

**THE PLACEMENT OF CHILDREN IN NEED OF CARE AND PROTECTION:  
A COMPARATIVE STUDY BETWEEN SOUTH AFRICAN LAW AND DUTCH LAW  
IN THE LIGHT OF INTERNATIONAL STANDARDS**

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by

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# DEDICATION

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For Juliette and Jonathan

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## ABSTRACT

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All children have the right to feel secure and to be protected. The two human rights instruments which specifically purport to protect children are the United Nations Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). Since 1995 both South Africa and the Netherlands have been state parties to the former treaty. South Africa is also bound by the latter document, which was intended to provide an additional standard pertaining to children on the African continent, whereas the Netherlands is bound by the European Convention. Therefore both countries are required to incorporate these standards in their national legislation. This poses the question whether South Africa and the Netherlands are in compliance with their international obligations pertaining to the provisions in relation to children in need of care and protection.

When the child's own family, even with the necessary support, is not able to adequately care for the child, it may be necessary for the child to be removed from the family environment. In removal cases the state is responsible for ensuring the child's safety and well-being by providing alternative care. However, the latter should, in principle, be of a temporary nature. As the protection of a child in need of care and protection generally cannot be considered in isolation of his or her family,<sup>1</sup> all efforts should be made to maintain families together, unless this would be contrary to the child's best interests.

Pertaining to the latter, Article 8 of the European Convention plays a significant role in the Netherlands and beyond European borders. The standards as provided in these treaties, together with the input of the Committee on the Rights of the Child and case law as developed by the European Court of Human Rights, form the backdrop against which the substantive and procedural law pertaining to children in need of care and protection in the two countries are tested.

The present thesis explores specifically the position of children in need of care and protection in terms of South African law and Dutch law. First an inventarisation takes place

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<sup>1</sup> The phrase "his and her" is used for the purpose of readability and consistency and not "her and his". However, it should not in any way be interpreted as a gender preference.

regarding the international and regional standards, on the basis of which it is ascertained which provisions offer a better protection for these vulnerable children and thus should prevail. Subsequently, the relevant provisions in the national legislation of South Africa and the Netherlands will be discussed in the context of comparative analysis. As a result thereof, some recommendations are formulated in which it is attempted to contribute to a possible improvement of the substantive and procedural provisions on a national level pertaining to both countries. The purpose of the latter is ultimately to provide a better protection for children in need of care and protection, as well as the realisation and enhancement of their rights in terms of international law.

## KEY WORDS

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Children's rights

Family life

Parental responsibilities and rights

Care (custody)

Guardianship

Contact (access)

Child in need of care and protection

Removal

Placement

Foster care

Adoption

Residential care

## PREFACE

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“If you were to see into the heart of any of the loveless, hopeless, hate-filled, fear-driven, cold, hungry, pain-possessed lost ones, captive to conditions with which they need help, you could understand why the ancestors teach that compassion must be humankind's first concern.”

*Messages from the Ancestors – Wisdom for the Way*

by Maryellen Kelley & David Cumes, M.D. (2012)

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# CHAPTER 1: INTRODUCTION

## 1.1 Background to the study

Every child has the right to care and protection. Whilst during childhood the child's capacities are evolving, he or she is dependent and vulnerable.<sup>2</sup> The parents or care-giver of the child therefore have the responsibility to care for and protect the child, and are required to act in the child's best interests until the child is capable of acting on his or her own accord.

The standard of the child's best interests, however, has not always been prevalent. Originally children were subjected to the tradition of paternal supremacy which coincided with the so-called non-interventionist tradition,<sup>3</sup> meaning that the state was reluctant to intervene in the lives of children and their families. This paternalistic approach developed gradually into a more equal relationship between both parents pertaining to the upbringing of their children. In the 20<sup>th</sup> century the emphasis shifted from the rights of the parents to the rights of the child, which was spearheaded by the adoption of international and regional documents on children's rights.<sup>4</sup>

However, with the emerging of the tradition of children's rights, and in particular the standard of the best interests of the child, the privacy of the family was no longer regarded as sacrosanct.<sup>5</sup> Therefore, the notion developed that where parents were not able to adequately protect the interests and well-being of the child, the state had the duty to

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<sup>2</sup> Lansdown distinguishes between the cognitive, physical, social, emotional and moral capacities: "The evolving capacities of the child" (2005) *Innocenti Insight-Unicef* xiii.

<sup>3</sup> See Breen *The Standard of the Best Interests of the Child – A Western Tradition in International and Comparative law* (2002) 16.

<sup>4</sup> Sinclair in Davel (ed.) *Children's Rights in a transitional Society* (1999) 62 and further.

<sup>5</sup> See Bruning *Rechtvaardiging van kindbescherming - naar een nieuw maatregelenpakket na honderd jaar kindbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam); also "The evolving capacities of the child" (2005) *Innocenti Insight-Unicef* 6.

intervene in order to ensure the protection of the child concerned.<sup>6</sup> As will be seen, although subject to specific limitations, the latter approach is nowadays as prevalent as never before.<sup>7</sup>

It is evident that all children require care and protection, which should be tailored to the needs of the individual child. However, for the purpose of this thesis the phrase “children in need of care and protection” refers to children who require additional care and protection services which are facilitated or provided by the state.<sup>8</sup> The notion of children in need of care and protection has been a societal issue in many countries, throughout time. Zaal has noted that since early times abandoned and orphaned children were taken into care by religious institutions and individual benefactors. Interestingly, the provision of care outside the family environment was foreign to the African continent since in many African tribes these children would be cared for by members of the extended family.

According to Zaal, the Western concept of removing children from the home environment and the placement in institutions was imported to the African continent during the colonial time.<sup>9</sup> In the 19th century the development of so-called reformatories took place in order to cater for the rehabilitation of child offenders.<sup>10</sup> Towards the end of the 19<sup>th</sup> century and around the onset of the 20<sup>th</sup> century, various countries started to enact legislation which provided for the placement of children in need of care and protection in terms of criminal law

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<sup>6</sup> The duty to protect the child from abuse and neglect emanates from Article 19 of the Convention on the Rights of the Child (1989), hereinafter referred to as the CRC. See also Article 16 of the Charter on the Rights and Welfare of the African Child (1990), hereinafter referred to as the African Children's Rights Charter. For a more detailed discussion see section 2.2.2.5.

<sup>7</sup> For a more detailed discussion on the prohibition of unlawful interference, see section 5.1.1.2.

<sup>8</sup> See also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-3.

<sup>9</sup> See Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system (LLD thesis 2008 University of the Witwatersrand) 33-34.

<sup>10</sup> These institutions provided for the rehabilitation of juvenile delinquents/child offenders, see Zaal (LLD thesis 2008 University of the Witwatersrand) 35. In the Netherlands these institutions were referred to as “opvoedingsgesticht”, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 419. It is submitted that the phrase “children in need of care and protection” encompasses children in conflict with the law, which also needs to be addressed with urgency. However, the field of juvenile/child justice falls outside the ambit of this thesis and therefore will not be further discussed.

as well as civil law.<sup>11</sup>

Ever since, the effectiveness of the care and protection proceedings and the imposition and implementation of the court orders have been the subject of academic debate and research.<sup>12</sup> Recent societal developments have affected many families worldwide,<sup>13</sup> which consequently seem to have contributed to an increase in the number of children in need of care and protection.<sup>14</sup> Apart from the contemporary societal challenges, the question comes to the fore as to whether the capacity or ability of today's parents to rear children has been affected due to changing circumstances.<sup>15</sup> In the past the gender-related roles and expectations were quite clear. Whilst the father would usually provide for the family and was considered to be the main decision-maker, the mother would look after the children and the

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<sup>11</sup> For example, the South African Children's Protection Act 25 of 1913, see Zaal (LLD thesis 2008 University of the Witwatersrand) 39. In the Netherlands the Kinderwetten of 1901 were enacted, see also section 1.2.

<sup>12</sup> See section 1.2.

<sup>13</sup> For example, the HIV/Aids pandemic in South Africa, see section 1.2. In addition, the global economic recession has impacted negatively on countries worldwide. This has affected the labour markets, causing retrenchments and stagnation regarding job migration. Moreover, the economic crisis has affected the unemployment rates. The unemployment rate for South Africa is 24,9%, available at [www.statssa.gov.za](http://www.statssa.gov.za) (31-07-2012), last accessed on 23-09-2012. Pertaining to the Netherlands, the Centraal Plan Bureau has indicated that the unemployment rate has increased from 5,4 in 2011 to 6,5 % in 2012, available at [www.cbs.nl](http://www.cbs.nl), last accessed on 23-09-2012. See "Schuldencrisis raakt ontwikkelingslanden" (12-06-2012), "Werknemer huiverig om van baan te veranderen" (20-06-2012), see *Trouw*, available at <http://www.trouw.nl/tr/nl/7964> and 4492, last accessed on 23-09-2012. Another problem is the phenomena of overspending and debts regarding households, which needs to be addressed urgently but falls beyond the scope of the present research. See "South Africa plunging deeper into debt" (05-10-2010) and "SA families 'have already spent 2012's pay cheques'" (03-11-2011), see *Mail & Guardian*, available at <http://mg.co.za/Article/2010-10-05> and <http://mg.co.za/Article/2011-11-03>, last accessed on 23-09-2012. Regarding the Netherlands, see <http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties>, last accessed on 23-09-2012.

<sup>14</sup> The HIV/Aids pandemic in South Africa has resulted in a dramatic increase in the number of orphans: Davel "The African Charter on the Rights and Welfare of the Child, family law and children's rights" 2002 *De Jure* 281 at 289. Child abuse, neglect and domestic violence have increased over the past decade, which has contributed to an increase in the number of state imposed child protection measures. Pertaining to the Netherlands, see "Trendrapport 2010" *Landelijke Jeugdmonitor* 123-125. It is submitted that job insecurity, the loss of jobs and/or financial problems put enormous strain on family relations and could possibly contribute to problems like domestic violence.

<sup>15</sup> The attempt to answer the question falls beyond the ambit of this thesis.

home. These traditional role-patterns have changed quite considerably.<sup>16</sup>

Nowadays in many families both parents work, whether by choice or not, either full-time or part-time, or a combination thereof, which inevitably impacts on the time spent with their children and their ability to know what is going on in a child's life.<sup>17</sup> As will be seen in the following chapters, various legal documents contain rights assigned to children and their parents. However, with rights come responsibilities.<sup>18</sup> It seems that society is becoming more complex and that more is expected from parents and care-givers, and in addition, the government. It is submitted that parents and care-givers need to take responsibility for the child, not merely because there is such an expectation or legal duty.<sup>19</sup> However, government should only step in where parents and/or care-givers cannot or will not fulfil their duty or abuse their powers, in which case the children concerned needs to be protected. In other words, intervention should only take place where there is a real need.

This is in line with the international principle of least intervention.<sup>20</sup> In addition, the court should not make any order unless such order would serve the interests of the child better, compared with making no order.<sup>21</sup> Moreover, budget-related constraints for governments

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<sup>16</sup> This is in line with the gender equality principle (non-discrimination), also provided for in many treaties and national laws of countries around the world. See Article 2 of the United Nations Universal Declaration of Human Rights (1948), Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 1 and further of the Convention on The Elimination of All Forms of Discrimination against Women (1979), Article 1 of the Constitution of the Kingdom of the Netherlands and section 9 of the Constitution of the Republic of South Africa, 1996. Specifically relating to children's rights are: Article 2 of the United Nations Convention on the Rights of the Child (1989), Article 3 of the Charter on the Rights and Welfare of the African Child (1990), section 2(f) and section 6(2) of the South African Children's Act 38 of 2005.

<sup>17</sup> It would be simplistic to argue that this is the main reason for the problems that exist. A holistic approach is required, encompassing all the relevant factors and dynamics within society.

<sup>18</sup> However, there is only one regional document which deals with "duties of children", namely Article 31 of the African Children's Rights Charter, see Chapter 2. Moreover, the South African Children's Act 38 of 2005 also contains a section dealing with "responsibilities of children". Section 16 provides that: "Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state."

<sup>19</sup> Ideally, the duty to take responsibility should inherently form part of the privilege of being a parent or care-giver.

<sup>20</sup> For a more detailed discussion, see Chapter 4 on child protection measures.

<sup>21</sup> See also Sloth-Nielsen & Van Heerden "Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South



have to be taken into consideration.<sup>22</sup> Apart from these societal developments and limitations, it has to be noted that a large gap may exist between the abstract body of rules in the form of a treaty (or on a national level, the national legislation) and the concrete living conditions of children and their families, especially in developing countries. The latter may be compounded by the presence of unwritten customary law, in terms of which a large part of the population in a country lives. These children are often in a vulnerable position due to, among others, poverty, limited health care, insufficient access to education or illiteracy, and therefore require additional attention.<sup>23</sup>

## 1.2 Significance of the research

South Africa, as a so-called “developing country”, faces serious challenges with regard to the care and protection of children. Despite the accomplishments since the onset of the democracy 18 years ago, many South African families still live in perilous circumstances. According to the Green Paper on Families, the family is facing a fundamental crisis, which needs to be urgently dealt with.<sup>24</sup> The problems include high levels of poverty and unemployment, the HIV/AIDS pandemic, and as a sad result thereof, increased numbers of orphans and child-headed households,<sup>25</sup> as well as an apparent increase of abuse and neglect in the family environment. The Netherlands, as a so-called “affluent country” encounters in some respects similar challenges; for example, an increase in illiteracy and

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Africa” (1996) *SAJHR* 260. It is agreed with these authors that the institutionalisation of a child should be a step of last resort and that alternatives to prevent institutionalisation should be provided for and indeed considered by the courts.

<sup>22</sup> Sloth-Nielsen & Van Heerden have pointed out correctly that instead of the institutionalisation of children, it will be more cost effective to keep children with their parents and provide support to families where this is needed, unless there is a situation of abuse or neglect, in which case removal is necessary. In (1996) *SAJHR* 260.

<sup>23</sup> Moreover, natural disasters, over population, lack of food supply, epidemics, drought and floods, war and violence make children extra vulnerable in becoming victims of famine or starvation, child prostitution, child labour and armed conflicts (as child soldiers). This becomes evident in the report “The State of the World's Children” published annually by UNICEF, the United Nations Children's Emergency Fund (founded in 1946). See Meuwise *et al.* “Informatie over het Verdrag Inzake De Rechten van het Kind” *Defence for Children International* (2002) 2-5. Also Chirwa “The merits and demerits of the African Charter on the Rights and Welfare of the Child (2002) *The International Journal of Children's Rights* 168.

<sup>24</sup> See the Green Paper on Families “Promoting family life and strengthening families in South Africa” by the Department of Social Development (GN 756 of 2011 *Government Gazette* 3 October 2011 No. 34657) 5.

<sup>25</sup> See Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 196.

domestic violence. In addition, the increase in the number of reported cases on abuse and neglect is worrisome. Moreover, the Bureaus for Youth Care, the agency dealing with child care and protection in the Netherlands, is by all means trying to resist a state of crisis.<sup>26</sup>

South Africa and the Netherlands are historically connected.<sup>27</sup> The arrival of the Dutch in the 17<sup>th</sup> century had a profound effect on the development of the common law in South Africa. The latter can be typified as non-enacted law, which consists of a set of rules which stem primarily from Roman-Dutch law<sup>28</sup> and to some extent, English law. Through the passing of time the common law has been adapted to the developments in South African society.<sup>29</sup> Therefore it can be said that the common law, as we know it today, finds its roots in three countries; namely in Roman territory, the Netherlands and South Africa.<sup>30</sup> It is interesting to note that in the present constitutional dispensation the common law derives its authority from the Constitution.<sup>31</sup>

In terms of section 39(2) of the Constitution, the South African courts are held to develop the common law. In addition, both countries are party to the same international but different

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<sup>26</sup> The media regularly reports on the inadequacy of Jeugdzorg and the increase in supervision orders and placements. In 2010 the newspapers contained headings like: “Het duivelse dilemma van een gezinsvoogd”, dealing with the criticism regarding Jeugdzorg (De Stentor, 13 February 2010) or “Het probleem van jeugdzorg”, dealing with parents declaring war to Jeugdzorg, due to extensive waiting lists and the abuse of power by social workers (De Stentor, 6 March 2010).

<sup>27</sup> For an overview of the early years of European settlement, see Davenport *South Africa – A modern history* (1992) 19 and further. Also Giliomee & Mbenga *New History of South Africa* (2007) 40 and further. Nowadays South Africa and the Netherlands are partners in terms of socio-economic development which include, among others, trade and investment, agriculture, water, transport and logistics and culture. See [zuidafrika.nlabassade.org/organization/ambassade-pretoria](http://zuidafrika.nlabassade.org/organization/ambassade-pretoria), last accessed on 24-09-2012.

<sup>28</sup> The combination of Roman law as it was applied in the Netherlands, and the local Dutch law, resulted in the Roomsche-Hollandsche-Recht. See Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 70.

<sup>29</sup> See Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 64.

<sup>30</sup> See Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 67.

<sup>31</sup> 108 of 1996. In *Pharmaceutical Manufacturers Association of SA In Re: Ex parte Application of President of the RSA* 2000 (2) SA 674 (CC), Chaskalson P deliberated that “there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control,” see sections 44 and 45. See Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 60; also Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 65.

regional documents, which provide specific standards of compliance for the protection of children and the enhancement of their rights. The United Nations Declaration of the Rights of the Child (1959) has contributed to the development of an international notion to propagate children's rights and to develop aspirations of youth. The United Nations Convention on the Rights of the Child (1990)<sup>32</sup> was ratified by South Africa on 16 June 1995 and by the Netherlands on 6 February 1995. On 7 January 2000 South Africa ratified the Charter on the Rights and Welfare of the African Child (1990).<sup>33</sup> Both documents recognise the right of the child to protection, family care and assistance, and moreover, child participation. The African Children's Rights Charter, however, only has regional application.<sup>34</sup>

The same applies to the European Convention on Human Rights,<sup>35</sup> which is binding to European countries (as members of the Council of Europe) who have ratified the Convention.<sup>36</sup> It is commendable that so many countries are involved in human rights documents and therefore have agreed on an international standard to strive for.<sup>37</sup> At the same time it should be noted that there are challenges.

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<sup>32</sup> Hereinafter referred to as the CRC. This international document was adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990.

<sup>33</sup> Hereinafter referred to as the African Children's Rights Charter. This treaty was adopted in 1990 and entered into force on 29 November 1999.

<sup>34</sup> This regional document is applicable to the African states members; see the Preamble to the African Children's Rights Charter. The African states members of the Organisation of African Unity (OAU) were the parties to the African Children's Rights Charter. Since the Organisation of African Unity has changed to the African Union (AU) - it is clear that the African Children's Rights Charter falls under the responsibility of the African Union. See Memzur "The African Children's Rights Charter versus the UN Convention on the Rights of the Child: A zero-sum game?" (23) 2008 *SAPR/PL* 6, available at [www.ggp.up.ac.za/...human.../03\\_ACRWC%20v%20CRC%20Article](http://www.ggp.up.ac.za/...human.../03_ACRWC%20v%20CRC%20Article), accessed on 09-03-2010.

<sup>35</sup> Hereinafter referred to as the European Convention. This treaty was signed on 4 November 1950 and entered into force on 3 February 1953.

<sup>36</sup> The Netherlands has ratified the European Convention on 31 August 1954. See Meuwise et al *Handboek Internationaal Jeugdrecht* (2005) 678.

<sup>37</sup> For example, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) which has been ratified by 170 countries; the International Covenant on Civil and Political Rights (1966), which has been ratified by 154 countries; and the Convention on the Elimination of All Forms of Discrimination against Women (1979), which has been ratified by 179 countries across the world. See Meuwise et al. *Handboek Internationaal Jeugdrecht* (2005) 30.

A treaty can only formulate a desired standard, which should serve as a mirror for state parties, organisations and professionals. In the end the state parties, the relevant organisations, and the professionals have to take all necessary measures to comply with the standard provided, which is their obligation under the treaty. In this regard children also have a role to play, since they are entitled to participation in matters affecting them. As will be outlined later, the importance of the contribution of children should not be underestimated.<sup>38</sup>

Therefore, this research will discuss the relevant provisions in the international and regional documents regarding the rights of children in need of care and protection, and in particular pertaining to the placement in alternative care. Where applicable, it will attempt to identify which provisions provide a higher standard. The outcome will subsequently be compared with the various substantive and procedural legislative provisions in South African and Dutch law in order to establish as to whether, and to what extent, both countries are in compliance with their international obligations.<sup>39</sup> The government of South Africa has taken responsibility at the national level; section 28 of the Constitution deals specifically with children.<sup>40</sup> In other words, children are bearers of these nine rights as well as most of the

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<sup>38</sup> See sections 2.2.1.6 and 3.1.4.

<sup>39</sup> These obligations came into existence by the ratification of the international and regional documents.

<sup>40</sup> 108 of 1996, which came into operation on 4 February 1997. See Currie & De Waal *The Bill of Rights Handbook* (2005) 7. Section 28 contains a range of specific rights which aim to protect children, some of which have been deliberated upon by the courts. For example, the right to family or parental care in section 28(1)(b), which came to the fore in the case *S v M* 2008 (3) SA 232. A mother of three children was facing short-term imprisonment for fraud, which would result in her being separated from the children. The competing rights were, on the one hand, the children's right to parental care combined with their best interests, and on the other hand, the rights of the community to be protected from crime. The court held that the importance of section 28(1)(b) and subsection (2) (on the paramountcy of the child's best interests) lies therein, that the law should where possible, avoid the breakdown of family life or parental care that may put children at risk. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the Constitutional Court held that section 28(1)(b) and (c) should be read in conjunction with each other. Whilst section (b) indicates who is responsible for providing care, section (c) deals with the scope thereof. Therefore, although families have the primary responsibility to provide for the care and basic needs, like basic nutrition, shelter, basic health care services and social services, it is the state's duty to ensure that the rights of children are protected. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) from which it can be derived that where the family or parental care falls short, it is the duty of the state to ensure the protection of children's rights. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 285-286.

other rights as mentioned in Chapter 2 of the Constitution.<sup>41</sup> To be more specific, according to section 28(1)(b) “every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”, and section 28(1)(d) confers the right to children to be protected from maltreatment, neglect, abuse or degradation. As will be seen, these constitutional rights are pivotal in the discussion pertaining to the placement of children in need of care and protection.<sup>42</sup>

In line with the constitutional imperatives relating to the protection of children, the South African Law Reform Commission<sup>43</sup> embarked upon a law reform process which went beyond the confines of the (repealed) Child Care Act,<sup>44</sup> and aimed to include all statutory, common, customary and religious law affecting children. The vision of the Project Committee was to present a report including recommendations for legal reform and a single comprehensive children's statute for South Africa.<sup>45</sup> As a result, the first draft Bill was published in December 2002,<sup>46</sup> which eventually culminated in the enactment of the Children's Act,<sup>47</sup> of which a number of specific sections came into operation on 1 July 2007,<sup>48</sup> followed by the remaining part on 1 April 2010.<sup>49</sup>

The Children's Act<sup>50</sup> contains various provisions relevant to the protection of children. For

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<sup>41</sup> Chapter 2 of the 1996 Constitution contains the Bill of Rights, which was included in the Constitution in order to safeguard human rights. See Currie & De Waal *The Bill of Rights Handbook* (2005) 2.

<sup>42</sup> See sections 3.1.2, 3.2.1, 4.3.1.1 and 5.1.1.1.

<sup>43</sup> Previously referred to as the South African Law Commission (SALC). In 1997 the SALC was requested to investigate and review the Child Care Act 74 of 1983 and to provide recommendations to the Minister of Social Development. See the SALC *Review of the Child Care Act Discussion Paper 103 Project 110* (December 2001) 1.

<sup>44</sup> 74 of 1983, which was repealed with the commencement of the remaining sections of the Children's Act, 2005 (Act No. 38 of 2005), see Proclamation No. R12 2010, *Government Gazette*, 26 March 2010 No. 33076.

<sup>45</sup> See the SALC *Review of the Child Care Act Discussion Paper 103 Project 110* (2001) 1.

<sup>46</sup> Children's Bill [B – 2002], which was published as Annexure “C” to the SALC's Report on the *Review of the Child Care Act* in December 2002. For a discussion on the developments leading up to the enactment of the Children's Act, see Louw *Acquisition of parental responsibilities and rights* (LLD thesis 2009 UP) 6-8.

<sup>47</sup> 38 of 2005.

<sup>48</sup> See Proclamation No. 13 2007, *Government Gazette*, No. 30030 29 June 2007.

<sup>49</sup> See Proclamation No. R12 2010, *Government Gazette*, No. 33076 26 March 2010

<sup>50</sup> 38 of 2005.

example, the meaning of the term “a child in need of care and protection” is formulated in a wide sense, which is a drastic improvement compared with the previous legislation.<sup>51</sup> When a children's court in South Africa has found that the child concerned is a “child in need of care and protection”, the court will make an appropriate order which aims to protect the child and which serves his or her interests best. The innovations brought about by the Act in this regard concern, among others, the expansion of the jurisdiction of the children's courts and the range of orders from which the children's court can choose the option which is most opportune to the specific needs of the child concerned.

With regard to the latter, section 46 of the Children's Act provides for an extensive number of general orders, ranging from various care orders, orders pertaining to early intervention services or family preservation programmes to child protection orders including instructions to undergo specified skills development, training, treatment or a rehabilitation programme. Section 46 also provides a possible solution for a situation peculiar to South Africa, namely the increasing number of children living without parents, due to for example, the HIV/AIDS pandemic.

Under these circumstances the children's court can make 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.<sup>52</sup> In addition, section 156 comes to the fore where the children's court has found that a child is in need of care and protection.<sup>53</sup> The latter section provides for a number of additional options, ranging from foster care and shared care to the placement of the child in a child and youth care centre, depending on the child's needs. Apart from the far more detailed regulation pertaining to the legal position of children, another improvement in the Children's Act is the fact that the language has been neutralised, moving away from stigmatisation.<sup>54</sup>

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<sup>51</sup> Section 14(4) of the repealed Child Care Act 74 of 1983.

<sup>52</sup> Section 46(1)(b) of the Children's Act 38 of 2005.

<sup>53</sup> Section 156 of the Children's Act is placed in chapter 9 which specifically deals with “child in need of care and protection”.

<sup>54</sup> The previous legislation referred to phrases like “child born out of wedlock” or “extra-marital” children, whereas the Children's Act refers to a child of unmarried parents or biological father or mother or married or unmarried parents. In addition, where previously reference was made to the parental power or authority of married parents, this has been replaced by the concept

Thus the fundamental rights conferred on children in terms of the Constitution combined with the provisions in the Children's Act provide the children in South Africa theoretically speaking with a solid legislative framework which aims to ensure their protection and well-being. With regard to the Netherlands, the legislation pertaining to the protection of children stems from the early 20<sup>th</sup> century.

The present-day child protection measures of temporary guardianship, relief of parental authority, deprivation of parental authority and the supervision order were introduced in 1905 and 1922 respectively.<sup>55</sup> In addition, with the coming into operation of the latter legislation, the children's courts were introduced. It is evident that with the passing of time the legislative framework and practice pertaining to child care and protection have been subject to change.<sup>56</sup> In the Netherlands a children's court will only order a child protection measure with regard to a child when the criteria in the relevant Articles of the Dutch Civil Code are strictly met. These criteria are even more stringent when it comes to the removal and placement of a child. Although it is the duty of state parties to protect children where parents or other care-givers fail to do so, the intervention should not only be necessary<sup>57</sup> but also proportionate. This means that the measures should not have more impact than strictly necessary. Since the removal and placement or detention of a child is the most far-reaching form of interference, it is evident that the latter is only permissible as a measure of last resort

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of parental responsibilities and rights, which are shared, irrespective of whether the parents are married, unmarried or divorced (and can even apply to persons who are not the biological parents of the child concerned). Furthermore, the neutral term "child and youth care centre" is used for all residential care facilities, instead of stigmatising terminology like "schools of industry" or "reform school", see section 1 of the Child Care Act 74 of 1983. For a discussion on the residential care facilities in terms of the previous legislation, see Schäfer & Schäfer in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997); also Zaal "Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983" 2001 *SALJ* 207-215. Pertaining to the Children's Act 38 of 2005, see Skelton in *Commentary on the Children's Act* (2012) chapter 13.

<sup>55</sup> See the so-called "Kinderwetten 1901" which consisted of both a civil law and a criminal law component and came into operation on 1 December 1905, see Stb. 1901, nr. 62, 63, 64. With regard to the Act of 1922, see Stb. 1921, nr. 834. See Bruning *Rechtvaardiging van kinderbescherming – naar een nieuw maatregelenpakket na honderd jaar kinderbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 20 and 82.

<sup>56</sup> The developments can be attributed to the subsequent amendments pertaining to the legislation, which has had an influence on the courts and the child care and protection practice. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 23 and 290 and further.

<sup>57</sup> Bruning refers in this regard to the principle of subsidiarity: *Rechtvaardiging van kinderbescherming – naar een nieuw maatregelenpakket na honderd jaar kinderbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 179.

and for the minimum necessary period.<sup>58</sup> In other words, preference should be given to assistance and support on a voluntary basis in order to alleviate or end the existing threat pertaining to the child's safety or well-being. However, the present research is mainly focused on the substantive and procedural provisions relating to the state imposed measures of child protection in South Africa and the Netherlands.

In relation to this, attention will be paid to the prevention and early intervention programmes, which aim to prevent the removal and placement of children in need of care and protection. The procedural provisions in the child care and protection legislation and/or practice in both South Africa and the Netherlands accommodate alternatives to the courts. As will be seen, these alternative solution-oriented mechanisms cater for the participation of the child and his or her family or social network. In this regard the South African Children's Act refers, among others, to the pre-hearing conference and the family group conference. In the Netherlands the use of family group conferencing in the field of care and protection has increased over the past decade. It is positive development that the participation of children in the process of solution-finding in matters affecting them gains ground. Due to its potential of ensuring direct participation, the legislative provisions and practice pertaining to these alternative mechanisms will be investigated and analysed and where applicable, recommendations will be formulated.<sup>59</sup>

Based on the aforementioned, the relevant substantive and procedural provisions pertaining to child protection measures in both South Africa and the Netherlands will be outlined and compared. Where applicable, some similarities or differences between the two countries will be identified. In addition, the national legal framework of the respective countries will be tested against the international standards. Therefore the research aims to investigate whether the South African and Dutch law and practice pertaining to the placement of children in alternative care is in compliance with the minimum standards as provided by the CRC, the African Children's Rights Charter, and the European Convention. In addition, this research will reveal which lessons can be drawn for these respective countries.

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<sup>58</sup> See the Preamble to the UN Rules for the Protection of Juveniles deprived of their Liberty, also known as the *Havana Rules* (Resolution 45/113 of 14 December 1990).

<sup>59</sup> See section 3.1.4 on the participation of children.



It should be emphasised that for the purpose of the limitation of the topic, the present research only deals with the civil law placement of children in need of care and protection. The placement relating to children who are in conflict with the law is a very important topic that merits research.<sup>60</sup> However, placement of children in terms of criminal law/child justice can form part of a further research project. In addition, it needs to be stressed that the present research is primarily focused on the removal and placement of children in need of care and protection, and the consequences thereof, in relation to the parent-child relationship.

### 1.3 Aim of the research

The purpose of the research is to identify and analyse the relevant provisions in the international and regional documents as well as the national law of South Africa and the Netherlands pertaining to the placement of children in need of care and protection in terms of civil law. Therefore this study has the following aims:

- (i) provide a structured overview of the relevant international standards pertaining to children in need of care and protection and, where applicable, identify which provisions provide a higher standard;
- (ii) discuss and analyse the relevant substantive and procedural national rules applicable to children in need of care and protection in both South Africa and the Netherlands and to identify some/specific similarities or differences between the two countries;

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<sup>60</sup> For a discussion on child justice in South Africa, see Skelton in Keightley (ed.) *Children's Rights* (1996) 180 and further; Sloth-Nielsen & Mayer in Burman (ed.) *The Fate of the Child – Legal Decisions on Children in the New South Africa* (2003) 84 and further; Gallinetti in Boezaart (ed.) *Child Law in South Africa* (2009) 635 and further. Pertaining to the Netherlands, see Weijers & Liefwaard “Jong vast 1995-2005- vrijheidsbeneming in het Nederlandse Jeugdstrafrecht” (4) 2007 *Proces* 173-181 and (5) 2007 *Proces* 203-212; Liefwaard & Bruning in Weijers & Imkamp (eds.) *Jeugdstrafrecht: Nederland in Internationaal Perspectief* (2008) 229-256; Liefwaard in Doek & Vlaardingerbroek (eds.) *Jeugdrecht en Jeugdzorg* (2009) 418-448; Uit Beijerse “Een kindvriendelijk klimaat in de justitiële jeugdinrichtingen – naar voorbeeld van de ‘European Rules for juvenile offenders subject to sanctions and measures’” in Forder *et al.* (eds.) *Kindvriendelijke Opsluiting – Gesloten Plaatsing van Jeugdigen in het Licht van Mensenrechten* (2012) 65-80.

- (iii) test the national legal framework of the respective countries against the standards provided by the international and regional documents;
- (iv) formulate various recommendations for the further enhancement of the protection of children in need of care and protection and placement in both South Africa and the Netherlands.<sup>61</sup>

## 1.4 Research methodology

The methodology of the research is both qualitative and comparative by nature. The qualitative component refers to the analysis of the content of the international and regional instruments in conjunction with the national law of South Africa and the Netherlands pertaining to child protection. As will be seen, the main focus will lie with the present legislation, and where relevant proposed legislation, in South Africa and the Netherlands, combined with the developments in terms of case law. With regard to South Africa, the Constitution, the Children's Act and the DSD regulations,<sup>62</sup> and DJCD regulations are of particular importance.<sup>63</sup>

Pertaining to the Netherlands, specific parts of Book 1 of the Dutch Civil Code, the Code of Civil Procedure, the Act on the Youth Care and the Implementation Decree to the Act on the Youth Care will be considered. In addition, relevant decisions of the various courts in the respective countries are included in the discussion, as well as certain judgments of the European Court of Human Rights. The latter court plays a pivotal role in the continuous development of family law and the protection of children and their rights in Europe and beyond.

The legal comparative method concerns the comparison of the legal provisions in South

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<sup>61</sup> This relates to both the substantive and procedural provisions in the national legislation as well as measures relating to the organisation or structure of the child care and protection system, collaboration and continuous training of the professionals.

<sup>62</sup> See the consolidated regulations pertaining to the Children's Act, 2005 of the Department of Social Development (GN R261/2010).

<sup>63</sup> See the regulations relating to children's courts and international child abduction, 2010 of the Department of Justice and Constitutional Development (GN R250/2010).

Africa and the Netherlands pertaining to children in need of care and protection. The reason for a comparative study between South Africa and the Netherlands lies in the fact that the two countries are connected from both a historical and legal perspective.

From the onset it needs to be emphasised that the field of child care and protection is vast and therefore mainly aspects relating to child protection, and in particular the removal and placement of children, will be highlighted. It will be attempted to identify both similarities and differences between the two countries with regard to substantive law and aspects of procedural law.

Where specific problems or *lacunae* come to the fore, recommendations will be made which aim to further the legal development of child care and protection in both South Africa and the Netherlands.

## 1.5 Outline of the chapters

In the following chapters various aspects pertaining to children in need of care and protection will be highlighted. Chapter 2 will provide an outline of the standards as set by the CRC and two regional documents; the African Children's Rights Charter and the European Convention. South Africa is a state party to the African Children's Rights Charter, whereas the European Convention is relevant in the Netherlands and beyond European borders.

After some background on these international instruments and a discussion on the application of international law in both South Africa and the Netherlands, a number of substantive provisions in these documents will be discussed. This will be a selection of Articles which relate to the role of family and in particular the role of parents in relation to the child.

As will be seen, these standards impose an obligation on parents to provide for the necessary care and protection of the child. In this context, it will be explored to what extent parents need to have regard for the child's evolving capacities and in addition, his or her views. Moreover, on the basis of the analysis of the international provisions pertaining to the removal and placement of children, various criteria may be distinguished which will be dealt

with accordingly. Finally, the placement of a child may result in the deprivation of liberty of the child concerned, which is of particular importance to the topic of the present research. Due to the far-reaching consequences of a removal and subsequent placement, it will be investigated under what circumstances such measures are justified. In this regard it has to be re-emphasised that this research merely focuses on the placement of children in terms of civil law.

In Chapter 3, the national law in South Africa and the Netherlands relating to the placement of children in need of care and protection will come to the fore. An overview of the relevant national legislative provisions will be given, which in turn will be linked to the relevant Articles in the international and regional instruments. In the first place, the general principles in the national law of the respective countries will be discussed. In this regard the meaning of the phrases “child” and “the best interests of the child” will be explored separately for each country, followed by an inventory of the rights of the child to participation. In addition, it will be established what the statutory duties of parents *vis-à-vis* the child entail on a national level. With regard to the latter topics, the research will identify, where relevant, similarities or differences between the two countries. It should be noted that the structure as presented in Chapter 2 will deviate slightly from in the present chapter, since the principle of non-separation and placement will be specifically discussed in Chapter 5.

Chapter 4 focuses on children in need of care and protection. In this chapter it will be outlined who may acquire parental responsibilities and rights in terms of South African and Dutch law and what this entails. In addition, attention will be paid to the importance of providing support to vulnerable families. As will be seen, the availability of these so-called prevention and early intervention programmes might have the potential to help to curb and even prevent children becoming in need of care and protection. Furthermore, the meaning of “child in need of care and protection” will be discussed in the context of South African and Dutch law, followed by the steps to be taken in the case of alleged or suspicion of abuse or neglect of a child. Moreover, a comparison will be drawn between the care and protection proceedings in South Africa and the Netherlands, followed by the various child protection orders in the respective countries, the duration thereof, and the available remedies.

Chapter 5 aims to provide a comprehensive overview of the various aspects relating to the removal and placement of children in need of care and protection in the respective countries.

The standards provided by the international and regional instruments form the backdrop for the discussion of the national framework regarding the removal and placement of children, presently in place in South Africa and the Netherlands. Of particular importance for the purposes of this study are the grounds for removal of a child. It will be investigated whether in this regard the national framework of the respective countries conform to the principles of subsidiarity<sup>64</sup> and proportionality.<sup>65</sup>

Furthermore, an overview of the available forms of placement in South Africa and the Netherlands will be presented. On the basis of the latter it will be established whether the two countries meet their obligations to ensure alternative care for children who have been temporarily or permanently removed from their family environment.<sup>66</sup> The chapter will be concluded by a discussion of a number of miscellaneous matters relating to the removal and placement of children, among others, the right to contact with the family during placement, and further decision-making regarding the child's future. Finally, in Chapter 6 the findings of the previous chapters will be drawn together on the basis of which it will be determined whether the South African and Dutch law and practice pertaining to the placement of children in alternative care is in compliance with the minimum standards provided by the CRC, the African Children's Rights Charter and the European Convention on Human Rights. In addition, a number of recommendations will be formulated for child care and protection legislation and practice in the respective countries. This will be followed by some proposed amendments in relation to the present legislative framework in both South Africa and the Netherlands.

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<sup>64</sup> The principle of subsidiarity ensures that first en foremost alternative solutions need to be considered in the light of the circumstances. State imposed intervention will only be justifiable where it becomes evident that the support and assistance on a voluntary basis will not be adequate or no longer be adequate in order to protect and safeguard the interests and well-being of the child. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 643.

<sup>65</sup> The principle of proportionality, or least intervention, ensures that the impact of the intervention is not more far-reaching than strictly necessary. In other words, the response should be in proportion to the problem which necessitates the intervention. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 644.

<sup>66</sup> See in this regard the Articles 20 of the CRC and 25 of the African Children's Rights Charter.

## CHAPTER 2: THE STANDARDS SET BY INTERNATIONAL AND REGIONAL LAW RELATING TO THE PLACEMENT OF CHILDREN IN NEED OF CARE AND PROTECTION

### 2.1 Historical background regarding the development of the rights of children

After the Second World War a process of international collaboration was set in motion for the purpose of achieving and maintaining peace and security, which resulted in the establishment of various international organisations.<sup>1</sup> Simultaneously, a worldwide notion pertaining to the protection and enjoyment of human rights started to develop.<sup>2</sup> As a result, a range of human rights documents were adopted and ratified by state parties. Where these treaties were legally binding, they created obligations to be fulfilled by the state parties for the purpose of enhancing and protecting human rights in their respective countries.

In 1948 the United Nations adopted the Universal Declaration of Human Rights.<sup>3</sup> In this document reference was made to the family as the “[n]atural and fundamental group unit of society and is entitled to protection by society and the state”.<sup>4</sup> Moreover, it acknowledged that “motherhood and childhood are entitled to special care and assistance”.<sup>5</sup> The first international document pertaining to the acknowledgement, and therefore enhancement and protection, of the rights of children was the United Nations Declaration on the Rights of the

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<sup>1</sup> Representatives of 50 countries attended the United Nations Conference on International Organisation in San Francisco in 1945 in order to draw up the United Nations Charter. The United Nations came officially into existence on 24 October 1945. It is interesting to note that membership was open to all peace-loving nations which were willing to accept and carry out the obligations of the Charter. See the booklet of the Department of Public Information *Basic Facts- About the United Nations* (2000) 3.

<sup>2</sup> Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 16; Meuwese *et al Handbook Internationaal Jeugdrecht* (2005) LVII.

<sup>3</sup> Resolution 217A (III) of 10 December 1948. See Patel & Watters *Human Rights – Fundamental Instruments & Documents* (1994) 11.

<sup>4</sup> See Article 16(3) of the Universal Declaration of Human Rights 1948.

<sup>5</sup> Article 25(2). This provision also stated that “all children, whether born in or out of wedlock, shall enjoy the same social protection”.

Child (1959). This document, however, was not a legally binding document.<sup>6</sup> In the late 70s Poland took the initiative to have the Declaration converted into a binding treaty, which, after a long period of negotiation,<sup>7</sup> resulted in the adoption by the General Assembly of the United Nations of the Convention on the Rights of the Child on 20 November 1989.<sup>8</sup> The CRC entered into force on 2 September 1990. Since then only the United States of America and Somalia and South Sudan<sup>9</sup> have not ratified this important document.<sup>10</sup>

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<sup>6</sup> This document consisted of a preamble followed by ten principles. It should be noted that the Declaration provided a child to be the holder of rights, instead of merely being entitled to protection and (limited) services. See Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 16.

<sup>7</sup> The initial proposal for a Convention was submitted by the Polish delegation in 1978. It took, in other words, 11 years of negotiations to get to the final product. However, it is a product worth while; the Convention stands for a significant shift in philosophy pertaining to children, where children are seen as holders of an extensive range of specific rights and where provision is made for measures of control, namely the reporting duty of each states party to the Committee on the Rights of the Child in Geneva, see below in Chapter 3. For a detailed discussion on the negotiation process regarding the CRC see Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 14-19; Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 310.

<sup>8</sup> CRC, Resolution 44/25. On the basis of Article 49(1) of the Convention, the document entered into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, which was 2 September 1990. Patel & Watters *Human Rights, Fundamental Instruments & Documents* (1994) 305. Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 14-15; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 231; Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 309.

<sup>9</sup> The United States of America and Somalia have, however, signed the CRC. The United States of America do not seem to be able to meet the obligations set by the CRC. Apparently one of the problems pertaining to the ratification by the United States of America is the perception that the CRC does not respect the autonomy of the family, since it contains provisions which can interfere with family relationships. However, it is agreed with Mahery that this is a misconception. Another impediment pertaining to ratification of the CRC is the federal system, which provides for a level of autonomy. If the United States of America were to ratify the CRC there would be a considerable shift of power from the individual states to the federal government. See <http://www.parentalrights.org>, last accessed on 19-9-2011. It is interesting to note that there has been a campaign by the International Rescue Committee to urge President Obama to take action for children's rights, see <http://www.rescue.org>, last accessed on 19-9-2011. See also sections 2.2.1.1 and 2.3.2. Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 312. Somalia is not able to ratify the CRC because it does not have a recognised government. See Sloth-Nielsen and Van Heerden "New child care and protection legislation for South Africa? Lessons from Africa" 1997 *STELL LR* 266; Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 14; Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 309. The third country which has not (yet) ratified the CRC is South Sudan. This country recently gained independence from Sudan, namely on 9 July 2011, see [www.bbc.co.uk/news/world-africa-14069082](http://www.bbc.co.uk/news/world-africa-14069082), accessed on 24-4-2013.

<sup>10</sup> It should be noted that the process of ratification of a treaty involves a formal procedure by which a state confirms to other states (parties) to be bound by the treaty. Therefore, where a

The CRC is the most widely ratified international human rights treaty in the world.<sup>11</sup> By ratifying this treaty the international community has expressed its commitment to children, and by doing so, the implementation of children's rights has been put on the agenda of most countries.<sup>12</sup> What makes the CRC truly inimitable is the profound change in attitude of state parties with regard to the enhancement of children's rights in their respective countries.<sup>13</sup> South Africa ratified the CRC on 16 June 1995,<sup>14</sup> and the Netherlands on 6 February 1995. Article 49(2) of the CRC states that:

“For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession”.

This means that for South Africa the CRC became binding on 16 July 1995, and for the Netherlands on 8 March 1995.<sup>15</sup> Apart from promoting and enhancing an extensive range of children's rights, this international document also provides for a monitoring system. Upon ratification, all states parties have undertaken to submit progress reports to the Committee on the Rights of the Child on the measures they have adopted in giving effect to the rights

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state (party) fails to comply with the provisions of the treaty, other states (parties) can hold the former state responsible. This is based on the international principle *pacta sunt servanda*, treaties must be observed. See Verheugt *Inleiding in het Nederlandse Recht* (2009) 537; Mahery in Boezaart (ed.) 324. Some treaties, like the CRC and the African Children's Rights Charter have monitoring bodies to which the governments of states parties regularly have to report on the enhancement of children's rights in their respective countries.

<sup>11</sup> Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 14. Meuwese *et al. Handbook Internationaal Jeugdrecht* (2005) 1; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 230.

<sup>12</sup> See also Van Bueren, *The International Law on the Rights of the Child* (1995); Rehman *International Human Rights Law – A Practical Approach* (2003) 378.

<sup>13</sup> Thomas Hammarberg, one of the original members of the Committee on the Rights of the Child, viewed the CRC mainly as a political instrument providing for changes in a social attitude towards children, see Hamilton in Davel (ed.) *Children's Rights in a Transitional Society* (1999) 26; Also Memzur (2008) 23 SAPR/PL 1 (available at: [www.ggp.up.ac.za/...human.../03-ACRWC%20v%20CRC%20Article.pdf](http://www.ggp.up.ac.za/...human.../03-ACRWC%20v%20CRC%20Article.pdf)), accessed on 09-03-2010.

<sup>14</sup> Sloth-Nielsen in Keightley (ed.) *Children's Rights* (1996) 6. It is interesting to note that the CRC was the first international human rights document ratified by the (then) Government of National Unity on 16 June 1995. See Sloth-Nielsen and Van Heerden, 1997 *STELL LR* 261; Mahery in Boezaart (ed.) *Child Law in South Africa* (1999) 323.

<sup>15</sup> Concerning the Netherlands, see Wet van 24 November 1994, *Stb.* (Staatsblad) 1994, 862. The CRC has been ratified on the basis of this Act (Wet). See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 231.



mentioned in the CRC and on the progress made on the enjoyment of those rights.

Article 44(1) of the CRC provides that state parties are to submit their first report within two years after the entry into force of the CRC for the state party concerned, and thereafter every five years.<sup>16</sup>

These reports must contain sufficient information to provide the Committee with a comprehensive understanding regarding the implementation of the Convention.<sup>17</sup> Moreover, these reports must indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the Convention. The Committee has the discretion to request further information which could be of relevance regarding the implementation of the Convention.<sup>18</sup>

South Africa submitted its initial report in December 1997, to which the Committee on the Rights of the Child responded in its *Concluding Observations* of February 2000.<sup>19</sup> However, a subsequent report seems to be still outstanding.<sup>20</sup>

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<sup>16</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 237.

<sup>17</sup> Article 44(2) of the CRC.

<sup>18</sup> Article 44(4) of the CRC.

<sup>19</sup> See CRC/C/15/Add.122 of 23 February 2000. Where relevant reference will be made to these *Concluding Observations* in the sections to follow, which deal with a number of rights as provided for in the CRC.

<sup>20</sup> The second periodic report was due in 2002 but has not been submitted. The submission for 2007 was intended to combine the second and third report. In 2013 the next report is due for submission. See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 326. According to Viviers of UNICEF South Africa, the Government of South Africa will submit a combined 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> periodic report to the Committee on the Rights of the Child in July 2013. This report is currently in the final stage of preparation and will be available to the public once it has been approved by Cabinet, probably early 2013. This information was obtained from André Viviers, via aviviers@unicef.org, on 01-10-2012.

Meanwhile South Africa has submitted its second report to the Working Group on the Universal Periodic Review (UPR). This UPR involves a review of the human rights records of all 193 UN Member States once every four years and was created through the UN General Assembly on 15 March 2006 (Resolution 60/251). During the proceedings of the review process, the South African delegation pointed out that the efforts of the South African government continued to be aimed at redressing the inequalities, imbalances and historical injustices, at restoring social justice to the people and at building a united, democratic, non-racial and non-sexist society, see A/HRC/21/16 of 9 July 2012, section 14.

Since the onset of the new constitutional dispensation the government has been faced with the mammoth task of providing for the well-being of a population of over 40 million people. A

The latest submission by the Netherlands is the third periodic report which was dealt with by the Committee on the Rights of the Child in January 2009 and resulted in the *Concluding Observations* of March 2009.<sup>21</sup> In addition, in terms of Article 44(6) of the CRC, state parties are obliged to make their reports widely available to the public in their respective countries. This is also in line with Article 42 which states that “State Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike”. The question arises as to whether South Africa and the Netherlands adhere to this obligation of transparency, and what can be done to increase the public awareness regarding children's rights.<sup>22</sup>

On a regional level, South Africa is a Member State of the African Union (previously called the Organisation of African Unity) and is also a party to the African Charter on the Rights and

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number of achievements, which have an immediate impact on children, relate, among others, to the increased access to housing, clean water and sanitation; the provision of social grants, basic education and health services. By 2009 98.5% of children aged 7 to 15 were enrolled in school. Over 3,000 primary health-care clinics were currently available to provide counselling, testing and treatment for people with HIV and AIDS.

As a result, the number of patients accessing antiretroviral therapy increased from 500,000 in 2008 to 1,9 million in 2012, see sections 17-21. Moreover, in its quest to prioritising gender equality, the advancement of the rights of women and the promotion and protection of the rights of the child and persons with disabilities, the government has established in 2009 the Department for Women, Children and People with Disabilities, with the mandate of advocacy for mainstreaming and monitoring Government policies and programmes with respect to these vulnerable groups, see section 22 and also the comment on domestic implementation mechanisms pertaining to recommendation no. 124.27 of Annex A (recommendations acceptable to South Africa).

<sup>21</sup> See CRC/C/NLD/CO/3, which will be referred to in the following sections. In 2012 the Netherlands has to submit the fourth progress report, which probably will be dealt with by the Committee on the Rights of the Child in 2013 or 2014. See <http://www.rijksoverheid.nl/onderwerpen/kinderrechten>, accessed on 10-06-2011.

<sup>22</sup> With regard to the Netherlands it is interesting to mention the so-called Kinderrechtencollectief, which is a collaboration of children's rights organisations in the Netherlands. The initiative was taken by the Dutch branch of Defence for Children International and UNICEF. The Kinderrechtencollectief is committed to contribute to the implementation of the CRC and collaborates with the Department of Health, Welfare and Sports. When the progress report for the Netherlands is due for submission, the organisation submits a separate report to the Committee on the Rights of the Child in Geneva, parallel to the submission of the report by the Dutch government. In 2009 this included a report containing the views of children themselves. In 2010 the so-called Kinderrechtenhuis (Children's Rights House) in Leiden opened its door, which aims to provide education on children's rights at a regional, national and international level. See <http://www.kinderrechtenhuis.nl>, accessed on 10-06-2011. Also <http://www.rijksoverheid.nl/onderwerpen/kinderrechten>, accessed on 10-06-2011.

Welfare of the Child, which was adopted in 1990.<sup>23</sup>

The African Children's Rights Charter came into force on 29 November 1999, almost 10 years later. South Africa ratified the African Children's Rights Charter on 7 January 2000. It is regrettable that this regional document has battled to gain the attention and support it deserves from the African countries on the continent.<sup>24</sup> The African Children's Rights Charter is the first regional human rights instrument which exclusively focuses on the rights of the child and explicitly acknowledges the child as the bearer of human rights (and duties).<sup>25</sup>

The Netherlands, as a member of the Council of Europe, became a High Contracting party to the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950.<sup>26</sup> On the basis of Article 66 the Convention took effect on 3 September 1953.<sup>27</sup> The European Convention was the first regional human rights instrument which contained supervisory and enforcement mechanisms.<sup>28</sup> Since the entry into force of Protocol No. 11 in 1998,<sup>29</sup> complainants may bring allegations of violations of human rights directly before the European Court. Article 33 provides for Inter-State cases and Article 34 for individuals. Article 34 determines that the European Court of Human Rights "may receive

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<sup>23</sup> See Van Bueren *The International Law on the Rights of the Child* (1995) 22. Shortly after the adoption of the CRC by the United Nations in 1990, the Assembly of the Organisation of African Unity adopted the African Children's Rights Charter (OAU Doc CAB/LEG/24.9/49 (1990), see Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 331.

<sup>24</sup> On the basis of Article 47(3) of the African Children's Rights Charter, the treaty has come into operation 30 days after the reception of the ratification by the 15<sup>th</sup> Member State, which took nine years. See Memzur (2008) 23 *SAPR/PL* 1.

<sup>25</sup> See Chirwa *The International Journal of Children's Rights* (2002) 157.

<sup>26</sup> The European Convention has entered into force on 3 September 1953, in accordance with Article 66(2) of this document.

<sup>27</sup> *European Issues Human Rights in International Law* (1994) 159.

<sup>28</sup> For an overview of the previous complaint procedure (right of petition) which was in place until 1998, see Van Bueren *The International Law on the Rights of the Child* (1995) 22. It should be noted that the other relevant regional document, the African Children's Rights Charter, also provides for the right of petition. Article 44 reads as follows: "The Committee may receive communication, from any group or non-government organisation recognised by the Organisation of African Unity (now AU) or the United Nations relating to any matter covered by this Charter."

<sup>29</sup> ETS no.155, which entered into force on 1 November 1998. See also Breen *The Standard of the Best Interests of the Child – A Western Tradition in International and Comparative Law* (2002) 243.

applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the European Convention”.<sup>30</sup>

Interestingly, in 1990 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1121 on the Rights of the Child, which invited the Committee of Ministers to draft a legal instrument to supplement the CRC.

The aim of this document was to support and enhance the implementation provision in the CRC.<sup>31</sup> This resulted eventually in the European Convention on the Exercise of Children's Rights,<sup>32</sup> which came into operation for the state parties involved on 1 July 2000. The following paragraphs in the Preamble are particularly relevant with regard to children and their families:

The member states of the Council of Europe and the other states signatory hereto, are:

- Convinced that the rights the rights and best interests of children should be promoted and to that end children should have the opportunity to exercise their rights, in particular in family proceedings affecting them;<sup>33</sup>

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<sup>30</sup> It is interesting that Article 34 ends with “*the High Contracting parties undertake not to hinder in any way the effective exercise of this right*”, meaning the right to approach the European Court. However, the latter is subject to the limitation in Article 35, which provides that “*the court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*” See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 33.

<sup>31</sup> See Article 4 of the CRC, in terms of which states parties are obliged “*to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights*” listed in the CRC. See section 2 of the Preamble of the European Convention on the Exercise of Children's Rights (1996).

<sup>32</sup> The European Convention on the Exercise of Children's Rights has been opened for signature as from 25 January 1996, see “*Explanatory Report*” (ETS no. 160), under I.

<sup>33</sup> Own emphasis. See section 4 of the Preamble. This provision gives the child's best interests hands and feet in the sense that it emphasises that children should be given the opportunity to actually exercise their rights. It goes further than merely providing that the child's best interests should be “a” or “the” primary consideration, like in Article 3 of the CRC and Article 4 of the African Children's Rights Charter. It is commendable that section 28(2) of the

- Recognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children;
- Recognising the importance of the parental role in protecting and promoting the rights and best interests of children and considering that, where necessary, states should also engage in such protection and promotion;<sup>34</sup>
- Considering, however, that in the event of conflict it is desirable for families to try to reach agreement before bringing the matter before a judicial authority.<sup>35</sup>

Chapter II provides specifically for procedural measures which aim to promote the exercise of children's rights. For example, Article 3 deals with the right to be informed and to express his or her views in proceedings. As will be seen, the latter has been incorporated in the national law of South Africa and the Netherlands.<sup>36</sup> It is submitted that the entitlement to information forms an integral part of the right to participate, since true participation will only be feasible when it is based on the relevant information.<sup>37</sup> The same hold true with regard to

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Constitution of the Republic of South Africa is even more explicit: "*a child's best interests are of paramount importance in every matter concerning the child*". The crux, however, revolves around the question whether children indeed have the opportunity to exercise their rights, in other words, whether they are able and encouraged to be involved in matters affecting them. The participation of children will be dealt with in sections 2.2.1.6 and 3.1.4.

<sup>34</sup> See section 6 of the Preamble. This provision acknowledges and supports the role of parents and other care-givers as holders of parental responsibilities. It should be noted that in terms of the definition of "holders of parental responsibilities" in Article 2, the latter is not limited to parents and other persons, but includes "bodies entitled to exercise some or all parental responsibilities".

<sup>35</sup> See section 7 of the Preamble. The term "judicial authority" has been defined as a court or an administrative authority having equivalent powers; see Article 2(b) of the European Convention on the Exercise of Children's Rights. It is commendable that out of court settlement should be encouraged in family matters, especially those involving children. Alternative methods of dispute resolution, for example, family group conferencing has proven to be very effective in the Netherlands. It is interesting to note that both the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008 refer to family conferencing. For a more detailed discussion, see section 3.1.4 on participation.

<sup>36</sup> See section 3.1.4.

<sup>37</sup> The term "relevant information" has been defined as "information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child." See Article 2(d) of the European Convention on the Exercise of Children's Rights.

the right to apply for the assistance by an appropriate person of the child's choice or the appointment of a special representative since this would strengthen the procedural rights of the child at a hearing. Based on the latter, it is submitted that it is regrettable that the Netherlands is not a state party to this Convention,<sup>38</sup> since Article 5 is not reflected in the Dutch legislation. Article 5 reads as follows:

“Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- (a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;
- (b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;
- (c) the right to appoint their own representative;
- (d) the right to exercise some or all of the rights of parties to such proceedings”.

This Convention provides thus an additional standard pertaining to the procedural rights of children, which state parties have to comply with. It is submitted that Article 5 could have made a meaningful contribution in strengthening the procedural position of children in the Netherlands in the past decade. However, it should be noted that recently the procedural rights of children have been under investigation by the office of the *Kinderombudsman*, which hopefully will strengthen the rights of children in the Netherlands.<sup>39</sup> Whilst it still has

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<sup>38</sup> Meuwise *et al.* have pointed out that most aspects of the latter Convention had been dealt with already in the Dutch legislation *Handboek Internationaal Jeugdrecht* (2005) 36. Although a child's right to express his or her views are accommodated in legislation (Article 809 and 811 of the Code of Civil Procedure) and legal practice, there is still room for improvement. Generally speaking a child will be represented by the parents or a guardian and sometimes by a special curator. Only in few instances the child can act independently, for example, on the basis of Article 29a of the Act on the Youth Care, as discussed in section 5.3.6.2.

<sup>39</sup> It is promising that the Ombudsman has taken it upon him to investigate the possibilities for children to commence legal proceedings, which will hopefully result in new legislation regarding civil procedure, thereby strengthening the legal position of children, available at <http://www.dekinderombudsman.nl/145/artikel/kinderombudsman-ond>, accessed on 10-6-2011. See also section 3.1.4.

to be seen whether children in the Netherlands will be able to approach the courts independently, it is submitted that meanwhile a provision similar to Article 5 of the European Convention on the Exercise of Children's Rights should be included in the Civil Code of Procedure.

The relevance of comparative analysis of the contents of international and regional documents can be found in establishing which provisions in which document provide a better standard. In other words, which part of an international or regional document fulfils its duty better in promoting and securing the rights of children. It is submitted that the highest possible standards should be adhered to. In general, states that become party to a treaty are obliged to bring their national legislation in line with the content of the treaty that they have subscribed to; thus this is a responsibility for both South Africa and the Netherlands. Moreover, it is agreed with Viljoen that international child law does not replace, but rather supplements, the protection of children on a national level.<sup>40</sup>

However, it depends on the system of each of the state parties as to what the effect of a treaty will be. In other words, it has to be established what the relationship is between international law and the national law of each state. In this regard a distinction can be drawn between the system of monism and dualism.<sup>41</sup> According to the monist system, international law is integrated into the national law of a country without the need of implementation legislation enacted by a legislative body of a particular country. Therefore, the national courts of a country should apply some of the rules of international law directly.<sup>42</sup> The Netherlands maintains a moderate system of monism,<sup>43</sup> as derived from the Dutch

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<sup>40</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 332.

<sup>41</sup> See also Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 63.

<sup>42</sup> According to Dugard, the whole body of international law, which is binding on a country, cannot be applied directly by the national courts of a country. Thus the absolute monist view is put in perspective by the so-called "harmonisation theory", where in the case of conflict between international law and the national law of a country, the judge should apply the own jurisdictional rules *International Law – A South African Perspective* (2007) 47-48. However, see *General Comment No. 5* (2003) on General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6) UN Document CRC/GC/2003/5). On page 6 of the latter document the Committee on the Rights of the Child "welcomes the incorporation of the Convention into domestic law [...]", and states that "in case of any conflict in legislation, predominance should always be given to the Convention, in the light of Article 27 of the Vienna Convention on the Law of Treaties."

<sup>43</sup> In Dutch called: *de leer van de directe werking*.

Constitution.<sup>44</sup>

The advantage of this system is that individuals can directly derive rights and obligations from the treaty concerned, but in the Netherlands only insofar as it concerns so-called “self-executing” provisions of a treaty. Whether or not a provision is “self-executing” is determined by the courts.<sup>45</sup>

These “self-executing” provisions of treaties are higher in ranking than the national legislation.<sup>46</sup> The other system, namely dualism, regards international law and the national law of a country as two distinct systems of law. Incorporation of international law into the national law of a country is an absolute prerequisite for its application by the national courts of the country concerned.<sup>47</sup> In other words, in order to give effect to a treaty, integration of the treaty contents into national legislation is needed because the direct applicability of provisions of treaties is not recognised.<sup>48</sup> This means that individuals cannot derive rights and obligations directly from the treaty. A litigant has to base his or her action on the national law of the country concerned. It is interesting to note that, unlike the Netherlands, South Africa, in essence,<sup>49</sup> subscribes to the system of dualism, meaning that incorporation, generally speaking, is necessary.<sup>50</sup>

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<sup>44</sup> The Dutch Constitution (in Dutch: *de Grondwet*) regulates the involvement of the Kingdom of the Netherlands to treaties in Article 90-95 and 120, see below in section 2.1.2.

<sup>45</sup> See the discussion in section 2.1.2.

<sup>46</sup> Article 94 of the Dutch Constitution.

<sup>47</sup> Dugard, *International Law – A South African Perspective* (2007) 47.

<sup>48</sup> For a discussion in Dutch on the distinction between monism (*de directe leer*) and dualism (*de transformatieleer*) see Verheugt *Inleiding in het Nederlandse Recht* (2009) 540-541.

<sup>49</sup> Transformation into national legislation takes place on the basis of section 231(4) of the Constitution. However, an international agreement could bind the Republic on the basis of section 231(2), after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Moreover, section 231(3) provides: that an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. Subsection (5) states that the Republic is bound by international agreements which were binding on the Republic when this Constitution (Constitution of the Republic of South Africa, 1996) took effect.

<sup>50</sup> See Chapter 14 of the Constitution, sections 231-233, dealing with International Law. Also



## 2.1.1 Application of international law in South Africa

With the enactment of the interim Constitution in 1993,<sup>51</sup> which was replaced by the 1996 Constitution,<sup>52</sup> the Republic of South Africa has become one sovereign democratic state, founded, among others, on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”.<sup>53</sup> Section 2 unambiguously states that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.<sup>54</sup>

Chapter 14 of the Constitution deals with General Provisions, relating among others to international agreements. The negotiating and signing of all international agreements are the responsibility of the national executive, the Cabinet.<sup>55</sup> Pertaining to the status of international law, section 231(4) of the Constitution states:

“[A]n international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

Section 231(4) of the Constitution provides that “any international agreement, which is not self-executing, becomes law in the Republic when it is enacted into law by national legislation [...]”.<sup>56</sup> It seldom happens<sup>57</sup> in South Africa that an international document as a

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see section 2.1.1.

<sup>51</sup> 200 of 1993, which took effect on 27 April 1994 and was in operation until it was replaced by the “final” Constitution of 1996.

<sup>52</sup> Which came into operation on 4 February 1997. Currie & De Waal *The Bill of Rights Handbook* (2005) 7.

<sup>53</sup> Section 1 of the Constitution.

<sup>54</sup> Also Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 37.

<sup>55</sup> Sections 231(1), 85 and 91 of the Constitution.

<sup>56</sup> See the discussion on monism versus dualism above in section 2.1. See also Du Bois (ed.) *Wille's Principles of South African Law* (2007) 109.

<sup>57</sup> A great disadvantage is the fact that an individual in South Africa (children, their parents or other interested parties; the rights are not limited to South African only) cannot (easily) base a legal action on the non-realisation of any right in the CRC or the African Children's Rights Charter. At first sight, the wording of section 28 of the Constitution and the various sections in

whole is enacted into law by national legislation.<sup>58</sup> However, with the recent enactment of the Children's Act<sup>59</sup> a number of the rights as mentioned in the CRC and African Children's Rights Charter have become part of the national law.

The South African Constitution also deals specifically with the application of international law.<sup>60</sup> Article 233 states that:

“[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

In other words, the word “must” indicates that this is imperative.<sup>61</sup> In addition, section 39 of the Constitution deals with the interpretation of the Bill of Rights in the Constitution.<sup>62</sup>

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the Children's Act 38 of 2005 do improve the protection and participation of children. However, wording in legislation is merely the first step. It depends on the interpretation and application by the courts on the basis of national legislation or section 39(1)(a) of the Constitution whether (or not) the rights of children are truly served. Nevertheless, there have been a few cases in South Africa in which some of the rights in the CRC came to the fore: for example, *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) and *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as amicus curiae)* [2009] JOL 23881 (CC).

<sup>58</sup> An exception, for example, is the Hague Convention on the Civil Aspects of International Child Abduction (1980), which as a whole has been adopted as the Hague Convention on the Civil Aspects of International Child Abduction Act, 72 of 1996. The complete Act was repealed with the coming into force of the second part of the Children's Act 38 of 2005 on 1 April 2010, see Schedule 4 of the Children's Act 38 of 2005. However, the Convention will maintain its relevance and validity through Schedule 2 of the Children's Act 38 of 2005. Mahery also refers to this exception in Boezaart (ed.) *Child Law in South Africa* (2009) 324.

<sup>59</sup> 38 of 2005.

<sup>60</sup> See Mahery in Boezaart (ed.) *Child Law in South Africa* (1999) 323.

<sup>61</sup> It is interesting to note that Du Bois wonders about the effect of section 233 of the Constitution; is it merely to constitutionalise the “*established statutory presumption*” that the intention of the Legislature is to respect international law or, more desirable, will it contribute to “*more strongly purposive interpretations of legislation*” with regard to international law, whether or not with regard to treaties prior transformation into South African law has taken place: *Wille's Principles of South African Law* (2007) 110.

<sup>62</sup> The Bill of Rights is included in Chapter 2 of the Constitution, 1996. The Bill of Rights contains an extensive number of rights (sections 7-39) and was put in place to safeguard human rights in South Africa. This was important due to the previous system of apartheid and is reflected in section 1(a) and (b) of the Constitution, which state, among others, that “the Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms; and

Section 39(1) reads as follows:

“When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) *must*<sup>63</sup> consider international law;<sup>64</sup> and
- (c) *may*<sup>65</sup> consider foreign law”.

It is clear that when it comes to the interpretation of any of the rights referred to in the Bill of Rights, a court, tribunal or forum is obliged to take international law into account. In other words, the South African courts can only take note of the CRC and the African Children’s Rights Charter on the basis of section 39(1)(b) of the Constitution, where they “must” consider international law. This merely entails an instruction to “consider” though. However, this duty creates the possibility of interpreting the rights in the Bill of Rights in a wider context, namely that of treaties. Skelton correctly points out that the courts also pay attention to guidelines developed in reference to a treaty.<sup>66</sup>

For example, the United Nations Committee on the Rights of the Child produces on a regular basis General Comments which provide guidance for state parties with regard to the

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(b) non-racialism and non-sexism”. The Constitution is the supreme law of the Republic of South Africa, see section 2. Apart from the Bill of Rights, the Constitution regulates a variety of government related matters, such as co-operative government, parliament, the President and National Executive, the Provinces and Local Government, the Courts and the Administration of Justice, State institutions which support the constitutional democracy, Public Administration, Security Services, Traditional Leaders and Finance. See also Currie & De Waal *The Bill of Rights Handbook* (2005) 2-8.

<sup>63</sup> Own emphasis.

<sup>64</sup> It is interesting to note that for the purpose of interpretation the South African Constitution allows reference to international human rights law in general, and that it is not limited to treaties to which South Africa is a party. Currie & De Waal *The Bill of Rights Handbook* (2005) 160.

<sup>65</sup> Own emphasis.

<sup>66</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 272.

interpretation of the CRC,<sup>67</sup> and moreover, Concluding Observations (including recommendations) as a response to the reporting duty of a states party.<sup>68</sup> Such input of a monitoring body, like the Committee on the Rights of the Child, is not binding on the courts.<sup>69</sup> Nevertheless, since a treaty is not a static document it is submitted that any additional documentation to an international document should be taken into consideration by the courts. In other words, such additional documentation should fall under the same obligation (to be considered) of section 39(1)(b) of the South African Constitution.

Section 39(1)(c) of the Constitution, however, provides for discretion with regard to the application of foreign law. Foreign law is the national law of a foreign country; for example, the national law of the Kingdom of the Netherlands, Canada or New Zealand.<sup>70</sup> The success of an argument based on foreign law before the South African court will depend on the relevance and therefore persuasiveness of the developed principles or legislation of the other country. According to Du Bois, South African courts regularly consider input from the “Common Law family” and the countries of the “Civil Law tradition”, like the Netherlands.<sup>71</sup> It is submitted that the importance of section 39 of the Constitution, although referring to “must consider” and “may consider” is not to be underestimated for the interpretation of the Bill of Rights since it specifically refers to international law and foreign law. It should be noted that the South African courts have been in compliance with this constitutional imperative over the past years.<sup>72</sup> Nevertheless, it is up to the courts and the legal profession to take comparative developments further.

## 2.1.2 Application of international law in the Netherlands

The Netherlands has a codified system, meaning that the majority of rules are contained in

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<sup>67</sup> Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 316.

<sup>68</sup> See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 325.

<sup>69</sup> See also Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 323.

<sup>70</sup> See the discussion by Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 107-112.

<sup>71</sup> *Wille's Principles of South African Law* (2007) 111.

<sup>72</sup> The principles set out in section 39 of the Constitution came to the fore in, for example, *Jooste v Botha* 2000 (2) BCLR 187 (T) 195C; also *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) par 25.

various Codes, for example the Civil Code, dealing with civil law. The main sources of law are legislation, case law and international law. The highest court in the Netherlands, the *Hoge Raad*,<sup>73</sup> provides for unity and legal certainty, since it only deals with legal questions and not the facts. The lower courts deal with the facts of a specific case. Although not formally bound, the lower courts are inclined to follow the decisions of the *Hoge Raad* and therefore the latter is indispensable with regard to legal developments in the Netherlands. Book 1 of the Civil Code, dealing with law of persons and family law, took effect from 1 January 1970. However, societal developments<sup>74</sup> and the influence of, among others the CRC and the European Convention on Human Rights, have led to an extensive number of court decisions and new and updated legislation.<sup>75</sup>

Articles 90 to 95 of the Dutch Constitution deal with treaties. Article 90 provides that the Dutch government promotes the development of an international legal order. It is therefore the responsibility of the government to establish the contents of international agreements.<sup>76</sup> Article 91 contains the main rule with regard to the commitment of the Netherlands to a treaty, approval by Parliament,<sup>77</sup> after which ratification of a treaty is possible. Treaties to which the Netherlands is a party should be published in the *Bulletin of Treaties*.<sup>78</sup>

Apart from the state being bound to a treaty, there is in principle a possibility for an individual person to directly derive rights and obligations from a treaty, depending on the nature of the

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<sup>73</sup> De *Hoge Raad* der Nederlanden.

<sup>74</sup> For example, the change of view on the concept “marriage” resulting in legislation on registered partnership (accommodating same-sex couples and couples who have a problem with the institution of marriage), which was incorporated in Book 1 of the Civil Code in 1997, Stb. 324, parliamentary documents 23 761, see Articles 80a to 80g of Book 1. For a detailed discussion see De Boer *Mr.C. Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht – Personen - en Familierecht* (2010) 443, hereafter referred to as Asser/De Boer *Personen- en Familierecht*. An increase in divorces also resulted in the incorporation of specific provisions in Book 1 of the Civil Code pertaining to, among others, the joint authority of parents and parental agreements. For a detailed discussion on parental authority in the Netherlands, see section 4.1.2. See also Asser/De Boer *Personen- en Familierecht* (2010) 679.

<sup>75</sup> Wortmann & Duijvendijk-Brand, *Compendium van het Personen- en Familierecht* (2009) 1.

<sup>76</sup> Signing of a treaty usually is done by the Minister of Foreign Affairs, on behalf of the government.

<sup>77</sup> In other words, the Houses of the States General. See Verheugt *Inleiding in het Nederlandse Recht* (2009) 539.

<sup>78</sup> After publication the conditions mentioned in Article 93 and 95 of the Dutch Constitution are fulfilled.

contents of such treaty. Article 93 of the Dutch Constitution states: “Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published”. In other words, in the Netherlands there is a possibility for certain provisions in the CRC or the European Convention to be “self-executing”, having “direct effect”, thus having binding force upon anyone in the Kingdom.

These Articles can be binding without any intervention by the national legislature. Moreover, Article 94 provides for a ranking order pertaining to provisions in a treaty which are “self-executing”; these are higher in rank than the legislative provisions in force within the Kingdom.<sup>79</sup> However, it is important to note that whether or not a provision in the Convention is “self-executing” will in the Netherlands ultimately be decided by the court.<sup>80</sup>

On the basis of Article 94 the court is authorised to test all Dutch legislative provisions against a “self-executing” provision in a treaty. If a Dutch legislative provision is in conflict with a particular “self-executing” provision in a treaty, the former will not be applied. It is interesting to note that Article 120 of the Dutch Constitution prohibits the court from considering a provision in a treaty when the latter is inconsistent with the Constitution. In other words, it is not within the authority of the court to determine whether provisions in a treaty are in conflict with the Constitution.<sup>81</sup>

When it comes to fundamental rights in the Constitution, however, the ranking order of Dutch legislative provisions pertaining to “self-executing” provisions in a treaty is slightly more complicated. Where the Dutch Constitution is more favourable for the litigant than the “self-

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<sup>79</sup> See Verheugt *Inleiding in het Nederlandse Recht* (2009) 90.

<sup>80</sup> Where a complainant or an accused refers to a provision in a Convention or treaty, the court is obliged to determine, on the basis of Article 94 of the Constitution of the Netherlands, whether such a provision is “self-executing” or not. Article 94 states that “statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions”. See Verheugt *Inleiding in het Nederlandse Recht* (2009) 89 and 540; also Akkermans, Bax & Verhey *Grondrechten, Grondrechten en Grondrechtsbescherming in Nederland* (2005) 45.

<sup>81</sup> Issues regarding conflict between provisions in a treaty and the Dutch Constitution fall within the authority of the government and Parliament (the States General who have to approve), not the court. See Verheugt, *Inleiding in het Nederlandse Recht* (2009) 91.

executing” provision in a treaty, the former will prevail.<sup>82</sup> By means of comparative analysis between international and regional law it can be determined which instrument provides a higher standard and which ensures a better protection. In addition, the national law of a country or countries can be tested against these standards.

From this it can be derived whether provisions can be improved, which in turn will contribute to legal development. The relevance lies therein that it aims to contribute to the promotion and protection of children's rights in a country.<sup>83</sup> The title of this chapter, “The standards set by international and regional law relating to the placement of children in need of care” refers to the influencing processes which are taking place between the various sources of rules.

The treaties (international and regional documents) have significantly influenced the national legislation and jurisprudence in both South Africa and the Netherlands.<sup>84</sup> Without the implementation and application of the standards provided for in the international and regional documents, the real enhancement of children's rights on a national level would at the very least be questionable. In the following sections of this chapter the relevant parts of the international<sup>85</sup> and regional documents<sup>86</sup> regarding the placement of children in need of care will be discussed.

For the sake of clarity it should be noted that the following sections are by no means a discussion of the complete documents. A selection of the Articles or sections has been made relating to the relevance of the topic under discussion.

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<sup>82</sup> This is in line with Article 60 of the European Convention on Human Rights.

<sup>83</sup> A noteworthy result of legal comparison is the South African case *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA (CC) 232, on the paramountcy of the best interests of the child. See also section 3.1.3. Moreover, it is interesting to note that for example in Europe, there is a development toward European family law and international family law. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 305.

<sup>84</sup> Viljoen rightly emphasises that “international children's law does not replace, but rather supplements protection as the national level,” in Boezaart (ed.) *Child law in South Africa* (1999) 332.

<sup>85</sup> The United Nations Convention on the Rights of the Child (1989).

<sup>86</sup> The African Charter on the Rights and Welfare of the Child (1990), which was preceded by the Declaration of the Rights and Welfare of the African Child (1979), see Bennett, *Human Rights and African Customary Law* (1999) 98, to which Charter South Africa is a state party. Furthermore, the Netherlands is a High Contracting party to the European Convention (1950). Some specific Articles of the European Convention will be relevant for the present discussion.

## 2.2 Discussion of relevant provisions in the CRC, the African Children’s Rights Charter and the European Convention

### 2.2.1 General provisions of the CRC compared to the African Children’s Rights Charter and selected provisions of the European Convention<sup>87</sup>

#### 2.2.1.1 Preambles of the various international and regional documents<sup>88</sup>

In the Preamble to the CRC reference is made to various existing documents,<sup>89</sup> in which basic human rights were already granted to “all members of the human family”, like the right to “inherent dignity and of the equal and inalienable rights”. Unquestionably, these rights were also afforded to children. The intention of the CRC is actually to make a striking contribution regarding the protection of the families in society. According to the Preamble, all state parties to the CRC are “convinced 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 responsibilities within the community”.

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<sup>87</sup> The full title of this document reads as follows: “European Convention for the Protection of Human Rights and Fundamental Freedoms”, or “European Convention on Human Rights, hereinafter referred to as the European Convention”. This regional document was signed on 4 November 1950 and entered into force on 3 February 1953, on basis of Article 66(2) of the European Convention. The reason for the inclusion of some of the Articles of this general human rights instrument has to do with the fact that apart from its relevance for the Netherlands, some provisions are of utmost importance for the protection of the rights of children and their families, even beyond Europe. For example, the Articles 5(1)(d), 5(4) and (5), 6(1) and 8. See also section 1.2 above.

<sup>88</sup> All three treaties under discussion start with a Preamble. This prologue describes the contracting parties and their common understanding, thereby explaining the necessity of the document, the ideal (situation), the intention and the purpose thereof. See also Kellaway *Principles of Legal Interpretation – Statutes, Contracts & Wills* (1995) 260. See also Akosua Aidoo, The CRC and UN Guidelines for the Alternative Care of Children: Opportunities for Sub-Saharan Africa, *Francophone SSA Conference – Family Strengthening and Alternative Care* Dakar, Senegal, 10 & 11-05-2012.

<sup>89</sup> For example, the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948) and the International Covenants on Human Rights (1976). See Patel & Watters *Human Rights – Fundamental Instruments & Documents* (1994) 3.



Apart from protection, reference is also made in the Preamble to the ideal regarding the development of each child. To this effect, state parties “recognise 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”. Although paragraph 5 of the Preamble of the African Children’s Rights Charter at first sight is phrased with similar wording, it contains the following addition: “[R]ecognizing that the child occupies a unique and privileged position in the African society”.<sup>90</sup> It is argued that at this point the Preamble of the African Children’s Rights Charter goes beyond the CRC’s Preamble.<sup>91</sup> The reality is that there are state parties which do not (yet) live up to the intended commitments and expectations.<sup>92</sup>

With regard to the topic of this thesis, namely: “The placement of children in need of care: a comparative study between South African Law and Dutch Law in the light of international standards”, it is also important to note that the Preamble of the CRC specifically refers to the fact that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before<sup>93</sup> as well as after birth”.<sup>94</sup>

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<sup>90</sup> Compare with section 6 of the Preamble of the CRC.

<sup>91</sup> See Akosua Aidoo (member/rapporteur UN Committee on the Rights of the Child) *The CRC and UN Guidelines for the Alternative Care of Children: Opportunities for Sub-Saharan Africa*, Francophone SSA Conference – Family Strengthening and Alternative Care, Dakar, Senegal, 10 & 11 May 2012, available at [www.conf-familiepriseencharge-dakar.org/Documents/01-confere](http://www.conf-familiepriseencharge-dakar.org/Documents/01-confere), accessed on 8-10-2012.

<sup>92</sup> See the various sessions of the Committee on the Rights of the Child and the recommendations made by the Committee regarding each states party. On the basis of Article 44 of the CRC, state parties are obliged to submit reports to the Committee on the measures they have adopted which are giving effect to the rights in the Convention and on the progress made on the enjoyment of those rights. After ratifying a state party should submit such a report within two years, thereafter every five years. In other words, South Africa and the Netherlands are obliged to submit their progress reports every five years. See also footnotes 20 and 21.

<sup>93</sup> It should be noted that in the Netherlands it is possible to obtain a supervision order even before a baby is born, but only from 24 weeks of pregnancy. At that stage the unborn child has reached a viable stage of development. Moreover, after 24 weeks the legislation pertaining to abortion will no longer be applicable. On the basis of Article 1:254(1) and 1:257(1) of the Civil Code, the children's court may order a supervision order, in terms of which a social worker will offer help and support to the parent-to-be, in order to protect the unborn child. See Romer, “Bescherming van kind voor geboorte niet toereikend – rondetafel gesprek over prenatale kindermishandeling” 2008 (2) *Tijdschrift voor de Rechten van het Kind* 10. See also Chapter 4.

<sup>94</sup> As indicated in the Declaration of the Rights of the Child (1959). See section 9 of the Preamble of the CRC. Section 6 of the African Children’s Rights Charter reads as follows: “[R]ecognizing that the child due to the needs of his physical and mental development

Furthermore it is recognised in the Preamble that “in all countries in the world there are children living in exceptionally difficult conditions, and that such children need special consideration”. Finally, for the protection and harmonious development of the child, the importance of traditions and cultural values of different people<sup>95</sup> should be taken into account. The Preamble concludes with the importance of “internal co-operation for improving the living conditions of children in every country, in particular in the developing countries”. South Africa is such a developing country. However, it is submitted that the same could be of importance for more developed countries, like the Netherlands, where in certain respects challenges of a similar nature are encountered.<sup>96</sup>

In the Preamble to the African Children’s Rights Charter, it is specifically noted, with concern, “that the situation of many African children remains critical<sup>97</sup> as a result of inadequate social conditions, natural disasters, armed conflicts, economic deprivation, exploitation, hunger, disability and ‘that the child, by reason of his physical and mental immaturity, needs special safeguard and care’”.<sup>98</sup>

At the same time, it is recognised “that the child occupies a unique and privileged position in the African society, and 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”, which is similar to the content of paragraph 6 in the Preamble to the CRC.

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requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security”. It is submitted that the latter document is clearer at this point, since it stipulates expressly the kind of care which children require.

<sup>95</sup> In South Africa the majority of the people are governed by customary law, which differs from region to region. Efforts have been made to make customary law more accessible and clear. For example, Bennet in *A Sourcebook of African Customary Law for Southern Africa* (1991); Bennett in *Human Rights and African Customary Law* (1999); Bekker, Labuschagne & Vorster (eds.) *Introduction to Legal Pluralism in South Africa, Part 1 Customary Law* (2002).

<sup>96</sup> For example, the occurrence of domestic violence and abuse; an increase of supervision orders over the past five years or single parent households due to the high divorce rates. There are, however, specific problems relating to South Africa, for example, child-headed households due to HIV/AIDS.

<sup>97</sup> According to Viljoen, African children are more likely to be exposed to human rights violations than children on other continents. He explicitly refers to poverty, HIV/AIDS, warfare, famine, and harmful cultural practices which have tremendous impact on vulnerable children: in Boezaart (ed.) *Child Law in South Africa* (2009) 332.

<sup>98</sup> The latter part corresponds with the CRC.

In Chapter 1 reference was made to the fact that although the European Convention does not specifically focus on children, some provisions are of utmost importance for the protection of the rights of children and their families.<sup>99</sup> Sparse reference is made to children and their specific rights. It is evident that the other rights in the European Convention are also applicable to minors or children, unless the contrary is implicated. The Preamble to the European Convention is formulated in general terms and focuses mainly on the importance, and further realisation, of human rights and fundamental freedoms in general, the ambit of which includes children.

Although the main comparison will revolve around the CRC and the African Children's Rights Charter as specific children's rights documents, the provisions of the European Convention will come to the fore where relevant for comparison or because of its additional value. It should be noted that whilst the CRC and the African Children's Rights Charter complement each other, on the basis of the comparison of provisions it will be established which provides a higher standard and thus better protection. The highest attainable standard should prevail, which is acknowledged in both the CRC and the African Children's Rights Charter. In this regard, Article 41 of the CRC states that "[n]othing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in the law of a state party or international law in force for that state."<sup>100</sup>

Whereas it can be derived from the CRC that children are viewed as independent subjects who have rights, the African Children's Rights Charter also considers the child to be a holder of rights, since almost half the provisions of the African Children's Rights Charter commence with "Every child shall...".<sup>101</sup> At the same time, the latter document acknowledges the importance of African cultural values. Therefore it has been argued that the African Children's Rights Charter indeed reconciles "Western juristic thought and African traditional

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<sup>99</sup> See section 1.2 above, in which reference was made to the Articles 5(1)(d), 5(4), (5), and 6(1), which are mainly discussed in Chapter 5 and Article 8 of the European Convention, which will be discussed in section 2.2.3.1 below.

<sup>100</sup> This can be compared with Article 1(2) of the African Children's Rights Charter which reads as follows: "[N]othing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that State." See also Memzur (2008) 23 *SAPR/PL* 15.

<sup>101</sup> Compare the formulation with most of the provisions in the CRC: "States Parties shall ...", which formulation is more traditional. See also Memzur (2008) 23 *SAPR/PL* 1.

cultural values”.<sup>102</sup> Another strength of the African Children’s Rights Charter concerns its stance pertaining to customs, tradition, cultural or religious practices which are inconsistent with the Charter. In terms of Article 1(3) of the Charter these shall be considered null and void to the extent of the inconsistency.<sup>103</sup> It is submitted that the African Children’s Rights Charter does not merely provide a minimum standard, but that it is committed to bring the protection of the African children and the enhancement of their rights to a higher level. In addition, it attempts to deal with specific challenges pertaining to the African continent, thereby having regard for the social, economic and cultural aspects.<sup>104</sup>

Before turning to the substantive provisions in the CRC and the African Children’s Rights Charter, the definition of “a child” will be outlined.

### 2.2.1.2 The meaning of “a child”<sup>105</sup>

Article 1 of the CRC is a general provision which is relevant, pertaining to all the specific rights as provided in the CRC. The definition of a child is formulated as follows:

“For the purposes of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”.<sup>106</sup>

A child means every person under the age of 18, unless the national law applicable to the child provides otherwise.<sup>107</sup> The importance of the definition of a child speaks for itself since

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<sup>102</sup> See Davel (2002) *De Jure* 282.

<sup>103</sup> See also Chirwa “The merits and demerits of the African Charter on the Rights and Welfare of the Child” (2002) *The International Journal of Children's Rights* 158. Davel has indicated that the importance of the African Children’s Rights Charter lies therein that it provides guidance pertaining to which cultural practices and traditions should be abandoned and which should be maintained in order to ensure the protection of children on the African continent, in 2002 *De Jure* 281 and further.

<sup>104</sup> See Memzur (2008) 23 *SAPR/PL* 15.

<sup>105</sup> See Article 1 of the CRC.

<sup>106</sup> Where the national legislation of a country provides for a higher age of majority, the provisions of the Convention remain applicable to everybody till the age of 18. See Meuwese *et al.*, *Handbook Internationaal Jeugdrecht* 2005 46.

<sup>107</sup> At the time of the negotiations regarding the text of the CRC discussions took place on the maximum age, in other words the end of childhood. Since there are profound differences

it determines to which specific rights a person up to 18 years is entitled and which legal remedies would be available. However, the fact that Article 1 allows for the possibility that on the basis of the national law of a country, majority will be attained at an earlier age and could be disadvantageous to children in those countries. This inevitably would have the consequence that most of the Articles under the CRC would not be applicable any more.<sup>108</sup> It is interesting to note that an extensive discussion revolved around the moment at which life begins and thus the question as to whether or not an unborn child should fall under Article 1 of the CRC.<sup>109</sup>

Detrick refers in this respect to the different opinions of states regarding the issue of abortion. Detrick further sets out that the discussions led to the compromise of including paragraph 9 in the Preamble and not to provide specifically for a lower age limit in Article 1.<sup>110</sup>

Paragraph 9 of the Preamble reads as follows: "Bearing in mind that ... ' the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'".<sup>111</sup> Thus no explicit protection of

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between cultures and societies on how they view the duration of childhood, there was a need for some flexibility, which resulted in the additional phrase in Article 1. Van Bueren *The International Law on the Rights of the Child* (1995) 36; Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 52; Meuwise *et al.* (2005) 46. Also Bekker "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" 2008 *Obiter* 397. See also section 3.1.1 which deals with the meaning of "a child" in terms of South African law and Dutch law.

<sup>108</sup> For an overview regarding the input of various state parties see Van Bueren *The International Law on the Rights of the Child* (1995) 36-38; See also Rehman *International Human Rights Law – A Practical Approach* (2003) 381.

<sup>109</sup> See Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 53.

<sup>110</sup> See *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 54. According to Detrick, the CRC's *travaux préparatoires* indicate that the original proposal of the definition of a "child" in Article 1 contained the following phrase: "every human being from the moment of his birth." This gave rise to the necessary debate which ranged from arguments in favour of including the moment of conception to the argument that the determination of the beginning of childhood should be abandoned and that the wording should be compatible with the national legislation of a number of countries. In order to bring an end to the impasse, Morocco suggested the phrase "from the moment of his birth" to be deleted, which proposal was adopted, in *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 54.

<sup>111</sup> The reference with regard to the unborn child was the result of the discussion on abortion. See for a discussion Van Bueren *The International Law on the Rights of the Child* (1995) 33;

the unborn child is made in Article 1. The beginning of childhood (and therewith life of the unborn foetus) is left to the discretion of each state party to provide for in their national legislation.<sup>112</sup>

At first sight it seems that the African Children's Rights Charter contains a similar definition of "a child" as the CRC.<sup>113</sup> According to Article 2 of the Charter, a child means "every human being up to the age of eighteen years". However, there is a clear distinction between the CRC and the African Children's Rights Charter. Since the latter does not contain any limitations or exceptions, it affords the widest protection possible, which is most welcome.

This is particularly relevant when it comes to so-called "child marriages", which were permitted in terms of customary law in, among others, South Africa. On the basis of Article 1 of the CRC, state parties can provide for the attainment of majority before the age of 18 in their national legislation. Viljoen has argued that based on the aforementioned, the CRC allows for child marriages.<sup>114</sup>

However, it is submitted that at this point some caution is required, since this conclusion would be contrary to the intention and purpose of the CRC. It nevertheless is regrettable that the CRC has not dealt expressly with early marriage.<sup>115</sup> Since child marriages have been an issue on the African continent, it is positive that the African Children's Rights Charter takes a firm stance by stating in unambiguous terms that child marriages shall be prohibited.<sup>116</sup> This is clearly an example of the African Children's Rights Charter "supplementing the CRC with regional specificities", and thereby offering the extra necessary

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Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 54. Also Rehman *International Human Rights Law – A Practical Approach* (2003) 381.

<sup>112</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 57. With regard to South Africa see *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (T), see section 3.1.1.1.

<sup>113</sup> See also Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 337.

<sup>114</sup> See Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 341.

<sup>115</sup> See Mamzur (2008) 23 *SAPR/PL* 20.

<sup>116</sup> Article 21(2) of the African Children's Rights Charter. See Davel 2002 *De Jure* 284.

protection”.<sup>117</sup>

The Charter does not say anything about the beginning of childhood. Neither does the European Convention.<sup>118</sup> The European Commission has rejected the argument that the unborn child has a right to life, but that “certain rights are attributed to the conceived but unborn child”.<sup>119</sup> From the above it seems apparent that with regard to these three international documents, childhood begins at birth. Regulation pertaining to the protection of the conceived but yet unborn child is left to the discretion of the various countries to provide for in their national legislation or case law.<sup>120</sup>

The following sections will outline a number of the substantive provisions in the CRC which will be compared with its counterpart in the African Children’s Rights Charter, and if relevant, the European Convention. From the outset it should be mentioned that the Committee on the Rights of the Child has identified four rights which are typified as the pillars in the CRC. These core principles are non-discrimination, best interests of the child, the right to life, survival and development, and the right to participation.<sup>121</sup>

In other words, Articles 2, 3, 6 and 12 form the fundamental principles which are of utmost importance to the implementation and interpretation of all substantive provisions in the CRC. In comparison, it should be noted that these four principles are equally relevant for the interpretation of the African Children’s Rights Charter.<sup>122</sup>

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<sup>117</sup> See Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 342.

<sup>118</sup> Article 2(1) of the European Convention reads: “Everyone’s right to life shall be protected by law. No. one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

<sup>119</sup> See Van Bueren *The International Law on the Rights of the Child* (1995) 35.

<sup>120</sup> For a discussion with regard to South Africa and the Netherlands, see Chapter 3.

<sup>121</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995) 46; Meuwese *et al.* (ed.) *Handboek Internationaal Jeugdrecht* (2005) 52; Memzur (2008) 23 *SAPR/PL* 1; Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 315.

<sup>122</sup> Non-discrimination (Article 3 African Children’s Rights Charter), the best interests of the child (Article 4 of the African Children’s Rights Charter), survival and development (Article 5 of the African Children’s Rights Charter) and participation (Article 4(2) of the African Children’s Rights Charter). See Olowu “Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child” 2002 *The International Journal of Children’s*

In addition, it is submitted that these pillars are also of significant importance with regard to the decision-making processes and implementation of court orders pertaining to the placement of children. Because of their overall importance, these principles will be discussed first.<sup>123</sup>

### 2.2.1.3 The principle of non-discrimination<sup>124</sup>

Children should be safeguarded from any kind of discrimination. To this effect, Article 2 of the CRC stipulates that:

- “(1) The state parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- (2) State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”.

The core of Article 2 is that all the entitlements in terms of the CRC are applicable to all children who fall within the jurisdiction of a state party, without differentiation.<sup>125</sup> The obligation of non-discrimination applies with regard to all the rights mentioned in the CRC. It

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*Rights 129.*

<sup>123</sup> In addition it should be noted that in the *Guidelines for Periodic Reports* (UN Document CRC/C/58of 20 November 1996) these four rights are grouped together under General Principles, and have to be discussed in the states parties' reports accordingly. To this effect, section 25 states that the “*reports should indicate whether the principle of non-discrimination is included as a binding principle in the Constitution or in domestic legislation specifically for children*”. Moreover, it should be indicated “*whether all the possible grounds for discrimination as spelled out in Article 2 of the CRC are reflected in such legal provisions*”. In addition reports should indicate the measures adopted to ensure the rights in the CRC without discrimination. See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 72 and 77.

<sup>124</sup> See Article 2 of the CRC.

<sup>125</sup> See Meuwise *et al.*, *Handboek Internationaal Jeugdrecht* (2005) 50.



is evident that it is in the best interests of any child to be treated equally without any distinction.

Article 2(1) of the CRC provides an extensive list of prohibited grounds for discrimination.<sup>126</sup> The latter is similar to that in Article 3 of the African Children's Rights Charter, although it deserves to be mentioned that "disability" is omitted in the latter.<sup>127</sup> Apart from the prohibition of discrimination pertaining to children, the CRC takes it further by extending it to the child's parents, legal guardians or family, which is a welcome addition ensuring the protection of vulnerable persons.<sup>128</sup> In addition, state parties are not only obliged to respect and ensure the rights listed in Article 2(1) but they are, in terms of Article 2(2), also bound to take all appropriate measures to eradicate discrimination. This means that state parties are required to actively put in place programmes and policies which aim to ensure the equal treatment of children.<sup>129</sup>

It is regrettable that the African Children's Rights Charter does not provide for a duty on the part of state parties in this regard. Therefore it can be concluded that the CRC at this point provides a higher standard in the sense that the measures in effect have to ensure that children are protected against any form of discrimination. As a state party to both instruments, South Africa is bound by the obligations in the CRC. The Netherlands are also bound by the CRC to provide this higher standard regarding non-discrimination against children.

#### **2.2.1.4 Best interests of the child<sup>130</sup>**

The "best interests of the child" is one of the four general principles, as identified by the

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<sup>126</sup> See Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 74.

<sup>127</sup> However, the African Children's Rights Charter "makes up" for the omission by providing a separate provision on disabled children, see Article 13. See also Chirwa 2002 *The International Journal of Children's Rights* 159.

<sup>128</sup> See also Article 3 of the African Children's Rights Charter.

<sup>129</sup> See Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law" 1995 (11) *South African Journal on Human Rights* 409.

<sup>130</sup> See Article 3 of the CRC.

Committee on the Rights of the Child, and considered to be fundamental to the interpretation and implementation of all other Articles in the Convention.<sup>131</sup> Article 3 of the CRC reads as follows:

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

The beginning of Article 3 clearly states that “in all actions concerning children ... the best interests of the child shall be a<sup>132</sup> primary consideration”.<sup>133</sup>

In this regard Sloth-Nielsen has stated that “the interests of parents and the state are not the all important or only consideration” when it comes to official decision-making pertaining to children”.<sup>134</sup> However, it is the most important consideration. The principle is applicable to all actions concerning children, individually and collectively.<sup>135</sup> A similar provision can be found in the African Children’s Rights Charter.<sup>136</sup> However, in the latter document, the best interests of the child shall be “*the*<sup>137</sup> primary consideration”. It is agreed with Chirwa that Article 4 of the African Children’s Rights Charter provides better protection than its

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<sup>131</sup> It is important to note that the following four principles are considered to be important for the implementation of both the CRC and the African Children’s Rights Charter: non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6) and respect for the views of the child (Article 12).

<sup>132</sup> Own emphasis. Van Bueren *The International Law on the Rights of the Child* (1995) 46) argues that the strength of the primacy of the best interests of the child in the UN Convention is compromised. Van Bueren indicates that “*the best interests as a primary consideration*” could create an opportunity for states parties “*to balance the best interests of the child against other equally weighty primary considerations of the state party’s own choosing, such as religious laws or economic considerations*”. See also Rehman *International Human Rights Law – A Practical Approach* (2003) 383, where he states that the use of the words “a primary” instead of “the primary” consideration allows for other factors to be taken into account.

<sup>133</sup> In the official Dutch translation of the CRC this is referred to as “the first consideration”, which is not exactly a precise translation. The Dutch word “*overwegend*” in sense of “dominant” or “paramount” would possibly have been more appropriate. See also Meuwese *et al. Handboek Internationaal Jeugdrecht* (2005) 53.

<sup>134</sup> See 1995 (11) SAJHR 408.

<sup>135</sup> See Memzur (2008) 23 SAPR/PL 18.

<sup>136</sup> Article 4(1) of the African Children’s Rights Charter.

<sup>137</sup> Own emphasis. It is submitted that this formulation is the correct one and less ambiguous compared to the formulation in Article 3 of the CRC.

counterpart in the CRC, since the phrase “the primary consideration” means it is the overriding consideration.<sup>138</sup>

What is meant by “the best interests of the child” is a matter of interpretation. Maithufi rightly states that “the best interests of the child” is a criterion used in determining whether the outcome of a decision is “in accordance with the needs of the child in question”.<sup>139</sup> From the case law in South Africa and the Netherlands it is apparent that the factors to be considered in order to establish what is in the “best interests of the child” are infinite, which in itself is positive.<sup>140</sup> The question comes to the fore as to whether a so-called “check list” of factors would be necessary and/or desirable in order to provide for some degree of predictability and consistency.<sup>141</sup> Since determining what would be “in the best interests of the child” will depend on the facts and circumstances of each separate case,<sup>142</sup> it is self-evident that such a check-list should not be exhaustive.<sup>143</sup> At the same time it can be said that the flexible

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<sup>138</sup> See Chirwa (2002) *The International Journal of Children's Rights* 160; also Lloyd “Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*” (2002) *The International Journal of Children's Rights* 183; also Memzur (2008) 23 *SAPR/PL* 18.

<sup>139</sup> Maithufi in Davel (ed.) “The Best Interests of the Child and African Customary Law” in *Introduction to Child Law in South Africa* (2000) 137.

<sup>140</sup> These factors will be further discussed in chapter 3. Van Bueren refers, among others, to a few factors which are seldom referred to in the literature and case law, namely: the opinion of the family members of the child, the child's sense of time, the risk of harm (physically and psychological) and the needs of the child. It is interesting to note here (already) that the Children's Act 38 of 2005 partially provides for the aforementioned. Section 2 dealing with the objects of the Act, sees to the protection of the child from any harm or hazards, and section 6(3) of the same Act provides for the opportunity for the child's family to express views in any matter concerning the child, but apparently only (or as long as) “if it is in the best interests of the child”. For a detailed discussion on the Children's Act in this regard, see Chapter 3.

<sup>141</sup> With regard to the discussion of a so-called “statutory checklist” see Van Heerden *et al.* in *Boberg's Law of Persons and the Family* (1999) 532. It is agreed with Van Heerden that a checklist would be helpful to both parents and children to get a better understanding of a judicial decision which ultimately will impact on them.

<sup>142</sup> See Robinson “Die beste belang van die kind by egskeiding – Enkele gedagtes na aanleiding van *McCall v McCall* 1994 3 SA 201(K) 1995 *THRHR* 475; Anderson and Spijker “Considering the view of the child when determining her best interest” 2002 *Obiter* 366; Glasser “Can the Family Advocate adequately safeguard our children's best interests?” 2002 80. Moreover, see Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 282.

<sup>143</sup> See Heaton “Some general remarks on the concept 'best interests of the child'” 1990 *THRHR* 95; Van Bueren *The International Law on the Rights of the Child* (1995) 47, who states that “it would not have been possible or even practical to have attempted to incorporate within the space of one international instrument an exhaustive list of core factors applicable to all situations”; Van Bueren in Davel (ed.) *Introduction to Child Law in South Africa* (2000) 205; Van Heerden in *Boberg's Law of Persons and the Family* (1999) 416.

criterion of “the best interests of the child” creates the opportunity for development to accommodate cultural diversity.<sup>144</sup>

It is submitted that it should be left to the individual state parties to determine the relevant factors in their domestic law,<sup>145</sup> and that it should be left to the courts concerned to carefully select and consider the factors relevant to a specific case.<sup>146</sup>

From the literature of almost two decades ago,<sup>147</sup> it can be derived that the concept of the “best interests of the child” is rather “indeterminate”<sup>148</sup> for two reasons; firstly, it is not feasible to formulate an exhaustive list of factors which would cover all possible situations. Secondly, it is an impossible task to allocate any weight to each and every factor because every situation deserves to be considered on its own merits.<sup>149</sup> Heaton avers that “the best interests of the child” should be used as a tool in order to (merely) aim at serving the interests of the child the best as possible under the given circumstances.<sup>150</sup> Nevertheless there seem to be various potential problems in the application of the standard of “the best interests of the child”. In the first place is it not possible to determine “the best interests of a child” with any degree of certainty, since it is not realistic to know all the options, their availability, and the implications thereof. The second problem revolves around the question as to which factors should be taken into account. According to Heaton, “it is widely accepted that there is no single factor that will always carry the most weight and that there is no fixed

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<sup>144</sup> Heaton “An individualised, contextualised and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context” (2009) 34(2) *Journal of Juridical Science* 1 at 8. See also Meuwise *et al.* (2005) 53.

<sup>145</sup> For example, in South Africa, section 7 of the Children’s Act 38 of 2005 provides for an extensive list of factors regarding “the best interests of child” standard. See the discussion in Chapter 3.

<sup>146</sup> It needs to be emphasised that for reasons of flexibility, an open-ended list is therefore preferable.

<sup>147</sup> Although a lot has been written on the “best interests of the child” since the early ‘90s, some of the initial publications remain relevant. For example: 1990 *THRHR* 95, where she indicates some of the challenges with regard to the application of the standard and in which she actually calls for a cautious and balancing approach. For this reason her argument in the aforementioned publication will be briefly summarised.

<sup>148</sup> See also Van Heerden *et al.* (eds.) *Boberg’s Law of Persons and the Family* (1999) 503.

<sup>149</sup> Heaton 1990 *THRHR* 95. See also Van Bueren, *The International Law on the Rights of the Child* (1995) 47.

<sup>150</sup> Heaton 1990 *THRHR* 98.

number of factors that should be taken into account in order to establish the child's best interests".<sup>151</sup> There is merely one requirement, and that is that a factor must be relevant in that particular case and that all the relevant factors that potentially could contribute to the answer on the question as to what is in the best interests of this particular child should be considered.

The third problem pertains to the question as to whether the child's best interests should be viewed from a short-term, medium-term or long-term perspective. It is suggested that a "weighing of interests should take place". Possible short-, medium- and long-term consequences should all be considered in order to ensure that the decision most probably, best serves the interests of the child in the specific case. The fourth problem deals with the subjective and the objective point of view pertaining to the best interests of the child. The subjective point of view refers to the child's subjective opinion and the parents' or others' subjective opinion, whereas the objective viewpoint refers to community norms.<sup>152</sup> A combination of both would be preferable, where all the different viewpoints of the various parties should be considered in order to answer the question as to "what will most probably best serve the interests of the child".<sup>153</sup>

The last problem regarding the application of "the child's best interests standard" amounts to the possibility of conflict with the rights of the parents or others. In this regard it is relevant to distinguish between the phrases "a primary consideration" in the CRC and "the primary consideration" in the African Children's Rights Charter, as referred to earlier. It is argued that the African Children's Rights Charter provides for a higher standard since it is phrased in more definite wording and as a result can be regarded as an overriding principle.<sup>154</sup>

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<sup>151</sup> Heaton 1990 *THRHR* 96.

<sup>152</sup> Different people with different backgrounds regarding culture, religion, age, etc., will have divergent opinions on how to raise a child and what would be in a child's best interests. For example, in the Netherlands even the so-called corrective tap in order to learn obedience is generally seen to be unacceptable. Nevertheless, the parents of three minor children were of a different opinion and had to explain to the court of Utrecht, sector trade and family on 8 January 2010, that they "*exploit faith without malice, but out of love for their child with the rod*". The court, after consideration of the submitted reports, concluded that there was a serious threat to the development of the children, and therefore made a supervision order (LJN: BK8714, Utrecht court, 277,402 / JE RK 09-2734).

<sup>153</sup> Heaton 1990 *THRHR* 97.

<sup>154</sup> See Chirwa 2002 *The International Journal of Children's Rights* 160; also Memzur (2008) 23 *SAPR/PL* 18.

According to Lloyd, the lower standard in the CRC has been regarded as a procedural fairness principle in the sense that it ensures that consideration will be given to what is in the child's best interests.<sup>155</sup> However, other considerations may be regarded as equally decisive.

The outcome of the balancing act as to what is in “the best interests of a particular child” could give rise to positive or negative conclusions drawn by other interested or (potentially) affected parties.<sup>156</sup> Thus despite the problems and the limitations regarding the application of “the child's best interests” standard, the concept is still a useful tool in determining what would probably serve the interests of a particular child under the particular circumstances best. It also needs to be kept in mind that various professions<sup>157</sup> might interpret the concept “best interests of the child” differently.<sup>158</sup> With regard to the authorities (the legislature and the courts) the aforementioned differences in interpretation create a potential risk; namely, that the “best interests of the child” allow authorities to substitute their own decisions for that of the parties concerned,<sup>159</sup> as long as such a decision is based on the application of the principle of “the best interests of the child”.<sup>160</sup> Van Bueren warns that the degree of subjectivity should be kept to a minimal level.

Moreover, for the sake of consistent application (and doing just to expectations of children, parents/guardian or other affected parties) it would be important that international and regional bodies in future indicate the factors which they regard as consistent with the child's best interests. In line with the above, the question arises as to whether, although the best interests is the prescribed standard, in reality what will be applied are what adults or

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<sup>155</sup> See 2002 *The International Journal of Children's Rights* 183.

<sup>156</sup> See Heaton 1990 *THRHR* 98, where she speaks about expectations and disincentives of the parties involved.

<sup>157</sup> For example, the legal profession *versus* the health practitioners, psychologists and social workers, see Van Heerden in *Boberg's Law of Persons and the Family* (1999) 503.

<sup>158</sup> See Van Heerden in *Boberg's Law of Persons and the Family* (1999) 503. See also Anderson and Spijker in Okpaluba (ed.) *Law and Contemporary South African Society* (2004) 112.

<sup>159</sup> The child(ren), the parents/guardian or other interested or affected parties, like other family members, foster parents or adoptive parents.

<sup>160</sup> See in this respect Van Bueren *The International Law on the Rights of the Child* (1995) 46, where she, among others, points out that it can be deducted from Article 3 of the CRC that the assumption that parents always know best and on that basis are always able to determine what is in their child's best interests is at least questionable. See also Sloth-Nielsen 1995 *SAJHR* 410.

decision-makers perceive as the better interests of the child.<sup>161</sup>

From the above it is clear that the application of “the best interests of the child” standard should be cautiously dealt with in order to do truly serve the interests of a particular child.<sup>162</sup>

It is submitted that a holistic approach would ensure that all relevant aspects pertaining to a specific case will be taken into consideration. The “best interests” principle should be used as a yardstick with regard to all actions taken by state parties regarding children.

Moreover, the reference to “all actions” in Article 3(1) is wide and includes both action and inaction.<sup>163</sup> From the listing it is taken that it concerns all state entities dealing with children. Although some Articles in the CRC create rights or duties, Article 3(1) pertaining to the “child’s best interests” is merely a principle of interpretation. It is meant to act as a guiding principle with regard to each and every right in the CRC, and is therefore important to all actions concerning children, taken by all state parties, thus including South Africa and the Netherlands.<sup>164</sup> Moreover, from the wording in Article 3(1) it can be derived that no distinction will be made with regard to any actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Article 3 of the CRC does not only determine that “the best interests of the child” standard has to be applied in all actions concerning children; it bestows duties on state parties. In terms of Article 3(2) and (3):

- “(i) State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

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<sup>161</sup> Van Bueren *The International Law on the Rights of the Child*, (1995) 49, even suggests instead of best interests or better interests of the child, “at least the less harmful”, but acknowledges at the same time that the latter standard could potentially have negative impact on the strength or value of the “best interests of the child” standard in the sense of promoting and the realisation of children’s rights.

<sup>162</sup> For example: grandparents, foster parents or adoptive parents.

<sup>163</sup> Van Bueren *The International Law on the Rights of the Child* (1995) 46. See also Van Bueren in Davel (ed.) *Introduction to Child Law in South Africa* (2000) 204.

<sup>164</sup> See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 318.

- (ii) State parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision”.

Thus on the basis of Article 3(2), state parties have to provide for appropriate care and protection to be given by the child's parents or legal guardian, or where this is not possible, “other individuals legally responsible for the child”. In other words, state parties are expected to take all appropriate legislative and administrative measures to ensure the protection and care necessary for the child's well-being. This includes measures pertaining to the care of children where this is needed<sup>165</sup> and measures relating to the maintenance of children.<sup>166</sup>

Lastly, Article 3(3) places a duty on state parties to ensure that the institutions, services and facilities which are responsible for the care or protection of children shall conform with the standards as set by the competent authorities in such a state party.

In order to ascertain what is “in the best interests” of a particular child, another children’s

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<sup>165</sup> Where parent(s) or other care-takers are not able to care for a child (any longer) a child may be in need of care and protection and suitable alternative care should be provided, which in turn, should be considered with the aim of serving the best interests of the child. In this respect the Articles 6, 18 and 27 are also relevant, which are discussed later in this chapter. For a discussion in this respect on the national law in South Africa and the Netherlands, see Chapter 3.

<sup>166</sup> The duty to support a child rests (in principle) on the biological parents. Article 27(2) of the CRC states that “*the parent(s) or others responsible for the child have the primary responsibility to secure, within abilities and financial capacities, the conditions of living necessary for the child's development*”. State parties are under the duty to take appropriate measures to assist parents and others responsible for the child in this respect. However, Article 27(3) contains a limitation to this responsibility by including the following phrase: “*in accordance with national conditions and within their means.*” Thus, although the primary responsibility rests on the parent(s) or other care-givers, the state has a secondary responsibility in providing an adequate standard of living for children. See also Meuwise *et al.* (2005) 229. Therefore, unambiguous legislation and effective enforcement mechanisms should be put in place in each state party in order to secure the entitlement of maintenance of children. See also Van Zyl *Handbook of the South African Law of Maintenance* (2010) 58. For a brief overview on the national legislation in South Africa and the Netherlands, see section 3.2.



right comes to the fore, namely the right of the child to voice his or her opinion and to have his or her wishes considered.<sup>167</sup> Although dealt with as a separate entitlement in the Articles 12 of the CRC and 7 of the African Children's Rights Charter, it is agreed with Van Bueren that this aspect should be added to the list of factors to be considered regarding "the best interests of the child".<sup>168</sup> Eekelaar, however, takes this further by proposing the application of the concept of "dynamic self-determinism" in this respect, on the basis of which a child would be given the opportunity to determine what his or her interests are.<sup>169</sup>

He rightfully avers that children, as holders of rights, should be treated accordingly. The fact that the child himself or herself has contributed to the outcome will ensure that the outcome will be in the best interests of the child concerned. The process is dynamic in the sense that a disposition does not necessarily have to be determinative, but rather should allow scope for development in the child's life pertaining to family dynamics and personality development. Practically speaking, this means that adults have the responsibility of ensuring the most favourable environment for the child which allows scope for, and is conducive to, such development.

This way the concept thus caters for the possibility of adjusting existing arrangements according to the needs of the child as indicated, among others, by the child himself or herself.<sup>170</sup> Eekelaar has pointed out that the concept relates to "each individual child within each culture" and requires that a child be given the necessary space to find and pursue his or her life-goals within the culture concerned. This requires a dialogue within the specific culture on how to effectively implement the concept in order to ensure the furtherance of the

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<sup>167</sup> Anderson & Spijker *Obiter* 365. See also Anderson & Spijker in Okpaluba (ed.) *Law and Contemporary South African Society* (2004) 111.

<sup>168</sup> Van Bueren *The International Law on the Rights of the Child* (1995) 47.

<sup>169</sup> This is not just an application of allowing the child to express views. The ultimate purpose of the concept is to guide a child towards adulthood, thereby providing the maximum opportunities to help the child to formulate and develop goals in life, and further providing the opportunity to pursue these goals, which ideally should be based on an autonomous choice, see Eekelaar "The interests of the child and the child's wishes: The role of dynamic self-determination" in Alston (ed.) *The Best Interests of the Child – Reconciling Culture and Human Rights* (1994) 43 and 53.

<sup>170</sup> In this regard Eekelaar points out clearly that usually the child's opinion is not determinative as the concept of dynamic self-determinism does not imply or result in any delegation of decision-making to children, in Alston (ed.) *The Best Interests of the Child – Reconciling Culture and Human Rights* (1994) 53.

interests of children and in addition, children's rights in general.<sup>171</sup> With regard to the topic of this thesis, it is submitted that the concept does not only naturally connect with Article 12 of the CRC but also with the child's right to periodic review of a placement decision in terms of Article 25.

It is clear that the age, maturity and stage of development of the child concerned have to be taken into account, but this should not be taken lightly.<sup>172</sup> All three factors deserve serious consideration, which, it is submitted, have to be communicated and explained to the child and parents concerned. Only then will there be compliance with Article 12 of the CRC and Article 7 of the African Children's Rights Charter.<sup>173</sup>

### 2.2.1.5 The right to survival and development<sup>174</sup>

Article 6 is considered one of the core Articles in the CRC.<sup>175</sup> Meuwise correctly states that the Article forms the *conditio sine qua non* regarding the existence of a child.<sup>176</sup> Although all rights in the CRC have an equal status, Article 6 forms the basis for the other basic rights of children. As mentioned above,<sup>177</sup> the Committee on the Rights of the Child identified the so-called "four pillars" which are considered to be fundamental to the implementation of the

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<sup>171</sup> Contrary to the concept of dynamic self-determinism, is the concept of objectivisation, which usually results in generalisations on how to ensure the child's well-being in a particular society, which might be detrimental to an individual child. Eekelaar has averred that although the application of objectivisation is inevitable and necessary in protecting a child's self-interest, it holds the risk that it amounts to the furtherance of the interests of other persons instead of that of the child or children. Therefore he recommends parallel application of the two approaches, in Alston (ed.) *The Best Interests of the Child – Reconciling Culture and Human Rights* (1994) 58.

<sup>172</sup> The South African courts have been inconsistent in giving children an opportunity to express their opinion and the views of a child have not always been regarded as important. Concerning custody cases see, for example: *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) or *Stock v Stock* 1981 (3) SA 1280 (A). For a more detailed discussion on Article 12 of the CRC see section 2.2.1.6.

<sup>173</sup> See sections 2.2.1.6 and 3.1.4 on the right to express views and the duty to give due weight to the views of a child.

<sup>174</sup> See Article 6 of the CRC.

<sup>175</sup> According to Rehman, "The right to life is the most fundamental of all human rights" and "in the case of children, the relevance of the right could not be overstated": in *International Human Rights Law – A Practical Approach* (2003) 384.

<sup>176</sup> See Meuwise *et al.* (2005) 81.

<sup>177</sup> See section 2.2.1.2.

CRC. One of them is Article 6 and it reads as follows:

- “(1) State parties recognise that every child has the inherent right to life.
- (2) State parties shall ensure to the maximum extent possible the survival and development of the child”.

From the text it is clear that Article 6 is a precondition of all other rights; state parties recognise and respect each child's right to life.<sup>178</sup> It does, however, not indicate the starting point of the right to life. At the finalisation of the text of Article 6 it was deliberately chosen to leave it up to the individual state parties to decide when the right to life and development starts.<sup>179</sup> Although Article 6(2) creates a positive obligation for all state parties to secure the possibilities of survival and development of the child,<sup>180</sup> it contains the phrase “*to the maximum extent possible*”.<sup>181</sup>

According to Detrick, it can be derived from the CRC's *travaux préparatoires* that the insertion of the latter phrase enabled state parties to take into account economic, social and cultural conditions in the implementation of their duty.<sup>182</sup> Whilst Article 6(2) imposes the obligation on state parties to ensure the survival and development of the child, thereby providing a context via the insertion of the qualifying phrase, it fails to direct what measures are required. Pertaining to the latter, Detrick has drawn a parallel with the implementation provision of Article 4 of the CRC. This would imply that state parties are required to undertake all appropriate legislative, administrative and other measures in order to ensure the child's right to survival and development.<sup>183</sup>

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<sup>178</sup> Compare with Article 5 of the African Children's Rights Charter.

<sup>179</sup> See in this regard also the discussion pertaining to Article 1 of the CRC in section 2.2.1.2. See Meuwise *et al.* (2005) 81.

<sup>180</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995) 57; Meuwise *et al.* (2005) 81.

<sup>181</sup> A similar vague phrase can be found in Article 5(2) of the African Children's Rights Charter.

<sup>182</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 132.

<sup>183</sup> In addition, it should be pointed out that in terms of sections 40 and 41 of the *General*

In the Outcome Document, A World Fit for Children,<sup>184</sup> reference is made to the importance of the right to life and development. With regard to the commitment to the objective of “care for every child”, it is stated that, “Children must get the best possible start in life. Their survival, protection, growth and development in good health and with proper nutrition are the essential foundation of human development”.<sup>185</sup> Compared with Article 5 of the African Children’s Rights Charter, it is submitted that Article 6 of the CRC lacks something fundamental; the right to life should be *protected by law*,<sup>186</sup> that is, the national law of each state party. In this regard the African Children’s Rights Charter clearly provides a better standard.<sup>187</sup> The same can be said of the European Convention which also states that “everyone’s right to life shall be protected by law”, which thus is inclusive of children.<sup>188</sup>

### 2.2.1.6 Participation of children<sup>189</sup>

All the rights in the CRC can be accommodated under any of the four P’s, the latter referring to the provision,<sup>190</sup> protection,<sup>191</sup> participation<sup>192</sup> and prevention<sup>193</sup> rights in the CRC.<sup>194</sup>

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*Guidelines for Periodic Reports*, state parties are required to provide specific information on the measures taken to guarantee the child’s right to life and to ensuring the survival and development of the child (CRC/C/58). See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 132.

<sup>184</sup> Outcome Document of the UN General Assembly Special Session on children, 2002 (A/Res/S-27/2). Meuwise *et al.* point out that although this document is not legally enforceable, it nevertheless creates an obligation for states parties to draw up a so-called “Plan of Action” which indicates how to ensure the realisation of the intentions as set out in the document, in terms of section III of the UN Document, in (2005) 65.

<sup>185</sup> UN Document A/RES/S-27/2 section 7.4.

<sup>186</sup> Own emphasis.

<sup>187</sup> Moreover, Article 5(3) of the African Children’s Rights Charter provides that sentence of death shall not be imposed for crimes committed by children. No. similar provision is to be found in the CRC.

<sup>188</sup> Article 2(1) of the European Convention (1950). Rehman mentions that the meaning of the term “life” has been discussed extensively, especially with regard to the moment when life starts and when it comes to an end, see *International Human Rights Law – A Practical Approach* (2003) 140.

<sup>189</sup> See Articles 12 of the CRC and 4(2) of the African Children’s Rights Charter.

<sup>190</sup> For example, the right to health and health services (Article 24) or the right to education (Article 28) in the CRC.

<sup>191</sup> For example, protection from abuse and neglect (Article 19) or child labour (Article 32) as mentioned in the CRC.

<sup>192</sup> This is discussed in the present section. Apart from Article 12, the following participation rights are also relevant: freedom of expression (Article 13), freedom of thought, conscience

However, the right of the child to express views and to be respected for those views, in terms of Article 12, forms also part of the four general principles,<sup>195</sup> as identified by the Committee on the Rights of the Child.<sup>196</sup> In the past adults thought children ought to be seen and not heard. The child was seen as naturally dependent and helpless with the emphasis on protection. This paternalistic approach resulted in decision-making by parents or other care-givers, without the acknowledgement of a level of autonomy of their child.<sup>197</sup> As Van Bueren explains, “the right to freedom of expression was traditionally not associated with childhood”.<sup>198</sup> These days, more and more people are convinced that children should play a key role when it comes to decisions which affect them as children. The CRC provides for a number of participation rights for children, which allows them to participate in decisions

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and religion (Article 14), freedom of association (Article 15) and access to appropriate information (Article 17) of the CRC. The African Children’s Rights Charter contains fewer provisions pertaining to the child’s right to participate. Apart from the core provision in Article 7, it entitles the child to the freedom of thought, conscience and religion (Article 9) and freedom of association (Article 8). However, as is well-explained by Sloth-Nielsen & Mezmur, Article 31 of the African Children’s Rights Charter which deals with the duties of children also provides a basis for child participation in their community and society at large. In this respect the child’s age and ability are taken into consideration, which coincides with the evolving capacities of a child. See “A dutiful child: the implications of Article 31 of the African Children’s Rights Charter (2008) *Journal of African Law* 171.

<sup>193</sup> For example, deprivation of liberty (Article 37(b)) or rehabilitative care (Article 39) as mentioned in the CRC.

<sup>194</sup> See Mahery, *Child Law in South Africa* (2009) 314

<sup>195</sup> The other principles as identified by the Committee on the Rights of the Child are: non-discrimination (Article 2), the best interests of the child (Article 3) and the right to survival and development (Article 6). See *General Comment No. 12*, section 2 (UN Document CRC/C/GC/12).

<sup>196</sup> Any guidance on the application of these general principles and the interpretation of the CRC as a whole, is provided by the Committee in the Committee’s *General Comments*.

<sup>197</sup> Human describes the historical basis of the parent-child relationship in relation to the question whether this historical basis can be seen as the foundation of or obstacle to the implementation of children’s rights. Her Article deals with a broad historical overview, from the absolute powers (*patria potestas*) of the *paterfamilias* under Roman law and the authority of the father as head of the family (called *mund*) under Germanic law up to *circa* 1000, to Roman Dutch law. She concludes that the traditional social and legal approach regarding the parent-child relationship, which is historically based, will indeed form a stumble block pertaining to the acknowledgement and implementation of children’s rights. She appeals that the ideology of the state as protector should change to an ideology of co-operation with parents and child. “Die historiese onderbou van die privaatregtelike ouer-kind verhouding – fondament vir of struikelblok in die implementering van kinderregte?” (2000) (63) *THRHR* 201-216. It is submitted that the ideology of co-operation between the state and families would indeed be desirable, but that the state still should maintain the role of protector, given the fact that domestic violence and abuse and neglect are apparently on the increase in many countries.

<sup>198</sup> Van Bueren *The International Law on the Rights of the Child* (1995) 131.

affecting them.<sup>199</sup> These are the following Articles; Article 12 (the child's opinion and the right to be heard),<sup>200</sup> Article 13 (freedom of expression),<sup>201</sup> Article 14 (freedom of thought, conscience and religion),<sup>202</sup> Article 15 (freedom of association)<sup>203</sup> and Article 17 (access to appropriate information).<sup>204</sup> In these Articles it is expressly mentioned that a child, as a legal subject (“*regsubjek*” or *persona iuris*) has specific rights, namely the right to form an opinion, to express an opinion or views, and to be respected for this by the state parties. Furthermore, it acknowledges children as individuals who have feelings and views themselves. Although state parties have already in 2002 reaffirmed their commitment to the realisation of Article 12 of the CRC in their countries, the Committee has noted with concern that certain barriers<sup>205</sup> impede the process implementation of Article 12.

Therefore the Committee issued a document in 2009 which specifically focuses on the right of the child to be heard, namely *General Comment No. 12 (2009)*.<sup>206</sup> The aim of this *General Comment* is to contribute to a better understanding of the contents of Article 12 and

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<sup>199</sup> See also Sloth-Nielsen and Van Heerden (1997) *STELL LR* 3 273. Moreover, the participation rights are forming part of the so-called “four P’s” under which all the rights in the CRC have been classified. The others are: provision rights and protection and prevention rights. See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 314.

<sup>200</sup> See section 3.1.4. below.

<sup>201</sup> See also Article 7 of the African Children’s Rights Charter, which reads as follows: “Every child who is freely capable of forming his own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by law”. The European Convention also provides for the right to freedom of expression. Article 10 of the European Convention states that: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]” “Everyone” obviously includes children. Limitations to the exercise of these freedoms are formulated in Article 10(2) of the European Convention.

<sup>202</sup> See Article 9 of the African Children’s Rights Charter; also section 2.2.2.4 above. Article 9 of the European Convention also provides for the right to freedom of thought, conscience and religion, conferring this right upon “everyone”, including children.

<sup>203</sup> Article 8 of the African Children’s Rights Charter states that: “*Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law*”. Article 11 of the European Convention is formulated in a general way: “*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests*”, containing restrictions in Article 11(2).

<sup>204</sup> See Meuwise *et al.* (2005) 116. On access to information see Chapter 4.

<sup>205</sup> Certain established practices and attitudes, as well as political and economic barriers. See section 4 of the Committee’s *General Comments No. 12*.

<sup>206</sup> UN Document CRC/C/GC/12 of 20 July 2009.

to provide insight to state parties on how to fully implement it.<sup>207</sup> For the purpose of this thesis, the main focus will be on Article 12 of the CRC and its counterpart in the African Children's Rights Charter.<sup>208</sup> However, in section 3.1.4 the participation rights of children in terms of South African and Dutch law will be discussed.

### 2.2.1.7 The child's opinion and the right to be heard<sup>209</sup>

Article 12 is one of the most important Articles in the CRC. It has been identified by the Committee on the Rights of the Child as one of the four general principles which are important for the implementation of the CRC.<sup>210</sup> This means that with regard to the implementation of all the other rights in the CRC, the rights to be heard and to have views given due weight have to be taken into account. Article 12 of the CRC has been formulated as follows:

- “(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the

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<sup>207</sup> General Comment No. 12, section 4.

<sup>208</sup> Article 4(2) of the African Children's Rights Charter.

<sup>209</sup> In George, in the Eastern Cape an enormous sign next to the road reads: “*Children should be seen, not hurt*”. It is submitted that many more of these messages concerning the rights of children should be made visible, next to the road and everywhere else. Awareness in society is step number 1.

<sup>210</sup> It is important to note that the following four principles are considered to be important for the implementation of the CRC as well as the African Children's Rights Charter: non-discrimination (Article 2 of the CRC and Article 3 of the African Children's Rights Charter), best interests of the child (Article 3 of the CRC and Article 4 of the African Children's Rights Charter), survival and development (Article 6 of the CRC and Article 5 of the African Children's Rights Charter) and the child's opinion (Article 12 of the CRC and Article 4(2) of the African Children's Rights Charter). See also Van Bueren *The International Law on the Rights of the Child* (1995) 46; Sloth-Nielsen 1995 *SAJHR* 410; Van Heerden *et al.* in *Boberg's Law of Persons and the Family* (1999) 541; Olowu (2002) *The International Journal of Children's Rights* 129; Meuwese *et al.* (2005) 52 and 117; Mezmur (2008) 23 *SAPR/PL* 1; Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 315; *General Comment No. 12* (2009) (UN Document CRC/C/GC/12), section 2.

procedural rules of national law”.

Article 12(2) of the CRC states that a child “shall in particular” be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child. This means that this opportunity should be granted regarding all relevant judicial proceedings affecting the child, without any limitation.<sup>211</sup> Without being exhaustive, *General Comment No. 12* provides for a number of examples, of which the following are relevant to the topic of this thesis; separation of parents, custody, care (and adoption), child victims of physical or psychological violence, sexual abuse or other crimes.<sup>212</sup> It is interesting to note that the Committee on the Rights of the Child specifically refers to mediation<sup>213</sup> and arbitration;<sup>214</sup> in other words, out of court settlement. Regretfully the role of these alternative dispute mechanisms is not further discussed in the document. It is submitted that in all cases where decisions are taken which affect the child directly, first out of court settlement possibilities should be explored or followed, and only when this fails or would not be desirable,<sup>215</sup> the option of a procedure in court would come to the fore.<sup>216</sup>

Article 12 of the CRC does not only demand that children should be assured the right to express their views freely, but also that decision makers indeed listen to these views, and moreover, that the views of the child are being given due weight.<sup>217</sup> In other words, this relates to the right of the child to participate in the decision-making process. Firstly, the

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<sup>211</sup> See General Comment No. 12, section 32.

<sup>212</sup> Other examples mentioned by *General Comment No. 12* are: children in conflict with the law, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings might include decisions about children's education, health, environment, living conditions or protection. See *General Comment No. 12* section 32.

<sup>213</sup> Mediation is a process on a voluntary basis, in which the mediator merely facilitates the negotiations between two or more disputing parties with the aim of reaching a satisfying agreement between the parties. On family mediation specifically see De Jong in *Child Law in South Africa* 113.

<sup>214</sup> Arbitration is the process whereby parties to a dispute submit their differences to the judgment of an impartial person whose decision is usually binding.

<sup>215</sup> For example, in cases of child abuse.

<sup>216</sup> In this respect it is interesting to note that the South African Children's Act 38 of 2005 explicitly states in the general principles, that “*in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided*”, see section 6(4) of the Children's Act.

<sup>217</sup> See also Meuwise *et al.* Handboek Internationaal Jeugdrecht (2005) 70.



Article commences with granting the child “*who is capable of forming his or her own views*”, the right to express those views in all matters affecting him or her, which is one of the most important principles in the CRC.<sup>218</sup> As Barrat has put it, Article 12 does not give children an unequivocal right to be heard; a child has to be capable of forming his or her own views.<sup>219</sup> The question arises as to whether or not this right, instead of being restricted, should accrue to children of whatever age.

Article 12 of the CRC does not contain a minimum age, and therefore it is submitted that the whole of Article 12, in principle, should be applicable to all children of whatever age.<sup>220</sup> Furthermore, the qualifying criteria “*that the child should be capable of forming his or her own views*” should serve as a guideline. The consideration of the question as to whether a particular child possesses this capability should not be taken lightly.

For that matter, the value of the input of a four-year-old child should not be underestimated. The state parties have a duty to assure this right. This too should not be taken lightly, because the first paragraph states unambiguously that the right to freely express such a view exists “*in al* <sup>221</sup> *matters affecting the child*”. On the basis of the latter, it is clear that anything which impacts somehow on a child should lead to granting a child the opportunity to express his or her views. It is submitted that this is one of the many entitlements which children should be made aware of, for example by means of school campaigns or awareness programmes.

With regard to the expression of views itself, the following should be noted. Formal usage of a language is merely one of the ways in order to express views. It is submitted that an open-minded approach is to be strived for with regard to obtaining the required opinion. It is submitted that Article 12 should be read in conjunction with Article 13 of the CRC which deals with freedom of expression, and the latter reads as follows:

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<sup>218</sup> See also Meuwise *et al.* (2005) 117, also 70.

<sup>219</sup> In Burman (ed.) *The Fate of the Child – Legal Decisions on Children in the New South Africa* (2003)148. See also Robinson and Ferreira “Die reg van die kind om gehoor te word: Enkele verkennende perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)” 2000 *De Jure* 58.

<sup>220</sup> See Meuwise *et al.* (2005) 117.

<sup>221</sup> Own emphasis, hereby stressing the seriousness of the commitment which rests upon states parties.

- “(1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice;
- (2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (a) for respect of the rights or reputations of others; or
  - (b) for the protection of national security or of public order (ordre public), or of public health or morals”.

Although Article 13 is clearly linked with Article 12, they have to be distinguished from one another. Article 13 concerns the right to hold and express an opinion and to seek and receive information, which in principle should not be limited by state parties, unless Article 13(2) is complied with. Moreover, it should be noted that the child can choose in which format (not just limited by language) or via which medium the information is sought, received or imparted. It can therefore be said that Article 13 is crucial for the effective exercise of the right to be heard.

Article 12 confers the right to express views freely with regard to matters affecting the child and thus aims to ensure the active involvement of the child in decisions or actions pertaining to his or her life. In other words, in terms of Article 12, state parties are required to develop a legal framework and mechanisms which are needed to ensure the active involvement of children in all actions and decisions affecting them. Moreover, they are required to ensure that the views of the child are given due weight. The latter provision thus requires an action by the respective state parties whereas Article 13 urges states parties refrain from interference.<sup>222</sup>

Secondly, Article 12(1) ends with the instruction that “the views of the child being given due

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<sup>222</sup> See *General Comment No. 12 (CRC/C/GC/12)* of 20 July 2009, section 81.

weight” and then “in accordance with the age and maturity of the child”.<sup>223</sup> Under normal circumstances it is a given that the older the child, the more advanced his or her capacity. Often this forms the basis for the level of seriousness of considering the views of the child; namely the older the child, the more serious the consideration of the child's views has to be.<sup>224</sup> The question arises as to whether or not this is a correct approach. Article 12 clearly states that “the views of the child being given due weight in accordance with the age and maturity of the child”. Maturity is linked with age, but not all children of a certain age are equally mature. Thus, although both criteria play a role, it is submitted that the emphasis should be on “the maturity of the child”. Moreover, Article 12 is interwoven with the child's best interests.<sup>225</sup>

What adult decision-makers consider to be in the best interests of the child does not necessarily coincide with the views of the particular child.<sup>226</sup> To put it bluntly, although it is ultimately the adult decision-maker that takes the decision (and thus is in control), the same adult decision-maker has to start getting used to the fact that the input of the child should be given serious consideration. Therefore, it is not only for adult decision-makers to determine and decide what they think is best for the child concerned, but the opinion of a child also should be given serious consideration.<sup>227</sup> In fact, the exercise of the rights in Article 12 of the CRC should be viewed as one of the ways in order to establish what is in a child's best interests.<sup>228</sup>

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<sup>223</sup> Compare with Article 5 of the CRC, dealing with the child's evolving capacities. See section 2.2.2.1 above. Also Sloth-Nielsen and Van Heerden 1997 *STELL LR* 273, mentioned that “age and maturity” of the child refers to “the evolving capacities” of the child.

<sup>224</sup> Decision-makers, for example a magistrate or a judge, should remain aware of their (inevitable) subjectivity in this regard. Extreme caution is recommended. See also Van Heerden *et al.* in *Boberg's Law of Persons and the Family* (1999) 541.

<sup>225</sup> Much has been written about the child's best interests. See section 2.2.1.4 and 3.1.3.

<sup>226</sup> Although it speaks for itself that children, due to less life experiences or insight, may not be mature enough to overview medium or long term consequences of certain decisions. On that basis the reasons which override the views and wishes of the child could be legitimate. This should be explained to the child concerned. It is submitted that this communication too should be taken seriously. See also Barrat in Burman (ed.) *The Fate of the Child – Legal Decisions on Children in the New South Africa* (2003) 150.

<sup>227</sup> See also Sloth-Nielsen (1995) *SAJHR* 410; Barrat in Burman (ed.) *The Fate of the Child – Legal Decisions on Children in the New South Africa* (2003) 150.

<sup>228</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 117.

Thus, Article 12 basically serves as a procedural right, meaning that it primarily focuses on ensuring a hearing for the child and the consideration of the child's input. However, it does not necessarily focus on the outcome of the decision. This does not mean that a child's opinion would outweigh the opinion of the decision maker.<sup>229</sup> However, where any decision differs from the child's opinion, it is submitted that this should be explained to the child (and where applicable, to the parents or other care-givers).

Thirdly, Article 12(2) of the CRC grants the child the right to be heard in every judicial and administrative procedure which affects the child concerned. Thus in a wide range of instances where decision-making is taking place which impacts on the child, the child has the right to be heard. The second part of Article 12(2) focuses on *how* the child should be heard. This can take place in any of the following three ways, namely,

- (i) directly;
- (ii) through a representative;<sup>230</sup> or
- (iii) an appropriate body.

It is regrettable that no reference has been made to personal representation for the child. In certain instances the interests of the child and his or her parents clash, and legal

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<sup>229</sup> See Sloth-Nielsen 1995 *SAJHR* 403 and 406.

<sup>230</sup> With regard to children who are deprived of their liberty Article 37 of the CRC is of specific importance. Apart from children who are accused of having infringed the national penal law of a states party, Article 37 is also applicable to children who have been deprived of their liberty for other reasons, for example where a child is placed in an institution in terms of the civil law, see chapter 5. All children deprived of their liberty have the right to "prompt access to legal and other appropriate assistance". See also Article 40(2)(b)(iii) of the CRC, which provides, among others, for a fair hearing, in the presence of legal or other appropriate assistance. In terms of section 14 of the *Beijing Rules* (UN Resolution 40/33, of 29 November 1985), "*the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely*". It should be noted that although the *Beijing Rules* are recommendatory and where adopted before the CRC, a number of the fundamental principles have been included into the CRC and moreover, the Preamble refers explicitly to the *Beijing Rules*. See Van Beuren & Tootell "United Nations Standard Minimum Rules for the Administration of Juvenile Justice – Beijing Rules" *Defence for Children International* (1995) 1 and 15. Also Meuwise *et al.* (2005) 519.

representation for both parties is necessary in order to serve the “best interests of the child”.<sup>231</sup> According to the Committee on the Rights of the Child, it is recommended that, “where possible, the child must be given the opportunity to be heard directly in any proceedings”.<sup>232</sup> It is agreed with the Committee that this would be the ideal situation. Direct hearing should preferably take place “in person” but it would also be possible to express personal views in writing. Representation can take place through the parent(s), a lawyer or other person. Where parents are the representatives of the child, caution is required to avoid possible conflict of interests between the child and the parents. Moreover, it should be safeguarded that the views of the child are correctly presented by the representative, and are the views of the child only. The representation should exclusively focus on the interests of the child concerned. It is submitted that there is a need for more specific training of professionals on the representation of children and Article 12 of the CRC.

It is furthermore submitted that where direct hearing is not feasible, legal representation should be an option to be chosen by the child concerned, after he or she has decided to make use of the right to be heard. It is evident that the child has to be informed about this right beforehand, which would be in line with the “steps for the implementation of the child right to be heard” of Article 12 of the CRC.<sup>233</sup> In this regard the Committee on the Rights of the Child has identified the following five steps towards the effective realisation of the right of the child to express views and to have those views given due weight.<sup>234</sup>

- (i) The preparation phase. The first step ensures that the child is informed about the right to express views in all matters affecting the child, and especially in judicial or administrative decision-making processes. Moreover, the child needs to be informed about the option of “direct” communication or “through a representative”. The decision-maker has to make sure that the child is adequately prepared in terms of the process, time and place and other

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<sup>231</sup> Clashing interests occur for example, in care proceedings after divorce, in cases of domestic violence and in placement related cases. For a distinction in the role of a Family Advocate and a Legal Representative see *Soller NO v G* 2003 (5) SA 430 (W). See also Sloth-Nielsen & Van Heerden (1996) *SAJHR* 250.

<sup>232</sup> See General Comment No. 12, section 35.

<sup>233</sup> See General Comment No. 12. Sections 40-47 contain five steps in order to effectively ensure the realisation of the right of the child to express views and those views given due weight.

<sup>234</sup> See General Comment No. 12 (CRC/C/GC/12) sections 41-47.

participants.

- (ii) The hearing itself. Paragraph 42 states that the context in which the child is heard should be enabling and encouraging. It is submitted that this should be read in conjunction with paragraph 34, which sets conditions for effective hearing, for example, the design of the court rooms, clothing of judicial officers and well-trained child focused staff. The format of the hearing should be more conversation focused than examination focused.
- (iii) The assessment of the capacity of the child. Where a case-by-case analysis indicates that the child is capable of forming his or her own views in a reasonable and independent manner, the views must be given due weight, meaning they should be considered as a significant factor in the settlement of the issue.
- (iv) Feedback to the child. The decision-maker has the duty to inform the child of the outcome of the process and also explain how the child's views were considered. This has two benefits: firstly to guarantee that the views are taken seriously and secondly that the information might be relevant where the decision should be taken on review or appeal.
- (v) Legislation should be enacted in order to equip children with complaint procedures and remedies where the right to be heard is disregarded or infringed. In addition, paragraph 46 explicitly refers to an ombudsman or similar person or institution where children have easy access to lodge a complaint.<sup>235</sup> It is self-evident that children should be informed about the existence of these kinds of offices and how to approach them. It is submitted that children should be better informed about their rights in general, and

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It is most welcome that the Netherlands has a national Children's Ombudsman since 1 April 2011. It is hoped that South Africa will also give priority to the establishment of this important office.

particularly about Article 12.<sup>236</sup>

The last aspect of Article 12(2) of the CRC determines that any representation of the child should be “in a manner consistent with the procedural rules of national law”.<sup>237</sup> It is submitted that the national law of state parties should be expanded in order to include more tailor-made, child-friendly rules of procedure (for the sake of consistency).<sup>238</sup>

Apart from the “general” right in Article 12, the CRC contains a number of provisions in which the right to be heard or to participate is implied or granted indirectly. These Articles are:

- (i) Article 9 of the CRC which deals with the child's separation from his or her parents.<sup>239</sup>
- (ii) Article 21 of the CRC aims to regulate (national or inter-country) adoption.<sup>240</sup>

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<sup>236</sup> In the magazine *Kinderrechtentop 2009* (the summit held in celebration of the 20<sup>th</sup> birthday of the CRC, in the Netherlands), it was outlined that it is high time to include children's rights in the curriculum at schools (see page 14). It is not clear whether South Africa and the Netherlands have yet followed the recommendation of the Committee on the Rights of the Child to “widely disseminate” General Comment No. 12 (2009) within government and administrative structures as well as to children and civil society (NGO's). The same applies to the reporting duty of both countries to the Committee and the Committee's consideration of reports, including recommendations. It is submitted that it is high time that the sharing of information pertaining to children's rights and their implementation should get the priority it deserves. Only then participation will become widely accepted.

<sup>237</sup> On the basis of General Comment No. 12, section 38, “State parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access of personal files”.

<sup>238</sup> It is self-evident that where the rules of procedure have not been adhered to, the decision of the particular authority should be challenged. Even where a child is heard “directly”, it is submitted that there is still a need for a representative in order to guide the child in aspects relating to the procedure and outcome, like the aforementioned irregular application of rules, but also for the necessary support often needed by vulnerable persons.

<sup>239</sup> Article 9(2) of the CRC states that “in any proceedings pursuant to section 1, all interested parties shall be given an opportunity to participate in the proceedings and make their views known”. The latter phrase “all interested parties” includes the child involved. For a more detailed discussion on Article 9, see sections 2.2.3.1 and 3.2.

<sup>240</sup> Article 21 reads as follows: “States Parties shall ensure that the best interests of the child shall be the paramount consideration and that they shall:

(a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent

State parties which have recognised and/or permit the system of adoption are obliged to bring their national law in line with the requirements in Article 21 of the CRC.<sup>241</sup> From the phrase “*if required, the persons concerned have given their informed consent*”, it can be derived that the persons involved should be fully informed of the consequences of the adoption. In addition, consent to the adoption should be provided.

It is submitted that the phrase “the persons concerned” includes the child who is to be adopted. However, the right of the persons concerned to give informed consent is qualified by the phrase “if required”, which means that the national legislation of a state party has to provide for this.<sup>242</sup> Ideally, the right of the child to give consent to his or her adoption should be explicitly provided for in the relevant legislation. It is submitted that where this is not included, Article 12 of the CRC serves as a safety net.

It can be invoked regarding “the child who is capable of forming his or her own views”, since adoption certainly is a matter affecting the child and the fact that the adoption procedure is of a judicial and/or administrative nature. This way the child's right to participation will be ensured in far-reaching decisions affecting the child. Article 25 of the CRC demands that state parties recognise the right of the child to a periodic review, in case the child has been removed from the family environment. At first it seems perhaps odd to relate the periodic review of placement to the right of the child to be heard.<sup>243</sup> However, since the child, in terms of Article 12(1) CRC has the right to participate “in all matters affecting the child”, he or she has the right to be heard with regard to the review of his or her placement decision. This can also be derived from Article 12(2), which determines that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child. Therefore, mechanisms must be put in place to ensure that children in all forms of alternative care, including placement in institutions, are able to express their views and that

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and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption [...].”

<sup>241</sup> For a more detailed overview of Article 21 of the CRC, see section 2.2.3.3.

<sup>242</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 185.

<sup>243</sup> Article 25 merely demands that the placement and/or treatment should be evaluated at regular intervals.



those views be given due weight, in line with Article 12 CRC.<sup>244</sup> The African Children's Rights Charter also provides for a number of participation rights.<sup>245</sup> In the African context, the general perception is that children are merely in need of protection, and furthermore, that children are not in need of any autonomy, since they are usually not capable of making decisions.

In this regard, Chirwa has pointed out that at most, children are heard indirectly, for example, via aunts, uncles or grandparents.<sup>246</sup> Hopefully, these perceptions and approaches will change, since Article 4(2) of the African Children's Rights Charter is in a number of respects similar to Article 12 of the CRC. For example, in terms of Article 4(2), the child has to be capable of forming his/her own views in order to be provided with the opportunity of expressing those views. This applies in all judicial and administrative proceedings affecting the child. Where Article 12 provides for three possibilities on how a child should be given the opportunity, the African Children's Rights Charter determines that this should be done directly or through an impartial representative as a party to the proceedings. Often parents or other care-givers would be the first persons to assist and support the child, supposedly having the child's best interests at heart. However, Article 4(2) refers to an impartial representative, which would mean a curator *ad litem* or a legal representative.

It is evident that in the case of a (potential) conflict of interests between the parents and the child, a child should be able to request the assistance of such a person. However, in order to ensure the optimal exercise of the right to express views, preference should be given to the possibility of hearing the child directly. It is submitted that the latter should be encouraged in all matters affecting the child. Alternatively, where a child is not able or willing

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<sup>244</sup> See also General Comment No. 12 (CRC/C/GC/12) of 20 July 2009, section 97. For a more detailed discussion of Article 25 of the CRC, see sections 4.7.

<sup>245</sup> See Article 7 on the freedom of expression, Article 8 on the right to association, Article 9 on the freedom of thought, conscience and religion and Article 17 regarding juvenile justice. See also Chirwa (2002) *The International Journal of Children's Rights* 160. As indicated above, Sloth-Nielsen & Mezmur have outlined that Article 31 of the African Children's Rights Charter, which deals with the obligations of children, may facilitate participation by children, depending on their age and ability. They have mentioned that children generally speaking are involved in tasks and traditions relating to adulthood, in order to prepare them for this phase in life, see 2008 *Journal of African Law* 171. However, Article 31(1) determines that every child is obliged "to respect his parents at all times" (and perhaps the elderly in general) it is hoped that Article 31 will not hamper the child's right to express views in any way.

<sup>246</sup> Chirwa (2002) *The International Journal of Children's Rights* 160.

to express views directly, the child should have easy access to the assistance of these professionals, otherwise the right to express views cannot be properly exercised, which would render the provision in effect meaningless.

Moreover, these views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws. No guidelines regarding the consideration of the views of the child by the decision-maker are given. At this point, Article 12 of the CRC immediately fills the gap; where the CRC provides for a better standard. All state parties are, on this particular point, bound by the CRC.

From the above it is evident that Article 12 of the CRC and Article 4(2) of the African Children's Rights Charter should be seen as a procedural right, meaning that it primarily focuses on ensuring a hearing for the child and the consideration of the child's input. It, however, does not necessarily focus on the outcome of the decision. Reference has been made to the importance of the right of the child to voice his or her opinion, and to have his or her wishes considered, in order to ascertain what is in the best interests of this particular child.<sup>247</sup> It is clear that the age and maturity of the child concerned have to be taken into account, but this should not be taken lightly; both factors deserve serious consideration, with, it is recommended, the emphasis on maturity. Only then would there be compliance with Article 12 of the CRC and Article 4(2) of the African Children's Rights Charter. Finally, linked with the right to freely express views is the right to freedom of thought, conscience and religion, as provided for in Article 14 of the CRC.<sup>248</sup> This provision reads as follows:

- “(1) State parties shall respect the right of the child to freedom of thought, conscience and religion.
  
- (2) State parties shall respect the rights and duties of parents and, when applicable, legal guardians, 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.

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<sup>247</sup> Anderson & Spijker (2002) *Obiter* 365.

<sup>248</sup> Meuwise *et al.* have pointed out that Article 13 is one of the participation rights in terms of the CRC, together with the right to express views (Article 12), freedom of expression (Article 13), freedom of association (Article 15) and access to information (Article 17), *Handboek Internationaal Jeugdrecht* (2005) 131.

- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

Article 14 thus explicitly acknowledges the right of the child to freedom of thought, conscience and religion, which has to be respected by states parties.<sup>249</sup> When reading critically one can deduct that it does not specifically include the right of the child to choose his or her own conviction or religion.<sup>250</sup> It is interesting to note that Article 9 of the African Children's Rights Charter confers these rights to every child, thus acknowledging that the child is a holder of rights. Many children are inclined to copy their parents or to rebel against the “family beliefs”. Whether or not one could speak about merely guiding a child or indoctrinating a child falls beyond the ambit of this thesis.

It has to be realised that a person's beliefs do have great impact on many facets of life, thus also on the life of a child. These facets relate, for example, to what school the child will attend, the circle of friends a child will be part of, the expectations (the do's and don'ts) of family, friends or members of the community, the clothes that someone is required to wear, whether or not a child can attend a birthday party, or whether or not a child is allowed to consume any alcohol.<sup>251</sup> Therefore it can be said that the impact of a person's convictions should not be underestimated.

Article 14(2) of the CRC is clearly linked with Article 5 regarding the responsibilities of the parents (and when applicable, legal guardians) and the evolving capacity of the child. State parties are required to respect the rights and duties of parents where they provide direction to the child with regard to his or her exercise of Article 14. The direction thus provided to the child should take place in a manner consistent with the development and maturity (evolving

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<sup>249</sup> See also Article 9(1) of the African Children's Rights Charter which is comparable to Article 14(1) of the CRC. It is interesting to note that where Articles in the African Children's Rights Charter regularly starts with “Every child shall [...]”, hereby granting children a specific right directly, the CRC does this in an indirect manner, thereby placing a duty on states parties to respect or recognise the right.

<sup>250</sup> See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 130.

<sup>251</sup> Luckily in many countries it is not possible to purchase any alcoholic beverages below the age of 18. However, the example regarding consumption of alcohol as shown at home or in the private sphere is not clear. This should clearly be the responsibility of the parents, guardian or other care-givers.

capacities) of the child concerned.<sup>252</sup>

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)<sup>253</sup> gives parents (or legal guardians of the child) the right “to organise life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up”.<sup>254</sup> State parties are bound to respect the exercise of this right and these duties of the parents or legal guardian,<sup>255</sup> even though the freedom of thought, conscience and religion is not without limitation, according to Article 14(3) of the CRC.<sup>256</sup>

Apart from being categorised as one of the participation rights, the freedom of religion forms part of someone's identity so it can be argued that there is a link with Article 8 of the CRC.<sup>257</sup> This would imply that state parties are obliged to respect the right of the child to preserve his or her identity, which is of utmost importance when it comes to the removal and placement of a child in alternative care. It is submitted that since a child who has been removed from the family environment is already vulnerable, the courts should have serious consideration for

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<sup>252</sup> Compare with Article 9(2) of the African Children's Rights Charter, which concludes with “and a duty (for parents and where applicable legal guardians) to facilitate the enjoyment of these rights subject to national laws and policies”.

<sup>253</sup> UN Resolution of the General Assembly 36/55 of 25 November 1981.

<sup>254</sup> See Article 5(1) of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981). The fact that the parents or legal guardians of the child have the decisive say with regard to the religion or belief of the child is confirmed in the same Article of the above-mentioned *Declaration*. Article 5(2) reads: “Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents (or legal guardians), and shall not be compelled to receive teaching on religion or belief against the wishes of his parents (or legal guardians), the best interests of the child being the guiding principle.”

<sup>255</sup> On the basis of the fact that reservations were made by various countries, Meuwise *et al.* conclude that freedom of religion is not a universally accepted children's right, in *Handboek Internationaal Jeugdrecht* (2005) 130.

<sup>256</sup> The freedom to express one's conviction or religion may, on the basis of Article 14(3) of the CRC only be limited when prescribed by law or necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. The same formulation can be found in Article 1(3) of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (UN Resolution 36/55 of 25 November 1981). The latter section has to be read in conjunction with Article 5(5) of the same document, which states that “practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking account Article 1, section 3, of the present *Declaration*.”

<sup>257</sup> See also Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 131.

the child's identity and background when deciding on suitable placement.

In this respect Article 20(3) of the CRC is relevant since it demands that “due regard shall be paid to the child's ethnic, religious, cultural and linguistic background”. It is interesting to note that, although Article 25(3) of the African Children's Rights Charter is similar in content, it does not refer to the duty of having regard to the “cultural” background. It is evident that decision-makers are obliged to have consideration for the latter factor, since the CRC in this regard fills the gap by having included this factor. Thus, where possible, all efforts should be aimed at achieving so-called “placement compatibility”, thereby ensuring that the child's best interests will be served.

### 2.2.1.8 Implementation of rights

Article 4 deals with the implementation of rights, as mentioned in the CRC, and reads as follows:

“State parties shall undertake all appropriate legislative, administrative and other measures, for the implementation of the rights recognised in this Convention. In regard to economic, social and cultural rights, state parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”.

This Article creates a number of obligations for states parties, in order to achieve the implementation of the rights as mentioned in the CRC. Implementation is the process whereby state parties take action (based on their commitment) to ensure the realisation of all rights in the CRC, with regard to all children in their country.<sup>258</sup>

A distinction is made between civil and political rights<sup>259</sup> on the one side, and economic, social and cultural rights on the other side. State parties are obliged to take all necessary legal, administrative and other measures to ensure the implementation of all rights in the

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<sup>258</sup> See also General Comment No. 5 (2003), UN Document CRC/GC/2003/5).

<sup>259</sup> These rights are of immediate application, see Rehman *International Human Rights Law – A Practical Approach* (2003) 383.

CRC.<sup>260</sup> However, with regard to economic, social and cultural rights, an exception is provided for; “to the maximum extent of their available sources, and where necessary, within the context of international co-operation”.<sup>261</sup>

State parties have in the past used the argument of “lack of available resources” to justify their non-compliance with Article 4 of the CRC.<sup>262</sup> The Committee on the Rights of the Child has acknowledged the concept of “progressive realisation” with regard to the implementation of economic, social and cultural rights, due to lack of resources (financial and other resources). Nevertheless it has emphasised that this can hamper the full implementation of these rights and therefore has urged states parties “to demonstrate that they have implemented ‘to the maximum extent of their available resources’ and where necessary, have sought international co-operation”.<sup>263</sup> It is interesting to note that the African Children’s Rights Charter does not distinguish between the various categories of rights, which, as pointed out by Memzur, confirm the interdependence of human rights.<sup>264</sup> On the basis of Article 1(1), state parties to the African Children’s Rights Charter are bound to take the necessary steps to adopt legislative or other measures in order to give effect to the provisions of the Charter. The emphasis of this Article is on the general implementation and therefore realisation of the rights in this treaty.

