in a manner appropriate to³⁴⁸ 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;³⁴⁹ and
- (j) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child."³⁵⁰

³⁴⁸ Bill 70 of 2003, reintroduced, uses the words "taking into account".

³⁴⁹ This subsec was not found in Bill 70 of 2003, reintroduced. Its inclusion is welcome as it emphasises that care also involves special care for a child with special needs, in the sense that the special needs of the child must be accommodated.

³⁵⁰ S 1 of Act 38 of 2005, as well as all three versions of the Children's Bill. Bill 70 of 2003, reintroduced, also defines alternative and partial care. The Children's Act does not contain these provisions currently due to the fact that the Bill was split. See 4 4 1 for an explanation of the splitting of the Bill. "Alternative care" is defined in the reintroduced Bill as "mean[ing] care of a child in accordance with section 167". "Partial care" means care of a child in accordance with section 76; "partial care facility" means any premises or other place used partly or exclusively for the partial care of six or more children, which place may include – (a) a private home; (b) other privately owned or managed premises; or (c) a school, hospital or other state-managed premises where partial care is provided by a person other than the school, hospital or other organ of state; "residential care programme" means a programme described in section 191(2) which is or must be offered at a child and youth care centre. "Temporary safe care" means care of a child in a child and youth care centre, shelter or private home or any other place of a kind that may be prescribed by regulation, where the child can safely be accommodated pending a decision or court order concerning the placement of the child but excludes care of a child in a prison or police cell. S 76: "Partial care is provided when a person, whether for or without reward, takes care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement between the parents or care-givers and the provider of the service, but excludes the taking care of a child – (a) by a school as part of tuition, training and other activities provided by the school; (b) as a boarder in a school hostel or other residential facility managed as part of a school; or (c) by a hospital or other medical facility as part of the treatment provided to the child." S 167: "A child is in alternative care if the child has been placed – (a) in foster care; (b) in court-ordered kinship care; (c) in the care of a child and youth care centre following an order of a court in terms of this Act or the Criminal Procedure Act, 1977 (Act No 51 of 1977); or (d) in temporary safe care." These definitions have been included here in order to distinguish them from the definition of "care" as one of the parental responsibilities. Partial care will not be dealt with further here as this discussion focuses on guardianship, care and contact within the parent-child relationship.

It is clear that the term “care” will replace the current term “custody”.³⁵¹

The Act defines a “caregiver” as meaning:

“any person other than a parent or guardian³⁵² who factually cares for a child,³⁵³ and includes –

- (a) a foster parent;
- (b) a person who cares for the child with the implied or express consent of a parent or guardian of the child;³⁵⁴
- (c) a person who cares for a child whilst the child is in temporary safe care;³⁵⁵
- (d) a person at the head of a child and youth care centre where a child has been placed;³⁵⁶
- (e) the person at the head of a shelter;³⁵⁷
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community,³⁵⁸ and

³⁵¹ For a discussion of the current definition of custody see 3 3 3 above.

³⁵² Bill 70 of 2003, reintroduced, refers to “other than the biological or adoptive parent”.

³⁵³ Bill 70 of 2003, reintroduced, reads “who factually cares for the child, whether or not that person has parental responsibilities and rights in respect of the child”.

³⁵⁴ Bill 70 of 2003, reintroduced, referred to a “kinship care-giver” and in the next subsection referred to a “family member who cares for a child in terms of an informal kinship care arrangement”. Bill 70B also referred to a “kinship care-giver”.

³⁵⁵ The following subclause of Bill 70 of 2003, reintroduced, also referred to a “primary care-giver who is not the biological or adoptive parent of the child”.

³⁵⁶ This section was not found in Bill 70 of 2003, reintroduced.

³⁵⁷ This provision was not found in Bill 70 of 2003, reintroduced.

³⁵⁸ *Ibid.*

- (g) the child at the head of a child-headed household.”^{359 360}

The Children’s Act also defines a family member as meaning, in relation to a child:

- "(a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;³⁶¹
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child;
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.”³⁶²

These definitions go some way in defining a caregiver of a child. It is hoped that this will assist caregivers in being able to receive child support grants. The inclusions of “any other person with whom the child had developed a significant relationship, based on psychological or emotional attachment” is received with pleasure as it will be of benefit to so-called social or psychological parents of the child.³⁶³ The fact that this relationship must “resemble a family relationship” unfortunately leaves the fact of whether this relationship will be deemed to be

³⁵⁹ Bill 70 of 2003, reintroduced, added: “to the extent that that child has assumed the role of primary care-giver.”

³⁶⁰ S 1 of the Children’s Act. Bill 70B reads much the same except that it also contained “kinship care-giver”, which was removed in Bill 70D and the Act. This was also clause 1 in the draft Bill, which read the same as Bill 70 of 2003, reintroduced.

³⁶¹ Bill 70 of 2003, reintroduced, included “a primary care-giver of the child”.

³⁶² S 1 of the Children’s Act, the wording is the same in all three versions of the Bill. “Cousin” has been added to (c), it was not found in clause 1 of the draft Bill.

³⁶³ Access by interested persons other than parents was discussed in 3 4 4 above.

“significant” open to interpretation. Must the relationship closely resemble the Western narrow view of what a family should be? Is it not possible that a child can have “significant relationship, based on psychological and emotional attachment” with someone although their relationship does not “resemble a family relationship”?³⁶⁴

Provision is also made in the Act that persons caring for a child, who otherwise have no parental responsibilities and rights in respect of the child, must “safeguard the child’s health, well-being and development; and ... protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical emotional or mental harm or hazards”.³⁶⁵ Such a person can:

³⁶⁴ It is hoped that when the Children’s Act is interpreted that the “family relationship” will not be interpreted solely in light of the Western view of the family but that a wider idea of what a “family relationship” is will be followed. Clause 150(i) of Bill 70 of 2003 contained the definition of a child in need of care and protection. The text of clause 150 is inserted here for ease of reference: “A child is in need of care and protection if, at the time of referral in terms of section 47, the child – (a) has been abandoned or orphaned or is without any visible means of support; (b) displays behaviour which cannot be controlled by the parent or care-giver; (c) lives or works on the streets or begs for a living; (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency; (e) has been exploited or lives in circumstances that expose the child to exploitation; (f) lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being; (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; (h) is in a state of physical or mental neglect; or (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child, or by a person under whose control the child is.” This clause ensured adequate protection of the child no matter what *de facto* care arrangements for the child were.

³⁶⁵ S 32(1)(a)–(b) of the Children’s Act. Clause 32(1)(a) and (b) of Bill 70B and Bill 70D read the same. Bill 70 of 2003, reintroduced, did not contain the word “emotional” and clause 44(1) of the draft Bill is the same.

“exercise any parental responsibilities and rights reasonably necessary to comply with [the above], including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian³⁶⁶ of the child.”³⁶⁷

Bill 70 of 2003, reintroduced, also stipulated that the care of a child may not be given to a parent solely on the basis of that person’s gender.³⁶⁸ This provision was inserted in order to resist the maternal preference rule.³⁶⁹ However, this provision is not found in Bill 70B, Bill 70D or in the Children’s Act.³⁷⁰

It is clear that the provisions of the Act relating to the care of children are designed to protect the rights of the child, take the views of the child into consideration and ensure that the best interests of the child will be the paramount

³⁶⁶ Bill 70 of 2003, reintroduced, did not refer to guardian but to “primary caregiver”. The inclusion of the term “primary caregiver” was welcomed, however as the section now stands consent must be obtained from the parent or guardian of the child, unless such consent cannot be reasonably obtained.

³⁶⁷ S 32(2) of the Children’s Act. Clause 32(2) of Bill 70B and Bill 70D and clause 44(2) of the draft Bill also contained this provision. S 32(3) of the Act stipulates the following: “A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).” S 32(4): “A person referred to in subsection (1) may not – (a) hold himself or herself out as the biological or adoptive parent of the child; or (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.” Exactly how s 33(4) will be policed, and implemented in practice, remains to be seen. It is submitted that although the policing of the section could be difficult in practice, it will not be impossible and it is best that the section is included in the Act.

³⁶⁸ S 5(3): “If a matter concerning a child involves a selection between one parent and the other, or between one care-giver or person and another, there should be no preference in favour of any parent, care-giver or person solely on the basis of that parent, care-giver or person’s gender.” The best interests of the child standard would play a role here and it may often be in the best interests of a young baby to be in the care of its mother. See further 3 5 for a discussion of the best interests of the child standard.

³⁶⁹ See also the discussion in 3 3 3 1 above that mothering does not only form part of a woman’s being.

³⁷⁰ This can be regarded as a step back for gender equality, although the best interests of the child are paramount and should be applied by the courts when deciding in whose care a child must be placed.

concern in all matters affecting the child. The position of caregivers, who do not currently have parental responsibilities and rights, has been improved by this Act, as has the protection of the child in the care of such caregivers. The only concern would appear to be how the abuse of their rights by such caregivers can be prevented in practice. Only once the Act is in place and some time has passed will it be clear whether this aspect is actually a problem or not. The fact that, when selecting one parent over another to care for a child, there should be no preference based solely on gender has unfortunately been excluded from the Children's Act.

4 4 6 Contact

“‘[C]ontact’, in relation to a child, means –

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else –
 - (i) communication on a regular basis with the child in person, including –
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including –
 - (aa) through the post; or

(bb) by telephone or any other form of electronic communication.”³⁷¹

This definition will replace the current definition of access.³⁷² The fact that contact is also defined as communication through the post, by telephone or other form of electronic communication is to be welcomed. The parent who is not living with the child is not always able to visit the child or be visited by the child and should thus have an enforceable right to communicate with the child in some other practical way. This provision is, of course, also to the benefit of the child who may live some distance away from his or her parent.³⁷³

³⁷¹ S1 of the Children’s Act, also found in all three versions of the Bill and clause 1 of the draft Bill, which reads the same as in the other versions of the Bill.

³⁷² The current definition of access was discussed in 3 4 above. Interestingly in a study by Rosen, “Notes and Comments Access: Expressed Feelings of Children of Divorce on Continued Contact with the Non-Custodial Parent” 1977 *SALJ* 342, 346, the findings indicated that so-called free access is desirable from the child’s point of view and that the system of regulated access should be looked into as it “does not take into account the importance of spontaneity, and frequently causes severe stress to children of divorce”. Unfortunately the Children’s Act is silent regarding the suitability, or not, of certain types of access.

³⁷³ However, this does not mean that the term contact is a broader term than the term access. The inclusion of all the forms in which contact may occur is welcome as they are now clearly stipulated in one accessible piece of legislation, instead of being dealt with piecemeal in case law.

4 4 7 The best interests of the child³⁷⁴ and children's rights

4 4 7 1 General

Section 7(1)³⁷⁵ of the Act stipulates that whenever the best interest of the child standard³⁷⁶ is to be applied then the following factors must be taken into consideration:

- “(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 or 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 –

³⁷⁴ See also the discussion of the best interest of the child standard in 3 5 above. For an analysis of the best interests of the child and the rescission of adoption orders, see Louw “Adoption Rights of Natural Fathers with Reference to *T v C* 2003 2 SA 298 (W)” 2004 *THRHR* 102. The discussion of adoption orders falls outside of the scope of this paper and will not be dealt with in detail here.

³⁷⁵ This provision was contained in clause 6(1) of Bill 70 of 2003, reintroduced.

³⁷⁶ For a discussion of the best interest of the child standard, see further 3 5 above.

- (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;
- (e) 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;
- (f) 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, tribe culture or tradition;
- (g) the child's –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) and any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;³⁷⁷
- (j) any chronic illness from which a child may suffer;³⁷⁸

³⁷⁷ This provision was not found in Bill 70 of 2003, reintroduced. The needs of children with disabilities and chronic illnesses are now recognised: Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 10.

³⁷⁸ *Ibid.*

- (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 caring 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 maltreatment, abuse, neglect, exploitation or degradation or exposing 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
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.”³⁷⁹

Section 9³⁸⁰ stipulates that “[i]n all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied”.³⁸¹

³⁷⁹ S 7(2) of the Act as well as clause 7(2) of Bill 70B and Bill 70D: “In this section ‘parent’ includes any person who has parental responsibilities and rights in respect of a child.” Clause 10(2) of the draft Bill also contained this provision but in the Children’s Bill 70 of 2003 the term “care-giver” was added in clause 6(1)(a)(ii) and (c) and (d)(ii); and the term “exploitation” was added to (j) and (i). Many of the factors listed in s 7(1) are similar to those listed in the *McCall* case. The *McCall* case is discussed at 3 3 3 1 above. Similar factors are listed in foreign legislation. See s 45 of the Ghanaian Children’s Act of 1998, discussed at 5 2 1 2 3 below; s 83(1) of the Kenyan Children Act 8 of 2001, dealt with at 5 2 2 2 3 below; s 7 of the Ugandan Children Statute 1996, examined at 5 2 3 2 2 below; and s 1(3) of the UK Children Act of 1989, explained at 5 3 2 2 below.