According to Meuwise *et al.*, the children’s rights as mentioned in the CRC coincide with youth policies which have to be developed, because the latter are the essence of government interference pertaining to children and the youth.<sup>265</sup> It is clear that the implementation is not merely about the question as to whether or not the wording of the national legislation is in line with the Articles in the CRC.

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<sup>260</sup> See also Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 313.

<sup>261</sup> Article 4 is one of the Articles which refers to international cooperation, on the basis of which developed countries are encouraged to assist developing countries in order to ensure the implementation of the CRC. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 64.

<sup>262</sup> See Rehman *International Human Rights Law – A Practical Approach* (2003) 383.

<sup>263</sup> See CRC/GC/2003/5, section 7; also Rehman (2003) 383.

<sup>264</sup> See Memzur (2008) 23 *SAPR/PL* 7.

<sup>265</sup> Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 63.

As important is the answer to the question as to whether or not the sources are adequately available to actually implement the national legislation.<sup>266</sup> In General Comment No. 5 (2003),<sup>267</sup> the Committee on the Rights of the Child indicated which general measures are needed in order to implement the CRC.

Apart from the obligation for state parties to bring the national legislation in line with the provisions of the CRC, other measures include the coordination of government (between central, provincial and local/municipal levels of government);<sup>268</sup> monitoring and evaluation to build into government at all levels (also essential is the independent monitoring of progress by, for example, parliamentary committees, NGOs, academic institutions and independent human rights institutions, for example a children's ombudsman);<sup>269</sup> data collection and analysis on children (over the whole period of childhood, throughout the country); training for all those involved in implementation process;<sup>270</sup> providing information on children's rights, in line with Article 42 of the CRC, including all adults around children, children themselves and the media; and the publishing of reports and other documentation under the Convention in each country.

Another document containing a list with recommendations to improve the position of children is the UN Outcome Document, *A World Fit for Children* (2002).<sup>271</sup> Although it is not a legally binding document, it obliges state parties to develop or strengthen a "Plan of Action" with regard to the implementation towards the rights of children.

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<sup>266</sup> *Ibid.*

<sup>267</sup> General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6 (UN Document CRC/GC/2003/5).

<sup>268</sup> For a discussion on South Africa and the Netherlands, see section 2.1.

<sup>269</sup> Discussed in Chapter 6. See also the UN Document *Paris Principles* (UN Document A/RES/48/134) on the establishment of a national institute for the promotion and protection of human rights. It should be noted that the term "ombudsman" is meant to be gender neutral.

<sup>270</sup> General Comment No. 5 (2003) refers in section 53 to government officials, parliamentarians, members of the judiciary, professionals working with children, including, community and religious leaders, teachers, social workers, professionals working with children in institutions and the police.

<sup>271</sup> UN Document A/RES/S-27/2.

## 2.2.2 Provisions relevant for the role of parents and families

### 2.2.2.1 Introduction

It is clear that according to the CRC the family plays a central role. In the Preamble<sup>272</sup> it is stated that:

“[T]he 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 responsibilities within the community”.<sup>273</sup>

In other words, the family can be seen as a basic unit of society as well as the natural environment for the growth and well-being of children (and others). The question arises as to whether or not there is an adequate definition of “family”, since such a definition could have significant impact on important aspects of a child's life. For example, the issue of children of unmarried parents,<sup>274</sup> contact between the biological (grand)parent(s) and a child after divorce, or whether a foster parent should have a say regarding a supervision order and placement of a child with this particular foster family.<sup>275</sup> Moreover, children are being socialised within the family structure, so the norms and values of this natural environment determine to a large extent the frame of reference of the child when moving into adulthood. Is what a child is exposed to within the family structure indeed in the child's best interests?

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<sup>272</sup> Section 5 of the Preamble of the CRC.

<sup>273</sup> See also A World Fit for Children (2002) (UN Document A/RES/S-27/2). In section 15, it is stated that “The family unit is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive protection and support”.

<sup>274</sup> It is interesting to note how terminology has changed over the past decades: previously a distinction was made between children of married parents and those of unmarried parents. Initially the latter children were referred to as “illegitimate”, and later as “extra-marital” or “born out of wedlock”. The discrimination on the basis of this was untenable and contrary the “non-discrimination” provision in terms of “birth” as explicitly mentioned in Article 2 of the CRC and Article 3 of the African Children’s Rights Charter. Van Bueren has correctly pointed out that the discrimination between marital and non-marital children has been one of the most enduring forms of unequal treatment, which lacks any objective justification, see *The International Law on the Rights of the Child* (1995) 41. For a more detailed discussion in terms of South African law, see Boezaart *Law of Persons* (2010) 94.

<sup>275</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 337.



The international and regional documents dealt with at present do not specifically define the concept “family”.<sup>276</sup> Nevertheless in a number of Articles reference is made to parent(s), guardian(s) or members of the extended family in relation to the child.<sup>277</sup>

The CRC does not only contain the rights of children but also refers in more than 16 Articles, directly or indirectly, to the role of parents.<sup>278</sup> In 1986 the General Assembly of the United Nations adopted the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.<sup>279</sup> Article 3 of this Declaration states that “the first priority for a child is to be cared for by his or her own parents”.<sup>280</sup> It furthermore calls for a high priority to be given to family and child welfare,<sup>281</sup> because “*child welfare depends upon good family welfare*”.<sup>282</sup>

In Africa, the family is considered the natural unit and forms the basis of the community.<sup>283</sup> The Preamble of the African Children’s Rights Charter also refers to the family environment in which a child should grow up.<sup>284</sup> Moreover, Article 18 of the African Children’s Rights Charter deals specifically with family values. On the basis of the latter provision, state parties are obliged to provide for the necessary protection of families.

It is interesting to note that the African Children’s Rights Charter takes a firm stance in favour of equality of spouses, which ultimately will impact on the position of children. Article 18(2)

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<sup>276</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995) 68-72.

<sup>277</sup> For example, Articles 3 and 5 of the CRC and Articles 19 and 20 of the African Children’s Rights Charter.

<sup>278</sup> The CRC is not at all parent-unfriendly. It is a misconception to think that the Convention is pro-child and anti-parent. Meuwise *et al. Handbook Internationaal Jeugdrecht* (2005) 68. The role of parents or other care-givers is mentioned for example in the Articles: 2, 3, 7, 8, 9, 10, 12, 14, 16, 21, 22, 27, 29, 37 and 40 of the CRC.

<sup>279</sup> UN Document A/RES/41/85 of 1985 is a non-binding document. See also Meuwise *et al.* (2005) 72.

<sup>280</sup> See also Article 7 of the CRC, which provides that the child has the right to be cared for by his or her parents.

<sup>281</sup> See Article 1 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally: UN Document A/RES/41/85 of 1986.

<sup>282</sup> Article 2 of the UN Declaration of 1986.

<sup>283</sup> See Article 18(1) of the African Children’s Rights Charter.

<sup>284</sup> Section 5 of the Preamble of the African Children’s Rights Charter.

states that,

“State parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution. In case of dissolution, provision shall be made for the necessary protection of the children”.

In terms of customary law, the responsibility pertaining to children would lie with specific members of the family, which would depend on the system of matriarchy or patriarchy. Based on Article 18(2), state parties are under the obligation to take the necessary steps to ensure equality of rights and responsibilities of spouses pertaining to their children.<sup>285</sup>

Memzur highlights that from the terminology of the Charter it can be derived that the extended family plays an important role on the African continent, even more so in the traditional and rural communities. In this regard he mentions Article 20(2)(a) in which reference is made not only to parents but also “others responsible for the child”.<sup>286</sup> Chirwa points out that the so-called extended family structure, although still functioning, is facing difficulties pertaining to the future. The sad result is that the protection granted by these structures is slowly but surely decreasing.<sup>287</sup>

It is interesting to note that the African Children's Rights Charter is the only regional children's rights document<sup>288</sup> that explicitly refers to the duties of children and their

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<sup>285</sup> See Chirwa (2002) *The International Journal of Children's Rights* 167.

<sup>286</sup> See Mezmur (2008) 23 *SAPR/PL* 25. See also the discussion in section 2.2.2.4 which deals with parental responsibilities.

<sup>287</sup> However, on the basis of Article 18(1) of the African Children's Rights Charter, the family as the natural unit within society should be protected by the state, which obligation accrues to all member states. It has to be kept in mind that although societies are inevitably changing, the rights of children should be protected at all cost. In this respect it is important that Article 18(2) provides for the protection of children in the case of dissolution of marriage. Also Chirwa (2002) *The International Journal of Children's Rights* 167.

<sup>288</sup> The provision regarding the duties of children stems from the so-called “parent-document”, namely the African Charter on Human and Peoples' Rights. The latter Charter was adopted on 17 June 1981 by the Heads of State and Government of the Organisation of African Unity and came into force on 21 October 1986. See Patel & Watters *Human Rights – Fundamental Instruments & Documents* (1994) 141. It has been ratified by all 53 member states of the African Union (AU) (previously called the Organisation of African Unity (OAU)). Chapter II of the document (Articles 27-29) deals with the duties of individuals, which includes children.

responsibility towards the family and parents.<sup>289</sup> Article 31 reads as follows:

“Every child shall have duties towards his family and society, the State and other legally recognised communities and the international community.<sup>290</sup> The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

- (1) To work for the cohesion of the family, to respect his<sup>291</sup> parents at all times and to maintain them in case of needs;<sup>292</sup>
- (2) To serve his national community by placing his physical and intellectual abilities at its service;<sup>293</sup>
- (3) To preserve and strengthen social and national solidarity;<sup>294</sup>
- (4) To preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society; [...]”<sup>295</sup>

It is clear that the emphasis in the African Children’s Rights Charter is on African traditions and values. Sloth-Nielsen and Mezmur elaborate on the concept of human rights in the African context, and in addition, the duties of the individual in this respect. They point out that from the extensive literature it can be ascertained that the focus on the group appears to

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<sup>289</sup> See Sloth-Nielsen & Van Heerden 1997 *STELL LR* 274; Chirwa (2002) *The International Journal of Children's Rights* 169. Compare Article 31 of the African Children’s Rights Charter to section 16 of the South African Children’s Act 38 of 2005, which reads: “Every child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state”.

<sup>290</sup> Article 27(1) of the African Charter on Human and Peoples’ Rights (1981) is similar in contents.

<sup>291</sup> It speaks for itself that this is a duty for all children, whether male or female. Article 31 starts off with “Every child [...]”.

<sup>292</sup> Compare with Article 29(1) of the African Charter on Human and Peoples’ Rights (1981).

<sup>293</sup> Compare with Article 29(2) of the “parent-document”. It is submitted that this should include the right to freely express views in this regard which entitlement accrues to the child on the basis of Article 7 of the African Children’s Rights Charter.

<sup>294</sup> See Article 29(4) of the Charter.

<sup>295</sup> See Article 29(7) of the Charter.

be a conspicuous characteristic of African culture. In addition, Sloth-Nielsen and Mezmur aver that the concept of human rights in the African context acknowledges the relevance of both the group as a unit as well as that of the individual.<sup>296</sup>

Moreover, Article 31 makes the duties of a child subject to (a) the age and ability of the child<sup>297</sup> and (b) such limitations as may be contained in the Charter; for example, provisions awarding protection to the child. The various duties as mentioned in Article 31 have the potential to provide for the participation of children in their family and community.<sup>298</sup> Seen in this light, Article 31 can be considered as a valuable contribution to the standards set by the CRC.<sup>299</sup>

The European Convention (1950)<sup>300</sup> was adopted shortly after the Second World War and does not refer explicitly to children. Article 8 formulates the right to respect for the private life and family life of each inhabitant (thus including children) in any of the High Contracting parties.<sup>301</sup> From the above it becomes evident that there is a triangular relationship; namely the child, the (extended) family/community, and the state (state party to a treaty).<sup>302</sup> It has to be kept in mind that respect for the family or family life by the state should never mean that a child would be without protection when this is needed. Van Bueren points out correctly that “*the privacy of the family is no longer sacrosanct*”.<sup>303</sup> In order to ensure the protection of the rights of the child, the state has to take responsibility where the quality of the relationships within a family is compromised.

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<sup>296</sup> See Sloth-Nielsen & Mezmur (2008) *Journal of African Law* 164.

<sup>297</sup> This is in line with the evolving capacities of the child in terms of Article 5 of the CRC. See section 2.2.2.2 below.

<sup>298</sup> For a discussion on participation rights in terms of South African law and Dutch law, see section 3.1.4.

<sup>299</sup> As will become apparent, the African Children’s Rights Charter provides for a higher standard than the CRC with regard to some of the rights of children. See also Van Bueren *The International Law on the Rights of the Child* (1995) 24; Davel (2002) *De Jure* 283.

<sup>300</sup> The European Convention on Human Rights, Rome 4 November 1950.

<sup>301</sup> For a more detailed discussion on the conditions pertaining to government interference on the basis of Article 8 of the European Convention, see section 2.2.2.3 below, regarding “preservation of identity”, Article 8 of the CRC.

<sup>302</sup> See Lansdown “The evolving capacities of the child” *UNICEF* (2005) ix.

<sup>303</sup> See Van Bueren *The International Law on the Rights of the Child* (1995) 72, where she points out that in the past international law focussed on ensuring the privacy of the family, resulting in a so-called “hands off” approach, in other words a policy of minimum intervention.

To provide the international legal framework, as the background for this comparison, the next sections present and discuss the Articles of the CRC and the African Children's Rights Charter directly relevant for this study on the placement of children. This will include the Articles dealing with the role, responsibilities and rights of parents and the (extended) family.

### 2.2.2.2 Parental guidance and the child's evolving capacities

Article 5 of the CRC deals with "parental guidance and the child's evolving capacities":

"State parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention".

Article 5 lays the responsibility for the upbringing of children in the first place with the parents, and where applicable, with other persons.<sup>304</sup> At the same time, Article 5 provides for a discretion regarding "appropriate direction and guidance". The Convention, and for that matter the state parties, shall respect the responsibilities, rights and duties of parents (or others) regarding providing direction and guidance in the exercise of the rights, but the parents (or others) have to deal with this responsibility "*in a manner which is consistent with the evolving capacities of the child*". In other words, the phrase "appropriate" indicates that parents or other care-givers cannot merely do as they please in providing direction and guidance, but need to consider the evolving capacities of the child.<sup>305</sup> Article 5 can be seen as an "umbrella" Article because it is applicable to everybody that in some or other way

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<sup>304</sup> Article 5 provides for a flexible definition of the concept "family". It is interesting to note that the phrase "*the members of the extended family or community as provided for by the local custom*" apparently was a "last minute" addition. There was a need to provide for a wider range of people taking responsibility for the upbringing of children since according to certain cultures and traditions in different countries it is not necessarily the parents that take care of their children. See Meuwise *et al.* in *Handbook Internationaal Jeugdrecht* (2005) 68. It is regrettable that the recognition of the extended family is only mentioned in a single Article, and not extended to the complete CRC, see Van Bueren *The International Law on the Rights of the Child* (1995) 50 and further 71.

<sup>305</sup> See Lansdown *UNICEF* (2005) ix.

cares for a child.<sup>306</sup>

From the wording of Article 5 it is clear that the crux of the Article is about the support (direction and guidance) of parents (or others) in the exercise by the child of the rights as mentioned in the Convention. Thus two aspects can be distinguished, namely:

- (i) The responsibilities of parents (or others); and
- (ii) The evolving capacities of the child.

The first aspect, namely the “responsibilities of parents (or others)” is further explained in Article 18 of the CRC.<sup>307</sup> The question arises as to what is meant by “appropriate” (direction and guidance). Parents have to consider the development of the child. The older and more mature a child becomes, the less direction and guidance will be needed. The responsibilities of parents (and others) are in this respect limited.<sup>308</sup>

The second aspect, namely “the evolving capacities of children”, acknowledges the different stages of development which children pass through.<sup>309</sup> It revolves around the fact that as a child develops towards adulthood, the child will increasingly become more independent, and can (and should) be able to exercise his or her rights, without the interference of the parents (or others). In fact, the child should be encouraged and assisted in exercising his or her rights. Combined with Article 12 of the CRC, Article 5 calls for a paradigm shift in certain cultures;<sup>310</sup> namely, a shift in the responsibility of decision making by parents towards that of

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<sup>306</sup> The overall text of the CRC is not consistent in the terminology regarding care-givers of children. Sometimes reference is made to “parents”, sometimes to “parents, legal guardians or other individuals legally responsible for the child”, sometimes to “family”. See Meuwise *et al.* (2005) 69.

<sup>307</sup> Article 18 of the CRC reads as follows: “Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child, and, the best interests of the child will be their basic concern”.

<sup>308</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995) 50.

<sup>309</sup> The term “evolving capacities” has not been defined in Article 5 of the CRC. See Rehman *International Human Rights Law – A Practical Approach* (2003) 383.

<sup>310</sup> Especially in countries where children are rather “seen but not heard”. See Anderson and Spijker (2002) *Obiter* 365.

the child, provided that the child is able and willing to do so.<sup>311</sup>

In this respect it is regrettable that the African Children's Rights Charter does not contain a corresponding provision. However, since the CRC is widely ratified, parents and others legally responsible for the child have to provide appropriate direction and guidance in a manner which is consistent with the evolving capacities nevertheless. It is agreed with Van Bueren that if the international law on the rights of children is to be truly meaningful and effective, it should be able to respond to the various stages of development.<sup>312</sup> Various Articles in the Convention acknowledge the importance of the development of children and the increase regarding their independence.<sup>313</sup> Moreover, it can be derived from Article 5 that the child is seen as an independent legal subject in terms of the CRC.<sup>314</sup> Article 19 is also closely linked to the Articles 5 and 18.<sup>315</sup> On the basis of Article 19 of the CRC, state parties shall protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents (or others). In other words, this Article provides for the boundaries regarding the family life of parents (or others) and the children in their care without state intervention.<sup>316</sup>

### 2.2.2.3 Preservation of identity without unlawful interference

The preservation of identity,<sup>317</sup> including family relations, as recognised by law, comes to the

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<sup>311</sup> It has to be kept in mind that a child should never be forced to taking decisions by himself or herself. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 71.

<sup>312</sup> Van Bueren *The International Law on the Rights of the Child* (1995) 50.

<sup>313</sup> For example Article 12, which gives the child the right to express his or her views freely in all matters affecting the child, and moreover, that the views of the child be given due weight (in accordance with the age and maturity of the child). See also section 2.2.1.6 on "the child's opinion and the right to be heard". Article 14, dealing with the freedom of thought, conscience and religion also refers to the role of parents and "the evolving capacities of the child", see Article 14(2) of the Convention. See also section 2.2.2.4 on "freedom of thought, conscience and religion: placement compatibility" and 3.1.4, dealing with participation of the child.

<sup>314</sup> Article 5 concludes with "[...] in the exercise by the child of the rights recognised in the present Convention".

<sup>315</sup> For a discussion on Article 18 see section 2.2.2.4, and on Article 19, section 2.2.2.5.

<sup>316</sup> See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 71.

<sup>317</sup> According to Rehman the right to identity is an "unusual" right. This right was brought forward by Argentina, as a response to the enforced disappearances of children in the 1970s.

fore in Article 8 of the CRC:

- “(1) State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference.
- (2) Where a child is illegally deprived of some or all of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity”.

State parties are bound to have respect for a child to preserve its identity, without unlawful interference. Although the word “his or her identity” is not defined in the CRC, it is clear from Article 8(1) that the following elements are at least included; namely, nationality, name and family relations as recognised by law. It has been indicated that other elements could also fall under the ambit of this Article, like, the cultural, sexual or religious identity.<sup>318</sup>

The non-discrimination provision<sup>319</sup> in the CRC is linked to Article 8 in the sense that Article 8 accommodates the child's unique identity with the related elements and moreover, the preservation and protection thereof, whilst the right to equal treatment in Article 2 allows for differentiation.<sup>320</sup> Detrick points out that the phrase “unlawful interference” means that

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*International Human Rights – A Practical Approach* (2003) 384. See also Meuwise *et al.* (2005) 92.

<sup>318</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 163; Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 94. Rehman correctly states that Article 8 read in conjunction with Article 30 could be of importance to children belonging to minority groups or indigenous groups when it comes to “preserving their family traditions as well as their linguistic, cultural and religious identity”, see *International Human Rights – A Practical Approach* (2003) 384.

<sup>319</sup> See Article 2 of the CRC which reads as follows:

“(1) The States parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

<sup>320</sup> It is agreed with Meuwise *et al.* that non-discrimination does not call for uniformity, but entails the right to equal treatment despite various differences. See Meuwise *et al.* (2005) 94. See



interference with regard to a child's identity, which is authorised by the state, can only be tolerated on the basis of the law of a country.<sup>321</sup> Where such interference regarding “some or all of the elements” of the child's identity is unlawful, Article 8(2) states the responsibility of states parties in this regard, namely, to provide appropriate assistance and protection, with a view to speedily re-establishing the child's identity. The African Children’s Rights Charter does not contain a similar provision.<sup>322</sup> It is mentioned above that “family relations as recognised by law” is one of the elements of a child's identity. One can link this with Article 8 of the European Convention which provides for the protection of “family life” against unlawful interference by a public authority. It reads as follows:

- “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
  
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

Article 8 starts off by referring to “everyone”, which implies that the respect for family life is of importance to parents and other family members as well as children (although nowhere in the Convention any reference is made to children).<sup>323</sup> “Private life”,<sup>324</sup> “family life”, “home” and “correspondence” are mentioned separately but in certain cases they might overlap.<sup>325</sup> The High Contracting parties are obliged to ensure and safeguard respect for family life and

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also Mahery in Boezaart (ed.) (2009) 317, where she refers to the fact that both the CRC and the South African Constitution allow for differentiation, not discrimination.

<sup>321</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 164.

<sup>322</sup> See also Chirwa (2002) *The International Journal of Children's Rights* 165.

<sup>323</sup> The European Convention is a post World War II document, signed on 4 November 1950.

<sup>324</sup> “Private life” has a wide meaning and includes many aspects, like identity, moral and physical integrity, personal and sexual relationships, see Rehman (2003) 150.

<sup>325</sup> Rehman *International Human Rights – A Practical Approach* (2003) 150.

this obligation seems to be of a positive nature.<sup>326</sup>

The European Convention does not protect the “family” as such, but does protect “family life”, which is not further defined in the document. In other words, Article 8 does not deal with the rights of the family unit *per se*, but rather focuses on the individuals which form part of such family unit.<sup>327</sup>

The European Court of Human Rights has played and is still playing a significant role in outlining and further developing the meaning of “family life”. In the *Marckx* case,<sup>328</sup> it was concluded that the protection of the right to “family life” is not limited to *de jure* family life, but rather to *de facto* family life.<sup>329</sup> Moreover, instead of merely focusing on family titles, it appears that in determining “family life” the substantive role of various family members *vis-à-vis* the children has been taken into consideration. In this manner it is possible to embrace a wide range of relationships in order to accommodate new evolving relationships in changing societies. At the same time it always should be kept in mind that the child's best interests

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<sup>326</sup> An example is the case *X and Y v The Netherlands*, Judgement of 26 March 1985, Series A, No. 91. A mentally handicapped girl had been sexually assaulted by an adult male of sound mind. Due to a procedural gap in Dutch Law it was not possible for the authorities to prosecute the man. Under the given circumstances the only relief available to the girl were civil remedies, of which the girl had been informed of by the authorities. According to the European Court of Human Rights “the civil remedies were inadequate and the absence of effective criminal sanctions in these circumstances constituted a breach by the Dutch government of the obligation to respect the girl's right to private life”. In other words, the positive obligations under Article 8 of the European Convention include the availability of adequate civil remedies and criminal provisions which ensure the possibility of prosecution under similar circumstances.

<sup>327</sup> See Breen *The Standard of the Best Interests of the Child – A Western Tradition in International and Comparative Law* (2002) 246.

<sup>328</sup> Judgement of 15 June 1979, Series A No. 31, 21 and NJ 1980, 462. In this case the European Court of Human Rights dealt with the legal relationship between the mother and her biological daughter, born out of wedlock. According to the (then applicable) Belgian law the child was not related to the mother by operation of law from birth. This was dependent on the mother recognising the child. The European Court deliberated that Article 8 does not differentiate between “legitimate or marital” and “illegitimate or non-marital” children, because that would not accord with the beginning of Article 8, which reads: “Everyone has the right to ... family life”. State parties were therefore under the obligation to provide for the development of normal family relations between close relatives. See Van Bueren (1995) 43; also Van der Linde *Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD Dissertation 2001 UP); Asser/De Boer *Personen – en Familierecht* (2010) 10.

<sup>329</sup> See Breen *The Standard of the Best Interests of the Child – A Western Tradition in International and Comparative Law* (2002) 248.

should be served, and therefore it is of the utmost importance to consider the factual and substantive relationship between a child and other family members.<sup>330</sup>

The High Contracting parties are obliged to follow up on the judgements of the European Court.<sup>331</sup> The jurisprudence of the European Court regarding Article 8, and more specifically the right to family life, has had tremendous impact on Dutch family law, for example on family relations or contact (access).<sup>332</sup> However, on the basis of Article 8(2), intervention by a public authority is possible, provided adherence to the stated conditions in the same Article. Interference is only justified when the following three elements are met:

- (i) It has been provided for by law (the national law of a High Contracting party); and,
- (ii) Is necessary in a democratic society; and,
- (iii) Is in the interests of, among others, the protection of others (for example, children).

It is interesting to note that at first this right implied a negative obligation on all of the High Contracting parties, namely not to interfere in family life without justification. However, since the 1980s positive obligations for High Contracting parties were also awarded to Article 8, in other words, a duty to provide. This notion developed due to the realisation that parents and children belong together, and where separated, reunification should be strived for.<sup>333</sup>

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<sup>330</sup> These other family members could even enforce their right to “family life” against a State (a High Contracting party) on the basis of Article 25 of the European Convention. See also Van Bueren *The International Law on the Rights of the Child* (1995) 70.

<sup>331</sup> Article 53 of the European Convention on Human Rights reads as follows: “The High Contracting parties undertake to abide by the decision of the court in any case to which they are parties”.

<sup>332</sup> Doek and Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 229. A child has the right to have contact with anyone to whom that child is in a close personal relationship. Even if this is not the case, a child has the right to contact with his biological father on the basis of Article 8. See also section 3.6 of Doek and Vlaardingerbroek (2009) 173.

<sup>333</sup> Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 72.

#### 2.2.2.4 Parental responsibilities<sup>334</sup>

Parental responsibilities are dealt with in Article 18 of the CRC:

- “(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the *primary responsibility*<sup>335</sup> for the upbringing and development of the child. The best interest of the child will be their basic concern.
- (2) For the purpose of guaranteeing and promoting the rights set forth in this Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
- (3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible”.

From the Preamble of the CRC, it is clear that according to this international document, children should grow up in a family environment.<sup>336</sup> Article 18 unambiguously states that the parents (both of them) are the first persons to be responsible for the upbringing and development of their child(ren). It is interesting to note that in addition to the parents, the same duty is extended to “others responsible for the child”, as provided in Article 20(1) and (2) of the African Children’s Rights Charter. The best interests of the child is their first-of-all concern<sup>337</sup> and thus serves as a guiding principle for parents as well as others responsible

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<sup>334</sup> Articles 18 CRC and 20 African Children’s Rights Charter.

<sup>335</sup> Own emphasis.

<sup>336</sup> See section 6 of the Preamble, which reads as follows: “Recognising 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”. See also section 5, “[...] 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 [...]”

<sup>337</sup> In the context of the African Children’s Rights Charter this applies to parents or others responsible for the child.

for the child.<sup>338</sup>

It is interesting to note that the African Children’s Rights Charter urges the parents, or others responsible for the child, to administer domestic discipline in moderation.<sup>339</sup> The CRC, on the other hand, rejects all forms of violence, which has been strongly reiterated by the recently issued *General Comment No. 13 (2011)*.<sup>340</sup> The Committee on the Rights of the Child is of the opinion that “*all forms of violence against children, however light, are unacceptable*”.<sup>341</sup> Based on this it can be concluded that the CRC, read in conjunction with *General Comment No. 13*, provides a better standard than the African Children’s Rights Charter.<sup>342</sup>

It is the duty of all state parties to assist parents (or where applicable legal guardians) in the exercise of their responsibilities. In this respect, Article 20(2)(b) of the African Children’s Rights Charter reads as follows:

“States Parties to the present Charter, in accordance with their means and national conditions shall take all appropriate measures: to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions for the care of children”.

Article 18 CRC is linked with the following Articles in the CRC, which are all specifically referring to the rights and duties of parents (and other care-givers):

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<sup>338</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995)46.

<sup>339</sup> Article 20(1)(c) of the African Children’s Rights Charter reads: “Parents or others responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty: [...] to ensure that domestic discipline is administered in moderation and that the child is treated with humanity and with respect for his inherent dignity”.

<sup>340</sup> CRC/C/GC/13 of 17 February 2011.

<sup>341</sup> Without exception, see CRC/C/GC/13 section 16. For a more detailed discussion, see sections 2.2.2.5 and 4.3.1.1.1.

<sup>342</sup> It is interesting to note that in South Africa, which is a member state to the African Children’s Rights Charter, there was a proposal to abolish corporal punishment, namely in the Children’s Amendment Bill [B19F-2006 (reprint)]. It is regrettable that this amendment has not become law. See also section 4.2.1.

- (i) Article 5, where states parties shall respect the responsibilities, rights and duties of parents or other care-givers;<sup>343</sup>
- (ii) Article 3(2),<sup>344</sup> on the basis of which there is an obligation on states parties to ensure the child “such protection and care as is necessary for his or her well-being, taking into account the rights and duties of the parents, legal guardians or other care takers,” and therefore shall take all appropriate legislative and administrative measures; and,
- (iii) Article 27,<sup>345</sup> which grants every child the right to an adequate standard of living for which the parents have the primary responsibility, and where state parties shall provide assistance in case of need in terms of Article 27(2) and (3).<sup>346</sup>

As mentioned, Article 18 creates an obligation for state parties; there is a duty in the form of rendering appropriate assistance in the performance of the child-rearing responsibilities of parents, like family support services or family life education programmes.<sup>347</sup> Article 18(1) refers to the common<sup>348</sup> responsibilities of both parents pertaining to the upbringing and development of their child. It is regrettable that the African Children’s Rights Charter does not emphasise the common responsibilities of both parents.

The fact that both parents are involved is usually in the best interests of the child, the interests of which they have to safeguard.<sup>349</sup> In the event that parents get divorced, it would

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<sup>343</sup> Parental guidance (role of the parents) and the child's evolving capacities. See section 2.2.2.2 above.

<sup>344</sup> See section 2.2.1.4 above.

<sup>345</sup> See section 2.2.2.6 below.

<sup>346</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 150.

<sup>347</sup> See also section 4.2 regarding prevention and early intervention.

<sup>348</sup> “Common responsibilities” does not necessarily mean “equal responsibilities”.

<sup>349</sup> Article 18(1) of the CRC clearly states: “*The best interest of the child will be their (the parents’) basic concern*”. Compare with Article 20(1)(a) of the African Children’s Rights Charter, which states that whoever has the primary responsibility for the upbringing and development of the child, “*shall have the duty to ensure that the best interest of the child are their basic concern at all times*”.

be desirable that the sharing of care<sup>350</sup> continues, unless this would not be in the child's best interests. The “call for the sharing of care after divorce” is confirmed in Article 7 of the CRC. According to Article 7:

- “(1) The child [...] shall have [...] as far as possible, the right to [...] be cared for by his or her parents.
- (2) State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field [...]”.

Thus, state parties have to take measures to encourage and support the possibility of the sharing of care after divorce. In other words, this has to be incorporated in the national legislation of the state parties. It is important that both parents, after divorce, fulfil a substantial role with regard to the care and upbringing of their child.<sup>351</sup> A similar approach is to be followed on the basis of the European Convention.<sup>352</sup> Article 18(3) of the CRC focuses on working parents. As mentioned above, the gender roles within the family have changed quite considerably in the past decades. The situation where men were the sole providers and their wives looked after the children and took care of the home has changed due to, among others, social, health and financial factors. These days many mothers have to work to make ends meet. The increase of single parent homes due to divorce or the death of partners or family members due to HIV/AIDS and related diseases should not be underestimated. At the beginning of this millennium the number of children under 16 years of age whose parent(s) had died was about 180.000. It was estimated that this figure would

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<sup>350</sup> In other words, joint custody, where both parents play a substantial role in the daily live of their child.

<sup>351</sup> On the sharing of care (custody) regarding South Africa and joint parental authority in the Netherlands, see also chapters 3 and 4. With regard to the (importance of the) existing relationship between a child and his or her parents the following Article should be noted: Article 9 of the CRC points out on what basis a child may be separated from his or her parents. After such separation the child has in principle the right to maintain personal relations and direct contact with both parents, on a regular basis. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 151. Article 19 of the African Children's Rights Charter is similar in contents.

<sup>352</sup> See also Van Bueren *The International Law on the Rights of the Child* (1995) 105.

rise to 2 million children by the year 2010.<sup>353</sup>

Moreover, the financial crisis (since 2007) has had (and still has) a huge impact globally. In many countries many people are facing retrenchments and job losses, due to necessary re-organisations and companies that folded. Where both parents work, state parties shall take all appropriate measures to ensure that the children concerned have the right to benefit from child care services and facilities for which they are eligible. In many developing countries so-called child care services and facilities do not exist. The question arises as to whether the obligations put on state parties are not unrealistic. Whether or not these child care services and facilities are feasible in developing countries will largely depend on the finances and priorities of the governments of state parties.

On this basis, Article 20(2)(c) of the African Children's Rights Charter states that parties are under the same obligation,<sup>354</sup> but it includes a realistic condition, namely, "*in accordance with their means and national conditions*". Therefore, regarding developing countries, the formulation in the African Children's Rights Charter is preferred. The importance of this right for children of working parents should not be taken lightly. In many cases children are left on their own after school.<sup>355</sup>

It is submitted that where parents are working, there is a chance that children are put at risk, and therefore the government should step in.<sup>356</sup> This is in line with the obligations for state parties in terms of the CRC.

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<sup>353</sup> See Davel (2002) *De Jure* 288.

<sup>354</sup> Article 20(2)(c) of the African Children's Rights Charter reads as follows: "States Parties to the present Charter, in accordance with their means and national conditions shall take all appropriate measures [...] to ensure that the children of working parents benefit from child care services and facilities."

<sup>355</sup> Although the concept of the so-called extended family is still a reality in many developing countries, for example, in South Africa, it is facing a development of disintegration. This puts children at risk. See also Chirwa 2002 *The International Journal of Children's Rights* 167. Reliable and trustworthy care-givers in the family home are needed in the absence of parents or other family members. Language barriers, poor salaries, exploitation, insufficient leave and matters relating to mutual respect in the workplace could potentially have negative impact on the commitment of staff and therefore the quality of the care provided. The same applies to staff in care-facilities.

<sup>356</sup> In the Netherlands, for example, all (primary) schools are compelled to provide for after school care for children of working parents (for a small fee).



### 2.2.2.5 Protection from abuse and neglect<sup>357</sup>

Children need at all times be protected from abuse and neglect. Child abuse can cause serious damage to the physical, psychological and social-emotional development of children, and therefore has to be taken seriously by states parties. Article 19<sup>358</sup> of the CRC states that in this regard:

- “(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”.

Article 19, although highly relevant,<sup>359</sup> is a complex provision in the sense that it deals with a number of aspects. First of all, Article 19 gives a wide definition of “abuse”; namely, “*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation<sup>360</sup> including sexual abuse*”. Recently the Committee on the Rights of the Child issued *General Comment No. 13* (2011),<sup>361</sup> which specifically deals with

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<sup>357</sup> Articles 19 of the CRC and 16 of the African Children’s Rights Charter.

<sup>358</sup> It is interesting to note that the Dutch delegation took the initiative to include an Article in the CRC for the protection of children against abuse and neglect. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 160.

<sup>359</sup> Apart from the statistics pertaining to abuse and neglect (suggesting an increase), the media report on a regular basis instances of abuse and neglect, in South Africa as well as in the Netherlands. See with regard to the Netherlands, Meuwise *et al.* (2005) 160.

<sup>360</sup> See also Article 34 of the CRC, which deals explicitly with the protection against sexual exploitation and the obligations of the states parties in this regard.

<sup>361</sup> CRC/C/GC/13 of 17 February 2011.

the rights of the child to have freedom from all forms of violence.<sup>362</sup>

Secondly, it indicates who may be regarded as a perpetrator; for example, parent(s), legal guardian(s) or any other person who cares for the child. This is focused on domestic violence, where the perpetrator has parental authority, or has (been awarded) care or custody of a child. However, in paragraph 34 of *General Comment* No 13 it has been specifically provided that the scope of Article 19 is not limited to violence perpetrated by care-givers in a personal context. Children may potentially not only be subjected to violence by a wide range of persons, but also a variety of settings.<sup>363</sup> It has to be pointed out that “while in the care of”<sup>364</sup> does not imply that the parent(s), legal guardian(s) or any other person who has the care of the child is/are necessarily the perpetrator(s). With the addition “[...] or any other person who has the care of the child”, Article 19 is extended to the persons who are supposed to safeguard the protection of the child, like staff members at day cares, schools and other private or public institutions.<sup>365</sup>

Thirdly, it includes a wide range of measures pertaining to the prevention, repression and treatment to be taken by each state party. These measures should be of a legislative, administrative, social and educational nature, and they should ensure, among others, the establishment of social programmes to provide the necessary support for the child and the

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<sup>362</sup> The objectives of General Comment No.13 are, among others, to guide states parties in understanding their obligations in terms of Article 19, in other words pertaining to the prohibition, prevention and response regarding all forms of violence. Moreover, to outline the legislative, judicial, administrative, social and educational measures that states parties should take. Furthermore, to promote a holistic approach to implementing Article 19, including the other children's rights, like dignity, health and development. It is also highlighted that there is a need for all states parties to act quickly to fulfil their obligations, see CRC/C/GC/13 section 10.

<sup>363</sup> The group of persons who potentially may inflict harm upon the child ranges from individuals with whom the child is familiar, like peers, friends, neighbours, or strangers. However, harm may also be inflicted by professional persons who misuse their powers, which may occur in a variety of settings, for example, in residential homes. See *General Comment* No 19, paragraph 34 (CRC/C/GC/13).

<sup>364</sup> It should be noted that the latter phrase has a broad interpretation, which ultimately aims to provide the maximum protection possible. See General Comment No 13 (CRC/C/GC/13), paragraphs 31 and 32.

<sup>365</sup> In this regard, government initiatives are urgently needed, like the National Child Protection Register, which has been put in place with the coming into force of the South African Children's Act 38 of 2005. See section 4.3.1.1.

people who have the care of the child concerned.<sup>366</sup> Article 19(2) of the CRC concludes by stating the need for measures relating to the identification, reporting, referral, investigation, treatment and follow-up of instances of child abuse and neglect, and moreover, for judicial involvement.

It is interesting to note that Article 19 of the CRC is almost identical to Article 16 in the African Children's Rights Charter. Noteworthy is the difference in the beginning of the Articles. Article 19 obliges state parties "to take all appropriate [...] measures", whilst the African Children's Rights Charter provides for "specific [...] measures to be taken by state parties". Moreover, the phrases "violence" and "exploitation" as referred to in Article 19(1) in the CRC, have been omitted in the African Children's Rights Charter.<sup>367</sup> Although perhaps explainable from a cultural context, Article 20(1)(c) of the African Children's Rights Charter gives rise for concern. Parents or others responsible for a child are under the duty to ensure that domestic discipline is administered in moderation, with humanity and respect for the child's inherent dignity.<sup>368</sup> In this respect, the CRC read in conjunction with *General Comment No. 13*, provides a better standard than the African Children's Rights Charter.<sup>369</sup>

Connected with Article 19 is Article 39 of the CRC, which makes explicit provision for child victims of, among others, neglect and abuse, and such provision has been omitted in the African Children's Rights Charter.<sup>370</sup> Article 39 of the CRC obliges state parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of any child victim of any form of neglect, exploitation or abuse.<sup>371</sup> In other

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<sup>366</sup> See also CRC/C/GC/13, section 42 and further.

<sup>367</sup> Whilst on the other hand, the Committee on the Rights of the Child, found it appropriate to choose the phrase "violence" to represent all forms of harm to children and emphasised most strongly that the term violence in *General Comment No. 13* should not be used in any way to minimise the impact thereof, see CRC/C/GC/13 section 3.

<sup>368</sup> See also Davel 2002 *De Jure* 287, where it is indicated that the parental authority to administer punishment for the purpose of education and correction is lawful and applicable to both common law and customary law. In the meantime the Children's Act 38 of 2005 has come into force, which provisions will be discussed more in detail in section 4.3.1.1.

<sup>369</sup> See also section 2.2.2.4.

<sup>370</sup> According to Lloyd, this may be regarded as the most major substantive omission in the Children's Charter. (2002) *The International Journal of Children's Rights* 184.

<sup>371</sup> Article 39 of the CRC reads as follows: [S]tate parties shall take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or

words, at this point the CRC provides an extra safeguard, since this standard should be reflected in the national legislation of all state parties. With regard to the European Convention, Article 3 indicates that “no one shall be subjected [...] to inhuman or degrading treatment or punishment”, which obviously includes children and which in certain countries has resulted in legislation prohibiting domestic discipline.<sup>372</sup>

#### **2.2.2.6 Standard of living<sup>373</sup>**

According to Article 27(1) of the CRC “states parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development”. With regard to the role of parents or others responsible for a child, it states:

- “(2) The parent(s) or other responsible for the child have the primary<sup>374</sup> responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
  
- (3) States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and other responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”.

Article 27 supplements Article 6 of the CRC, since the latter provides for the basic right to life, survival and development of the child. These are issues especially affecting children in developing countries. Where poverty is rife, children suffer from hunger and may be exposed to, for example, inadequate health care and housing. Under these circumstances life is more about survival than development. Thus Article 27, read in conjunction with Article 6, means that apart from the right to life and survival, which have to be safeguarded, there are specific obligations to ensure that the development of children will not be

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degrading treatment or punishment, or armed conflicts. Such recovery and re-integration shall take place in an environment which fosters health, self-respect and dignity of the child.”

<sup>372</sup> For example, in the Netherlands, in Article 1:247(2) of the Civil Code.

<sup>373</sup> Articles 27 of the CRC and 20 of the African Children's Rights Charter.

<sup>374</sup> Own emphasis.

hampered due to an inadequate standard of living.<sup>375</sup>

It follows from Article 27(1) that the right of the child to an adequate standard of living is not limited to food, housing, and other necessities but that it focuses on the child's physical, mental, spiritual, moral and social development. Other relevant rights are the right to education,<sup>376</sup> the right to recreation and to participate freely in cultural life and the arts,<sup>377</sup> and Articles dealing with social, cultural and religious rights of children.

Both instruments have stipulated in unambiguous terms that (again)<sup>378</sup> the parents or others responsible for a child, have the primary responsibility to secure the conditions of living necessary for the child's development.<sup>379</sup> The background to this provision has to do with the fact that on the one hand parents and families should be protected against (unnecessary) state intervention, and that on the other hand parents or others responsible for the child should take responsibility themselves.

However, from Articles 27(3) of the CRC and 20(2)(a) of the African Children's Rights Charter, it can be derived that a secondary responsibility rests with the state parties. It imposes a duty on state parties that they, "in case of need", have to provide for programmes pertaining to material assistance and support; particularly with regard to nutrition, clothing and housing. The phrase "particularly" is an indication that the list of merely three factors mentioned in Article 27(3) is not exhaustive.<sup>380</sup> In comparison, in Article 20(2)(a) of the African Children's Rights Charter, state parties are obliged to take all appropriate measures:

"... to assist parents and others responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing".

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<sup>375</sup> See also Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 228.

<sup>376</sup> See Articles 28 and 29 of the CRC and Article 11 of the African Children's Rights Charter.

<sup>377</sup> See Article 31 of the CRC and Article 12 of the African Children's Rights Charter.

<sup>378</sup> Compare with Article 18 of the CRC and Article 20 of the African Children's Rights Charter which deal with parental responsibilities. See section 2.2.2.4 above.

<sup>379</sup> See the Articles 27(2) of the CRC and 20(1)(b) of the African Children's Rights Charter.

<sup>380</sup> Meuwise *et al.* (2005) 229. Also Van Bueren (1995) 318.

Thus Article 20(2)(a) of the African Children’s Rights Charter also contains a non-exhaustive list, but includes two extra factors; namely, health and education, both of which constitute challenges on the African continent and therefore require the necessary attention of state parties.<sup>381</sup> It has to be noted that the obligation of state parties in both documents have been made subject to a condition. Therefore state parties are bound to take appropriate measures pertaining to assisting families, but “in accordance with national conditions and within their means”.<sup>382</sup>

From the above it is clear that the Articles 18 and 27 of the CRC and 20 of the African Children’s Rights Charter recognise the right of a child to be primarily cared for by his or her parent(s), or under certain circumstances, others responsible for the child. Moreover, that the state parties shall render appropriate assistance to parents and others responsible for the child in the performance of their child-rearing responsibilities and that state parties shall ensure the development of institutions, facilities and services for the care of children.<sup>383</sup> In other words, state parties have a positive duty to assist parents and others in their responsibilities for the upbringing and development of the child, and undertake to respect family relations as part of a child’s identity without unlawful interference.

It should be noted that the rights, as discussed above, should not be considered in isolation. Most of the rights are linked to each other and therefore supplement each other.

### **2.2.3 The principle of non-separation pertaining to the child and his or her parents<sup>384</sup>**

In various sections above, reference was made to the importance that children do grow up in their own family environment, or to be more precise, that it is the right of a child to grow up

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<sup>381</sup> See for example, *Memzur (2008) 23 SAPR/PL 22*.

<sup>382</sup> Compare with Article 20(2)(a) of the African Children’s Rights Charter, which reads as follows: “States Parties to the present Charter, in accordance with their means and national conditions shall take all appropriate measures: to assist parents and others responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.”

<sup>383</sup> See Article 18(1) and (2) of the CRC. See also section 2.2.2.4 above.

<sup>384</sup> See also the discussion in section 5.1.1.2.

with its own family. However, sometimes the circumstances are temporarily or for a longer period of time not ideal for the physical, emotional and psychological development of a child.

In such a case help is needed to ensure that a child will indeed be able to develop fully, sometimes outside the setting of its own family environment but in an environment which resembles a family environment as closely as possible. In these instances it is paramount that the rights of children are taken into account, which means all of these rights, since these children affected by these circumstances are vulnerable.

In line with the topic of this thesis, the following Articles in the CRC are of utmost importance, Articles 9, 16, 20 and 37(b), and these Articles will be discussed in a chronological order.

### **2.2.3.1 Separation from parents<sup>385</sup>**

Article 9 emphasises two important principles pertaining to the rights of children: firstly, a child will in principle not be separated from his or her parents against their will, unless this would be considered necessary for the best interests of the child concerned. Secondly, all procedures resulting in the separation of children from their parents should be fair and just. The wording of Article 9 CRC reads as follows:

“(1) State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(2) In any proceedings pursuant to paragraph 1, all interested parties shall be given an

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<sup>385</sup> See the Articles 9 of the CRC and 19 of the African Children's Rights Charter.

opportunity to participate in the proceedings and make their views known.

- (3) State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
- (4) Where such separation result from any action initiated by a state party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state) of one or both parents or of the child, that state party shall, upon request, provide the parents, the child or, if applicable, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family, unless the provision of the information would be detrimental to the well-being of the child. State parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned”.

On the basis of Article 9(1), it is clear that state parties have to make sure that a child will not be separated from its parents against their will. The wording “against their will” refers to the opinion of the parent(s) and that of the parent(s) and child together.<sup>386</sup>

It is interesting to note that Article 19(1) of the African Children’s Rights Charter contains a similar provision, with the difference that the child will not be separated from his parents against “his” will. It is submitted that the phrase “not against his will” indicates that the child concerned should have a voice in the matter in the context of his or her age and/or maturity. In other words, it is important to have regard for the evolving capacities of the child.<sup>387</sup>

Moreover, only the competent authorities (judicial authorities) can decide on the basis of the applicable law and in line with the proper procedure, that the separation is necessary for the

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<sup>386</sup> It has been pointed out that “against their will” does not refer to the opinion of the child separately. Children cannot by themselves choose their care-givers. Parents have to be involved in decisions pertaining to separation. This is also linked with Article 9(2), which states that all interested parties to the proceedings shall be given an opportunity to participate in the proceedings and make their views known. See also Meuwise *et al.* (2005) 97.

<sup>387</sup> For a discussion on the evolving capacities of the child, see section 2.2.2.2.



child's best interests.<sup>388</sup> It is important to mention that such a decision should be subject to judicial review. Where a child will be separated from his or her parents, the state parties have to ensure the possibility of judicial review, on the basis of Article 9(1) in conjunction with Article 25 of the CRC.

Article 25 provides for periodic review of the decision by the competent authorities, when such decision results in the separation of the child from his or her parents, for the purposes of care, protection or treatment of his or her physical or mental health.

Specific reasons for the decision by the competent authorities to cause such separation involve “abuse or neglect of the child by the parents, or where the parents live separately and a decision must be made as to the child's place of residence”.

The phrase “such as” in Article 9(1) of the CRC indicates that other circumstances could also lead to the separation of children and their parents.<sup>389</sup> However, this does not necessarily cause legal uncertainty, due to arbitrary decision-making resulting in the separation of children and their parents.

All state parties are obliged to ensure the availability of “applicable law and procedures”, and the competent authorities have to base their decisions on these national laws.<sup>390</sup> Article 9(2) of the CRC focuses on the procedure and stipulates that “all interested parties shall be able to take part in the proceedings and will be enabled to express their views”. This clearly includes children. This is in line with Article 12 of the CRC,<sup>391</sup> on the basis of which children, who are capable of forming their own views, should be given the opportunity to express these views freely and in all matters affecting the child. Besides this, these views have to be given due weight, in accordance with the child's age and maturity.

Article 9(2) is linked with Article 12(2) of the CRC, according to which “the child in particular

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<sup>388</sup> See also Article 19(1) of the African Children's Rights Charter.

<sup>389</sup> In other words, the factors mentioned in Article 9(1) of the CRC are not exhaustive.

<sup>390</sup> Which decision should be “subject to judicial review”, which serves as a safety net.

<sup>391</sup> See the discussion in section 2.2.1.6.

shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child [...]”. It is regrettable that the African Children’s Rights Charter does not provide the opportunity for the child to express his or her views, where the necessity of separation of the child and his or her parents are considered by the competent authorities. It is submitted that under these circumstances Article 4(2) of the African Children’s Rights Charter automatically becomes applicable. After all, in all judicial or administrative proceedings which affect a child who is able to form his or her views, the child should be given the opportunity to express these views. The input given by the child must, in turn, be considered by the relevant authority. It is submitted that the CRC on this point gives more clarity with regard to the participation of all interested parties, especially the affected child.

Article 9(3) of the CRC, in principle, confirms the right of the child who has been separated from one or both parents, to maintain a relationship and direct contact with both parents, on a regular basis, unless this is considered contrary to the child’s best interests. See Article 9(3) of the CRC in conjunction with Article 3(1), which provides for the child’s best interests as a guideline in all actions and decisions pertaining to children. The same provision can be found in Article 19(2) of the African Children’s Rights Charter. Linked with Article 9 of the CRC is Article 10 on family reunification. Both provisions subscribe to the importance of the family as a unit and aim to protect children against unjustified and unreasonable separation from their parents. However, Article 10 provides for family reunification where the child and his or her parents live in different countries. It is submitted that the law pertaining to aliens or foreigners requires the necessary attention in order to improve the protection of vulnerable children who have been separated from their parents due to, for example, poverty or wars.

Where separation results from any action of the state due to, for example, detention or imprisonment of the parent(s) or of the child, state parties are, on the basis of Article 9(4) of the CRC, obliged to provide the parents or the child or other member of the family with any relevant information, unless this would be detrimental to the child. It should be noted that this obligation arises upon request only. The African Children’s Rights Charter contains a similar provision, namely, Article 19(3), which is applicable where separation results from the action of a state party.

Whereas Article 19(3) of the African Children’s Rights Charter does not stipulate any

examples, Article 9(4) of the CRC refers specifically to detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the state). Article 8 of the European Convention protects the right to family life. It does, however, not state anything explicit pertaining to the right of the child not to be separated from his or her parents. On the basis of Article 8(2) of the European Convention, no interference by a public authority will be condoned regarding, among others, the right to family life, except where any of the limitations listed, come into play.<sup>392</sup>

However, Article 1 and Article 3 of the European Convention, read together, call on the authorities to take necessary steps in order to protect, among others, children from abuse and neglect.<sup>393</sup> In *Haase v Germany* the European Court<sup>394</sup> held that before the authorities can resort to so-called emergency measures resulting in the removal and placement of a child, “the imminent danger should be actually established”.<sup>395</sup>

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<sup>392</sup> Article 8(2) does not condone interference by a public authority except such as is “[i]n accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” See also Van der Linde Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van *Die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD dissertation 2001 UP) 185-186. See also Chapters 4 and 5 which deal with child protection measures in terms of the national law in South Africa and the Netherlands.

<sup>393</sup> Article 1 of the European Convention states that, the High Contracting parties shall secure to everyone (thus including children) within their jurisdiction the rights and freedoms defined in Section I of this Convention. Article 3 states that “*no one shall be subjected to [...] inhuman or degrading treatment [...]*”.

<sup>394</sup> The European Court for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as the “European Court”).

<sup>395</sup> ECHR 8 April 2004 (2004-III). In December 2001 it had been reported by an expert that the normal development of the children Haase was under threat, that the parents were often unreasonably strict and administered corporal punishment. The expert recommended no further contact between the parents and the children. The same day, without hearing the parents, the seven children were removed and placed in three different and unidentified foster homes, among them a seven-day-old baby who was taken straight from the hospital and placed with a foster family. Without hearing the parents, the appeal was dismissed. The Federal Constitutional Court in Germany partially set aside the decisions and found that there was concern regarding the question whether the courts had sufficiently considered the position of the parents and moreover that the risk of harm to the children had not sufficiently been ascertained. The order prohibiting contact between the parents and the children, however, was not set aside. In considering Article 8 of the European Convention, the European Court found, among others, that the removal and placement of these children, without hearing the parents and combined with the prohibition of any contact, was

From the above it is evident that a separation between parents and their child(ren), as provided for under the CRC as well as the African Children's Rights Charter and the European Convention, will only be allowed where competent authorities have determined that this would be necessary in line with their existing national law, and that this ultimately would serve the best interests of the child.<sup>396</sup>

### 2.2.3.2 Protection of privacy<sup>397</sup>

Every person is entitled to respect and protection of his or her privacy, thus including children. Protection of privacy is guaranteed in Article 16 of the CRC.

- “(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, nor to unlawful attacks on his or her honour and reputation.
- (2) The child has the right to the protection of the law against such interference or attacks”.

Article 10 of the African Children's Rights Charter contains exactly the same provision. Both provisions provide for the right of all children to protection by law against arbitrary or unlawful interference or attacks, pertaining to the child's privacy, family, home or correspondence and furthermore the child's honour and reputation. This fundamental right is applicable to all situations. Moreover, this protection works both horizontally, against other persons, as

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disproportionate. See also Chapter 5.

<sup>396</sup> The European Court has emphasised that measures of child protection, including the separation of the child from his or her parents, should be temporary, which should be terminated as soon as the circumstances allow for such. In addition, the ultimate purpose of the measure should be the reunification of the child and his or her parents, unless this would be contrary to the child's best interests. See the decision of the European Court 24 March 1988 *Olsson v Sweden* Series A no. 130, see also Van der Linde (LLD dissertation 2001 UP) 183; Forder in Bruning & Kok (eds.) *Herziening Kinderbeschermingsmaatregelen* (FJR congresbundel) (2008) 42; also Doek and Vlaardingebroek (2009) 296.

<sup>397</sup> Articles 16 of the CRC and 10 of the African Children's Rights Charter.

vertically, against the state.<sup>398</sup>

Protection of family life is explicitly mentioned and the concept “family” has been given a wide definition under the CRC.<sup>399</sup> Therefore there is a link with other Articles in the CRC (and African Children’s Rights Charter), which deal with the family and entitlements or duties of members of the family unit. For example, that state parties shall ensure that a child shall not be separated from his or her parents against their will, unless the conditions in Article 9 of the CRC are fulfilled.<sup>400</sup> With regard to the right to privacy, it does not matter what living circumstances the child finds him or herself in; be this in a family environment, foster care or in an institution.

Where the child has been placed outside the own family setting, it means that the child is entitled to have contact with both parents, which right is reciprocal.<sup>401</sup>

The right to privacy in Article 16 of the CRC and Article 10 of the African Children’s Rights Charter can be compared with Article 8(2) of the European Convention; in principle no interference with the privacy, family, home or correspondence will be condoned, which right is protected by law. Contrary to this provision in the CRC and the African Children’s Rights Charter, Article 8(2) of the European Convention contains specific limitations pertaining to the right to respect for someone’s private and family life.<sup>402</sup>

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<sup>398</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 141.

<sup>399</sup> See section 2.2.2 above. Compare with Article 8(1) of the European Convention.

<sup>400</sup> With regard to the African Children’s Rights Charter, see Article 19(1).

<sup>401</sup> In this respect Article 16 is clearly linked with Article 9(3) of the CRC, like Article 10 and Article 19(2) of the African Children’s Rights Charter.

<sup>402</sup> Article 8(2) of the European Convention reads as follows: “There shall be no interference by a public authority with the exercise of this right (among others respect for his [...] family life) except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### 2.2.3.3 Protection of children without families<sup>403</sup>

Although, according to the CRC, children ideally should be brought up within the family environment,<sup>404</sup> some children are just not able to grow up in their own family; for example, where the child is exposed to abuse or neglect. The protection of these children who are temporarily or permanently without their family is expressly dealt with in Article 20 of the CRC, which reads as follows:

- “(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
- (2) States parties shall in accordance with their national laws ensure alternative care for such a child.
- (3) Such care could include, *inter alia*, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.

Where children cannot stay within their family environment, it means that these vulnerable children are in need of special protection, which Article 20 presupposes to provide for.<sup>405</sup> It is stated in unambiguous terms that the state party is under obligation to provide for the care needed by these children. For the sake of clarity, children in the following circumstances are entitled to special protection and assistance on the basis of the present provision: children for whom the family circumstances have changed permanently due to the fact that the parents have passed away, children whose parents are unable to take care of them temporarily or permanently, and moreover, children who for reason of their best interests

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<sup>403</sup> Articles 20 of the CRC and 25 of the African Children's Rights Charter.

<sup>404</sup> See section 6 the Preamble of the CRC, which expressly states: “Recognising 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.”

<sup>405</sup> Compare with Article 25 of the African Children's Rights Charter.

have been separated from their parents.

Article 25(2) of the African Children's Rights Charter states explicitly under which circumstances a child will be provided with alternative family care; namely a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or where in his or her best interests cannot be brought up or allowed to remain in that environment. It is submitted that Article 25(2) of the African Children's Rights Charter is clearer and thus more easily accessible than Article 20(1) of the CRC. In sum, there should be a serious reason for such separation, for example abuse or neglect of the child by the parents, in order to justify such a decision, since children should not easily be separated from their parents against their will.<sup>406</sup>

In the text of Article 20(1) of the CRC, reference is made to "family" and not merely "parents". Therefore, where a child cannot stay with the parents it is imperative for the "competent authorities" to first inquire about the possibilities within the wider context of the family, as described in Article 5 of the CRC.<sup>407</sup> Only when this is not an option other alternatives like foster care, adoption or a children's home should be considered. The alternative form of care should resemble the previous situation as closely as possible, in order to safeguard the continuity of the child's upbringing, if so desirable. This means that the child's ethnic, religious, cultural and linguistic background should be considered in the decision-making process.<sup>408</sup>

On the basis of Article 20(2) of the CRC, each state party is under obligation to ensure alternative care, which should resemble the familiar situation of the child as closely as possible, in order to provide some recognition and therefore stability to the child concerned. However, the kind of care depends on what is available under the national law of the

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<sup>406</sup> In this respect Article 9 of the CRC, dealing with the separation of children from their parents is relevant; see also the discussion in section 2.2.3.1 above. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 172.

<sup>407</sup> Apart from referring to parents, Article 5 of the CRC refers to members of the extended family or community, as provided for by the local custom, legal guardians or other persons legally responsible for the child. See also Meuwise *et al.* (2005) 172.

<sup>408</sup> See also Article 14 of the CRC and Article 9 of the African Children's Rights Charter, where religion plays a role in the determination of the placement compatibility of a child. See also section 2.2.1.6.

relevant state party. Moreover, the alternatives to parental or family care may differ from culture to culture. Therefore it is positive that it is left to the state parties to fill this in, in accordance with the specific needs of children and the available resources in the country concerned.

Article 20(3) of the CRC lists a number of possibilities pertaining to the alternative care of children who cannot be taken care of by their parents or other family members. Examples of such care are foster placement (meaning temporary care by a foster family), Kafala of Islamic law (a kind of legal foster care on a more permanent basis), adoption (to take someone else's child as your own),<sup>409</sup> or placement in suitable institutions. It should be kept in mind that Article 20(3) starts off with the phrase “such care could include, *inter alia*, [...]” which indicates that the list is not at all exhaustive.

Moreover, from the wording, “if necessary” in Article 20(3) of the CRC, it is clear that preference should be given to an alternative family setting which resembles the familiar family environment, instead of residential placement.<sup>410</sup> The question then arises: what does suitable alternative care entail? In considering a solution for a particular child, due regard has to be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.<sup>411</sup> As it will be seen, this principle of continuity in the care plays a significant role in the case law.<sup>412</sup> At the same time the child's background should be considered with regard to ethnicity, religion, culture and linguistics.

On the basis of this Article, one would be inclined to “automatically” follow the “family tradition”; in other words, ensuring continuity as close as possible to what the child is used to. It is submitted that in order to do justice to the “best interests of the child” a child has to participate in the decision-making process pertaining to suitable alternative care. This

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<sup>409</sup> Islamic law does not allow adoption. See the explanation of “kafala” in [http://www.proz.com/kudoz/arabic\\_to\\_english/law\\_general/727145-kafala.html](http://www.proz.com/kudoz/arabic_to_english/law_general/727145-kafala.html), last accessed on 25-04-2010.

<sup>410</sup> Where placement of a child has been decided to by the competent authorities, periodic review of such placement should take place on the basis of Article 25 of the CRC. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 173. See also section 5.3.6.

<sup>411</sup> See Article 20(3) of the CRC.

<sup>412</sup> See section 5.2 which deals with the national law of South Africa and the Netherlands pertaining to children who have been removed from the family environment.



means that the child should be at liberty to express a preference for placement which possibly would go contrary to the religion or traditions of his or her parents. A holistic approach is recommended, taking into account all relevant facts, circumstances and opinions.

This way it can be established what serves the particular child's interests best. In addition, reference was made to Article 14 of the CRC which provides for the right of the child to freedom of thought, conscience and religion and the role of the parents therein.<sup>413</sup> In line with Article 5(4) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), it is submitted that where a child is not under the care of his parents or legal guardians, due regard should be paid to his or her expressed wishes in relation to these personal matters.<sup>414</sup> It is clear that Article 20 urges state parties, and especially the competent authorities, to adopt a holistic approach in order to serve the interests of the child in the best way possible.<sup>415</sup> In Article 20(3) of the CRC, reference is made to the institution of adoption as one of the examples of alternative care for a child, which is further regulated in Article 21 of the CRC. From the onset Article 21 determines that “states parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.

First of all, the addition of the phrase, “*states parties which recognise and/or permit the system of adoption*” means that Article 21 is only applicable in countries which have recognised and/or permit the institution of adoption. Secondly, state parties are obliged to ensure that the best interests of the child are the paramount consideration. The latter has been construed in a similar way in Article 24 of the African Children’s Rights Charter.

In addition, Article 21 of the CRC instructs states parties to:

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<sup>413</sup> See section 2.2.1.6 on participation.

<sup>414</sup> See in this regard also Article 5(4) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which in addition provides that apart from the express wishes of the child concerned, any other proof of the child's wishes will also do. Moreover, reference is made to the best interests of the child being the guiding principle. See (UN Resolution 36/55 of 25 November 1981).

<sup>415</sup> It is self-explanatory that Article 3 on the best interests of the child, is linked with the present Article 20 of the CRC.

- “(a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary”.

To ensure that the adoption is indeed in the best interests of the child, the competent authorities have to, in accordance with the applicable national law and procedures, determine that the adoption is permissible in view of the existing relations between the child and his or her parents, relatives and legal guardians.

Furthermore, the persons concerned have to, if required, and after having been fully informed on the consequences of the adoption, consent to the adoption. “The persons concerned” include the child who is to be adopted. However, the right of the persons concerned to give informed consent is qualified by the phrase “if required”, which means that the right of consent depends on whether this has been provided for in the national legislation of the state party concerned.<sup>416</sup>

A similar provision can be found in Article 24 of the African Children’s Rights Charter, which requires the informed consent of the “appropriate persons concerned”, also insofar this has been provided for in the national legislation. It is submitted that due to the far-reaching consequences of adoption, state parties should be obliged to include the requirement of consent of all affected parties in their national legislation. This should in effect boil down to informed consent and is meant to include the child concerned. As discussed above, where the right of consent to the adoption is not accommodated in the national legislation, Article 12 of the CRC serves as a safety net with regard to children.<sup>417</sup> Therefore the child “who is capable of forming his or her own views”, should be able to resort to Article 12, since the adoption is a matter affecting the child directly, and moreover, since the adoption procedure is of a judicial and/or administrative nature.

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<sup>416</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 185.

<sup>417</sup> See the discussion on participation of children, see section 2.2.1.6.

It is clear that the competent authorities can only determine that the adoption is permissible when the rights in Article 7<sup>418</sup> and 9<sup>419</sup> of the CRC are not infringed upon. In other words, in principle, a child has the right to be cared for by his or her parents,<sup>420</sup> and moreover, a child shall not be separated from his or her parents against their will.<sup>421</sup> Therefore an adoption can only take place where the parents of the child are not willing or not capable of taking care of their child and only when the requirements are met, with the child's best interests as the paramount consideration, which should have an overriding effect. The importance of a child's well-being is even taken further by the African Children's Rights Charter, which provides for a post-adoption mechanism and does not have a counterpart in the CRC. In terms of Article 24(f), state parties are obliged to establish a machinery to monitor the well-being of the adopted child, once the adoption has taken place.<sup>422</sup> Adoption, in the context of permanency planning, will be further discussed in Chapter 5 which deals specifically with the placement of children.<sup>423</sup>

Returning to Article 20 of the CRC, the latter is linked with Article 8 of the European Convention, which deals with respect for family life. Interference with this right will only be condoned in accordance with the law and when necessary in a democratic society in the interests of the protection of the rights and freedoms of others. In other words, the interference with the family life of children and their parents by a public authority pertaining to a measure of child protection, like a supervision order or placement order, needs to be legally justified, and this should not be taken lightly.<sup>424</sup> It is agreed with Bruning that children and their parents have the right to be taken seriously. Moreover, the legal system of child protection should provide sufficient justification for the interference with family life, in order to

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<sup>418</sup> See section 2.2.2.4.

<sup>419</sup> See section 2.2.3.1.

<sup>420</sup> On the basis of Article 7 of the CRC, as discussed in section 2.2.2.4.

<sup>421</sup> In terms of Article 9 of the CRC, as discussed in section 2.2.3.1.

<sup>422</sup> Memzur has pointed out that thus recognition is given to the fact that adoption is a process, not merely an event, in (2008) 23 *SAPR/PL* 26-27.

<sup>423</sup> See section 5.2.

<sup>424</sup> See also Bruning *Rechtvaardiging van Kinderbescherming* (2001) 473. Article 25 of the CRC, dealing with periodic review, is also automatically applicable.

protect especially vulnerable children.<sup>425</sup>

#### 2.2.3.4 Deprivation of liberty<sup>426</sup>

The CRC was the first international document to address the position of children deprived of their liberty. In addition, the CRC formed the basis of two more documents, which are non-binding recommendations, relevant pertaining to child justice.<sup>427</sup> These are: *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the *Riyadh Guidelines*),<sup>428</sup> and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the *Havana Rules*).<sup>429</sup> Also relevant are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*),<sup>430</sup> While the latter document predates the CRC, a number of the core principles have been included in the CRC. It should be noted that these documents refer to “juveniles” instead of “children”. A juvenile is any person under the age of 18.<sup>431</sup> Both “juvenile” and “child” refer to a person under the age of 18. However, the term “juvenile” is usually used in criminal law, and in addition, it might have a stigmatising effect.<sup>432</sup> Since in private law reference is made to “child”, rather than “juvenile”, the former term will be further used in this thesis.

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<sup>425</sup> See Bruning *Rechtvaardiging van Kinderbescherming* (2001) 472. See also the discussion in section 5.1.1.2, which deals with the principle of non-separation and its limitation.

<sup>426</sup> Article 37(b) of the CRC. See also the discussion in section 5.1.2.

<sup>427</sup> See Van Bueren “United Nations Rules for the Protection of Juveniles deprived of their Liberty” *Defence for Children International* (1995) 1. Some of the Rules have become binding due to them being incorporated into treaties. According to Liefwaard, the Committee on the Rights of the Child has recommended to state parties to implement these documents, in *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 87. See also *General Comment No. 10* of 25 April 2007 (CRC/C/GC/10), section 4.

<sup>428</sup> UN Resolution 45/112, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 1990).

<sup>429</sup> UN Resolution 45/113, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 1990).

<sup>430</sup> UN Resolution 40/33, adopted in 1985. This document predated the CRC (1989), see also section 10 of the Preamble to the CRC.

<sup>431</sup> Van Bueren “Introduction: United Nations Rules for the Protection of Juveniles deprived of their Liberty” *Defence for Children International* (1995) 1.

<sup>432</sup> It is interesting to note that the South African Child Justice Act 75 of 2008, which provides for a criminal justice system for children who are in conflict with the law, use the term “juvenile”, but only refers to “child” in section 1 (the definition section).

Deprivation of liberty, which limits a person's right to liberty may take various forms. Liefwaard refers in this respect, among others, to the context of juvenile justice, mental health reasons and child protection.<sup>433</sup> With regard to the topic of this thesis, that is, placement of children in need of care and protection, the focus will be on child protection in the context of civil law. As discussed above,<sup>434</sup> where a child needs to be removed from the family environment, the state is obliged to ensure alternative care for the child. Apart from foster care placement or adoption, this could, if necessary, amount to placement in suitable institutions which constitutes deprivation of liberty, in terms of civil law.<sup>435</sup> Support for the proposition that deprivation of liberty can be relevant in the civil law context can be found in Rule 11(b) of the *Havana Rules*, which provides that,

“The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public body”.<sup>436</sup>

In terms of the CRC, Article 37 is the central provision which deals with the deprivation of liberty of children and applies generally speaking to all forms of deprivation of liberty,<sup>437</sup> thus including placement in terms of civil law. According to General Comment No. 10, Article 37 “contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty.”<sup>438</sup> Although a part of Article 37 specifically focuses on juvenile justice, attention will be further paid to the parts which are relevant in the civil law context. Article 37 of the CRC is formulated as follows:

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<sup>433</sup> Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 143-144.

<sup>434</sup> See Article 20 of the CRC as discussed in section 2.2.3.3.

<sup>435</sup> Other aspects referred to in the Articles 37 and 40 of the CRC are dealing with standards regarding criminal procedure for children. Criminal law and procedure fall outside the ambit of this thesis.

<sup>436</sup> See Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 86; also Forder & Olujić in Forder *et al.* (eds.) *Kindvriendelijke Opsluiting – Gesloten Plaatsing van Jeugdigen in het Licht van Mensenrechten* (2012) 5.

<sup>437</sup> See Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 85.

<sup>438</sup> See (CRC/C/GC/10), section 78. Also Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 83.

“State parties shall ensure that:

- (a) no child shall be subjected to [...] inhuman or degrading treatment or punishment;<sup>439</sup>
- (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The [...], detention [...] of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;<sup>440</sup>
- (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action”.

Where the circumstances do not allow the child to be with his family or legal guardian temporarily or permanently, the child has to be placed elsewhere, preferably in an environment as close as the one he or she is familiar with. Article 37 provides for specific guidelines, or rather, a minimum standard which has to be safeguarded by all state parties.

Article 37(b) indicates that state parties are under the duty to ensure that no child that is deprived of his or her liberty, shall be subjected to inhuman or degrading treatment or punishment. In other words, any treatment or punishment pertaining to children who are removed from their familiar surroundings, should meet the basic standard of human rights,

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<sup>439</sup> Compare with Article 17(2)(a) of the African Children's Rights Charter, which is similar in content.

<sup>440</sup> Article 17(2)(b) of the African Children's Rights Charter only refers to the importance of children to be separated from adults. It reads: “*State parties to the present Charter shall in particular ensure that children are separated from adults in their place of detention or imprisonment.*”

like respect and dignity.<sup>441</sup> In this respect contact with the parents on the basis of Article 9 is also relevant, as is Article 12 of the CRC, in which the participation rights of the child are acknowledged. Children have the right to be taken seriously. On the basis of Article 37(b) it has to be ensured by state parties that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”. Rule (11b) of the *Havana Rules*<sup>442</sup> provides for a definition on the deprivation of liberty; namely, “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority”. It is clear that the placement should be based on an order made by the relevant authority.

Moreover, any detention should be in conformity with the national law of the country concerned, and should be used only as a measure of last resort and for the shortest appropriate period of time. The latter provision is based on the *Beijing Rules*.<sup>443</sup> This is also provided for in Article 16 of the CRC, which aims to prevent arbitrary or unlawful interference with, among others, family. Relevant for a civil placement are Rules 17 and 19 of the *Beijing Rules*. Rule 17 provides for Guiding Principles in Adjudication and Disposition, and the relevant provisions contain the following:

“Rule 17.1.a: The reaction taken shall always be in proportion (not only to the circumstances and the gravity of the offence but also) to the circumstances and the needs of the juvenile as well as to the needs of the society”.

This is meant as a practical guideline and also requests the relevant authorities to safeguard the fundamental rights of children, especially the fundamental rights of personal

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<sup>441</sup> This is also mentioned in Rule 12 (scope and application of the rules) of the UN Rules for the Protection of Juveniles deprived of their Liberty, which states: “*The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. [...]*”. See *Defence for Children International* 1995. Also compare with Article 3 of the European Convention, which states that: “*No. one shall be subjected to [...] inhuman or degrading treatment or punishment.*” This is also applicable to children.

<sup>442</sup> United Nations Rules for the Protection of Juveniles deprived of their Liberty, *Defence for Children International* (1995) 9.

<sup>443</sup> Rule 19 of the *Beijing Rules*. Also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 500.

development and education.<sup>444</sup>

“Rule 17.1.b: Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum”.

This sub-rule encourages the competent authorities to make use of alternatives to institutionalisation to the maximum extent possible.

“Rule 17.1.d: The well-being of the juvenile shall be the guiding factor in the consideration of her or his case”.

This Rule overlaps with Rule 1 of the *Havana Rules*, which reads: “the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort”.

“Rule 17.3: Juveniles shall not be subject to corporal punishment”.

The latter provision aims to ensure that under no circumstances, whether a child is detained, imprisoned or whatever the circumstances might be, corporal punishment will be condoned.<sup>445</sup> Moreover, Rule 19 provides:

“The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period”.

In other words, there should be a restriction quantity-wise (indicated by “of last resort”) and time-wise (indicated by “minimum necessary period”).<sup>446</sup> There is a link with Article 25 of the

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<sup>444</sup> Commentary to Rule 17 of the *Beijing Rules* Van Bueren & Tootell *Defence for Children International* (1995) 17.

<sup>445</sup> In this regard it is of utmost importance that institutions provide for a complaint system, where in case irregularities of this nature do take place, a child can get the appropriate assistance without any detrimental repercussions. This would be in line with Rules 72-78 of the *Havana Rules*, dealing with Inspection and Complaints. There is also a link with Article 19 of the CRC, which provides for the protection of abuse and neglect. See also Article 16 African Children’s Rights Charter.

<sup>446</sup> See Commentary to Rule 19 of the *Beijing Rules* (1995) 18.



CRC, which stipulates that placement decisions should be subject to periodic review.<sup>447</sup> Where a child has to be institutionalised, the deprivation of liberty should entail the least possible degree. Priority should be given to “open” institutions instead of “closed” institutions.

Moreover, any possible facility dealing with children should rather be of an educational or correctional nature than a prison like setting.<sup>448</sup> Rule 2 (part of Fundamental Perspectives) of the *Havana Rules* is also unambiguous in this respect:

“Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release”.<sup>449</sup>

Article 5 of the European Convention, specifically paragraph (1)(d), is also relevant to children. The Article starts off with the following general provision:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...]”.

and specifically deals with children in sub-paragraph (d):

“the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority [...]”.

From the above it is apparent that a number of fundamental principles can be derived from the provisions in the CRC, the African Children’s Rights Charter, the European Convention,

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<sup>447</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 504.

<sup>448</sup> See footnote 303.

<sup>449</sup> United Nations Rules for the Protection of Juveniles deprived of their Liberty *Defence for Children International* (1995) 9.

and moreover the *Beijing Rules* and the *Havana Rules*, pertaining to deprivation of liberty of children. These could be summarised as follows:

- (i) Deprivation of liberty should ideally be avoided and should be regarded as a measure of last resort, limited to exceptional cases.
- (ii) Deprivation of liberty, in the absence of an appropriate alternative, should be for the minimum period possible, subject to periodic review. Contact with family members should be a priority, since the aim is the return to the family environment.<sup>450</sup>
- (iii) Children should only be deprived of their liberty in accordance with the national law of the country (and in accordance with the principles and the procedures of international law).

The above presents a solid set of guidelines which aim to protect the rights of children who have been deprived of their liberty. However, it depends on the state parties as to how this will be incorporated in their national legislation. It is hoped that the Committee on the Rights of the Child will continue to provide guidance in this respect. It is also hoped that the Optional Protocol on a communications procedure<sup>451</sup> will come into operation shortly, which will contribute to the protection of children and the further enhancement of their rights.

The next chapter contains a discussion and comparison of the national law in South Africa and the Netherlands relating to the placement of children in need of care and protection, which subsequently will be linked to relevant provisions in the international and regional documents.<sup>452</sup>

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<sup>450</sup> In this regard rehabilitative care, as provided for in Article 39 of the CRC can be relevant: "State Parties shall take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of any form of neglect, exploitation, or abuse [...]. Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child." See also section 2.2.2.5.

<sup>451</sup> A/HRC/17/L.8 of 9 June 2011.

<sup>452</sup> See Chapter 3, "The national law in South Africa and the Netherlands relating to the

## 2.3 Conclusion

The CRC is the most widely ratified international human rights treaty in the world, which is indicative of the fact that the world is committed to ensure the protection and well-being of children and the enhancement of their rights. In addition, the regional children's rights document, the African Children's Rights Charter, can be subscribed to by members of the African Union.<sup>453</sup>

The contribution of the African Children's Rights Charter in addition to the CRC, is at least three-fold. Firstly, as it has been argued, it reconciles Western legal thought and African customs,<sup>454</sup> and therefore is able to address region-specific matters. Secondly, it provides guidance in relation to which African customary practices should be nurtured or abandoned for the sake of the protection and well-being of children on the continent. Thirdly, in certain respects it provides a higher standard than the CRC, which will be deliberated upon below. Although the European Convention cannot be typified as a "children's rights document", it has been included in the discussion whenever relevant to the protection of the rights of children.

It has been outlined that with the ratification of an international or regional document come responsibilities. States which become a party to a treaty are bound to bring their national law in line with the content of the treaty that they have subscribed to. This means that the ratification of the CRC and the African Children's Rights Charter obliges state parties to promote and enhance the rights of children in their respective countries. Therefore the latter presupposes an action. Both the CRC and the African Children's Rights Charter contain an extensive range of rights which accrue to children and state parties have to adhere to the standards thus provided. The question as to how state parties incorporate these standards in their national legislation depends on whether the system of monism or dualism is

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placement of children in need of care, linked to the international and regional documents."

<sup>453</sup> This was previously called the Organisation of African Unity.

<sup>454</sup> See Davel (2002), *De Jure* 282.

applicable in the country concerned.<sup>455</sup>

A selection of provisions in these international documents was made in relation to the topic of this thesis. The relevance of the subsequent comparison lies therein that it could provide the basis for establishing which provision(s) provide a better standard of protection. In this respect the following should be noted:

Although both documents define “a child” as “every human under the age of 18 years, the African Children’s Rights Charter provides a better standard, since there are no conditions or exceptions attached to the definition.<sup>456</sup> It has been discussed that this is particularly relevant when it comes to child marriages, which were permitted in terms of customary law in, for example, South Africa.

Pertaining to the latter, it is important to note that the African Children’s Rights Charter takes a firm stance against child marriages in Article 21(2). In other words, across the board, only persons of 18 years or older should be able to conclude a marriage.

The principle of non-discrimination is important in both the CRC and the African Children’s Rights Charter. It has been mentioned that many of the provisions in the African Children’s Rights Charter start with “every child has the right ...” which is indicative of the fact that children are seen as a holder of rights. This is also applicable to the non-discrimination provision in Article 3 of the Charter. Although both documents contain an extensive list of prohibited grounds for discrimination which coincide, it is regrettable that in Article 3 of the African Children’s Rights Charter no reference is made to the ground “disability”.

In addition, the CRC extends the protection to the child’s parents, legal guardians or family, which is a welcome addition ensuring the protection of vulnerable persons. Moreover, state parties are, in terms of Article 2(2), bound to take all appropriate measures to eradicate discrimination; for example, by developing programmes and policies which aim to ensure the equal treatment of children. It is regrettable that the African Children’s Rights Charter does

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<sup>455</sup> For a more detailed discussion, see sections 2.1.1 and 2.1.2.

<sup>456</sup> See Articles 1 of the CRC and 2 of the African Children’s Rights Charter.

not provide for a duty on the part of state parties in this regard. Therefore it can be concluded that the CRC at this point provides a higher standard in the sense that the measures in effect have to ensure that children are protected against any form of discrimination.

Where Article 3 of the CRC determines that the best interests of the child shall be a primary consideration, Article 4(1) of the African Children's Rights Charter refers to *the*<sup>457</sup> primary consideration. It is submitted that the latter formulation is less ambiguous compared with the formulation in Article 3 of the CRC. The phrase "*the* primary consideration" means that it is the overriding consideration and therefore provides a better protection than its counterpart in the CRC.

In an attempt to ascertain what is "in the best interests" of a particular child, reference was made to the importance of the right of the child to express views, which indeed should be added to the list of factors to be considered. However, this should not amount to the mere hearing of a child as a formality, but rather be seen in the context of "dynamic self-determinism".<sup>458</sup> The application of this concept ensures that the child concerned is involved in determining what is in his or her best interests. As has been pointed out, the latter is not necessarily limited to the moment of decision-making but is applicable on a continuous basis whenever the child's input is required which includes future hearings. It is submitted that in this regard, the children's courts and other decision-makers should maintain a holistic approach in determining the child's best interests.

In addition, on the basis of Article 3(2), state parties have to provide for the appropriate care and protection to be given by the child's parents or legal guardian, or where this is not possible, "other individuals legally responsible for the child". In other words, state parties are expected to take all appropriate legislative and administrative measures to ensure the protection and care necessary for the child's well-being.

Moreover, Article 3(3) places a duty on state parties to ensure that the institutions, services and facilities which are responsible for the care or protection of children shall be in line with

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<sup>457</sup> Own emphasis.

<sup>458</sup> See Eekelaar, as discussed in section 2.2.1.4.

the standards as set by the competent authorities in the respective country.

With regard to the right to life, survival and development, Article 6 of the CRC lacks something fundamental in comparison with Article 5 of the African Children's Rights Charter; the right to life should be *protected by law*<sup>459</sup> which means the national law of a state party. In this regard the African Children's Rights Charter clearly provides a better standard.<sup>460</sup> The same can be said of Article 2(1) of the European Convention which states that "*everyone's right to life shall be protected by law*", which thus is inclusive of children.

It has become evident that Article 12 of the CRC is one of the most important provisions in the CRC, since it is relevant with regard to the implementation of all the other rights in the CRC. Article 4(2) of the African Children's Rights Charter is in a number of respects similar to Article 12 of the CRC. For example, in terms of Article 4(2), the child has to be capable of forming his/her own views in order to be provided with the opportunity to express them. This applies in all judicial and administrative proceedings affecting the child. Where Article 12 provides for three possibilities on how a child should be given the opportunity, the African Children's Rights Charter determines that this should be done directly or through an impartial representative as a party to the proceedings.

Often parents or other care-givers would be the first persons to assist and support the child, supposedly having the child's best interests at heart. However, Article 4(2) refers to an impartial representative, which would mean a professional like a curator *ad litem* or a legal representative. It is evident that in the case of a (potential) conflict of interest between the parents and the child, a child should be able to request the assistance of such a person. However, in order to ensure the optimal exercise of the right to express views, preference should be given to the possibility of hearing the child directly.

It is submitted that the latter should be encouraged in all matters affecting the child. Alternatively, where a child is not able or willing to express views directly, the child should

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<sup>459</sup> Own emphasis.

<sup>460</sup> Moreover, Article 5(3) of the African Children's Rights Charter provides that sentence of death shall not be imposed for crimes committed by children". No. similar provision is to be found in the CRC.

have easy access to the assistance of these professionals, otherwise the right to express views cannot be properly exercised, which would render the provision in effect meaningless.

However, Article 4(2) of the African Children's Rights Charter provides that "those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws". No guidelines regarding the consideration of the views of the child by the decision-maker are given. At this point, Article 12 of the CRC immediately fills the gap; where the CRC provides for a better standard, all state parties are, like on this particular point, bound by the CRC. This means that the relevant decision-maker is bound to give due weight to the views of the child in accordance with the age and maturity of the child.

Therefore it is evident that both provisions should be seen as a procedural right, since the primary aim is ensuring a (preferably direct) hearing for the child and the consideration of the child's input. It is clear that the factors age and maturity of the child concerned have to be taken into account and that both deserve serious consideration, with, it is submitted, the emphasis on maturity. Only when the aforementioned criteria are met, will state parties be in compliance with the Articles 12 of the CRC and 4(2) of the African Children's Rights Charter.

As has been indicated, the right to participation is also linked with the freedom of thought, conscience and religion. The latter is of practical importance when it comes to placement decisions. When considering the options for placement, suited to the needs of the child, Article 20(3) of the CRC demands that "due regard shall be paid to the child's ethnic, religious, cultural and linguistic background". Whilst Article 25(3) of the African Children's Rights Charter is similar in contents, it lacks the factor "cultural" background. It is evident that decision-makers are obliged to have consideration for the latter factor, since the CRC in this regard fills the gap by having included this factor. Thus where possible, all efforts should be aimed at achieving so-called "placement compatibility", thereby ensuring that the child's best interests.

The role of parents and the family have been given the necessary attention in both the CRC and the African Children's Rights Charter. Both Preambles refer to the family environment in which a child ideally speaking should grow up.<sup>461</sup> In addition, in terms of Article 18 of the African Children's Rights Charter, the family as the natural unit shall be protected by the state, which provision does not have a specific counterpart in the CRC. The protection of the family as a unit extends to the obligation of state parties to ensure the equality of rights and responsibilities as pertaining to marriage and the dissolution thereof.

For the African continent this is important, since the responsibility pertaining to children would lie with specific members of the family, according to the system of matriarchy or patriarchy. If the rights and responsibilities between parents were to be shared and the child's best interests taken as a point of departure and overriding consideration, this will benefit children who otherwise would be at the mercy of traditional customs, which are not necessarily child-focused. It has been argued that the concept of human rights in the African context acknowledges the relevance of the group as a unit as well as that of the individual.

In this respect Article 31 of the African Children's Rights Charter should be mentioned, which does not have a counterpart in the CRC. On the basis of the latter provision, children will incur duties towards, among others, the family, society and the state, which are made subject to, among others, the age and ability of the child. Since the various duties have the potential to increase the levels of participation of children in their families and communities, Article 31 can be considered as a valuable contribution to the standards set by the CRC.

Although the concept of extended family is more prevalent on the African continent, it does not mean that it is foreign in the European context. Article 8 of the European Convention contains the right to respect for the private life and family life of each inhabitant (thus including children) in any of the High Contracting parties.<sup>462</sup> Thus, where on the basis of Article 18 of the African Children's Rights Charter the family shall be protected by the state, a parallel may be drawn pertaining to the protection offered by Article 8 of the European Convention, which are operative on a regional level.

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<sup>461</sup> See sections 6 of the Preamble of the CRC and 5 of the Preamble of the African Children's Rights Charter.

<sup>462</sup> For a more detailed discussion on the conditions pertaining to government interference on the basis of Article 8 of the European Convention, see section 2.2.2.3.



The extended family also comes to the fore in Article 5 of the CRC. Although this provision lays the primary responsibility for the upbringing of children with the parents, where relevant, other parties may come to the fore. Because of its almost universal ratification it is important that Article 5 provides for a wide definition of the concept “family”. Especially on the African continent there is a need to provide for a wider range of persons taking responsibility for the upbringing of children since according to certain cultures and traditions it are not always necessarily the parents that take care of their children.

Regrettably, the recognition of the extended family is only mentioned in one single provision and not extended to the complete CRC. In terms of Article 5, state parties shall respect the responsibilities, rights and duties of parents (or others) regarding providing direction and guidance in the exercise of the rights. However, the parents (or others) have to deal with this responsibility “in a manner which is consistent with the evolving capacities of the child”, which acknowledges the different stages of development which children pass through. The older and more mature a child becomes, the less direction and guidance will be needed. Thus the child will become increasingly more independent, and should be able to exercise his or her rights, without the interference of the parents (or others).

It has been said that Article 5, read in conjunction with Article 12 of the CRC, calls for a paradigm shift in a number of cultures; namely a shift in the responsibility of decision-making by parents towards that of the child, provided that the child is able and willing to do so. In this respect it is regrettable that the African Children’s Rights Charter does not contain a corresponding provision. However, since the CRC is widely ratified, parents and others have to provide appropriate direction and guidance in a manner which is consistent with the evolving capacities nevertheless. In other words, the CRC supplements the African Children’s Rights Charter at this point.

State parties are bound to have respect for a child to preserve its identity, which includes among others, nationality, name and family relations as recognised by law, without unlawful interference. In case unlawful interference takes place, state parties are obliged, in terms of Article 8(2) of the CRC, to provide appropriate assistance and protection in order to ensure a speedy re-establishing of the child's identity. The African Children’s Rights Charter does not contain a similar provision. “Family relations as recognised by law” is thus one of the elements of a child's identity.

This allows for comparison with Article 8 of the European Convention which provides for the protection of “family life” against unlawful interference by a public authority.<sup>463</sup> It was pointed out that the European Convention does not protect the “family” *per se*, but that it protects “family life”, which has not been defined.

However, this notion has been conceptualised by the European Court of Human Rights, which still plays a significant role in further developing the meaning of “family life”. For example, the court has held that the protection of the right to “family life” is not limited to *de jure* family life, but rather to *de facto* family life. Moreover, the role and relationship of members of the family *vis-à-vis* a child is taken into consideration.<sup>464</sup> In other words, a wider range of relationships has been acknowledged in order to accommodate new evolving relationships in changing societies, which is most welcome. It is evident that the best interests of the child(ren) concerned has been, and should be, the guiding principle.

Parental responsibilities are addressed in the Articles 18 of the CRC and 20 of the African Children’s Rights Charter. The parents or others have the primary responsibility for the upbringing and development of their child(ren). The best interests of the child are their basic concern,<sup>465</sup> which, in terms of the African Children’s Rights Charter applies “at all times”. The latter is therefore slightly clearer. It should be noted that in terms of Article 18 of the CRC, state parties are obliged to try to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Although it has been said that the latter does not necessarily equate equal responsibilities, it is usually in the best interests of the child when both parents are involved.

It is regrettable that the African Children’s Rights Charter does not emphasise the common responsibilities of both parents. As discussed earlier,<sup>466</sup> Article 18 of the African Children’s Rights Charter, which deals with family values, encourages state parties on the African continent to ensure the equality of rights and responsibilities of spouses as to marriage and

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<sup>463</sup> See section 2.2.2.3.

<sup>464</sup> See the *Marckx* case, Judgement of 15 June 1979, Series A No. 31, 21 and NJ 1980, 462. For a more detailed discussion, see section 2.2.2.3.

<sup>465</sup> In the context of the African Children’s Rights Charter this applies to parents or others responsible for the child.

<sup>466</sup> See section 2.2.2.4.

its dissolution. It is assumed that this is extended to the rights and responsibilities pertaining to any children from the marriage. In any event, Article 18 of the CRC is binding on both South Africa and the Netherlands, both being state parties. It is submitted though that an explicit provision on common responsibilities would have been welcome.

It is interesting to note that the African Children's Rights Charter urges the parents or others responsible for the child, to administer domestic discipline in moderation.<sup>467</sup> The CRC, on the other hand, rejects all forms of violence, which has been strongly reiterated in *General Comment No. 13* (2011).<sup>468</sup>

It is agreed with the Committee on the Rights of the Child that "all forms of violence against children, however light, are unacceptable".<sup>469</sup> Therefore it can be concluded that the CRC, read in conjunction with General Comment No. 13, provides a better standard than the African Children's Rights Charter,<sup>470</sup> and as a consequence, should be adhered to. It is submitted that parallel to Article 21 of the African Children's Rights Charter, on the basis of which harmful customs and practices should be abolished, state parties on the African continent should take a firm stance against domestic discipline. Awareness is the first step towards reform.

The standards pertaining to the right of the child to be protected from abuse and neglect, as provided for in the Articles 19 of the CRC and 16 of the African Children's Rights Charter, are almost identical. However, the phrases "violence" and "exploitation" as referred to in

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<sup>467</sup> Article 20(1)(c) of the African Children's Rights Charter reads: "Parents or others responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty: [...] to ensure that domestic discipline is administered in moderation and that the child is treated with humanity and with respect for his inherent dignity".

<sup>468</sup> CRC/C/GC/13 of 17 February 2011.

<sup>469</sup> Without exception, see CRC/C/GC/13 section 16. For a more detailed discussion, see sections 2.2.2.5 and 4.3.1.1.1.

<sup>470</sup> It is interesting to note that in South Africa, which is a member state to the African Children's Rights Charter, there was a proposal to abolish corporal punishment, namely the Children's Amendment Bill [B19F-2006 (reprint)]. It is regrettable that this Amendment Bill has not become law.

Article 19(1) in the CRC, have been omitted in the African Children's Rights Charter.<sup>471</sup>

Therefore it should be reiterated that Article 19 of the CRC, read and applied in conjunction with General Comment No. 13, provides a better standard than the African Children's Rights Charter and thus should prevail. In relation to abuse and neglect, reference should be made to another omission in the African Children's Rights Charter. Unlike the latter, Article 39 of the CRC obliges state parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of any child victim of any form of neglect, exploitation or abuse. In other words, at this point the CRC provides an extra safeguard for these vulnerable children, which standard should be reflected in the national legislation of all state parties.

Returning to Article 18(3) of the CRC, which addresses the issue of working parents, state parties are obliged to take all appropriate measures to ensure that the children concerned have the right to benefit from child care services and facilities for which they are eligible. It was pointed out that in many developing countries so-called child care services and facilities do not exist. The question was raised as to whether the obligations put on state parties are not unrealistic, given the finances and apparent priorities of the governments of state parties. Although Article 20(2)(c) of the African Children's Rights Charter is similar in content, thereby creating the same obligation,<sup>472</sup> it differs from its counterpart. The African Children's Rights Charter contains a realistic condition, namely, "in accordance with their means and national conditions", which is important and better suited to developing countries.

According to Article 27(1) of the CRC, "states parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development", which is not explicitly mentioned in the African Children's Rights Charter. However, Article 27(2) of the CRC coincides with Article 20(1)(b), both of which impose a

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<sup>471</sup> The Committee on the Rights of the Child found it appropriate to choose the phrase "violence" to represent all forms of harm to children and emphasised most strongly that the term violence in *General Comment No. 13* should not be used in any way to minimise the impact thereof, see CRC/C/GC/13 section 3.

<sup>472</sup> Article 20(2)(c) of the African Children's Rights Charter reads as follows: "States Parties to the present Charter, in accordance with their means and national conditions shall take all appropriate measures [...] to ensure that the children of working parents benefit from child care services and facilities."

duty on parents or others responsible for the child to secure conditions of living which are necessary for the child's development. This obligation, however, is subject to the condition “within their abilities and financial capacities”.

Where the responsible parties fall short in meeting their obligations, Articles 27(3) of the CRC and 20(2)(a) of the Charter will come to the rescue by imposing a secondary responsibility on the state parties. “In case of need” state parties have to provide for programmes pertaining to material assistance and support, particularly with regard to nutrition, clothing and housing. The African Children’s Rights Charter contains two extra factors, namely, health and education, both of which constitute challenges on the African continent and therefore require the necessary attention of the relevant state parties.

From the supposition that children and their parents belong together, it can be derived that they in principle should not be separated. Article 9(1) includes the phrase “against their will”, which refers to the opinion of the parent(s) and that of the parent(s) and child together. It is interesting to note that Article 19(1) of the African Children’s Rights Charter is similar but differs in the sense that it refers to “his” will.

It is submitted that the phrase “not against his will” indicates that the child concerned should have a voice in the matter, thereby taking into account the child's age and/or maturity. In other words, decision-makers are urged to have regard for the evolving capacities of the child.<sup>473</sup>..Where a child has been separated from his or her parents, the state parties have to ensure the possibility of judicial review of the decision on the basis of Article 25 of the CRC. It is regrettable that this important right has not been included in the African Children’s Rights Charter. Nevertheless, all state parties to the CRC are required to recognise the right of the child to a periodic review of a placement decision pertaining to the child concerned and ensure the implementation thereof.<sup>474</sup>

In addition, Article 9(2) of the CRC focuses on the procedure and stipulates that “all interested parties” shall be able to take part in the proceedings in order to make their views

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<sup>473</sup> For a discussion on the evolving capacities of the child, see section 2.2.2.2.

<sup>474</sup> For a more detailed discussion on the right to periodic review of a placement, see section 4.7 and 6.8.1.

known, which undoubtedly includes children. It is regrettable that the African Children's Rights Charter does not provide the opportunity for the child to express his or her views, where the necessity of separation of the child and his or her parents are considered by the competent authorities.

It is submitted that under these circumstances Article 4(2) of the African Children's Rights Charter automatically becomes applicable, since the matter under discussion concerns judicial proceedings which affect a child.

It is submitted though that the CRC on this point gives more clarity with regard to the participation of all interested parties, especially the affected child. Therefore it can be concluded that a separation between parents and their child(ren), as provided for under the CRC as well as the African Children's Rights Charter and the European Convention, will only be allowed where competent authorities have determined that this would be necessary in line with their existing national law, and that this ultimately would serve the best interests of the child.

Articles 20 of the CRC and 25 of the African Children's Rights Charter deal with children who have been temporarily or permanently deprived of their family environment. Due to the latter circumstances they are not only entitled to special protection and assistance but also to alternative care to be provided by the state. Article 25(2) refers in this respect explicitly to "alternative family care", to which children are entitled who are parentless, who are temporarily or permanently deprived of his or her family environment, or who in their best interests cannot be brought up or allowed to remain in that environment. Compared with its counterpart in the CRC, Article 25(2) of the African Children's Rights Charter is clearer and thus more easily accessible than Article 20(1) of the CRC and is therefore a valuable supplement.

Pertaining to the forms of alternative care, both instruments refer to foster placement and institutional care. In addition, Article 20 of the CRC also includes adoption as a form of alternative care, which is dealt with in more detail in the Articles 21 of the CRC and is also included in Article 24 of the African Children's Rights Charter. Whilst the latter provisions coincide to a large extent, there is one important provision missing in the CRC. In terms of Article 24(f) of the African Children's Rights Charter, state parties are required to establish a

machinery to monitor the well-being of the adopted child, once the adoption has taken place. It is submitted that a monitoring mechanism should be developed in relation to all forms of placement, in order to safeguard the well-being of children who have been removed from the family environment.

This will empower children, encourage participation, and hopefully curb instances of abuse.<sup>475</sup> It should be noted that the CRC restricts the imposition of institutional care to the situation where this is necessary. In other words, it is regarded as an *ultimum remedium*, which is most welcome. As will be seen, in this regard adherence to the principles of proportionality and subsidiarity is important, in connection with the impact of imposed child protection measures and in particular placements.<sup>476</sup>

Although it has been mentioned that the placement of children in terms of criminal law falls beyond the ambit of this thesis, it will become apparent that the institutional placement in terms of civil law also may constitute deprivation of liberty. Therefore state parties are obliged to put in place special safeguards in order to secure the protection of the rights of these children.<sup>477</sup> The latter is of utmost importance due to the fact that they might be (partially) hidden from the public view. It is regrettable that Article 37(b) of the CRC does not have a counterpart in the African Children's Rights Charter. Once more, the standard thus provided has to be met by all state parties to the CRC.

Although the CRC with its almost universal ratification is impressive, its African counterpart is certainly valuable too. It has been shown that both documents provide a variety of important standards which aim to ensure the protection of children and the enhancement of their rights. However, although these standards partially overlap, there are differences in weight or extent. Although it has been argued that the standards in the respective

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<sup>475</sup> In this regard reference should be made to the report Samson, which was issued in the Netherlands on 8 October 2012. Based on extensive research conducted by the Committee, it was found that the Dutch government and Jeugdzorg (National Child Care agency) have failed to protect children who have been removed from their family environment against sexual abuse. See <http://www.binnenlandsbestuur.nl/sociaal/nieuws/rapport-samson-legt-falen-jeugdzorg-bloot.8503093.lynkx>, accessed on 8 October 2012.

<sup>476</sup> See Chapter 5 which specifically deals with the placement of children in need of care and protection.

<sup>477</sup> See in this respect Rule 11(b) of the *Havana Rules*. For a more detailed discussion, see Chapter 5.

international documents are complementary in nature,<sup>478</sup> it is evident that the highest attainable standard should be adhered to by state parties. In this regard it should be reiterated that both the CRC and the African Children's Rights Charter acknowledge and support this.<sup>479</sup>

Application of the better standard will contribute to the overall aim of ensuring the necessary protection of children, and in addition, promote the advancement of their rights. At ground level this means that decision-makers should act in line with these preferred standards.

However, this requires sufficient knowledge and awareness of all relevant professionals in the field of child care and protection. In addition, the public at large, especially children, need to be made more aware of the rights contained in these documents and the developments in this regard in their respective countries. State parties should take responsibility to ensure this, in line with the Articles 42 and 44 of the CRC.<sup>480</sup> In this regard the importance of the monitoring bodies should not be underestimated.<sup>481</sup> State reports are meant to indicate the progress made in the respective countries and conversely the Concluding Observations of the Committee on the Rights of the Child are aimed at assisting state parties in their quest to protect children and enhance their rights in a global context.

Based on the above, it is submitted that it is positive that South Africa is a state party to both the CRC and the African Children's Rights Charter. By providing a higher standard in the instances as indicated above, the Charter might indeed have a significant effect on the lives

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<sup>478</sup> See Olowu (2002) *The International Journal of Children's Rights* 128; also Lloyd (2002) *The International Journal of Children's Rights* 185.

<sup>479</sup> Article 41 of the CRC states: "[N]othing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in the law of a State Party or international law in force for that State." In addition, Article 1(2) of the African Children's Rights Charter provides that "[N]othing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that State."

<sup>480</sup> See also *General Guidelines for periodic reports (CRC/C/58)* of 20 November 1996, section 22, in which reference is made to the inclusion of children's rights (CRC) in school curricula, parents' education campaigns, professional training curricula and codes of conduct.

<sup>481</sup> For the CRC this is the Committee on the Rights of the Child, see Article 43 of the CRC. The monitoring body for the African Children's Rights Charter is called the African Committee of Experts on the Rights and Welfare of the Child, generally referred to as "the Committee", see Article 32 of the African Children's Rights Charter.



of children in Africa. Pertaining to the latter, it is important to note that the African Children's Rights Charter takes a firm stance against, among others, child marriages and harmful customs and practices. Because of the reality thereof, these standards are meant to influence the national legislation of state parties.

It is hoped that the enforcement mechanisms will be improved in order to ensure that the African Children's Rights Charter will function as a living instrument and its potential will be optimally realised. Finally, the criticism pertaining to the lack of petition in the CRC will become redundant within the near future, namely when the Optional Protocol on a communications procedure will come into operation.<sup>482</sup>

In Chapter 3 it will be explored whether, and to what extent, South Africa and the Netherlands are in compliance with the international standards in terms of the national laws in the respective countries.

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<sup>482</sup> A/HRC/17/L.8 of 9 June 2011.

## CHAPTER 3: THE NATIONAL LAW IN SOUTH AFRICA AND THE NETHERLANDS RELATING TO THE GENERAL PRINCIPLES AND FAMILY LIFE, LINKED TO THE RELEVANT INTERNATIONAL AND REGIONAL DOCUMENTS

### 3.1 General principles in the national law relating to the international standards

The discussion in Chapter 2 revolved around the various entitlements of children as referred to in international<sup>1</sup> and regional documents<sup>2</sup> to which both South Africa and the Netherlands subscribe. In other words, there is a duty on both countries to develop their national laws in line with the required standards as set by the international and regional documents. The national law of South Africa relevant to the topic is mainly to be found in the Constitution<sup>3</sup> and the Children's Act.<sup>4</sup> Furthermore it has to be noted that South Africa has a so-called dual legal system, which means that the common law (in other words, the English common law and Roman Dutch law) is applicable to all people in the country. At the same time the majority of the population is also governed by indigenous African customary law.<sup>5</sup>

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<sup>1</sup> The United Nations Convention of the Rights of the Child (1989) hereinafter referred to as the CRC.

<sup>2</sup> The Charter on the Rights and Welfare of the African Child (1990) to which South Africa is a States Member (hereinafter referred to as the African Children's Rights Charter) and the European Convention on Human Rights (1950) to which the Netherlands is a High Contracting Party.

<sup>3</sup> 108 of 1996.

<sup>4</sup> 38 of 2005. The predecessor of the Children's Act was the Child Care Act 74 of 1983.

<sup>5</sup> In section 1 of the Recognition of Customary Marriages Act 120 of 1998 "customary law" is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". For a detailed discussion see Bennett in Bekker *et al. Introduction to Legal Pluralism in South Africa* (2002) 21-33. See also Bekker 2008 *Obiter* 396.

The South African Constitution compels the South African courts to apply customary law “when that law is applicable, subject to the Constitution<sup>6</sup> and any legislation that specifically deals with customary law”.<sup>7</sup> Moreover, on the basis of section 39(2) of the Constitution, dealing with the interpretation of the Bill of Rights, the courts are also obliged “to promote the spirit, purport and objects of the Bill of Rights when [...] developing the common law or customary law”. According to section 39(3), “the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (of Rights)”. With regard to the Netherlands, the national legislation dealing with the law of persons and family law is mainly contained in Book 1 of the Civil Code.

The following sections aim to provide an outline of what both South Africa and the Netherlands have incorporated in their respective legislation in order to fulfil their obligations in terms of the international and regional instruments. In order to come to an analysis and comparison, a similar chronological order as in Chapter 2 will be maintained.<sup>8</sup> For the sake of clarity it should be noted that the following sections are by no means a full discussion of the national legislation of South Africa or the Netherlands. A selection of the sections and Articles has been made in relation to the relevance thereof to the topic.

### 3.1.1 The meaning of “a child”

With regard to the definition of a child, the legislation in South Africa as well as in the Netherlands is unambiguous. The Constitution of the Republic of South Africa,<sup>9</sup> the Children's Act<sup>10</sup> and Dutch law, Article 1:233 of the Dutch Civil Code,<sup>11</sup> are similar in content;

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<sup>6</sup> This Constitution is the supreme law of the Republic of South Africa; see section 2 of the Constitution.

<sup>7</sup> Section 211(4) of the Constitution. See Bennett in Bekker *et al.* (2002) 22; Du Bois in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 100-107.

<sup>8</sup> See the discussion in section 2.2.

<sup>9</sup> 1996, section 28(3).

<sup>10</sup> 38 of 2005, section 1 dealing with the interpretation of “child”, meaning a person under the age of 18 years. Moreover, section 17 of the Children's Act states that “a child, whether male or female, becomes a major upon reaching the age of 18 years.” Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 173; Boezaart in Boezaart (ed.) *Child Law in South Africa* (2009) 17; Robinson *et al.* *Introduction to South African Family Law* (2009) 250. For the sake of completeness it should be mentioned that until 1 July 2007 section 1 of the

namely that “a child” is a person under the age of 18. Moreover, when born alive, the child is from a legal point of view regarded as a legal *persona*.<sup>12</sup> Basically, the provisions in South Africa and the Netherlands conform to the international and regional documents in this regard. It has to be borne in mind that (even) in the CRC and the African Children’s Rights Charter, and moreover in various national legislation in South Africa and the Netherlands, different age norms are used for various purposes.<sup>13</sup>

It has been pointed out that in South Africa many people are governed by African customary law.<sup>14</sup> In this context Bennett explains that the term “childhood” as such is a flexible concept, which is not only based on age but also on the limitations presented by the economic and social circumstances.<sup>15</sup>

Moreover, Bekker points out that “many African had, and some still have, firm views and practices about the passage from childhood to adulthood”.<sup>16</sup> These practices could, for example, entail circumcision, attendance of an initiation school,<sup>17</sup> marriage and the

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Age of Majority Act 57 of 1972 provided that majority was reached by the age of 21. According to Bennet the Age of Majority Act has not been applied consistently, which resulted in uncertainty with regard to childhood related age limits in customary law (see Bennett *Human Rights and African Customary Law* (1999) 100). With the coming into force of the first part of the Children's Act 38 of 2005 on 1 July 2007, the age of 21 was lowered to the age of 18 (see Proclamation No. 13 2007 Government Gazette No. 2894419 June 2006, section 17 *juncto* the third item of Schedule 4 of the Children's Act 38 of 2005).

<sup>11</sup> On the basis of Article 1:233 of the Dutch Civil Code “persons who have not reached the age of 18 years or have not become a major in any other way, for example by marriage or by being registered as such or being declared a major, are regarded as minors”. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 47; Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 33.

<sup>12</sup> Regarding legal subjectivity, see below in this section.

<sup>13</sup> For example, Article 38(3) of the CRC deals with child soldiers and determines that states parties should refrain from recruiting persons younger than 15 years into their armed forces.

<sup>14</sup> The country's population stands at 50.5-million (mid-year estimates from Statistics South Africa, July 2011) and shows the following structure of the population: African 79.5%, White (Italians, Germans, English) 9.0%, Coloured 9.0%, Indian/Asian 2.5%. See [www.southafrica.info/about/people/population](http://www.southafrica.info/about/people/population), last accessed on 13 October 2012.

<sup>15</sup> Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 339. See also Bennett *Human Rights and African Customary Law under the South African Constitution* (1999) 101.

<sup>16</sup> Bekker 2008 *Obiter* 395.

<sup>17</sup> Bennet has explained initiation as an occasion where parents submit their offspring to painful and humiliating rites that are intended to transform children into adults (*Human Rights and African Customary Law* (1999) 109). He adds to this that although this is no longer absolutely

establishment of an independent home. Although the Constitution provides for the right to enjoy culture,<sup>18</sup> it should be kept in mind that on the basis of the Children's Act “every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being”.<sup>19</sup> In some areas in South Africa, initiation and circumcision<sup>20</sup> are still general practice pertaining to boys in order to become a man. With regard to girls, puberty and possibly a certain ceremony, in some areas would result in being accepted as a woman.<sup>21</sup>

With regard to the existing differences of opinion pertaining to cultural or religious practices, Bosman-Sadie and Corrie suggest the following approach: “The key to implementing this part of the Act is to show great respect and compassion for those groups who feel that their cultural rights have been interfered with, while adhering to these sections of the Act.”<sup>22</sup> It should be realised that a long period of childhood, although desirable and to strive for, is actually a luxury which for children in disadvantaged circumstances are not necessarily a

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essential, initiation is still a widespread practice in South Africa. See also *GQ v Yedwa* 1996 (2) SA 437 (Tk), in which case the court recognised the relevance of initiation as a rite of passage from childhood to adulthood. See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 174.

<sup>18</sup> Section 31 of the Constitution deals with cultural, religious and linguistic communities.

<sup>19</sup> Section 12(1) of the Children's Act 38 of 2005.

<sup>20</sup> Section 12(8)-(10) of the Children's Act provides for rules pertaining to the circumcision of boys. Section 12(8) states: “Circumcision of male children under the age of 16 is prohibited, except when (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.” On the basis of section 12(9) of the Children's Act, circumcision of male children older than 16 may only be performed – (a) if the child has given consent to the circumcision in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed. Finally section 12(10) states that: “Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision.” Peer group pressure and pressure of the community and the family should not be underestimated. The question arises whether there will be a true choice in this regard. For a detailed discussion see Kassan & Mahery *Child Law in South Africa* (2009) 186. Apparently there are no regulations with regard to cultural circumcision. Bosman-Sadie & Corrie warn of the serious detrimental consequences of this omission in *A Practical Approach to the Children's Act* (2010) 28.

<sup>21</sup> It should be noted that genital mutilation or the circumcision of female children is prohibited on the basis of section 12(3) of the Children's Act 38 of 2005. Virginity testing of children under the age of 16 is prohibited and above 16 only after consent of the child, after proper counselling of the child and in the manner prescribed, as indicated in section 12 of the Children's Act. The results of a virginity test may not be disclosed without the consent of the child. See also Bekker (2008) *Obiter* 398.

<sup>22</sup> *A Practical Approach to the Children's Act* (2010) 28.

given. Bennett states that the only reason why childhood ends at the age of 18 is for the purpose of enjoying the rights referred to in the different documents,<sup>23</sup> and to provide for legal certainty. In case of a legal conflict, however, the statutory norm as mentioned in the Children's Act should prevail.<sup>24</sup> Thus from the above it is evident when childhood ends. Generally speaking, majority will be attained at the age of 18.<sup>25</sup>

A more difficult aspect pertaining to the definition of “a child” is when childhood actually starts. The South African Constitution is not explicit in this regard; it merely refers to “a person under the age of 18 years”.<sup>26</sup> From section 28(3) of the Constitution it can be derived that the crucial criteria apparently is “a person”. The question arises what is meant by “a person”. Boezaart rightfully states that “there should be clarity about the exact moment at which the individual becomes a person in law”.<sup>27</sup> Legal subjectivity is attained by a biological person at the moment of a successful birth. This means basically that two requirements have to be met.

Firstly, the foetus should become separated from the mother's body, and secondly, the foetus should be alive at that very moment.<sup>28</sup> Therefore an unborn child is not regarded as a legal subject.<sup>29</sup> However, under certain circumstances, the interests of unborn children may be protected.<sup>30</sup> In this respect the so-called *nasciturus* fiction comes into play. The

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<sup>23</sup> Article 1 of the CRC, dealing with the definition of “child” starts with: “[f]or the purposes of the present Convention” and a similar provision can be found in Article 2 of the African Children's Rights Charter, which reads: “[a]ccording to the present Charter [...]”. See Bennett 102. See also the discussion in section 2.2.1.2.

<sup>24</sup> Bekker (2008) *Obiter* 398.

<sup>25</sup> Himonga states that: “the absence of any qualification means that this applies also to matters governed by customary law”, see “Children (minors)” in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 188.

<sup>26</sup> Section 28(3) of the Constitution, 1996, merely states: “[i]n this section 'child' means a person under the age of 18 years”.

<sup>27</sup> *Child Law in South Africa* (2009) 4.

<sup>28</sup> In other words, a stillborn or a baby which has died in the process of being born has not attained legal subjectivity. See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 173; Boezaart *Child Law in South Africa* (2009) 5; Boezaart *Law of Persons* (2010) 12.

<sup>29</sup> A legal subject is a bearer of rights, duties and capacities. See also Kruger & Robinson *The Law of Children and Young Persons* (1997) 2; Boezaart *Child Law in South Africa* (2009) 4.

<sup>30</sup> At common law the *nasciturus* fiction has been mainly applied in the field of succession.

*nasciturus* or unborn child is regarded to have been born, and therefore to have acquired legal personality, prior to the moment of birth.

In such a case, as Boezaart outlines, “the interests of the 'potential' legal subject are kept in abeyance”.<sup>31</sup> However, the application of this fiction would be subject to the following three requirements:

- (i) it should be to the benefit of the unborn child;
- (ii) the benefit should accrue to the unborn after he or she has been conceived;
- (iii) the *nasciturus* must be born alive.

From the moment the *nasciturus* is born alive, the particular benefit will be conferred on him or her.<sup>32</sup> In the Netherlands an unborn child is also not (yet) regarded as a legal *persona*.<sup>33</sup>

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However, the fiction has been applied in South Africa in the field of delict as well, as a dependants' action for loss of support. See, for example, the dated case of *Chrisholm v East Rand Proprietary Mines Ltd* 1909 TH 297 301. In this case the death of a man was negligently caused by another employee of the defendant. The claimant being pregnant with their first baby claimed damages from the defendant on the basis of loss of support. By applying the *nasciturus* fiction the unborn child would be in the same position as other children. With regard to an action for loss arising from pre-natal injuries, see *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

A pregnant woman suffered injuries due to negligence of the other driver. After the child is born it transpires that the child suffers from cerebral paralysis and brain damage. On behalf of the child the father claims damages based on the assumption that the car accident caused the injuries. The court held that the child would have been entitled to compensation under the given circumstances. However, the plaintiff was not able to prove that the brain damage was sustained during the car accident (on a balance of probabilities). In the more recent case *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA), the issue of the *nasciturus* fiction as a basis for a claim for pre-natal injuries has been resolved. In this case a pregnant woman was injured in a car accident and the child was later born with brain damage and a mental disability. The Supreme Court of Appeal held that the ordinary rules of the law of delict should be used in order to establish whether or not a child has a claim. Furthermore the court held that the child's action pertaining to its pre-natal injuries becomes “complete” when the child is born alive. Therefore it was not necessary to make use of the *nasciturus* fiction. Heaton *The South African Law of Persons* (2008) 18. For an in-depth discussion see Keightly in *Boberg's Law of Persons and The Family* (1999) 30 and see especially Boezaart *Child Law in South Africa* (2009) 5-11.

<sup>31</sup> *Law of Persons* (2010) 13.

<sup>32</sup> See Kruger & Robinson *The Law of Children and Young Persons* (1997) 2; Keightly *Boberg's*

The fiction referred to above has been codified in the Netherlands.<sup>34</sup> Article 1:2 of the Civil Code<sup>35</sup> determines that a foetus will be regarded as having been born, whenever this would serve his or her interests.<sup>36</sup> It is clear that this is a fiction pertaining to the moment of the birth. Therefore it is not applicable in the case where a child is not born alive.<sup>37</sup>

There are three conditions to be adhered to before the rule will become applicable:

- (i) the interests of the child should require that it is deemed to have already been born;
- (ii) the existence of a pregnancy (proof thereof);
- (iii) the child must be born alive.<sup>38</sup>

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*Law of Persons and The Family* (1999) 31; Boezaart *Child Law in South Africa* (2009) 6; Boezaart *Law of Persons* (2010) 13 and further.

<sup>33</sup> See Article 1:2 of the Civil Code. With regard to the topic of this thesis, it is interesting to note that in the Netherlands a supervision order can be granted by the court for the benefit of an unborn child. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 35-36. See also chapter 4 on various child protection measures in South Africa and the Netherlands.

<sup>34</sup> See Feenstra *Romeinsrechtelijke Grondslagen van het Nederlands Privaatrecht* (1984) 18.

<sup>35</sup> In other words, Article 2 of Book 1 of the Civil Code, dealing with the Law of Persons and Family Law.

<sup>36</sup> Article 2: "Het kind waarvan een vrouw zwanger is wordt als reeds geboren aangemerkt, zo dikwijls zijn belang dit vordert. Komt het dood ter wereld, dan wordt het geacht nooit te hebben bestaan."

<sup>37</sup> See footnote 33, where Article 1:2 of the Civil Code, second sentence refers to a stillborn. In such a case it is deemed to have never come into existence. This is also a fiction, which does not preclude the biological father to acknowledge a stillborn baby. In fact, where the latter action by the father would not be possible, this is considered a violation of Article 8 of the European Convention. During pregnancy "family life" can develop between the parents and the unborn child, which does not promptly end when a baby dies or where it is stillborn (European Court of Human Rights 2 June 2005, *NJB* 2005, p. 1895). See Doek & Vlaardingerbroek (2009) 35; also Doek in Vlaardingerbroek & ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-2-4.

<sup>38</sup> The requirements pertaining to the fiction coincide to a large extent, which is not surprising since the origin of Dutch law is Roman law and the South African law of persons and family law is based on Roman Dutch law (unlike for example, mercantile law, which is based more on the English common law).



It is interesting to note that Article 1:2 of the Civil Code provides for the possibility to issue a measure of child protection even before the child is born, which presently does not exist in South Africa. As soon as the baby is born, he or she will be immediately protected and taken care of.<sup>39</sup> In the case of a supervision order, the parent(s) would have to follow the instructions given by the social worker pertaining to the care of the unborn child.<sup>40</sup>

When a child is born alive, the circumstances sometimes require the removal of a child from the family environment and placement with a foster family. In these instances the realisation of contact between the child and his or her biological parents should be a priority.<sup>41</sup>

### 3.1.2 The principle of non-discrimination

Equality includes the full and equal enjoyment of all (human) rights and freedoms,<sup>42</sup> which evidently is the ideal situation but is not necessarily a given.

Therefore many human rights instruments contain a prohibition on discrimination.<sup>43</sup> During the apartheid era in South Africa, the legal system and the South African society as a whole was based on racial discrimination and inequality. With the coming into force of the

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<sup>39</sup> For example, where it is evident that a child will be at risk of abuse or neglect, or where there is a possibility that the development of a child is at risk due to the fact that the parent(s) is/are mentally retarded. See Rietveld "Gezinsvoogd van zwakbegaafde ouders coordineert scala aan hulpverlening" (2005) (7) *Perspectief (Informatie- en Opinieblad voor de Jeugdbescherming)* 4-5.

<sup>40</sup> Doek & Vlaardingerbroek (2009) 36. See the Dutch case LJN: BC9962, Rechtbank Utrecht, 10-04-2008, where the children's court deliberated that the mother, due to her limited cognitive abilities and social emotional problems, would not be able to take care of herself and her unborn baby. Moreover, the mother did not want to accept any help on a voluntary basis (the court concluded a so-called "*zorgmijdende opstelling*" of the mother, meaning she is avoiding any possible assistance available. Due to the risks involved for the unborn baby, the court ordered a temporary supervision order. For a more detailed discussion on child protection measures see the chapters 4 and 5.

<sup>41</sup> See also Chapter 4, dealing with child protection measures.

<sup>42</sup> Section 9(2) of the Constitution, 1996.

<sup>43</sup> For example, see Article 2 of the Universal Declaration of Human Rights (1948); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966) and Article 14 of the European Convention. For a discussion on the Articles 2 of the CRC and 3 of the African Children's Rights Charter, see section 2.2.1.3.

Constitution a number of fundamental changes were put in place.<sup>44</sup> In this respect Article 1 of the Constitution clearly states that the Republic of South Africa is founded on, among others, the following values:

- (i) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (ii) Non-racialism and non-sexism.

With regard to children, generally speaking the emphasis lies on special protection rather than on matters such as equality. However, as has been pointed out, the principle of non-discrimination is one of the four general principles in the CRC. This means that it affects all the other rights to which children are entitled,<sup>45</sup> and thus plays a central role in the realisation of children's rights. The Constitution of South Africa contains a specific provision on children's rights, namely section 28.

Although the latter section does include a prohibition on discrimination, children are nevertheless covered by the equality clause in section 9 of the Constitution, since children are generally speaking also entitled to the other rights as listed in the Bill of Rights.<sup>46</sup>

Section 9 of the Constitution reads as follows:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination

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<sup>44</sup> The Interim Constitution came into operation on 27 April 1994, which was succeeded by the 1996 Constitution, which took effect on 4 February 1997. See also Currie & De Waal *The Bill of Rights Handbook* (2005) 2.

<sup>45</sup> Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 49. See also section 2.2.1.3.

<sup>46</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 265 and 277.

may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

Currie and De Waal have indicated that the need to work through the legacy of the past has been acknowledged in section 9(2) of the Constitution, in terms of which legislative and other measures may be taken which aim to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.<sup>47</sup> In addition, it is commendable that an extensive list of grounds against discrimination is provided, which to a large extent coincides with the Articles 2 of the CRC and 3 of the African Children’s Rights Charter.<sup>48</sup> Besides the state, individuals are also expected to refrain from unfair discrimination. Section 9(4) of the Constitution requires the enactment of national legislation in order to prevent or prohibit unfair discrimination. This has resulted in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.<sup>49</sup>

However, it allows for differentiation, which does not amount to discrimination.<sup>50</sup> Whether

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<sup>47</sup> Currie & De Waal *The Bill of Rights Handbook* (2005) 230 and further.

<sup>48</sup> In section 2.2.1.3 it was pointed out that the factor “disability” was omitted in the African Children’s Rights Charter. It is commended that it has been included in section 9(3) of the Constitution.

<sup>49</sup> Hereinafter referred to as the Equality Act. This statute came partially into operation on 1 September 2000 and became fully effective on 16 June 2003. See Currie & De Waal *The Bill of Rights Handbook* (2005) 267.

<sup>50</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 317. See also *General Comment No. 5* of 27 November 2003, section 12, in which the Committee on the Rights of the Child has emphasised that “the application of the non-discrimination principle of equal access to

certain actions amount to the former or the latter has to be determined in the light of the facts and circumstances of each case. In *MEC for Education: KwaZulu-Natal and Others v Pillay and Others*<sup>51</sup> the court had to decide whether the suspension of a learner for wearing a nose stud amounted to discrimination on the basis of religion and culture. Pillay, a high school learner was required to wear a nose stud based on her Hindu religion. This, however, was contrary to the school's dress code, which prohibited any jewellery apart from plain earrings and a watch. The court held that in this case culture and religion were related, since “religious belief informs cultural practice and cultural practice attains religious significance”.<sup>52</sup>

The court held accordingly, that there had been unfair discrimination which was unjustifiable due to the fact that the school's code of conduct did not accommodate cultural and religious differences in a reasonable manner, which is required in terms of section 14(3) of the Equality Act.<sup>53</sup> Malherbe points out in this case that the Constitutional Court thus followed “an accommodating, even encouraging approach” pertaining to the cultural and religious differences which are apparent in South Africa. It is submitted that this approach to cultural and religious diversity could serve as an example to other countries.<sup>54</sup>

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rights does not mean identical treatment.” (CRC/GC/2003/5).

<sup>51</sup> 2008 (1) SA 474 (CC).

<sup>52</sup> See section 60. The court deliberated at this point as follows: “ The question arises whether the nose stud should be classified as a religious or cultural practice, or both. This Court has noted that “the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted. That is particularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious beliefs informs cultural practice and cultural practice attains religious significance. As noted above, that will not always be the case: culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.”

<sup>53</sup> Malherbe in Boezaart (ed.) *Child Law in South Africa* (2009) 431. In order to comply with section 14(3) of the Equality Act the school could have made an exemption pertaining to sincerely held religious and cultural beliefs and practices, see section 114 of the case.

<sup>54</sup> According to Malherbe this case of the Constitutional Court forms a bright contrast with the trends towards diversity in Western Europe, in “Oor kopdoeke, neuskopies en taal: die uitdagings van diversiteit in onderwys” in Boezaart & De Kock (eds.) *Vita perit, labor non moritur: Liber memorialis PJ Visser* (2008) 53. In its report of 23 April 2012 Amnesty International has expressed its concern pertaining to the disintegration of human values in European countries, especially in relation to Muslims and Islamic culture. Intolerance and discrimination seem to be rife in the education system and the labour market. Some countries have enacted legislation providing for a general prohibition on the concealment of the face, for the purpose of maintaining safety and public order, which are directed at the burka's and

In order to monitor the progress of state parties in relation with Article 2 of the CRC, the Committee on the Rights of the Child has requested state parties to provide the relevant information in this respect.<sup>55</sup> In its *Concluding Observations* regarding South Africa, the Committee expressed its concern at the insufficient measures adopted to guarantee all children access to education, health and social services. Moreover, it identified certain vulnerable groups including, black children, girls, children with disabilities, especially those with learning disabilities, working children, children in rural areas, children working or living on the streets, children who are dealing with justice and refugee children.<sup>56</sup> A number of these matters have been dealt with in the Children's Act<sup>57</sup> and the Child Justice Act.<sup>58</sup> However, as pointed out by Mahery, the difference in minimum age between boys and girls when entering into marriage amounts to gender discrimination.<sup>59</sup> In terms of the common law in South Africa a child cannot get married below the age of puberty, which is 12 years for girls and 14 years for boys.<sup>60</sup> Below the age of 18 a child has limited capacity to act and therefore needs to obtain the necessary consent in order to get married.<sup>61</sup>

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niqabs. For a more detailed discussion, see the Amnesty-report "Choice and Prejudice Discrimination against Muslims in Europe" of 23 April 2012. Available at [www.amnesty.nl/sites/default/files/public/religious\\_discrm\\_muslims\\_report](http://www.amnesty.nl/sites/default/files/public/religious_discrm_muslims_report), last accessed on 14 October 2012.

<sup>55</sup> For example, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. See *General Comment No. 5* of 27 November 2003 section 12.

<sup>56</sup> It was recommended that South Africa would strengthen its efforts to ensure the application and adherence to Article 2 of the CRC. It will be interesting to see what information the next progress report will contain regarding non-discrimination. The combined 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Periodic Report will be submitted by South Africa in July 2013. Information obtained via [aviviers@unicef.org](mailto:aviviers@unicef.org), on 1-10-2012.

<sup>57</sup> 38 of 2005. For example, protection against social, cultural and religious marriages.

<sup>58</sup> 75 of 2008.

<sup>59</sup> See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 317.

<sup>60</sup> See Van der Vyver in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 289-290.

<sup>61</sup> See the sections 24, 27 and 12 of the Marriage Act 25 of 1961. See also section 26, which contains a prohibition of marriage of persons under certain ages. It reads as follows: "[N]o boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage, except with the written permission of the Minister [of Home Affairs] or any officer in the public service authorised thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law; Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court

Unfortunately this matter has not been dealt with in the Children's Act, which in effect means that the common law rule still perpetuates.

The Dutch Constitution provides unambiguously that “[A]ll persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”<sup>62</sup> It is evident that the term “all persons” includes children in the Netherlands. Recent research on children's rights in the Netherlands indicates that the right to equal treatment of children is regarded as of utmost importance by children. According to the report “*Jongeren-rapportage over kinderrechten in Nederland 2012*”, it was rated as the second most important right (number 1 is the right to protection against violence).<sup>63</sup> In its *Concluding Observations* (2004) the Committee on the Rights of the Child expressed its concern about societal prejudices and discrimination in society and in particular, against children of ethnic minorities and refugee and asylum-seeking children.

In addition, there was concern that in some localities and schools in the Netherlands there appeared to develop a *de facto* segregation between ethnically Dutch families and families of foreign origin. On this basis, the Committee recommended to the Netherlands to increase its efforts to ensure the full compliance with Article 2 of the CRC and adopt a strategy to eliminate discrimination on any ground and against all vulnerable groups.<sup>64</sup> In the *Concluding Observations* (2009) the Committee welcomed the Equal Treatment Act, the

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having jurisdiction in the matter is necessary and has been granted.” It is interesting to note that when a marriage has been concluded without the required consent of the Minister, the latter may still ratify the defect, provided that the marriage is considered desirable and in the interests of the parties concerned; the marriage has been lawfully solemnised and that there was no other lawful impediment thereto. See Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 195; also Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 37.

<sup>62</sup> See Article 1 of the Constitution of the Kingdom of the Netherlands 2002, published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Department, in collaboration with the Translation Department of the Ministry of Foreign Affairs. Available at [www.wipo.int/wipolex/en/tekst](http://www.wipo.int/wipolex/en/tekst), last accessed on 14 October 2012.

<sup>63</sup> “Jongeren-rapportage over kinderrechten in Nederland 2012” NJR and Kinderrechtencollectief (2012) 22. This research was conducted by the NJR in collaboration with the Kinderrechtencollectief, for the purpose of drafting a NGO report to be submitted to the Committee on the Rights of the Child in the course of 2013. Available at <http://www.defenceforchildren.nl/p/21/2441/mo89-mc21/mo45>, accessed on 22-6-2012.

<sup>64</sup> CRC/C/15/Add.227 of 30-01-2004, sections 30-32.

National Action Plan against Racism, the Racial Discrimination Monitor and the campaign “Discrimination? Phone now!”.

The Committee, however, expressed its concern that racial discrimination still persists and therefore reiterated the importance of ensuring full protection against discrimination. The Committee recommended more awareness-raising and other preventative activities against discrimination and that all necessary measures to be taken to ensure that cases of discrimination against children in all sectors of society are addressed effectively.<sup>65</sup>

Pertaining to the latter, reference should be made to the establishment of the office of the *Kinderombudsman* in the Netherlands, which is able to investigate complaints pertaining to an alleged infringement of any of the rights as provided by the CRC, thus including complaints relating to any form of discrimination. It is submitted that this office is indispensable in the protection of the rights of children and the realisation and enhancement thereof,<sup>66</sup> and thus would be very welcome in South Africa.

### **3.1.3 Best interests of the child**

It has been outlined that the best interests of the child is one of the four general principles and therefore is connected with and influences all the other rights mentioned in the CRC. In the following sections it will be explored how this central principle has been incorporated in South African law and Dutch law.

#### **3.1.3.1 Best interests in South African law**

With regard to the national law of South Africa “the best interests of the child” standard is well-established.<sup>67</sup> It has been typified as “a golden thread which runs throughout the whole

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<sup>65</sup> It will be interesting to take note of the outcome regarding the 4th periodic report of the Netherlands, which was due in March 2012 and will probably be dealt with in 2013 or 2014.

<sup>66</sup> See Article 11b(2)(c) of de Wet Nationale Ombudsman. Chapter IIA of the latter Act provides specifically for the *Kinderombudsman*.

<sup>67</sup> The principle has been part of the South African common law before it became part of section 30(3) of the Interim Constitution (of 1993). Already in 1907 Solomon J in *Cronjé v Cronjé* (1807 TS 871 872) said: “In all cases the main consideration for the court in making an order

fabric of our (South African) law relating to children”.<sup>68</sup> The various tests to be applied in determining what is in the best interests of a particular child has come to the fore in a number of custody cases, even before the “the best interests of the child” was used as a commonly known principle.<sup>69</sup> For example, in the case *French v French* of 1971,<sup>70</sup> the court formulated a number of factors to be considered in determining the child's best interests in the case of the variation of a custody order. These factors/facts were derived from previous cases and included, the preservation of the child's sense of security,<sup>71</sup> the suitability of the

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for the custody of the children is, what is best in the interests of the children themselves?”, see Anderson & Spijker (2002) *Obiter* 365. See Eiselen in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 232.

<sup>68</sup> Clark “A 'golden thread'? Some aspects of the application of the standard of the best interest of the child in South African family law” 2000 *Stell LR* 3.

<sup>69</sup> See for example, *Cook v Cook* 1937 AD 154 and *Fletcher v Fletcher* 1948 (1) SA 130 (AD). For a detailed discussion see Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 534-540.

<sup>70</sup> 1971 (4) SA 298 (W).

<sup>71</sup> This was regarded the primary test and reference was made to the case *Myers v Leviton* 1949 (1) SA 203 (T). The court in the latter case held that “There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from its own mother – an important factor in the normal psychological development of a healthy child,” at p 214. The factor “preservation of the sense of security of a child” was linked with the strong tendency to prefer the mother as the custodian parent, as was decided in *Fortune v Fortune* 1955 (3) SA 348 (AD) and furthermore applied in *Tromp v Tromp* 1956 (4) SA 738 (N). See also Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 534. This application of the so-called “maternal preference-rule” or “tender years” principle, on the basis of which mothers were preferred as custodians of young children, children with disabilities and daughters of any age, due to the assumption that they would be better able to take care of children, has become outdated. Firstly, section 9 of the Constitution deals with “equality” and prohibits unfair discrimination.

Moreover, the principle has been rejected in *Van der Linde v Van der Linde* 1996 (3) SA 509 (O), where it was held that “mothering” refers to caring for a child's well-being and that this is part of a mother as well as a father. It was pointed out that the quality of a parent's contribution is not just determined by gender. Rejection of the maternal preference-rule also took place in *Madiehe (born Ratlhogo) v Madiehe* 1997 (2) All SA 153 (B), in which case the court held that custody (or care) is a responsibility and privilege that has to be earned. Again in *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O), it was held that the assumption that a mother is of necessity in a better position to care for a child than the father belongs to an era from the past. It is now accepted that “mothering” is not just a component of a woman's being, but is part of a man's being as well, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody (or care) over a child as well as the mother (101C/D). The move away from maternal preference is in line with section 28(1)(b) of the Constitution, on which basis “every child has the right to family care or parental care (or to appropriate alternative care when removed from the family environment)”, without reference to a specific parent.

See in this regard Cronjé & Heaton *South African Family Law* (2004) 163-164. See also Van Heerden *et al. in Boberg's Law of Persons and the Family* (1999) 539. Moreover, section 2 of the Children's Act 38 of 2005, stating the objects of the Act, also refers explicitly to “the



proposed custodian parent in terms of his or her character,<sup>72</sup> the religion and language in which the children are to be brought up,<sup>73</sup> the ability to give guidance pertaining to the moral, cultural and religious development of the child,<sup>74</sup> material considerations pertaining to the child's well-being,<sup>75</sup> and lastly, the wishes of the child concerned should be taken into consideration. An example of a disqualifying factor with regard to the custody (care) was the situation where a parent would frustrate the right of contact of the other parent and a child.<sup>76</sup> From the developments in the South African case law it can be deduced that a care order should not be based on gender but rather on the facts and circumstances of each case, in conjunction with the best interests of the child concerned. However, the application of a more gender-neutral approach in this regard depends to a large extent on the courts and the frame of reference of the presiding officers.<sup>77</sup>

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promotion of the preservation and strengthening of families” and “the right of the child to family care or parental care”. Article 19 of the Rights and Welfare of the African Child states that “every child shall be entitled to the enjoyment of parental care.” The equivalent can be found in Article 7 of the CRC, which reads as follows: “[...] the child shall have, as far as possible, the right to know and be cared for by his or her parents”. It is submitted that both provisions clearly call for joint care after divorce. This is supported by Article 18 of the CRC and Article 20 of the African Children’s Rights Charter, because the principle that both parents have common responsibilities or the primary responsibility for the upbringing and development of the child has been emphasised. See the discussion on the Articles 7 and 18 of the CRC and Article 20 of the African Children’s Rights Charter in section 2.2.2.4.

<sup>72</sup> See *Fletcher v Fletcher* 1948 (1) SA 130 (AD).

<sup>73</sup> See *Hassan v Hassan* 1955 (4) SA 388 (D) and *Tromp v Tromp* 1956 (4) SA 738 (N).

<sup>74</sup> See *Kallie v Kallie* 1947 (2) SA 1207 (SR).

<sup>75</sup> See *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W) and *Goodrich v Botha* 1954 (2) SA 540 (AD).

<sup>76</sup> See *Mitchell v Mitchell* 1904 TS 128, which was, it is submitted, quite revolutionary in the beginning of the 20<sup>th</sup> century.

<sup>77</sup> It is ultimately the court which makes such an order, based on the child's best interests. It is submitted that all practitioners in the legal profession and social workers should be expected, or rather are obliged, to undergo continuous training regarding developments and trends in their fields of expertise. The reason for this would be to avoid too much conservatism, like, for example, in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), where homosexuality was described as abnormal. It is submitted that a slight step back occurred in *Ex parte Critchfield and Another* 1999 (3) SA 132, where it was said that “[given] the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination for a court to have regard to maternity as a fact in making a determination as to the custody of young children”. Furthermore, “[that] the court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children”, which last part at least gives some hope for a gender-neutral approach combined with the child's best interests when it comes to care orders. See also sections 7 and 9 of the Children's Act 38 of 2005, which are discussed below.

Subsequently, in *McCall v McCall*,<sup>78</sup> King J formulated an extensive list of factors to be considered with regard to determining “the best interests of the child” in care (custody) decisions. The factors were the following:

- (i) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (ii) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (iii) the ability of the parent to communicate with the child and the parent's insight into understanding of and sensitivity to the child's feelings;
- (iv) the capacity and disposition of the parent to give the child the guidance which he requires;
- (v) the ability of the parent to provide for the basic physical needs of the child, the so-called “creature comforts”, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (vi) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (vii) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (viii) the mental and physical health and moral fitness of the parent;
- (ix) the stability or otherwise of the child's existing environment, having regard to

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<sup>78</sup> 1994 (3) SA 201 (C). See also Van Heerden in Van Heerden *et al. Boberg's Law of Persons and The Family* (1999) 498 and further; Ngidi in Boezaart (ed.) *Child Law in South Africa* (2009) 227; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 141.

the desirability of maintaining the *status quo* [that is, the present state of affairs];

- (x) the desirability or otherwise of keeping siblings together;
- (xi) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (xii) the desirability or otherwise of applying the doctrine of same sex matching, whether a boy should be placed in the custody of his father; and
- (xiii) any other factor which is relevant to the particular case with which the Court is concerned.<sup>79</sup>

It has to be emphasised that the aforementioned criteria were not listed in order of importance and that some of these factors inevitably overlap.<sup>80</sup> Since the *McCall* case in 1994, the list of criteria has been used in several subsequent cases in determining what is “in the best interests of a child”.<sup>81</sup> The list formulated in *McCall v McCall* has, to a large extent, been incorporated in section 7 of the Children's Act.<sup>82</sup>

From section 7 it is clear that all the factors indeed revolve around the “best interests of the child” in general, thus providing a set standard.<sup>83</sup>

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<sup>79</sup> “Any other factor [...]” clearly indicates that the present list is not exhaustive. Therefore any factor which would be relevant under the circumstances of the case at hand can be accommodated, which flexibility is of utmost importance. See also Van Heerden *et al.* in *Boberg's Law of Persons and the Family* (1999) 533. Furthermore Anderson and Spijker in Okpaluba (ed.) *Law and Contemporary South African Society* (2004) 113:

<sup>80</sup> *McCall v McCall* 1994 (3) SA 201 (C), see page 205.

<sup>81</sup> Anderson & Spijker (2002) *Obiter* 366. See also *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O).

<sup>82</sup> 38 of 2005.

<sup>83</sup> See below.

Section 28(1) of the Constitution reads:

“Every child has the right -

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

and

- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict”.

Thus section 28(1) of the Constitution provides for the protection of children in nine specific rights,<sup>84</sup> and children are the bearers of these rights.<sup>85</sup> Moreover, children are also entitled to the other rights as mentioned in the Bill of Rights of the Constitution,<sup>86</sup> as far as the nature of the right is relevant with regard to children.<sup>87</sup> Section 28(2) of the Constitution of the Republic of South Africa<sup>88</sup> states that: “a child's best interests are of paramount importance in every matter concerning the child.”<sup>89</sup>

The *Cassell Concise English Dictionary*<sup>90</sup> explains the meaning of “paramount” as “supreme above all others”,<sup>91</sup> which means that the child's best interests is thus of utmost importance.<sup>92</sup> What does this mean? Cockrell refers in his discussion on section 28(2)<sup>93</sup> to

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<sup>84</sup> Haysom “Children” in Davis *et al. Fundamental Rights in the Constitution – Commentary and Cases* (1997) 264; Mosikatsana in De Waal *et al. “Children” The Bill of Rights Handbook* (2001) 456; Himonga in Wille's *Principles of South African Law* (2007) 212; Heaton *The South African Law of Persons* (2008) 86; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 265.

<sup>85</sup> See Himonga (2007) 212; Skelton in Boezaart (ed.) (2009) 276.

<sup>86</sup> Chapter 2 of the Constitution.

<sup>87</sup> Cockrell “The Law of Persons and the Bill of Rights” in *Bill of Rights Compendium* 3E-20; Haysom (1997) 266; Bonthuys in Currie & De Waal *et al. “Children”* (2005) 600; Skelton in Boezaart (ed.) (2009) 265.

<sup>88</sup> 108 of 1996.

<sup>89</sup> Compare with the provisions in the international documents. Article 3 of the CRC determines that the best interests of the child shall be “a” primary consideration, whilst Article 4 of the African Children’s Rights Charter demands that the best interests of the child shall be “the” primary consideration. The latter provision means that “the best interests of the child” is the overriding consideration. It was therefore argued that the African Children’s Rights Charter at this point provides a higher standard and thus a better protection. See Chirwa (2002) *The International Journal of Children's Rights* 160; also Lloyd (2002) *The International Journal of Children's Rights* 183; also Memzur (2008) 23 *SAPR/PL* 18. See also section 2.2.1.4.

<sup>90</sup> 1994.

<sup>91</sup> According to the *Cassel Concise English Dictionary* (1994) the word “supreme” means: highest in importance, utmost, extreme, greatest possible.

<sup>92</sup> However, this does not mean that the other constitutional rights are of less importance, see for example the discussion on the case *M v R* 1989 (1) SA 416 (O), as discussed below.

<sup>93</sup> “The Law of Persons and the Bill of Rights” *Bill of Rights Compendium* 3E19, note 10.

the case *M v R*<sup>94</sup> in which an application for an order compelling the child to submit to blood tests in order to establish paternity came to the fore. The court said that “the best interests of the minor was not the only but yet the determining or domineering factor, against which all other considerations should play a minor role” and that “section 28(2) of the Constitution now gives additional emphasis to the proposition that “all other considerations” in this context must be subservient to the paramount consideration of the best interests of the child”.

Although an important decision, the question arises as to whether or not in the case of conflicting interests “all other considerations” can always be subservient to the “best interests of the child” principle. In other words, the child's best interests are of utmost importance, but does this mean that the main consideration will always be “the child's best interests”, thereby having overriding effect? After all, is it not just a principle of interpretation with regard to “every matter concerning the child”?<sup>95</sup> On the basis of legal interpretation one could argue that, although not easy, other considerations could theoretically speaking outweigh the child's best interests.<sup>96</sup> If it were that a decision would always be given in favour of the child's best interests, no other conflicting interests need to be considered. This would be a futile exercise.

Moreover, the legislature would have formulated section 28(2) differently, for example “a child's best interests are the most important consideration (or the only consideration) in all matters concerning the child”. The question is, what would be a just approach where there is a conflict of rights involving “the best interests of the child”?

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<sup>94</sup> 1989 (1) SA 416 (O).

<sup>95</sup> Compare the discussion regarding Article 3(1) of the CRC, see Van Bueren (1995) 46.

<sup>96</sup> See *Howell v S* [1999] 2 All SA 233. See for a discussion regarding a clash with the best interests of the child, Van Bueren (1995) 48-49. In *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC), the Constitutional Court came to the conclusion that “although the best interests of the child are paramount, this does not mean that they are absolute”, par [26] page 250.

In *Jooste v Botha*<sup>97</sup> Dijkhorst J, deliberated that:

“[t]he wide formulation of section 28(2) of the Constitution is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or deprivation by the employer of the parent where that is not in the child's best interest. That can clearly not have been intended” and therefore concluded that “[s]ection 28(2) is intended as a general guideline and not as a rule of law of horizontal application. That should be left to the positive law and any amendments it may undergo”.

However, shortly thereafter, the Constitutional Court, as the highest court in constitutional matters in South Africa, held in *Minister of Welfare and Population Development v Fitzpatrick*<sup>98</sup> that “[s]ection 28(2) of the Constitution creates a right that is independent of those specified in section 28(1)”.<sup>99</sup> In paragraph 17 of the case it was furthermore said that section 28(1) is not exhaustive of children's rights. “[T]he plain meaning of the words [in section 28(2)] clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions.” In other words, according to the Constitutional Court, section 28(2) should be regarded as a separate constitutional right of a child.

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<sup>97</sup> 2000 (2) BCLR 187 (T), in which case the extra-marital child (as the children of unmarried fathers were then referred to), assisted by his mother, sued the defendant for damages of R 450 000 on the basis that defendant failed to render plaintiff any “attention, love, cherishment, and interest”, whilst the plaintiff was entitled to “parental care” on the basis of section 28(1)(b) of the Constitution. The relevant aspects concerning section 28(1)(b) are discussed in section 3.2.1 below.

<sup>98</sup> 2000 (3) SA 422 (CC). In this adoption case the question arose whether a child born of a South African citizen could be adopted by a person who was not a South African citizen, since section 18(4)(f) of the Child Care Act 74 of 1983 prohibited such adoption. The High Court declared section 18(4)(f) unconstitutional but suspended the declaration for two years in order to allow Parliament to amend the existing legislation in this respect. Since the High Court made this order concerning the constitutional invalidity of (a part of) an Act of Parliament (namely the Child Care Act 74 of 1983) this order would be of no force unless it is confirmed by the Constitutional Court on the basis of section 172(2)(a) of the Constitution. The Constitutional Court confirmed the invalidity of section 17(4)(f) but set aside the suspension of the order. Therefore the Fitzpatricks could adopt the child immediately.

<sup>99</sup> This interpretation is consistent with the way in which section 28(2) was applied by the Constitutional Court in the case *Fraser v Naude and Others* 1999 (1) SA 1 (CC). In this case the father of an extra-marital child (as the children of unmarried fathers were then referred to) was denied the right to re-open adoption proceedings which were finalised almost three years earlier. In refusing an application for leave to appeal from the Supreme Court of Appeal, the court applied section 28(2) and its standard of the “child's best interests” as a discrete principle. See section 2.2.2 above. Also Boezaart (2010) 94.

In *Sonderup v Tondelli and Another*,<sup>100</sup> the Constitutional Court had to deal with the best interests of a four-year-old girl against the background of the Hague Convention on the Civil Aspects of International Child Abduction Act.<sup>101</sup> During their marriage the parties moved from South Africa to Canada. In 1998 they separated. The order of the Supreme Court of British Columbia stated that the mother was granted sole custody and the father was granted access.

In 2000 the child was removed by her biological mother from British Columbia in Canada and taken to South Africa. On the basis of the aforementioned Act, the South African Chief Family Advocate applied to the High Court for the return of the child to British Columbia,<sup>102</sup> which was granted. The mother of the child sought and obtained leave to appeal directly to the Constitutional Court. The Constitutional Court had to decide on two matters: (1) whether or not the mother had acted in transgression of the Hague Convention, and if this was the case, (2) whether the Hague Convention on the Civil Aspects of International Child Abduction Act was unconstitutional. The Constitutional Court held that the mother had violated the Hague Convention on the Civil Aspects of International Child Abduction Act, and furthermore, that this Act was not unconstitutional.

The rule of “peremptory or mandatory return” as referred to in Article 1 of the Act,<sup>103</sup> which aims to evaluate the best interests of children in determining custody matters,<sup>104</sup> mainly focuses on long-term interests. Where the child's short-term interests may not be met by immediate return, the Act might require those short-term best interests to be overridden. To that extent, the Hague Convention on the Civil Aspects of International Child Abduction Act might be inconsistent with Article 28(2) of the Constitution. The latter provides an expansive

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<sup>100</sup> 2001 (1) SA 1171 (CC), also reported as *LS v AT* 2001 (2) BCLR 152 (CC).

<sup>101</sup> 72 of 1996.

<sup>102</sup> On the basis of Article 1 of the Hague Convention the object is to secure the prompt return of children wrongfully removed to any contracting state.

<sup>103</sup> Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 deals with the objects of the Hague Convention, which reads under (a): “to secure the prompt return of children wrongfully removed to or retained in any contracting state”; and (b) “to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.”

<sup>104</sup> It has to be kept in mind that it is the law of the contracting state in which the child was habitually resident immediately before the removal or retention, which determines who has rights of custody (see Article 3 of the Hague Convention).



guarantee that a child's best interests are paramount in every matter concerning the child.<sup>105</sup> Therefore, if a child's short-term best interests were limited, this would be justifiable under section 36 of the Constitution, since the Hague Convention on the Civil Aspects of International Child Abduction Act desires to protect children internationally from the harmful effects of their wrongful removal or retention.<sup>106</sup> Goldstone J ordered that the child should be returned under certain conditions.<sup>107</sup>

In the *De Reuck* case,<sup>108</sup> the applicant, a film producer, was charged for possession and importation of child pornography, which is banned under the Films and Publications Act.<sup>109</sup> In the High Court judgment, the view was expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether and that section 28(2) of the Constitution “trumps” other provisions of the Bill of Rights.<sup>110</sup> However, at the Constitutional Court,<sup>111</sup> Langa DCJ, did not agree.

“[T]his, the aforementioned approach, would be alien to the approach adopted by this court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This court has held that section 28(2) of the Constitution, like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and

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<sup>105</sup> See section [29].

<sup>106</sup> See the Preamble of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; also Skelton *Child Law in South Africa* (2009) 282. It should be noted that the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 has the force of law in South Africa in terms of s275 of the Children's Act 38 of 2005 and is included in the Children's Act as Schedule 2 (Schedule 4 determines that the whole of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 is repealed).

<sup>107</sup> The order included, among others, the following condition: “that the warrant for the arrest of the mother to be withdrawn and that she would not be subject to arrest by reason of her failing to return the daughter to British Columbia on 14 July 2000 [...]”.

<sup>108</sup> 2003 (3) SA 389 (W).

<sup>109</sup> 65 of 1996.

<sup>110</sup> Chapter 2 of the South African Constitution, 1996.

<sup>111</sup> *De Reuck v Director of Public Prosecutions Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC). The applicant applied for leave for appeal (directly) to the Constitutional Court, without first approaching the Supreme Court of Appeal. This was granted due to the fact that the legal questions involved were all constitutional issues and due to a public interest in their early resolution.

justifiable in compliance with section 36 of the Constitution”.<sup>112</sup>

In other words, the legislation banning child pornography limits indeed the rights to freedom of expression and privacy, but this limitation is reasonable and justifiable having regard for the chief purpose of the legislation; namely to protect the dignity, humanity and integrity of children.<sup>113</sup>

From the aforementioned it is clear that in the case of conflict with another party's constitutional right, the court has to balance the competing rights and to decide whether under the given circumstances the limitation of the child's best interests would be reasonable and justifiable, in terms of the limitation clause in the Constitution.<sup>114</sup>

In *Howells v S*,<sup>115</sup> the interests of society outweighed the best interests of the children whose mother was convicted of fraud and sentenced to four years imprisonment. The court decided that, due to the seriousness of the offence, the interests of society as a whole outweighed the interests of the mother and the three children. In this case the conviction was based on fraud. Would the situation have been any different where the mother had been convicted of a violence-related crime instead of fraud? Shouldn't the interests of these three children being brought up by their mother have been the most important factor? Did all this justify outweighing the children's best interests? It is submitted that the outcome of this case would probably have been more acceptable where there would have been a clear

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<sup>112</sup> See section [85].

<sup>113</sup> See also section [63], where Langa DCJ considered that: “[t]here is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children”. See also Skelton *Child Law in South Africa* (2009) 282; Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 23.

<sup>114</sup> Section 36 of the Constitution. See Cronjé and Heaton *South African Family Law* 1994 262; Van Bueren *The International Law on the Rights of the Child* (1995) 49 points out that from the “travaux préparatoires” it becomes evident that only under limited circumstances the “child's best interests” should not have preference. Van Bueren states furthermore that in states which have included the CRC in their national legislation and where it is averred that the interests of other parties are at stake or where other interests are in conflict with the “best interests of the child”, the burden of proof should rest on the parties who are of the opinion that those other interests prevail.

<sup>115</sup> [1999] 2 All SA 233 (C).

danger for society; for example because of a violence-related crime.

Another Constitutional Court case, where a primary care-giver was sentenced to imprisonment which obviously clashed with the best interests of her three minor sons is *S v M* (Centre for Child Law as amicus curiae).<sup>116</sup> M, a single mother of three sons aged eight, 12 and 16 was convicted of fraud in 1996. She was sentenced to a fine which was coupled with a term of incarceration, which was suspended for five years. In 1999 she was charged with fraud once more, and committed further fraud whilst being out on bail. In 2002 the Wynberg Regional Court convicted her on 38 counts of fraud and four counts of theft. Therefore she was sentenced to four years of imprisonment.

The Cape High Court granted leave to appeal and she was released on bail. The outcome was that the mother's sentence was converted to eight months' imprisonment after which the Commissioner for Correctional Services was able to authorise her release, but under correctional supervision.

Leave to appeal against this sentence to the Supreme Court of Appeal in Bloemfontein was denied. She then applied to the Constitutional Court for leave to appeal against, among others, the sentence of imprisonment as imposed by the High Court. The main question revolved around the best interests of the child, *in casu*, the three minor children: "what are the duties of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary care-giver of minor children?"

Sachs J deliberated that "[t]he ambit of section 28 of the Constitution was undoubtedly wide and that the comprehensive and emphatic language used in section 28 indicated that law enforcement [...] must always be child-sensitive". He furthermore considered that:

"[b]ased on the character of section 28, the latter presupposed that the sins and traumas of fathers and mothers should not be visited on their children. Section 28 required the law to make best efforts to avoid, where possible, any breakdown of family life or parental care [...] and where rupture of the family became inevitable, the state was obliged to minimise the

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<sup>116</sup> 2008 (3) SA 232.

negative effect on children as far as possible”.<sup>117</sup>

In referring to the fact that the paramountcy of the best interests of the child was not to be applied in a way that obliterated other valuable and constitutionally protected interests, he indicated that the standard was capable of limitation and that although paramount, this did not mean that the best interests were absolute.<sup>118</sup> Therefore he concluded that:

“[t]he paramountcy principle read together with the right to family care, required that the interests of the children to be affected receive due consideration. This did not mean the overriding of all other considerations, but rather that appropriate weight be given in each case to a consideration to which the law attached the highest value, namely, the interests of the children concerned”.<sup>119</sup>

In a recent criminal case at the Constitutional Court involving a child offender,<sup>120</sup> Cameron J sums it up:

“the fact that the child's interests are of 'paramount importance' does mean that these interests are 'more important than anything else, but not that everything else is unimportant’”. Therefore there is a possibility that other interests would outweigh the best interests of the child”.<sup>121</sup>

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<sup>117</sup> See also Skelton *Child Law in South Africa* (2009) 281 fn 96.