³⁸⁰ Of the Act, as well as clause 9 of Bill 70B and Bill 70D.

³⁸¹ Clause 9 of Bill 70 of 2003, reintroduced, stipulated: “[i]n all matters concerning a child the standard referred to in section 28(2) of the Constitution and section 6 of this Act that the child’s best interest is of paramount importance, must be applied”.

Section 6(4)³⁸² says that “the child’s family must be given the opportunity to express their views in any matter concerning the child” if it is in the best interest of such child. The fact that a conciliatory and problem solving approach must be followed, and a confrontational approach should be avoided, is emphasised.³⁸³ From these sections it is clear that the best interests of the child are paramount in every decision affecting the child and care has been taken to entrench this in the Bill. This is in accordance with not only the South African Constitution but also various international documents, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.³⁸⁴

Children’s rights are also emphasised in the Children’s Act.³⁸⁵ The Act clearly states that “[t]he rights which a child has in terms of this act supplement the rights which a child has in terms of the Bill of Rights”.³⁸⁶ Throughout the Act it is

³⁸² Of the Act. S 6(4) of Bill 70B and Bill 70D and S 5(4) of Bill 70 of 2003, reintroduced, contained the same provision.

³⁸³ S 6(4)(a) the Act. S 6(4)(a) of Bill 70B and Bill 70D contained the same provision.

³⁸⁴ See further pars 3 1 1 1 1 and 3 1 1 1 3 above, as well as 4 5 below.

³⁸⁵ In ch 2. Ch 3 of Bill 70 of 2003, reintroduced, and ch 4 of the draft Bill contained these provisions.

³⁸⁶ S 8(1) of the Act. The same provision is contained in clause 8(1) of Bill 70B and Bill 70D. Clause 7(1) of Bill 70 of 2003, reintroduced, referred to “chapter” instead of Act. S 8(2) of the Act: “All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act” this was contained in clause 7(2) of Bill 70 of 2003, reintroduced. S 8(3) of the Act: “A provision of this Act binds a natural or a juristic person, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” Clause 7(3) of Bill 70 of 2003, reintroduced, read “if and to the extent”.

also clear that the views of the child must be considered.³⁸⁷ The access of children to courts is also protected.³⁸⁸

The rights of children were listed in clause 11 of Bill 70 of 2003, reintroduced. These rights were the same as those listed in the South African Constitution. The Children's Act, as well as Bill 70B and Bill 70D, do not contain this list of rights. The non-inclusion of this list of rights in the final version of the Children's Bill should not be a cause for concern,³⁸⁹ as section 8(1) stipulates that the rights which a child has in terms of the Act will supplement the rights which a child has in terms of the Bill of Rights. However, the inclusion of the list

³⁸⁷ Eg s 10 of the Act. The same provision was found in all three versions of the Bill.

³⁸⁸ S 14.

³⁸⁹ However, Proudlock and Dutschke "Submission Number 1 on the Children's Rights Chapter of the Children's Bill" 27 July 2004 Children's Institute, UCT 7–11, in light of the risks associated with a "general lack of understanding on the meaning of section 28 of the Constitution and how to put children's rights into practice" propose that "[t]here is ... a need for Parliament to provide guidance on the meaning of Children's Rights. One way is through the inclusion of a Children's Rights Charter in the Children's Bill. The Charter can provide guidance by elaborating on the meaning of children's rights and the state's duties using international law and South Africa's particular history and challenges." The authors are in favour of the provisions contained in the draft Bill, which included a comprehensive list of children's rights. Bill 70 of 2003 is criticised for not containing the comprehensive list of rights. The authors point out that certain key rights have been totally omitted. These are social security, education, refugee children, children with disabilities, leisure and recreation, prohibition against unfair discrimination and property. Proudlock and Dutschke recommend that a comprehensive Child Rights Charter be included in the Bill, that is binding on all government departments and that elaborates on the rights contained in international law, and also obliges government departments to review their legislation and draw up and implement plans to show how they intend to promote children's rights through their policies. The authors (10) recommend that the following list of rights be included in the Children's Bill (as it was at that stage): "•Prohibition against Unfair Discrimination •Best interests of the child •Child participation •Name, nationality and identity •Family relationship and alternative care •Property •Protection from maltreatment, abuse, neglect, degradation, exploitation and other harmful practices •Protection from harmful social and cultural practices •Protection from economic exploitation •Education •Health Care •Food and nutrition •Water and Sanitation •Shelter •Social Security •Environment •Social Services •Refugee and undocumented migrant children •Children with disabilities and chronic illnesses •Leisure and recreation •Access to child and family court •Age of Majority." The authors recommend that this list would serve "as [a] minimum standard for all government departments to follow when they draft legislation and policy, make budgetary decisions or implement programmes".

would have been preferred simply to make the Act an all inclusive reference source of law relating to children.³⁹⁰

Children are also protected from harmful social and cultural practices³⁹¹ and have the right to information on health care.³⁹² The Act does not just provide for the rights of children but also for their responsibilities. It stipulates that “[e]very child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state”.³⁹³

Section 29(6)(a) provides for the appointment of a legal practitioner for the child.³⁹⁴ Section 10 provides for the participation rights of children.³⁹⁵ Unfortunately, the Children’s Act, as well as the final version of the Bill,³⁹⁶ states that children that are “of such an age, maturity and stage of development as to be able to participate” have a right to participate “in an appropriate way”. Bill 70 of 2003, reintroduced, stated that “[e]very child capable

³⁹⁰ Without having to refer to other legislation in this regard. S 15: “(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Chapter has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. (2) The persons who may approach a court, are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; [‘and (e) an association acting in the interest of its members’ was found in B 70 of 2003, reintroduced].”

³⁹¹ S 12. Such as female genital mutilation.

³⁹² S 13.

³⁹³ S 16. Similar to the provision in the ACRWC, see 3 1 2 1 3 above.

³⁹⁴ See further n 314 and par 4 4 8 below for a discussion of this section.

³⁹⁵ See 4 4 3 1 above where the wording of this section is quoted. Human (“Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding” 2000 *THRHR* 393, 400) is in favour that “‘n kind se reg op deelname aan besluitneming behoort uitgebou en bevorder te word. Hierdie reg beteken nie dat ‘n kind se wense sonder meer geïmplimenteer moet word nie maar dat ‘n proses van konsultasie en deelname aan besluitneming in die ouer-kind verhouding aangemoedig moet word”.

³⁹⁶ Bill 70D of 2003, which is now Act 38 of 2005.

of participating meaningfully” has the right to participate. Article 4(2) of the African Charter on the Rights and Welfare of the Child³⁹⁷ also states that the child must be “capable of communicating his or her views” before he or she may be heard in legal proceedings.

Davel³⁹⁸ observes that clause 10 of the Children’s Bill³⁹⁹ “could be seen as an effort to incorporate article 12 of the United Nations Convention on the Rights of the Child into our legislative framework”. Section 55⁴⁰⁰ of the Children’s Act refers to a legal representative being appointed for a child, but only in a matter before the Children’s Court. Davel⁴⁰¹ submits that:

“The Children’s Bill [as it then was] therefore explicitly acknowledges child participation in line with international law. It further endorsed the Constitution on the issue of child representation but leaves the important questions⁴⁰² ... to be answered creatively by the members of the legal profession.”

Children’s rights are clearly enshrined and protected in this Act. It is hoped that once the Children’s Act is in force these rights will be protected and promoted in

³⁹⁷ As well as s 12 of the CRC.

³⁹⁸ In Nagel (2006) 29.

³⁹⁹ She refers to Bill 70 of 2003, reintroduced.

⁴⁰⁰ S 61 of the Children’s Act also provides for child participation in the Children’s Court.

⁴⁰¹ In Nagel (2006) 29, but it still falls short of the provisions of the CRC. See further 3 1 1 1 1 above for a discussion of the relevant provisions of the CRC and 3 7 above regarding the appointment of a legal practitioner to represent a child.

⁴⁰² Discussed above, in this paragraph.

practice, similarly to what occurred in the case of *Soller v G*⁴⁰³ where legal representation was assigned to a child in divorce proceedings.

4 4 7 2 The Right to a Family⁴⁰⁴

The preamble of the Children’s Act states that “... protection of children’s rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children in isolation from their families and communities”. The preamble also emphasises that:

“it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality should grow up in a family environment and in an atmosphere of happiness, love and understanding”.⁴⁰⁵

⁴⁰³ 2003 5 SA 430 (WLD).

⁴⁰⁴ “Although the family is defined as the basic unit, its procedural capacity to enforce its rights is limited due to excessive individualization which characterizes many aspects of international human rights law” and under the International Covenant on Civil and Political Rights only individual family members can claim interference with their family. An individual cannot petition on behalf of the entire family in order to protect the family unit. The right of a family to protection is formulated as a group right but procedural hurdles only allow for individual claims: Van Bueren (1995) 78.

⁴⁰⁵ This section reiterates what is stated in the preamble of the ACRWC. The child’s right to a family is discussed in 3 1 2 4 4 above. Human (“Teoretiese Oorwegings Onderliggend aan die Rol van die Staat in die Erkenning en Implementering van Kinderregte” 2000 *TVR* 123 125–126) points out that “’n benadering ten gunste van ouerlike outonomie impliseer dat die staat aan ouers se besluite rakende die opvoeding en versorging van hulle kind voorkeur verleen en dat daar slegs ’n beperkte mate van staatsinmenging in die gesin geduld ... [word] ouerlike reg op vryheid teen staatsinmenging word ... as ’n reg van die kind

The Children’s Act defines the word “care”, as meaning more than just providing a place to live but as also including maintaining a sound relationship with the child.⁴⁰⁶

The term “contact”,⁴⁰⁷ which replaces the term “access”, is defined as maintaining a personal relationship with the child and, if the child lives with someone else, communicating on a regular basis with that child in person, including visiting the child or being visited by the child or communicating with the child on a regular basis, in any other manner including by post or by telephone or some other form of electronic communication.

The definition of the term “family member”⁴⁰⁸ is wide enough to include not only parents and other persons having parental responsibilities and rights in the child, but also grandparents, aunts and uncles, as well as cousins of the child. The definition also includes social parents of the child.⁴⁰⁹

geformuleer ... Die gronde vir inmenging ... word eng omskryf ... statutêre inmenging [word] presies gedefineer ... solank as wat ‘n kind lid is van ‘n gesin wat funksioneer, smelt sy belange en dié van ander gesinslede saam”. Criticism against this approach (128) is that “‘n [o]nbelemmerde ouer-kind verhouding kan net sowel ‘n kind benadeel en die erkenning en beskerming van kinderregte vereis noodwendig dat inbreuk op ouerlike outonomie gemaak word”. See also Dingwall and Eekelaar “Rethinking Child Protection” in Freeman (ed) *State, Law and the Family* (1984) 104–106. Human (130) identifies that the most important way that the State can give recognition and protection to children’s rights is through legislation. This perspective leads to her concluding (130) that “[d]it is ook kragtens wetgewing dat gepoog word om ‘n balans te vind tussen ‘n paternalistiese benadering enersyds of groter outonomie aan die kind andersyds en om die spanning tussen ouerlike outonomie en kinderregte te ontfont” and that “... regsreëls wat die ouer-kind verhouding reguleer, poog om ‘n balans te vind tussen die beste belang van die kind en die uitoefening van ouerlike gesag”.

⁴⁰⁶ S 1, the provision reads the same in all three versions of the Children’s Bill.

⁴⁰⁷ Clause 1 of the Children’s Bill. This term is explained in 3 4 as well as 4 2 6 above.

⁴⁰⁸ S 1, the term “family” was discussed in detail in 3 1 1 4 1 above.

⁴⁰⁹ “[A]ny other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.” This

According to the Children’s Act a parent includes the adoptive parent of a child but excludes:

- “(a) the biological father of a child conceived through the rape of or incest with the child’s mother;
- (b) any person who is biologically related to the child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights⁴¹⁰ in a child have been terminated.”⁴¹¹

The Children’s Act sees “family” as being far wider than the narrow definition of a family,⁴¹² as a family member includes “any person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship”. The Act also clearly states that it is neither desirable nor possible to protect children in isolation from their

definition is in line with the proposal made by the Law Commission *Report of the Law Commission on the Children’s Bill* ch 8 “The Parent-Child Relationship” (1999) 194–195.

⁴¹⁰ Clause 1 of Bill 70 of 2003, reintroduced, defined parental responsibilities and rights as “in relation to a child ... the responsibility and the right – a) to care for the child; b) to have and maintain contact with the child and c) to act as the guardian of the child”. Clause 1 of Bill 70B and Bill 70D defines parental responsibilities and rights as the responsibilities and rights referred to in clause 18. S 18 is discussed in 4 4 3 1 above.

⁴¹¹ S 1 of the Children’s Act. The same definition was found in Bill 70B and 70D.