<sup>118</sup> See section [25] and [26]. See also Skelton (2009) 283.

<sup>119</sup> See section 42. The sentence of the High Court had subsequently been set aside and replaced by the order of the Constitutional Court. The latter order stated that the mother was sentenced to four years' imprisonment, the remainder to be suspended for four years on condition that she is not convicted of an offence which is committed during the period of suspension and of which dishonesty is an element. The order included a few other conditions pertaining to correctional supervision and the repayment of persons and entities which were defrauded.

<sup>120</sup> Although criminal law falls outside the ambit of this thesis, aspects relating to (civil) placement will nevertheless be referred to, for example, that placement always should be considered a measure of last resort. In *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 (CC), Cameron J mentioned that section 28(2) of the Constitution did not entirely preclude the possibility of child offenders to be sentenced to imprisonment, but that this always should be considered as a measure of last resort. See also Skelton *Child Law in South Africa* (2009) 284.

<sup>121</sup> Provided that section 36 of the Constitution is adhered to.

The balancing act by the court can be very intricate, especially where the rights or interests of more than one child are at stake.<sup>122</sup> It is submitted that “the best interests of the child” should be the guiding standard in every matter concerning the child; in other words that it receives paramount (supreme or utmost) consideration where a balancing of interests would take place, but that in the end after proper consideration of all the facts and circumstances, an equitable decision will be made. Moreover, for the purpose of openness and transparency in these important matters, written reasons should be provided<sup>123</sup> in order to explain to the parties involved (including children who are capable of understanding) why and how the court has come to its decision.

This will contribute to a better understanding and possible acceptance by the affected parties of the decision made by the court. It will also assist the parties in challenging a decision by lodging an appeal (rehearing) if possible,<sup>124</sup> or to have the decision reviewed, where the regularity of the procedure is challenged.<sup>125</sup> For the sake of justice and legal certainty, it is submitted that section 28(2) of the Constitution should be reformulated in line with the standard provided by Article 4 of the African Children’s Rights Charter.<sup>126</sup>

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<sup>122</sup> See also the case of *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2006 (6) SA 51 (W), in which the court found that the best interests of each child should be examined on an individual basis; also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 282; Heaton (2009) *Journal for Judicial Science*, 1

<sup>123</sup> Section 66 of the Children's Act 38 of 2005 determines that: “[s]ubject to the Promotion of Access to Information Act 2 of 2000, no person has access to children's court case records, except – (c) for the purpose of a review of appeal [...]”.

<sup>124</sup> The right to appeal exists only on the basis of an express statutory provision in a specific Act. For example: section 16A of the Child Care Act 74 of 1983, which provided for the possibility of an appeal “against any order made or any refusal to make an order in terms of section 11, 15 or 38(2)(a)”, or against the variation, suspension or rescission of such order, to the competent division of the High Court of South Africa”, or section 22 of the aforementioned Act, which provided for an appeal regarding an order of adoption, a rescission of an order of adoption and the refusal of an application for the rescission of an adoption order. Section 51 of the Children's Act 38 of 2005 provides: “any party involved in a matter before a children's court may appeal against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction”. For a distinction between appeal and review, see Burns & Beukes *Administrative Law under the 1996 Constitution* (2007) 278.

<sup>125</sup> See also Sloth-Nielsen “Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children’s Rights in South Africa” (1996) *Acta Juridica* 6 at 25, where she refers to the possibility of the best interests of the child standard to become a benchmark for review of all proceedings in which decisions are taken pertaining to children.

<sup>126</sup> Article 4 of the African Children’s Rights Charter states that the “best interests of the child

Alternatively, hereby an appeal is made to the courts, to take extreme care in applying the criterion “the child's best interests” and to give it due weight, and moreover, where the courts decide to outweigh the best interests of the child due to more important considerations, a more extensive duty to give reasons in the decision should be required for all courts dealing with the principle of “best interests of the child”.<sup>127</sup>

Another point which needs to be raised is the principle of a child's best interests in the context of African customary law,<sup>128</sup> especially since this legal system is generally applicable to the majority of the population in South Africa.<sup>129</sup> According to Van Bueren the CRC does not sufficiently accommodate customary law. Moreover, Viljoen is of the opinion that the CRC is the result of many compromises, thereby “sacrificing regional specificities”.<sup>130</sup> It can be derived from Article 1(3) of the African Children’s Rights Charter that any custom, tradition, cultural or religious practice which is inconsistent with the Charter will also be inconsistent with the duty of the state to protect the best interests of the child. In other words, on the basis of Article 4 of the African Children’s Rights Charter, providing for the best interests of the child-standard, cultural traditions and the like will not be accepted where they infringe on the internationally, regionally and nationally protected rights of children.<sup>131</sup>

Marriage is one of the criteria which determine a person's rights under customary law. The position of children depends on the fact whether the parents were married or not. Until the mother is married, a child belongs to the family of the mother. When a mother gets married, a child's mother is transferred from her own family to the family of her husband.

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shall be the primary consideration” and thus provides a higher standard than Article 3 of the CRC. The latter provision refers to “a” primary consideration. For a more detailed discussion, see section 2.2.1.4.

<sup>127</sup> See also *Jooste v Botha* 2000 (2) BCLR 187 (T) where Van Dijkhorst J indicated that “when judicial choices have to be made, judicial discretion exercised and public policy determined, this will be done with full recognition of the principles enacted in section 28”.

<sup>128</sup> See also Knoetze “The role of custom in the interpretation of the child's 'best interests' principle” 2002 *Obiter* 348-358.

<sup>129</sup> See Maithufi in Davel (ed.) “The best interests of the child and African customary law” *Introduction to Child Law in South Africa* (2000) 137.

<sup>130</sup> Viljoen also points out that this has contributed to a need for a regional Children's Charter with the focus on the needs and protection of the African child specifically. See Viljoen in Boezaart (ed.) *Child Law in South Africa* (2009) 335.

<sup>131</sup> Van Bueren (1995) 49. See also section 12 of the Children's Act as discussed in section 2.3.

Bride wealth, in other words *lobolo*, plays a central role in the completion of a marriage. Maithufi explains that the purpose of *lobolo*, among others, is to transfer the reproductive capacity of a woman to her husband's family.<sup>132</sup>

Where the husband initially acquired guardianship and custody over his children, this has changed in the course of time, since the courts have begun to consider the child's best interests.<sup>133</sup> With the coming into force of the interim Constitution,<sup>134</sup> which was replaced by the (final) Constitution<sup>135</sup> the child's best interests had to be applied by all courts in South Africa. In a discussion on "parental responsibilities and rights" as dealt with in the Children's Act,<sup>136</sup> Himonga<sup>137</sup> states that the principle of the child's best interests applies also to customary law and refers hereby to the interesting case *Hlophe v Mahlalela and Another*.<sup>138</sup> At the time Hlophe claimed custody (care) of his minor daughter who was living with her maternal grandparents, since the sudden death of her mother.

One of the arguments was the fact that Hlophe had not paid *lobolo*<sup>139</sup> in full at the time of his wife's death, which according to customary law could have consequences regarding the granting of care. Although the second respondent (the grandmother) stated that according to Swazi culture, if the mother of a child dies and the *lobolo* has not been paid in full, the child must go to the mother's mother, this was not proven on a preponderance of probabilities by the expert witness. What was clear was (1) that in custody matters the

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<sup>132</sup> Maithufi in Davel (ed.) 141. It is interesting to note that on the basis of section 3 of the Recognition of Customary Marriages Act 120 of 1998, "*lobolo*" is not explicitly mentioned as one of the requirements for the conclusion of a valid customary marriage. Nevertheless it is expected that *lobolo* will continue to serve as a requirement since it seems to be imbedded in most systems of customary law. See also Bekker *et al. Introduction to Legal Pluralism in South Africa* (2002) 62.

<sup>133</sup> Maithufi in Davel (ed.) 143.

<sup>134</sup> 200 of 1993.

<sup>135</sup> 1996.

<sup>136</sup> 38 of 2005.

<sup>137</sup> In "Children (minors)" *Wille's Principles of South African Law* (2007) 208.

<sup>138</sup> 1998 (1) SA 449 (D).

<sup>139</sup> Section 1 of the Recognition of Customary Marriages Act 120 of 1998, having effect since 15 November 2000, defines "*lobolo*" as the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabhaka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

interests of the child had to take precedence; and (2), that where parties concluded a marriage by civil rights after a customary marriage it imposed on the spouses a new personal status governed by the common law, with the result that the parent-child relationship was governed by the common law.

Although the outstanding amount of *lobolo* was tendered to respondent during the trial, it was plain that issues relating to the custody of a minor child could not be determined by the mere delivery or non-delivery of a certain number of cattle. The court stated in support of this, that “any doubt as to the applicable legal principles that might have existed in this regard was, in the view of the court, effectively removed by the section 30(3) of the interim Constitution”,<sup>140</sup> hereby referring to the paramountcy of the child's best interests which section is similar to section 28(2) of the present Constitution.<sup>141</sup> The court concluded that the matter should and would be decided only on the basis of what would be in the best interests of the minor.<sup>142</sup> According to Himonga, the Children's Act<sup>143</sup> “is clearly intended to institute a uniform system of parental responsibilities and rights for all children and leaves no legal scope for the application of a separate and distinct body of customary law on parental authority”.<sup>144</sup> However, on the basis of section 39(2) of the Constitution, the courts must “when interpreting any legislation, and when developing the common law or customary law, promote the spirit, purport and objects of the Bill of Rights”.

It is submitted that customary law definitely has a role to play, in fact, has to be developed, but it needs to be brought in line with the Bill of Rights in the Constitution.<sup>145</sup>

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<sup>140</sup> 200 of 1993, which provided as follows: “For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.”

<sup>141</sup> 1996, which replaced the interim Constitution on 4 February 1997.

<sup>142</sup> See also Bennett *Human Rights and African Customary Law* (1999) 100 and 106; Bennett *A Sourcebook of African Customary for Southern Africa* (1991) 291.

<sup>143</sup> 38 of 2005.

<sup>144</sup> Himonga in *Wille's Principles of South African Law* (2005) 208.

<sup>145</sup> See also Maithufi in Davel (ed.) “The best interests of the child and African customary law *Introduction to Child Law in South Africa* (2000) 145. It is agreed with Ngidi that customary law is “an active and integral part of the South African community”. However, the application of customary law will inevitably present some challenges to the courts. In the case of a dispute involving children where customary law plays a role, the court has to weigh the law



The Children's Act<sup>146</sup> refers explicitly to “the best interests of the child” standard in section 7 and 9, which both are part of Chapter 2 dealing with General Principles, and should be read with section 28(2) of the Constitution.<sup>147</sup> Moreover, section 9 also refers to the paramountcy of the best interests of the child, which section is formulated as follows:

“In 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”.

On the one hand, it is clear that one is dealing with the overall well-being of a child.<sup>148</sup> In order to focus on this, one should consider what would enhance the physical, emotional, intellectual, social, moral, spiritual, religious, cultural and economic well-being of a particular child.<sup>149</sup> On the other hand, it still allows for subjectivity and inconsistency in its application.

Section 7 of the Children's Act<sup>150</sup> deals with the best interests of the child standard in great detail:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors<sup>151</sup> *must*<sup>152</sup> be taken into consideration where relevant, namely -

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against the best interests of the child: Ngidi in *Child Law in South Africa* (2009) 242.

<sup>146</sup> 38 of 2005.

<sup>147</sup> Both sections 7 and 9 of the Children's Act 38 of 2005 have come into force on 1 July 2007. See Proclamation No. 13 of 2007 *Government Gazette* No. 28944 19 June 2006. See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 21.

<sup>148</sup> See also section 1 of the Children's Act 38 of 2005, where it is stated in the definition of “care”, under (b) that “care” in relation to a child includes, where appropriate - [...] to safeguarding and promoting the well-being of the child. See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 5.

<sup>149</sup> See the list in *Mc Call v Mc Call* 1994 (3) SA 201 (C). The importance of the last factor mentioned in the aforementioned case, namely “any other relevant factor” should be noted, which provides for flexibility, which is often needed. Also Van Heerden *Boberg's Law of Persons and the Family* (1999) 526.

<sup>150</sup> 38 of 2005.

<sup>151</sup> See also *McCall v McCall* 1994 (3) SA 201 (C).

<sup>152</sup> Own emphasis.

- (a) the nature of the personal relationship between -
  - (i) the child and the parents, or any specific parent; and
  - (ii) the child and any other care-giver or person relevant in those circumstances;
  
- (b) the attitude of the parents, or any specific parent, towards -
  - (i) the child; and
  - (ii) the exercise of parental responsibilities and rights in respect of the child;
  
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
  
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from both or either of the parents; or 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, culture or tradition;
  
- (g) the child's -

- (i) age, maturity and stage of development;
  - (ii) gender;
  - (iii) background; and
  - (iv) 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;
- (j) any chronic illness from which a child may suffer;
- (k) the need for the 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.

- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child”.

It is regrettable that for the sake of clarity and development the list does not conclude with “and any other relevant factor”. This omission, however, does not at all mean that the list is exhaustive.<sup>153</sup> It is submitted that this list is merely to be seen as a minimum standard. It has been pointed out<sup>154</sup> that when the decision is to be made regarding what is in the child's best interests, “the court must guard against relying on factors which infringe the constitutional rights of the child's parent(s)”, although those factors at the same time could play a role in establishing what is (or is not) in the best interests of the child.<sup>155</sup>

From the above it can be concluded that the legislation in South Africa on “the best interests of the child” standard as provided for in section 28(2) of the Constitution<sup>156</sup> in conjunction with section 9 and 7 of the Children's Act<sup>157</sup> would in principle, stand the test against the standard as set out in the CRC<sup>158</sup> and the African Children's Rights Charter.<sup>159</sup> Furthermore it is up to the courts to contribute to legal development in terms of section 39 of the Constitution.<sup>160</sup>

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<sup>153</sup> See also Cronjé & Heaton *South African Family Law* (2004) 159, commenting on clause 6(1) of the Children's Bill 70 of 2003.

<sup>154</sup> Cronjé & Heaton *South African Family Law* (2004) 159.

<sup>155</sup> Although there has been a shift in focus from the rights of parents to the rights of children (see for example, Van Heerden *Boberg's Law of Persons and The Family* 314), it is clear that court decisions should be in line with the Constitution and general human rights like dignity (respect), protection against unfair discrimination etc, unless there are justified reasons to the contrary.

<sup>156</sup> 108 of 1996.

<sup>157</sup> 38 of 2005.

<sup>158</sup> Article 3 of the CRC.

<sup>159</sup> Article 4(1) of the African Children's Rights Charter.

<sup>160</sup> See section 2.1.1. For the sake of completeness, the text of section 39 of the Constitution, on the interpretation of Bill of Rights, is as follows:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

### 3.1.3.2 Best interests in Dutch law

In the Netherlands “the best interests of the child” standard is in the Dutch Civil Code, referred to as “*het belang van het kind*”, and is extensively dealt with in the Dutch jurisprudence.<sup>161</sup> Interestingly enough, it is not explicitly mentioned as a general principle in the legislation.<sup>162</sup> It is, however, implicitly<sup>163</sup> and explicitly<sup>164</sup> referred to in various Articles in Book 1 of the Civil Code, dealing with the law of persons and family law. In the most recent *Concluding Observations* of the Committee on the Rights of the Child of January 2009,<sup>165</sup>

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- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
  - (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”.

<sup>161</sup> For example, LJN: BI5314, Gerechtshof's-Hertogenbosch, 14-05-2009. In this case the biological father of a child, who never exercised joint parental authority with the mother before, requested the court for joint parental authority, on the basis of Article 1:253c of the Civil Code. The court considered that the best interests of the child were the most important consideration, which interests is not to the disposal of the parties concerned. Therefore it was decided that the father was allowed to file a request pertaining to joint parental authority; LJN: BI5028, Rechtbank Arnhem, 18-05-2009, in which case the non-custodial parent, the father, whilst imprisoned, filed a request pertaining to contact with his child. This court decided to dismiss the request, due to the fact that contact was considered contrary to the weighty interests of the child; LJN: BH7593, Gerechtshof Leeuwarden, 17-03-2009, where the court considered that contact between the child and the biological father should be based on the interests of the child. In this case the court concluded that contact is contrary to the weighty interests of the child in terms of Article 1:377a(3)(d) of the Civil Code. In deciding whether or not a child should return to the biological parent, the first consideration should be what is in the best interests of the child concerned, and not the capability of the mother to care for her child, see LJN:BG5572, Rechtbank Groningen, 17-10-2008.

<sup>162</sup> Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 297.

<sup>163</sup> See for example Article 1:241(2) of the Civil Code, which states: “Where it is urgently and immediately necessary, in order to avoid serious danger to the moral or psychological interest or to the health of such child, the children’s court can assign an organisation, as referred to in Article 1, under f, of the Act on Child Care, with guardianship of the child. In such case the Council for Child Protection will within six weeks file an application to the court in order to obtain the relevant order.”

<sup>164</sup> See for example, Article 1:2 (fiction pertaining to an unborn child), see the discussion in section 3.1.1 above; or, Article 1:266 of the Civil Code: “Provided that it is not in conflict with the interests of the children, the court may relieve a parent of parental authority regarding one or more of his children, on the ground that he is unfit to fulfill his duty pertaining to care and upbringing.”

<sup>165</sup> UN Document CRC/C/NLD/CO/3 of 30 January 2009. This concerns the comments made by the Committee on the Rights of the Child regarding the report submitted by the Kingdom of the Netherlands by 6 March 2007, in terms of Article 44 of the CRC. See CRC/C/15/Add.227 of 26 February 2004, section 63, which contained the submission date for the third periodic

the Committee has expressed its concern that the best interests principle is not always codified in legislation affecting children or is formalised in proceedings. The Committee recommends that the Netherlands,

“take all appropriate measures to ensure that the principle of the best interests of the child [...] is adequately integrated in all legal provisions and applied in judicial and administrative decisions and in projects, programmes and services which have an impact on children.”<sup>166</sup> The Committee has nevertheless “welcomed the efforts toward attaching more importance to the best interests of the child in decisions concerning children”.

The “best interests of the child” is regarded as the key concept in Dutch child law and child protection law. The principle has two functions:

- (i) It is a general regulatory principle which serves as a legal focus point for the legislature, the courts, the parents and everyone working with children. In this regard reference should also be made to Article 6(2) of the CRC, which stresses the importance of ensuring the (continuous) development of the child.<sup>167</sup>
- (ii) The principle of the best interests of the child coincides with the legal position of the parents against interference with their parental authority. Generally speaking it is in the child's best interests to grow up in the care of his or her parents and that the parents are responsible for the child's care and upbringing. Therefore, any infringement needs to be justified,<sup>168</sup> properly motivated and should ultimately

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report by the Kingdom of the Netherlands.

<sup>166</sup> See section 29 of the UN Document CRC/C/NLD/CO/3 of 30 January 2009. The submission of the fourth periodic report by the Kingdom of the Netherlands was due by 6 March 2012, see section 85. The session of the Committee on the Rights of the Child during which this periodic report will be dealt with will probably only take place in the course of 2013 or 2014, see <http://www.rijksoverheid.nl/onderwerpen/kinderrechten>, last accessed on 6 October 2011.

<sup>167</sup> Above it was pointed out that Article 6 is one of the four general principles as identified by the Committee on the Rights of the Child. For a more detailed discussion, see section 2.2.1.5. For a discussion on the connection between the Articles 3 and 6 of the CRC and the other rights in the context of child protection measures, see Idsardi “Kinderrechten en de Jeugdzorg” (2010) (2) *Perspectief – Jeugdzorg & Kinderbescherming & Pleegzorg* 14-15. See also the following sections.

<sup>168</sup> This is also in line with Article 8 of the European Convention to which the Netherlands is a party.

serve the best interests of the child concerned.

The principle is not considered to stand on its own, especially in the case of interference with parental authority. In a case of a supervision order, relief of parental authority or deprivation of such authority, it is self-evident that the criteria of the relevant legal provision in Book 1 of the Civil Code have to be met.<sup>169</sup> In addition, the interests of the child should necessitate such child protection order. Thus, besides the general legal basis for interference by a public authority in the family life of parents and their child(ren), the best interests principle serves as a correction against the “automatic” application of the criteria as referred to in the legal provision as well.<sup>170</sup>

From the above it is clear that whether or not specific reference is made to “the best interests of the child” standard in any legislation pertaining to children, it is undoubtedly clear that Article 3 of the CRC is applicable when decisions regarding children are to be made. In other words, in all actions concerning children, the interests of the child shall be “a” primary consideration. As mentioned above, there is a possibility for certain provisions in the CRC to be “self-executing”, having “direct effect”, thus having binding force on anyone, without any intervention by the national legislature.<sup>171</sup> Article 3(1) is one of the Articles to be eligible for direct effect/application.<sup>172</sup>

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<sup>169</sup> See Article 1:254 of the Civil Code for the criteria pertaining to a supervision order; Article 1:266 of the Civil Code deals with relief of parental authority and Article 1:269 provides the criteria for the dismissal from parental authority. For an in-depth discussion, see chapter 4, dealing with child protection measures.

<sup>170</sup> See De Ruiter & Moltmaker *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht – Personen- en Familierecht* (1992) 538-539.

<sup>171</sup> Article 93 of the Constitution of the Netherlands states that: “Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.” Whether or not a provision in the Convention is “self-executing” will ultimately be decided by the court.

<sup>172</sup> According to Meuwise *et al.* 56, Article 3(1) of the CRC is self-executing, which can be derived from the wording of Article 3(1), its contents and the jurisprudence (despite the fact that Article 3(1) was not explicitly mentioned in the list of the ratification Act). Nevertheless, elsewhere at 56 it is indicated that the highest court in the Netherlands, the *Hoge Raad der Nederlanden* and the Judicial Division of the Council of State (*de Raad van State*) have not (yet) come to the same conclusion as to whether Article 3(1) of the CRC is indeed self-executing.

### 3.1.4 Participation of children

In Chapter 2 reference was made to the fact that the participation rights in the CRC form part of the four P's.<sup>173</sup> In addition, the right of the child to express views and to be respected for those views in terms of Article 12 is one of the four general principles,<sup>174</sup> as identified by the Committee on the Rights of the Child.<sup>175</sup> As mentioned earlier, the Committee issued a document in 2009 which specifically focuses on the right of the child to be heard, namely *General Comment No. 12* (2009).<sup>176</sup> The aim of this *General Comment* is to contribute to a better understanding of the contents of Article 12 and to provide insight in how to fully implement it for every child.<sup>177</sup>

Moreover, it was said that children, as legal subjects, are bearers of rights and duties.<sup>178</sup> It is evident that children need to be protected but that at the same time they have the right to

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<sup>173</sup> All the rights in the CRC can be accommodated under any of the four P's. The one under discussion are the participation rights, the other three P's entail provision rights, for example the right to health and health services (Article 24) or the right to education (Article 28); protection rights, for example protection from abuse and neglect (Article 19) or child labour (Article 32); and prevention rights, for example deprivation of liberty (Article 37(b)) or rehabilitative care (Article 39). See Mahery *Child Law in South Africa* (2009) 314.

<sup>174</sup> The other principles as identified by the Committee on the Rights of the Child are: non-discrimination (Article 2), the best interests of the child (Article 3) and the right to survival and development (Article 6). See *General Comment No. 12*, section 2 (UN Document CRC/C/GC/12).

<sup>175</sup> Any guidance on the application of these general principles and the interpretation of the CRC as a whole, is provided by the Committee in the Committee's *General Comments*.

<sup>176</sup> UN Document CRC/C/GC/12 of 20 July 2009.

<sup>177</sup> Melton has indicated that the need for the *General Comment* has come to the fore due to "(1) the ambiguity and expansiveness of the concept, at least as articulated in the CRC, (2) the nearly universal challenges in fully implementing the right, and (3) the central importance of the right to participation in the implementation of the CRC as a whole and in enhancement of the well-being of children and the communities of which they are a part", in "Background for a General Comment on the right to participate: Article 12 and related provisions of the Convention on the Rights of the Child" 2006 *Institute on Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child) 25. Although state parties have already in 2002 reaffirmed their commitment to the realisation of Article 12 of the CRC in their countries (Resolution S-27/2 "A world fit for Children", section 32), the Committee on the Rights of the Child has noted with concern that certain barriers impede the process of implementation of Article 12. See *General Comment No. 12*, section 4.

<sup>178</sup> See Kruger & Robinson *The Law of Children and Young Persons in South Africa* (1997) 18; Also Sloth Nielsen & Van Heerden in Davel (ed.) *Children's Rights in a Transitional Society* 114; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 276.



self-determination.<sup>179</sup> Melton indicates that respect for the privacy and (developing) autonomy is important to the self-differentiation of children and the development of their self-esteem.<sup>180</sup> Various Articles in the CRC acknowledge the importance of the development of children and the increase in their independence.<sup>181</sup> It is agreed with Liefwaard<sup>182</sup> that a child should be seen as an individual in development. This has obviously implications with regard to the level of protection a child needs, and simultaneously the level of participation a child should be entitled to. However, this is not only relevant with regard to the family.<sup>183</sup>

Naturally the relationship between parents or others and the child changes as the child grows older and matures.<sup>184</sup> The older and more mature a child becomes, the more independent the child becomes, and therefore the less direction and guidance is needed, and thus the responsibilities of parents (or others) decrease accordingly.

In order to give truly effect to Article 5 of the CRC<sup>185</sup> it is necessary to put more emphasis on the second aspect of this important Article, namely having regard for the evolving capacities

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<sup>179</sup> Human in Boezaart (ed.) *Child Law in South Africa* (2009) 261. See also section 2.2.2.2 above, on the child's evolving capacities.

<sup>180</sup> "Background for a General Comment on the right to participate: Article 12 and related provisions of the Convention on the Rights of the Child" (2006) *Institute on Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child) 17.

<sup>181</sup> For example Article 12, which gives the child the right to express its views freely in all matters affecting the child, and moreover, that the views of the child be given due weight (in accordance with the age and maturity of the child). Article 14, dealing with the freedom of thought, conscience and religion also refers to the role of parents and "the evolving capacities of the child", see Article 14(2) of the CRC.

<sup>182</sup> See also Liefwaard *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (2008) 31.

<sup>183</sup> Whether a child lives in a family environment or resides elsewhere on the basis of a placement order, or on a voluntary basis which is possible in the Netherlands, does not matter at all because these basic rights accrue to all children.

<sup>184</sup> See also Article 5 of the CRC which deals with the child's evolving capacities and calls upon the parents and family to support this.

<sup>185</sup> Article 5 of the CRC reads as follows: "States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention." For a more in-depth discussion, see section 2.2.2.2 above.

of children.<sup>186</sup> This basically entails the acknowledgement of the different stages of development which children pass through, whilst in addition accommodating (an increase in) the participation of children.<sup>187</sup> Therefore Article 5 is clearly linked with Article 12 of the CRC, and these Articles read together might call for a paradigm shift in some cultures.<sup>188</sup> In the present context namely, a shift in the responsibility of autonomous decision-making by adults towards the child, towards decision making which (increasingly) involves the child. After all, the views of children may add relevant perspectives and should be given consideration regarding any decision-making affecting the child. Moreover, their input is valuable regarding policy making and preparation and evaluation of existing laws.<sup>189</sup>

It is agreed with Melton that legal structures on a national level are needed to promote the participation of children and to ensure that children start to perceive themselves as valuable partners in the environment of which they form part and realise that they can make a difference.<sup>190</sup>

It is submitted that the term “environment” should be given the widest possible meaning and that participation should not be regarded as a mere formality but rather as a part of life, by children and adults alike. In other words, participation is of overall importance. However, in terms of the CRC, participation is even more pressing in a number of specific circumstances, of which the following are of particular importance for the purpose of this thesis; namely,

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<sup>186</sup> It is agreed with Van Bueren that if the international law on the rights of children to be truly meaningful and effective it should be able to respond to these stages of development, in *The International Law on the Rights of the Child* (1995) 50.

<sup>187</sup> The term “evolving capacities” has not been defined in Article 5 of the CRC. See Rehman *International Human Rights Law – A Practical Approach* (2003) 383. In section 84 of *General Comment No. 12*, it is pointed out that the child has the right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child. Where a child becomes more mature the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange of opinions on an equal footing.

<sup>188</sup> Especially in countries where children are rather “seen but not heard.” See Anderson & Spijker (2002) *Obiter* 365.

<sup>189</sup> See also *General Comment No. 12* (UN Document CRC/C/GC/12), section 12.

<sup>190</sup> See also Melton (2006) *Insitute on Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child) 29. It is submitted that this might require an adjustment in frame of reference of children and adults alike. In order to speed up the process of implementation of the right of participation, the adoption of structures which aim to facilitate participation should be a priority on the agenda's of state parties and other forums.

where the child may be separated from his or her parents against their will<sup>191</sup> or where a child has been deprived of his or her liberty in terms of a placement order.<sup>192</sup>

Article 12(1) of the CRC contains a few elements which have already been discussed in more detail.<sup>193</sup> In short, on the basis of this important provision every child-

- (i) Who is capable of forming his or her own views;<sup>194</sup>
- (ii) Has the right to freely express his or her views;<sup>195</sup>
- (iii) In all matters affecting the child;
- (iv) Which right shall be assured by state parties;<sup>196</sup>

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<sup>191</sup> See Article 9 of the CRC, which is discussed in sections 2.2.3.1 and 5.1.1.2.

<sup>192</sup> See Article 37(b) and (d) of the CRC, which provides for the right to challenge the legality of the deprivation of liberty. The latter provision is discussed in the sections 2.2.3.4 and 5.1.2. See also Melton (2006) *Insitute on Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child) 57.

<sup>193</sup> See section 2.2.1.6 above. For the purpose of convenience, Article 12 of the CRC reads:

“(1) States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

<sup>194</sup> It was discussed in section 2.2.1.6. that this should not be interpreted as a limitation. State parties are under the obligation to have the capacity of the child to form an opinion assessed, to the greatest extent possible. See also section 20 of *General Comment No. 12* (UN Document CRC/C/GC/12).

<sup>195</sup> To express a view freely means first of all that there is a choice whether or not to make use of the right one is entitled to. Furthermore it means to be able to express views without pressure, manipulation or undue influence. Lastly, children need to be encouraged to express truly the own views instead of the views of others, or stating what others would like to hear, in order to please them. The last aspect needs to be emphasised. It is submitted that it is the duty of the person assisting the child to be “on guard” with regard to the conditions and approach to be followed in which a child is going to express his or her views, especially where the “hearing” could possibly have a detrimental impact on the child. A child is a vulnerable person who should express his or her views in an environment where he or she feels secure and respected. See also *General Comment No. 12*, section 22 and 23.

- (v) These views be given due weight in accordance with the age and maturity of the child.

With regard to the first element, state parties should presume that a child does have the ability to form his or her own views. Therefore, ideally speaking, there should not be any age limit indicated on the exercise of this right. Pertaining to the second element, it is submitted that a child should be fully informed about what to expect, his or her role in the process including the decision-making, and to be informed of the choice to make use of the right or not and the consequences of that decision.

Once again, (reciprocal) communication is the key. When children feel that they are taken seriously, and are safe and secure, they will feel encouraged to indeed freely express themselves. The third element provides the basic condition that the child should be heard if the matter under discussion affects the child, which should be understood broadly.<sup>197</sup> The fourth element focuses on the obligation of the state parties to assure the right of the child to freely express his or her views. “In all matters affecting the child” places state parties under a serious obligation, which for the sake of legal certainty and consistency should be dealt with in legislation and policy-making.

The last element imposes the duty to give due weight to the views of the child, which implies that simply listening will not suffice. The age factor regarded on its own cannot determine the significance of the child's input.<sup>198</sup> This means that the capacity of the child needs to be assessed by the decision-maker, which in the absence of clear guidelines on how to establish maturity, creates leeway for the decision-maker to disregard (a part of) the input. It is submitted that it has to be communicated to the child, preferably in writing, how the views

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<sup>196</sup> State parties are obliged to recognise and implement the full content of Article 12 of the CRC. As mentioned above there is no discretion in this respect.

<sup>197</sup> The importance of a wide interpretation of “matters affecting the child or children” should not be underestimated. On this basis children could become more involved in social processes in their communities and society and provide decision-makers and policy-makers with important perspectives.

<sup>198</sup> See the discussion in section 2.2.1.6 above and also *General Comment No. 12*, section 28-30.

of the child have influenced the outcome of the process.<sup>199</sup>

Article 12(2) of the CRC imposes a duty on state parties to provide children the opportunity to be heard in, among others, any judicial proceedings, which includes family law matters such as the removal and placement of a child. The Committee on the Rights of the Child has specifically indicated that the main issues which require that the child be heard involve divorce and separation, separation from parents, and alternative care and adoption.<sup>200</sup> Moreover, the hearing of a child should take place either directly, or through a representative or an appropriate body and in a manner which is consistent with the procedural rules of the national law of the state party concerned. It should be reiterated that according to the Committee on the Rights of the Child, wherever possible, preference should be given to the direct hearing of children in any proceedings.<sup>201</sup> For the full implementation of Article 12 of the CRC, it is submitted that direct involvement of children is recommended across the board, since this minimises the risk of valuable input getting lost in the process. However, where a direct hearing is not feasible or possible it should be safeguarded that the views of the child are correctly presented by the representative, and the views of the child only.<sup>202</sup> In addition, more attention should be given to ensuring that the views are given due weight in accordance with the age and maturity of the child.

In the following paragraphs it will be explored what opportunities the national law of South Africa and the Netherlands have to offer to children in matters which affect them. Moreover, it will be attempted to establish whether or not the existing legislation in South Africa and the Netherlands live up to the standard as set by the CRC and the Committee on the Rights of the Child,<sup>203</sup> thereby ensuring the implementation of Article 12 and creating a culture of

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<sup>199</sup> Similar input was given by the Committee on the Rights of the Child in *General Comment No. 12*, section 33. In addition, where necessary this should provide for a possibility to have the outcome reviewed.

<sup>200</sup> See *General Comment No. 12*, sections 50-56. See also Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 103.

<sup>201</sup> See *General Comment No. 12*, section 35.

<sup>202</sup> The same applies to an interpreter. The representation exclusively focuses on the interests of the particular child. It is submitted that there is a need for more specific training on the representation of children and the hearing of children.

<sup>203</sup> See Melton (2006) *Insitute on Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child); also *General Comment No. 12 (CRC/C/GC/12)* of 20 July 2009.

respect for children and their views.<sup>204</sup>

### 3.1.4.1 Child participation in terms of South African law

For South Africa, the coming into operation of the Children's Act<sup>205</sup> meant an enormous leap forward towards the realisation of children's rights.<sup>206</sup> For a long time the saying, "a child should be seen and not be heard", was accepted in South African society.<sup>207</sup> Moreover, it has been argued that the child's right to be heard is not consistently exercised or implemented and thus not always realised,<sup>208</sup> which has been a matter of concern.<sup>209</sup> However, with a new and exciting legislative framework enhancing children's rights, there is only one way possible and that is the way forward.<sup>210</sup> The Children's Act contains many of

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<sup>204</sup> See specifically the requirements discussed in *General Comment No. 12*, which aim to contribute to the full realisation of Article 12 of the CRC.

<sup>205</sup> Specific sections of the Children's Act 38 of 2005 came into force already on 1 July 2007 [Proclamation No. 13 2007, *Government Gazette* No. 3003029 June 2007], whereas the remaining part of the Children's Act came into operation on 1 April 2010 [Proclamation No. R12 2010, *Government Gazette* No. 33076 26 March 2010].

<sup>206</sup> Technically speaking, the theoretical legislative framework is in place. The practical implementation, however, is still lacking. All relevant parties, including the legal profession still have to get used to all novelties brought by the Children's Act, which will take some time.

<sup>207</sup> Human rights and especially children's rights do not become entrenched in a society overnight. It is possible that this notion is still apparent in some cultural groups or circles of people. Melton has referred to the fact that a general threat to the implementation of the right to participation is the reluctance of many adults to make children become active participants in matters affecting them, in "Background for a General Comment on the right to participate: Article 12 and related provisions of the Convention on the Rights of the Child" (2006) *Institute of Family and Neighborhood Life* Clemson University USA (prepared for use by the United Nations Committee on the Rights of the Child) 15.

<sup>208</sup> See Carnelley (2010) *Obiter* 640. Heaton has averred that it is very rare for a child to express his or her views in court, in *South African Family Law* (2010) 168.

<sup>209</sup> Especially given the fact that South Africa committed itself to the CRC in 1995. South Africa has ratified the CRC on 16 June 1995, without reservations. See Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 90.

<sup>210</sup> However, Bekker has pointed out that some people, among others African, might have difficulty in understanding child participation, since the role of the fathers and their responsibilities are clearly entrenched in the various cultural systems. Moreover, the hearing of a child separate from his or her parents may have negative impact on the relationship between the parties. It is agreed that decision makers should sensitise themselves to the culture of the parties involved and therefore familiarise themselves with the thought patterns of parents (and children) involved, especially where the possibility of conflict (before or afterwards) exists. See Bekker (2008) *Obiter* 402. It is, however, difficult to grasp that these matters could result in the possibility for parents "to opt out of their parental obligations". Is it not most desirable for all children to know that they are loved unconditionally, no matter what?

the rights as provided for in the CRC and the African Children's Rights Charter, which is not particularly surprising, since South Africa is under the obligation to bring its legislation in line with the standards set in these international/regional documents.<sup>211</sup> The question is, however, how are the participation rights for children accommodated in the South African legislation, especially pertaining to Article 12 of the CRC?<sup>212</sup> First of all, reference has already been made to the rights in the Bill of Rights,<sup>213</sup> which, apart from a specific section on children,<sup>214</sup> also provides for a number of rights to which, generally speaking, all children are also entitled. Therefore the participation rights mentioned in the Constitution are in principle also applicable to children.<sup>215</sup> In terms of section 28(1)(h) of the Constitution, every child has the right:

“to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”.

Thus representation in civil proceedings is guaranteed, assigned and paid for by the state, but only as far as substantial injustice would be foreseen.<sup>216</sup> Not very satisfactory, since the right to express views, via any of the three possibilities in Article 12(2) of the CRC, thus including expressing views via a representative, should be available “in all matters affecting

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<sup>211</sup> It has to be kept in mind that South Africa is also a member state under the African Children's Rights Charter. In line with the present topic on the participation of children, Article 7 of the African Children's Rights Charter is of specific relevance. This has been dealt with under section 2.2.1 above.

<sup>212</sup> Apart from expressing views and having these views duly taken into account, Article 12(2) of the CRC demands specifically that a child's views should be heard in any of the following three ways, namely, directly, through a representative or an appropriate body.

<sup>213</sup> Chapter 2 of the Constitution, 108 of 1996.

<sup>214</sup> Section 28 of the Constitution.

<sup>215</sup> Children are also entitled to the other rights in the Constitution, except when a specific right would not be applicable because of the child's age. See Skelton *Child Law in South Africa* (2009) 265. Participation rights provided for in the Bill of Rights of the Constitution are: section 16 (freedom of expression), section 15 (freedom of religion, belief and opinion), section 17 (freedom of assembly, demonstration, picket and petition), section 18 (freedom of association), section 30 (language and culture), section 31 (cultural, religious and linguistic communities) and section 32 (access to information). Section 19 (political rights) concerns adult citizens, meaning from the age of eighteen. See the definition of “child” in the sections 2.2.1.2 and 3.1.1 above.

<sup>216</sup> See Zaal “When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution (1997) *SALJ* 335; also Zaal & Skelton “Providing effective representation for children in a new Constitutional era: Lawyers in the criminal and children's courts” (1998) *SAJHR* 541.

the child”. Due to vague terminology like “injustice”, which moreover is required to be “substantial”, it might be that a child will miss the boat with regard to access to legal representation. Moreover, Article 4(2) of the African Children’s Rights Charter demands that the child must participate through an “impartial” representative. Whilst it is agreed with Carnelley that children do not in all instances require separate legal representation at state expense,<sup>217</sup> the phrase “if substantial injustice would otherwise result” is somehow worrisome. It does not only lack clarity, but it also provides a limitation compared with the text and purpose of Article 12 of the CRC.

However, Schäfer indicates that case law provides some direction on when “substantial injustice” comes to the fore, thereby necessitating independent legal representation for children. In this respect he distinguishes between litigation involving constitutional matters,<sup>218</sup> older children, some members of a wider group,<sup>219</sup> and unusual complicated family disputes.<sup>220</sup> With regard to the latter category, reference should be made to the case *Legal Aid Board v R*<sup>221</sup> which revolved around the appointment of a separate legal representative for a child by the Legal Aid Board. In this case a 12-year-old girl had been subjected to a custody battle since the age of five. In desperation the child approached Child Line for help due to the fact that her views and wishes were not respected by her parents. With the assistance of Child Line and the Centre for Child Law, a legal representative was appointed by the Legal Aid Board.

However, the mother contested the appointment, averring that she, as the guardian of the child, should have been approached and that it should be the guardian or the court who

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<sup>217</sup> See (2010) *Obiter* 644.

<sup>218</sup> For example, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), which dealt with the prohibition of corporal punishment in schools; *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC), in which case a high school refused to give a learner permission to wear a nose stud.

<sup>219</sup> For example, *Seodin Primary School v MEC of Education, Northern Cape* [2006] 1 All SA 154 (NC), in which case a group of parents challenged the decision of the MEC to change certain Afrikaans medium schools into dual English and Afrikaans medium schools. In this case only some children were represented, whilst representation should have been available to all children whose rights were at stake.

<sup>220</sup> See Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 146-147.

<sup>221</sup> 2009 (2) SA 262 (D).



appoints a separate legal representative for the child. The court deliberated that issues about residence or which parent is to care for a child are of crucial importance to a child, and that therefore the views of the child were to be considered of vital importance. Wallis AJ held,

“[W]here the court comes to the conclusion that the voice of the child has been drowned out by the warring voices of her or his parents, it is a necessary conclusion that substantial injustice to the child will result if he or she is not afforded the assistance of a legal practitioner.”<sup>222</sup>

In terms of section 3 of the Legal Aid Act,<sup>223</sup> the Legal Aid Board is charged with the duty to provide legal representation at state expense, as set out in the Constitution.<sup>224</sup> Paragraph 4.18.1 of the *Legal Aid Guide* (2012) provides the following criteria in order to establish “if substantial injustice would otherwise result”:

- (a). The seriousness of the issue for the child, for example, if the child's constitutional rights or personal rights are at risk;
- (b). The complexity of the relevant law and procedure;
- (c). The ability of the child to represent himself or herself effectively without a lawyer;
- (d). The financial situation of the child or the child's parents or guardians;
- (e). The child's chances of success in the case;
- (f). Whether the child has a substantial disadvantage compared with the other party in the case.

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<sup>222</sup> See [par. 20].

<sup>223</sup> 22 of 1969.

<sup>224</sup> See section 1.1 of chapter 1 “Legal Aid South Africa Mandate and Structure” (2012) *Legal Aid Guide* 23.

Where the above criteria are met, the child should get legal aid, provided that Legal Aid South Africa has the necessary resources and the other requirements in the *Legal Aid Guide* are met.<sup>225</sup> For a long time the question has been how children could, practically speaking, obtain legal representation through a court if they required legal representation to approach a court in the first place. The developments in the case law, combined with the recent *Legal Aid Guide(s)*, have contributed to a major step forward in realising legal representation for children.

However, the question remains as to what kind of representation is required in terms of section 28(1)(h) of the Constitution. As will be seen later, it can be derived from the case *Soller NO v G and Another*<sup>226</sup> that the Family Advocate is not a suitable medium for legal representation. The Family Advocate is required to investigate the family matter or dispute and needs to present a neutral report containing recommendations to the court pertaining to the best interests of the child(ren).<sup>227</sup> On the other hand, whereas a legal representative, among others, represents the views of his or her client,<sup>228</sup> a *curator ad litem* has a broad mandate. It is therefore submitted that the latter two cannot be equated.<sup>229</sup> In other words, the functions of a Family Advocate, a legal representative and a *curator ad litem* need to be distinguished. The importance of child participation was highlighted by the Constitutional Court in the case *Christian Education South Africa v Minister of Education*,<sup>230</sup> in which it was argued that the law prohibiting corporal punishment in schools limited the parents' right to freedom of religion. Sachs J indicated that he deplored the absence of someone to state the

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<sup>225</sup> For example, a means test is applicable, subject to some "child friendly" rules. Where a child is not assisted by his or her parents, then the child's means will be considered. It is interesting to note that where parents can afford to provide legal representation for the child and yet fail, refuse or neglect to do this, then legal aid will be provided to the child if substantial injustice would otherwise result. If this happens, Legal Aid South Africa may under certain circumstances, institute proceedings against the parents or guardians in order to recover these costs. See 2012 *Legal Aid Guide* 66.

<sup>226</sup> 2003 (5) SA 430 (W), as discussed below.

<sup>227</sup> See Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 108.

<sup>228</sup> Carnelley has provided an overview of the role of a legal representative for the child, which should amount to "best-interest" legal representation. The latter is child oriented and not merely limited to informing the court on the views of the child is required but is extended to guiding and informing the child. It is submitted that specifically trained persons are required to assist children in need of representation and who are willing to go the extra mile in this regard. For a more detailed discussion, see Carnelley (2010) *Obiter* 649-652.

<sup>229</sup> See also Boezaart & De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" (2011) (2) *De Jure* 423.

<sup>230</sup> 2000 (4) SA 757 (CC).

views of the children and held:

“The children concerned were from a highly conscientised community and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator [*ad litem*] could have enabled their voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.”<sup>231</sup>

In terms of common law a curator *ad litem* may be appointed to safeguard the interests of the child on the basis of four established grounds; namely, when the child is without parents or guardian, a parent or guardian cannot be found or is not available, the interests of the child are conflicting with those of the parent or guardian or where such conflict is anticipated, or the parent or guardian unreasonably refuses to assist the child.<sup>232</sup> Boezaart indicates that in the past few years curators *ad litem* also have been appointed for reasons other than the limited four grounds as mentioned above.<sup>233</sup>

For example, in *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*,<sup>234</sup> the court had to decide on the joint adoption by a same-sex couple. The court held that,

“where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children”.<sup>235</sup>

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<sup>231</sup> See also Anderson & Spijker (2002) (23) *Obiter* 372; Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 96-97.

<sup>232</sup> See Davel in Nagel (ed.) 2006 *Gedenkbundel vir JMT Labuschagne* 25; Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 108-109; also Boezaart & De Bruin “Section 14 of the Children’s Act 38 of 2005 and the child’s capacity to litigate” 2011 (2) *De Jure* 422.

<sup>233</sup> See 2-19. *Commentary on the Children’s Act* (2012)

<sup>234</sup> 2003 (2) SA 198 (CC).

<sup>235</sup> See Boezaart in *Commentary on the Children’s Act* (2012) 2-19.

In *S v J*<sup>236</sup> even the Supreme Court of Appeal decided on the appointment of a curator *ad litem*, based on the fact that the most recent information about the child was required in order to be able to decide on a care and contact matter.<sup>237</sup> Conversely, where the court is of the opinion that there is sufficient information available about the children, it may decline the request for the appointment of a *curator ad litem*.<sup>238</sup> It is submitted though, that this should not be concluded easily. In this regard, the Constitutional Court held that in case there is any doubt pertaining to the well-being of the children concerned, it may be necessary to appoint a curator *ad litem*.<sup>239</sup>

According to Du Toit, the practice of appointing curators *ad litem* has not been limited to merely ensure the protection of the interests of children, but also in the light of ensuring the child(ren)'s right to participate in matters affecting them, which is commendable.<sup>240</sup> Moreover, in a recent case involving the removal and placement of a number of children, a curator *ad litem* was appointed in order to investigate the circumstances and to advise on the best interests of the children concerned. It is submitted that the appointment of a curator *ad litem* in this case was most welcome, given the fact that the placement does not only have major impact on their lives, but also due to the fact that these children are not always noticed, especially not where the matter before the court does not deal with the (extension of) their individual placement.<sup>241</sup>

In serious matters like care and protection proceedings, children are particularly vulnerable and therefore might require assistance. Especially where their parents cannot offer, refuse or ignore this need, children should be able to have easy access to representation. However, according to Schäfer, the boundaries between the functions of a curator *ad litem*

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<sup>236</sup> (695/10) [2010] ZASCA 139 (19 November 2010).

<sup>237</sup> See Boezaart in *Commentary on the Children's Act* (2012) 2-19.

<sup>238</sup> In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

<sup>239</sup> See *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

<sup>240</sup> In Boezaart (ed.) *Child Law in South Africa* (2009) 97.

<sup>241</sup> See *MEC for Social Development, KwaZulu Natal v Patricia Dawn Irons NO and Others: KwaZulu Natal* case no 5919/12, KwaZulu Natal High Court, Pietermaritzburg, in which case children had been removed from a children's home to other places, due to the fact that it had been closed down by the government. See Boezaart in *Commentary on the Children's Act* (2012) 2-19.

and a legal representative still require the necessary clarification.<sup>242</sup> It is therefore recommended that, as a matter of urgency, professional guidelines be finalised pertaining to the appointment and discharge of duties of both a curator *ad litem* and a legal representative.<sup>243</sup>

In addition, more publicity should be given to these respective professions and how to obtain such assistance.<sup>244</sup> The (repealed) Child Care Act<sup>245</sup> did not sufficiently provide for the participation of children, and mainly revolved around children in need of care, adoption cases and absconder's inquiries.<sup>246</sup> When the Child Care Amendment Act was passed in 1996, section 8A was supposed to provide for legal representation for children in children's court proceedings for the first time in South Africa,<sup>247</sup> but has never come into operation.

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<sup>242</sup> Although in a few cases it was decided to join children as parties to the proceedings, in which case the representative acted more like a representative of a party to litigation instead of a *curator ad litem*, in *Child Law in South Africa – Domestic and International Perspectives* (2011) 149.

<sup>243</sup> See also Carnelley (2010) *Obiter* 644 and further. It is interesting to note that in the Netherlands the office of the Kinderombudsman recently has indicated the need for guidelines pertaining to the appointment and functions of a special curator in terms of Article 1:250 of the Civil Code, see the report “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 50-51.

<sup>244</sup> Apart from children, parents, guardians and the public, a wide range of professionals should also be (come) well informed about this, for example, social workers and psychologists.

<sup>245</sup> 74 of 1983.

<sup>246</sup> At the hearing in terms of section 38 of the Child Care Act 74 of 1983, the Commissioner of Child Welfare had to interrogate the child on the reasons why he or she had run away from the institution or whilst being in custody on the basis of a court order. See also Zaal in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 101.

<sup>247</sup> See Sloth-Nielsen & Van Heerden *Stell LR* 262. Section 8A, providing for legal representation, read as follows:

- (1) “A child may have legal representation at any stage of a proceeding under this Act.
- (2) A children's court shall 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.
- (3) A children's court may approve that a parent may appoint a legal practitioner for his or her child for any proceeding under this Act, should the children's court consider it to be in the best interest of such child.
- (4) 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.
- (5) If a children's court makes an order referred to in subsection (4), the clerk of the children's court shall request the Legal Aid Board, established under section 2 of the

Section 8A(4) of the Child Care Amendment Act<sup>248</sup> stated that a children's court could order that legal representation be provided at state expense, where the children's court considered this to be in the best interest of the child.<sup>249</sup> One point of critique pertaining to section 8A had to do with the domineering role of the children's court who would determine whether or not representation for the child would be desirable.<sup>250</sup> Moreover, there was nothing in section 8A about hearing a child directly, never mind about a duty to give the expressed views due weight, even if these views are expressed via a representative. On the basis of this, it is submitted that section 8A of the Child Care Amendment Act would probably not have met the standard provided for in Article 12 of the CRC.<sup>251</sup>

With regard to matters pertaining to divorce, the Mediation in Certain Divorce Matters Act<sup>252</sup> provides for the involvement of a Family Advocate in order to look after the best interests of the child. Although the name of the Act suggests mediation take place, there seems to be some discrepancy between the title and the contents of the Act - the Family Advocate is expected to inform the court on the circumstances and interests of a child of divorcing or divorced parents, whilst real mediation is different in approach.<sup>253</sup> In terms of section 4 of

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Legal Aid Act, 1969 (Act No. 22 of 1969), to appoint a legal practitioner to represent the child.

(6) (a) After the appointment of a legal practitioner referred to in subsection (5), the children's court shall refer the matter to the Legal Aid Board for evaluation and a report thereon [...].”

<sup>248</sup> 96 of 1996.

<sup>249</sup> Section 8A was intended to be read in conjunction with Regulation 4A of the Child Care Regulations. Neither section nor regulation have (ever) come into operation. See also Sloth-Nielsen & Van Heerden (1996) *SAJHR* 250; See Zaal “When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution” 1997 *SALJ* 335; also Van Heerden *Boberg's Law of Persons and The Family* (1999) 618.

<sup>250</sup> See also Sloth-Nielsen & Van Heerden (1996) *SAJHR* 650-651, where the authors indicated that legal representation was still discretionary. They also stated that the Act [Child Care Amendment Act 96 of 1996] would not necessarily mean an increase in child representation in the children's court due to the “overt emphasis on cost considerations”.

<sup>251</sup> Sloth-Nielsen & Van Heerden also pointed out that the right to be heard extends beyond granting children an opportunity to state their case in children's court proceedings. Mechanisms should be put in place to ensure that children's views are heard when, for example, inspections of places of safety or children's homes take place and when placement decisions are amended. (1996) *SAJHR* 264.

<sup>252</sup> 24 of 1987.

<sup>253</sup> For a definition on mediation, see section 2.2.1.7 above. See also Ashley Phillips *The Mediation Field Guide – Transcending Litigation and Resolving Conflicts in Your Business or Organization* (2001) 7; See also *Soller NO v G and Another* 2003 (5) SA 430 section [22],

the Act, the Family Advocate shall institute an enquiry in order to enable him or her to furnish the court with a report and recommendations on the welfare of the child concerned.<sup>254</sup> The court, in turn, will take a decision after having considered the report of the Family Advocate.<sup>255</sup> At such an enquiry the Family Advocate will obviously have to ascertain the wishes of the child concerned. However, no (legal) provision is made for hearing the child directly.<sup>256</sup>

Furthermore, although section 6(4) of the Divorce Act<sup>257</sup> gives discretion to the court to appoint a legal practitioner to represent a child at divorce proceedings, Carnelley points out that the latter provision has not been of much significance in practice.<sup>258</sup> The reason for the latter lies in the assumption that the report of the Family Advocate sufficiently represents the opinions of the children concerned. The distinction between the respective functions of the Family Advocate and a legal practitioner appointed in terms of section 28(1)(h) of the Constitution came to the fore in the case *Soller NO v G and Another*.<sup>259</sup> In this case a 15-

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where it is indicated that the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court. It is submitted that an important question should be dealt with: could it be that the child's best interests will be compromised in the process?

<sup>254</sup> Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 deals with the powers and duties of Family Advocates. It reads as follows: "(1) The Family Advocate shall -

- (a) after the institution of a divorce action; or
- (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court. [...]."

<sup>255</sup> It has to be emphasised that the court is not bound by the recommendations of the Family Advocate.

<sup>256</sup> See Anderson & Spijker in Okpaluba (ed.) *Law and Contemporary South African Society* (2004) 114.

<sup>257</sup> 70 of 1979.

<sup>258</sup> On the basis of section 6(4) of the Divorce Act 70 of 1979, the court may order the parties or any one of them to pay the costs of the representation. See Van Heerden in *Boberg's Law of Persons and the Family* (1999) 517. It has been argued that the fact that the parties had to carry the financial burden for the legal representation of their child(ren) in effect meant that such assistance was only available where the parents were in the position to afford it, by Carnelley (2010) *Obiter* 642.

<sup>259</sup> 2003 (5) SA 430 (W).

year-old boy, being assisted in his application, sought variation of a custody order for the reason that he wanted to live with his father.

The judgement dealt, *inter alia*, with the distinction between a legal practitioner appointed in terms of section 28(1)(h) of the Constitution and the office of the Family Advocate. Satchwell J held that:

“the Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer [the court], whilst the legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child”.<sup>260</sup>

From this distinction it can be derived that the Family Advocate would thus not be suitable to represent a child. The Family Advocate is required to be neutral in order to be able to institute an enquiry and subsequently submit a report and recommendations to the court.<sup>261</sup> It should be noted that given the fact that the decision of the court is based on the Family Advocate's report, or in some instances the input of a legal representative, the “hearing of the child” would thus generally take place indirectly.<sup>262</sup>

The South African courts have, in deciding which parent should be granted custody [care] of a child after divorce, not been very consistent in regarding the views of the child as of importance and giving due weight to those views. Sometimes the courts did not even bother to establish any preference of the child(ren),<sup>263</sup> and at other times the court did not give much weight to the child's preference, because the court realised that as children grow up

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<sup>260</sup> See *Soller NO v G and Another* 2003 (5) SA 430 section [27]. In addition, Satchwell J pointed out, that the legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece [section 27].

<sup>261</sup> See Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 108.

<sup>262</sup> In fact, in the case *F v F* (2006 (3) SA 42 (SCA) par 25-26, the Supreme Court of Appeal indicated preference for taking cognizance of the child's views indirectly via expert evidence. See Carnelley 2010 *Obiter* 641.

<sup>263</sup> In *Stock v Stock* 1981 (3) SA 1280 (A), the court did not even inquire into the views of the children (aged 14 and 17), since no great weight could be attached to the children's preference.



their perspectives change.<sup>264</sup> Some courts, however, do value the right of children to express views and give these views due weight in accordance with the age and maturity of the child concerned.<sup>265</sup> The factor age is normally relatively easy to determine,<sup>266</sup> although not too much emphasis should be placed on age alone in determining the weight to be attached to the child's views.<sup>267</sup>

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<sup>264</sup> See *Greenshields v Wyllie* 1989 (4) SA 898 (W). Flemming J deliberated that “at the age of twelve and fourteen it is particularly difficult to know who you are and where you are going and where you belong. Everyone knows that. I may add that I have four daughters. It is understandable that they may resent certain things, and that they may not like Southbroom [a holiday resort on the Natal South Coast], or at times not even their mother or their grandmother and at times not even their best boyfriend. That is normal. But the court also knows that as time goes by their own perspective changes ... It is therefore, not that the court simply ignores their desire but, as a father sometimes tells a child 'no', the court, as the children's super father, can tell both them and their father and mother 'no' when it is necessary”. See Schäfer *The Law of Access to Children* (1993) 53; In *Children's Rights* in Keightley (ed.) (1996) 112, Palmer has rightfully warned against the subjectiveness of the assessment of the courts, and the aforementioned court in particular, of what would be in the child's best interests where a child had expressed his or her preference. Also Van Heerden *Boberg's Law of Persons and the Family* (1999) 541; See also Robinson & Ferreira “Die reg van die kind om gehoor te word: Enkele verkennende perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)” (2000) *De Jure* 55.

<sup>265</sup> See *Van Deijl v Van Deijl* 1966 (4) SA 260 (R), where the court held that in the case of older children, their wishes could not be ignored. In *French v French* 1971 (4) SA 298 (W) and *Manning v Manning* 1975 (4) SA 659 (T) the court said where the child reaches the age of discretion, its personal preferences may also weigh with the court. See also *Märtens v Märtens* 1991 (4) SA 287 (T), where the court deliberated that, if the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards the relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to this expressed preference in which the children's views were taken into consideration. In *Meyer v Gerber* 1999 (3) SA 650 (O), due weight was attached to the preference of the child (aged 15).

<sup>266</sup> It has to be kept in mind, however, that in some parts of South Africa not all children are necessarily registered in the Birth Register at the Department of Home Affairs. Moreover, where parents have left or died, children are more and more left on their own with their siblings, if there are any, forming so-called child-headed households. In these circumstances birth certificates are often not readily traceable. For a discussion on child-headed households, see section 5.3.1.1.1 below.

<sup>267</sup> See also Schäfer *The Law of Access to Children* (1993) 55; also Van Heerden *Boberg's Law of Persons and The Family* (1999) 542; moreover, see *General Comment No. 12* (2009), on the right of the child to be heard. In section [29] the Committee on the Rights of the Child has pointed out that “age alone cannot determine the significance of the child's views, since their level of understanding are not uniformly linked to their biological age”. Since the development of a child to form a view differs from the overall environment and experiences a child has been exposed to, this differs from child to child and therefore the views of a child have to be assessed on an individual basis, in other words a case-by-case examination.

Maturity in the light of Article 12 of the CRC means the capacity of a child to express his or her views on matters in a reasonable and independent manner. It is agreed with the Committee on the Rights of the Child that the more impact a decision will have on the child's life, the more relevant an appropriate assessment of the child's maturity will be.<sup>268</sup> In *I v S*,<sup>269</sup> the applicant [the father] and respondent had been married in terms of Islamic law. When the marriage dissolved, the parties came to an agreement in which issues relating to property, maintenance and access to the parties' minor children were settled. The father exercised irregular access to the children which came to an end about four years after the dissolution of the marriage. The father then applied in terms of section 2 of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997<sup>270</sup> to have a part of the agreement relating to access made an order of court. The court requested the Family Advocate to institute an enquiry concerning the circumstances of all persons involved, which included a psychological evaluation by a psychiatrist specialising in child psychiatry.

The report of the Family Advocate stated that the children presented “blatant antagonism” toward the father. Moreover, the psychiatrist was of the opinion that enforcing access would only serve to increase the anger and hostility of the children towards their father. A very important question came to the fore: what weight must be attached to the wishes of the children? After referring to existing case law, Erasmus AJ held that the Act [Natural Fathers of Children Born Out of Wedlock Act 86 of 1997] recognised that the applicant had a right of access to the children if it was in their best interests. Furthermore, he stated that it was generally to the advantage of a child to have communication with both its parents unless there were factors present which would indicate the opposite. It was also mentioned that on the basis of the relevant Act [which was repealed on 1 July 2007], due weight had to be attached to the wishes of the children.

Erasmus AJ concluded that the relevant children appeared to be sufficiently mature and old enough to give an independent opinion as to their refusal to have contact with their father [at the time they were 20, 17 and 14 years old], and that their wishes had to be respected.

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<sup>268</sup> *General Comment No. 12* (2009), the right of the child to be heard, section [30].

<sup>269</sup> 2000 (2) SA 993.

<sup>270</sup> This Act was repealed on 1 July 2007, when the first part of the Children's Act 38 of 2005 came into operation. See Proclamation No. 13, 2007. Government Gazette No. 28944 19 June 2006.

Therefore the application of the father was dismissed. It is submitted that it cannot be over-emphasised that all decisions pertaining to children have to serve their best interests and that this should be the decisive factor.<sup>271</sup>

As mentioned before, the Children's Act instructs regarding matters involving children to follow an approach which is conducive to conciliation and problem-solving,<sup>272</sup> which, it is submitted, unquestionably calls for true participation of children. Whilst section 7 of the Children's Act provides for at least 23 factors for establishing the best interests of the child,<sup>273</sup> it is regrettable that it does not refer to the participation of children at all.<sup>274</sup> However, sections 10 and 61 provide explicitly for child participation. Section 10, dealing

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<sup>271</sup> This is also in line with section 9 of the Children's Act, which provides that "in all matters concerning the care, *protection and well-being of a child* [own emphasis], the standard that the child's best interest is of paramount importance, must be applied". A problem arises where an adult (parents or the court) may find something to be in a child's best interests and the child is unwilling to cooperate. Whose decision will be decisive? The factors age and maturity will immediately come to the fore in order to determine how much weight can be given to the child's opinion. Other, but related questions come up: can children really be forced to have contact with the other parent? And would such be in their best interests?

What in cases of the so-called parental alienation syndrome, where the one parent deliberately, or not, works against a relationship between the child and the other parent. What about the situation where a parent suffers from a psychological disorder, like a borderline personality syndrome, which negatively impacts on the relationship between the child and the other parent. After having had contact with the one parent, the child has to face the other parent at home who possibly makes life difficult for the child after his or her return. This however, happens behind closed doors and due to a loyalty conflict of the child, he or she will not easily admit to the potential or existing problems. To take it even further, where for example the father and children are willing to have contact, but the mother tries to prevent this at all cost, even alleging sexual abuse of the father with the child(ren). How to deal with such a matter? It is submitted that serious allegations like sexual abuse or domestic violence always should be investigated and that the safety and the interests of the child(ren) always should come first, even though this might be hurtful and unjust for an innocent parent and the family. If at all possible, there should be no risk or chance of allowing a damaging environment or situation to perpetuate for a child. See also the discussion below on the Netherlands, where some courts decided to make a supervision order in case of an uncooperative custodian parent, in order to enforce contact between the non-custodian parent and the children.

<sup>272</sup> Section 6(4)(a) of the Children's Act.

<sup>273</sup> It is interesting to note that Chetty J in the recent case of *HG v CG* 2010 (3) SA 352, deliberated that "although the best-interests-of-the-child standard recognises that the capacity of the parents to provide for the needs of children [section 7(1)(c) of the Children's Act] is an important consideration, it is but one of a host of factors which together with others require evaluation". [See par 18].

<sup>274</sup> See also Carnelley (2010) *Obiter* 643. Compare to the factors mentioned in *McCall v McCall* 1994 3 SA 201 (C), where under factor (k) is listed "the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration".

with child participation,<sup>275</sup> is placed in Chapter 2 of the Children's Act, which contains the general principles of the Act. Section 10 of the Children's Act reads as follows:

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

Whilst Article 12 of the CRC only requires a child to be “capable of forming his or her own views” in order to be entitled to express views, section 10 of the Children's Act contains three criteria<sup>276</sup> to enable a child to participate, which requires a factual assessment of the child's capacity.<sup>277</sup> In order to establish whether a child is indeed able to participate, any of the following three criteria will do: age, maturity and stage of development.<sup>278</sup> However, no age limits are given<sup>279</sup> and since section 10 states “in any matter concerning the child” no specific limitations are set.<sup>280</sup> This provides for a flexibility that will hopefully be acknowledged as such by the courts and other decision-makers in order to involve children

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<sup>275</sup> In *HG v CG* 2010 (3) SA 352, Chetty J referred to the fact that “the Act [Children's Act 38 of 2005] brought about a fundamental shift in the parent/child relationship, from that which prevailed in the pre-constitutional era, and now not only vests a child with certain rights, but moreover gives a child the opportunity to participate in any decision-making affecting him or her” and “thus section 10 of the Act explicitly recognises a child's inherent rights [to participate] in any matter affecting him or her”. [See [par 6]].

<sup>276</sup> In *HG v CG* 2010 (3) SA 352, Chetty J referred in his conclusion to the factors age and level of maturity of the children, which enabled the children [aged fourteen and eleven] to make an informed decision and therefore dismissed the application [par. 23 and 24]. This case dealt with an application for the variation of a joint custody [care] award made under the divorce settlement agreement in 2006. Applicant [the mother] wished to change the present joint physical custody arrangement with the father of the children into being awarded the primary care of the children so that they could relocate with her abroad. The children stated unanimously and unambiguously on several occasions that they preferred the situation to remain as it was and that they did not want to have to miss their father. It is interesting to note that Chetty J found that the applicant's experts had neither properly considered nor accorded due weight to the opinion and attitude of the children concerned [par. 21].

<sup>277</sup> See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 164.

<sup>278</sup> Maturity can be considered as overlapping with stage of development. However, where stage of development is linked with age [categories], it is submitted that the first-mentioned differs from maturity.

<sup>279</sup> This is in line with *General Comment No. 12* (2009), the right of the child to be heard, section [21].

<sup>280</sup> See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 25.

more in decision-making which affects these children.<sup>281</sup>

Moreover, it is important to note that section 10 merely states that participation is required to take place “in an appropriate way”, whilst Article 12 of the CRC provides for three options, namely, directly (which is preferred by the Committee on the Rights of the Child)<sup>282</sup>, through a representative, or an appropriate body. It is clear that the phrase “in an appropriate way” gives much discretion to the court or other decision-maker. It is submitted that in this respect the present formulation of section 10 is not specific enough since it merely states that “every child has the right to participate” but does not specify “how”. It is submitted that the wording of section 10 in this regard needs to be amended in order to guarantee the right to participate to children who are capable of doing so.<sup>283</sup> Where Article 12 of the CRC requires “the views of the child being given due weight in accordance with the age and maturity of the child”, section 10 simply demands that views expressed by the child must be given due consideration.

It is submitted that a decision-maker cannot hide behind the factors “age and maturity” for not having to give due consideration to the expressed views of the child. The peremptory language in section 10 is unambiguous; the court or other decision-maker has to give due consideration to the input given by the child. However, this does not mean that the wishes of the child will always be fulfilled, in other words, that a child will always get what he or she wants.

A holistic approach is recommended for the court or other decision-maker, which means that all relevant aspects need to be taken into account in order to make a balanced decision. In this regard Schäfer suggests that it would be good practice for any decision-maker to

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<sup>281</sup> After all, section 10 states explicitly “in any matter concerning that child”.

<sup>282</sup> See *General Comment No. 12* (2009), the right of the child to be heard, section [35].

<sup>283</sup> Participation of children in decision-making is something [relatively] new to many professionals, parents and children. A change in frame of reference of all interested parties is needed to make participation generally accepted and to ensure implementation in practice. It cannot be expected from children to come forward and demand their right to participate. Even in a so-called developed country like the Netherlands, many children are not well informed about their rights, not to mention the children in developing countries. In the Netherlands Oomen has rightfully called for the subject “Children’s Rights” to be incorporated in the schools’ curriculum as a compulsory subject, see “Kinderrechten in de Klas” *Publication Kinderrechtentop 20 November 2009*.

provide information on how the child's views have been taken into consideration in establishing his or her best interests.<sup>284</sup> It is submitted that it would be a positive development if such practice were to be developed. Providing an explanation is even more pressing where the wishes of a child differ from the decision made by the court or other decision-maker. In the latter case reasons should ideally be provided in writing, since this might assist the child in understanding or, if necessary and possible, to taking the matter further. Robinson and Ferreira pose the question whether Article 12 of the CRC would be self-executing in South Africa.<sup>285</sup> In other words, whether or not a child automatically would have the right to be heard, and furthermore, that it would be possible to enforce/demand this right. Where Article 12 would not be self-executing, it merely would set a standard in terms of which the national law [of South Africa] could be tested.<sup>286</sup> The latter position is the relevant one with regard to South Africa. It was indicated that the legislature nevertheless has to ensure that children can exercise the right to express views and to have these views given due weight through incorporating procedural rules in relevant legislation.<sup>287</sup> In this regard reference should be made to Chapter 4 of the Children's Act, which deals with children's courts. As mentioned above, participation of children is explicitly dealt with in section 61 of the Children's Act, under the heading "Court proceedings".<sup>288</sup> Article 61 has been formulated as follows:

- "(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 and any special needs that the child may have, is able to participate 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 in the proceedings or is unwilling to express a view or preference in the matter;

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<sup>284</sup> Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 166.

<sup>285</sup> Robinson & Ferreira (2000) *De Jure* 58.

<sup>286</sup> Whether or not a provision in a treaty is self-executing is determined by the national law of the state party concerned. See also the discussion in section 2.1.1 above.

<sup>287</sup> Robinson & Ferreira (2000) *De Jure* 67.

<sup>288</sup> See Part 2 of Chapter 4 of the Children's Act.

and

- (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child.
- (2) A child who is a party or a witness in a matter before a children's court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)<sup>289</sup> if the court finds that this would be in the

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Since the provision on evidence through intermediaries has been dealt with in detail in section 170A of the Criminal Procedure Act [51 of 1977], it is considered important to give the full text. The aforementioned section reads as follows:

- “(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary. [Sub-s. (1) substituted by s. 68 of Act 32 of 2007.]
- (2)(a) No. examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
  - (2)(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
  - (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place -
    - (a) which is informally arranged to set that witness at ease;
    - (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
    - (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.
  - (4)(a) The Minister [of Justice] may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries. [Persons or categories or classes of persons who are competent to be appointed as intermediaries were determined under GN R1374 in GG 15024 of 30 July 1993, as amended.].
    - (b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister [of Justice], with the concurrence of the Minister of Finance, may determine.
  - (5)(a) No. oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact

that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

- (b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to -
    - (i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
    - (ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
    - (iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.
  - (6)(a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.
  - (b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection -
    - (i) the trial court; or
    - (ii) the court considering an appeal or review, has not delivered judgment.
  - (7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of a child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.
- [Sub-s. (7) added by s. 68 of Act 32 of 2007.]
- (8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary. [Sub-s. (8) added by s. 68 of Act 32 of 2007.]
  - (9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court -
    - (a) is for any reason absent;
    - (b) becomes unable to act as an intermediary in the opinion of the court; or
    - (c) dies,the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor -
    - (i) postpone the proceedings in order to obtain the intermediary's presence;
    - (ii) summons the intermediary to appear before the court to advance reasons for



best interests 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 interests of the child; and
  - (b) must record the reasons for any order in terms of paragraph (a).

Section 10 and 61 are clearly connected. The latter section sets out some procedural requirements directed at the presiding officer or the court, which are aimed to protect the child in question, which is certainly commendable. However, section 61 is limited in application since it only focuses on court procedures, whereas according to section 10 the right to participate is accorded to a child “in any matter concerning that child”.

With the enactment of the Children's Act, South Africa has made a major step forward in providing a legal framework which is inclusive of the child's right to participate in a wide spectrum of aspects of their lives. Although these are not necessarily directly related to children in need of care and protection or the placement of children *per se*, they nevertheless might become relevant in the process. Moreover, the listing below shows that South Africa, from a legislative point of view, is committed to improving the participation of children in matters which affect them directly. Thus apart from the general provisions on the participation of children in terms of sections 10 and 61, the Children's Act provides for a number of provisions which aim to ensure the participation of children in specific instances.

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- being absent;
  - (iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or
  - (iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary. [Sub-s. (9) added by s. 68 of Act 32 of 2007.]
- (10) The court shall immediately give reasons for any direction or order referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings.” [Sub-s. (10) added by s. 68 of Act 32 of 2007.]
- [S. 170A inserted by s. 3 of Act 135 of 1991 and substituted by s. 1 of Act 17 of 2001.]”.

These are the following:

- (1) Section 22(6), on the basis of which a parental responsibilities and rights agreement,<sup>290</sup> may be amended or terminated on application by [among others] the child, acting with leave of the court.
- (2) Section 28(3), where [among others] a child, acting with leave of the court, may lodge an application with the High Court, a Regional Division of the Magistrate's Court<sup>291</sup> or a children's court, for an order
  - (i) Suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of the child; or
  - (ii) 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.

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On the basis of section 22(1) of the Children's Act, the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with (a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or (b) any other person having an interest in the care, well-being and development of the child. Section 22(2) states that only those responsibilities and rights which the mother or other person with parental responsibilities and rights have in respect of the child at the time of the conclusion of such agreement may be conferred. Furthermore, such an agreement will only take effect if registered with the family advocate or made an order of the High Court, a Regional Division of the Magistrate's Court or the children's court on application by the parties to the agreement, see section 22(4). Moreover, it is clear that a parental responsibilities and rights agreement should serve the best interests of the child concerned. It is agreed with *Bosman-Sadie & Corrie* that in order to determine the child's best interests, the views of the child should also be taken into account with regard to the contents of such an agreement, see *A Practical Approach to the Children's Act* (2010) 42. In other words, the whole of section 10 should be applicable. The question arises what should happen when a child does not agree with the contents of the agreement. *Bosman-Sadie & Corrie* suggest the matter to be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person, similar to what has been provided in section 21(3). However, the latter section deals with a dispute between the biological father and mother of the child on the fulfilment of the criteria as listed in section 21, in order to determine whether or not the biological father has acquired full parental responsibilities and rights.

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What was known as the divorce court are now courts of the Regional Division of the Magistrate's Courts as from 2010: s29(1B) of the Magistrates' Courts Act, Act 32 of 1944 as inserted by s7 of the Jurisdiction of Regional Courts Amendment Act, Act 31 of 2008.

- (3) Section 31(1)<sup>292</sup> provides for participation of the child where it comes to major decisions pertaining to the child concerned.

The major decisions on the basis of this provision concern: (i) any decision relating to a matter as listed in section 18(3)(c); in other words, the granting or refusal of consent with regard to the child's marriage, adoption, departure or removal from the Republic of South Africa, the application for a passport, or, the alienation or encumbrance of any immovable property of the child; (ii) any decision affecting contact<sup>293</sup> between the child and a co-holder of parental responsibilities and rights; (iii) any decision regarding the assignment of guardianship<sup>294</sup> or care<sup>295</sup> in respect of a child to another person in terms of section 27; or

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<sup>292</sup> Due to the importance of section 31 of the Children's Act, it is considered necessary to provide the full text of this provision, which deals with major decisions involving the child.

“(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in section (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development;

- (b) A decision referred to in section (a) is any decision -
- (i) in connection with a matter listed in section 18(3)(c);
  - (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
  - (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
  - (iv) 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.

(2)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in section (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in section (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.”

<sup>293</sup> Section 1 defines “contact” in relation to a child as (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 visiting the child or being visited by the child or (ii) communication on a regular basis with the child in any other manner, including through the post or by telephone or any other form of electronic communication.

<sup>294</sup> With regard to guardianship the definition section [section 1] refers to section 18. Section 18(3) describes the duties of the guardian of a child as follows: to administer and safeguard the child's property and property interests; to assist or represent the child in administrative, contractual and other legal matters; or to give or refuse any consent required by law in respect of the child [in terms of section 18(3)(c).

(iv) any decision which is likely to significantly change, or to have an adverse effect on the child's *status quo* [the existing state of affairs].<sup>296</sup>

(4) Section 34(5), dealing with parenting plans,<sup>297</sup> allows [among others] the child, acting with leave of the court, to apply to court to have an existing parenting plan amended or terminated. Since neither section 33 nor section 34 refers to the participation of children, it is submitted that section 10 should be applicable with regard to the drafting of parenting plans in the case where children are able to participate. In other

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<sup>295</sup> According to section 1 of the Children's Act [which provides definitions] "care", in relation to a child, includes, where appropriate -

- (a) within available means, providing the child with -
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child's health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

<sup>296</sup> Section 31(1)(b)(iv) refers to the child's living conditions, education, health, personal relations with a parent or family member, or generally, the child's well-being. It is commended that section 31 ensures the participation of children in matters which will have immediate impact on the lives of children. This is even more important where possible adverse effects could occur.

<sup>297</sup> A parenting plan determines the exercise of responsibilities and rights in respect of a child. Many aspects relating to the daily life of the child can be dealt with in such a plan, among others, where and with whom the child is to live; the maintenance of the child; contact between the child and others; the schooling and religious upbringing of the child [see section 33(3)].

words, where a child is of such an age, maturity and stage of development as to be able to participate, that child should be granted the opportunity to express its views, simply because it will concern [and thus impact on] the child and moreover, because the basic requirements as stated in section 10 are met.

- (5) A children's court may, before it decides a matter or an issue in a matter, order a so-called lay forum hearing in an attempt to settle the matter or issue out of court, on the basis of section 49 of the Children's Act. Such a lay forum hearing could take the form of mediation by a family advocate, social worker, social service professional or other suitably qualified person.<sup>298</sup> In terms of section 71(1) the children's court may refer the matter to any appropriate lay forum, including a traditional authority. De Jong has listed a number of forums which are important in resolving family disputes in South African society. These include street committees, community courts, community-based advice centres and traditional leaders.<sup>299</sup> However, although these forums can make a significant contribution, De Jong has pointed out that it has to be kept in mind that the persons involved are usually not trained mediators.<sup>300</sup> Returning to the topic of participation, the following should be noted: before ordering a lay forum hearing, the court is obliged to take into account all relevant factors, among others, the vulnerability of the child and the ability of the child to participate in the proceedings. It is submitted that the courts have the duty to establish whether it will be in the best interests for the child to participate, and if this appears to be the case, to emphasise the importance thereof to the parties concerned.
- (6) Section 69 provides for pre-hearing conferences, which may be ordered by the court in a children's court matter which is contested. A child involved in the matter may attend and participate in the conference unless the children's court orders

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<sup>298</sup> See the sections 49(1) and 71 of the Children's Act.

<sup>299</sup> In Boezaart (ed.) *Child Law in South Africa* (2009) 121.

<sup>300</sup> De Jong avers that it is therefore understandable that section 71(2) excludes lay forums where there are allegations of child abuse. See De Jong "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 (71) *THRHR* 634 read in conjunction with De Jong in Boezaart (ed.) *Child Law in South Africa* (2009) 122.

otherwise.<sup>301</sup>

- (7) Section 70 focuses on family group conferences,<sup>302</sup> to which the parties involved in a matter brought to or referred to a children's court are invited. Although section 70 does not in any way refer to the participation of children, it is submitted that this in principle should always be the norm, unless it would be clearly contrary the best interests of the child.<sup>303</sup> Whilst not much detail is provided in the legislation and Regulations,<sup>304</sup> it is submitted that, like in the Netherlands, this child-inclusive solution oriented model also has a lot of potential in the South African context.<sup>305</sup>
- (8) Section 129 provides for the participation of children on health related matters concerning the children themselves. Firstly, in terms of the Choice on Termination of Pregnancy Act [92 of 1996],<sup>306</sup> a child may be subjected to medical treatment or a

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<sup>301</sup> In terms of section 69(1) the aim of a pre-hearing conference is 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.

<sup>302</sup> Section 70 creates the impression that family group conferences are to be attended by the parties involved together with any other family members of the child. However, attendance is certainly not limited to family members. It is therefore submitted that one should rather refer to the social network surrounding a child.

<sup>303</sup> It should not be concluded to easily that participation of a child at a family group conference would not be in the child's best interests.

<sup>304</sup> See section 70 of the Children's Act and DJCD Regulation 13 (GN R250/2010).

<sup>305</sup> See Louw & Spijker (2007) (28) *Obiter* 101-110. For a more detailed discussion on family group conferences in the Netherlands, see section 3.1.4.2.

<sup>306</sup> Subject to section 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996. This Act provides for the possibility of an abortion upon the request of the pregnant girl concerned within the first twelve weeks of pregnancy. Pregnant women and girls of whatever age can give permission for an abortion to be performed on themselves on the basis of section 2 of the aforementioned Act [thus not on the basis of the Children's Act 38 of 2005], see also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 139. It should be noted that the statistics indicate that child/teenage pregnancy is a [relatively] common occurrence in [South] Africa. According to a report by Save the Children annually approximately 13 million children are born to women under age 20 worldwide and more than 90% of these births occur in developing countries. The Netherlands has a low rate of births (and abortions) among teenagers, 5 births per 1 000 teenagers between 15-19 years in 2002 [<http://en.wikipedia.org>]. Research conducted by the Human Sciences Research Council on teenage pregnancies in South Africa has indicated in 2009 that although teenage pregnancies among school-going children have been declining in South Africa due to policy and legislative interventions, the rates still remain high. For example in the Eastern Cape with 68.81 pregnant pupils per 1 000 registered and Limpopo with 60.36 per 1 000 pupils [<http://www.news24com>].

surgical operation only if consent for such treatment or operation has been given on the basis of the subsections (2) – (7) of section 129 of the Children's Act. This means that a child may consent to his or her own medical treatment if he or she is over the age of twelve years and is sufficiently mature, having the mental capacity to understand the benefits, risks, social and other implications of the treatment.<sup>307</sup> The same is applicable in the case of the performance of a surgical operation on the child concerned but in the latter case the child also needs to be duly assisted by his or her parent or guardian. It is interesting that it has been spelt out in an unambiguous manner that no parent, guardian or care-giver of a child may refuse to assist a child or withhold consent in terms of the aforementioned by reason only of religious or other beliefs, unless that parent, guardian or care-giver can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.<sup>308</sup> It should be noted that the child “may” consent, in other words, he or

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<sup>307</sup> Where a child is under the age of 12 years or is over the age of 12 years but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment or operation, the parent or guardian of the child may, subject to section 31 of the Children's Act, consent to the medical treatment of the child or a surgical operation on the child. It is submitted that where a child is over the age of 12 years it should not be decided too lightly that the child is insufficiently mature or unable to understand the benefits, risks and social implications of the treatment or operation. For the sake of completeness it deserves notification that in a matter of emergency the superintendent of a hospital (and in his or her absence the person in charge of the hospital) may consent to the medical treatment or surgical operation, where the treatment or operation is necessary to preserve the child's life or to save the child from serious or lasting physical injury or disability and the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining the required consent from the parent or guardian. Where a parent or guardian of the child unreasonably refuses to give consent or to assist the child in giving consent, or is incapable of doing so, or cannot readily be traced or is deceased, the Minister [of Social Development] may consent to the medical treatment of or surgical operation on the child concerned. On the basis of section 129(9) a high court or children's court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent refuses or is unable to give the required consent.

<sup>308</sup> Section 129(10) of the Children's Act. In the past, an urgent application to the high court [as upper guardian of all minors] was sometimes necessary in order to obtain the consent for medical treatment or an operation for a child. For example where a blood transfusion appeared to be necessary in order to save a child's life. In *Hay v B and Others* 2003 (3) SA 492 (W), the applicant, a paediatrician made an urgent application for an order authorising her to administer a blood transfusion to an infant, since the parents where opposed to the treatment due to their religious convictions and their concern of the risk of infection associated with blood transfusions. The court held that the infant's right to life was inviolable and capable of protection, and it was in the best interests of the infant that this right be protected. With regard to the religious beliefs and concerns of the parents, it was held that while the concerns were understandable, they were neither reasonable nor justifiable and that their beliefs could not override the infant's right to life. Therefore, on the basis of the high court being the upper guardian of all minors and the fact that it was in the best interests of the infant to receive medical treatment, an order that the minor receive such treatment was appropriate

she has the discretion not to take a decision and leave it to the parent or guardian. However, it is submitted that in this case open communication between the parent and the child is recommended. Where the child unreasonably refuses to give consent, the Minister [of Social Development] may consent to the medical treatment of or surgical operation on a child.<sup>309</sup>

- (9) In terms of section 130, consent for a HIV-test on a child may be given by a child, if the child is 12 years of age or older or under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test.<sup>310</sup> For the purpose of this thesis it is relevant to refer explicitly to section 130(2)(d), which permits consent for a HIV-test on a child to be given by a designated child protection organisation which is arranging the placement of the child concerned. However, this is only possible where a child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test.<sup>311</sup>
- (10) Participation of children is also required in adoption matters. Although adoption will be dealt with in the context of permanency placement in Chapter 5,<sup>312</sup> the participatory aspects relating to the institution of adoption merit to be mentioned here. In terms of section 233(1)(c), a child may be adopted only if the child him or herself has given consent for the adoption. It is interesting that the required age of a child should be ten years or older.<sup>313</sup> Where a child is under the age of 10 years, but is of

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notwithstanding the refusal by the minor's parents to consent to it. That was not to say, however, that the parents' reason for refusal should be ignored: proper consideration had to be given to those reasons [Par. 495H/I-J]. See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 140.

<sup>309</sup> Section 129(8) of the Children's Act.

<sup>310</sup> The parent or care-giver may give consent for a HIV-test on a child, if a child is under the age of twelve years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test.

<sup>311</sup> In terms of section 130(2)(f) the children's court can be approached if consent by the child, parent or care-giver or designated child protection organisation is unreasonably withheld or where the child, the parent or care-giver of the child is incapable of giving consent.

<sup>312</sup> See section 5.3.5.

<sup>313</sup> Compare to the Netherlands where one of the requirements for the adoption of a child is that the adoptive child of twelve years or older is given the opportunity to express any objections in person. The same applies to a child below the age of twelve years who is capable of



an age, maturity and stage of development to understand the implications of such consent, this child should also give consent.<sup>314</sup> Moreover, section 234 deals with the so-called “post-adoption agreement”, which is revolutionary, but optional.<sup>315</sup> This is an agreement between the parent or guardian and a prospective adoptive parent of the child concerned, which provides for communication (including visitation between the child and the biological parent or guardian) and for the provision of information (including medical information) about the child, after the application for adoption is granted.<sup>316</sup> It is commended that in terms of section 234(2) of the Children's Act, such a post-adoption agreement may not be entered into without the consent of the child, if the child is of an age, maturity and stage of development to understand the implications of such an agreement.<sup>317</sup>

Moreover, the fact that a post-adoption agreement may be amended or terminated only by court order on application by the adopted child<sup>318</sup> means that input and thus

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reasonable judging of his or her own interests. Where a child objects against the adoption, the court will dismiss the application, see Article 1:228(1)(a) of the Civil Code. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 93. For a brief discussion on adoption, see section 5.3.5.

<sup>314</sup> See section 233(1)(c)(ii) of the Children's Act. The latter provision, accommodating children *under* [own emphasis] the age of 10 who are able to understand the implications of the consent, is new. The rest is similar to the previous legislation [see section 18(4)(e) of the Child Care Act 74 of 1983].

<sup>315</sup> See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 256.

<sup>316</sup> Compare to the Netherlands where a distinction is made between strong adoption (in which the family ties between the child and his or her biological parents are severed) and weak adoption, which provides for the continuation of contact between the child and the biological family, even though the child has been adopted and thus is a member of the family of the adoptive parents. See Van der Linden *et al. Jeugd en Recht* (2001) 63; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 85 and 99.

<sup>317</sup> It is submitted that in principle a child should become part of the decision-making process with regard to a post-adoption agreement, since the consequences of such an agreement clearly impact on a child's life. Therefore section 234(2) is linked with section 31 [major decisions involving the child]. Furthermore it is submitted that, in line with the aforementioned, it should not be concluded too easily that a child is not of an age, maturity and stage of development to understand the implications of a post-adoption agreement. Therefore the courts should test, before granting an application in terms of section 239 for the adoption of the child, whether a presented post-adoption agreement has been entered into properly [involving the child in most cases] and whether it generally speaking is in the best interests of the child concerned. It is commended that a post-adoption agreement takes effect only if made an order of court in terms of section 234(6) of the Children's Act.

<sup>318</sup> See section 234(6)(b) of the Children's Act. In terms of the aforementioned section, a post-adoption agreement may also be amended or terminated by court order at the initiative of a party to such an agreement.

participation of children is regarded as indispensable. Furthermore, the high court or children's court may rescind an adoption order on application by the adopted child.<sup>319</sup> It should be kept in mind that the rescission of an adoption order means that the effects of the adoption order as set out in section 242(2) and (3) are no longer applicable and that all responsibilities, rights and other matters terminated by the adoption order are restored. In other words, in this regard everything will revert back to the previously existing situation, that is, if possible. Therefore it is important to note that when rescinding an adoption order, the court may make an appropriate placement order in respect of the child concerned or alternatively, order that the child be kept in temporary safe care until an appropriate placement order can be made.<sup>320</sup> The latter is especially relevant in the case where, on termination of the adoption, a child could possibly be identified as a child in need of care and protection.<sup>321</sup>

Although it is commended that the opportunities for the participation of children have been improved in the legislation, it is hoped that the practical implementation will follow suit. With regard to the latter, the legislative framework merely serves as a prerequisite. For the realisation of participation in practice, a change in frame of reference is also required.

Most professionals, parties and children alike, still have to get used to the notion of participation of children and therefore guidelines should be developed which ensure participation in a wide range of settings;<sup>322</sup> one of them being official guidelines regarding the

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<sup>319</sup> Section 243(1)(a) of the Children's Act. It should be noted that such an application must be lodged within a reasonable time but not exceeding two years from the date of the adoption. Rescission of an adoption order will only be considered if it is in the best interests of the child or where formalities were not complied with (where the applicant is a biological parent of the child whose consent was required for the adoption, but whose consent was not obtained, or if at the time of making the adoption order, the adoptive parent did not qualify in terms of section 231 of the Children's Act).

<sup>320</sup> The court may place a child in temporary safe care pending a children's court inquiry, during which has to be determined whether a placement order will be necessary. See also Bosman-Sadie & Corrie, *A Practical Approach to the Children's Act* (2010) 264.

<sup>321</sup> See section 150 and further of the Children's Act. For a more detailed discussion on children in need of care and protection see chapter 4, and pertaining to the removal and placement of a child, see chapter 5.

<sup>322</sup> It is submitted that continuous specialised training of the officers of the court is indispensable. Moreover, a course in basic psychology for lawyers should be available (at least as an elective subject) at all Law Schools, Faculties of Law and Schools for Legal Practice. Furthermore, more attention should be paid in Law Schools and Faculties of Law to the importance of mediation in family related disputes, especially with the aim of enhancing

appointment of a legal representative for children.<sup>323</sup> Where financial considerations count against allowing legal representation “in all matters affecting the child”, this can (quite easily) be solved by hearing the child directly in proceedings involving the child<sup>324</sup> and “reserve” legal representation for the more complex cases. For example, where there is a conflict of interests involving the child or between the child and his or her parents or in cases which concern child protection measures, due to the possible impact on the life of a child and its family.

### 3.1.4.2 Child participation in terms of Dutch law

In the Netherlands the participation of children is generally speaking reasonably established. Meuwise *et al.* point out that since the 1960s a more contemporary style of upbringing started to emerge in Dutch families, which resulted in the transformation from authoritarian decision-making of parents towards decision-making which took note of the opinions of the children involved.<sup>325</sup> Nowadays, there is generally speaking no question about it; children and the youth in the Netherlands will speak their mind. However, although the relationship is usually based on an exchange of opinions, it is evident that the parents remain (legally) responsible for their children and their upbringing. This two-way process has been confirmed in the Articles 1:247 and 249 of the Civil Code.<sup>326</sup> Participation has also

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conciliation and avoiding a confrontational approach. The latter is in line with the “general principles” as referred to in section 6 of the Children’s Act 38 of 2005.

<sup>323</sup> See Carnelley (2010) *Obiter* 644.

<sup>324</sup> Compare with the Netherlands, where the secretary of the children’s court invites a child to the presiding officer’s chambers in order to hear the child in person. In such a case a child may also write a letter to the court in order to state his or her views or wishes, which certainly will be taken into consideration. An obvious advantage of hearing a child directly is the personal interaction which may be essential in order to ascertain the sincere opinion. Moreover, it gives the opportunity to provide the child with relevant information on the proceedings and process of deliberation and decision-making. It is submitted that a child-friendly brochure should be made available to the child, explaining the rights of the child, what is expected from the child thereby reassuring the importance of the child’s input, to set out the procedural matters and the kind of assistance a child can obtain and how to go about his. In this regard several brochures should be available to cater for various situations; for example, pertaining to divorce, supervision orders, foster care, placement in residential care and adoption.

<sup>325</sup> In *Handboek Internationaal Jeugdrecht* (2005) 118.

<sup>326</sup> In terms of Article 1:249 of the Civil Code, a child is expected to have regard for the parent or guardian with regard to the latter person(s) exercise of duties and also for the other members of the family. For a more detailed discussion on the contents of parental authority in the Netherlands, see section 4.1.2.

developed beyond the ambit of the family setting although it has been noted by Defence for Children International that youth participation is still in its infancy stage.<sup>327</sup>

In 2001 the National Youth Council was established. This is an umbrella organisation, which represents the youth between 12 and 30 years old. The National Youth Council is in regular consultation with the government and supports youth participation by bringing relevant stakeholders together in order to join forces in their quest for the realisation and enhancement of participation by the youth.<sup>328</sup> Although it is agreed with Defence for Children that more can be done in order to increase the level of participation of children in all aspects of their lives, the following examples deserve to be noted: the youth councils in municipalities, the learner councils at schools and student representation in tertiary education institutions, youth participation in sports clubs and other youth organisations. Unfortunately financial cut-backs on the budgets of youth organisations hamper the work and thus the effectiveness of these important organisations.<sup>329</sup>

Apart from the developing participation of the youth in societal matters, the Netherlands as a state party to the CRC is obliged to ensure participation for children in all matters affecting the child. On the basis of Article 809 of the Code of Civil Procedure, children of 12 years and older have the right to be heard in family law matters.<sup>330</sup> It is, however, up to the child to decide whether or not he or she will make use of this right.<sup>331</sup> A child below the age of 12 may be given the opportunity to be heard but this is left to the discretion of the court. This means in effect that only a child of 12 years or older has the right to be heard. Moreover, it means that the right to be heard, as provided for in Article 809 of the Code of Civil Procedure, is not in line with the CRC.

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<sup>327</sup> See “Non-gouvernementele organisaties rapporteren over kinderrechten – Zorgen over kwetsbare kinderen” 2009 (1) *Tijdschrift voor de Rechten van het Kind – Defence for Children International* K 7.

<sup>328</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 119.

<sup>329</sup> 2009 (1) *Tijdschrift voor de Rechten van het Kind – Defence for Children International* K 7.

<sup>330</sup> In Dutch: *het hoorrecht*.

<sup>331</sup> Where the child has declined to make use of the right to be heard, the court may in terms of Article 809(4) of the Code of Civil Procedure determine the day on which the child will be brought before the court. This might require the assistance of the prosecuting authority (Openbaar Ministerie) and the police, see also Article 813(1)(a) of the Code of Civil Procedure. Where the child once again does not appear, the matter will be dealt with in his or her absence. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 110.

As indicated in *General Comment No 12*, state parties should presume that a child has the capacity to form his or her own views.<sup>332</sup> The Committee on the Rights of the Child has emphasised that, ideally speaking, there should be no age limit on the exercise of the right to be heard.<sup>333</sup> It is recommended to change the age-criterion into a material criterion, which focuses solely on the capability and maturity of the child concerned.<sup>334</sup>

Thus, before the court makes a supervision and placement order, orders the relief or deprivation of parental authority of parents, or makes an adoption order, the child concerned should or may in principle be given the opportunity to express his or her views. In addition, where authorisation for the removal and placement of a child in a closed setting is requested, the presiding officer is required to hear, among others, the child in terms of Article 29f of the Act on the Youth Care, before granting such authority.<sup>335</sup> However, the right to be heard in Article 809(1) is subject to two exceptions, namely:

- (i) When the court in terms of Article 809(1) considers the matter to be of apparent minor importance. Doek and Vlaardingerbroek refer in this respect to the situation where a special curator has been appointed.<sup>336</sup> It is submitted that this should not be concluded too easily, since the right to express views is of fundamental importance and should ideally take place in all matters affecting the child, and
- (ii) If the opportunity to express views cannot be awaited for without the risk of immediate and serious danger for the child, the presiding officer may issue a

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<sup>332</sup> See section 20 of *General Comment No. 12* (CRC/C/GC/12) of 20 July 2009.

<sup>333</sup> See section 21 of *General Comment No. 12* (CRC/C/GC/12) of 20 July 2009.

<sup>334</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 124; also “De bijzondere curator, een lot uit de loterij? - Adviesrapport over waarborging van de stem en de belangen van kinderen in the praktijk” (2012) *De kindombudsman*.

<sup>335</sup> This rule is applicable unless it has been determined that the child declines to make use of the right to be heard. Article 29f(2) provides that the court instructs on its own accord the Legal Assistance Bureau to assign legal representation to the child.

<sup>336</sup> A special curator may be appointed on the basis of Article 1:250 of the Civil Code. However, research has shown that the legal concept of the special curator is not generally known and often made use of, in “De bijzondere curator, een lot uit de loterij? - Adviesrapport over waarborging van de stem en de belangen van kinderen in the praktijk” (2012) *De kindombudsman*.

child protection order without hearing the child first on the basis of Article 809(3), which includes emergency placements. The validity of the orders thus made lapse after two weeks, unless the child has been given the opportunity to express his or her views.<sup>337</sup>

Moreover, it should be noted that the automatic hearing of a child in the case of divorce has been subject to some change. Due to the fact that, on the basis of Article 1:251(2) of the Civil Code, parents after divorce usually continue with joint parental authority, the hearing of a child seems superfluous. However, Doek and Vlaardingerbroek point out that this disadvantage has been compensated for by the inclusion of Article 1:251a(4) of the Civil Code. Although joint parental authority is thus the point of departure, a child of 12 years or older may inform the court that he or she prefers that either his or her mother or father will be awarded single parental authority.<sup>338 339</sup> Article 1:251a(4) determines that the court may make a decision on the matter on its own accord.

Although in family law matters, which include child protection measures, children need to be heard by the court, there may be limitations pertaining to the effectiveness. For example, it has been argued that the conducting of a hearing of a child requires a level of skills and knowledge pertaining to the field of pedagogics and psychology, whilst not all presiding

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<sup>337</sup> These emergency orders include a temporary supervision order, a removal order and an order for temporary custody. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 110-111. This is also applicable in the case of an application by the Bureau for Youth Care for provisional authorisation for placement in a closed setting in terms of Article 29c of the Act on the Youth Care. Forder and Olujić have indicated that in practice some Bureaus for Youth Care are inclined to deal with these provisions in a casual way, attempting to proceed without the child being heard. Caution in this respect is required, for all professionals, but especially presiding officers who ultimately have to make a decision which will serve the child's best interests. It is reassuring though that Article 809(3) of the Code of Civil Procedure determines that the child in any event needs to be heard within two weeks after which the provisional authorisation will lapse. In *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 26. See also section 4.4.2.2.

<sup>338</sup> The same applies to a child younger than twelve years of age when the child is considered to have a reasonable judgment of his or her interests. To inform the court of an opinion can be done in writing. It depends on the facts and circumstances of the case whether the child (and parents) will be invited to court in order to be heard in person. Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 206-207.

<sup>339</sup> This is typified as so-called “informal” access to the court and comes to the fore in matters pertaining to parental authority and contact after divorce. The same applies to Article 1:377g of the Civil Code. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 119; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 242.

officers would be sufficiently equipped for this.<sup>340</sup> In addition, a child will usually only be heard once whilst the circumstances of a child can change in the process.<sup>341</sup>

Brummelman points out that nevertheless a good communication with the child during the proceedings is important for two reasons; firstly, for the presiding officer in order to be able to make the most suitable order, and secondly, it might assist the child to better accept the decision of the court and the consequences thereof.<sup>342</sup> It is submitted that the relevance of the latter should not be underestimated, since the positive effects which are pursued by the imposition of the order require a positive attitude of the child (and his or her parents). With regard to Article 809 of the Code of Civil Procedure, the clerk of the court will, on behalf of the presiding officer, invite the child to be heard in person, which is applicable in matters concerning the law of persons or family law.<sup>343</sup>

Meuwise *et al.* rightfully pose the question as to what extent the duty lies with the authorities to inform the child on his or her right to express views.<sup>344</sup> The latter has become more pressing since recent research indicates that there has been a decline in awareness of children in the Netherlands pertaining to their rights.<sup>345</sup> It is submitted that apart from the duty of a presiding officer, the professionals dealing with children, across the board, have the responsibility to make children aware of their right to express views and how to utilise this right effectively in matters affecting them.<sup>346</sup>

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<sup>340</sup> See “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” 2012 *De Kinderombudsman* 28.

<sup>341</sup> In this regard the periodic review of a decision is important, which is especially relevant in the case of the removal and placement of a child. See the standard mentioned in Article 25 of the CRC as discussed in section 4.7.

<sup>342</sup> “Luisteren naar de jongere – De ondertoezichtstelling en uithuisplaatsing” 2010 (2) *Right! - Tijdschrift voor de Rechten van het Kind* 17-18.

<sup>343</sup> See also section 4.4.2.2.

<sup>344</sup> *Handboek Internationaal Jeugdrecht* (2005) 124.

<sup>345</sup> According to Defence for Children International 69% of the youth are not (sufficiently) aware of their rights and how to effectively make use of those rights. They have observed that there has been a decline in this respect over the past decade, from 62% in 2002, to 30% in 2007 to merely 19% in 2012. See “Jongeren spreken zich uit over kinderrechten in Nederland – Bekendheid met kinderrechten” newsletter of 14 June 2012, available via <http://www.defenceforchildren.nl/p/21/2441/mo89-mc21/mo45-mc52>, accessed on 22-6-2012.

<sup>346</sup> In addition, children's rights need to be more prioritised in the curricula at schools, at different

Apart from hearing a child in person, Article 12 of the CRC also demands that the views of the child be given due weight in accordance with the age and maturity of the child. Neither the Civil Code nor the Code of Civil Procedure contains any reference or guidance pertaining to the latter. It is submitted that this lacuna needs to be urgently addressed, since the affected parties should be entitled to information on how the child's views have been taken into consideration in the decision.

From Article 1:245(3) and (4) of the Civil Code it can be derived that the parent(s) under normal circumstances will represent the child in legal matters. As a general rule, children have no formal independent access to the courts.<sup>347</sup> However, from both legislation and case law it can be derived that the latter rule has been subject to some exceptions. In connection with the topic of this thesis, the following legislative provisions should be noted, on the basis of which a child may approach the court on his or her own accord:

- (i) The appointment of a special curator. Article 1:250 of the Civil Code demands that the latter may be appointed upon the request of an affected party or by the court on its own accord. Since the child's legal position is at stake, the child may be regarded as an affected party, which means that he or she may request the court for the appointment of a special curator;<sup>348</sup>
- (ii) Upon the request of, among others, the child of twelve years or older, the presiding officer may replace the Bureau for Youth Care on the basis of Article 1:254(5) of the Civil Code;
- (iii) Upon the request of, among others, the child of twelve years or older, the presiding

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levels, national campaigns on television and in children's magazines and websites should be made available. The role of NGOs/civil society is not to be underestimated and sufficient funding should be made available. The website of Defence for Children International and the Children's Ombudsman are, due to their appealing and child-friendly approach, valuable tools in order to provide children with information but children need to be made aware first. See [www.defenceforchildren.nl](http://www.defenceforchildren.nl), [www.kinderombudsman.nl](http://www.kinderombudsman.nl), and [www.kinderrechten.nl](http://www.kinderrechten.nl).

<sup>347</sup> Children do have so-called informal access to the courts in specific instances.

<sup>348</sup> Where the child's legal position is under discussion he or she is regarded as an interested party in terms of Article 798 Code of Civil Procedure, which might be of importance since a child is not able to lodge an appeal independently. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 240.



officer may terminate a supervision order, on the basis of Article 1:256(4), provided that the reason for imposing the order are no longer present;

- (iv) A child of twelve years or older may apply to the court for the annulment of a directive issued by the Bureau for Youth Care in terms of Article 1:259(1);
- (v) Moreover, after having approached the Bureau for Youth Care for the partial or full withdrawal of an issued directive, due to a change in circumstances without having had any effect, the child may approach the court on the basis of Article 1:260;
- (vi) Upon the request of, among others, the child of twelve years or older a presiding officer may withdraw the authorisation fully<sup>349</sup> or partially or alternatively shorten the duration of the placement in terms of Article 1:263 of the Civil Code;
- (vii) For the duration of a placement order the presiding officer may have determined the right to contact with the view to the purpose of the supervision order. Upon the request of, among others, the child, this decision may be altered by the presiding officer in terms of Article 1:263b of the Civil Code due to a change in circumstances or in case the decision was based on incorrect or incomplete information;<sup>350</sup>
- (viii) Pertaining to the placement of a child in a closed setting, Article 29a(2) of the Act on the Youth Care is relevant.<sup>351</sup> On the basis of the latter provision a child of twelve years or older has full capacity to litigate and is thus regarded to be a party to the legal proceedings.<sup>352</sup> The same applies to the child who is younger than twelve years old, provided that he or she is able to reasonably judge his or her own

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<sup>349</sup> This means in effect that the placement will be terminated. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 119; also Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 241.

<sup>350</sup> See “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 11.

<sup>351</sup> Chapter IVa of the Act on the Youth Care (Articles 29a-29v) came into operation on 1 January 2008 and provides specifically for placement in a closed setting. See the sections 5.2.2.1 and 5.3.2.2.2.

<sup>352</sup> This means that they, for example, may lodge an appeal. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 242.

interests.

In other words, the legal framework pertaining to independent access to the court looks like a complicated patchwork, which lacks clarity and accessibility, which is problematic in itself but even more so with regard to children. Since children thus generally speaking cannot approach the court independently, the hearing of children (in person) is of crucial importance. Research conducted by the Office of the Ombudsman in the Netherlands reveals that in some instances the appointment of a special curator<sup>353</sup> could be instrumental in order to safeguard the voice of the child and his or her interests, and should therefore be made use of more often.

Since a child in child protection cases generally cannot act independently,<sup>354</sup> it is submitted that the appointment of a special curator is essential. This is even more pressing given the fact that generally speaking a child in family law matters is not entitled to individual legal representation, unless Article 29f(2) of the Act on the Youth Care is applicable.<sup>355</sup> Since the child is considered to be an affected party in terms of Article 798 of the Code of Civil Procedure, the child themselves can file a formal application or informally write a letter to the court.<sup>356</sup> In order to ensure that the appointment of a special curator can be secured in the widest possible context, a number of recommendations have been formulated by the Office of the *Kinderombudsman*. These include, among others, the need for an extensive interpretation of Article 1:250 of the Civil Code, more publicity across the board regarding the appointment of a special curator, the need for a protocol pertaining to appointments, the formulation of a clear job description, and quality assurance.<sup>357</sup>

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<sup>353</sup> The Dutch equivalent of a curator *ad litem*.

<sup>354</sup> Unless Article 29a(2) of the Act on the Youth Care is applicable or any of the other exceptions as listed above.

<sup>355</sup> This provision is applicable where placement in a closed setting comes to the fore, see the discussion earlier in this section. Thus generally speaking parents are expected to represent their child and they may obtain legal representation, not the child on his or her own accord.

<sup>356</sup> Parents, grandparents, foster parents of a child or a legal representative may also file a request with the court on behalf of the child, in "De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk" (2012) *De Kinderombudsman* 13.

<sup>357</sup> 2012 *De Kinderombudsman* 49-53.

However, the above-mentioned report also refers to a few matters which need serious attention; for example the fact that the role and benefits of a special curator is not generally known (for the public and professionals alike),<sup>358</sup> and the fact that it is not necessarily a lawyer who is to be appointed but also may be another professional.<sup>359</sup>

It is submitted that the latter aspects are to be taken into consideration when the recommendations of the Ombudsman are considered and included in the legislative framework and protocols. Apart from the parents or the appointment of a special curator who might assist a child in ensuring that his or her opinion is heard and the views are taken into consideration, an alternative approach toward solution-finding has taken root in the care and protection practice in the Netherlands, namely family group conferencing.

Whilst it is argued that the concept has certain challenges or limitations,<sup>360</sup> the positive results in the Netherlands are of such a magnitude that they have resulted in an amendment to the proposed legislation on child protection measures.<sup>361</sup>

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<sup>358</sup> See “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 22. Therefore more publicity is needed and it should be included in the curricula of various study disciplines, for example, in Faculties of Law, social work and psychology as well as postgraduate training for professionals.

<sup>359</sup> For example, a professional in the field of pedagogics or psychology. The research shows that a neutral and professional person is preferred above the appointment of a relative. See “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 15.

<sup>360</sup> Zaal has averred that a number of serious problems have come to the fore, which hamper the usefulness of family group conferencing. For example, the fact that it appears to be a resource intensive process, the complexity of matters, the fact that the cost implications are not as favourable as expected and the power dynamics within families. Another point of concern pointed out by Zaal is the possibility that after the family group conference has been held, children might be exposed to further harm or neglect due to less involvement of social workers. See Zaal *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African System* (LLD thesis 2008 University of the Witwatersrand) 96-97. See the discussion below on the Netherlands.

<sup>361</sup> The proposed text of Article 1:262a of the Civil Code (new) reads as follows in Dutch:

“(1) De stichting stelt ter uitvoering van haar taak als eerste de ouder of ouders met gezag in de gelegenheid om samen met bloedverwanten, aanverwanten of anderen die tot de sociale omgeving behoren binnen zes weken een plan van aanpak op te stellen of een bestaand plan aan te passen. Slechts indien de concrete bedreigingen in de ontwikkeling van het kind hiertoe aanleiding geven of de belangen van het kind anderszins geschaad worden, kan de stichting hiervan afzien.

If these proposals were to become law, the Bureau on the Youth Care has the duty to first allow the social network surrounding a family to draft a plan (of action) or to adjust an existing plan on the basis of a family group conference.<sup>362</sup> In other words, the family, including the child, and the social network will be given the opportunity before the imposition of a supervision order or during the implementation of such a child protection measure, to draft a plan of action. Via the mobilisation of the social network it will be explored by the participants how a solution can be found for the problem(s), thereby ensuring the safety and well-being of the child(ren).

The process does not only make an appeal to the communal thinking towards solution finding, but also to the practical assistance in implementing the plan as being drawn up during the process of the family group conference. The strength of this approach lies therein that the persons involved will take responsibility for their problems and will be empowered to find a viable solution, which may prevent intervention with their family life. Research in the Netherlands has shown that via the process of family group conferencing supervision orders and removals have been prevented.<sup>363</sup>

In addition, it has become evident that instead of resorting to professional assistance and care, the implementation of a self-owned plan works out more cost-effective. Moreover, it is

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- (2) Indien het plan van aanpak geschikt is om binnen de duur van de ondertoezichtstelling de concrete bedreigingen, bedoeld in artikel 255, vijfde lid, weg te nemen, geldt het *als* het plan, bedoeld in artikel 13, derde lid, van de Wet op de jeugdzorg. Indien het plan van aanpak naar het oordeel van de stichting niet geschikt is om de concrete bedreigingen weg te nemen, deelt de stichting dit binnen vijf werkdagen na de aanbieding van het plan van aanpak gemotiveerd aan de ouder of ouders met gezag mede, en stelt zij hen in de gelegenheid om het plan van aanpak binnen twee weken aan te passen. Indien de stichting binnen deze termijn geen aangepast plan van aanpak ontvangt of een plan van aanpak ontvangt dat naar haar oordeel evenmin geschikt is om de concrete bedreigingen weg te nemen, stelt zij alsnog zelf een plan als bedoeld in artikel 13, derde lid, van de Wet op de jeugdzorg op.
  - (3) Op verzoek van een met het gezag belaste ouder of de minderjarige van twaalf jaar of ouder kan de kinderrechter het plan van aanpak laten gelden als het plan, bedoeld in artikel 13, derde lid, van de Wet op de Jeugdzorg. Artikel 264, tweede en derde lid, zijn van overeenkomstige toepassing”.

<sup>362</sup> This is applicable unless there is a clear threat to the development of the child or when the interests of the child might be harmed otherwise. See the proposed Article 262a of the Civil Code.

<sup>363</sup> See Schuurman & Mulder “Eigen Kracht-conferenties bij gezinnen in de regio Amsterdam – Wat levert het op?” (2010) *Kalliope Consult/Antropol* 23 and 29.

submitted that the effect of active solution-finding by the affected parties compared to the imposition of a child protection measure should not be underestimated. In case of a family law<sup>364</sup> related problem, a family comes together with the members of their social network. For example, relatives, neighbours, the teacher or any other relevant person who may be able to make a contribution. The family decides on when and where the family group conference takes place. The conference will be facilitated by an independent co-ordinator, who is specifically trained for this task by the organisation, Eigen Kracht,<sup>365</sup> in Zwolle, the Netherlands.<sup>366</sup> The co-ordinator invites all the participants, as directed by the child and the family (on average the group consists of 16 people). The family group conference consists of three phases:<sup>367</sup>

- (i) The general introduction of the participants by the independent co-ordinator, if necessary. The so-called “rules of order” are to be determined by the participants, which ensure that everyone is clear on what is expected from the process of family group conferencing. A social worker or another professional, for example a psychologist, will outline the problems of the family concerned and what they as professionals can do to assist the family. In addition they will explain that the plan to be drafted by the family will be accepted by the professional (Bureau for Youth Care) as long as the safety and well-being of the child are secured.<sup>368</sup> Everyone is given the opportunity to ask questions.
- (ii) In this phase the participants are able to deliberate freely without the presence of the professionals. This is thus a private meeting of the family and network. All professionals, including the independent co-ordinator, leave

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<sup>364</sup> It is interesting to note that the concept family group conference is included in South Africa in both the Children's Act 38 of 2005 (section 70) and the Child Justice Act 75 of 2008 (section 61).

<sup>365</sup> Which means “own strength”.

<sup>366</sup> It was a privilege to have been invited to attend the training for independent co-ordinators at the Eigen Kracht Centrale in Zwolle, the Netherlands, in December 2007.

<sup>367</sup> Van Patee in Van Patee (ed.) *Eigen Kracht, Family Group Conference in Nederland, van model naar invoering* (2003) 41-49.

<sup>368</sup> The threat mentioned in terms of Article 1:254 of the Civil Code, which may give rise to the need for a supervision order, needs to be averted by the plan of action of the family and social network.

the venue. The family will discuss the problem and the aim is to draft a workable plan which outlines the responsibilities of various participants. There is no time limit as such, and a conference can be adjourned and resume later or on the following day. The co-ordinator will be on stand-by in case the family needs some guidance.

- (iii) Presentation of the written plan as drafted by the family and network. One of the participants will present the plan to the co-ordinator and other professionals. Usually the plan will be accepted, unless it is unsafe or against the law.<sup>369</sup> After some time the plan and implementation will be evaluated; this again involves the family and the network.

It should be noted that, unlike the situation in South Africa, the plans presented by the family and social network do not need to be confirmed by the court. Where necessary, the Bureau for Youth Care has discretion to approach the court for a child protection measure, which possibilities will be outlined in Chapter 4.<sup>370</sup>

Research has indicated that about 86% of the actions mentioned in the plan of action, drafted by the family and the network, can be implemented by the family and network.<sup>371</sup> In other words, the taking responsibility of the persons involved substitutes the need of care and dependence of professional assistance. Other benefits are the increase of social cohesion and a saving pertaining to the costs of professional care. It is submitted that although the removal of a child may be prevented, in some instances a supervision order might still be in the best interests of the child. This way a social worker can still supervise the implementation of the plan as made and implemented by the social network.

The fact that on the basis of the proposed legislation, both the parent and the child of 12

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<sup>369</sup> Research has shown that as a result of family group conferencing the safety and well-being of children has been improved pertaining to the families who took part in the research, in "De familie aan zet – De uitkomsten van Eigen Kracht-conferenties in de jeugdbescherming met betrekking tot veiligheid, sociale cohesie en regie" (2008) *PI Research* 57.

<sup>370</sup> See the sections 4.3.1.2 and 4.5.2.

<sup>371</sup> See "*Families voorkomen ondertoezichtstelling*", available via <http://www.eigenkracht.nl/nl/artikel/families-voorkomen-ondertoezichtstelling>, accessed on 15-3-2012.

years or older may approach the children's court in order to request the court to authorise the plan made is most welcome. It is hoped that this opportunity for the child to approach the court independently in this matter can soon be added to the list mentioned above.<sup>372</sup>

Finally, it is interesting to note that the Committee on the Rights of the Child specifically refers to mediation and arbitration; in other words, out of court settlement, but the role of these alternative dispute mechanisms is not further discussed. It is regrettable that this has not received more attention. It is commendable that the general approach of the Children's Act is conducive to conciliation and problem-solving<sup>373</sup> and provides for alternatives in procedure. It is submitted that in all cases where children are involved, first out of court settlement possibilities should be explored or followed, and only when this fails or would not be desirable,<sup>374</sup> the option of a procedure in court would arise.

Furthermore, additional guidelines are needed for the implementation of these alternative procedures, combined with the training of professionals who are expected to facilitate these processes and who have to effectively work with them.

### 3.1.5 Implementation of children's rights

In Article 4 of the CRC, reference is made to a progressive implementation of economic, social and cultural rights. In this regard state parties are under the obligation to realise measures "to the maximum extent of their available resources"; the latter involving finances, manpower and organisational skills.<sup>375</sup> With regard to the implementation of treaties, in other words, the realisation of the children's rights as contained in the CRC, two aspects can be identified.

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<sup>372</sup> See page 59 and 60.

<sup>373</sup> Section 6(4)(a) of the Children's Act clearly states that "In any matter concerning a child – an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided".

<sup>374</sup> For example, where a child has been abused.

<sup>375</sup> See Meuwise *et al.* (2005) 66.

Firstly, the treaty law has to be “translated” into national law. As mentioned above,<sup>376</sup> it depends on the system of the individual state parties as to what the effect of a treaty will be. Reference was made to the distinction between the system of monism and dualism. Dualism regards international law and the national law of a country as two distinct systems of law. Transformation of international law into the national law of a country is an absolute prerequisite for its application by the national courts of the country concerned.<sup>377</sup> South Africa, in essence, subscribes to the system of dualism.<sup>378</sup> According to the monist system, international law is integrated into the national law of a country without the need of transformation by a legislative body of a particular country. The Netherlands maintains a moderate system of monism, as can be derived from the Dutch Constitution.<sup>379</sup>

Whichever system applies to the country concerned, all state parties have a duty to bring their national legislation in line with the CRC. Therefore all legislation has to be checked, including customary law. Since ratifying the CRC a number of countries have come up with law reforms pertaining to the realisation of children's rights.<sup>380</sup> Every five years state parties have to submit their reports pertaining to the realisation of the CRC to the Committee on the Rights of the Child.<sup>381</sup> After consideration of a state party's report, the Committee makes recommendations on improvements to be made by individual state parties and general recommendations relevant to all state parties.<sup>382</sup>

The second aspect pertaining to the implementation deals with the development of policies to ensure the realisation of children's rights on a practical level. In South Africa the National Department for Women, Children and Persons with Disabilities was established in 2009.<sup>383</sup>

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<sup>376</sup> See section 2.1 above.

<sup>377</sup> Dugard (2007) 47.

<sup>378</sup> See Chapter 14 of the Constitution, sections 231-233 dealing with international law.

<sup>379</sup> The Dutch Constitution (in Dutch: *de Grondwet*) regulates the involvement of the Kingdom of the Netherlands to treaties in the Articles 90-95 and 120.

<sup>380</sup> See Sloth-Nielsen & Van Heerden (1997) *Stell LR* 261, where reference is made to Uganda, Namibia, Kenya, Ghana and Australia.

<sup>381</sup> In terms of Article 44 of the CRC.

<sup>382</sup> These are called *Concluding Observations*, in terms of Article 45(d) of the CRC.

<sup>383</sup> At first the Department functioned under the Presidency, but since 2010 it has established itself as a separate Department, with a budget of R156 million over three years, allocated by the National Treasury: <http://www.pmg.org.za/print/20686>, last accessed on 6 October 2011.



The Department aims to strengthen family life in the country. The broader mandate of the Department is to facilitate compliance with the various regional and international treaties and to mainstream the rights of the three groups (women, children and people with disabilities). Furthermore, there has to be scrutiny of all programmes “to ensure that their alignment with the national norms for the sector are monitored and evaluated”.<sup>384</sup> The Children's Rights Advisory Council is one of the first platforms to build these national norms and standards. Moreover, the Office on the Rights of Children (ORC) works closely with departments in all spheres of government. The minister has indicated that it is necessary that the mandates of the Office on the Rights of Children be linked to the Department for Women, Children and People with Disabilities. On a provincial level the Department of Health and Social Development plays an important role with regard to initiating programmes in the field of child welfare.

In the Netherlands a new ministry was established in 2007, namely the Ministry for Youth and Family.<sup>385</sup> This ministry is responsible for initiating policies pertaining to the enhancement of the position (and rights) of children and their families, and the implementation thereof. Various non-governmental organisations/civil organisations working on children's rights have been collaborating under the Dutch NGO Coalition for Children's Rights or “*Kinderrechtencollectief*”.<sup>386</sup> Since then, so-called Centres for Youth and Family

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<sup>384</sup> [Http://www.pmg.org.za/print/20686](http://www.pmg.org.za/print/20686) page 2, last accessed on 6 October 2011.

<sup>385</sup> In Dutch: *Ministerie voor Jeugd en Gezin*. After the elections in 2010 this Ministry regrettably ceased to exist as a separate Ministry and was subsequently accommodated under the Ministry of Health, Welfare and Sports.

<sup>386</sup> The Dutch NGO Coalition for Children's Rights was initiated by Defence for Children in the Netherlands and UNICEF and focuses on the implementation of the CRC. It has had regular contact with the Ministry on Youth and Family. On the website of the “*Kinderrechtencollectief*” all 54 rights of children are explained in a child-friendly manner. See <http://www.kinderrechten.nl>. See Meuwise *et al.* (2005) 67. In January 2008 UNICEF and Defence for Children in the Netherlands have released their first Annual Report Children. This report gives an impression of the situation of children and children's rights in the Netherlands. It also contains suggestions for improvement pertaining to the implementation of the CRC. This report was presented to the Ministry for Youth and Family. See <http://www.jeugdengazin.nl/dossiers/kinderrechten/default.asp>, last accessed on 6 October 2011.

Moreover, the important function of NGO's with regard to the implementation of the CRC is highlighted in Meuwise *et al.* “*De kritische rol van kinderrechtensorganisaties*” 2007 *Tijdschrift voor de Rechten van het Kind – Defence for Children International* No. 2, page 2. In this publication he refers to Article 45(a) of the CRC, which offers specialised agencies, UNICEF “and other competent bodies” like NGO's an opportunity to provide the Committee on the Rights of the Child with expert advice on the implementation of the CRC. For a discussion on the role of NGO's pertaining to reporting duties of states parties, see also Doek

have been established in most municipalities, with the aim of assisting parents, children and young people with questions about parenting and related matters. This is developing into a nationwide walk-up point with easy access for the public at large. In November 2009 a summit on Children's Rights, the so-called "*Kinderrechtentop*", was organised by UNICEF in collaboration with Defence for Children International and attended by a number of stake holders, various members of parliament, experts in child law, parents and children. Minister Rouvoet of the (then still existing) Ministry for Youth and Family, announced the start of the country-wide campaign on Children's Rights.<sup>387</sup> Furthermore, the minister announced that 50 000 Euro would be made available to the University of Leiden in order to support the Chair on Child Law at this University.<sup>388</sup> In the course of 2010 a so-called "*kinderrechtenhuis*" or "children's rights house" opened its doors in Leiden.<sup>389</sup> This "children's rights house" will offer activities to groups of children with the aim of improving their knowledge on children's rights from a regional, national and international perspective.

Since 1 April 2011 the Netherlands has had its own Children's Ombudsman, who will monitor the implementation of the CRC in the Netherlands. For many years there have been so-called "*kinderen- en jongeren rechtswinkels*" in the Netherlands, where children have been able to get information and answers to (legal) questions; for example relating to their status, divorce of their parents and the consequences thereof, name change, parental responsibilities and rights, and the effect thereof on the child concerned.<sup>390</sup> These centres are run by students under the supervision of professionals in the field. It is submitted that it is very positive that in South Africa that there is a specific ministry mandated to contribute to the enhancement of children's rights and to the welfare of families (family life). It is

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"Samenwerken voor Kinderrechten – Kinderrechtenorganisaties en het Kinderrechtencomite" (2007) 2 *Tijdschrift voor de Rechten van het Kind – Defence for Children International* 19.

<sup>387</sup> The campaign aims to create awareness on children's rights and involves the media in order to reach a wide range of people: children, the youth, adults and professionals.

<sup>388</sup> This Chair at the University of Leiden will provide for courses in the field of child law in order to contribute to skills development regarding professionals working with children. Research will be as important in order to establish the needs of children in various circumstances. These findings, in turn, will be indispensable to all relevant sections (government and non-governmental organisations/civil organisations alike) working with children.

<sup>389</sup> This was an initiative of the International Child Development Initiative (ICDI). See also <http://www.kinderrechtenhuis.nl>.

<sup>390</sup> At the moment there are fourteen "Kinderen- en Jongerenrechtswinkels" in the Netherlands, namely in Amsterdam, Assen, Breda, Den Haag, Enschede, Groningen, Hengelo, Leeuwarden, Leiden, Maastricht, Nijmegen, Alkmaar, Rotterdam and Utrecht. See [www.kinderrechtswinkel.nl](http://www.kinderrechtswinkel.nl), last accessed on 6 October 2011, for more information.

regrettable that in the Netherlands the separate ministry for Youth and Family does not exist any longer but has been incorporated in the ministry of Health, Welfare and Sports, (probably) due to budget considerations.

Nevertheless, as mentioned, a positive development is the fact that the first Children's Ombudsman has taken office in the Netherlands.<sup>391</sup> This national institute is under the statutory duty to overview and ensure the enhancement and implementation of children's rights in the Netherlands independently.

In conclusion, what is needed is a proper inventory and thus overview of children's rights initiatives in order to avoid unnecessary duplication and costs (and reinventing the wheel). These national offices should ensure the collaboration on a horizontal level (through the departments) and on a vertical level (the three spheres of government; national, provincial and municipal), and include the participation of children in order to establish their needs. Much will depend on the practical implementation by various agencies on the ground, which efficacy needs to be evaluated regularly.

Non-governmental organisations or civil organisations will have to collaborate with government and there should be proper channelling of information and data from ground level up to the national ministries and back. Moreover, apart from the existing legal aid clinics at the various universities in South Africa, there is scope for a South African variant of a legal advice bureau for children (and the youth), similar to the Centre for Child Law at the University of Pretoria, but widespread over South Africa.

## **3.2 Respect for the family and family life**

In both South Africa and the Netherlands the concept of the family plays a central and crucial

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It is interesting to note that although the Kinderombudsman is part of the Bureau National Ombudsman, he (or she) does have specific allocated functions and powers. See in this respect the Articles 11a-11e of the Wet Nationale Ombudsman (amendment of 13 December 2010, Stb. 2011, 4). The Kinderombudsman protects children's rights and keeps note on the observance of children's rights by the government, private organisations in the field of education, and in the field of child and youth care and health care. He provides advice to Parliament and organisations and reports to Parliament annually. For more information, see <http://www.dekinderombudsman.nl/17/volwassenen>, accessed on 6 October 2011.

role in society. Both countries are signatories to the instruments which are aimed specifically at the enhancement of children's rights, namely the CRC and the African Children's Rights Charter.

In the Preamble of both instruments reference is made to the importance of the family as a fundamental group of society and as the ideal environment to grow up in.<sup>392</sup> However, in comparing the South African situation to the situation in the Netherlands, the composition of "family" differs in certain respects, as will be discussed below. It is submitted that whatever the concept entails, where a group of persons is regarded as a family under the national legislation and practice or custom of a state party, this unit should be given protection against unjustified interference.<sup>393</sup>

In terms of Article 7(1) of the CRC a child is, as far as possible, entitled to be cared for by his or her parents, and it is this right of the child that is the point of departure in the discussion to follow. The relationship between the child and his or her parents also comes to the fore in Article 5 of the CRC. It was mentioned that the emphasis in this provision is on the role of the parents,<sup>394</sup> since they are the first ones to be responsible for providing appropriate direction and guidance in the exercise by the child of the rights in the CRC.<sup>395</sup> Besides parents, Article 5 also refers to members of the extended family or community (as provided for by the legal custom), legal guardians or other persons legally responsible for the child.

The question arises as to who exactly should, apart from providing direction and guidance, have regard for the evolving capacities of the child in South Africa and the Netherlands?<sup>396</sup> In addition, parents have been assigned the parental responsibilities as set out in Article 18

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<sup>392</sup> See section 2.2.1.1 above.

<sup>393</sup> See also UN *General Comment No. 19* (1990), section 2.

<sup>394</sup> See also section 2.2.2.2 above.

<sup>395</sup> On the basis of Article 14 of the CRC parents and other care-givers may also provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion, in a manner consistent with the evolving capacities of the child. States parties are obliged to respect the rights and duties of parents or other care-givers in this respect, see Article 14(2) of the CRC. For a more detailed discussion, see section 2.2.1.6.

<sup>396</sup> Article 5 of the CRC acknowledges the fact that children develop competencies and capabilities gradually, and that parents and other care-givers should have regard for this and support this. See section 2.2.2.2.

of the CRC<sup>397</sup> and are expected to provide an adequate standard of living.<sup>398</sup> With regard to the latter reference was made to the states parties' obligations in terms of Article 27(3) and (4) of the CRC.<sup>399</sup> Apart from adopting appropriate measures in order to assist parents and others responsible for the child in case of need,<sup>400</sup> state parties have to take all appropriate measures to secure the recovery of maintenance for the child from the parents or others who are financially responsible.<sup>401</sup> The latter is even more pressing in the case of single parent families, which is a phenomenon in both South Africa and the Netherlands.

The effects of the financial difficulties these family units may encounter should not be underestimated, even more so in developing countries. As already mentioned, to ensure the enforcement of maintenance is an obligation of each state party. Where the enforcement mechanisms are not functioning adequately, the improvement of the enforcement system needs to be prioritised, not only in order to comply with the obligations in terms of international law but ultimately to serve the interests of children. It goes without saying that children should not be at the receiving end of a dysfunctional system. It is therefore submitted that the obligation pertaining to the enforcement system should be prioritised.

The following paragraphs contain an overview of (parts of) the legislation in South Africa<sup>402</sup> and the Netherlands which are linked to the relevant rights<sup>403</sup> mentioned in the international documents, pertaining to the concept family and family life.<sup>404</sup>

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<sup>397</sup> See also Article 20 of the African Children's Rights Charter. For a more detailed discussion on these international standards, see section 2.2.4 and section 2.2.2.5.

<sup>398</sup> See the Articles 27 of the CRC and 20(1)(b) of the African Children's Rights Charter. See Van Heerden *Boberg's Law of Persons and the Family* (1999) 554. See also section 2.2.2.6.

<sup>399</sup> See section 2.2.2.6 above.

<sup>400</sup> Particularly with regard to nutrition, clothing and housing. Compare to Article 20(2)(a) and (b) of the African Children's Rights Charter, which includes also health and education.

<sup>401</sup> Article 27(4) of the CRC. The CRC contains a more detailed provision compared to Article 20 of the African Children's Rights Charter. By providing a better standard it therefore contributes more to the intended protection of children.

<sup>402</sup> Which includes customary law in South Africa, where applicable.

<sup>403</sup> This needs to be qualified: it is evident that all the rights in the CRC and other documents are important. The word "relevant" should be seen in the context of the topic of this thesis, dealing with the placement of children in need of care and protection.

<sup>404</sup> For a discussion on the standards as provided in the international documents, see chapter 2.

### 3.2.1 The right to family care or parental care in South Africa<sup>405</sup>

In South Africa, the Constitution,<sup>406</sup> as the supreme law of the Republic of South Africa,<sup>407</sup> does not contain a provision pertaining to the protection of the family *per se*.<sup>408</sup> However, as discussed above,<sup>409</sup> the Constitution does include a provision specifically on children.<sup>410</sup> The Constitutional Court has determined that this section 28, “requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk”.<sup>411</sup>

On the basis of section 28(1)(b) every child has the right -

“to family care or parental care, or to appropriate alternative care when removed from the family environment”.<sup>412</sup>

In other words, this provision, which aims at ensuring adequate care for each and every child, provides for three possibilities. Firstly, the right to “family care”; secondly, the right to “parental care”; and thirdly, the right to “appropriate alternative care when removed from the family environment.” The last mentioned option only comes to the fore where family care or parental care is lacking.<sup>413</sup>

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<sup>405</sup> See section 28 of the Constitution and chapter 3 of the Children's Act 38 of 2005.

<sup>406</sup> 108 of 1996.

<sup>407</sup> Section 2 of the Constitution, which furthermore states: “law or conduct inconsistent with it (the Constitution) is invalid, [...]”

<sup>408</sup> Compare to, for example, Article 8 of the European Convention which aims to protect “family life”. From other sections in the Bill of Rights in the Constitution, 1996, it can be derived that the institutions of marriage and family do get some support. For example, section 9 (non-discrimination), section 14 (privacy) and section 15 (religion and culture). See also Davis *et al. Fundamental Rights in the Constitution: Commentary and Cases* (1997) 269.

<sup>409</sup> See section 3.1.3 above.

<sup>410</sup> Section 28 of the Constitution. See also section 3.1.3.1 above.

<sup>411</sup> *S v M* (Centre for Child Law as amicus curiae) 2008 (3) SA 232 [par 20]. See also Skelton *Child Law in South Africa* (2009) 285.

<sup>412</sup> This is also one of the objects of the Children's Act, see section 2(b)(i) of the Act.

<sup>413</sup> This will be discussed in chapter 5, pertaining to the placement of children. See also Matthias & Zaai in Boezaart (ed.) *Child Law in South Africa* (2009) 163.

It is clear that the primary responsibility for ensuring family care lies with both parents or the extended family.<sup>414</sup> When this is not an option (any more),<sup>415</sup> parental care comes to the fore. In the Constitutional Court case *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>416</sup> it was mentioned that section 28(1)(b) and section 28(1)(c) must be read together. The reason behind this is that section 28(1)(b) defines those responsible for care and section 28(1)(c) lists various aspects of the care entitlement,<sup>417</sup> so they complement each other.

Furthermore, Yacoob J deliberated that “[s]ection [section 28(1)(b) of the Constitution] encapsulates the conception of the scope of care that children should receive in our [South African] society”.<sup>418</sup> The court also considered that,

“where children are cared for by their parents or families, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28”.

This would normally be realised by the passing of legislation and by creating enforcement mechanisms pertaining to the maintenance of children, their protection from abuse and neglect, and the prevention of other forms of abuse, as mentioned in section 28 of the Constitution.<sup>419</sup>

In *Jooste v Botha*<sup>420</sup> the plaintiff, the extra-marital child (as the children of unmarried parents were then referred to),<sup>421</sup> assisted by his mother as his guardian, instituted an action against his father (defendant). He claimed damages allegedly arising from defendant's failure to render plaintiff any “attention, love, cherishment and interest” in the past 11 years. The

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<sup>414</sup> See Van Dijkhorst J in *Jooste v Botha* 2000 (2) BCLR 187 (T) 196 B.

<sup>415</sup> Due to divorce or when a parent has passed away.

<sup>416</sup> 2000 (11) BCLR 1169 (CC).

<sup>417</sup> Section 28(1)(c) provides for the right to basic nutrition, shelter, basic health care services and social services.

<sup>418</sup> See section 76 of the *Grootboom* case (2000) (11) BCLR 1169 (CC)).

<sup>419</sup> See section 78. See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 286.

<sup>420</sup> 2000 (2) BCLR 187 (T). See also the discussion in section 3.1.3 above.

<sup>421</sup> See Boezaart *Law of Persons* (2010) 94.

father and mother were never married. Plaintiff's contention that a cause of action existed in terms of section 28 of the Constitution was based on the entitlement to parental care, as referred to in section 28(1)(b), and the fact that defendant was his biological father.

Dijkhorst J deliberated that,

“a bond of kinship evolves from the relationship mother – father – child, which society expects the parents, children and siblings to honour. But this does not grant rights to and impose concomitant obligations upon the parties, except in the economic sphere”. Moreover, “where there exists no legal obligation on parents to love their legitimate offspring, it is axiomatic that there can be none in respect of illegitimate children”.

Neither common law nor any legislation recognises the right of the child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. Therefore a bond of love is not a legal bond. On the basis of section 28(1)(b) every child is entitled to be in the care of somebody who has custody over him or her. Here lies a constitutional obligation for the state. Where there is no family, a single parent can be the care-giver. The word “parental” in section 28, therefore refers to a custodian parent. Dijkhorst J concluded that,

“thus interpreted, the non-custodian legitimate parent and the natural father of an illegitimate child (who does not have custody) fall outside the scope of section 28(1)(b) of the Constitution”.

Recently enacted legislation pertaining to children can be found in the Children's Act,<sup>422</sup> which truly is a 21<sup>st</sup> century document. In its Preamble reference is made to section 28 of the Constitution. Furthermore, it is acknowledged in the Preamble that the protection of children's rights gives rise to “a corresponding improvement in the lives of other sections of the community” since the protection of children's rights cannot be dealt with in isolation from the families and communities where these children form part of.

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<sup>422</sup> 38 of 2005.



Moreover, reference is made to the various (children's rights) documents, and it is reiterated that a child should grow up in a loving and understanding family environment. The objects of the Children's Act are numerous, which is to be expected from an "all-encompassing"<sup>423</sup> document.<sup>424</sup>

It is exciting and promising that the list with objects of the Children's Act starts with promoting the preservation and strengthening of families. The latter implies that by supporting and therefore the strengthening of families, the key lies in prevention.<sup>425</sup> However, where problems arise, the Children's Act contains various solution-oriented procedures,<sup>426</sup> and in cases where the court is approached to step in, the Children's Act

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<sup>423</sup> Some legal aspects relating to children are, although referred to in the Children's Act, dealt with in detail in other legislation pertaining to specific fields, for example, criminal law and procedure and labour law.

<sup>424</sup> Section 2 of the Children's Act lists the objects of the Act as follows:

- “(a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely -
  - (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 a 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, 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 may have; and
- (i) generally, to promote the protection, development and well-being of children.”

<sup>425</sup> Article 27(3) of the CRC provides that state parties should in cases of need, provide material assistance and support programmes. Compare with Article 20(2)(a) of the African Children's Rights Charter. See also section 4.2 below on prevention and early intervention.

<sup>426</sup> These fall under the term "lay-forum hearings" in section 49 of the Children's Act. This may include a pre-hearing conference, a family group conference or mediation (including a traditional authority). See sections 69-71 of the Children's Act. This is in line with the general

encourages the court to be creative in making an order suitable to the needs of the child and his or her circumstances.<sup>427</sup>

Chapter 3 of this Act deals with “parental responsibilities and rights”. The dated paternalistic approach and traditional decision making have made way for the fresh breeze of acknowledgement of children's rights. According to section 1(1) of the Children's Act, “parental responsibilities and rights” in relation to a child means the responsibilities and the rights referred to in section 18.

Section 18 reads as follows:

- “(1) A person may have either full or specific parental responsibilities and rights in respect of a child.
- (2) The parental responsibilities and rights that a person may have in respect of a child, include 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.
- (3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must -

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principles in section 6 of the Children's Act, more specifically section 6(4) which states that – in any matter concerning a child (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

<sup>427</sup> Where section 15 of the Child Care Act 74 of 1983 only gave a limited choice, section 46 provides the courts with many more options. However, it is submitted that placement should be a measure of last resort. For an in-depth discussion see Chapter 5.

- (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.
- (4) When ever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other, any right or responsibility arising from such guardianship.
- (5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c)".

The overall contents of this section are not completely new; however, some aspects have changed drastically.<sup>428</sup> Firstly, in line with the shift in focus from parental rights to the rights of children,<sup>429</sup> section 18 replaces parental authority<sup>430</sup> with parental responsibilities and

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<sup>428</sup> For a detailed discussion on the acquisition of parental responsibilities and rights in terms of South African law, see section 4.1.1.

<sup>429</sup> The Children's Act is aimed at giving effect to the (constitutional) rights of children. See also Van Heerden *Boberg's Law of Persons and The Family* (1999) 314; Himonga in *Wille's Principles of South African Law* (2007) 171. It should be noted that all legislation pertaining to

rights. Although parents and other care-givers are still bound to care for and to protect the child, this should be done in accordance with the evolving capacities of the particular child.<sup>431</sup> After all, the child is a bearer of rights and duties<sup>432</sup> which includes the right to self-determination, which is ever increasing alongside age and maturity.<sup>433</sup> The terms “custody” and “access” have been replaced by “care” and “contact”.<sup>434</sup> Previously, the common law concept of “parental authority” was divided in three components; namely, guardianship, custody and access.<sup>435</sup> With the coming into force of the Children's Act<sup>436</sup> only the term guardianship was retained.<sup>437</sup>

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children in South Africa, should be in line with the Constitution, on the basis of section 2 of the Constitution.

430 Parental authority means the sum total of rights and duties which a parent has in relation to his or her child. See Bosman & Van Zyl in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 52.

431 This is in line with Article 5 of the CRC.

432 For the meaning of legal subject and the beginning of legal subjectivity, see section 3.1.1 above.

433 See also Van Heerden (1999) 314.

434 This was recommended by the South African Law Reform Commission Discussion Paper *Review of the Child Care Act* Project 110 chapter 8 (2001) 216. In its report the Commission considered that “[i]n the context of children caught up in divorce proceedings, a shift to new, less 'loaded' terminology can reduce conflict in divorce”, see pages 215 and 653. Moreover, the more neutral language would let both parents focus on their responsibilities rather than their rights, page 652. See also *J v J* 2008 (6) SA30(C), Boniface *Revolutionary changes to the parent-child relationship in South Africa, with specific reference to guardianship, care and contact* (LLD thesis 2007 UP) 376.

435 *WW v EW* 2011 (6) SA53(KZP). For a more in-depth discussion on the previous concept of parental authority and its content, see Boniface (LLD thesis 2007 UP), chapter 3.

436 38 of 2005. Proclamation No. 13, 2007 *Government Gazette* No. 28944 19 June 2006.

437 Discussion Paper *Review of the Child Care Act* Project 110 chapter 8 (2001) 215. Until recently guardianship was dealt with in the Guardianship Act, which provided for joint guardianship of the mother and father with regard to their minor child born out of their marriage. Thus both parents would be guardians of their child during marriage and this would usually continue after divorce. Where parents were not married, the mother would be the guardian. However, legitimization of an extra-marital child by a subsequent marriage of both his or her biological parents, at any time after the child's birth, would cause the father to acquire parental authority. However; only as from the date of the marriage. Nevertheless this parental authority would be equal to that of the mother. It should be noted though, where the one parent would marry somebody else than the other parent, that no parental authority would be acquired over a stepchild. For the stepparent to acquire parental authority, he or she would have to adopt the stepchild. See also Van Heerden (1999) 323.

In short, guardianship entailed the administration of the minor's estate, and the assistance of the minor in the performance of juristic acts and in legal proceedings.<sup>438 439</sup> Care (custody) involved that part of parental authority which deals with the day-to-day care of a child, to control the child's daily life, including the duty to provide for the overall needs and well-being of the child.<sup>440</sup> Contact (access) referred to contact between the non-custodian parent and the child.<sup>441</sup> After a brief overview on the position of unmarried, married and divorcing parents preceding the Children's Act, the discussion will revert back to the current situation, which includes the changes brought by the Children's Act.<sup>442</sup> Where in the past the parents of a child were not married, the mother would be the guardian as well as the custodian parent.<sup>443</sup> The biological father did not automatically acquire any rights,<sup>444</sup> yet he did incur a responsibility, namely the duty to pay maintenance.<sup>445</sup>

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<sup>438</sup> Due to the limited capacity to act a minor needs to be assisted by his or her guardian. See Bosman & Van Zyl in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 53; also Van Heerden *Boberg's Law of Persons and the Family* (1999) 313-314.

<sup>439</sup> In Discussion Paper *Review of the Child Care Act* Project 110 chapter 8 (2001) 215, the South African Law Reform Commission recommended that the term "guardianship" should be retained, "[b]ut should be defined so as to encompass the residual aspects of parental responsibility (viz. those not covered by 'care' and 'contact')".

<sup>440</sup> This would relate, among others, to matters like education, health, discipline and religion.

<sup>441</sup> See Robinson *et al. Introduction to South African Family Law* (2009) 224.

<sup>442</sup> See also section 4.1.1.

<sup>443</sup> The legal position of an "extra-marital child" (now referred to as a child of unmarried parents) was based on the maxim "*een moeder maakt geen bastaard*". Where the mother would be a minor herself, the custody of the child would vest in the mother, unless a competent court would direct otherwise in terms of section 3 of the repealed Children's Status Act 82 of 1987. This Act was repealed on 1 July 2007. See Proclamation No. 13, 2007, *Government Gazette* No. 28944 19 June 2006. See Van Heerden in *Boberg's Law of Persons and the Family* (1999) 394.

<sup>444</sup> The biological father of an "extra-marital child" (now referred to as a child of unmarried parents) was from a legal point of view unrelated to the child and thus did not automatically acquire parental power or parental authority. See also Clark *Boberg's Law of Persons and the Family* (1999) 240.

<sup>445</sup> Which originated *ex lege*. This obligation has been codified in section 15 of the Maintenance Act 99 of 1998, which Act came into operation on 26 November 1999. Before this date, the obligation to maintain your biological child existed in terms of the Maintenance Act 23 of 1963. See also Clark *Boberg's Law of Persons and The Family* (1999) 240. Although the duty of support seems to be based on blood relationship, the question arises whether the duty of support should not be extended to, for example, step children, like in the Netherlands. It is submitted that the case *Heystek v Heystek* 2002 (2) All SA 401 (T) could play a role in causing a paradigm shift with regard to an more open approach to maintenance duties.

However, legitimation of a child of unmarried parents by a subsequent marriage of both his or her biological parents would cause the father to acquire parental authority.<sup>446</sup> The position of an unmarried father has been subject to a lot of debate, especially in view of the equality provision in the Constitution.<sup>447</sup> The *Fraser*-cases<sup>448</sup> eventually paved the way for law reform pertaining to unmarried fathers, which resulted in the Natural Fathers of Children Born out of Wedlock Act.<sup>449</sup> On the basis of this Act a natural or biological father could bring an application to the High Court regarding access (contact), custody (care) or guardianship. In other words, these rights did not come “naturally” but in order to be granted any rights pertaining to access or custody or guardianship of the child, the biological (natural) father first had to approach the court.

The court did have discretion in granting the father any of the rights he had applied for.<sup>450</sup>

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Where a parent with children marries his or her partner, it is not really comprehensible why not both parties should contribute to the maintenance of these children, in case this is needed. Why would one party have all the benefits of being part of a family unit and not contribute? Can we in South Africa really afford it to allow certain individuals to have their bread buttered on both sides? With rights come responsibilities, in fact, according to section 18 of the Children's Act, first the responsibilities and then rights. See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 68. For an in-depth discussion on maintenance see Van Schalkwyk in Boezaart (ed.) *Child Law in South Africa* (2009) 38-61.

<sup>446</sup> A subsequent marriage could take place at any time after the child's birth. However, parental authority by the biological father was only acquired as from the date of marriage. See also Van Heerden (1999) 320; Himonga *Wille's Principles of South African Law* (2007) 225.

<sup>447</sup> Section 9 of the Constitution (and before this section 10 of the Interim Constitution).

<sup>448</sup> Fraser had been in a relationship with a woman and after ending the relationship she discovered to be pregnant. She decided to give the child up for adoption. As they were not married, notification of this intention or consent of the biological father was not needed. Fraser approached the high court in the hope he could state his case being the biological father of the child. This was not successful. Eventually, after a lot of litigation, he was successful in challenging section 18(4)(d) of the Child Care Act 74 of 1983. In *Fraser v Children's Court* 1997 (2) SA 261 (CC), the Constitutional Court declared section 18(4)(d) of the Child Care Act invalid and left it to Parliament to correct the defect in the legislation in order to bring it in line with the Constitution. For an overview, see Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 72-73.

<sup>449</sup> 86 of 1997, which Act came into operation on 4 September 1998. The Natural Fathers of Children Born out of Wedlock Act was repealed on 1 July 2007, and replaced by section 18 and further of the Children's Act. See Proclamation No. 13, 2007, *Government Gazette* No. 28944 19 June 2006.

<sup>450</sup> Section 2(5) of the repealed Natural Fathers of Children Born out of Wedlock Act contained seven circumstances to be considered by the court, of which the last one was an open ended (non-exhaustive) consideration, namely “any other fact that, in the opinion of the court, should be taken into account”. Further circumstances to be taken into account dealt, among others, with the question whether there had been a history of violence between the applicant and the mother (against each other or the child), the degree of commitment that the applicant had

This Act, however, did not equate unmarried fathers with mothers or married fathers. The Children's Act has drastically improved the position of an unmarried father in South Africa.<sup>451</sup> During marriage both parents of the child share care in relation of their child. However, in the case of divorce it was not at all obvious that both parents would jointly continue to exercise care.<sup>452 453</sup> In terms of the Divorce Act, the court “may make an order which it may deem fit”.<sup>454</sup> In other words, the court has a discretion which exercise is nevertheless guided by the best interests of the child concerned and the consideration of the report and recommendations of the Family Advocate.<sup>455</sup> Care (custody) was usually awarded to one of the parents. The question would arise to whom care should be awarded.

In the past, the so-called “maternal preference” rule was applied by the courts.<sup>456</sup> According to this rule, mothers were preferred as custodians and naturally considered to be better care givers, especially in the case of young children, daughters and handicapped children, unless the mother's character or past conduct would render her unfit to have custody or unless the

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shown towards the child, and to which extent the applicant had contributed. An application was not granted unless the court was satisfied that it would be in the best interests of the child.

<sup>451</sup> See the discussion below on section 21 of the Children's Act, which deals with the position of unmarried fathers. This part of the Children's Act already took effect on 1 July 2007. See Proclamation No. 13, 2007, *Government Gazette* No. 28944 19 June 2006. See also Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 83 and further.

<sup>452</sup> In terms of the Children's Act it is expected that this will change drastically. The South African Law Reform Commission recommended that “[t]he court, in making an order in respect of the child, attempt to ensure the continued involvement of both parents of the child in that child's life”. See Discussion Paper *Review of the Child Care Act Project* 110 chapter 13 (2001) 656.

<sup>453</sup> It is interesting to note that where the one parent would marry someone else (other than the other parent), no parental authority would be acquired over a stepchild. For a stepparent to acquire parental authority, he or she had to adopt the stepchild. Section 20(2) of the (repealed) Child Care Act 74 of 1983, stated that “an adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage.” See also Van Heerden (1999) 323.

<sup>454</sup> Section 6(3) of the Divorce Act 70 of 1979. The latter Act is still in force.

<sup>455</sup> Section 6(1)(b) of the Divorce Act 70 of 1979, which states that: “a decree of divorce shall not be granted until the court - [...] has considered the report and recommendations [...].” It is self-evident that after considering the contents of the report the court has the final say and thus can deviate from the recommendations of the Family Advocate.

<sup>456</sup> Also called the tender years-principle. See section 3.1.3.

father was able to make better provision for the needs and well-being of the child.<sup>457</sup>

This rule or principle was rejected in 1996 in the case *Van der Linde v Van der Linde*.<sup>458</sup> The court declared that mothers are not necessarily better able to be good parents on a day-to-day basis. Hattingh J, held that “mothering” refers to caring for a child’s physical and emotional well-being and that it is not only a component of a mother but also forms part of a father’s being. It was emphasised that the quality of a parent’s role or input is not merely determined by gender. Thus, a father can be just as good “mother” as the biological mother, and at the same time, a mother can be just as good “father” as the biological father of the child. Maternal preference was again rejected in *Madiehe (born Ratlhogo) v Madiehe*.<sup>459</sup> In this case Lever AJ emphasised that custody is not a gender privilege or right, but a responsibility and privilege that has to be earned.<sup>460</sup>

It is evident that the rejection of the maternal preference rule is in line with the equality provision in the Constitution.<sup>461</sup> Instead of granting care (custody) to one parent, the court could also order care to be shared by both parents (joint custody),<sup>462</sup> provided that this would

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<sup>457</sup> See also Van Heerden *Boberg’s Law of Persons and the Family* (1999) 534. A factor not to be underestimated is the frame of reference of a particular judge or magistrate. See the view of Fleming J in *Greenshields v Wyllie* 1989 (4) SA898 (W) 899D. He mentions that he also has four daughters. Was it his personal experience that persuaded him to ignore the views of the two girls involved, aged 12 and 14 years? Although in both South Africa and the Netherlands the judiciary undergoes continuous training, the point of departure in each country differs. In the Netherlands aspirant magistrates (and public prosecutors) would normally after their university degree first have to successfully complete a 4-year work-study programme before being appointed a magistrate or public prosecutor. This is not the case in South Africa.

<sup>458</sup> 1996 (3) SA 509 (O). See also the discussion on “gender bias and the ‘maternal preference’ or ‘tender years’ rule by the South African Law Reform Commission. The Commission recommended “that the common law ‘tender years-doctrine’ or ‘maternal preference rule’ be rejected as a guide to decision-making about parenting”, see Discussion Paper *Review of the Child Care Act* Project 110 (2001) sections 14.4 and 14.5.

<sup>459</sup> 1997 (2) All SA 153 (B).

<sup>460</sup> However, in the same case Lever AJ stated that in case of doubt, the court might as well favour the mother, due to the physical demands on the mother regarding pregnancy and child birth. See also *Ex parte Critchfield* 1999 (1) All SA 319(W), in which case Willis AJ held that “given the facts of the dynamics of pregnancy, it would not amount to unfair discrimination” if a court considered maternity in making a custody award. He nevertheless added that it would be unconstitutional to place “undue weight” upon maternity when considering other relevant factors.

<sup>461</sup> Section 9 of the Constitution.

<sup>462</sup> In the past joint custody could be divided into joint legal and joint physical custody. Joint legal



serve the child's best interests.<sup>463</sup> It is regrettable that there has been quite a lot of resistance to the sharing of care (joint custody) in South Africa.<sup>464</sup> The courts have generally speaking been cautious, which resulted in some decisions favouring the sharing of care (joint custody) and other decisions rejecting it, regrettably even in cases where the circumstances were conducive to a successful exercise of the sharing of care (joint custody).<sup>465</sup> A striking case in this respect was *Kruger v Kruger*.<sup>466</sup>

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custody revolved around joint decision making. This would involve decision making regarding the day-to-day life of the child; for example, schooling, extra-curricular activities, medical care, routine or religion. The child would, however, stay with the one parent whilst the other parent would have contact (access) with the child. Joint physical custody involved that the child spent considerable time with each parent, thus at both parents' residences. For example, to spend a part of the week at the one parent's residence, the other part at the other parent, or alternate weeks. The feasibility would obviously depend on the circumstances. See Van Heerden *Boberg's Law of Persons and the Family* (1999) 550-558..

<sup>463</sup> See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 63-64.

<sup>464</sup> Due to the fact of getting divorced, parents are sometimes not willing or able to co-operate with their ex-spouse on a regular basis. Some of the common reasons are: the risk of (increase in) parental disagreements on matters they have to decide jointly, the lack of or insufficient communication between the parents and the child's need for stability and certainty. It is agreed with Van Heerden that the latter reason can be overcome by consistently applying a set routine ((1999) 557). It is submitted that the child should be involved in the planning of an appropriate routine, which involvement would be in line with the Articles 5 and 12 of the CRC. Other issues that may arise in custody disputes concern loyalty conflicts of children with regard to both their parents and the development of the parental alienation syndrome.

<sup>465</sup> *Kastan v Kastan* 1985 (3) SA 235 (C) was the first reported case in South Africa in which joint custody was granted to divorced parents. In this case the parents of three children requested the court to have a consent paper, in which they had agreed on joint custody, incorporated into the decree of divorce. King AJ deliberated that because of the loving relationship between the children and both the parents and the fact that both parents seemed determined to make it work, it would be in the best interests of the children to make an order in terms of the consent paper. However, in *Schlebusch v Schlebusch* 1988 (4) SA 548 (E), the court was of the opinion that joint custody should not be granted lightly. Mullins J was of the opinion that a joint custody order is likely to encourage a tug-of-war between the parents where one of the parents remarries or moves to another town, as frequently happens.

In *Pinion v Pinion* 1994 (2) SA 725 (D), the parents agreed on joint custody which was supported by the Family Advocate. Although the circumstances were promising (the parties were willing to co-operate, both parents were very involved in their child's life), Page J decided against it, since, among others, the future behaviour of parents is unpredictable. In *Corris v Corris* 1997 (2) SA 930 (W) the court granted a decree of divorce which incorporated the deed of settlement providing for joint custody, on the fact that the joint custody had been in place for over a year (since parties were living apart) and was functioning properly. In *V v V* 1998 (4) SA 169 (C), the parents had exercised joint custody for about two years prior to their divorce. However, at the time of the divorce the father claimed sole custody of the children. He alleged that the mother was suffering from a mental condition and that she was involved in a same-sex relationship and that she therefore only should be allowed supervised access with the children.

The parents of two children were joint legal custodians in terms of a settlement agreement which was made an order of court after the parent's second divorce and in which the father was awarded physical custody. After moving to Cape Town the father approached the court and applied for sole custody of the children, since the new circumstances would make it difficult to exercise joint custody. The mother agreed to the children to continue to live with their father; however, she applied for extended access pertaining to the children. De Vos J deliberated that:

“joint custody has been seen as potentially contributing to the promotion of children's rights and the equality between the sexes. It is argued that a child has the right to know and to be cared for by both his or her parents and to maintain personal relationships with both parents on a regular basis. Joint custody ensures precisely this sort of relationship in that it signals to the child that he or she is wanted, loved and looked after by both parents”.<sup>467</sup>

She was also of the opinion that:

“as long as both parents are fit and proper persons, it is important that they should have equal say in the raising of their children”.

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After analysing the evidence of experts pertaining to the mother's mental condition, Foxcroft J concluded that the father's main objection to joint custody concerned the mother's sexual orientation. In referring to the (pre- interim Constitution) case *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), Foxcroft J was of the opinion that in the latter case “the court had made a moral judgment about what is normal and correct insofar sexuality is concerned, and that there can be no doubt that the learned Judge regarded homosexuality as being *per se* abnormal”. After considering the equality provision (section 9) in the Constitution, it was concluded that “in law, it is [...] wrong to describe a homosexual orientation as abnormal”. It was acknowledged that the child's rights are paramount and need to be protected. Nevertheless, the right of a child to have access to his or her parents is complemented by the rights of parents to have access to the child. It is essential that a proper two-way process occurs, so that the child may fully benefit from its relationship with each parent in future. The court granted joint custody and presented parties with a tailor-made order, providing various solutions for possible upcoming issues. It is interesting to note that the order specifically determines that where a dispute arises on an issue of joint decision making, the matter will be referred for mediation by two mediators. Furthermore, where the mediators are not able to agree on a resolution, they shall jointly refer the dispute to an arbitrator, whose decision will be final.

<sup>466</sup> 2003 (6) SA 220 (T).

<sup>467</sup> See section [19]. It should be noted that De Vos J explicitly referred to the Articles 7 and 9 of the CRC.

In considering whether or not to make an order for the sharing of care (joint custody), the court had to weigh up whether input from both parents was not preferable to an uninvolved parent, even if this input was at times disharmonious. In this respect De Vos J held that:

“unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input. To my mind a joint custody order would not only promote the rights of children subsequent to the divorce of their parents but also help establish equality between the sexes”.<sup>468</sup>

Therefore the court considered it in the best interests of the children to keep the existing shared care (joint custody) order intact.<sup>469</sup>

From the above it can be derived that the courts in recent years have developed a more liberal approach pertaining to the sharing of care. In this respect the court would take note of arguments against the sharing of care, but yet would not get intimidated by, for example, the argument of ongoing conflicts between the parents.<sup>470</sup> The principle of the child's best interests was, and still is, the ultimate yardstick. With the coming into force of the Children's Act, the sharing of care has become the point of departure in South Africa, comparable to the situation in the Netherlands,<sup>471</sup> unless the interests of the child require otherwise.

Contact (access) refers to contact between the non-custodian parent and the child.<sup>472</sup> Based on the common law, the non-custodian parent would have the right to reasonable

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<sup>468</sup> See section [22].

<sup>469</sup> It is interesting to note that the order contained a specific stipulation in which the applicant (the father) would be responsible for paying one half of the travelling costs of the children to the respondent every second month.

<sup>470</sup> It is agreed with De Vos J that disagreement and negotiation are a part of life. It is submitted that children should be taught how to handle situations of conflict, namely in an atmosphere of dignity and mutual respect. These skills could possibly assist in preventing and/or combating the cycle of domestic violence.

<sup>471</sup> In the Netherlands joint authority generally speaking continues after divorce. See Article 1:251 of the Civil Code. For an in-depth discussion on parental authority in the Netherlands, see section 4.1.2.

<sup>472</sup> See Robinson *et al.* *Introduction to South African Family Law* (2009) 224.

access with regard to his or her child(ren). In *Van Erk v Holmer*<sup>473</sup> Van Zyl J held that the time was ripe for the recognition by South African courts of an inherent right of access by the father to his extra-marital child (which a child of unmarried parents was referred to),<sup>474</sup> which gave rise to severe criticism.<sup>475</sup> Howie JA, in *B v S*<sup>476</sup> analysed the *Van Erk's* case and concludes that natural fathers have no inherent right of access to their extra-marital children in terms of the common law. What they do have is *locus standi* to approach the court for an order awarding them access rights, which will only be successful if this serves the best interests of the child. In order to determine this, the following had to be examined:

- (i) The degree of commitment which the father has shown pertaining to the child;
- (ii) The degree of attachment between the father and the child;
- (iii) The reasons of the father for approaching the court.<sup>477</sup>

In 1995 the South African Law Reform Commission presented a Discussion Paper containing suggestions for statutory reform with the aim of improving the position of an unmarried natural father *vis-à-vis* his child. However, the notion that the unmarried father should have an inherent right of access to his child was rejected. The efforts made by the Commission resulted in the previously discussed Act, namely the Natural Fathers of Children Born out of Wedlock Act.<sup>478</sup>

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<sup>473</sup> 1992 (2) SA 636 (W). However, this decision seems to have ignored the binding precedent created in *B v P* 1991 (4) SA 113 (T). In the latter case it was held that the father did not have an inherent right of access. The court held nevertheless that the father would be granted access if he could prove, on a balance of probabilities, that access would serve the child's best interests and that it would not unduly interfere with the custody rights of the mother.

<sup>474</sup> See Boezaart *Law of Persons* (2009) 94.

<sup>475</sup> See Van Heerden *Boberg's Law of Persons and the Family* (1999) 407.

<sup>476</sup> 1995 (3) SA 571 (A).

<sup>477</sup> For an in-depth discussion see Van Heerden *Boberg's Law of Persons and the Family* (1999) 408 and further.

<sup>478</sup> 86 of 1997. This Act came into operation on 4 September 1998. The Natural Fathers of Children Born out of Wedlock Act was repealed on 1 July 2007, and replaced by section 18 and further of the Children's Act. See Proclamation No. 13, 2007, *Government Gazette* No. 28944 19 June 2006.

In terms of this Act the biological (natural) father had to approach the High Court in order to obtain an order granting him access rights with regard to his biological child. Section 2(5) of the (now repealed) Act contained seven circumstances which had to be considered by the court. The last one was an open ended (non-exhaustive) consideration; namely “any other fact that, in the opinion of the court, should be taken into account”. Further circumstances to be taken into account dealt, among others, the question as to whether there had been a history of violence between the applicant and the mother (against each other or the child), the degree of commitment that the applicant had shown towards the child, and to which extent the applicant had contributed. An application was not granted unless the court was satisfied that it would be in the best interests of the child. In other words, a cumbersome procedure was lying ahead for a natural father who was forced to approach the court in order to be awarded any kind of parental responsibilities and rights pertaining to his biological child.<sup>479</sup>

The Children's Act presents a new perspective. On recommendation by the South African Law Reform Commission this statute meant a break from archaic and paternalistic role patterns of parents, making way for various innovations pertaining to the parent-child relationship. As mentioned above, the terminology of certain concepts changed. The new terms of “care” and “contact” and the term “parental responsibilities and rights”<sup>480</sup> are more in line with the international/regional documents.

Apart from a change in terminology, the contents of certain concepts followed suit. For example, it can be derived from section 18 that parental responsibilities and rights can be shared among various persons<sup>481</sup> and, moreover, that a person may have either full or specific parental responsibilities and rights in respect of a child. As mentioned above, the parental responsibilities and rights that a person may have in respect of a child include the responsibility and right – (a) to care for the child; (b) to maintain contact with the child; (c) to

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<sup>479</sup> See also the discussion below on section 21 of the Children's Act, which deals with the position of unmarried fathers. This part of the Children's Act already took effect on 1 July 2007. See Proclamation No. 13, 2007, *Government Gazette* No. 28944 19 June 2006.

<sup>480</sup> The acquisition of parental responsibilities and rights by various persons improved dramatically. See the discussion in section 4.1.1.

<sup>481</sup> Interestingly, a biological or existing legal relationship is not necessarily required. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 65.

act as guardian of the child; and (d) to contribute to the maintenance of the child.<sup>482</sup>

Section 1 of the Children's Act gives the definition of “care”.

“ ‘care’, in relation to a child, includes, where appropriate -

- (a) within available means, providing the child with -
  - (1) a suitable place to live;
  - (2) living conditions that are conducive to the child's health, well-being and development; and
  - (3) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting, and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;

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Section 18(2) of the Children's Act. It should be emphasised that these elements can be allocated to more than one person. In other words, various people can share these responsibilities and rights.

- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child”.

The above boils down to having responsibility regarding the day-to-day care and protection of the child concerned. At first sight nothing particularly new, but the detailed provision differs from its predecessor<sup>483</sup> in the sense that it encompasses a broader concept. In line with Article 5 of the CRC, it clearly accommodates the duty of a parent,<sup>484</sup> guardian<sup>485</sup> or care-giver<sup>486</sup> to have regard for the evolving capacity of the child.<sup>487</sup>

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<sup>483</sup> *Kastan v Kastan* 1985 (3) SA 235(C) was the first reported case on the sharing of care (joint custody) after divorce. King J deliberated that “custody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness”, see section [236]. See also Skelton and Carnelley (eds.) *Family Law in South Africa* (2010) 143-144.

<sup>484</sup> The definition of parent has been defined in section 1 as follows: “‘parent’ in relation to a child, 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 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.”

<sup>485</sup> “‘Guardian’ means a parent or other person who has guardianship of a child.”

<sup>486</sup> According to the definition-section 1 of the Children’s Act, “‘care-giver’ means any person other than a parent or guardian, who factually cares for a child and includes -

- (a) a foster parent;
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;

Moreover, the above indicates that apart from the biological parents, others who have a nurturing role in the life of the child concerned also may obtain parental responsibilities and rights.<sup>488</sup> The second element of parental responsibilities and rights concerns “contact”.<sup>489</sup>

Section 1 explains:

“ ‘Contact’ 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”.

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- (e) the person at the head of a shelter;
  - (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
  - (g) the child at the head of a child-headed household.”

<sup>487</sup> A few times reference is made to “in a manner appropriate to the child’s age, maturity and stage of development”.

<sup>488</sup> Bosman-Sadie & Corrie refer to injustices committed in the past, where parents exerted parental authority without considering the child’s best interests, see *A Practical Approach to the Children’s Act* (2010) 34.

<sup>489</sup> Section 18(2)(b) of the Children’s Act. This was previously called “access”.



This provision stresses the importance of a personal relationship between the child and the parent, which is also acknowledged in the Articles 9(3) of the CRC and 19(2) of the African Children's Rights Charter. The term "contact" does not materially differ from "access",<sup>490</sup> but it is more in line with the terminology in the international/regional documents. Where the parent(s) and the child do not share the same residence it is evident that a personal relationship may be difficult to build up or maintain. Under such circumstances the necessary arrangements should be included in a parenting plan<sup>491</sup> or a court order.<sup>492</sup>

Where the court is of the opinion that contact would not be in the child's best interests, it may make an order preventing contact or order non-physical contact. The inclusion of modern day technology in this section, which ensures contact where feasible in the circumstances of the case, is welcomed.<sup>493</sup>

The third component regarding parental responsibilities and rights concerns guardianship. According to section 1, "guardianship' in relation to a child, means guardianship as contemplated in section 18." In this respect the following subsections of section 18 are relevant:

"(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must -

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<sup>490</sup> See Heaton in *Commentary on the Children's Act (2012) Children's Act (2007)* 3-5; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 67; Skelton and Carnelley (ed.) *Family Law in South Africa* (2010) 146.

<sup>491</sup> See section 33 of the Children's Act, which provides that co-holders of parental responsibilities and rights may agree on a parenting plan which determines the exercise of their respective responsibilities and rights in respect of the child. It is commendable that the Act encourages co-holders to come to an agreement, which serves the best interests of the child: where co-holders are experiencing difficulties in exercising their responsibilities and rights they cannot first approach the court.

Section 33(2) states unambiguously that they first must seek to agree on a parenting plan, with the assistance of a family advocate, social worker or psychologist or via mediation through a social worker or other suitably qualified person, see section 33(5). The provision explicitly refers to "contact", see section 33(3)(c).

<sup>492</sup> In the case of a placement order, contact between the child and his or her parents or caregivers should be provided for. It is submitted that children should be heard in this regard, in order to ensure that the arrangement will be in the child's best interests.

<sup>493</sup> See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 67; Skelton and Carnelley (eds.) *Family Law in South Africa* (2010) 146.

- (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.
- (4) Where more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other, any right or responsibility arising from such guardianship.
- (5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c)".

It is clear that in principle, any guardian can act independently and without the consent of the other in matters pertaining to guardianship. However, when it comes to the five instances in section 18(3)(c), the consent of all the guardians is required, unless the court orders otherwise.

Lastly, the fourth element focuses on the contribution to the maintenance of the child.<sup>494</sup> Since the Children's Act does not contain a definition of "maintenance", the common law meaning remains relevant.<sup>495</sup> As mentioned above, previously unmarried natural or biological fathers had a duty to financially support their child, but did not have automatically any rights pertaining to the child.<sup>496</sup> The latter aspect has been changed by the Children's Act, since maintenance is now brought into the ambit of parental responsibilities and rights.<sup>497</sup>

The present South African Maintenance Act<sup>498</sup> provides for an extensive legislative framework. In terms of section 15(3)(a)(i) and (iii), parents are legally obliged to maintain their child(ren), whether they are married or not.<sup>499</sup> Moreover, the parent's respective shares of the maintenance obligation are apportioned between them according to their respective means,<sup>500</sup> which may come to the fore where the common household is not shared or no longer shared.

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<sup>494</sup> See Van Schalkwyk in Boezaart (ed.) *Child Law in South Africa* (2009) 38.

<sup>495</sup> The common law meaning includes, among others, "[f]ood, clothing, accommodation, medical care and a suitable education", see Heaton in *Commentary on the Children's Act* (2012) *Children's Act* (2007) 3-5; also Skelton & Carnelley *Family Law in South Africa* (2010) 353.

<sup>496</sup> Before the coming into force of the Children's Act the legal obligation to pay maintenance was not linked to parental authority. In other words, maintenance was not an element of parental authority and therefore a natural/biological father would not acquire any rights pertaining to his child. The only possibility for unmarried fathers to become involved in any way was to approach the high court in terms of the repealed Natural Fathers of Children Born out of Wedlock Act 86 of 1997, on which basis the court could make an order granting contact, care or guardianship. In terms of the latter Act, no reference is made to maintenance. The Children's Act has drastically improved the situation regarding unmarried fathers. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 68; Skelton and Carnelley (eds.) *et al. Family Law in South Africa* (2010) 243.

<sup>497</sup> See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 68. However, in order to acquire full parental responsibilities and rights, an unmarried father needs to comply with section 21 of the Children's Act. For a more detailed discussion, see section 4.1.1.2.2.

<sup>498</sup> 99 of 1998.

<sup>499</sup> This obligation arises for both parents *ex lege* at the moment of birth of the child.

<sup>500</sup> Section 15(3)(a)(ii) of the Maintenance Act 99 of 1998. Although the jurisdiction of the children's court has been expanded on, it is regretful that the children's court may not adjudicate any matter relating to proceedings arising out of the application of the Maintenance Act, see sections 1(4) and 45(1) of the Children's Act. A one-stop "legal service" point would have been clearer and better accessible to children. It is submitted that the court structure in South Africa needs to be simplified in order to ensure true access to the courts for all, in line with section 34 of the Constitution.

Where the parents upon divorce cannot come to an agreement, the court may on the basis of section 6(3) of the Divorce Act<sup>501</sup> make any order it deems fit for the maintenance of the dependent child.<sup>502</sup> It is interesting to note that section 15(4) of the Maintenance Act explicitly states that,

“[n]o provision of any law to the effect that any obligation incurred by a parent in respect of a child of a first marriage shall have priority over any obligation incurred by that parent in respect of any other child shall be of any force and effect”.

In effect this means that a child born of a prior marriage or civil union may not be preferred above a child or children born from a subsequent relationship.<sup>503</sup> It is regrettable that the latter provision is formulated in narrow terms by only referring to “first marriage”, whilst nowadays there are a variety of possible relationships. It is submitted that for clarity purposes, section 15(4) of the Maintenance Act be amended in order to be phrased in neutral language which accommodates a range of possible relationships. Since the status of the relationship between the parents should not matter, the responsibility for the child's care and well-being is the paramount consideration. It is interesting to note that the Preamble of the Maintenance Act explicitly refers to Article 27 of the CRC, on the basis of which state parties are required to take all appropriate measures in order to secure the recovery of maintenance from the parents or other person having financial responsibility.

Despite the existing legislative framework, Bonthuys points out that the enforcement of maintenance has been problematic in the past and still faces challenges today.<sup>504</sup> In this

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<sup>501</sup> 70 of 1979.

<sup>502</sup> Skelton and Carnelley (eds.) *et al. Family Law in South Africa* (2010) 354.

<sup>503</sup> See Heaton *South African Family Law* (2010) 325. It is submitted that this is in line with the international obligation to prevent discrimination on the basis of birth, see the Articles 2 of the CRC and 3 of the African Children's Rights Charter as discussed in the sections 2.2.1.3 and 3.1.2 above.

<sup>504</sup> Some of the problems revolved around postponements of cases and difficulty to obtain relevant information in order to secure a maintenance order. These problems affected especially poor women and women from rural areas who could not afford to attend (postponed) court proceedings, due to financial and practical reasons (lack of money and/or loss of income for the day or accommodating their child(ren) for the day).

Moreover, poor and/or illiterate women were and still are usually left to the mercy of a maintenance officer in order to be assisted in understanding the process and dealing with the formalities involved. In addition, apart from the problem of securing the attendance of

regard reference should be made to one of the features of the Maintenance Act, namely its hybrid nature in the sense that it contains both civil<sup>505</sup> and criminal sanctions.<sup>506</sup> Pertaining to the latter it is most welcome that the South African courts have played a pivotal role in the enforcement of maintenance in the past decade. In the case *Bannatyne v Bannatyne*<sup>507</sup> the mother of two children repeatedly approached the court for the enforcement of a maintenance order without resorting any effect. In her desperation she applied for an order committing her ex-husband to prison for contempt of court for having failed to comply with the maintenance order. The court deliberated that:

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maintenance debtors in court, the courts often accepted technical arguments which frustrated maintenance claims for child maintenance. Generally, as a consequence of the technical nature of maintenance court matters, women had to resort to legal representation, which in effect meant that many women who could not afford this had to be dependent and still are dependent on already overburdened maintenance officers, who have too many cases to deal with. For more details, see Bonthuys "Realizing South African children's basic socio-economic claims against parents and the state: what courts can achieve" (2008) 22 *International Journal of Law, Policy and the Family* 335-336.

<sup>505</sup> Where a maintenance debtor fails to make a payment as stipulated in the maintenance order for a period of ten days from the day on which the relevant amount became payable or any such order was made, the maintenance creditor who is entitled to the amount, may apply for any of the following three orders on the basis of section 26(2) of the Maintenance Act: (a) the authorisation of the issue of a warrant of execution against the movable property of the debtor, and where the latter is insufficient to satisfy the order, his or her immovable property, which amount consists of the maintenance debt together with interest and costs; (b) the attachment of emoluments (any salary, wages allowances or other form of remuneration) at present or in future owing or accruing to the maintenance debtor which order will authorise his or her employer to make the necessary payments to the creditor until the maintenance amount, together with interest and costs have been paid in full; (c) the attachment of any debt at present or future owing or accruing to the maintenance debtor, which order shall direct the person who has incurred the obligation to pay the debt to make such payment as specified in the order. See the sections 26-30 which deal with the civil execution of maintenance orders. Also Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 358-359.

<sup>506</sup> In terms of section 31 of the Maintenance Act any person who fails to make any particular payment in accordance with a maintenance order is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine. Section 31(2) states unambiguously that in the case of prosecution, the defence is raised that the failure to pay maintenance was due to lack of means, the accused will not be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

In addition, section 40(1) deals with arrear maintenance and provides that the court may grant an order for the recovery of any amount the convicted person has failed to pay in terms of the maintenance order, together with interest which order has the effect of a civil judgment and shall be executed in the prescribed manner. It is positive that the Act provides for the necessary flexibility offered by section 41, in terms of which the criminal proceedings may be converted into a maintenance enquiry. See also Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 360.

<sup>507</sup> 2003 (2) SA 363 (CC).

“The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.”<sup>508</sup>

The order was granted by the High Court but was subsequently dismissed by the Supreme Court of Appeal on the basis that not all legal remedies had been exhausted before applying for imprisonment. However, the Constitutional Court took a firm stand, and stated in unambiguous terms that,

“[i]t is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system”.<sup>509</sup>

In addition, the court held that “[c]ourts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children,”<sup>510</sup> and confirmed the High Court order that permitted imprisonment for contempt of court. This case alluded to the onset of a stricter approach towards maintenance defaulters.<sup>511</sup>

Another firm stance towards (deliberate) maintenance defaulters<sup>512</sup> was taken by the Department of Justice in collaboration with the police in the so-called “Operation Isondlo”. On the basis of this operation child maintenance defaulters were arrested at road blocks and brought before the court to answer on their failure to support their children.<sup>513</sup> Apart from the

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<sup>508</sup> Section [27]. See also Heaton *Casebook on South African Family Law* (2010) 93.

<sup>509</sup> Section [28].

<sup>510</sup> See section [32].

<sup>511</sup> For a more detailed discussion on further developments, see Bonthuys 2008 (22) *International Journal of Law, Policy and the Family* 337 and further.

<sup>512</sup> These are the persons pertaining to whom the court has established that they are able to contribute to the maintenance of a child.

<sup>513</sup> See also “Crackdown on maintenance defaulters”, News24 of 29-10-2011, via

enforcement related problems, it is a sad reality in South Africa that many parents simply cannot provide adequately for their children due to poverty.

For these children and children without parents, the state should step in.<sup>514</sup> In this regard the South African Social Security Agency (SASSA) provides, on behalf of the Department of Social Development, needy families with income support; for example the child support grant (CSG), which is an unconditional grant paid to care-givers of children who are in need of a grant.<sup>515</sup> Since January 2012 the CSG has been available for eligible children up to 18 years, which is in line with the recommendations of the Committee on the Rights of the Child.<sup>516</sup> Bonthuys indicates that the functioning of the so-called public maintenance system also encounters problems, thereby preventing eligible persons to access welfare grants.

Practical problems like illiteracy, lack of information, and socio-economic problems or ill health, combined with lack of efficiency, insufficiently trained staff, backlogs and delays seriously hamper the access to these grants for people who need it most. Some non-governmental organisations took it upon them to sue provincial welfare departments on behalf of individuals who could not afford litigation. This eventually resulted in the courts having to resort to punitive orders against individual officials who were in charge of the implicated provincial welfare departments. Case law suggests that the Constitutional Court

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[www.news24.com](http://www.news24.com), accessed on 17-10-2012.

<sup>514</sup> See Bonthuys (2008) 22 *International Journal of Law, Policy and the Family* 334. According to Jamieson *et al.*, South Africa has high rates of child poverty, namely in 2009 61% of children lived in households with a per capita income below R552 per month. Moreover, the expanded definition of unemployment gives a figure of 33% in 2009, in *South African Child Gauge 2010/2011* (2011) 84-86, available from the Children's Institute, University of Cape Town, via [www.ci.org.za](http://www.ci.org.za), accessed on 23 September 2012.

<sup>515</sup> Since August 2011 the child support grant is R270 per child per month. According to Jamieson *et al.*, by April 2011 the child support grant had been paid to 10.5 million children between 0-16 years, in *South African Child Gauge 2010/2011* (2011) 88, available from the Children's Institute, University of Cape Town, via [www.ci.org.za](http://www.ci.org.za), accessed on 23 September 2012. The importance of these grants lies therein that it contributes to proper nutrition, schooling and better health, see Pawelczyk in "Child Support Grants prove critical to reducing child poverty in South Africa", UNICEF South Africa, available via [www.unicef.org/infobycountry/southafrica\\_62535.html](http://www.unicef.org/infobycountry/southafrica_62535.html), last accessed on 20-10-2012.

<sup>516</sup> See Concluding Observations of the Committee on the Rights of the Child: South Africa 2000/02/23 (CRC/C/15/Add.122) section 24.

condones these drastic measures to ensure compliance by government officials.<sup>517</sup>

It is important to reiterate that the parental responsibilities and rights as mentioned in the Children's Act can be shared between various persons. However, this does not imply that there should be necessarily a biological or legal connection between the adult and the child.<sup>518</sup> This legal construction caters for any kind of circumstances, with one aim, and that is that no child should be without someone who has parental responsibilities and rights.

Various biological parents acquire parental responsibilities and rights automatically and in different ways.<sup>519</sup> Section 19 deals with the parental responsibilities and rights of mothers. The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The position of the married biological father is dealt with in section 20 of the Children's Act. He also acquires full parental responsibilities and rights – if he is married to the child's mother or previously was married to the child's mother.<sup>520</sup>

An unmarried biological father can automatically acquire full parental responsibilities and rights but only insofar he meets the requirements of section 21(1)(a) and (b), namely:

- “(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 -

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<sup>517</sup> For an overview of relevant cases, see Bonthuys (2008) 22 *International Journal of Law, Policy and the Family* 341-344.

<sup>518</sup> See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 65.

<sup>519</sup> It is important to note that parental responsibilities and rights can be acquired in different ways. Apart from the sections 19-21 of the Children's Act, parental responsibilities and rights can be acquired by way of a formalised agreement in terms of section 22 and moreover, by way of court order in terms of section 23 and 24 of the Children's Act. For a more detailed discussion, see section 4.1.1.

<sup>520</sup> Section 20(b) of the Children's Act gives the following time frames within which the father should have been married to the biological mother of the child, in order for him to automatically acquire parental responsibilities and rights, namely at the time of the child's conception; the child's birth; or any time between the child's conception and birth.



- (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;
- (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 child for a reasonable period".

It is important to note that the factors (i) - (iii) must all be present for the father to acquire full parental responsibilities and rights. If the requirements are met, the unmarried father will, under normal circumstances, automatically acquire full parental responsibilities and rights.<sup>521</sup> It is interesting to note that in the case of a dispute between the biological father and the biological mother with regard to the fulfilment of the conditions by the father as set out in subsection (1), the matter must be referred for mediation,<sup>522</sup> the outcome of which is subject to review by a court.<sup>523</sup> This emphasises the modern approach of conflict resolution and conciliation in matters concerning children.<sup>524</sup> From the above it is clear that the position of an unmarried father has been significantly improved by section 21 of the Children's Act.

Nevertheless, where a marriage between the biological parents of the child would be legally possible and considered desirable by both parents, the Children's Act regulates the effects of such a subsequent marriage in section 38.<sup>525</sup> The Children's Act has replaced a scattered

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<sup>521</sup> See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 37. See also on the same page the unreported case *Botha v Dreyer*, case no 4421/08 [2008] ZAGPHC 395, 19 November 2008, where it was stated that the rights in section 21 are conferred upon him [the father] automatically if the requirements in the same section are met. With regard to the best interests of the child it was said that this standard becomes important when it needs to be decided how these rights will be exercised.

<sup>522</sup> The mediation in terms of section 21 of the Children's Act can be facilitated by a Family Advocate, social worker, social service professional or other suitably qualified person.

<sup>523</sup> See section 21(3)(b) of the Children's Act.

<sup>524</sup> Section 6(4)(a) of the Children's Act states in peremptory language that "in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided".

<sup>525</sup> Section 38 of the Children's Act states: "(1) A child born of parents who marry each other at any time 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 conception or birth of the

compilation of different Acts pertaining to children, and brought most of these rules together in one document, a codification after all.<sup>526</sup>

This surely contributes to the accessibility of the legislative rules applicable to children and their parents. However, the rules of customary law are also prevalent in South Africa. Where *lobolo* has been paid, the husband and his family would obtain full parental rights with regard to the children born to the wife during the existence of the marriage.

On divorce, the courts would consider what is in the child's best interests when deciding on care [custody], whilst guardianship was governed by customary law.<sup>527</sup> It needs to be emphasised that the Children's Act is, and will be, applicable to all children in South Africa. With regard to the dissolution of a customary marriage, the Recognition of Customary Marriages Act<sup>528</sup> refers to the Mediation in Certain Divorce Matters Act 24 of 1987 and section 6 of the Divorce Act 70 of 1979, to provide for directives which would benefit the children born from the marriage. In line with the international and regional documents, there should be no discrimination in terms of birth or other status, ethnic or social origin.<sup>529</sup>

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child”.

<sup>526</sup> In the late '90s the South African Law Reform Commission was mandated to investigate the possibility of a comprehensive review of the Child Care Act, 1983 and “to develop a systematic and coherent approach to child law, which would be consistent with constitutional and international law obligations of equity, non-discrimination, concern for the best interests of the child, participation of children in decisions affecting their interests and protection of children in vulnerable circumstances.” In addition, the Commission would consider “how to maximise the state's commitment to the promotion of family and community life, so that removal of children to residential care facilities would be needed in fewer cases.” See Discussion Paper 103, Project 110 *Review of the Child Care Act* (December 2001) chapter 2, section 2.1.

It is submitted that the Children's Act provides indeed a comprehensive set of rules and regulations, in line with the international documents, in order to enhance the realisation of children's rights in South Africa. In theory, everything seems in place, it nevertheless remains to be seen how this in practice will turn out. It is commendable that the position of the children's courts has been improved drastically and that the courts are equipped with more tools compared to the previous position. For example, the jurisdiction of the children's court has been expanded and provision is made for an extensive range of court orders, which encourages the courts to find more creative solutions, involving and thus benefitting children, see sections 45, 46, 156 and 157.

<sup>527</sup> See Bennett *Human Rights and African Customary Law* (1999) 106.

<sup>528</sup> 120 of 1998.

<sup>529</sup> See the provision of non-discrimination in Article 2 of the CRC and its equivalent in the African Children's Rights Charter, Article 3. It is interesting to note that the CRC imposes a

Specific issues relating to customary law and the position of children still have to be dealt with.

### 3.2.2 The right to joint parental care in the Netherlands<sup>530</sup>

In the Netherlands, Article 1:245 of the Civil Code determines that children are under authority, which is either parental authority or guardianship.<sup>531</sup> The terminology differs from that used in South Africa. Parental authority arises by operation of law and is exercised by both parents jointly,<sup>532</sup> by one parent only<sup>533</sup> or by a parent and his or her partner,<sup>534</sup> whereas guardianship is exercised by someone else than the biological parents.<sup>535</sup> Parental authority relates to the person of the child, the administration of the child's estate, and the representation of the child in civil acts, at law and otherwise.<sup>536</sup> The contents of parental authority are described in Article 1:247 of the Civil Code: it involves the duty and the right of

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duty on state parties to respect and ensure the rights in the CRC without discrimination of any kind, whereas the African Children's Rights Charter merely provides for an entitlement for children.

<sup>530</sup> Article 1:247 of the Dutch Civil Code.

<sup>531</sup> In Dutch: *voogdij*. The responsibility of the guardian is according to Article 1:336 of the Civil Code, limited to ensuring that the child is cared for and raised in line with his or her estate. This guardianship only comes into being by court order or by a will of a parent who had parental authority before passing away. Since in terms of Article 1:245(3) of the Civil Code guardianship is exercised by someone other than a parent, the discussion of guardianship in Dutch law falls outside the ambit of this thesis and will therefore not be discussed.

<sup>532</sup> Article 1:251(1) of the Civil Code determines that during marriage the parents exercise partnership, on the basis of Article 1:253aa Civil Code. See also Wortmann & Van Duijvendijk-Brand *Compendium van het Personen- en Familierecht* (2009) 205. In the situation where the parents never got married and never exercised parental authority jointly, they can request the court for joint parental authority via Article 1:252 of the Civil Code, provided that the father has acknowledged the child or after the legal establishment of paternity, from which it is evident that he is the father.

<sup>533</sup> Article 1:253b of the Civil Code deals with the position of the mother who exercises authority alone, by operation of law. It is also possible that the court confers authority on one parent only, see Article 1:251(2), 1:253g (where one parent has passed away) or 1:253ha (after declaration of majority by the mother of sixteen-years-old) of the Civil Code.

<sup>534</sup> See the Articles 1:253sa and 1:253t of the Civil Code in conjunction with Article 1:245(5) of the Civil Code.

<sup>535</sup> See also Wortmann & Van Duijvendijk-Brand *Compendium van het Personen-en Familierecht* (2009) 202. For a more detailed discussion on parental authority in the Netherlands, see section 4.1.2.

<sup>536</sup> See Article 1:245(4) of the Civil Code. A child has limited capacity to act and therefore needs assistance from a parent or guardian.

a parent to care for the child and to raise the child.<sup>537</sup>

Linked with this is the responsibility of parents to contribute towards the costs of care and upbringing of the child, which in terms of Article 1:404 of the Civil Code should be in accordance to their respective means.<sup>538</sup> Where a parent does not (satisfactory) fulfil his or her obligations in this regard, the other parent may approach the court on the basis of Article 1:406, in order to have the amount determined by the court.<sup>539</sup>

The other parent may on behalf of the child collect the amount, but where this appears problematic, the agency “*Landelijk Bureau Inning Onderhoudsbijdragen*” (LBIO) may collect the amount.<sup>540</sup> In the case of the imposition of a child protection measure, like the placement of a child, the Act on the Youth Care determines that the parents are required to make a financial contribution towards the costs of care incurred by the government.<sup>541</sup>

Article 1:247(2) of the Civil Code determines that the latter involves, among others, the care and responsibility for the psychological and physical well-being and the safety of the child, as well as to promote the development of the child's personality.<sup>542</sup> It is interesting to note that in the fulfilment of the latter duties, sub-Article (2) prescribes that the parents should not

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<sup>537</sup> This relates to the basic needs, for example, clothing, food, shelter, education and medical treatment.

<sup>538</sup> It is interesting to note that the same applies to a step-parent during the marriage or registered partnership with the biological parent of the minor children, see Article 1:404(2) in conjunction with Article 1:395 of the Civil Code. Other persons, like the natural father, also might be bound to contribute, see Article 1:394. For a more detailed overview, see Doek & Vlaardingebroek *Jeugrecht en Jeugdzorg* (2009) 391 and further.

<sup>539</sup> This can take place simultaneously with a decision regarding parental authority. See Doek & Vlaardingebroek *Jeugrecht en Jeugdzorg* (2009) 392.

<sup>540</sup> See Article 1:408 of the Civil Code.

<sup>541</sup> See Article 69 of the Act on the Youth Care. Chapter XIII (Articles 69-76) of the Act specifically deals with contributions towards the costs of youth care, which are collected by the agency “*Landelijke Bureau Inning Onderhoudsbijdragen*”. Details pertaining to the required amounts are provided in the Articles 69-73 of the Implementation Decree to the Act on the Youth Care. See also Doek & Vlaardingebroek *Jeugrecht en Jeugdzorg* (2009) 412-415.

<sup>542</sup> On the basis of Article 1:248 of the Civil Code, Article 1:247(2) also applies to a legal guardian and a foster parent. In other words, they also have the duty and the responsibility for the psychological and physical well-being and the safety of the child as well as to promote the development of the child's personality. In doing so, they should not resort to any psychological, physical or any other humiliating treatment.

practise any psychological, physical or any other humiliating treatment.<sup>543</sup> Moreover, it is made explicit that parental authority also includes the obligation of the parent to promote the development of the bond between his or her child and the other parent.<sup>544</sup>

Parental authority confers various powers on the parent(s); for example, to determine the child's domicile, schooling, religion, membership of a club, or giving permission for medical treatment. The Civil Code is silent on *how* parents should exercise their parental authority.<sup>545</sup> According to the *Hoge Raad* which is the supreme court in the Netherlands, the point of departure in the exercise of parental authority should be the child's best interests.<sup>546</sup> Where parents do not fulfil their duties properly, the state can interfere.

In such a case the *Council for Child Protection* could request the court for a child protection measure. Where the criteria of specific provisions pertaining to child protection measures in Book 1<sup>547</sup> of the Civil Code are complied with, the court can make an order, which results in the limitation or (temporary) deprivation of parental authority. Depending on the child protection measure, a social worker can give directives and/or family support services can be made available.<sup>548</sup>

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<sup>543</sup> Article 1:248 of the Civil Code determines that Article 1:247(2) is also applicable on the guardian and the person who cares for and raises the child without having authority pertaining to the child.

<sup>544</sup> See Article 1:247(3) of the Civil Code.

<sup>545</sup> However, where parents encounter a difference of opinion, Article 1: 253a Civil Code offers the parents or each of them the possibility to approach the court. The court can make a decision based on the interests of the child.

<sup>546</sup> HR 25 September 1998, *NJ* (Nederlandse Jurisprudentie) (1999), 379, where the *Hoge Raad* found that "parental authority is a 'right' which accrues to parents, but this right has been given in the interests of the child and therefore it cannot be considered separately from the duty to serve this interests (of the child)".

<sup>547</sup> For example, Article 1:254 which deals with the criteria for a supervision order; Article 1:261 dealing with the placement of a child; 1:266 for the relief of parental authority and Article 1:269 on the dismissal of parental authority.

<sup>548</sup> For an in-depth discussion on the child protection measures in the Netherlands, see the chapters 4 and 5. In the *Guidelines for Periodic Reports* (UN Document CRC/C/58) of 20 November 1996, the Committee on the Rights of the Child has requested states parties to indicate in their reports, with regard to Article 5 of the CRC, whether or not family counselling services or parental education programmes were available. It was also requested to indicate how knowledge and information about child development and the evolving capacities of the child are conveyed to parents and other persons responsible for the child. See also Meuwise

Upon divorce, the point of departure is that both parents continue having parental authority.<sup>549</sup> Article 1:247(4) of the Civil Code provides explicitly that after divorce the child concerning whom both parents jointly exercise parental authority has the right to the equal care and upbringing by both parents.<sup>550</sup> It is assumed that the continuation of parental authority by both parents will be in the child's interests.<sup>551</sup> Therefore, a request to have authority assigned to one parent after divorce will not easily be granted.

The lack of communication between parents does not necessarily mean that it would be in the child's interests to assign the authority to one parent.<sup>552</sup> However, in terms of Article 1:251a of the Civil Code, the court may grant authority to one of the parents where:

- (i) There is an unacceptable risk for a child “to get lost or clip between the parents” and it is not anticipated that this will satisfactory improve within a reasonable period of time;<sup>553</sup> or
- (ii) Change in the authority is otherwise necessary in the best interests of the

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*et al. Handboek Internationaal Jeugdrecht (2005) 69.*

<sup>549</sup> In the case of divorce the Articles 815-828 of the Code of Civil Procedure come into play.

<sup>550</sup> Article 1:247(4) of the Civil Code refers in this respect to “het recht op een gelijkwaardige verzorging en opvoeding door beide ouders.”

<sup>551</sup> See Article 1:251(2) of the Civil Code, which provides that after divorce parental authority is exercised by the parents jointly, unless the court determines that it would be in the interests of the child that the authority would be assigned to one of the parents. A request hereto can be done by the parents jointly or any of the parents. See also Article 1:247(4) of the Civil Code.

<sup>552</sup> Compare with the trend in South Africa as discussed earlier in this section. See also *Kruger v Kruger* 2003 (6) SA 220 (T), in which De Vos J rightfully held: “unless the disagreement is of such a nature that the child is put at risk [...] it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input”. See also the discussion above under “care”.

<sup>553</sup> This criterion has been incorporated in the Civil Code per 1 March 2009 (Wet van 27 November 2008, *Stb.* 2008, 500) and was initially developed in the case law, see HR 10 September 1999, *NJ* 2000, 20; LJN:AO3870, *Hoge Raad der Nederlanden*, Zaaknr: R03/011HR. In this case there were serious communication problems between the parents of the child. In this regard Doek & Vlaardingebroek have referred to the Dutch criterion known as “klem en verloren raken” between the parents, in *Jeugdrecht en Jeugdzorg (2009) 204-205*. Simultaneously with the aforementioned amendment the parenting plan was introduced in the Civil Code.

child.<sup>554</sup>

In such a case the child and the non-custodian parent are entitled to have contact.<sup>555</sup> It should be noted that where both parents continue with the exercise of parental authority after divorce, this does not necessarily equate co-parenting.<sup>556</sup>

It neither implies that the duties pertaining to the care of the child are equally divided.<sup>557</sup> A so-called “parenting plan” will provide the necessary clarity in this respect and is therefore indispensable.

It is interesting to note that where an application for divorce has been filed with the court, Article 815 of the Code of Civil Procedure demands that this should include a parenting plan.<sup>558</sup> The drafting of a parenting plan is also required where the unmarried parents of a child end their cohabitative relationship.<sup>559</sup> The minimum requirements for the plan are stipulated by Article 815(3), on the basis of which the parents are obliged to include:

- (i) How they intend sharing the responsibility for the care and upbringing of the child(ren) concerned on the basis of Article 1:247 and how they

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<sup>554</sup> Doek & Vlaardingerbroek refer in this instance to the possibility of the child being taken abroad, in *Jeugdrecht en Jeugdzorg* (2009) 211.

<sup>555</sup> See Article 1:377a Civil Code, which also contains a provision for so-called “structured” contact, ordered by the court. Moreover, it provides the circumstances under which contact may be denied by the court. Article 1:377a(3) states: the court will deny the right to contact only, when (a) contact would cause serious harm for the psychological or physical development of the child; or, (b) the parent is apparently unfit or apparently not capable to have contact; or (c) the child is twelve years or older, and raises serious objections against having contact with the parent at the hearing; or (d) contact is otherwise contrary the weighty interests of the child.

<sup>556</sup> In the case of co-parenting both parents are responsible for a substantial part of the care and upbringing of the child(ren). See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 208.

<sup>557</sup> See Meuwise *et al.* (2005) 75.

<sup>558</sup> Article 815(6) of the Code of Civil Procedure determines that where it is reasonably not possible to put forward the parenting plan (in Dutch: *ouderschapsplan*), other documents can be presented to court, which will be left to the discretion of the court.

<sup>559</sup> See Article 1:247a of the Civil Code. The latter provision refers to Article 1:252(1) on the basis of which parents who are not married to one another or have concluded a registered partnership, exercise joint parental authority upon their request, which is noted in the register referred to in Article 244.

accommodate the right and the duty to contact as referred to in Article 1:377a,<sup>560</sup>

- (ii) How information sharing will take place between the parents as well as the reciprocal consultation pertaining to important matters relating to the person of the child(ren) or the estate;
- (iii) The costs in connection with the care and upbringing of the child(ren), in other words, maintenance.

It is evident that a parenting plan may iron out and/or prevent various (potential) problems between the ex-spouses, which will ultimately serve the best interests of the child(ren) concerned. By making the submission of a parenting plan in principle compulsory, important aspects regarding the child's life, like contact and maintenance will be specifically addressed, which might possibly contribute to some continuity or stability in the case of divorce.<sup>561</sup>

It is interesting to note that Article 1:249 contains an obligation for the child concerned, namely to have regard for the authority vested in the parent or legal guardian as well as the interests of the other members of the family. It is regrettable that no provision pertaining to the duty of parents to have regard to, and respect for, their child's evolving capacity has been included in Book 1 of the Civil Code. Although there is a possibility that Article 5 of the CRC could have "direct" effect, this has not yet been established. Therefore a child who wants to invoke Article 5 of the CRC will have to approach the court and request to confer direct effect upon this Article.<sup>562</sup> It is evident that Article 5 is linked with Article 12 of the CRC. In other words, having regard for the evolving capacities of children means the more mature children become, the more involved children should be in decision-making, or at the

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<sup>560</sup> For example, matters relating to routine (breakfast, homework, set time limits to watching TV or computer games and bed time), discipline, schooling, religion, extra-curricular activities and who will financially contribute to this, school holidays, celebration of birthdays, visitation and (telephonic) contact with other family members, choice of general practitioner or dentist.

<sup>561</sup> See Article 815 of the Code of Civil Procedure.

<sup>562</sup> See also Meuwise *et al.* (2005) 74.



least, to be heard and having considered their opinion.<sup>563</sup>

### 3.3 Conclusion

The above has provided an overview of the provisions which have been incorporated in South African and Dutch law in order to fulfil these countries' obligations in terms of the international and regional instruments to which they are state parties. In the following, reference will be made to similarities and differences between the two countries. Pertaining to the latter, some recommendations may follow with the aim of improving the protection of children and enhancing their rights.

#### 3.3.1 The meaning of “a child”

In South Africa and the Netherlands the definition of a child is similar in content<sup>564</sup> and when born alive, the child is regarded as a legal *persona*. In this regard the provisions in South Africa and the Netherlands conform to the international and regional documents. However, an unborn child is not regarded as a legal subject. Nevertheless, under certain circumstances, the interests of an unborn child may be protected, which in effect means that “the interests of the 'potential' legal subject are kept in abeyance”.<sup>565</sup> The moment the nasciturus is born alive, the particular benefit will be conferred on him or her. Whereas the requirements for the application of the fiction coincide to a large extent, there is a distinct difference which is most relevant for the purpose of the present thesis. Article 1:2 of the

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<sup>563</sup> Moreover, where opinions differ there should be proper communication about the issue, where both parties are taken seriously and respect each other, in order to (try to) achieve a mutual understanding. It is submitted that the proper handling of these processes does not come naturally, they have to be learned. In *Krugel v Krugel* 2003 6 SA 220 (T), the issue of the sharing of care (custody) came to the fore. De Vos J held that “[...] it still seems preferable for the child to learn with the ups and downs of two involved parents, than to lose half of his or her rightful parental input”. It is obvious that children have to be taught and need to develop skills on how to deal with conflict and difference of opinion in a reasonable manner without resorting to aggression or violence. Therefore it is the responsibility of parents or the care-giver to guide the child in this regard as well. Perhaps this would even assist in combating domestic violence.

<sup>564</sup> A child is a person under the age of eighteen. Pertaining to South Africa, see section 28(3) of the Constitution and section 17 of the Children's Act 38 of 2005. With regards to the Netherlands, see Article 1:233 of the Civil Code.

<sup>565</sup> See Boezaart *Law of Persons* (2010) 13.

Dutch Civil Code provides for the possibility to issue a measure of child protection even before the child is born, which does not exist in South Africa. Thus where it has become evident that a child will be at risk of abuse or neglect, or where there is a possibility that the development of a child is at risk, a supervision order or removal and placement will be effected as soon as the baby is born.<sup>566</sup>

### 3.3.2 Non-discrimination

The right not to be discriminated against is protected by legislation in both South Africa and the Netherlands. There are specific issues to be identified for South Africa which need to be addressed, namely, access to education, health and social services. The latter should be made available across the board which is of particular importance pertaining to certain vulnerable groups. The latter include black children, girls, children with disabilities and learning disabilities, working children, children in rural areas, street children, children in conflict with the law, and refugee children.

A matter which needs to be urgently addressed is the gender discrimination on the basis of age when entering into marriage.<sup>567</sup> In terms of the common law in South Africa a child cannot get married below the age of puberty, which is 12 years for girls and 14 years for boys.<sup>568</sup> Below the age of 18 a child has limited capacity to act and therefore needs to obtain the necessary consent in order to get married.<sup>569</sup> Due to the fact that the Children's Act has not addressed this matter, the common law rule still perpetuates, which is in contravention with Article 2 of the CRC.<sup>570</sup>

The Committee on the Rights of the Child has expressed its concern about societal

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<sup>566</sup> For example, where the parent(s) is/are mentally retarded. See Rietveld "Gezinsvoogd van zwakbegaafde ouders coordineert scala aan hulpverlening" (2005) 7 *Perspectief (Informatie- en Opinieblad voor de Jeugdbescherming)* 4-5. See also section 3.1.1.

<sup>567</sup> See Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 317.

<sup>568</sup> See Van der Vyver in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 289-290.

<sup>569</sup> See the sections 24, 27 and 12 of the Marriage Act 25 of 1961. See also section 26, which contains a prohibition of marriage of persons under certain ages.

<sup>570</sup> See section 3.1.2.

prejudices and discrimination in society and in particular, against children of ethnic minorities and refugee and asylum-seeking children. In addition, there is concern about some level of segregation between ethnically Dutch families and families of foreign origin at schools and in some regions in the Kingdom. A welcome addition to the mechanisms which help ensure the realisation of the rights of children in the Netherlands is the office of the *Kinderombudsman*. The latter is able to investigate complaints pertaining to an alleged infringement of any of the rights as provided by the CRC, thus including complaints relating to any form of discrimination. It is submitted that this office is indispensable in the protection of the rights of children and is thus highly recommended for South Africa.<sup>571</sup>

Based on the aforementioned, it is submitted that the matter of non-discrimination should remain high on the agenda of policy-makers in order to ensure that all children feel safe within their family environment and beyond, and will have equal access to health, social services and education.

### **3.3.3 The best interests of the child**

From the child care and protection legislation and practice in South Africa and the Netherlands, it can be derived that both countries are committed to the application of the best interests of the child-standard. South Africa has included the principle in its legislation and thus complies with the international documents. The following has been observed: whereas South Africa has expressly included the principle in general terms in the sections 28(2) of the Constitution and 9 of the Children's Act, such a general provision is lacking in the Dutch Civil Code. Moreover, section 7 of the Children's Act provides a list of relevant factors which must be taken into consideration in determining the child's best interests, which guidelines do not feature in the Dutch legislation.

As discussed, the best interests of the child has become entrenched in the Dutch child care and protection practice, and therefore it can be concluded that from a jurisprudence point of view the Netherlands adheres to the standard provided by the CRC. However, for the sake of clarity and legal certainty, the following recommendations can be made.

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<sup>571</sup> See section 3.1.2.

Pertaining to South Africa, it is suggested that section 28(2) of the Constitution be amended in line with the standard provided by Article 4 of the African Children’s Rights Charter, which refers to the best interests of the child-standard as “the” primary consideration. In addition, for the Netherlands it is recommended that a general provision containing the best interests of the child-standard be included in the Civil Code, as well as a separate provision with a list of factors which should be taken into account. It is submitted that the listing of factors in terms of the latter provision should be non-exhaustive, which allows for the necessary flexibility.

### 3.3.4 Participation of children

Generally speaking, children should have the right to participate in all matters affecting them, which means across the board, namely in families, schools and other aspects of their lives. In addition, they should be enabled to form part of policy making in the sense that children may provide indispensable information which may inform legislation and policies alike. Whilst the role of, for example, the *Nationale Jeugdraad* and civil society, like the *Kinderrechtencollectief* in the Netherlands and the Centre for Child Law and the Children's Institute in South Africa are important, policy making pertaining to matters affecting children should generally speaking be child-inclusive.

Whilst in the Netherlands a child of 12 years or older has the right to be heard in court, in South Africa the direct hearing does not seem general practice, or at the least, is applied inconsistently. Therefore children in South Africa are dependent on their parents or on a representative to communicate the views of the child concerned. Although it is evident that not all cases require separate legal representation at state expense,<sup>572</sup> section 28(1)(h) of the South African Constitution provides for legal representation in civil proceedings, assigned and paid for by the state.

However, the latter is subject to the legal phrase “if substantial injustice would otherwise result”. This does not only lack clarity but it also provides a limitation compared to the text and purpose of Article 12 of the CRC. South African case law, read in conjunction with the

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<sup>572</sup> See Carnelley (2010) *Obiter* 644.

Legal Aid Guide (2012), provides the necessary guidance on when a child is entitled to legal representation at state expense. It is submitted that children should be made aware of where to resort when they need to obtain professional assistance.

Therefore, more publicity is needed pertaining to the role of the various professionals, including the Family Advocate, a legal representative and the curator ad litem.<sup>573</sup> The latter is relevant because, although section 14 of the Children's Act provides for access to the courts, children are still required to make use of the aforementioned professionals in order to bring a legal matter to court.<sup>574</sup> Moreover, it is recommended that, as a matter of urgency, professional guidelines be finalised pertaining to the appointment and discharge of duties of both a curator ad litem and a legal representative.<sup>575</sup> Although section 10 of the South African Children's Act confers a general right to participation on the child, it is subject to the clause "in an appropriate way", which provides too much leeway to the court or other decision-maker.<sup>576</sup> It is therefore recommended that the wording of section 10 be amended in order to ensure the participation of children who are capable of doing so.

Although section 10 also makes it compulsory for a decision-maker to give due consideration to the views as expressed by the child, it is agreed with Schäfer that it would be good practice for any decision-maker to provide information on how the child's views have been taken into consideration in establishing his or her best interests.<sup>577</sup> Providing an explanation enhances a level of accountability and ensures transparency, which is even more pressing where the wishes of a child differ from the decision made by the court or other decision-maker. In the latter case reasons should ideally be provided in writing.<sup>578</sup>

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<sup>573</sup> Apart from children, parents, guardians and the public, a wide range of professionals should also be(come) well informed about the different professions, for example, social workers and psychologists.

<sup>574</sup> The common-law rules which relate to the child's capacity to litigate have not been changed by the coming into force of section 14 of the Children's Act. See Boezaart & De Bruin (2011) 2 *De Jure* 438.

<sup>575</sup> See also Carnelley (2010) *Obiter* 644 and further.

<sup>576</sup> See section 3.1.4.1.

<sup>577</sup> Schäfer (2011) 166.

<sup>578</sup> Reasons provided in writing might assist the child in understanding the decision and may assist in taking the matter further, if such need would arise.

In the Netherlands, Article 809 provides that a child of 12 years or older will be given the opportunity to be heard before the court decides on the matter, whilst there is discretion pertaining to children younger than the age of 12. This means, in effect, that only a child of 12 years or older has the right to be heard. Since there is a distinction on the basis of age, it can be concluded that Article 809 of the Code of Civil Procedure is not fully in compliance with the CRC and *General Comment No 12*.<sup>579</sup> It is therefore recommended that Article 809 of the Code of Civil Procedure be amended in order to change the age-criterion into a material criterion, which focuses solely on the capability and maturity of the child concerned.<sup>580</sup>

In addition, it is submitted that the hearing of children in person should be preferred where possible, which might render the use of additional professionals like a legal representative or a special curator, to a large extent unnecessary and thus be more cost-effective. Apart from hearing a child in person, Article 12 of the CRC also demands that the views of the child be given due weight in accordance with the age and maturity of the child. Neither the Civil Code nor the Code of Civil Procedure contains any reference or guidance pertaining to the latter. It is submitted that this lacuna needs to be urgently addressed, since the affected parties should be entitled to information on how the child's views have been taken into consideration in the decision. Therefore it is recommended that an additional sub-Article be included in Article 809 of the Code of Civil Procedure.<sup>581</sup>

The legal framework pertaining to independent access to the court for children in the Netherlands lacks clarity and accessibility, which may have a detrimental effect on children. Separate legal representation for children in the Netherlands is not very common. It has become apparent that in some instances children require the assistance of a special curator but that this office has been seriously underutilised, due to unfamiliarity. In the Netherlands too, more publicity should be given on how to obtain the assistance of a special curator.<sup>582</sup>

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<sup>579</sup> See section 21 of *General Comment No. 12* (CRC/C/GC/12) of 20 July 2009.

<sup>580</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 124; also “De bijzondere curator, een lot uit de loterij? - Adviesrapport over waarborging van de stem en de belangen van kinderen in the praktijk” (2012) *De Kinderombudsman*. See also section 3.1.4.2.

<sup>581</sup> This would result in the adoption of Article 809(5) or 809a of the Code of Civil Procedure.

<sup>582</sup> In addition the Kinderombudsman has indicated that there is a need for guidelines pertaining

Finally, after the introduction of family group conferences in South African legislation, the legislation in the Netherlands may soon follow suit. If the amendment to the proposed legislation on child protection measures were to become law, the Bureau on the Youth Care has the duty to first allow the social network surrounding a family to draft a plan (of action) or to adjust an existing plan on the basis of a family group conference.<sup>583</sup>

In other words, the family, including the child, and the social network will be given the opportunity before the imposition of a supervision order or during the implementation of such a child protection measure, to draft a plan of action. Via the mobilisation of the social network it will be explored by the participants how a solution can be found for the problem(s), thereby ensuring the safety and well-being of the child(ren) and possibly preventing interference with the family life of the persons involved. The difference in South Africa is that the Dutch legislation neither prescribes what the process of family group conferencing entails nor requires the confirmation of the plan by the court.<sup>584</sup> In the past decade, the organisation *Eigen Kracht* has spread all over the Netherlands.

Further comparative research is recommended with the aim of ascertaining which aspects of the approach in the Netherlands could be of use in the South African context. The latter is relevant with the view to seeking solutions for the lacunae in the South African legislation and process of implementation. Since the process of family group conferencing empowers families, including children, and ensures their participation towards solution-finding, it is submitted that the approach has much potential. Therefore, efforts should be made to ensure that the process of implementation of family group conferencing is accelerated in South Africa.<sup>585</sup>

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to the appointment and functions of a special curator in terms of Article 1:250 of the Civil Code, see the report “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 50-51.

<sup>583</sup> This is applicable unless there is a clear threat to the development of the child or when the interests of the child might be harmed otherwise. See the proposed Article 262a of the Civil Code.

<sup>584</sup> See section 3.1.4.2.

<sup>585</sup> It is suggested that staff members of the organisation *Eigen Kracht* in the Netherlands come to South Africa in order to provide the necessary training to the relevant professionals and other interested persons.

Finally, although the Committee on the Rights of the Child specifically has referred to mediation and arbitration, it is regrettable that this has not been given further attention. It is commended that the general approach of the South African Children's Act is conducive to conciliation and problem-solving<sup>586</sup> and provides for alternatives in procedure. It is submitted that in all cases where children are involved, first out of court settlement possibilities should be explored or followed, and only when this fails or would not be desirable,<sup>587</sup> the option of a procedure in court would arise.

Furthermore, additional guidelines are needed for the implementation of these alternative procedures, combined with the training of relevant professionals who are expected to facilitate the processes and who have to effectively work with them. The above applies to both South Africa and the Netherlands.

### 3.3.5 Implementation of children's rights

It is commended that in South Africa there is a specific ministry mandated to contribute to the enhancement of children's rights and to the welfare of families, whilst it is regrettable that in the Netherlands the separate ministry for Youth and Family does not exist. It is hoped that the Ministry of Health, Welfare and Sports will keep up with the progress which was made by its predecessor. Nevertheless, as mentioned, a positive development is the fact that the first Children's Ombudsman has taken office in the Netherlands. This national institute is under a statutory duty to overview and ensure the enhancement and implementation of children's rights in the Netherlands independently.<sup>588</sup>

The realisation of a children's ombudsperson is also highly recommended for South Africa. Moreover, a detailed inventory of children's rights initiatives on a national level is recommended for both countries in order to obtain an overview of existing programmes and to avoid unnecessary duplication and costs.

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<sup>586</sup> Section 6(4)(a) of the Children's Act clearly states that "In any matter concerning a child – an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided".

<sup>587</sup> For example, where a child has been abused.

<sup>588</sup> See section 3.1.5.



### 3.3.6 Respect for the family and family life

Children have the right to grow up in a family, and this unit should be protected against unlawful interference.<sup>589</sup> The CRC emphasises that the primary responsibility for the upbringing and development of the child rests in principle with both parents.<sup>590</sup> The African Children's Rights Charter is similar in this respect, although it extends the responsibility to "others responsible for the child".<sup>591</sup>

From the legal framework in both South Africa and the Netherlands, it can be derived that the point of departure is in line with these international documents. However, these responsibilities are allocated to a wider group of persons in South Africa.<sup>592</sup> With the coming into force of the Children's Act, the sharing of care has become the point of departure in South Africa, comparable with the situation in the Netherlands, unless the interests of the child require otherwise.<sup>593</sup>

Whereas in South Africa section 33 of the Children's Act provides that the co-holders of parental responsibilities and rights may agree on a parenting plan, in the Netherlands the latter is compulsory in the case of termination of a relationship between parents. In South Africa it requires the assistance and involvement of a family advocate, social worker or psychologist. Where the co-holders are experiencing difficulties in exercising their responsibilities and rights they first have to attempt mediation, with, for example a social

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<sup>589</sup> This topic will be further explored in chapter 5, see specifically section 5.1.1.

<sup>590</sup> See the Articles 5, 7, 18, 27(1) and (2) of the CRC. See also Clark in *Boberg's Law of Persons and the Family* (1999) 260.

<sup>591</sup> Article 20(1) of the African Children's Rights Charter.

<sup>592</sup> Apart from parents, responsibilities, rights and duties are also assigned to the members of the extended family or community as provided for by the local custom, legal guardians (see section 18 of the Children's Act 38 of 2005) or other persons legally responsible for the child (who are also accommodated by section 18 of the Children's Act 38 of 2005), dealing with parental responsibilities and rights. This coincides with Article 5 of the CRC, as discussed in section 2.2.2.2.

<sup>593</sup> For an overview of the various possibilities in terms of South African law, see section 4.1.1. In the Netherlands joint parental authority generally speaking continues after divorce. For an in-depth discussion on parental authority in the Netherlands, see section 4.1.2.

worker or consultation with a family advocate before they can approach the court.<sup>594</sup>

Furthermore, the formalities pertaining to such a plan include the registration with the family advocate or being made an order of court, which has implications for any further amendments to the plan or the termination thereof. Although the aim of finding common ground between the immediately involved persons is commendable, the question arises as to whether this will be practically feasible for many people in the country who are less fortunate in many respects or feel committed (voluntary or not) by customary or religious law.<sup>595</sup> Parents have been assigned the parental responsibilities and have in this regard the primary responsibility to provide for an adequate standard of living.<sup>596</sup> Whilst it is commended that South Africa has a detailed legislative framework which specifically provides for matters pertaining to maintenance, it is submitted that for clarity purposes section 15(4) of the Maintenance Act to be amended in order to be phrased in neutral language which accommodates a range of possible relationships.

A subsidiary responsibility lies with the state parties, which are the governments of South Africa and the Netherlands. Apart from adopting appropriate measures in order to assist parents and others responsible for the child in case of need, these governments are obliged in terms of the international instruments to take all appropriate measures to secure the recovery of maintenance for the child from the parents or others who are financially responsible.<sup>597</sup>

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<sup>594</sup> See section 33(2) and 34(3) of the Children's Act.

<sup>595</sup> Although it is very positive that nowadays the child's best interests is regarded paramount, across the board, and that equality between parents or partners is *de jure* a reality, it does not exclude the possibility that people *de facto* view matters differently. For example, Ngidi has pointed out the different approach regarding section 21(1)(b) of the Children's Act and rules of customary law. In terms of the former, an unmarried father obtains full parental responsibilities and rights provided the criteria are complied with, whereas in terms of the latter the rights vest in the father of the unmarried mother or the heir, in *Child Law in South Africa* (2009) 242. This discrepancy or dichotomy between the law and the life reality of people governed by these laws still needs time to be addressed.

<sup>596</sup> See the Articles 5, 18 and 27(2) of the CRC. For a more detailed discussion, see section 3.2, 2.2.2.4 (on parental responsibilities) and 2.2.2.6 (on standard of living).

<sup>597</sup> Article 27(4) of the CRC. The CRC contains a more detailed provision compared to Article 20 of the African Children's Rights Charter By providing a better standard it therefore contributes more to the intended protection of children.

Since the occurrence of single parent families is common in both South Africa and the Netherlands, it is submitted that the enforcement of maintenance should be prioritised, not only in order to comply with the obligations in terms of international law but ultimately to serve the interests of children.<sup>598</sup> The Children's Act has replaced a scattered compilation of different Acts pertaining to children, and brought most of these rules together in one codification. This contributes in principle to the accessibility of the legislative rules applicable to children and their parents.

However, family life in South Africa is not merely governed by statutory legislation. The rules of customary law are also prevalent in South Africa. Where, for example, *lobolo* has been paid, the husband and his family would obtain full parental rights with regard to the children born to the wife during the existence of the marriage. On divorce, the courts would consider what is in the child's best interests when deciding on care [custody], whilst guardianship would be governed by customary law. Although the courts will continue to develop the common law and customary law in terms of section 39(2) of the Constitution, this has to be in line with the Bill of Rights, having regard for the equality provision in section 9. Despite some differences between these sources of South African law it needs to be emphasised that the Children's Act is, and will be, applicable to all children in South Africa.

From the above it can be derived that, generally speaking, South Africa and the Netherlands are in line with the minimum standards as provided by the international and regional documents. At the same time it is relevant to point out that there is always room for improvement. Pertaining to the substantive and procedural legislative provisions, this can be ascertained by regular testing of the national legislation against the standards provided by international law. The monitoring bodies may assist in this regard, which is valuable. The Optional Protocol to the Convention on the Rights of the Child on a communications procedure is promising and it is hoped that it will shortly come into operation.<sup>599</sup>

On the basis of Article 44(6) of the CRC, state parties are obliged to make their reports widely available to the public in their respective countries. This is in line with Article 42 of the

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<sup>598</sup> See also section 3.2.1 and 3.2.2.

<sup>599</sup> A/HRC/17/L.8 of 9 June 2011, which has been opened for signature since 28 February 2012. It is regretful that neither South Africa nor the Netherlands has up to today (29-09-2012) signed the Protocol. Available via [www.treaties.un.org](http://www.treaties.un.org), accessed on 29-09-2012.

CRC, on the basis of which state parties are required to make the principles and provisions of the CRC widely known, by appropriate and active means, to adults and children alike.” The question arises as to whether South Africa and the Netherlands are sufficiently in compliance with this obligation of promoting and enhancing children's rights. It is submitted that more publicity should be given to the international documents; their content as well as possible remedies. The latter includes the dissemination of more information on obtaining legal representation or the appointment of a curator *ad litem* or a special curator.<sup>600</sup>

First and foremost, children should become better informed about children's rights. The mere inclusion in curricula at schools is not sufficient, although it is at least a start. It should have practical meaning by linking the discussion on children's rights to the frame of reference of children, presented in accordance with their level of development and maturity.<sup>601</sup> In addition, parents and other caregivers and the public at large should be reached via public campaigns and the media. The role of civil society (NGOs) may also play a significant role in this respect.<sup>602</sup>

Moreover, children's rights should be included in the curricula of various tertiary education programmes, especially for law students and the social sciences. Although the same is applicable pertaining to the curricula for professionals in the field of law and law enforcement, social work, health, education and psychology, the latter programmes should be of practical relevance for the respective professions.

Finally, it should be pointed out that nothing in the international documents prevents state parties from adopting a higher standard pertaining to the rights of children in their national legislation.<sup>603</sup> Organisations like the Children's Institute and the Centre for Child Law in South Africa and the *Kinderrechtencollectief* in the Netherlands<sup>604</sup> are required to keep an

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<sup>600</sup> Children should be able to obtain the necessary assistance in cases where there is a conflict of interests or other matter between the child and his or her parents or care-giver.

<sup>601</sup> In order to contribute in this regard, the so-called “Children's Rights House”, in Dutch “*Het Kinderrechtenhuis*” in Leiden, has opened its doors in the course of 2010. This initiative provides education on children's rights at a regional, national and international level.

<sup>602</sup> For example, Defence for Children International issues a weekly newsletter via email in order to provide an update on the developments in the field of children's rights.

<sup>603</sup> See the Articles 41 of the CRC and 1(2) of the African Children's Rights Charter.

<sup>604</sup> This organisation is composed of organisations dedicated to the realization and enhancement

eye on developments in this respect and (hopefully) will contribute to fast-tracking, achieving (and subsequently retaining) the highest attainable standards pertaining to the rights of children, which are inter-connected.

The quest of ensuring and improving the protection of children should remain permanently on the agendas of state parties. The same applies to the enhancement of the rights of children in the respective countries.

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of the rights of children. The initiative was taken by the Dutch branch of Defence for Children and UNICEF. In January 2008 they released the first Annual Report Children, in which the position of children in the Netherlands is highlighted. The report also contains recommendations for improving children's rights.

## CHAPTER 4: CHILDREN IN NEED OF CARE AND PROTECTION

### 4.1 Introduction

In the previous chapters<sup>1</sup> reference was made to the importance of the family being the fundamental group of society and the natural environment for the growth and well-being of children.<sup>2</sup> It was also mentioned that for a balanced development of the child, he or she should grow up in a family environment “in an atmosphere of happiness, love and understanding”.<sup>3</sup> The latter, however, is not necessarily a given. Whereas it should be strived for that any family environment provides for a safe and balanced upbringing and allows a child to develop in his or her own time in order to reach his or her full potential, the statistics pertaining to the increase of children's court cases in the recent years reveal that the need for support and assistance for families is increasing accordingly.

In the following sections it will be outlined what the content of parental responsibilities and rights entails, and the various persons to whom this may accrue or be assigned to. This will be followed by a discussion of the legislative framework pertaining to the prevention and early intervention measures in South Africa and the Netherlands, which serve to assist families in order to prevent unnecessary intervention.<sup>4</sup> The last part of this chapter focuses on the various aspects relating to child protection in both countries, which come to the fore when preventative measures are considered insufficient or have failed.

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<sup>1</sup> See sections 2.2.2.1.

<sup>2</sup> See Preamble of the CRC, paragraph 5, in which it is also stated that the family “should be afforded the necessary protection and assistance, so that it can fully assume its responsibilities within the community”.

<sup>3</sup> Preamble of the CRC, paragraph 6, which has been reiterated in the Preamble of the Children's Act 38 of 2005, paragraph 7.

<sup>4</sup> These measures aim to provide the necessary support and assistance to families in need thereof. For a more detailed discussion, see section 4.2.

#### 4.1.1 Parental responsibilities and rights in South Africa

Before the coming into force of the Children's Act<sup>5</sup> the concept of “parental responsibilities and rights”, which were then referred to as “parental authority”,<sup>6</sup> was mainly based on common law. At the time, parental authority of parents included guardianship, custody and access with regard to the children born of the marriage.<sup>7</sup> Guardianship entailed the administration of the minor child's estate, the assistance of the child in performing juristic acts and the assistance of the child in legal proceedings, because of the child's limited capacity to act.<sup>8</sup>

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<sup>5</sup> The Children's Act took partial effect on 1 July 2007; see commencement of certain sections of the Children's Act 38 of 2005, Proclamation No. 13 GG 30030 of 29 June 2007.

<sup>6</sup> Traditionally referred to as “parental power”, which means “the complex of rights, powers, duties and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of their minor child and his or her property”, see Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 313. Parental power sounds archaic and in recent years has become outdated, since the emphasis is more on the rights of children and their best interests rather than the rights of parents. See also Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 314; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 35.

<sup>7</sup> On the birth of a so-called “legitimate” child, in other words, a child whose biological parents were married, both parents acquired equal parental authority. See section 1(1) of the (repealed) Guardianship Act 192 of 1993, which provided that “a woman shall be the guardian of her minor children born out of a marriage and such guardianship shall be equal to that which a father has under the common law in respect of his minor children”. Although not defined in the Act, guardianship seemed to have been used in a wide context, including the custody of a child. See Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 318. It is interesting to note that the coming into operation of the Guardianship Act 192 of 1993 on 1 March 1994 changed the South African common law in the sense that although parental authority over a legitimate child was shared by both parents, the father's authority was nevertheless superior to that of the mother at that stage. The mother would act jointly with the father as custodians of the child, thus in matters pertaining to the child's daily life. However, till the commencement of the Guardianship Act only the father of the child was regarded as the child's guardian for matters relating to the administration of the child's estate, the assistance of the child in performing juristic acts and the assistance of the child in legal proceedings. The Guardianship Act 192 of 1993 brought along the necessary equality between both parents. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 63-64.

<sup>8</sup> Guardianship in the narrow sense: see Van Heerden *Boberg's Law of Persons and the Family* (1999) 313 & 314; Himonga *Wille's Principles of South African Law* (2007) 204. The Guardianship Act 192 of 1993 which took effect on 1 March 1994, was repealed and replaced by section 18(3)-(5) of the Children's Act 38 of 2005 on 1 July 2007, see Proclamation No. 13 GG 30030 of 29 June 2007.

Custody, on the other hand, relates to the personal day-to-day life of a child.<sup>9</sup> In the case of a child of unmarried parents,<sup>10</sup> only the mother would attain parental authority.<sup>11</sup> However, via legitimation of the child by a subsequent marriage of both biological parents, the father would acquire parental authority equal to that of the mother, as from the date of the marriage.<sup>12</sup> Moreover, adoption would confer parental authority on the adoptive parent(s).<sup>13</sup> Furthermore, parental authority, or aspects of it, could be acquired on the basis of an order of the high court, acting in its capacity as upper guardian of all minors.<sup>14</sup>

The common law was developed by the courts,<sup>15</sup> the latter taking into account the Constitution, which subsequently resulted in the enactment of The Natural Fathers of Children Born Out of Wedlock 86 of 1997.<sup>16</sup> In terms of the latter Act, the high court had the

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<sup>9</sup> See Van Heerden *Boberg's Law of Persons and the Family* (1999) 313; also Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 47. With the commencement of certain sections of the Children's Act on 1 July 2007, the term "custody" was replaced by the term "care", as defined in section 1 of the Act. Also see section 18(2) of the Children's Act, which explicitly refers to "care" as one of the aspects of "parental responsibilities and rights".

<sup>10</sup> Previously referred to as an "extra-marital" child or an "illegitimate" child. See Boezaart *Law of Persons* (2010) 94.

<sup>11</sup> Where the mother of a child was unmarried and a minor herself, the custody of the child would vest in that mother, unless a competent court would direct otherwise, see section 3(1)(b) of the (repealed) Children's Status Act 82 of 1987. Guardianship of the child would vest in the guardian of the mother, unless a competent court would direct otherwise, see section 3(1)(a) of the Act. Moreover, section 3(2) provided that "if the mother of an extra-marital child is under the age of 21 years but acquires the status of a major, the guardianship and custody of that child shall, unless a competent court directs otherwise, vest in that mother". The Children's Status Act 82 of 1987 has been repealed on 1 July 2007.

<sup>12</sup> In other words, no retrospective effect. See section 4 of the (repealed) Children's Status Act 82 of 1987. See also Van Heerden *Boberg's Law of Persons and the Family* (1999) 320. Compare with section 38 of the Children's Act 38 of 2005, as discussed in section 4.1.1.2.8.

<sup>13</sup> In terms of section 20(2) of the (repealed) Child Care Act 74 of 1983, an adopted child was considered for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage. See Van Heerden *Boberg's Law of Persons and the Family* (1999) 320. The Child Care Act 74 of 1983 was repealed on 1 April 2010 by the Children's Act 38 of 2005. Chapter 15 of the Children's Act deals with adoption. Section 242(3) of the Children's Act 38 of 2005 provides that "an adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child". See also section 5.3.5.1.

<sup>14</sup> See Van Heerden *Boberg's Law of Persons and the Family* (1999) 321-322.

<sup>15</sup> See the case law on aspects of parental authority in chapter 3, see specifically section 3.2.1.

<sup>16</sup> The Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 took effect on 4 September 1998 and was subsequently repealed on 1 July 2007 by the Children's Act 38 of 2005. See Commencement of Certain Sections of the Children's Act, 2005 (Act No. 38 of



discretion to make an order granting a natural father of a child born out of wedlock access rights to or custody or guardianship of the child; however, only upon application by the natural father. Thereupon, the coming into force of the Constitution<sup>17</sup> and the ratification of various international and regional instruments<sup>18</sup> regarding children has largely influenced the present position of children under South African law.<sup>19</sup>

With the coming into force of the Children's Act<sup>20</sup> the statutory basis has changed.<sup>21</sup> The "new" Children's Act has integrated, reshaped and extended many of the previous provisions relating to the welfare and protection of children.<sup>22</sup> Chapter 3 of the Children's Act<sup>23</sup> deals in detail with the relevant aspects pertaining to parental responsibilities and rights,<sup>24</sup> which

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2005) Proclamation No. 13 GG 30030 of 29 June 2007. Section 21 of the Children's Act specifically deals with the position of unmarried biological fathers, as will be discussed below, in section 4.1.1.2.2.

<sup>17</sup> The Interim Constitution of the Republic of South Africa, 1993 (Act 209 of 1993) included section 30 dealing with children's rights, later to be replaced by section 28 of the Constitution, 1996 (Act 108 of 1996). The (final) Constitution of 1996 came into operation on 4 February 1997.

<sup>18</sup> The United Nations Convention on the Rights of the Child (referred to as the CRC), adopted 20 November 1989, entered into force on 2 September 1990. South Africa ratified the CRC on 16 June 1995. In terms of Article 49(2) of the CRC, the document became binding for South Africa on 16 July 1995, as discussed in section 2.1. South Africa is also a state party to the Charter on the Rights and Welfare of the African Child, which was adopted in 1990 and came into force on 29 November 1999. South Africa ratified the African Children's Rights Charter on 7 January 2000. See also Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 309.

<sup>19</sup> See chapter 2 on "The standards set by international and regional law relating to the placement of children in need of care and protection", and chapter 3 on "The national law in South Africa and the Netherlands relating to the general principles in the CRC and family life, in the context of international standards".

<sup>20</sup> See Commencement of Certain Sections of the Children's Act, 2005 (Act No. 38 of 2005), which took effect on 1 July 2007. See Proclamation No. 13 2007, *Government Gazette*, No. 30030 29 June 2007. Furthermore, Commencement of Remaining Sections of the Children's Act, 2005 (Act No. 38 of 2005), which came into force on 1 April 2010. See Proclamation No. R 12 2010 *Government Gazette* No. 33076 26 March 2010

<sup>21</sup> The Commencement of the various parts of the Children's Act led simultaneously to the repeal of certain Acts (statutes). On 1 July 2007 the following Acts were repealed: section 1 of the General Law Further Amendment Act 57 of 1962; the whole of the Age of Majority Act 57 of 1972; the whole of the Children's Status Act 82 of 1987; the whole of the Guardianship Act 192 of 1993 and the whole of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997. The other legislation mentioned in Schedule 4 of the Children's Act was repealed on 1 April 2010.

<sup>22</sup> See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 199.

<sup>23</sup> 38 of 2005, which came partly into operation on 1 July 2007.

<sup>24</sup> "Parental responsibilities and rights" in relation to a child, means the responsibilities and rights referred to in section 18, see section 1(1) of the Children's Act.

include care, contact, guardianship and maintenance.<sup>25</sup> The term “parental responsibilities and rights”<sup>26</sup> suggests that it merely provides for the responsibilities and rights of parents. In the South African context this would be short-sighted and totally insufficient. Although section 28 of the Constitution, in conjunction with most of the other rights as referred to in the Bill of Rights,<sup>27</sup> provides children in South Africa with an extensive and solid set of rights, societal conditions, like the HIV/AIDS pandemic,<sup>28</sup> poverty,<sup>29</sup> the high incidences of (domestic) violence, abuse and neglect to which children are exposed to or statistically speaking are at risk for, hamper the realisation of some of these entitlements. The right of a child to family care<sup>30</sup> or (alternatively) parental care [...] is contained in section 28(1)(b) of

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<sup>25</sup> See Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 48. On the basis of the formulation “which include [...]” in section 18(2), Heaton has indicated that the definition is not exhaustive, see *Commentary on the Children's Act* (2012) 3-4. See for a detailed discussion section 4.1.1.1 below.

<sup>26</sup> Previously referred to as “parental authority”. Although the expression “rights and responsibilities” is easier on the ear than “responsibilities and rights”, the legislature has deliberately chosen for the latter option, emphasising firstly on the importance of responsibilities with regard to children, and furthermore see Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 63.

<sup>27</sup> See chapter 3. Also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 265 and 277.

<sup>28</sup> According to the 2009 General Household Survey there were circa 4.3 million orphans in South Africa, which figure includes children without a living biological mother, father or both parents (23% of all children in South Africa). See *South African Child Gauge 2010/2011* Children's Institute University of Cape Town 81. See also <http://www.avert.org/aidssouthafrica>, accessed on 23-9-2012. The HIV/AIDS pandemic has contributed to an increase in so-called “child-headed households”. Based on the 2009 General Household Survey there were 95 000 children living in a total of 49 000 child-headed households, see *South African Child Gauge 2010/2011* Children's Institute University of Cape Town 83.

<sup>29</sup> The unemployment rate in South Africa is very high (24.9% for Quarter 2 in 2012), available via Statistics South Africa, [www.statssa.gov.za](http://www.statssa.gov.za), last accessed on 23-09-2012. This has contributed to increasing numbers of street children begging for money and food. Child poverty is rife in South Africa. In 2009 circa 61% of children lived in households with an income of per capita below R552 per month, in *South African Child Gauge 2010/2011* Children's Institute University of Cape Town 85. See also Skelton “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa” 2012 *The International Survey of Family Law* 334.

<sup>30</sup> Interestingly, the term “family” is not defined in the Act. Van der Linde has provided an overview of various definitions of a family and refers among others to Benokraitis which has defined the family as “[A]ny sexually expressive or parent-child relationship in which (1) people live together with a commitment, in an intimate, interpersonal relationship; (2) the members see their identity as importantly attached to the group; and (3) the group has an identity of its own”, in *Grondwetlike Erkenning van Regte ten aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD thesis 2001 University of Pretoria) 32.

It is submitted that “family care” should not be narrowed down to biological parents, but

the Constitution, which implies that the present focus is on the rights of children rather than on those of parents.<sup>31</sup> In addition, in acknowledging a diverse and developing society, the Children's Act has a proactive approach in relation to the challenges which many children in South Africa might face in their lives.<sup>32</sup> The Act is, among others, aimed at setting out principles relating to the care and protection of children.<sup>33</sup> It hereby provides for a number of alternatives in family structures and care, and this is seamlessly connected with Chapter 3 of the Act,<sup>34</sup> since parental responsibilities and rights can also be acquired by other persons who are not the biological parents.<sup>35</sup> Simultaneously, the Act provides for the co-exercise of parental responsibilities and rights by various categories of co-holders, thereby creating a number of options, to be tailor-made in order to do justice to the circumstances of each and every child in South Africa.<sup>36</sup>

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should rather be interpreted widely in order to provide for alternatives in family forms, like for example, same sex parents and kinship care. See also Skelton in Boezaart (ed.) (2009) 63. This is supported by the fact that the term "family member" has also been defined in a wide sense. "Family member", in relation to a child, means – (a) a parent of the child; (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; or, (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship." See section 1(1) of the Children's Act 38 of 2005.

<sup>31</sup> In terms of section 28(1)(b) of the Constitution, "every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment". Skelton rightfully points out that parental rights remain of importance in the context of protection of the child within the family against arbitrary interference by the state or third parties, see in Boezaart (ed.) *Child Law in South Africa* (2009) 63.

<sup>32</sup> See also Van der Linde "Die beskerming van die gesin en gesinslewe met verwysing na aspekte van kontak met minderjarige kinders ingevolge die 'Children's Act'" in *Gedenkbundel, Liber memorialis PJ Visser* (2008) 259.

<sup>33</sup> See the long title as substituted by section 1 of Act 41 of 2007.

<sup>34</sup> Chapter 3 of the Children's Act deals with matters pertaining to "parental responsibilities and rights", including the acquisition and loss of parental responsibilities and rights, as discussed in part 1 of chapter 3, followed by some practical aspects regarding the co-exercise of parental responsibilities and rights in part 2. Part 3 deals with parenting plans and part 4 provides for so-called "miscellaneous" aspects. The latter contains, among others, provisions pertaining to the presumption of paternity in respect of a child of unborn parents, the refusal to submit to the taking of blood samples and the rights of a child born of a voidable marriage. See Heaton in *Commentary on the Children's Act* (2012) 3-38 and further.

<sup>35</sup> This will be possible on the basis of an agreement in terms of section 22 of the Children's Act or by court order in terms of sections 23 and 24. Furthermore, guardianship and care can be assigned by way of appointment in a will. For a more detailed discussion on the acquisition of parental responsibilities and rights, see section 4.1.1.2.2 below. Also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 80-85.

<sup>36</sup> See section 30 of the Children's Act.

#### 4.1.1.1 The contents of parental responsibilities and rights and the termination thereof

As mentioned in the paragraph above, in terms of the Children's Act, a person may have either full or specific parental responsibilities and rights in respect of a child.<sup>37</sup> Moreover, more than one person may hold parental responsibilities and rights in respect of the same child.<sup>38</sup> The question arises as to what parental responsibilities and rights exactly entail.

In terms of section 18(2) of the Children's Act, parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –

- (a) to care for the child;<sup>39</sup>

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<sup>37</sup> Section 18(1). See also Heaton in *Commentary on the Children's Act* (2012) 3-3 and further.

<sup>38</sup> Section 30(1) of the Children's Act. Also Heaton in *Commentary on the Children's Act* (2012) 3-26 and 27.

<sup>39</sup> This was previously referred to as “custody”. However, the present term “care” has a far wider meaning than its predecessor. In terms of section 1(1) of the Children's Act, “care”, in relation to a child, includes, where appropriate -

- (a) within available means, providing the child with -
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child's health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;

- (b) to maintain contact with the child;<sup>40</sup>
  - (c) to act as guardian of the child;<sup>41</sup> and
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- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.” See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 349; for a more detailed discussion see Skelton in Boezaart (ed.) (2009) 65 and further; Boezaart *Law of Persons* (2010) 114-116.

<sup>40</sup> Contact was previously referred to as “access”. In terms of section 1(1) of the Children's Act, “contact’, 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.”

See also Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 356.

<sup>41</sup> Comparing the previously used terminology and that of the Children's Act, the concept of guardianship remains to a large extent the same and is dealt with in detail in section 18(3) to (6). It reads as follows: Section 18(3): “Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must -

- (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.
- (4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.
- (5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).”

(d) to contribute to the maintenance of the child.<sup>42 43</sup>

The change in terminology of these concepts and the effects thereof have caused uncertainty as to whether the concepts custody and access (and to a lesser degree guardianship) had survived the coming into operation of the Children's Act. In *W v EW*<sup>44</sup> the court found that the concepts "care" and "contact" had widened the common law concepts to a degree and recommended that court orders should use the terminology as provided for in the Children's Act.<sup>45</sup> In addition, the change in terminology contributed to some confusion in practice which came to the fore in *WW v EW*,<sup>46</sup> and revolved especially around the concepts "care" and "contact".<sup>47</sup> Although the court acknowledged that these concepts to a large extent correspond with its common-law counterparts,<sup>48</sup> it deliberated that they were not

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See also Heaton *Commentary to the Children's Act* (2012) 3-3 and further; Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 350-351.

<sup>42</sup> For further reading on maintenance, see Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 358. With regard to (recent) important legal developments pertaining to maintenance, see *Petersen v Maintenance Office, Simon's Town Maintenance Court* 2004 (2) SA 56 (C). In the past, the common law provided that where the unmarried biological parents of a child were not able to maintain their child, the duty of support rested on the maternal grandparents, not on the parental grandparents.

It was evident that the latter decision was not only in conflict with the right to equality on the basis of birth in terms of section 9 of the Constitution but also with the right to dignity in terms of section 10. Moreover, the court took into consideration the best interests of the child standard in terms of section 28(2). In this case, the court developed the common law on the basis of section 39(2) of the Constitution, and held that a child of unmarried parents also might have a claim against the paternal grandparents. See Van Schalkwyk in Boezaart (ed.) *Child Law in South Africa* (2009) 45; Boezaart *Law of Persons* (2010) 116-117; Boezaart *Law of Persons Sourcebook* (2010) 395; Skelton & Carnelley *Family Law in South Africa* (2010) 254.

<sup>43</sup> See also Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 46-50.

<sup>44</sup> [2010] JOL 25083 (KZP).

<sup>45</sup> See Schäfer *Child Law in South Africa—Domestic and International Perspectives* (2011) 221.

<sup>46</sup> 2011 (6) SA 53 (KZP).

<sup>47</sup> Rall AJ deliberated that guardianship in terms of the Children's Act as provided for in section 18(3), (4) and (5) has left the position which existed previously (in terms of the common law) unchanged, see paragraph [20]. In addition, since the concept maintenance was not defined in the Children's Act, it was deliberated that it was safe to assume that maintenance has retained its prior meaning (in terms of common law), paragraph [14]. See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 226.

<sup>48</sup> Reference was made to *J v J* 2008 (6) SA 30 (C), in which it was held that the common law terminology of parental power and parental authority were replaced by the term "parental responsibilities and rights" and "custody" by "care". In addition, Rall AJ referred to *LB v YD* 2009 (5) SA 463 (T), in which it was held that the Children's Act had brought along changes

exactly in correspondence. The court ascertained that whilst the concepts contained in the Children's Act included all the elements of the common-law concepts, these statutory concepts were wider than those in terms of the common law.<sup>49</sup>

Instead of providing clarity pertaining to the envisaged effects of the change in terminology, the legislature included section 1(2) of the Children's Act, which exacerbated the confusion.<sup>50</sup> The court held that since it was not the purport of the latter provision to abolish the common-law concepts, the common-law concepts have been given a wider meaning, which includes both the common-law concepts and the statutory concepts. In conclusion Rall AJ held that although custody can be used interchangeably with care, and access with contact respectively, it is preferable to use the new terminology in pleadings and court orders.<sup>51</sup>

It should be reiterated that all persons sharing parental responsibilities and rights, including the biological parents, have either full<sup>52</sup> or specific<sup>53</sup> responsibilities and rights, as referred to in section 18(2).<sup>54</sup> In principle, where more than one person holds the same parental

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to existing laws, that there was a broad correspondence between the concept of “responsibilities and rights” and its predecessor (parental authority) as well as between the concepts care, contact and guardianship compared to its common law counterparts (custody, access and guardianship).

<sup>49</sup> In this regard the court referred to the definition of care, the aspects mentioned under (h) and (i) which formed traditionally not part of custody, and in terms of the definition of contact, aspect (a) was not included in the concept access in terms of common law, see paragraph [21].

<sup>50</sup> Section 1(2) of the Children's Act reads as follows: “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 care and contact as defined in this Act.” It should be noted that the common-law terminology has been maintained in other statutes, for example, the Divorce Act 70 of 1979, section 6(3), the Matrimonial Affairs Act 37 of 1953, section 5 and the Mediation in Certain Divorce Matters Act 24 of 1987, section 4.

<sup>51</sup> See paragraph [28]. Finally, Rall AJ made an effort to provide examples of relevant court orders in divorce cases, accommodating the various terminology, see paragraphs [35]-[43]. See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 228.

<sup>52</sup> Which consists of care, contact, guardianship and maintenance, see section 18(2). See also Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 205.

<sup>53</sup> Referring to one or some of the aspects of parental responsibilities and rights as referred to in section 18(2).

<sup>54</sup> Read in conjunction with section 30(1) and further, which provides for the co-exercise of parental responsibilities and rights, by more than one person.

responsibilities and rights in respect of a child, each of the co-holders may act “without the consent”<sup>55</sup> of the other co-holders when exercising those responsibilities and rights.<sup>56</sup> However, before a person holding parental responsibilities and rights in respect of a child takes any decision which is likely to change significantly, or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and rights in respect of the child, that person must give due consideration to any views and wishes expressed by the other co-holder of parental responsibilities and rights.<sup>57</sup> Thus section 31 prevents decision-making by a person single-handedly but only as so far as major decisions regarding the child are concerned.<sup>58</sup>

Moreover, it has to be kept in mind that before a major decision involving the child is taken, it is also peremptory for the person holding parental responsibilities and rights to give due

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<sup>55</sup> In other words, the co-holder can act independently.

<sup>56</sup> Except where the Children's Act, any other law or an court order provides otherwise. See section 30(2) of the Children's Act. See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 206.

<sup>57</sup> See section 31(2)(a) and (b) of the Children's Act. See Heaton in *Commentary on the Children's Act* (2012) *Children's Act* (2007) 3-30; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 86-87; Skelton & Carnelley *Family Law in South Africa* (2010) 263.

<sup>58</sup> The first case involving the sections 30 and 31 was the case *J v J* 2008 (6) SA 30 (C). The mother of the child, with whom the child was living, enrolled the child in a school without consulting the father before the time. The question was to which extent a co-holder of parental rights and responsibilities may act independently in terms of section 30(2). On the basis of section 31(2) the court held that the choice of a school was not likely to significantly change or to have a significant adverse effect on the father's exercise of his parental responsibilities and rights in respect of the child. It is interesting to note that the court was of the opinion that even if the duty to consult had existed, this would not have meant that the mother was bound by the views and wishes of the father. See also Heaton in *Commentary on the Children's Act* (2012), *Children's Act* (2007) 3-30. On the basis of section 33 the co-holders of parental responsibilities and rights may agree on a parenting plan, which among others may include a provision regarding the schooling and religious upbringing of the child, see section 33(3)(d).

Another significant decision involves the relocation of a parent with the child(ren). In the case *B v M* [2006] 9 BCLR 1034 (W), the mother approached the court for an order permitting her to relocate with the children (within South Africa). This served before the court before the coming into force of the Children's Act. Before granting the order, the court deliberated that the following aspects needed consideration: the consequent challenges for the parties should it be decided to overrule the mother's (reasonable) decision to relocate; the effect on the bond between the non-moving parent and the children and the father's views and wishes. The court held that the relevant factors to consider depend on the context and that there is no specific preference in that respect. See Skelton in Boezaart (ed.) (2009) 87; Bosman-Sadie & Corrie (2010) 51; Skelton & Carnelley *Family Law in South Africa* (2010) 263.



consideration to any views and wishes expressed by the child.<sup>59</sup> This presupposes that the child has been given the opportunity to express his or her views. This provision should be read in conjunction with section 10, on the basis of which a child is entitled to participate in any matter concerning the child.

The connection between these two provisions came to the fore in the case *HG v CG*.<sup>60</sup> In this case the mother approached the court for an order entitling her to relocate to Dubai with her four children. The court dismissed the application on the basis that relocation was not in their best interests. Apart from the fact that the reporting of the experts was contradictory, the voices of the children had not been heard. Chetty J deliberated that the children were of an age and maturity to fully understand the situation and held that the children's voices could not be stifled but must be heard.<sup>61</sup> What is meant by a major decision which involves the child is set out in section 31(1)(b).<sup>62</sup> It is agreed with Skelton and Carnelley that some problems regarding the co-exercise of the parental responsibilities and rights by co-holders can possibly be prevented, or at the least be minimised, by a parenting plan.<sup>63</sup>

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<sup>59</sup> Section 31(1)(a). Thus the person(s) holding parental responsibilities and rights must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development. See also section 10 of the Children's Act, which provides for child participation in any matter concerning the child, which is in line with Article 12 of the CRC and Article 7 of the African Children's Rights Charter. For a more detailed discussion on the participation of children, see sections 2.2.1.6 and 3.1.4 above.

<sup>60</sup> 2010 (3) SA 352 (ECP).

<sup>61</sup> The children were aged 14 and 11 years.

<sup>62</sup> This concerns any decision (i) in connection with a matter in section 18(3)(c), in other words guardianship; (ii) affecting contact between the child and a co-holder of parental responsibilities and rights; (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or (iv) a decision which is likely to significantly change, or 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. It is commendable that the latter ground is widely formulated in order to accommodate a variety of matters which might affect the child.

<sup>63</sup> A parenting plan determines the exercise of the responsibilities and rights which the co-holders of responsibilities and rights may have in respect of the child, see section 33 of the Children's Act. Section 33(2) dictates that before parties want to approach the court due to a conflict relating to the exercise of responsibilities and rights, they must first seek to agree on a parenting plan. To this effect, the parties must seek the assistance of a family advocate, social worker or psychologist or mediation through a social worker or other suitably qualified person. Moreover, there are specific formalities prescribed formalities mentioned in section 34 which should be read in conjunction with DSD regulations 9 and 10 and Forms 8, 9 and 10. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 90; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 267; Bosman-Sadie & Corrie *A Practical Approach to the*

It is interesting to note that a child, where possible, also should be involved in the preparation of a parenting plan.<sup>64</sup>

Furthermore, it is not possible for a co-holder to privately surrender or transfer any of the responsibilities and rights to another co-holder or any other person. However, on the basis of an agreement, another co-holder or other person may exercise any or all of the responsibilities and rights on behalf of the first-mentioned co-holder.<sup>65</sup> It is commendable that the Children's Act also provides for an unwilling person who needs to share (aspects of) parental responsibilities and rights on the basis of a court order or a parental responsibilities and rights agreement which has been formalised in terms of section 22(4). Where a person having care of a child refuses another person who has access to that child or who holds parental responsibilities and rights in respect of the child from exercising these rights, he or she is guilty of an offence and liable on conviction to a fine or to imprisonment for maximum one year.<sup>66</sup> The person having care of a child is also bound to notify another person who has access or holds parental responsibilities and rights, of any changes in residential

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*Children's Act* (2010) 52.

<sup>64</sup> This is explicitly provided for in DSD regulation 11. Whether and till what extent the child will participate depends largely on the views (of adults) on the child's age, maturity and stage of development, see regulation 11(1) and (2). See also section 10 of the Children's Act.

<sup>65</sup> Which implies that the original or first-mentioned co-holder remains responsible. See Heaton in *Commentary on the Children's Act* (2012) *Children's Act* (2007) 3-27; Bosman-Sadie & Corrie (2010) 50.

<sup>66</sup> Section 35(1) of the Children's Act reads as follows: "Any person having care or custody of a child who, *contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22(4)*, refuses another person who has access to that child or who holds responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or prevents that person from exercising such access or such responsibilities and rights, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year", own emphasis. Skelton has urged that these powers should be used sparingly for two reasons.

Firstly, due to the drastic consequences of the arrest and possible detention of the primary care-giver, which is not necessarily in the child's best interests, whilst the latter should be of paramount importance. Secondly, the parent trying to prevent contact between the child and the other parent might have valid reasons. It is submitted that in the latter case these reasons should be investigated and that the child should participate in any decision-making in this regard. Therefore caution is required pertaining to the use of criminal processes in family law issues and that the possible consequences of such actions should be given serious consideration before resorting to these measures. See Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 268-269.

address.<sup>67 68</sup>

As mentioned above, parental responsibilities and rights concern children.<sup>69</sup> When a child becomes a major,<sup>70</sup> it is automatically assumed that he or she has sufficiently evolved or matured to face the world,<sup>71</sup> and on this basis the parental responsibilities and rights move to the background. It is, however, not necessarily realistic to assume that all eighteen-year-old persons are mature enough to face all the challenges in their lives independently. Research has shown that especially young adults between 18 and 23 years with a background of care and protection are at risk.<sup>72</sup>

The question arises what could be done to prevent an eighteen-year-old who was placed in foster care or residential care, to fall between two stools.<sup>73</sup> The Children's Act provides,

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<sup>67</sup> See section 35(2)(a), which stipulates that this should be in writing. Where a person fails to comply with this duty, he or she is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

<sup>68</sup> It is submitted that a legislative provision like the aforementioned would also be useful in the Netherlands, where especially after divorce parents sometimes have difficulty in sharing responsibilities and rights pertaining to their children. Sometimes the children's court would order a supervision measure in terms of which an unwilling parent is encouraged by a social worker (and thus theoretically forced) to take responsibility, in the interests of the child. There has been criticism to this practice because a supervision order is one of the child protection orders which only should be ordered when the grounds are present, in other words, where the elements of Article 1:254 of the Civil Code are met. See section 4.3 below.

<sup>69</sup> See section 18(1).

<sup>70</sup> Upon reaching the age of eighteen years, see section 17 of the Children's Act.

<sup>71</sup> See the discussion on parental guidance and the child's evolving capacities in sections 2.2.2.2 and 3.2 above.

<sup>72</sup> See the research conducted by the Verwey-Jonker Institute in the Netherlands, Steketee *et al.* "(Jeugd)zorg houdt niet op bij 18 jaar" (2009) 6. These young and vulnerable people have often been placed in residential care or foster care or might have specific problems, for example psychological, psychiatric problems or mental disability. Although this research was conducted in the Netherlands, this does not necessarily mean that the findings are only relevant to the Netherlands. It is submitted that more comparative and interdisciplinary research is needed to establish the situation in South Africa.

<sup>73</sup> Children who have been in alternative care, for example, foster care or residential care, might not be sufficiently independent at the age of 18. This might in principle be applicable to all eighteen-year-old youngsters. However, where the parental support background does not exist (anymore) these young adults might be at risk. When foster care or residential care comes to an end, the safety network ends simultaneously. Because they have been taken care of by the social welfare system, which provided for them, they might not be able to find adequate help or assistance when needed. Without a proper co-ordinated social support system these youngsters could eventually be worse off than before, which, where possible, should be prevented.

among others, for the protection of the rights of children, of which the latter is clearly defined.<sup>74</sup> An appeal is made to all the professionals involved, to find (creative) interim solutions which accommodate the specific needs of the child concerned on a voluntary/informal basis.<sup>75</sup> Moreover, legislation and regulations need to be formulated to provide for a wide range of (tailor-made) options for support services, which should ensure a smooth transition of assistance with regard to children and young adults. This system should be made easily accessible and widely communicated to the public in general.<sup>76</sup>

Section 28(1)<sup>77</sup> deals with the termination, extension, suspension or restriction of parental responsibilities and rights.<sup>78</sup> The parental responsibilities and rights, any or all of them, which a specific person has in respect of a child, may be suspended for a period, or terminated and also extended or restricted by a high court,<sup>79</sup> a Regional Division of the

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<sup>74</sup> See the definition section, section 1, which is in line with the international and regional documents. See sections 2.2.1.2 and 3.1.1 above.

<sup>75</sup> Presiding officers and other professionals need a proactive approach and should participate actively in the whole process, hereby sharing of expertise. With every extension of an existing child protection order, it should not only be checked whether the grounds are still complied with, which would justify the interference. It is also necessary to develop a (realistic) vision with regard to the child concerned. The child should participate in the deliberations. The alternative forms of participation, for example, family group conferencing promises to be an excellent tool in providing creative solutions by the family concerned and the social network, in which the child also should be involved. See the discussion on family group conferencing in the Netherlands in section 3.1.4.2 above.

<sup>76</sup> Compare with the Netherlands, where the Act on the Youth Care, among others, deals with youth up to the age of eighteen but under certain circumstances also provides for persons between 18 and 23 years, provided the help and assistance already started before 18, see Article 1(b) of the Act on the Youth Care. If the latter provision is not applicable, assistance can only take place on a voluntary basis. There is, however, an exception in terms of Article 29a of the Act on the Youth Care, which provides for closed residential care up to the age of 21. This would be applicable in the case of serious problems relating to the upbringing of the child which seriously hamper his or her development. See Steketee *et al.* "(Jeugd)zorg houdt niet op bij 18 jaar" (2009) 17-18.

<sup>77</sup> Children's Act 38 of 2005.

<sup>78</sup> Although the aspects relating to the extension, restriction, suspension and termination of parental responsibilities and rights seem to be centrally dealt with in one provision, section 135 of the Children's Act should not be overlooked. On the basis of the latter provision, the Director-General of the Department of Social Development, a provincial head of the same department or a designated child protection organisation have a discretion to make an application to court pertaining to the termination or suspension of parental responsibilities and rights which a specific person has in respect of a child. See Sloth-Nielsen in *Commentary on the Children's Act (2012) Children's Act (2007) 7-41.*

<sup>79</sup> The high court as upper guardian of all children had and still has the power to deprive a parent of parental responsibilities and rights (previously called parental authority), completely or partially, based on the common law or on any of the statutory powers in terms of the

Magistrate's Court in a divorce matter or a children's court.<sup>80</sup> The application for such an order may be brought by a whole range of persons, namely:

- “(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;<sup>81</sup>
- (c) by the child, acting with leave of the court;
- (d) in the child's interest by any other person, acting with leave of the court; or by a family advocate or the representative of any interested organ of the state”.<sup>82</sup>

In considering such an application, the court must take into account the best interests of the child,<sup>83</sup> the relationship between the child and the person whose parental responsibilities and rights are being challenged, the degree of commitment that the person has shown towards the child, and any other relevant factor. It is important to stress that the principle of the best interests of the child, together with the other rights in section 28 and the remainder of the Bill

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Matrimonial Affairs Act 37 of 1953, the Divorce Act 70 of 1979 or the Child Care Act 74 of 1983, the latter which has been replaced by the Children's Act 38 of 2005. For a detailed discussion see Van Heerden in Van Heerden *et al.* (eds.) *Boberg's Law of Persons and the Family* (1999) 499. With regard to the deprivation of guardianship or care (custody), see 504; Also Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 207.

<sup>80</sup> See section 28(1). An application in terms of section 28(1) can be combined with a section 23 application, in terms of which the court may assign contact and care to an interested person. See in this respect section 4.1.1.2.6 above. Like in all civil court proceedings, a finding in terms of section 28 will be based on a balance of probabilities. See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 206; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 85; Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 47.

<sup>81</sup> For example, a professional person who has been involved with the family, like a social worker.

<sup>82</sup> Section 28(3). Any professional person will be able to make such an application, for example, a social worker or a doctor. Compare with section 135 which specifically allows the authorities of the Department of Social Development to make such an application, see later in this section.

<sup>83</sup> See section 28(2) of the Constitution and sections 7 and 9 of the Children's Act, as discussed in chapter 3, section 3.1.3 above.

of Rights in the Constitution, apply to all children,<sup>84</sup> regardless of the marital status of their parents or the kind of marriage concluded between the parents.

Himonga states categorically that section 28(2) of the Constitution is applicable to customary law as well, and that therefore, matters relating to parental responsibilities and rights can be dealt with without considering the situation pertaining to *lobolo*<sup>85</sup> payments. This subsequently leaves no scope for the application of African customary law in matters relating to parental responsibilities and rights.<sup>86</sup>

In addition, on the basis of section 135 of the Children's Act, the Director-General of the Department of Social Development<sup>87</sup> can also apply for a court order, temporarily suspending, terminating or transferring any or all of the parental responsibilities and rights, or restricting or circumscribing the exercise by that person of the responsibilities and rights. It is interesting to note that an application in terms of this section may be brought *without*<sup>88</sup> the consent of a parent or care-giver of the child. Section 135(2) states that:

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<sup>84</sup> See the Preamble to the Children's Act 38 of 2005. See also Bonthuys in *The Bill of Rights Handbook* (2005) 600. See chapter 3 above, in which reference is made that there are a few restrictions pertaining to the rights applicable to children in terms of chapter 2 of the Constitution, like the right to vote.

<sup>85</sup> Which means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage, see section 1 of the Recognition of Customary Marriages Act 120 of 1998. See also the case *Hlope v Mahlalela* 1998 (1) SA 449 (T), in which the court pronounced on the best interests of the child in customary law. After the death of the mother of the child, both the father and the maternal grandmother competed for being awarded care (custody) of the child. The point of focus was the question whether the father had paid the *lobolo* to the family of the deceased. The grandmother of the child averred that since the father had merely paid a part of the *lobolo*, he was not entitled to the child. The court held that the matter would be decided only on the basis of the best interests of the child. For a detailed discussion of the case, see section 3.1.3 above.

<sup>86</sup> See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 208. Ngidi refers to the fact that the best interests of the child being paramount in any matter concerning the child, is a constitutional injunction which invalidates customary law to the extent where it is inconsistent with the Constitution, in Boezaart (ed.) *Child Law in South Africa* (2009) 229.

<sup>87</sup> Section 135(1) of the Children's Act refers to the Director-General, a provincial head of social development or a designated child protection organisation. Other professionals, like social workers or doctors, need to resort to section 28(3) of the Children's Act, as discussed earlier in this section.

<sup>88</sup> Own emphasis.

“An application in terms of subsection (1) may be brought without the consent of a parent or care-giver of the child if the child at the time of the application -

- (a) is older than seven years, and has been in alternative care for more than two years;
- (b) is older than three years but not older than seven years, and has been in alternative care for more than one year; or
- (c) is three years or younger, and has been in alternative care for more than six months”.<sup>89</sup>

The contents of the sections 135 and 136 suggest that the stability of the child is more important than the protection of the parent(s). Sloth-Nielsen has correctly pointed out that from Articles 7 and 9 of the CRC it can be derived that the child is in principle entitled to maintain a legal relationship with the biological parents.<sup>90</sup> She therefore suggests that sections 135 and 136 of the Children's Act should be used sparingly and only in order to facilitate adoption or where continuation of parental responsibilities and rights would be detrimental for the child.<sup>91</sup> It is submitted that especially during the formative years, children should ideally be living in a stable and loving environment. Where a young child has been in alternative care for a longer period of time, there is a need for the child to be placed in a stable and more permanent situation.<sup>92</sup>

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<sup>89</sup> Section 29 of the Children's Act which, among others, deals with the court proceedings relating to the termination, extension, suspension or restriction of parental responsibilities and rights is similarly applicable to these proceedings, as far as read with such changes as the context requires. See section 135(3) of the Children's Act.

<sup>90</sup> In terms of Article 7 of the CRC the child has the right to know and to be cared for by his or her parents and Article 9 of the CRC provides that it is the right of the child not to be separated from the parents against their will, unless when competent authorities determine that this would be in the child's best interests, which decision should be subject to judicial review. For a more detailed discussion on these provisions, see section 2.2.2.

<sup>91</sup> Sloth-Nielsen in *Commentary on the Children's Act* (2012) 7-42 to 7-44.

<sup>92</sup> For example, foster care or adoption. See Skelton in Boezaart (ed.) (2009) 86.

The court has to consider an application in terms of section 135.<sup>93</sup> With regard to the decision whether (or not) to terminate or suspend parental responsibilities and rights,<sup>94</sup> especially where a child has been in alternative care for some time, the court is obliged to:

“take into account all relevant factors, including -

- (i) the need for the child to be permanently settled, preferably in a family environment, taking into consideration the age and stage of development of the child;
- (ii) the success or otherwise of any attempts that have been made to reunite the child with the person whose parental responsibilities and rights are challenged;
- (iii) the relationship between the child and that person;
- (iv) the degree of commitment that that person has shown towards the child;
- (v) whether there had been any contact between the parent and the child over the year preceding the application; and
- (vi) the probability of arranging for the child to be adopted or placed in another form of alternative care”.<sup>95</sup>

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<sup>93</sup> See section 136.

<sup>94</sup> Regarding an application in terms of section 135 of the Children's Act.

<sup>95</sup> Section 136 of the Children's Act, which deals with the court's consideration of the application to terminate or suspend parental responsibilities and rights in terms of section 135. See also section 236, which outlines the circumstances in which the consent of a parent with regard to the adoption of the child can be dispensed with. Section 236(5) states that a children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of section 236 from giving consent to the adoption of a child.



From the above it is clear that the child's best interests are indeed paramount<sup>96</sup> meaning that the arrangement which will benefit the child the most should be decisive,<sup>97</sup> and not the rights of the parent(s).<sup>98</sup>

#### 4.1.1.2 Acquisition of parental responsibilities and rights

##### 4.1.1.2.1 Acquisition of parental responsibilities and rights by mothers

For the acquisition of parental responsibilities and rights by mothers, the Children's Act does not focus on the marital status of mothers, be they married or unmarried. Section 19 reads as follows: "The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child." In other words, in principle, a biological mother acquires automatically full parental responsibilities and rights, merely by giving birth to the child concerned.<sup>99</sup>

However, two exceptions are mentioned in section 19.<sup>100</sup> Firstly, where the biological mother of a child is below the age of eighteen<sup>101</sup> and unmarried (thus not having guardianship in respect of the child), and where the biological father of the child does not

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<sup>96</sup> See sections 7 and 9 of the Children's Act, referring explicitly to the child's best interests being paramount. Moreover, section 136(a) also summons the court, with regard to the consideration of the application pertaining to the termination or suspension of parental responsibilities and rights, to be guided by the principles set out in chapter 2 and 3 of the Children's Act, to the extent that those principles are applicable to the matter before it.

<sup>97</sup> Bosman-Sadie & Corrie aver that sections 28 and 135 (application to terminate or suspend parental responsibilities and rights), section 136 (consideration of the application to terminate or suspend parental responsibilities and rights) and section 236 (where consent of a parent/guardian to the adoption of the child is not necessary), are indicative of a move away from the protection which the biological parents enjoyed under the previous legislation: *A Practical Approach to the Children's Act* (2010) 146.

<sup>98</sup> In the aforementioned, reference was made to the shift in legal focus, from the rights and "powers" of parents pertaining to their children to the rights of children. See chapter 3 above. Also Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 171.

<sup>99</sup> Skelton in Boezaart (ed.) (2009) 69; Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 35.

<sup>100</sup> See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 231.

<sup>101</sup> On the basis of section 17 of the Children's Act, a child, whether male or female, becomes a major upon reaching the age of 18 years.

have guardianship in respect of the child either,<sup>102</sup> the guardian of the child's biological mother becomes also the guardian of the child.<sup>103 104</sup> Secondly, section 19 is not applicable in respect of a child who is the subject of a surrogacy agreement.<sup>105</sup> In other words, in a case of surrogacy, the gamete donors do not obtain parental responsibilities and rights, since on the basis of the surrogacy agreement the child becomes the legitimate child of the commissioning parent and therefore the latter will acquire parental responsibilities and rights. However, it should be noted that the commissioning parent(s) will only be protected by a valid and court-confirmed surrogate motherhood agreement.<sup>106 107</sup>

#### **4.1.1.2.2 Acquisition of parental responsibilities and rights by fathers**

In South Africa the question whether or not a biological father will automatically acquire

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<sup>102</sup> Section 19(2)(a) and (b) of the Children's Act. This section is applicable where the biological father would be a minor (below the age of eighteen) or where there would be some other impediment, for example, where a person is mentally handicapped. Therefore, the unmarried father of a child may be a guardian of the child if he is 18 years or older and qualifies as such on the basis of section 21 of the Children's Act. See Bosman-Sadie & Corrie (2010) 35.

<sup>103</sup> See Boezaart *Law of Persons* (2010) 112.

<sup>104</sup> In the past, the Children's Status Act 82 of 1987 provided that the guardianship of a child born from an unmarried minor girl would in principle vest in the parents of the minor girl, unless the father of the child had guardianship. The position of unmarried fathers was under the previous legislation even more precarious than at present, since they had no inherent right of guardianship. They had to approach the high court in order to be awarded guardianship, in terms of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

Apart from being costly, the high court had to apply the stringent criteria as referred to in section 2 of the Natural Fathers of Children Born Out of Wedlock Act, which did not make it easy for unmarried fathers to be awarded guardianship. Both Acts (Children's Status Act 82 of 1987 and the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997) have been repealed by the Children's Act 38 of 2005 on 1 July 2007. (See Commencement of Certain Sections of the Children's Act, 2005 (Act 38 of 2005) Proclamation No. 13 2007 *Government Gazette* No. 30030 29 June 2007). Under the aforementioned circumstances section 21 of the Children's Act would be relevant, which is discussed below in section 4.1.1.2.2.

<sup>105</sup> See section 19(3) of the Children's Act. For a definition of "surrogate motherhood agreement" see section 4.1.1.2.8 below. In section 1(1) of the Children's Act as: an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon his or her birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

<sup>106</sup> See chapter 19 of the Children's Acts which deals with surrogate motherhood and particularly sections 295 and 297.

<sup>107</sup> For a detailed discussion see Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 71 and further.

parental responsibilities and rights depends on his marital status or the commitment shown towards the child or the mother of the child.<sup>108</sup> Two provisions in the Children's Act regulate the acquisition of parental responsibilities and rights by a biological father.

Section 20 of the Children's Act specifically deals with the position of married fathers:

"The biological father of a child has full parental responsibilities and rights in respect of a child -

- (a) if he is married to the child's mother; or
- (b) if he was married to the child's mother 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".

Thus on the basis of the section 20 read with section 18, fathers who are married to the child's mother acquire full parental responsibilities and rights regarding their biological child.<sup>109</sup> The same applies to fathers who at some stage were married to the child's mother.<sup>110</sup>

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<sup>108</sup> See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 75; also Boezaart *Law of Persons* (2010) 112 and further.

<sup>109</sup> If a child is born from a marriage, it is presumed that the child is the legitimate child of the married couple, with respect to the adagium *pater est quem nuptiae demonstrant*. However, this is a rebuttable presumption. See Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 84; also Bosman-Sadie & Corrie (2010) 36; Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 232.

<sup>110</sup> It has to be kept in mind that in the past fathers were not treated equally to mothers in the case of a divorce, due to the so-called "maternal preference rule", resulting in mothers usually being awarded custody (care) by the courts. These days the courts are more inclined to award, or at least consider, joint care to both biological parents. In this regard a distinction

The position of unmarried fathers is dealt with in section 21 of the Children's Act and is considered one of the major changes compared to the previous legislation.<sup>111</sup> Section 21 reads as follows:

- “(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;
    - (ii) contributed 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 child for a reasonable period”.

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can be made between joint legal care and joint physical care or joint residency.

The former amounts to joint decision-making concerning important matters, for example relating to education, language or religion. In this case the child usually lives with one parent who will take decisions pertaining to the daily matters. In terms of the Children's Act this seems to be the default position. With regard to the latter (joint physical care or joint residency), the child will spend considerable time with each parent, for example a certain part of the week, or every other week, which results in two homes. It is evident that the latter is only viable where the parents do not live too far apart. See Heaton *South African Family Law* (2010) 173; see also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 64-66. For a more detailed discussion see section 3.2.1.

<sup>111</sup> See Heaton in *Commentary on the Children's Act* (2012), *Children's Act* (2012) 3-9; also Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa*, with *Specific Reference to Guardianship, Care and Contact* (LLD thesis 2007 University of Pretoria) 377.

The importance of this section lies in the fact that an unmarried father can automatically, thus without the need of a court order, acquire full parental responsibilities and rights, if the requirements as mentioned in 21(1)(a) or (b) are met.<sup>112</sup> This will happen in the following instances: (1) were the biological father was, or is, living with the mother of the child in a permanent life-partnership<sup>113</sup> at the time of the child's birth, or (2) regardless of whether he is still living with the mother, he claims paternity in terms of section 26 of the Children's Act<sup>114</sup>

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<sup>112</sup> See the case, *LB v YD* 2009 (5) SA 463 T and on appeal, *YM v YD* 2012 (6) SA 338 (SCA) in which it was confirmed that when the requirements in section 21 are met, parental responsibilities and rights are automatically conferred on the biological unmarried father. The best interests of the child only comes to the fore where a decision is needed pertaining to the question how the parental responsibilities and rights will be exercised. See also Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* 377; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 110; Bosman-Sadie & Corrie (2010) 37; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 245 and further.

<sup>113</sup> Regrettably this term has not been defined in section 1(1) of the Children's Act. It is agreed with Skelton that there is a measure of subjectivity involved and that it therefore is difficult to determine when a partnership is considered permanent: in Boezaart (ed.) *Child Law in South Africa* (2009) 75. Traditionally, this kind of relationship resembled to a certain extent that of a civil marriage. In the past decade, the term "permanent life-partnership" has been dealt with in various court cases. For example, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), in which the term came to the fore regarding a same-sex permanent life-partnership. Prior to the coming into operation of the Civil Union Act 17 of 2006, it was also used with regard to heterosexual permanent life-partnerships, see *Robinson v Volks NO* 2004 (6) SA 288 (C) and the subsequent case *Volks NO v Robinson* 2005 (5) BCLR 446 (CC). However, on 1 December 2006 the Civil Union Act 17 of 2006 came into force, which among others, made it possible for same-sex and heterosexual partners to enter into a civil union which would have the same legal consequences as a civil marriage. In other words, since the coming into force of the Civil Union Act the phrase "permanent life-partnership" is only relevant for those permanent relationships which fall outside the ambit of this Act. See Heaton in *Commentary to the Children's Act* (2012) 3-11. It thus can be said that the term still provides for a measure of flexibility pertaining to a variety of different kinds of relationships and family forms.

<sup>114</sup> Section 26 deals with the person claiming paternity. It reads as follows: "A person who is not married to the mother of the child and who is or claims to be the biological father of the child may-

- (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or
- (b) apply to a court for an order confirming his paternity of the child, if the mother -
  - (i) refuses to consent to such amendment;
  - (ii) is incompetent to give consent due to mental illness;
  - (iii) cannot be located; or
  - (iv) is deceased."

However, it has to be kept in mind that section 26 is not applicable 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.

or pays damages in terms of customary law.<sup>115</sup> In addition, he must have contributed to the child's upbringing and expenses in connection with the maintenance of the child<sup>116</sup> for a reasonable period<sup>117</sup> (or must have attempted to do so in good faith).<sup>118</sup>

At this point it can be concluded that the criteria in the latter instance are quite stringent.<sup>119</sup> Where a father fails to comply with these requirements, he could possibly resort to any of the following three provisions: section 22 (parental responsibilities and rights agreement between the unmarried parents of the child), section 23 (assignment of contact and care by order of court)<sup>120</sup> or section 24 (assignment of guardianship by order of court).<sup>121</sup> It can be

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Thus in the latter three instances paternity cannot be registered. See also Bosman-Sadie & Corrie (2010) 46.

<sup>115</sup> Skelton has pointed out that unlike *lobolo* or bridewealth, the payment of damages in terms of customary law does not automatically bestow any rights pertaining to the care or contact with regard to a child. However, with regard to a pregnancy of unmarried parents, the man might identify himself as being the father of the child concerned: in Boezaart (ed.) *Child Law in South Africa* (2009) 76. According to Heaton the payment of damages in terms of customary law could involve the delivery of cattle or other form of payment of damages due to the fact that the mother was seduced or fell pregnant, in *Commentary on the Children's Act* (2012), *Children's Act* (2007) 3-12.

<sup>116</sup> Skelton gives a clear explanation on section 21(1)(b)(ii) and (iii): the formulation of these two grounds is almost identical, though not quite the same. She points out that the contribution to the child's upbringing implies some kind of involvement in the life of the child, instead of merely contributing financially, in Boezaart (ed.) (2009) 77.

<sup>117</sup> Since the term "reasonable period" is not defined in the Children's Act, it will be left to the courts to determine what in the light of the facts and circumstances of a specific case. Heaton rightfully refers to the dilemma that it is rather a relative or subjective matter to determine when exactly a period can be typified as reasonable, in *Commentary on the Children's Act* (2012) 3-11. It should be noted that in terms of section 21(1)(b) the unmarried father will only acquire full parental responsibilities and rights after having discharged his duty in line with the requirements as stated. In other words, he attains these parental responsibilities and rights retrospectively. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 77.

<sup>118</sup> The question what exactly constitutes a reasonable period for a financial contribution and/or maintenance may give rise to difference of opinion between the child's biological parents. In this regard section 21(3)(a) may contribute to finding a solution by referring the dispute for mediation, see the discussion on the next page. Section 21(2) explicitly states that section 21 does not affect the duty of a father to contribute towards the maintenance of the child. In other words, the *ex lege* responsibility in terms of section 15(1) of the Maintenance Act 99 of 1998 remains unchanged.

<sup>119</sup> Regardless of whether the unmarried father has lived or is living with the mother of the child, section 21(1)(b) provides for 3 criteria ((i), (ii) and (iii)) which all need to be complied with, if the father were to acquire parental responsibilities and rights automatically. See also Heaton in *Commentary on the Children's Act* (2012) 3-11.

<sup>120</sup> Both these provisions are discussed in section 4.1.1.2.6 below.

<sup>121</sup> As discussed in section 4.1.1.2.6 below. See Heaton in *Commentary on the Children's Act* (2012) 3-11; Boezaart *Law of Persons* (2010) 113.

concluded that, although the position of unmarried fathers has dramatically improved, their legal position is neither the same as that of (unmarried) mothers, nor that of married fathers.<sup>122</sup>

It is important to note that section 21 has retrospective effect, therefore assisting unmarried fathers regardless of whether the child was born before or after the commencement of the Children's Act.<sup>123</sup> Moreover, where the parents of a child could not have legally married each other at the time of conception or birth of the child, they could do so at any time after the birth of the child.<sup>124</sup> On the basis of the subsequent marriage the (previously unmarried) father acquires full parental responsibilities and rights, with retrospective effect.<sup>125</sup> In the various instances just mentioned, the unmarried father and mother will become co-holders of parental responsibilities and rights, which means that in principle each of the co-holders may act independently when exercising those responsibilities and rights.<sup>126</sup> It is important to note

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<sup>122</sup> See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 74. For a detailed discussion see Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 148-184 (conclusion).

<sup>123</sup> Section 21(4) of the Children's Act. Section 21 came into force on 1 July 2007, see Commencement of certain sections of the Children's Act 38 of 2005, Proclamation No. 13 GG 30030 of 29 June 2007. See Heaton in *Commentary on the Children's Act* (2012) 3-10; Bosman-Sadie & Corrie (2010) 37. However, the case law on section 21(4) at first suggested that the retroactive effect was not applicable to the responsibilities and rights of a father. See *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C), in which the school was of the opinion that the unmarried father of a pupil was liable for the child's school fees because of the retroactive effect of section 21(4). The court held that section 21 was not applicable in this regard. The father's responsibilities and rights did not come into play before 1 July 2007, the date on which the Act came into operation. See Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 79. However, this finding has been reversed on appeal. In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA), the Supreme Court of Appeal held that the phrase "parent" in section 1(a) of the South African Schools Act (84 of 1996) included married and unmarried fathers. See Boezaart *Law of Persons Sourcebook* (2010) 382; also Boezaart *Law of Persons* (2010) 113.

<sup>124</sup> Section 38 of the Children's Act. See also section 4.1.1 above and section 4.1.1.2.8 below.

<sup>125</sup> Section 38 provides that: "(1) A child born of parents who marry each other at any time 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 conception or birth of the child."

<sup>126</sup> See section 30(1) of the Children's Act. For a more detailed discussion, see section 4.1.1.1 dealing with the concept and contents of parental responsibilities and rights. It has to be kept in mind that even in matters relating to guardianship, in principle each of the guardians is competent to exercise independently and without the consent of the other any right or responsibility arising from such guardianship. Only in any of the five matters as mentioned under section 18(3)(c), the consent of all persons having guardianship is required, see section

that section 21 also intends to provide direction in the case of a dispute between the biological mother and father with regard to the fulfilment of the requirements as set out in subsection 21(1).<sup>127</sup> Where a dispute arises the matter must be referred<sup>128</sup> for mediation to a family advocate, social worker, social service professional or other suitably qualified person.<sup>129 130</sup> Both biological parents are thus obliged to attempt to have the dispute settled

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18(3), (4) and (5) of the Children's Act.

<sup>127</sup> Section 21 of the Children's Act strengthens the position of unmarried fathers compared to that of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, in terms of which a natural and unmarried father had to approach the high court in order to be awarded custody, guardianship or access. This could understandably give rise to disputes between the two biological parents.

<sup>128</sup> The phrase "must be referred" is peremptory, see the case *Hendricks v Thomson* [2009] JOL 23016 (T). In this case an unmarried father applied to court to be granted care of his child. The court held that the parties must (try to) resolve the dispute through mediation before the court may be approached. See Boezaart *Law of Persons* (2010) 112; Boezaart *Law of Persons Sourcebook* (2010) 381-382. However, it is not clear by whom the dispute needs to be referred. Other cases where the court was of the opinion that parties should attempt mediation first before approaching the court (again), see *Van den Berg v Le Roux* 2003 (3) All SA 599 (NC); *Townsend-Turner and Another v Morrow* [2004] 1 All SA 235 (C). On mediation, see Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 345-347.

<sup>129</sup> It is not completely clear what is meant by a "social service professional" or "other suitably qualified person". Moreover, it is most unfortunate that no reference is made to any training in mediation skills in these kinds of family law matters. It is submitted that continuing training in mediation should be encouraged and that more emphasis is put on mediation in the curriculum of the relevant fields of study. This would be in line with the spirit of the Children's Act in the sense that in matters which involve children, an approach conducive to conciliation and problem-solving should be followed instead of an adversarial approach, see section 6(4). See also Boezaart in *Commentary on the Children's Act* (2012) 2-4. De Jong has averred that since mediators might come from different professional backgrounds, specific family mediation training programmes should be developed and that all mediators should have to become accredited by a central (national) body, for example, the South African National Council of Mediators, in Boezaart (ed.) *Child Law in South Africa* (2009) 129-130.

<sup>130</sup> Bosman-Sadie & Corrie have listed the following instances in the Children's Act which refer explicitly to mediation: (i) parental responsibilities and rights involving an unmarried father (section 21(3)(a)); (ii) parenting plans (sections 33(5)(b) read in conjunction with section 34(3)(b)(ii)(bb)); (iii) children's court (sections 46(1)(h)(iii) and 155(4)(b)); (iv) lay forum hearings (section 49); (v) pre-hearing conference (section 69); (vi) family group conference (section 70); (vii) other lay forums (section 71); (viii) protection of abused or neglected child and child in need of care and protection (section 110(7)(a)); and section 150(3), where after investigation it is found that a child is not a child in need of care and protection, but might benefit from, among others, mediation, in *A Practical Approach to the Children's Act* (2010) 39. Instances (i) and (ii) provide for mandatory mediation, whereas the sections 46(1)(h)(iii), 49, 69, 70 and 71 provide for court-ordered mediation. For a more detailed discussion, see De Jong "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 *THRHR* 631-636; De Jong in Boezaart (ed.) *Child Law in South Africa* (2009) 119-124; Zaal "Children's courts and alternative dispute resolution in care and protection cases: an assessment of the legislation" 2010 *THRHR* 355 and further. See furthermore the discussion on the participation of children in section 3.1.4 above.



through mediation.<sup>131 132</sup> However, where mediation fails or does not result in a satisfactory outcome, any party to the mediation may have the outcome of the mediation reviewed by a court.<sup>133</sup>

#### ***4.1.1.2.3 Acquisition of parental responsibilities and rights under other circumstances***

Apart from the automatic acquisition of parental responsibilities and rights by the mother, and under specifically mentioned circumstances, the biological father, the Children's Act also provides for other situations which may arise. Various persons might acquire full or specific

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<sup>131</sup> It is submitted that the instruction of dispute resolution in the form of mediation in terms of section 21(3) of the Children's Act is at odds with the very nature of mediation, namely its voluntary basis. Moreover, it is not clear in terms of the Children's Act what happens when both biological parents straight forward refuse mediation. If this would happen, can the high court, as the upper guardian of all children, be approached by either parent or the parents jointly, hereby by-passing the obligation to mediate in terms of section 21(3)(a), or not?

Based on the decision in *Hendricks v Thomson* [2009] JOL 23016 (T) and the peremptory language in the provision, it seems that parties first should try to resolve the dispute before they may approach the court. De Jong has highlighted the dilemma of parties resisting mediation. She has suggested that the court should consider any of the following three sanctions: (i) an order as to costs; (ii) to find a *mala fide* party guilty of contempt of court combined with a fine or imprisonment (where mediation should have taken place pursuant to a court order, like in terms of the sections 49, 69, 70 and 71); of (iii) to suspend the hearing of a case until such time that the mediation process has been finalised. Reference is made to section 64(1) of the Children's Act, on the basis of which the children's court may adjourn the court proceedings for a period of not more than 30 days at a time: 2008 *THRHR* 636-637. The question remains how successful the mediation efforts on the basis of section 21(3) will be. This remains to be seen. Nevertheless, the aforementioned is in line with the general principles as set out in section 6 of the Children's Act. Section 6(4)(a) calls for an approach which is conducive to conciliation and problem-solving in any matter involving children. In addition, it is submitted that more clarity is needed in specific cases on the vague phrases in section 21, like "permanent life-partnership" or "reasonable period", as referred to earlier in this section.

<sup>132</sup> De Jong describes family mediation as "a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfying settlement agreement that recognises the needs and rights of all family members": in Boezaart (ed.) *Child Law in South Africa* (2009) 113. The use of alternative dispute resolution in care and protection cases has also been mentioned in the *Guidelines for the Alternative Care of Children*, as adopted by the General Assembly of the United Nations (A/RES/64/142) of 24 February 2010. Paragraph 33(b) encourages states parties to promote parental care by adopting measures including supportive social services, like mediation and conciliation services, thereby preventing the need of alternative care.

<sup>133</sup> Section 21(3)(b) of the Children's Act.

parental responsibilities and rights<sup>134</sup> in terms of the provisions discussed in the following sub-sections.

#### **4.1.1.2.4 The unmarried biological father to whom section 21 is not applicable**

Where the biological father of a child did not automatically acquire parental responsibilities and rights in respect of the child in terms of section 20<sup>135</sup> and 21,<sup>136</sup> he still may acquire such on the basis of a so-called “parental responsibilities and rights agreement”<sup>137</sup> or by court order,<sup>138</sup> where this would be in the best interests of the child.<sup>139</sup> On the basis of section 22 of the Children's Act, the mother of the child or other person who has parental responsibilities and rights in respect of the child, may enter into a written agreement with the biological father on which basis the latter acquires full or specific parental responsibilities and rights.<sup>140</sup> It is important to note that it should be stipulated in the agreement whether the biological father will acquire full or specific responsibilities and rights, which in the latter case need to be specifically outlined in order to avoid misconceptions. Moreover, such an

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<sup>134</sup> Section 18(1) of the Children's Act.

<sup>135</sup> Where the biological father is married to the child's mother or was married to her, at the time of the child's conception, the time of the child's birth or any time between the child's conception and birth, he will acquire parental responsibilities and rights automatically.

<sup>136</sup> Where the unmarried biological father has not met the requirements as set out in section 21(1)(a) and (b), and where the court has not provided otherwise.

<sup>137</sup> A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars, see section 22(3). See DSD regulation 7(1), which prescribes that the agreement must be in writing; in a form substantially corresponding with Form 4; contain particulars of those aspects pertaining to the care of, contact with, financial responsibility for the child; and contain incidental matters related to the upbringing of the child or children that are being conferred by the mother or other person upon the biological father or any other person having an interest in the care, well-being and development of the child.

<sup>138</sup> For the assignment of contact and care, see section 23. However, for the assignment of guardianship section 24 will be applicable. Both sections are discussed later in the present section and sections 4.1.1.2.6 and 4.1.1.2.7.

<sup>139</sup> See section 22(5), where the family advocate or the court must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child and to this effect need to apply the standard of the best interests of the child in terms of sections 7 and 9 of the Children's Act. Where a family advocate is required to satisfy himself or herself that a parental responsibilities and rights agreement is in the best interests of the child, this must be done in a form substantially corresponding with Form 5, see DSD regulation 7(6). For an in-depth discussion on the child's best interests, see section 3.1.3 above. See also Heaton in *Commentary on the Children's Act* (2012) 3-15.

<sup>140</sup> Section 22(1)(a) and section 18(1). See Heaton 3-14; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 80; Boezaart *Law of Persons* (2010) 113.

agreement will only take effect after registration with the family advocate or if it has been made an order of court, upon application by the parties to the agreement.<sup>141</sup> Only those parental responsibilities and rights which the mother or other person having responsibilities and rights themselves have at the time of the conclusion of the agreement, can be conferred with such.<sup>142</sup>

A parental responsibilities and rights agreement can be amended or terminated by the family advocate<sup>143</sup> or by the court<sup>144</sup> on application by any of the following persons: (1) a person having parental responsibilities and rights in respect of the child; (2) the child himself or herself, acting with leave of the court or (3) in the child's interest by any other person, acting with leave of the court.<sup>145</sup> However, section 22 does not contain any provision on which court should be approached when an amendment or termination of the agreement is required.<sup>146</sup> Heaton rightfully outlines that obviously the high court would have jurisdiction, since this court, as the upper guardian of all minor children, is empowered to deal with any matter relating to children.<sup>147</sup>

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<sup>141</sup> Section 22(4)(a) and (b). See Heaton 3-15; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 252.

<sup>142</sup> Section 22(2). In other words, the mother of the child or other person who has parental responsibilities and rights retain their own responsibilities and rights with regard to the child. See also section 30(3) and (4). The aim of the agreement is merely to provide for the co-exercise of parental responsibilities and rights. See also section 4.1.1.1, dealing with the contents of parental responsibilities and rights.

<sup>143</sup> Section 22(6)(a).

<sup>144</sup> Section 22(6)(b). Heaton 3-15 and 16.

<sup>145</sup> A person having parental responsibilities and rights in respect of the child may apply to the court for variation or termination straight away, whereas the child concerned and a third person acting in the child's interest need to be granted permission from the court first, in order to bring such application. See Heaton 3-16.

<sup>146</sup> It should be noted that in terms of section 22(7) only the high court may confirm, amend or terminate a parental responsibilities and rights agreement relating to the guardianship of a child.

<sup>147</sup> See Van Heerden in Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 500-501. Moreover, section 1(4) of the Children's Act provides that "any proceedings arising out of the application of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court." In other words, the latter provision specifically excludes a number of matters from the jurisdiction of the children's courts. See also *Ex parte Sibisi* 2011 (1) SA 192 (KZP), in which it was held that the children's court cannot make an order pertaining to guardianship, see section 24 of the

It is agreed with Heaton that it should be assumed that the children's court would have jurisdiction as well, since the matters to be adjudicated by the children's court have increased drastically in terms of the Children's Act.<sup>148 149</sup>

Apart from acquiring parental responsibilities and rights on the basis of a written agreement, an unmarried father could also be assigned contact, care or guardianship to him by court order. Where he would like to be assigned care or contact, he has to make an application to the high court or a children's court, in terms of section 23.<sup>150</sup> However, in the case of the assignment of guardianship an application has to be made to the high court, due to the fact that the high court has exclusive jurisdiction pertaining to, among others, guardianship.<sup>151</sup> Before making an order pertaining the assignment of guardianship, the court has to take various factors into account, namely, the best interests of the child;<sup>152</sup> the relationship between the applicant and the child, and any other relevant person and the child;<sup>153</sup> and any other fact that should, in the opinion of the court, be taken into account.<sup>154</sup> With regard to considering the assignment of contact or care there are two additional factors; namely, the

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Children's Act. See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 342 and 344.

<sup>148</sup> See section 45(1) of the Children's Act, which provides a non-exhaustive list of matters which the children's court may adjudicate, which ends with "any other matter relating to the care, protection or well-being of the child provided for in this Act", see section 45(1)(k).

<sup>149</sup> Whether or not a Regional Division of the Magistrate's Court could be approached in the case of amendment or termination of a parental responsibilities and rights agreement is not certain yet. Heaton avers that on the one hand, since the Regional Division of the Magistrate's Courts only have jurisdiction pertaining to the matters conferred to it by statute, and the present matter has not been included in any statute, the Regional Division of the Magistrate's Court possibly would not have jurisdiction. On the other hand she states that it would indeed be "most anomalous – if not downright absurd" if the Regional Division of the Magistrate's Courts would not be able to amend or terminate such agreement, since it does have the power to make it an order of court in terms of section 22(4): in 3-16. On the basis of the latter provision it may be concluded that the Regional Division of the Magistrate's Court probably should be included.

<sup>150</sup> Since the father never got married to the child's mother, he cannot successfully approach a Regional Division of the Magistrate's Court; see section 23(1).

<sup>151</sup> Section 24 read in conjunction with section 45(3). See also Skelton in Boezaart (ed.) (2009) 83.

<sup>152</sup> Section 23(2)(a) and section 24(2)(a). See also Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 253.

<sup>153</sup> Section 23(2)(b) and section 24(2)(b).

<sup>154</sup> Section 23(2)(e) and section 24(2)(c). These non-exhaustive grounds provide for the necessary flexibility in order to accommodate a variety of factors which might come to the fore and, in the opinion of the court, should be taken into consideration.

degree of commitment that the applicant has shown towards the child,<sup>155</sup> and the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.<sup>156</sup>

#### **4.1.1.2.5 Other persons to acquire parental responsibilities and rights**

Section 22 of the Children's Act also provides for other persons to acquire full or specific parental responsibilities and rights in respect of the child, such as an aunt, uncle or grandparent.<sup>157</sup> To this affect the mother of a child or other person who has parental responsibilities and rights may enter into a written agreement<sup>158</sup> with any other person who takes an interest in the care, well-being and development of the child. As mentioned above, this creates flexibility in order to share the responsibilities pertaining to a child and to accommodate alternatives in family forms, thereby safeguarding the rights of children.<sup>159</sup>

In order to take effect, a parental responsibilities and rights agreement should be registered with the family advocate or be made an order of the high court, a Regional Division of the

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<sup>155</sup> Section 23(2)(c). Bosman-Sadie & Corrie refer in this respect to the important aspect of any emotional ties and bonds that may have developed between the child and the applicant. In addition, the views of the child concerned should also be taken seriously, see section 10 of the Children's Act: *A Practical Approach to the Children's Act* (2010) 44.

<sup>156</sup> Section 23(2)(d).

<sup>157</sup> It is a reality that in South Africa many children live with their grandparents or aunts, whilst their parents work elsewhere. The list of people is in principle open-ended. Apart from the extended family it may also concern a person who is not at all related to the child, like a family friend, a teacher or other professional person who has an interest in the care, well-being and development of the child concerned. See Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 253. According to Skelton approximately 5.6 million children live with family members not being their biological parents, in "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" 2012 *The International Survey of Family Law* 333.

<sup>158</sup> For a brief outline regarding the prescribed format of a parental responsibilities and rights agreement and the effect of such an agreement, see section 4.1.1.2.2 and section 22 of the Children's Act. See DSD regulation 7(1) in conjunction with Form 4.

<sup>159</sup> A wide range of options are available. The Children's Act does not provide for a limitation on the number of persons who could be co-holders of parental responsibilities and rights. It is submitted that, although it is very welcome that various persons can become involved in a child's life, suited to the child's needs and circumstances, that the number of persons should nevertheless be limited. It should not create confusion to the child concerned or contribute to disputes between the co-holders of parental responsibilities and rights. See also section 4.1.1 above.

Magistrate's Court or the children's court.<sup>160</sup> It should be noted though, that before registering such an agreement, the family advocate or the court needs to be satisfied that the parental responsibilities and rights agreement will be in the child's best interests.<sup>161</sup>

#### **4.1.1.2.6 Assignment of specific parental responsibilities and rights by order of court**

Chapter 4 of the Children's Act focuses mainly on the children's courts. Part 1 deals with the establishment, status and jurisdiction of the children's courts<sup>162</sup> and outlines in detail which matters the children's court may and may not adjudicate.<sup>163</sup> Applications pertaining to the assignment of full or specific parental responsibilities and rights may be brought before the court within whose area of jurisdiction the child concerned is ordinarily resident.<sup>164</sup> With regard to the assignment of parental responsibilities and rights by order of court, a distinction needs to be drawn between the assignment of contact and care by order of court in terms of section 23, and the assignment of guardianship by order of court based on section 24.

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<sup>160</sup> With regard to the amendment or termination of a parental responsibilities and rights agreement, see the discussion in section 4.1.1.2.2 above.

<sup>161</sup> See section 22(4) and (5). These professionals need to apply the standard of the best interests of the child in terms of sections 7 and 9 of the Children's Act. For an in-depth discussion on the child's best interests, see section 3.1.3 above.

<sup>162</sup> In *Kambule v Kambule* [1998] 2 All SA 278 (E), the court held that the general rule was that pertaining to any decision regarding permanent custody of the child the preeminent jurisdiction would rest with the court where the child would have domicile or permanent residence. *In casu* the child was living with the respondent in the Transkei, whilst attending school in Queenstown in the Eastern Cape (different jurisdiction). The court deliberated that sometimes it would be necessary for the court to exercise jurisdiction pertaining to a child who was only temporarily within its jurisdiction in order to protect the child from imminent danger, any threat of harm or wrong being done to the child. However, this appeared not to be the case, since there were no allegations of such imminent danger or abuse.

<sup>163</sup> Section 1(4) of the Children's Act states that "any proceedings arising out of the application of the Administration Amendment Act 9 of 1929, the Divorce Act 70 of 1979, the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998, and the Recognition of Customary Marriages Act 120 of 1998, in so far as these Acts relate to children, may not be dealt with in a children's court." This section needs to be read in conjunction with section 45(3), providing exclusive jurisdiction to the high courts and Regional Division of the Magistrate's Courts (pending the establishment of family courts by an Act of Parliament). Section 45(1) gives an (non-exhaustive) overview of matters which the children's court may adjudicate.

<sup>164</sup> Section 29(1). Section 29 specifically deals with the court proceedings and is also applicable in the following instances: section 22(4)(b), on the basis of which a parental responsibilities and rights agreement can be made an order of court; section 23, pertaining to the court ordered assignment of contact and care to an interested person; section 24, dealing with the court ordered assignment of guardianship; section 26(1)(b) regulating paternity claims or section 28 which deals with the termination, extension, suspension or restriction of parental responsibilities and rights. See section 4.1.1.1.

Contact or care<sup>165</sup> can be assigned by order of court to *any person*<sup>166</sup> having an interest in the care, well-being or development of the child,<sup>167</sup> on application to the high court, Regional Division of the Magistrate's Court in divorce matters or children's court.<sup>168</sup>

Apart from considering the child's best interests, the court is obliged to take into account the relationship between the applicant and the child, and any other relevant person and the child; the degree of commitment that the applicant has shown towards the child; the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and any other fact that should, in the opinion of the court, be taken into account.<sup>169</sup> This novel provision is not merely a welcome addition to South African child law, as it is submitted that it is an absolute necessity since many South African children are not raised by their biological parents, but rather by their grandparents or other relatives.<sup>170</sup> It

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<sup>165</sup> Contact and care are defined in section 1(1) of the Children's Act, and see section 4.1.1.1 above.

<sup>166</sup> Own emphasis. Previously, in terms of the common law the courts were reluctant to interfere with parental authority and grandparents did not have an inherent right of access to their grandchildren. See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 83; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 254.

<sup>167</sup> For a discussion on the position of the unmarried biological father, see sections 4.1.1.2.2 and 4.1.1.2.4 above.

<sup>168</sup> Section 23(1), which is subject to section 1(4), limiting the jurisdiction of the children's court. See also section 45. See Heaton 3-17; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 280-281; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 255.

<sup>169</sup> The court may grant an order pertaining to care or contact on such conditions as the court may deem necessary, see section 23(1). "Care" has been widely defined in section 1(1), thus conditions could be attached to an order by court. The same applies to "contact". Skelton refers in this respect to conditions relating to various forms of contact, for example supervised contact, where contact will be granted provided it takes place under supervision of a stipulated person or professional, in Boezaart (ed.) (2009) 82.

<sup>170</sup> Previously children would be living with their grandparents for years and would then unexpectedly be demanded back by any of the biological parents, causing family disputes. See Bosman-Sadie & Corrie (2010) 43. In the past grandparents had to approach the high court in connection with a right of access, which rights were considered limited. For example, in *Townsend-Turner and Another v Morrow* [2004] 1 All SA 235 (C), the court held that the law (in South Africa) does not grant any right to anyone other than the legitimate parents of children to have access to them. A similar line of thought was followed in *Kleingeld v Heunis and Another* 2007 (5) SA 559 (T), where it was held that only the biological parents of a child have an inherent right of access to their children. See Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 254. Section 23 at least offers the possibility for a person having an interest in the care, well-being or development of the child, to make an application to the court in order to officially being granted "contact" with the child or "care" with regard to the child, which is a major improvement. It will ultimately be left to the discretion of the court to determine whether this will be in the best interests of the child concerned, taking cognizance

is important to note that the granting of care or contact to an interested person by order of court does not affect the parental responsibilities and rights that any other person may have in respect of the same child.<sup>171</sup> In other words, where the court assigns contact or care to an unmarried father or other interested person, the position of the mother of the child (or anyone else having parental responsibilities and rights) remains unchanged.<sup>172</sup>

Contact and care are central aspects in a child's life and any decision in this respect requires a meticulous consideration of all the facts and circumstances of the case. It is therefore welcome that the court may grant an order "on such conditions as the court may deem necessary". In this regard the situation could arise where an interested person has applied for court ordered assignment of contact or care, whilst (simultaneously) another applicant has filed an application for the adoption of the child concerned. Where this situation has come to the attention of the court,<sup>173</sup> the court concerned is obliged to request a family advocate, social worker or psychologist to furnish the court with a report and recommendation in order to establish what would serve the child's interests best. In addition, the court has the discretion to suspend the application for court-ordered assignment of contact or care on any conditions the court may deem necessary.<sup>174</sup>

The assignment of guardianship by order of court is provided for in section 24 of the Children's Act. Any person<sup>175</sup> having an interest in the care, well-being and development of a

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of the other factors as provided in section 23(2).

<sup>171</sup> This is explicitly mentioned in section 23(4). See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 83.

<sup>172</sup> The latter would obviously mean that these parties now have become co-holders of parental responsibilities and therefore section 30 and further would become relevant, as discussed in section 4.1.1.1 above. See also Heaton 3-18; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 254. It is submitted that these consequences should be clearly communicated to the various parties concerned in order to avoid unnecessary conflict. This would also be in line with section 6(5) of the Children's Act which provides that a child and a person who has parental responsibilities and rights must be informed of any action or decision taken in a matter concerning the child which significantly affects the child. Legal practitioners, family advocates and presiding officers of the courts have an important role to play to ensure that the parties involved (including children, where possible) do understand the processes and outcomes.

<sup>173</sup> It seems that the application of section 23(3) will largely depend on coincidence, since it is not clear who or by which means the court will be informed of applications which run simultaneously.

<sup>174</sup> See section 23(3)(a) and (b).

<sup>175</sup> Own emphasis. Compare with section 23, see above.



child may make such application. However, section 24 states in unambiguous terms that only the high court may grant court-ordered guardianship to the applicant concerned.<sup>176</sup> In *Ex parte Sibisi*<sup>177</sup> it was confirmed that children's courts are not empowered to make orders pertaining to guardianship.<sup>178</sup> In considering such application the court has to take into account the following three factors: (a) the best interests of the child; (b) the relationship between the applicant and the child, and any other relevant person and the child; and (c) any other fact that should, in the opinion of the court, be taken into account.<sup>179</sup> It should be noted that in the event of a person applying for guardianship of a child whilst the child already has a guardian, the applicant is obliged to submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.<sup>180 181</sup>

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<sup>176</sup> For a discussion on the position of the unmarried biological father, see sections 4.1.1.2.2 and 4.1.1.2.4 above. Heaton correctly points out that section 24(1) is in conflict with section 29(1). In the latter provision reference is made to a variety of applications, including section 24, in which instances the high court, a Regional Division of the Magistrate's Court in a divorce matter or a children's court have jurisdiction. However, section 24 specifically allocates the assignment of court-ordered guardianship to the high court. Heaton also offers a plausible solution: instead of interpreting section 29 as extending the jurisdiction to the other courts, rather to interpret it as a guiding provision in terms of the question which high court would have jurisdiction: in 3-19.

<sup>177</sup> 2011 (1) SA 192 (KZP).

<sup>178</sup> See also section 24 of the Children's Act. See Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 342.

<sup>179</sup> Section 24(2) of the Children's Act.

<sup>180</sup> Section 24(3) of the Children's Act. Written reasons must be given for example in the case where the present guardian is ill or otherwise not capable to fulfil his or her duties as a guardian. See Bosman-Sadie & Corrie (2010) 44. Be this as it may, Skelton has pointed out correctly that the requirement of providing reasons in section 24(3) is at odds with the fact that in principle parental responsibilities and rights can be shared between a number of persons, and that any (number) of these persons may have either full or specific parental responsibilities and rights in respect of the child. After all, the application for guardianship (in order to assist the child and act as a guardians in the child's best interests) does not imply or necessarily include an application to divest the present guardian of guardianship, see Skelton in Boezaart (ed.) (2009) 83. Also section 18 and further, dealing with the acquisition and loss of parental responsibilities and rights and section 30(1) providing for the co-exercise of parental responsibilities and rights.

<sup>181</sup> In terms of section 6(3) of the Divorce Act 70 of 1979, a court may make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship or the sole custody of the child. This means that in the context of a divorce of the parents, full parental responsibilities and rights may be acquired "for the first time" on the basis of a divorce order, when the court assigns parental responsibilities and rights to a third party. Louw has set out that although the latter is possible in terms of statutory law the assignment of care and guardianship to a third party might not be in the child's best interests and therefore should only be taken into consideration in exceptional circumstances, (LLD thesis 2009 University of Pretoria) 266-269.

From the wording it can be derived that seemingly in this situation only one person can be a guardian, and that by granting the application for guardianship, the present guardian loses guardianship.<sup>182</sup> Interestingly, section 29(2) demands that an application for court-ordered guardianship must contain the reasons why the applicant is not applying for the adoption of the child concerned. This suggests that the legislator rather would see a child being adopted than two parties competing for guardianship, of which the first-mentioned option could bring the sometimes desperately needed stability in a child's life.<sup>183</sup>

#### ***4.1.1.2.7 Assignment of guardianship and care by way of appointment in a will***

Guardianship or care in respect of a child can also be assigned by appointment in a will made by the parent.<sup>184</sup> To this effect, a parent, being the sole guardian of the child concerned, may appoint a fit and proper person as guardian in the event of the death of the parent.<sup>185</sup> Moreover, 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.<sup>186</sup> The appointee will only acquire guardianship or care in respect of the child after the parent's death and after he or she has accepted the appointment, expressly or by implication.<sup>187</sup> It is interesting to note that if two or more persons are appointed as guardians or to be vested with the care of the child, any one or more or all of them may accept the appointment, unless the appointment provides otherwise.<sup>188</sup>

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<sup>182</sup> With regard to the assignment of court-ordered contact or care, section 23(4) states explicitly that existing parental responsibilities and rights are not affected. With regard to guardianship there is no such provision.

<sup>183</sup> For the effect of adoption on the parental responsibilities and rights of a person, see section 4.1.1.2.8 below.

<sup>184</sup> Section 27(2) of the Children's Act.

<sup>185</sup> Section 27(1)(a).

<sup>186</sup> Section 27(1)(b).

<sup>187</sup> Section 27(3).

<sup>188</sup> On the basis of section 27(4) two or more persons can be assigned guardianship or care by appointment in a will. This is in line with the background of chapter 3, part 1 of the Children's Act, in terms of which more people are able to share responsibilities and rights in respect of a child.

#### **4.1.1.2.8 Remaining ways of acquiring parental responsibilities and rights**

In order to conclude the overview of the various ways in which parental responsibilities and rights can be acquired by a range of different people who have one thing in common, namely, the interests of the child, three remaining ways need to be mentioned.

In the first place it should be noted that parental responsibilities and rights can be acquired via so-called legitimation.<sup>189</sup> Section 38 of the Children's Act provides the following:

- “(1) A child born of parents who marry each other at any time 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 conception or birth of the child”.<sup>190</sup>

In other words, the effect of the marriage between both biological parents subsequent to the birth of the child, is that the (previously unmarried) father acquires full parental responsibilities and rights retrospectively,<sup>191</sup> and thus places him in the position as if he had been married to the mother at the time of the child's birth.<sup>192</sup> Secondly, similar to the situation before the coming into operation of the Children's Act,<sup>193</sup> an adoption order<sup>194</sup> of the

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<sup>189</sup> It is a reality that the biological parents of a child cannot always legally marry one another before a child is born or shortly thereafter, for example, because of a pending divorce.

<sup>190</sup> Commencement date: 1 July 2007. See also section 4.1.1 and further. See furthermore, Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 225; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 70.

<sup>191</sup> Compare with section 4 of the repealed Children's Status Act 82 of 1987, where these fathers would get parental authority as from the date of the marriage to the child's mother. See section 4.1.1 and 4.1.1.2.1 above.

<sup>192</sup> See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 237.

<sup>193</sup> Before the coming into operation of the Children's Act the terminology used was “parental authority” or “parental power”. See section 4.1.1 above.

<sup>194</sup> Section 228 provides that a child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in section 242. In other words, a so-called “informal adoption” of a child by, for example, a family member is not considered an adoption. Section 229 emphasises on the purpose of adoption, which is to

children's court<sup>195</sup> confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent(s).<sup>196</sup> Moreover, an adopted child must, for all purposes, be regarded as the child of the adoptive parent, and an adoptive parent must, for all purposes, be regarded as the parent of the adopted child.<sup>197</sup> A major advantage of the Children's Act is that the categories of persons who may adopt a child has been expanded.<sup>198</sup> The

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protect and nurture children by providing a safe, healthy environment with positive support on a permanent basis. See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 247.

<sup>195</sup> Section 45(1)(i) provides that a children's court may *inter alia* adjudicate the adoption of a child, including an inter-country adoption, and that a children's court may make an adoption order, which includes an inter-country adoption order, see section 46(c). Adoption does not fall under the exclusive jurisdiction of the high court in terms of section 1(4) of the Children's Act.

<sup>196</sup> Section 242(2)(a) of the Children's Act. Compare with section 20 of the (repealed) Child Care Act 74 of 1983, as dealt with in section 4.1.1 above.

<sup>197</sup> Section 242(3). The (repealed) Child Care Act 74 of 1983 merely provided that "an adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adopted parent, as if he was born of that parent during the existence of a lawful marriage". See also Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 439.

<sup>198</sup> Section 231 deals with the various persons who may adopt a child. It reads as follows:

"(1) A child may be adopted -

- (a) jointly by -
  - (i) a husband and wife (was the same in terms of section 17 of the Child Care Act);
  - (ii) partners in a permanent domestic life-partnership; or
  - (iii) other persons sharing a common household and forming a permanent family unit;
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock (which refers to fathers who do not have parental responsibilities and rights in terms of section 21 of the Children's Act, see section 4.1.1.3.1); or
- (e) by the foster parent of the child."