⁴¹² Davel was in favour of broadening the concept of “family” in the children’s statute. She favoured the New Zealand approach because it not only acknowledges biological or legal relationships but functional relationships as well: *Report of the Law Commission on the Children’s Bill* ch 8 “The Parent-Child Relationship” (1999) 191. Functional relationships are also acknowledged in the English Children Act, particularly in s 10(5)(a) which allows any person to whom a child is a “child of the family” to apply to court to have contact with the child. This aspect is dealt with in 5 3 2 3 below.

families or communities and that it is preferable that children grow up in a family environment.⁴¹³

Section 2 of the Children's Act stipulates the objects of the Act. One of these is to promote the preservation and strengthening of families⁴¹⁴ and to give effect to certain constitutional rights of children, namely the right to family care, or parental care or appropriate alternative care when removed from the family environment.

Section 7 of the Children's Act deals with the best interests of the child and specifies factors that must be considered when determining what is in the best

⁴¹³ See further 3 1 1 4 2 for an overview of the relevant provisions of international documents governing the child's right to a family, as well as 3 1 1 4 4 for a discussion of the provisions of the Children's Act and the child's right to a family.

⁴¹⁴ S 2(a). Skweyiya ("Speech by Dr Zola Skweyiya, Minister of Social Development, to the International Conference on Families, Durban. 1 March 2005" <<http://www.info.gov.za/speeches/2005/05030208451003.htm>> accessed on 2006-05-13) stresses the government's intentions to "intensify efforts aimed at engendering a spirit of solidarity, community, citizenship, and social activism in each and every family, neighbourhood and village in our country. In order to achieve this objective government will continue to implement programmes that strengthen families, and is committed to increasing its support for the mobilisation of community structures. All of government's programmes – which are broadly aimed at creating work, fighting poverty and promoting equality – are premised on the foundation of strong families. It is strong families that build and ensure a better life for children. Similarly, it is the process of living, working, worshipping and surviving together as a family that generates love, care, support, hope and happiness ... there is a lot of diversity in family forms ... [yet] the one feature of the family that is most telling about it is the way it cares for and supports its poorest and most vulnerable members". Clearly the South African government realises the importance of the family and is committed to strengthening it. This is also evident in s 2(a) of the Children's Act. Skweyiya also provides a summary of factors that have influenced the family in South Africa, namely: the migrant system of labour, the extensive appropriation of land, rural to urban migration, integration into the global economy, HIV/AIDS, poverty and unemployment. Skweyiya states that the structure of the extended family has been affected by these factors, specifically HIV/AIDS and poverty. Skweyiya also provides a synopsis of steps that government have taken in order to assist the family. These are: freed resources for social expenditure by reducing the interest that government pays for debt, boosted the income of poor households through social grants, provided access to basic social services at municipal level, addressed land issues through tenure and land reform processes, promoted the emancipation and equality of woman (by means of the recognition of customary marriages, labour equality, maternity benefits and affirmative action).

interests of the child. These include, the nature of the relationship between the child and parent; the effect of separation from the parent/s or brother and sisters or caregiver with whom the child is living; the practical difficulty of having contact; the need for the child to remain in the care of parents, family and extended family and to maintain contact with family, extended family, culture or tradition; as well as the need for the child to be brought up in a stable family environment and, where this is not possible, an environment that resembles as close as possible a caring family environment.⁴¹⁵

Section 16 of the Act emphasises that every child also has responsibilities⁴¹⁶ towards his or her family, community and the State.

Section 18 of the Act stipulates that a person can either have full or specific parental responsibilities and rights in respect of a child and provision is made in section 21 for the biological father, who does not have rights and responsibilities in the child to acquire these.⁴¹⁷

⁴¹⁵ The best interests of the child standard is dealt with at 4 2 7 above. The child's right to a family in South African law, prior to the coming into being of the Children's Act is discussed at 3 1 1 4 above.

⁴¹⁶ Appropriate to the child's age and ability. In 2002 the Children's Institute indicated that it was not clear what the purpose of including children's responsibilities in the then proposed Bill is and that the impact, whether positive or negative, of including this clause is uncertain: Proudlock *et al* "Submission on the Child Care Act Discussion Paper: Submission to the South African Law Commission" 2002 Children's Institute, UCT 19.

⁴¹⁷ See further 4 2 3 2 2 above. For a discussion of the legal position of the unmarried father with regard to his child prior to the Children's Act, see 3 2 2 3, 3 3 3 3 and 3 4 3 above. S 20 states that the biological father of a child has full parental rights and responsibilities in respect of the child if he is married to the child's mother, or if he was married to the child's mother at the time of the child's conception, birth or any time between the conception or birth.

Section 22 makes provision for the mother of a child, or anyone else who has parental responsibilities and rights in respect of a child, to enter into a responsibilities and rights agreement with the biological father, or anyone else having an interest in the care, well-being and development of the child, who does not have parental rights and responsibilities in terms of section 20 or 21.

Section 30 makes provision for co-holders of parental responsibilities and rights. Provision is also made for parenting plans⁴¹⁸ to be drawn up, as well as for family group conferences.⁴¹⁹

The provisions of the Children's Act stress the importance of the family in the lives of children. The Children's Act sees a family as being far wider than the narrow definition of a family, as a family member includes "any person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".⁴²⁰ The Act also

⁴¹⁸ S 33 of the Act as well as all three versions of the Bill.

⁴¹⁹ S 70 of the Children's Act, as well as clause 70 of Bill 70B and Bill 70D. This section states that the Children's Court may cause a family group conference to be set up with the parties involved in the matter, as well as any other family members of the child. The aim of this conference is "to find solutions for any problem involving the child": s 70(1). The Children's Court must "appoint a suitably qualified person or organization to facilitate at the family group conference", as well as prescribe the way in which records must be kept of the agreement reached and the Children's Court must consider the report on the conference when the matter is heard in the court: s 70(2). The office of the Family Advocate will probably be seen by the court as a "suitable organisation", this will place additional burdens on the already overworked Family Advocate's offices, and thus additional resources must be made available to the Family Advocate. See 4 4 8 below for a discussion of the current role of the Family Advocate, and especially the view that Family Advocates are not currently practising mediation. The Children's Court may also refer a matter to an appropriate lay forum, including a traditional authority in order to attempt to settle a matter by mediation out of court: s 71(1). Lay forums may not be used in matters where abuse or sexual abuse of the child is alleged: s 71(2).

⁴²⁰ S 1 Children's Act.

clearly states that it is neither desirable nor possible to protect children in isolation from their families or communities and that it is preferable that children grow up in a family environment. Throughout the Children's Act the importance of the family as the ideal environment for a child to exercise their rights in, and to be cared for, is stressed.

In general ratification of or accession to international instruments creates obligations on State Parties to take action to bring law and practice into line with the relevant international instrument.⁴²¹ It is clear from the previous discussion that not even our Constitution is in line with international instruments, which we have ratified. It is recommended that the right to a family should be inserted in the Constitution.⁴²²

⁴²¹ The CRC specifies in art 42 that the provisions of the CRC must be made known to both children and adults. Art 43 and art 44 state that a Committee on the Rights of the Child must be established and State Parties must submit reports on the measures they have adopted to give effect to the rights in the CRC. Such reports had to be submitted two years after the Convention came into force and thereafter every 5 years. Art 45 stipulates that specialised agencies may be present at the consideration of the implementation of the CRC and may give advice. South Africa's initial report was due on 15 July 1997 and it was submitted on 4 December 1997. South Africa's second periodic report was due on 15 July 2002 and the third report is due on 15 July 2007: <[http://www.unhchr.ch/tbs/doc.nsf/o/8f6/367a61fee/cec/256d/2003031365/\\$FILE/GO340678.pdf](http://www.unhchr.ch/tbs/doc.nsf/o/8f6/367a61fee/cec/256d/2003031365/$FILE/GO340678.pdf)> accessed on 2006-09-19. For a discussion of the relevant provisions of the CRC, see 3 1 1 1 1 above. The ACRWC in arts 32–41 deals with the establishment and organisation of the Committee on the Rights and Welfare of the Child and art 43 stipulates that every State must submit reports to the committee. Such reports must be submitted within two years of the charter coming into force and then every three years. Such reports must specify how effect was given to the provisions of the charter. For a discussion of the relevant provisions of the ACRWC, see 3 1 1 1 3 above. See further n 31 and n 59 in ch 3 which partly deal with the Committee on the Rights of the Child.

⁴²² This was discussed at 3 1 1 4. See also Van der Linde (345–350) where he discusses the arguments against State interference with the family, unless it is necessary to prevent serious physical and emotional harm to a child. He also states that due to the importance of the family relationship that the State should lay down strict guidelines which must be followed before the State interferes in the family relationship. Van der Linde (351) states that the position under the South African Constitution differs remarkably from that under the Convention on the Rights of the Child and the German law and that “dit oorweldigend duidelik is dat die kind as beskermingswaardige subjek *binne gesinsverband* gesien moet word. Die situasie in die Grondwet blyk 'n ontkenning te wees van die werklikheid van die

Unfortunately the Children's Act does not explicitly state that the child has a right to family life. Due to the amount of emphasis that is placed on the family throughout the Children's Act, it is submitted that the child has a right to family life in terms of the Children's Act and will be able to enforce this right.⁴²³

4 4 8 The role of the Children's Courts and the High Court as the upper guardian of all minors

Section 45 of the Children's Act indicates the matters that a Children's Court may adjudicate. Amongst these are "the care or contact with a child"⁴²⁴ and the "paternity of a child".⁴²⁵ Until the Family Courts are established the High Courts and Divorce Courts have exclusive jurisdiction over matters involving the guardianship of a child; the assignment, exercise,⁴²⁶ suspension or termination of guardianship;⁴²⁷ the appointment of a parent-substitute; the removal of a child

gesinsverband waarbinne die kind hom bevind, grondwetlik beskermbaar is en dat die kind so binne gesinsverband met fundamentele regte beklee kan word. Waar grondwetlike beskerming binne die gesinsverband aan die kind verleen word, word nie alleen die eiesoortige aard van die gesin in publiekereg verband erken nie, maar word ook erkenning daaraan verleen dat die kind die sogenaamde *imbecillitas* in hom omdra sodat hy ook wat die bekleding met, en uitoeffening van fundamentele regte betref, steeds ouerlike sorg en opvoeding behoef".

⁴²³ See further 3 1 1 4 above for a discussion of the child's right to a family.

⁴²⁴ S 45(1)(b).

⁴²⁵ S 45(1)(c). Other matters include the temporary safe care of a child: s 45(1)(g); the alternative care of a child: s 45(1)(h) and the adoption of a child: s 45(1)(i). S 45(2) stipulates that a court may try and convict a person for non-compliance with a court order or contempt of court but may not try and convict a person in respect of criminal charges other than in respect of s 45(1)(a): "the protection and well-being of the child."

⁴²⁶ Also extension and restriction: s 45(3)(b).

⁴²⁷ Bill 70 of 2003, reintroduced, contained provision for "the appointment of a parent-substitute". Guardianship thus remains the exclusive jurisdiction of the High Court and that has not been extended to the Children's Court. The disadvantage of this approach is that "[t]his is a major problem for the many caregivers who need to protect the property rights of orphans in their care – especially those living in rural areas": Jamieson and Proudlock

from the Republic;⁴²⁸ the artificial fertilisation of a child; the appointment of a parent-substitute; applications requiring the return of the child to South Africa from abroad as well as the age of majority or contractual and legal capacity of a child; and safeguarding the child's interest in property.⁴²⁹ The High Court will also have exclusive jurisdiction over surrogate motherhood until the Family Court is established.⁴³⁰

The High Court maintains its inherent jurisdiction as upper guardian of all children.⁴³¹ The orders that a Children's Court can make are also specified.⁴³² The referral of matters to the Children's Court, by other courts, is

"Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 2.

⁴²⁸ "[D]eparture, removal or abduction": s 45(3)(d).

⁴²⁹ S 45(3).

⁴³⁰ S 45(3)(h) of the Act, as well as clause 45(3)(h) of Bill 70B and Bill 70D. Bill 70 of 2003, reintroduced, did not contain this provision.

⁴³¹ S 45(4) the Children's Act, as well as all three versions of the Bill.

⁴³² S 46 of the Act, as well as clause 46 of Bill 70B and Bill 70D: "(1) A children's court may make the following orders: (a) An alternative care order, which includes an order placing a child – (i) in the care of a person designated by the court to be the foster parent of the child; [(ii) in the care of a family member designated by the court to be the kinship care-giver of the child was contained in Bill 70 of 2003, reintroduced]; (ii) in the care of a child and youth care centre; or (iii) in temporary safe care; (b) an order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court; (c) an adoption order, which includes an inter-country adoption order; (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period; (e) a shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods; (f) a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court; (g) an order subjecting a child, a parent or care-giver of a child, or any person holding parental responsibilities and rights in respect of a child, to – (i) early intervention services; (ii) a family preservation programme; or (iii) both early intervention services and a family preservation programme; (h) a child protection order, which includes an order – (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court; (ii) giving consent to medical treatment of, or to an operation to be performed on a child; (iii) instructing a parent or care-giver of a child to undergo professional counselling or to participate in mediation, a family group conference, or other appropriate problem-solving forum; (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional

also provided for,⁴³³ as well as for additional powers of the Children's Court.⁴³⁴ The Children's Court may also order an investigation to be done and a

assessment; (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry; (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child; (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure; (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure; (ix) instructing that a person be removed from a child's home; (x) limiting access of a person to a child or prohibiting a person from contacting a child; or (xi) allowing a person to contact a child on the conditions as specified in the court order; (i) a contribution order in terms of this Act; (j) an order instructing a person to carry out an investigation in terms of section 50; (k) any other order which a children's court may make in terms of any other provision of this Act. (2) A children's court may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order." Clause 59 of the draft Bill contained the same provisions. Divorce and maintenance matters may not be dealt with by the Children's Court: Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 15.