Compare to section 17 of the (repealed) Child Care Act 74 of 1983, which provided that "a child may be adopted – (a) by a husband and wife jointly; (b) by a widower or widow or unmarried or divorced person; (c) by a married person whose spouse is the parent of the child (in other words, stepparent adoption); (d) by the natural father of a child born out of wedlock". In other words, on the basis of the (new) legislation, section 231(1)(a)(ii) accommodates unmarried couples who want to adopt jointly (whereas in terms of section 17(a) of the (repealed) Child Care Act 74 of 1983, only a husband and wife could adopt jointly). This was, however, expanded to same-sex life partners in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC). On the basis of this case also section 17(c) of the Child Care Act was expanded to include adoption by a person whose permanent same-sex life partner is the parent of the child. Section 231(1)(a)(iii) does just to the multi-cultural society providing for a variety in different family forms. Another new category of persons who can adopt is a foster parent, who is able to adopt a child as a single parent on the basis of 231(1)(e). See Himonga

Children's Act contains a number of *nova* pertaining to the adoption of children.<sup>199</sup> For example, the Act provides specifically that, apart from the fact that the adoption should be in the best interests of the child,<sup>200</sup> the child should be “adoptable”.<sup>201</sup> What is meant by the latter is explained in section 230(3) of the Children's Act, which states:

“(3) A child is adoptable if -

(a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;

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in Boezaart (ed.) (2009) 194-199. See also Bosman-Sadie & Corrie (2010) 251.

<sup>199</sup> See chapter 15 of the Children's Act 38 of 2005 in conjunction with regulation 98 and further of the DSD Regulations (of the Department of Social Development, GN R 261/2010). For a detailed discussion on adoption, see Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 193 and further; Louw in Boezaart (ed.) (2009) 133 and further.

<sup>200</sup> Section 18(4)(c) of the (repealed) Child Care Act contained a similar provision. Section 18(4) contained 7 factors which needed to be considered by the court, if applicable to the situation. Section 18(4)(f) of the repealed Act, prevented inter-country adoptions and was rightfully challenged in 2000. In this case a British couple wanted to adopt a South African child, which was not possible since neither applicant was a South African citizen (alternatively, the applicants should have had the necessary residential qualifications to be granted South African citizenship in terms of the South African Citizenship Act, 1949 (Act No. 44 of 1949) or would qualify for naturalisation). In *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC), the Constitutional Court found that section 18(4)(f) was inconsistent with the Constitution since it did not give paramountcy to the child's best interests and subsequently declared it invalid with immediate effect. See Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 199; Nicholson in Boezaart (ed.) *Child Law in South Africa* (2009) 376; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 305.

<sup>201</sup> Adoption merits a complete thesis on its own. However, for the purpose of this thesis, some aspects pertaining to adoption will be dealt with in chapter 5 which deals with (removal and) placement. The following innovations in the Children's Act are interesting to mention. Unlike under the previous Act, financial independence is no longer a condition in order to adopt a child. Under certain circumstances an adoptive parent can apply for a social security grant, see section 231(4) and (5). Moreover, section 232 provides for a Register on Adoptable Children and Prospective Adoptive Parents (RACAP). Another innovation is the “post-adoption agreement” in terms of section 234. This agreement between the parent/guardian of the child and the prospective adoptive parent provides for (a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and (b) the provision of information, including medical information, about the child, after the application for adoption is granted. Since such an agreement only takes effect if made an order of court, it is important that it is drawn up before the adoption order is finalised. Freeing orders make it possible for a parent/guardian to free himself or herself from parental responsibilities and rights in respect of the child pending the adoption of the child, which also relieves the parent from the duty to contribute to the maintenance of the child, unless the court orders otherwise, see section 235.

- (b) the whereabouts of the child's parent or guardian cannot be established;
- (c) the child has been abandoned;
- (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- (e) the child is in need of a permanent alternative placement”.

It is important to note that these grounds partially overlap with those for a child being “in need of care and protection”, namely sub-sections 150(1)(a), (g), (h) and (i).<sup>202</sup> The ratio behind adoption is to place a child in the permanent care of a person, who will protect and nurture the child by providing a safe, healthy environment with positive support, thereby connecting the child to nurturing family relationships intended to last a lifetime.<sup>203</sup> Therefore, it should be established whether a child is indeed adoptable where it appears that a child has been abandoned<sup>204</sup> or orphaned,<sup>205</sup> and in determining whether a child can be made available for adoption.

Regulation 56 prescribes that an advertisement should be published in a local newspaper, calling upon any person to claim responsibility for the child.<sup>206</sup> However, where the parent or

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<sup>202</sup> The latter is the main focus of this thesis. What exactly is meant by a child “in need of care and protection” in terms of section 150 and further of the Children's Act, will be discussed below in section 4.3.

<sup>203</sup> Sections 228 and 229 of the Children's Act. Adoption in this way can be seen as permanency planning.

<sup>204</sup> Section 1 of the Children's Act defines “abandoned” in relationship to a child as follows: “a child who (a) has obviously been deserted by the parent, guardian or care-giver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months”.

<sup>205</sup> An orphan means a child who has no surviving parent caring for him or her, section 1 in the Children's Act.

<sup>206</sup> Regulation 56 of the DSD Regulations (GN R 261/2010) deals with abandoned or orphaned children. “If it appears to a designated social worker that a child has been abandoned or orphaned, whether for purposes of determining if such child is in need of care and protection or if such child can be made available for adoption, such social worker must cause an advertisement to be published in at least one local newspaper circulating in the area where the child has been found, calling upon any person to claim responsibility for the child.”

guardian has abused<sup>207</sup> or deliberately neglected<sup>208</sup> the child, or has allowed the child to be abused or deliberately neglected, the child is in need of care and protection<sup>209</sup> and therefore adoptable.<sup>210</sup> Louw has posed the question whether an adoption order could be regarded as an unjustified interference with the parental responsibilities and rights of the biological parents of the child. It is agreed with Louw that since the adoption is the most far-reaching interference, it should therefore be used only when it is in the child's best interests and after careful consideration of all the facts and circumstances surrounding the child.<sup>211</sup>

Third and lastly, parental responsibilities and rights can be acquired via a surrogacy agreement, which is dealt with in Chapter 19 of the Children's Act. A surrogate motherhood agreement has been defined in section 1(1) of the Children's Act as:

“an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent”.

In the above, reference was made to section 19, in terms of which a biological mother acquires parental responsibilities and rights.<sup>212</sup> However, the latter section states unambiguously that it is not applicable in respect of a child who is the subject of a surrogacy agreement.<sup>213</sup> In addition, section 297(1)(c) is also clear: the surrogate mother does not

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<sup>207</sup> “Abuse in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes (among others) – (a) assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused; [...],” see section 1.

<sup>208</sup> “Neglect in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs”, see section 1.

<sup>209</sup> See section 150(1)(i).

<sup>210</sup> Section 230(3)(d), which has far reaching consequences for the biological parents or the guardian of the child concerned. In terms of section 236(1)(c) no consent is needed for the adoption of the child, where the parent or guardian of the child has abused or deliberately neglected the child or allowed the child to be abused or deliberately neglected.

<sup>211</sup> Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 446.

<sup>212</sup> See section 4.1.1.2.1 above.

<sup>213</sup> See section 19(3).

acquire parental responsibilities and rights with regard to the child concerned.<sup>214</sup> <sup>215</sup> Therefore, on the basis of the surrogacy agreement, the child becomes the legitimate child of the commissioning parent and he or she will acquire parental responsibilities and rights.<sup>216</sup> It is important to note that the commissioning parent(s) are only protected in case of a valid and, as important, court-confirmed surrogate motherhood agreement.<sup>217</sup>

From the above it is clear that, in terms of the Children's Act, it depends on the circumstances whether there will be one, two or more persons having parental responsibilities and rights in respect of a child, or whether this will be shared with other adults, be it the biological parent(s), any family member or other person(s).<sup>218</sup> Moreover, a person may have either full or specific parental responsibilities and rights in respect of a child.<sup>219</sup>

It is submitted that the major strength of the Children's Act lies in the combination of flexibility regarding the acquisition of parental responsibilities and rights and the sharing of the various responsibilities and rights between the persons surrounding the child. This is especially

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<sup>214</sup> It should be noted that where the ovum of the surrogate mother would be used, and she thus contributes to the biological material, she nevertheless does not acquire parental responsibilities and rights. See Heaton 3-6.

<sup>215</sup> In this respect Heaton draws a parallel with the artificial fertilisation of a married woman (in the absence of surrogacy). Section 40(1)(a) provides that “whenever the gamete or gametes of any person other than the 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 had been used for such artificial fertilisation”. In other words, in the legal context the donor's biological contribution is ignored and such donor cannot be identified as a biological parent. In addition, section 40(3) states unambiguously that in principle, no right, responsibility, duty or obligations arise between a child born of a woman as a result of artificial fertilisation and the donor (“any person whose gamete has or gametes have been used for such artificial fertilisation”), unless the donor is the child's birth mother or her husband. In 3-7; also 3-42.

<sup>216</sup> Louw has stated that section 297 is crucial pertaining to the acquisition of parental responsibilities and rights by the commissioning parents, see *Acquisition of Parental Responsibilities and Rights* (LLD thesis 2009 University of Pretoria) 356.

<sup>217</sup> See sections 295 and 297 of the Children's Act.

<sup>218</sup> Section 30(1) unambiguously states that “more than one person may hold parental responsibilities and rights in respect of the same child”, for example, a mother and two grandparents.

<sup>219</sup> Section 18(1) of the Children's Act 38 of 2005, which came into operation on 1 July 2007. See Proclamation No. 13 GG 30030 of 29 June 2007. See also section 4.1.1.1 above.



relevant since children do not necessarily live with their biological parents, and moreover, many children form part of extended families or communities.<sup>220</sup>

In a diverse, multi-cultural and multi-religious society such as South Africa, a multiple of circumstances and scenarios which children find themselves in have to be accommodated. As a result, there is no “one size fits all” solution. Heaton points out that the challenge is to have regard for the cultural and religious values surrounding the child, and his or her social environment, thereby ensuring that the best interests of the child are not compromised.<sup>221</sup> In order to practically and effectively apply the best interests of the child standard, it is imperative to create tailor-made and child-centred possibilities.<sup>222</sup>

#### 4.1.2 Parental authority in the Netherlands

It is clear that all children have (had) biological parents. Usually biological parenthood and legal parenthood coincide, but this is not always the case.<sup>223</sup> Title 11 of Book 1 of the Civil Code focuses on the rules relating to descent.<sup>224</sup> The mother of a child is the woman from whom the child is born or who has adopted the child.<sup>225</sup> Paternity is dealt with in Article 1:199 of the Civil Code.

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<sup>220</sup> According to the General Household Survey 2009, merely 34% of children in South Africa live with both biological parents, whereas 39% of all children live with their mothers (without their fathers). 24% of children live with neither biological parent(s), in *South African Child Gauge 2010/2011* (2011) Children's Institute University of Cape Town 80. According to Skelton approximately 5.6 million children live with other family members instead of their biological parents, in “Kinship care and cash grants: in search of sustainable solutions for children living with members of their extended families in South Africa” 2012 *The International Survey of Family Law* 333. Some of the reasons for children living with different care-givers are relating to poverty, labour migration, educational opportunities or cultural practice; see *South African Child Gauge 2010/2011* (2011) Children's Institute University of Cape Town 80.

<sup>221</sup> Heaton (2009) 2 *Journal for Juridical Science* 10 and 13.

<sup>222</sup> It is submitted that the Children's Act assists presiding officers in children's courts in their quest to find creative solutions which accommodate the specific circumstances of the child concerned.

<sup>223</sup> For example, in the case of a sperm-donor.

<sup>224</sup> In Dutch: *afstamming*. This is based on the blood relationship between the parents and children. Article 1:197 determines that “a child, his parents and their next of kin are related to one another”.

<sup>225</sup> Article 1:198 of the Civil Code.

The main rules are as follows:

“The father of a child is the man who -

- (i) At the moment of birth of the child is married to the biological mother of the child;
- 1. Has acknowledged the child as his biological child, where there is no marriage;<sup>226</sup>
- 2. Has had his paternity established via the affiliation procedure in court;<sup>227</sup> or,
- 3. Has adopted the child.<sup>228</sup>

Title 14 of Book 1 of the Civil Code deals with the authority pertaining to all minor children. What is meant by “authority” is explained in Article 1:245(2); namely, parental authority as well as guardianship. In other words, there are two forms of authority with regard to children. Parental authority is exercised by both parents jointly or one parent, whilst guardianship<sup>229</sup> is authority exercised by someone else than the parent(s), a so-called third party.<sup>230</sup>

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<sup>226</sup> See Title 11, chapter 3, Articles 203-206. Acknowledgement can take place by a deed of acknowledgement, drawn up by the registrar of births, deaths and marriages or by notarial deed. It should be noted that this legal act will only have effect from the moment of acknowledgement, see Article 1:203(2). See also Van der Linden *et al. Jeugd en Recht* (2001) 17 and 18.

<sup>227</sup> See Title 11, chapter 4, Articles 207-208. See also Van der Linden (2001) 18 and 19.

<sup>228</sup> See Title 12 of Book 1 of the Civil Code, Articles 227–232. See also Van der Linden *et al.* (2001) 19 and chapter 3.

<sup>229</sup> The provisions pertaining to guardianship can be found in 1:280 Civil Code and further. For the sake of completeness reference is made to the following: Article 326 (supervision order) and Articles 327 and further (dismissal from guardianship).

<sup>230</sup> See Article 1:245(2) and (3) of the Civil Code. Guardianship is discussed in Article 1:280 and further (Book 1, Title 14, paragraph 6). Also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 120. Minors, persons placed under tutelage or having a mental disorder, affecting the ability to exercise authority (unless the disorder is of a temporary nature) are incompetent to exercise authority, see Article 1:246 of the Civil Code.

The following discussion is based on Title 14, dealing with the authority of biological parents (and others) with regard to their minor children. The possible infringements thereon, which vary in degree,<sup>231</sup> will be discussed below.<sup>232</sup> It should be noted that a court order depriving a parent of parental authority regarding his or her child, is in the Netherlands categorised and discussed under child protection measures and will in this chapter be discussed accordingly.<sup>233</sup> For the purpose of this thesis, the focus will mainly be on parental authority; in other words, the authority exercised by both parents jointly or one parent.<sup>234</sup> The focus of attention will first turn to the contents of parental authority,<sup>235</sup> which is the Dutch equivalent of the South African “parental responsibilities and rights”.<sup>236</sup>

#### 4.1.2.1 The contents and termination of parental authority in terms of Dutch law

Parental authority<sup>237</sup> is related to the person of the minor, the administration of the minor's estate<sup>238</sup> and the representation of the child in civil acts and in legal and other proceedings.<sup>239</sup> Article 1:247(1) determines that parental authority comprises the duty and

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<sup>231</sup> From a minimum level of intervention, which is the supervision order to the maximum level of intervention, dismissal from parental authority.

<sup>232</sup> See section 4.3 and further.

<sup>233</sup> For relieve of parental authority (in Dutch: *ontheffing van het ouderlijk gezag*) see Article 1:266-268. For dismissal from parental authority (in Dutch: *ontzetting van het ouderlijk gezag*), see Article 1:269 and further. See also section 4.5 below.

<sup>234</sup> Where relevant reference will be made to guardianship, exercised by someone else than the (biological) parent.

<sup>235</sup> In Dutch: *ouderlijk gezag*. However, in the Netherlands parental authority can only be exercised by both biological parents jointly or by one parent. See Article 1:245(2) of the Dutch Civil Code. Also Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 119.

<sup>236</sup> For an in-depth discussion on parental responsibilities and rights in terms of South African law, see section 4.1.1 above.

<sup>237</sup> Which is exercised by both parents jointly or one parent, see Article 1:245(3) or the Civil Code.

<sup>238</sup> Article 1:253i and further.

<sup>239</sup> Article 1:245(4) of the Civil Code. The same applies to the other form of authority, namely guardianship, which is exercised by a third party, see Article 1:245(3) of the Civil Code. With regard to the administration of the minor's estate and the representation of the child it should be noted that these are joint responsibilities for both parents. However, it would be cumbersome to expect both parents to be involved in every matter. Therefore one parent can act independently as long as the other parent does not object. Where it is apparent that the objection already existed at the time of the conclusion of the juristic act or representation, the act or representation is considered voidable and can be set aside. See Doek & Vlaardingebroek (2009) 131.

the right of the parent to take care of the child and to raise the child.<sup>240</sup>

The latter includes the care and the responsibility for the psychological and physical well-being and the safety of the child and to stimulate the development of his personality.<sup>241</sup> It is agreed with the Dutch Family Council<sup>242</sup> that Article 1:247(2) merely provides a minimum requirement. The concrete responsibilities of parents on how to ensure the well-being and the development of the child have not been specified. This implies a potential risk; the assessment of whether the parents have fulfilled the minimum requirement or responsibility is completely left to the discretion of children's courts and other professionals in the child protection arena (whether or not to initiate child care protection proceedings).<sup>243</sup>

With regard to the care and upbringing of the child, parents are recently<sup>244</sup> under the statutory obligation to refrain from psychological or physical force or any other humiliating treatment.<sup>245</sup> In other words, even moderate chastisement should actually not be tolerated.

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<sup>240</sup> The parents are under the obligation to care for the child and to raise the child and therefore the phrase "duty" is mentioned before the phrase "right" of the parent. However, it is clear that the "right to parental authority" is given in the best interests of the child and is connected to the duty of parents to serve the child's best interests. See Van der Linden *et al. Jeugd en Recht* (2001) 23; De Boer *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht – Personen en Familierecht* (2010) 689, hereafter referred to as Asser/De Boer I (2010).

<sup>241</sup> See Article 1:247(2). This is in line with the Articles 5 and 12 of the CRC, pertaining to parental guidance and the child's evolving capacities and the child's opinion. See chapter 2 above. See also Doek & Vlaardingerbroek (2009) 128.

<sup>242</sup> In Dutch: *de Nederlandse Gezinsraad*, which is an advisory body to the government with regard to family matters.

<sup>243</sup> See the report of the Dutch Family Council *Als vrijwillig te vrijblijvend is – een studie naar de mogelijkheden van een lichtere rechtsgrond voor pedagogische interventie* (2001) 101.

<sup>244</sup> Amendment of Book 1 of the Civil Code in order to contribute to the prevention of violence pertaining to the care and upbringing of children. *Stb.* 2007, 145. See Doek & Vlaardingerbroek (2009) 131.

<sup>245</sup> See Article 1:247(2) of the Civil Code. This is in line with *General Comment* No. 13 (2011), CRC/C/GC/13, which deals with the right of the child to freedom from all forms of violence. This means that parents cannot rely anymore on the defence of their parental right to chastisement in the criminal court, in case they are prosecuted for offences committed against the child, for example, child abuse. In other words, this will no longer result in acquittal. See Doek & Vlaardingerbroek (2009) 389. This is not the situation in South Africa (yet). If clause 139 of the Children's Amendment Bill [B19F-2006 (Reprint)] were to take effect, the position in South Africa would change: clause 139(3) provides that the common law defence of reasonable chastisement available to a person who has care of a child, including a person who has parental responsibilities and rights will be abolished. See also section 3.2 above. In terms of Article 1:248 the same responsibility accrues to the person exercising

Parental authority also includes the duty of the one parent to encourage the development of the bond between his or her child and the other parent.<sup>246</sup> In fact, generally speaking, a child has the right to be cared for and raised by both parents equally.<sup>247</sup> The freedom of parents to raise their children according to their own discretion and convictions arises from the right to the respect for private and family life, as referred to in Article 8 of the European Convention.<sup>248</sup> However, this freedom is not unlimited. Where the exercise of parental authority would result in any danger or damage pertaining to the psychological and/or physical development of the child, it is possible to interfere with the authority of parents.<sup>249</sup> It should be emphasised that a court order depriving a parent of parental authority is in the Netherlands categorised and discussed under the child protection measures, and therefore the termination of parental authority in this context will be discussed later in this chapter.<sup>250</sup>

It is interesting to note that there is a statutory duty for children to have consideration for the parent or guardian where it comes to the exercise of their duties, as well as for the interests of the other members of the family.<sup>251</sup> In the case of a conflict of interest between the child and the parent(s) pertaining to the taking care of the child, its upbringing or the administration of the child's estate, the court may appoint a special curator to assist the child in these matters.<sup>252</sup> The curator looks after the interests of the child and is not appointed to

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guardianship or the foster parent(s). See also Article 3 of the European Convention which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

<sup>246</sup> Article 1:247(3).

<sup>247</sup> Article 1:247(4).

<sup>248</sup> The Netherlands is a High Contracting Party to the European Convention, see chapters 2 and 3 above.

<sup>249</sup> See the discussion on child care protection measures in sections 4.3, 4.5 and 4.6 below.

<sup>250</sup> For the sake of clarity: parental authority might be terminated in two instances. Firstly, where the court relieves a parent of parental authority (in Dutch: *onthefing van het ouderlijk gezag*), in terms of the Articles 1:266-268. Secondly, where the court orders the dismissal from parental authority (in Dutch: *ontzetting van het ouderlijk gezag*), in terms of Article 1:269 and further. However, restoration of parental authority is possible on the ground of Article 1:277, which is in line with the principle that all child protection measures should be of a temporary nature. See also section 4.5 and 4.6 below.

<sup>251</sup> Article 1:249 of the Civil Code. Compare to the South African Children's Act, section 16 which deals with the responsibilities of children towards the family, community and the state.

<sup>252</sup> Article 1:250 of the Civil Code. See Meuwise *et al.* (2005) 54; Doek & Vlaardingbroek (2009) 137. See also section 3.1.4.2 on participation rights of children in terms of Dutch law.

settle conflicts between the parents.<sup>253</sup> With regard to the latter situation, there is a specific provision, namely Article 1:253a. Conflicts regarding the joint exercise of parental authority can, upon request of the parent(s), be decided by the court, which then takes into account the interests of the child.<sup>254</sup> On the basis of the aforementioned, it is self-explanatory that parental authority comes to an end when the child becomes a major; in other words, when he or she turns eighteen.<sup>255</sup> Before such time, changes can take place pertaining to the persons exercising parental authority. In terms of Article 1:253n, one of the parents or both parents, who have not been married to one another, can upon (joint) request, ask the court to terminate the joint authority, in two instances. Firstly, where the circumstances have since then changed; and secondly, where at the time of the assignment of joint authority, the decision was based on incorrect or incomplete information. In this case the court will decide which of the parents will have the authority pertaining to each child. The same is applicable where there was joint authority by a parent and his or her partner.<sup>256</sup>

Doek and Vlaardingerbroek point out that the same applies to other situations of joint authority to be converted into single authority; namely, the Articles 1:253aa (registered partnership of the parents), 1:253sa (parent and partner who are married or in a registered partnership), and 1:253 (remarriage or registered partnership of former spouses-parents).<sup>257</sup> It has to be kept in mind that, in terms of the Dutch legislative system, parental authority can

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<sup>253</sup> See the decision of the district court Groningen: LJN: BO7050, Rechtbank Groningen, 30/11/2010. See also Van 't Hek "Uitgesproken" (2011) 1 *Het Kind Eerst – Vakblad voor Jeugdzorg, Kinderbescherming en Pleegzorg* 30.

<sup>254</sup> On the basis of this Article the court can also determine an arrangement, upon request of the parent(s), pertaining to the exercise of the parental authority. This arrangement could include (a) the allocation to each parent of responsibilities pertaining to the care and education of the child; (b) the decision on the domicile of the child; (c) the arrangement of information sharing between the parents pertaining to the person of the child and his or her estate, where the child is living with one of the parents; and (d) the way in which third parties will provide information to the parent who is not entrusted with the daily care of the child, in terms of Article 1:377b, which deals with the duty to providing information by third parties.

<sup>255</sup> Article 1:233 of the Civil Code. See also the definition of "child" as discussed in chapter 3 above. Article 1:245(1) states that authority will be exercised with regard to minors. See also Wortmann & Duijvendijk-Brand *Compendium van het Personen- en Familierecht* (2009) 201.

<sup>256</sup> See Article 1:253v(3), which explicitly refers to Article 1:253n.

<sup>257</sup> Doek & Vlaardingerbroek (2009) 160-161. Parental authority on the basis of a court order commences on the day on which the judgment has become final and conclusive or where the decision is provisionally enforceable as far as possible, on the day the clerk of the court has informed the parents to whom the authority has been assigned, see Article 1:253p(1) of the Civil Code. However, until such time the authority remains generally speaking with the person(s) who already had the authority.

be exercised only by two persons jointly at the time.<sup>258</sup>

#### 4.1.2.2 Joint authority *ex lege*

As a point of departure, both parents exercise authority jointly during the existence of their marriage<sup>259</sup> or their registered partnership,<sup>260</sup> unless a court order provides otherwise. After divorce the joint authority continues *ex lege*.<sup>261</sup> Where the former spouses remarry or conclude a registered partnership, and immediately before such an event one of the spouses exercised authority pertaining to the child(ren), the joint authority revives *ex lege*.<sup>262</sup> Joint authority also revives *ex lege*, where one of the parents who jointly exercised authority was temporarily incompetent and the grounds for incompetence has disappeared.<sup>263</sup>

It is interesting to note that after divorce, single parental authority is only possible upon the request of one or both parent(s).<sup>264</sup> It is interesting to note that the *Hoge Raad* in the Netherlands has considered that lack of proper communication between the parents does not necessarily imply that the assignment of authority to one parent would be in the child's best interests.<sup>265</sup> The child's best interests are paramount.<sup>266</sup> Article 1:251a indicates that

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<sup>258</sup> See Doek & Vlaardingbroek (2009) 143. This is thus different from the position in South Africa, see section 4.1.1.

<sup>259</sup> Article 1:251(1) of the Civil Code.

<sup>260</sup> Article 1:253aa specifically deals with joint authority of parents within a registered partnership. Article 253aa(2) determines that the provisions relating to joint parental authority exercised by parents who are or were married are applicable *mutatis mutandis*.

<sup>261</sup> Article 1:251(2). See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 155; Doek & Vlaardingbroek (2009) 141; Wortmann & Duijvendijk-Brand *Compendium van het Personen- en Familierecht* (2009) 205.

<sup>262</sup> Unless one of the spouses is incompetent to exercise authority or has been relieved of or dismissed from parental authority or exercises the authority jointly with someone else other than the parent. See Article 1:253(1) and (4). See for a detailed discussion Doek & Vlaardingbroek (2009) 144-146.

<sup>263</sup> Article 1:253q and Article 246. See the discussion in section 4.1.2 above.

<sup>264</sup> Doek & Vlaardingbroek (2009) 141, 210-211.

<sup>265</sup> See HR 10 September 1999, *NJ* 2000, 20. See also Meuwise *et al.* (2005) 155. In the South African case *Krugel v Krugel* 2003 (6) SA 220 (T) De Vos J held that the various arguments against joint custody do not serve the best interests of children and that general hostility between the parents should not be a bar to a joint custody order, see [par. 21]. For a discussion of the latter case, see section 3.2.1.

<sup>266</sup> In the Civil Code the wording "the best interests of the child" is not used consistently. See

the court has discretion to this effect, where there is a compelling risk that the child would get stuck in a tug-of-war between both parents and it is not expected that this will change for the better in the near future, or that single parental authority would otherwise be in the best interests of the child.

It is important to note that where a child is twelve years or older, the court can, after hearing the child, decide on its own accord to assign single parental authority. The same applies where the child is younger than the age of twelve years, but has reached a stage of development where he or she can be expected to understand the consequences.<sup>267</sup>

#### 4.1.2.3 Joint authority upon request via registration in the authority register

Article 1:244 provides that the district courts<sup>268</sup> hold public registers, in which legal acts pertaining to the exercise of authority of children are recorded. In terms of Article 1:252(1) the biological parents who are not married to each other, or have concluded a registered partnership, can both request to have their joint authority recorded in the authority register. Such a request has to be filed with the clerk of the court in the district where the child was born.<sup>269</sup>

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*Meuwise et al. Handboek Internationaal Jeugdrecht* (2005) 54. The Committee on the Rights of the Child has expressed its concern that the best interests' principle is not consistently codified in Dutch legislation affecting children or formalised in proceedings. It was therefore recommended that the Netherlands would take all appropriate measures to ensure that the principle of the best interests of the child is adequately integrated in all legal provisions. See CRC/C/NLD/CO/3 of 30 January 2009, paragraphs 28 and 29.

<sup>267</sup> See Article 1:251a(4). This is clearly in line with Article 12 of the CRC. For a more detailed discussion, see sections 2.2.1.6 and 3.1.4.2.

<sup>268</sup> In Dutch: *de Arrondissements rechtbank*.

<sup>269</sup> As referred to in Article 1:244. See Van der Linden *et al. Jeugd en Recht* (2001) 24; Doek & Vlaardingerbroek (2009) 141-142. The clerk of the court will refuse a request to record joint parental authority, among others, when at the time of the request (a) one or both parents are incompetent to exercise such authority; or (b) where one of the parents has been relieved or dismissed from parental authority and the other parent exercises such authority, see Article 1:252(2). However, the parent who has been relieved or dismissed of parental authority could request the court to be restored of the parental authority in terms of Article 1:277.



#### 4.1.2.4 Joint authority of a parent and another person

Since 1 January 1998 authority pertaining to a child can be exercised by a parent and his or her partner jointly; for example, in the case where a divorced or widowed parent has a new relationship. Article 1:253sa determines that a parent and his or her spouse or registered partner who is not the biological parent, exercise authority jointly with regard to the child born during the existence of their marriage or registered partnership. However, this will not be the case where a child is also related to the other (biological) parent. For example, where the parents are divorced or where the father has acknowledged the child as his biological child.<sup>270</sup>

In the case where the parent has single parental authority, the court can upon joint request by this parent and his or her partner, assign joint authority to them provided that the latter person is in a close and personal relationship with the child concerned. In other words, joint authority for the parent and the step-parent where both actually care for the child. However, where the child is also related to the other (biological) parent, the request for joint authority will only be entertained (a) where the parent and the other at the day of filing the request, have had the joint care for the child for an uninterrupted period of at least one year prior to the request; and (b), the parent who files the request has had single authority for at least an uninterrupted period of three years, at the day of filing the request.<sup>271</sup>

The same applies to the situation where a parent and partner are in a registered partnership or are in a cohabitative relationship, irrespective of the gender of the partner.<sup>272</sup> Doek and Vlaardingbroek point out that by the wording “the other person who is in a close and personal relationship with the child”, the legislation does not exclude a family member of the parent who has single authority.<sup>273</sup>

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<sup>270</sup> See Article 1:203 and further. See also section 4.1.2 above. Also Doek & Vlaardingbroek (2009) 150.

<sup>271</sup> Article 1:253t, which provides for joint authority of a parent and another person by virtue of a court order.

<sup>272</sup> Doek & Vlaardingbroek (2009) 148 and further.

<sup>273</sup> For example, where the mother who has single authority (due to the fact that the father has not acknowledged the child as his biological child) requests the joint authority together with

#### 4.1.2.5 Single parental authority

In the situation where only motherhood can be determined or were the parents of a child are/were not married and thus do not exercise authority jointly, only the mother exercises authority *ex lege*.<sup>274</sup> It should be noted that a father who is competent to exercise authority, and never exercised such jointly with the mother, can request the court to assign him single authority<sup>275</sup> or joint authority together with the mother.<sup>276</sup>

## 4.2 Prevention and early intervention

In Chapter 2 the importance of the preservation of the family unit and the protection of family life on the basis of the international<sup>277</sup> and regional documents<sup>278</sup> was outlined in detail. According to the Preamble of the CRC, all state parties are,

“convinced 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 responsibilities within the community”.<sup>279</sup>

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her brother or another family member. See Doek & Vlaardingerbroek (2009) 149.

<sup>274</sup> Unless the biological mother was incompetent to exercise authority at the moment of birth of the child concerned, see Article 1:253b. For the sake of completion it should be noted that the present provision is also applicable where there is a marriage or a registered partnership but where no *ex lege* joint authority arises, in accordance with Articles 1:253aa and 253sa. See Doek & Vlaardingerbroek (2009) 155.

<sup>275</sup> Where the other parent exercises authority, the request of the father will only be successful where the court is of the opinion that this will be in the best interests of the child. The effect of assigning single authority to the father will be that the other parent loses the authority, unless the court assigns joint authority. See Article 1:253c(3) and 253e.

<sup>276</sup> Article 1:253c. Such a request for the assignment of joint authority can also be done by the mother on the basis of Article 1:253c(5).

<sup>277</sup> The UN Convention on the Rights of the Child (1989), in this thesis referred to as the CRC.

<sup>278</sup> The African Charter on the Rights and Welfare of the Child (1990), in this thesis referred to as the African Children’s Rights Charter, to which South Africa is a state party. The Netherlands is a High Contracting party to the European Convention on Human Rights, referred to as the European Convention.

<sup>279</sup> Paragraph 5 of the Preamble of the CRC. See also Frank in Davel & Skelton (eds.)

State parties also,

“recognise 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”.<sup>280</sup>

In other words, the family can be seen as a basic unit of society as well as the natural environment for the growth and well-being of, among others, children.<sup>281</sup> Children have, as far as possible, the right to know and be cared for by their parents.<sup>282</sup> Parents or legal guardians have the primary responsibility for the upbringing and development of the child, and the best interest of the child will be their basic concern.<sup>283</sup> Also, in the *UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*,<sup>284</sup> it is indicated that “[e]very state should give a high priority to family and child welfare” and “[t]he first priority for a child is to be cared for by his or her own parents”.<sup>285</sup> Apart from the right of the child to be cared for by his or her parents or family, where possible, and assigning responsibility to the parents or guardian, the international documents set out the duty of state parties to respect the privacy of a family unit. The CRC unambiguously states this in Articles 5 on parental guidance and the child's evolving capacities<sup>286</sup> and Article 8 which reads:

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*Commentary of the Children's Act (2010) 8-5.*

<sup>280</sup> Paragraph 6 of the Preamble of the CRC. See also the Preamble of the African Children's Rights Charter, paragraph 4, which contains similar wording.

<sup>281</sup> See also chapter 2, section 2.2.2, which deals with respect for the family in terms of the international documents. See also Article 18(1) of the African Children's Rights Charter which states that “the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and morals”.

<sup>282</sup> See Article 7(1) of the CRC. See also Article 19, which states that “every child shall be entitled to the enjoyment of parental care [...]”.

<sup>283</sup> See Article 18(1) of the CRC. Also Article 20 of the African Children's Rights Charter. See also Meuwise *et al. Handboek Internationaal Jeugdrecht (2005) 150-151*. Moreover, they have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, see Article 27 of the CRC.

<sup>284</sup> Document A/RES/41/85 of 3 December 1986.

<sup>285</sup> See Article 1 and 3 of the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Document A/RES/41/85.

<sup>286</sup> Article 5 of the CRC reads as follows: “States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community

“[s]tates parties undertake to respect the right of the child to preserve his or her identity, including [...] family relations as recognised by law *without unlawful interference*”.<sup>287</sup>

In terms of the African Children’s Rights Charter “[t]he family shall be protected by the state, which shall take care of its physical health and morals”.<sup>288</sup> According to the European Convention, “[e]veryone has the right to respect for his [...] family life [...]”,<sup>289</sup> and furthermore, “there shall be no interference by a public authority with the exercise of this right”.<sup>290</sup> As already outlined above, the interference with the family life of children and their parents by a public authority, for example, pertaining to a measure of child protection, needs to be legally justified, and this should not be taken lightly.<sup>291</sup> However, it seems a reality that these days more families all over the world are experiencing difficulties when it comes to the running of the household and the raising of children.<sup>292</sup> Depending on the seriousness of the situation, the question arises where the line should be drawn between respect for the family and the need for protection of the child. It is submitted that, in line with the international documents, firstly the focus should be on what can be done in order to assist the child and the family to preserve the family unit,<sup>293</sup> and to prevent drastic measures of statutory intervention where possible. To this effect, both the CRC and the African Children’s Rights Charter contain provisions where state parties have the duty to render appropriate assistance to parents and legal guardians in the performance of their child-rearing

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as provided for by the local custom, legal guardians, or other persons legally responsible for the child to provide (in a manner consistent with the evolving capacities of the child) appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.”

<sup>287</sup> Own emphasis.

<sup>288</sup> See Article 18(1) of the African Children’s Rights Charter.

<sup>289</sup> Article 8(1) of the European Convention.

<sup>290</sup> Article 8(2) of the European Convention states: “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>291</sup> See section 2.2.3 above.

<sup>292</sup> Unemployment and/or financial difficulties, debts, alcohol and drug abuse, working parents, unsupervised children, discipline issues within the family, lack of communication between family members, domestic violence are all contributing factors to a possible increased risk of a breakdown of the functioning of the family unit. Even where stress or frustration is unintentionally taken out on a child, this might have a negative impact on the child.

<sup>293</sup> In the case of abuse or neglect the child need to be protected and immediate action is required.

responsibilities.<sup>294</sup> For example, in providing information, advice and support pertaining to the upbringing of children. In the *General Guidelines for Periodic Reports*,<sup>295</sup> state parties are requested by the Committee on the Rights of the Child,

“to provide information on the measures adopted to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities, as well as on the institutions, facilities and services developed for the care of children [...]”.<sup>296</sup>

In the following paragraphs it will be investigated how South Africa and the Netherlands are fulfilling the duty to render appropriate assistance to the families that are in need of support with regard to child-rearing, in order to prevent further-reaching intervention.

#### 4.2.1 Prevention and early intervention in South Africa

In terms of section 28 of the Constitution, every child has the right to family care or parental care.<sup>297</sup> In addition, every child is, among others,<sup>298</sup> entitled to social services.<sup>299</sup> Moreover, on the basis of section 7(2) of the Constitution and section 8(2) of the Children's Act, the state is obliged to respect, protect, promote and fulfil each of these rights.<sup>300</sup> It is clear that

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<sup>294</sup> See Article 18(2) and 6(2) of the CRC and Article 20(2)(b) of the African Children's Rights Charter. In terms of Article 19(2) of the CRC, which specifically deals with the protection from abuse and neglect, states parties are obliged to take protective measures “to include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”. See also Article 16 of the African Children's Rights Charter. See Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-5. See also the discussion of these Articles in section 2.2.2.1 and 3.2 above.

<sup>295</sup> UN Document CRC/C/58 of 20 November 1996.

<sup>296</sup> See paragraph 66 of *General guidelines for periodic reports* (UN Document CRC/C/58 of 20 November 1996).

<sup>297</sup> Section 28(1)(b) of the Constitution.

<sup>298</sup> As already mentioned, all the rights in section 28 serve to provide protection to children and they are additional to the other rights mentioned in chapter 2 of the Constitution. See also section 8(1) of the Children's Act. See Bonthuys *The Bill of Rights Handbook* (2005) 600; Skelton in Boezaart (ed.) (2009) 265; Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-4. See also chapter 3 above.

<sup>299</sup> Section 28(1)(c) of the Constitution, which forms part of the socio-economic rights.

<sup>300</sup> See also Proudlock *The Bill of Rights Handbook* (2005) 291.

legislation and policies should form the basis for specific programmes which are needed in order to achieve the realisation of these rights.<sup>301</sup>

Proudlock has mentioned that for the realisation of these rights, the primary enabling legislation plays a vital role, which, when it comes to the child's entitlement to social services, is the Children's Act.<sup>302</sup> The latter Act obliges the Minister of Social Development, after consultation with interested persons and other ministers<sup>303</sup> to include in the departmental strategy a comprehensive national strategy<sup>304</sup> which is aimed at securing the provision of prevention and early intervention programmes to families, parents, care-givers and children in the whole of South Africa.<sup>305</sup> Moreover, the MEC<sup>306</sup> for Social Development must, within the parameters of this national framework, provide for, and importantly, fund,<sup>307</sup> a provincial

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<sup>301</sup> Other socio-economic rights include the right to education, access to health services, social security, sufficient food and water and adequate housing.

<sup>302</sup> See Proudlock (2005) 296-297. This is the first time that prevention services have been explicitly included in an Act of Parliament, namely in chapter 8 of the Children's Act 38 of 2005, which was inserted into the latter Act by section 3 of the Children's Amendment Act 41 of 2007. Bosman-Sadie & Corrie (2010) 155, aver that the inclusion of prevention and early intervention services contributes to the move toward the "developmental model", in terms of which the focus lies on prevention rather than intervention. It is submitted that the impact of this should not be underestimated. In principle a child has the right to be with his or her family and the placement of a child should only be a measure of last resort. See also section 144(1)(i), which states that the focus of prevention and early intervention programmes must be on avoiding the removal of a child from the family environment.

<sup>303</sup> The Ministers of Education, Finance, Health, Provincial and Local Government and Transport.

<sup>304</sup> Includes national norms and standards for prevention and early intervention programmes, which should relate to (a) outreach services; (b) education, information and promotion; (c) therapeutic programmes; (d) family preservation; (e) skills development programmes; (f) diversion programmes; (g) temporary safe care; and (h) assessment of programmes. See section 147(1) and (2). These national norms and standards are contained in Part IV of Annexure B, which prescribes in detail what should be adhered to with regard to the aforementioned (a) – (h). The national norms and standards kick off with outreach services which must aim at reaching out to especially vulnerable children and families in order to meet the needs of the children in the context of family and community. These services should also aim at the development of community-based services and facilities to promote safety and well-being of children in communities, and among others, teach communities to recognise the signs of abuse and deliberate neglect of children and the risk factors associated with this. See further part IV of Annexure B of the DSD regulations GN R261/2010.

<sup>305</sup> Section 145(1) of the Children's Act, which deals with the strategy for securing prevention and early intervention programmes. Moreover, in terms of section 147, the Minister must provide for regulations with regard to the national norms and standards for prevention and early intervention programmes, after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport.

<sup>306</sup> Which means a Member of Executive Council, at a provincial level.

<sup>307</sup> See section 146(1) of the Children's Act. Subsection (4) states that the funding of prevention

strategy aimed at the provision of properly resourced, co-ordinated and managed prevention and early intervention programmes.<sup>308</sup> Prevention should be a priority for all stakeholders, since the focus is on influencing the situation before any harm or further harm is caused.<sup>309</sup>

According to the *South African Child Gauge 2010/2011*, South Africa has high rates of child poverty.<sup>310</sup> When families cannot meet the children's basic needs, children should be entitled to social grants. In this regard the Social Assistance Act<sup>311</sup> is relevant, on the basis

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and early intervention programmes must be prioritised (a) in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children; and (b) to make prevention and early intervention programmes available to children with disabilities. See also section 11(1) of the Children's Act, which deals specifically with children with disabilities. For a discussion on the UN Convention on the Rights of Persons with Disabilities (2007), see Eijgenraam "Gelijke kansen voor iedereen – De rechten van kinderen met een handicap" 2008 *Tijdschrift voor de Rechten van het Kind* 10. The position of children with disabilities and their rights in terms of the Children's Act has recently been highlighted by Boezaart. She refers, among others, to the importance of appropriate care and assistance when needed, participation rights, not only regarding social, cultural, religious and educational activities but also in the community. It is agreed that special attention is needed for children with disabilities, including providing for early childhood development, prevention and early intervention programmes and an adequate supply of various forms of care. The latter includes partial care and alternative care which should provide for the specific needs of these children. Moreover, for children with a disability who live without parents or on the street are even more vulnerable, drop-in centres might offer some basic assistance. The importance here is that these individuals at least get noticed by professionals, after which more appropriate assistance can be offered. It should be noted that Article 23 of the CRC, *General Comment No. 9* (2007) (CRC/C/GC/9), the United Nations Convention on the Rights of Persons with Disabilities (which came into force on 3 May 2008) together with section 11 of the Children's Act theoretically forms a solid framework for the enhancement and realisation of the rights of children with a disability in South Africa. However, Boezaart rightfully points out that it still has to be seen how effective the implementation process will be: "The Children's Act: A valuable tool in realising the rights of children with disabilities" 2011 *THRHR* 264. It is submitted that far more attention has to be paid to this important group of children, not only to have it on the political agenda for implementation, but also to inform the children concerned and the public in general about these rights and to diminish prejudices.

<sup>308</sup> Section 145(2) of the Children's Act. It is submitted that the outcome of this will differ from province to province, depending on budget related constraints. However, the statutory involvement of various government departments combined with the consultation of interested persons, will ensure that the focus will be on promoting the welfare of children by providing these prevention and early intervention services. See also Bosman-Sadie & Corrie (2010) 159. See also Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-3.

<sup>309</sup> See Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-2, where she states that the proactive orientation demanded by the Children's Act creates obligations for government agencies but also requires more from the professionals working with children, parents, care-givers and families, compared to the (repealed) Child Care Act.

<sup>310</sup> According to the *Children's Gauge 2010/2011* in 2009 circa 61% of children lived in households with a per capita income below R552 per month, Children's Institute University of Cape Town 85.

<sup>311</sup> 13 of 2004.

of which eligible parties (children and families) may apply for a grant.<sup>312</sup> The latter is of utmost importance in order to assist in preserving a child's family structure and preventing a child from becoming in need of care and protection.

Apart from the theoretical framework and strategies to be set out, the practical implementation, and thus realisation, of these programmes is of utmost importance. For example, to ensure that where a children's court would order a child to be placed in an early intervention programme,<sup>313</sup> such a programme is indeed available. There should be no delay. With regard to the initial report of South Africa to the Committee on the Rights of the Child in 2000,<sup>314</sup> the Committee expressed its concern with regard to the increasing number of single parent families and child-headed households and the impact of these situations on these children. Moreover, inadequate support services and consulting parental guidance and parenting was a concern of the Committee. South Africa has been encouraged to intensify its efforts in education and awareness of the family by providing support to parents, and teaching them how to exercise their responsibilities in relation to Article 18 of the CRC.<sup>315</sup>

The question arises as to what is meant by prevention and early intervention programmes. "Prevention programmes" refer to programmes provided to families with children in order to strengthen and build their capacity and self-reliance to address problems that may, or are, bound to occur in the family environment, which, if not attended to, may lead to statutory intervention.<sup>316</sup> "Early intervention programmes" mean programmes provided to families where there are children identified as being vulnerable to, or at risk of, harm or removal into

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<sup>312</sup> Pertaining to children the following grants should be mentioned: a child support grant, a care dependency grant, a foster child grant or a disability grant. See section 4 and further of the Social Assistance Act 13 of 2004.

<sup>313</sup> See section 46(1)(g)(i) and (iii), on the basis of which the court has the discretion to make 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, among others, early intervention services (see (i)) or both early intervention services and a family preservation programme (see (iii)).

<sup>314</sup> CRC/C/15/Add.122 of 23 February 2000.

<sup>315</sup> CRC/C/15/Add.122 paragraph 22.

<sup>316</sup> In addition these programmes are designed to serve the purposes mentioned in section 144, which is discussed later in this section. See section 143(1). The definition section, section 1(1) also refers to section 143(1). See also Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-11.



alternative care.<sup>317</sup> It is clear that both kinds of programmes focus on families with children.

The purposes of prevention and early intervention programmes are diverse and dealt with in detail in the Children's Act. Section 144(1) states:

“Prevention and early intervention programmes must focus on -

- (a) preserving a child's family structure;
- (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline;
- (c) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities and chronic illnesses;
- (d) promoting appropriate interpersonal relationships within the family;
- (e) providing psychological, rehabilitation and therapeutic programmes for children;
- (f) preventing the neglect, exploitation, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children's needs;
- (g) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;
- (h) diverting children away from the child and youth care system and the criminal justice system; and
- (i) avoiding the removal of the child from the family environment.”<sup>318</sup>

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<sup>317</sup> See section 143(2), which also refers to the purposes as mentioned in section 144, see section 143(2)(a). The definition section, section 1(1) also refers to section 143(2).

<sup>318</sup> Section 144(2) provides that “prevention and early intervention programmes may include -

- (a) assisting families to obtain the basic necessities of life;
- (b) empowering families to obtain such necessities for themselves;
- (c) providing families with information to enable them to access services;

Since some of these purposes are linked with one another, any or more of the aforementioned sub-sections could become relevant, depending on the circumstances in which a child and his or her family finds themselves. Section 144(1) refers explicitly to how risks for intervention may be reduced by the offering of (parenting) skills-programmes and psychological, rehabilitation/diversion and therapeutic programmes for children.<sup>319</sup> Moreover, it is imperative that prevention and early intervention programmes, generally speaking, involve and promote the participation of families, parents, care-givers and children in identifying and seeking solutions to their problems.<sup>320</sup> Frank correctly points out that input is needed from the child and others involved pertaining to all three of the following steps of the process; (a) assessing the nature and the intensity of the problems encountered; (b) seeking solutions for the problem(s); and (c) focusing on a course of action to follow.<sup>321</sup>

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- (d) supporting and assisting families with a chronically ill or terminally ill family member;
  - (e) early childhood development – in terms of the Children's Act means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age. To this effect, there are early childhood development services which are intended to promote the aforementioned aspects of a child's development. For more details, see chapter 6 of the Children's Act, inserted into the Children's Act by section 4 of the Children's Amendment Act 41 of 2007; and
  - (f) promoting the well-being of children and the realisation of their full potential.”

It is clear from the above formulation that this list is not exhaustive. See Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-13. In addition, reference should be made to the Social Assistance Act 13 of 2004, on the basis of which the following social grants are available in South Africa, namely, a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid (the latter refers to the situation where a person is in such a physical or mental condition that he or she requires regular attendance by another person).

<sup>319</sup> Providers of prevention and early intervention programmes which offer these kinds of services will be able to apply for government funding. See Bosman-Sadie & Corrie (2010) 157. However, in ensuring the qualification of the services offered, section 146(3) prescribes that such a provider only qualifies for funding if the programmes comply with the prescribed national norms and standards contemplated in section 147 and such other requirements as may be prescribed.

<sup>320</sup> See section 144(3). This participatory approach is present in a number of sections in the Children's Act, see for example, section 69 on pre-hearing conferences, section 70 on family group conferences, section 71 on other lay-forums. See also section 3.1.4 above, which deals with the participation of children.

<sup>321</sup> See Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-13. This is also in line with Article 12 of the CRC and Article 7 of the African Children's Rights Charter. See also the discussion on child participation in sections 2.2.1.6 and 3.1.4. Furthermore, it would be in accordance with sections 10 and 61 of the Children's Act, which specifically provide for child participation. Participation of the child's family is imperative if it is in the best interests of the child, in terms of section 6(3) of the Children's Act.

It is important to note that 144(1)(b) states the purpose of “developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline”. With the latter inclusion it is attempted to encourage parents and other care-givers to steer away from violent forms of discipline, which include corporal punishment.<sup>322</sup> In this regard it should be emphasised that a child has the right not to be subjected to neglect, abuse or degradation,<sup>323</sup> and that corporal punishment is unquestionably degrading.<sup>324</sup>

Sadly, the Abolition of Corporal Punishment Act 33 of 1997, although enacted by Parliament, never took effect.<sup>325</sup> In addition, it is most unfortunate that some clauses of the Children's Amendment Bill also did not become law.<sup>326</sup> In terms of clause 139 of this Bill, a parent or other care-giver would have been under a statutory duty to respect, promote and protect the child's right to physical and psychological integrity.<sup>327</sup> In addition, a parent or other care-giver would have been obliged to make sure that the child is not subjected to corporal

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<sup>322</sup> See also section 4.1.2.1, in which reference is made to the statutory duty of parents in the Netherlands to refrain from psychological or physical force or any other humiliating treatment, in terms of Article 1:247(2) of the Dutch Civil Code. See also section 4.3 and further.

<sup>323</sup> Section 28(1)(d) of the Constitution. This is in line with Article 19 of the CRC and Article 16 of the African Children's Rights Charter, which both aim at the protection of children from all forms of harm. For a discussion on the international and regional provisions, see section 2.2.2.5.

<sup>324</sup> See also *S v Williams* 1995 (3) SA 632 (CC), in which the Constitutional Court declared corporal punishment on the basis of section 294 of the Criminal Procedure Act 51 of 1977 unconstitutional, due to the fact that it was found to be cruel, inhuman and degrading. Moreover, section 10 of the South African Schools Act 84 of 1996 prohibits corporal punishment in schools, which constitutionality was challenged in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC). The applicants wanted to have it declared invalid with regard to the independent schools (they represented). The argument was that learners were to be educated according to their Christian religion and that the parents or guardians of the children had given consent to the possibility of imposing corporal punishment. The Constitutional Court held that the prohibition of corporal punishment in terms of section 10 of the South African Schools Act 84 of 1996, was a justifiable limitation of the right to freedom of religion. See also Bonthuys (2005) 614-615; Skelton in Boezaart (ed.) (2009) 287. In the view of the Committee on the Rights of the Child, corporal punishment is invariably degrading (paragraph 22, CRC/C/GC/13 of 2011).

<sup>325</sup> See Bonthuys (2005) 614. See also *General Comment* No. 13 (2011) of 17 February 2011, which deals with the right of the child to freedom from all forms of violence, and no exceptions. See paragraph 16 of CRC/C/GC/13.

<sup>326</sup> According to Schäfer clause 139 of the Children's Amendment Bill [B19F-2006 (Reprint)] has probably been deleted from the draft Bill due to lack of political consensus, in *Child Law in South Africa – Domestic and International Perspectives* (2011) 133.

<sup>327</sup> This right is conferred on children by section 12(1)(c), (d) and (e) of the Constitution.

punishment or any other punishment in a cruel, inhuman or degrading way.<sup>328</sup>

It is submitted that this would have been a welcome addition to the existing Children's Act indeed, and would have been in line with *General Comment No. 13*, which was issued in 2011.<sup>329</sup> It is hoped for that in the near future another attempt will be made to ensure the adoption of a national law or provision(s) which bans any form of violence in which explicit reference will be made to the prohibition of physical violence including corporal punishment.<sup>330</sup>

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<sup>328</sup> Clause 139(3) stated in unambiguous terms that the common law defence of reasonable chastisement available to a person who has care of a child, including a person who has parental responsibilities and rights in respect of the child, in any court proceeding will be abolished, which, it is submitted, could have assisted in initiating a change in the perceptions and frame of reference of people in South Africa. Moreover, in terms of subsection (6), a parent, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to inappropriate forms of punishment must be referred to an early intervention service in terms of section 144. In addition, such person may be prosecuted if the punishment constitutes abuse of the child, see subsection (7), which could have served as a deterrent. In relation to the topic of this thesis clause 139(4) of the Children's Amendment Bill [B19F-2006 (reprint)] could have had an important impact, since it contained a prohibition of corporal punishment or subjecting a child to any form of cruel, inhuman or degrading punishment to [any] child in a youth care centre, partial care facility, shelter or drop-in centre. From all perspectives it is regretful that this provision has not become law. See also the discussion in section 4.3 below.

<sup>329</sup> CRC/C/GC/13 of 2011.

<sup>330</sup> It is agreed with the Committee on the Rights of the Child that there should be no exception. The explicit reference to the prohibition of any form of physical violence, including corporal punishment is necessary because it seems widely accepted in South Africa. The crime statistics show that in South African society violence is rife. According to the figures presented by the South African Police Service there has been a significant decrease of (serious) crimes over the past eight years. The crime ratio per 100.000 of the population was in 2003/4 (base line) 5287.9 and in 2011/12 3608.7. See [www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime\\_statistics\\_presentation](http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation), accessed on 20-10-2012. In May 2012 UNICEF called on all South African to support the campaign called "Believe in Zero" which highlighted the role that everybody has to play in protecting children thereby reducing violence against children to zero. Statistics revealed that between 1 April 2011 and 31 March 2012 over 54.000 crimes against children were reported. In addition reference was made to the fact that crimes against children are grossly underreported, which implies that the real statistics is (much) higher. Sexual offences make up circa 50% of the figures and circa 30% of the victims are children below the age of ten, in [www.unicef.org/infobycountry/SouthAfrica\\_62328](http://www.unicef.org/infobycountry/SouthAfrica_62328), accessed on 20-10-2012. Moreover, many children are exposed to violence in South Africa as it is and this should be prevented wherever possible. In order to pursue change within society, it is important for the legislature(s), the courts, law enforcement, civil society and other organisations to take a firm stand and say "no" to any form of violence. Non-condonation of any form of violence in the family environment, schools, (care) institutions and society at large should be translated in unambiguous legislation and this should be broadcasted repeatedly in the media and included

With regard to the topic of this thesis,<sup>331</sup> section 148 is of particular relevance.<sup>332</sup> Before making an order concerning the temporary or permanent removal of a child from his or her family environment, a children's court may order the relevant service provider to provide early intervention programmes where this would be appropriate in the circumstances of the case.<sup>333</sup> In other words, where the court decides, on a balance of probabilities, that an early

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in educational programmes and curricula of schools, colleges and tertiary institutions across the board, due to the fact that everyone should become aware and also since to some extent most professions are dealing with these matters directly or indirectly. However, a well-structured legislative framework is only the first step. The next step should seek to effect a change in attitude in which adults in their private and professional lives are convinced that any form of violence is detrimental to children and should be avoided at all cost and that there are other ways to achieve discipline. Programmes promoting appropriate discipline, education and awareness-raising programmes are needed in order to achieve these goals. Interestingly, the Children's Amendment Bill [B19F-2006 (Reprint)] contained a provision in this respect, see clause 139(5). Regrettably this sub-provision too has never become law.

<sup>331</sup> "The placement of children in need of care and protection: a comparative study between South African Law and Dutch Law in the light of international standards."

<sup>332</sup> To be read in conjunction with section 149, which deals with the content of the report of a designated social worker. In order to assist the court in determining a matter concerning the child, the report must contain a summary of any prevention and early intervention programmes provided in respect of the child and the family or care-giver involved. Frank has pointed out that such a report should provide information about the nature of the programme and the impact of it on the child and the family or care-giver concerned, in *Commentary on the Children's Act (2010)* 8-18.

<sup>333</sup> Section 148 reads as follows:

"(1) Before making an order concerning the temporary or permanent removal of a child from that child's environment, a children's court may order -

- (a) the provincial Department of Social Development, a designated child protection organisation, any other relevant organ of state or any other person or organisation to provide early intervention programmes in respect of the child and the family or parent or care-giver of the child if the court considers the provision of such programmes appropriate in the circumstances; or
  - (b) the child's family and the child to participate in a prescribed family preservation programme.
- (2) An order made in terms of subsection (1) must be for a specified period not exceeding six months.
  - (3) When a case resumes after the expiry of the specified period, a designated social worker's report setting out progress with early intervention programmes provided to the child and the family, parent or care-giver of the child, must be submitted to the court.
  - (4) After considering the report, the court may -
    - (a) decide the question whether the child should be removed; or
    - (b) order the continuation of the early intervention programme for a further specified period not exceeding six months.
  - (5) Subsection (1) does not apply where the safety or well-being of the child is seriously

intervention programme or prescribed family preservation programme would be appropriate, the need to remove a child can be avoided.<sup>334</sup> It is self-explanatory that such an order cannot be made where the safety or well-being of the child is seriously or imminently at risk.<sup>335</sup>

An order pertaining to such an early intervention programme must be for a specified period but not exceeding six months. After this period has lapsed, the children's court has to assess the progress made, based on the report submitted by the social worker.<sup>336</sup> The court may order the continuation of the early intervention programme for a further specified period.<sup>337</sup> However, the court may, at this point, also decide on the removal of the child.<sup>338</sup> Nevertheless the reason behind this is that the children's court first should explore and exhaust alternative options before making the decision to remove the child.<sup>339</sup> Due to its impact on a child's life and that of the family, the removal of the child should indeed be a measure of last resort.

In conclusion it can be said that the statutory basis for prevention and early intervention programmes is strong. However, it will depend on each provincial strategy and its allocated budget as to how successful the implementation will be. It is submitted that a shift in frame of reference is required of all the professionals working with children in order to prioritise prevention and early intervention where this would be safe and in the child's best interests, in order to prevent further-reaching interventions.<sup>340</sup> It has to be seen to what extent this

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or imminently at risk.”

<sup>334</sup> See also Bosman-Sadie & Corrie (2010) 161.

<sup>335</sup> See section 148(5).

<sup>336</sup> In addition, section 149 determines that “when a report of a designated social worker is produced before a court, in order to assist a court in determining a matter concerning a child, the report must contain a summary of any prevention and early intervention programmes provided in respect of that child and the family, parent or care-giver of the child”.

<sup>337</sup> Section 148(4)(b) indicates that the further specified period should not exceed six months.

<sup>338</sup> Section 148(4)(a) of the Children's Act.

<sup>339</sup> Frank in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 8-18.

<sup>340</sup> See in this respect the case *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others* [2011] 3 All SA 625 (GNP). In this case the high court declared sections 151 and 152 of the Children's Act unconstitutional in so far as they failed to provide an appropriate mechanism for the judicial review of a removal decision, within reasonable time (see par. 15). Fabricius J held that although the state will not be able to repair disruptive family life as such, it does have the power “to create positive conditions for repair to take

chapter of the Children's Act will positively contribute to the prevention of and/or reduction in various forms of child care protection measures, particularly placement.<sup>341</sup>

#### 4.2.2 Assistance in child rearing responsibilities in the Netherlands

In paragraph 4.1.2. above, a basic overview was given on the various categories of persons who can have parental authority pertaining to a child in terms of Dutch law.<sup>342</sup> Who will have authority depends on the circumstances, and therefore which Article(s) in the Civil Code would be applicable accordingly. Surely the child's best interests will be paramount in practice, although the Civil Code does not consistently refer to this important consideration.<sup>343</sup>

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place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril". In addition it was pointed out that "in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can". It is submitted that continuing (multi-disciplinary) training of professionals who work with children is needed. With regard to a professional who is not suitable to work with children, it is commendable that Part two of Chapter 7 of the Children's Act explicitly provides for a National Child Protection Register. This aims to keep a record of all convictions of all persons on charges involving the abuse or deliberate neglect of a child, see section 114(1)(b). This would help to decrease (preferably prevent) situations of (sexual) abuse and neglect in day-care facilities, schools and after care. In 2011 there was a major public outcry in the Netherlands about Robert M. who allegedly abused a number of children between the ages of 0-4 at nursery schools. He had been able to move from facility to facility without being noticed. A National Child Protection Register could assist relevant employers to inquire about future employees. Due to privacy considerations, access to the South African Child Protection Register is limited; see section 125 of the Children's Act.

<sup>341</sup> It is self-evident that were prevention and early intervention programmes successful, the number of children in (expensive) residential care would be reduced, which would save unnecessary expenses. Most important, the child will be able to stay in his or her familiar environment. The placement of a child elsewhere should be a measure of last resort in protecting a child. See also Bosman-Sadie & Corrie (2010) 155. See also chapter 3 above.

<sup>342</sup> See Title 14 of Book 1 of the Civil Code.

<sup>343</sup> See Meuwise *et al.* (2005) 54. Although the Committee on the Rights of the Child welcomed the efforts towards attaching more importance to the best interests in decisions concerning children in its concluding observations of 27 March 2009, it nevertheless made the following recommendation: "that the Netherlands take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with Article 3 of the Convention, is adequately integrated into all legal provisions and applied in judicial and administrative decisions and in projects, programmes and services which have an impact on children". See CRC/C/NLD/CO/3, paragraph 28 & 29.

With regard to the second periodic report to the Committee on the Rights of the Child in 2004,<sup>344</sup> the Committee expressed its concern pertaining to the “reduction of funding for child care institutions, facilities and services in the Netherlands, which has resulted in waiting lists and a fragmentation of services aimed at assisting parents in their child-rearing responsibilities”.<sup>345</sup> The Committee recommended an evaluation of services available to a parent that assists them in their child-rearing responsibilities, in order to determine the reason for any waiting lists and to assess the quality of services provided. Furthermore it was recommended that the Netherlands increase the funding and availability of quality childcare facilities and services, and support parental educational programmes, in particular for parents of disadvantaged and vulnerable children and adolescents.<sup>346</sup>

In the *Concluding Observations* of the Committee in 2009,<sup>347</sup> the committee acknowledged that although services for families and children are widely available, the problem of waiting lists still persists. Moreover, the Committee expressed its concern about the lack of sufficient family based-services to ensure prevention and early intervention at the local level, which inevitably leaves children without adequate help. The Committee therefore recommended research to be initiated in order to find reasons for the long waiting lists, and to take steps to involve families in preventing and solving their problems, including the implementation of community-based programmes with a view to assisting the extended family in taking an active role; for example conference models,<sup>348</sup> and provide parenting education in a culturally sensitive manner.<sup>349</sup>

In various provinces in the Netherlands the Bureaus for Youth Care<sup>350</sup> have since then focused on measures to ensure the decline in the waiting lists. For example, in Zuid-Holland, the Bureau for Youth Care initiated a so-called “waiting list-team”, making use of

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<sup>344</sup> See the concluding observations: The Kingdom of the Netherlands (Netherlands and Aruba), CRC/C/15/Add.227 of 26 February 2004.

<sup>345</sup> See CRC/C/15/Add.227, paragraph 39.

<sup>346</sup> See CRC/C/15/Add.227 paragraph 40.

<sup>347</sup> CRC/C/NLD/CO/3 of 30 January 2009.

<sup>348</sup> See for a detailed discussion on family group conferences in the Netherlands, see section 3.1.4.2.

<sup>349</sup> CRC/C/NLD/CO/3, paragraphs 39 and 40.

<sup>350</sup> In Dutch: *Bureau voor Jeugdzorg*.



family coaches.<sup>351</sup> The purpose was two-fold: to realise the decline in waiting lists and to provide home based support where possible.<sup>352</sup> In the province Overijssel, all cases relating to child care protection matters are referred to “Eigen Kracht”<sup>353</sup> in Zwolle, an NGO specialised in facilitating family group conferences, before the children's court is approached. In this way unnecessary court intervention and thus infringement on the family life of all parties concerned will be avoided.<sup>354</sup>

### 4.3 Children in need of care and protection

From the discussion above it is evident that generally a two-way system is applicable: the child has, where possible, the right to be cared for by his or her parents, whereas the parents have the primary responsibility and right to care for and to raise the child.<sup>355</sup> This clearly includes the care and responsibility for the psychological and physical well-being and safety of the child. Simultaneously, state parties are obliged to have respect for the exercise of these responsibilities and rights by the parents (guardians or other care-givers) and thus refrain from unlawful interference.<sup>356</sup>

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<sup>351</sup> In Dutch: *gezinscoaches*.

<sup>352</sup> For a detailed discussion, see Neefjes “*Geen Maatpak maar Confectie – snelle inzet van allround gezinscoaches werpt vruchten af bij wegwerken wachtlijst Jeugdzorg*” (2010) 3 *Het Kind Eerst* 4-6.

<sup>353</sup> “*Eigen Kracht*” means literally “own strength”. It is an appropriate name in the sense that the social network (which is wider than merely the family) will attempt to find a solution for the problem(s) based on its own strength (without major interference of professionals), thereby taking responsibility. It empowers the people involved.

<sup>354</sup> For a more detailed discussion, see section 3.1.4.2 on participation.

<sup>355</sup> Articles 7 (name and nationality), 8 (preservation of identity, including family relations), 18 (parental responsibilities) and 27(2) of the CRC. Also Articles 19 (parental care) and 20 (parental guidance) of the African Children’s Rights Charter and Article 8(1) of the European Convention. For a more detailed discussion, see chapter 2 on the international and regional documents and chapter 3 on the national legislation pertaining to South Africa and the Netherlands, especially, section 2.2.2.1 and 3.2. Moreover, see section 4.1 above, which deals with parental responsibilities and rights.

<sup>356</sup> See the Articles on parental guidance and the child's evolving capacities (Article 5), preservation of identity, including family relations (Article 8) and protection of privacy (Article 16) of the CRC. Also Articles 10 (privacy) and 18 (family values) of the African Children’s Rights Charter and 8(2) of the European Convention.

Although parents (guardians or other care-givers) can, to a large extent, use their discretion in the exercise of these responsibilities and rights, this implied freedom is not unlimited. Where the exercise of these responsibilities would result in any danger or damage pertaining to the psychological and/or physical development of the child, it is possible to interfere with the authority of parents. In fact, it is the duty of state parties to ensure the protection of children where parents (or other care-givers) fail.<sup>357</sup> To sum up, where parents, guardians or other care-givers are not able or not willing to take sufficient care of the child concerned, and where prevention and early intervention services have not been successful in order to safeguard the well-being of the child, further measures may become inevitable in order to protect the child and to safeguard his or her interests.

#### 4.3.1 The meaning of “child in need of care and protection”

On the basis of Article 19 of the CRC, a child should be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who cares for the child.<sup>358</sup> In this regard, state parties are obliged to take all appropriate legislative, administrative, social and educational measures to ensure this right to protection.<sup>359</sup>

On 17 February 2011 the Committee on the Rights of the Child has issued *General Comment No 13*, in which the Committee noted with concern that “the extent and intensity of violence exerted on children is alarming” and that therefore measures are needed and existing measures need to be massively strengthened in order to end all forms of harm to children, as listed in paragraph 1 of Article 19 of the CRC.<sup>360</sup>

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<sup>357</sup> Article 19 of the CRC and Article 16 of the African Children’s Rights Charter, as discussed in section 2.2.2.5 above. See also section 4.3.1.

<sup>358</sup> Compare with Article 16 of the African Children’s Rights Charter which contains similar wording. See also section 2.2.2.5.

<sup>359</sup> For a more detailed discussion on Article 19 of the CRC and Article 16 of the African Children’s Rights Charter, see section 2.2.2.5 above.

<sup>360</sup> UN Document CRC/C/GC/13 of 17 February 2011; see the introductory section 1.1. See also section I.3, which gives a wide definition of “violence”. The Committee on the Rights of the Child has explicitly emphasised that for the purpose of *General Comment No 13*, “violence” is

However, an explicit definition of “child in need of care and protection” is neither given in the CRC nor in the African Children’s Rights Charter. The importance of these documents in the present context lies in providing a minimum standard for the protection of all children, which is outlined in great detail in *General Comment No 13*.<sup>361</sup> It is submitted that the provisions in the international and regional documents in combination with *General Comment No 13* provide sufficient guidance for state parties to ensure the protection of “children in need of care and protection” in legislation and practice. Simultaneously it allows state parties to develop a proper standard of protection which is tailor-made to the circumstances, demands and challenges in the country concerned. It can therefore be concluded that the identification of “child in need of care and protection” is left to the national legislation of each state party.<sup>362</sup>

#### 4.3.1.1 The child in need of care and protection in terms of South African law

As became apparent in paragraph 4.1.1, all children are, generally speaking, in need of care and protection which usually will be taken care of by the parent(s), guardian or other care-giver. It was indicated that a child, in terms of the international documents, has the right, where possible, to be cared for by his or her parents.<sup>363</sup> The Constitution of South Africa<sup>364</sup> is unambiguous in this respect by firstly referring to family care. In terms of section 28(1)(b):

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understood to mean “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in paragraph 1 of Article 19. The term “violence” has been chosen here to represent all forms of harm to children as listed in paragraph 1 of Article 19, in conformity with the terminology used in the 2006 United Nations Study on Violence against Children, although the other terms used to describe types of harm (injury, abuse, neglect or negligent treatment, maltreatment and exploitation) carry equal weight. As in common parlance the term “violence” is often understood to mean only “physical” harm and/or “intentional harm”. However, the Committee emphasises most strongly that the choice of the term “violence” in the present general comment must not be used in any way to minimise the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as neglect and psychological maltreatment *inter alia*). See paragraph 3 of *General Comment No. 13* (2011).

<sup>361</sup> UN Document CRC/C/GC/13 of 17 February 2011.

<sup>362</sup> Which has been reiterated in Article 19 of the CRC and Article 16 of the African Children’s Rights Charter by stipulating that states parties shall take all appropriate legislative, administrative, social and educational measures to provide protection for children. See also section 2.2.2.5.

<sup>363</sup> Articles 7(1) and 18(1) of the CRC. Also Article 19(1) and 20(1) of the African Children’s Rights Charter. See also sections 2.2.2.2, 2.2.2.4 and 2.2.2.6.

<sup>364</sup> 108 of 1996.

“every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”. The importance of a child ideally growing up in a family environment has been reiterated in the Preamble of the Children's Act.<sup>365</sup> However, in terms of the latter Act, when speaking of a child “in need of care and protection” it goes beyond the usual care and protection which should be provided to each and every child.<sup>366</sup>

Matthias and Zaal indicate that a child in need of care and protection is “a child who requires additional or alternative care and protection services imposed as a compulsory measure by the state”.<sup>367</sup> Where family care or parental care is not adequate, temporarily or permanently, the state has to provide for appropriate alternative care in order to safeguard the well-being of the child concerned.<sup>368</sup> However, in accordance with the international standards and the obligations arising from these, the state should refrain from unlawful interference,<sup>369</sup> and in principle not separate a child from his or her parents against their will.<sup>370</sup>

Chapter 9 of the Children's Act starts with the identification of a child in need of care and

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<sup>365</sup> See paragraph 7 of the Preamble to the Children's Act 38 of 2005.

<sup>366</sup> 38 of 2005. Compare to the terminology in terms of section 14(4) of the Child Care Act 74 of 1983, in which reference was made to “a child in need of care”. Schäfer has pointed out that without providing an explanation the South African Law Reform Commission recommended the new phrase “child in need of care and protection” to be incorporated in the Children's Act. Moreover, reference is made to the fact that the new phrase, apart from being cumbersome, does not add substantial weight to what was generally understood by “a child in need of care”. What is positive though, is the fact that the definition in terms of the Children's Act has been expanded, thereby providing protection to a larger number of children, in *Child Law in South Africa – Domestic and International Perspectives* (2011) 423.

<sup>367</sup> Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-3.

<sup>368</sup> See section 28(1)(b) of the Constitution. Also chapter 9 of the Children's Act, sections 150-160. Chapter 10 of the Children's Act deals with contribution orders, in terms of which a person who is legally liable to maintain a child must pay a sum of money towards the alternative care, services or treatment provided to the child. On the basis of this, the parent, guardian or other care-giver financially assists the state in providing for the needs of the child. See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-3.

<sup>369</sup> Article 8(1) of the CRC, Article 10 of the African Children's Rights Charter and Article 8(2) of the European Convention. See section 2.2.2.1 and further.

<sup>370</sup> Article 9(1) of the CRC, Article 19 of the African Children's Rights Charter and Article 5(1)(d) of the European Convention. See the discussion in section 2.2.3.1.

protection.<sup>371</sup> Section 150 provides that:

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<sup>371</sup> Compare with the previous legislation, section 14(4) of the Child Care Act 74 of 1983, in terms of which a child would be found in need of care when -

- (a) the child has no parent or guardian; or
- (aA) the child has a parent or guardian who cannot be traced; or
- (aB) the child –
  1. has been abandoned or is without visible means of support;
  2. displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
  3. lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;
  4. lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
  5. is in a state of physical or mental neglect;
  6. has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
  7. is being maintained in contravention of section 10.

Prior to the above section, the criteria for the removal of children focussed completely on the inability and/or unfitness of the parent/care-giver (see section 14(4)(b) of the repealed Child Care Act 74 of 1983). The above-mentioned grounds in section 14(4)(AB) were more child-centred grounds, which replaced the so-called fault-based parent-centred grounds. Section 14(4) was already more in line with the CRC and section 28(2) of the Constitution than its predecessor, since it focussed on the needs of children, rather than the deficiencies of parents. See Van Heerden *Boberg's Law of Persons and the Family* (1999) 605 and 611 and further. However, Matthias has submitted that field research has indicated that a combination approach on removal grounds was to be preferred, which provides for a combination of parent-centred grounds (based on fault/responsibility of the parent) and child-centred grounds. Moreover, that it should be left to the discretion of the social worker to determine which grounds would be appropriate in a specific case. She indicated that the child-centred grounds would give parents leeway to relinquish their parental responsibilities to the state: "Removal of children and the right to family life: South African Law and Practice" 1997 *Children's Rights Project UWC* 16 & 26. Zaal supported the views of Matthias, see "Children's courts: An underrated resource in a new constitutional era" in Robinson (ed.) *Law of Children and Young Persons* (1995) 97. For a detailed discussion on the previous legislation, see Van Heerden in *Boberg's Law of Persons and the Family* (1999) 602 and further. Nevertheless, section 150 of the Children's Act contains child-centred grounds. It is hoped that the

- “(1) A child is in need of care and protection if, the child -
- (a) has been abandoned<sup>372</sup> or orphaned<sup>373</sup> and is without any visible means of support;<sup>374</sup>
  - (b) displays behaviour which cannot be controlled by the parent or care-giver;<sup>375</sup>
  - (c) lives or works on the streets<sup>376</sup> or begs for a living;<sup>377</sup>

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availability of the prevention and early intervention programmes will encourage parents to take responsibility, which ultimately would benefit all, the child included, instead of having to resort to removal and placement.

<sup>372</sup> Section 1(1) of the Children's Act indicates that “abandoned’, in relation to a child, means a child who – (a) has obviously been deserted by the parent, guardian or care-giver; or, (b) has, for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months”.

<sup>373</sup> Section 1(1) of the Children's Act defines “orphan” as “a child who has no surviving parent caring for him or her”. Matthias & Zaal point out that in terms of the Children's Act a child is also considered an orphan even if the child does have a surviving parent, but the latter is not actually caring for the child: *Commentary on the Children's Act* (2012) 9-5 fn 1.

<sup>374</sup> Bosman-Sadie & Corrie point out that children who are orphaned are not per definition in need of care and protection. It has to be determined whether a child is left with sufficient financial means to ensure a stable upbringing of the child concerned, in which circumstances the protection in terms of the Children's Act would not be necessary: *A Practical Approach to the Children's Act* (2010) 166.

<sup>375</sup> According to section 1 of the Children's Act 38 of 2005, “care-giver” means “any person other than a parent or guardian, who factually cares for a child and includes, amongst others, a person who cares for a child with the implied or express consent of a parent or guardian of the child”. It is agreed with Bosman-Sadie & Corrie that one should be cautious with blaming the parents or care-givers inadequacy for the uncontrollable behaviour of the child concerned. Various complex factors can contribute to the situation. The most important is that specialised therapy and therapeutic family intervention should be explored before considering further-reaching measures, like the removal of a child to alternative care. See chapter 11 of the Children's Act; see also Bosman-Sadie & Corrie (2010) 167.

<sup>376</sup> A “street child” in terms of section 1(1) of the Children's Act means “a child who – (a) because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or (b) because of inadequate care, begs or works on the streets u returns home at night”.

<sup>377</sup> According to Bosman-Sadie & Corrie (2010) 167, this provision is not entirely new in South African law. Apparently a similar provision was included in the Children's Protection Act 25 of 1913. However, the Child Care Act 74 of 1983 did not contain such a provision. See in this regard the case *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others* [2011] 3 All SA 625 (GNP). In this case social workers of the Department of Social Development, together with other officials had been planning a “raid” on the people who have children with them or near them, whilst begging. For a discussion of this case, see section 4.5

- (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;<sup>378</sup>
- (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;<sup>379</sup> or
- (i) is being maltreated, abused,<sup>380</sup> 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."

Because of the potentially far-reaching consequences, it needs to be stressed that a legal determination (by the children's court) is essential before any mandatory care and protection

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below.

<sup>378</sup> "Exploitation', in relation to a child, includes – (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage; (b) sexual exploitation; (c) servitude; (d) forced labour or services; (e) child labour prohibited in terms of section 141; and (f) the removal of body parts (which means the removal of any organ or other body part from a living person in contravention of the National Health Act, 2003 (Act No. 61 of 2003)). See the definitions in section 1(1) of the Children's Act.

<sup>379</sup> "Neglect', in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs", see section 1(1).

<sup>380</sup> "Abuse', in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes – (a) assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused; (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally", see section 1(1) of the Children's Act. See also the discussion in section 4.3.1 above.

measure would come to the fore.<sup>381</sup> One of the nine grounds in section 150(1) need to be proved before the children's court and the latter has to decide on a balance of probabilities.<sup>382</sup> Zaal points out that it is unclear whether a children's court may find a child in need of care and protection on the basis of another ground as proved by the designated social worker who has investigated the matter. It is agreed with Zaal that this should be possible, since the best interests of the child are considered to be of paramount importance.<sup>383</sup> It is submitted that although the input of professionals should be acknowledged, it is nevertheless the court who has to decide on the matter; thereby being guided by what serves the interests of the child best.

Where it comes to an abandoned or orphaned child, the additional requirement is that “he or she should be without any visible means of support”. Both requirements need to be proved in court.<sup>384</sup> It is agreed with Van Heerden that (acute) poverty or being without visible means by itself should not be the point of departure for removal proceedings.<sup>385</sup> Instead of depriving a child and his or her parents from a poverty struck but otherwise loving environment, the focus should rather be on state financed assistance for needy families.<sup>386</sup>

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<sup>381</sup> Zaal & Matthias aver that in this regard the children's court should at least indicate one applicable ground expressly: in Boezaart (ed.) *Child Law in South Africa* (2009) 174.

<sup>382</sup> See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-5.

<sup>383</sup> *Zaal Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (LLD thesis 2008 University of the Witwatersrand) 324.

<sup>384</sup> See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-5. Section 150(1)(a) contains the word “and”, so apart from the fact that the child has been abandoned or orphaned, the second requirement pertains to being without visible means of support. Compare section 150(1)(a) to section 14(4)(AB)(i) of the (repealed) Child Care Act 74 of 1983, which merely referred to “or” - “the child has been abandoned or is without visible means of support”. See Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* (2009) 175.

<sup>385</sup> Poverty is unfortunately a common occurrence across South Africa. Parents and other caregivers are usually not to blame. Moreover, growing up under poor circumstances does not mean the care is per definition inadequate. As has been reiterated in the Preamble of the CRC, it is recognised “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”, see paragraph 6. For a similar provision see paragraph 5 of the Preamble of the African Children's Rights Charter, and paragraph 7 of the Preamble to the Children's Act 38 of 2005. The proposed reservation pertaining to removal cases based on poverty has been dealt with in various publications, among others, Sloth-Nielsen & Van Heerden (1996) 12 *SAJHR* 247; Sloth-Nielsen & Van Heerden (1997) 8 *Stell LR* 261; Van Heerden in *Boberg's Law of Persons and the Family* (1999) 612; also Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* (2009) 175.

<sup>386</sup> This would be in line with the international documents. Article 9 of the CRC stresses the obligation of states parties not to separate a child from his or her parents, except when



Moreover, support for this argument can be found in the *Draft United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children* (2007):

“the family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in the care of his or her parents”.<sup>387</sup>

Moreover,

“financial and material poverty alone, or conditions directly or uniquely imputable to such poverty, should never be a justification for the removal of a child from parental care but should be seen as a signal for the need to provide appropriate support to the family”.<sup>388</sup>

In this regard the grants available in terms of the Social Assistance Act<sup>389</sup> might bring the necessary relief in order to preserve the child's family structure and to prevent the removal of the child from his or her family environment.<sup>390</sup> Furthermore, in various publications it has been indicated that keeping a child in his or her family environment whilst providing financial support, is more cost effective than residential placement for the child.<sup>391</sup> Nevertheless, it is submitted that, whilst financial considerations should not in the least be disregarded, the decisive consideration should be, as a matter of principle, to keep families together,

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competent authorities, subject to judicial review, determine in accordance with applicable law and procedures, that such separation is necessary for the child's best interests. Moreover, Article 9 should be read in conjunction with Article 27(3) of the CRC, which creates an obligation on states parties, in accordance with national conditions and within their means, to assist parents and others responsible for the child, in implementing the right of each child to an adequate standard of living. See the similar provisions in the African Children's Rights Charter, Articles 19(1) and 20(2)(a). See Van Heerden in *Boberg's Law of Persons and the Family* (1999) 612. See sections 2.2.2.6 and 2.2.3.1 above.

<sup>387</sup> See paragraph 3 of the *Draft United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children* of 18 June 2007, as presented by the Government of Brazil.

<sup>388</sup> See paragraph 14 of the *Draft United Nations Guidelines*.

<sup>389</sup> 13 of 2004, section 4 and further.

<sup>390</sup> See also the discussion on prevention and early intervention programmes in section 4.2.1.

<sup>391</sup> See Sloth-Nielsen & Van Heerden 1996 12 *SAJHR* 247; Sloth-Nielsen & Van Heerden 1997 8 *Stell LR* 261; also Van Heerden in *Boberg's Law of Persons and the Family* (1999) 612; Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* (2009) 175.

whenever possible.<sup>392</sup>

Returning to the child who apparently has been abandoned or orphaned and is without any visible means of support in terms of section 150(1)(a), regulation 56 is relevant:<sup>393</sup> In such a situation a designated social worker must advertise in at least one local newspaper circulating in the area where the child has been found, calling upon any person to claim responsibility for the child. In other words, it has to be attempted to trace the parent(s). When at least one month has passed and no person has claimed responsibility for the child and a presiding officer is satisfied that regulation 56 has otherwise been complied with, the child may be found in need of care and protection.

However, when a period of three months has passed since the publication of the advertisement, section 157(3) should be considered.<sup>394</sup> On the basis of the latter provision “a very young child who has been orphaned or abandoned by its parents must be made available for adoption except when this is not in the best interests of the child”. The peremptory language forces the involved professionals, for example the presiding officer and the social worker, to focus on permanency planning,<sup>395</sup> which in principle is commendable,<sup>396</sup> but obviously should be in the best interests of the child concerned. At first sight it seems that on the basis of section 150(1)(d) children addicted to a dependence-producing substance can be provided with treatment by the state. However, this is only as far as they, that is the child and the family, are without any (financial) support to pay themselves for the necessary treatment. Section 150(1)(f) and (h) are exact copies of section 14(4)(AB)(iv) and (v) of the (repealed) Child Care Act:<sup>397</sup> living in or being exposed to circumstances which

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<sup>392</sup> See also paragraph 13 of the *Draft Guidelines for the Appropriate Use and Conditions of Alternative Care for Children, 2007*, which states that “removal of a child from the care of the family should be seen as a measure of last resort and for the shortest possible duration”.

<sup>393</sup> DSD regulations, general regulations regarding children GN R261 of 2010.

<sup>394</sup> DSD regulation 56(2)(b)(ii).

<sup>395</sup> It is submitted that especially in the case of a very young child, adoption should be preferred to foster care. Most importantly, a child should be provided with a safe and healthy environment with positive support, and the children's court should aim at securing stability in a child's life, see section 157. However, where family reunification is not an option, due to the fact that a child is apparently found to be abandoned or orphaned, foster care will not serve its purpose as referred to in section 181 of the Children's Act.

<sup>396</sup> Moreover, this is in line with section 28(1)(b) of the Constitution, which provides that every child has the right to family care or parental care.

<sup>397</sup> 74 of 1983.

may seriously harm that child's physical, mental or social well-being.

Serious harm is indicated, which means that sufficient evidence based on facts is needed in order to make a reasonable case for identifying a child as being in need of care and protection. However, neglect in terms of section 150(1)(h) is not easy to determine, since it needs to be proven that the parent or other care-giver has failed in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs.<sup>398</sup>

Moreover, a child can be identified as a child in need of care and protection, where the child may be at risk if returned to the custody of the parent, guardian or care-giver as there is reason to believe that the child will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child.<sup>399</sup> It is evident that “reason to believe” needs to be substantiated by facts. This (sub) section is linked to section 45 of the Children's Act, on the basis of which the children's court may adjudicate many more matters than under the previous Act,<sup>400</sup> including matters involving the care of, or contact with, a child.<sup>401</sup>

Section 150(1)(i) requires a harmful action or intention on the part of the parent, care-giver of other adult in a child's life, namely, that of maltreatment, abuse<sup>402</sup> or deliberate neglect or degradation. This is taken so seriously by the legislature that a National Child Protection Register is put in place which provides for a record pertaining to the abuse or deliberate neglect inflicted on specific children and the circumstances surrounding the abuse or deliberate neglect.<sup>403</sup> Although the eight other grounds are mainly child-centred, the

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<sup>398</sup> See the definition on “neglect” in section 1(1).

<sup>399</sup> Section 150(1)(g).

<sup>400</sup> The repealed Child Care Act 74 of 1983. On the basis of the latter Act the children's court had merely the limited powers in terms of section 15. See for a more detailed discussion section 4.5 below.

<sup>401</sup> It should be noted that the jurisdiction of the children's court is subject to section 1(4) of the Children's Act.

<sup>402</sup> For the definition of “abuse” in terms of the Children's Act, see the definition section 1(1).

<sup>403</sup> See section 113 and further of the Children's Act, which provides for Part A of the Register. The purpose of Part B of the Register is to have a record of persons who are unsuitable to work with children and to use the information in the Register in order to protect children in

grounds under discussion zoom in on the inadequacy of the parent, guardian or other care-giver. Matthias and Zaal recommend that stigmatisation should be avoided at all costs, since this will make the parties, for example the child and the parent or care-giver concerned, drift apart. It will usually indeed be in the child's best interests that the "faulty" parent or care-giver does stay involved and eventually, with the necessary support where needed, will take responsibility again.<sup>404 405</sup>

From the fact that section 150 generally is formulated in the present tense, it can be derived that the present situation in which the child finds himself or herself should be decisive. In other words, a child cannot (too easily) be found in need of care and protection where it is feared or expected that in future any of these circumstances might arise, or alternatively, on the basis of what possibly has happened in the past but where the situation has sufficiently improved and thus the ground for intervention has fallen away.<sup>406</sup> Any of the aforementioned nine grounds for finding a child to be in need of care and protection can potentially give rise to far-reaching decisions pertaining to the child and his or her family. Due to the possible impact of these kind of decisions on the lives of all the parties concerned, caution is required for all the professionals involved.<sup>407</sup> It is agreed that imposing a care and protection order,

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general against abuse from these persons, see section 118 and further.

<sup>404</sup> It will obviously depend on the facts and circumstances of each case, whether a family services order or family reunification services will be feasible. See also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-6.

<sup>405</sup> See also section 4.3.1 and further, in which Article 19 of the CRC is discussed in conjunction with *General Comment No. 13* (CRC/C/GC/13). It is submitted that the issue of domestic discipline of children in South Africa needs to be addressed as a matter of urgency. It is hoped for that legislation will be enacted, similar to clause 139 of the Children's Amendment Bill [B19F-2006 (Reprint)]. It is important to provide for statutory limitations to corporal punishment or punishment in a cruel, inhuman or degrading way for persons having care of a child. Moreover, serious consequences to the transgression of these limitations should be provided for which might be instrumental in realising a decrease in family violence in South Africa. See also section 4.2.1.

<sup>406</sup> See Bosman-Sadie & Corrie (2010) 166. Matthias & Zaal have indicated that the grounds (a), (b), (c), (d), (e), (h) and (i) will be easier to apply in practice, since the proof will be based on past or present circumstances. However, grounds (f) and (g), refer to the phrase "may", in which case the social worker has to convince the presiding officer on what possibly is going to happen to the child concerned, in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-7. Compare to the situation in the Netherlands, where the court will only make a child protection order where the grounds provided in the Civil Code are complied with at the very moment of the court proceedings. If not, the court will turn down the request for a child care protection measure. For a more detailed discussion, see section 4.3.1.2 and further.

<sup>407</sup> Due to the possible increase of the workload, more designated social workers are needed. Section 1(1) of the Children's Act defines a designated social worker as follows: "a social

and thus compelling people to compulsory care and protection services provided by the state, should only come to the fore as a measure of last resort.<sup>408</sup> Section 150(2)<sup>409</sup> implies that a child who is a victim of child labour<sup>410</sup> or is a child in a child-headed household<sup>411</sup> might meet the criteria of any of the nine grounds in section 150(1). In order to have this established, the case needs to be referred to a designated social worker for investigation. Where after the investigation it becomes apparent that the child would meet any of the circumstances as listed in section 150(1), the matter should be referred to the local children's court. However, if after investigation a social worker finds that the child concerned is *not*<sup>412</sup> a child in need of care and protection in terms of subsection (1), the social worker must, where necessary, take measures to assist the child.<sup>413</sup> In any event, the social worker is required to report to the children's court, even in the last-mentioned situation. The social worker must indicate the reasons for the finding in the report, which must be submitted to the

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worker in the service of (a) the Department or a provincial Department of Social Development; (b) a designated child protection organisation; or (c) a municipality". On the basis of the latter section, local governments can appoint social workers. See Bosman-Sadie & Corrie (2010) 167.

<sup>408</sup> Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-4 and 9-23. See also Van Heerden *Boberg's Law of Persons and the Family* (1999) 612.

<sup>409</sup> Section 150(2) reads as follows: "[A] child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker:

- (a) a child who is a victim of child labour; and
- (b) a child in a child-headed household."

<sup>410</sup> Which means that the child is a victim because the work by the child (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development. See the definition of "child labour" in section 1(1) of the Children's Act.

<sup>411</sup> The definition section 1(1) refers to section 137 in which it is determined that a household may be recognised as a child-headed household if the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household, where there is no adult family member available to provide care for the children and where a child over the age of 16 has assumed the role of care-giver in respect of the children in the household.

<sup>412</sup> Own emphasis.

<sup>413</sup> Note the peremptory language. It is mandatory that the social worker should investigate and then take the necessary measures to assist the child. These measures include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation; see section 150(3). Matthias & Zaal point out that although in the latter situation there will be no formal finding by the children's court, these children and their families are nevertheless subject to welfare services (where necessary): in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-7.

children's court for review.<sup>414</sup>

Where there is another child (or children) in the same family home or on the same premises as an already removed child, this might constitute a potential risk. If under these circumstances, there are reasonable grounds for believing that this child or these children are in need of care and protection as well, they may be referred to a designated social worker for an investigation in terms of section 155(2).<sup>415</sup>

Finally, section 110(2) allows any person who, on reasonable grounds, believes that a child is in need of care and protection to report that belief to the provincial Department of Social Development, a designated child protection organisation, or a police official.<sup>416</sup> A police official who becomes aware of a child in need of care and protection must ensure the safety and well-being of the child and notify the provincial Department of Social Development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.<sup>417</sup>

The duties of the provincial Department of Social Development and a designated child protection organisation in terms of section 110(5) overlap. It is clear that the safety and well-being of the child, where at risk, should be ensured at all times. A report pertaining to the belief of the child being in need of care and protection should be assessed and investigated on its truthfulness, and if the report is substantiated, without delay initiate proceedings.<sup>418</sup> After an investigation in terms of section 110(5), the provincial Department of Social Development or child protection organisation have the discretion to take measures to assist

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<sup>414</sup> See section 155(4), which deals with the process of decision-making by the children's court on the question whether or not a child is in need of care and protection.

<sup>415</sup> See section 154 of the Children's Act. The person who has to act in this regard, is the person under whose care the child placed in temporary safe care is or the provincial head of social development: *Bosman-Sadie & Corrie* (2010) 175. For a detailed discussion of section 152 see section 4.5.

<sup>416</sup> Such a person must substantiate that conclusion or belief to the provincial Department of Social Development, a designated child protection organisation or a police official, see section 110(3)(a).

<sup>417</sup> Section 110(4).

<sup>418</sup> See section 110(5)(a)-(e). Any particulars of the report need to be submitted to the Director-General for inclusion in Part A of the National Protection Register. See also the discussion in section 4.3.1.1.1.

the child,<sup>419</sup> to request a police official to remove the alleged offender in order to secure the safety and well-being of the child concerned,<sup>420</sup> and, where necessary, provide for the removal of the child in terms of section 151, 152 or 155.<sup>421</sup>

#### **4.3.1.1.1 Reporting duty in the case of abuse and deliberate neglect in South Africa**

The Children's Amendment Act 41 of 2007<sup>422</sup> has added an important and indispensable provision to the Children's Act; namely the duty to report abuse and deliberate neglect of a child. This duty rests upon people in specifically stipulated professions. Section 110 of the Children's Act reads as follows:

“(1) Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer at a partial care facility, drop-in centre or child and youth care centre *who on reasonable grounds concludes*<sup>423</sup> that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, *must report*<sup>424</sup> that conclusion in the prescribed form to a designated child protection organisation, the provincial Department of Social Development or a police official”.

Compared with the former child care legislation<sup>425</sup> this is a major improvement, since the

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<sup>419</sup> Such assistance includes counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation, see section 110(7)(a).

<sup>420</sup> Section 110(7)(b) in conjunction with section 153.

<sup>421</sup> Section 110(7)(c).

<sup>422</sup> Which commenced on 1 April 2010, Proclamation R12/GG 33076. Herewith section 4 of the Prevention of Family Violence Act 133/1993 was repealed.

<sup>423</sup> Own emphasis.

<sup>424</sup> Own emphasis.

<sup>425</sup> The Child Care Act 74 of 1983 also contained a provision for mandatory reporting, namely section 42. With the Child Care Amendment Act 96 of 1996 the pool of professional persons was extended to include the following: “Notwithstanding the provisions of any other law (Prevention of Family Violence Act 133 of 1993, own addition), every dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who examines, attends or deals with any child in

categories of professionals who are now under a statutory duty to report these matters have been increased drastically. Section 110(1) imposes the reporting duty on the professional “*who on reasonable grounds concludes*<sup>426</sup> that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected”.

Two issues immediately come to the fore. Firstly, what exactly does the phrase “on reasonable grounds” entail? This is a so-called “open norm”, which allows for various interpretations. In this respect DSD regulation 35 is of importance. This regulation contains a “broad risk assessment framework” which provides, among others, guidelines for the identification of children who are being abused or deliberately neglected and the assessment of risk factors to support a conclusion of abuse or neglect on reasonable grounds, as referred to in section 110.<sup>427</sup> It is submitted that the yardstick to come to such a serious conclusion should be that of a *bona fide* professional and supported by objective facts.

The second issue concerns the limitation to visible signs of abuse or neglect. It is regrettable that the reporting duty is limited to abuse causing physical injury, sexual abuse and deliberate neglect, since there are many other aspects to abuse and neglect.<sup>428</sup> However, it is evident that the physical proof should be objectively conclusive or at least convincing and meeting the criteria, in order to justify action. There should be one basic rule: where there is an objective suspicion of abuse of whatever kind, this should be properly

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circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him or her for the purposes of this section, of those circumstances.” Moreover, section 4 of the Prevention of Family Violence Act 133 of 1993, as mentioned above, also provided for a statutory obligation to report that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances (a) to a police official; or (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983). The possibility to report to the commissioner of child welfare or any social worker has been replaced by the new provision, DSD regulation 33 and Forms 22 and 23 pertaining to the Children's Act. Both sections 42 of the Child Care Act 74 of 1983 and section 4 of the Prevention of Family Violence Act 133 of 1993 have been repealed since the commencement of remaining sections of the Children's Act, 2005 on 1 April 2010 by Proclamation No. 33076.

<sup>426</sup> Own emphasis.

<sup>427</sup> See also Kassan & Mahery in Boezaart (ed.) (2009) 222.

<sup>428</sup> See the definitions of “abuse” and “neglect” in section 1 of the Children's Act, as discussed in the section 4.3.1.1.



investigated. The abuse has to be reported to a designated child protection organisation,<sup>429</sup> the provincial Department of Social Development, or a police official. DSD regulation 33(1) states that a report by a professional in terms of section 110(1) of the Children's Act must be made to the relevant authority in a form which substantially corresponds with Form 22.<sup>430</sup> The professional is required to complete the form to the best of his or her ability by including in the form such particulars as are available to him or her.

It is submitted that awareness programmes should be put in place to train professionals on the signs of child abuse and neglect and how to deal with these matters accordingly; that is, in line with the Children's Act, its regulations and Forms, in order to provide adequate help and support for these children as soon as possible. The provincial Department of Social Development, the designated child protection organisation or police official to whom a report has been made, must submit the particulars of the abuse to the Director-General in

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<sup>429</sup> The definition in section 1(1) refers to an organisation designated in terms of section 107 to perform designated child protection services. Section 105(5) provides that these "designated child protection services include -

- (a) services aimed at supporting -
  - (i) the proceedings of children's courts; and
  - (ii) the implementation of court orders.
- (b) services relating to
  - (i) prevention services;
  - (ii) early intervention services;
  - (iii) the reunification of children in alternative care with their families;
  - (iv) the integration of children into alternative care arrangements;
  - (v) the placement of children in alternative care; and
  - (vi) the adoption of children, including inter-country adoptions.
- (c) the carrying out of investigations and the making of assessments, in cases of suspected abuse, neglect or abandonment of children;
- (d) intervention and removal of children in appropriate cases;
- (e) the drawing up of individual development plans and permanency plans for children removed, or at risk of being removed, from their family; and
- (f) any other social work service as may be prescribed".

<sup>430</sup> See Form 22 of the Consolidated Forms in terms of the Regulations under the Children's Act, 2005 and the Children's Amendment Act, 2007. The document consists of four-and-a-half pages which have to be completed by the professional concerned.

accordance with Form 23, for inclusion in Part A of the National Child Protection Register.<sup>431</sup>

Apart from the range of professionals who are obliged to report, it is important to note that *any other person*<sup>432</sup> who on reasonable grounds believes that a child is in need of care and protection may report that belief.<sup>433</sup> For both professionals and other persons, section 110(3) is of specific importance. Upon reporting the aforementioned conclusion or belief, the person concerned must substantiate that conclusion or belief to the provincial Department of Social Development, a designated child protection organisation or police official. The person who makes a report in good faith is not liable to civil action on the basis of the report.<sup>434</sup> Section 110 also provides for the steps to be taken when a report has been made. In the case of a report to a police official, or where such person becomes aware of a child in need of care and protection, he or she must ensure the safety and well-being of the child concerned if this is at risk and within 24 hours notify the provincial department or a designated child protection organisation of the report and any steps that have been taken with regard to the child concerned.<sup>435</sup> Furthermore, a police official to whom a report has been made, may, if he or she is satisfied that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, issue a written notice to this effect to the alleged offender. This written notice calls upon the alleged offender, who is the parent or other care-giver, to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing, specified in the notice.<sup>436</sup>

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<sup>431</sup> See chapter 7 of the Children's Act, on the protection of children, Part 2, which provides for the National Child Protection Register.

<sup>432</sup> Own emphasis.

<sup>433</sup> See section 110(2) of the Children's Act. In other words, any person of the public who has reasonable grounds to believe that a child is in need of care and protection may report this belief, to the provincial Department of Social Development, a designated child protection organisation or police official. See also Kassan & Mahery in Boezaart (ed.) (2009) 222.

<sup>434</sup> This applies irrespective in which capacity or form the person concerned has made the report. See Bosman-Sadie & Corrie (2010) 122. Compare with section 42(6) of the Child Care Act 74 of 1983 which contained a similar provision applicable to the limited professionals listed in that section.

<sup>435</sup> Section 110(4) and (6). The safety of the child concerned is the first priority. See also Bosman-Sadie & Corrie (2010) 122.

<sup>436</sup> See section 153 of the Children's Act. The written notice to the alleged offender needs to contain all the information as stipulated in section 153(1): Bosman-Sadie & Corrie (2010) 174.

Also, where a report has been received by the provincial Department of Social Development or designated child protection organisation, the safety and well-being of the child should be firstly secured.<sup>437</sup> Moreover, an initial assessment of the report<sup>438</sup> must be made and the truthfulness of the report or cause should be investigated.<sup>439</sup> If the report is substantiated by such investigation, proceedings should be initiated without delay, in terms of the Children's Act for the protection of the child. The provincial head of social development must monitor the progress of all matters reported to it. After the investigation by the provincial Department of Social Development or designated child protection organisation in terms of section 110(5), the following possible decisions should be considered:

- “(a) [M]easures to be taken to assist the child. This could include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.
  
- (b) [I]f the social worker is satisfied that it is in the best interests of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place of residence<sup>440</sup> would secure the

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<sup>437</sup> Section 110(5).

<sup>438</sup> DSD regulation 35(4) and (5) contain details pertaining to the assessment and evaluation of the child's circumstances.

<sup>439</sup> Section 110(5), unless the report is frivolous or obviously unfounded.

<sup>440</sup> Compare with the Netherlands, where on 1 January 2009 the Act “Wet tijdelijk huisverbod” took effect. In terms of this Act, a person who constitutes serious and immediate danger to the safety of one or more persons with whom he is sharing the family home, may be ordered to leave the home at once and is prohibited from entering the home (hereafter referred to as “restraining order”). The duration of the order is ten days, which may be extended. The aim of this (short) period is to involve social work services for the necessary assistance. After this period has lapsed, ideally speaking the family should reunite and move on with the necessary help and support. It is interesting to note that such a prohibition may be imposed by the mayor of a town/city or an assistant public prosecutor. In the case of child abuse or a suspicion thereof, the Bureau for Youth Care will get involved. On appeal the Judicial Division of the Council of State (de Raad van State) recently (09-02-2012) had to decide on the legitimacy of two restraining orders, which were imposed on a man by the mayor of Veere (in the Netherlands) as a result of the reporting of a domestic quarrel. The man averred that the police, the public prosecutor and mayor had acted without proper investigation. It was held that in future a thorough investigation is needed and that the right to hear and be heard should be applied prior to the imposition of a restraining order. In addition, it was held that such an order is a far-reaching sanction which is only justified when the facts are unambiguous and there is a fear of re-offending. See <http://www.huiselijkgeweld.nl/dossiers/huisverbod/nieuws/2012/090>, accessed on 24-02-2012.

safety and well-being of the child, request a police official<sup>441</sup> to take the steps referred to in section 153<sup>442</sup> and in the prescribed manner; or

(c) [D]eal with the child in the manner contemplated in sections 151,<sup>443</sup> 152<sup>444</sup> or 155.”<sup>445</sup>

In other words, on the basis of the above, there is discretion to decide what would serve the child's interests best under the given circumstances. It is submitted that the social worker should firstly consider the least intrusive option; namely any preventative measures which would support and, as important if not more important, protect the child.

To have the alleged perpetrator removed from the family home, instead of the child, is a relatively new development.<sup>446</sup> Section 110(7)(b) refers to the removal of the alleged offender in order “to secure the safety and well-being of the child”.<sup>447</sup> This requires a risk assessment<sup>448</sup> and a proper consideration of the interests of all persons involved.<sup>449</sup> It is clear that this measure is less drastic for the child than the child's own removal from the family home.

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<sup>441</sup> A request for the removal of an alleged offender from his or her home or place of residence should be done in the prescribed manner. DSD regulation 34 prescribed that such a request must contain particulars regarding the alleged offender and must be done in writing, in accordance with Form 24.

<sup>442</sup> Section 153 contains detailed information pertaining to a written notice to an alleged offender, including the particulars of the alleged offender, and aspects relating to evidence and procedure in the children's court. It should be noted that the misuse of a power by a police official in this regard, constitutes grounds for disciplinary proceedings against such police official, see section 153(7).

<sup>443</sup> Removal of a child to temporary safe care on the basis of a court order. See section 4.5.

<sup>444</sup> Removal of a child to temporary safe care without a court order. See also section 4.5.

<sup>445</sup> Which deals with the decision of the children's court whether or not a child is in need of care and protection and the children's court processes. See section 4.3 and further.

<sup>446</sup> See also a similar trend in the Netherlands.

<sup>447</sup> See also section 153 of the Children's Act, which deals with the contents of a written notice to an alleged offender. It also contains relevant procedural requirements.

<sup>448</sup> See DSD regulation 35.

<sup>449</sup> Perhaps superfluous to mention, but the child's best interests should always prevail, as rightfully dictated in section 28(2) of the Constitution, and sections 7 and 9 of the Children's Act. This is in line with Article 3 of the CRC and Article 4 of the African Children's Rights Charter. For a more detailed discussion, see section 2.2.1.4 and 3.1.3.

It is submitted that the removal of the adult will bring home a message to the parents or care-taker of the child concerned that something has to change dramatically, because otherwise further reaching intervention will (possibly) become inevitable. During this period of “time-out”, the child and other family members can recuperate and family support services can be initiated or increased.<sup>450</sup> Furthermore, the social worker may open a children's court enquiry, in terms of sections 47, 151, 152 or 154 of the Children's Act.<sup>451 452</sup>

As has been indicated by Kassan and Mahery, the statutory obligation for professionals to report will have an effect on the right to confidentiality of children regarding health care.<sup>453</sup> The aforementioned section 110 affects the doctor-(child) patient principle of confidentiality. Where normally the disclosure of health information would be prohibited, thereby constituting a breach of confidentiality, this has been turned around into a enforceable legal obligation for professionals to report. The legal duty to report abuse and deliberate neglect is considered so important that any failure to report such situation will lead to criminal liability, in terms of section 305(1)(c).<sup>454</sup> In other words, the so-called “doctor-patient privilege” cannot be maintained in the case of reasonable suspicion of abuse or deliberate neglect.

On the basis of the imposition of this statutory duty for professionals, combined with an effective enforcement mechanism, it can be concluded that South Africa at this point, in principle,<sup>455</sup> meets its obligation to protect children from abuse and neglect, in terms of

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<sup>450</sup> It is submitted that during this period it should also be investigated whether or not there are sufficient grounds for the possible (criminal) prosecution of the alleged offender.

<sup>451</sup> These sections will be discussed in section 4.5.

<sup>452</sup> See also Bosman-Sadie & Corrie (2010) 122.

<sup>453</sup> See Kassan & Mahery in Boezaart (ed.) (2009) 222-223. In *Tshabalala-Msimang and Another v Makhanya and Others* 2008 (6) SA 102 (W), the court held that private information relating to the health status, treatment is worth protecting as an aspect of human autonomy and dignity. Nevertheless, these rights can be limited. For example, section 134(3), which indicates the right of the child to confidentiality in obtaining condoms, contraceptives or contraceptive advice. However, this right is limited by the statutory obligation to report abuse.

<sup>454</sup> Section 305 of the Children's Act provides a comprehensive list of diverge actions, contravening legal provisions as mentioned in the Children's Act. If found guilty, the offender will be liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment. See section 305(6). It should be kept in mind that, where a person is convicted more than once, he or she will be liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment, see subsection (7).

<sup>455</sup> The legislative framework is impressive. However, it will depend on the implementation how effectively the well-being of children will be protected. It is submitted that all professionals dealing with children should receive further training on the symptoms of child abuse and

Article 19 of the CRC.<sup>456</sup>

#### 4.3.1.2 The Dutch equivalent of a child in need of care and protection

In the discussion on the developments in Dutch child law and the law pertaining to youth care in the past decades, Doek has indicated that the terminology in the Netherlands has changed from “*kinderrecht*” or “child law” to “*jeugdrecht*”, meaning “youth law” (or juvenile law).<sup>457</sup> The youth law relevant to the topic of this thesis<sup>458</sup> is mainly contained in the following Dutch legislation: the Civil Code, Book 1, the Civil Code of Procedure<sup>459</sup> and the Act on Youth Care, which came into operation on 1 January 2005.<sup>460</sup>

In paragraph 4.1.2 it was outlined under what circumstances a parent, parents jointly or a parent with the partner have authority pertaining the child(ren). Moreover, it was discussed what parental authority entails; namely, the duty and the right of the parent to care for the child and to raise the child.<sup>461</sup> The latter includes the care and the responsibility for the psychological and physical well-being and the safety of the child and to stimulate the

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neglect and obviously on the present legal system, which came into operation fairly recently (1 July 2007 and 1 April 2010).

<sup>456</sup> See also *General Comment* No. 13 (2011), CRC/C/GC/13. The same obligation for South Africa exists in terms of Article 16 of the African Children’s Rights Charter. See also section 2.2.2.5.

<sup>457</sup> Doek & Vlaardingerbroek (2009) 25; also Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) 1.1-1-6. In this thesis the phrases “child” and “child law” are meant to include “youth” and “youth law” and “juvenile” and “juvenile law”. In other words, it refers to any young person below the age of eighteen, unless it is stipulated otherwise. Pertaining to South Africa it should be noted that the phrases “juvenile” and “juvenile law” have not been incorporated in the Children’s Act 38 of 2005 and Child Justice Act 75 of 2008, in order to avoid stigmatisation.

<sup>458</sup> The topic of this thesis is “the placement of children in need of care and protection: a comparative study between South African and Dutch law in the light of international standards”.

<sup>459</sup> In Dutch: *Wetboek van Burgerlijke Rechtsvordering*.

<sup>460</sup> The latter Act is of a more recent date, namely of 22 April 2004 and amended by Stb. 2005, 666.

<sup>461</sup> See Article 1:247 of the Civil Code. The parents are under the obligation to care for the child and to raise the child and therefore the phrase “duty” is mentioned before the phrase “right” of the parent. However, it is clear that the “right to parental authority” is given in the best interests of the child and is connected to the duty of parents to serve the child’s best interests. See Van der Linden *et al. Jeugd en Recht* (2001) 23; De Boer *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht – Personen- en familierecht* (2010) 689.

development of his personality.<sup>462</sup> With regard to the care and upbringing of the child, parents have a statutory obligation to refrain from any psychological or physical force or any other humiliating treatment.<sup>463</sup> The freedom of parents to raise their children according to their own discretion and convictions arises from the right to respect for this private and family life, as referred to in Article 8 of the European Convention.<sup>464</sup> However, this freedom is not unlimited. Where the exercise of authority would result in any danger or damage pertaining to the psychological and/or physical development of the child, it is possible to interfere with the authority of parents.<sup>465</sup>

With regard to the protection of children, two Acts are particularly important in the Netherlands. Firstly, the Civil Code, Book 1, providing for, *inter alia*, the child protection measures. Secondly, the Act on the Youth Care,<sup>466</sup> which took effect on 1 January 2005 and which has brought important changes in connection with the preparation and execution of child protection orders. In this regard two agencies come to the fore; namely the Bureau for Youth Care,<sup>467</sup> and the *Council for Child Protection*.<sup>468</sup> The Bureau for Youth Care plays a central role with regard to providing the necessary support and assistance to children and their families when it comes to (anticipated) problems pertaining to the care and upbringing of children.<sup>469</sup> Where a child's development is threatened from a mental and/or physical point of view, various persons, amongst others the client him or herself,<sup>470</sup> can approach the Bureau for Youth Care in order to get the required support or assistance.

Where a child grows up under such circumstances that his moral or psychological interests

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<sup>462</sup> See Article 1:247 of the Civil Code.

<sup>463</sup> This statutory obligation is the result of an amendment of Book 1 of the Civil Code in order to contribute to the prevention of violence pertaining to the care and upbringing of children: *Stb.* 2007, 145. See Doek & Vlaardingerbroek (2009) 131.

<sup>464</sup> The Netherlands is a High Contracting Party to the European Convention, see section 2.1.

<sup>465</sup> For a detailed discussion, see section 4.5 below.

<sup>466</sup> In Dutch called: *Wet op de Jeugdzorg* (22 April 2004).

<sup>467</sup> In Dutch: *Bureau Jeugdzorg*.

<sup>468</sup> In Dutch: *Raad voor de Kinderbescherming*. Chapter 10 of the Implementation Decree to the Act on the Youth Care deals with the co-operation between the two.

<sup>469</sup> See Article 1 of the Act on the Youth Care.

<sup>470</sup> The Act on the Youth Care of 2004, defines "client" as: a juvenile, his parents or stepparent or others who are responsible for the care and upbringing of the juvenile concerned.

or his health are seriously threatened, the child may be in need of care and protection. Moreover, where other measures to avert this threat have failed, or expectedly will fail, these circumstances might lead to state intervention:<sup>471</sup> a children's court may impose a compulsory child protection measure, called a supervision order.<sup>472</sup> This is the least intrusive of the protection measures pertaining to children in the Netherlands. It should be pointed out that it is merely the child who is placed under supervision, not the family.<sup>473</sup>

It will nevertheless in effect limit the authority of the parent(s) and/or the partner of the parent, since they have to follow the instructions of a social worker.<sup>474</sup> The phrase in Article 1:254 "under such circumstances that his moral or psychological interests or his health is seriously threatened" is a so-called "open norm". Such a norm allows for various

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<sup>471</sup> This is in line with the obligation arising from Article 19 of the CRC, on which basis the Netherlands as one of the state parties, is obliged to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who cares for the child. For a more detailed discussion, see section 2.2.2.5 above.

<sup>472</sup> In Dutch: *een ondertoezichtstelling*, see Article 1:254 Civil Code.

<sup>473</sup> The interests of the child concerned are the focus point in care and protection proceedings. With regard to each individual child the requirements as stipulated in Article 1:254 of the Civil Code need to be complied with in order to justify such an order. See, for example, LJN:BL7043, *Hoge Raad*, 21-05-2010, Van 't Hek in "Uitgesproken" 2010 (5) *Perspectief* 30. In this case the *Hoge Raad* held, among others, that with regard to each individual child the legislative criteria have to be met; also LJN:BP5982, *Rechtbank Haarlem*, 15-02-11, in which case the court was not convinced that the moral or psychological interests of the children was under serious threat and therefore found that the requested supervision order to solve contact problems between the parents could not be imposed. See Van 't Hek "Uitgesproken" 2011 (3) *Het Kind Eerst – Vakblad voor jeugdzorg, kinderscherming en pleegzorg* 30.

<sup>474</sup> It is obvious that in child protection cases the relationship between parties involved cannot be typified as equal but rather as an unequal relationship, namely the state *vis-à-vis* the family/child, in which the first-mentioned is in a stronger position. Where a family gets involved with child protection agencies, it is agreed with Van Dijk, that professionals should treat the affected parties with the necessary respect, although the failure in the performance of the parental responsibilities, or worse, the maltreatment or neglect should be disapproved of, or in the latter circumstances, be rejected. He comes to the conclusion that non-respect towards parents contribute to the risk of further maltreatment. Via proper communication with the parties involved in which the problems are addressed, parties should get a chance to learn from their mistakes. In his Article he makes the following analogy: where a professional makes a mistake, he can count on the necessary help and support. He will possibly even gain respect, where he acknowledges the mistake and learns from it in order to avoid repetition. Should this not also apply to the average parent, who almost *per definition* is not even a professional? See Van Dijk "Mishandelende en verwaarlozende ouders hebben recht op ons respect" (2010) *Perspectief* 20-21. It is submitted that especially with regard to supervision orders the family members should be encouraged and empowered to improve on the relationship with the child concerned, since this is one of the main objectives of the child protection order. See also Asser/De Boer *Personen – en Familierecht* (2010) 752.



interpretations and flexibility, on the basis of which it becomes easier to interfere. It is agreed with Bruning that, although open norms in child care and protection legislation are useful in order to interfere when indeed necessary, there are nevertheless certain consequences attached: firstly, the risk of “false negatives”, meaning that mistakenly no intervention takes place, where this was actually required, which will be minimised.

Secondly, as important and perhaps more important, is the risk of “false positives”; meaning that mistakenly intervention takes place, where this is not justified.<sup>475</sup> The latter will be increased by these open norms. This contributes to a decrease in legal certainty for families, because of the risk that care and protection measures are imposed in cases where this is not strictly required.<sup>476</sup> Therefore, as a rule, interference in the autonomy of parents can only be justified where this is strictly necessary.<sup>477</sup> Moreover, the applicant initiating care and protection proceedings has to prove that other (voluntary) measures to avert the threat pertaining to the moral or psychological interests or health of the child have failed, or expectedly will fail, otherwise the child protection measure will not be legitimate. Asser/De Boer typifies the supervision order as the mother-measure (main measure), since other measures can follow depending on the circumstances, like the child's removal from the family environment.<sup>478</sup> An overview of the child protection orders which the children's court can make will be discussed in more detail in paragraph 4.5, whereas chapter 5 focuses specifically on matters relating to the removal from the family environment, resulting in the placement of the child.

#### **4.3.1.2.1 Reporting duty in the case of abuse and neglect in the Netherlands**

Concerns and suspicions pertaining to the abuse of children can be reported to the so-called

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<sup>475</sup> See Bruning *Rechtvaardiging van Kinderbescherming* (2001) 188. Also Kanters *et al.* “*Ingrijpen of laten varen?*” (2010) *Perspectief* 18.

<sup>476</sup> The so-called “false positives”. Bruning recommends to limit the risks for both false negatives and false positives, see (2001) 188-189.

<sup>477</sup> The principle of subsidiarity, see Bruning *Rechtvaardiging van Kinderbescherming* (2001) 179.

<sup>478</sup> The latter child protection measure can only be imposed in terms of Article 1: 261. For a detailed discussion, see chapter 5. See also Asser/De Boer *Personen – en Familierecht* (2010) 748 and further.

AMK,<sup>479</sup> which is an Advice and Report Centre for Child Abuse in the Netherlands, and forms part of the Bureau for Youth Care.<sup>480</sup> However, the AMK is a separate unit within the Bureau:<sup>481</sup> child abuse or a suspicion thereof can be reported at a specific country-wide telephone number.<sup>482</sup> As the name of the organisation indicates, the duties of the AMK are mainly two-fold: on the one hand it provides advice to (reporting) professionals on how to deal with (a suspicion of) child abuse,<sup>483</sup> and, on the other hand, after having received an (anonymous)<sup>484</sup> report of (alleged) child abuse, it can conduct an investigation in order to establish whether or not child abuse has taken place.<sup>485</sup>

It is important to note that a professional, who is normally not permitted to disclose any information on the basis of a legal provision or due to privilege or confidentiality, can provide the AMK with the necessary information. However, this should be done where this is necessary in order to end the situation of child abuse, or to investigate a reasonable suspicion of child abuse.<sup>486</sup> In this respect Meuwise *et al.* refer to a “reporting duty” for

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<sup>479</sup> In Dutch: *Advies en Meldpunt Kindermishandeling*, which is part of the Bureau for Youth Care (since 1 January 2005).

<sup>480</sup> See Article 11 of the Act on the Youth Care and Articles 50-55 of the Implementation Decree to the Act on the Youth Care which deals specifically with the AMK. In Dutch: *Advies en Meldpunt Kindermishandeling (AMK)*.

<sup>481</sup> In Article 51 of the Implementation Decree provision is made for a separation of duties pertaining to child abuse; an employee working for an AMK will not be burdened with any of the other duties within the Bureau for Youth Care, pertaining to a case of child abuse in which this employee was involved.

<sup>482</sup> Article 50(2) of the Implementation Decree of the Act on the Youth Care.

<sup>483</sup> Doek and Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 302. In addition to this, Article 53(3) of the Implementation Decree indicates that a (professional) person who is bound by law or his/her profession not to disclose information, can nevertheless, without the consent of the affected person, give information to the Bureau for Youth Care, in case this is necessary in order to stop a case of child abuse or to investigate where there is a reasonable suspicion of child abuse.

<sup>484</sup> Article 55(3) of the Implementation Decree. Information of persons of the public who report (alleged) child abuse to the AMK will remain confidential, unless permission is given by the persons concerned. See Article 55(3)(b) of the Implementation Decree. Professionals can also remain anonymous, when disclosure of the information would cause a risk for the professional or the child, or where it is expected that disclosure would result in a breach of confidence with the family. See Article 55(3)(a), but also see below on Article 53(3) of the Act on the Youth Care.

<sup>485</sup> Article 53 defines “interested parties” as: “the person who requests any advice or reports, the person that will be affected by the report and the person from whom information will be obtained pertaining to a case of possible child abuse”. At the first contact, information will be given to these categories of people pertaining to the complete procedure.

<sup>486</sup> Article 53(3) of the Act on the Youth Care. Under these circumstances the information can be

professionals in the field of youth care and a “reporting right” pertaining to professionals who are in principle bound by privilege.<sup>487</sup> After a case of child abuse (or a suspicion thereof) has been reported,<sup>488</sup> the AMK has to decide within five days whether the case will be investigated.<sup>489</sup> Any decision-making regarding to a report of (alleged) child abuse will take place by at least two staff members of an AMK.<sup>490</sup>

In this respect it should be noted that at each AMK there will be a medical doctor involved who is specialised in the field of child abuse.<sup>491</sup> Within 13 weeks a decision needs to be made concerning any further steps to be taken,<sup>492</sup> for example, to establish the need for any form of child care services resulting in a directive,<sup>493</sup> or to request the *Council for Child Protection* to investigate the need for a child protection order.<sup>494</sup>

Especially where there is an urgent and serious threatening situation for a child, the Bureau for Youth Care has to forthwith inform the Council for Child Protection of the fact that a child protection measure is required.<sup>495</sup> Immediately thereafter, the Bureau for Youth Care will inform the child and its parents about the fact that the Council for Child Protection has been

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provided without the consent of the person involved. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 165.

<sup>487</sup> See Article 21 and 53(3) of the Act on the Youth Care. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 165.

<sup>488</sup> Liefwaard & Punselie have indicated that the period between the moment (alleged) child abuse has been reported and the commencement of an investigation was approximately 1,6 weeks in 2008. The duration of an investigation took circa 11,5 weeks, see “*Actualiteiten*” in *FJR* (2009), 93 p 244 (source: Nieuwsbericht MOgroep Jeugdzorg 16 July 2009).

<sup>489</sup> Article 54(1) of the Implementation Decree.

<sup>490</sup> Article 54(3) of the Implementation Decree.

<sup>491</sup> Article 52 of the Implementation Decree.

<sup>492</sup> Article 54(2).

<sup>493</sup> This directive (in Dutch: “*indicatie besluit*”) involves a diagnosis of the problem(s), indicating the kind of care or assistance which is required, its purpose and its duration. For example, non-residential care on a voluntary basis, the reasons and purpose combined with the recommended duration.

<sup>494</sup> In the column “*Actualiteiten*” it was reported by Liefwaard & Punselie that the number of investigations by the AMK (*Advies en Meldpunt Kindermishandeling*).has decreased with 5% in 2008 (resulting in circa 16 000 investigations). It should be noted that where child abuse is merely alleged but not sufficiently substantiated, the matter will be dealt with by the Bureau Youth Care. However, the number of reports of a suspicion of child abuse has increased in 2008 (resulting in circa 53 000), see *FJR* 2009 (93) 244.

<sup>495</sup> Article 56 Implementation decree to the Act on the Youth Care.

informed, unless this would be possibly detrimental to the child.<sup>496</sup> In the latter case reasons will be provided to the Council for Child Protection why deviation from the Implementation decree are deemed to be necessary.<sup>497</sup> However, the Bureau for Youth Care cannot take the decision to deviate too lightly; according to the European Court of Human Rights a process of transparent decision-making is required in the case of intervention with family life, and therefore the abovementioned rules should be followed cautiously.<sup>498</sup>

### 4.3.2 The various role players in care and protection cases

Where there is a genuine and objective concern that a child is or could be in need of care and protection, this should always be investigated. After all, both South Africa and the Netherlands are under the obligation to protect children from all forms of abuse and neglect.<sup>499</sup> In terms of Article 19 of the CRC and *General Comment No 13 (2011)*,<sup>500</sup> state parties are obliged to take among others, all appropriate legislative and administrative measures to protect children from abuse and neglect while in the care of parents or other care-givers. These protective measures should include effective procedures pertaining to, among others, the identification, reporting, referral, investigation and as appropriate, for judicial involvement.<sup>501</sup> Apart from the child and his or her family, various professionals could become involved, even before care and protection proceedings are contemplated or take place.

In the following two paragraphs it will be outlined who could be considered an interested party to a care and protection case, and which professionals or agencies, generally

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<sup>496</sup> Article 59(1) of the Implementation decree to the Act on the Youth Care (In Dutch: *Uitvoeringsbesluit Wet op de Jeugdzorg*).

<sup>497</sup> Article 59(2) Implementation decree to the Act on the Youth Care.

<sup>498</sup> See in this respect *Venema v the Netherlands* European Court of Human Rights (ECHR) 17 December 2002 *NJ* 2004 632; Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 301.

<sup>499</sup> As state parties to the CRC. See Article 19 of the CRC and *General Comment No. 13 (2011)*, which deals with the right of the child to freedom of all forms of violence, in terms of Article 19 of the CRC. For a more detailed discussion see section 4.3.1.

<sup>500</sup> CRC/C/GC/13, section 4.

<sup>501</sup> See Article 19(1) and (2) of the CRC. Article 16 of the African Children's Rights Charter contains similar wording. See also section 2.2.2.5 above.

speaking, are involved when a child is potentially (or becomes) in need of care and protection.

#### 4.3.2.1 The role players in care and protection cases in South Africa

In child care and protection cases the central focus is on the child concerned.<sup>502</sup> If there is no child, there is no case; in terms of the Children's Act. It is interesting to note that "every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court".<sup>503</sup> On the basis of this provision a child should be able to bring an application to court or to be assisted in doing so. It is submitted that the main criteria in this respect should be that the matter concerned would affect the child, and moreover, that the matter falls within the jurisdiction of the court.<sup>504</sup> Moreover, section 53 should be noted.

It reads as follows:

"(1) Except where otherwise provided in this Act, any person listed in this section may bring a matter which falls within the jurisdiction of the children's court, to a clerk of

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<sup>502</sup> Which means in terms of section 1(1) of the Children's Act, a person under the age of 18 years. Section 17 determines that a child becomes a major upon reaching the age of 18 years.

<sup>503</sup> Section 14 of the Children's Act. See also Boezaart & De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate", who have come to the conclusion that section 14 did not amend the common-law rules pertaining to the child's capacity to litigate, which means that a child still has to resort to the common law mechanism of a curator *ad litem*, in (2011) 2 *De Jure* 437-438. For a discussion on legal representation shortly after the coming into operation of the Constitution, see Matthias & Zaal (1996) 51 *Acta Juridica* 51; Zaal (1997) 114 (1) *South African Law Journal* 334; Zaal & Skelton (1998) 14 *SAJHR* 539.

<sup>504</sup> Chapter 2 of the Children's Act aims to strengthen the position of children. The literal meaning of section 14 undoubtedly grants children the right to act themselves in matters which concern their lives or to be assisted in this respect. In terms of Article 12 of the CRC and *General Comment No. 12* (CRC/C/GC/12) of 20 July 2009, direct participation of children would be preferred in order to give full meaning to the child's right to participate and thus achieving true participation. However, Article 12(2) also provides for legal representation, which provides for indirect participation. It is submitted that this should be easier accessible to children as well. Moreover, children and adults alike should be informed about these rights and, as important, how to make use of this right. Presiding officers should also more readily refer matters to Legal Aid, in terms of section 55 of the Children's Act, which then decides whether the child concerned will be granted a lawyer at state expense. See section 4.18 of the Legal Aid Guide (2012). For a more detailed outline, see the discussion in section 3.1.4.1 above.

the children's court for referral to a children's court.

- (2) The persons who may approach a court, are:
- (a) A child who is affected by or involved in the matter to be adjudicated;
  - (b) Anyone acting in the interest of the child;
  - (c) Anyone acting on behalf of a child who cannot act in his or her own name;
  - (d) Anyone acting as a member of, or in the interest of, a group or class of children; and
  - (e) Anyone acting in the public interest.<sup>505</sup>

Generally, on the basis of the latter section, *any person*<sup>506</sup> who has an interest in the matter concerned may approach the children's court. The Children's Act provides also a definition of a "party" to a matter before a children's court, which is more specific. This includes a child involved in the matter, a parent, a person who has parental responsibilities and rights in respect of the child, a prospective adoptive or foster parent of the child, the department or the designated child protection organisation managing the case of the child, or any other person admitted or recognised by the court as a party.<sup>507</sup>

Usually a child forms an integral part of his or her family. There is no doubt about the fact that the child's best interests are of paramount importance in every matter concerning the child.<sup>508</sup> However, these interests cannot be properly established in isolation or without

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<sup>505</sup> Compare to section 15 of the Children's Act. Compare also with section 38 of the Constitution, which is similar in content and provides for *locus standi* as a constitutional right in the Bill of Rights.

<sup>506</sup> Own emphasis.

<sup>507</sup> See section 1(1) of the Children's Act.

<sup>508</sup> See section 28(2) of the Constitution and sections 7 and 9 of the Children's Act. These provisions are in line with the international instruments. See Article 3 of the CRC and Article 4 of the African Children's Rights Charter. See also Heaton (2009) 2 *Journal for Juridical*

taking into account other factors surrounding the child. It is submitted that a holistic, all encompassing approach should be followed, which includes taking into consideration the interests of others, like parents or others who have parental responsibilities and rights.

The Children's Act contains a definition of “parent”, which 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 a child by reason only of being a gamete donor for purposes of artificial fertilisation; and (c) a parent whose responsibilities and rights in respect of a child have been terminated.<sup>509</sup> In addition, the phrase “family member” has been given a wide meaning, namely:

- “(a) A parent of the child;
- (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; or
- (d) Any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship”.<sup>510</sup>

The central role of the family becomes evident in one of the general principles in the Children's Act: “if it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child”.<sup>511</sup>

Representatives of the state who have to investigate the matter and report to court on whether or not a child is a child in need of care and protection must be designated social workers.<sup>512</sup> Section 1(1) defines the term “designated” social worker as a social worker in

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*Science* 4-5. For a more detailed discussion see sections 2.2.1.4 and 3.1.3.

<sup>509</sup> Section 1(1) of the Children's Act.

<sup>510</sup> See section 1(1) of the Children's Act.

<sup>511</sup> Section 6(3) of the Children's Act.

<sup>512</sup> It has to be kept in mind that it is the duty of the children's court, which has jurisdiction, to make the finding or order, after having taken into consideration the report and

the service of (1) the Department or a provincial Department of Social Development; (2) a designated child protection organisation,<sup>513</sup> for example, a civil organisation (NGO) which is authorised by the Department of Social Development to perform these so-called care and protection investigations; or (3) a municipality.<sup>514</sup> The latter possibility is new in terms of South African child care and protection legislation.<sup>515</sup> Moreover, regulation 36<sup>516</sup> contains specific criteria for determining who is a suitable person to investigate child abuse or neglect; namely, a registered social worker with sufficient experience in the field of child protection.<sup>517</sup>

When it comes to the phase of the children's court proceedings, section 56 is relevant. These proceedings take place *in camera*<sup>518</sup> and may be attended only by -

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recommendations of the designated social worker, and possible other professionals, for example, a psychologist.

<sup>513</sup> This is defined in section 1(1) as an organisation designated in terms of section 107 to perform designated child protection services. See also DSD regulation 31, which provides the criteria for designation as a child protection organisation.

<sup>514</sup> Which means a metropolitan, local or district municipality established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998, but to the extent that a municipality may or must implement a provision of this Act in or in relation to an area which falls within the area of both a local municipality and a district municipality, "municipality" in such a provision means the relevant local municipality.

<sup>515</sup> See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-5.

<sup>516</sup> DSD regulations.

<sup>517</sup> "A person is suitable to conduct investigations into cases of alleged child abuse or neglect as contemplated in section 142(d) of the Act if such person -

- (a) is a registered social worker in terms of the Social Service Professions Act, 1978, and is employed -
  - (i) by the Department or a provincial Department of Social Development; or
  - (ii) by a designated child protection organisation;
- (b) has sufficient experience in the field of child protection or is working under the supervision of a person who has at least five years' experience in child protection;
- (c) has not been found unsuitable to work with children and has no previous convictions relating to child abuse;
- (d) upholds the rights of the child and children's best interests; and
- (e) is able to work in a multidisciplinary team with the objective of securing the best protection plan based on the child's developmental needs."

See for the powers and responsibilities of persons suitable to investigate child abuse or neglect, regulation 37. Moreover, the conditions for examination or assessment of abused or neglected children and their consent is dealt with in regulation 38 of the DSD regulations (GN R261/2010).

<sup>518</sup> Section 56 determines that the proceedings of a children's court are closed. The rule that the



- “(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;<sup>519</sup>
- (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”.

Section 56(b) thus creates the right for the child concerned to attend.<sup>520</sup> In terms of section 42(2) of the Children's Act, every magistrate shall be a presiding officer of a children's court

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children's court proceedings should always take place behind closed doors is under discussion in the Netherlands at the moment. The European Court has indicated that proceedings should not structurally and automatically take place behind closed doors, since this would be contrary Article 6 of the European Convention. In terms of Article 6(1) “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. See for example, the judgment of the European Court for Human Rights 21 September 2006 (Moser) RFR 2007, 1. See also *De Stentor* (2011-10-22) 12.

<sup>519</sup> Section 57 deals with the compulsory attendance of persons involved in proceedings. The clerk of the children's court may, by written notice in the prescribed manner, request a party in a matter before a children's court, a family member of a child involved in the matter or a person who has another interest in the matter, to attend the proceedings of the children's court. Failure to conform to section 57(1) constitutes an offence in terms of section 305(1)(d) of the Children's Act, and may be liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment, see subsection (6). In principle, the person in whose physical control the child is must ensure that the child attends the proceedings, unless the clerk of the children's court or the court directs otherwise. Failure to conform to the latter section also constitutes an offence. See section 305(1)(c) read together with subsection (6).

<sup>520</sup> Zaal has pointed out that since on the basis of section 57(1) the clerk of the children's court may request any party in the matter to attend, including a child, it appears that the Children's Act provides both a right and a duty for child-parties to attend court, in *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (2008) 151.

and must perform the functions assigned to him or her under the Children's Act or any other law.<sup>521</sup> This presiding officer controls the children's court proceedings and may call any person to give evidence or to produce documentary evidence.<sup>522</sup> Another officer of the court is the clerk of the children's court.<sup>523</sup>

Since a child who is possibly in need of care and protection is especially vulnerable, legal representation might be important. On the basis of section 55, a presiding officer is obliged to consider whether the child involved in a matter before the children's court needs legal representation, which is a welcome provision.<sup>524</sup> If the court is of the opinion that it would be in the child's best interests to have legal representation, the court must refer the matter to Legal Aid, as referred to in section 2 of the Legal Aid Act.<sup>525</sup> The Board then has to decide, in accordance with section 3B of the Act and with the necessary contextual changes,<sup>526</sup>

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<sup>521</sup> Section 42(5).

<sup>522</sup> Section 60.

<sup>523</sup> With regard to the appointment, the functions, powers and duties of a clerk of the children's court, see section 67 in conjunction with chapter II of the DJCD regulations, regulations 2-5.

<sup>524</sup> See also Bosman-Sadie & Corrie (2010) 77.

<sup>525</sup> Act 22 of 1969. This Act was amended by the Legal Aid Amendment Act 20 of 1996, in terms of which section 3B was included in the principle Act of 1969. See section 55(2). Also Bosman-Sadie & Corrie (2010) 76.

<sup>526</sup> Section 3B of the Legal Aid Amendment Act 20 of 1996 provides direction for legal aid in criminal matters. Section 3B has to be read with the necessary changes since the present topic concerns legal representation of children in the children's court. Section 3B reads as follows:

- “(1) Before a court in criminal proceedings directs that a person be provided with legal representation at State expense, the court shall -
- (a) take into account -
    - (i) the personal circumstances of the person concerned;
    - (ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;
    - (iii) whether any other legal representation at State expense is available or has been provided; and
    - (iv) any other factor which in the opinion of the court should be taken into account; and
  - (b) refer the matter for evaluation and report by the Board.
- (2)(a) If a court refers a matter under subsection 1(b), the Board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter (see the *Legal Aid Guide* (2012) 67 and further).
- (b) The report in question shall be in writing and be submitted to the registrar or

whether a child should be granted legal representation at state expense. Paragraph 4.18.5 of the *Legal Aid Guide* (2012) provides that after having received the written report from Legal Aid South Africa), the court has the discretion to order Legal Aid to provide legal representation at state expense.<sup>527 528</sup>

Furthermore, the services of interpreters may be required. It is of utmost importance that a child be addressed in a language in which he or she feels comfortable, under the given circumstances.<sup>529</sup> However, caution is required pertaining the effectiveness of interpreters with regard to the accuracy of the translations.<sup>530</sup> It is self-evident that where no direct

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the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person concerned.

- (c) The report shall include -
- (i) a recommendation whether the person concerned qualifies for legal representation;
  - (ii) particulars relating to the factors referred to in subsection (1)(a)(i) and
  - (iii) any other factor which in the opinion of the Board should be taken into account.”

It is clear that the abovementioned section needs to be interpreted in the context of the children's court (civil procedure). After evaluation of the matter, Legal Aid South Africa has to submit a report back to the court (under section 3B(2)).

<sup>527</sup> The effect of section 55 of the Children's Act is thus to limit the right to legal representation at State expense pertaining to matters in the Children's Act to when the children's court is of the opinion that the best interests of the child demands legal representation. See *Legal Aid Guide* (2012) 67-69. Where the child is not assisted by his or her parents or guardians, the child's means will be considered. If the child is assisted by the parents or guardian, the latter parties means will be considered, see section 4.18.3 in conjunction with section 5.1.1 and further, which provides for the “means-test enquiry”. On the basis of the latter the net monthly income after deduction of income tax for a single applicant is R5.500 or less, for households R6.000 a month or less, see sections 5.1.4 and 5.1.5. Where the child is assisted by the parents or guardian who exceed the means-test and can afford legal representation, but fail, refuse or neglect to do this, then legal aid will be made available provided that substantial injustice would otherwise result. Pertaining to the latter circumstances, section 4.18.3 provides discretion for Legal Aid South Africa to institute proceedings against the parents or guardian in order to recover these costs. Compare with the situation in the Netherlands, see footnote 542.

<sup>528</sup> The Legal Aid Guide specifically provides a listing of the types of Children's Act matters in terms of which legal representation can be ordered, among which is “child in need of care and protection”, relevant for this thesis, see the *Legal Aid Guide* (2012) 69.

<sup>529</sup> Compare with regulation 38 of the DSD regulations, in terms of which a social worker, upon the examination or assessment of a child who is suspected of having been abused or neglected, needs to address the child in a language which the child can understand.

<sup>530</sup> Zaal has pointed out that in his research based on interviews with commissioners of child welfare (in terms of the Children's Act called the presiding officer of the children's court), 98%

communication between a presiding officer and the child is possible, there is a risk that vital or pressing information does not come to the fore and thus will not be given the necessary consideration needed to make an adequate decision. Especially since the child concerned is the most important party in these cases, it goes without saying that it is important to ensure that the child understands what is happening, and is given the opportunity to participate meaningfully.<sup>531</sup>

Matthias and Zaal have rightfully suggested that language and cultural barriers can, to a large extent, be overcome by the training of specialised children's court interpreters and/or including an African language-speaking assessor in the children's court proceedings, to sit with the presiding officer.<sup>532</sup> The latter possibility has, regrettably, not been provided for in the Children's Act. However, section 52(2)(b) explicitly provides for the use of suitably qualified or trained interpreters. It is submitted that both requirements should be met.

Firstly, that an interpreter is indeed sufficiently qualified; but secondly, it is important that the person is sufficiently trained in dealing with children. As mentioned, in order to be able to fully participate to the child's ability, a child should be put at ease. The role of an interpreter should not be underestimated in this respect. Since the child's best interests are paramount, the ultimate question is how the interests of the child can be duly served. Therefore, it is submitted that the language issue should be dealt with urgently and that the importance of African language-speaking assessors should be reconsidered, especially in the more rural areas in South Africa.

#### 4.3.2.2 The role players in care and protection cases in the Netherlands

The affected or interested parties in care and protection cases are, first and foremost, a child

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of the commissioners who were fluent in at least one of the African languages had indicated "that interpreters, on the whole, are often inaccurate in the children's court": see Zaal in Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 50.

<sup>531</sup> See also Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 50; also Gallinetti in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 4-18. See also section 3.1.4 on the participation of children.

<sup>532</sup> Matthias *Removal of Children and the Right to Family Life: South African Law and Practice* (1997) 59.

or children as well as their parent(s) or other care-givers.<sup>533</sup> They are the persons whose rights or responsibilities are affected and who may be in need of support and assistance in terms of the Act on the Youth Care.<sup>534</sup> If this is the case, it is general practice that, as a point of departure, it first needs to be established whether or not any support and assistance can be provided in a voluntary context.<sup>535</sup> In other words, the co-operation and participation of the family on a voluntary basis is required in order to solve the problem or to prevent any further problem(s).<sup>536</sup> If this is feasible there is no need for court intervention.<sup>537</sup> This is in line with one of the general principles pertaining of child protection; namely, that a care and protection order should be a measure of last resort.<sup>538</sup> In case the latter does not have the desired effect, further measures are required in order to safeguard the interests of the child.

Various categories of persons can approach the children's court in connection with a care and protection order. For example, in the case of a supervision order,<sup>539</sup> the following persons may make a request: a parent, a person who cares for the child as part of his or her family, the Council for Child Protection, or the prosecuting authority.<sup>540</sup> It is interesting to note that usually these requests can be made without the assistance of a lawyer, except in

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<sup>533</sup> In Dutch: *belanghebbende(n)*, which is explained in Article 798 of the Code of Civil Procedure as, the person whose rights or responsibilities are affected.

<sup>534</sup> See the definition of “youth care” in Article 1(c) of the Act on the Youth Care.

<sup>535</sup> This can be derived from the following phrase in Article 1:254(1) of the Civil Code: “[a]nd other (voluntary) measures to avert the threat pertaining to the moral or psychological interests or health of the child have failed, or expectedly will fail”.

<sup>536</sup> It is submitted that help and assistance on a voluntary basis increases the chances of successful collaborative participation of the parent(s) or other care-givers, which will only benefit the interests of the child concerned. Family group conferences in the Netherlands have proven to be very helpful in this regard. See section 3.1.4.2 on the participation of children in the Netherlands.

<sup>537</sup> In order to address a problem within the family, measures may be put in place on the basis of the voluntary co-operation of the affected persons. For example, the persons affected may be encouraged or strongly advised to learn certain skills. For a more detailed discussion on “early intervention”, see section 4.2 above.

<sup>538</sup> The other three principles are: the assistance needs to be proportionate, in other words, the least intrusive (nearby and for the shortest period necessary); the best interests of the child requires intervention in terms of a child protection measure; and that the implementation of the protection measures should be assigned to specific (civil) organisations, See Doek & Vlaardingerbroek (2009) 295-298.

<sup>539</sup> See Article 1:254(4) of the Civil Code.

<sup>540</sup> In Dutch: *het openbaar ministerie*.

the case of an appeal.<sup>541</sup> Because the children's court proceedings are informal, parties do not require legal representation. However, parents may approach a lawyer to represent them in court, at own costs, unless they are entitled to state-financed legal representation due to financial constraints.<sup>542 543</sup>

Previously reference was made to the position that a child generally lacks the capacity to be involved in legal action independently,<sup>544</sup> and therefore requires to be assisted by the parent(s) having parental authority.<sup>545</sup> However, there are a few exceptions which allow children to act independently. The legal provisions relevant for the topic of this thesis provide for procedures relating to a supervision order and that of placement in a closed facility for youth care, which affects the child directly. Firstly, regarding supervision orders, a child of twelve years or older may request the court to replace the social worker/Bureau for the Youth Care.<sup>546</sup> Moreover, a child of twelve years or older may request the children's court to terminate an existing supervision order.<sup>547</sup> Furthermore, such a child<sup>548</sup> may request the court to declare a directive of a social worker partially or wholly invalid,<sup>549</sup> or he or she

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<sup>541</sup> See Article 1:265 of the Civil Code. Also Doek & Vlaardingbroek (2009) 367.

<sup>542</sup> According to Article 18(2) of the Dutch Constitution legislation will be providing for rules pertaining to legal aid to persons with less financial capacity (in Dutch: *rechtsbijstand voor minder draagkrachtigen*). Compare to the terminology in the South African *Legal Aid Guide* (2012), which refers to "indigent persons". Interestingly, since the latter term has not been defined in the Act, a means test is used in order to determine "indigence" on the basis of which legal aid might be provided, see section 5.1 of the *Legal Aid Guide* (2012) 75 and further. See also footnote 527.

<sup>543</sup> State-financed legal representation will be available to persons whose yearly income amounts to € 24.600 or below (in the case of a single person), and with a maximum of € 34.700 (in the case of a joint household). See the Articles 12 and 34 of the *Wet op de rechtsbijstand* (of 23 December 1993, Stb. 775 (which came into operation on 1 January 1994), and amended by Act of 30 September 2010, Stb. 715.

<sup>544</sup> In legal proceedings affecting the child's legal position, the child should surely be considered an interested party in terms of Article 798 of the Civil Code of Procedure. However, a minor child is not able to lodge an appeal independently and Article 804 of the Civil Code of Procedure is not applicable. See Doek & Vlaardingbroek (2009) 240.

<sup>545</sup> Article 1:245(4) provides that (parental) authority concerns the person of the minor, the administration of the estate and the representation in civil legal acts. For a more detailed discussion on legal representation for children, see section 3.1.4.2.

<sup>546</sup> Article 1:254(5) of the Civil Code.

<sup>547</sup> Article 1:256(4) of the Civil Code. The court will only terminate a supervision order when the reasons for imposing the order are not present anymore.

<sup>548</sup> Twelve years or older.

<sup>549</sup> Article 1:259(1) of the Civil Code. Until such time a parent and the child are bound to comply with such a directive given by the Bureau for the Youth Care, see Article 1:258(2).

may approach Bureau for Youth Care to withdraw an existing directive given by a social worker.<sup>550</sup> In addition, a child of twelve years or older may request the Bureau for Youth Care to terminate a placement or to shorten the duration of the placement.<sup>551</sup> Secondly, regarding the procedures pertaining to the placement of a child in a closed facility of youth care, Article 29a(2) of the Act on the Youth Care provides that a child of twelve years or older can act independently in all matters relating to the placement.<sup>552</sup> In other words, they have full capacity to act in the aforementioned instances.<sup>553 554</sup>

Various agencies and professionals are involved in care and protection cases. Their functions, duties and powers are circumscribed in the aforementioned legislation<sup>555</sup> and the Implementation Decree to the Act on the Youth Care. Although care and protection cases include child abuse, it dealt with separately in the legislation.<sup>556</sup> Matters of (alleged) child abuse should be forthwith reported to a specialised agency, namely the AMK.<sup>557</sup> This is an Advice and Report Centre specifically for matters of (alleged) child abuse and has been discussed above in more detail.<sup>558</sup>

Reference has already been made of the two agencies which, generally speaking, come to the fore in child care and protection cases, namely the Council for Child Protection and the Bureau for Youth Care.<sup>559</sup> According to Article 1:238 of the Civil Code there is one (national)

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550 Article 1:260(1). In terms of sub-article (2) Bureau for the Youth Care has to issue a written directive within two weeks after receiving the request. No. (timeous) decision is equated with a refusal to take a decision, after which the children's court may be approached.

551 Article 1:263(2) determines that these options will only be considered by Bureau for the Youth Care where there has been a change in circumstances.

552 The same applies to children below the age of twelve years but who are capable of looking after his or her own interests, which is to the discretion of the presiding officer.

553 This means that they are also able to lodge an appeal. See Doek & Vlaardingerbroek (2009) 241-242.

554 For a more detailed overview pertaining to the Netherlands, see section 3.1.4.2.

555 These are: Book 1 of the Civil Code, the Civil Code of Procedure and the Act on the Youth Care, which came into operation on 1 January 2005.

556 See sections 50-55 of the Implementation Decree to the Act on the Youth Care.

557 In Dutch: *Advies en Meldpunt Kindermishandeling (AMK)*.

558 For a more detailed discussion, see section 4.3.1.2.1 above.

559 See section 4.3.1.2.

Council for Child Protection<sup>560</sup> in the Netherlands, which falls under the Department of Justice. The Dutch Civil Code determines the duties and authority of the Board.<sup>561</sup> For the discharge of the duties of the Board, the Board needs to ensure to remain updated with the developments in the field of child care and protection, has to promote the collaboration with institutions for child protection and child care, and has to provide authorities and institutions with advice where this is required<sup>562</sup> (upon request or on the Board's own accord).<sup>563</sup> On the other hand, in terms of Article 1:242 of the Civil Code, the Council for Child Protection has to inform itself of all cases where a measure regarding (parental) authority over a child has to be considered.

With regard to the proper discharge of its duties, the Board will have the full co-operation of the municipal executive councils and the registrars of births, deaths and marriages; information and documentation will be provided free of charge.<sup>564</sup> Generally speaking, the Council for Child Protection has one office in each district.<sup>565</sup> Each office can have one or more units, called “*werkeenheden*” that are responsible for the duties of the Board, which are to investigate, to provide advice, and to make applications to the court. A particular unit will act on behalf of the Board with regard to a child who has or had residence in its district. In case a particular unit is already involved in respect of a case another unit will not be competent to act in respect of the same case.<sup>566</sup>

The Council for Child Protection can act in the interests of any child who has residence in the Netherlands, but although the competence of the Board is mainly focused on children

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<sup>560</sup> In Dutch: *de Raad voor de Kinderbescherming*.

<sup>561</sup> The duties and authority of the Board are executed on behalf of the Minister of Justice, Article 1:238(2) Civil Code, which implies that the Minister can issue general directives (*algemene aanwijzingen richtlijnen*) and under special circumstances can even give instructions in individual cases; see Article 1(4) Organisation Decree of 21 June 1996, *Stb.* 1996, 329. See also Doek & Vlaardingerbroek *Jeugdrecht en jeugdzorg* (2009) 305-306.

<sup>562</sup> The possible involvement of the Board does not interfere with the religious foundation or convictions (views/opinions) of a particular institution of child care protection; see Article 1:238(4) Civil Code.

<sup>563</sup> Article 1:238(3) of the Civil Code.

<sup>564</sup> Article 1:243(1) of the Civil Code.

<sup>565</sup> The country has been divided into various jurisdictional districts, each of which has a court of appeal (in Dutch: *gerechtshof*).

<sup>566</sup> Article 1:239(3) of the Civil Code.



who live in the Netherlands, it is not limited to minors/children who have or had residence in the Netherlands; it can act or take action in order to protect any child who is a Dutch citizen who lives abroad.<sup>567</sup> It should be emphasised that the Council for Child Protection will, as a matter of principle, only investigate matters on request of the Bureau for Youth Care.<sup>568</sup> This is referred to as the so-called “two-tier system” of child protection in the Netherlands.<sup>569</sup> Nevertheless, in limited instances the Board can investigate matters directly (without the request by the Bureau for Youth Care); namely, where there is an immediate threatening situation for a child or where the Board in its execution of its statutory duties would consider requesting a child protection measure.<sup>570</sup> In such cases the Board will inform the Bureau for Youth Care of the province where the child resides and will inform the Bureau about the findings of the investigation.<sup>571</sup>

Where no child protection order will be made, the Council for Child Protection may hand over a case to the Bureau for Youth Care in order to assist families on a voluntary basis, if so desired. Although the Bureau for Youth Care is responsible for the preparation and implementation of child protection measures, it is the Council for Child Protection which usually will investigate whether or not a child protection measure is necessary, and if so, will make an application for a child protection order to the children's court.<sup>572</sup> The Council for Child Protection will usually become aware of a possible need for a protection order via notification by the Bureau for Youth Care or the AMK (the Advice and Report Centre for child abuse).<sup>573</sup>

The other relevant agency is the Bureau for Youth Care. The latter is the central port of access to the field of child and youth care. However, the Bureau for Youth Care is not

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<sup>567</sup> Article 1:239(2) of the Civil Code determines that with regard to children who live within a certain district (*arrondissement*), the units (*werkeenheden*) in that particular district will act on behalf of the Board. Where a child does not have residence in the Netherlands the units of Board in the district of Amsterdam will be competent.

<sup>568</sup> Article 57 of the Implementation decree to the Act on the Youth Care.

<sup>569</sup> Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) 1.1-7-14.

<sup>570</sup> Article 57(2) Implementation decree.

<sup>571</sup> Article 58 Implementation decree.

<sup>572</sup> Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) 1.1-7-11.

<sup>573</sup> See also section 4.3.1.2.1, which deals with the reporting duty in the case of abuse and neglect in the Netherlands.

explicitly mentioned in the Civil Code. Reference is merely made to “the foundation organisation”<sup>574</sup> as meant in Article 1 paragraph (f) in the Act on the Youth Care, which facilitates a Bureau for Youth Care.<sup>575</sup> As mentioned above, a point of departure is that the Bureau can be approached<sup>576</sup> where the child's normal development is somehow threatened, after which it has to be established and decided whether any support and assistance is required.<sup>577</sup>

Such a decision will contain the following aspects: the (menacing) problems and the seriousness thereof, the necessary care and the purpose thereof, the period of providing support and assistance, and by whom the latter will be provided.<sup>578</sup> Generally, in principle problems relating to the care and raising will not be reported to the Council for Child Protection. However, where the Bureau for Youth Care concludes that in the light of the circumstances a measure of child protection needs to be considered, the Council for Child Protection will be informed.<sup>579</sup> The latter will investigate the case and where necessary make an application to the children's court, requesting a child protection order.<sup>580</sup> This organisational structure is in line with the aforementioned two-tier system of Dutch child protection law.<sup>581</sup> It should be noted that the duties of the Council for Child Protection come to an end as soon as the court order becomes final.<sup>582</sup> The implementation of the court order, including a child protection measure, lies in the hands of the Bureau for Youth Care,

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<sup>574</sup> In Dutch: *stichting*.

<sup>575</sup> See Articles 254(1), 256-260, 262-265 of the Civil Code.

<sup>576</sup> The Bureau can be approached by a client or others. Article 1 of the Act on the Youth Care defines “client” as: the child/juvenile, his or her parents or stepparent or others who bring up the child and care for the child as belonging to their family, see section (d).

<sup>577</sup> See Article 5 Act on the Youth Care. See also Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-12.

<sup>578</sup> See Articles 30-36 of the *Implementation Decree to the Act on the Youth Care*.

<sup>579</sup> Article 9(2) Act on the Youth Care. This will especially be the case where there is a serious and imminent threatening situation for the child concerned, see Article 56 of the Implementation Decree.

<sup>580</sup> For the sake of completeness it should be noted that the Public Prosecution Authority (in Dutch: *het Openbaar Ministerie*) may also approach the children's court in order to request a child protection measure. As Doek has indicated, this will only happen in exceptional cases. Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-25; also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 312.

<sup>581</sup> Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-14.

<sup>582</sup> Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-15.

which will allocate a social worker to a specific case.

The importance of the role of a social worker should not be underestimated. Both the Council for Child Protection and the Bureau for Youth Care employ social workers in specific functions. Where a social worker is employed by the Council for Child Protection and has been allocated the duty to investigate whether or not a child protection measure is necessary, the contact with the family and its social network revolves mainly on establishing the facts and circumstances. The focus of the investigation is to produce a report, for which the social worker and his or her supervisor and interdisciplinary team are jointly responsible.<sup>583</sup> The report, including recommendations, is to be submitted to the relevant children's court.<sup>584</sup>

It is the presiding officer of children's court<sup>585</sup> who will ultimately decide whether a child protection order is deemed necessary in the light of the facts and circumstances of a specific case. Generally speaking, these presiding officers are specifically trained in the field of child law and have sufficient background in (child) psychology. It is submitted that insight in the field of child psychology is important in order to be able to determine what is in the best interests of the child concerned. After all, to establish the latter is of paramount importance in terms of international law and the national law of both the Netherlands and South Africa.<sup>586</sup> Although during the proceedings in the children's court the use of experts may be necessary, a presiding officer needs to have acquired the necessary skills and insight to weigh the input of various experts. Another judicial officer who attends the children's court

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<sup>583</sup> Doek & Vlaardingebroek have correctly emphasised that therefore the reporting duty of a social worker is not a “one-man-show” or a “one-woman show”, see *Jeugdrecht en Jeugdzorg* (2009) 307.