⁴³³ Clause 47 of Bill 70D and s 47 of the Children's Act: "(1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as in contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a Children's Court for decision: Bill 70 of 2003, reintroduced] designated social worker for an investigation contemplated in section 155(2). (2) If [it appears to a court: Bill 70 of 2003, reintroduced] in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No 9 of 1929) [this Act was not in Bill 70 of 2003, reintroduced, or in Bill 70B], Matrimonial Affairs Act, 1953 (Act No 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No 116 of 1998) or the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998) [this Act was not mentioned in Bill 70 of 2003, reintroduced, or in Bill 70B], the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court [this was not in Bill 70 of 2003, reintroduced. It contained the words: that allegations of abuse or neglect made in respect of a child of any of the parties to the proceedings are well-founded] (a) may suspend the proceedings pending an investigation contemplated in section 155(2) into the question whether the child is in need of care and protection; [Bill 70 of 2003, reintroduced, stated: the outcome of an inquiry by the Children's Court into the question whether the child is in need of care and protection] and (b) must request a Director for Public Prosecutions to attend to the allegations of abuse or neglect. (3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child." This section as it now stands does not place as large a burden on the Children's Court, as what the reintroduced Bill did. One of the ways in which this is accomplished is by stating that a social worker must do an investigation in order to determine whether the child is in need of care and protection. The court does not have to investigate the matter itself, nor have personnel appointed to do this. In all likelihood the Family Advocate's offices will play a role in investigating matters for the Children's Court.

⁴³⁴ S 48 of the Act, as well as clause 48 of Bill 70D and Bill 70B: "(1) A children's court may, in addition to the orders it is empowered to make in terms of this Act – (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1) [Bill 70 of 2003, reintroduced, did not contain reference to this section]; (b) extend, withdraw, suspend, vary

report to be furnished before it decides a matter.⁴³⁵ A party involved in a matter before a Children's Court may appeal against any order made to the High Court having jurisdiction.⁴³⁶

From the above discussion it is clear that although the Children's Courts will be able to make decisions regarding contact and care of a child only the Divorce Courts and High Courts will be able to make decisions regarding the guardianship of a child and the appointment of a parent-substitute, until the Family Courts are established. The High Courts' position as upper guardian of all minor children is also secured.

The Act also provides for ways to minimise conflict in matters involving children. Provision is made for lay forum hearings, which may include mediation, and a family group conference.⁴³⁷ The child's vulnerability, the child's ability to

or monitor any of its orders; (c) impose or vary time deadlines with respect to any of its orders; (d) make appropriate orders as to costs in matters before the court; and (e) order the removal of a person from the court after noting the reason for the removal on the court record. (2) A children's court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner."

⁴³⁵ S 50(1) of the Act, and clause 50(1) of all three versions of the Bill.

⁴³⁶ Clause 51(1) of Bill 70 of 2003, reintroduced; Bill 70B and Bill 70D: "or any refusal to make an order, or against the variation, suspension or rescission of such order."

⁴³⁷ Clause 49(1) of Bill 70 of 2003, reintroduced, clause 49(1)(b) of Bill 70B and Bill 70D. S 49 states that a Children's Court may, before it decides any matter, order a lay forum hearing in an attempt to settle the matter out of court, and this may include "mediation by a family advocate, social worker, social service professional or other suitably qualified person [as well as] a family group conference contemplated in section 70; or mediation contemplated in section 71". This section also does not stipulate that a legal practitioner may mediate but simply refers to a "suitably qualified person": see n 331 above. Mediation is discussed further below in this paragraph. Clause 70 of Bill 70D: "(1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child. (2) The children's court must – (a) appoint a suitably qualified person or organization to facilitate at the family group conference; (b) prescribe the manner in which a record is kept of any agreement or settlement reached

participate in proceedings, the power of relationships in a family and the nature of any allegations made by parties must be taken into account by a court before ordering a lay forum hearing.⁴³⁸ Section 52(2) makes it clear that rules made governing the issue and service of process, the appearance in court of advocates and attorneys, the execution of court orders and other matters⁴³⁹ must be designed to avoid adversarial procedures.⁴⁴⁰

between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and (c) consider the report on the conference when the matter is heard.” This provision was found in clause 71 of Bill 70 of 2003, reintroduced. Clause 66(1)(c) of the draft Bill made provision for mediation by a traditional authority. Clause 71(1) of Bill 70D states that any matter before the Children’s Court may be referred to an appropriate lay forum, including a traditional authority. Lay forums may not be used in the event of alleged abuse or sexual abuse of the child: clause 71(2) of Bill 70D. The court may prescribe the manner in which record is kept of any agreement reached between the parties as well as any fact which emerges from the conference which must be brought to the notice of the court. The court may also consider a report on the proceedings of the lay forum when the matter is heard before the court: clause 71(3) of Bill 70D. Note the difference in the wording of clause 70(2), which states that the court “must” prescribe the manner in which record is kept of a settlement reached between the parties, and clause 71(3) which says that the court “may” prescribe the manner in which a record is kept of any agreement reached in a lay forum. It is submitted that the word “must” should be used in both sections, as it is essential that there is proper record keeping at a lay forum and the best way to ensure this is if the manner in which records must be kept are prescribed, and monitored, by the court.

⁴³⁸ S 49(2) of the Act, and all three versions of the Bill.

⁴³⁹ S 52(1) of the Act, and all three versions of the Bill.

⁴⁴⁰ S 52(2), and must include rules concerning: “(a) appropriate questioning techniques for – (i) children in general; (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication; (iii) traumatised children; and (iv) very young children; and (b) the use of suitably qualified or trained interpreters”. All three versions of the Bill read the same. This move away from adversarial processes when children are involved in a matter before court is to be welcomed. Zaal conducted a study to determine “to what extent are our courts geared towards hearing the voice of the child”. In this study Zaal found that the most significant factors inhibiting children in court were the cultural and language differences between children and court staff, pitfalls experienced when working with interpreters, the non-impact of lawyers and social workers (these parties were found not to serve as child advocates), the physical environment of the court and the physically or mentally-challenged child. Solutions recommended by the respondents in the study included a child-appropriate environment, less formal court procedures, special selection and training of court staff, adequate preparation of children for court, a less formal dress code, greater use of court intermediaries, cultural sensitivity and ethnic representation of staff and child-appropriate communication: “Hearing the Voices of Children in Court: A Field Study and Evaluation” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158–185. Müller and Tate “Little Witnesses: a Suggestion for Improving the Lot of Children in Court” 1999 *THRHR* 241, 242 describe cross-examination as a “major hurdle” for children on the witness stand.

A party before a Children's Court may appoint a legal practitioner of its own choice, at its own expense.⁴⁴¹ Provision is also made for the appointment of a legal practitioner for the child.⁴⁴² The Act also states that proceedings of the Children's Court are closed, specifies who may attend the proceedings of a Children's Court, and emphasises that the court proceedings must be conducted in an informal manner, in a relaxed and non-adversarial atmosphere.⁴⁴³ The

⁴⁴¹ S 54 of the Act, and all three versions of the Bill.

⁴⁴² Clause 55 Bill 70 of 2003, reintroduced: "(1) Notwithstanding the provisions of section 54, a child involved in a matter before a children's court is entitled to legal representation. (2)(a) A child may request the court to appoint a legal practitioner to represent him or her in such matter. (b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment. (3) If no legal practitioner is appointed in terms of subsection (2)(a), the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child's right to legal representation. (4) If no legal practitioner is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal practitioner in terms of subsection (2)(b), the court may order that a legal practitioner be assigned to the child by the state, and at state expense, if substantial injustice would otherwise result. (5) The court must record its reasons if it declines to issue an order in terms of subsection (4). (6) If the court makes an order in terms of subsection (4), the clerk of the children's court must request the Legal Aid Board to instruct a legal practitioner to represent the child." Clause 78 of the draft Bill is the same. S 55 of the Children's Act states that: "(1) Where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation: the court must refer the matter to the Legal Aid Board ..." There is a vast difference between clause 55(1) of the reintroduced Bill, which states that "a child involved in a matter before the children's court is entitled to legal representation" and clause 55(1) of Bill 70D, which states that "the court is of the opinion that it would be in the best interests of the child to have legal representation". It is submitted that the wording of clause 55(1) of Bill 70D, and s 55(1) of the Children's Act is not in line with the provisions of international documents, and specifically art 12 of the CRC. See further the discussion at 3 1 1 1 1 above.

⁴⁴³ S 56 of the Children's Act: "Proceedings of a children's court are closed and may be attended only by – (a) a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the purpose of the proceedings; (b) the child involved in the matter before the court and any other party in the matter; (c) a person who has been instructed in terms of section 57 by the clerk of the children's court to attend those proceedings; (d) the legal representative of a person who is entitled to legal representation; (e) a person who obtained permission to be present from the presiding officer of the children's court; and (f) the designated social worker managing the case". Bill 70 of 2003, reintroduced, emphasised that the proceedings must be conducted in an informal manner: clause 56: "(2) If a child is present at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interest of that child. (3) Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial

participation of children in matters before the Children’s Court is also provided for.⁴⁴⁴ Provision is also made for pre-hearing conferences.⁴⁴⁵

atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.” See also n 439.

⁴⁴⁴ S 61 of the Act, as well as clause 61 of Bill 70D and Bill 70B: “(1) The presiding officer in a matter before a children’s court must – (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child’s age, maturity and stage of development, is able to participate [meaningfully: was contained in the reintroduced Bill] in the proceedings and the child chooses to do so; (b) record the reasons if the court finds that the child is unable to participate [meaningfully: was contained in reintroduced Bill] in the proceedings or is unwilling to express a view or preference in the matter; and (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interest of the child. (2) A child who is a party or a witness in a matter before a children’s court may be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No 51 of 1977), if the court finds that this would be in the best interest of that child. (3) The court – (a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interest of the child; and (b) must record the reasons for any order in terms of paragraph (a).” The removal of the word “meaningfully”, which was contained in the reintroduced Bill, is welcome as it would have limited the ability of many children to participate as the court could simply have held that the children were too young to participate “meaningfully”. “[T]his could be read to exclude children with mental disabilities”: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 10. The submission is made that all children should be allowed to express a view, regardless of whether the court finds that due to the child’s age, maturity and stage of development, the child is able to participate in the matter. Any child who is able to express a view, even if this must be done by means of an interpreter or for example, the child’s expression through play or art, must be allowed to do so. The court must take note of the view of the child and then can determine what weight will be attached to the child’s view in the final decision, and whether the child’s preference is in the best interests of the child or not. See also 3 1 1 1 1 above where the participation rights of the child as set out in the CRC were highlighted.

⁴⁴⁵ S 69: “(1) If a matter brought to or referred to a children’s court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to – (a) mediate between the parties; (b) settle disputes between the parties to the extent possible; and (c) define the issues to be heard by the court. (2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child. (3) The child involved in the matter may attend and may participate in the conference unless the children’s court decides otherwise. (4) The court may – (a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended; and (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; (c) consider the report on the conference when the matter is heard.” Ghanaian Child Panels, which perform a mediation function, are discussed at 5 2 1 2 6 below.

The provision of non-adversarial methods of resolving conflict in the Children's Act must be applauded.⁴⁴⁶ Hopefully this will, to some extent, relieve the burden on our courts as well as lead to better conflict resolution, which can be to the benefit of the child concerned, due to the non-adversarial process involved in mediation. De Jong⁴⁴⁷ points out that little mediation has taken place in divorce and family matters in South Africa and that although there is divorce and family mediation offered by private mediators,⁴⁴⁸ these mediators are underutilised. Only a small percentage of the South African population can afford to use these mediation services. There are, however, also mediation services being offered by community-based organisations.⁴⁴⁹ However, they also only offer mediation to the public on a small scale and they also have a lack of funds.⁴⁵⁰ Mediation is not offered by the Family Advocate's offices as the function of the Family Advocate is to evaluate the circumstances of a case and provide the court with a report and recommendation concerning the children in a case.⁴⁵¹

⁴⁴⁶ The provision for family mediation is also in line with recent trends in South African law. Mediation was ordered in *Townsend-Turner v Morrow* 2004 1 All SA 235 (C); this case is discussed in par 3 4 4, as well as in *Van der Berg v Le Roux* 2003 3 All SA 599 (NC), where the parties were ordered not to approach the court again with any dispute regarding their daughter but to first go to mediation. In *G v G* 2003 5 SA 396 (Z) 412D–E the court stressed that mediation is often better for parents and children.

⁴⁴⁷ "Judicial Stamp of Approval for Divorce and Family Mediation in South Africa" 2005 *THRHR* 95.

⁴⁴⁸ Most of whom are affiliated to SAAM, ADRASA and FAMAC. Van der Merwe "Overview of the South African Experience" April 1995 *Community Mediation Update* 3 indicates that the services offered by private mediators provide excellent results.

⁴⁴⁹ Such as street committees, community courts (*makgotla*), community-based advice centres, Family Life and FAMSA.

⁴⁵⁰ De Jong 2005 *THRHR* 96. Van der Merwe April 1995 *Community Mediation Update* 3 indicates that these services offered to the community are seen as being accessible by the community.

⁴⁵¹ Although the Family Advocate does sometimes try to mediate between the parties: De Jong 2005 *THRHR* 96. See also par 3 2 5 and 3 4 5 and Van Zyl "Family Mediation" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 94–95. See also Glasser "Custody on

The most important features of divorce and family mediation are:⁴⁵²

- “• Usually an impartial and neutral third party facilitates the negotiation process in which the parties themselves make their own decisions.
- Divorce and family mediation has a multi-disciplinary character and is regarded as a socio-legal process.
- The aim of divorce and family mediation is to assist parties to reach a mutually satisfying agreement that recognizes the needs and rights of all family members.
- Divorce and family mediation operates under the aegis of the law.
- The mediation process is confidential.
- The mediation process is flexible and creative and can be adapted according to the context of the dispute and the needs of the parties.”

The advantages of mediation are that it provides divorcing parties with more control over the consequences of their divorce,⁴⁵³ has advantages for children

Divorce: Assessing the Role of the Family Advocates” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 108–121.

⁴⁵² De Jong 2005 *THRHR* 96.

⁴⁵³ Parties are also more likely to honour these agreements: De Jong 2005 *THRHR* 97; Goldberg “Family Mediation is Alive and Well in the United States of America: A Survey of Recent Trends and Developments” 1996 *TSAR* 370.

affected by a divorce⁴⁵⁴ and advantages for the judicial system.⁴⁵⁵ ⁴⁵⁶ The disadvantages of mediation are that divorce mediation has been said to be inappropriate where parties have unequal bargaining power;⁴⁵⁷ it is inappropriate in cases of family violence;⁴⁵⁸ mediators are not able to always be impartial and

⁴⁵⁴ The best interests of the child are protected in the mediation process and often the provisions are more advantageous for children than those which the court would have laid down: De Jong 2005 *THRHR* 98. See also Kelly “Mediated and Adversarial Divorce Resolution Processes” 1991 *Family Law Practice* 386–387 and Van Zyl “Family Mediation” in Davel (ed) (2000) 89. Mediation also emphasises that parenthood is not ended upon divorce and that both parents still have parental responsibilities in the restructured family: De Jong 2005 *THRHR* 98. See also Hoffmann “Divorce Mediation and Custody Evaluation: Fundamental Differences” 1989 *Social Work* 105, 107.

⁴⁵⁵ The burden on the courts is lighter as parties make their own important decisions in divorce matters. Parties are also more likely to honour agreements which have been mediated, which means there is less likelihood of them approaching the court at a later stage due to a dispute. The courts are thus saved a lot of administrative work and can use their expertise for more complex matters: De Jong 1995 *THRHR* 98. See also Faris “Exploiting the Alternative in Alternative Dispute Resolution” 1994 *De Jure* 339.

⁴⁵⁶ Van Zyl “Family Mediation” in Davel (ed) (2000) 95 lists the claimed advantages of mediation as: “(a) a mediated divorce is better for children than a litigated divorce; (b) mediation is especially appropriate in family disputes; (c) control of the outcome of the mediation is in the hands of the parties themselves; (d) the mediator is neutral; (e) through mediation parties learn to communicate better with each other so that conflict between them is reduced; (f) mediation usually leads to agreement and such agreements are longer lasting than those reached through the adversary procedure; (g) parties are more satisfied with the process and outcome of mediation than with the adversary procedure; (h) mediation is a fair process which produces fair outcomes; (i) mediation saves time and money”. Van Zyl (96) points out that the entire break-up caused due to divorce is harmful to children, not just litigation in a divorce and that although former spouses must keep in touch it does not result in a continued relationship. Van Zyl (96) also states that it does seem to be true that mediation improves communication between the parties.

⁴⁵⁷ Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 201–202. De Jong 1995 *THRHR* 99: “In actual fact there is always a power imbalance between parties and it would be unreasonable to conclude that mediation cannot succeed unless both parties have precisely the same bargaining power. Similarly, in the adversarial system of litigation, parties who do not have equally good attorneys or advocates do not have equal bargaining power ... [D]ivorce mediation can indeed be used successfully in these cases ... where there is a power imbalance between parties, mediators must exercise a greater measure of control over the process in order to prevent the weaker party ... from being prejudiced.”

⁴⁵⁸ Some writers propose that mediation is never suitable where family violence has occurred: Kabanias and Piper “Domestic Violence and Divorce Mediation” 1994 *JSWFL* 271. Other writers believe that divorce mediation can be used in cases of family violence: Scott-MacNab “Mediation and Family Violence” 1992 *SALJ* 283; De Jong 2005 *THRHR* 100.

neutral;⁴⁵⁹ and that mediation does not offer the same safeguards as litigation.⁴⁶⁰

Mediated agreements must be submitted to the courts for final approval and the courts will act as a safeguard in that they will not approve a mediated agreement that is not in the best interests of the children or that is unjust or unfair towards one of the parties.⁴⁶¹

In family disputes, where there will be a continued relationship between the parties, mediation is recommended.⁴⁶² The adversarial approach can also be very expensive for parties and has been said to increase hostility between parties.⁴⁶³ The question has been raised⁴⁶⁴ whether social workers or legal practitioners should practice mediation. Social workers can help their clients to

⁴⁵⁹ When a mediator's cultural background is not the same as the parties to the mediation then this can give rise to problems: Goldberg "The Practical and Ethical Concerns in Alternative Dispute Resolution in General and Family and Divorce Mediation in Particular" 1998 *TSAR* 755. De Jong 2005 *THRHR* 100–101 submits that this problem is not unique to the mediation process as it is already experienced in our courts and that many of the problems that can arise in mediation can be prevented by proper training courses for mediators.

⁴⁶⁰ Such as that the parties are each represented by a legal representative. However, De Jong 2005 *THRHR* 100–101 submits that many parties in divorce matters do not have legal representation anyway, and that in mediation the parties are encouraged to bring their own legal representatives with if they can afford it. However, few parties in South Africa would be able to do so as legal representation is costly.

⁴⁶¹ De Jong 2005 *THRHR* 102. Van Zyl "Family Mediation" in Davel (ed) (2000) 97–99 states that the disadvantages of mediation are, from a feminist approach, that it emphasises children's interests at the expense of women's rights and that mediators display a bias in favour of joint custody. Other disadvantages are that it may be inappropriate in certain instances, such as where the parties have unequal power; where there is a history of domestic violence; and where there is psychopathy. Mediation also does not pay attention to legal rights, and no record is kept of the proceedings and there is no appeal and thus the parties may be prejudiced. Confidentiality may also cause a problem, if a mediator becomes aware of child abuse they may have to not only terminate the mediation but also have a duty to report the abuse in terms of the Child Care Act 74 of 1983 and the Domestic Violence Act 116 of 1998. Records will have to be kept of mediation in terms of the Children's Act, the court may prescribe how this must be done: s 69(4)(b)–(c); s 71(3)(a)–(b).

⁴⁶² De Jong 2005 *THRHR* 102.

⁴⁶³ Van Zyl "Family Mediation" in Davel (ed) (2000) 90.

⁴⁶⁴ Van Zyl "Family Mediation" in Davel (ed) (2000) 99.

express their emotional needs but may confuse mediation with counselling.⁴⁶⁵ Legal practitioners have a good knowledge of the law but may not be skilled in dealing with clients' emotional problems.⁴⁶⁶

It is hoped that the establishment of the Family Courts will not take too long, due to budget constraints, so that once the Act is in force, it can be to the benefit of children in a practical and effective way by providing for the rights of children to be protected and by making the court easily accessible to all. Infrastructure will also have to be developed, or improved, in order to accommodate the referral of matters by the Children's Court to social workers and mediation.

4 5 DOES THE CHILDREN'S ACT COMPLY WITH THE PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION AND INTERNATIONAL DOCUMENTS?

4 5 1 Introduction

The relevant provisions of the United Nations Convention on the Rights of the Child as well as the European Convention on Human Rights and the African Charter on the Rights and Welfare of the Child were discussed above.⁴⁶⁷ Only

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Van Zyl "Family Mediation" in Davel (ed) (2000) 99 however, submits that "lawyers bring useful negotiating skills to mediation, for fewer than ten percent of divorce cases handled by lawyers go to trial". It is submitted that the view held by Van Zyl, that many lawyers do possess negotiating skills and that often much negotiation takes place in divorce proceedings, is correct.

⁴⁶⁷ See pars 3 1 2 1 1–3 1 2 1 3.

those provisions of the Children's Act which pertain to the parent-child relationship will be evaluated here.

4 5 2 The United Nations Convention on the Rights of the Child

4 5 2 1 General

The Convention on the Rights of the Child is based on the best interests of the child and recognises that the family and parents have the primary responsibility towards children.⁴⁶⁸ It also acknowledges that many children rely on the State for protection and that it is important to involve a child in matters which affect his or her life.⁴⁶⁹

The preamble of the Convention makes it clear that children are best cared for in a family.⁴⁷⁰ Article 5 states that State Parties must respect the responsibilities, rights and duties of parents or members of the extended family or community to provide direction and guidance to the child in the exercise of his rights. Article 7 says that a child has the right to know and be cared for by his parents. The best interest of the child is protected.⁴⁷¹ Article 3 states that State Parties must ensure that the child has the care and protection necessary for his well-being,

⁴⁶⁸ Van Bueren *The International Law on the Rights of the Child* (1995) 68. See also pars 3 1 2 1 1 and 3 1 2 4 above.

⁴⁶⁹ De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289, 296.

⁴⁷⁰ See par 3 1 2 2 1 above.

⁴⁷¹ See also par 3 1 2 2 1 above.

taking the rights and duties of parents, guardians or others legally responsible for him into consideration, and that the State shall take appropriate legislative and administrative measures to this end.

From the above it is clear that new South African legislation outlining the care and protection of children, taking the rights and duties of parents and others into account, was necessary. Such legislation would also have to entrench the best interests of the child standard. South Africa also had to incorporate the Convention on the Rights of the Child into legislation.

Article 14(2) of the Convention specifies that parents or legal guardians have the right “to provide direction to the child in the exercise of his or her right [to freedom of thought, conscience and religion]”. Article 18 emphasises the duty of parents. It stipulates that “both parents have common responsibilities for the upbringing and development of the child. The best interest of the child will be their basic concern”.⁴⁷² Article 27 states that parents or others “have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development”. Article 12(1) provides that a child should have the right to express his views and article 12(2) states that the child has the right to be heard in administrative or judicial proceedings.⁴⁷³

⁴⁷² Art 18(1).

⁴⁷³ Either directly or through a representative or an appropriate body. In order to implement the provisions of art 12 it was found that “[a] change must now occur that necessarily entails actively listening to the voices of children and giving appropriate weight to their opinions and wishes expressed by them by recognising that children have the capacity to reason and rationalise the issues at hand, whatever they may be. In order for this change to occur there has to be a clear understanding of the import and implications of the contents of Article

4 5 2 2 Does the Children’s Act Comply with the Provisions⁴⁷⁴ of the United Nations Convention on the Rights of the Child?