<sup>584</sup> The report should be timeously made available to the parent(s) and if applicable, a legal representative.

<sup>585</sup> In Dutch: *de kinderrechter*.

<sup>586</sup> See Article 3 of the CRC, which is universally applicable; see section 2.2.1.4 for a detailed discussion. As mentioned in chapter 3, the phrase “the best interests of the child” appears in the Dutch legislation at various places in various wording. Above reference was made to the fact that the Committee on the Rights of the Child has indicated that it would welcome a specific provision in the Dutch legislation on the child's best interests. Since the standard of the child's best interests is so fundamentally entrenched in the Dutch child law practice, it is debatable whether a specific Article would be necessary. It is recommended that a non-exhaustive list of factors should be drawn up, indicating what the child's best interests entails, similar to the example in South Africa. See section 28(2) of the Constitution and sections 7 and 9 of the Children's Act. For a more detailed discussion, see sections 2.2.1.4 and 3.1.3.

proceedings is the clerk of the court. He or she deals with the administrative matters relating to the cases and assists the presiding officer.

Where a children's court has made a child protection order, the above mentioned Bureau for Youth Care is the agency responsible for the implementation of the court order, and to that effect will assign a social worker. This crucial professional has the responsibility to provide the required and necessary support and assistance. In a culturally diverse society with numerous religions, the effectiveness (and thus success) of a child protection measure depends largely on a proper two-way co-operation between the family (including the child) and the social worker. This requires a relationship built on trust.

It is submitted that the Bureau for Youth Care should attempt to provide families with a so-called "matching" social worker,<sup>587</sup> and that the, often imposed, "working relationship" is characterised by openness and transparency.<sup>588 589</sup> Lastly, the importance of language should not be underestimated since it is part of everyone's identity. It is submitted that in families where the Dutch language forms a barrier, a social worker with similar cultural or language background should be assigned to a case; especially in sensitive cases like care and protection cases. Alternatively, a translator should become involved, even though there is a potential risk of misinterpretation. It is submitted that in situations and circumstances in which people, adults and children alike become vulnerable, they should be able to communicate freely.<sup>590</sup> All efforts should be made to ensure a meaningful participation in all stages, during any investigation, proceedings and implementation of orders, if applicable.<sup>591</sup>

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<sup>587</sup> For the purpose of this thesis further referred to as "case-matching". The following factors need to be taken into consideration: cultural background, language and religion.

<sup>588</sup> The latter is essential when it comes to the reports and recommendations which will be submitted to the children's court.

<sup>589</sup> Another matter concerns the work load of social workers. Sufficient time should be allocated to each case and where necessary extra time should be provided. Each case should be judged on its own merits. In this respect the multi-disciplinary team meeting could be meaningful.

<sup>590</sup> Preferably in their first language or any basic language they are comfortable with.

<sup>591</sup> It is interesting to note that Eigen Kracht, the organisation for family group conferencing in the Netherlands, also focuses on "case-matching". The independent co-ordinators come from almost all cultural groups in society and are able to provide services in a total of 96 different languages and dialects! In May 2012 there were 650 trained independent co-ordinators, which are spread over the country. The word "independent" refers to the fact that the

## 4.4 The children's court procedure

In both South Africa and the Netherlands, child care and protection cases are dealt with by specialised courts, the children's courts. Although it is generally acknowledged that the officers of these courts need specific training in family law and child law legislation, as well as basic psychology, this objective is not always sufficiently realised.<sup>592</sup> It is agreed with Matthias and Zaal that it is not only important to provide a neutral and independent forum in which a decision can be reached which serves the interests of the child best, but also to ensure that the officers of these courts have acquired the necessary skills, including a general understanding of the other disciplines<sup>593</sup> which are involved in care and protection cases.<sup>594</sup>

### 4.4.1 The care and protection proceedings in South Africa

As noted above,<sup>595</sup> the Children's Act has brought various changes to the field of family- and child law. Some of the provisions in the Act were already in place under the (repealed) Child Care Act, but have re-appeared, whilst other provisions are completely new.<sup>596</sup>

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organisation Eigen Kracht does not have any interests in the outcome of the process, the plan and the contents thereof. These co-ordinators may have any kind of background and the compulsory training ensures some kind of selection, since participants will experience hands-on what the process entails which might not necessarily be for everyone. See also "Feiten over Stichting Eigen Kracht Centrale", via [www.eigenkracht.nl/sites/default/files/Factsheet%20mei%202012](http://www.eigenkracht.nl/sites/default/files/Factsheet%20mei%202012), accessed on 20-10-2012.

<sup>592</sup> In South Africa the Justice College offers specialised courses for officers of the court and in the Netherlands judicial officers are required to attend courses on a regular basis, so in both countries there is a system in place which ensures continued legal training.

<sup>593</sup> The other professionals who are usually involved in care and protection cases are social workers, police officials, medical staff, psychologists and legal representatives.

<sup>594</sup> A multi-disciplinary approach will contribute to a general understanding and respect for and among the various professionals involved, officers of the court and other professionals dealing with care and protection cases, alike. See also Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 164.

<sup>595</sup> See section 3.2 above.

<sup>596</sup> For example, the procedure in the children's courts is in certain respects similar to the procedure under the (repealed) Child Care Act 74 of 1983, although it is commendable that the Children's Act puts more emphasis on child participation, in line with Article 12 of the CRC and Article 7 of the African Children's Rights Charter. See also section 3.1.4.1.

The latter provisions could have a ground-breaking effect, provided they are put to use effectively. Some of the innovations relate to the increase in matters the children's court may adjudicate and the subsequent extensive list of orders it can make.<sup>597</sup> Alternatives in procedures and the settling of matters out of court also have great potential in allowing parties to actively participate in finding a solution to their problem(s) in a constructive way.<sup>598</sup> However, the question is how effectively these provisions will be put into practice. It is submitted that multidisciplinary training of all professionals, officers of the court and other professionals alike, is needed to ensure a mutual understanding and professionalism regarding their respective fields of expertise. This training should include skills development in accommodating the parties involved to participate actively which will benefit the processes and ultimately the parties involved. Generally speaking, the children's court structure is similar to that under the previous statute.<sup>599</sup>

Chapter 4 of the Children's Act deals specifically with the children's courts. Section 42 determines that for the purposes of the Children's Act, every magistrate's court shall be a children's court, having jurisdiction on any matter arising from the Act,<sup>600</sup> for the area of its

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<sup>597</sup> The (repealed) Child Care Act 74 of 1983 was limited in application, compared to the present Children's Act. It mainly provided for consent to the marriage of a minor, children in need of care, the adoption of children and absconder inquiries. See Zaal in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 96-102. Already in 1997 Zaal typified the children's courts as "an underrated resource in a new constitutional era". It is commendable that the Children's Act provides the basis for a modern approach which facilitates an extensive range of tailor-made decisions in which the interests of the child are paramount. See also Gallinetti in Davel & Skelton (eds.) 4-3. See also section 4.5 below.

<sup>598</sup> Section 6(4)(a) determines that "in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided".

<sup>599</sup> Gallinetti provides some background on the Report on the Review of the Child Care Act, Project 110 and Children's Bill, which were published in 2002 by the South African Law Reform Commission. Gallinetti rightfully comments that it is regrettable that some of the changes as proposed in the Bill did eventually not make it due to financial considerations. For example, the initial envisaged two-tier system of child and family courts was removed and replaced by the present system and the jurisdiction of these courts has been reduced due to the fact that the high court retains exclusive jurisdiction in specific matters: *Commentary to the Children's Act* (2007) 4-4 to 4-7. Also Zaal *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (LLD thesis 2008 University of Witwatersrand) 71 and further.

<sup>600</sup> See section 42(5). This means that the children's courts are bound by the provisions in the Children's Act and its Regulations. It has to be kept in mind, however, that the high court has inherent jurisdiction, see section 45(4). Moreover, the high court has exclusive jurisdiction pertaining to the matters as referred to in section 45(3), for example guardianship pertaining to a child. Another restriction has been provided by section 1(4) of the Children's Act, which states that "any proceedings out of the application of the Administration Amendment Act,

jurisdiction. It is clear that these specialised courts are well spread over the Republic, which is important because every child who is affected by or involved in a children's court matter should have access to a court.<sup>601</sup> On the basis of the fact that every magistrate shall be a presiding officer of a children's court, there is no immediate shortage of presiding officers to be expected.<sup>602</sup> However, it is submitted that there is a concern relating to the specific skills and knowledge which are required in children's court matters and that the necessity of specific and adequate training should be prioritised.<sup>603</sup> In the General Principles of the Children's Act it was already highlighted that in matters pertaining to children an approach which is conducive to conciliation and problem-solving should be followed instead of a confrontational and adversarial approach.<sup>604</sup> Moreover, all proceedings, actions or decisions in a matter concerning a child must respect the child's rights set out in the Bill of Rights,<sup>605</sup> respect the child's inherent dignity, and treat the child fairly and equitably.<sup>606</sup> Where it comes to dealing with children, the proceedings should be informal and accommodating for children. To this extent section 42(8) provides the following:

“The children's court hearings must, as far as is practicable, be held in a room which -

(a) is furnished and designed in a manner aimed at putting children at ease;

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1929 (Act No. 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court”. It is submitted that the fact that specific matters fall under the exclusive jurisdiction of the high court needs reconsideration. It would be more efficient and also more cost effective to permit a children's court to deal with all matters relating to parental responsibilities and rights. Moreover, it would also avoid unnecessary confusion for the persons who are dependent on these courts, which court to approach. Real access to the courts presupposes logical access, to be understood by the very people who have to resort to it.

<sup>601</sup> See sections 14 and 15 of the General Principles, chapter 2 of the Children's Act.

<sup>602</sup> The confusing term “commissioner of child welfare” in terms of section 6 of the (repealed) Child Care Act 74 of 1983 has become obsolete. See also Gallinetti in Davel & Skelton (eds.) 4-9.

<sup>603</sup> See also Zaal (LLD thesis 2008 University of Witwatersrand) 110 and 155.

<sup>604</sup> Section 6(4)(a). See also Zaal (LLD thesis 2008 University of Witwatersrand) 105 and further, where he has deliberated on the disadvantages of courts.

<sup>605</sup> Section 28 specifically and in addition the other rights in the Bill of Rights, except those which are not applicable due to age limitations, like the right to vote. See chapter 3. Also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 265.

<sup>606</sup> Section 6(2)(a)-(c).

- (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
- (c) is not ordinarily used for the adjudication of criminal trials; and
- (d) is accessible to disabled persons and persons with special needs”.

It is important to strive for a compromise between informality to accommodate the needs of children and some level of formality to ensure respect for the court. It is indeed recommended that children's court proceedings are held in the private office of the presiding officer, in civilian clothes instead of a formal court robe.<sup>607</sup> For the sake of continuity it is relevant to mention section 42(10), which provides that proceedings which have started within a jurisdiction can continue, even if the court loses its jurisdiction in terms of subsection (7).<sup>608</sup>

A number of provisions in the Children's Act aim to protect specifically children in need of care and protection, and provide for various actions by professionals depending on the urgency of the matter. It should be emphasised that a child can, from a legal point of view, only formally be found in need of care and protection by a children's court. It is evident that where a child has already been removed and placed in temporary safe care, it is of utmost importance that a court establishes as soon as possible thereafter whether a child is indeed in need of care and protection. The court will make an appropriate finding which should serve the child's interests best, based on the facts and circumstances brought forward at the hearing and the report and recommendations of the social worker.

To this effect, a thorough investigation by a designated social worker is an indispensable aid,

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<sup>607</sup> Due to the possible psychological effects, children should not unnecessarily be exposed to an ordinary court room. See also Bosman-Sadie & Corrie (2010) 65; De Jong “Opportunities for mediation in the new Children's Act 38 of 2005” 2008 (71) *THRHR* 630; also Zaal (LLD thesis 2008 University of Witwatersrand) 108.

<sup>608</sup> The publication of a notice in the *Gazette* which defines the area of jurisdiction of each children's court and increase or reduce the area of jurisdiction of each children's court, does not affect proceedings which have been instituted but not yet completed at the time of such publication: section 42(7) read with section 42(10).



of which availability might take time.<sup>609</sup> The need for a proper investigation has also been highlighted in the *Beijing Rules*, as adopted by the United Nations, and which provides Standard Minimum Rules for the Administration of Juvenile Justice.<sup>610</sup> The *Beijing Rules* have been extended to “all juveniles”<sup>611</sup> who are dealt with in welfare and care proceedings.<sup>612</sup> The court needs to be informed of all relevant facts concerning the child, to further the well-being of the child and her or his family.<sup>613</sup> Van Bueren and Tootell indicate specifically the need for investigation into the social and family background, school career and educational experiences of the child concerned, which have to be taken into consideration with regard to a decision on a suitable measure.<sup>614</sup> It is agreed with Bosman-Sadie and Corrie that the (increasing) numbers of care and protection cases and the number of vacancies in the field of social work place extra pressure on the social workers.<sup>615</sup>

Nevertheless, where a child and his or her parents have been separated, this removal decision should be subject to judicial review as a matter of urgency, in order to respect the right to family life of the parties involved.<sup>616</sup> After reviewing the facts and circumstances, the

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<sup>609</sup> See section 155(2), which states that the social worker must investigate the matter and within 90 days compile a report on whether the child is in need of care and protection.

<sup>610</sup> See Resolution 40/33 of 29 November 1985, Rule 16, which refers to “social inquiry reports”.

<sup>611</sup> A “juvenile” is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult, see Rule 2.2. For the sake of consistency, in the following generally reference is made to the term “child” instead of “juvenile”, which is more in line with the South African approach, thereby preventing possible stigmatisation of the child concerned.

<sup>612</sup> See Rule 3.2 of the *Beijing Rules*.

<sup>613</sup> See Rule 1.1 of the *Beijing Rules*. The phrase “child” is meant to include “juvenile”.

<sup>614</sup> See “Introduction to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice” *Defence for Children International* (1995) 16.

<sup>615</sup> (2010) 177. It is submitted that many more social workers need to be trained in order to adequately cater for the increase in child care and protection cases. Prevention is better than cure.

<sup>616</sup> Article 9 of the CRC and Article 19 of the African Children’s Rights Charter ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. See the discussion in section 2.2.3.1. Although the Constitution does not expressly provide protection of the right to family life, it is protected by the constitutional right to dignity, section 10 of the Constitution. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

court should then confirm the removal decision or set it aside.<sup>617</sup> However, at this point the Children's Act contains a *lacuna*, since there is no provision made with regard to the return date for the review of the removal decision. This was rightfully challenged in the recent case *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others*.<sup>618</sup> Fabricius J, held that sections 151 and 152 were unconstitutional insofar as they fail to provide an appropriate mechanism for judicial review of removal decisions. Moreover, it was held that the necessity of bringing the child before the children's court as soon as possible after removal should be "read in" the relevant provisions.<sup>619</sup> An overview of the relevant sections pertaining to the children's court proceedings will follow next.

Part 2 of Chapter 9 of the Children's Act, which deals with the child in need of care and protection, outlines the children's court processes with a specific focus on care and protection cases. As was mentioned above, in terms of section 155(1) it is the responsibility of the children's court to decide on the question whether the child is in need of care and protection.<sup>620</sup> More specifically, the children's court that has jurisdiction is the court of the area in which the child concerned is ordinarily resident.<sup>621</sup>

In the above it was outlined that there are various ways in which the children's court can become involved and be given the statutory duty to determine whether the child concerned is in need of care and protection.<sup>622</sup> To reiterate,<sup>623</sup> this will be the case where a child has been the subject of proceedings in terms of sections 47, 151, 152, 154, and moreover, section 68. In other words, where 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, the court

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<sup>617</sup> Where the removal decision has been set aside, the child will return to the care of the parent(s), guardian or other care-giver. See also Matthias & Zaal (2009) 170.

<sup>618</sup> [2011] 3 All SA 625 (GNP).

<sup>619</sup> For a detailed discussion of the *Chirindza* case by the Constitutional Court, *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC), see section 5.3.3 below.

<sup>620</sup> Although nothing in the Children's Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children, see section 45(4).

<sup>621</sup> See section 44(1). Subsection (2) determines that where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter.

<sup>622</sup> See also Matthias & Zaal (2009) 165.

<sup>623</sup> See section 4.5.1.

must order the matter to be referred to a designated social worker for investigation.<sup>624</sup> The same applies to the situation where it appears to a presiding officer that a child is in need of care and protection, on the basis of evidence given by any person on oath or affirmation.<sup>625</sup> However, where a designated social worker or a police official have removed a child without a court order on the basis that he or she had reasonable grounds for believing that the child was in need of care and protection, the situation differs. Under these circumstances immediate emergency protection may be required and obtaining a court order could therefore not be awaited.<sup>626</sup> The same applies where there are reasonable grounds for believing that another child or children are present at the same place or on the same premises as an already removed child as had been found before.<sup>627</sup> In addition, section 68 states that if it comes to the attention of the clerk of the children's court that a child may be in need of care and protection, he or she has the duty to refer the matter to a designated social worker for investigation in terms of section 155(2). It is interesting to note that the clerk must refer the matter on his or her own accord, without first having to obtain the permission from the children's court.<sup>628</sup> It is submitted that it would be desirable that such referral would be noted or rather signed by the children's court to whom the clerk is attached.

As already mentioned, before the court can determine whether a child is in need of care and protection, and thus make a factual finding in this regard based on a balance of probabilities,<sup>629</sup> a designated social worker must investigate the matter. Section 155(2) prescribes that the investigation and report on whether the child is in need of care and protection, have to be finalised within a period of 90 days. The formal requirements pertaining to the contents of the report are discussed in DSD regulation 55 and the structure of the report in Form 38.<sup>630</sup>

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<sup>624</sup> Section 47.

<sup>625</sup> Section 151.

<sup>626</sup> Section 152.

<sup>627</sup> Section 154.

<sup>628</sup> Section 68 of the Children's Act. See Bosman-Sadie & Corrie (2010) 87. See also the regulations relating to the children's court and international child abduction, 2010 of the Department of Justice and Constitutional Development (GN R250/2010), hereafter referred to as the DJCD regulations.

<sup>629</sup> Bosman-Sadie & Corrie (2010) 177.

<sup>630</sup> For the sake of ensuring quality control it is worth mentioning that the signature of the

The report mainly concerns the background and recommendations pertaining to the specific case.<sup>631</sup> On the basis of the investigation, the social worker can find the child to be in need of care and protection, or that this is not the case. Where, in the opinion of the social worker, a child is not in need of care and protection, he or she should indicate in the report the reasons for such a finding and submit the report to the children's court for review.<sup>632</sup> Nevertheless, the social worker must, where necessary, indicate in the report the measures recommended to assist the family, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.<sup>633</sup>

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supervisor or senior of the social worker also is required on the cover page of the report completed by the social worker. Moreover, section 155(3) prescribes that the social worker must report the matter to the relevant provincial Department of Social Development.

<sup>631</sup> This report must be compiled in the prescribed manner. DSD regulation 55(1) states that it must be "in a form substantially corresponding with Form 38 and must -

- (a) contain an introduction and personal details of the social worker;
- (b) reflect a history of and background to the matter to be decided by the children's court;
- (c) give reasons for the removal of the child, if applicable;
- (d) address any relevant factors referred to in section 150 of the Act;
- (e) contain details of previous interventions and family preservation services that have been considered or attempted;
- (f) contain an evaluation of the matter to be decided by the children's court;
- (g) indicate whether, after investigation, the child concerned is considered to be in need of care and protection;
- (h) contain a recommendation as to which order or orders in terms of section 156 of the Act, including an order in terms of section 46 of the Act, would be appropriate to the child;
- (i) list sources of information;
- (j) contain recommendations, where necessary, regarding measures to assist the child's parent, guardian or care-giver, including -
  - (i) counselling;
  - (ii) mediation;
  - (iii) prevention and early intervention services;
  - (iv) family reconstruction and rehabilitation;
  - (v) behaviour modification;
  - (vi) problem solving;
  - (vii) referral to another suitably qualified person or organisation;
- (k) contain an assessment of the therapeutic, educational, cultural, linguistic, developmental, socio-economical and spiritual needs of the child; and
- (l) address any written request by a presiding officer to the designated social worker concerned".

<sup>632</sup> Section 155(4)(a).

<sup>633</sup> See section 155(4)(b) and DSD regulation 55(1)(j). See also section 149 which makes it compulsory for a designated social worker to include in the report a summary of any prevention and early intervention programmes provided in respect of the child and his or her family.

#### 4.4.1.1 Bringing the child before the children's court

Where the social worker finds the child in need of care and protection, the child concerned must be brought before the children's court.<sup>634</sup> The submitted report of the social worker serves to inform the court about the facts and personal circumstances of the child and his or her family. Because of the weight which is usually attached to these reports, it is submitted that the court has the duty to intensively scrutinise these reports. The importance of this should not be underestimated. Presiding officers are not bound by the recommendations made<sup>635</sup> and must, on their own accord, enquire into the facts and circumstances surrounding a child and his or her family. Timeous submission of the report by the social worker is necessary to enable the court to prepare these care and protection cases properly. The reports should also be timeously made available to all interested parties in order to prepare themselves for the hearing and to enable them to participate in a meaningful manner.<sup>636</sup>

In addition, section 62 deals specifically with professional reports which, where necessary, may be ordered by the children's court for the purposes of deciding a matter before it or any issue in the matter. The professional persons explicitly mentioned are a designated social worker, a family advocate, medical practitioner, or other suitably qualified person. Any of these professionals may be instructed to carry out an investigation to establish the circumstances of the child, the parent(s) of the child, a person having parental responsibilities and rights in respect of the child, a care-giver of the child, the person under whose control the child is, or any other relevant person.<sup>637</sup> These professionals have the discretion to obtain supplementary evidence or reports from other suitably qualified

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<sup>634</sup> Section 155(5).

<sup>635</sup> See also Bosman-Sadie & Corrie (2010) 83.

<sup>636</sup> This is Article 12 of the CRC. See also the discussion in sections 2.2.1.6 and 3.1.4 above.

<sup>637</sup> Bosman-Sadie & Corrie (2010) 81, warn against the risk of the potential conflict between the therapeutic and forensic roles of professionals. Pertaining to the forensic role, the court requires objective information based on facts and neutrality, whereas the clinical role focuses more on the therapeutic aspects by offering help and support to a child and the family concerned, which interaction might result in a relationship of trust. The latter should not in any way be harmed or tempered with by a subsequent reporting duty to court, the latter which the parties concerned may perceive as betrayal. This could result in lack of trust and antipathy against professionals in general, jeopardising future co-operation which would benefit the child (and the family).

persons.<sup>638</sup> Moreover, they may be required by the court to present the findings of the investigation to the court by testifying at the hearing or alternatively by submitting a written report to the court.<sup>639</sup> With regard to evidence, section 63 provides:

“A written report, purported to be compiled and signed by a medical practitioner, psychologist, family advocate, designated social worker or other suitably qualified person who on the face of the report formed an authoritative opinion in respect of the child or the circumstances of a child involved in a matter before a children's court, or in respect of another person involved in the matter or the circumstances of such other person, is, subject to the decision of the presiding officer, on its mere production to the children's court hearing the matter admissible as evidence of the facts as stated in the report”.<sup>640</sup>

In other words, a report in terms of section 63 is regarded as *prima facie* evidence of the facts and circumstances as mentioned in the document. If the rights of a person who is a party to the proceedings are prejudiced by such a report, the court is obliged to disclose the relevant parts of the report to the person concerned, within the prescribed period prior to the date of the hearing. Moreover, the court must give that person the opportunity to question or cross-examine the author of the report on any matter arising from the report, or to refute any statement contained in the report.<sup>641</sup>

However, where there is no (substantial) evidence of proof to the contrary, the aforementioned proof “at first sight” becomes conclusive proof.<sup>642</sup> It is submitted that with regard to section 63(3), any person being a party to the proceedings and whose rights are prejudiced by the report should have easy access to legal assistance or representation in order to be able to refute some of the information mentioned in the report. With regard to bringing a matter to the children's court, section 53 of the Children's Act has to be read in

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<sup>638</sup> Section 62(2)(a).

<sup>639</sup> Section 62(2)(b). However, subsection (2) is subject to section 63(1) and (2). The latter provision prescribes that the written report must be submitted to the children's court within the prescribed period prior to the date of the hearing of the matter.

<sup>640</sup> It is evident that the written report in terms of section 63 must be submitted to the children's court within the prescribed period prior to the date of the hearing of the matter. See subsection (2). See also the discussion above.

<sup>641</sup> Section 63(3)(a) and (b). This forms part of the so-called *audi alteram partem* principle of natural justice.

<sup>642</sup> See also Bosman-Sadie & Corrie (2010) 84.

conjunction with DJCD Regulation 6. Any person as listed in section 53<sup>643</sup> must notify the clerk of the children's court that has jurisdiction,<sup>644</sup> on a form that corresponds substantially with Form 1 and 2.<sup>645</sup> The clerk is obliged to refer the matter to a presiding officer of the court, no later than within five days after receipt of the aforementioned notice. Subsequently, the presiding officer must, within seven days after receiving the relevant documentation, refer the matter for mediation to a family group conference<sup>646</sup> or lay-forum<sup>647</sup> or order a pre-hearing conference<sup>648</sup> or refer the matter to court.<sup>649</sup> In the latter case, the presiding officer concerned must assign a date for the matter to be heard in court, which date must be within 30 days after he or she has decided that the matter must be heard in court.<sup>650</sup> Within five days after the court date has been determined (and at least 15 days before the hearing), the clerk must notify the parties to attend the court proceedings, in line with Form 4 of the Annexure.<sup>651</sup>

Deviation from any period of time as prescribed in the DJCD regulations can be requested

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<sup>643</sup> Subsection (2) provides that the persons who may approach a court, are (a) a child who is affected by or involved in the matter to be adjudicated; (b) anyone acting in the interest of the child; (c) anyone acting on behalf of a child who cannot act in his or her own name; (d) anyone acting as a member of, or in the interest of, a group or class of children; and (e) anyone acting in the public interest. Compare to section 15, which falls under General Principles and which also deals with persons who may approach a court.

<sup>644</sup> It has to be kept in mind that where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter, see section 44(2).

<sup>645</sup> DJCD regulation 6(1) and Form 1 and 2 of the Annexure.

<sup>646</sup> See section 70 of the Children's Act. For a more detailed discussion, see section 3.1.4.

<sup>647</sup> See section 71 of the Children's Act. See also section 3.1.4.

<sup>648</sup> If a matter brought to or referred to a children's court is contested, the court may order a pre-hearing conference to be held with the parties concerned, in order to mediate between the parties, to settle disputes between them to the extent possible and to define the issues to be heard by the court. See section 69(1).

<sup>649</sup> DJCD regulation 6(2).

<sup>650</sup> DJCD regulation 7(1). The same applies where the matter was referred back to the court by a facilitator of a family group conference or by a chairperson of a lay forum. The time frame of 30 days within which a date should be assigned for hearing the matter in court is also applicable where the matter was referred back to the court by such facilitator or chairperson.

<sup>651</sup> DJCD regulation 7(2). Such a notice must be served personally on a party by a sheriff, a clerk, or a person authorised by the presiding officer of the court. Alternatively it must be submitted to a party by registered post or be served or submitted in any other manner as directed by the presiding officer of the court, see regulation 7(3).

by a party to the proceedings or his or her legal representative.<sup>652</sup> The particular court has the discretion to grant a deviation from a time period on the conditions that the court deems fit, but only if any other party does not raise any objections, or in case the other party did not respond, that party's rights would not be affected by granting such deviation.<sup>653</sup>

However, it is submitted that children and their families should not be left in uncertainty unnecessarily long and that therefore the care and protection proceedings should be dealt with expeditiously. This is also in line with the general principle that in any matter concerning a child, a delay in any action or decision to be taken must be avoided as far as possible.<sup>654</sup> The aforementioned Form 4, read in conjunction with section 57 of the Act, specifically aims to ensure the (compulsory) attendance of a family member of a child involved in the matter or a person who has another interest in the matter.<sup>655</sup>

The person in whose physical control the child is, must, as a matter of principle, ensure that the child attends the proceedings as well.<sup>656</sup>

With regard to the children's court proceedings, the provisions of the Magistrates' Courts Act 32 of 1944, and the rules made under the Rules Board for Courts of Law Act 107 of 1985, are applicable; however, with the necessary changes required by the context, to the children's court.<sup>657</sup> Section 52(2) is of utmost importance with regard to the need for

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<sup>652</sup> DJCD regulation 8(1) demands that such request must be in writing, stating the reasons for the request and submitting any proof to substantiate his or her reasons.

<sup>653</sup> DJCD regulation 8(2). The court may refuse a deviation from any period of time prescribed in the Regulations, if any other party (i) raises an objection and that party's rights may be affected if a deviation from any period of time prescribed in these regulations is granted; or (ii) does not respond but that party's rights may be affected if a deviation from any period of time prescribed in these regulations is granted.

<sup>654</sup> See section 6(4)(b).

<sup>655</sup> Section 57 seeks to ensure the compulsory attendance of specific persons. Failure to comply with subsection (1) constitutes an offence in terms of section 305(1)(d) of the Children's Act.

<sup>656</sup> Unless the clerk of the children's court or the court directs otherwise, see section 57(2). However, failure to comply with subsection (2) constitutes an offence in terms of section 305(1)(c) of the Children's Act. See also *Bosman-Sadie & Corrie* (2010) 78.

<sup>657</sup> Section 52(1) provides that "except as is otherwise provided in this Act, the provisions of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), and of the rules made in terms thereof as well as the rules made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply, with the necessary changes required by the context, to the children's court in so far as these provisions relate to- (a) the issue and service of process; (b) the appearance in



developing more child-friendly rules of procedure. This section instructs that the rules made regarding court proceedings must be designed to avoid adversarial procedures and include rules concerning appropriate questioning techniques for children,<sup>658</sup> and the use of suitably qualified or trained interpreters.<sup>659</sup>

Although direct communication is to be preferred, it is commendable that the drafters of the Children's Act have specifically provided for this, in case the language forms a barrier.<sup>660</sup> The evidence of children who are a party in care and protection cases is very important and might be traumatised in some way.<sup>661</sup> It is evident that the proceedings should be child-sensitive and appropriate questioning techniques are an integral and indispensable part of this. Moreover, the latter enhances meaningful participation and thus contributes to the realisation of the child's right to be heard. In addition, section 52 calls for specific training of the professionals involved, which requires a certain financial budget. It is hoped that the provision will be implemented to its full use. The proceedings of a children's court are held *in camera*.<sup>662</sup> Section 56 states specifically who may attend the court proceedings.

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court of advocates and attorneys; (c) the execution of court orders; (d) contempt of court; and (e) penalties for (i) non-compliance with court orders; (ii) obstruction of the execution of judgments; and (iii) contempt of court”.

<sup>658</sup> In terms of section 52(2)(a) these appropriate questioning techniques are relating to “(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”.

<sup>659</sup> Gallinetti points out that where the language of a presiding officer differs from that of the child, it is difficult to give truly effect to the child's right to be heard in terms of Article 12 of the CRC: 4-19. See also Article 7 of the African Children's Rights Charter. For a more detailed discussion on these Articles, see section 2.2.1.6 above. With regard to the sections 10 and 61 of the Children's Act which provide for the participation of children, see section 3.1.4.

<sup>660</sup> In South Africa there are eleven official languages, therefore direct communication might not always be feasible. Sufficient training of the professionals is a necessity. It is submitted that presiding officers should have discretion in requesting the assistance of an assessor who speaks the same language as the child. This might assist in avoiding miscommunication or manipulation (where a translator would not adequately communicate the views of the child concerned). On the topic of interpreters, see also the research findings of Zaal in Matthias “Removal of children and the right to family life: South African law and practice” 1997 *Children's Rights Project UWC* 50.

<sup>661</sup> It is commendable that the court may order any person present in the room where the proceedings are taking place to leave the room if the child is present, if this would be in the best interests of the child concerned, see section 60(2).

<sup>662</sup> Which is the same in the Netherlands, see section 4.4.2.2.

The non-peremptory language indicates that the permission to attend is to a large extent left to the discretion of the presiding officer. It is provided that the proceedings 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;<sup>663</sup>
- (b) the child involved in the matter before the court and any other party in the matter;<sup>664</sup>
- (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;
- (f) the designated social worker managing the case”.

Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.<sup>665</sup> The clerk of the children's court

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<sup>663</sup> This could be a professional who is required to give input due to his or her expertise. In terms of section 62 the court may order such a professional to carry out an investigation to establish the circumstances of the child, the parent(s), a person having parental responsibilities and rights in respect of the child, a care-giver of the child, the person under whose control the child is or any other relevant person. The professional concerned may be required by the court to present the findings of the investigation to the court by testifying before the court or submitting a written report to the court. In the latter case, section 63 provides for matters pertaining to any evidence produced in a report and the rules relating to *audi alteram partem*.

<sup>664</sup> Zaal has pointed out that this provision provides a basic right for the child involved to attend the proceedings. In addition he makes reference to some lack of clarity with regard to whether or not it would be compulsory for the child to attend, which partly is addressed by section 57(2). Therefore it can be concluded that the Children's Act, apart from creating a right to attend proceedings, also provides a duty to attend for children; in *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system* (LLD thesis 2008 University of the Witwatersrand) 151.

<sup>665</sup> Section 60(3). See also section 6(4)(a) of the Children's Act which, as a general principle,

may attend every children's court hearing.<sup>666</sup> Although the terminology in the Children's Act consistently refers to "children's court proceedings" instead of "inquiry", Bosman-Sadie and Corrie have pointed out that the (nature of the) proceedings are to be typified as an inquiry and that the presiding officer should have a more active role in order to establish what would serve the interests of the child concerned best.

During the children's court proceedings the presiding officer is in control of the proceedings and has wide discretionary powers with regard to protecting the interests of the child concerned. The South African Law Reform Commission already referred, in its Discussion Paper 103, to the need for an inquisitorial role for the presiding officer in children's court cases.<sup>667</sup> Section 60(1) provides for an active role of the presiding officer, which is commendable. In this respect Zaal points out the necessity for the children's court to establish the truth where relevant and disputed facts come to the fore. In addition, reference is made to the protection-mechanism in section 61(1)(c), which is indispensable. On the basis of the latter, the presiding officer may intervene in the questioning or cross-examination of a child, thereby safeguarding his or her best interests.<sup>668</sup> It is submitted that

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calls for an approach which is conducive to conciliation and problem-solving in any matter concerning a child. In this respect section 42(8) is also relevant. It dictates that the hearing must, as far as is practicable, be held in a room which is furnished and designed in a manner aimed at putting children at ease, is conducive to the informality of the proceedings and accessible to disabled persons and persons with special needs. See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 166. Zaal has pointed out the strengths and weaknesses of both alternative dispute resolution methods and courts. It is agreed with Zaal that the alternative approaches have significant potential in South Africa, especially in relation to the improvement of participation and communication. In addition, reference should be made to the psychological effects. Zaal refers in this respect to the potential of healing differences in an amicable and therapeutic way, which in turn has the potential to promote involvement and improved care by parents, thereby preventing the removal of a child, in (LLD thesis 2008 University of the Witwatersrand) 124-125, also 239.

<sup>666</sup> On the basis of section 73 the clerk may attend every children's court hearing but it can be derived from the non-peremptory language that he or she is not obliged to attend all sessions.

<sup>667</sup> The so-called inquisitorial approach ensures the child-centred approach of securing the child's best interests in terms of section 28(2) of the Constitution and sections 7 and 9 of the Children's Act. See Gallinetti 4-25, where she refers to the report of the South African Law Reform Commission, Discussion Paper 103 (2001) 1176; Heaton (2009) (2) *Journal for Juridical Science* 3 and 5; also Bosman-Sadie & Corrie (2010) 80.

<sup>668</sup> He rightfully stresses the responsibility for presiding officers to keep a close eye on how a child responds and behaves and where necessary, indeed intervene: in Boezaart (ed.) *Child Law in South Africa* (2009) 166. See also Zaal *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* 133 and further, in which he discusses the advantages and disadvantages of involving children in court proceedings. It is fully agreed with Zaal that where a child has the opportunity to give input he or she has a chance of influencing the outcome of the proceedings. Direct interaction

reports and the input of professionals and other persons should be properly scrutinised in order to determine what is in the best interests of the child.

Section 58 provides that various persons, including a child, have the right to adduce evidence in a matter before a children's court. In addition, with the permission of the presiding officer, a wide range of persons, including a child involved in the matter, have the right to question or cross-examine a witness or to address the court in argument.<sup>669</sup>

Based on the aforementioned provisions, it could be concluded that, theoretically speaking, a child is considered to be a “real” or equal party to the proceedings. It is hoped that a child will be properly informed about these forms of active participation that he or she is entitled to. At the same time, the legislature seems to have kept in mind that a child may be vulnerable. Where the 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

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also establishes a relationship which benefits both actors: the child becomes a “real” person in the eyes of the presiding officer and it enables him or her to obtain information, whilst for the child it is important to be heard which might benefit the sense of self-worth (which effect should not be underestimated for children who are vulnerable).

In addition Zaal highlights the importance of informing the child about the court order, its implications and reasons. It is submitted that this might possibly contribute to a better understanding, which is especially relevant where the content of a court order does not coincide with the wishes of the child concerned. It also confirms that the child is not only heard but that his or her input has been taken into consideration, which right is granted to the child in section 10 of the Children's Act. The aforementioned is in line with the international documents, Article 12 of the CRC and Article 7 of the African Children's Rights Charter. For a more detailed discussion on the latter provisions, see sections 2.2.1.6 and 3.1.4 above.

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In terms of section 58 the following categories of persons have the right to adduce evidence, question witnesses and produce argument: “(a) a child involved in the matter; (b) a parent of the child; (c) a person who has responsibilities and rights in respect of the child; (d) a care-giver of the child; (e) a person whose rights may be affected by an order that may be made by the court in those proceedings; and (f) a person who the court decides has a sufficient interest in the matter”. Zaal avers that the basic right to provide evidence on the basis of section 58 is a *sine qua non* for realising child participation and must be read in conjunction with section 10. The latter section provides that the right of participation accrues to every child that is of such an age, maturity and stage of development as to be able to participate in an appropriate way. It is agreed with Zaal that the requirement that the parties should obtain the permission of the presiding officer before they may question or cross-examine a witness or to address the court in argument is restrictive and adversarial. However, this way a presiding officer could provide some protection for children if the circumstances would demand such: *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* 152.

be in the child's best interests.<sup>670</sup>

Witnesses may be summoned to appear in a matter before the court on request by the presiding officer concerned in terms of section 59(1). It is interesting to note that the same can be requested by the child or a person whose rights may be affected by the anticipated court order, as well as the legal representative of any of these parties.<sup>671</sup> The presiding officer may call any person to give evidence,<sup>672</sup> question or cross-examine that person, or even allow that person to be questioned or cross-examined by the child concerned, the parent or other person involved.<sup>673</sup> However, the latter is limited in effect, since section 60(1)(c) determines the discretion to be “to the extent necessary to resolve any factual dispute which is directly relevant in the matter”.

It is submitted that presiding officers should try to effectively make use of these provisions by actively encouraging the parties involved, including the child, to raise relevant matters of concern.<sup>674</sup> Especially where a child might be in need of care and protection, it is most

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<sup>670</sup> See section 60(2), which clearly aims to protect children. The same applies to section 61(3), in terms of which the court may order that the matter or a specific issue, be disposed of separately and in the absence of the child concerned, but only if this would be in the best interests of the child. See *Zaal Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* 154.

<sup>671</sup> Section 59(1) instructs the clerk of the children's court to summons a person to appear as a witness in the prescribed manner. In this respect DJCD regulation 9 is relevant. Regulation 9(1) prescribes that a witness has to be subpoenaed at least 10 days before the date of the hearing on a form that corresponds substantially with Form 6 of the Annexure. However, where the child concerned, a person whose rights may be affected by the anticipated court order or the legal representative of any of these parties intends to have a witness subpoenaed, must within 15 days before the date of the hearing request the clerk to issue a subpoena to that witness, where after the clerk must issue the subpoena without delay. The subpoena must be served personally on a party by a sheriff, a clerk or a person authorised by the presiding officer of the court. Alternatively, the document should be submitted to a party by registered post or served or submitted in any other manner as directed by the presiding officer of the court, see sub-regulations (2) and (3).

<sup>672</sup> Any person may be called upon to give evidence or to produce a book, document or other written instrument, see section 60(1)(a).

<sup>673</sup> The parties allowed to question or cross-examine in terms of section 60(1)(c) are: “(i) the child involved in the matter; (ii) the parent of the child; (iii) a person who has parental responsibilities and rights in respect of the child; (iv) a care-giver of the child; (v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or (vi) the legal representative of a person who is entitled to a legal representative in those proceedings”.

<sup>674</sup> This would be in line with the right to dignity of the child in terms of section 6(2)(b) of the Children's Act and the right to participation in terms of section 10 and 61 of the Children's Act.

important to establish the truth. Therefore an open deliberation with the parties, including the child, is indispensable. This will also improve and encourage co-operation of the parties concerned, aimed at healing a family relationship. It is agreed with Zaal that the above requires specific training for presiding officers.<sup>675</sup>

Before the court will make a binding decision on the question as to whether a child is in need of care and protection, the court must have regard to the report of the social worker<sup>676</sup> and should hear the parties concerned. Before the court decides on the matter, it should be remembered that it may, in terms of section 50, order any person to carry out an investigation or further investigation that may assist the court in deciding the matter.<sup>677</sup> Within 10 days after the conclusion of the investigation, the investigator must submit a written report in terms of DJCD regulation 11(6).<sup>678</sup> At this point, section 63 becomes relevant. It provides that a written report of the professional, who on the face of the report formed an authoritative opinion in respect of the case concerned, is in principle on its mere production to the court admissible as evidence of the facts stated in the report. Moreover, if a person's rights are prejudiced by the report, the court is bound to disclose the relevant parts of the report to that person. If that person is a party to the proceedings, the disclosure of relevant information must take place prior to the date of the hearing.

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On basis of section 10 of the Constitution everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>675</sup> *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* 155.

<sup>676</sup> Section 155(9). The court is thus obliged to consider the report and where it fails to do so, it would follow suit that the order could be challenged. Matthias & Zaal come to the conclusion that such a finding would be improper. They also point out that the report of the designated social worker contains core evidence in the care and protection proceedings and that the contents should be objective, factual and detailed. It is fully agreed with Matthias & Zaal that regulations are needed which allow parents and other parties concerned to challenge any statements in the report from the social worker: in *Commentary on the Children's Act (2012)* 9-18.

<sup>677</sup> Apart from the fact that section 50(1) explicitly refers to section 155(9), on which basis the court is obliged to have regard for the report of the social worker, section 11 of the DJCD regulations comes into play (GN R250/2010). This regulation provides direction with regard to investigations in terms of section 50 of the Children's Act. An order to carry out an investigation or further investigation must be on a form which corresponds substantially with Form 9 of the Annexure, see section 11(1) of the DJCD regulations (GN R250/2010). On the basis of the order the investigator is authorised to question relevant persons in order to obtain information. Furthermore the investigator is obliged to keep a written record of the investigation and is required to compile a written report after conclusion of the investigation.

<sup>678</sup> See section 63(2) read in conjunction with DJCD regulation 11(6) (GN R250/2010).

Furthermore, the prejudiced person must be given the opportunity to question or cross-examine the author of the report and be given the opportunity to refute any statement in the report.<sup>679 680</sup>

Another aspect pertaining to court proceedings concerns adjournments. Where a children's court in general is able to adjourn the proceedings for a period of maximum 30 days, on good cause shown,<sup>681</sup> it is different in care and protection cases in terms of Chapter 9.<sup>682</sup> In the latter situation the children's court has the discretion to adjourn the matter for a maximum of 14 days and has the discretion to decide, pending decision of the matter, where the child should be kept in the meantime.<sup>683</sup> It is agreed with Matthias and Zaal that any undue delay in care and protection proceedings may be prejudicial to the child and other parties involved, and therefore should be avoided at all cost.<sup>684</sup> In the end, the court has to make a decision whereby it is determined that the child is in need of care and protection, or not. If the court finds that there is no sufficient proof of the child being in need of care and protection, and the child is in temporary safe care, the court is obliged to order the child to be returned to the person in whose care the child was before it was put in temporary safe

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<sup>679</sup> Section 63(3) is in line with the principle *audi alteram partem*, on which basis a person does not only have the right to be heard, but also to be informed of considerations which count against him or her. See also Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 321.

<sup>680</sup> It is interesting to note that under the repealed child care system similar provisions were in place, but these were included in regulation 5, not in the Child Care Act 74 of 1983 itself. However, there are some differences. Firstly, section 63(1) contains a list of professionals who might be requested to compile a report based on their findings. Secondly, section 63(3) refers to persons who are "prejudiced" by the report, whereas the repealed regulation referred to a person who is "affected". It is agreed with Gallinetti that it appears that the number of persons who should be given the opportunity to comment on the report or to question or cross-examine the author thereof, are consequently (and regretfully) limited: in 4-30. However, it is not clear whether the limiting effect was the intention of the legislature.

<sup>681</sup> See section 64(1) under court proceedings, Part 2 on the children's courts. See Chapter 4 of the Children's Act.

<sup>682</sup> Chapter 9 deals specifically with the child in need of care and protection. See Matthias & Zaal *Commentary on the Children's Act* (2012) 9-1 and further; see also Bosman-Sadie & Corrie (2010) 85.

<sup>683</sup> The remand of an enquiry should not extend beyond 14 days at a time; see section 155(6). Subsection (6)(b) specifically mentions the possibilities of what should happen to the child pending the decision by the court: (i) remain in temporary safe care at the place where the child is kept; (ii) be transferred to another place in temporary safe care; (iii) remain with the person under whose control the child is; (iv) be put under the control of a family member or other relative of the child; or (v) be placed in temporary safe care.

<sup>684</sup> In Boezaart (ed.) *Child Law in South Africa* (2009) 173. The reasoning is in line with the general principles of the Children's Act, as stated in section 6(4)(b).

care.<sup>685</sup> If the child is not in temporary safe care, the court must decline to make an order.<sup>686</sup> Nevertheless the court has the discretion to make an order for early intervention services, in line with section 46(1)(g),<sup>687</sup> in case the child has been identified as being vulnerable to or at risk of harm or removal into alternative care.<sup>688</sup>

If the court finds that the child is in need of care and protection, it may make an appropriate order in terms of section 156.<sup>689</sup> However, before making an order concerning the temporary or permanent removal of a child from that child's family environment, a children's court may order an early intervention programme<sup>690</sup> or participation in a family preservation programme,<sup>691</sup> on the basis of section 148(1), in order to avoid the need to remove the child concerned.<sup>692</sup> Such an order, however, must be for a specific period of time; not exceeding six months.<sup>693</sup> After the specified period has lapsed, the designated social worker needs to submit a report to the court, setting out any progress pertaining to the programmes in which the child and his or her family took part. After consideration of the report, the court may

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<sup>685</sup> Section 155(8)(a). Separation from a parent, guardian or care-giver for any longer than necessary or justified would constitute an infringement on the right to family care or parental care; see section 28(1)(b) of the Constitution, as discussed in section 3.2.1.

<sup>686</sup> Section 155(8)(c). See also Matthias & Zaal *Commentary on the Children's Act* (2012) 9-19.

<sup>687</sup> It is agreed with Matthias & Zaal that it is regrettable that the court has such limited powers in terms of section 155(8)(b), whilst a social worker, on the basis of subsection (4)(b) may recommend any appropriate measure in order to assist the family, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation, in *Commentary on the Children's Act* (2012) 9-19.

<sup>688</sup> Section 155(8)(b) in conjunction with chapter 8 of the Children's Act, which deals with prevention and early intervention as discussed in section 4.2 above. See also Bosman-Sadie & Corrie (2010) 178.

<sup>689</sup> See the orders of the court as discussed in section 4.5 below.

<sup>690</sup> The children's court may order the provincial Department of Social Development, a designated child protection organisation, any other relevant organ of state or any other person or organisation to provide early intervention programmes in respect of the child and the family or parent or care-giver of the child if the court considers the provision of such programmes appropriate in the circumstances.

<sup>691</sup> The children's court may also order the child's family and the child to participate in a prescribed family preservation programme.

<sup>692</sup> This is in line with the principle of opting for the least intrusive measure, but it simultaneously provides the necessary support which is needed for the child and his or her family. The same is provided in section 46(1)(g), which provides a list of general orders which the children's court may make.

<sup>693</sup> Section 148(2). After six months the situation needs to be evaluated. See Bosman-Sadie & Corrie (2010) 161.



decide on the question as to whether the child should be removed, or order the continuation of the aforementioned programme for a further specified period not exceeding six months.<sup>694</sup>

However, it is evident that where the safety or well-being of the child concerned is seriously or imminently at risk, such early intervention programme or family preservation programme will not be possible.<sup>695</sup> In order to assist the court in determining a matter concerning the child, section 149 demands that the designated social worker indicates in the report the kind of preventative measures which had been made available to the child and the family, parent or care-giver of the child.<sup>696</sup> In other words, based on this, the court will be in the position to thoroughly assess whether sufficient efforts were made (to prevent removal) and the effects thereof, before the question of removal of the child comes to the fore.

Section 157 prescribes that, before a children's court makes an order in terms of section 156 for the removal of the child, the court must:

- “(a) obtain and consider a report by a designated social worker on the conditions of the child's life, which must include -
  - (i) an assessment of the developmental, therapeutic and other needs of the child;
  - (ii) details of family preservation services that have been considered or attempted; and

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<sup>694</sup> See section 148(4). The discretion of the court to order the continuation of the early intervention programme is important because it could prevent the removal of the child. See Frank in *Commentary on the Children's Act* (2012) 8-17. It is submitted that the parties involved should be made aware of the effects of their participation (or non-participation) in these programmes on the final decision.

<sup>695</sup> Section 148(5).

<sup>696</sup> Section 149 of the Children's Act. See also Bosman-Sadie & Corrie (2010) 162. This is in line with Article 37(b) of the CRC, which provides that deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time. See also Rule 11 of the *Beijing Rules*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Resolution 40/33 of 29 November 1985. See also the discussion in section 2.2.3.4.

- (iii) a documented permanency plan<sup>697</sup> taking into account the child's age and developmental needs aimed at achieving stability in the child's life and containing the prescribed particulars; and
- (b) consider the best way of securing stability in the child's life, including whether such stability could be secured by -
  - (i) leaving the child in the care of the parent or care-giver under the supervision of a designated social worker, provided that the child's safety and well-being must receive first priority;
  - (ii) placing the child in alternative care for a limited period to allow for the reunification of the child and the parent or care-giver with the assistance of a designated social worker;<sup>698</sup>
  - (iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
  - (iv) making the child available for adoption; or
  - (v) issuing instructions as to the evaluation of progress made with the implementation of the permanency plan at specified intervals”.

Thus, before making an order for the removal of the child,<sup>699</sup> the court needs to consider the report of the social worker which provides insight in the present state and circumstances of the child. In addition, section 157(1)(b) provides the court with various options to consider in

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<sup>697</sup> Section 1(1) defines “permanency plan” as a documented plan referred to in section 157(1). See also DSD regulation 55(2), as discussed below.

<sup>698</sup> In this respect “a designated social worker facilitating the reunification of a child with the child's family in terms of subsection (1)(b)(ii) must -

- (a) investigate the causes why the child left the family home;
- (b) address those causes and take precautionary action to prevent a recurrence; and
- (c) provide counselling to both the child and the family before and after reunification”.

<sup>699</sup> In terms of section 156.

deciding the best way of securing stability in the child's life. It is interesting to note that subsection (3) determines that a very young child, under certain circumstances, *must*<sup>700</sup> be made available for adoption, except when this is not in the child's best interests.<sup>701</sup> Matthias and Zaal point out that although the term “very young” is vague, it nevertheless makes it clear that with regard to orphaned or abandoned babies and toddlers, a social worker should advise the court on the appropriateness of section 156(1)(e)(iii).<sup>702</sup>

When issuing an order involving the removal of the child from the care of the child's parent or care-giver, the court may include in the court order instructions as to the implementation of the permanency plan for the child.<sup>703</sup> DSD regulation 55(2) prescribes that a permanency plan must explore the following five options, taking into account that the first option is the most desirable and the last option the least desirable:

- “(a) if the child is to be removed from the care of his or her parent, guardian or care-giver, the possibility of placing the child in foster care<sup>704</sup> with relatives or non-relatives as geographically close to the parent or care-giver as possible to encourage visiting by

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700 Own emphasis.

701 This is applicable where the child has been orphaned or abandoned by his or her parents. In this respect DSD regulations 56(1) and (2) become relevant, which, among others, deals with establishing whether a child has been abandoned or orphaned (GN R261/2010). To this effect the social worker must cause an advertisement to be published in at least one local newspaper. Bosman-Sadie & Corrie pose the question whether it will be the Department of Social Development who will be responsible for the advertising costs involved: *A Practical Approach to the Children's Act (2010)* 182.

702 In 9-26.

703 Section 157(4).

704 “Foster care” means care of a child as described in section 180(1) and includes foster care in a registered cluster foster care scheme, which refers to a scheme providing for the reception of children in foster care, managed by a non profit organisation and registered by the provincial head of social development for this purpose: see section 1(1). Skelton has warned that the foster care grant system is in a systematic crisis. The number of foster child grants increased from 49.843 in April 2000 to over 500.000 around 2010, due to the impact of HIV/AIDS and the fact that foster child grants were made available to relatives caring for children. She has suggested a more sustainable solution would be to limit foster care to placement with unrelated care-givers, and kinship care for two categories, namely court-ordered and informal kinship. The former would concern children who have been abused or neglected and need social work supervision, whereas informal kinship care would not need such supervision, but would be supported by a grant payable through the social assistance system, in “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa” 2012 *The International Survey of Family Law* 344. See also section 5.3.1.1.2.

- the parent or care-giver;
- (b) the possibility of adoption<sup>705</sup> of the child by relatives;
  - (c) the possibility of a relative or relatives obtaining guardianship of the child;<sup>706</sup>
  - (d) the possibility of adoption of the child by non-relatives, preferably of similar ethnic, cultural and religious background; or
  - (e) the possibility of placing the child in foster care with relatives or non-relatives or with a cluster foster care scheme”.

From the above it is clear that the balancing of interests by the court is not in the least an easy task. Although the child's best interests should be paramount, including his or her safety and well-being, the least intrusive measure should be opted for.<sup>707</sup> The prospect of a positive change in circumstances within the family environment, with or without the necessary support services, needs serious consideration, since, ideally speaking, a child should (eventually) return home where it belongs. It is submitted that more emphasis and thus priority should be given to prevention and early intervention services.<sup>708</sup> It is agreed with Frank that prevention and early intervention programmes have enormous potential in preventing the removal of children,<sup>709</sup> provided they are properly implemented.

These programmes go a long way in changing the shape of the child and protection arena. Therefore, various possibilities need to be explored by the social worker and elaborated

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<sup>705</sup> Adoption refers to the child being placed in the permanent care of a person in terms of an order of the children's court that has the effects contemplated in section 242, see section 228. The adoptive parents will be granted full parental responsibilities and rights, including guardianship. See also Bosman-Sadie & Corrie (2010) 247. See also section 5.3.5..

<sup>706</sup> See sections 1(1) and 18(3)-(5) of the Children's Act.

<sup>707</sup> The so-called principles of minimum intervention and last resort. See Rule 19 of the *Beijing Rules*, Res 40/33 (1985); Rule 1 1 and 2 of the *Havana Rules*, Res 45/113 (1990); *Draft United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children* (2007) paragraph 13; and *General Comment No. 10* (2007) paragraph 79. See also section 2.2.3.4 which specifically deals with deprivation of liberty.

<sup>708</sup> For a detailed discussion, see section 4.2 above.

<sup>709</sup> In *Commentary on the Children's Act* (2012) 8-18.

upon in the report and recommendations. Where reunification is not feasible, further reaching measures are necessary,<sup>710</sup> ensuring permanency and thus stability in a child's life, without disrupting it.<sup>711</sup>

Where a permanency plan has been approved by the court, it must be evaluated by the social worker concerned within six months of its implementation, unless the children's court gives other directions in terms of section 157(1)(b)(v). Thereafter, evaluation should take place at intervals of six months, which is commendable. This serves to establish whether the child may be returned to the care of his or her parent(s) or care-giver, unless the child had been adopted or placed in foster care.<sup>712</sup> The various court orders which the court may consider in terms of South African law will be discussed below.<sup>713</sup>

#### **4.4.2 Aspects relating to the children's court proceedings in the Netherlands**

Book 1 of the Civil Code of the Netherlands provides for the substantive law pertaining to the law of persons and family law. The Civil Code of Procedure deals with the procedural aspects of the various courts. For the purpose of this thesis, Title 6 (Articles 798-813) is of particular importance since it specifically deals with the civil procedure pertaining to the law of persons and family law. Moreover, Title 3 (Articles 261-291) is relevant since it provides for the application procedure in first instance. The procedural rules of both Titles in the

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<sup>710</sup> Foster care provides a temporary solution with the aim of the child returning home. Adoption aims to provide a permanent family care solution, intended to last a lifetime, see section 229. It surely is commendable that in terms of section 231(1)(e) of the Children's Act, a foster parent can also adopt the child, unlike the situation in the repealed Child Care Act 74 of 1983, section 17. However, it is most regrettable that in such a situation they will lose the foster care grant. The problem lies therein that such financial loss cannot be replaced since adoption grants are not available. It is submitted that this matter needs to be urgently addressed. For many children a more permanent care arrangement would serve their best interests. In order to provide an incentive for adopting a child, adoption grants should be made available for the persons who need such financial assistance.

<sup>711</sup> Especially in the case of very young children, adoption provides permanency by connecting children to other safe and nurturing family relationships intended to last a life time. See the purpose of adoption as referred to in section 229. See also section 157(3) and DSD regulation 56.

<sup>712</sup> DSD regulation 55(3) (GN R261/2010).

<sup>713</sup> See section 4.5.1.

Code of Civil Procedure will be outlined in the following.<sup>714</sup>

#### 4.4.2.1 Filing of an application with the children's court

All procedures relating to family law are application procedures and therefore the general rules pertaining to application procedures come into play.<sup>715</sup> The district court,<sup>716</sup> under which the children's court resides as a specialised court, has jurisdiction in all matters relating to the person and authority of children.<sup>717</sup> Cases pertaining to children are dealt with by the court in whose district the child resides.<sup>718</sup> Usually the individual provisions in Book 1 of the Civil Code stipulate who is considered an applicant. An application for any of the child protection measures may be filed by the following parties: the Council for Child Protection,<sup>719</sup> the prosecution authority, and generally speaking the parents, foster parents or relations by blood or affinity, except in the case of relieve of parental authority.<sup>720</sup> Generally speaking, it

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<sup>714</sup> The heading of Title 3 reads in Dutch: “*De verzoekschriftprocedure in eerste aanleg*”, which procedure applies to all cases which commence with an application in the first instance. Title 6 reads: “*Rechtspleging in zaken betreffende het personen- en familierecht*”, which specifically provides for matters relating to the law of persons and family law. See also Wortmann & Van Duijvendijk-Brand *Compendium van het personen- en familierecht* (2009) 284. Doek has pointed out that the specific rules need to be applied in conjunction with the general rules in the Code of Civil Procedure: where the specific rules do not come into play, the general rules pertaining to an application procedure are applicable: *Tekst & Commentaar – personen-en familierecht* (2010) 1467.

<sup>715</sup> See the Articles 261-291 of the Civil Code of Procedure, which deals with the application procedure in first instance. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 104.

<sup>716</sup> In Dutch: *de arrondissementsrechtbank*.

<sup>717</sup> Which includes matters relating to contact and information pertaining to the child. Title 3 and 6 of the Code of Civil Procedure refer to “minor”. Since the definition of “minor” and “child” coincides, further reference will be made to “child”, for the sake of consistency in terminology. For a definition of “a child”, see sections 2.2.1.2 and 3.1.1.

<sup>718</sup> Article 265 of the Civil Code of Procedure. A child has residence with the person who exercises parental authority over the child, see Article 1:10 of the Civil Code; Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1476.

<sup>719</sup> In matters relating to children, the Council for Child Protection will be informed, even when it is not the applicant. Article 810(3) of the Code of Civil Procedure determines that the Board will be sent a copy of all applications in matters concerning children. This way, the Board will be able to provide the court with the necessary information and advice. In this regard the court has also discretion to call upon the Board to appear in court.

<sup>720</sup> In Dutch: *de ontheffing*. The latter child protection measure can only be requested by the Council for Child Protection and the Public Prosecuting Authority, in terms of Article 1:267(1). See Doek & Vlaardingerbroek (2009) 304 and 374. For a more detailed discussion on the child protection measures, see section 4.5 below.

may be assumed that any “affected person” may file an application, unless it is otherwise provided by law.<sup>721</sup>

The legislation does not contain any listing of affected parties. However, Article 798(1) of the Civil Code of Procedure describes an “affected party” as the person whose rights and responsibilities are directly affected by the case. In other words, children are considered an affected party.<sup>722</sup> Whether a person will be classified as an affected party will ultimately be decided by the presiding officer.<sup>723</sup> Doek outlines that in order to answer the question whether someone may be typified as an affected party, it has to be determined whether the outcome of the procedure will impact on this person's interests to such an extent that this warrants taking part in the proceedings in order to protect such interests.<sup>724</sup> It should be noted that Article 8 of the European Convention is also relevant in this respect. Any relationship with a child which *de facto* falls under the term “family life” may provide an opportunity to appear in proceedings as an affected party. Article 799 of the Civil Code of Procedure refers to Article 278 with regard to the contents of an application.<sup>725</sup> Apart from the first names, surname and domicile, the document needs to contain a clear outline of the request/application with reference to the reasons for the application, after which it needs the signature of the applicant.<sup>726</sup> It should be noted that in matters concerning the law of persons and family law, the particulars of the affected parties also need to be included.<sup>727</sup>

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<sup>721</sup> For example, see Article 1:267(1) where an affected party is explicitly excluded. Doek is of the opinion that an affected party may file an application (as an applicant) even when the legislation does not specifically provide for this: *Tekst & Commentaar – personen- en familierecht* (2010) 1478.

<sup>722</sup> See Van Triest “Het kinderverhoor in het ressort Den Bosch onder de loep” 2004 *Tijdschrift voor Familie- en Jeugdrecht* 17. It has to be kept in mind that generally speaking children need to be represented by their parent(s), guardian or a curator. It is interesting to note that regarding the placement of a child in a closed setting in terms of a supervision order, the child concerned has legal standing, see Article 29a(2) of the Act on the Youth Care. The rules which are applicable specifically in this situation are contained in Article 29a-29y of the Act on the Youth Care.

<sup>723</sup> See Doek in *Tekst & Commentaar – personen-en familierecht* (2010) 1478–1479.

<sup>724</sup> *Tekst & Commentaar – personen-en familierecht* (2010) 1478.

<sup>725</sup> For a more detailed outline, see Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 105-106.

<sup>726</sup> See Doek in *Tekst & Commentaar – personen-en familierecht* (2010) 1480.

<sup>727</sup> See Article 800 of the Code of Civil Procedure. The particulars concern the names and if known, the first names of the persons affected and their place of residence.

In addition, other relevant persons, whose information or statements could be relevant in the assessment of the application, might also be mentioned in the application, which is left to the discretion of the applicant.<sup>728</sup> Doek refers in this respect to “informants”, like, neighbours or friends of the applicant who may provide valuable information.<sup>729</sup> Generally speaking, an application for a child protection measure can be submitted to the children’s court by a parent or legal guardian, which application requires the assistance of a lawyer. Only the Council for Child Protection can file such request without a lawyer, which is specifically provided in Article 1:243(4) of the Civil Code. Subsequent applications in the context of a child protection measure can be filed without the assistance of a lawyer.<sup>730</sup> Subsequently, the document needs to be filed at the court registry.<sup>731</sup> If needed, documentary proof relating to the request may be submitted.<sup>732</sup> After the filing of the application by the applicant, the presiding officer determines the date and time for the hearing and orders the applicant to be summoned to appear in court.<sup>733</sup> Copies of the application and additional documentation will be sent to the affected parties.<sup>734</sup> At the same time the affected parties will be summoned to appear in court, on the basis of Article 800 of the Code of Civil Procedure.<sup>735</sup> This includes a child of twelve years or older if mentioned in the application as an affected party.<sup>736</sup>

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<sup>728</sup> These persons are not directly affected and therefore cannot be classified as an “affected party”. See Wortmann & Van Duijvendijk-Brand (2009) 285.

<sup>729</sup> See *Tekst & Commentaar – personen-en familierecht* (2010) 1480.

<sup>730</sup> See Article 1:265(1) and (4) of the Civil Code. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 367. See also Article 278(3) of the Code of Civil Procedure, which states that generally speaking an application requires the signature of a lawyer, unless the request may be filed with the sub-district court judge (in Dutch: *de kantonrechter*) or where in terms of the relevant legislative provisions the filing of the application does not require the assistance of a lawyer. The aforementioned Article 1:265 forms such an exception.

<sup>731</sup> See Article 278(2) of the Code of Civil Procedure.

<sup>732</sup> Article 799 of the Code of Civil Procedure.

<sup>733</sup> See Article 279 of the Code of Civil Procedure.

<sup>734</sup> A sufficient number of copies need to be provided, including copies for the court, the court file, the Council for Child Protection (where a child is involved in the case) and in the case of an adoption, the Department of Justice. See Doek in *Tekst & Commentaar – personen- en familierecht* (2010) 1481.

<sup>735</sup> See Article 271 of the Code of Civil Procedure, unless the presiding officer makes an order at once in terms of Article 800, in which he or she grants the request or declares that the court has no jurisdiction.

<sup>736</sup> In cases involving children, a presiding officer is obliged to give such a child the opportunity to express his or her views, before taking a decision. See Article 809 of the Code of Civil



In addition, the presiding officer may order that the other persons (informants) whose information or statements could be relevant in the assessment of the application be summoned to appear in court.<sup>737</sup> The question arises whether, for example, foster parents should be considered as an affected party and subsequently be summoned to appear in court. Doek indicates that the presiding officer is not obliged to do so, but when the duration of the placement has been extended beyond one year, it is highly recommended to do so, even if this was not requested.<sup>738</sup> Where the court decides otherwise, it is submitted that foster parents should in any event be called upon, at the least as informants in terms of Article 800(2).

However, Article 800(3) contains two exceptions on the basis of which no summons to appear (and thus no hearing) is required with regard to affected parties, namely,

- (i) The provisional supervision order in terms of Article 1:255 of the Civil Code;
- (ii) The authorisation required for the removal of a child by the Bureau for Youth Care in terms of Article 1:261 of the Civil Code;<sup>739</sup> or this concerns an order for

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Procedure. See also section 4.4.2.2 below. Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1482.

<sup>737</sup> See Article 800(2) of the Code of Civil Procedure. It is, however, the court's discretion to decide who will or will not be summoned to appear in court. See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1469 and 1480.

<sup>738</sup> Doek refers to specific regulations (procesreglement civiel jeugdrecht) in which foster parents who have cared for a child for a period longer than one year, are considered an affected party: *Tekst & Commentaar – personen- en familierecht* (2010) 1482.

<sup>739</sup> Although a provisional supervision order will often be combined with the removal and placement of a child, it has to be kept in mind that the latter needs to be authorised by a separate court order (the latter allows for the right to appeal, which is not possible in the case of a provisional supervision order). Moreover, where previously an (ordinary) supervision order (1:254) was issued, a change in circumstances could require the removal and placement of the child concerned. In such a case the authorisation for removal and placement may be given without a hearing. In this respect reference should also be made to the Articles 29a-29y of the Act on the Youth Care. Article 29f(1) prescribes that before the children's court can decide on an application regarding the provisional authority to the placement of a child in a closed setting (which usually will be a matter of urgency), the person exercising parental authority and a foster parent need to be heard, unless the parties do not want to make use of this opportunity. Due to the fact that no reference is made to the exception in Article 800(3), which was discussed above, the rule in Article 29f(1) should normally be applied. This might only be different where there is serious and imminent danger for the child which is of such a nature that a hearing can not be awaited. See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1483.

provisional custody in terms of Article 1:241 of the Civil Code, which is relevant where no parental authority is exercised over a child.<sup>740</sup>

In other words, these child protection orders can be made at once, provided that the hearing cannot be awaited without the immediate and serious danger for the child. In other words, the only reason why, in these instances, no summons to appear in court is issued and no hearing takes place, is because of the urgency of these cases. However, since, due to the circumstances, no hearing has taken place, these orders will only be valid for two weeks, unless the affected parties have been given the opportunity to be heard.<sup>741</sup>

To sum up, an “affected party” has the following entitlements in terms of the Civil Code of Procedure:

- (i) To be summoned to appear in court and in addition, to receive a copy of the application combined with other relevant documentation on the basis of Article 800(1);
- (ii) He or she may file a statement of defence (and include a separate application), in terms of Article 282(1) and (4);
- (iii) To be entitled to receive a copy of the court order, based on Article 805(1);
- (iv) The right to an appeal or cassation to the *Hoge Raad* in terms of Article 806(1) and 398;
- (iv) The right to information and to receive a copy of the relevant documentation, based on the Articles 811 and 290.

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<sup>740</sup> Provisional custody in terms of Article 1:241 of the Civil Code, is exercised by someone else than the parent(s) and therefore will not be discussed in detail.

<sup>741</sup> Article 809(3) of the Code of Civil Procedure provides specifically for the hearing of children, but is similar in content to Article 800(3).

#### 4.4.2.2 The hearing

As mentioned,<sup>742</sup> matters involving children are dealt with by the children's court; generally a single judge/magistrate.<sup>743</sup> At any time during the proceedings, the presiding officer may refer a case to a three-judge section, for example regarding an application for a supervision order.<sup>744</sup> In such case the presiding officer takes part in the proceedings.<sup>745</sup>

All cases concerning the law of persons and family law take place behind *in camera*,<sup>746</sup> which is specifically provided for in Article 803 of the Code of Civil Procedure. The question arises whether this is in line with Article 6 of the European Convention, which provides for the right to a fair trial. Bruning mentions that the practice that hearings always take place behind closed doors, should be reconsidered.<sup>747</sup> It should be noted that the right to appear

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<sup>742</sup> See section 4.4.2.1.

<sup>743</sup> Except in cases pertaining to maintenance, see Article 808 Code of Civil Procedure. See also Article 15(1) and (2) of the Code of Civil Procedure.

<sup>744</sup> See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 334.

<sup>745</sup> See Articles 808 and 15(3) of the Code of Civil Procedure. See also Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1469 and 1492.

<sup>746</sup> Which is the same in South Africa, see section 4.4.1.1.

<sup>747</sup> “Equality of arms bij jeugdbescherming” 2007 *FJR* 1 (1) 1. In this Article Bruning outlines the approach of the European Court in procedural matters pertaining to child protection cases, with reference to the case *Moser v Austria* of 21 September 2006. In this case the baby was separated from the mother shortly after birth and placed in foster care. The mother was subsequently deprived of parental authority and had very limited contact. The European Court concluded that Article 8 of the European Convention had been violated because the mother was only heard once, that she had not been given the opportunity to reply to any of the submitted reports and that she did not have legal representation. In addition, the court concluded that Article 6 had been violated. Bruning refers to the distinction between three aspects regarding the principle *equality of arms*, namely the opportunity to reply/comment to reports (to be considered in the decision-making), the lack of proceedings in public and the delivery of judgment behind closed doors instead of in public. It is agreed with Bruning that especially in child protection cases the parties are not equal; it is the state versus the family and child.

It is submitted that the three aspects of the principle *equality of arms* should be tested against the provisions in the Code of Civil Procedure. Specific provisions in the Code of Civil Procedure, the Act on the Youth Care and the policy document “Kwaliteitskader en Protocollen 2009” of the Council for Child Protection, do provide for the opportunity for affected parties to comment to reports, see also section 4.4.2.3 below, in which the right to inspection and the right to receive documentation are discussed. However, it is agreed with Bruning that the matter of a public hearing and the delivery of judgment in public in child protection cases need to be looked into. However, it is evident that the circumstances of certain cases demand the proceedings taking place behind closed doors. It is suggested that the affected parties should be able to request the proceedings taking place in public, which

in person does not mean that the applicant can attend the entire procedure. In addition, a hearing might take place outside the court building.<sup>748</sup> Article 809 of the Code of Civil Procedure is one of the core provisions with regard to the court proceedings; it provides that a presiding officer may not decide on any application affecting a child, before a child of twelve years or older has been given an opportunity to express his or her opinion.<sup>749</sup> The right to be heard may be extended to children below the age of twelve years, but this is left to the discretion of the presiding officer.<sup>750 751</sup> It is submitted that in order to realise the implementation of Article 12 of the CRC, the latter provision should be interpreted extensively, rather than restrictively, thereby generously granting the opportunity to participate.<sup>752</sup> Children are usually heard in chambers, and such hearing will take place in

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decision should be left to the court. The main consideration should always be the best interests of the child concerned. Where such a request is dismissed/rejected, the court should provide reasons. In addition, judgment should preferably be delivered in public, for the sake of transparency and due process of law.

<sup>748</sup> This concerns an applicant, an affected party or an informant who is resident in the Netherlands and unable to come to the court building, see Article 802 of the Code of Civil Procedure. With regard to children the presiding officer can determine that the child to be heard at home or in a more neutral place, for example at school. The condition of not being able to come to the court building will not be applicable in those circumstances. See Doek *Tekst & Commentaar – personen-en familierecht* (2010) 1486. For example, the district court (in Dutch: *arrondissementsrechtbank*) of Alkmaar decided to hold hearings in “Transferium Jeugdzorg” in Heerhugowaard, a closed setting for children, before making an order pertaining to supervision or placement of the children residing at the institution. The ratio behind this was that the court hoped that children and parents would be more at ease and to have actual contact with the professionals involved at the institution. See “Kinderrechter houdt zitting in jeugdzorginstelling” *Nieuwsbrief Jeugd* Nederlands Jeugdinstuut (2011-01-12) 4 (file://C:\Documents and Settings\spijker\Local Settings\Temp\XPgrpwise\4D2DE11BSTA last accessed on 18/01/2011).

<sup>749</sup> The hearing of a child of twelve years or older is in principle compulsory, unless the presiding officer is of the opinion that it concerns a matter of minor importance (in Dutch: *een zaak van kennelijk ondergeschikt belang*), see Article 809(1) of the Code of Civil Procedure. The latter concerns for example the appointment of a special curator in terms of Article 1:212 of the Civil Code, in which case the child does not need to be heard. See Doek *Tekst & Commentaar – personen-en familierecht* (2010) 1494. See also section 3.1.4.2.

<sup>750</sup> The presiding officer may decide to hear the child on his or her own accord, or upon the request of the parent(s) or guardian or the child. However, in case such a request is disallowed the decision does not need to be motivated, due to the fact that it is not prescribed by law. It is agreed with Doek that such a decision nevertheless should be properly motivated, especially with regard to Article 12 of the CRC, *Tekst & Commentaar – personen- en familierecht* (2010) 1495. *De Hoge Raad*, however, is not clear on the matter.

<sup>751</sup> Van Triest has pointed out that the criteria on which the presiding officer may decide whether the child should be given the opportunity to express his or her views are unclear. Another problem lies in the fact that children below the age of twelve are usually not invited for a hearing and therefore have more difficult access to the courts: “Het kinderverhoor in het ressort Den Bosch onder de loep” 2004 *FJR* 17.

camera. However, the hearing may also take place elsewhere, for example at the child's home<sup>753</sup> or at a residential setting where the child has been placed.<sup>754</sup> However, the presiding officer may decide who else will be present at the hearing; for example, a parent or another person who might be supportive of the child concerned. A child is not obliged to make use of the opportunity to be heard in person. Often a child will send a written response, after having received an invitation from the clerk of the court. Where a child has not made use of the opportunity to be heard, the presiding officer may, if necessary, determine another day for the child to appear in person. He or she may even order the child to be brought before the court, in which case the prosecution authority might be requested to assist.<sup>755</sup> If the child once more does not appear, the proceedings may continue in the absence of the child.<sup>756</sup>

The question arises whether the information presented at the children's hearing, in the absence of the parent(s), should be treated with confidentiality. Doek points out that before the court makes a decision which includes any information given by the child at the hearing, the parents have to be informed of the core content of that information, and they should be able to comment on the information concerned.<sup>757</sup> Since 1 September 2009, the relevant regulations pertaining to civil procedure contain the following rules: that children will be heard separately (outside the oral proceedings), of which no record will be kept. However, during the main proceedings the presiding officer will in brief outline the contents of the

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<sup>752</sup> See also *General Comment No. 12* (2009). For a detailed discussion on the right of the child to be heard, see sections 2.2.1.6 and 3.1.4. It is submitted that where provision is made for the participation of children, there might be less resistance from the parties with regard to the (implementation of a) court order.

<sup>753</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 110.

<sup>754</sup> See Kaljee, Sikkes & Warmerdam "De rechter in de auto in plaats van de jongere in de cell!", in Forder *et al. Kindvriendelijke Opsluiting – Gesloten Plaatsing van Jeugdigen in het Licht van Mensenrechten* (2012) 167 and further.

<sup>755</sup> Article 813(1)(a) of the Code of Civil Procedure.

<sup>756</sup> Article 809(4) of the Code of Civil Procedure.

<sup>757</sup> This would be in line with the principle of hearing both sides of the argument. Infringement of this principle would be contrary the right to fair trial in terms of Article 6 of the European Convention. Article 19 of the Code of Civil Procedure also contains the right to hear and be heard. On the basis of the latter provision, the court is obliged to give both parties the opportunity to present arguments and to comment to each others arguments, involving all documentation presented during the proceedings, unless otherwise provided by legislation. See the Conclusion of the Advocate General Langemeijer in the case of the *Hoge Raad* of 23 April 2004 (LJN AO4611). See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1494.

child's statement.<sup>758</sup>

As mentioned above, Article 809(3) of the Code of Civil Procedure contains an exception to the rule that a hearing should take place, namely in a crisis situation.<sup>759</sup> Where there appears to be an immediate and serious danger for the child, which does not allow for the child to be heard due to its urgency, the presiding officer may decide against hearing the child. He or she may make thus the following orders at once: a temporary supervision order, an order authorising the Bureau for Youth Care to remove a child, and an order for temporary custody.

However, within two weeks a hearing has to take place.<sup>760</sup> With regard to the urgency placement, Article 29f(1) of the Act on the Youth Care might pose a problem. It prescribes that, among others, the child concerned needs to be heard before the children's court and may decide to issue an order authorising the removal and placement of the child. Since Article 29 provides specific rules pertaining to the placement in a closed setting, it is agreed with Doek that this provision should prevail, and thus the child should be heard before any decision-making on the matter. After all, such an order has far-reaching consequences in the life of a child. Although Doek indicates that the courts are inclined to give preference to Article 809(3) in a matter of urgency, it is submitted that nevertheless Article 29f(1) of the Act on the Youth Care should be applied, since the provisions in Article 29 specifically purport to protect children who are facing removal, followed by placement in closed institutions.<sup>761</sup>

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<sup>758</sup> Which may have been provided orally or in writing. See also the discussion of Bruning "Equality of arms bij jeugdbescherming" 2007 *FJR* 1, as referred to in footnote 747 above. See Doek *Tekst & Commentaar – personen-en familierecht* (2010) 1494.

<sup>759</sup> See section 3.1.4.2. Compare with Article 800(3) of the Code of Civil Procedure, where similar court orders can be made at once, without a hearing, due to the fact that the proceedings cannot be awaited without immediate and serious (pending) danger for the child. See also Asser/De Boer *Personen- en familierecht* (2010) 758, where it is indicated that the parents should be involved in the decision-making process before the child protection measure is applied for (initiated), on the basis of Article 8 of the European Convention. See the case *Venema v the Netherlands* of 17/12/2002, which dealt with a temporary (or provisional) supervision order without involving the parents timeously. In that case the European Court concluded that Article 8 had been violated.

<sup>760</sup> Article 809(3) of the Code of Civil Procedure determines that these orders will lapse after two weeks, unless the child has been given the opportunity to express his or her views.

<sup>761</sup> See *Tekst & Commentaar – personen- en familierecht* (2010) 1495.

Article 282 of the Code of Civil Procedure allows every affected party to file a statement of defence<sup>762</sup> up to the commencement of the hearing and with the permission of the presiding officer, even during the proceedings.<sup>763</sup> In the latter case copies of the documentation have to be provided to the applicant and other parties. Where during the proceedings it appears to the court that additional information is required, the court has the following options regarding expertise and reappraisal before it will make an order.<sup>764</sup>

- (i) To request the Council for Child Protection to investigate and to submit a report and recommendations. This may be upon the request of an affected party;
- (ii) The court may, upon the request of a party or on its own accord, appoint one or more experts which will report back to court on the matter concerned; or<sup>765</sup>
- (iii) In cases pertaining to a supervision order,<sup>766</sup> the relief from parental authority or the deprivation from parental authority, the court may appoint an expert upon the request of the child's parent and after consultation with the parent

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<sup>762</sup> In Dutch: *het indienen van een verweerschrift*.

<sup>763</sup> See Wortmann & Van Duijvendijk-Brand *Compendium van het personen- en familierecht* (2009) 287; Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1470.

<sup>764</sup> Doek has pointed out that with regard to the interpretation of this specific Article, the general rules pertaining to the hearing of experts (Articles 194-200) come into play via Article 284: *Tekst & Commentaar – personen- en familierecht* (2010) 1499.

<sup>765</sup> See Article 284 and 194 of the Code of Civil Procedure. In some instances the expertise of a child psychologist or psychiatrist may be required. See Wortmann & Van Duijvendijk-Brand *Compendium van het personen- en familierecht* (2009) 288; also Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1473.

<sup>766</sup> The request of reappraisal can be made with regard to any of the decisions regarding supervision orders, like the application for a supervision order, the extension thereof, the order authorising the removal and placement or the extension thereof. Since on the basis of Article 29a(2) of the Act on the Youth Care children under certain circumstances are considered a party to the legal proceedings, this would imply that with regard to the placement in a closed setting, they are also entitled to request a reappraisal. This could be done by the legal representative of the child concerned, who will have been assigned to the child in terms of Article 29f(2). Interestingly, where the court has appointed an expert in connection with a reappraisal in child protection cases, the costs involved are covered by the government. See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1501.

concerned, on the basis of Article 810a(2).<sup>767</sup>

Wortmann and Van Duijvendijk-Brand point out clearly that the presiding officer will grant such request where the expert-opinion would contribute to the decision-making in the case concerned and where it is not contrary to the interests of the child.<sup>768</sup>

It is important to stress that, on the basis of Article 810,<sup>769</sup> in proceedings relating to children, the court may request the advice of the Council for Child Protection at any given moment, when considered necessary in connection with the interests of the child.<sup>770</sup> In these cases the Council for Child Protection may also act on its own accord by submitting a report to court or by appearing in court.<sup>771</sup> Therefore it is crucial that the Board needs to be informed about the filing of any application which involves children and will have to be informed timeously of the court date.<sup>772</sup> Moreover, Article 810(4) of the Code of Civil Procedure specifically provides that the following child protection orders cannot be made without having heard (or having called upon) the Council for Child Protection to give advice; a supervision order, the relief of parental authority, or the deprivation of parental authority or

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<sup>767</sup> Doek has pointed out that such a consultation might be useful to ensure that the appointment of the expert concerned will be acceptable to the parties concerned, in order to avoid unnecessary conflict in the proceedings: *Tekst & Commentaar – personen- en familierecht* (2010) 1501.

<sup>768</sup> *Compendium van het Personen- en Familierecht* (2009) 288. For example, where a parent would disagree with any reports presented during the proceedings, he or she may request a contra-expertise.

<sup>769</sup> Code of Civil Procedure.

<sup>770</sup> The question arises whether the court is obliged to pronounce on the contents of the report where it decides contrary to the recommendations of the Council for Child Protection. It is submitted that at least in the case of child protection orders there should be a duty for the court to justify why it deviates from the recommendations, due to the far-reaching consequences for the child and his or her family. In the policy document “*Kwaliteitskader en Protocollen 2009*” of the Council for Child Protection it is explicitly stipulated that the child and other affected persons, for example the parent(s) need to be involved in the investigation by the Board. Section 3.2.5 of the document provides that children above the age of twelve will be heard individually and where this has not materialised, this needs to be motivated in the report. With regard to children below the age of twelve it is only required that they will be involved, having regard to their age and level of development.

<sup>771</sup> Section 3.4.1 of the policy document “*Kwaliteitskader en Protocollen 2009*” prescribes that the Council for Child Protection will always attend the court proceedings where the report is considered by the court (or where the Board has filed an application for a child protection measure.

<sup>772</sup> See also section 4.4.2.1.



guardianship.<sup>773</sup> At the end of the proceedings, the presiding officer announces the date on which judgment will be given.<sup>774</sup> This date is important since it marks the commencement of the period in which to lodge an appeal or cassation to the *Hoge Raad*.<sup>775</sup> Since it concerns an order in a case which was dealt with behind closed doors, third parties will only have limited access to information.<sup>776</sup>

#### 4.4.2.3 The right to inspect and receive documentation

Generally speaking, in terms of Article 290 of the Code of Civil Procedure, an applicant and all affected parties have the right to inspect and receive copies of all the relevant documents; for example, the application, the statement of defence, any written statements, and expert opinions.<sup>777</sup> However, this involves (and is limited to) any documentation submitted by any of the affected parties.<sup>778</sup>

It should be noted that with regard to any documentation presented to court by the Council for Child Protection, the prosecution authority or any experts (upon the request by the court), the situation differs slightly. Article 811(1) of the Code of Civil Procedure determines that in matters relating to children, a limited number of persons are regarded as “affected parties”, namely:

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<sup>773</sup> It should be noted though that where the Council for Child Protection has filed the application for a child protection order, it always will attend the court proceedings. See section 3.4.1 of the policy document “*Kwaliteitskader en Protocollen 2009*”. For a more detailed discussion on the various child protection orders, see section 4.5.2 below.

<sup>774</sup> Article 804 of the Code of Civil Procedure.

<sup>775</sup> See Doek *Tekst & Commentaar – personen-en familierecht* (2010) 1471.

<sup>776</sup> Doek refers in this respect to Article 28(4) of the Code of Civil Procedure, which determines that only anonymous copies of the court order will be issued. Moreover, parties have an obligation of confidentiality, see Article 29 of the Code. In *Tekst & Commentaar – personen-en familierecht* (2010) 1486.

<sup>777</sup> See Doek *Tekst & Commentaar – personen-en familierecht* (2010) 1471.

<sup>778</sup> See Wortmann & Van Duijvendijk-Brand *Compendium van het Personen- en Familierecht* (2009) 288.

- “(a) the applicant(s);<sup>779</sup>
- (b) the parents and guardians;<sup>780</sup>
- (c) the foster parents;<sup>781</sup>
- (d) the child of twelve years or older, unless the presiding officer is of the opinion that the child is not able to judge his or her own interests.”

Therefore, with regard to these professional reports, only the abovementioned categories of persons are entitled to inspection and documentation.<sup>782</sup> In addition, pertaining to the right to inspect any files of the Bureau for Youth Care, the Articles 49-56 of the Act on the Youth Care are relevant. It is evident that when a court order is, among others, based on a report of the Bureau for Youth Care, parties should be able to inspect such report and express their

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<sup>779</sup> Which means the formal applicants. It depends on the child protection measure who may be a particular applicant, like the parents, guardian, foster parents or blood relatives up to the fourth degree. For example, with regard to the latter two categories of persons mentioned, see Article 1:270 of the Civil Code, pertaining to the dismissal of parental authority.

<sup>780</sup> The father or mother of the child concerned. It is, however, not necessary to have parental authority to qualify.

<sup>781</sup> Article 811(1) requires that in order to have the right of inspection, the foster parents should have cared for/having raised the child and should be closely connected to the child. Doek has indicated that the latter will be established by the presiding officer. After having cared for/raised the child for one year, the foster parents have a so-called “blocking right” (in Dutch: “*blokkade recht*”) which gives foster parents a stronger position since they are then considered an affected party, see Article 1:253s of the Civil Code. Moreover, the right to (inspect) documentation accrues to the registered partner of the parent of the child as well as the partner of the parent who exercises joint authority with the parent: *Tekst & Commentaar – personen- en familierecht* (2010) 1504.

<sup>782</sup> However, the presiding officer may refuse inspection and the issue of a copy of the documents in terms of Article 811(2) of the Code of Civil Procedure. The latter provision refers to the Government Information (Public Access) Act (in Dutch: *Wet Openbaarheid van Bestuur*), Article 10(2)(e) and (g), which provide for the protection of privacy and to prevent disproportionate harm or benefit of an affected party or a third party. However, Doek has rightfully pointed out that in the view of the decisions of the European Court the presiding officer should only refuse inspection and copy of the documents in exceptional cases and properly motivate such a decision. See *Tekst & Commentaar – personen-en familierecht* (2010) 1504. Where the court refuses inspection and copy of the documents the only remedy available to an interested party is cassation in the interest of the law, except for their lawyer. See also section 4.7.2 below. However, where the court has refused any access to information to any of the affected parties, the lawyer concerns is required merely to discuss the contents of the documents without allowing inspection.

views in that regard. A copy of the court order will promptly be issued or sent to the applicant and the affected parties by the clerk of the court.<sup>783</sup> Moreover, where a court order concerns a child or where an order serves to revoke an adoption, a copy of the order will be sent to the Council for Child Protection.<sup>784</sup> Thus in the case of child protection orders this will be standard procedure. After all, in matters concerning children, the Council for Child Protection has been given specific responsibilities in terms of Article 810. The court may request the advice of the Council for Child Protection at any time during the proceedings, but the Board also may, on its own accord, provide the court with information where this is deemed necessary.<sup>785</sup>

Interestingly, with regard to an order authorising the placement of a child in a closed setting, Article 29g Act on the Youth Care contains specific guidelines; a copy of the order should be sent to the child concerned of twelve years and older, the person having authority over the child, the foster parent, Bureau for Youth Care who made the application, and the Council for Child Protection. Furthermore, the clerk of the court indicates the period in which an appeal may be lodged.<sup>786</sup>

#### **4.4.2.4 Aspects pertaining to the implementation of the court order**

Article 812 of the Code of Civil Procedure determines that all court orders pertaining to the authority of a child, by operation of law, include the right of the person to whom the child is entrusted, to have handed over of the child concerned. On the basis of this general Article, this kind of order may be executed even when the handing over of the child has not been explicitly ordered in the decision. Where such execution encounters major resistance, Article 813 may come into play. This allows the prosecuting authority to request the assistance of a police official. The latter will be able to access any place necessary for the

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<sup>783</sup> Which concerns the affected parties who appeared in court, as well as those who did not appear in court but who have received a copy of the (initial) application.

<sup>784</sup> Except in the case of a maintenance order, see Article 805(1) of the Code of Civil Procedure.

<sup>785</sup> Article 810(1) and (2). The Board may provide advice in writing or appear in court during the proceedings.

<sup>786</sup> Article 805(2) of the Code of Civil Procedure. With regard to the right of appeal, see section 4.7.2 below.

execution of his or her duty.<sup>787</sup>

The following instances are included in the right to enforce the handing over of the child:

- (i) The so-called “blocking right” of foster parents in terms of Article 1:253s of the Civil Code. On the basis of this Article the parents need to have the consent of the foster parents where they want to change the place of residence of their child, due to the fact that the foster parents have taken care of the child for over one year.
- (ii) The authorisation for the removal (and placement) of the child concerned on the basis of Article 1:261 of the Civil Code. This provision does not indicate to whom the child is entrusted. It merely authorises the Bureau for Youth Care to place the child in foster care or an institution. It is agreed with Doek that therefore the Bureau for Youth Care has the right to claim the handing over of the child in order to realise the necessary placement.<sup>788</sup> For the placement of a child in a closed setting, the Articles 29a-29y of the Act on the Youth Care come into play.<sup>789</sup> In these circumstances the authorisation for the removal and placement of the child will be based on Articles 29b(1) and 29c(1) of the Act on the Youth Care (instead of Article 1:261 of the Civil Code).<sup>790</sup> It is interesting to note that the person to whom the child will be entrusted, may request the court to impose a financial penalty in case the child will not be handed over.<sup>791</sup>
- (iii) Finally, with regard to the execution of the court order the public prosecution authority may become involved on the basis of Article 813 of the Code of Civil Procedure.

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<sup>787</sup> See Article 813(2) of the Code of Civil Procedure. In which instances Article 813 is applicable, is discussed later in this section.

<sup>788</sup> *Tekst & Commentaar – personen- en familierecht* (2010) 1505. For the sake of clarity it should be mentioned that the provisions pertaining to guardianship (Articles 1:295-335 of the Civil Code) are not included in the discussion of the topic.

<sup>789</sup> This is indicated in Article 1:261(5) of the Civil Code.

<sup>790</sup> The court order has immediate effect (in Dutch: *bij voorraad uitvoerbaar*), unless this is not found necessary in terms of Article 29h(6) of the Act on the Youth Care. See also *Tekst & Commentaar – personen- en familierecht* (2010) 1506.

<sup>791</sup> In this respect Doek has referred to the fact that Article 812 of the Code of Civil Procedure does not exclude this and that this therefore should be possible: *Tekst & Commentaar – personen- en familierecht* (2010) 1506.

This makes it possible to call in the assistance of the police who may access any place, necessary for the fulfilment of his duty. Such assistance might be necessary in the following instances:

- (i) Where the child has to be brought before the court in order to be heard, in terms of Article 809 of the Code of Civil Procedure;<sup>792</sup>
- (ii) Where the Bureau for Youth Care has been authorised to ensure the removal and placement of the child;
- (iii) To ensure the handing over of the child in terms of Article 812, as discussed above;
- (iv) With regard to the execution of a court order as referred to in Article 1:278(2) of the Civil Code.

On the basis of this provision the court may defer a decision pertaining to the restoration of parental authority during the trial period, in which the child may stay with the parent(s) concerned.

## 4.5 Court orders

In both South Africa and the Netherlands, the children's court may decide on an appropriate court order, based on the child care and protection legislation of the country concerned. It should be kept in mind that in terms of the international and regional documents, state parties have undertaken to respect the right of the child to preserve his or her identity, including family relations as recognised by law without unlawful interference.<sup>793</sup>

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<sup>792</sup> For a more detailed discussion, see section 4.4.2.2 above.

<sup>793</sup> See Article 8 of the CRC which contains the principle of non-intervention. See also Article 10 of the African Children's Rights Charter which refers explicitly to the child's right to the protection of the law against unlawful interference. Also Article 8 of the European Convention which states that there shall be no interference by a public authority with the exercise of the right to family life, except where this would be justified. See also the discussion in section

Simultaneously it is the same state parties who have committed themselves to protect the child from all forms of physical or mental injury or abuse, neglect or maltreatment, including sexual abuse, while in the care of a parent, legal guardian or any other person who has the care of the child.<sup>794</sup>

It will depend on the facts and circumstances of each case what child protection measure may be considered appropriate. Child protection measures refer to state initiated interference with family life which limits or terminates the parental authority parents have regarding their child(ren). Moreover, it is important to note that these measures should, as a matter of principle, be of a temporary nature, which should be terminated as soon as the circumstances have improved, thereby securing the best interests of the child. Moreover, in the case of removal and placement, reunification of the child with his or her parents should be the principle purpose.<sup>795</sup> The main yardstick remains the best interests of the child concerned.<sup>796</sup> Some legislative provisions contain specific criteria which need to be met in order to justify any interference with the family life of the parties involved.<sup>797</sup>

At the end of the court proceedings, the children's court has to consider the kind of order to be appropriate, if any, under the given circumstances. Various questions may come to the fore; for example, the kind of court order, the effect of the court order, its duration, and the

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2.2.3 and further.

<sup>794</sup> See Article 19 of the CRC and Article 16 of the African Children's Rights Charter. For a detailed discussion, see section 2.2.2.5. See also *General Comment No. 13* (2011) which contains specific and detailed information on what abuse and neglect contains and how to combat and prevent abuse and neglect. Although the present *General Comment* is of a recent date (17 February 2011), it is nevertheless hoped that the state parties will review their national legislation and bring it in line with the standard in the international documents, in order to duly protect children. A debatable topic remains chastisement in the family home. However, *General Comment No. 13* is unambiguous on this issue: corporal punishment is invariably degrading, see section 22. For a discussion pertaining to proposed but unfortunately rejected clause in the Children's Amendment Bill [B19-2006] on the domestic discipline of children in South Africa, see section 4.2.1. With regard to the position in the Netherlands, see section 4.1.2.1.

<sup>795</sup> See Doek & Vlaardingerbroek *Jeugdrecht en jeugdzorg* (2009) 296.

<sup>796</sup> See Article 3 of the CRC and Article 4 of the African Children's Rights Charter. For an in-depth discussion, see section 2.2.1.4 and 3.1.3.

<sup>797</sup> The outcome of a court case can be reviewed by a court. In some instances it is possible to lodge an appeal. However, it is submitted that the court who made a specific order, should review the order and the facts and circumstances at regular intervals to ensure that the needs of the child are still appropriately secured.

(possibility of) review of the court order.<sup>798</sup> In the following sections attention is paid to these matters.

#### 4.5.1 Orders of the children's court in South Africa

The Children's Act provides for a whole range of different court orders which the children's court, generally, may make.<sup>799</sup>

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<sup>798</sup> See the sections 4.6 and 4.7 below.

<sup>799</sup> Compare with section 15 of the Child Care Act 74 of 1983, which only provided for the following four possible orders:

- (a) that the child be returned to or remain in the custody of his parents, or, if the parents live apart or are divorced, the parent designated by the court or of his guardian or of the person in whose custody he was immediately before the commencement of the proceedings, under the supervision of a social worker, on condition that the child or his parent or guardian or such person complies or the parents of the child comply with such of the prescribed requirements as the court may determine; or
- (b) that the child be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker; or
- (c) that the child be sent to a children's home designated by the Director-General; or
- (d) that the child be sent to a school of industries designated by the Director-General.

It is evident that the new legislation provides for a much larger variety of court orders than the repealed section 15. This allows the court to be more creative in considering and deciding on any of the orders. The advantage is that an order will hopefully be more tailor-made to the needs of the specific child and his or her circumstances. The (new) supervision order can be imposed on the child, an adult or both of them, see section 46(1)(f). Moreover, children may be placed under the supervision of a social worker or other person designated by the court. In other words, the new provision provides for more flexibility regarding the person supervising. It is interesting to note that in the Netherlands only a child may be put under supervision, although both parents and child need to follow the directive (in Dutch: *aanwijzing*) of a social worker. It should also be noted that in South Africa a supervision order is not possible for an unborn child, unlike in the Netherlands, where this is possible when a foetus is 24 weeks or older. In terms of Article 1:2 of the Civil Code a foetus may be considered as already been born when this would be in the interests of the unborn child. In addition, the grounds for a supervision order in Article 1:254 need to be complied with. In short, the extension of the protection of the unborn child comes only to the fore in the case of a serious threat and when assistance on a voluntary basis has proven not to be sufficient. See Enkelaar & Van der Does "Ouderlijke (on)verantwoordelijkheid, al voor de geboorte" in *Artikelen* (2009) *FJR* 3 and further. For a more detailed discussion, see section 4.5.2.1 below. The orders previously mentioned under the paragraphs (b), (c) and (d) of the repealed section 15, are now accommodated under the term "alternative care order", see section 46(1)(a)(i) and (ii), which refers to the placement in foster care or a "child and youth care centre". The latter refers to residential care, see chapter 13 of the Children's Act. The term "child and youth care centre" can be seen as an umbrella word, accommodating a variety of residential care options, namely, children's homes, places of safety, secure care facility, schools of industry and

Section 46 states:

- “(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 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;

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reform schools, see section 196 of the Children's Act and further. See also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 483 and further. It is commendable and important to note that alternative care includes the placement in “temporary safe care”, see section 167. Temporary safe care has been defined in section 1(1) as “the care of a child in an approved child and youth care centre, shelter or private home or any other place, 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”. Section 191(2) is undoubtedly an innovative provision. The various residential care centres can be distinguished on the basis of the therapeutic programmes which they must offer. A wide variety of, for example, therapeutic, treatment and development programmes will assist in selecting the correct placement which will meet the needs of the child concerned. See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 215. Placement should be temporarily, see section 2.2.3.4 above and chapter 5 on removal and placement. It is interesting to note that section 191(3)(e) refers to a programme to assist a person with the transition when leaving a child and youth care centre after reaching the age of eighteen.



- (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 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 the 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 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; and
  - (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”.

On the basis of the latter provision, the children's court can make any of the orders which suit the needs of the child concerned.<sup>800</sup> It is of utmost importance to emphasise here that the main purpose of these orders is to bring or secure stability in a child's life, and that these children are *not* considered to be children in need of care and protection.<sup>801</sup> In other words, the aforementioned situation has to be distinguished from a so-called “care and protection” cases,<sup>802</sup> in which the children's court has to decide whether or not a child should be formally found “in need of care and protection.” Where it becomes evident during the proceedings that a child is indeed in need of care and protection,<sup>803</sup> section 156 becomes relevant. It provides that:

“If a children's court finds that a child is in need of care and protection the court may make any order which is in the best interests of the child, which may be or include an order -

- (a) referred to in section 46;<sup>804</sup>
- (b) confirming that the person under whose control the child is may retain control of the child, if the court finds that that person is a suitable person to provide for the safety

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<sup>800</sup> Section 48 of the Children's Act provides for additional powers for the children's court. It states:

- “(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);
  - (b) extend, withdraw, suspend, vary or monitor any of its orders;
  - (c) impose or vary 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.”

<sup>801</sup> Own emphasis. See also Bosman-Sadie & Corrie (2010) 68.

<sup>802</sup> For a discussion in more detail, see section 4.4.

<sup>803</sup> This is the main focus of this research, namely the placement of children in need of care and protection.

<sup>804</sup> See previous pages. In other words, on top of the general orders offered in section 46, the court may make an order specifically tailor-made for children in need of care and protection in terms of section 156, which section is placed in chapter 9 of the Children's Act, dealing with the child in need of care.

and well-being of the child;<sup>805</sup>

- (c) that the child be returned to the person under whose care the child was before the child was placed in temporary safe care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;<sup>806</sup>
- (d) that the person under whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court finds that the child became in need of care and protection because the person under whose care the child was lacked the time to care for the child.<sup>807</sup>
- (e) if the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in -
  - (i) foster care with a suitable foster parent;<sup>808</sup>
  - (ii) foster care with a group of persons or an organisation operating a cluster foster care scheme;<sup>809</sup>
  - (iii) temporary safe care, pending an application for, and finalisation of, the adoption of the child;<sup>810</sup>

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<sup>805</sup> Although the child is found to be in need of care and protection, he or she is nevertheless able to stay with the usual care-giver without any conditions made by the court.

<sup>806</sup> In other words, the child is to be placed back with the previous care-giver.

<sup>807</sup> This is in line with the state's obligation in terms of Article 18(3) of the CRC, to ensure that children of working parents are properly cared for. See also Article 20(2)(c) of the African Children's Rights Charter. Bosman-Sadie & Corrie (2010) 181, refer to children who spend time in the streets after school and need the necessary supervision. See also section 2.2.2.1.

<sup>808</sup> See sections 1(1) and 180 of the Children's Act.

<sup>809</sup> A "cluster foster care scheme" means a scheme providing for the reception of children in foster care, managed by a nonprofit organisation and registered by the provincial head of social development for this purpose, see the definition in section 1(1).

<sup>810</sup> "Temporary safe care" in relation to a child means the care of a child in an approved child and youth care centre, shelter or private home or any other place, 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, see the definition in section 1(1).

- (iv) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
- (v) a child and youth care centre designated in terms of section 158 that provides a residential care programme suited to the child's needs.
- (f) if the child lives in a child-headed household, that the child must remain in that household subject to section 137;<sup>811</sup>
- (g) that the child be placed in a facility designated by the court which is managed by an organ of state or registered, recognised or monitored in terms of any law, for the care of children with disabilities or chronic illnesses, if the court finds that –
  - (i) the child has a physical or mental disability or chronic illness; and
  - (ii) if it is in the best interests of the child to be cared for in such facility;<sup>812</sup>
- (h) that the child be placed in a child and youth care centre selected in terms of section 158 which provides a secure care programme suited to the needs of the child, if the court finds –
  - (i) that the parent or care-giver cannot control the child; or
  - (ii) that the child displays criminal behaviour;
- (i) that the child receive appropriate treatment or attendance, if needs be at state expense, if the court finds that the child is in need of medical, psychological or other treatment or attendance;

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<sup>811</sup> Section 137(2) determines that a child-headed household must function under the general supervision of an adult as designated by the children's court, an organ of state or a civil organisation (NGO) determined by the provincial head of social development.

<sup>812</sup> These specialised child and youth care facilities cater for the specific needs of these children. The court may order a child to such a facility on recommendation of the social worker. See also DSD regulation 55(1); Bosman-Sadie & Corrie (2010) 181.

- (j) that the child be admitted as an inpatient or outpatient to an appropriate facility if the court finds that the child is in need of treatment for addiction to a dependence-producing substance; or
- (k) interdicting a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, if the court finds that -
  - (i) the child has been or is being maltreated, abused, neglected or degraded by that person;
  - (ii) the relationship between the child and that person is detrimental to the well-being or safety of the child; or
  - (iii) the child is exposed to a substantial risk of imminent harm”.<sup>813</sup>

Compared with the previous legislative framework, the list of orders has been substantially and impressively expanded. It is agreed with Matthias and Zaal that this is one of the most important changes brought into the care and protection arena.<sup>814</sup> It is left to the court to decide what the needs of a specific child are, keeping in mind the obligations in terms of international and regional instruments.

The central focus should lie on the principle of non-intervention and where intervention seems inevitable, it should be a measure of last resort and with the least restrictive effect.<sup>815</sup> It is commendable that the Children's Act firstly refers to the least intrusive kind of orders, where the child will remain with, or be returned to, the care of the parent(s) or care-giver, with possible conditions attached by the court.<sup>816</sup> In addition, an extensive list of various forms of placements is available to the court to consider. Again, depending on the specific

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<sup>813</sup> Compare section 156 with section 15 of the (repealed) Child Care Act 74 of 1983, which only provided for four orders: see footnote 799 above.

<sup>814</sup> In Davel & Skelton (eds.) 9-22.

<sup>815</sup> See Van Heerden *Boberg's Law of Persons and the Family* (1999) 497; Matthias & Zaal *Commentary on the Children's Act* (2012) 9-23.

<sup>816</sup> Matthias & Zaal refer in this respect to “in-home placements”: in *Commentary on the Children's Act* (2012) 9-23.

needs of the child concern, the court should opt for the least far-reaching measure given the circumstances.<sup>817</sup> Matthias and Zaal have indicated that with regard to institutional placements there are three main forms to be distinguished, namely,

- (i) alternative care placements in child and youth care centres;
- (ii) secure care placements in child and youth care centres; and
- (iii) special needs placements in facilities providing the necessary therapeutic care and support.<sup>818</sup>

However, it is important to note that a children's court may only issue a placement order for a child and youth care centre if another option is not appropriate.<sup>819</sup>

Where a court makes any of the abovementioned orders, it may simultaneously order that the child concerned be kept in temporary safe care until such time as effect can be given to the court's order.<sup>820</sup> Moreover, the court can attach any conditions to an order in order to assist the child and/or the parent, guardian or care-giver.<sup>821</sup> From the fact that Article 25 of the CRC prescribes to states parties to recognise the right of the child to periodic review of a removal and placement decision, it can be deduced that these kinds of decisions cannot be of a permanent nature as a matter of principle. In fact, these far-reaching measures, which have obviously a severe impact on the family life of the child and his or her parents or care-

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<sup>817</sup> It is evident that the safety and well-being of the child should at all times be ensured.

<sup>818</sup> Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-27. Removal and placement will be dealt with in more detail in chapter 5.

<sup>819</sup> See section 156(1)(e)(v) in conjunction with section 158(1).

<sup>820</sup> Section 156(2).

<sup>821</sup> Section 156(3) provides that in the case of a placement in terms of subsection 1(e)(i), (ii), (iii), (iv) or (v), the following conditions may be included: (i) rendering the placement of the child subject to supervision services by a designated social worker or authorised officer; (ii) rendering the placement of the child subject to reunification services being rendered to the child and the child's parents, care-giver or guardian, as the case may be, by a designated social worker or authorised officer; or (iii) requiring the person in whose care the child has been placed, to co-operate with the supervising designated social worker or authorised officer or to comply with any requirement laid down by the court, failing which the court may reconsider the placement.

giver, should be reviewed at regular intervals.<sup>822</sup>

With regard to the effect of children's court orders the following should be noted: In the event of a children's court order where the child continues to be cared for by his or her parent(s), it is self-explanatory that the latter will continue to have parental responsibilities and rights.<sup>823</sup> Where the court has decided that any of the placement orders would benefit the child most under the circumstances, this will have an effect on the responsibilities and rights of parents. In this respect a distinction needs to be made between the various aspects of parental responsibilities and rights.<sup>824</sup> The parents would jointly continue with the exercise of guardianship.<sup>825</sup>

With regard to another aspect of parental responsibilities and rights, namely "care", the situation is different. Care concerns, *inter alia*, the factual living with the child and the daily caring for the child, which practically (and legally) shifts to the person or the head of the institution in which care the child will be placed.<sup>826</sup> However, the parent would, in principle, have a right of reasonable contact.<sup>827</sup> These visitation rights might be a cause of conflict between the parent(s) and the factual care-giver. It is important to note that in terms of the Children's Act, the children's court does have jurisdiction to adjudicate matters involving

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<sup>822</sup> See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 213.

<sup>823</sup> See section 18(3)-(5).

<sup>824</sup> For a detailed discussion, see section 4.1 and further.

<sup>825</sup> Section 18(3) determines that the person who acts as a guardian of a child must administer and safeguard the child's property and property interests; assist or represent the child in administrative, contractual and other legal matters; or give or refuse any consent required by law in respect of the child pertaining to the child's marriage, adoption, departure or removal from the Republic, application for a passport or alienation or encumbrance of any immovable property of the child. Also Heaton in Davel & Skelton (eds.) 3-4 and further. Moreover, section 129 is relevant pertaining to consent of the guardian to medical treatment and surgical operation. See also Matthias & Zaai in *Child Law in South Africa* (2009) 181.

<sup>826</sup> For a definition of "care" see section 1(1): it includes 7 categories of persons. In terms of the (repealed) Child Care Act 74 of 1983, see section 53, which read that "a parent or guardian who has been placed in any custody other than the custody of the parent or guardian, shall be divested of his right of control over and of his right to the custody of the child and those rights, including the right to punish and to exercise discipline, shall be vested in the management of the institution or in the person in whose custody the child was placed". It is submitted that the repealed section 53 would not have been in line with *General Comment No. 13* insofar it provided for or allowed corporal punishment. The aim of the latter document is to eliminate all forms of violence pertaining to children, see also section 4.3.1.

<sup>827</sup> Unless the court makes an order to the contrary. For a definition on "contact" (previously access), see section 1(1) and section 4.1.1 above.



contact with a child.<sup>828</sup> It is agreed with Matthias and Zaal that where problems pertaining to contact are possibly expected to arise, the court could, at the hearing, be requested to make a specific order to avoid future and unnecessary problems (and costs).<sup>829</sup>

#### 4.5.2 Orders of the children's court in the Netherlands

Reference has already been made to the circumstances which children might find themselves in, which give rise to concern.<sup>830</sup> Matters of concern regarding the physical and psychological well-being and development of children cut across all societies. As mentioned above, child protection measures refer to state initiated interference with family life which limits or terminates the parental authority of parents regarding their child(ren) and should be of a temporary nature.<sup>831</sup>

Around the turn of the 20<sup>th</sup> century the notion developed in the Netherlands, that the state had to step in where parents failed to take responsibility for their children. The first measures of child protection were adopted over 100 years ago.<sup>832</sup> The so-called “*Kinderwetten 1901*” which entered into force on 1 December 1905 heralded the coming into force of legislation which made it possible to impose the following child protection measures:

- (i) “Relief of parental authority”, in Dutch: “*gedwongen ontheffing*”, and

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<sup>828</sup> See section 45(1)(b). This is a great step forward compared to the previous situation where the high court held that neither the social worker nor the children's court had the power to define the access rights of parents in care and protection cases, see *Van Schoor v Van Schoor* 1976 (2) SA 600 (A).

<sup>829</sup> See also Matthias & Zaal (2009) 181.

<sup>830</sup> See section 4.3.1.1, in which the grounds pertaining to a child in need of care and protection are discussed.

<sup>831</sup> On the duration of court orders, see section 4.6 below.

<sup>832</sup> A conference memorising the existence of 100 years of child protection measures took place in 2005 in Amsterdam. Especially the fact that professionals of a large variety of organisations had an opportunity to interact, was very positive. Presiding officers and other staff of the children's courts, academics, staff of the Council for Child Protection, Bureau for Youth Care and AMK, (in Dutch: *Advies en Meldpunt Kindermishandeling (AMK)*) lawyers specialised in child law and civil society/NGO's contributed to interesting discussions.

- (ii) “Deprivation of parental authority”, in Dutch: “*ontzetting*”,<sup>833</sup> followed by an additional child protection measure which was introduced in 1922, namely,
- (iii) “Supervision order”, in Dutch: “*ondertoezichtstelling*”. The latter was combined with the introduction of the children's court.

It is interesting to note that the core of these “archaic” measures are still in place, although it is self-explanatory that over the decades some changes have taken place in order to stay in tune with societal developments in the field.<sup>834</sup>

Presently, Book 1 of the Civil Code provides for a number of measures which have the primary purpose to serve the interests of the child concerned. These are:

- (i) Supervision order;<sup>835</sup>
- (ii) Supervision order combined with an order authorising the removal and placement of a child;<sup>836</sup>
- (iii) Relief of parental authority (which is reversible by the order to restore parental authority);
- (iv) Deprivation of parental authority (which is also reversible by the subsequent order for the restoration of parental authority);

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<sup>833</sup> Bruning & Kok *Herziening Kinderbeschermingsmaatregelen – Commentaren op het voorontwerp van wet “FJR-congresbundel”* (2008) 1.

<sup>834</sup> Over the years some legislative amendments have been put in place. The courts have also contributed to legal developments in this field of law. The most recent proposed law reform is under way. On 30 July 2009 the proposed legislation was sent to Parliament. The coming into force is still pending. For a more detailed discussion on the proposed amendments regarding the measures of child protection, see section 4.5.2.1.

<sup>835</sup> Articles 1:254-260 of the Civil Code, which includes the order for temporary (provisional) supervision (Article 1:255), a supervision order granted by the court on its own accord (in Dutch: *ambtshalve*), on the basis of Articles 1:271a and 272a. Moreover, in divorce proceedings, the court also may grant a supervision order in terms of Article 823 Code of Civil Procedure. See Doek *Jeugdrecht en Jeughulpverleningsrecht* (2009) I.1-7-42.

<sup>836</sup> This measure of child protection will be extensively dealt with in chapter 5.

Moreover there are a few temporary child protection measures,<sup>837</sup> namely:

- (i) Suspension of parental authority in terms of the Articles 1:271 or 272 of the Civil Code, resulting in temporary custody (in the case of an anticipated deprivation or imposed relief of parental authority);<sup>838</sup>
- (ii) Provisional custody in terms of Article 1:241 of the Civil Code.<sup>839 840</sup>

The various child protection measures each have their own grounds and consequences. The latter results in the limitation, (temporary) relief, or deprivation of the authority parents have with regard to their child(ren). In other words, the legal and/or *de facto* situation might change drastically (and the psychological effects on the parties concerned should not be

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<sup>837</sup> It should be stressed that all child protection measures should be of a temporary nature and moreover with the least interfering effect possible. However, sometimes the circumstances require further action. For example, instead of opting for a supervision order it might in the light of the facts and circumstances be better for the child to make an order whereby the child is placed in foster care, especially where the child is young (and where this appears necessary, to suspend the parental authority of parents). With regard to the latter situation, see Bruning *Rechtvaardiging van Kinderbescherming* (2001) 220 and further. For the discussion on the requirements of each child protection measure, see below in this section.

<sup>838</sup> During the time period in which the one parent has been suspended from his or her parental authority, the other parent exercises parental authority. Where both parents are affected, the Bureau for Youth Care will be awarded temporary custody over the child.

<sup>839</sup> Article 241 of the Civil Code describes two situations in which it is possible to impose the measure of provisional custody, to be exercised by the Bureau for Youth Care, provided where this is urgent and forthwith necessary in order to prevent a serious risk pertaining to the moral and psychological interests or health of the minor concerned. It is interesting that this ground is thus far similar to the ground for a supervision order in terms of Article 1:254, which is discussed in section 4.5.2.1 below.

However, provisional custody may only be imposed if any of the two following situations come to the fore, namely, (1) a child is not under any authority or no authority is exercised pertaining to the child (for example, where the mother herself is still a minor or in the case of a minor seeking asylum), or (2) where a child younger than six months is not under custody of any organisation, and has been placed with a foster family without prior written permission of the Council for Child Protection. Article 241 determines that the children's court may impose provisional custody upon the request of the Council for Child Protection or the Public Prosecuting Authority (*Openbaar Ministerie*). Within 6-12 weeks a permanent order pertaining to the custody needs to be requested, failing which will result in the extinction of the initial order/cause the provisional custody measure to be extinguished. For a more detailed discussion, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 313 and further; Asser/De Boer *Personen- en familierecht* (2010) 670-673.

<sup>840</sup> These temporary measures result in provisional custody, which is exercised by others than the parent(s) and therefore will not be further discussed.

underestimated).<sup>841</sup>

Provided that a matter has been reported, the question arises as to whether or not the child(ren) is/are, could be, or could (possibly or probably) become in need of care and protection.<sup>842</sup> This would be the case where a child's physical or psychological well-being is severely compromised or threatened, often due to the fault or negligence of the parent(s) or guardian.<sup>843</sup> It is clear that any intervention in the family life of children and their parents should be justifiable and proportionate, and where inevitable, ensuring the imposition of the least intrusive measure and only in specific formulated instances. This is in line with the general principles pertaining to the measures of child protection.

Doek and Vlaardingerbroek point out that the Dutch child protection legislation does not contain specific principles with regard to the application and/or implementation of child protection measures. Subsequently, they formulated the following four general principles, based on the jurisprudence and practice.<sup>844</sup>

- (i) The imposition of a child protection order should be a measure of last resort.<sup>845</sup> This means in practice that the first option is to explore the possibilities for assistance on a voluntary basis in order to alleviate the problem. This might, generally speaking, also enhance the co-operation of the parties concerned, which will serve the child's best interests.
- (ii) The level of interference in the existing situation should be kept to the minimum. This means that the least interfering measure should be opted for. In other words, where possible, a supervision order should be preferred above the further reaching

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<sup>841</sup> It is submitted that more research should be conducted by psychologists with regard to the psychological effects of state initiated intervention in family life. An improved multidisciplinary approach might contribute to a higher success rate pertaining to the implementation and eventual result/outcome of the child protection measures.

<sup>842</sup> See also the discussion on "children in need of care and protection" in section 4.3.

<sup>843</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 290.

<sup>844</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 295-298.

<sup>845</sup> This is also in line with the international and regional documents, for example, the Articles 7(1) and 8(1) of the CRC and Article 8(2) of the European Convention.

measure of relief of parental authority. In addition, where placement is necessary, this should ideally be realised as close to the family home as possible.<sup>846</sup> Furthermore, it should be for the shortest duration necessary. This implies that any extension of a child protection measure needs serious consideration.

- (iii) The interests of the child should demand the imposition of a child protection measure. Various legislative provisions in Book 1 of the Civil Code refer to this principle explicitly or implicitly.<sup>847</sup>
- (iv) The implementation of the child protection measures is left to a private organisation; the Bureau for Youth Care. The rationale behind this is that the state should not be involved with the actual care for and upbringing of children. However, the state does have a responsibility to initiate child protection proceedings where a child is in need of care and protection.<sup>848</sup>

With the abovementioned principles in mind, the children's courts have to ensure that the grounds or elements of the relevant child protection measure are fully complied with, and to make sure that the interests of the child are safeguarded.<sup>849</sup> This implies that where the prescribed grounds are not fulfilled, no imposition of the requested child protection measure should take place.

Measures of child protection might be relevant pertaining to the authority of a parent or parents, as well as the custody of other care-givers (not parents). The following discussion will, however, merely focus on the position of parents and their child(ren) regarding the supervision order, relief of parental authority, and deprivation of parental authority. The supervision order, combined with an order authorising the removal and placement of a child,

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<sup>846</sup> Preferably in the same province in order to ensure that contact with the family is practically feasible. After all, reunification is the primary purpose.

<sup>847</sup> See Articles 1:241(2) or 1:271(1) of the Civil Code. Moreover, this is in line with the best interests of the child-standard as mentioned in Article 3 of the CRC. For a detailed discussion, see section 2.2.1.4 and 3.1.3 above.

<sup>848</sup> The government provides subsidies to the provinces to ensure the functioning of these organisations. See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 298.

<sup>849</sup> Section 4.4.2 deals with the children's court proceedings in the Netherlands.

will be dealt with separately in Chapter 5.

#### 4.5.2.1 Supervision order<sup>850</sup>

The child protection measure of “supervision order” was introduced by law in 1922. This measure aimed to assist the child and his or her family in order to prevent more far-reaching measures, like the relief or deprivation of parental authority.<sup>851</sup> Since then, various amendments have taken place.<sup>852</sup> The supervision order forms the core of the child protection measures in the Netherlands, since it is the measure which is applied most frequently.

The problems which lead to the necessity of a supervision order are diverse.<sup>853</sup> For example, maltreatment or neglect of a child, psychological problems of the parents, incapability of parents or behavioural problems of children. Moreover, recently, supervision orders were granted to enforce the right of contact between a child and his or her parent, who does not have physical care of the child, after divorce. It is agreed with Doek and Vlaardingebroek that the latter would only be possible (and acceptable) where non-contact or problematic contact would have such a detrimental effect on the child, that he or she would be threatened in his or her development.<sup>854</sup> Under these circumstances, the social worker is required to assist in realising proper contact between the child and the parent.<sup>855</sup>

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<sup>850</sup> In Dutch: *ondertoezichtstelling*.

<sup>851</sup> These measures became law in 1905, see section 4.5.2.

<sup>852</sup> For a historical overview, see Asser/De Boer *Personen- en familierecht* (2010) 682 and further.

<sup>853</sup> See also the discussion in section 4.3.1.2 on the Dutch equivalent of the child in need of care and protection.

<sup>854</sup> The criteria in terms of Article 1:254 of the Civil Code need to be fulfilled; otherwise the infringement on the right to family life would not be justified. In *Jeugdrecht en Jeugdzorg* (2009) 330; Asser/De Boer *Personen- en familierecht* (2010) 753.

<sup>855</sup> It is agreed with Bruning that in this respect it is necessary to invest in support mechanisms, for example a so-called “*omgangshuis*” or “visiting homes”, in which children and parents(s) can spend time together, under supervision of a social worker. The latter situation is sometimes the result of a compromise with an unwilling parent who has the physical care for the child. Supervised contact and visiting homes may have a lot of potential, but require funding and staff for proper and consistent implementation. Bruning suggests that the Bureaus for Youth Care should make use of their authority to indicate (issue directives) for

In the past decades there has been an increase in the number of supervision orders.<sup>856</sup> For a supervision order to be implemented successfully, a professional/social worker should be able to spend ample time with a child and his or her family. Due to financial considerations, the lack of staff is a reality which hampers the success rate of the implementation of supervision orders.<sup>857</sup> Many children need actually more guidance than what is practically feasible. It is agreed with Doek and Vlaardingerbroek that in the light of these circumstances, the question arises as to whether the government can justify these infringements on the right to family life in terms of Article 8 of the European Convention. After all, if the assistance offered is likely to be inadequate, the question remains as to whether the child concerned would not have been better off without the intervention. It is submitted that the government (courts and child protection agencies) should only step in where they can follow through with their good intentions (of providing assistance). In other words, if any adequate help or assistance is not feasible, due to the lack of manpower or financial constraints, one should back off in terms of a formal intervention. It might be that in the voluntary context or within the social network of the family concerned solutions can be explored. However, it might also be that in the light of the circumstances a more far-reaching measure should be considered.<sup>858</sup>

The point of departure of the present discussion is what the supervision entails at present and how it is implemented. This will be followed by an overview of the proposed legislation pertaining to the measures of child protection.<sup>859</sup> The central provision regarding a supervision order is Article 1:254(1) of the Civil Code, which reads as follows:

“Where a child grows up under such circumstances that his or her moral or psychological

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providing support regarding access: “Omgangsprikelen” (Editorial) *FJR* (2008) (1) 1.

<sup>856</sup> Doek and Vlaardingerbroek have provided some statistics with regard to the imposition of supervision orders. 2745 supervision orders were made in 1980, which was increased to 5434 in 1998 and increased to 6670 in 2003. In 2007 the number of children involved in supervision orders were 29 503, and another 10 568 new supervision orders were imposed. They have also indicated that over 50% of the children has been removed from the family environment (once or several times). More than 50% lives in a children's home and circa 40% lives in foster care: *Jeugdrecht en Jeugdzorg* (2009) 323-324.

<sup>857</sup> This position is similar to that in South Africa. More social workers are required in order to assist the families who are in need of professional guidance. See also section 4.5.1.

<sup>858</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 325.

<sup>859</sup> See section 4.5.2.6.

interests or health is seriously threatened, and where other measures to avert this threat have failed, or expectedly will fail, the children's court may place him or her under supervision of an organisation, as referred to in Article 1, under f, of the Act on the Youth Care".<sup>860</sup>

Whether the factual circumstances meet the requirements above, is left to the discretion of the presiding officer. In terms of the above provision, a threat is sufficient to impose a supervision measure, but this threat should be realistic, not merely a possibility.<sup>861</sup> It should be stressed that the applicant needs to provide proof of the fact that other measures to avert the existing threat, have failed or that it is reasonably expected that they will fail.<sup>862</sup> Based on this, it is clear that the circumstances in which a child finds himself or herself must be of a serious nature in order to justify an infringement on the right to family life.

It is interesting to note that the question as to whether parents have failed to fulfil their parental duties or whether they are in any way to blame, is irrelevant.<sup>863</sup> A supervision order focuses on the child concerned and should be in the child's best interests.<sup>864</sup> The child needs supervision, but the co-operation of the family members is essential for a successful implementation (and end result).<sup>865</sup> Whenever possible, it is preferable to first explore the

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<sup>860</sup> Own translation. The full text of Article 1:254(1) in Dutch reads as follows: "*Indien een minderjarige zodanig opgroeit, dat zijn zedelijke of geestelijke belangen of zijn gezondheid ernstig worden bedreigd, en andere middelen ter afwending van deze bedreiging hebben gefaald or, naar is the voorzien, zullen falen, kan de kinderrechtster hem onder toezicht stellen van een stichting als bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg.*" The wording "an organisation, as referred to in Article 1, under f, of the Act on the Youth Care" refers to the Bureau for Youth Care, which is responsible for the implementation of such an order.

<sup>861</sup> See Asser/De Boer *Personen- en familierecht* (2010) 753.

<sup>862</sup> For example, because of the personal problems of the father, combined with his domineering attitude in the family home and the fact that the father had resisted various forms of assistance and refused to co-operate, the appeal court held that there was indeed a threat regarding the emotional development of the three children, which precluded them from developing freely toward adulthood (*Gerechtshof 's-Hertogenbosch*), LJN: BR7116 of 7 September 2011).

<sup>863</sup> Even where the parents are not to blame, this does not exclude the possibility that the child might be threatened in his or her development in terms of Article 1:254(1) and thus be in need of a child protection measure in order to avert even more serious consequences. See Asser/De Boer *Personen- en familierecht* (2010) 752.

<sup>864</sup> The consequence of this is that where there is any change pertaining to the parental authority of parents regarding their child, the child remains under supervision for the time as stipulated in a court order. This means that any directions issued by the Bureau for Youth Care have to be complied with as long as the supervision order is in place. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 329.

<sup>865</sup> This means that the (previously existing) threat which hampered the well-being and



possibility of providing the required assistance in a voluntary context, before resorting to the application for, and imposition of, a child protection measure.<sup>866</sup> The latter is in line with one of the criteria stipulated in Article 1:254(1), namely that “other measures have failed or expectedly will fail”.<sup>867</sup>

In addition, Article 8(2) of the European Convention refers to the measure “to be necessary in a democratic society”. Apparently, this criteria dictates that there should be a definite need for the measure and relates to the purport of the measure concerned. Where the pursued effect can be achieved with a child protection measure of less impact on the family life of the parties concerned, this should be given preference.<sup>868</sup> An application for a supervision order can be filed by a parent,<sup>869</sup> another person who cares for and raises the child as part of his or her family,<sup>870</sup> the Council for Child Protection, or the prosecuting authority;<sup>871</sup> not the child him or herself.<sup>872</sup> The procedural aspects relating to the supervision order are dealt with in paragraph 4.4.2. Reference is made to the importance of

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development of the child will have ceased to exist, paving the way for the parents and child to carry on independently, without formal supervision.

<sup>866</sup> Where the court is of the opinion that other measures, in a voluntary context may still bring the necessary relief or solution in order to prevent or avert the problems, the court may (and often will) dismiss the application. Such a finding would be reasonable since the requirements of Article 1:254 are not fully complied with. See *Gerechtshof 's-Hertogenbosch*, LJN:7118 of 7 September 2011.

<sup>867</sup> See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 328; Asser/De Boer *Personen- en familierecht* (2010) 747 and 753.

<sup>868</sup> See Asser/De Boer *Personen- en familierecht* (2010) 749.

<sup>869</sup> This includes a parent who does not have parental authority, as well as the situation where a parent has joint authority with a partner (non-parent) in terms of Articles 1:253sa and 1:253t of the Civil Code. See in this respect section 4.1.2.4 above. For the sake of clarity it needs to be pointed out that Article 1:253v(6) of the Civil Code determines that the provisions regarding supervision orders and the relieve or dismissal of parental authority are applicable *mutatis mutandis* in the case of joint authority of a parent and his or her partner, as referred to in Article 1:253t. See Doek & Vlaardingbroek (2009) 333.

<sup>870</sup> For example, the (new) partner of the parent having authority over the child (when married: stepparent) or a foster parent.

<sup>871</sup> Article 1:254(4). In most cases the Council for Child Protection will be the applicant. See Doek & Vlaardingbroek (2009) 333.

<sup>872</sup> The child is nevertheless able to approach the Council for Child Protection, who may investigate the circumstances of the child. The outcome of the investigation and the child's best interests are taken into consideration with regard to the decision whether (or not) an application for a supervision order should be filed. In this respect it is important that children should be made aware of their rights. In order to enhance this “children's rights” should be included in the curriculum of schools.

the participation of the child. The child should be granted the opportunity to express his or her views and his or her input should be duly taken into consideration.<sup>873</sup> In addition, the appointment of a special curator to assist and represent the child concerned may also be relevant with regard to supervision cases.<sup>874</sup> Doek and Vlaardingerbroek indicate that this trend has been on the increase in recent years, which is a positive development. Especially where the opinions and interests of the affected parties differ or conflict with each other, a special curator is able to specifically look after the child's interests.<sup>875</sup>

However, true child participation does not only include expressing views and the consideration thereof via representation by a parent, guardian or a special curator.<sup>876</sup> It should be extended to include the opportunity to initiate legal action, where the interests of the child concerned are at stake.<sup>877</sup> The Civil Code provides for this, although in a limited way. Where a supervision order has been granted, a child of twelve years or older may approach the court independently in terms of the following legislative provisions:<sup>878</sup>

- (i) Article 254(5): which concerns the application for the replacement of the Bureau for Youth Care;
- (ii) Article 256(4): the application for the termination of an existing supervision order;
- (iii) Article 259(1): the application for the annulment of a directive issued by the Bureau

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<sup>873</sup> See the discussion on Article 12 of the CRC in the sections 2.2.1.6 and 3.1.4.

<sup>874</sup> Article 1:250 of the Civil Code refers with regard to the appointment of a special curator specifically to matters relating to the care of and upbringing of the child, which certainly includes child protection measures. For a more detailed discussion, see section 3.1.4.2.

<sup>875</sup> And trained, see Doek & Vlaardingerbroek (2009) 335.

<sup>876</sup> See also Article 12 of the CRC, which refers to the ways in which a child can be heard, namely, "either directly, or through a representative or an appropriate body". For a detailed discussion, see *General Comment No. 12* (2009), on the right of the child to be heard, paragraphs 35-37.

<sup>877</sup> It is interesting to note that the South African Children's Act 38 of 2005 specifically provides for this. See section 14, which states "[e]very child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court". See also Boezaart & De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" 2011 (2) *De Jure* 437-438. A provision in the line of section 14 of the Children's Act is recommended for the Netherlands, in order to provide for the child's right to access to the court.

<sup>878</sup> However, this does not include the right to lodge an appeal independently, except in the case of placement in a closed setting/institution, see Article 29a(2) of the Act on the Youth Care.

for Youth Care;<sup>879</sup>

- (iv) Article 260(3): to request the Bureau for Youth Care to withdraw an issued directive, partially or completely, due to a change in circumstances;
- (v) Article 263(2): the child may apply to the Bureau for Youth Care with the following request; to terminate the placement, to shorten the duration of the placement concerned or to disregard the obtained authorisation to change the place of residence of the child.<sup>880</sup>
- (vi) Article 263(4): the children's court may, upon application, withdraw the authorisation pertaining to the removal and placement of a child, partially or completely, or shorten the duration thereof;
- (vii) Article 263b(2): upon application the children's court may alter the existing order regarding contact, due to a change in circumstances or due to the fact that the decision was based on incorrect or incomplete information. The initial contact order was made in conjunction with the supervision order (combined with the authorisation for the removal and placement of the child).<sup>881</sup>

In the following three situations the court may also grant a supervision order.

- (i) Pending the inquiry for a supervision order, the children's court may grant a temporary supervision order in terms of Article 1:255 of the Civil Code, in emergency situations.<sup>882</sup> Although of a temporary nature, this order is a fully-fledged supervision

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<sup>879</sup> Article 1:258(2) of the Civil Code provides explicitly that both the parents and the child are obliged to comply with such a directive. Therefore it is welcome that the child concerned is also able to take action in respect of the directive. The time frame within which to take such action is very limited, namely two weeks, which commences the day after the decision was sent or delivered. However, it is not completely clear how a child will be informed in case the parents refuse to inform the child, which might be a point of concern since the time frame within which to apply is limited.

<sup>880</sup> After having received the request, the Bureau for Youth Care has to respond in writing within two weeks, see Article 1:263(3) of the Civil Code.

<sup>881</sup> Asser/De Boer *Personen- en familierecht* (2010) 757.

<sup>882</sup> Doek indicates that the temporary supervision order will usually be combined with an order authorising the removal and placement of the child concerned. It should be noted that an order for temporary supervision may be granted without prior hearing of the parent(s) or child, but only in the case of immediate and serious danger for the child concerned: *Jeugdrecht en*

order, which means that the other provisions regarding supervision orders are applicable.<sup>883</sup> The court can decide on its own accord, or upon the request of the applicant, but only where this is urgent and forthwith necessary.<sup>884</sup>

- (ii) In addition, the court has the discretion to make a supervision order, on its own accord, pending the proceedings relating to the deprivation from parental authority or (forced) relief of parental authority.<sup>885</sup>
- (iii) Furthermore, in divorce proceedings, the court may order the supervision of the child, upon application by a spouse/parent or the Council for Child Protection.<sup>886</sup>

Since 1 November 1995, the implementation of a supervision order lies with the Bureau for Youth Care.<sup>887</sup> To this effect, a family supervisor will be assigned to the case within five days after the supervision order was made. The family supervisor, usually a social worker<sup>888</sup> acts on behalf of the Bureau for Youth Care. He or she consequently notifies the parent(s) and child concerned in writing of the aspects relating to the implementation of the order.<sup>889</sup>

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*Jeugdzorg* (2009) 335. See Articles 800(3) and 809(3) of the Code of Civil Procedure, as discussed in section 4.4.2.2.

<sup>883</sup> Asser/De Boer *Personen- en familierecht* (2010) 758.

<sup>884</sup> The duration of a temporary supervision order is maximum three months, within which period a decision has to be made regarding the application for a supervision order in terms of Article 1:254. The children's court may terminate the order at any time. Article 807 of the Code of Civil Procedure determines that there is no possibility of appeal, see also section 4.7.2 below. Also Doek *Jeugdrecht en Jeugdzorg* (2009) 336.

<sup>885</sup> In Dutch: *de ambtshalve ondertoezichtstelling*. See Article 1:271a and 272a of the Civil Code, which is discussed in section 4.5.2.2 below. See Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-42 and 47.

<sup>886</sup> In this case Article 1:254 and further are fully applicable. See also Article 823 of the Code of Civil Procedure. See Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-42

<sup>887</sup> Article 1:254(1) last sentence, refers to a foundation (in Dutch: *stichting*) in terms of Article 1(f) of the Act on the Youth Care. Since 2009 the Bureaus for Youth Care use a specific approach regarding the implementation of a supervision order, the so-called "Deltaplanmethode". The aims of the supervision order are explicitly formulated in the document and are evaluated at intervals. In addition, the case-load per social worker has decreased from 20/25 cases to 15 cases (per fte), which would provide more quality time per child (case). See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 325.

<sup>888</sup> In Dutch: *gezinsvoogd of gezinsvoogdijwerker*. Apart from a social work background, some family supervisors have additional qualifications, for example in the field of pedagogics or psychology. For the purpose of this thesis, reference will be made to the term "social worker", which is meant to be all-encompassing.

<sup>889</sup> See Article 44 of the Implementation Decree to the Act on the Youth Care (*Uitvoeringsbesluit Wet op de Jeugdzorg*). The notification contains the following information: details of the social

Within six weeks a plan has to be drawn up, which outlines the aims (short term/long term) and the way in which these aims will be realised, which needs to be discussed with the affected parties.<sup>890</sup> It should be noted that during the implementation of the supervision order, the Bureau for Youth Care regularly assesses the progress made in order to decide whether or not a further-reaching measure is necessary, namely the relief of parental authority.<sup>891</sup>

The purpose of a supervision order is to minimise or reverse any existing threat which gave rise to the imposition of the order. Therefore the Bureau for Youth Care supervises the child and is responsible for offering the required help and assistance which the parents and child are in need of. At the same time, where possible, the parents should retain the responsibilities for the care of and the upbringing of the child.<sup>892</sup> However, where the parents refuse to give consent for the medical treatment of the child, which is necessary to avoid serious danger with regard to the child's health, the required consent may be obtained from the children's court. The Bureau for Youth Care may lodge an application to that effect in terms of Article 1:264.<sup>893</sup> In terms of Article 1:258(1), the Bureau for Youth Care may issue directives in writing to the parties concerned,<sup>894</sup> regarding the care and upbringing of

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worker and his or her replacement when the former is not on duty, the date for the first appointment, the duties and authority of the Bureau for Youth Care and an outline of the procedure regarding various remedies. For example, regarding the application for the annulment of a directive or the withdrawal of a directive, see the Articles 1:259(1) and 260(1).

<sup>890</sup> See Article 43 of the Implementation Decree to the Act on the Youth Care. The plan also includes reference to any required care pertaining to the child or the parents, any activities with regard to the child and/or parent(s) and a description of the involvement of the parties concerned, including their social network. The plan may be evaluated and if necessary, adjusted at any time but at least once a year. It is submitted that evaluation preferably should take place with 6 months intervals.

<sup>891</sup> See Article 1:268 of the Civil Code, which is discussed in section 4.5.2.2 below.

<sup>892</sup> The focus is to avert the threat pertaining to the moral or psychological interests or health of the child. In addition, the Bureau for Youth Care is required to strengthen the family bond between the parent(s) and child, see Article 1:257.

<sup>893</sup> The application may be filed with regard to children up to the age of twelve years old. For a detailed discussion on the position of children above the age of twelve, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 253-260.

<sup>894</sup> Doek & Vlaardingerbroek aver that oral (more informal) instruction could enhance the co-operation of the parties concerned. The children's court Rotterdam decided that the format of the directive (whether or not in writing) was not decisive. Therefore the legal remedies available to the affected parties can also be utilised in the case of oral directives: *Jeugdrecht en Jeugdzorg* (2009) 343.

the child concerned.<sup>895</sup> Both parents and child are obliged to comply with these directives.<sup>896</sup> These directives are to be taken seriously, which can be ascertained from the fact that the legislation provides for legal remedies which can be utilised by the affected parties.<sup>897</sup> Moreover, non-compliance may have serious consequences, because it constitutes one of the grounds for the deprivation of parental authority.<sup>898</sup> Pieters points out that, because of the seriousness, a directive should only be given (in writing) when in consultation there is not sufficient co-operation from the parents and the child.<sup>899</sup> In addition, the Bureau may apply for authorisation for the removal of the child concerned, or to be involved in decisions pertaining to the extension or termination or an existing order. Unfortunately, any association with the Bureau for Youth Care is, generally speaking, perceived as negative. This makes it very difficult for this organisation to get the necessary co-operation of parents and children alike. One of the very reasons for the resistance of the parties concerned lies in the fact that a measure of child protection is imposed on the parties<sup>900</sup> which is worsened by the fact that the “Bureau for Youth Care” is becoming involved; this creates a major public stigma which is detrimental to the affected parties. The Bureau for Youth Care is often negatively portrayed in the media. The public is not sufficiently aware of the fact that help and assistance can also be offered on a voluntary basis.

It is submitted that in the public interests more attention should be paid to informing the

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<sup>895</sup> Doek & Vlaardingerbroek stress that these decisions involve serious matters, like an instruction regarding specific treatment of therapy or to attend a relevant course. Moreover, with regard to the issue of directives the Bureau for Youth Care needs to be considerate regarding sensitive issues like, religion and cultural background of the affected parties: *Jeugdrecht en Jeugdzorg* (2009) 342 and 343. The aforementioned is in line with the obligations in terms of the Articles 8 and 14 of the CRC.

<sup>896</sup> See Article 1:258(2) of the Civil Code. Asser/De Boer *Personen- en familierecht* (2010) 755.

<sup>897</sup> However, the affected parties do have the following rights: in terms of Article 1:259 of the Civil Code, the parent having parental authority or the child of twelve years or older may, within two weeks, apply to court for the partial or complete annulment of a directive issued by the Bureau for Child Care. Moreover, the aforementioned parties may request the Bureau for Youth Care to partially or fully withdraw an issued directive, due to a change in circumstances, see Article 1:260 of the Civil Code. For a detailed discussion, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 343-345. See also the provisions listed above (a)-(g).

<sup>898</sup> See Article 1:269(1)(d) of the Civil Code, which is discussed in section 4.5.2.3 below. See also Doek *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-58.

<sup>899</sup> See the Note with regard to the case of the district court (*Rechtbank*) Roermond, 7 July 2010, LJN BN0387.

<sup>900</sup> The parental authority of parents pertaining to their children has been limited or even terminated by the order.

public of the duties and functions of the Bureau for Youth Care in order to minimise or lift prejudices and eradicate the existing stigma. This will possibly assist the affected parties in coming to terms with the temporary intervention in their family life and to co-operate in order to be affected by it for the shortest duration possible. It is further submitted that more effort should be made to improve the public perception of the child protection agencies; both the Bureau for Youth Care and the Council for Child Protection. However, sometimes supervision seems no longer adequate, in which case the removal of a child may become inevitable in order to protect or safeguard the interests of the child, which will be discussed in Chapter 5. Under certain circumstances the relief, or even deprivation, of parental authority might be necessary, which will be discussed shortly.<sup>901</sup>

#### 4.5.2.2 Relief of parental authority<sup>902</sup>

Relief of parental authority is only possible in the case of joint parental authority or joint authority of a parent and his or her partner.<sup>903</sup> Article 1:266 of the Civil Code contains the grounds for the parent's relief of his or her parental authority. It reads as follows:

“Provided that it is not in conflict with the interests of the children, the court may relieve a parent of parental authority regarding one or more of his children, on the ground that he is unfit or unable to fulfil his duties pertaining to the care and upbringing”.<sup>904</sup>

The application for the relief of a parent's parental authority can, in principle, only be filed by the Council for Child Protection or the public prosecuting authority.<sup>905</sup> In other words, other

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<sup>901</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 291 and 331. See sections 4.5.2.2, 4.5.2.3 and 4.5.2.4.

<sup>902</sup> In Dutch: *ontheffing*.

<sup>903</sup> A guardian, meaning a non-parent (which could be a juristic or a natural person) can only be dismissed. See Doek & Vlaardingerbroek (2009) 376.

<sup>904</sup> Article 1:266 of the Civil Code reads in Dutch: “*Mits het belang van de kinderen zich daar niet tegen verzet, kan de rechtbank een ouder van het gezag over een of meer van zijn kinderen ontheffen, op grond dat hij ongeschikt of onmachtig is zijn plicht tot verzorging en opvoeding te vervullen.*”

<sup>905</sup> Article 1:267(1). In practice the Bureau for Youth Care will request the Council for Child Protection to file an application for the relief of parental authority of a parent. Usually an investigation will follow suit. In the report and recommendations attention will be paid to the present situation in which the child finds himself or herself and the importance of the continuation thereof for the sake of stability in the child's life. Where there is no prospect of

persons, for example the parent or other relations by blood or affinity, cannot approach the court in this regard. It is agreed with Doek and Vlaardingerbroek<sup>906</sup> that in some instances this potentially causes unnecessary problems; for example, where the child has been in the care of a family relative for a while due to the fact that neither the biological mother nor the father is capable or able to care for their child.

Where the parents have decided that the child would be better off in the present situation, they cannot file an application to be relieved from parental authority. Instead, they can only approach the Council for Child Protection in the hope of convincing the latter to file the application for the relief in parental authority.<sup>907</sup> The question comes to the fore as to whether it is desirable that the discrepancy between the *de facto* and the *de jure* situation will be prolonged unnecessarily beyond the power of the affected parties. It is submitted that there should be no reason for parents not to be able to request to be relieved from parental authority. In any event, will the court decide what would serve the interests of the child concerned best.

Article 1:268(1) determines that the relief of parental authority can, in principle, not be ordered if the parent concerned objects to it.<sup>908</sup> However, there are two exceptions to this rule. In the first place, where such an order would be contrary to the child's best interests, and secondly, when any of the four exceptions mentioned in Article 1:268(2) are applicable.

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the child returning home it would be more appropriate to deprive a parent of parental authority by ordering the relief of or dismissal from parental authority. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 350.

<sup>906</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 374-375.

<sup>907</sup> In South Africa there are also discrepancies between a *de facto* and the *de iure* situation, for example where the parents of a child leave the child for a long period of time with the grandparents. The latter persons should consider adopting a child which provides a sense of security for the child concerned and would be in line with the goal of permanency planning in terms of section 229 of the Children's Act 38 of 2005. It is agreed with Bosman-Sadie & Corrie who have stated: "stability and security are essential building blocks that enable a child to grow up into a responsible, thriving adult. Adoption is the most cost-effective way of dealing with children whose parents cannot make the necessary provision for them": *A Practical Approach to the Children's Act* (2010) 248. It is regrettable that there is no adoption grant available for the children and (prospective) adoptive parents. If this grant would be included in the Social Assistance Act 13 of 2004, it could contribute to an increase of the number of adoptions.

<sup>908</sup> See in this regard the bench mark case of the *Hoge Raad* of 4 March 2008, LJN BC5726, which is discussed later in this section.



For the purpose of this thesis, the first exception is of utmost importance, since compliance with these grounds paves the way for further-reaching interference; the court may impose a measure of relief of parental authority after a supervision order or a removal (and placement) order have failed.<sup>909</sup> It should be noted that in this respect there needs to be a justified expectation that the measure of supervision or removal is insufficient to avert a threat in terms of Article 1:254. In other words, if the child's moral or psychological interests or health are seriously threatened, due to the fact that the parent is unfit or unable to fulfil his duties pertaining to the care and upbringing of the child. The Civil Code prescribes at this point that the supervision should have lasted for a period of at least six months.

It is commendable that first the least form of interference is opted for before a further-reaching measure will be considered, which is in line with the international standards. This poses the question as to whether the six month period will generally be sufficient to enable a parent to make satisfactory progress, under the supervision of a social worker. On the other hand, it needs to be considered that the existing threat should not be unnecessarily prolonged, for the sake of the child's interests. A similar line of thought may be applicable to the removal and placement of a child, which should have lasted for at least one and a half years.

Apart from the first-mentioned exception, Article 1:268(2) also contains three other grounds on which basis the relief of parental authority may be imposed. The grounds (b) and (c) are not often applied.<sup>910</sup> On the other hand, exception (d) enables a foster parent to file an application for the relief of the biological parent's parental authority. This would come to the fore where a child has been cared for and raised by the foster parent for one year or longer, with the consent of the biological parent. However, the following additional criteria have to be complied with; namely, that the continuation of the placement in the foster family is necessary and that it is feared or expected that the child's return to the parent will be prejudicial to the child. However, this power is nevertheless limited due to the ambit of

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<sup>909</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 376.

<sup>910</sup> Ground (b) concerns the situation where the one parent has been dismissed from parental authority and the relief of the other parent is necessary in order to withdraw any influence of the former, to safeguard the interests of the child. In terms of ground (c) the reason for the relief of parental authority is the mental disturbance of the parent concerned, which is apparently of such a nature that he or she is not able to manifest his or her intention or to understand the meaning thereof.

Article 1:267(2).

All this is only applicable after the court has already dismissed the request of the biological parent to obtain the court's consent for a change of residence of their child.<sup>911</sup> In other words, where the foster parent has successfully blocked the intended change of residence of the child concerned, a biological parent can be forced to be deprived of parental authority, upon the application of the foster parent.<sup>912</sup>

Apart from the foster parent, the Council for Child Protection or the public prosecuting authority may also make use of the fourth exception in terms of Article 1:268(2), provided that the parent is unfit or unable to fulfil his duties pertaining to the care and upbringing, and that it is feared or expected that the child's return to the parent will be prejudicial to the child. Foster parents may therefore also approach either the Council for Child Protection or the public prosecution authority with the request to file an application for the deprivation of the

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<sup>911</sup> Where a child has been cared for and raised by a foster parent for at least one year, to which the parents having parental authority have agreed, the parents may only change the child's place of residence with the consent of the foster parent, see Article 1:253s(1). In other words, the foster parent has the power to block the parent's intention to move the child. However, upon the request of the parents the necessary consent can be given by the court on the basis of Article 1:253s(2) of the Civil Code. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 376.

<sup>912</sup> For clarify reasons the full text of Article 1:268 reads in Dutch as follows:

- “(1) Ontheffing kan niet worden uitgesproken, indien de ouder zich daartegen verzet.
- (2) Deze regel lijdt uitzondering:
- (a) indien na een ondertoezichtstelling van ten minste zes maanden blijkt, of na een uithuisplaatsing krachtens het bepaalde in artikel 261 van dit boek van meer dan een jaar en zes maanden gegronde vrees bestaat, dat deze maatregel – door de ongeschiktheid of onmacht van een ouder om zijn plicht tot verzorging en opvoeding te vervullen – onvoldoende is om de dreiging als bedoeld in artikel 254 af te wenden;
  - (b) indien zonder de ontheffing van de ene ouder, de ontzetting van de andere ouder de kinderen niet aan diens invloed zou onttrekken;
  - (c) indien de geestvermogens van de ouder zodanig zijn gestoord, dat hij niet in staat is zijn wil te bepalen of de betekenis van zijn verklaring te begrijpen;
  - (d) indien na een verzorging en opvoeding met instemming van de ouder – anders dan uit hoofde van een ondertoezichtstelling of een plaatsing onder voorlopige voogdij – van ten minste een jaar in een ander gezin dan het ouderlijke, een voortzetting daarvan noodzakelijk is en van terugkeer naar de ouder ernstig nadeel voor het kind moet worden gevreesd.”

parent's parental authority.<sup>913</sup>

It is submitted that it depends on the facts and circumstances of each case whether an application for a further-reaching measure is necessary and justifiable. It is commendable to have a sliding scale of child protection measures in the legislative framework; that is, to first opt for the least form of interference before resorting to further-reaching measures.<sup>914</sup> When it, after proper investigation,<sup>915</sup> on reasonable grounds can be concluded that the latter is necessary, it probably would serve the child's best interests to act swiftly.<sup>916</sup> This would prevent leaving the child in limbo for too long.

A benchmark decision of the *Hoge Raad* concerned the following facts. The child concerned was born in 1998. When the child was two years old, the mother disappeared. In relation to this the father was prosecuted and sentenced for culpable homicide of his wife and subsequently incarcerated. The child had been under supervision since 5 February 2001 and had been in foster care ever since.<sup>917</sup> The child was well taken care of in the foster family and the child and foster parents were closely attached to one another.

For a number of years there had been no prospect of the child being able to return to the father, and the situation was not expected to change. Therefore the Council for Child Protection in Amsterdam filed an application for the relief of parental authority of the biological father of the child, to which the father objected. He did, however, give consent to the placement of his child with the present foster parents and indicated that he did not have

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<sup>913</sup> See Asser/De Boer *Personen- en familierecht* (2010) 807.

<sup>914</sup> The approach to give preference to the least intrusive form of intervention can also be derived from the Children's Act. For example, section 157(1) instructs the children's court to first give consideration to input relating to measures which have less impact, before resorting to the removal of the child from the care of his or her parents or care-giver. See also section 158(1) which provides that a children's court may issue an order placing a child in the care of a child and youth care centre only if another option is not appropriate.

<sup>915</sup> The Council for Child Protection drafts a report which includes recommendations on the basis of the investigation. For a detailed discussion on the role of the Council for Child Protection in connection with the child protection measures, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 304-312.

<sup>916</sup> At the same time it should be ensured that proper procedure is adhered to, for example the hearing of the affected parties, including the child.

<sup>917</sup> Both orders have a maximum duration of one year, which may be extended upon application, see also section 4.6.2 below.

the expectation that the child in time would return to him. He averred that it was not apparent that the supervision order combined with the placement order were inadequate to prevent a threat of moral or psychological interests of the child due to him being unfit or unable to fulfil his parental duties. Thus the condition to have the father relieved of his parental authority, in terms of Article 1:268(2)(a), was not complied with.

In the past the *Hoge Raad* had been of the opinion that the condition mentioned in Article 1:268(2)(a)<sup>918</sup> was not fulfilled where a parent had shown his or her willingness regarding the continuation of the child's placement with the foster family. In other words, as long as a parent was co-operative regarding the continuation of the foster care, no further-reaching measure would be considered.<sup>919</sup> In the meantime these legislative provisions had been the subject of much academic debate. The question arose as to what point a supervision order (and/or placement order) is still adequate and where a further-reaching measure would become more appropriate.

Where there is a prospect that the parent(s) in the (near) future are able to fulfil the parental duties, the temporary child protection measures would be appropriate. Parents and the child should obtain the necessary help and assistance to learn to cope independently (so that, if applicable, the child could return home). If, however, in all reasonableness, the latter is not feasible, the central focus should be ensuring the stability in the child's life (and the continuation thereof) since this would serve his or her interests best.

In this respect Bruning has distinguished between the placement in a children's home and with a foster family. With regard to the latter situation, the best interests of the child might demand not to remove the child from the foster family, due to (mutual) attachment, especially when the placement has lasted for some time. Moreover, this is even more pressing when a baby or a young child has been in foster care for an extended period of

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<sup>918</sup> The condition that, because of the parent's unfitness or inability to fulfill his duties regarding the care and upbringing, the measure of supervision and/or removal and placement would be insufficient to avert the threat in terms of Article 1:254, namely, to prevent a serious threat regarding the moral or psychological interests or the health of the child.

<sup>919</sup> However, the *Hoge Raad* was of the opinion that if there is any doubt regarding the continuation of the parent's willingness, he or she could nevertheless be relieved of parental authority. See HR 4 April 2008, LJN: BC5726, 2.2 (see <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BC5726> last accessed on 2-11-2012).

time.<sup>920</sup> De Boer refers in this respect to the fact that in these circumstances the child may have no bond at all or a weak bond with the biological parents, whereas he or she has developed a strong bond with the foster parents. It is agreed with De Boer, that slowly but surely, the right to protection of the child's family life, which means his or her interest in maintaining the *status quo* regarding the living environment, should take preference over that of the parents.<sup>921</sup> In addition, where the foster care has lasted for an extended period of time, more consideration should be given to the protection of the family life of the foster parents (with the child concerned).<sup>922</sup>

Punselie also expresses her concern regarding the (till then) existing jurisprudence of the *Hoge Raad*. She refers to the fact that where a child has been in foster care for a long time, which due to the facts and circumstances of the case is expected to continue, the legal practice would contribute to a measure of uncertainty in the child's living environment.<sup>923</sup> In line with these discussions, the district court ordered the relief of parental authority of the father (and the child was placed under guardianship). The appeal against this decision was dismissed after which the father lodged an appeal with the *Hoge Raad*, which was eventually

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<sup>920</sup> Bruning refers to the attachment theory which was developed in the field of pedagogics: *Rechtvaardiging van Kinderbescherming* (2001) 220. Weterings & Van den Berg plead for a better involvement of (young) foster children in the decision-making process which affect them. Especially pertaining to the question whether the child should return to the biological parent(s) or whether he or she should remain in the care of the foster parent(s). In the latter case it could mean that an in the meantime, well-developed attachment relationship between the child and foster parent(s) will be continued, which could be in the child's best interests: "De stem van het pleegkind" 2012/5 *Tijdschrift voor Familie- en Jeugdrecht (FJR)*. With regard to the research methodology regarding the attachment of foster children, see Juffer "Gehechtheid kan niet mee in de koffer" 2012/6 *Tijdschrift voor Familie- en Jeugdrecht*. It is commendable that in recent years more attention has been paid to interdisciplinary research and the sharing of findings based on the research between different disciplines. Child law is, for example, intertwined with child psychology, pedagogics and education. Interaction with, a general understanding of and respect for professionals in these other (related) disciplines is indispensable. It is therefore submitted that the importance of this should be highlighted at a tertiary (education) level, not only pertaining to law students but regarding all students in the related disciplines.