The preamble of the Children’s Act states that “the need to extend particular care to the child has been stated in the ... Convention on the Rights of the Child” and “it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance ... the child, for the full and harmonious development of his or her personality , should grow up in a family environment and in an atmosphere of happiness, love and understanding”. The

12. It has been noted that the nature of Article 12 is such that it is drafted with sufficient detail to be implementable and self-executing ... The CRC requires States to respect the rights contained therein (Article 2) and take appropriate measures to ensure these rights are achieved (Article 4) ... [T]he Convention has adopted a flexible approach and left the matter to member States to implement its provisions in their national laws. State Parties are obliged to ‘assure’ to the child the right to express his or her views. This ensures that States do not hold children directly accountable in the decision-making process and force them to make a decision or express their opinion, it merely obliges States to afford children the opportunity to be heard and participate by allowing them access to the decision-making process. This ensures the child the freedom to choose whether or not to participate in any process. Article 12(1) also has broad application in that it refers to the child expressing his or her views in ‘all matters affecting the child’. This wording does not limit the child’s participation to a closed list of instances ... the implication is that the State is now obliged to assure the child the opportunity to express his or her views in relation to public and private sphere issues and in relation to the latter it appears the child has a right to actively participate in the historically closed arena of family decision-making. This wording also ensures the child’s ability to participate in matters that extend beyond the scope of the Convention itself”: Community Law Centre “Report on Children’s Rights: Children and the Creation of a New Children’s Act for South Africa” 2001 Community Law Centre, UWC <<http://www.communitylawcentre.org.za/children/report-on-children’s-rights.doc>> accessed on 2006-05-10. Art 4 of the CRC binds States to ensure that the child’s right to express his or her views and to be heard is implemented. This provision “place[s] a direct obligation on member States to adopt domestic laws and procedures to ensure the implementation of the rights contained in the CRC in their respective countries. It has been noted that whether or not the steps taken are ‘appropriate’ is a question for the Committee on the Rights of the Child to decide”: Community Law Centre “Report” 2001. Importantly, it has been stated that the reference in art 4 of the CRC to “other measures” reinforces the view of the Committee on the Rights of the Child that legal frameworks alone will not achieve the necessary changes in attitudes and practice in relation to child participation in families, schools and communities. It therefore encourages education on the Convention itself as well as information programmes and systematic training of those working with and for children to try and achieve a more suitable environment to allow for increased child participation”: Community Law Centre “Report” 2001.

⁴⁷⁴ Only the provisions relevant to the topic at hand will be discussed.

emphasis of the Act that the child should grow up in a family environment is important in this study of the parent-child relationship. The preamble of the Convention on the Rights of the Child also emphasises that “childhood is entitled to special care and assistance” and that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibility within the community”. The Convention further makes it clear that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. The Convention thus states that the parent-child relationship is a significant one and the family deserves protection and assistance. The Children’s Act does not go as far.⁴⁷⁵

One of the objects of the Children’s Act is to “make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children”.⁴⁷⁶ Others are “to strengthen and develop community structures which can assist in providing care and protection for children”⁴⁷⁷ and “to protect children from discrimination, exploitation and any other physical, emotional or moral harm

⁴⁷⁵ See further the discussion of whether a child has a right to a family in terms of South African law, at 3 1 1 4.

⁴⁷⁶ S 2(d) of the Act. The same provision is contained in clause 2(a) of the Children’s Bill 70 of 2003, reintroduced and clause 2(d) of Bill 70B and Bill 70D.

⁴⁷⁷ S 2(e) of the Act. The same provision is contained in clause 2(b) of the Children’s Bill 70 of 2003, reintroduced and clause 2(e) of Bill 70B and Bill 70D.

or hazards”.⁴⁷⁸ Another object is to “provide care and protection to children who are in need of care and protection”⁴⁷⁹ and “to give effect to the Republic’s obligations concerning the well being of children in terms of international instruments binding on the Republic”.⁴⁸⁰

The further objects of the Act are to “promote the preservation and strengthening of families”.⁴⁸¹ It is clear from the objects of the Act that article 3 of the United Nations Convention has been complied with here. The importance of parental responsibilities and rights are emphasised in the Act.⁴⁸² This is in accordance with articles 5, 7, 14(2) and 18 of the United Nations Convention on the Rights of the Child. Article 5 of the Convention stipulates that State Parties must “respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate exercise and guidance in the exercise by the child of the rights recognised in the ...

⁴⁷⁸ S 2(f) of the Act. The same provision is contained in clause 2(f) of Bill 70B and Bill 70D. Clause 2(c) of Children’s Bill 70 of 2003, reintroduced read: “to protect children from maltreatment, abuse, neglect ...”

⁴⁷⁹ S 2(g) of the Act. The same provision is contained in clause 2(d) of Bill 70 of 2003, reintroduced and clause 2(g) of Bills 70B and 70D.

⁴⁸⁰ S 2(c) of the Act. The same provision is contained in clause 2(c) of Bill 70B and Bill 70D. Clause 2(f) of Bill 70 of 2003, reintroduced read: “to promote the protection, development and well-being of children”. “While South Africa has signed many international instruments committing us to prioritise children’s needs, in practice, children’s needs tend to get lost amidst the many other competing societal needs, especially within Departments that do not consider children’s issues to be their responsibility. This is partly because there is a lack of clarity as to what exactly our international and constitutional obligations oblige us to do, who is responsible and how to do it. It therefore does not take us further in our struggle to realise Children’s Rights, to simply re-state section 28 of the Constitution in the Bill. This does not provide the much needed guidance that decision makers and service providers need”: Proudlock and Dutschke “Submission Number 1 on the Children’s Rights Chapter of the Children’s Bill” 27 July 2004 11.

⁴⁸¹ S 2(a) of the Act. The same provision is found in clause 2(a) of Bill 70B and Bill 70D. This provision was not found in the reintroduced Bill. See further the discussion of the child’s right to a family at 4 4 7 2 and 3 1 1 4.

⁴⁸² Ss 18–28 of the Act. The same provision is found in clauses 18-28 of all three versions of the Bill.

Convention". The provisions of the Children's Act complies with this section of the Convention in that when determining what is in the best interests of the child, the nature of the personal relationship between the child and his or her parents⁴⁸³ as well as the attitude of the parent or parents towards exercising parental rights and responsibilities⁴⁸⁴ is considered. Additionally, the Children's Act emphasises the need for the child to remain in the care of his or her parent or parents.⁴⁸⁵ Article 7 of the Convention provides that the child has the right to know and be cared for by his or her parents. The provisions of the Children's Act comply with this article of the Convention, for example the Act states that one of its objects is to give effect to the constitutional right of children to family care or parental care.⁴⁸⁶ Article 14(2) of the Convention provides that "State Parties shall respect the rights and duties of parents ... to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". The Children's Act complies with this provision of the Convention in that it defines part of the term "care", which is exercised by a person with parental responsibilities and rights,⁴⁸⁷ as "guiding, directing and securing the child's education and upbringing ... in a manner appropriate to the child's age, maturity and stage of development" and "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".⁴⁸⁸ Article 18(1) of the Convention stipulates

⁴⁸³ S 7(1)(a).

⁴⁸⁴ S 7(1)(b)(ii).

⁴⁸⁵ S 7(1)(f)(i).

⁴⁸⁶ S 2(b)(i). See also s 7(1)(f)(i).

⁴⁸⁷ In accordance with s 18.

⁴⁸⁸ S 1.

that “State Parties shall use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”. The Children’s Act makes provision for more than one person to be able to exercise guardianship over a child,⁴⁸⁹ and provides that such guardianship can be exercised independently and without the consent from the other guardian. In terms of the Children’s Act a person may have “either full or specific parental responsibilities and rights in respect of a child”⁴⁹⁰. The Act also provides that parental responsibilities and rights agreements can be entered into between the mother of the child, or other person having parental responsibilities and rights, and the biological father of the child⁴⁹¹ or any other person. The acquisition of parental rights and responsibilities by mother and fathers are dealt with separately in the Children’s Act. The mother of a child acquires full parental responsibility and rights in respect of the child, whether she is married or unmarried.⁴⁹² The rights and responsibilities of married and unmarried fathers are dealt with separately in the Act.⁴⁹³ The acquisition of parental responsibility and rights by unmarried fathers is subject to a list of criteria.⁴⁹⁴ It is submitted that these sections of the Children’s Act do not comply with Article 18(1) of the Convention, as the “common responsibility[y] for the upbringing and development of the child” by both parents is not emphasised sufficiently in the Children’s Act. There is still a distinction made between mothers and fathers, and married and

⁴⁸⁹ S 18(4).

⁴⁹⁰ S 18(1).

⁴⁹¹ Who did not acquire parental responsibilities and rights in terms of s 20 or 21.

⁴⁹² S 19(1).

⁴⁹³ In s 20 and s 21.

⁴⁹⁴ S 21(1).

unmarried fathers. There is also no provision made to force a parent to take responsibility for the “common responsibility” for the upbringing and development of the child.⁴⁹⁵ The responsibility required by the Convention obviously extends much further than simply the responsibility to provide maintenance for the child.⁴⁹⁶

According to article 12(1) of the Convention the views of the child must be given due consideration in every matter involving the child. It is doubtful whether the Children’s Act sufficiently ensures that this will take place.⁴⁹⁷

Clause 55 of the reintroduced Bill entitled children to legal representation in a matter before a Children’s Court, and stipulated that such representative must be appointed by the court. However the Act itself, is not worded as widely, and only provides for legal representation when the court believes that this will be in the best interests of the child. Section 54 provides any person who is a party in a matter before a Children’s Court to appoint a legal practitioner of their own

⁴⁹⁵ S 30 of the Children’s Act provides for the co-exercise of parental responsibilities and rights by co-holders of parental responsibilities and rights. It is submitted that this section is insufficient for the Act to comply with Article 18(1) of the Convention, as not all parents are co-holders of parental responsibilities and rights in terms of the Children’s Act.

⁴⁹⁶ The provision of maintenance for the child is, for example, protected in s 21(2).

⁴⁹⁷ S 31(a) of the Act provides for the views of the child to be taken into consideration. This provision is contained in clause 31(a) of Bill 70D and Bill 70B.

choice, at their own expense.⁴⁹⁸ It is submitted that the Children’s Act does not entirely comply with the provisions of article 12(1) and 12(2) of the Convention.⁴⁹⁹

⁴⁹⁸ See also s 10 of the Act, which allows every child “that is of such age, maturity and stage of development as to be able to participate” to participate and allows for the views of the child to be given due consideration and s 14 which provides that every child has the right to bring a matter (and to be assisted in doing so) to the court.

⁴⁹⁹ See also Davel in Nagel (ed) (2006) 18: “Section 28 [of the South African Constitution] gives guarantees and specific rights to children and in the implementation of these rights the courts have frequently referred to the Convention on the Right of the Child [see 3 1 1 1 1 above for a discussion of the CRC]. Although still a far cry from the direct participation envisaged in article 12, section 28(1)(h) states that a child has a right to legal representation in civil proceedings affecting him or her if substantial injustice would otherwise result. Furthermore, the legal practitioner has to be assigned to the child by the State at state expense”. “Case law between 1971 and the 1994 *McCall* decision sometimes paid lip-service to the wishes of children concerned, but usually e.g. failed to mention the children’s wishes [eg *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)], ignored their expressed opinions where the evidence in this regard was insufficient or contradictory [eg *Stock v Stock* 1981 3 SA 1280 (A)], or held that the children’s preferences could carry no weight because the children concerned were too young or immature or had been influenced by a parent [eg *Matthews v Matthews* 1983 4 SA 136 (SE)]. One court even sanctioned the use of violence against an unwilling child in order to force him to submit to the arrangements spelled out in his parents’ divorce decree [*Germani v Herf* 1975 4 SA 887 (A)]: Barratt “‘The Best Interests of the Child’ – Where is the Child’s Voice?” in Burman (ed) (2003) *The Fate of the Child: Legal Decisions on Children in the New South Africa* 145, 147–148. Barratt (148) further states that the dictum in the *McCall* case that a child who has the necessary maturity to express his or her opinion should have weight given to his or her expressed opinion, accords with the provisions of art 12(1) of the CRC. The *McCall* case is discussed in 3 3 3 1 above. Barratt (149) identifies that the significance of art 12 of the CRC is that it recognises the child as a full human being, who is able to participate fully in society. Barratt (150–151) cautions that because children may not yet be competent to make decisions on their own, that this task will fall to adults. These adults may need to restrict the child’s choices where this is in the child’s “basic and developmental interests”. Basic interests include physical, intellectual and emotional care, whereas developmental interests “include the opportunity to maximise available resources (such as education) so that the child’s capacities are developed to her best advantage”. See further in this regard Eekelaar “The Emergence of Children’s Rights” 1986 *Oxford Journal of Legal Studies* 161, 170. Barratt (151–154) emphasises the importance of “the procedural questions concerning the manner in which the child’s view are solicited”. Procedural issues are said to be important in the following ways: “[a]t the most basic level, the child who is able to express a view has a right of participation, and this right is only meaningful if proper procedural opportunities are available to her. Regardless of whether the child’s wishes ultimately prevail, she may benefit from the very fact of involvement in a decision that will have an enormous impact on the rest of her life. She may feel that she has some control over the situation, is informed about proceedings and possible outcomes, and at the very least, will not feel ignored or that her feelings are of little importance.” Barratt (154–157) identifies the procedural pitfalls in the South African legal system such as that children may feel intimidated and that legal practitioners may lack the necessary skills to interpret children’s views in a meaningful way. However, she does identify the opportunities that exist in the South African legal system for a child to express his or her views, these are when the child appears before the presiding officer in court or appears as a witness, a legal practitioner may be assigned to represent the child, experts such as psychologists may interview the child, the child’s view may be expressed in the Family Advocate’s report. Barratt (156–157) concludes that “[w]hile

The well-being and protection of the child and the child's rights are emphasised throughout the Children's Act.⁵⁰⁰ The best interests of the child are also stressed.⁵⁰¹ This complies with article 3 of the Convention which states that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration". Section 9 of the Children's Act does not refer to the best interests of the child as "a primary consideration"⁵⁰² but instead stipulates that "the standard that the child's best interest is of paramount importance must be applied". This section of the Children's Act more than fulfills the requirement laid down in the Convention on the Rights of the Child.