<sup>921</sup> See also Article 3 of the CRC in conjunction with Article 20(3), where it is stated that "[w]hen considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing". See also the European Court *K and T/Finland* 12 July 2001, where the court deliberated that "after a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited".

<sup>922</sup> See HR 4 April 2008, LJN: BC5726, section 2.3; also Asser/De Boer *Personen- en familierecht* (2010) 808-809 and 751.

<sup>923</sup> *Voor een Pleegkind met Recht een Toekomst* (diss. 2006 Leiden) 90, see "inleidende opmerkingen" in HR 4 April 2008, LJN: BC5726, section 2.3.

dismissed as well.<sup>924</sup>

However, in the case under discussion,<sup>925</sup> the *Hoge Raad* held that the previous position needed to be revisited, due to the child's need for stability and continuity of his living environment. The *Hoge Raad* deliberated that the continuation of the parent's willingness regarding the placement was merely one of the factors to be taken into consideration, but that it would not (automatically) prevent the imposition of the parent's relief of parental authority.<sup>926</sup>

Children in the so-called child protection arena are entitled to extra care and consideration due to the fact that they are already vulnerable because of the circumstances they find themselves in. Children who have been placed in, for example, a foster family, need stability and certainty or the continuation thereof. The annual review of the temporary child protection measures of supervision and the removal and placement order inevitably bring a level of uncertainty for all affected parties; the child, the biological parents, and the foster parents. However, these measures should be of a temporary nature, during which period the parent(s) should be assisted in order to be able to take full responsibility (again). Where this sometimes appears not to be feasible, the child's best interests might demand the continuation of the existing situation of placement, overriding the wishes of the parent(s) to be reunited with the child.<sup>927</sup>

It should be outlined that in principle, the order depriving a parent of the parental authority will be in force indefinitely. The consequences of this child protection measure are discussed below.<sup>928</sup> However, it should be kept in mind that the measure does not have a definite effect. It will obviously come to an end when the child turns eighteen.<sup>929</sup> In addition,

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<sup>924</sup> In cassation, the *Hoge Raad* held that for the sake of stability and continuity of the child's living environment, it was necessary to revisit the (existing) case law, see below in this section. The *Hoge Raad* concluded that the finding of the court of appeal to confirm the parent's relief of his parental authority was not incorrect and dismissed the case.

<sup>925</sup> HR 4 April 2008, LJN: BC5726.

<sup>926</sup> See also Asser/De Boer *Personen- en familierecht* (2010) 808.

<sup>927</sup> This decision cannot be taken lightly. For a more detailed discussion on the removal and placement of a child, see chapter 5.

<sup>928</sup> See section 4.5.2.4 below.

<sup>929</sup> Usually the child protection measures come to an end when the child becomes a major (at

the Articles 1:277 and 278 of the Civil Code explicitly provide for the restoration of parental authority regarding a parent.<sup>930</sup>

#### 4.5.2.3 Dismissal from parental authority<sup>931</sup>

In the past the deprivation from parental authority of a parent was considered the ultimate sign of parental incompetence or failure. It would only come to the fore where there was culpable misconduct on the side of a parent; for example, serious neglect, abuse of authority or criminal behaviour committed against or in conjunction with the minor.<sup>932</sup> Presently Article 1:269 of the Civil Code contains the grounds for deprivation from parental authority.<sup>933</sup> It reads as follows:

“(1) Where the court finds it necessary in the interests of the children, she may deprive a parent of the authority regarding one or more of his children, on the grounds of:

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eighteen), see Article 1:233 of the Civil Code. For a definition of a child, see sections 2.2.1.2 and 3.1.1 above. It is interesting to note that in recent research by the Verwey-Jonker Institute, the question was posed whether in some cases the available youth care should not be extended to 23 years. Although persons of eighteen years are considered to be majors, research has confirmed that the youth between 18 to 23 years, who have been involved in youth care, is potentially a vulnerable group. These persons are often not sufficiently independent, do not have a proper functioning social network, and have no family support. It mainly concerns the youth with the following background: residential care or foster care, street children and children with psychiatric problems or mental handicaps. It is agreed that these persons might be at risk and that, where possible, it should be avoided that they will fall between the cracks (*tussen wal en schip vallen*). See Steketee *et al.* (*Jeugd)zorg houdt niet op bij 18 jaar* (2009) 6. In this respect it is interesting to note that the South African Children's Act makes explicit provision for programmes which should assist young people with the transition when leaving a child and youth care centre after reaching the age of 18, see section 191(3)(e). It is submitted that (at least) these vulnerable persons should get the appropriate assistance in preparing them to be on their own as from the age of eighteen. Specific programmes are an indispensable aid in this respect. See also chapter 5.

<sup>930</sup> See further section 4.5.2.4 above. With regard to dismissal of guardianship, see Article 1:335, which falls outside the ambit of the topic of this thesis and will not be further discussed.

<sup>931</sup> In Dutch: *ontzetting*.

<sup>932</sup> See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 370, where they also point out that until the coming into force of the Constitution of 1983, the “dismissed” parent was excluded from the right to vote.

<sup>933</sup> Dismissal from guardianship concerns the position of non-parents, see Article 1:327 of the Civil Code, and therefore will not be further discussed. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 379-380; also Asser/De Boer *Personen- en familierecht* (2010) 810-814.

- (a) abuse of the authority, or gross neglect regarding the care or upbringing of one or more children;
- (b) rejectable conduct;
- (c) final conviction:
  - (i) due to the intentional participation to a criminal offence in conjunction with a minor over whom he exercised parental authority;
  - (ii) due to committing a criminal offence against the minor as described in the titles XIII-XV and XVIII-XX of Book II of the Dutch Criminal Code;
  - (iii) resulting in the incarceration of two years or longer;
- (d) the serious disregard of an instruction by the Bureau for Youth Care or the obstruction of a child's removal in terms of Article 1:261 of the Civil Code;
- (e) the reasonable fear for the neglect/disregard of the interests of the child, because of the parent demanding or removing the child from others, who provide for the care and upbringing of the child".<sup>934</sup>

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<sup>934</sup>

Own translation. The full text of Article 1:269 of the Civil Code in Dutch reads as follows:

- “(1) Indien de rechtbank dit in het belang van de kinderen noodzakelijk oordeelt, kan zij een ouder van het gezag over een of meer van zijn kinderen ontzetten, op grond van:
- (a) misbruik van het gezag, of grove verwaarlozing van de verzorging of opvoeding van een of meer kinderen;
  - (b) slecht levensgedrag;
  - (c) onherroepelijke veroordeling:
    - (i) wegens opzettelijke deelneming aan enig misdrijf met een onder zijn gezag staande minderjarige;
    - (ii) wegens het plegen tegen de minderjarige van een van de misdrijven, omschreven in de titels XIII-XV en XVIII-XX van het tweede boek van het Wetboek van Strafrecht;



Deprivation of parental authority is regarded as the most far-reaching form of intervention. Generally speaking, the behaviour or the consequences thereof are based on the deliberate dereliction of duty, or being unworthy to take responsibility.<sup>935</sup> It may only be ordered when, in the opinion of the district court,<sup>936</sup> this is necessary in the interests of the child. Moreover, a limited number of persons may apply for such a far-reaching order; namely, the other parent, a family member,<sup>937</sup> the Council for Child Protection, or the public prosecuting authority.<sup>938</sup> In addition, a foster parent may file an application, where it is reasonably expected that the parent will demand the child back, which could result in the neglect or disregard of the interests of the child.<sup>939</sup>

Article 1:269(1) also determines that the dismissal may concern one or more of the parent's children. Various grounds are listed in subsection (1), which have their own requirements. For the purpose of this thesis, the grounds (a), (d) and (e) are of importance. Ground (a) refers to the abuse of authority or gross neglect regarding the care and upbringing. The former implies a dereliction of duty by a positive act, whereas the latter concerns a dereliction of duty by omission. The content of these vague phrases is not clear.<sup>940</sup> It is left to the presiding officer to determine the contents thereof, which needs to be motivated in the court order.<sup>941</sup> Ground (d) concerns the possible dynamics between the parents and the Bureau for Youth Care. The serious disregard for an instruction by the Bureau for Youth

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- (iii) tot een vrijheidsstraf van twee jaar of langer;
  - (d) het in ernstige mate veronachtzamen van de aanwijzingen van de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg of belemmering van een uithuisplaatsing krachtens het bepaalde in artikel 261;
  - (e) het bestaan van gegronde vrees voor verwaarlozing van de belangen van het kind, doordat de ouder het kind terugeist of terugneemt van anderen, die diens verzorging en opvoeding op zich hebben genomen.
- (2) Onder misdrijf worden in dit artikel begrepen medeplichtigheid aan en poging tot misdrijf.”

<sup>935</sup> Asser/De Boer *Personen- en familierecht* (2010) 810.

<sup>936</sup> In Dutch: *de arrondissementsrechtbank*.

<sup>937</sup> A relation of blood or affinity of the child up to and including the fourth degree.

<sup>938</sup> See Article 1:270(1) of the Civil Code.

<sup>939</sup> Article 1:270(2) in conjunction with Article 1:269(1)(e) of the Civil Code.

<sup>940</sup> Bruning refers in this respect to “open normen”. For a detailed discussion, see *Rechtvaardiging van Kinderbescherming* (2001) 187 and further.

<sup>941</sup> See Asser/De Boer *Personen- en familierecht* (2010) 812.

Care or the obstruction of the child's removal may result in a further reaching measure. Its relevance lies mainly in its preventative effect.<sup>942</sup>

Article 1:269(1)(e), read in conjunction with Article 1:270(2), gives foster parents a stronger position. Where a parent demands the child (back) from a foster parent and there is a reasonable fear/expectation that the interest of the child will be neglected, the foster parent(s) may request the court to deprive the parent of parental authority.<sup>943</sup> In such a case, the court has to establish what would be in the best interests of the child; to remain with the foster family or to return to the (biological) family.<sup>944</sup> The order by which the parent will be deprived of the authority will also be in force indefinitely, however, without a definite effect.<sup>945</sup> The legal consequences of the deprivation of parental authority and the restoration thereof in terms of the Articles 1:277 and 278 which will be discussed hereafter.

#### 4.5.2.4 The legal consequences of the deprivation of parental authority

It is evident that each case has to be decided on its own merits in order to justify (any kind of) interference. Whilst in the process of deliberating whether or not any of the grounds for the deprivation of parental authority are applicable, it might be that interim measures need to be put in place. On the basis of Article 1:271 of the Civil Code, the court may suspend a parent (partially or fully) in the exercise of his or her authority, where this is urgently and instantly required. In such a case the other parent will exercise parental authority. Where both parents are suspended, the court may order the temporary guardianship, in which situation the Bureau for Youth Care will become involved.<sup>946</sup> However, instead of the suspension as mentioned above, the court may also order supervision regarding a child, in terms of Article 1:254.<sup>947</sup> It is interesting to note that where the court dismisses the application for the relief or deprivation of parental authority of a parent, it has the discretion

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<sup>942</sup> Asser/De Boer (2010) 813.

<sup>943</sup> This is only possible where the interests of the child concerned are at stake, see Article 1:269(1)(e).

<sup>944</sup> For a discussion on the placement of children, see chapter 5.

<sup>945</sup> The effect is similar to the order of dismissal of parental authority. However, restoration in parental authority is possible, see section 4.5.2.5 below.

<sup>946</sup> See Article 1:271(4).

<sup>947</sup> For a more detailed discussion, see section 4.5.2.1 above.

to order supervision of the child.<sup>948</sup>

Once the court has found that it is necessary to deprive a parent of his or her parental authority on the ground of Articles 1:266 or 1:269, the following consequences come to the fore. Article 1:274(1) determines that where parents previously had joint parental authority and one of the parents will be deprived thereof, the parental authority will be solely be exercised by the other parent. However, in the case of joint authority of one parent and his or her partner, the situation is quite different. If this parent will be deprived of parental authority, the other parent (who does not exercise parental authority) will be given the opportunity to file an application to be granted the parental authority.<sup>949</sup> Then the court subsequently has to choose between the two, which decision obviously has to serve the child's interests best.<sup>950</sup>

When after divorce one parent has exercised parental authority and this parent is to be deprived thereof, the other parent has a position of preference; he or she may request the court to assign authority to him or her. Article 1:274(2) stipulates that this will only be dismissed where there is a reasonable fear or expectation that, if granted, the interests of the children would be neglected.<sup>951</sup>

In all other instances, the court has to confer authority to a third party. In practice, guardianship will usually be awarded to the Bureau for Youth Care.<sup>952</sup> The Implementation Decree to the Act on the Youth Care regulates the exercise of the guardianship by the Bureau for Youth Care in the Articles 40-42.<sup>953</sup> This does, however, not concern the daily

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<sup>948</sup> See Article 1:272a.

<sup>949</sup> See the Articles 1:274(2) in conjunction with 1:253v(6) of the Civil Code.

<sup>950</sup> Where the court grants the other parent parental authority, the partner of the other parent will lose the authority. This implies that the order which conferred joint authority in terms of Article 1:253t, needs to be amended or canceled. For a discussion of joint authority between a parent and his or her partner, see section 4.1.2.4 above.

<sup>951</sup> In case the application is dismissed, the court has the discretion to change the order upon request, due to a change in circumstances, see Article 1:274(3).

<sup>952</sup> Although, theoretically speaking, any person may file an application in order to be awarded guardianship. See Article 1:275(2). See also Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 380.

<sup>953</sup> Within five days the Bureau for Youth Care assigns the case to one of the social workers and will inform the parents and child(ren) accordingly. Within six weeks a plan needs to be drawn

care and upbringing of the child. Where the Bureau for Youth Care exercises guardianship, due to the deprivation of the parent's authority, the child will usually be placed in a foster family or a children's home.<sup>954</sup>

In case the Bureau for Youth Care is intending to place a child in a closed setting, specific authorisation is needed from the children's court, based on the Articles 29b of the Act on the Youth Care and 1:261(5) of the Civil Code.<sup>955</sup> Although the child might be placed elsewhere, the parent(s) and the child remain entitled to have contact with one another. It is commendable that the Implementation Decree explicitly provides that the contact between the child and his or her family should be enhanced, unless this would be detrimental to the child.<sup>956</sup> How this turns out in practice depends to a large extent on the social worker involved. It is submitted that any intentions or plans regarding contact should be explicitly mentioned in the plan to be drawn up.<sup>957</sup>

Another scenario involves the situation where the foster parents have requested the court to relieve a parent of parental authority. In this case the court will usually appoint one of the foster parents as a guardian.<sup>958</sup> It is strange that the foster parents cannot be awarded joint guardianship straight away.<sup>959</sup> It is submitted that the latter possibility would be in line with

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up pertaining to the needs of the client, the aims and activities including the involvement of the parents. Article 40(5) of the Implementation Decree stipulates that in this regard consultation with the child, parents or foster parents is necessary unless this would be harmful to the child concerned.

<sup>954</sup> Doek & Vlaardingerbroek have indicated that circa 60% of the children will be accommodated in a foster family, whereas the rest will be placed in a children's home/institutionalised or (supervised) lodging (in Dutch: *op kamers wonen*): *Jeugdrecht en Jeugdzorg* (2009) 382.

<sup>955</sup> For a detailed discussion on the placement of children, see chapter 5. With regard to the periodical review of child protection measures, including any placement of a child, see section 4.7.2 below.

<sup>956</sup> See Article 42(2) of the Implementation Decree to the Act on the Youth Care.

<sup>957</sup> Article 40(2) of the Implementation Decree prescribes the contents of a plan. However, it does not explicitly refer to the right to contact. It merely refers to a description of how the parents or the social network will be involved in the activities pertaining to the child. The parties involved should be informed of their right to have contact.

<sup>958</sup> In this respect Article 1:275(3) refers to the position of foster parents in terms of Article 1:268(2)(d), as discussed in section 4.5.2.2 above.

<sup>959</sup> Doek & Vlaardingerbroek point out that the foster parents have two options: Firstly, to apply for the parent's dismissal of parental authority, in terms of Article 1:270(2), after which a guardian needs to be appointed. Secondly, to request to be appointed as a guardian in terms of Article 1:299a. With regard to the latter situation, the foster parent may be appointed as a

the child's need for stability and continuity in the child's upbringing, which ultimately would serve the child's best interests.<sup>960</sup>

Another legal consequence of the deprivation of parental authority relates to the administration of the child's property. After being deprived of parental authority, the parent concerned has the duty to render an account to the successor regarding his or her financial management.<sup>961</sup> Nevertheless, since child protection measures are in principle of a temporary nature, it is possible to have the parental authority restored, which will be discussed in the next section.

#### 4.5.2.5 Restoration of parental authority

Where a parent has been deprived of parental authority pertaining to his or her child, such order will be in force indefinitely but without a definite effect. In other words, where the circumstances have changed, the restoration of parental authority may be applied for. The court has a wide discretion in this respect.<sup>962</sup> Article 1:277(1) states:

“If the court is convinced that the child may be entrusted once more to his parent who was relieved of or deprivation of parental authority, once more, the court can restore the parental authority, upon his request”.<sup>963</sup>

The parent who was relieved of, or deprived of, parental authority may file such an application as well as the Council for Child Protection.<sup>964</sup> Pending the procedure, either of

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guardian first, after which an application can be made on the basis of Article 1:282, resulting in joint guardianship. It is agreed with Doek & Vlaardingerbroek that this procedure is unnecessary cumbersome. In order to avoid this, they recommend that the courts should award joint guardianship immediately in these cases: *Jeugdrecht en Jeugdzorg* (2009) 380-381.

<sup>960</sup> See also the Articles 3 and 20(3) of the CRC. See also section 4.5.2.3 above.

<sup>961</sup> See Article 1:276 of the Civil Code.

<sup>962</sup> The court may also grant the application for the restoration of parental authority and simultaneously impose a supervision order. See Doek & Vlaardingerbroek (2009) 384.

<sup>963</sup> Article 1:277(1) reads in Dutch: “Indien de rechtbank overtuigd is, dat een minderjarige wederom aan zijn ontheven of onzette ouder mag worden toevertrouwd, kan zij deze ouder op zijn verzoek in het gezag herstellen.”

<sup>964</sup> Article 1:277(1) in conjunction with 278(2) of the Civil Code.

the two parties may request the court to defer the decision and to determine a trial period during which the child will be placed (back) with the parent.<sup>965</sup> It is interesting to note that Article 807 of the Code of Civil Procedure determines that there is no appeal possible against an order regarding a trial period.<sup>966</sup>

#### **4.5.2.6 Proposed legislation pertaining to child protection measures in the Netherlands**

In September 2006 the report “*Kinderen Eerst!*” was presented, which contained a proposal for the amendment of the child protection measures in the Netherlands. It was felt, among others, that the supervision order should be extended to less serious cases, in order to work more effectively from the perspective of (prevention and) early intervention. The report was converted into proposed legislation, which, after consultation with various organisations, was subsequently presented in Parliament (*Tweede Kamer der Staten Generaal*) on 30 July 2009. It is still pending but the proposed legislation is expected to take effect soon.<sup>967</sup>

The point of focus in the proposed legislation revolves around the right of the child to a healthy and steady development, with the aim of becoming independent and responsible (young) adults. Consequently, if these provisions become law, it will be easier to impose a child protection measure, such as a supervision order.

Article 255(1) (new) determines that the children's court may order supervision of the child on the basis of two cumulative grounds.

- (i) Where this is necessary for the unthreatened upbringing and the care needed in connection with the problems of the child or those of the parents, are not (fully) accepted by the parents; and
- (ii) There is a justified expectation that the parent(s) are able within a reasonable period

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<sup>965</sup> The trial period is maximum six months, see Article 1:278(2).

<sup>966</sup> See Article 807b of the Code of Civil Procedure. The relevant provisions, the Articles 798-813 of the Code of Civil Procedure are discussed in section 4.4.2 above.

<sup>967</sup> Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 387.

of time, are able to take responsibility for the care and upbringing of the child.

In other words, where the parents are not receptive (enough) to the assistance which is needed in order to safeguard the unthreatened upbringing of a child, and where it is a justified expectation that they are still able within the near future to take full responsibility, supervision can be ordered. To this effect the children's court will determine the aims of the order, as well as the duration thereof.<sup>968</sup> Another aspect involves the improvement of the legal position of foster parents where the (foster) child was placed under supervision in terms of Article 1:254 of the Civil Code. After they have cared for and raised the child concerned for one year (or longer), they obtain a blocking-right, which means that they need to provide consent where the Bureau for Youth Care intends to change the place of residence of the child. However, if the foster parents refuse to consent to the removal of the child, the Bureau for Youth Care may approach the children's court for the necessary consent.

Other aspects which increase the powers of the Bureau for Youth Care relate to the right to obtain information from third parties, without the consent of the parent(s), even in the case of professional privilege. Where a supervision order is combined with an removal and placement order, the Bureau for Youth Care may be assigned specific powers; for example, to register the child for a school or to give consent to a medical procedure. Where the Bureau for Youth Care has issued a directive, it may approach the court for a measure of compulsion, in order to enforce compliance. It will be left to the court to determine whether this is reasonable (or not).

The right to participation of the child in child protection proceedings is (slightly) enhanced. In every application regarding a supervision order, reference needs to be made regarding the questions if, and how, the contents and purpose of the application were discussed with the child, which also need to include the child's response in this regard. In terms of the proposed legislation, the two measures depriving a parent of parental authority will be combined in one type of order, for which the consent of the parent is no longer required. It is expected that this measure will come to the fore at an earlier stage, as soon as it becomes apparent that the parent will not be capable of taking responsibility (again) within a

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<sup>968</sup> See Article 255(3) new.

reasonable period of time.

Similar to the rules for the implementation of a supervision order by the Bureau for Youth Care, a system will be put in place for the implementation of guardianship. This results in a measure of control exercised by the Council for Child Protection. To this effect, the Bureau for Youth Care is expected to submit a progress report to the Council for Child Protection on an annual basis.<sup>969</sup>

#### **4.6 Duration, extension and termination of a children's court order**

In the case state intervention with regard to the family life of a child and his or her family is unavoidable, this should only last for the minimum necessary period. This is even more pressing in the case of removal and placement of a child.<sup>970</sup> Since placement results in the deprivation of liberty, it should be kept in mind that the following two United Nations documents are applicable, and thus have to be adhered to by all state parties; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (better known as the *Beijing Rules*),<sup>971</sup> and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (also known as the *Havana Rules*).<sup>972</sup> Although the *Beijing Rules* provide a standard with regard to the treatment of juveniles<sup>973</sup> in relation to a committed offence,<sup>974</sup> the principles referred to in these Rules have been extended to children who are dealt with in welfare and care proceedings.<sup>975</sup> The same applies to the *Havana Rules*, which are

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<sup>969</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 386-390.

<sup>970</sup> See Rule 19 of the *Beijing Rules* and Rule 1(1) and (2) of the *Havana Rules*. It is also mentioned that the deprivation of liberty should be a disposition of last resort.

<sup>971</sup> UN Resolution 40/33 of 29 November 1985.

<sup>972</sup> UN Resolution 45/113 of 14 December 1990. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 446-447.

<sup>973</sup> A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult. See Rule 2.2(a).

<sup>974</sup> A committed offence is any behaviour (act or omission) that is punishable by law under the respective legal systems. See Rule 2.2(b).

<sup>975</sup> See Rule 3.2.



applicable to any deprivation of liberty; in other words, in the widest sense possible.<sup>976</sup>

Rule 17.1(b) of the *Beijing Rules* determines that restrictions on the personal liberty of a juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum. In this context, the use of alternatives to institutionalisation is encouraged as far as possible.<sup>977</sup> Moreover, “deprivation of personal liberty shall not be imposed [...] unless there is no other appropriate response”, and “the well-being of the juvenile shall be the guiding factor in the consideration of his or her case”.<sup>978</sup>

Rule 19.1 also prescribes the least possible use of institutionalisation, due to the fact that it should always be a disposition of last resort and for the minimum necessary period.<sup>979</sup> The same content is to be found in Rule 1.2 and 3 of the *Havana Rules*.<sup>980</sup>

#### 4.6.1 Duration of court orders in terms of South African law

Section 159 of the Children's Act deals with the duration of the original orders of the court, as well as the extension thereof, where this is deemed necessary. Where the court has made an order on the basis of section 156, and only in terms of the latter section, such order lapses on expiry of two years from the date the order was made, or such shorter period for which the order was made.<sup>981</sup> However, two years is a long time, whilst short term intervention programmes can sooner bring about the required changes or results in

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<sup>976</sup> Rule 11(b) of the *Havana Rules* defines deprivation of liberty as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority”.

<sup>977</sup> See Van Bueren & Tootell “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 17.

<sup>978</sup> *Beijing* Rule 17.1(c) and (d).

<sup>979</sup> These two requirements have a limiting effect on the measure of institutionalisation. See Van Bueren & Tootell “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 18.

<sup>980</sup> United Nations Rules for the Protection of Juveniles deprived of their liberty, Resolution 45/113 of 14 December 1990.

<sup>981</sup> The maximum duration of a court order is the same as under section 16 of the (repealed) Child Care Act 74 of 1983. See also Matthias & Zaal *Commentary on the Children's Act* (2012) 9-32.

safeguarding and protecting the child's interests and well-being.

Therefore, it is submitted that a period of two years is too long, and secondly, that such orders should be subject to interim review by the court responsible for such order.<sup>982</sup> In this respect, section 48 brings about the necessary flexibility. Section 48 gives the children's court additional powers to make the specific orders as listed in subsection (1) in addition to the orders it is empowered to make, in terms of the Children's Act. For the present discussion, section 48(1)(b) and (c) are most relevant. Apart from any other orders the children's court may make, it can extend, withdraw, suspend, vary or monitor any of its orders.<sup>983</sup> The rescission, suspension or variation of an (existing) order is nothing new in terms of legislation pertaining to children.<sup>984</sup> However, the possibility of the court to monitor their own orders and therefore to have the power to check whether a specific order has been complied with or not, is most welcome and indispensable.<sup>985</sup> Other additional powers of the children's court concern the ability to impose or vary time deadlines with respect to any of its orders. This provides for flexibility which is necessary to ensure tailor-made decisions which suit the circumstances and therefore the interests of the particular child best. In other words, generally speaking, there is flexibility with regard to the time frames of court orders, including the possibility of variations on the basis of section 48.

Nevertheless, it should be noted that in the case of an order in which a child is found to be in

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<sup>982</sup> See also section 4.7 below. This would be more in line with the CRC, Articles 9(1) and 25 which ensure judicial review and period review where removal is inevitable. See also Article 19 of the African Children's Rights Charter. For a more detailed discussion, see section 2.2.3.1. It is submitted that these provisions should come into play with regard to any kind of intervention pertaining to the family life of a child and his or her parents.

<sup>983</sup> Section 48(1)(b).

<sup>984</sup> Section 8(1) of the Divorce Act 70 of 1979 reads that "a maintenance order or an order in regard to the custody [care] or guardianship of, or access [contact] to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court". Moreover, section 21 of the (repealed) Child Care Act provided for the rescission of an adoption order, which section has been replaced by section 243 of the Children's Act.

<sup>985</sup> See also section 4.7 below. See Gallinetti in Davel & Skelton (eds.) 4-15.

need of care and protection, section 159 applies, providing an exception to the general rule; where a court order is made on the basis of section 156, such order lapses on expiry of two years from the date the order was made, or such shorter period for which the order was made.<sup>986</sup> Thus, in principle, a care and protection order lapses after two years, but the court is able to monitor the compliance with their order and therefore any progress made, by determining the duration of the order for a shorter period of time.<sup>987</sup>

#### 4.6.2 Duration of court orders in terms of Dutch law

The children's court determines the duration for a supervision order, which is usually one year but may be shorter (not longer).<sup>988</sup> In principle this measure may be extended yearly, but for the maximum duration of one year. However, this cannot be done on the court's own accord but should be based on an application. Article 1:256(2) provides that such application may be filed by the Bureau for Youth Care, a parent, another person who cares for and raises the child as part of his or her family,<sup>989</sup> the Council for Child Protection, or the public prosecution authority.

Usually it will be the Bureau for Youth Care who files an application for the extension of the supervision order. However, if the Bureau for Youth Care decides against filing an application for an extension of the existing supervision order, the Council for Child Protection has to be informed as soon as possible. In addition, a report on any progress made in terms of the supervision order needs to be produced to the Council for Child Protection, on the basis of Article 1:256(3) of the Civil Code. The latter is one of the three legislative provisions on the basis of which a monitoring function has been assigned to the Council for Child Protection.<sup>990</sup> Based on the information provided by the Bureau for Youth Care, the Council

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<sup>986</sup> See section 159(1). The maximum duration of a court order is the same as under section 16 of the (repealed) Child Care Act 74 of 1983. See also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-32.

<sup>987</sup> See also section 65 which specifically deals with the monitoring of court orders. When making an order, the court may order any person involved in the matter to appear before it at any future date, see section 65(2), which grants children's courts a measure of flexibility.

<sup>988</sup> Doek has pointed out that the children's court does not often make use of the possibility to determine a shorter period than one year: *Jeugdrecht en Jeugdzorg* (2009) 337.

<sup>989</sup> For example, a (new) partner of the parent/stepparent or foster parent.

<sup>990</sup> The other two are Article 1:262(3), where no extension has been requested of the

for Child Protection may conduct an investigation and decide on filing an application for the extension of an existing order, nevertheless. However, time is of the essence. Doek and Vlaardingerbroek refer in this respect to the importance of filing the application for an extension in due time. Once the duration of an existing supervision order has lapsed it is terminated.<sup>991</sup>

Article 1:256(4) states that an (existing) supervision order can be terminated when the grounds or reasons for imposing the order no longer exist. This implies that any of the following three situations come to the fore; the serious threat does not exist any longer, the threat is no longer of a serious nature, or it can be sufficiently dealt with in other (less interfering) ways.<sup>992</sup> The termination of an existing supervision order may be done at any time during the term of the order or towards the end of the term, but only upon application.<sup>993</sup> Where the child protection measure of supervision was ordered, the children's court may, upon request, grant the authorisation for the removal and placement of a child on the basis of Article 1:261.<sup>994</sup> Such authorisation may be granted for one year at the time. However, this can be annually extended for one year, which means that the measure can carry on for years. The question arises as to whether this is in the best interests of any child.<sup>995</sup>

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authorisation for the placement of a child, and Article 1:263(1), pertaining to the termination of the placement of a child. See Doek & Vlaardingerbroek (2009) 368. Also “*Kwaliteitskader en Protocollen 2009*” section 2.1, under I.

<sup>991</sup> Extension with retrospective effect is not possible. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 337.

<sup>992</sup> For example, on a voluntary basis or where the social network of the family concerned is involved to assist the family and to look after the interests of the child. See also Doek & Vlaardingerbroek (2009) 338.

<sup>993</sup> The parties who can apply for the termination of a supervision order are the Bureau for Youth Care, the parent having authority pertaining to the child, and the child of twelve years or older. It is agreed with Doek & Vlaardingerbroek that it is odd that for example a foster parent can not file such an application, whilst he or she could be considered as an affected party. It is agreed that this will most probably not be in line with Article 8 of the European Convention, in *Jeugdrecht en Jeugdzorg* (2009) 338.

<sup>994</sup> Such authorisation may only be granted if it is necessary in the interest of the care and upbringing of the child or for the examination of his or her mental or physical condition. Removal and placement will be further discussed in chapter 5.

<sup>995</sup> It depends on the facts and circumstances of each case whether and/or when a further reaching child protection measure should be considered if the existing one has proven to be inadequate. See also the discussion on the various child protection measures in section 4.5.2 above.

As discussed above, the order which deprives a parent of his or her (parental) authority will be in force indefinitely; however, without a definite effect. The legal consequences of the relief of parental authority or the deprivation thereof have been already discussed.<sup>996</sup> Reference was also made to the possibility to apply to court, requesting the restoration of parental authority in terms of Article 1:277 of the Civil Code.<sup>997</sup>

## 4.7 Periodic review and appeal

Article 25 of the CRC deals with periodic review of placement. It reads as follows:

“States parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”.

It was mentioned previously,<sup>998</sup> that Article 25 of the CRC prescribes to all state parties to recognise the right of a child who has been removed from the family environment, to a periodic review of the removal and placement decision.<sup>999</sup> Consequently, this right accrues to all children who are placed in foster families, hospitals, both open and closed residential facilities, therapeutic facilities, and youth prison facilities.<sup>1000</sup>

It is submitted that periodic review should take place across the board, with regard to all care and protection orders, and not only with placement orders. Any kind of interference with the family life of children and their parents or care-givers will impact on their relationship and life in general. Therefore the review of such an order is needed to justify the continuation of such an infringement. On the basis of this, there is a definite need to establish and ensure, on a regular basis, that the persons involved remain on track, to the benefit of all, and particularly the child.

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<sup>996</sup> See section 4.5.2.4 above.

<sup>997</sup> See section 4.5.2.5 above.

<sup>998</sup> Section 4.6.

<sup>999</sup> The African Children’s Rights Charter does not contain such provision.

<sup>1000</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 213.

Above reference was made to the principles in the *Beijing Rules*<sup>1001</sup> which should be extended to children who are dealt with in welfare and care proceedings.<sup>1002</sup> For the present discussion, Rule 7.1 is particularly relevant, since it, among others, refers to the right to appeal to a higher authority which shall be guaranteed at all stages of proceedings. In addition, Rule 14.1 deals with the competent authority to adjudicate, and that the proceedings shall be conducive to the best interests of the juvenile.

#### 4.7.1 Periodic review and appeal in South Africa

Article 25 of the CRC creates a right for children who have been placed by competent authorities, to a periodic and all-encompassing review of that removal and placement decision.<sup>1003</sup> It was mentioned before, that Matthias and Zaal, as early as 1996, rightfully call for six-monthly monitoring hearings in the case of a placement order.<sup>1004</sup>

Above reference was made to the importance of extending review across the board, to all care and protection measures, in order to justify any continuation of interference with the family life of a child and his or her parents.<sup>1005</sup> Since the coming into operation of the Children's Act on 1 April 2010, South African law provides for the monitoring of court orders.<sup>1006</sup> Section 65 states in unambiguous terms that a children's court may monitor (a) compliance with an order made by it in a matter, or (b), the circumstances of a child following an order made by it. From the wording it can be deduced that the children's court has discretion to determine specifically that monitoring should take place. To this effect the court may order any person involved in the matter to appear before it at any future date, or that reports by a designated social worker be submitted to the court within a specified period

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<sup>1001</sup> In other words, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, see section 4.6.

<sup>1002</sup> See Rule 3.2.

<sup>1003</sup> The all-encompassing review refers to the fact that not only the treatment provided needs review but also all other circumstances relevant to his or her placement, all in the light of the best interests of the child concerned.

<sup>1004</sup> See Matthias & Zaal "Can we build a better children's court? Some recommendations for improving the processing of child-removal cases" 1996 *Acta Juridica* 51.

<sup>1005</sup> See the previous section 4.7.

<sup>1006</sup> Commencement of Remaining Sections of the Children's Act, 2005 (Act No. 38 of 2005). Proclamation No. R 12, 2010, *Government Gazette* 33076.

or from time to time as specified in the order.

In addition, the court may call or recall any person involved in the matter to appear before it, at any time after making an order or when a report of non-compliance in terms of section 65(4) has been referred to the court. When subsequently a person appears before the court, the court may inquire whether the order has been, or is being, complied with, and if not, why the order has not been complied with, or is not being complied with.<sup>1007</sup> Apart from inquiring on what happened to the enforcement of the order, the court may, on the basis of the hearing, confirm, vary or withdraw the order.<sup>1008</sup> The court may also enforce compliance with the order, if necessary through a criminal prosecution in a magistrate's court or in terms of section 45(2).<sup>1009</sup>

Subsection (4) is also worth mentioning. It states that:

any person may report any alleged non-compliance with an order of a children's court, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court, who must refer the matter to a presiding officer for a decision on possible further action.

It is submitted that the phrase “any person” should be changed to “any professional person”, due to the fact that the children's court proceedings are confidential<sup>1010</sup> and that publication of information relating to the proceedings is in principle not permitted.<sup>1011</sup> As mentioned

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<sup>1007</sup> Section 65(3)(a).

<sup>1008</sup> Section 65(3)(b). See also section 48, providing the children's court with additional powers, among others, to extend, withdraw, suspend, vary or monitor any of its orders, see section 48(1)(b).

<sup>1009</sup> Section 65(3)(c).

<sup>1010</sup> The proceedings are held in camera and may be attended only by a limited number of persons, see section 56 and section 4.4.1.1. Moreover, section 66 provides that no person has access to children's court case records except (a) for the purpose of performing official duties in terms of the Children's Act; (b) in terms of an order of court if the court finds that such access would not compromise the best interests of the child; (c) for the purpose of a review or appeal; or (d) for the purpose of bona fide research or the reporting of cases in law reports, provided the provisions of section 74 are complied with.

<sup>1011</sup> Section 74 reads: “No. person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings.”

above, when a report of non-compliance is referred to the court, the court may call or recall any person involved in the matter to appear before it.<sup>1012</sup> During these proceedings the court may inquire whether the order has been, or is being, complied with or not, and in the latter case, the reasons for non-compliance.<sup>1013</sup>

On the basis of the proceedings the court may confirm, vary or withdraw the order, as well as enforce compliance with the order.<sup>1014</sup> The review of a court order is also relevant when it comes to the extension of an existing order. The question is whether or not an extension is necessary or justified under the circumstances, and whether this still serves the interests of the child best. This is especially relevant in the so-called removal decisions, resulting in the placement outside the family environment.

Section 159 demands that the orders of the children's court made in terms of section 156, in which the child is formally found to be in need of care and protection, may be extended for a period not longer than two years *at the time*.<sup>1015</sup> This is new in South African law.<sup>1016</sup> What is also new and is certainly commendable, is that the children's courts now have been granted the power to review their own orders, by having to decide whether an extension of an original order is necessary or not.<sup>1017</sup>

Before deciding on such an extension, the court is under the statutory obligation to hear the views of the various parties involved; namely, (a) the child, (b) the parent and any other

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<sup>1012</sup> Section 65(2)(b).

<sup>1013</sup> Section 65(3)(a).

<sup>1014</sup> See section 65(3)(b) and (c), in the latter case, if necessary through a criminal prosecution in a magistrate's court or in terms of section 45(2). See also section 45(2), on the basis of which the children's court may try or convict a person for non-compliance with an order of a children's court or contempt of such court and is bound by the law as applicable to magistrates' courts when exercising criminal jurisdiction.

<sup>1015</sup> Own emphasis.

<sup>1016</sup> See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-32.

<sup>1017</sup> This was one of the four recommendations for reform, made by Matthias & Zaal. The other recommendation concerned the improvement of child care institutions, reducing ministerial powers and the creation of the right of appeal. These are all matters which have been addressed in the Children's Act. See Matthias & Zaal "Can we build a better children's court? Some recommendations for improving the processing of child-removal cases" (1996) *Acta Juridica* 51. Also Van Heerden in *Boberg's Law of Persons and the Family* (1999) 634; Matthias & Zaal (2009) 183.



person with parental responsibilities and rights, (c) the management of the centre where the child is placed, if applicable, and (d) any alternative care-giver of the child.<sup>1018</sup> The fact that an extension cannot continue any longer than two years at the time, implies the possibility of review within a shorter period of time. It is submitted that two years will be too long.<sup>1019</sup> Where circumstances change with regard to the child or the family environment, regular review is necessary in order to establish whether the plan is on track or whether the circumstances require adjustments to the plan, in which the child's best interests should be the central focus.

Section 159(3) determines that no order made in terms of section 156, or an extension of an original order, extends beyond the date on which the child concerned reaches the age of eighteen years.<sup>1020</sup> However, in terms of section 176, such a person is entitled to remain in that care until the end of the year in which he or she reaches the age of eighteen years.<sup>1021</sup> An exception to this rule is contained in section 176(2). Upon application by the person placed in alternative care as a child, this person can be allowed to remain in that care until the end of the year in which that person reaches the age of 21 years, but only where the current care-giver is willing and able to care for him or her, and, the continued stay in that care is necessary to enable the person to complete his or her education or training.<sup>1022</sup> It should be noted that in the latter situation it is not the care and protection order of the court which is extended, but rather the Department of Social Development who is instrumental in realising this specific need for the young adult concerned.<sup>1023</sup>

Finally, the right to appeal should be mentioned. Gallinetti points out that before 1999 an appeal against a finding of the children's court was not permitted. With the insertion of section 16A, the (repealed) Child Care Act also did not provide for an appeal against a finding of a children's court that a child was in need of care and protection and the

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<sup>1018</sup> See section 159(2).

<sup>1019</sup> See also section 4.6.1 above.

<sup>1020</sup> Section 159(3).

<sup>1021</sup> Parallel to the definition of "child" which means a person under the age of 18 years, children's court orders may run until the moment the child turns eighteen.

<sup>1022</sup> Such application needs to be directed at the provincial head of social development. See DSD Regulation 63.

<sup>1023</sup> See sections 159(3) and 176(2). Also Bosman-Sadie & Corrie (2010) 199.

subsequent order made, but the matter could be brought before the high court on review.<sup>1024</sup> Only where the proceedings were found irregular resulting in prejudice to an applicant or the child concerned, the order would be set aside. Matthias and Zaal rightfully plead for the creation of a right of appeal in this respect, especially because of the far-reaching effects of these removal and placement orders.<sup>1025</sup> Section 51 of the Children's Act provides that an appeal against *any*<sup>1026</sup> order made by the children's court, or any refusal to make an order may be lodged with the high court having jurisdiction in the matter.<sup>1027</sup>

#### 4.7.2 Periodic review and appeal in the Netherlands

In paragraph 4.4.2 reference was made to Titles 3 and 6 of the Code of Civil Procedure, which deals with the procedural aspects relating to the law of persons and family law. Article 806 provides explicitly for the possibility of appeal in these matters. An appeal may be lodged by the applicant and the persons who have received a copy of the court order, within three months after the date of the court order.<sup>1028</sup>

Other affected persons also have a period of three months after having been informed/being served the notice of the court order.<sup>1029</sup> In other words, apart from the applicant, any

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<sup>1024</sup> Section 16A was inserted by Act 13 of 1999 in the (repealed) Child Care Act 74 of 1983 and read as follows: "an appeal shall lie against any order made or any refusal to make an order in terms of section 11, 15 or 38(2)(a), or against the variation, suspension or rescission of such order, to the competent division of the High Court of South Africa, and if brought shall be noted and prosecuted as if it were an appeal against a civil judgement of a magistrate's court". See Gallinetti in Davel & Skelton (eds.) 4-18.

<sup>1025</sup> See Matthias & Zaal (1996) *Acta Juridica* 51; also Van Heerden in *Boberg's Law of Persons and the Family* (1999) 644.

<sup>1026</sup> Own emphasis.

<sup>1027</sup> The appeal may concern any order made or any refusal to make an order, or against the variation, suspension or rescission of an order of the children's court. Such an appeal must be noted and prosecuted as if it were an appeal against a civil judgment of a magistrate's court, subject to section 45(2)(c), see section 51(1) and (2).

<sup>1028</sup> See Article 358(2) of the Code of Civil Procedure. See the Articles 358-362 of the Code of Civil Procedure. Also Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 104.

<sup>1029</sup> Article 806 of the Code of Civil Procedure. See also Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 371; Wortmann & Van Duijvendijk-Brand *Compendium van het personen- en familierecht* (2009) 289; Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1473. Specific procedural rules pertaining to the various child protection orders will be discussed in section 4.5 above, dealing with court orders.

affected party may lodge an appeal, except in the instances listed in Article 807.<sup>1030</sup> With regard to the list of court orders in Article 807, there is no recourse to an ordinary appeal, but only the legal remedy of (review in) cassation to the *Hoge Raad*.<sup>1031</sup> Such an appeal has to be brought within three months after the date of the court order.<sup>1032</sup> These involve the orders relating to:

- (i) The request to the replacement of the Bureau for Youth Care,<sup>1033</sup> a temporary supervision order,<sup>1034</sup> an application to the children's court for the annulment of a directive from the Bureau for Youth Care<sup>1035</sup> or the request directed at the Bureau for Youth Care to withdraw a previously given directive, due to a change in circumstances;<sup>1036</sup>
- (ii) With regard to a procedure pertaining to the restoration of parental authority, where the court is requested to defer judgment on the matter pending an investigation;<sup>1037</sup>

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<sup>1030</sup> Doek points out that it is to the discretion of the appeal court to determine whether or not a specific appellant should be considered an affected party. If not, the appeal is dismissed: *Tekst & Commentaar – personen- en familierecht* (2010) 1489. Close relatives, like grandparents, who would like to establish family life, by taking the child into their home are also included in the phrase “affected party” in terms of Article 806 of the Code of Civil Procedure. Therefore they would be able to lodge an appeal with regard to an order authorising the removal and placement of a child. See Asser/De Boer *Personen- en familierecht* (2010) 757.

<sup>1031</sup> See the Articles 426-429 of the Code of Civil Procedure.

<sup>1032</sup> Article 426(1) and (3) of the Code of Civil Procedure.

<sup>1033</sup> Article 1:254(5).

<sup>1034</sup> Article 1:255. It should be noted that this measure is often combined with an order for the authorisation regarding the removal and placement of a child. Such authorisation is granted to the Bureau for Youth Care. Furthermore it should be mentioned that with regard to the latter order, an appeal is possible. See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1492.

<sup>1035</sup> Article 1:259.

<sup>1036</sup> Article 1:260. However, any order in terms of Article 1:263a(2) of the Civil Code is excluded. On the basis of the latter section the Bureau for Youth Care may issue a directive which limits any contact between the parent(s) and the child concerned, for the duration of the removal order where such limitation is deemed necessary for the purpose of the order. The parent(s) or the child of twelve years or older may object to the contents of the directive. The children's court may make an order pertaining to the contact between the parent(s) and the child, taking into consideration the child's best interests. With regard to the latter order, an appeal is possible.

<sup>1037</sup> Article 1:278(2), which may be requested by the Council for Child Protection or the parent concerned. The court may determine a trial period, during which the child will live with the parent who has filed a application for the restoration of his or her parental authority.

- (iii) A matter relating to a child who has been placed in foster care with the consent of his or her biological parents for longer than one year, after which a change of *domicili* can only take place with the consent of the foster parents;<sup>1038</sup>
- (iv) A matter concerning the appointment of an administrator by the court;<sup>1039</sup> and
- (v) Regarding the appointment of a mentor.<sup>1040 1041</sup>

In the above matters, the *Hoge Raad* will merely review a case, which does not amount to the rehearing of a case and the weighing of the facts. However, Doek points out that in the above instances an appeal will nevertheless be admissible in the case of an infringement of a fundamental legal principle, like for example, *audi alteram partem*.<sup>1042</sup> It should be noted that, generally speaking, the period of appeal will be strictly adhered to. Where this period has lapsed this might result in disallowance of the appeal.<sup>1043</sup> With regard to the procedure in appeal, the above discussed Articles pertaining to the procedure in the first instance are applicable *mutatis mutandis*.<sup>1044</sup>

## 4.8 Conclusion

### 4.8.1 Introduction

The South African Children's Act has brought along a number of significant changes, one being the shift from parental authority to parental responsibilities and rights. It has become

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<sup>1038</sup> Article 1:253s. The same applies to the situation where a child has been in foster care with the consent of the guardian in terms of Article 1:336a.

<sup>1039</sup> Article 1:435(2).

<sup>1040</sup> Article 1:452.

<sup>1041</sup> See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1492.

<sup>1042</sup> Infringement of the principle of hearing both sides of the argument would be contrary the right to fair trial: *Tekst & Commentaar – personen- en familierecht* (2010) 1492.

<sup>1043</sup> See Doek *Tekst & Commentaar – personen- en familierecht* (2010) 1488.

<sup>1044</sup> Article 806(2) of the Code of Civil Procedure determines explicitly that the Articles 799-805(1) are applicable *mutatis mutandis*. Moreover, the same applies to the rules applicable to cases involving children, namely the Articles 809-813 Code of Civil Procedure. See also Wortmann & Van Duijvendijk-Brand *Compendium van het personen- en familierecht* (2009) 289.

evident that parental responsibilities and rights can be shared, whether the parents of the child are married, unmarried or divorced.

It was pointed out that for a variety of reasons a substantial percentage of children in South Africa do not live with their biological parents.<sup>1045</sup> Therefore it is important that parental responsibilities and rights can be acquired by, or assigned to, other persons who are not the biological parents. Provision is thus made for the co-exercise of parental responsibilities and rights by various categories of co-holders. This structure provides thus for a number of options which can be tailored to the circumstances of an individual child in South Africa, which is most welcome.

In addition, in a multicultural society like South Africa, a variety of cultural and religious rules and customs occur which are constitutionally protected, provided they are not harmful to children and are in line with the Constitution.<sup>1046</sup> The fact that parental responsibilities and rights can be shared between various persons differs significantly from the Dutch legislative framework, since in the Netherlands parental authority can only be exercised by two persons jointly at the time.<sup>1047</sup>

It has become apparent that the topic “children in need of care and protection” can be regarded as a vast field with various connected sub-topics which are accommodated in both substantive law and procedural law. For the purpose of clarity and convenience, the following concluding remarks and recommendations are structured according to sub-topic.

#### **4.8.2 Prevention and early intervention**

Before resorting to the most drastic form of interference, which is the removal of a child from

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<sup>1045</sup> See *South African Child Gauge 2010/2011* (2011) Children's Institute University of Cape Town 80; also Skelton “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa” (2012) *The International Survey of Family Law* 333-334. See also section 4.1.1.

<sup>1046</sup> See Heaton “An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context” (2009) (2) *Journal for Juridical Science* 10.

<sup>1047</sup> See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 143. See also section 4.1.2.

his or her family environment, it is not only desirable, but in terms of section 148 of the Children's Act and international law, also necessary to first consider less intrusive options.<sup>1048</sup> In this regard it is most welcome that the Children's Act specifically provides for prevention and early intervention programmes appropriate in the circumstances of the case.

Section 144 states the purpose of prevention and early intervention programmes and instructs that they have to focus on a wide range of programmes which aim to preserve the family structure and assist the family members in order to avoid the removal of the child.<sup>1049</sup> Since every child has the right not to be subjected to neglect, abuse or degradation,<sup>1050</sup> it is evident that the prevention of any form of abuse or neglect or recurrence thereof should be prioritised. It is submitted that section 144(b) has the potential to effect a change in frame of reference of persons pertaining to domestic discipline. Parenting skills programmes which focus on the promotion of positive, non-violent forms of discipline, might encourage parents and other care-givers to steer away from violent forms of discipline, which include corporal punishment.

The latter is especially relevant, since the Children's Amendment Bill was not passed. It is hoped that with the next Amendment Bill, a provision similar to clause 139<sup>1051</sup> will be successfully enacted, because it contains all the necessary elements to prohibit any form of violence, including corporal punishment.<sup>1052</sup> Where such a provision would encounter severe resistance, the statutory duty in terms of Article 1:247(2) of the Dutch Civil Code could serve as an example. On the basis of this provision, parents are obliged to refrain from psychological or physical force, or any other humiliating treatment, which is in line with *General Comment No. 13*, as issued by the Committee on the Rights of the Child in

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<sup>1048</sup> It should be reiterated that section 148(5) of the Children's Act determines that participation in these programmes are not applicable where the safety or well-being of the child is seriously or imminently at risk.

<sup>1049</sup> Section 144(1)(a), (b)-(e) and (i). See section 4.2.1.

<sup>1050</sup> Section 28(1)(d) of the Constitution. This is in line with Article 19 of the CRC and Article 16 of the African Children's Rights Charter, which both aim at the protection of children from all forms of harm. For a discussion on the international and regional provisions, see section 2.2.2.5.

<sup>1051</sup> [B19F-2006 (Reprint)].

<sup>1052</sup> For a more detailed discussion, see section 4.2.1.

2011.<sup>1053</sup>

It is submitted that for South Africa the obligation to refrain from any form of violence or degradation should not merely rest on parents only. Since many children do not live with their parent(s), it is crucial that this duty extends to all relevant persons forming part of the child's environment.

#### 4.8.3 The determination of a child in need of care and protection

The Children's Act provides for nine grounds on the basis of which the court has to decide whether or not the child concerned is a child in need of care and protection.<sup>1054</sup> In this respect all the facts and circumstances have to be taken into account, and any decision should be in the best interests of the child concerned. It was noted that the South African grounds mentioned in section 150(1) partially focus on events which have happened in the past and those which are presently relevant, and those which involve future possibilities.<sup>1055</sup>

Pertaining to the latter, grounds (f) and (g) are relevant. These grounds refer to the phrase "may", which indicates that the social worker has to convince the presiding officer what is possibly going to happen to the child concerned. In comparison with the Netherlands, it is submitted that the grounds (f) and (g) create too much leeway for subjectivity of the professional involved. In the Netherlands the court will only make a child protection order where the grounds provided in the Civil Code are strictly complied with at the very moment of the court proceedings. If not, the court will turn down the request for a child protection measure.<sup>1056</sup>

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<sup>1053</sup> CRC/C/GC/13 of 2011.

<sup>1054</sup> See section 150(1) of the Children's Act.

<sup>1055</sup> In this respect Matthias & Zaal have indicated that the grounds (a), (b), (c), (d), (e), (h) and (i) will be easier to apply in practice, since the proof will be based on past or present circumstances, in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-6 and 9-7.

<sup>1056</sup> For a more detailed discussion, see section 4.3.1.2 and further.

Since subjectivity needs to be limited where possible, it is recommended that the courts demand substantial proof on the basis of which it can be anticipated, in all reasonableness, that the child is indeed at risk.

#### 4.8.4 Removal of alleged offender

Where a child has allegedly been abused or neglected, immediate action is required in order to protect the child. It is evident that the facts and circumstances surrounding a child will dictate what the most adequate response will be. In some instances the circumstances are of such a serious nature that the removal and placement of a child might be necessary in order to secure the safety and well-being of the child.<sup>1057</sup> In this respect it is most welcome that the legislation in both South Africa<sup>1058</sup> and the Netherlands<sup>1059</sup> provides for the option to remove the alleged offender, instead of removing a child from his or her family environment.

It should be emphasised that under these circumstances, social work services should be made available to provide the necessary assistance. All efforts should be joined in order to assist in the reunification of the family. What is interesting is the fact that in neither country the legislation requires a court hearing prior to the actual removal. In South Africa a police official may upon request<sup>1060</sup> issue a written notice to the alleged offender in terms of section 153(1), which calls upon him or her to leave the home or place where the child resides and to refrain from entering the home or place or having contact with the child until the court hearing.<sup>1061</sup> In the Netherlands the prohibition of entering the home<sup>1062</sup> may be imposed by the mayor of a town or city or an assistant public prosecutor.<sup>1063</sup> The Judicial Division of the Council of State has recently determined that in future a thorough investigation is needed

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<sup>1057</sup> The removal and subsequent placement will be discussed in chapter 5.

<sup>1058</sup> See section 110(7)(b) of the Children's Act, as discussed in section 4.3.1.1.1.

<sup>1059</sup> See the Act *Wet tijdelijk huisverbod*, which came into operation on 1 January 2009.

<sup>1060</sup> In terms of section 110(7) of the Children's Act it is the provincial Department of Social Development or designated child protection organisation which has conducted an investigation who may request the police to take the necessary steps as provided for in section 153.

<sup>1061</sup> See section 153 of the Children's Act.

<sup>1062</sup> In Dutch: *tijdelijk huisverbod*.

<sup>1063</sup> In the case of alleged child abuse, the Bureau for Youth Care will get involved, see also section 4.3.1.2.1.



and that the right to hear and be heard should be adhered to prior to the imposition of a restraining order.<sup>1064</sup>

#### 4.8.5 Deliberation of the court and decision-making on the statutory grounds

It was stated that before the court makes a decision on whether or not the child is in need of care and protection, the court has to take into consideration any report relating to the matter which has been submitted to the court.<sup>1065</sup> Where a person's rights are prejudiced by the report, section 63(3) of the Children's Act obliges the court to disclose the relevant parts of the report to that person, prior to the hearing, provided that the person concerned is a party to the proceedings. Whereas previously reference was made to a person who is "affected",<sup>1066</sup> section 63(3) merely refers to persons who are "prejudiced" by the report, which has a limiting effect and thus is potentially prejudicial. Therefore it is recommended that a regulation be included in the DJCD Regulations,<sup>1067</sup> with the aim of broadening the range of persons who may express opinions in relation to the report.

In addition, it has become apparent that where a court finds that the child is not in need of care and protection, the court has three options; namely, to order the return of the child, to make an order for early intervention services, or to decline to make an order. This limitation pertaining to the powers of the court is regrettable, especially in the light of section 155(4)(b) on the basis of which a social worker may recommend any appropriate measure. It is submitted that an additional sub-paragraph be added to section 155(8) which provides for the wording "or any appropriate order which is in the best interests of the child, as the court may deem fit". This would be in line with the innovations as provided for in the Children's

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<sup>1064</sup> In addition it was held that such an order is a far-reaching sanction which is only justified when the facts are unambiguous and there is a fear of re-occurrence. See the Judicial Division of the Council of State (*de Raad van State*) decided on the legitimacy of two restraining orders on 09-02-2012, via <http://www.huiselijkgeweld.nl/dossiers/huisverbod/nieuws/2012/090>, accessed on 24-02-2012. See also footnote 440.

<sup>1065</sup> See section 4.4.1.1.

<sup>1066</sup> See regulation 5 in terms of the Child Care Act 74 of 1983.

<sup>1067</sup> Regulations relating to children's courts and international child abduction, 2010 (GN R250/2010).

Act.<sup>1068</sup>

In the Netherlands it is possible for the court to order the relief of a parent from parental authority in terms of Article 1:268 of the Civil Code. One of the grounds is the mental disturbance of the parent concerned, which should apparently be of such a nature that he or she is not able to manifest his or her intention or to understand the meaning thereof.<sup>1069</sup> It is recommended that a similar provision be included in the South African Children's Act.

#### 4.8.6 The need for respect pertaining to the affected parties

Care and protection proceedings take place in terms of an unequal relationship; namely, the state *vis-à-vis* the family and child, in which the former is in a stronger position. Where a family gets involved with child protection agencies, professionals should treat the parties involved with the necessary respect. It is evident that the maltreatment or neglect of the child cannot be condoned. However, it has been argued that non-respect towards parents contributes to the risk of further maltreatment.<sup>1070</sup> It is submitted that this needs to be addressed in practice. Via positive communication with the parties involved in which the problems are addressed, parties should get a chance to learn from their mistakes. It is submitted that especially with regard to supervision orders, the family members should be assisted and encouraged by the professionals to improve on the relationship with the child concerned, since this is one of the main objectives of the child protection order.

#### 4.8.7 Implementation of court order

When it comes to the implementation of child protection orders, the role of a social worker is of crucial importance. This professional has the responsibility of providing the necessary support and assistance, which can only be effective where sufficient time is allocated per

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<sup>1068</sup> One of the innovations of the Children's Act was the wide range of court orders as provided by the sections 46 and 156. See also section 4.4.1.1.

<sup>1069</sup> It was pointed out that the ground of Article 1:268(2)(c) of the Civil Code is not often applied in the Netherlands. Nevertheless this ground provides the possibility to act when these circumstances arise, in order to protect the well-being of the child.

<sup>1070</sup> See Van Dijk "Mishandelende en verwaarlozende ouders hebben recht op ons respect" (2010) *Perspectief* 20-21. See also section 4.3.1.2.

case. To ensure some quality assurance, it is submitted that the workload of social workers needs to be assessed in both South Africa and the Netherlands.

Both South Africa and the Netherlands can be typified as a cultural diverse society with numerous religions. The effectiveness, and thus the success of a child protection measure, depends largely on a proper two-way co-operation between the family (including the child) and the social worker. This requires a relationship built on trust and understanding, the quality of which might depend on the cultural background, language and religion of the respective parties. It is submitted that in the case of imposed child protection measures, the so-called “case-matching” of a social worker with a family could enhance the implementation process.

Lastly, it is evident that language is an important tool for meaningful communication. The importance of language should not be underestimated since it is part of everyone's identity. It is submitted that in sensitive matters like child care and protection cases, the persons involved ideally should be able to express themselves in their mother-tongue.

It is submitted that in families where a language forms a barrier, a social worker with similar cultural or language background should be assigned to a case. Alternatively, a translator should become involved, even though there is a potential risk of misinterpretation. It is submitted that in situations and circumstances in which people, adults and children alike become vulnerable, they should be able to communicate freely. All efforts should be made to ensure meaningful participation in all stages, during any investigation, proceedings and implementation of orders.

## CHAPTER 5: REMOVAL AND PLACEMENT OF CHILDREN IN NEED OF CARE AND PROTECTION

### 5.1 Introduction

The international and regional documents provide a clear framework pertaining to the rights and protection of children all over the world. The provisions contained in these documents present a specific standard which should positively influence the decision-making and (legal) procedures of state parties. Reference has been made to the fact that countries around the world have ratified the CRC, except the United States of America and Somalia and South Sudan.<sup>1</sup> Both South Africa and the Netherlands are bound by this important universal document.

On a regional level, the African Children's Rights Charter is relevant for South Africa and the European Convention for the Netherlands.<sup>2</sup> However, as outlined above, the importance of comparative analysis lies therein that norms and legal rules are compared, taking into account the changing circumstances on a global level, which ultimately aims to improve the lives of children on a national level.<sup>3</sup> The international and regional documents are indispensable instruments in this regard since they provide a general and international standard for the protection and well-being of the child. State parties are therefore required to bring their national law in line with these standards, for the benefit of children and the enhancement of their rights.<sup>4</sup>

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<sup>1</sup> See section 2.1 above. For a listing of the state parties see Meuwise et al *Handboek Internationaal Jeugdrecht* (2005) 12 and 13.

<sup>2</sup> For a general discussion on the standards set by international and regional law relating to the placement of children in need of care and protection, see section 2.1 and further.

<sup>3</sup> See sections 1.2 and 1.3 above. The effects of the sharing of values and the agreement on legal standards beyond borders was recently referred to on the web page of the Council of Europe, where it was stated “[t]he Council of Europe brings together governments from across Europe – and beyond – to agree on legal standards in a wide range of areas”. See <http://www.coe.int/lportal/web/coe-portal>, last accessed on 20-1-2012.

<sup>4</sup> The progress on the implementation of these standards is under regular scrutiny of the Committee on the Rights of the Child, to which countries have to submit their reports every five years, in terms of Article 44 of the CRC. The Committee examines each national report

The current chapter provides a brief overview of the relevant provisions in the international and regional documents specifically pertaining to the removal and placement of children in need of care and protection.<sup>5</sup> The standards provided by these documents will subsequently be linked to the national legislation in South Africa and the Netherlands, in order to determine whether both countries are (sufficiently) in line with the set standards and what could possibly be improved.

### **5.1.1 International provisions pertaining to the removal and placement of children in need of care and protection**

From the Preambles of the CRC and the African Children's Rights Charter it can be derived that there is general consensus that the "family", in any kind of composition, forms the fundamental group of society and is regarded as the natural environment for the growth and

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and issues "Concluding Observations", which contain concerns and recommendations. A recent development which will contribute to the monitoring of children's rights involves the possibility for the Committee to receive and consider individual complaints by children. This will be possible in terms of the (Third) Optional Protocol to the Convention on the Rights of the Child on a communications procedure, see <http://www2.ohchr.org/english/bodies/crc>, last accessed on 14-1-2012. See also Doek, in [www.ecpat.net.El/pdf/Jaap\\_Doek\\_Presentation\\_WCIIIFU.pdf](http://www.ecpat.net.El/pdf/Jaap_Doek_Presentation_WCIIIFU.pdf), where he has referred to the fact that the Optional Protocol with its right to file complaints provides for the missing piece in the legal protection of all children, accessed on 14-1-2012. This Protocol was adopted by the United Nations General Assembly on 19 December 2011; see <http://dci.m4.mailplus.nl/genericservice/>, last accessed on 18-1-2012. This Third Optional Protocol has been opened for ratification since last January (2012), see <http://www.maryknollogc.org/social/children/htm>, last accessed on 14-1-2012. In addition, the African Children's Rights Charter also provides for a communication procedure in Article 44. In terms of this Article, the Committee (the African Committee of Experts) may receive communications, from any group or non-government organisation recognised by the Organisation of African Unity or the United Nations relating to any matter covered by the Charter. See also the briefing from Newell in September 2010, in which he discussed the importance of collective communications, [http://www2.ohchr.org/.../BriefingCollectiveCommunications\\_en.doc/](http://www2.ohchr.org/.../BriefingCollectiveCommunications_en.doc/), last accessed on 14-1-2012. Furthermore, for the European region, the European Court of Human Rights may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties in terms of Article 34 of the European Convention. On 1 June 2010 the European Convention was amended by Protocol No. 14, which aims to guarantee the long-term efficiency of the Court by optimising the filtering and processing of applications. See <http://www.coe.int/>, last accessed on 13-3-2012.

<sup>5</sup> For a more in-depth discussion, see chapter 2, titled "the standards set by international and regional law relating to the placement of children in need of care and protection" and chapter 3 on "the national law in South Africa and the Netherlands relating to the general principles in the CRC and family life, in the context of international standards".

well-being of all its members and particularly children. In the respective Preambles it has also been acknowledged that the child should grow up in a family environment to ensure the full and harmonious development of his or her personality.<sup>6</sup>

Reference was also made to the basic right of children to be raised by their parents (provided they are alive), or other care-givers.<sup>7</sup> At the same time, as a general principle, parents or care-givers have the primary responsibility for the upbringing and development of the child.<sup>8</sup> State parties, including South Africa and the Netherlands, are thus obliged to use their best efforts to ensure the recognition of the principle that children and their parents belong together. Therefore, family life should be afforded the necessary protection, which includes protection against unlawful interference.<sup>9</sup> Moreover, the international<sup>10</sup> and regional documents<sup>11</sup> stipulate specifically that children “by reason of his or her physical and mental

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<sup>6</sup> See the Preamble of the United Nations CRC (1989), paragraphs 5 and 6 and the Preamble of the African Children's Rights Charter, paragraph 4. See also section 2.1 above. On a national level, the importance of the family environment has been referred to in the Preamble of the South African Children's Act 38 of 2005, paragraph 7. Reference in this respect can also be made to the case *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC), paragraph 19, in which it is highlighted that “foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma”. See also section 2.2.1.1 above. For an overview of the related provisions in terms of the national law of South Africa and the Netherlands, see section 3.2 above.

<sup>7</sup> See Articles 7 and 18(1) of the CRC. Detrick has pointed out that the following provisions in the CRC are linked with Article 7, namely, the Articles 8 (preservation of identity), 9 (separation from parents), 18(1) (parental responsibilities) and 27(2) (standard of living). In *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 153. The relevant provisions in the African Children's Rights Charter are Articles 19(1) and 20(1), which emphasises the role of parents. Linked with these provisions are Articles 10 (non-interference), 19 (separation from parents), 20 (parental responsibilities) and 20(1)(b) (conditions of living). For a more detailed discussion, see sections 2.2.2.1, 2.2.2.4 and 2.2.2.6 above and the discussion below.

<sup>8</sup> See Article 18 of the CRC and Article 20 of the African Children's Rights Charter. See also the discussion in section 2.2.2.4 above.

<sup>9</sup> In terms of Article 8 of the CRC, state parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference. Article 16 of the CRC, Article 10 of the African Children's Rights Charter and Article 8(2) of the European Convention are similar in content. For a more detailed discussion on the right to preservation of identity without unlawful interference, see section 2.2.2.3 and the protection of privacy, see section 2.2.3.2.

<sup>10</sup> See paragraphs 5 and 9 of the Preamble of the CRC.

<sup>11</sup> Paragraph 6 of the Preamble of the African Children's Rights Charter states: “[r]ecognising that the child due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security”.

immaturity need special safeguards and care”<sup>12</sup> and “should be afforded the necessary (legal) protection and assistance”.<sup>13</sup>

On the basis of the aforementioned commitments of state parties or member states, it can be said that parents and children belong together and that their relationship should be respected.<sup>14</sup> However, the Preambles refer to growing up in a family environment. It seems there is a quality test attached to the latter phrase, namely, that growing up in a family environment should take place “in an atmosphere of happiness, love and understanding”. There is tension (or grey areas) between two entitlements; on the one hand, the entitlement to grow up within one’s own biological family unit, being taken good care of, which all should be respected by third parties, including the state; and on the other hand, the much needed protection in the situation where a child is psychologically and/or physically threatened in his or her development or well-being whilst in the care of his or her (biological) parents or care-giver.

In the latter case all state parties are, in terms of international law, under the obligation to interfere with the family life of the particular family in order to safeguard the well-being of the child concerned. However, in this respect a few important questions come to the fore; firstly, to what extent the state is allowed to interfere in terms of its international and regional

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<sup>12</sup> The African Children's Rights Charter outlines the following reasons for the need of special safeguard and care: inadequate social conditions, natural disasters, armed conflicts, economic deprivation, exploitation, hunger and disability, see paragraph 4 of the Preamble.

<sup>13</sup> In line with the discussion of the Articles in chapter 2 of this thesis, protection is ensured in the Articles providing for non-discrimination (Article 2), the best interests of the child (Article 3(2)), preservation of identity (Article 8), protection of privacy (Article 16), protection from abuse and neglect (Article 19) and the protection of children without families (Article 20). See specifically section 2.2.2.1, 2.2.2.3, 2.2.2.5 and 2.2.3.1. Protection is also provided for in the Articles dealing with non-discrimination, (Article 3), survival and development (Article 5), privacy (Article 10) and protection from abuse and neglect (Article 16). With regard to the European countries, there is no doubt that the European Convention is applicable to children, since Article 1 states unambiguously: “[T]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention,” see also Meuwise et al Handboek Internationaal Jeugdrecht (2005) 33. The European Convention only incidentally refers to children, see Article 5(1)(d), which deals with the detention of a minor, and will be discussed below, in section 5.1.2. Article 8 of the European Convention provides for the right to respect for private and family life, which is granted to “everyone”, including children. Article 8(2) aims to protect against unlawful interference, which briefly will be discussed in section 5.1.1.2 below. See also section 2.2.2.3 above.

<sup>14</sup> The relevant Articles in the respective documents will be briefly discussed below. See also section 2.2.2.3.

commitments, and secondly, whether the affected parties, namely the child concerned and his or her parents, have been provided with a meaningful opportunity to participate towards finding a solution.<sup>15</sup>

#### 5.1.1.1 The child's right to parental care and the parent's responsibilities and rights

In the above<sup>16</sup> it was highlighted that there has been a shift in focus from parents' rights towards children's rights. The standard of the best interests of the child is key in this respect, since all decisions pertaining to children should be in the best interests of the child(ren) concerned.<sup>17</sup>

It therefore can be said that the principle of the best interests of the child has developed into an autonomous universal legal principle.<sup>18</sup> The CRC and the African Children's Rights Charter explicitly refer to this.<sup>19</sup> On a national level, South Africa has acknowledged the principle as well, since it has been provided for in the Constitution<sup>20</sup> and the Children's Act.<sup>21</sup> The Netherlands, however, has not separately included this important principle in its

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<sup>15</sup> The first question focuses on the matter of proportionality, see below. The second question is dealt with in sections 2.2.1.6 and 3.1.4 above, which deals with the right to participate.

<sup>16</sup> See section 3.2.1.

<sup>17</sup> This is the general standard in the international and regional documents, see Article 3 of the CRC and Article 4 of the African Children's Rights Charter. Detrick has pointed out that "[a]rticle 3(1) is of major importance since it is an 'umbrella' provision which prescribes the approach to be followed in all actions concerning children". As a consequence, it will be regularly invoked with regard to other provisions in the CRC. It is agreed with Detrick that the best interests' of the child principle is relevant to the interpretation and implementation of all the provisions in the CRC. It is interesting to note that she also refers to other functions of Article 3(1), namely, (1) the mediating role, meaning that it can be the guiding principle in resolving conflicts between any of the rights in the CRC, and (2) as a guiding principle in the evaluation of existing laws, policies and practices, in *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 92. In addition, the child's best interests standard is also embedded in the national legislation and/or case law of both South Africa and the Netherlands. For a more detailed discussion on the best interests of the child, see sections 2.2.1.4 and 3.1.3. See also Breen *The Standard of the Best Interests of the Child – A Western Tradition in International and Comparative Law* (2002) 16.

<sup>18</sup> Compare with the notion of "family life", which has also developed into an autonomous universal legal principle, see below.

<sup>19</sup> For a discussion on Article 3 of the CRC and Article 4 of the African Children's Rights Charter, see section 2.2.1.4 above.

<sup>20</sup> Section 28(2) of the Constitution, 1996.

<sup>21</sup> Sections 6 and 9 of the Children's Act 38 of 2005.



legislation.<sup>22</sup> It nevertheless has become entrenched in Dutch law, which can be derived from the case law.<sup>23</sup> This does not necessarily mean that there is no room for improvement. For the sake of clarity and consistency it is recommended that legislation be enacted which provides for a non-exhaustive list of factors which should be taken into consideration in order to assist in establishing what the best interests is.

In chapter 2 it was outlined that in terms of the international and regional documents, children have the right to be cared for by their parents.<sup>24</sup> In addition, parents are obliged in terms of international law to take responsibility for the care and well-being of their child(ren).<sup>25</sup>

However, how parents or other care-givers discharge of these duties or fulfil their obligations is largely left to their own discretion, since state parties “[s]hall respect the responsibilities, rights and duties of parents [...],”<sup>26</sup> and “[s]hall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”.<sup>27</sup>

It should be noted though that the discretion of parents of other care-givers is not unlimited; Article 19 of the CRC, which protects the child from abuse and neglect, lists the instances

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<sup>22</sup> The Committee on the Rights of the Child has expressed its concern in this regard. In the most recent *Concluding Observations* of the Committee on the Rights of the Child of January 2009, the Committee has recommended that the Netherlands “take all appropriate measures to ensure that the principle of the best interests of the child [...] is adequately integrated in all legal provisions and applied in judicial and administrative decisions and in projects, programmes and services which have an impact on children”. See paragraph 29 of the United Nations Document CRC/C/NLD/CO/3 of 30 January 2009.

<sup>23</sup> For an in-depth discussion on the position in the Netherlands, see section 3.1.3.2 above.

<sup>24</sup> See section 2.2.2 and further. See Article 7(1) of the CRC and Article 19 of the African Children's Rights Charter.

<sup>25</sup> Article 18(1) of the CRC states unambiguously that parents or legal guardians have the primary responsibility for the upbringing and development of the child and that the child's best interests should be their basic concern. See Article 20(1)(a) of the African Children's Rights Charter, which is similar in content. See also section 2.2.2.4. For a discussion on the acquisition of parental responsibilities and rights by adults, *ex lege* or otherwise, see section 4.1 above.

<sup>26</sup> Article 18(1) is linked with Article 5 of the CRC. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 151. See section 2.2.2.4.

<sup>27</sup> Article 18(1) of the CRC, which at this point does not have an equivalent in the African Children's Rights Charter.

which might lead to state intervention.<sup>28 29</sup> Moreover, in terms of Article 18(2) of the CRC, state parties are under the positive obligation to provide for assistance to parents and other care-givers when the need arises.<sup>30 31</sup> This should not merely be limited to the development of institutions, facilities and services for the care of children,<sup>32</sup> or the “[p]rovision of material assistance and support programmes, particularly with regard to nutrition, clothing and housing”.<sup>33</sup> This obligation calls also for creative innovative prevention and early

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<sup>28</sup> See Article 19 of the CRC and Article 16 of the African Children's Rights Charter. *General Comment No. 13* (2011), which specifically deals with the right of the child to freedom from all forms of violence, is particularly relevant. For a detailed discussion see section 2.2.2.5 above. Detrick has pointed out that although the primary focus of Article 19(1) is on *intra-familial* situations of child abuse or neglect, the words “any other person who has the care of the child” could widen its application. This could include staff of (public and private) institutions, services or facilities providing for the care of children and even schools: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 321. It should be noted that abuse or neglect of a child by the parents is mentioned as an example in Article 9(1) of the CRC which deals with the child's separation from his or her parents. See the discussion in section 5.1.1.2 below.

<sup>29</sup> For a discussion on the protection from abuse and neglect in terms of South African law, see section 4.3.1.1 and in terms of Dutch law, section 4.3.1.2 above.

<sup>30</sup> This refers to appropriate assistance in the performance of the parent's child-rearing responsibilities, see Article 18(2) of the CRC. It is submitted that this provision should be interpreted as widely as possible, in order to include prevention and early intervention measures aiming at preserving the family unit, where possible. See also Article 20(2) of the African Children's Rights Charter. For a discussion on prevention and early intervention, see section 4.2.

<sup>31</sup> The extent in which measures relating to economic, social and cultural rights are realised will largely depend on the available resources and may only be (fully) achieved over time. See for example Article 4 of the CRC, which is discussed in section 2.2.1.8. Article 27(3) and Article 20(2) of the African Children's Rights Charter also confer a duty on state parties to assist parents and other care-givers, however, “in accordance with their means and national conditions”. It is hoped that this clause is not an easy way out for developing countries. Detrick has pointed out that Articles 26 and 27(3) are linked with Article 18(2). Article 26 provides for the right of the child to benefit from social security, including social insurance: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 295 and 305.

<sup>32</sup> Article 18(2) and (3) of the CRC. Detrick has rightfully referred to the fact that these provisions are linked to Article 3(3), which instructs state parties “[t]o ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision”. *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 94 and 295. With regard to the topic of this thesis, the standard provided in Article 3(3) is thus relevant for all institutions and facilities responsible for the care of children, especially with regard to vulnerable children who have been deprived of their liberty, see sections 5.1.1.3 and 5.1.2. See also Article 20(2)(b) and (c) of the African Children's Rights Charter. See section 2.2.2.4 above.

<sup>33</sup> Article 27(2) of the CRC, which deals with the standard of living, see also section 2.2.2.6. As discussed in section 2.2.2.4, Article 20(2)(a) of the African Children's Rights Charter contains a similar provision, but has added to the listing “health and education” to form part of support

intervention programmes<sup>34</sup> where “families in need” could benefit, in order to prevent a child becoming in need of care and protection.<sup>35</sup> It is submitted that as a matter of principle, all efforts should be joined in order to preserve the family life of a family.

It has been explicitly mentioned in the international and regional documents, that in principle, no state interference in family life should be permitted,<sup>36</sup> unless this is justifiable. To this effect strict criteria have been put in place in these documents, which subsequently should be integrated in the national legislation of states parties.<sup>37</sup> As Doek points out, key element for the implementation (and therefore realisation) of the human rights of children, is the right to an effective remedy for actions which constitute an impingement on any of these rights.<sup>38</sup> Therefore in the case of an alleged unjustified infringement, some international/regional

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programmes. It is submitted that sometimes parents are, although willing, not able to raise their children, due to a variety of reasons. State financed assistance could help to prevent unnecessary stress within a family, which might help to prevent problems and preserve the family unit.

<sup>34</sup> For an in-depth discussion on prevention and early intervention, see section 4.2.

<sup>35</sup> Where a child is found to be in need of care and protection, intervention becomes inevitable.

<sup>36</sup> Article 8 of the CRC states that “states parties undertake to respect the right of the child to preserve his or her identity, including [...] family relations as recognised by law without unlawful interference”. Also Article 10 of the African Children’s Rights Charter, which provides that “no child shall be subjected to arbitrary or unlawful interference with his privacy, family [...]. The child has the right to the protection of the law against such interference or attacks”. Also Article 8(2) of the European Convention. See the discussion in section 2.2.3 above and section 5.1.1.2 below.

<sup>37</sup> See the discussion below in this section. With regard to state interference regarding the family life of parents and their child(ren), the international and regional documents prescribe that such actions should be “in accordance with applicable law (and procedures)”, see Article 9(1) of the CRC, Articles 19(1) and 10 of the African Children’s Rights Charter and Article 8(2) of the European Convention. This presupposes an obligation on state parties to have provided for such (national) legislative provisions (and to improve on such legislation, for which comparative analysis between legal systems is indispensable). Both the CRC and the African Children’s Rights Charter have a system in place in terms of which state parties are required to submit reports to a monitoring body, which monitors the implementation and ensures the protection of the rights as mentioned in the document(s). Article 44 of the CRC requires a state party to submit a report to the Committee on the Rights of the Child, which report contains information on the measures which have been adopted in order to give effect to the Convention. After examination of the report, the committee communicates its concerns and recommendations to the state party in the “concluding observations”, see also <http://www2.ohchr.org/english/bodies/crc>, last accessed on 14-1-2012. Article 43 of the African Children’s Right Charter obliges a state party to submit reports to the African Committee of Experts on the measures they have adopted which give effect to the provisions of the Charter and on the progress made in the enjoyment of these rights on a national level.

<sup>38</sup> See the presentation at the Follow-up meeting Third World Congress Rio de Janeiro 2008 (Bangkok, October 25, 26 2010). [www.ecpat.net/EI/pdf/Jaap\\_Doek\\_Presentation\\_WCIIIFU.pdf](http://www.ecpat.net/EI/pdf/Jaap_Doek_Presentation_WCIIIFU.pdf), accessed on 14-1-2012.

documents provide for a complaints procedure. Article 44 of the African Children's Rights Charter provides for the right of petition.<sup>39</sup>

In addition, on the basis of Article 34 of the European Convention, individual applications regarding a violation of the rights as set forth in the Convention may be directed to the European Court of Human Rights.<sup>40</sup> Until now, the strength of the CRC has been somewhat limited since it did not provide for the right of petition.<sup>41</sup> However, on 19 December 2011 the General Assembly of the United Nations adopted the Third Protocol to the CRC, which allows for individual communications, which is much anticipated and exciting.<sup>42</sup> The

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<sup>39</sup> On the basis of Article 44 the African Committee of Experts may receive communications, from any group or non-government organisation recognised by the African Union (previously referred to as the Organisation of African Unity) or the United Nations relating to any matter covered by the African Charter. Moreover, Article 45 of the African Children's Rights Charter provides that the Committee may resort to any appropriate method of investigating any matter which falls within the ambit of the Charter.

<sup>40</sup> The European Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, see Article 38. It is interesting to note that the High Contracting Parties are required to abide by the final judgment of the Court in any case to which they are parties. Moreover, the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution, see Article 46(1) and (2) of the European Convention.

<sup>41</sup> This can be viewed as a serious omission...

<sup>42</sup> Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a communication procedure reads as follows: "Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party: (a) The Convention; (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; (c) The Optional Protocol to the Convention on the involvement of children in armed conflict." Apart from individual communications in terms of Article 5, this Optional Protocol also provides for Inter-State communications, which deals with the reporting of a state party regarding non-compliance by another state party (Article 12) and an inquiry procedure for grave or systematic violations by a state party (Articles 13 and 14). See United Nations Document A/HRC/17/L.8 of 9 June 2011, obtained via [www.maryknollogc.org/social/children/htm](http://www.maryknollogc.org/social/children/htm), last accessed on 14-1-2012. Although the Third Optional Protocol is a major step forward in providing the CRC teeth, it is regretful that the possibility of collective communications has not been specifically included. This would have provided national human rights institutions, ombudsman institutions and non-governmental organisations with the possibility to submit collective communications alleging grave or systematic violations of rights in terms of the CRC or its Protocols. The strength of collective communications would have lied therein that potential or actual violations of rights in terms of the CRC could have been reported without the identification of specific cases. In his briefing on collective communications of September 2010, Newell set out various reasons why collective communications are vital for the effective protection of children's rights. These are among others, that collective communications submitted on behalf of approved organisations, avoid the need to involve individual child victims or identified groups of child victims. Moreover, collective communications would provide for an additional mechanism which could

importance of these monitoring mechanisms and remedies should not be underestimated, since they will assist in the realisation and upholding of the rights of children, which is the ultimate objective and purport of these instruments.<sup>43</sup> Moreover, communication procedures also have a positive effect on the affected parties: where the national legal system has not brought any satisfactory relief, it will have an empowering effect on individuals to be able to approach a regional or universal forum to pronounce on the matter objectively.

Based on the above, it is clear that parents and children in principle belong together. Therefore “family life” should be respected and protected by the state as long as this would serve the child's best interests. This poses the question as to what exactly “family life” entails. The term “family life” is not generally used in international documents, except in the European Convention.<sup>44</sup> Yet, via the jurisprudence of the European Court of Human Rights<sup>45</sup> on this point, a general understanding has developed on what the right to family life entails.<sup>46</sup> It is self-explanatory that the conventional relationship between biological parents and child(ren) is included in the notion of “family life”. However, already in 1978 the European Court heralded the opinion to view the European Convention as “a living instrument, to be interpreted in the light of present-day conditions”.<sup>47</sup> Previously reference was made to the *Marckx* case, where the outcome was the result of a creative method of interpretation in order to extend the concept of “family life”.<sup>48</sup> By recognising family relations

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contribute to the prevention of violations. In addition, it would contribute to a more efficient use of procedure, since it would prevent the Committee having to deal with large numbers of individual communications which are similar in contents. See [www2.ohchr.org/.../BriefingCollectiveCommunications\\_en.doc](http://www2.ohchr.org/.../BriefingCollectiveCommunications_en.doc), last accessed on 14-1-2012; also <http://www.peopletoparliament.org.za/focus-areas/children-rights/news/collective-communications>, accessed on 15-3-2012.

<sup>43</sup> See Defence for Children International Nieuwsbrief, 6 January 2012, available at [Http://dci.m4.mailplus.nl/genericservice](http://dci.m4.mailplus.nl/genericservice), accessed on 18-1-2012.

<sup>44</sup> Article 8 of the European Convention, which not only confers the right to respect for his private and family life [...] on everyone, including children, but also states in peremptory language that there shall be no interference by a public authority in this regard, unless the other elements in Article 8(2) become applicable in a specific case.

<sup>45</sup> Hereafter referred to as the European Court.

<sup>46</sup> See also section 2.2.2 and further.

<sup>47</sup> European Court of Human Rights (ECHR) in *Tyrer v The United Kingdom* 25 April 1978, Application no. 5856/72. See also Asser/De Boer *Personen- en Familierecht* (2010) 9.

<sup>48</sup> *Marckx v Belgium* ECHR 13 June 1979, Application no. 6833/74. Concerning this case, see also Van der Linde *Grondwetlike Erkenning van Regte ten aansien van die Gesin en Gesinslewe met verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die*

which traditionally would fall outside the ambit of the national legislation of an individual state party, like in the aforementioned case, the concept “family life” eventually developed into an autonomous notion.<sup>49</sup> Therefore, family relations between parent(s) and child were “automatically” assumed to constitute family life in terms of Article 8.<sup>50</sup>

In addition, the European Court had to consider various other relationships and determine whether it would qualify as “family life”; for example, between grandparent(s) and grandchild, foster parent(s) and foster child, the biological father and his biological child,<sup>51</sup> or couples (including same-sex partners) and their child(ren). As a result, various forms of non-recognised biological and factual family relationships were included in the concept “family life” and subsequently awarded recognition.<sup>52</sup> In this regard the facts and surrounding circumstances of each case were taken into account. Asser/De Boer refers in this respect to the question whether the parties involved would *de facto* share family life, which ultimately would be derived from the circumstantial facts; like for example, care, responsibility, regular contacts, mutual affection and correspondence.

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*Beskerming van die Regte en Vryhede van die Mens* (LLD dissertation 2001 UP) 51. See also section 2.2.2.3 above.

<sup>49</sup> Asser/De Boer *Mr. C. Assers Handleiding tot the beoefening van het Nederlands Burgerlijk Recht Personen- en familierecht* (2010) 10.

<sup>50</sup> Asser/De Boer refers in this respect to the full or complete model of “family life”, meaning where the biological, legal and factual aspects of the family life coincide/overlap; *Personen- en familierecht* (2010) 15. In this situation family life will be assumed, unless the facts and circumstances would indicate otherwise.

<sup>51</sup> For example, in the case *Lebbink v the Netherlands* (ECHR 1 June 2004, Application no. 45582/99) the European Court held that the mere biological bond without any other existing legal or factual relationship is not sufficient to conclude the existence of family life in terms of Article 8. However, the Court nevertheless acknowledged the presence of family life between the donor and his child, based on additional circumstances. In the present case, the father had been present at the birth of the child, he had regular contact with the child until she was sixteen months old and he had looked after the baby on a few occasions. Other factors would include the nature of the relationship between the biological parents and the interest and commitment shown by the biological father with regard to the child (before and after the birth of the child concerned). In other words, the circumstances may require extending the protection of family life to the potential relationship between a biological father and child, which should be allowed to develop. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 334; Asser/De Boer *Personen- en familierecht* (2010) 12-13.

<sup>52</sup> Asser/De Boer typifies these relationships as a weaker form of family life. Where an appeal on “family life” is not feasible, the ground of “private life” as referred to in Article 8 of the European Convention might bring the required relief. See Asser/De Boer *Personen- en familierecht* (2010) 15. It is submitted that the creativity displayed by the European Court in enhancing and protection the rights of children and their parents truly serves as an example for the national courts of member states and non-member states alike.

In other words, it goes far beyond merely looking after a child. It is agreed with Asser/De Boer that the relevance of the above developments are not to be underestimated; it is not merely the law which categorises the various relationships (with their distinguished legal consequences), but rather the factual existing and developing of family relationships which should be recognised and subsequently the law has to follow suit.<sup>53</sup> Societal developments urging the law to change are not something new. The legislatures and the courts should be instrumental in this, which is necessary in order to stay in tune with relevant national and international developments.<sup>54</sup> Furthermore the legislatures of the state parties should update the relevant legislation to ensure the protection and the enhancement of the rights of children, parents and other care-givers.<sup>55</sup> In other words, family life is not merely limited to the relationship between parents or other care-givers and their children; members of the extended family may also play a vital role in the lives of children.<sup>56</sup>

It is interesting that these developments regarding Article 8 of the European Convention have also impacted on countries which are not member states of the European Convention and thus are neither bound by the Convention nor the jurisprudence of the European Court, like South Africa.<sup>57</sup> Although the South African Constitution<sup>58</sup> bestows the right to family care or parental care on each and every child in the Republic, it does not explicitly protect the right to “family life”. Nevertheless, the Constitutional Court has pronounced on the term

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<sup>53</sup> Asser/De Boer *Personen- en familierecht* (2010) 11.

<sup>54</sup> With regard to the judicial officers, continuous legal training is indispensable, which should include training in the social sciences. For a discussion on judicial activism, see Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 32.

<sup>55</sup> This would contribute to some level of legal certainty. It has to be kept in mind that due to financial constraints, individuals are often not able to approach the courts.

<sup>56</sup> See also *Marckx v Belgium* (ECHR 13 June 1979, Application no. 6833/74) in which the European Court had to pronounce on the (then applicable) Belgian Civil Code, in terms of which birth did not constitute a legal bond between a mother and her child born out of wedlock. The court held that the natural bond between the mother and daughter constitutes family life which should be protected in terms of Article 8 (and that therefore the Belgian law at this point was in contravention with the Articles 8 and 14 (prohibition of discrimination between the child of married parents and unmarried parents) of the European Convention). See Van der Linde *Grondwetlike Erkenning van Regte ten aansien van die Gesin en Gesinslewe met verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD dissertation 2001 UP) 51; Asser/De Boer *Personen- en familierecht* (2010) 10 and 575.

<sup>57</sup> It is submitted that the term “family life” deserves the widest possible interpretation, whenever this would serve the child's best interests.

<sup>58</sup> 108 of 1996.

on various occasions and on that basis it is (indirectly) part of South African law.<sup>59</sup> Moreover, the concept is regularly mentioned in the South African academic literature on family law.<sup>60</sup> It is submitted that a holistic (and flexible) approach pertaining to the concept “family life” is desirable. The Children's Act is in line with this, since on the basis of chapter 3 of the Act, parental responsibilities and rights may be acquired by various categories of persons and because of the fact that these responsibilities and rights might be shared by various persons.<sup>61</sup> Hereby, a variety of situations are accommodated, which thus have explicitly been brought within the ambit of family life, which is certainly commendable. Since the relevance and the effects are not limited to the borders of the European Union (anymore), the right to “family life” and the protection thereof forms an inherent part of the field of international family law.<sup>62</sup>

### 5.1.1.2 The principle of non-separation and its limitation

Reference was made to the duty of state parties to ensure that a child, in principle, shall not be separated from his or her parents contrary to the will of the affected party/parties.<sup>63</sup> It is

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<sup>59</sup> See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC); *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 par [20], in which the Constitutional Court said that “section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk”.

<sup>60</sup> See for example, Van der Linde *Grondwetlike Erkenning van Regte ten aansien van die Gesin en Gesinslewe met verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD dissertation 2001 UP) 45 and further; Van der Linde “The extent of the state's duty to reunite parent and child: A European human rights perspective” in *Gedenkbundel vir JMT Labuschagne* (2006) 101; Van der Linde “Die beskerming van die gesin en gesinslewe met verwysing na aspekte van kontak met minderjarige kinders ingevolge die 'Children's Act'” *PJ Visser Gedenkbundel (Vita perit, labor non moritur – Liber memorialis: PJ Visser)* (2008) 260; Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 285.

<sup>61</sup> See chapter 3 of the Children's Act, sections 18 – 31. See also section 4.1.1 above.

<sup>62</sup> For an introduction in international family law, see Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 305.

<sup>63</sup> Article 9 of the CRC relates to the separation between children and their parents in domestic situations, see Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 170. Article 9(1) reads as follows: “States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. For a more detailed



the explicit right of the child not to be separated from his or her parents.<sup>64</sup> The African Children's Rights Charter contains a similar provision.<sup>65</sup> However, there is a difference: Article 19(1) of the African Children's Rights Charter states “against his will”, whereas Article 9(1) of the CRC refers to “against their will”.<sup>66</sup> Against “his” will suggests that only the opinion of the child concerned would be relevant. This approach may be the result of the fact that the African Children's Rights Charter puts the child in the centre: “No child shall ...”. However, the opinion of the child concerned is certainly relevant, but needs to be considered in conjunction with the views of the parent(s) or other care-givers, and measured against the yardstick of the best interests of the child.<sup>67</sup>

State parties are obliged to ensure the realisation of the child's right to be heard in all matters affecting him or her, and in addition, that these views be given proper consideration.<sup>68</sup> However, in the case of proceedings regarding the separation of the child from her or his parents, Article 9(2) of the CRC states that “[a]ll interested parties shall be given an opportunity to participate in the proceedings”.<sup>69</sup> It is commendable that in addition

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discussion on the international provisions, see section 2.2.3 above.

<sup>64</sup> Detrick has mentioned that “[A]lthough Article 9(1) is formulated in terms of an obligation of states parties, it may be assumed, in accordance with the objects and purposes of the CRC, that it accords to the child the right not to be separated from his or her parents against their will”, in *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 171.

<sup>65</sup> See Article 19(1) of the African Children's Rights Charter, which reads as follows: “Every child shall be entitled to the enjoyment of parental care and shall, whenever possible, have his place of residence determined by his parents. No. child shall be separated from his parents against his will, except when a competent authority subject to judicial review determine in accordance with the appropriate law, that such separation is in the best interest of the child.” See section 2.2.3.1 above. Article 8 of the European Convention does not stipulate this right explicitly, but it does protect the right to family life, see the discussion in the previous section 5.1.1.1.

<sup>66</sup> Meuwise *et al.* also refer to the fact that “against their will” refers to the opinion of the parents and the child together, in *Handboek Internationaal Jeugdrecht* (2005) 97.

<sup>67</sup> With regard to the phrase “against their will” Detrick refers to Newell who has explained that the phrase refers to the parents' will or to the parents' and the child's will together: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 171 (179 note 3). See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 97. From the formulation of the phrase it can be derived that it is not only the will of the child that counts.

<sup>68</sup> This obligation is based on the Articles 12 of the CRC and 7 of the African Children's Rights Charter.

<sup>69</sup> Participation implies making one's views known. See Article 9 in conjunction with Article 12 of the CRC.

to the general participation provision,<sup>70</sup> Article 9(2) specifically supplies the child with a procedural right to participate in any kind of procedure relating to (possible) separation.

In addition, Article 9 states unambiguously that the exercise of the right not to be separated may be limited, namely “when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. Article 9(1) contains thus various elements. “Competent authorities” refers to a public authority in a country, specialised in decision-making pertaining to the child's separation from his or her parents. “Subject to judicial review” ensures the possibility of review regarding the lawfulness of decisions.<sup>71</sup>

The phrase “in accordance with applicable law and procedures” indicates that substantive and procedural national laws need to be put in place, which specifically regulates the separation by a public authority of a child from the parents.<sup>72</sup> Separation by a public authority may only take place where such separation is necessary for the best interests of the child.<sup>73</sup> In other words, separation may take place provided that all the aforementioned

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<sup>70</sup> The right to be heard is contained in Article 12(2) of the CRC.

<sup>71</sup> The question arises whether this review includes the right to an appeal, which amounts to an examination of the merits of the matter by an appellate court, see Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 279. As indicated by Vucovic, Doek & Zermatten, the right to an effective remedy as provided for in Article 8 of the Universal Declaration of Human Rights (1948) is neither explicitly nor implicitly recognised in the CRC. However, from paragraph 24 of *General Comment No. 5 (CRC/GC/2003/5* of 27 November 2003) it can be derived that the Committee on the Rights of the Child holds the opinion that children and their representatives should be able to challenge decisions which allegedly constitute an infringement of their rights, in *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: All about Children's Rights* (2012) 68-69.

Hodgkin & Newell have correctly set out that “removing children from their parents is as serious a step as depriving them of their liberty”, in *Implementation Handbook for the Convention on the Rights of the Child* (2007) UNICEF 129. Based on the aforementioned and the serious consequences of a child's separation from his or her parents, it is submitted that the affected parties should be entitled to an appeal pertaining to the removal decision. The latter, however, has to be distinguished from the periodic review as provided for in Article 25 of the CRC. This Article provides for the regular interim evaluation of the placement, in order to determine whether the placement is still necessary in the light of the present circumstances of the child.

<sup>72</sup> Article 19(1) of the African Children's Rights Charter refers merely to “in accordance with the appropriate law”. It is submitted that the formulation of Article 9 of the CRC is to be preferred, since the inclusion of “applicable procedures” helps minimise arbitrariness and reiterates the right to participation, since “against their will” refers to the opinion of the parents as well as that of the parents and the child concerned.

<sup>73</sup> Detrick has pointed out that this element is in line with Article 3(1) of the CRC, which

requirements are fulfilled, in order to justify the infringement of the right of the child not to be separated from the parents.

Linked with Article 9 is Article 8(1) of the CRC, which urges states parties “to respect the right of the child to preserve his or her identity, including<sup>74</sup> [...] family relations as recognised by law”<sup>75</sup> and to refrain from unlawful interference. In the case of unlawful removal from the parents, Article 8(2) obliges the state to provide appropriate assistance and protection with a view to speedily re-establishing the child's identity.<sup>76</sup>

The obligation to refrain from arbitrary or unlawful interference with, among others, the child's privacy and family is furthermore explicitly mentioned in Article 16 of the CRC and Article 10 of the African Children's Rights Charter.<sup>77</sup> The prohibition of arbitrary and unlawful interference presupposes unambiguous legislation regulating state intervention in order to provide the child with the necessary protection. Detrick refers to the fact that these

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determines that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, in *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 172.

<sup>74</sup> Meuwise *et al.* have pointed out that the word “identity” has not been defined in Article 8(1), in *Handboek Internationaal Jeugdrecht* (2005) 93. The text of Article 8(1) suffice with the listing of a few elements which form part of the child's or any persons' identity, namely nationality, name and family relations. Other elements are thus not excluded. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 162 and 163.

<sup>75</sup> The last part of the phrase “family relations 'as recognised by law” was added to the final text at the instance of the Dutch delegation, due to the fact that the concept “family identity” was not necessarily known in all states parties. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 161; Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 93. In the past decade the notion of international family law has started to develop. It is submitted that the phrase “as recognised by law” nowadays is to be interpreted as “as recognised by international law”. This would provide more protection to the right of the child to preserve his or her identity, including family relations, than limiting the interpretation to the national law of a states party. This way, family relations which are not recognised in terms of the national law of a states party can still be accommodated under “family life” which has developed into an autonomous notion of international law.

<sup>76</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 160, where she refers to Argentina, which initiated this provision as a response to the “disappearance” of 145 to 170 children between the mid-seventies and mid-eighties. This obligation does not necessarily include the obligation to ensure that the child be brought up again by his or her blood relatives. See also Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 93.

<sup>77</sup> Its equivalent in the African Children's Rights Charter is Article 10, which reads as follows: “no child shall be subjected to arbitrary or unlawful interference with his, family, home, .... The child has the right to the protection of the law against such interference...”.

(national) laws must comply with the overall contents of the CRC, but particularly the child's best interests.<sup>78</sup>

In addition, the European Convention also contains a prohibition on unlawful state interference with, among others, family life. To this effect, Article 8(2) states in unambiguous terms:

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

In other words, there are three elements which have to be complied with in order to justify such an infringement; namely:

- (i) “In accordance with the law”, which is the national law of a member state;<sup>79</sup>
- (ii) “Necessary in a democratic society”;<sup>80</sup> and
- (iii) “In the interests of, among others, the protection of the rights and freedoms of, for example, children.”<sup>81</sup>

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<sup>78</sup> *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 164.

<sup>79</sup> Arbitrary decision-making will not be condoned, which applies across the board. Asser/De Boer has outlined that this applies to the “mother-measure” which is the supervision order, as well as additional orders, involving the removal and placement of a child, any contact between parent(s) and the child and the refusal of reunification of parent(s) and child, in *Personen- en Familierecht* (2010) 748.

<sup>80</sup> This criterion revolves around the meaning and purport of the (interfering) measure. Preference should be given to the least obtrusive measure, hereby limiting the effects of the interference as much as possible. See Asser/De Boer *Personen- en Familierecht* (2010) 749.

<sup>81</sup> The interests of the child should be the guiding principle. See also sections 2.2.2.3, 2.2.3.1 and 2.2.3.2 above.

When it comes to the far-reaching measure of removing a child from the family environment it is evident that this should be in the best interests of the child concerned.<sup>82</sup> It is, however, not enough that the child would be better off if placed in care.<sup>83</sup> In various cases before the European court the applicants' argument was focused on the necessity of the interference.

In the case of *Gnahoré v France*,<sup>84</sup> the son was removed from the care of his biological father shortly after being injured by his father, and in addition, restrictions were imposed on the right to contact between the father and son. The French authorities intended to re-establish contact between father and son with the aim of eventually allowing the child to return home. However, the applicant/father did not co-operate. The court held that the failure of the parent to co-operate in itself is not an absolute decisive factor, since even under such circumstances the authorities are obliged to implement the required measures in order to try to maintain the family link between the affected parties.<sup>85</sup>

The court emphasised that the child's interest must come before all other considerations and that this interest comprises of two aspects; firstly, to ensure the child's development in a sound environment, and secondly, the child's interest to have his or her family ties maintained, except where the family would be particularly unfit.<sup>86</sup> The court held that the interests of the child dictate that in principle everything should be done to preserve personal relations, and where possible, to "rebuild" the family. As a matter of course, this would mean that only in very exceptional circumstances family ties may be severed. Furthermore, the court held that the ultimate aim of any care order should be to "reunite the parent with his or

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<sup>82</sup> Liefwaard has pointed out that the necessity and the duration of the placement has to be carefully considered in each case, in which the child's best interests shall be a primary consideration, in line with Article 3(1) of the CRC, in "Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten" (2009) *NJCM-Bulletin* (4) 361.

<sup>83</sup> See ECHR *Olsson v Sweden No. 1* of 24 March 1988, Application no. 10465/83; also ECHR *K and T v Finland* of 12 July 2001, Application no. 25702/94, in which it was held that "the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents", see paragraph 173. Asser/De Boer *Personen- en Familierecht* (2010) 750.

<sup>84</sup> ECHR 19 September 2000, Application no. 40031/98.

<sup>85</sup> In this case the relevant authorities had made the necessary efforts to ensure maintenance of the family bond. See *Gnahoré v France* (ECHR 19 September 2000), paragraph 63.

<sup>86</sup> The severing of family ties would imply cutting a child off from his or her roots, which only can be allowed in very exceptional circumstances. See paragraph 59.

her child".<sup>87</sup> Inherently part of the principle of reunification is the notion that the child would be best off when placed with his or her parents. It is the duty of the courts to establish whether this is the case under the given facts and circumstances.

Moreover, in order to justify the removal of a newborn baby, extra strict criteria need to be adhered to, as was deliberated by the European Court in the case *Haase v Germany*.<sup>88</sup> After a psychological assessment by an expert, the report indicated that the children's normal development was in jeopardy, that the parents were often unreasonably harsh and had beaten the children, and that any further contact between the parents and the seven children should be severed. The Munster District Court made an order withdrawing the applicants' parental rights with regard to the seven children living with them, without hearing the parents or the children. The next day the children were removed and placed in three different, unidentified foster homes. The seven-day-old baby was taken from the maternity hospital and placed in a foster family.<sup>89</sup>

The European Court held that before public authorities had recourse to emergency measures like removal, the imminent danger should be actually established. In addition, where it would still be possible to hear the parents and to discuss the necessity of the measure, there should be no call for emergency action. Furthermore, to remove the children suddenly and place them in unidentified foster homes, prohibiting all contact with their parents, could not be accepted as proportionate. In particular, the removal of a new-born baby from the hospital was an extremely harsh measure, traumatic for the mother, and detrimental to her physical and mental health. Moreover, it deprived the baby of close contact with its biological mother (and father) and of the advantages of breastfeeding.

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<sup>87</sup> The principle of reunification/returning home should be applied in the context of the child's interest, which should come before all other considerations. See also Asser/De Boer *Personen- en Familierecht* (2010) 749.

<sup>88</sup> ECHR 8 April 2004, Application No. 11057/02.

<sup>89</sup> The Federal Constitutional Court had serious doubts regarding the following aspects: whether the courts had had due regard to the parents' rights, whether the decision was in line with the principle of proportionality, and whether the evidence supporting the opinion that the children were at risk was adequately considered. Nevertheless, the court's decision prohibiting contact remained in force and the case was referred back to the district court.

The court held that “it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible”. There had to be extraordinary or compelling reasons before a baby could be physically removed from the care of its mother, against her will, immediately after birth, as a consequence of a procedure in which neither she nor her husband had been involved. Based on the lack of sufficient reasons pertaining to the above, and the irreversibility of the measures (due to the continuing separation), the element of “necessary in a democratic society” had not been fulfilled. Therefore, Article 8 of the European Convention had been violated.

Another case involving the removal and placement of a newborn baby is *Moser v Austria*.<sup>90</sup> In this case the Vienna Youth Welfare Office had ordered that the biological mother could not take the baby with her upon the departure from the hospital and the baby was placed with foster parents. The reasons revolved around the mother's unclear personal and financial situation and the risk that the lack of a residence permit would endanger the child's welfare. Subsequently the court transferred the custody of the baby to the Youth Welfare Office. No measures were taken to establish and maintain contact between the mother and baby while the proceedings were pending. The court deliberated that this is particularly serious given that they did not have a chance to bond in the first place, due to the immediate removal of the baby after his birth. The court held that the authorities' failure to examine all possible alternatives (to transferring custody of the baby to the Youth Welfare Office), their failure to ensure regular contact, and the mother's insufficient involvement in the decision-making process, were not sufficient to justify such a serious interference with the family life of the applicants. Since the interference was not proportionate to the legitimate aims pursued, there had been a violation of Article 8 of the European Convention.<sup>91</sup>

In the case *Saviny v Ukraine*,<sup>92</sup> it was held that the removal of a child cannot be justified “by the mere reference to the parents' precarious situation, which can be addressed by less radical means than the splitting of the family, such as targeted financial assistance and

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<sup>90</sup> ECHR 21 September 2006, Application no. 12643/02.

<sup>91</sup> See *Moser v Austria* ECHR 21 September 2006, Application no. 12643/02, paragraph 73.

<sup>92</sup> ECHR 18 December 2008, Application no. 39948/06.

social counselling”.<sup>93</sup> In other words, the interference should be proportionate in relation to the envisaged aim. It is submitted that this imposes an obligation to find alternatives with less intrusive consequences.<sup>94</sup>

It is interesting to note that in a number of cases the European court has mentioned that it is not the court's task to substitute its decision for that of the national authorities. In *Gnahoré v France*<sup>95</sup> the court stated that its role was rather,

“[t]o review under the Convention the decisions that the authorities have taken in the exercise of their power of appreciation. On this subject it will be noted that, while the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, the Court will exercise a stricter scrutiny both of any further limitations, such as restrictions placed by the authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life”.<sup>96</sup>

In addition, in *Moser v Austria*<sup>97</sup> the court reiterated that although it recognises the wide margin of appreciation of authorities, it must still be satisfied that there existed circumstances which justified the removal of the child. To that effect,

“it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care was carried out prior to the implementation of such a measure”.

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<sup>93</sup> The parents of the child were visually challenged. In such cases alternatives to the far-reaching measure of removal are called for. Prevention and early intervention programmes could also be considered. For a more detailed discussion, see section 4.2 above.

<sup>94</sup> The development and implementation of early intervention programmes should be enhanced, in order to keep the family together (where possible) and to ensure that the parents remain involved and take responsibility (or are assisted in developing these skills).

<sup>95</sup> ECHR 19 September 2000, Application no. 40031/98.

<sup>96</sup> Paragraph 54.

<sup>97</sup> ECHR 21 September 2006, Application no. 12643/02.



The court considered further,

“following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on parental rights of access, as such further restrictions entail the danger that the family relations between the parents and the child are effectively curtailed”.<sup>98</sup>

Based on the above, it is clear that state parties/authorities should be reluctant to interfere with the family life of parents and their children. However, as has been outlined, under specific and narrowly circumscribed circumstances, interference may be justified in order to protect and to safeguard the physical and/or emotional well-being of a child concerned.

It should be mentioned that parents are not always necessarily to blame for not being able to protect and safeguard the child's well-being and development adequately. In this respect state parties and professionals in the child protection field should try to maintain a professional approach at all times towards the parties involved<sup>99</sup> and try to avoid stigmatisation of the parent(s) and/or child.<sup>100</sup> In addition, parents should not be side-lined. Article 6 of the European Convention provides the interested parties with the right to a fair trial. This also includes the right to inspect and receive documentation.<sup>101</sup> All interested parties should be heard and their opinions should be given due consideration.

Moreover, where the removal of a child is inevitable, professionals should in principle assist the family towards the return of the child to the family home and encourage parents to take

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<sup>98</sup> Paragraphs 65 and 66.

<sup>99</sup> This approach should be based on the basic principles of dignity and respect.

<sup>100</sup> See also Day of General Discussion Committee on the Rights of the Child *Children without Parental Care* 17 March 2006 CRC/C/153 paragraph 657. The right to privacy is also confirmed in Rules 8.1 and 8.2, which state that “the right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling,” and that “in principle, no information that may lead to the identification of a juvenile offender shall be published”.

<sup>101</sup> The refusal to inspect any reports will constitute a violation of the Articles 6 and 8 of the European Convention, see the case *Tsourlakis v Greece*, ECHR 15 October 2009, Application no. 5079/07.

responsibility to the largest extent possible.<sup>102</sup>

To sum up, in a number of cases the European Court did not pronounce on the removal-decision *per se*, but on some of the (procedural) aspects surrounding the removal-decision, like the lack of a possibility to comment on the reports of professionals, the failure to allow the parents to participate in the decision-making, the lack of a public hearing and public pronouncement, the lack of exploring alternatives to the removal with a less intrusive effect, and the failure to establish or maintain contact between the parent(s) and the child, which after the passing of time would diminish the chances of reunification, possibly having an irreversible effect. The next two sections focus on specific provisions in the CRC which aim to enhance the protection of the child after being removed from the parents.

### 5.1.1.3 Protection of children when removed from the family environment

Although children ideally should grow up in a family environment, this is not always feasible due to a variety of reasons; for example, abuse or neglect, where parents temporarily or permanently are not able to take care of a child, or where the child's best interests demand the removal of the child. This should be linked with Article 9 of the CRC which aims to prevent unlawful and arbitrary separation.<sup>103</sup> A child which has been removed from his or her own environment is vulnerable and therefore needs additional protection and assistance.<sup>104</sup> Article 20 of the CRC provides children with the right to special protection and assistance.

It reads:

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<sup>102</sup> Any guidance or assistance provided by a professional should take place in a non-patronising way. Parents and children alike have the right to be respected under all circumstances. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 72.

<sup>103</sup> Separation against the will of the affected parties is only permitted when competent authorities, subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. These procedures should also provide for the right to participate in the proceedings, in terms of section 9(2). See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 333.

<sup>104</sup> This provision is linked with Article 3(2) of the CRC, on the basis of which states parties are obliged "to ensure the child such protection and care as is necessary for his or her well-being". See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 173.

- “(1) A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”.

However, it does not contain any information on how to realise or implement the right to special protection and assistance. It only provides that:

- “(2) States Parties shall in accordance with their national laws ensure alternative care for such a child.
- (3) Such care could include, *inter alia*, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.

State parties are thus under the international duty to ensure special protection (and assistance) to children who have been removed from the family environment and to provide for alternative care for these children.<sup>105</sup> In addition, a number of examples of alternative care are included in Article 20(3), which listing is not exhaustive.<sup>106</sup> This listing ends with “[i]f necessary placement in suitable institutions for the care of children”. The phrase “if necessary” indicates that preference should be given to alternative forms of placement which resemble the family environment and that residential placement should only come to the fore

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<sup>105</sup> State parties are required to indicate in their periodic reports the measures adopted to ensure the alternative care for children which are deprived of their family environment and to specify the available forms of such care. See *General Guidelines for Periodic Reports*, paragraph 80 (CRC/C/58 of 20 November 1996). In the *Concluding Observations* regarding the Kingdom of the Netherlands (CRC/C/15/Add.227) of 30-01-2004, the Committee on the Rights of the Child expressed its concern regarding the lack of alternatives to residential care for children deprived of a family environment in the Netherlands, see section 41. It was therefore recommended to expand alternative care through, *inter alia*, increasing the support services and financial assistance for foster care families, see section 42.

<sup>106</sup> Article 20(3) of the CRC provides that: “such (alternative) care *could* include, *inter alia*, foster placement, Kafala of Islamic law, adoption, or placement in suitable institutions”. (Italics is own emphasis). See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 172.

as an *ultimum remedium*.<sup>107</sup> The various forms of placement are discussed below.<sup>108</sup>

It is interesting to note that the African Children's Rights Charter refers to “alternative family care”, which phrase stresses the importance of giving preference to family resembling placement, if possible. Thus, Article 20(2) read in conjunction with (3) allows state parties the discretion to provide for different forms of alternative care to conform with their own legal system.<sup>109</sup> The right to special protection also implies having regard to the special needs and vulnerability of the child which is placed in alternative care. Liefwaard refers in this respect to the duty to take into account the differences between children on the basis of age,<sup>110</sup> maturity and gender, which need consideration in finding adequate placement. It is submitted that the right to special protection also extends to the principle that children placed in terms of civil law should be separated from those placed in the context of the child juvenile system/criminal law. Moreover, children should be protected from any form of cruel, inhuman or degrading treatment whilst being deprived of their liberty.<sup>111</sup> In addition, Article 3

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<sup>107</sup> See Bruning, Liefwaard & Volf, who have pointed out that the phrase “if necessary” refers to the situation where other, less far-reaching options have failed or are expected to fail, in “Rechtswaarborgen voor OTS-ers in justitiële jeugdinrichtingen” (Artikelen) (2004) 9 *Tijdschrift voor Familie- en Jeugdrecht* 208. See also Article 4 of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85 of 3 December 1986). Article 4 of the Declaration states that “when care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered”. It is submitted that this provision is formulated in order of preference. Returning to Article 20(3) of the CRC, Detrick also refers to the preference for (another) substitute family, see *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 336. See also Liefwaard *Deprivation of Liberty of children in light of International Human Rights Law and Standards* (2008) 114.

<sup>108</sup> See section 5.3 below, which deals with the forms of placement.

<sup>109</sup> Detrick refers to the fact that various legal systems in the world have different forms of alternative care for children which should be respected, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 336. See also the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (UN Document A/RES/41/85 of 3 December 1986). In terms of paragraph 6 of the Preamble, it is recognised “that under the principle legal systems of the world, various valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents”.

<sup>110</sup> Young children should be placed separately from older children. See “Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten” (2009) *NJCM-Bulletin* (4) 363.

<sup>111</sup> This obviously includes (sexual) abuse and neglect as well as violence by any person or professional in whose care the child is placed or anyone else sharing the same environment. Moreover, this includes any kind of unnecessary and disproportionate use of measures of

of the European Convention also contains a prohibition of inhuman or degrading treatment or punishment.<sup>112</sup>

Apart from special protection, state parties are obliged to provide assistance in terms of Article 20(1). It is submitted that the obligation to provide assistance should be widely interpreted, extending to the consequences of the placement. This implies, for example, that when a placement order is made, the child should be assisted in being placed speedily and that assistance is provided for maintaining contact with the family. Moreover, that a child will be assisted in being informed about his or her rights whilst being placed in alternative care, for example the right to lodge a complaint.<sup>113</sup>

It is interesting to note that Article 20(3) includes the principle of continuity regarding the child's upbringing. It provides an instruction when it comes to considering and thus finding solutions; namely the duty to have due regard to the continuity in the child's upbringing, thereby providing the necessary stability.<sup>114</sup> In this respect consideration should be given to specifically stipulated aspects relating to a child's identity, which are the child's ethnic, religious, cultural and linguistic background.<sup>115</sup> In other words, where placement seems

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order and control. These kind of measures should be based on legislation or regulations in order to be lawful. Liefwaard refers in this respect to Rules 64 and 68 of the *Havana Rules*, in (2009) *NJCM-Bulletin* (4) 364.

<sup>112</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 537.

<sup>113</sup> Matters relating to complaints procedures concerning, for example, the treatment of a child or with regard to any regulations pertaining to a placement facility merit research on its own and fall outside the ambit of this thesis. The same applies to the important topic of inspection of facilities, their internal regulations and the implementation thereof.

<sup>114</sup> The aim of providing continuity and stability in the upbringing will be in the best interests of the child concerned. This implies that transfers in placement should be limited and avoided where possible. See also the *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010), paragraph 59, which states that frequent changes in care setting are detrimental to the child's development and ability to form attachments and should be avoided. Also Bruning *Rechtvaardiging van Kinderbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 467; Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 176.

<sup>115</sup> Detrick has pointed out that the main consideration of Article 20(3) was to provide some direction regarding the application of the best interests of the child-standard in Article 3(1), in relation to deciding on appropriate placement, see *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 337. The principle of continuity in the child's upbringing is also mentioned in Article 25(3) of the African Children's Rights Charter. With regard to the personal circumstances regarding the child's identity, the African Children's Rights Charter merely refers to the child's ethnic, religious or linguistic background (and does not mention the cultural background).

inevitable, an environment which resembles the family environment as closely as possible should be given preference, simultaneously taking into account the child's ethnic, religious, cultural and linguistic background. It is submitted that these aspects which relate to the child's identity are already implied in "an environment resembling the family environment".

Meuwise and others point out that before any of the options of alternative care as mentioned in Article 20(3) can be considered, the possibilities within the child's (extended) family should first be explored.<sup>116</sup> This would probably serve the interests of the child best. It is evident that the child should be entitled to express his or her views in this matter. Alternatives in procedure, for example, a family group conference, provide an opportunity for the child to participate actively in finding a solution.<sup>117</sup>

### 5.1.2 Specific international provisions relating to civil placement or detention

When a child has been removed from the family environment and placed in alternative care, this obviously means that the child is deprived of his or her liberty. Neither the CRC nor the African Children's Rights Charter contain a definition of deprivation of liberty.<sup>118</sup>

But Rule 11(b) of the *Havana Rules*<sup>119</sup> defines it as:

"any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any

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<sup>116</sup> *Handboek Internationaal Jeugdrecht* (2005) 172. See also Article 5 of the CRC, which refers to the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child.

<sup>117</sup> See the discussion on participation in section 3.1.4.

<sup>118</sup> Article 17 of the African Children's Rights Charter seems to focus more on child justice in criminal law. The only reference to civil placement is made in Article 17(2)(a), on the basis of which states parties shall ensure that no child who is deprived of its liberty is subjected to (torture), inhuman, degrading treatment or punishment. See also Liefwaard *Deprivation of Liberty of children in light of International Human Rights Law and Standards* (2008) 154.

<sup>119</sup> The United Nations Rules for the Protection of Juveniles deprived of their Liberty, also referred to as the *Havana Rules*, Resolution 45/113 of 14-12-1990.

judicial, administrative or other public authority”.<sup>120</sup>

Thus deprivation of liberty in effect constitutes a limitation of a person's fundamental right to liberty. Needless to say, such far-reaching measures should be surrounded by specific safeguards which protect the interests of a child.<sup>121</sup> It is evident that a child who is deprived of his or her liberty will not (automatically) be deprived of other human rights he or she is entitled to.<sup>122</sup> The CRC contains a specific standard regarding the deprivation of liberty of children and the consequences thereof. Although Articles 37 and 40 are mainly focused on criminal law pertaining to children, parts of these Articles are also relevant to civil placements. The same applies to the *Beijing Rules*<sup>123</sup> and the *Havana Rules*.<sup>124</sup> Therefore, here are some further remarks on these provisions and rules. Where state parties are bound to comply with the provisions in the CRC, the aforementioned Rules have merely the status of recommendation and are thus not legally binding, unless the contents of these provisions overlap with those in the CRC.<sup>125</sup> Nevertheless these documents play an important role since they contain a minimum standard for the handling of (criminal) cases involving children and their possible subsequent deprivation of liberty. These Rules should ideally be incorporated into the national legislation of state parties in order to enhance the rights of the children to whom the Rules are applicable.

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<sup>120</sup> On the objectives and definitions of the Rules, see Liefwaard *Deprivation of Liberty of children in light of International Human Rights Law and Standards* (2008) 94 and further; also Liefwaard “Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten” (2009) *NJCM-Bulletin* (4) 359.

<sup>121</sup> There are many relevant aspects pertaining to the legal position of children deprived of their liberty, which merit research. For the purpose of this thesis a selection of (sub) Articles is made. The general provisions in the CRC should also be adhered to.

<sup>122</sup> See Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 68.

<sup>123</sup> The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, also known as the *Beijing Rules* (Resolution 40/33) of 29/11/1985, provides guidelines for the adjudication of juvenile criminal law. Rule 3.2 of the *Beijing Rules* aims to extend the protection granted by this document to cover juvenile welfare and care proceedings. It states that “efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings”. State Parties are thus obliged to afford a similar standard of protection to children in (alternative) care. See also Van Bueren and Tootell “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 10.

<sup>124</sup> See footnote 119.

<sup>125</sup> See Van Bueren & Tootell (1995) *Defence for Children International* 1; Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 515.

Article 37(b) of the CRC determines:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

The duty of state parties is set out in clear language; there should be legislative and other measures in place to ensure that a child will not be deprived of his or her liberty on the basis of an unlawful or arbitrary decision.<sup>126</sup> In the *General Guidelines for Periodic Reports* of the Committee on the Rights of the Child, reference is made to Rule 11(b) of the *Havana Rules* which extends the application of Article 37(b) to civil placements by including the phrase “placement of a person in a custodial setting”.<sup>127</sup> To this effect, state parties are required to indicate in their periodic reports, any measures adopted pursuant to Article 37(b).<sup>128</sup>

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<sup>126</sup> See the discussion of Detrick regarding the phrase “arbitrary”. She points out that some delegations were of the opinion that it was too vague, whilst others held that it obviously meant “without legal grounds” or “contrary to law”, “illegal” but also “unjust” and therefore incompatible with the general principles of natural justice or dignity of a person: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 630.

<sup>127</sup> CRC/C/58 of 20 November 1996, paragraph 138. Also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 500.

<sup>128</sup> See *General Guidelines for Periodic Reports* (CRC/C/58 of 20 November 1996). State parties are required to submit reports periodically in terms of Article 44 of the CRC. Paragraphs 138 – 146 of the *General Guidelines* contain specific instructions pertaining to the reporting on children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings. A report of a state party should also indicate the existing alternatives to deprivation of liberty, the frequency with which they are used and the children concerned, including by age, gender, religion, rural/urban area, and social and ethnic origin (paragraph 139). Information should also be provided on the number of children deprived of liberty as well as on the period of deprivation of liberty, including disaggregated data.

Moreover, information should be given regarding the realisation of the child's right to maintain contact with the family and how this is effected, the conditions in institutions, complaint procedures and periodic review of the situation of the child and of the circumstances relevant to his or her placement (paragraph 143). Furthermore, state parties should indicate, among others, the measures which are in place ensuring prompt access to legal and other appropriate assistance, and measures adopted with regard to the right of the child to challenge the legality of the deprivation of his or her liberty before a court and ensuring a prompt decision (paragraph 144). Finally, paragraph 146 mentions the duty to indicate the progress achieved pertaining to the implementation of Article 37(b) to (d), the difficulties encountered and any targets set for the future. Some of these aspects are dealt with later in this chapter, however, most of these aspects are topics on their own which merit separate research and will not be further discussed. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 500.



In terms of the second part of Article 37(b), detention (and other forms of deprivation of liberty) should conform to the national law of a country and may only be used as a measure “of last resort” and for the “shortest appropriate period of time”.<sup>129</sup> According to Liefwaard, the latter two requirements can be typified as child-specific elements, which give meaning to the requirements of lawfulness and non-arbitrariness.<sup>130</sup> Meuwise *et al.* have pointed out that this provision is based on the Rules 13, 17 and 19 of the *Beijing Rules*, which seem more focused on the context of juvenile justice.<sup>131</sup> Rule 17.1(b) states that,

“restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum”.

Liefwaard points out that an individual assessment is required pertaining to the appropriateness and duration of the deprivation of liberty, while simultaneously taking into consideration the best interests of the child concerned.<sup>132</sup> In addition, Van Bueren and Tootell refer to the need to use alternatives to institutionalisation as much as possible.<sup>133</sup> In other words, a variety of alternatives should be developed which are suitable for these vulnerable children and their needs, hereby ensuring that the restriction on the personal

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<sup>129</sup> In addition, State parties are requested to provide relevant information with respect to Article 1 of the Convention, which deals with the definition of “child”. Relevant for the topic under discussion is that information should be provided on the minimum legal age defined by the national legislation for (among others) deprivation of liberty, which includes placement of children in welfare and health institutions. In addition information should be given on the minimum legal age with regard to participation in administrative and judicial proceedings affecting the child. See *General Guidelines for Periodic Reports* (CRC/C/58 of 20 November 1996), paragraph 24. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 629.

<sup>130</sup> In *Deprivation of Liberty of children in light of International Human Rights Law and Standards* (2008) 84.

<sup>131</sup> See Liefwaard *Deprivation of Liberty of children in the light of International Human Rights Law and Standards* (2008) 84. Rule 13 of the *Beijing Rules* deals with detention pending trial, which is clearly applicable to the administration of juvenile justice.

<sup>132</sup> *Deprivation of Liberty of children in the light of International Human Rights Law and Standards* (2008) 84. See also 101.

<sup>133</sup> In “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 17. Liefwaard refers in this respect to the latest *Concluding Observations* of the Committee on the Rights of the Child with regard to the Kingdom of the Netherlands (CRC/C/NLD/CO/3 of 30 January 2009): “Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten” 2009 *NJCM-Bulletin* (4) 359. The Committee expressed its concern regarding the lack of alternatives to the deprivation of liberty (the waiting lists for placements and the joint placement of children in terms of civil law and of criminal law).

liberty of a child will indeed be limited to the possible minimum.<sup>134</sup> Rule 19.1 pursues the least possible use of institutionalisation by providing that “the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period”. In other words, if, in a last case scenario a child needs to be institutionalised, the loss of liberty should be limited where possible, thus preference should be given to open settings.<sup>135</sup>

Although reference was made to the fact that many rules regarding the deprivation of liberty are more applicable in the context of juvenile justice, it could be argued that a substantial number of these rules are also relevant to civil placements.

This is supported by Rule 3 of the *Beijing Rules*, which aims to extend the principles embodied in the Rules to children who are dealt with in welfare and care proceedings, and Rule 11(b) of the *Havana Rules*.<sup>136</sup> Nevertheless the position still seems uncertain. There is no doubt that children deprived of their liberty should be protected due to their vulnerability and dependence. After being placed, they are hidden from the public view, even more so when placed in closed settings. Therefore it is submitted that a broad definition should be maintained, rather than a strict approach. In this respect Liefwaard suggests the Committee on the Rights of the Child provide some direction in this regard.<sup>137</sup>

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<sup>134</sup> Reference should also be made to part five of the *Beijing Rules* which deals with institutional treatment. Rule 26.1 and 26.2 aim to provide care, protection and all necessary assistance, for example, social, educational, vocational or psychological, that a child may require due to his or her age, sex and personality and in the interest of his or her wholesome development. Van Bueren and Tootell point out that the aforementioned objectives would in principle be acceptable and thus usable in any legal system or culture, but need serious attention by state parties; “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 21; Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 520. It is submitted that children, once institutionalised, are hidden from the public view and that therefore basic standards for treatment of these vulnerable children should urgently be put in place and effectively controlled.

<sup>135</sup> See Van Bueren and Tootell “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (1995) *Defence for Children International* 18; Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 632; Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 520.

<sup>136</sup> See specifically Rule 3.2 of the *Beijing Rules*. For a detailed discussion see Liefwaard *Deprivation of Liberty of children in the light of International Human Rights Law and Standards* (2008) 85 and further. Rule 11(b) of the *Havana Rules* has been discussed at the beginning of this section.

<sup>137</sup> The Committee on the Rights of the Child could issue a *General Comment* on this topic. See Liefwaard *Deprivation of Liberty of children in the light of International Human Rights Law and*

It is agreed with Liefwaard that the requirement of “minimum necessary period” in Article 37(b) could provide the basis for (more regular) interim or periodic review by the court.<sup>138</sup> It is submitted that the far-reaching consequences of deprivation of liberty should be limited where possible, and that regular assessment is needed to establish whether a least intrusive measure has been/may be employed for the realisation of the objective(s) taking into account the best interests of the child concerned.<sup>139</sup>

In addition, the *Havana Rules* also determine, among others, that imprisonment should be used as a last resort, for the minimum necessary period and limited to exceptional cases.<sup>140</sup> Rule 17 contains an appeal for the use of alternative measures to detention. In sum, these Rules provide a detailed framework geared towards the protection of children with regard to procedural matters, as well as matters relating to the placement itself. Furthermore, Article 37(c) states that, “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of their age”.<sup>141</sup>

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*Standards* (2008) 101.

<sup>138</sup> “Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten” (2009) *NJCM-Bulletin* (4) 362.

<sup>139</sup> Liefwaard refers in this respect to the “realisation of the purposes of the deprivation of liberty”, which constitutes the third component of the legal position of children deprived of their liberty (the other two are about (1) basic rights which accrue to all children and thus also children who are detained, for example the right to privacy, an adequate standard of living and health care, and (2) the right to special protection). During the deprivation of liberty various aspects should be paid attention to, like the drafting of an individual (treatment) plan for the child, the opportunity of the child to have access to education and socialisation programmes which would be of benefit to the child: (2009) *NJCM-Bulletin* (4) 365. These tailored programmes should focus on the needs of the specific child and equip the child with the necessary skills and mindset in order to move forward (independently) in life. Suitable after care is also recommended, the first period after the deprivation of liberty. This is especially important with regard to older children. This would involve practical matters, like accommodation, work/study and finances. See also Steketee *et al.* “(Jeugd)zorg houdt niet op bij 18 jaar” (2009) <http://www.verwey-jonker.nl/jeugd/publicaties/jeugdzorg>, last accessed on 31-3-2012. For the dilemma of closed placement relating to young adults of eighteen years and older who might be in need of care, see section 5.3.3.2 and further.

<sup>140</sup> See Rules 1 and 2 of the *Havana Rules*.

<sup>141</sup> This includes the right to be separated from adults. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 635.

It is agreed with Liefaard that this right is of utmost importance to ensure the quality of treatment of children who are deprived of their liberty,<sup>142</sup> which, it is submitted, applies to civil and criminal law placements alike. Thus the personal situation and the (age-related) needs of a child have to be taken into account, on which state parties are required to report to the Committee on the Rights of the Child.<sup>143</sup>

The provisions in the CRC in conjunction with these Rules comprise a useful tool for state parties in order to enhance the protection of children (temporarily) deprived of their liberty on a national level.<sup>144</sup> To work towards the realisation thereof depends on the priorities of the state party concerned. At present the Committee on the Rights of the Child can (merely) encourage state parties to improve their laws and procedures by providing useful feedback in the form of *Concluding Observations*. With the much anticipated communications procedure, the (practical) meaning of the Convention and the guidance provided by the Committee<sup>145</sup> will be largely enhanced.

The European Convention also deals with the right to liberty and the limitation thereof. In terms of Article 5(1), everyone, thus including children, has the right to liberty and security of person and that no one shall be deprived of his liberty except in any of the situations as stipulated in this provision. Moreover, Article 5 demands that this should be in accordance with a procedure prescribed by (national) law of a member state. With regard to the topic of this thesis, which focuses on civil placement, Article 5(1)(d) is particularly relevant. It provides that “no one shall be deprived of his liberty save in the case of the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”.

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<sup>142</sup> *Deprivation of Liberty of children in the light of International Human Rights Law and Standards* (2008) 89.

<sup>143</sup> See *General Guidelines for Periodic Reports* (CRC/C/58 of 20 November 1996), paragraphs 142 and 143. Also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 634. Aspects relating to the protection of the legal position of children deprived from their liberty are worked out in detail in the *Havana Rules*.

<sup>144</sup> See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 523.

<sup>145</sup> The *General Comments* and *Concluding Observations* provide general and specific guidance to state parties.

Educational supervision in this context refers to the necessity of a programme relating to the upbringing of the child concerned, which is aimed at lifting or diminishing the existing problems.<sup>146</sup> The result of the combination of the terminology “minor” and “detention for the purpose of educational supervision” is that detention of an adult for the purpose of educational supervision is not in line with Article 5(1)(d). As a matter of course, the (extension of) treatment for the purpose of education or upbringing of a person above the age of eighteen does not seem possible.<sup>147</sup> Thus, deprivation of liberty of a child will only be acceptable when it is based on a lawful order for the purpose of educational supervision<sup>148</sup> (or the lawful detention in order to ensure that the child will be brought before the competent legal authority). In other words, the court should be able to test the legitimacy of the deprivation of liberty and the order accordingly.<sup>149</sup> Therefore, strict adherence to the procedural requirements is required.<sup>150</sup> In this respect Article 5(4) determines that in the case of deprivation of liberty by detention, everyone, thus including children, is entitled to take measures by which the lawfulness of his detention shall be speedily decided by a court.<sup>151</sup>

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<sup>146</sup> See Asser/De Boer *Personen- en familierecht* (2010) 799.

<sup>147</sup> Duijst & Veerman conclude in this respect that closed placement (detention) of a person above the age of eighteen is merely possible where (a) the consent of the affected person is obtained or (b) on the basis of the Wet bijzondere opnemingen in psychiatrische ziekenhuizen, which Act provides for the admission in psychiatric hospitals: in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 141. See also the discussion in sections 5.2.2.1 and 5.3.3.2 below.

<sup>148</sup> However, Article 5(1)(d) does not exclude the possibility of temporary placement elsewhere. In the case *Bouamar v Belgium* of 29 February 1988 (Application no. 9106/80), the European Court held that “the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designated and with sufficient resources for the purpose”. Also Bruning, Liefwaard & Volf “Rechtswaarborgen voor OTS-ers in justitiële jeugdinrichtingen” (2004) 9 *Tijdschrift voor Familie- en Jeugdrecht* 211.

<sup>149</sup> See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 352.

<sup>150</sup> The mere appearance of the minor child before the court is not sufficient. Due to his or her age, the child needs to be legally represented, see the case *Bouamar v Belgium* of 29 February 1988 (Application no. 9106/80). With regard to the detention in a closed setting, a court in the Netherlands is on its own accord obliged to order the assignment of legal aid on the basis of Article 29f(2) of the Act on the Youth Care. See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 352.

<sup>151</sup> In this respect Article 1:29a(2) of the Act on the Youth Care is relevant, which confers children of twelve years and older, who are placed in a closed setting, the capacity to litigate. The same applies to a child below the age of twelve provided he or she is able to judge his or her

This right should also include the right to periodic review of a placement.<sup>152</sup> Regular intervals ensure that it will be possible for a court to re-examine the lawfulness of the detention and establish whether a less intrusive measure is appropriate in the light of the circumstances.<sup>153</sup> This is especially relevant because of the far-reaching consequences of the deprivation of liberty.<sup>154</sup>

It should be noted that where it has been established by the court that the detention is not lawful, the person's release will be ordered and the latter shall have an enforceable right to compensation.<sup>155</sup> Even where the detention has come to an end, the affected person may have a legal interest in having the lawfulness of the detention determined, with the view to Article 5(5) of the Convention, which provides for the right to compensation.<sup>156</sup>

## 5.2 Grounds for removal of the child from the family environment

Above reference was made to the obligation of state parties in terms of Article 9 of the CRC,

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own interests. Thus for children placed in a closed setting, the Netherlands is in line with the requirement provided in Article 5(4) of the European Convention. Unfortunately, this does not apply to children who have been removed and placed in another (less stringent) setting, for example, an open setting or foster care. It is submitted that Article 1:29a(2) should be extended to include all children who have been removed and placed elsewhere. Alternatively, that a specific legislative provision be included in the Code of Civil Procedure, which explicitly provides for the capacity to litigate in the case of a child's removal/placement. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 242; also Asser/De Boer *Personen- en Familierecht* (2010) 662. See also the report of the Kinderombudman in the Netherlands: *De bijzondere curator, een lot uit de loterij?* of 5 July 2012. This report contains the research findings and recommendations for improving the procedural rights of children in the Netherlands, accessed via [www.dekinderombudsman.nl/36/kinderen/nieuws](http://www.dekinderombudsman.nl/36/kinderen/nieuws), on 8-5-2012.

<sup>152</sup> See also Article 25 CRC.

<sup>153</sup> See Rule 17.1 of the *Beijing Rules* (Res. 40/33 of 29 November 1985), which refers to the principle of proportionality. See also Asser/De Boer *Personen- en familierecht* (2010) 802.

<sup>154</sup> See also section 5.3.5 below, which deals with the topic "returning home *vis-à-vis* permanent placement".

<sup>155</sup> On the basis of violation of Article 5(4) and 5(5) of the European Convention.

<sup>156</sup> See in this regard the decision of the European Court of Human Rights in *S.T.S. v the Netherlands* of 7 June 2011 (Application no. 277/05), in which the court pronounced on both the right to have the lawfulness of the detention decided and the right to a speedy decision. For a discussion of the case and the impact thereof on the Dutch case law, see section 5.3.3.2 below. See also Forder & Olujić in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 46; Cardol & Van Rheenen in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 123.

to ensure that a child shall not be forced to be separated from his or parents. However, although it should not, and cannot, be taken lightly, under specific and narrowly circumscribed circumstances interference may be justified; namely, in order to protect and safeguard the physical or emotional well-being of a child concerned. Where prevention and early intervention programmes and/or measures on a voluntary basis have proven not to resolve the problem(s) adequately, further-reaching measures might be inevitable in order to protect the child and to safeguard a balanced and harmonious development towards adulthood.

In the *Cassell Concise English Dictionary*<sup>157</sup> “to remove” has been defined as “to move from a place”, “to move to another place”, to take away”; which in itself has a serious connotation. When applied to the situation of vulnerable children in problematic (family) environments, it can be experienced as traumatic, which may be exacerbated by possible loyalty and attachment towards the parent(s). In order to determine whether the removal of the child will be in the best interests of the child under the given circumstances, the child needs to be heard in person.<sup>158</sup> Therefore extra care and consideration should be given to the psychological effects of an intended removal.<sup>159</sup>

As mentioned above, there is an important role laid out for the prevention and early intervention services in order to support families in need of these services and to keep families, as far as possible, together. Removal and subsequent placement of a child should ultimately be a measure of last resort; in other words, the *ultimum remedium*.<sup>160</sup> In the following sections the grounds for the removal of a child in terms of South African law will be discussed, followed by a discussion on its Dutch counterpart.

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<sup>157</sup> 1994

<sup>158</sup> See *General Comment No.12 (CRC/C/GC/12)* of 2009, paragraphs 53 and further and 71. Apart from hearing the child in relation to an intended removal and placement, the Committee on the Rights of the Child also recommends the involvement of the child in the development of care plans and their review, and visits with parents and family, see paragraph 54.

<sup>159</sup> Professionals working with children should be or become sufficiently trained in basic psychology. It is submitted that this should be applicable across the board and specific courses should be incorporated in the curriculum of relevant study programmes. This should include, but is not limited to, social workers, officers of the court, legal representatives, professionals offering family services and police officials.

<sup>160</sup> See Article 9(1) of the CRC and Article 19(1) of the African Children's Rights Charter. See *Draft United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children* (2007), paragraphs 5 and 13. See also the discussion in section 2.2.3.1 above.

## 5.2.1 Grounds for removal and placement of a child in terms of South African law

In the above section it was mentioned that the state has the duty to protect children from all forms of abuse or neglect,<sup>161</sup> and that under the latter circumstances intervention may be justified, resulting in a limitation of the right to privacy within the family.<sup>162</sup> The Children's Act 38 of 2005, among others, aims to regulate various forms of intervention and ensures that those children, regarding whom there are apparent concerns, be referred to a designated social worker.

Chapter 9 of the Children's Act deals specifically with the child in need of care and protection.<sup>163</sup> Part 1 of the chapter focuses on the identification of a child in need of care and protection, whereas Part 2 deals with the children's court processes.<sup>164</sup> From the outset it should be reiterated that the interests of the child should be the focus point.<sup>165</sup> Before any decision pertaining to the removal of a child is contemplated, consideration needs to be given to section 7(1)(d) and (f), which deal with the likely effect of the child's separation from the family and the need of the child to remain with the family, or at least to maintain a connection with the (extended) family, culture or tradition.

### 5.2.1.1 Removal of child to temporary safe care on order of court

However, in Chapter 4, which deals with children's courts, section 47 provides for the referral of children for investigation by any other court, due to the supposition of the child being in need of care and protection.

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<sup>161</sup> See Article 19 of the CRC and *General Comment No. 13* (2011), Article 16 of the African Children's Rights Charter, section 28(1)(d) of the Constitution and section 7(1)(l) of the Children's Act. For a detailed discussion, see section 2.2.2.5.

<sup>162</sup> See paragraph 7 of the *Chirindza* case.

<sup>163</sup> Sections 150–154. For a discussion on the identification of a child in need of care and protection, see section 4.3.1 above.

<sup>164</sup> Sections 155–160. The latter sections will be discussed later in this section and the sections to follow.

<sup>165</sup> See the provisions 9 and 7 of the Children's Act which ensure the implementation of the best interests- standard, as discussed in section 3.1.3.1.



Section 47 states:

- “(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 is 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 designated social worker for an investigation contemplated in section 155(2).
- (2) If, in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the 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), the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court -
- (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; and
- (b) must request the 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”.<sup>166</sup>

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Compare with the equivalent in the (repealed) Child Care Act 74 of 1983, section 11(1), which dealt with the removal of a child to a place of safety on order of any court. Section 11(1) contained the following: “If it appears to any court in the course of any proceedings before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children’s court”. The latter sentence indicates clearly that the justification of the removal or the detention, should be tested as soon as possible by the specialised court, which is the children’s court. In other words, the matter of timeous judicial review seems to be lacking in the Children’s Act. See the discussion on the sections 151 and 152 of the Children’s Act in conjunction with the *Chirindza* case below.

If it becomes apparent *during the proceedings of any other court*<sup>167</sup> than the children's court, that a child involved might be in need of care and protection, the court has no discretion but should refer the matter to a designated social worker<sup>168</sup> for an investigation contemplated in section 155(2).<sup>169</sup> Any court can do so, for example, a Regional Division of the Magistrate's Court or a criminal court.<sup>170</sup> In the case of family law-related proceedings where the relevant court has a suspicion of abuse or neglect of a child of any of the parties, these proceedings may be suspended in order to first prioritise the determination of whether or not the child concerned is in need of care and protection. Moreover, it needs to be looked into whether prosecution of the alleged offender would be appropriate under the given circumstances.

Where a court issues an order in terms of any of the subsections (1) and (2), it also has the discretion to order that the child be placed in temporary safe care, where this appears necessary.<sup>171</sup> "Temporary safe care" is defined as "the care of a child in an approved child and youth care centre, shelter or private home or any other place, 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".<sup>172</sup>

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<sup>167</sup> Own emphasis, for the sake of clarity in the light of comparative analysis with the Netherlands.

<sup>168</sup> See the definition in section 1(1).

<sup>169</sup> See the discussion below.

<sup>170</sup> In order to ensure the protection of children as indicated in section 28 of the Constitution and several sections in the Children's Act, the court cannot decide otherwise but order an investigation, where the facts and circumstances justify such.

<sup>171</sup> The far-reaching measure of removal from the family home is only justified as a measure of last resort. See among others: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (*Beijing Rules*) Resolution 40/33 of 29 November 1985; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (*Havana Rules*) Resolution 45/113 of 14 December 1990; the Draft United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (2007) paragraph 13. See also section 2.2.3.4.

<sup>172</sup> Section 1(1) of the Children's Act. It is commended that the Children's Act is unambiguous in this respect and prevents problems of the past. Previously it was cause for concern having to resort to the mixed placement of children in need of care and children who have been "in trouble with the law" in places of safety in terms of section 28 of the Child Care Act 74 of 1983. See also Matthias & Zaal in Keightly (ed.) *Children's Rights* "Can we build a better children's court? Some recommendations for improving the processing of child-removal cases" (1996) 61.

### 5.2.1.2 Removal of child on court order based on sworn evidence

Section 151 provides for the removal of a child to temporary safe care *on the basis of a court order*.<sup>173</sup> It is formulated as follows:

- “(1) If, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2).
- (2) A presiding officer issuing an order in terms of subsection (1) may also order that the child be placed in temporary safe care if it appears that it is necessary for the safety and well-being of the child.
- (3) When referring the question whether the child is in need of care and protection in terms of subsection (1) or when making an order in terms of subsection (2), the children's court may exercise any of the functions assigned to it in terms of section 50(1) to (3).<sup>174</sup>
- (4) An order issued in terms of subsection (2) must identify the child in sufficient detail to execute the order.
- (5) A person authorised by a court order may, either alone or accompanied by a police official -
- (a) enter any premises mentioned in the order;
  - (b) remove the child from the premises; and
  - (c) on those premises exercise any power mentioned in section 50(3)(a) to (d).

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<sup>173</sup> Own emphasis for the sake of clarity in the light of comparative analysis with the Netherlands.

<sup>174</sup> See the discussion later in this section.

- (6) A police official referred to in subsection (5) may use such force as may be reasonably necessary to overcome any resistance against the entry of the premises contemplated in subsection (5)(a), including the breaking of any door or window of such premises: provided that the police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.
- (7) The person who has removed a child in terms of the court order must -
- (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
  - (b) within 24 hours refer the matter to a designated social worker for investigation in terms of section 155(2); and
  - (c) report the matter to the relevant provincial Department of Social Development.
- (8) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the safety and well-being of the child as the first priority”.<sup>175</sup>

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Compare with the equivalent in the (repealed) Child Care Act 74 of 1983, section 11(2) which dealt with removal on sworn information resulting in the issue of a warrant. The text was as follows: “(2) If it appears to any commissioner of child welfare on information on oath given by any person that there are reasonable grounds for believing that any child who is within the area of his jurisdiction has no parent or guardian or that it is in the interest of the safety and welfare of any child who is within the area of his jurisdiction that he be taken to a place of safety, that commissioner may issue a warrant authorising any policeman or social worker or any other person to search for the child and to take him to a place of safety, to be there kept until he can be brought before a children's court.” The similarity lies mainly therein that a presiding officer needs to grant a court order for the removal of a child to temporary safe care on the basis of evidence given on oath or affirmation. Section 151 is better formulated and provides much more detail which contributes to legal certainty. However, no reference has been made to the important matter of bringing a child before the children's court. It is submitted that it is of utmost urgency that after the removal of a child the court pronounces on the correctness of this far-reaching intervention. It is most unfortunate that this has been omitted. See also the discussion on the *Chirindza* case later in this section.

Thus, if, on evidence given by any person under oath or affirmation before a children's court, it appears that a child is in need of care and protection, the presiding officer is under the statutory obligation to refer the matter to a designated social worker<sup>176</sup> for investigation into the question as to whether or not the child is in need of care and protection. In addition, where a presiding officer refers a matter for investigation, he or she has the discretion, in terms of section 151(2), to simultaneously order that the child be placed in temporary safe care pending the investigation, but only where this appears to be necessary for the safety and well-being of the child concerned. In this regard regulation 53 is relevant; a person authorised by a court order, a designated social worker, or a police official who removes a child to temporary safe care must complete Form 36 and submit it to the temporary safe care.<sup>177</sup> It is interesting to note that the person or police official concerned must give the relevant parent, guardian, care-giver, next of kin and a number of professionals, access to the child at all reasonable times, subject to the terms of the court order and provided that access is in the child's best interests.<sup>178</sup>

The main issue revolves around the question whether eventually the children's court can come to the conclusion whether or not the child concerned can be formally found to be in need of care and protection. Although on the basis of section 155(9) the court is first and foremost obliged to have regard to the report of the designated social worker, the court may exercise any of the functions assigned to it in terms of section 50(1) to (3).<sup>179</sup> The court may thus order any person to carry out an investigation or further investigation that may assist the

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<sup>176</sup> For a definition of "designated social worker", see section 1(1) of the Children's Act.

<sup>177</sup> Regulation 53 of the DSD regulations is applicable where a child is placed in temporary safe care in terms of a children's court order in terms of section 151(2) or without a court order in terms of section 152(1). Form 36 concerns the authority for removal of child to temporary safe care. On the basis of regulation 53(2)

<sup>178</sup> See DSD regulation 53(2). The list of professionals includes the following: social worker, religious counsellor, medical practitioner, psychologist, psychiatrist, legal representative, child and youth care worker or any other person, approved by the designated social worker. Regulation 53(2)(b) provides that the designated social worker needs to be notified immediately in case of any difficulties with the placement concerned and of any change in the child's residential address.

<sup>179</sup> The written report of the social worker needs to be submitted to the court within the time framework provided for in the Children's Act. Section 155(2) determines that the social worker must investigate the matter and within 90 days compile a report and recommendations in accordance with DSD regulation 55 and Form 38, on whether the child is in need of care and protection. For a discussion on the court's finding on whether or not a child is in need of care and protection, see later in this section. For a discussion on the various court orders, see section 4.5.1.

court in deciding the question as to whether or not the child is in need of care and protection. This begs the question whether the Children's Act actually maintains a predominantly inquisitorial (or accusatorial) approach.

In the previous chapter reference was made to the informal proceedings and non-adversarial approach in the children's courts. Zaal shows that the (predominantly) inquisitorial approach for the children's courts will be most beneficial. The latter has the potential of ensuring the full participation of the (vulnerable) affected parties and legal representatives, which in effect contributes to the availability of relevant information. Consequently, this enhances the quality of both the proceedings and the outcome thereof. It is agreed with Zaal that in order to achieve this, the regulations to the Children's Act should be supplemented, and in addition, state the purpose. The latter should refer to the fact that the direct interaction between the presiding officer and the parties increases the possibility of obtaining all relevant information and contributes to the finding of the most adequate decision. Zaal also recommends additional training for officers of the court on how to conduct hearings, which deal with matters like questioning techniques and evidence-related matters.<sup>180</sup>

Section 50 will usually come to the fore when the court is of the opinion that the child is not *per se* in immediate danger but where an investigation is required.<sup>181</sup> Any of these professionals need to furnish the court with a report and recommendations. Furthermore, such an investigation or further investigation should be carried out in accordance with any prescribed procedures and subject to any directions and conditions as determined in the court order.<sup>182</sup> With regard to the latter, DJCD regulation 11<sup>183</sup> is relevant in combination

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<sup>180</sup> Zaal *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system* (LLD thesis 2008 University of Witwatersrand) 238-244.

<sup>181</sup> See Bosman-Sadie & Corrie (2010) 74. Compare with section 152 which deals with the so-called emergency removal, in other words, where the child is in immediate danger.

<sup>182</sup> See section 50(2)(a) and (b).

<sup>183</sup> The Regulations of the Department of Justice and Constitutional Development GN R250/2010. Regulation 11 deal with investigations, and for the sake of completeness the full text reads as follows:

- “(1) An order of a court in terms of section 50 of the Act to carry out an investigation or further investigation must be on a form which corresponds substantially with Form 9 of the Annexure.
- (2) A person who has been ordered by a court in terms of section 50(1) of the Act to carry out an investigation or further investigation may, for the purpose of performing his or her functions -

with Form 9 of the Annexure, the former which provides for details pertaining to the investigation, any written records to be kept, and finally, the written report to be submitted to the court within 10 days after the conclusion of the investigation. It speaks for itself that reports like these have to be submitted before the date of the hearing,<sup>184</sup> in order to be of any significance to the court's deliberations on deciding the matter whether or not the child concerned is in need of care and protection. Furthermore, in terms of section 50(3):

“the court order may authorise a designated social worker or any other person authorised by the court to conduct the investigation or further investigation to enter any premises mentioned in the court order, either alone or in the presence of a police official, and on those premises -

- (a) remove a child in terms of section 47 and 151;
- 

- (a) question any person who is likely to give material or relevant information about any matter that the court ordered him or her to investigate; and
  - (b) request a person to identify himself or herself to the satisfaction of the investigator.
- (3) An investigator may, in investigating a matter so ordered by a court and with due consideration to expediting the investigation of that matter, request any person to -
- (a) meet with him or her at a specific time and place on a specific date; and
  - (b) provide him or her at the meeting, with information relating to the matter and documentary proof of the information, if applicable.
- (4)(a) A request referred to in subregulation (2) may be made in the manner the investigator deems fit.
- (b) An investigator must keep a written record of -
    - (i) the manner in which the request referred to in paragraph (a) was made;
    - (ii) any matter he or she investigates;
    - (iii) any meetings held with him or her; and
    - (iv) the outcome of the investigation.
- (5) After the investigator has concluded the investigation ordered by a court he or she must compile a written report which must contain the following information:
- (a) The matter which was investigated;
  - (b) the reason for the investigation;
  - (c) the manner of the investigation; and
  - (d) the outcome of the investigation.
- (6) The investigator must submit the report referred to in subregulation (5) to the court within 10 days after the conclusion of the investigation.”

<sup>184</sup>

See Bosman-Sadie & Corrie (2010) 73.

- (b) investigate the circumstances of the child;
- (c) record any information; and
- (d) carry out any specific instruction of the court”.

Returning to section 151, on which basis the presiding officer refers a matter to a designated social worker for investigation and where the child is to be placed in temporary safe care, such an order must identify the child in sufficient detail to execute the order.<sup>185</sup> Pertaining to the entering of any premises and the use of force in order to overcome any resistance in this respect, it is important to mention that this is only justified where this, given the circumstances and after an audible demand of admission to the premises and the reason therefore, would be reasonably necessary. The person who has removed the child on the basis of the court order has the statutory duty to:

- “(a) inform the parent, guardian or care-giver, of the removal of the child, without delay but within 24 hours, if that person can readily be traced;
- (b) within 24 hours refer the matter to a designated social worker for investigation in terms of section 155(2); and
- (c) report the matter to the relevant provincial Department of Social Development”.<sup>186</sup>

It is submitted that where the parent(s), guardian or care-giver are readily traceable, 24 hours is too long. Due to the immense impact of the measure of removal on the child and his or her parents, guardian or care-giver, immediate action is required in order to inform the relevant parties.<sup>187</sup>

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<sup>185</sup> Section 151(4). This concerns any personal information regarding the child concerned and his or her whereabouts.

<sup>186</sup> See also Form 36 which provides for the authority for removal of a child to temporary safe care and specifically the notes which contain directions for social workers and police officials.

<sup>187</sup> Note 1C, under “General” at the end of Form 36 states that, the parent, guardian or care-giver



However, no adequate mechanism is included in sections 151 and 152 in order to provide for the judicial review of the removal, which was rightfully challenged in the case *Chirindza and Others v Gauteng Department of Health and Social Welfare And Others*.<sup>188</sup> The facts were as follows: social workers of the Department of Social Development, together with officials from the City of Tshwane Metropolitan Municipality, had planned a “raid” on the people who had children with them or near them, whilst begging, which was scheduled for Friday 13 August 2010. Beforehand they had published a pamphlet informing the public of this action. They had planned to be accompanied by police, wearing neon coloured vests and had informed the media, who were present to record the event on camera.

However, no court order for the removal of any children was obtained beforehand.<sup>189</sup> On this particular Friday (13 August 2010), the applicants were both in the area Sunnyside in Pretoria, at an intersection just outside a take-away restaurant. As a daily routine, Mr Chirindza was applying his trade as a shoe repairer. Although his daughter of three-years-old was usually looked after by her mother, on this particular day he had the child with him because the mother was in hospital giving birth. The second applicant in the case, Ms M, was in the same area, and begs for a living. Due to the fact that she is blind, she and her two children (aged one and four-years-old) were accompanied by an assistant.