The responsibilities and rights of persons other than parents are also recognised.⁵⁰³ Section 22 of the Children's Act provides that responsibility and rights agreements may be drawn up between the mother or person having parental responsibility and rights and "any other person having an interest in the care, well-being and development of the child". This is in line with article 5 of the

South African divorce courts are more likely to consider the child's views than they were ten years ago, there is very little evidence that they have paid any attention to the question of whether the children concerned have been given a chance to participate in the decision-making process, and as yet, there is no reported judgement highlighting the state's obligation to provide such opportunities".

⁵⁰⁰ Eg in the definition of "care" in s 1.

⁵⁰¹ Eg in the definition of "care" it is emphasised that the person who cares for the child must "ensure that the best interests of the child is the paramount concern in all matters affecting the child" and also in s 6(2)(a) and s 9 of the Act.

⁵⁰² Own emphasis.

⁵⁰³ Eg see the definition of "care-giver", which includes "any person other than a parent or guardian, who factually cares for a child and includes ... a person who cares for a child with the implied or express consent of a parent or guardian of the child". "[F]amily member" in s 1 includes not only the parent of the child but also "(b) any other person who has parental responsibilities and rights in respect of the child; (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; (d) or any other person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".

Convention which, in addition to the responsibilities and rights of parents also recognises the responsibilities and rights of members of the extended family or community.

From this overview it is clear that the Children's Act does comply with many of the provisions⁵⁰⁴ of the United Nations Convention on the Rights of the Child. However, better provision should have been made for the child to express his or her views in every matter affecting him or her.

4 5 3 The African Charter on the Rights and Welfare of the Child

4 5 3 1 Introduction

Article 4(1) of the Charter specifies that the child's best interests shall be the primary consideration in all actions concerning the child. Article 9 stresses that children have the right to freedom of thought, religion and conscience and that parents have a duty to provide direction and guidance. Article 18(2) stresses that steps must be taken "to ensure equality of rights and responsibilities to children during marriage and in the event of its dissolution".⁵⁰⁵ Article 20 of the Charter outlines parental responsibilities. Article 20(2) provides for States Parties to assist parents and provide material assistance and support programmes. Article 31 stipulates that children have responsibilities towards their family, society and

⁵⁰⁴ Relevant to the discussion at hand.

⁵⁰⁵ Provision for the necessary protection of the child must also be made when a marriage is dissolved.

the State and must “work for the cohesion of the family, respect [their] parents [and] superiors ... and ... assist them in case of need”.⁵⁰⁶

4 5 3 2 Does the Children’s Act Comply with the Provisions of the African Charter?

The preamble of the African Charter stipulates that “for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. The wording of the preamble of the Children’s Act is nearly identical.

The definition of a child, as being a person below the age of eighteen years, is the same in both the African Charter and the Children’s Act.⁵⁰⁷

The best interests of the child are stressed in the Children’s Act.⁵⁰⁸ Article 4(1) of the Charter stipulates that the best interests of the child shall be “the primary consideration” in matters concerning the child. The Children’s Act states that the best interests of the child are of “paramount importance” in every matter concerning the child.⁵⁰⁹ It is submitted that the term “paramount importance” complies with the “primary consideration” that must be given to the best interests of the child according to article 4(1) of the African Charter.

⁵⁰⁶ Art 31(b). See further par 3 1 1 1 3 for a discussion of the ACRWC.

⁵⁰⁷ Art 2 of the Charter, s 1 of the Children’s Act. See also par 3 1 1 1 3 for a comparison of this definition with the definition of a child contained in the CRC.

⁵⁰⁸ S 2 (a)(iv), s 6, s 7 and s 9 of the Act.

⁵⁰⁹ S 2(a)(iv), s 9.

Article 4(2) of the African Charter provides for “a child who is capable of communicating his/her own views” an opportunity to be heard.⁵¹⁰ Section 10 of the Children’s Act states that children “of such an age, maturity and stage of development as to be able to participate” have a right to participate “in an appropriate way and views expressed by the child must be given due consideration”. Article 4(2) of the African Charter also provides that the child may be heard directly or through a representative. Section 10 of the Children’s Act does not provide for a representative.⁵¹¹ It is submitted that the right provided for in the Children’s Act is more restrictive than that provided for in the African Charter. The charter does not require that a child is “able to participate” but only that a child is “capable of communicating his/her views”. Thus, the Children’s Act does not fully comply with Article 4(2) of the African Charter.

Article 9(2) and (3) of the Charter provides for parents to direct and guide the exercise of the child’s right to freedom of thought, religion and conscience. Provision is made for compliance with this article in the definition of “care” found in section 1 of the Children’s Act, which stipulates that parents may guide and direct the child’s religious upbringing.

⁵¹⁰ The complete wording of this article is quoted in 3 1 1 1 3.

⁵¹¹ The possible appointment of a representative is only provided for in matters before the Children’s Court: s 55. S 61, which deals with participation of children in the Children’s Court, also provides that a child must be allowed to express a view “if the court finds that the child, given the child’s age, maturity and stage of development ... is able to participate in the proceedings”.

Article 10 of the African Charter provides that parents have “the right to exercise reasonable supervision over the conduct of their children”. This provision is accommodated in the Children’s Act in the definition of “care” in section 1. This section states that care means, amongst other things, “guiding the behaviour of the child in a humane manner”.

The African Charter states in article 14 that parents must be assisted in caring for their children by the State providing nutrition, water and primary health care for children. The Children’s Act does not directly protect this right but does comply with this provision of the Charter, as section 8(1) stipulates that the rights which a child has in terms of the Act supplements the rights which a child has in terms of the Constitution. Section 28 of the Constitution adequately provides for the rights of children as required in article 14 of the Charter.

Article 18(1) of the African Charter stipulates that the family is the natural basis of society and it shall enjoy the protection and support of the state for its development and establishment. Section 2(a) of the Children’s Act states that one of the objects of the Act is “to promote the preservation and strengthening of families” and to give effect to the right of children to parental care. However, the Children’s Act does not stipulate directly that the family will enjoy the protection and support of the state for its development and establishment.⁵¹²

⁵¹² See also the discussion of the child’s right to a family at 3 1 1 4.

Article 18(2) stipulates that “the equality of right and responsibilities of spouses with regard to children during marriage and in the event of its dissolution” must be provided for. Section 20 of the Children’s Act provides for married fathers to acquire automatic parental rights and responsibilities in respect of their biological children. On the face of it, this complies with article 18(2) of the Charter, however a court may grant an order regulating guardianship, care or contact of the children,⁵¹³ for example at divorce, and there is no provision in the Children’s Act that clearly stipulates that the right and responsibilities of spouses with regard to their children should be equal during the marriage and at its dissolution, if applicable.⁵¹⁴

Article 19 of the Charter provides for the right to parental care. The Children’s Act fully complies with this provision. Section 2(a)(i) provides that one of the objects of the Act is to give effect to the constitutional right of children to parental care. Section 7 of the Act provides that when applying the best interest of the child standard some of the factors taken into account are the nature of the relationship between the child and the parents, the effect of separation from the parents on the child and the need for the child to remain in the care of his or her parents.

⁵¹³ The court may assign contact and care to an interested person: s 23. Court may assign guardianship: s 24.

⁵¹⁴ The Children’s Act does provide that in major decisions involving the child “due consideration must be given to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child”: s 31(2)(a).

The responsibilities of parents are emphasised in the Act.⁵¹⁵ This is in compliance with article 20 of the Charter which states that parents have the primary responsibility for the upbringing and development of the child. However, the Children's Act does not make adequate provision for the assistance of parents in the performance of child-rearing and to ensure that children of working parents are provided with facilities and services, as is required in Article 20 of the African Charter.

Article 31 of the Charter provides that children have responsibilities towards their family, society the state and the community. The responsibilities of children are also emphasised in the Children's Act.⁵¹⁶ Section 16 also states that children have responsibilities towards their family, community and the state and is thus fully compliant with the provision of the African Charter.

4 5 4 The South African Constitution

4 5 4 1 Introduction

The provisions of the South African Constitution have had a direct impact on the content of the Children's Act. Section 2 of the Children's Act clearly stipulates that one of the objects of the Act is "to give effect to the constitutional rights of children". The most important part of the Constitution in relation to children is

⁵¹⁵ Ch 3.

⁵¹⁶ S 16, this provision was also found in clause 16 of Bill 70B and Bill 70D.

section 28, which clearly sets out the specific rights that children have. Section 28(2) states that “[a] child’s best interests are of paramount importance in every matter concerning the child”.⁵¹⁷ In the section that follows the most relevant wording, in relation to parental responsibility, of the Children’s Act will be identified and analysed to determine whether it complies with the provisions of the Constitution. In particular, the relevant provisions of the Constitution will be examined in order to determine whether they comply with section 28(1)(b) of the Constitution, which provides for the child’s right “to family care or parental care, or to appropriate alternative care when removed from the family environment”.

4 5 4 2 Does the Children’s Act Comply with the Provisions of the Constitution?

Section 8(1) of the Children’s Act⁵¹⁸ states that the rights which a child has in terms of the Act supplement the rights which a child has in terms of the Bill of Rights.⁵¹⁹ Thus, the aim of the Children’s Act is to not only provide for the rights of children, as contained in the Constitution, but also to clarify and supplement these rights. Examples of the ways in which the Children’s Act does this will be provided later in this discussion.

⁵¹⁷ See further 1 4 2 for a discussion of the best interests of the child in light of the provisions of the South African Constitution.

⁵¹⁸ The same provision is found in Bill 70D and Bill 70B. See also s 6(2)(a) which states that all proceedings or decisions concerning a child must “respect, protect, promote and fulfil the child’s rights as set out in the Bill of Rights”.

⁵¹⁹ S 28 of the Constitution was directly incorporated into clause 11 of the reintroduced Children’s Bill; this has been removed from the Act.

The best interests of the child are emphasised in section 9 of the Act, as well as in section 7 of the Act.⁵²⁰ These sections of the Act comply with section 28(2) of the Constitution, which states that “[a] child’s best interests are of paramount importance in every matter concerning the child”. Not only does the Children’s Act comply with this provision of the Constitution,⁵²¹ but it goes further and clarifies this right. This is done by providing factors⁵²² that must be taken into consideration whenever the Children’s Act requires the best interests of the child standard to be applied.

Section 2(a) of the Children’s Act provides that one of the objects of the Act is to “promote the preservation and strengthening of families”. Section 2(b)(i) states that another object of the Act is to give effect to the constitutional right of children “to family care or parental care or appropriate alternative care when removed from the family environment”. The wording of section 2(b)(i) of the Act is identical to the wording of section 28(1)(b) of the Constitution. The Children’s Act clarifies the child’s right to parental or family care by making provision for the assignment or obtainment of parental rights and responsibilities towards a child. Section 18 of the Act defines parental responsibilities and rights as “including the responsibility and the right – (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute towards the maintenance of the child”. Thus, in order to determine the meaning of parental responsibilities

⁵²⁰ For a detailed discussion of the best interests of the child standard, see 3 5, 4 2 7 and 4 4 7.

⁵²¹ S 9 of the Act states that “[i]n all matters concerning the care, protection and well-being of the child the standard that the child’s best interest is of paramount importance, must be applied”.

⁵²² In s 7 of the Act. See also 4 4 7 above.

and right and how these enforce the child's right to parental or family care, it is necessary to look at the definitions of "care", "contact" and "guardianship" as provided for in section 1 of the Act. These definitions have already been dealt with in detail⁵²³ and only their most pertinent features will be mentioned here. The definition of care includes providing the child with a place to live, financial support and safeguarding the well-being of a child. Additionally, care includes guiding and directing the child's education and upbringing, as well as guiding the behaviour of the child. The Act also defines care as "maintaining a sound relationship with the child". All of these aspects mentioned in the definition of care form part of parental or family care.⁵²⁴ Similarly, part of the definition of contact is defined as "maintaining a personal relationship with the child".

Sections 19, 20 and 21⁵²⁵ of the Children's Act specifies when parents obtain parental responsibilities and rights towards their children. Provision is also made in sections 23 and 24 of the Children's Act for the assignment of contact, care or guardianship to an interested person by the court. Thus, provision is made for the child's right to parental and family care, despite the fact that these sections seem

⁵²³ Guardianship was discussed in 4 4 4, care in 4 4 5 and contact in 4 4 6 above.

⁵²⁴ Or alternative care, the Children's Act makes provision for holders of parental responsibilities and rights to be person's other than parents: s 22(1)(b), s 23, s 24. S 32 of the Act even provides for the safeguarding and protection of the child when the child is in the care of a person not holding parental responsibilities and rights.

⁵²⁵ Parental responsibilities and rights, as provided for in the Children's Act are discussed at 4 4 3 above and thus will not be dealt with in detail here.

to focus more on the parents than on the children.⁵²⁶ This is at least balanced by provision for the best interests of the child to be taken into account.⁵²⁷

The child's right to parental or family care is further defined by the provisions of section 28 of the Children's Act, which provides for the termination, extension, suspension or restriction of parental responsibilities and rights, and section 30 which provides for co-holders of parental responsibilities and rights. Section 31 stipulates that in major decision involving the child the person making the decision must also give consideration to the views and wishes of any co-holder of parental responsibilities and rights.

From the above discussion it is clear that provisions of the Children's Act clarifies the child's right to family or parental care as specified in section 28(1)(b) of the Constitution. This is done by means of defining the content of parental rights and responsibilities and specifying who acquires these responsibilities and rights and when.

4 6 CONCLUSION

Criticism has been levelled, against the Children's Act, such as that:

⁵²⁶ S 19-21 simply state when the biological parents have parental responsibilities and rights in respect of a child, thus focusing on the rights of the parents and not the right of the child to parental care.

⁵²⁷ For example, in s 23(2)(a), s 24(2)(a) where it is specifically mentioned, and s 9 which covers all matters affecting the child.

“The original draft contained a range of primary preventative measures to promote the care of children in their own families and communities ... [and] early intervention mechanisms ... the Bill [as it then was] has ... undergone many changes and is a pale shadow of its former self.”⁵²⁸

Other criticisms include the following:

“The concept of ‘informal kinship care’ has disappeared, along with provision for a grant for the children concerned. Poor families would thus still have to go through children’s court investigations and cumbersome associated processes to access a grant to enable them to care for destitute child relatives. The overstretched foster care system is incapable of dealing with most such children. Meanwhile, social workers and the children’s court stand to remain swamped with applicants who simply need financial support, crippling their capacity to respond to cases of abuse and neglect [and] the proposed children’s court structure has been significantly downgraded. Powers which would have been devolved to these courts to make them accessible to families who cannot afford high court costs have been removed, along with all references to essential training and qualifications for Commissioners of Child Welfare. The Bill has lost most of its potential to prevent children from falling into damaging

⁵²⁸ Allsopp “The Children’s Bill has Lost its Soul” (August 2003) in *Child and Youth Care* at <<http://www.cyc-net.org/features/ft-SAchildbilleditional.html>> accessed on 2004-01-17. See also Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004 Children’s Institute, UCT who observe that the Bill (as it was then) focuses on secondary and tertiary interventions after a child has been abused instead of improving the provision of primary prevention and early intervention services. They also emphasise that in the White Paper of Social Welfare in 1997 there was a shift away from a residual welfare approach towards a social developmental approach and that the Bill (as it was then) does not reflect this change in policy.

circumstances. And when they then have to turn to formal protective services, these services as presently provided for would continue to fail them.”⁵²⁹

The fact that the passage of the Children’s Act in Parliament was delayed due to consultations with non-governmental organisations has also been criticised.⁵³⁰ However, it was an essential move⁵³¹ on the part of our Legislature to incorporate the laws relating to children in a single, comprehensive

⁵²⁹ Allsopp *Child and Youth Care* <<http://www.cyc-net.org/features/ft-SAchildbilleditional.html>> accessed on 2004-01-17. Additional criticism against the passage of the (as it was then) Children’s Bill was that “we are all in the dark as to how much this Bill is going to cost” and that “our children should not be guinea pigs in social experiments”: Maclemaan “Children’s Bill Approved by Assembly” 2005-10-21 *Mail and Guardian online* <http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news_nationa...> accessed on 2005-10-21. See also Bower and Proudlock “Bill Needs to be Kept on Everyone’s Agenda” June/July 2003 *Children First* <www.childrenfirst.org.za/shownews?mode=content&id=16927&refto=2536&P...> accessed on 2006-05-12, where concern was expressed about the costing of the Bill and that “[t]he results of such costing could be used to reasons to dilute the cornerstone provisions of the Bill because they are too costly”. See further Sloth-Nielsen and Van Heerden “The Political Economy of Child Law Reform: Pie in the Sky?” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 107, for a discussion of the budgetary implications of reforming child law. Before the Children’s Bill was drawn up concerns were expressed by the Law Commission (South African Law Commission Issue Paper 13 Project 110 “The Review of the Child Care Act” First Issue Paper (18 April 1998) par 11.2 and 11.4) “... that proper mechanisms for future control of the implementation of [the Act’s] principles and provisions be put in place in the principal legislation itself” and that the new legislation will not in itself improve children’s lives “... unless sufficient resources (both human resources and financial resources) are allocated to underpin new child law”. The Committee (in par 11.2) indicated that they were “alert to the need for a commitment from government to allocate sufficient resources (within available means) to underpin the proposed children’s statute”.

⁵³⁰ “Social Cohesion Requires Stronger Partnerships with NGO Sector says Minister Skweyiya” 11 April 2005 <<http://www.info.gov.za/speeches/2005/05041209151008.htm>> accessed on 2006-04-10. During his speech the Minister expressed the opinion that “various well-intentioned Children’s rights advocacy groups – lobbying for the inclusion of this or that particular element in the Bill in order to construct a no expenses spared ‘be all and end all’ piece of legislation – were acting as if the delay in passing the Children’s Bill was of no consequence”. He also stated that if there are any shortcomings in the Bill that these can be amended later.

⁵³¹ “[T]he need for revision and reform of the law relating to children has, to my mind, been proven, and much of the Law Commission’s proposals [as they then were] are both uncontroversial and manifestly necessary to improve access by children to their rights”: Sloth-Nielsen “Changing Family Relationships in the Proposed New Children’s Statute” Unpublished Notes UP (2002).

statute.⁵³² Once in force, this legislation should contribute to clarifying the rights of children, the rights and responsibilities of parents and attempting to eliminate hostility in legal actions where children are affected. To have the laws relating to children in one piece of legislation, leads to easy accessibility of the law. However, we must be careful not to move towards a system of codification where the law is not flexible and adaptable to the facts at hand. The Children's Act does seem to have provided a safeguard against this by the inclusion of the best interests⁵³³ of the child standard.⁵³⁴

“The new Children's [Act] will modernise South African Law as it takes a child's rights approach, promotes mediation rather than conflict and recognises flexible and diverse family forms. These aspects converge to provide a shift in

⁵³² Bower and Proudlock “Bill Needs to be Kept on Everyone's Agenda” June/July 2003 *Children First* <www.childrenfirst.org.za/shownews?mode=content&id=16927&refto=2536&P...> accessed on 2006-05-12, also express the opinion that the Bill “is a proactive piece of legislation and could go a long way to ensuring that children's constitutional rights to survival, development, participation and protection are enshrined” and that the Bill improves upon the Child Care Act of 1983 by “provid[ing] for a focus on the need to prevent abuse and neglect from occurring and to support families in caring for their children. Thus, poverty alleviation strategies, an inter-departmental approach to caring for children's survival, development and protection needs, a comprehensive social security system, and an overall foundational commitment to the prioritisation of children's rights are the cornerstones”.

⁵³³ Already in 1992 the proposal was made that “there is a need for careful re-examination of the ‘best interests of the child’ principle as a focal point in decision making ... Decision-making in child custody disputes is very different from what it is in other types of litigation. Child-custody disputes are ‘person-oriented’ as compared with ordinary litigation, which generally focuses on the Act or subject-matter of the litigation rather than the evaluation of the parties, except to determine which party's version of the Act is more credible. A second difference is that child-custody disputes require a prediction of the future – with whom will this child be better off in the years to come? A decision has to be reached based on the future best interests of the child, whereas adjudication normally requires a determination of past Acts and facts. Applying the test is thus a difficult process, very different from the test employed in ordinary litigation and one which raises enormous problems for the judiciary in the interpretation and evaluation of the personalities of the parties and the evidence produced to support their claims”: Clark “Custody: The Best Interests of the Child” 1992 *SALJ* 391, 394–395. The application of the standard of the best interests of the child is not an easy one. See further the discussion on the best interests of the child at 3 5 above.

⁵³⁴ Clause 1, 6, 7 and 9 of Bill 70D, also Bill 70B. See also 3 5 above.

emphasis from parental power to parental responsibilities and rights ... Parental power is historically rooted in private law and was used more to reduce conflict between parents on divorce; however this did not recognise the emerging self-determination of the child and the varied roles of ‘care-givers’ in the lives of children.”⁵³⁵

Human⁵³⁶ cautions that “kinderregte as werkbare begrip vereis inisiatiewe oor ‘n veel breër front as net wetgewing wat verorden word”. However, Human also recognises that legislation is “die belangrikste instrument om kinderregte te erken, af te dwing en te beskerm”.⁵³⁷ Legislation alone cannot ensure that children’s rights are protected. For the successful implementation of children’s rights, they must form part of the community’s value system. The general public, as well as children, must be educated about children’s rights as well as the provisions of the new Children’s Act.

The Law Reform Commission had originally recommended⁵³⁸ that the concept “parental power” be replaced by the term “parental responsibility”. The Law Reform Commission also recommended⁵³⁹ that the term “access” be replaced by the term “contact” and that the term “custody” be replaced by the term

⁵³⁵ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45.

⁵³⁶ Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid Afrikaanse Reg* (LLD Thesis 1998 US) 216.

⁵³⁷ Human 2000 *TVR* 139.

⁵³⁸ See further 4 2 3 2 above.

⁵³⁹ See further 4 2 3 2 and 4 2 5 above for a discussion of the term “care” by the Law Reform Commission as well as 4 2 6 above for a discussion of the term “contact” by the Law Reform Commission.

“care”. These recommendations of the Law Reform Commission have all been included in the Children’s Act.⁵⁴⁰

From the above analysis of the provisions of the Children’s Act it is clear that revolutionary changes have taken place in the parent-child relationship in South Africa. One example of these changes is that fathers of children born out of wedlock now acquire automatic parental responsibilities and rights to their children, whereas in the not too distant past these fathers did not even have a right of access to their children.⁵⁴¹ Another important change is that parenting plans may now be registered with the Family Advocate or the court.⁵⁴² These parenting plans also make provision for parties other than parents to have parental responsibilities and rights in the child.⁵⁴³

⁵⁴⁰ The definitions of “care” and “contact” are included in s 1 of the Children’s Act 38 of 2005. The definition of parental responsibilities and rights is found in s 18 of the Children’s Act. “Parental rights and responsibilities”, as defined in the Children’s Act, are discussed in 4 4 3 above. The term “guardianship”, as defined in the Children’s Act, is explained in 4 4 4 above. The term “care”, as defined in the Children’s Act, is dealt with in 4 4 5 above. The term “contact”, as defined in the Children’s Act, is discussed in 4 4 6 above.

⁵⁴¹ Access of fathers of children born out of wedlock to their children in Roman law is explained in 2 2 5 5 above. Access of such fathers to their children in terms of Roman Dutch law is examined in 2 3 4 above. The concept “access” as found in current South African law is discussed in 3 4 above and the rights of access of fathers of children born out of wedlock are analysed in 3 4 3 above. S 21 of the Children’s Act 38 of 2005 now provides for the acquisition of full parental responsibilities and rights by unmarried fathers in certain instances. This section was discussed in 4 4 3 1 above.

⁵⁴² The Law Reform Commission had also originally recommended that parenting plans be allowed to be registered at the Family Advocate’s offices or be made an order of court: 4 2 3 2 2 above.

⁵⁴³ Parenting plans are dealt with in s 22 of the Children’s Act 38 of 2005. The term used for these plans in the Act is “parental responsibilities and rights agreements”. The section provides for the mother or any person having parental responsibilities and rights in respect of a child, to enter into such an agreement with the biological father of a child who does not have parental responsibilities and rights in the child in terms of s 20 or 21, or with any other person who has an interest in the care, development or well-being of the child: s 21(1) of the Children’s Act 38 of 2005. This part of the Children’s Act was discussed in 4 4 3 1 above. The access rights of interested persons other than parents was examined in 3 4 4 above. The right to a family was analysed in 3 1 1 4 above.

The Children's Act has not changed the common law definition of guardianship. However, there is now greater scope in terms of the Children's Act for parties other than the child's parents to have parental responsibilities and rights in a child.⁵⁴⁴ The Children's Act is not perfect⁵⁴⁵ but is welcome and should make an important contribution to our law. In the following chapter the provisions of the Children's Act will be briefly compared with similar legislation found in other countries.

⁵⁴⁴ This could include guardianship. S 24 of the Children's Act 38 of 2005 provides that "any person having an interest in the care, well-being and development of a child" can apply to the High Court for an order granting guardianship to them. S 23 of the Act provides for the assignment of care and contact to an interested person by application to the court. For a discussion of the current law regulating guardianship, see 3 2 above. For an analysis of the current law regulating custody, see 3 3 above. The current law regulating access is described in 3 4 above.

⁵⁴⁵ Yet, what piece of legislation can be regarded as being perfect, in the sense that it provides for every eventuality?