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must also be informed of the date, time and place for the review of the detention of the child/children and the right to furnish the court with information which must be the first court day after the removal of the child. The latter refers clearly to the first court day after the removal, which does not include a Saturday, Sunday or public holiday, see the definition of “day” in chapter 1 of the DJCD regulations GN R250/2010. However, since no reference is made to a review hearing pertaining to the removal/detention in Form 36, it is unclear when the judicial review of the removal takes place. Surely, this should take place as soon as possible after the removal and placement of a child. See for a comparison sections 11(1) and (2) and 12 in conjunction with regulation 9 in terms of the (repealed) Child Care Act 74 of 1983. In terms of the latter a child had to be brought before the children's court as soon as possible (usually within 48 hours), and after hearing the parties, the presiding officer would confirm the detention or set the authority aside and direct that the child be restored to the custody of the person in whose custody the child was immediately before the removal. In terms of the Children's Act, a reasonable time frame for the judicial review of the removal or detention seems to be omitted or overlooked by the legislature. See the discussion on the sections 151 and 152 of the Children's Act in conjunction with the *Chirindza* case [2011] 3 All SA 625 (GNP). Form 37 merely provides for the notification to the parent, guardian or caregiver to attend the children's court proceedings where a decision will be made as to whether or not the child is in need of care and protection, which can only be established by the children's court after the said investigation by the social worker in terms of section 155(2).

<sup>188</sup> [2011] 3 All SA 625 (GNP). See also the discussion of the Constitutional Court case later in this section.

<sup>189</sup> Apparently it was argued that the procedure of obtaining a court order was required for the removal of children, save in emergency situations, see paragraph 4.

Subsequently, the children of the applicants were among the children who were removed by the social workers.<sup>190</sup> An application to the high court was brought on an urgent basis with the purpose of restoring the children of the applicants to the care of their parents. At the court hearing on 24 August 2010,<sup>191</sup> Preller J made the order that the child of the first applicant was to be immediately returned to the parents, and that the children of second applicant should remain at the place of safety for five weeks, pending an investigation whether they were in need of care and protection. In the meantime these two children had been returned into the care of the second applicant and her husband, under the supervision of a social worker.

Fabricius J, held that section 151(7), as formulated in the Children's Act, was inadequate since it failed to provide for an appropriate mechanism for the judicial review of a removal decision; it needed to be extended on the basis of "reading in" what was lacking and what was required.<sup>192</sup> Consequently, an additional paragraph was formulated in order to strengthen the rights of the affected children and parents. On this basis, the person who had removed a child in terms of the court order was required to perform additional duties.<sup>193</sup> It was held that sections 151 and 152 be declared unconstitutional to the extent that they fail to provide for a child who has been removed in terms of those sections and placed in temporary safe care to be brought before the children's court for a review of the placement in temporary safe care.

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<sup>190</sup> Fabricius J, indicated in the judgement that the traumatised first applicant had been searching for his daughter over the weekend, only to have made contact with Lawyers for Human Rights the following Monday. Moreover, the second applicant had been placed in a school for the blind and, since her children were placed in a place of safety, she had not been able to continue with breastfeeding her 1-year-old child.

<sup>191</sup> Eleven days after the removal of the children, the court hearing took place.

<sup>192</sup> See paragraph 16 of the *Chirindza* case, in which it is outlined that in this context the relevant court must define with sufficient precision how the statute ought to be extended in order to comply with the Constitution.

<sup>193</sup> On the basis of the high court ruling, section 151(7) read as follows: "The person who has removed the child on the basis of a court order has the statutory duty to: (a) without delay but within 24 hours inform the parent, guardian or care-giver (if that person can readily be traced); (b) within 24 hours refer the matter to a social worker for investigation in terms of section 155(2); and (c) report the matter to the relevant provincial Department of Social Development; and in addition (d) within 48 hours, place the matter before the children's court having jurisdiction for a review of the removal and continued placement of the child, give notice of the date and time of the review to the child's parent, guardian or care-giver, and cause the child to be present at the review proceedings where practicable." See paragraph 18 of the *Chirindza* case.

Subsequently, the high court judgment was set down in the Constitutional Court for confirmation.<sup>194</sup> In January 2012, the Constitutional Court decided the case *C and Others v Department of Health and Social Development, Gauteng and Others*.<sup>195</sup> In short, the Constitutional Court confirmed the declaration of invalidity of the sections 151 and 152 of the Children's Act made by the North Gauteng high court, due to the failure to provide for the automatic review by a court in the presence of the child and parents. It was held that, pending the possible amendment of the Act, some provisions needed to be read-in, in order to provide for the necessary relief. The Constitutional Court nevertheless set the orders in paragraph 18 of the high court judgment aside and replaced them with additional provisions which resulted in the inclusion of the new subsections 151(2A), 152(2)(d) and 152(3)(b).

The court deliberated, amongst others, that,

“... it can never be in the interests of children for their safety or well-being to be endangered. The removal provisions are aimed precisely at preventing this and ensuring that the interests of the children are positively catered for.<sup>196</sup> Despite the tightly defined circumstances in which children can be removed, there exists always the possibility that a removal would be wrongly made”.<sup>197</sup>

The court continued its deliberation by considering:

“It is in the interests of children that an incorrect decision by a court made without hearing the child or the parents, or by a designated social worker or police official be susceptible to automatic review by a court, in the ordinary course, in the presence of the child and the parents. It follows from this that sections 151 and 152 do not provide for this and are therefore constitutionally wanting. Sections 151 and 152 of the Act, though their positive provisions are aimed at the best interests of children, fall short of achieving this result. They therefore limit

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<sup>194</sup> Section 167(5) of the Constitution.

<sup>195</sup> 2012 (2) SA 208 (CC), which was decided on 11 January 2012. See [www.centreforchildlaw.co.za](http://www.centreforchildlaw.co.za), accessed on 26-3-2012.

<sup>196</sup> See paragraph 75 of the case.

<sup>197</sup> See paragraph 76.

the rights contained in section 28(2)".<sup>198</sup>

Subsequently Yacoob J, considered the relevant provisions against the limitation clause in section 36 of the Constitution. He deliberated:

"I stress that it is the limitation that must be justified and not the entire removal provision. There is nothing wrong with these provisions in so far as they authorise removal in the tightly defined circumstances prescribed. The difficulty with these sections lies in the fact that they do not provide for automatic judicial review in the presence of the child and parents".

He considered whether there was any purpose, legitimate or otherwise, to justify this limitation and concluded that there was none. Yacoob J, held that,

".. sections 151 and 152 of the Act are inconsistent with the Constitution because they infringe the rights of children and parents in that they fail to provide for automatic review by a court of any removal ordered or effected in terms of these provisions in the presence of the children and parents concerned".<sup>199</sup>

With regard to determining an appropriate remedy, Yacoob J expressed the opinion that the only way forward was reading-in. Based on the aforementioned the court made the following order:

1. Condonation is granted.
2. The declaration of invalidity of section 151 and 152 of the Children's Act 38 of 2005, made on 27 May 2011 by the North Gauteng High Court under Case No. 47723/2010, is confirmed.

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<sup>198</sup> See paragraph 77. Yacoob J continued to evaluate the law against the requirements of section 34 of the Constitution, which provides for everyone's right to access to the courts. In this regard he considers that "the child has the right to challenge the appropriateness of his or her removal, whereas parents, in the exercise of their duty to care for the child, have the duty to challenge the correctness of the removal", see paragraph 79.

<sup>199</sup> See paragraph 83.

3. The orders of the High Court in paragraph 18 of its judgment are set aside and replaced with the orders in paragraphs 4 to 6 below.
4. An additional paragraph to be numbered 2A is read-in to section 151 of the Children's Act 38 of 2005 as follows:
  - “(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:
    - (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
    - (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court”.

In other words, where a child has been removed to temporary safe care by a court order, the court ordering the removal is obliged to simultaneously refer the matter to a designated social worker. The court must inform the social worker of the following two responsibilities:

- (i) To place the removal before the children's court for review, before the close of business the day after the removal; and
- (ii) To ensure that the child and the parents, guardian or care-giver are present in court (unless this is impracticable).<sup>200</sup>

It is submitted that the mere presence will not do. The child and the parents, guardian or care-giver should be given the opportunity to be heard (directly) and those views given appropriate consideration. It is hoped that the children's court will interpret sections 10 and 61 of the Children's Act widely in order to ensure that most children will be given a chance to give direct input.

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<sup>200</sup> It still needs to be seen under what circumstances the absence of any of these affected parties will be considered genuinely “impracticable”.

The Constitutional Court order continued with the following:

5. An additional paragraph to be numbered (d) is read in to section 152(2) of the Act as follows:
  - “(d) ensure that:
    - (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
    - (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court”.
  
6. Section 152(3)(b) is severed and replaced by a section reading:
  - “(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:
    - (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;
    - (ii) the child concerned and the parents, guardian or care-giver as the case may be, are, unless this is impracticable, present in court; and
    - (iii) the investigation contemplated in section 155(2) is conducted.”

In other words, where a child has been removed without a court order,<sup>201</sup> a distinction must be drawn between a removal by a social worker, in terms of section 152(2) and a removal conducted by a police official, which is regulated by subsection (3).<sup>202</sup> The latter provisions

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<sup>201</sup> When a child has been removed by a designated social worker or a police official, he or she will be placed in temporary safe care. “Temporary safe care” in relation to a child, means care of a child in an approved child and youth care centre, shelter or private home or any other place, 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, see section 152(1) in conjunction with section 1(1).

<sup>202</sup> It has to be kept in mind that section 152(8) prescribes that any person who removes a child

will be further discussed next.<sup>203</sup>

Returning to section 151, which aims to regulate the removal of a child to temporary safe care on the basis of a court order, subsection 151(2A) provides that:

“... the court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

- (i) the removal is placed before the children's court for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court”.

A similar additional provision was suggested for the emergency removal to be read-in, which resulted in the inclusion of subparagraph (d). First of all, the social workers in the field of care and protection are required to be informed about procedural aspects and need to be sufficiently trained. Nevertheless, where the court has already been involved in issuing the removal order, it would, in my opinion, have been more desirable to instruct the clerk of the court to place the removal before the children's court for review, before the expiry of the next court day after the removal. In addition, although it is commendable that sections 151(2A)(ii) and 152(2)(d)(ii) provide that the child concerned, the parents guardian or care-giver, in principle should be present at the review hearing, this does not explicitly confer the right to be heard and thus offers a discretion, which is undesirable. For the sake of compliance and consistency it is recommended to include a provision which specifically states that the court will not come to any decision before hearing the affected parties, including the child.

Finally, it is interesting to note that section 151(8) dictates that the best interests of the child should be the determining factor in any decision whether a child in need of care and

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must comply with the prescribed procedure. If a (part of the) procedure is not adhered to, subsections (5)-(7) are applicable. See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act (2010)* 173.

<sup>203</sup>

See section 5.2.1.3 which deals with the emergency removal.

protection should be removed and placed in temporary safe care, and that all relevant facts must for this purpose be taken into account, with the safety and well-being of the child as the first priority.<sup>204</sup>

### 5.2.1.3 The emergency removal

Section 152 provides for the so-called “emergency removal”; in other words the removal of a child to temporary safe care *without a court order*,<sup>205</sup> which is formulated as follows:

“(1) A designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing -

(a) that the child -

(i) is in need of care and protection; and

(ii) needs immediate emergency protection;

(b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and

(c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being.

(2) If a designated social worker has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the social worker must -

(a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and

(b) not later than the next court day inform the relevant clerk of the children's

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<sup>204</sup> See sections 7 and 9 of the Children's Act. For a detailed discussion on the child's best interests in terms of the Children's Act, see section 2.2.1.4 and 3.1.3.

<sup>205</sup> Own emphasis for the sake of clarity in the light of comparative analysis with the Netherlands.



- court of the removal of the child; and
- (c) report the matter to the relevant provincial Department of Social Development.
- (3) If a police official has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the police official must -
- (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
  - (b) refer the matter to a designated social worker for investigation contemplated in section 155(2); and
  - (c) without delay but within 24 hours notify the provincial department of social development of the removal of the child and of the place where the child has been placed; and
  - (d) not later than the next court day inform the relevant clerk of the children's court of the removal of the child.
- (4) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the possible removal of the alleged offender in terms of section 153 from the home or place where the child resides, and the safety and well-being of the child as the first priority.
- (5) Misuse of power referred to in subsection (1) by a designated social worker in the service of a designated child protection organisation -
- (a) constitutes unprofessional or improper conduct as contemplated in section 27(1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker; and
  - (b) is a ground for investigation into the possible withdrawal of that organisation's designation.

- (6) Misuse of power referred to in subsection (1) by a designated social worker employed in terms of the Public Service Act or the Municipal Systems Act constitutes unprofessional or improper conduct as is contemplated in section 27(1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker.
- (7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act, 1995 (Act No. 68 of 1995).
- (8) Any person who removes a child must comply with the prescribed procedure”.<sup>206</sup>

In terms of this section a child can be instantly removed from the family environment where the child is in imminent or immediate danger and where obtaining a court order would put the child's safety and well-being at serious risk. In other words, a child may only be removed from the family environment or place of residence without a court order if there are reasonable grounds for believing that the child is in need of care and protection and needs immediate emergency protection. It is submitted that the open norm “reasonable grounds for believing” by a professional should not be taken too lightly.

Section 12(1) of the repealed Child Care Act<sup>207</sup> contained the phrase “reason to believe”, which was discussed in detail by Robinson.<sup>208</sup> The formulation in section 152, however, is more concise compared with its predecessor. It is submitted that section 152 should be strictly interpreted by all professionals. In other words, by any social worker or police official involved, but also by the children's court reviewing the removal decision. Strict interpretation

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<sup>206</sup> Compare with the equivalent in the (repealed) Child Care Act 74 of 1983, section 12(1), which read as follows: “Any policeman, social worker or authorised officer may remove a child from any place to a place of safety without a warrant if that policeman, social worker or authorised officer has reason to believe that the child is a child referred to in section 14(4) and that the delay in obtaining a warrant will be prejudicial to the safety and welfare of that child.”

<sup>207</sup> 74 of 1983.

<sup>208</sup> See “Artikel 12(1) van die Wet op Kindersorg en die posisie van die maatskaplike werker” (1992) *THRHR* 75-76. It was concluded, in the light of any factual circumstances, that: (a) there have to be facts present, which are of such a nature that this gives rise to an impression or belief for the social worker that the child would be a child in need of care; (b) these facts have to be reasonable, in other words, the facts should in all reasonableness give rise to an impression or belief for the social worker; and (c) it would be the discretion of the court to determine whether the impression or belief of the social worker would be “reasonable held”.

would ensure a relative degree of precaution in dealing with these sensitive and far-reaching measures and implement the principle that removal will indeed be a measure of last resort and for the shortest duration possible.<sup>209</sup> Moreover, section 152 also states explicitly that any person removing a child has a statutory duty to comply with the prescribed procedure, or will otherwise encounter repercussions.<sup>210</sup>

Where a designated social worker or police official has removed a child and has placed the child in temporary safe care without a court order, this person must act in accordance with DSD regulation 53(1)(b): Form 36, which provides for the authority for removal of a child to temporary safe care needs to be completed and submitted as soon as possible.<sup>211</sup> Moreover, note 1A and B determine that a social worker or police official, after removal of the child/children, needs to deliver or hand a true copy of such authority to:

- “(1) the parent/guardian/care-giver who can readily be traced within 24 hours;
- (2) the relevant clerk of the children's court by not later than the next court day; and
- (3) the closest office of the relevant provincial Department of Social Development within 24 hours.

In addition, a police official has to deliver or hand a true copy of the authority to

- (4) a designated social worker within 24 hours”.

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<sup>209</sup> See section 28(1)(g) of the Constitution. A similar standard is prescribed in various international documents. For example, Article 37(b) read in conjunction with Rule 19 of the *Beijing Rules* (UN Resolution 40/33 of 29 November 1985), Rule 1 and 2 of the *Havana Rules* (United Nations Resolution 45/113 of 14 December 1990), paragraphs 79 and 80 of *General Comment No. 10* (2007) (CRC/C/GC/10 of 25 April 2007), paragraph 13 of the Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children, 18 June 2007, and paragraph 13 of the *Guidelines for the Alternative Care of Children* (United Nations resolution A/RES/64/142 of 24 February 2010). For a more detailed discussion, see sections 2.2.3.4 and 5.1.2.

<sup>210</sup> The so-called misuse of a power by certain professionals will be reprimanded, see section 152(5)-(8).

<sup>211</sup> Attached to Form 36 are notes 1 and 2, which contain directions for social workers and police officials. See the Consolidated Forms in terms of the Regulations under the Children's Act, 2005 and the Children's Amendment Act, 2007.

Furthermore, note 1C provides the following under “General”:

- “(1) The parent/guardian/care-giver must be informed of the date, time and place of the review of the detention of the child/children and the right to furnish the court with information which must be the first court day after the removal of the child. The person issuing this authority must bring the child/children or cause the child/children to be brought before the children's court of the district of removal;
- (2) The place where the child is placed in temporary safe care must report to the children's court concerned if the placement is not confirmed by court order within seven days”.

However, the status of these aforementioned notes is unclear, as they are placed at the end of Form 36.<sup>212</sup>

Section 152(2) provides that where a designated social worker has removed a child in terms of the requirements for an emergency removal on the basis of section 152(1), he or she must:

- “(a) inform the parent, guardian or care-giver as soon as possible but maximum within 24 hours;<sup>213</sup>
- (b) inform the relevant clerk of the children's court, not later than the next court day; and
- (c) report the matter to the provincial Department of Social Development”.

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<sup>212</sup> The contents of these notes are interesting in relation to the discussion on the *Chirindza* case, see below in this section.

<sup>213</sup> As it was submitted above, 24 hours is too long where a parent, guardian or care-giver can be readily traced. It is submitted that it should not be accepted too easily that a person is not readily traceable. It will depend on the facts and circumstances whether subsection 2(a) is adhered to.

However, in the case *C and Others v Department of Health and Social Development, Gauteng and Others*,<sup>214</sup> the Constitutional Court ordered the inclusion of the following paragraph, namely

“(d) ensure that:

- (i) the removal is placed before the Children's court for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court”.

The latter thus imposes an additional duty on the social worker, which ensures that the lawfulness of the removal will be pronounced on by the court and in the presence of the affected parties. This implies that social workers in the field of care and protection are expected to know which (procedural) steps need to be taken. It is submitted that in this regard provision should be made for adequate training of these professionals.<sup>215</sup> In addition, although it is commendable that both sections 151(2A)(ii) and 152(2)(d)(ii) provide that the child concerned and the parents, guardian or care-giver in principle should be present at the review hearing, this does not explicitly confer the right to be heard and thus offers a discretion, which is undesirable. For the sake of compliance and consistency it is recommended that section 155(1) of the Children's Act be amended in order to specifically include the duty for the court that it will not decide on the question as to whether the child is a child in need of care and protection before hearing the affected parties, including the child.<sup>216</sup>

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<sup>214</sup> 2012 (2) SA 208 (CC).

<sup>215</sup> It should be noted that the misuse of a power by a designated social worker in the service of a designated child protection organisation has two consequences. It constitutes not only unprofessional or improper conduct as contemplated in section 27(1)(b) of the Social Service Professions Act 110 of 1978, but also may be a ground for investigation into the possible withdrawal of that organisation's designation, see section 152(5). In case a designated social worker is employed in terms of the Public Service Act or the Municipal Systems Act, section 27(1)(b) of the Social Service Professions Act 110 of 1978 is also applicable.

<sup>216</sup> For the formulation of the proposed amendment to section 155(1) of the Children's Act, see chapter 6.

Section 152(2)(a) has to be read in conjunction with DSD regulation 54, which deals with the bringing of a child before children's court to decide whether the child is in need of care and protection.<sup>217</sup> However, again no referral is made to a return date for the judicial review of the removal decision. Moreover, Form 37<sup>218</sup> concerns the notification by the clerk of the court to a parent, guardian or care-giver to attend the children's court proceedings, where a decision will be made as to whether the child concerned is in need of care and protection, followed by the date, the time and the place of hearing.

Section 152(3) also allows a police official to remove a child without a court order, but only if the requirements in section 152(1)(a) to (c) are met.<sup>219</sup> After removal of the child and

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<sup>217</sup> DSD regulation 54 reads as follows:

- “(1) A child -
- (a) whose placement in temporary safe care has been confirmed by a presiding officer; or
  - (b) who is not in temporary safe care but is the subject of an investigation as to whether he or she is in need of care and protection;
  - (c) who is a victim of trafficking and has been returned to the Republic as contemplated in section 286(1) of the Act; or
  - (d) who is a victim of trafficking and is found in the Republic as contemplated in section 289(1) of the Act,

must be brought or caused to be brought before the children's court of the district where the child resides, is found or happens to be, by a designated social worker or, in the case of a child referred to in paragraph (b), be brought by his or her parent, guardian or care-giver, for a decision on whether the child is in need of care and protection by not later than 90 days after -

- (a) the removal of the child to temporary safe care, in the case of a child contemplated in paragraph (a);
  - (b) the commencement of the investigation, in the case of a child contemplated in paragraph (b);
  - (c) the date of return of the child to the Republic, in the case of a child contemplated in paragraph (c); or
  - (d) the date upon which the child was found in the Republic, in the case of a child contemplated in paragraph (d).
- (2) The parent, guardian or care-giver of a child as contemplated in sub-regulation 1(a), (b) or (c) must be notified by the clerk of the court to attend proceedings of the children's court where a decision will be made as to whether the child is in need of care and protection in a form substantially corresponding with Form 37.”

<sup>218</sup> As referred to in DSD regulation 54 (GN R261/2010).

<sup>219</sup> Removal of a child to temporary safe care without a court order will only be possible if the police official has reasonable grounds for believing - (a) that the child is in need of care and protection and needs immediate emergency protection; (b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise

placement in temporary safe care, the police official has specific statutory duties. Section 152(3) has also been affected by the *Chirindza* case<sup>220</sup> and the subsequent case *C and Others v Department of Health and Social Development, Gauteng and Others*.<sup>221</sup> The Constitutional Court ordered the original section 152(3)(b) to be severed and replaced by a section ensuring the referral of the matter to a social worker, who in turn has the duty to have the removal placed before the children's court for review, in the presence of the affected parties and ensuring that the investigation in terms of section 155(2) is conducted.

Therefore, the police official has the following statutory duties in terms of section 152(3):

- “(a) without delay but within 24 hours, inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
- (b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:
  - (i) the removal is placed before the children's court for review before the expiry of the next court day after the referral;
  - (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and
  - (iii) the investigation contemplated in section 155(2) is conducted.
- (c) without delay but within 24 hours notify the provincial Department of Social

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the child's safety and well-being; and (c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being.

<sup>220</sup> [2011] 3 All SA 625 (GNP) of 27 May 2011. Fabricius J, held that the section as formulated in the Children's Act was inadequate since it failed to provide for an appropriate mechanism for the judicial review of a removal decision, and subsequently expanded on the section on the basis of “reading in” what was lacking and what was required. It was held that section 152(3)(b) would read as follows: after removal of the child, the police official must (b) without delay but within 24 hours refer the matter to a designated social worker to place the matter before the children's court for review as contemplated in section 152(2)(d) and for investigation contemplated in section 155(2). See paragraph 18 of the judgment.

<sup>221</sup> 2012 (2) SA 208 (CC).

Development of the removal of the child and of the place where the child has been placed; and

- (d) not later than the next court day inform the relevant clerk of the children's court of the removal of the child".

In other words, where the statutory duties of a social worker after removal of the child seem similar to those of a police official, the latter needs, in addition, to inform the designated social worker. Since due to the emergency situation the court has not been involved yet, it is probably the most feasible option to assign the important duties under (i), (ii) and (iii) to a designated social worker to ensure that the court will pronounce on the matter shortly. However, some caution is required pertaining to the standard of the expertise which is required to place the matter before the children's court. It is submitted that adequate training needs to be provided to equip and prepare these professionals, thereby ensuring a proper standard of performance.

It is nevertheless clear that where a child has been removed, especially in the absence of a court order to this effect, the child concerned should be brought before a children's court as soon as possible. Matthias and Zaal rightfully indicate that it would be a violation of the rights of the child and those of the parents to keep them separated against their will without a court order, for whatever period of time.<sup>222</sup> The court has to pronounce on the facts, in line with the national and international law, whether or not the removal decision was justified.<sup>223</sup> In fact, this should be dealt with as a matter of urgency.

To sum up, based on the decision of the Constitutional Court, a social worker has the following duties in case of a so-called "emergency-removal", namely,

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<sup>222</sup> Matthias & Zaal in *Child Law in South Africa* (2009) 168.

<sup>223</sup> Article 9(1) of the CRC states that "states parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." See also Article 19 of the African Children's Rights Charter, which is similar in content. See also the discussion in section 2.2.3.1. See also section 28(1)(b) of the Constitution which provides that every child is entitled to family care or parental care or to appropriate alternative care when removed from the family environment. Section 39(1)(b) states that "when interpreting the Bill of Rights, a court must consider international law".



- “(a) without delay but within 24 hours inform the parent, guardian or care-giver of the child's removal (if that person can readily be traced); and
- (b) not later than the next court day inform the relevant clerk of the children's court of the removal of the child; and
- (c) report the matter to the relevant provincial Department of Social Development; and ensure that:
  - (i) the removal is placed before the children's court for review, before the expiry of the next court day after the removal; and
  - (ii) the child concerned and the parents, guardian or care-giver are present in court (unless this is impracticable)”.

However, if a police official has removed a child, section 152(3) is applicable, in terms of which he or she has the following duties:

- “(a) without delay but within 24 hours inform the parent, guardian or care-giver of the child's removal;
- (b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker, who must ensure that:
  - (i) the removal is placed before the children's court for review (before the expiry of the next court day after the referral;
  - (ii) the child concerned and the parents, guardian or care-giver are present in court (unless this is impracticable).
  - (iii) the investigation contemplated in section 155(2) is conducted.
- (c) without delay but within 24 hours notify the provincial department of social development of the child's removal and of the place where the child has been placed;

and

- (d) not later than the next court day inform the relevant clerk of the children's court of the child's removal".<sup>224</sup>

It is clear that both subsections correspond to a large extent, although the differences should be noted.<sup>225</sup> Thus in terms of subsection (b) the police official merely has to refer the matter as soon as possible to a designated social worker, after which the latter person is in charge of ensuring that a hearing for the review of the removal decision takes place in the presence of the child and the parents/guardian or care-giver. Once more it needs to be stressed that it is of the utmost importance that the courts give children who are able to express themselves (verbally), the opportunity to present their views and that these views are given due consideration.<sup>226</sup> After all, Article 12 of the CRC does not impose any age limit on the right of the child to be heard.<sup>227</sup> It is submitted that the direct hearing of children should be prioritised in these far-reaching decisions.<sup>228</sup>

Since the original formulation of the sections 151 and 152 of the Children's Act 38 of 2005 did not provide for the judicial review of removal and placement decisions, the importance of the abovementioned cases lies thus therein that they raise and address the issue of judicial

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<sup>224</sup> Misuse of a power to remove a child without a court order by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act 68 of 1995, see section 152(7).

<sup>225</sup> The Constitutional Court held that the contents of section 152(3)(b) is severed and replaced the text, which is mentioned in the main text. Moreover, like a social worker, a police official also has to notify the provincial Department of Social Development, but there is a time frame provided: without delay but within 24 hours, and in addition the police official has to give notification of the place where the child has been placed, see *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC).

<sup>226</sup> This has been provided for in section 10 of the Children's Act 38 of 2005. For a more detailed discussion on the right of the child to participate, see section 3.1.4.1.

<sup>227</sup> In actual fact, the Committee has discouraged state parties from introducing age limits either in law or in practice which restricts the child's right to be heard, see CRC/C/GC/12, paragraph 21. See for a more detailed discussion, sections 2.2.1.6 and 3.1.4 above.

<sup>228</sup> This would be in line with *General Comment No. 12* (2009) (CRC/C/GC/12 of 20 July 2009), see paragraph 35. See also paragraph 20, where the Committee on the Rights of the Child is of the view that state parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; "it is not up to the child to first prove her or his capacity". See also paragraphs 53-56, which specifically provide for the child's right to be heard in the case of removal and placement of the child. Even in emergency situations a child has the right to be heard, see paragraph 125.

review of emergency removal of the child. Fabricius J deliberated that the Republic of South Africa was in breach of its obligations in terms of the Articles 9 of the CRC and 19 of the African Children's Rights Charter.<sup>229</sup> In addition, in terms of Article 9(2) of the CRC, all interested parties should be given an opportunity to participate in the proceedings and make their views known, with regard to the separation of a child from her or his parents against their will.

The court's meticulous balancing of interests demands that procedures for participation should be adhered to, and where they are absent or inadequate, they should be created or improved on, in order to do just to the rights of the child(ren) and their parents. In this regard Fabricius J, rightfully emphasised that “the judicial review or a removal and placement decision, is one of the cornerstones of international law and standards relating to the removal of children”, and then concludes “that this critical component of the child protection system is absent in the current system created by the said Children's Act“. Although section 155(2) provides that before a child is brought before the children's court after removal, a social worker has 90 days to compile a report to be submitted to the children's court,<sup>230</sup> this does not equate a return date provision for the hearing pertaining to the removal decision.

Based on the above, it is recommended that an explicit sub-section be included to ensure the direct hearing of the affected parties.<sup>231</sup> However, in the meantime, whilst awaiting the necessary amendments by Parliament, the Constitutional Court has provided some (interim) relief by means of reading-in the (sub)sections as discussed above.<sup>232 233</sup>

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<sup>229</sup> See *Chirindza And Others v Gauteng Department of Health and Social Welfare And Others*, [2011] 3 All SA 625 (GNP), paragraph 5. For a discussion on the Articles 9 of the CRC and 19 of the African Children's Rights Charter, see section 2.2.3.1.

<sup>230</sup> The investigation which results in a report and recommendations serves to inform the court on whether or not a child can be regarded as in need of care and protection. To bring the child before the children's court serves to enable the court to determine whether the child indeed is in need of care and protection, based on hearing the interested parties concerned.

<sup>231</sup> This would be in line with the recommendations of the Committee on the Rights of the Child. See *General Comment No. 12* (2009), section 35.

<sup>232</sup> See *Chirindza And Others v Gauteng Department of Health and Social Welfare And Others*, [2011] 3 All SA 625 (GNP). Also *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC).

<sup>233</sup> With regard to the regulations and Forms, the only reference to a review of the detention by a court is to be found in note 1 C under “General”, at the end of Form 36. Moreover, DSD

It is interesting to note that instead of removing the child from the family environment, Article 152 offers also another solution, which is certainly worth mentioning. Subsection (4) states that the best interests of the child should be the determining factor with regard to any decision whether or not the child is in need of care and protection and his or her removal from the family environment. In this regard the *removal of the alleged offender*<sup>234</sup> from the home or place where the child resides should be considered, instead of the child's removal.<sup>235</sup> The procedure regarding the removal of the alleged offender should take place

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regulation 54(1) only determines that a child should be brought or caused to be brought before the children's court by not later than 90 days after the removal, in order to determine whether or not the child is in need of care and protection.

<sup>234</sup> Own emphasis. This is an innovative measure. A similar possibility is provided for in the Netherlands. From 1 January 2009, an alleged offender may be prohibited from entering the family home. It is interesting to note that the authority to order such a prohibition lies with the mayor of a town or city. Article 2 provides that the mayor has the discretion to impose a temporary prohibition to enter the family home with regard to the person posing a threat to the safety of one or more persons who are sharing the same residence. See the Act on temporary prohibition of entering the family home of 9 October 2008 (Staatsblad 2008 421).

<sup>235</sup> For the sake of completeness, the full text of section 153 reads as follows:

- “(1) A police official to whom a report contemplated in section 110(1) or (2) or a request contemplated in section 110(7) has been made, may, if he or she is satisfied that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, issue a written notice which -
- (a) specifies the names, surname, residential address, occupation and status of the alleged offender;
  - (b) calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing specified in paragraph (c);
  - (c) calls upon the alleged offender to appear at a children's court at a place and on a date and at a time specified in the written notice to advance reasons why he or she should not be permanently prohibited from entering the home or place where the child resides: Provided that the date so specified shall be the first court day after the day upon which the notice was issued; and
  - (d) contains a certificate under the hand of the police official that he or she has handed the original of such written notice to the alleged offender and that he or she has explained to the alleged offender the importance thereof.
- (2) The police official must forthwith forward a duplicate original of the written notice to the clerk of the children's court.
- (3) The mere production to the court of the duplicate original referred to in subsection (2) is *prima facie* proof of the issue of the original thereof to the alleged offender and that such original was handed to the offender.
- (4) The provisions of section 55 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) apply, with the necessary changes, to a written notice handed to an alleged offender in terms of subsection (1). [In other words, the notice needs to state the consequences of the failure to appear in the children's court].
- (5) A children's court before which an alleged offender to whom a written notice in terms

in conformity with section 153.

## 5.2.2 Grounds for removal and placement of a child in terms of Dutch law

It has been outlined that the removal (and placement) of a child potentially constitutes an infringement on the right to respect for family life of the parents and child in terms of Article 8 of the European Convention. Thus in addition to the provisions in the CRC, Article 8 of the European Convention plays an important role in terms of Dutch law. Article 8(2) of the European Convention only permits such interference in specific circumstances,<sup>236</sup> which should be limited, where possible.<sup>237</sup> It should be stressed that, when the question whether or not to remove the child comes to the fore, in the Netherlands the child concerned often has already been placed under supervision by the children's court, due to the fact that the personal circumstances of the child seriously threaten his moral or psychological interests or health. Alternatively, an application may be filed with the children's court for a supervision order combined with the authorisation for the child's removal.

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- of subsection (1) has been issued, appears, may summarily inquire into the circumstances which gave rise to the issuing of the notice.
- (6) The court may, after having considered the circumstances which gave rise to the issuing of the written notice and after having heard the alleged offender -
- (a) issue an order prohibiting the alleged offender from entering the home or place where the child resides or from having any contact with the child, or both from entering such home or place and having contact with the child, for such period of time as the court deems fit;
  - (b) order that the alleged offender may enter the home or the place where the child resides or have contact with the child upon such conditions as would ensure that the best interests of the child are served;
  - (c) order that the alleged offender will be responsible for the maintenance of his or her family during the period contemplated in paragraph (a);
  - (d) refer the matter to a designated social worker for an investigation contemplated in section 155(2); or
  - (e) make such other order with regard to the matter as the court deems fit.
- (7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act, 1995 (Act No. 68 of 1995)".

<sup>236</sup> See sections 2.2.2.3 and 5.1.1.2.

<sup>237</sup> The question arises whether the measure is necessary (subsidiarity) and whether it is the least interfering measure (proportionality), for the shortest duration possible. Article 5(4) of the Act on the Youth Care refers explicitly to these principles. In addition it states that the required care should be offered as close to the residence of the client as possible and for the shortest duration possible.

At this point the Bureau for Youth Care plays a central role, not only with regard to the application and the realisation of the removal, but especially with regard to the issuing of the so-called “indication-decision” or “*indicatie besluit*”.<sup>238</sup> This decision forms the basis for any decision-making pertaining to youth care, including removals, and therefore merits a discussion in more detail. An indication-decision is usually only provided upon the request by a client.<sup>239</sup> However, the Bureau for Youth Care can also make an indication-decision on its own accord upon the request of the public prosecuting authority or the Council for Child Protection, when a removal in the context of a supervision order is required.<sup>240</sup>

Before making the indication-decision, the Bureau for Youth Care has the responsibility to ascertain whether there is a need for assistance regarding care in terms of Article 5(1) of the Act on the Youth Care. Such assistance might be necessary in connection with any problems relating to the raising or upbringing of the child or the child's psychological or psychiatric problems. It also could involve problems of a client who is not the child but which hinders the unimpeded childhood development of the child concerned. On the basis of Article 5(2)<sup>241</sup> the provincial Bureau for Youth Care<sup>242</sup> thus determines the kind of youth care which should be provided. This could entail the following: youth care provided in terms of the Act on the Youth Care,<sup>243</sup> youth care provided in terms of the Exceptional Medical Expenses Act,<sup>244</sup> or youth care in terms of Article 11a of the Youth Custodial Institutions

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<sup>238</sup> In terms of the Act on the Youth Care the Bureau for Youth Care is the central port of entrance to any form of youth care to which a client may be entitled. See Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-11.

<sup>239</sup> “Client” has been defined as: the child, his or her parents or step parent or others who bring up the child and care for the child, see Article 1(d) of the Act on the Youth Care.

<sup>240</sup> See Article 7(6)(b) of the Act on the Youth Care; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>241</sup> Act on the Youth Care.

<sup>242</sup> To the exclusion of others.

<sup>243</sup> See Article 5(2)(a) of the Act on the Youth Care. This involves the treatment or mentoring, residence (foster care or institutional care) or observation diagnostics. The latter includes an examination of the child, which findings form the basis for an “indication-decision” of the Bureau for Youth Care on the most appropriate kind of care or assistance for the particular child. For a more detailed outline, see the Articles 2-6 of the Implementation Decree to the Act on the Youth Care.

<sup>244</sup> In Dutch: *de Algemene Wet Bijzondere Ziektekosten* (AWBZ). This includes mental health care for children and care for intellectually challenged children, see Article 5(2) of the Act on the Youth Care. See also Asser/De Boer *Personen- en Familierecht* (2010) 767.

Act.<sup>245</sup>

For the purpose of this thesis the focus will be on the first-mentioned possibility, namely youth care in terms of the Act on the Youth Care. The entitlement to youth care includes youth assistance,<sup>246</sup> which consists of:

- (a) the treatment or assistance of a child with the aim to provide relief, to diminish or prevent the aggravation of his or her psychosocial, psychological or behavioural problems or to learn how to deal with the consequences of these problems,<sup>247</sup>
- (b) residence in a suitable pedagogic climate with a foster parent or in a residential setting;<sup>248</sup> and
- (c) observation diagnostics, which include examinations of the child for the purpose of obtaining information relevant for making an indication-decision by the Bureau for Youth Care.<sup>249</sup>

In the case of an authorisation for the removal of the child, the envisaged care usually involves the placement in foster care or institutional care, of which the actual placement in principle will be determined by the Bureau for Youth Care.<sup>250</sup> It should be noted that the

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<sup>245</sup> In Dutch: *Beginselenwet Justitiële jeugdinrichtingen*. The coming into operation of chapter IVa of the Act on the Youth Care on 1 January 2008 has brought an end to the so-called joint placement of children placed on a civil basis and those placed on a criminal law basis. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 625. However, see also Article 29k(2) of the Act on the Youth Care, on the basis of which the children's court may determine that the placement will take place in a judicial institution for juvenile persons who are placed on a criminal law basis. See also Asser/De Boer *Personen- en Familierecht* (2010) 762. For the purpose of this thesis the placement of children on a criminal law basis will no further be discussed. For the sake of completeness it deserves notification that there is also youth care offered for which no indication-decision is required, for example for general social work or for the treatment of addictions.

<sup>246</sup> In Dutch: *jeugdhulp*, see Articles 2 and 3 of the Implementation Decree to the Act on the Youth Care.

<sup>247</sup> See Article 3(1) of the Implementation Decree to the Act on the Youth Care.

<sup>248</sup> See Article 4 of the Implementation Decree to the Act on the Youth Care.

<sup>249</sup> See Article 5 of the Implementation Decree to the Act on the Youth Care.

<sup>250</sup> See Articles 4 and 5 of the Implementation Decree to the Act on the Youth Care. It is evident

court, in principle, is guided by the request as submitted by the Bureau for Youth Care, including the indicated care as provided in the indication-decision. In other words, if foster care has been requested, the court does not have the discretion to authorise a completely different form of placement, for example, in an institution.

However, as pointed out by Asser/De Boer, the request and authorisation might provide for more options. This could be relevant, for example, where there is uncertainty regarding the availability of the required care. Under such circumstances, the court has to consider the purpose of the removal and decide, after hearing the affected parties, whether a wider discretion (in the authorisation) is desirable.<sup>251</sup> The court may order the authorisation which includes a wide discretion for the Bureau for Youth Care pertaining to the choice of facilities but could stipulate additional conditions to safeguard the protection of the rights of the child (and family). But this wide discretion may be at the expense of a meaningful opportunity for the child and the parents to express their views.

The duration of the entitlement to youth care is in principle one year, unless for example, the child has stayed with a foster parent for two years or longer and it is anticipated that the return home is not feasible.<sup>252</sup> The recommended youth care should ensure or safeguard the unimpeded childhood development of the child, taking into account the needs of the child.

In addition, three important aspects are explicitly mentioned in Article 5(4) on the Act on the Youth Care:

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that the court will consider the facts and circumstances of each case and test these against the legislative provisions (lawfulness and proportionality), in conjunction with the contents of any request. See Asser/De Boer *Personen- en Familierecht* (2010) 765. For a more detailed discussion, see section 5.3.2 on the forms of placement in the Netherlands.

<sup>251</sup> Asser/De Boer refer to the fact that a wider discretion could enhance the efficacy of the administration of justice: *Personen- en Familierecht* (2010) 769.

<sup>252</sup> See Article 23 of the Implementation Decree to the Act on the Youth Care. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.



- “(i) The care should not be more interfering with the right to family life than necessary;<sup>253</sup>
- (ii) It should be offered as closely to home as possible;<sup>254</sup> and
- (iii) It should be for the shortest possible duration”.<sup>255</sup>

In other words, when the Bureau for Youth Care makes a so-called “indication-decision”, it has already been established that there is a need for assistance regarding youth care in terms of Article 5(1). In addition, Article 6 of the Act on the Youth Care provides guidelines for the contents of the decision.<sup>256</sup> Thus the indication-decision forms the basis for any subsequent decision-making pertaining to the removal of a child. It should be noted that there are three instances in which an indication-decision is not required. Firstly, in the case of an emergency removal: Article 1:261(3) of the Civil Code provides that under these circumstances the authorisation remains valid until an indication-decision is taken (as referred to in Article 6 of the Act on the Youth Care). The latter decision needs to be taken within four weeks, otherwise the entitlement to youth care comes to an end<sup>257</sup> and as a matter of course, the validity of the authorisation for the removal lapses.

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<sup>253</sup> The impact should not be disproportionate. The principle of proportionality is also referred to in the *Beijing Rules* (Res. 40/33 of 29/11/1985), Rule 17.1(a) and (b). The aim is to ensure the unimpeded childhood development of the child.

<sup>254</sup> This would enhance the right of the child to maintain contact with the family, see the discussion in section 5.3.4.2 below.

<sup>255</sup> See *Beijing Rules* (Res. 40/33 of 29/11/1985), Rule 19; also paragraph 13 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

<sup>256</sup> Where the Bureau for Youth Care takes a decision which indicates that assistance regarding care is needed, Article 6(1) prescribes that the following information should be provided: (a) a description of the problems or anticipated problems of the client, the seriousness and possible causes thereof (a client can be the child, his or her parents or step parent or others who bring up the child and care for the child, see the definition in Article 1(d)); (b) an description of the needed care and the intended purpose; (c) the duration of the care; (d) the period in which the entitlement should be asserted; and an advice on who will be able to provide the aforementioned necessary care. See also Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-12; Bakker & Bentem in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 114 and further.

<sup>257</sup> The entitlement for youth care could involve the placement in a family-like setting or residential placement. With regard to an emergency situation, see Article 14(2) of the Implementation Decree on the Act on the Youth Care. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

Secondly, where the Council for Child Protection deems the removal of the child necessary and applies to court for authorisation: whilst the Bureau for Youth Care is of the opinion that a removal is undesirable and thus has not provided an indication-decision.<sup>258</sup> The latter situation may come to the fore after expiry of the duration of a previous placement, which in the opinion of the Bureau for Youth Care and does not require extension. With regard to such a decision, the Bureau is required to inform the Council for Child Protection before the duration of the placement expires. Where there is reason for concern, the Council for Child Protection will investigate the matter on its own accord and subsequently has discretion to request the court for the extension of the authorisation and thus placement.<sup>259</sup> Article 1:261(4) demands that under these circumstances the request for authorisation contains specific information regarding the envisaged (form and place/area of) placement.

The third and last instance in which an indication-decision is not required is where the child will be placed with the non-custodial parent. In the latter case formal youth care does not come to the fore.<sup>260</sup>

Pertaining to the removal (and placement) of children who are already placed under supervision,<sup>261</sup> a distinction needs to be drawn between:

- (i) the removal of a child on a voluntary basis by the parent; and
- (ii) the removal on the basis of authorisation granted by the children's court.

With regard to the voluntary removal (under a), the court's authorisation for the removal of a child is not necessary when a parent decides to remove and place the child elsewhere,

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<sup>258</sup> See Article 1:261(4) of the Civil Code.

<sup>259</sup> With regard to the important function of control by the Council for Child Protection, see below in this section. It is interesting to note that if the children's court authorises the extension, the Bureau for Youth Care will be under the obligation to implement the child protection order, even though it maintains a different opinion. The latter indicates that still an indication-decision would be required, since this provides details on the necessary and suitable care and the duration thereof. Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>260</sup> This situation falls outside the ambit of Article 5(2) of the Act on the Youth Care. Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 349.

<sup>261</sup> In terms of Article 1:254 of the Civil Code, as discussed in section 4.5.2.1 above.

provided that the Bureau for Youth Care does not object to this.<sup>262</sup> In terms of the Act on the Youth Care, such a removal<sup>263</sup> can only materialise when the Bureau for Youth Care has issued a so-called “indication-decision”, which creates an entitlement for the parents to the required assistance regarding care.<sup>264</sup> It is important to note that a child of twelve years and older should give consent to the parent's request for an indication-decision, since this could ultimately result in the voluntary removal (and placement) of the child.<sup>265</sup>

Thus, Article 1:258(3) of the Civil Code makes specific provision for the placement on a voluntary basis, provided the aforementioned aspects are complied with. In the latter case the parent remains responsible for the child.<sup>266</sup> It is, however, important to note that in terms of the envisaged amendments regarding child protection measures, this position will change.<sup>267</sup>

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<sup>262</sup> It could be argued that where the choice to remove the child is made by the parents, it might be that at a later stage the parents might want to terminate such placement on their own accord. Nevertheless, the granting of authorisation for the removal of the child at this stage would be premature. Doek has pointed out that this complies with the reticent attitude required by Article 8 of the European Convention: Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-64; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 346.

<sup>263</sup> That is on a voluntary basis.

<sup>264</sup> An “indicatie besluit”, as mentioned in Article 3(3) of the Act on the Youth Care, creates an entitlement to youth care for the parents, which in this case provides for the (temporary) removal of the child.

<sup>265</sup> See Article 7 of the Act on the Youth Care. It can be deducted from Article 7(4) that the request for youth care cannot be done without the child's consent, where he or she is twelve years or older. However, where the child is between 12 and 16 years old and consent for the request for youth care is refused by the child, the Bureau for Youth Care has the discretion to nevertheless make a decision, when the care is considered necessary for the child, see Article 7(5). Where the matter of consent poses a problem, the other route may be considered, namely to apply for an order authorising the removal of a child in terms of Article 1:261 of the Civil Code. See also Article 7(6) of the Act on the Youth Care, which determines that the Bureau has the discretion to make a decision without a request for youth care from the parents, but upon the application of the public prosecuting authority or the Council for Child Protection. See Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-64; also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 347.

<sup>266</sup> Doek & Vlaardingerbroek point out that this is in line with the purpose of a supervision order, namely that the help and support should be of such a nature that the parent concerned retains the responsibility for the care and upbringing of the child as far as possible: *Jeugdrecht en Jeugdzorg* (2009) 346. See Article 1:257(2) of the Civil Code, also section 4.5.2.1 above.

<sup>267</sup> See in this regard Van der Reijt “Ondertoezichtstelling en vrije plaatsing gaan niet samen.

A Bill for the revision of the measures of child protection contains, amongst others, the provision (Article 1:265c of the Civil Code) that “the placement of the child, for day and night, outside the family, occurs only/exclusively in terms of Article 1:265d”. The latter provision, in turn, demands that such placement should be necessary in the interest of the care and upbringing of the child or for the examination of the child's psychological or physical condition.<sup>268</sup>

It is submitted that the required process for the authorisation of the placement, generally, contributes to the increase of legal certainty in serious matters like removal. It ensures that the court pronounces on the necessity and efficacy of such a measure, thereby protecting the child in cases where the parents would like to place the child voluntarily. It also protects the child from the threat of a sudden removal by parents, where the latter party would like to take the child home. In such a case the child might, for example, have developed family-life with the foster parent(s) and the sudden return home would not necessarily be in the child's best interests.<sup>269</sup> In order to establish what indeed is in the child's best interests in the case

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Artikel 1.258 lid 3 BW” (2008) 3 *Perspectief – Kinderbescherming & Jeugdzorg*.

<sup>268</sup> The Bill (Parliamentary document 2008/09, 32 015) has been approved by the Second Chamber of Parliament in June 2011 and is now pending with the First Chamber. Article 1:265c of the Bill reads in Dutch as follows: “Plaatsing van de minderjarige gedurende dag en nacht buiten het gezin geschiedt uitsluitend met toepassing van artikel 265d”. In addition, Article 1:265d determines that “indien dit noodzakelijk is in het belang van de verzorging en opvoeding van de minderjarige of tot het onderzoek van diens geestelijke of lichamelijke toestand, kan de kinderrechter de stichting op haar verzoek machtigen de minderjarige gedurende dag en nacht uit huis te plaatsen. De machtiging kan ook worden verleend op verzoek van de raad voor de kindbescherming of van het openbaar ministerie in geval de machtiging gelijktijdig wordt verzocht met een ondertoezichtstelling of een voorlopige ondertoezichtstelling”.

<sup>269</sup> With regard to a possible conflict of interests between the child and his or her parents the appointment of a special curator (*curator ad litem*) would enhance the legal position of the child. The latter topic has also been under attention by the office of the Kinderombudsman. In 2011 the Kinderombudsman announced the intention to investigate the possibilities for children to approach the court, which resulted in the advisory report “De bijzondere curator, een lot uit de loterij?” of July 2012. In this report it has been recommended that Article 1:250 of the Civil Code, which provides for the appointment of a special curator, needs to be interpreted more extensively in order to ensure that assistance is provided to children when this is needed (instead of having to resort to separate legal representation). More publicity should be given to the possibility of a special curator or the possibility of approaching the court informally. It is submitted that the latter should apply across the board, children and their parents should be informed as well as the public at large. Moreover, training of professionals is required and it should be included in the curriculum for upcoming jurists and social workers. Finally the report recommends measures for quality control, for example, the establishment of quality norms for special curators, a protocol for the appointment and job description of special curators. See Van der Bijl *et al.* “De bijzondere curator, een lot uit de loterij?” Adviesrapport over waarborging van de stem en de belangen van kinderen in the

of (extended) removal, a formal forum; that is, the children's court, should be involved.<sup>270</sup> Needless to say, in determining the best interests, the input of the child concerned is indispensable.

On the basis of Article 809 of the Code of Civil Procedure, children of twelve years or older have the right to be heard, whilst the court has a discretion with regard to younger children. It has been argued that this age restriction be removed from Article 809 of the Code of Civil Procedure and replaced with a criterion based on maturity of the child.<sup>271</sup> However, this would place a burden on the court to first establish the maturity of the child concerned before the child can be heard, which, it is submitted would not be desirable.<sup>272</sup> The hearing of children of twelve years or older has become entrenched in the family and child law practice, and therefore it can be said that Article 809 finds consistent application pertaining to this age group.

The concern lies with children below the age of twelve. Article 809 only refers to the possibility of being heard which is left to the discretion of the court. It is interesting to note that no reference is made to any qualifying criterion, like for example, "capable of a reasonable opinion about her or his interests". In order to ensure that the hearing of children will not be limited (unnecessarily) on the basis of age, it is agreed with Bruning that the court in principle should allow children younger than twelve to express their views, if they should wish to do so.<sup>273</sup> The latter implies that children should be made aware of such a possibility. It is recommended that the relevant professionals should inform children of their right to participate and ensure that children will exercise their right to be heard, including those

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praktijk *De Kinderombudsman* (2012) 49-53. Available via [www.dekinderombudsman.nl](http://www.dekinderombudsman.nl), accessed on 8-7-2012.

<sup>270</sup> This is also in line with Article 9(1) of the CRC, which demands that competent authorities determine that such separation is necessary for the best interests of the child.

<sup>271</sup> See Van der Bijl *et al.* "De bijzondere curator, een lot uit de loterij?" *De Kinderombudsman* (2012) 34.

<sup>272</sup> It is submitted that it requires specific expertise to establish the maturity of a child, for which presiding officers are not (adequately) trained. See also Van der Bijl *et al.* "De bijzondere curator, een lot uit de loterij?" (2012) *De Kinderombudsman* 34.

<sup>273</sup> The Committee on the Rights of the Child has emphasised that Article 12 of the CRC does not impose an age limit on the right of the child to express his or her views and discourages state parties from introducing age limits. See *General Comment No. 12 (CRC/C/GC/12)* of 20 July 2009, paragraph 21.

below the age of twelve.<sup>274</sup>

The second possibility (under *b*) concerns the application to court for an order authorising the removal of the child from the family environment, which if granted, will be followed by the placement of the child. Again, the so-called indication-decision of the Bureau for Youth Care is very important. An application to court for the authorisation to remove the child needs, generally speaking, to be accompanied by an indication-decision from the Bureau for Youth Care. However, an indication-decision is not required in the case of an emergency placement, placement in a judicial institution for juvenile persons, or in a juvenile psychiatric institution.<sup>275</sup> Under these circumstances the authorisation remains valid until an indication-decision is taken.<sup>276</sup> The latter decision needs to be taken by the Bureau for Youth Care within four weeks; otherwise both the entitlement to youth care and the validity of the authorisation for the removal come to an end.<sup>277</sup>

Usually an indication-decision does only take effect after authorisation is granted by the children's court.<sup>278</sup> Doek and Vlaardingerbroek rightfully pose the question as to how much

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<sup>274</sup> In her opening address for the Children's Rights House in Leiden, Bruning stated that apart from the right to be heard, the child's right to have (independent) access to the court in matters concerning the child, could possibly also be derived from Article 12 of the CRC, in "Participatie van kinderen: wat kunnen wij betekenen?" (2010) 5, [media.leidenuniv.nl/legacy/microsoft-word-participatie-van-kinderenlezing280510.doc.pdf](http://media.leidenuniv.nl/legacy/microsoft-word-participatie-van-kinderenlezing280510.doc.pdf), accessed on 8-5-2012. This is definitely food for thought, especially in the light of the strengthening of the legal position of children, via or in addition to, for example, the appointment of a special curator. Moreover, Article 6 of the European Convention allows everyone access to the court, which undoubtedly includes children. It is fully agreed with Bruning that, although there might be resistance with regard to awarding children independent access to courts, more interdisciplinary research is necessary. It is submitted that the research should include practical aspects relating to costs, staffing and expediency.

<sup>275</sup> See Article 1:261(3) of the Civil Code in conjunction with Article 14 of the Implementation Decree to the Act on the Youth Care.

<sup>276</sup> For the contents of a so-called indication-decision, see Article 6 of the Act on the Youth Care. This crucial decision should be taken within four weeks, after which the validity of the authorisation for the removal lapses. With regard to an entitlement to care in emergency situations and the termination thereof, see Article 14(2) of the Implementation Decree on the Act on the Youth Care. See Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) 1.1-7-66; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>277</sup> The entitlement for youth care could entail the placement with foster parents or residential placement.

<sup>278</sup> Article 3(4) of the Act on the Youth Care provides that "where the decision of the Bureau for Youth Care aims to effect the removal in terms of a supervision order as provided in Article 1:261 of the Civil Code, it does not take effect then after the required authorisation has been

discretionary power is in actual fact left to the children's court, since the court is directed by the indication-decision of the Bureau for Youth Care.<sup>279</sup> From the legislation in the Civil Code, read in conjunction with the Act on the Youth Care, it can be derived that the discretion is indeed limited. Although the indication-decision forms the point of departure in considering the application for the removal, the court does have certain powers, namely the power to set the indication-decision aside, in which case no authorisation for the child's removal will be granted.<sup>280</sup>

In addition, authorisation for the removal of the child can only be granted once it has been established by the court that the requirements of Article 1:261 of the Civil Code are complied with. Therefore, the court has to consider the indication-decision as well as the grounds for the removal as provided for in Article 1:261 of the Civil Code. It can thus be said that the children's court has its own responsibility in removal cases, which naturally includes the application of the ultimate test, namely the best interests of the child.<sup>281</sup> However, the question remains whether a more inquisitorial approach should not be considered most expedient in children's court proceedings. Moreover, this fits in with the informal nature of the proceedings and the non-adversarial approach in the children's courts, as discussed in the previous chapter.

In practice the courts (actively) try to establish whether the grounds for removal are complied with, thereby taking the indication-decision of the Bureau for Youth Care as a point of departure. It is submitted that an inquisitorial approach and thus active fact-finding by the courts will be beneficial since it promotes the full participation of the affected parties and

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obtained from the children's court".

<sup>279</sup> In *Jeugdrecht en Jeugdzorg* (2009) 349. Above reference was made to the fact that an application to court for the authorisation to remove the child generally speaking needs to be accompanied by a indication-decision from the Bureau for Youth Care.

<sup>280</sup> For example, where the court is of the opinion that (part of) the indication-decision is expected not to be in the child's best interests.

<sup>281</sup> Doek & Vlaardingbroek have pointed out that the own responsibility of the court also comes to the fore with regard to the question where best the child should be placed. In this regard reference is made to foster care, in which case the court does have discretion to hear and to consider the input of the parties concerned and make a decision accordingly. Therefore it cannot be said that the children's court is absolutely bound by the indication-decision of the Bureau for Youth Care: *Jeugdrecht en Jeugdzorg* (2009) 350. Needless to say that in deliberating on the best suitable form of placement for the child concerned family group conferencing could play an important role thereby enabling the parties to participate. For a more detailed discussion on this participative form of solution-seeking, see section 3.1.4.

therefore enhances the quality of both the proceedings and the outcome thereof. The consoling effect on the parties concerned should not be underestimated, which possibly improves the co-operation of the parties, which in turn increases the chances of the child (eventually) returning home. For the purpose of clarity it is recommended that a provision be included in the Civil Code of Procedure emphasising the inquisitorial approach in children's court proceedings, for the purpose of fact-finding and establishing the needs of the child and parents concerned.<sup>282</sup>

With regard to the removal of children the Articles 1:261-265 of the Civil Code are the core provisions and will be discussed next.

Section 1:261 reads as follows:

“In case it is necessary in the interest of the care and upbringing of a child or for the examination of the child's psychological or physical condition, the children's court may authorise the foundation, referred to in Article 1, under *f*, of the Act on the Youth Care (in other words the Bureau for Youth Care) upon its request, to remove the child for day and night. Such authorisation may also be granted upon the request of the Council for Child Protection or the public prosecuting authority”.<sup>283</sup>

This provision makes it clear that in the Netherlands there are two grounds for the removal of a child, namely,

- (i) It should be necessary in the interest of the care and upbringing of the child concerned, or,

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<sup>282</sup> An additional advantage would be that it keeps the professionals involved on their toes. It has to be kept in mind that in care and protection cases the child and his or her parents are vulnerable and have the right to be taken seriously.

<sup>283</sup> Own translation. Article 1:261(1) of the Civil Code reads in Dutch as follows: “Indien dit noodzakelijk is in het belang van de verzorging en opvoeding van de minderjarige of tot onderzoek van diens geestelijke of lichamelijke gesteldheid, kan de kinderrechter de stichting, bedoeld in artikel 1, onder *f*, van de Wet op de jeugdzorg op haar verzoek machtigen de minderjarige gedurende dag en nacht uit huis te plaatsen. De machtiging kan eveneens worden verleend op verzoek van de raad voor de kinderbescherming of van het openbaar ministerie.”



- (ii) It should be necessary for the examination of the child's psychological or physical condition".<sup>284 285</sup>

Moreover, it is also evident that when the above criteria are met, the removal of a child in the context of a supervision order may only take place on the basis of authorisation granted by the children's court to the Bureau for Youth Care. It should be noted that where reference is made to "removal" or "*uithuisplaatsing*" in terms of Article 1:261 of the Civil Code, this only concerns full-time placement; in other words, placement for day and night.<sup>286</sup> It is general policy that removal and placement is a measure of last resort and therefore should be imposed sparingly.<sup>287</sup>

Furthermore, the application requesting the removal can be filed by the following parties:

- (i) Bureau for Youth Care;
- (ii) Council for Child Protection;<sup>288</sup> and

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<sup>284</sup> It is agreed with Doek & Vlaardingerbroek that the required "necessity" for the removal concerns the examination as such and that is necessary to place the child in a residential setting, in *Jeugdrecht en Jeugdzorg* (2009) 348; also Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-65.

<sup>285</sup> In addition, there are specific provisions with regard to the placement of a child in a closed setting, as provided for in chapter IVa of the Act on the Youth Care, see the discussion below in this section.

<sup>286</sup> For day placement no court authorisation is required. However, Doek & Vlaardingerbroek recommend that the application for authorisation should contain the reasons why the required examination cannot take place on a non-residential basis, in *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>287</sup> This is also in line with the international standards, see Article 37(b) of the CRC, which among others states that detention of the child shall be used only as a measure of last resort and for the shortest appropriate period of time. See also the *Havana Rules* (1990) which aim to prevent or limit the detrimental effects of the deprivation of liberty of children. Paragraph 1 of the Preamble is of particular importance which states that the placement of a child should always be a disposition of last resort and for the minimum necessary period. This is also in line with Article 8 of the European Convention, which indicates that an infringement on the right to respect for family life should be restricted whenever possible. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 347.

<sup>288</sup> The Council for Child Protection exercises a measure of control with regard to specific (important) decisions of the Bureau for Youth Care, namely with regard to the following decisions (a) not to request the extension of a supervision order, in terms of Article 1:256(3);

(iii) The public prosecuting authority.

Generally speaking the Bureau for Youth Care will initiate the removal procedure.<sup>289</sup> The Bureau is often familiar with the circumstances of the family, due to the fact that the child had already been put under its supervision by the court.<sup>290</sup> Where the supervision order does not seem adequate (anymore) a further child protection measure might be required.<sup>291</sup> In case the children's court concludes that the grounds for removal are met and that the removal will be in the child's best interests, it will authorise the Bureau for Youth Care to remove the child from his or her family environment.<sup>292</sup> In other words, it is the Bureau for Youth Care that is responsible for the implementation of the court order, not the Council for Child Protection.<sup>293</sup>

However, the Council for Child Protection has an important function of control with regard to

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(b) not to request the extension of the authority of the child's removal/placement, in terms of Article 1:262(2); and (c) to terminate the placement of a child, in terms of Article 1:263(1) of the Civil Code.

<sup>289</sup> Generally speaking the indication-decision which provides for the entitlement of youth care as provided for in Article 6(1) of the Act on the Youth Care, should be submitted jointly with the request for the removal, see Article 1:261(2) of the Civil Code.

<sup>290</sup> The Bureau for Youth Care and the Council for Child Protection have their own functions, see the discussion in section 4.3.2.2 above. The collaboration between the two agencies is dealt with in Articles 56 – 60 of the Implementation Decree to the Act on the Youth Care.

<sup>291</sup> The purpose of a supervision order is to allow parents to take responsibility as much as possible, see Article 1:257(2) of the Civil Code, as discussed in section 4.5.2.1. In the situation of the removal of the child this would mean that the aim is to working towards the child returning home. Where this is not feasible anymore, Doek & Vlaardingerbroek have rightfully pointed out that under those circumstances the consideration of a further-reaching measure might come to the fore, namely the relief of parental authority or the deprivation of parental authority: *Jeugdrecht en Jeugdzorg* (2009) 350. See sections 4.5.2.2 and 4.5.2.3.

<sup>292</sup> The period of validity of the authorisation will usually be linked with the duration for the required care (as mentioned in the indication-decision). However, on the basis of Article 3(4) of the Act on the Youth Care, the court may determine a shorter duration for the authorisation and placement. Article 1:262(1) stipulates that the maximum duration for the authorisation of removal/placement is one year. See also section 5.3.3.2. It is important to note that in case the authorisation is requested whilst the child is already under supervision (in terms of a supervision order), the duration of the authorisation and placement will be granted only for the remaining period of the supervision order. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 349-350.

<sup>293</sup> See Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) 1.1-7-65. Doek & Vlaardingerbroek have indicated that consultation about the (intended) placement is necessary between the Council for Child Protection or public prosecuting authority and the Bureau for Youth Care: *Jeugdrecht en Jeugdzorg* (2009) 347.

some subsequent decisions pertaining to existing child protection measures.<sup>294</sup> Control may be exercised where the Bureau for Youth Care:

- (i) Decides against requesting an extension of a supervision order;<sup>295</sup>
- (ii) Decides against requesting an extension of the authorisation for the removal;<sup>296</sup> or
- (iii) Intends to terminate the placement of the child.<sup>297</sup>

The Bureau for Youth Care is under the obligation to timeously inform the Council for Child Protection about its intention to take one of these decisions together with the submission of a “youth care plan”, which is a report on the progress of the order or the placement and other relevant information.<sup>298</sup> Where there is reason for concern, the Council for Child Protection will investigate the matter on its own accord in order to assess whether there has been such a substantial improvement in the circumstances surrounding the care and upbringing in which case there is no need for further interference.<sup>299</sup> However, where the Council for Child Protection finds that the continuation of the child protection measure (supervision and/or placement) is required, it will request the Bureau for Youth Care to reconsider its decision. In the case of disagreement on the matter, the Board may apply for the extension on its own accord.<sup>300</sup>

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<sup>294</sup> See the policy document “Kwaliteitskader en Protocollen 2009”, which outlines the methods of the Council for Child Protection, paragraph 2.1 under (I).

<sup>295</sup> See Article 1:256(3) of the Civil Code.

<sup>296</sup> See Article 1:262(2).

<sup>297</sup> See Article 1:263(1).

<sup>298</sup> See Doek in Vlaardingerbroek & Ten Siethoff (eds.) *Jeugdrecht en Jeugdhulpverleningsrecht* (2009) I.1-7-86.

<sup>299</sup> The same applies where there is a difference of opinion between the Bureau for Youth Care and the affected parties, see Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 368.

<sup>300</sup> Doek & Vlaardingerbroek have pointed out that if the court grants the extension order, this might cause a serious problem, since the Bureau for Youth Care is under the statutory obligation to implement such an order and will be held responsible, whilst under the circumstances there is a disagreement about the necessity of the placement. However, the Bureau for Youth Care may lodge an appeal or can request the court to be replaced by another Bureau on the basis of Article 1:254(5): *Jeugdrecht en Jeugdzorg* (2009) 368.

The purpose of this (limited) control function of the Council for Child Protection is to advise the court, thereby ensuring the safety and well-being of the child concerned. The importance of the function of control should not be underestimated.<sup>301</sup> However, it is evident that it is ultimately the court which decides what the most appropriate decision will be with regard to the child.

### 5.2.2.1 Ground for removal and placement in a closed setting

In addition to the two general grounds for the removal of a child as discussed above,<sup>302</sup> there is a separate ground/criterion which specifically focuses on youth care and placement in a closed setting. From the onset it should be pointed out that placement in a closed setting constitutes deprivation of liberty. In addition to the international provisions regarding detention,<sup>303</sup> reference should be made to Article 15 of the Dutch Constitution, which provides that “other than in the cases laid down by or pursuant to Act of Parliament, no one may be deprived of his liberty”. It is the responsibility of the authorities to ensure that unlawful and arbitrary decision-making in this regard will be prevented, where possible.

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<sup>301</sup> It is submitted that the safety and well-being of the child concerned are the priority. Nevertheless, some measure of control might have a positive effect on the quality of decision-making of the Bureau for Youth Care as well, which is beneficial. This is important because it keeps professionals on their toes and especially because the powers of the court are quite limited in the sense that it is to a large extent bound to the indication-decision of the Bureau for Youth Care. It has to be kept in mind that with regard to child care protection matters the Bureau for Youth Care is the first agency to be approached, which essentially is a private agency for child welfare. However, the Council for Child Protection is a second-line facility or so-called “tweedelijnsvoorziening”, meaning a specialised and independent agency which falls under the Department of Justice. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 298 and 304; Asser/De Boer *Personen- en Familierecht* (2010) 665 and further. For a discussion on the role players in care and protection cases in the Netherlands, see section 4.3.2.2 above. Perhaps a similar system of structural control could be recommended for South Africa, for the sake of quality control in decision-making on grass root level (instead of leaving it to the courts). The first office which comes to mind is that of the Family Advocate, but this office has been allocated many functions already, for example, to provide the courts with advice in divorce matters and (international) child abduction cases. Perhaps the office of the Chief Family Advocate could be expanded on in order to facilitate some measures of control in child protection cases. However, in the absence of a measure of control by an independent body it should be noted that the South African courts have a wide range of court orders to their disposal which provides for a variety of needs and in addition has a various powers with regard to the court procedure. See chapter 4 of the Children's Act which deals specifically with the children's courts. See also the discussion in section 4.4.1 above.

<sup>302</sup> In terms of Article 1:261 of the Civil Code.

<sup>303</sup> See section 5.1.2. above, which deals with specific international provisions relating to civil placement or detention.

Therefore strict adherence to the legislative provisions is required whereby the rights of the affected parties should be safeguarded.<sup>304</sup> Since placement in a closed setting is a measure with the most far-reaching impact, this will be under discussion next.

On 1 January 2008 an amendment to the Act on the Youth Care came into operation, which resulted in the inclusion of chapter IVa. The latter aims to regulate the placement of a child in a closed setting in terms of civil law (and thus separate from children placed on the basis of criminal law).<sup>305</sup> Doek and Vlaardingerbroek have pointed out that the inclusion of Article 29a brought along two fundamental changes.<sup>306</sup> Firstly, Article 29a(1) determines that chapter IVa of the Act on the Youth Care regarding closed placement is applicable to both children/minors and young adults up to the age of 21, provided that for the latter authorisation for the placement was (already) granted at the time of becoming a major. Article 29a(1) thus deviates from Article 1:233 of the Civil Code and seemingly aims to treat these young adults like minors/children.<sup>307</sup>

The rationale behind this was the apparent need in practice to be able to gradually cut back on the provided care and assistance, rather than abruptly when reaching the age of eighteen. However, it was highlighted already that Article 5(1)(d) of the European Convention only permits the detention of a minor for the purpose of educational supervision.<sup>308</sup> From the case *Koniarska t. v United Kingdom* it can be derived that Article

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<sup>304</sup> See also Bruning & Liefwaard "Ontwikkelingen en knelpunten in de gesloten jeugdzorg" *Tijdschrift voor Familie- en Jeugdrecht* (2009) 42.

<sup>305</sup> Prior to 1 January 2008 children with authorisation for the removal on a civil law basis could be placed in a judicial institution for juvenile persons, for which institutions the Act on the General Principles for Judicial Institutions for Juvenile Persons was applicable (in Dutch: *Beginnelsenwet justitiële jeugdinrichtingen*). This Act provides a detailed set of rules which aim to protect and enhance the procedural and other rights of children placed in these judicial institutions. With the coming into operation of chapter IVa of the Act on the Youth Care, this detailed set of rules is no longer applicable to children placed in terms of civil law. Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 356; also Asser/De Boer *Personen- en Familierecht* (2010) 799. It is submitted that more research is needed to compare the standards of safeguards in both Acts in order to ensure that the children placed on civil law title are afforded the same (level of) protection of their (procedural) rights, which should also be in line with the *Beijing Rules* and the *Havana Rules*. On the disadvantages of joint placement, see section 5.3.2.2 below.

<sup>306</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 353-354.

<sup>307</sup> For a more detailed discussion on the definition of "child", see section 3.1.1 above.

<sup>308</sup> The relevant part of Article 5(1) of the European Convention reads as follows: "Everyone has the right to liberty and security of person. No. one shall be deprived of his liberty save in the

5(1)(d) does not allow for the detention for the purpose of educational supervision after reaching the age of majority.<sup>309</sup> As a result, Article 29a(1) of the Act on the Youth Care had to be considered as contrary to international standards. Subsequently, one year after its entry into force, Article 29a(1) of the Act on the Youth Care was declared non-binding by the district court in Amsterdam on the basis of conflict with Article 5 of the European Convention.<sup>310</sup> As a matter of course, the (extension of) youth care in a closed setting for the purpose of education/upbringing of a person above the age of eighteen is not possible.<sup>311</sup>

The second change brought about by the inclusion of chapter IVa concerned the possibility to effect placement in a closed setting without a measure of child protection, provided that the consent is obtained from the parent. Article 29b(2) of the Act on the Youth Care, determines that authorisation for placement in a closed setting can be granted only in the case of a supervision order,<sup>312</sup> guardianship, or where the person having (parental) authority consents to the placement.<sup>313</sup> The children's court may thus upon request<sup>314</sup> authorise the

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following cases and in accordance with a procedure prescribed by law: (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority". For a discussion, see section 5.1.2 above.

<sup>309</sup> European Court of Human Rights of 12 October 2000, Application no. 33670/96.

<sup>310</sup> Rechtbank Amsterdam LJN: BH0778, 08-3254/411312 of 23 January 2009. See also Forder & Olujić in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 35.

<sup>311</sup> Duijst & Veerman conclude in this respect that closed placement (detention) of a person above the age of eighteen is only possible where (a) the consent of the affected person is obtained or (b) on the basis of the *Wet bijzondere opnemingen in psychiatrische ziekenhuizen*, which Act provides for the admission in psychiatric hospitals: Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 141. See also the discussion in sections 5.1.2 above and 5.3.3.2 below.

<sup>312</sup> For a discussion on the supervision order in terms of Dutch law, see section 4.5.2.1.

<sup>313</sup> See Article 29b(1) and (2) of the Act on the Youth Care. This means that for placement in a closed setting not automatically a supervision order is required but that this placement can be effected against the will of the child on the basis of consent of the parent(s) or care-giver. The latter Article also refers to the situation where guardianship pertaining to a child is exercised by a Bureau for Youth Care, in sub-Article (2)(b), but this falls outside the ambit of the present thesis. In case the person having parental authority withdraws the consent, the child concerned can remain in the closed setting for a maximum of fourteen days, see Article 29b(8) of the Act on the Youth Care.

<sup>314</sup> The parents can direct the request via the Bureau for Youth Care to the court. In addition, the request can be made/an application can be filed by the Bureau for Youth Care (of the province where the child resides) or by the Council for Child Protection on the basis of Article 29d. From the legislative provisions it can be derived that the indication-decision and the

removal and placement of a child in (closed) accommodation in spite of the lack of the child's consent.<sup>315</sup> This poses the question whether the same is (indeed) possible with regard to young adults between 18 and 21 years.

As discussed in chapter 4, parents have parental authority pertaining to their child up to the age of eighteen.<sup>316</sup> Although the CRC defines "child" as a person below the age of eighteen, majority may be attained earlier in terms of the national law of a state party.<sup>317</sup> Thus the legislature of a state party has discretion to consider a child as a major before reaching the age of eighteen. However, it does not seem to work the other way around, meaning that it cannot be derived from Article 1 of the CRC that a person of eighteen years (or older) still can be treated as a child/minor.<sup>318</sup> According to Detrick the phrase "majority" refers to full legal capacity.<sup>319</sup> In other words, with the attainment of majority at the age of eighteen, the (now) young adult obtains full capacity to act. It is submitted that in view of the aforementioned it should not be (legally) possible for a parent of care-giver to actualise the placement of an eighteen-year-old in a (closed) setting against his or her will.

Article 29b(3) of the Act on the Youth Care is one of the core provisions. It reads as follows:

"Authorisation can only be granted if, in the opinion of the children's court, the child experiences serious problems relating to him or her growing up or to his or her upbringing which seriously impede his or her development to adulthood, and which makes admittance

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declaration of necessity and/or urgency play a central role in obtaining the required court authorisation for the placement in a closed setting. It is submitted that it is welcome that specific procedural requirements are in place and that the relevant agencies are obliged to careful consideration and decision-making due to the far-reaching consequences for the child and his or her family. The filing of an application must be done in writing and can take place without the assistance of a legal representative. Relevant documents, like the (treatment) plan with regard to the child and a progress report pertaining to the implementation of the supervision order also needs to be sent to the Council for Child Protection. See Article 1:265 of the Civil Code.

<sup>315</sup> Article 29b(1) of the Civil Code.

<sup>316</sup> See the Articles 1:245, 247 and 233 of the Civil Code. See also section 4.1.2 above.

<sup>317</sup> The latter provides for some flexibility, since the age of eighteen does not necessarily coincide with the age of majority in some countries. See Article 1 of the CRC. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 52 and 57.

<sup>318</sup> See the decision of the district court Rotterdam of 19 February 2009 (LJN: BH5398, *Rechtbank Rotterdam*, 323923/J1 RK 09-155).

<sup>319</sup> In *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 59.

and stay (in a closed setting) necessary in order to prevent that the child will abscond from the necessary care or will be abducted by others”.<sup>320</sup>

In addition, in terms of sub-Article (4), the children's court will grant the authorisation only when the Bureau for Youth Care has made an indication-decision mentioned in Article 6(1),<sup>321</sup> which indicates that residential care is required and declares that the above ground for the authorisation is complied with.<sup>322 323</sup> The latter needs to be confirmed by a psychologist who has examined the child shortly before the time.<sup>324</sup>

Article 29c provides for the possibility of obtaining provisional authorisation, which can merely be granted in a case of urgency. Urgency comes to the fore where the following ground or criteria is adhered to, namely:

“when the immediate provision of youth care is necessary in connection with serious problems relating to the raising or upbringing of the child which seriously impede his or her development to adulthood (or a serious suspicion thereof), and which makes admittance and stay (in a closed setting) necessary in order to prevent that the child will abscond from the

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320 Own translation.

321 For an explanation of an indication-decision, see earlier in this section.

322 The ground mentioned in Article 29b(3), reads as follows: “Authorisation can only be granted if, in the opinion of the children's court, the child experiences serious problems relating to him or her growing up or to his or her upbringing which seriously impede his or her development to adulthood, and which makes admittance and stay (in a closed setting) necessary in order to prevent that the child will abscond from the necessary care or will be abducted by others”.

323 The children's court may deviate from these provisions when the Council for Child Protection declares that the ground mentioned in Article 29b(3) is applicable, which needs to be confirmed by a psychologist, who has examined the child shortly before the time.

324 This declaration of consent (in Dutch: *instemmingsverklaring*) by the psychologist is one of the safeguards in the procedure to establish whether placement in a closed setting is necessary. Cardol and Van Rheenen have averred, that the aforementioned declaration of consent can only be regarded as a true safeguard if the following specific requirements are met: registration of the psychologist, date and signature to ensure recent examination, the examination should be of a substantial nature, conclusions should be substantiated, the examination includes an analysis of existing files/documentation and a personal meeting with the child, the psychologist should report independently. In conclusion it is recommended that these requirements are to be included in the Act, in order to ensure transparency and uniform application: Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 124-132.



necessary care or will be abducted thereof by others”.<sup>325</sup>

The Bureau for Youth Care has to declare that the grounds for such urgent and provisional authorisation are indeed complied with, which in principle also needs the confirmation of a psychologist.<sup>326</sup> However, before the court decides on whether or not to grant the authorisation or provisional authorisation, the court will hear the following parties; the child, the person having parental authority, and the person who cares for and raises the child as belonging to his or her family, as well as the agency which has filed the application (the Bureau for Youth Care or the Council for Child Protection). In addition, it is important to note that the court on its own accord will order the assignment of a lawyer to the child.<sup>327</sup>

Article 29g provides that in case authorisation is granted, a copy of the order will be sent to the child of twelve years and older, the person having parental authority, the person who cares for and raises the child as belonging to his or her family, the particular Bureau for Youth Care, and the Council for Child Protection. The order containing the authorisation has immediate effect and needs to be produced upon admittance of the child at the institution. The validity of the authorisation is usually linked to the period of the required care as determined by the Bureau for Youth Care. However, the provisional authorisation is only valid till such time as the court has decided on the merits of the (original) application, with a maximum of four weeks.<sup>328</sup>

It is important to note that with regard to matters pertaining to the care and placement of the child in a closed setting, a child of twelve years and older is considered to be a party to legal proceedings on the basis of Article 29a(2) of the Act on the Youth Care.<sup>329</sup> In the case of a

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<sup>325</sup> See Article 29c(2) of the Act on the Youth Care.

<sup>326</sup> Unless such examination is *de facto* not possible, see Article 29c(4) of the Act on the Youth Care.

<sup>327</sup> See Article 29f of the Act on the Youth Care.

<sup>328</sup> See Article 29h of the Act on the Youth Care. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 355.

<sup>329</sup> Article 29a(2) of the Act on the Youth Care provides that for the purpose of any matter relating to chapter IVa, a child of twelve years and older is considered to be a party to the proceedings. The same is applicable to a child below the age of twelve who is considered to be able to a reasonable judgment of his or her interests in this regard. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 355.

request for the authorisation for a placement in a closed setting, the court instructs, on its own accord, the Legal Assistance Bureau to assign legal representation to the child.<sup>330</sup> Another important aspect before granting authorisation for the removal and placement of the child revolves around participation. Article 29f of the Act on the Youth Care makes it obligatory for the court to hear the child, his or her parents (having parental authority) or care-givers, prior to the granting of the authorisation. This applies, in principle, in emergency situations as well. However, the appeal court in Arnhem held that in the case of imminent and serious danger, a provisional authorisation may be issued without prior hearing, provided that the hearing takes place shortly thereafter.<sup>331</sup> A child of twelve years or older also receives a copy of the court order.<sup>332</sup>

To sum up, the Civil Code in the Netherlands provides for two scenarios on the basis of which a court may authorise the removal of the child which results in the child's placement. The first possibility contains two grounds; namely, where such is deemed necessary in the interest of the care and upbringing of the child, or pertaining to an examination of the mental or physical condition of the child.<sup>333</sup> It will, however, depend on the strict (or more lenient) interpretation of a presiding officer whether these criteria are sufficiently complied with in order to justify this far-reaching measure of child protection. The second scenario concerns authorisation for placement in a closed setting. Apart from the serious problems relating to him or her growing up or to his or her upbringing which seriously impedes his or her development to adulthood, placement in a closed setting should be necessary in order to prevent the absconding of the child from the required care or the abduction of the child by others.<sup>334</sup>

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<sup>330</sup> Article 29f(2) of the Act on the Youth Care. This is in line with Rule 15.1 of the *Beijing Rules* (Res. 40/33 of 1985), which is also relevant in welfare and care proceedings on the basis of Rule 3 of the document.

<sup>331</sup> Within the next few days. See *Gerechtshof Arnhem*, 20 February 2008 (LJN BC6063).

<sup>332</sup> Apart from the child of 12 years and older, Article 29g of the Act on the Youth Care determines that the following parties will be sent a copy of the court order: the person having (parental) authority of the child, the person who cares for and raises the child as belonging to his family (foster parent), the relevant Bureau for Youth Care and the Council for Child Protection.

<sup>333</sup> See Article 1:261 of the Civil Code, which is discussed in section 5.2.2 above.

<sup>334</sup> See Article 29b(3) of the Act on the Youth Care, which is discussed in more detail in section 5.2.2.1.

Although the criterion “as a measure of last resort” is not explicitly mentioned in the Civil Code, it should be reiterated that the authorisation for the removal of a child is usually given in the context of a supervision order in terms of Article 1:254. One of the criteria in the latter provision demands that only where it is evident that “other measures to avert the threat have failed or expectedly will fail”, the children's court may impose such measure. Therefore, on the basis of the Articles 1:261 and 254, read in conjunction, combined with legal practice and the jurisprudence of the *Hoge Raad*, it can be argued that the Netherlands is (indirectly) in compliance with the criterion of “measure of last resort” in terms of the international and regional instruments. It is submitted that with regard to the proposed legislation on the review of the child protection measures, the criterion should be explicitly included in the court order.

With regard to the placement in a closed setting, chapter IVa of the Act on the Youth Care comes into play which provides the following safeguards for the child and his or her family:

- “1) Court authorisation will only be granted when the ground specifically provided for in Article 29b(3) is met, which needs to be confirmed by the Bureau for Youth Care<sup>335</sup> and a psychologist.<sup>336</sup>
- 2) Before deciding on whether or not to grant authorisation or provisional authorisation, the children's court will hear the following parties: the child concerned, the person having parental authority and the person who cares for the child as part of his or her family, as well as the agency which has filed the application (the Bureau for Youth Care or the Council for Child Protection).
- 3) The court will on its own accord order the assignment of a lawyer to the child.
- 4) After granting the authorisation, a copy of the order will be sent to the child of twelve years and older, his or her parent(s) or the person who cares for and raises the child

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<sup>335</sup> Alternatively the Council for Child Protection, see Article 29b(6).

<sup>336</sup> The requirements for the declaration of consent are not mentioned in the Act. It is agreed with Cardol & Van Rheenen that for the sake of transparency and consistent application the requirements should be included in the legislation: *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 132.

as belonging to his or her family.

- 5) For the purpose of any matter relating to chapter IVa, as discussed in the above, a child of twelve years and older is considered to having full legal capacity to act, which effectively means that he or she can be a party to legal proceedings relating to youth care in a closed setting. The same is applicable to a child below the age of twelve who is considered to be able to a reasonable judging of his or her interests in this regard.<sup>337</sup> This implies that such child has the right to access all the relevant documents (the request, the reports and the contents of decisions), can submit written views and has the right to an appeal”.

The matter of independent access to the courts has lately been subject of research. Steketee *et al* have made the recommendation that children should have the right to approach the courts independently, based on the following reasons:

- “1) The possibility of the appointment of a special curator is not generally known. Where such a person has been appointed, it is usually the legal representative, which does not seem to add much value;
- 2) The present legislation lacks consistency and clarity;
- 3) Although informally children may approach the court, they cannot lodge an appeal; and
- 4) Children have become more mature and independent”.<sup>338</sup>

It is submitted that Article 12 of the CRC, as one of the core provisions, be given the widest possible and most progressive interpretation and application. Based on the latter, children should have the right to approach the court independently.<sup>339</sup> Therefore, it is recommended

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<sup>337</sup> See Article 29a(2) of the Act on the Youth Care.

<sup>338</sup> See Steketee *et al*. “Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen” (2003) *Verweij-Jonker Instituut* 93-94; also Meuwise *et al*. *Handboek Internationaal Jeugdrecht* (2005) 124.

<sup>339</sup> For a discussion on the child's right to access to the court on the basis of section 14 of the

that this be extended to all matters affecting the rights of children. It is, however, submitted that more research needs to be conducted in order to establish how this entitlement can be realised, thereby having regard for the practical implications, like, costs, staffing and expediency. It is hoped that as a result, a general legislative provision will be included in Title 6 of the Dutch Code of Civil Procedure, thus conferring a general right of access to the courts and not limited to placements in a closed setting.

### 5.3 Forms of placement

The point of departure in the international documents is that children should grow up within a family environment.<sup>340</sup> Where a child has been removed from the family environment, the state has to take responsibility; not only to ensure the protection of the child but also to guarantee the realisation of all the other entitlements in terms of the international and regional documents, where applicable. Reference was made to the special protection and assistance which children are entitled to when temporarily or permanently deprived of their family environment.<sup>341</sup> In addition, in terms of the Articles 20(2) of the CRC and 25(2) of the African Children's Rights Charter, individual state parties are obliged to provide for alternative (family) care.<sup>342</sup>

Neither the phrase “alternative care” nor “alternative family care” has been defined in any of these documents.<sup>343</sup> However, a few examples are explicitly mentioned in these provisions.

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South African Children's Act and section 28(1)(h) of the Constitution, see section 3.1.4.1.

<sup>340</sup> See the Preamble to the CRC, paragraph 5; also the Preamble of the African Children's Rights Charter, paragraph 5; *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85) of 3 December 1986, Article 3; *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010, Article 3. Also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 171.

<sup>341</sup> For a more detailed discussion on Article 20 of the CRC and Article 25 of the African Children's Rights Charter, see section 5.1.1.3 above.

<sup>342</sup> It should be noted that Article 25(2) of the African Children's Rights Charter merely refers to foster placement and institutional placement as alternative (family) care. In addition, with regard to the desirability of continuity in a child's upbringing, reference is merely made to the child's ethnic, religious or linguistic background (not including the factor “culture”), like Article 20(3) of the CRC. Based on these considerations the discussion will be focused on Article 20(3) of the CRC.

<sup>343</sup> In this respect the *Guidelines for the Alternative Care of Children* distinguishes between

Article 20(3) of the CRC reads as follows:

“Such care could include, *inter alia*, foster placement, Kafala of Islamic law,<sup>344</sup> adoption, or if necessary placement in suitable institutions for the care of children”.

The phrase “such care *could* include” refers to the fact that merely some examples are given without the aim of imposing any suggestions. For example, Kafala provides for alternative care for children who cannot be raised by their biological parents and such occurs in Islamic countries. In the Islamic tradition, legal family ties are created at birth, and such blood relationship cannot be changed and therefore the institution of adoption is not recognised.<sup>345</sup> Doek points out that the CRC does not prescribe to state parties to include the institution of adoption in their legislation, but emphasises that where it has been included, state parties need to comply with specific procedures.<sup>346</sup> In other words, it is left to the discretion of individual state parties to give meaning to “alternative care”, in the context of the legal possibilities and customs of the country concerned.

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informal care and formal care; followed by a number of alternatives, but does not specifically contain a definition of alternative care. A/RES/64/142 of 24 February 2010, paragraph 28.

<sup>344</sup> The Islamic institution of Kafala can be described as legal foster care. Islamic law does not provide for adoption of a child, in terms of the taking or accepting of a child as your own child. See [http://www.proz.com/kudoz/arabic\\_to\\_english/law\\_general/727145-kafala](http://www.proz.com/kudoz/arabic_to_english/law_general/727145-kafala), accessed on 25-4-2010. Some Islamic countries have made reservations with regard to the implementation of the CRC, for example pertaining to Article 14 (freedom of religion) and Article 21 (adoption). Some countries would implement the Convention insofar as it would not be incompatible with the sharia, which governs all aspects of a Muslim's life. Sharia law stems from a combination of sources, among others the Qur'an, the sayings and conduct of the prophet Muhammad and the rulings of Islamic scholars. See <http://www.bbc.co.uk/religion/religions/islam/beliefs/sharia>, last accessed on 14-6-2012. Doek has pointed out that research conducted in Pakistan has revealed that apparently there is nothing in the sharia which would prevent the implementation of the CRC. According to Doek a reservation made by a state party had been considered acceptable, as long as it would not result in incompatibility with the purpose of the Convention. Moreover, it would be necessary that eventually these reservations would be lifted/withdrawn in order to realise the full implementation of the Convention: Eijgenraam “Interview met Jaap Doek – De sharia staat het Kinderrechtenverdrag niet in de weg” (2008) 4 *Tijdschrift voor de Rechten van het Kind* K10-K11.

<sup>345</sup> See Blaak “Alternatieve zorg voor kinderen volgens de islam – Kafala” (2008) 4 *Tijdschrift voor de Rechten van het Kind* K7. Both South Africa and the Netherlands provide for the institution of adoption, see below in this section.

<sup>346</sup> Eijgenraam “Interview met Jaap Doek – De sharia staat het Kinderrechtenverdrag niet in de weg” (2008) 4 *Tijdschrift voor de Rechten van het Kind* K11.

With regard to the examples in Article 20(3), only adoption is specifically included in the CRC, namely in Article 21.<sup>347</sup> As indicated by Doek, Article 21 thus provides a (procedural) standard which state parties need to comply with, provided they have included the institution of adoption in their national legislation.

Article 21 of the CRC reads as follows:

“States parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in the view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) recognise that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;<sup>348</sup>
- (c) ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;
- (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs”.

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<sup>347</sup> Although the CRC does not provide a standard pertaining to foster care, specific safeguards are included in the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*: United Nations document of the General Assembly (A/RES/41/85) of 3 December 1986.

<sup>348</sup> The principle of subsidiarity. For a more detailed discussion on inter-country adoption, see Meuwisse *et al.* *Handboek Internationaal Jeugdrecht* (2005) 383 and further.

Article 21 states unambiguously that the best interests of the child are paramount in the case of adoption. To ensure this, state parties have to strictly adhere to the aspects mentioned under (a), namely, that only the competent authority can authorise adoption; the process must conform with the national legislation and procedures and on the basis of all relevant information; and that the adoption is permissible with regard to the child's status. Moreover, where required,<sup>349</sup> the affected parties need to consent to the adoption, after having been informed about the consequences thereof. This undoubtedly includes the child concerned, since the child's best interests cannot be established without hearing the child and considering his or her views.<sup>350</sup>

From an international perspective, both foster care and adoption have been the focus of attention which resulted in 1986 in the adoption of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*.<sup>351</sup> This document, among others, emphasises the obligation of every state to give a high priority to family and child welfare.<sup>352</sup> In addition, the first priority for a child is to be cared for by his or her own parents, and where this is unavailable or inappropriate, care by relatives, by other substitute – foster or adoptive – family should be considered (or, if necessary an appropriate institution).<sup>353</sup>

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<sup>349</sup> This is left to the individual state parties to decide. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 185. The legislation of both South Africa and the Netherlands provide for the consent of the affected parties.

<sup>350</sup> See also *General Comment* No. 12 (CRC/C/GC/12) of 20 July 2009, paragraphs 55 and 56.

<sup>351</sup> These universal principles were to be taken into account in cases where procedures are instituted relating to foster placement or adoption of a child, either nationally or internationally. See paragraph 9 of the Annexure of the United Nations document of the General Assembly (A/RES/41/85) of 3 December 1986. Detrick refers in this respect to the fact that the wide range of views on adoption and foster care, which stems from differences in social and cultural values around the world and the need to protect the rights of all affected parties (especially children) created the need for an international standard which resulted in the *Declaration: A Commentary on the United Nations Convention on the Rights of the Child* (1999) 332.

<sup>352</sup> See Article 1. The question arises whether the state parties under discussion prioritise family and child welfare adequately, since there seems to be an increase of children in need of care and protection. State parties do have an overall responsibility which includes prevention and early intervention, adherence to procedures (including the hearing of children), creating sufficient number of placements, ensure quality care provided by professionals (and foster and adoptive parents) which requires continuous training, but also to inform the children and the public of their rights (and responsibilities, for example, to report child abuse).

<sup>353</sup> See Articles 3 and 4 of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*.



From the international provisions it can be concluded that family-like care, which resembles the environment of the child as closely as possible, is to be preferred, provided this is available in the light of the circumstances.<sup>354</sup> Moreover, in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child should be the paramount consideration; particularly his or her need for affection and right to security and continuing care.<sup>355</sup> Apart from establishing the specific needs of the child in relation to the quality of the placement, attention is needed for the professional or appropriate training of persons responsible for foster placement or adoption procedures.<sup>356</sup> With regard to foster placement specifically, the *Declaration* contains three Articles. Article 10 requires that “foster placement of children should be regulated by law”. Article 11 provides that “foster family care, though temporary in nature, may continue, if necessary, until adulthood but should not preclude either prior return to the child's own parents or adoption”. Lastly, Article 12 comprises two aspects. On the one hand, proper involvement of the prospective foster parents and, as appropriate, the child and the parents in all matters relating to foster family care. On the other hand, that “a competent authority or agency should be responsible for supervision to ensure the welfare of the child”.<sup>357</sup>

Apart from the above, it should nevertheless be reiterated that state parties are obliged to provide for alternative care, which implies that a variety of care options should be developed and practically implemented, providing for the different needs of children. In its *Concluding*

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<sup>354</sup> In case the child concerned has specific needs due to, for example, psychological problems, it could be that foster care is only feasible where the prospective foster parents are specifically trained or will get the necessary support in order to be able to provide for the required care for the child. Therefore a variety of options for foster care should be available. There are some differences in this regard between South Africa and the Netherlands, see sections 5.3.1.1.2 and 5.3.2.1.1 below.

<sup>355</sup> Article 5 of the aforementioned *Declaration*.

<sup>356</sup> It is submitted that the phrase “persons responsible for foster placement or adoption procedures” should be interpreted extensively, including the professionals involved in the preparation, the procedure and decision-making and implementation. Continuous training is required for all professionals dealing with children in need of care and protection. Especially the child's right to participate in all facets (during preparation, the legal procedure and in the case of placement), including the right of complaint and the right to legal representation in care proceedings should be given far more attention. Apart from the legal aspects, the training should include (child) psychology but also interdisciplinary aspects relating to other fields of expertise which are relevant in the assessment and decision-making. This would impact positively on the general understanding of the different kind of professionals involved.

<sup>357</sup> With regard to the latter aspect, Detrick refers to the connection with Article 25 of the CRC which provides for the right of the child to periodic review of the placement: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 337.

*Observations*, the Committee on the Rights of the Child has appealed to both South Africa and the Netherlands to expand and develop alternative care.<sup>358</sup> In the report “Children without parental care”,<sup>359</sup> the Committee on the Rights of the Child emphasised the “principle of individualisation”. By acknowledging the uniqueness of each child and considering the actual situation of the child concerned, the Committee is of the opinion that more tailored solutions can be provided. It is submitted that it goes without saying that this will ultimately serve the child's best interests, and moreover, ensure compliance with the international instruments.

In addition, the Committee states that “there are few obstacles standing in the way of this ideal path towards individualisation of solutions”. In this regard the Committee refers to the lack of time to carry out assessments of the actual situation, the lack of personnel, inadequate numbers of potential foster families, temporary and emergency measures and reception homes. It is submitted that even when resources are limited, the various professionals should join efforts to ensure the best solution for the individual child possible, thereby giving effect to the rights of these vulnerable children.<sup>360</sup> In addition, it is important that siblings in principle should be placed together, unless this would not serve their best interests.

Returning to Article 20(3) of the CRC, the reference to foster placement, Kafala of Islamic law and adoption all provide some resemblance with the family environment. The fact that these family-like alternatives are mentioned before reference is made to institutional care,

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<sup>358</sup> For South Africa see (CRC/C/Add.122) of 23 February 2000, paragraph 25. With regard to the Netherlands, see (CRC/C/15/Add.227) of 26 February 2004, paragraphs 41 and 42. In its latest *Concluding Observations* regarding the Netherlands in 2009, the Committee expressed its concern that youth care in the Netherlands still focuses to a large extent on placement in residential institutions. In addition, there were concerns relating to long waiting lists for placement, the frequent changes of placements and the lack of a permanent social worker to be assigned to a specific child and family. The Committee recommended, among others, the evaluation of the reasons behind the high number of placement orders and the long waiting lists, the implementation of community based programmes with a view to assisting the extended family in taking an active role, e.g. conference models, and provide parenting education in a culturally sensitive manner. See (CRC/C/NLD/CO/3) of 30 January 2009, paragraphs 39-42.

<sup>359</sup> CRC/C/153 of 17 March 2006, Day of general discussion on children without parental care.

<sup>360</sup> For example, to ensure the best interests of the child, to facilitate the participation of the child before decision-making, during the placement and also afterwards and to give consideration to those views. See CRC/C/153 of 17 March 2006, paragraph 662-664.

suggests that the first-mentioned options are to be preferred.<sup>361</sup> The family-like alternative care is also given priority in the report “Children without parental care” of the Committee.<sup>362</sup> The same has been explicitly referred to in the resolution of the United Nations’ *Guidelines for the Alternative Care of Children* (2010).<sup>363</sup> In addition, such priority can also be deduced from the phrase “or if necessary”.<sup>364</sup> It is argued that institutional care indeed should be an *ultimum remedium*.<sup>365</sup>

In terms of Article 40(4) of the CRC, state parties are also obliged to provide for alternatives to institutional care.<sup>366</sup> Although this provision mainly focuses on juvenile justice it is submitted that the relevance should be extended to alternatives in institutional care on a civil law basis.<sup>367</sup> The question arises as to whether South Africa and the Netherlands are sufficiently in line with this duty.<sup>368</sup> It is submitted that more research should be conducted in order to assess whether there are sufficient institutions available to cater for the demand, but also whether there is a sufficient variety of institutions which provide for the different needs of children. It is evident that problems like waiting lists and institutional transfers should be avoided where possible. This is particularly relevant in case of the transfer to an institution

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<sup>361</sup> Detrick refers in this respect to the fact that the wording of Article 20(3) of the CRC “reflect the preference for alternative care by another substitute family”: *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 336.

<sup>362</sup> See paragraph 665 of the Report “Children without parental care”.

<sup>363</sup> A/RES/64/142 of 24 February 2010. In paragraph 52 reference is made to “with priority to family- and community-based solutions”.

<sup>364</sup> Own emphasis.

<sup>365</sup> For example, see the discussion by Liefwaard, where he opines that placement in suitable institutions should only come to the fore if other /lighter options have failed, or are expected to fail: *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 114. Also Asser/De Boer *Personen- en familierecht* (2010) 749.

<sup>366</sup> Article 40(4) of the CRC reads as follows: “A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”.

<sup>367</sup> See Bruning, Liefwaard & Volf “Rechtswaarborgen voor OTS-ers in justitiële jeugdinrichtingen” 2004 (9) *Tijdschrift voor Familie- en Jeugdrecht* 210.

<sup>368</sup> In the notice “Meld je zorg – jeugdzorg” of 23 May 2012, it was indicated that in the Netherlands many children are accommodated in closed settings due to a serious shortage in institutions for youth care. See <http://www.meldjezorg.nl/meldjezorg/jeugdzorg>, accessed on 23-5-2012.

with a more restrictive regime.<sup>369</sup>

The aforementioned *Guidelines for the Alternative Care of Children* set out desirable orientations to help to inform national policy and practice (in state parties) and aim to enhance the implementation of the CRC and of relevant provisions of other instruments.<sup>370</sup> Paragraph 28 provides a number of definitions relating to alternative care. For example, the distinction between informal and formal care lies in the fact that in the latter case the care has been ordered by a competent authority, whilst in first-mentioned case no authority is involved.<sup>371</sup> It is interesting to note that the contents of “alternative care” are formulated in non-imposing language, which is commendable. After all, the document aims to provide guidance on policy and practice in relation to the alternative care of children. Therefore, it is left to the discretion of individual state parties to give meaning to, and to provide for, alternative care, and in addition, to ensure the implementation thereof.

When considering solutions, due regard needs to be paid to the desirability of continuity in the child's upbringing, which consideration should extend to the child's personal background; namely, the ethnic, religious, cultural and linguistic background. To safeguard the continuity in the child's upbringing where possible, it is important to minimise disruption of the child's personal, educational, cultural and social life.<sup>372</sup> Therefore it is not only necessary to prioritise a family-resembling environment, but also to maintain the child as close as possible to his or her habitual place of residence. This is necessary to give effect to the other rights which a child without parental care is entitled to; namely the right to maintain contact with the family and eventually to reunification, unless the latter would be contrary to the child's best

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<sup>369</sup> In this regard, the case *Anna Jonker v The Manager, Gali Thembani/JJ Serfontein School and Others* (94/2011) of 19 March 2012, is relevant. Ms Jonker, the grandmother of one of the children placed in Gali Thembani, approached the high court in Grahamstown (Eastern Cape) for an interdict to prevent, among others, the relocation of a number of children in need of care and protection to a child and youth care centre at Bhisho. Since the latter was of a more restrictive nature than the original facility, section 171(6)(b) of the Children's Act had not been complied with. On the basis of this section a transfer order made by the provincial head of social development in terms of section 171(1), requires the ratification by the children's court that had previously made the placement order. Since this had not happened, the high court granted the interdict against the respondents.

<sup>370</sup> Ideally, the *Guidelines* should be disseminated widely among all sectors concerned with alternative care, *inter alia*, the legislature, judiciary, professionals, the media and the public at large, see paragraphs 2 of the Preamble, and paragraph 2 of the *Guidelines*.

<sup>371</sup> See paragraph 28(b)(i) and (ii) of the *Guidelines*.

<sup>372</sup> See A/RES/64/142, paragraph 10.

interests.<sup>373</sup>

The following paragraphs will briefly outline the various forms of alternative care or placement in South Africa and the Netherlands. Beforehand it should be noted that although both countries do cater for alternatives regarding care for children, this does not diminish a state's obligation to improve the child protection system in the country, which includes the development (and implementation) of suitable alternatives. It is hoped that not merely financial considerations will urge state parties to reconsider placement options and priorities in this respect, but that the best interests and needs of children will inform policy considerations and decisions.<sup>374</sup>

With regard to the alternatives in placement or forms of placement, a distinction is drawn between those which resemble a family environment and residential care.<sup>375</sup> It should be reiterated that preference should be given to the first-mentioned and that residential care should be a measure of last resort.<sup>376</sup>

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<sup>373</sup> See the discussion below in sections 5.3.4 and 5.3.5 below.

<sup>374</sup> On the side line, reference needs to be made to the fact that the decision to remove a child from the family environment should not be merely based on financial and material poverty or conditions directly relating to this. Article 14 of the *Guidelines for the Alternative Care of Children* explicitly states that the latter circumstances “should never be the only justification for the removal of a child from parental care ... but should be seen as a signal for the need to provide appropriate support to the family”. It is submitted that the latter document and other relevant documents should form an integral part of the training programmes for professionals dealing with placement cases, which will positively contribute to the frame of reference of these professionals dealing with vulnerable families.

<sup>375</sup> From the onset it should be pointed out that each of these forms of placement and their legislative and policy context are potential research topics on their own and merit separate research. The latter is relevant in order to establish how the rights of children can be enhanced and practically exercised, especially pertaining to participation. For the purpose of this thesis some of the core aspects relating to the various forms of placement will be highlighted.

<sup>376</sup> See Article 4 of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85 of 3 December 1986); also paragraph 665 of the report “Children without parental care” (CRC/C/153 of 17 March 2006), in which a family-type alternative care is prioritised; also paragraphs 13 and 20-22 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010), which indicates that according to the predominant opinion of experts, alternative care for young children should be provided in family-based settings and residential care should be limited to cases where it is specifically appropriate.

### 5.3.1 Forms of placement in South Africa

In Chapter 4 reference was made to the wide range of court orders which are at a court's disposal.<sup>377</sup> In establishing what order (if any) would be in the best interests of the child, the court is obliged to have due regard to the best interests of the child-standard as provided for in the sections 7 and 9 of the Children's Act. Section 7(1)(k) explicitly refers to the fact that consideration needs to be given to the need for the 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. Where the circumstances are not too serious the court may decide not to impose an order or may opt for any of the less intrusive impositions; for example, a supervision order.<sup>378</sup> However, when it comes to considering the other extreme, namely the removal and subsequent placement of a child, additional criteria come to the fore. The international and regional instruments refer in this respect to the phrases "if necessary", "measure of last resort" and/or "for the shortest appropriate period of time".<sup>379</sup>

Given the fact that circumstances sometimes urge the removal of a child, any placement decision should be based on a careful deliberation and assessment of the child's individual needs. Whilst the placement options in terms of the previous legislation were relatively limited,<sup>380</sup> with regard to the Children's Act they are plentiful, which is certainly commendable.<sup>381</sup> As indicated, with regard to the various forms of placement, a distinction is drawn between care which resembles a family environment and institutional care, which will be discussed after a brief discussion on the informal care arrangements which do not require a court order.

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<sup>377</sup> It needs to be reiterated that this is one of the major strengths of the Children's Act. For a complete overview of the court orders, see section 4.5.1 above.

<sup>378</sup> For an overview of the range of court orders in terms of South African law, see section 4.5.1 above.

<sup>379</sup> For a detailed discussion, see section 5.1.2 above.

<sup>380</sup> Section 1 of the repealed Child Care Act 74 of 1983 contained various definitions of child care facilities, namely "children's home", "place of care", "place of safety", "reform school", "school of industries", "shelter" and "secure care facility". According to Zaal, these definitions were problematic in the sense that they lacked clarity on the main distinctive functions: "Casting children out into a legal wilderness? A critical evaluation of the definitions of care facilities in the Child Care Act 74 of 1983" *The South African Law Journal* (2001) 207.

<sup>381</sup> See also Zaal *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system* (LLD dissertation 2008 University of the Witwatersrand) 411.

### 5.3.1.1 Family-like placements in South Africa

From the outset it should be noted that in South Africa many children are living with relatives, whilst the parent(s) are employed and residing elsewhere. In other words, informal care seems to be a common feature, even more so in the rural areas.<sup>382</sup> Although it is commendable that such an arrangement, generally speaking, results in a continuation of a (familiar) family environment, this might not always necessarily serve the child's best interests.<sup>383</sup> In addition, it is not always clear who has parental responsibilities and rights with regard to the child.<sup>384</sup> The Children's Act provides for the possibility that parental responsibilities and rights can be shared between so-called co-holders of parental responsibilities and rights.<sup>385</sup> It is important to note that even when it is unclear who has parental responsibilities and rights, section 32 dictates that the person who *de facto* cares for the child, voluntarily or by agreement, is under the statutory obligation to safeguard the child's health, well-being and development, and to protect the child from any maltreatment and neglect.<sup>386</sup> It is submitted that the contents of these "new" provisions need to be widely disseminated among the public in South Africa, to ensure that people become aware of

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<sup>382</sup> Many children in South Africa are living with their grandparents or other relatives. These situations meet the definition of "informal care" as provided by the *Guidelines for the Alternative Care of Children (A/RES/64/142)*, paragraph 28(b)(i), which reads as follows: "any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body".

<sup>383</sup> There might be a distinct difference in approach regarding the issue of raising children, between the grandparents and their own children. Moreover, some of the rights which accrue to children might not be adequately protected, for example matters relating to domestic discipline.

<sup>384</sup> For a detailed discussion on parental responsibilities and rights, see section 4.1 above.

<sup>385</sup> Sections 30-32 of the Children's Act deal specifically with co-holders of parental responsibilities and rights.

<sup>386</sup> The care-giver concerned acquires parental responsibilities and rights which are reasonably necessary in order to comply with the statutory duties. This includes the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child. See section 32(2). However, the care-giver is not permitted to hold himself or herself out as the biological or adoptive parent of the child or deceive the child or any other person into believing such. This would constitute an offence in terms of section 305(1)(b) and results in liability to a fine or to imprisonment for a period not exceeding ten years, or to both, when convicted. See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 52.

these responsibilities and thus can act accordingly.<sup>387</sup> As mentioned, section 32 aims to protect a child who is cared for by a person who does not have parental responsibilities and rights, but provides care on a voluntary basis, either indefinitely, temporarily or partially. Although it is welcome that section 32 provides a “safety-net” in this regard, the question arises as to whether it would not be in the child's best interests to link the *de facto* care provided by the care-giver with the exercise of parental responsibilities and rights for the purpose of clarity and stability for the persons involved. The latter is especially relevant pertaining to children in need of care and protection.

The relationship between these legislative provisions came to the fore in the recent decision *SS v Presiding Officer of the Children's Court, District of Krugersdorp and Others* (Children's Institute as *amicus curiae*).<sup>388</sup> In this case an application for foster care of a twelve-year-old boy was declined by the children's court on the basis that the child was *inter alia* “not in need of care as envisaged in section 150(1)(a) of the Children's Act”, since the child was already cared for on a voluntary basis in terms of section 32. Therefore the presiding officer refused to place the child in foster care and as a consequence, the child was not eligible for a foster child grant.

The facts of the case were as follows: when the boy was two years old, the mother left him in the care of her maternal aunt and uncle, the Lamani family, who remained the care-givers after the mother of the boy passed away in 2007. In 2010 the background screening for a foster care application was done, after which the Lamanis were found to be suitable foster parents. The social worker's report indicated that the boy was a child in need of care and protection in terms of section 150(1)(a) and recommended that he be placed in foster care with the Lamanis, that a foster care grant be paid, and that supervision services would be rendered to the Lamanis. The presiding officer of the children's court rejected the report of the social worker and found that since the Lamanis were already taking care of the boy, he was not in need of care in terms of section 150(1)(a) and could therefore not be placed into foster care. This was based on the interpretation of a child in need of care and protection as “a child who has been abandoned or orphaned and has no care-giver, and that if any person

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<sup>387</sup> Section 33 provides that the co-holders of parental responsibilities and rights may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

<sup>388</sup> [2012] JOL 29302 (GSJ).



claims or takes responsibility, the child has “visible means of support” and does not meet the requirements set out in the provision.

On appeal, Saldulker J held that the latter interpretation was misplaced and that it ignored the existing legislation on foster care.<sup>389</sup> The court set out guidelines pertaining to a flexible approach which would be in the interests of children. The guidelines pertaining to the application of section 150(1)(a) involve two stages. In the first place it needs to be determined whether a child is in need of care and protection (“orphaned” or “abandoned”). Secondly, it has to be determined whether the child is “without any visible means of support”.<sup>390</sup>

Pertaining to the latter, the presiding officer needs to inquire about the child's financial position.<sup>391</sup> The court elaborated on the legal duty of support by various categories of persons and established that the child was without visible means of support, since aunts and uncles do not have a legal duty to support their nieces or nephews.<sup>392</sup> Therefore the child was found to be in need of care and protection and was placed in foster care with the Lamanis. In addition, a foster care grant pertaining to the child had to be paid to the foster parents. Saldulker J recommended the children's courts adopt a flexible approach appropriate for the determination of the best interests of the child and to interpret section 150(1)(a) in accordance with the Constitution.

#### **5.3.1.1.1 *Child-headed households***<sup>393</sup>

Another matter of concern is the occurrence of child-headed households in South Africa, due

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<sup>389</sup> See paragraph 16 of the case.

<sup>390</sup> This revolves around the financial means of the child, not those of the prospective foster parents, see paragraph 31.

<sup>391</sup> In this regard it needs to be established whether there is a legal duty of support resting on anyone in respect of the child, whether the child has any means currently or whether the child has an enforceable claim for support. See paragraph 30.

<sup>392</sup> See paragraphs 32-35 of the case.

<sup>393</sup> See for a legal analytical study on this form of alternative care, Phillips *Child-headed households: A feasible way forward, or an infringement of children's right to alternative care?* (Proefschrift 2011 Universiteit Leiden).

to the HIV/AIDS pandemic.<sup>394</sup> Where parents, for example, have passed on, children are left in the care of their older brother(s) or sister(s). In this respect the Children's Act also offers assistance. A provincial head of the Department of Social Development may recognise a household as a child-headed household if the statutory requirements are met. This is relevant in the context of this thesis, since it could prevent the child's removal from his or her environment and the subsequent placement.

Another benefit could be that any siblings can (more easily) remain together.<sup>395</sup> The importance of the latter is also emphasised in the "General principles and perspectives" relating to alternative care in the *Guidelines for Alternative Care of Children*.<sup>396</sup> Since this form of alternative family care does not occur in the Netherlands, it will be briefly elaborated on.

Where it is noticed that a child is a member of a child-headed household, the child must be referred for investigation by a social worker, in order to establish whether the child is in need of care and protection in terms of section 150.<sup>397</sup> In case the social worker is of the opinion that the child is in need of care and protection, care and protection proceedings should follow. If, after investigation the social worker finds that the child is not a child in need of care and protection, he or she must, where necessary, take measures to assist the child.<sup>398</sup>

In terms of section 137 of the Children's Act, a household may be recognised as a child-

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<sup>394</sup> See also Sloth-Nielsen in Davel & Skelton (eds.) 7-45; also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 196.

<sup>395</sup> In this respect Sloth-Nielsen refers to *General Comment No. 3* on HIV/Aids and the Rights of the Child. See (CRC/GC/2003/1, paragraph 31. Also in Davel & Skelton 7-46.

<sup>396</sup> (A/RES/64/142), paragraph 16. In addition, Article 7(1)(d) of the Children's Act also lists separation from, among others, siblings as one of the factors to be considered in determining the best interests of the child.

<sup>397</sup> Section 150(2) and (3).

<sup>398</sup> The Children's Act is silent with regard to any resistance coming from the side of the child regarding any assistance or services to be offered/suggested. Matthias & Zaal suggest that under such circumstances, the social worker should consider whether the circumstances are of such a nature that they warrant the initiation of care and protection proceedings on the basis of section 150(1)(f), namely, that the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being: Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-7. Also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 169.

headed household, if

- “(a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;
- (b) no adult family member is available to provide care for the children in the household;
- (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and
- (d) it is in the best interests of the children in the household”.

All four requirements need to be fulfilled in order to have a household recognised as a child-headed household.<sup>399</sup> Section 137(2) provides that a child-headed household *must*<sup>400</sup> function under the general supervision of an adult, who has been designated by a children's court or an organ of state or a non-governmental organisation.<sup>401</sup> However, all day-to-day decisions relating to the household and the children in the household may be taken by the child heading the household.<sup>402</sup> The designated adult is required to perform the duties as prescribed in relation to the household, which are outlined in detail in DSD regulation 50.<sup>403</sup> The supervising adult may not take any decisions concerning either the household or the children without consulting the child heading the household and the other children (given the

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<sup>399</sup> See Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 197.

<sup>400</sup> Own emphasis to stress the importance of the involvement of an adult who is specifically designated by a children's court, organ of state or a civil organisation (NGO). For a more detailed discussion see Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 199.

<sup>401</sup> Which will be determined by the provincial head of Social Development.

<sup>402</sup> Section 137(2).

<sup>403</sup> Section 137(3)(a) in conjunction with DSD regulation 50 (GN R261/2010). The duties of a supervising adult entail, for example, to facilitate psychological, social and emotional support to all members of the household when required; ensure that all members who are by law required to attend school or otherwise attend an education programme, do so; educate the members with regard to health and hygiene; keep record of all expenditure of the household; assist the member heading the household with his or her responsibilities and be available when a child requires services after hours. In addition it is important to note that incidents of abuse need to be reported to the relevant authority, in a form substantially corresponding with Form 22.

age, maturity and stage of development).

Any social security grant or other assistance to which the household is entitled, may be collected and administered by either the child heading the household or the supervising adult.<sup>404</sup> It is hoped that the above provisions will have the desired effect of (informally) regulating these arrangements. However, at all times it needs to be ensured that the best interests of these children are safeguarded and protected, as well as the other rights children are entitled to.

If a children's court finds that a child is in need of care and protection, the court may make any of the orders listed in section 156, provided it is in the best interests of the child. With regard to the latter requirement, sections 7 and 9 of the Children's Act are relevant; of which section 7 contains the factors which must be taken into consideration when applying the best interests of the child-standard.<sup>405</sup> In addition, the children's court may choose any of the orders listed in section 46, to which reference is made in section 156.<sup>406</sup>

Section 156, thus offers the court a whole range of court orders to select from, which is one of the main features of the Children's Act. Matthias and Zaal indicate that section 156 provides the children's courts with "almost a *carte blanche*" with regard to the formulation of any order in terms of this provision.<sup>407</sup> This makes it possible for the court to create an order which is tailored to the needs of a specific child. However, before the children's court can proceed to make an order for the removal of the child from his or her family environment,

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<sup>404</sup> Section 137(5)(a). On the basis of sub-paragraph (b), the supervising adult is accountable to the organ of state or non-governmental organisation that designated him or her to supervise the household. DSD regulation 51 prescribes the duties of the supervising adult in this regard. Where the child heading the household or any of the other children are dissatisfied with the manner in which the supervising adult performs his or her duties, they may report this to the organ of state or ngo, in terms of section 137(8). See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 147-148.

<sup>405</sup> For a more detailed discussion on the best interests of the child standard, see section 3.1.3 above. It is recommended that with regard to the Netherlands a similar list should be included in Book 1 of the Civil Code, however, preferably non-exhaustive.

<sup>406</sup> See section 156(1)(a). It should be noted that this provision is placed in chapter 9, which specifically deals with a child in need of care and protection. See also Matthias and Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-22. For a discussion on the court orders in terms of section 46, see section 4.5.1 above.

<sup>407</sup> Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-22.

section 157 needs to be complied with first. It reads as follows:

- “(1) Before a children's court makes an order in terms of section 156 for the removal of the child from the care of the child's parent or care-giver, the court must –
- (a) obtain and consider a report by a designated social worker on the conditions of the child' life,<sup>408</sup> which must include –
- (i) an assessment of the developmental, therapeutic and other needs of the child;
  - (ii) details of family preservation services<sup>409</sup> that have been considered or attempted; and
  - (iii) a documented permanency plan taking into account the child's age and developmental needs aimed at achieving stability in the child's life and containing the prescribed particulars; and
- (b) consider the best way of securing stability in the child's life”.

It should be reiterated that section 157 needs to be complied with before the court makes an order for the removal of the child in terms of section 156. The above list of considerations that the court is obliged to adhere to ensure that a removal decision is not taken lightly, whilst at the same time the focus is on ensuring (some) stability in the child's life, thereby safeguarding his or her protection and well-being.

It is commendable that these duties are outlined in the legislation, ensuring that proper

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<sup>408</sup> DSD regulation 55(1) contains a detailed list pertaining to the information required for the report and must be in a form substantially corresponding with Form 38. It is self-evident that, if applicable, reasons should be given for the removal of the child, see regulation 55(1)(c): GN R261/2010.

<sup>409</sup> The exact content of “family preservation services” is not clear since no reference seems to be made in the definition section (section 1(1)). From the context it can be derived that it involves prevention and early intervention programmes. It is therefore recommended that section 157(1) be amended, in order to provide clarity.

consideration is given to the child's background, any services already offered, and a documented permanency plan, which includes the child's needs and suggesting the way forward pertaining to the child concerned.

The importance of such a plan is not to be underestimated. Where the court issues a removal order, the court may include in the court order instructions as to the implementation of the permanency plan for the child.<sup>410</sup> It is submitted that the child concerned should participate in the drafting of such a plan and that regular evaluation of the plan is necessary in order to be able to adjust it to the (changing) needs of the child. Furthermore, section 157(1)(b) prescribes that the court must consider the best way of securing stability in the child's life before it makes a removal decision. Various options should be considered whereby priority should be given to the one which secures stability in the child's life best.<sup>411</sup> The sequence followed in the latter provision ranges from the option with the least impact to the one with major impact; namely, making the child available for adoption. Sub-section (1)(b) is aimed at assisting the court in making the most appropriate order.<sup>412</sup>

Reference should be made to section 157(3), which states that “a very young child who has been orphaned or abandoned by its parents must be made available for adoption except when this is not in the best interests of the child”. Although it is not very clear what is meant by the phrase “very young”,<sup>413</sup> it is obvious that under these circumstances stability and

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<sup>410</sup> See section 157(4). It is submitted that adequate training is necessary for presiding officers, social workers and other professionals dealing with these plans.

<sup>411</sup> In order to consider the best way of securing stability in the child's life, consideration should be given to the following five options: (i) leaving the child in the care of the parent or care-giver under the supervision of a designated social worker, provided that the child's safety and well-being must receive first priority; (ii) placing the child in alternative care for a limited period to allow for the reunification of the child and the parent or care-giver with the assistance of a designated social worker; (iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver; (iv) making the child available for adoption; or (v) issuing instructions as to the evaluation of progress made with the implementation of the permanency plan at specified intervals.

<sup>412</sup> See also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-31.

<sup>413</sup> Bruning has referred to the fact that children between birth and five years of age are positioned in the first phase of the “attachment theory”, which forms the basis for attachment: *Rechtvaardiging van Kinderbescherming* (2001) 220. This is important to keep in mind with regard to permanency planning and the implementation of such plans. See also the *Guidelines for Alternative Care of Children* (A/RES/64/142) of 24 February 2010, paragraph 59, in which it is noted that frequent changes pertaining to the care of a child should be avoided, since it is detrimental to the development of a child and to the ability to form

permanency are priorities and that therefore adoption should be timeously considered rather than alternative care. Bosman-Sadie and Corrie correctly indicate that the latter is part of permanency planning and aims to prevent children from “continuously being uprooted and disrupted by unnecessary transfers”.<sup>414</sup>

In addition, before making an order concerning the (temporary or permanent) removal of a child from his or her family environment, a presiding officer needs to be aware of the possibility of section 148.<sup>415</sup> This section provides discretion to order an early intervention programme or the participation in a prescribed family preservation programme instead of the removal of the child. This is certainly commendable, provided that the safety or well-being of the child is not at risk.<sup>416</sup> It seems, however, that neither section 156 nor section 157, which both deal with considerations pertaining to removal orders, refer to section 148.<sup>417</sup> Without adequate (continuing) training of the professionals involved, section 148 may easily be overlooked. This would be most regrettable, since it has much potential in avoiding the removal of children from their family environment. It is therefore recommended that cross referencing in these provisions will be included, for the sake of clarity and certainty.

Returning to the extensive list of court orders provided by section 156(1), it is important to note that the court, in terms of sub-section (2), may order that the child concerned be kept in temporary safe care until such time that the order can be practically implemented or realised.<sup>418</sup> This is relevant where the placement options are (temporary) limited.<sup>419</sup>

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attachments.

<sup>414</sup> *A Practical Approach to the Children's Act* (2010) 182.

<sup>415</sup> For a more detailed discussion on prevention and early intervention programmes in South Africa, see section 4.2.1 above.

<sup>416</sup> Section 148(5) determines that an early intervention programme or a prescribed family preservation programme in terms of section 148(1) does not apply where the safety or well-being of the child is seriously or imminently at risk.

<sup>417</sup> Section 148 forms part of chapter 8 of the Children's Act, which provides specifically for prevention and early intervention services, whilst the sections 156 and 157 are situated in chapter 9, the child in need of care and protection. In order to link these two chapters, cross referencing is a necessity.

<sup>418</sup> The term “temporary safe care” is defined as: “care of a child in an approved child and youth care centre, shelter or private home or any other place, 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”, see section 1(1) of the Children's Act.

<sup>419</sup> See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 181. It is,

However, the following discussion will focus on the different forms of placement in the context of a care order imposed by the children's court in terms of section 156(1) of the Children's Act.<sup>420</sup>

Alternative care placements are provided for in section 156(1)(e) and include:

- “(i) foster care with a suitable foster parent;
- (ii) cluster foster care;
- (iii) temporary safe care in preparation for the adoption of the child;<sup>421</sup>
- (iv) shared care between different care-givers or centres;<sup>422</sup> and

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however, state parties' duty to provide for alternative care in terms of Articles 20(2) of the CRC and 25(2) of the African Children's Rights Charter. In the report *Children without parental care* (CRC/C/153 of 17 March 2006) the Committee on the Rights of the Child recommends that state parties strengthen their mechanisms for data collection. Relevant and updated data can inform future policies and decisions regarding the required allocation of resources. If it can be derived from the available data that there has been an apparent increase in placement orders, (policy) decisions are needed to increase the number of anticipated places accordingly. Children in need of care and protection can not be left in limbo (unnecessarily) due to the fact that there are no foster families available or no space in institutions. In addition research is needed to determine the cause or reasons for such increase, which in turn should inform decisions pertaining to any measures to be taken.

<sup>420</sup> Section 156(1) is applicable when a children's court finds that a child is in need of care and protection and where it has been established that the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child.

<sup>421</sup> Matthias & Zaal have pointed out that this order would be appropriate where it has been established that the child is in need of care and protection and that it is anticipated that reunification services will not be effective, due to the circumstances and where there are prospective adoptive parents available, willing and able to adopt: Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-25.

<sup>422</sup> In the case of “shared care”, the responsibility for the care of the child concerned is shared between individual care-givers and or care centres. To this effect, the child moves between different places at different times of the day or week (or month). These care-givers are supposed to complement one another and jointly provide sufficient care for the child which improves the upbringing of the child concerned. However, this form of alternative care placement still needs to be further fine-tuned. It is agreed with Matthias & Zaal that regulations are needed to provide more direction regarding the contents and application: Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-27. It is submitted that this form of care has a lot of potential in providing the necessary support toward the quality of the



- (v) placement in a child and youth care centre in terms of section 158”.

The abovementioned forms have in common that they are all based on a placement order issued by the children's court and thus require periodic or regular review.<sup>423</sup> These respective forms of alternative care placements will be discussed next.

### **5.3.1.1.2 Foster care**

Where the removal and placement of a child is deemed necessary to protect the child or to safeguard the child's emotional, physical or psychological development, it is important to provide appropriate alternative care for the child.<sup>424</sup> This ideally entails a family-like environment which is best catered for in a foster family.

As pointed out already,<sup>425</sup> it is a reality in South Africa that many children are living with family members,<sup>426</sup> both formally and informally. Skelton and Carnelley point out that in recent years a trend has developed in formalising the informal arrangements into foster care orders.<sup>427</sup> As will be seen, the children's court may, amongst others, place a child in foster care with a person who is not a family member of the child or with a family member (who is not the parent or guardian of the child). The latter amounts to kinship care, which refers to the child being cared for by a member of the extended family. At this point in time the South African law does not explicitly recognise kinship care. This is most unfortunate since it allows for the perpetuation of a discrepancy between the legislative framework, which

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upbringing of the child, without major intervention and the (possible) adverse consequences.

<sup>423</sup> On the basis of Article 25 of the CRC, which is discussed in section 4.7. See also *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010), paragraph 13; also Schäfer *Child Law in South Africa – Domestic and International Perspectives* (2011) 453-454.

<sup>424</sup> Compare with section 28(1)(b) of the Constitution of the Republic of South Africa, 108 of 1996. See section 5.3.1.1.1 above. The term “alternative care” in terms of section 167(1) refers to foster care, placement in a child and youth care centre or temporary safe care (the definition section 1(1) refers to section 167(1)).

<sup>425</sup> Section 5.3.1.1 above.

<sup>426</sup> According to Skelton, a general household survey in 2009 has revealed that approximately 5.6 million children live with family members other than their own parents, in “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa” *The International Survey of Family Law* (2012) 333.

<sup>427</sup> *Family Law in South Africa* (2010) 318.

provides various (but limited) options, and the *de facto* reality involving many children in South Africa.

Although the South African Law (Reform) Commission proposed apart from foster care, the inclusion of both court ordered kinship care and informal kinship care,<sup>428</sup> kinship care had been removed altogether from the proposed text for the Children's Bill.<sup>429</sup> It is agreed with Skelton that a structure which was proposed by the SALRC was most valuable in the South African context and should be re-considered for inclusion in the Children's Act. She proposes the following models, which cater for various scenarios and have different implications pertaining to costs and required social services. Firstly, foster care in the traditional sense,<sup>430</sup> and secondly, kinship care, which is divided in two options; namely, court-ordered kinship care for children in need of care and protection and informal kinship care, in which case families do not require social services but need financial support.

Foster care, in the traditional sense, is often regarded as the preferred form of substitute care and is common in South Africa.<sup>431</sup> The previous statement, however, needs some qualification: it is submitted that foster care should be preferred if it is genuinely feasible (and in his or her best interests) that the child (eventually) will be able to return home.<sup>432</sup> In terms

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<sup>428</sup> In the case of foster care the child would be placed in the care of a person unrelated to the child. Court-ordered kinship care concerned care by relatives for children who would not be able to live at home due to abuse or neglect, whereas informal kinship care would be limited to cases where a child did not need care and protection services. See SALRC Discussion Paper 103 on the *Review of the Child Care Act*, Project 110 (2001) 722; see Matthias & Zaal in Boezaart & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-31; also Skelton "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" 2012 *The International Survey of Family Law* 337.

<sup>429</sup> For a more detailed discussion, see Skelton 2012 *The International Survey of Family Law* 338-340.

<sup>430</sup> This involves foster care for a child in need of care and protection, based on a court order and placement with persons the child does not know. Since this is in principle of a temporary nature, reintegration services are necessary.

<sup>431</sup> See Article 4 of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85 of 3 December 1986); also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-24. See also the discussion in section 5.1.1.3 above.

<sup>432</sup> Foster care is supposed to be of a temporary nature, whilst adoption aims to provide a permanent situation, which offers more security for the child concerned, see below in this section. See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010)

of section 180(1) of the Children's Act, a child is in foster care if he or she has been placed in the care of a person who is not the parent or guardian of the child.<sup>433</sup> Thus temporary care is provided by substitute parents in a family-like environment.<sup>434</sup>

Foster parents are entitled to a foster child grant of R770 per month, provided that the foster child is in need of care and protection.<sup>435</sup> However, since the case *SS v Presiding Officer of the Children's Court, District of Krugersdorp and Others*,<sup>436</sup> a foster parent who is a member of the extended family, is no longer "automatically" eligible for the foster child grant. As discussed above,<sup>437</sup> the twelve-year-old orphan was found in need of care and protection and without any visible means of support. Therefore he was placed in the foster care of his aunt and uncle (the Lamani family) until the age of eighteen<sup>438</sup> and was subsequently entitled to a foster child grant. The latter is based on the fact that aunts and uncles do not have a legal duty of support towards their nieces and nephews. However, grandparents do have a legal duty of support towards their grandchildren.<sup>439</sup> The outcome of the case is that they are no longer eligible for foster child grants, which is a major cause for concern since many of these families are taking financial strain. As a consequence, grandparents have to rely on the much lower child support grant (R280 per month) in future which will be totally inadequate.

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<sup>433</sup> The definition section 1(1) refers in this respect to section 180(1), in chapter 12 of the Children's Act, which specifically deals with foster care. According to section 1(1) it includes foster care in a registered cluster foster care scheme.

<sup>434</sup> Matthias & Zaal have referred to the distinction between foster parents who are blood relatives of the child (so-called "kinship care") and foster parents who are not related to the child, in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-24. The Children's Act does not specifically refer to the term kinship care, but placement with a family member is nevertheless possible, see section 180(3)(b).

<sup>435</sup> See section 8 of the Social Assistance Act 13 of 2004.

<sup>436</sup> [2012] JOL 29302 (GSJ).

<sup>437</sup> For the facts of the case, see section 5.3.1.1.

<sup>438</sup> On the basis of section 186(2) of the Children's Act, the court has a discretion to place a child in foster care with a family member until the child turns eighteen, provided that the child has been abandoned by the biological parents, the parents are deceased or that there is no purpose in attempting reunification between the child and her or his parents and that such order would be in the child's best interests. It is submitted that it should not be concluded too easily that reunification is not feasible. However, *in casu* there was no possibility of reunifying the child with either of his biological parents due to the fact that he was an orphan.

<sup>439</sup> See "No. more foster child grants for grannies", available via [www.ci.org.za](http://www.ci.org.za), accessed on 20-09-2012.

Skelton recommends either the extension of the foster care grant or the introduction of the so-called kinship grant. Since the latter merely provides for financial assistance, it would alleviate the crisis in the foster care system.<sup>440</sup>

The purposes and benefits are outlined in section 181, which reads as follows:

“The purposes of foster care are to -

- (a) protect and nurture children by providing a safe, healthy environment with positive support;
- (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and
- (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity”.<sup>441</sup>

After the removal and placement of a child, the foster parent(s) is/are (temporarily) awarded the care of the child concerned.<sup>442</sup> Therefore it should be one of the priorities to render (intensive) family reunification services as soon as possible, with the view of the child

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<sup>440</sup> “Kinship care and cash grants: in search of sustainable solutions for children living with members of their extended families in South Africa” *The International Survey of Family Law* (2012) 344; also “No. more foster child grants for grannies”, available via [www.ci.org.za](http://www.ci.org.za), accessed on 20-09-2012.

<sup>441</sup> Skelton & Carnelley have posed the question whether a baby can be considered having a culture, language and religion. Whilst the latter aspects need to be given consideration by the court in any event, it seems even more pressing where a child is older and already has established a connection with a specific culture, language or religion, in *Family Law in South Africa* (2010) 320-321. It is submitted that each case has to be considered on its own merits, having due regard to the various aspects and especially the best interests of the child. See also *C and Another v Commissioner of Child Welfare, Wynberg* 1970 (2) SA 76 (C), in which the court held that “[t]he selection of a person in whose custody a child who has a meaningful religious and cultural background shall be placed, must accordingly have a close relationship to such background”, see paragraph 87E. The latter contributes to the necessary stability and continuity in the child’s life.

<sup>442</sup> The biological parents remain the guardians of the child, in terms of section 18 of the Children’s Act.

(eventually) returning home.<sup>443</sup> In addition, chapter 12 contains a detailed set of provisions relating to, *inter alia* the prospective foster parent(s) and their responsibilities and rights,<sup>444</sup> and the determination of placement and specific aspects with regard to the actual placement and its consequences.<sup>445</sup> It is interesting to note that in terms of South African law, a children's court may choose any of the three following options regarding foster care placement, depending on the availability. These are placement:

- (i) With a person who is not a family member of the child;
- (ii) With a family member of the child;<sup>446</sup> or
- (iii) In a registered cluster foster care scheme.

In the latter case, a child is not placed with an individual foster parent, but with a group of persons or an organisation,<sup>447</sup> possibly (and preferably) in the own community.<sup>448</sup> Matthias and Zaal indicate that the benefits of cluster foster care are that more children can be placed

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<sup>443</sup> Where family reunification is not in the best interest of the child, an order of the children's court may give parental rights and responsibilities to a foster parent on the basis of section 188(3). It is agreed with Bosman-Sadie & Corrie that under these circumstances adoption should be considered as alternative placement, due to the fact that the latter would offer better security for the child concerned: *A Practical Approach to the Children's Act* (2010) 210. It should be noted that in terms of section 231 a child may be adopted by the foster parent of the child, which is welcome addition to the categories of persons who may adopt a child in terms of South African law.

<sup>444</sup> Section 182 contains the requirements for a prospective foster parent, whereas section 188 deals with the responsibilities and rights of foster parents. In this respect DSD regulation 65 and 66 are also worth mentioning (GN R261/2010). A foster parent has the responsibility of providing for the day to day needs of a foster child and regulation 65 contains a list of responsibilities, followed by a listing of rights which foster parents have, in regulation 66.

<sup>445</sup> For example, in principle the maximum number of children placed in foster care per household is six, see section 185. Section 187 regulates the reunification of a child with his or her biological parents, section 186 deals with the duration of the order (generally two years or longer) and section 189 provides for the termination of foster care.

<sup>446</sup> This family member is not the parent or guardian of the child.

<sup>447</sup> The organisation operating or managing the cluster foster care scheme must be a nonprofit organisation registered in terms of the Nonprofit Organisations Act 71 of 1997, see section 183(1)(a) of the Children's Act in conjunction with DSD regulation 67 (GN R261/2010).

<sup>448</sup> See section 156(1)(e)(ii).

(fostered)<sup>449</sup> and that it prevents institutionalisation. The responsibility for the foster care lies with a group of persons or an organisation within the community. Therefore the child will be able to stay within its own familiar environment. Although this form of alternative care is not worked out in detail in the Children's Act, the DSD regulations 67-71 regulate the establishment, functioning, management and provision of services by cluster foster care schemes. It is submitted that more publicity should be given to this innovative form of foster care.

Thus, in addition to the well-known foster care as briefly mentioned above, the Children's Act provides for two new forms of care; namely, cluster foster care and shared care. This is certainly welcome and needed, due to the fact that more children seem to be in need of (alternative) care and also because adoption does not happen as frequently as wished for.<sup>450</sup> However, since care provided by the extended family is a common phenomenon in South Africa, it is submitted that kinship care is indispensable and it is hoped that it will soon be included in the Children's Act.<sup>451</sup>

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<sup>449</sup> Cluster foster care has been described as follows by McKerrow: "volunteer women and couples are recruited and trained in the basics of child care. Up to six children are placed with each volunteer who receives foster care grants and material support. Community workers link these volunteers to other resources such as day care centres which relieve foster parents of child care duties in order to undertake income-generating activities". However, the South African Law Reform Committee recommended the following description: that cluster foster care be understood to imply a grouping of caregivers who are linked together to provide mutual support in the care of a number of children, and who receive some form of external support and monitoring. See South African Law Reform Commission Discussion Paper 103 *Review of the Child Care Act Project 110* (December 2001) 724-726. It is interesting to note that the Commission also considered the possibility of specialist or professional foster care. However, it was argued that many foster parents provide both care and treatment and that it would be a difficult task to determine which categories of children should get professional foster care. Moreover, the term "professional foster care" insinuates that ordinary foster parents do not provide professional care, see South African Law Reform Commission Discussion Paper 103 *Review of the Child Care Act Project 110* (December 2001) 727-731.

<sup>450</sup> Unlike adoptive parents, foster parents are entitled to a (foster care) grant from the government. See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-24.

<sup>451</sup> See Skelton "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" *The International Survey of Family Law* (2012) 343-344.

### 5.3.1.2 Residential care

Returning to section 156(1)(e), option (v) provides for the placement of a child in a child and youth care centre. A child and youth care centre is a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the children in the facility concerned.<sup>452</sup> Here reference should be made to section 158, which reads as follows:

- “(1) A children's court may issue an order placing a child in the care of a child and youth care centre only if another option is not appropriate.
- (2) If a children's court decides that a child should be placed in the care of a child and youth centre, the court must -
- (a) determine the residential care programme best suited for the child; and
  - (b) order that the child be placed in a child and youth care centre offering that particular residential care programme”.

Before the children's court can make an order in line with the needs of the child concerned, it has to consider the report of the designated social worker.<sup>453</sup> The children's court will, to a large extent, be guided by the report and recommendations of professionals, since they are the experts in their respective disciplines. It is a positive development that it has been made explicit in section 158(1) that the children's court only has discretion to order residential care if another option is not appropriate.

However, the phrase “if another option is not appropriate” is neither completely unambiguous nor is it necessarily on the same level as “a measure of last resort”. Any recommendation indicating that another option would not be appropriate should be sufficiently substantiated in

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<sup>452</sup> Section 1(1) refers to a facility described in section 191(1), which is placed in chapter 13 of the Children's Act and deals with child and youth care centres.

<sup>453</sup> See section 155(2) and (9), on which basis an investigation followed by the submission of a report needs to be finalised within 90 days. For detailed information on the contents of such a report, see DSD regulation 55(1) (GN R261/2010) and Form 38.

the report. To ensure that the aforementioned phrase will not be regarded (and used) as an easy way out, it is submitted that the courts should interpret the phrase strictly. Only in this way it can be maintained that the provisions are in reasonable compliance with the “last resort principle”, as indicated in the international instruments.<sup>454</sup> For the sake of clarity, it is nevertheless recommended that the principle “as a measure of last resort” be explicitly included in the legislation.<sup>455</sup>

Thus the children's court decides the kind of residential care programme which is best suited for the child, after which it is the provincial head of Social Development who needs to implement this in terms of section 158(3). It could be argued that too much authority lies with the provincial head of the Department of Social Development, since he or she will eventually decide where the child will be placed.<sup>456</sup> It is evident that the instructions of the court regarding the suitable programme in terms of section 158(3) need to be followed, thereby having regard to the general rule mentioned in subsection (4). In terms of the latter provision, the head of Social Development of the relevant province is obliged to effect the required placement as close to home as possible. This rule is very important in connection with the child's right to maintain contact with the family, especially regarding the practicable realisation of this right.<sup>457</sup>

Therefore, it is submitted that some measure of control is necessary with regard to the implementation of the court order. Where the aforementioned instructions are not followed,

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<sup>454</sup> For a more detailed discussion on the principle “measure of last resort”, see section 5.1.2 above.

<sup>455</sup> For the proposed formulation of section 158(1), see footnote 68 in chapter 6 (section 6.7.4).

<sup>456</sup> In considering and deciding in which child and youth care centre the child should be placed, the provincial head of social development needs to take into account the six factors as listed in section 158(3), which are: (a) the developmental, therapeutic, educational and other needs of the child; (b) the permanency plan for the child which was considered by the court and any instructions issued by the court with regard to the implementation of the permanency plan; (c) any other instructions of the court; (d) the distance of the centre from the child's family or community; (e) the safety of the community and other children in the centre, in the case of a child in need of secure care; and (f) any other relevant factors. See also Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* (2012) 9-28; Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 183. It is commendable that the listing is in a non-exhaustive fashion, thereby allowing flexibility.

<sup>457</sup> Long distances could have a detrimental effect on maintaining contact with the family. In addition, with the present high unemployment rate in South Africa, many families face financial constraints which might make it difficult to practicably give meaning and effect to the right to maintaining contact.



this should be sufficiently motivated and communicated to the concerned parties. In addition, these parties should be able to challenge such a decision on the basis of section 156(3)(b), which provides that a placement order may be reconsidered by a children's court at any time.<sup>458</sup> Affected parties should be informed about these remedies and assisted in this respect.

As mentioned earlier in this paragraph, chapter 13 of the Children's Act contains the provisions specifically aimed at the regulation of child and youth care centres. This chapter was included in the Children's Amendment Act 41 of 2007 and also came into force on 1 April 2010.<sup>459</sup> The phrase "child and youth care centre" can be typified as an umbrella term since it accommodates a variety of facilities.<sup>460</sup> It is quite an intricate system in the sense that the facilities listed are multi-purpose, offering a wide range of programmes, and distinguished on the basis of these programmes, as spelled out in section 191(2). Although it is up to the courts to determine a suitable residential care programme, an important responsibility lies with the social worker to establish the needs of the child by conducting a thorough assessment.

The institutions which were established in terms of the previous legislation<sup>461</sup> are incorporated in the listing of section 191(2) and are obliged to ensure that they will be registered as child and youth care centres and are in compliance with the present legislation and regulations.<sup>462</sup> All child and youth care centres are required to offer a therapeutic programme designed for the residential care of children outside the family environment.

Section 191(2) states that such therapeutic programmes may include a programme for -

“(a) the reception, care and development of children other than in their family

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<sup>458</sup> On the basis of such consideration, the court has a discretion to confirm, withdraw or amend the previously made order, as may be appropriate.

<sup>459</sup> See Proclamation No. R12 2010, *Government Gazette*, 26 March 2010 No. 33076

<sup>460</sup> See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 215.

<sup>461</sup> The (repealed) Child Care Act 74 of 1983.

<sup>462</sup> See the sections 196 and further.

environment;<sup>463</sup>

- (b) the reception, care and development of children on a shared basis with the parent or other person having parental responsibilities;
- (c) the reception and temporary safe care of children pending their placement;<sup>464</sup>
- (d) early childhood development;
- (e) the reception and temporary safe care of children to protect them from abuse or neglect;<sup>465</sup>
- (f) the reception and temporary safe care of trafficked or commercially sexually exploited children;
- (g) the reception and temporary safe care of children for the purpose of-
  - (i) observing and assessing those children;
  - (ii) providing counselling and other treatment to them; or
  - (iii) assisting them to reintegrate with their families and the community;
- (h) the reception, development and secure care of children awaiting trial or sentence;<sup>466</sup>
- (l) the reception, development and secure care of children with behavioural, psychological and emotional difficulties;<sup>467</sup>

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<sup>463</sup> Previously referred to as children's homes, see section 196(1)(a).

<sup>464</sup> Previously referred to as places of safety, see section 196(1)(b).

<sup>465</sup> Also previously referred to as a place of safety, see section 196(1)(b).

<sup>466</sup> Previously referred to as secure care facility, see section 196(1)(c).

<sup>467</sup> Previously referred to as school of industries. These schools were in the past the responsibility of a provincial department of education but this will be transferred to the

- (j) the reception, development and secure care of children in terms of an order-
  - (i) under section 29 or chapter 10 of the Child Justice Act, 2008;
  - (ii) in terms of section 156(1)(i) placing the child in a child and youth care centre which provides a secure care programme;
  - (iii) in terms of section 171 transferring a child in alternative care;<sup>468</sup>
- (k) the reception and care of street children; or
- (l) the reception and care of children for any other purpose that may be prescribed by regulation”.

This wide range of options is certainly commendable, since it in theory provides for the possibility of a tailor-made placement which corresponds with the needs of the child concerned. It is submitted that (continuous) training is needed for all professionals in this specific field of child care protection. All children are entitled to the protection and enhancement of their basic (human) rights. With regard to children in residential care facilities, the state has the duty to ensure that these children are protected and that their rights will not be infringed upon. This is especially relevant where children live in closed settings, since they are hidden from the public view and therefore extra vulnerable.<sup>469</sup>

It is submitted that the topic “residential care” has a lot of scope for further (field) research, in order to establish whether the various facilities are in line with the present legislation and

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relevant provincial Department of Social Development, see section 196(1)(d) in conjunction with subsection (3).

<sup>468</sup> These options were previously accommodated under the archaic term “reform school”. In the past these institutions resorted under a provincial department of education but will be transferred to a provincial Department of Social Development, see section 196(1)(e) in conjunction with subsection (3).

<sup>469</sup> These children are dependent on the professional attitude of the staff concerned. Proper training, including ethics and human rights should be ensured. Furthermore, strict control and supervision is needed to protect and enhance the rights of these vulnerable children. Internal complaint mechanisms should be provided for, including an independent complaint forum.

regulations. In addition, it needs further investigation as to whether they in practice meet the specific standards as set in the *Havana Rules*.<sup>470</sup> With regard to a court order relating to any of the five aforementioned placement options, the court may include a condition as provided for in section 156(3)(a); for example, that placement is subject to supervision or reunification services.<sup>471</sup> In addition, it is important to note that section 156(3)(b) provides that a court order made in terms of subsection (1) may be reconsidered by a children's court "at any time", and be confirmed, withdrawn or amended as may be appropriate. This is certainly welcomed, since the possibility of reconsideration and a subsequent decision are not subjected to any criteria or limitations.

However, it is not clear who has to file a request for having a court order reconsidered. Is it the child or his or her parents, or jointly? Moreover, it is hoped that the phrase "at any time" will be as widely interpreted as the provision suggests, and that the possibility of reconsideration of a court order will be invoked regularly, especially placement orders. It is regrettable though that there are no specific time frames included for the periodic review of placement decisions.<sup>472</sup>

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<sup>470</sup> However, this merits and requires a research project on its own and therefore cannot be dealt with in detail in this thesis.

<sup>471</sup> The full text of section 156(3)(a) reads as follows: "An order made by the court in terms of subsection (1) – is subject to such conditions as the court may determine which, in the case of the placement of a child in terms of subsection 1(e)(i), (ii), (iii), (iv) or (v), may include a condition-

- (i) rendering the placement of the child subject to supervision services by a designated social worker or authorised officer;
- (ii) rendering the placement of the child subject to reunification services being rendered to the child and the child's parents, care-giver or guardian, as the case may be, by a designated social worker or authorised officer; or
- (iii) requiring the person in whose care the child has been placed, to co-operate with the supervising designated social worker or authorised officer or to comply with any requirement laid down by the court, failing which the court may reconsider the placement."

<sup>472</sup> This would have been in full compliance with Article 25 of the CRC. Due to the far-reaching consequences of removal and placement, regular review of such a decision is necessary in order to establish whether the needs of the child have changed or the situation at home has improved. In the latter case it could mean that the child, within reasonable time, could return home. For a more detailed discussion on periodic review, see section 4.7. See also chapter 6, in which the inclusion of the periodic review of placement orders has been recommended for both South Africa and the Netherlands.

### 5.3.2 Forms of placement in the Netherlands

Reference was made to the distinction between the removal and placement of a child on a voluntary basis in terms of Article 1:258(3) of the Civil Code and the court-imposed order for which authorisation of the children's court is required.<sup>473</sup> In order to effect the removal and placement of the child, a so-called “indication-decision” of the Bureau for Youth Care is needed, which provides an indication/information regarding the care which is required. Article 1:261(2) and the Civil Code are applicable in this regard, and for placement in a closed setting Article 29b(4) of the Act on the Youth Care.<sup>474</sup>

With regard to the various forms of placement in the Netherlands, a distinction is drawn between alternatives which resemble a family environment and residential care, which will be discussed in the following section.

#### 5.3.2.1 Family-like placements in the Netherlands

As a state party to the CRC, the Netherlands is obliged to ensure alternative care for children who are temporarily or permanently deprived of their family environment or who cannot be allowed to remain in that environment.<sup>475</sup> It has been set out that where the removal and placement of a child is deemed inevitable, preference should be given to a family-resembling environment. In this respect the Dutch legislation provides for placement in foster care and adoption.<sup>476</sup>

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<sup>473</sup> See Article 1:261(1) of the Civil Code which reads as follows: “Where it is necessary in the interest of the care and upbringing of a child or for the examination of the child's psychological or physical condition, the children's court may authorise the foundation, referred to in Article 1, under *f*, of the Act on the Youth Care (in other words the Bureau for Youth Care) upon its request, to remove the child for day and night. Such authorisation may also be granted upon the request of the Council for Child Protection or the public prosecuting authority”. For a more detailed discussion on the grounds for removal, see section 5.2.2 above.

<sup>474</sup> See section 5.2.2 above.

<sup>475</sup> See Article 20 of the CRC.

<sup>476</sup> Since adoption aims to provide permanent care for the child, it will be discussed in section 5.3.5 below, under permanency planning.

### 5.3.2.1.1 Foster care

Apart from the abovementioned *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*,<sup>477</sup> the (European) *Recommendation on foster families*<sup>478</sup> is relevant for the Netherlands. The guidelines in these documents have influenced the Dutch legislation and policy relating to foster care,<sup>479</sup> by ensuring, amongst others, the control and supervision of foster families, involvement of all affected parties, and to maintain and promote contact with the biological parents.

Since state parties are obliged to provide for alternative care, the Dutch government has to take responsibility for the realisation of foster care, which (still) faces challenges. According to Doek the budget allocation for foster care is insufficient.<sup>480</sup> As a result the foster grants are too low and the budget available for the recruitment, selection and supervision of foster families is limited, which negatively impacts on the availability of foster placement.

Another challenge concerns the lack of co-operation between foster care organisations, the agencies requesting removal, and the courts granting authorisation for placement (and extension thereof).<sup>481</sup> It has to be reiterated that where children can no longer remain in their family environment and removal and placement seem inevitable, the responsibility to safeguard the protection and well-being of the child shifts to the state. Therefore the government needs to prioritise the sufficient allocation of funds in order to ensure the realisation of a sufficient number of placements. It is further recommended that mechanisms be put in place for the co-ordination of foster care organisations and the improvement of co-operation between private child care organisations, the relevant government agencies and

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<sup>477</sup> UN Document (A/RES/41/85) of 3 December 1986; see also section 5.3 above.

<sup>478</sup> Adopted on 20 March 1987, Council of Europe. This document does not deal with adoption.

<sup>479</sup> For example, "Regeling Pleegzorg", which came into operation on 1 January 2005 which stipulates certain (legal) requirements relating to the prospective foster parents, the foster care contract and the foster care grant. See <http://www.nji.nl/eCache/DEF/1/16/735>, accessed on 27-10-2010.

<sup>480</sup> Which was regrettably once more confirmed in 2010, see *Factsheet Pleegzorg* (2010) 1.

<sup>481</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 182.

the courts.<sup>482</sup>

In line with the international obligations, preference should be given to the placement of a child with a foster family in the case a child can no longer be cared for by his or her biological parents. In the Netherlands foster care can be placement in the family or the social network of the parents, the so-called network placement,<sup>483</sup> which happens in about 40% of all the foster care placements.<sup>484</sup> Alternatively, a child can be placed in the traditional foster family, which are not family or friends of the parents. Foster care can be provided for a short- or longer period of time or on a part-time basis,<sup>485</sup> which makes it possible to tailor the arrangement to the needs of the child (and the family). Foster care can be based on an informal arrangement without any involvement of organisations or institutions.<sup>486</sup>

On the other hand, it can be ordered by the court in the context of a child protection measure (supervision order),<sup>487</sup> which is relevant in the context of this thesis.<sup>488</sup> In the latter case authorisation for the removal (and subsequent foster care placement) has to be granted by the children's court. This is usually initiated by the Bureau for Youth Care and based on a so-called "indication-decision", which indicates that this specific care is required and

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<sup>482</sup> At the same time, the parents should, where possible, also take responsibility by contributing to the costs of placement. This topic falls outside the ambit of this thesis.

<sup>483</sup> In Dutch: *netwerkplaatsing*.

<sup>484</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 264.

<sup>485</sup> The latter usually involves placement for weekends and holidays. This form of assistance may be offered where the parents are taking strain in meeting the needs of the children and might help to prevent the removal of the child from the family environment. See *Factsheet Pleegzorg* (2010) 4.

<sup>486</sup> The parents of the child concerned may arrange with family, friends or others to temporarily provide care for the child. For these informal arrangements, the Foster Children Act of 1951 is relevant, which aims to provide some measure of control regarding the implementation of foster care. Since the latter Act is not relevant for the placement of children in terms of child protection measures (which create a responsibility for the government), it will not be further discussed. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 269.

<sup>487</sup> It should be noted that the foster parent(s) also may apply for a supervision order in terms of Article 1:254(4) of the Civil Code.

<sup>488</sup> In 2010, 24 150 children made use of foster care for a shorter or longer period of time. On 1 January 2010 approximately 15 206 children lived with foster parents and there were 8 944 new placements realised. Two-third of the foster children in 2010 were placed with foster parents in terms of a child protection measure. See *Factsheet Pleegzorg* (2010) 1 and 3, accessed on 27-10-2010.

recommended under the circumstances.<sup>489</sup>

With the coming into force of the Act on the Youth Care,<sup>490</sup> foster care has been included in the Act. Article 22 provides that the responsible youth care institution needs to ensure that the care and upbringing of the child by the foster parent(s) will take place on the basis of a foster care contract.<sup>491</sup> At the same time it also has to ensure that the foster parent(s) will receive a foster care grant, for the care provided.<sup>492</sup> In the Netherlands there are 28 regional youth care institutions which offer/arrange for foster care and collaborate under the name “*Pleegzorg Nederland*”. This umbrella organisation provides annual statistics on foster care in the Netherlands and initiates publicity campaigns.<sup>493</sup>

Due to an increase in demand for foster care placements,<sup>494</sup> more couples and families need to be encouraged to come on board. In this regard these centrally organised publicity campaigns are indispensable,<sup>495</sup> since the public at large need to know what foster care entails in order to make informed choices on becoming involved.<sup>496</sup>

*Pleegzorg Nederland* also provides valuable information regarding trends in foster care. For example, the past few years the capacity for foster care has been over-utilised, which means that more children needed to be accommodated than the budget allowed for, which is a

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<sup>489</sup> See Article 1:261 of the Civil Code.

<sup>490</sup> On 1 January 2005.

<sup>491</sup> In this regard, specific ministerial regulations are provided for. However, a discussion of the latter is beyond the scope of this thesis. It is self-evident that foster care is relevant as ever and merits more publicity, budget allocation and research.

<sup>492</sup> See Article 23 of the Act on the Youth Care. See also Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 265.

<sup>493</sup> For example, based on the publicity campaign “Pleegouders zijn bijzonder nodig” organised by SIRE in 2008 (and research conducted prior to the campaign) it could be established that foster care is highly valued in the Netherlands and that there was an increase in the interest regarding foster care. See *Factsheet Pleegzorg* (2010) 3, accessed on 27-10-2010.

<sup>494</sup> In the past ten years the number of children in foster care has doubled. See *Factsheet Pleegzorg* (2010) 1.

<sup>495</sup> This warrants consistency in the publication of information, quality control and is more cost effective.

<sup>496</sup> *Pleegzorg Nederland* forms part of *Jeugdzorg Nederland* (Youth Care). See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 262; *Factsheet Pleegzorg* (2010) 1.



matter of concern. Another point of concern is the existing waiting list for placement.<sup>497</sup> In addition, the supply and demand do not correspond when it comes to the quality of care.

It seems a challenge to find sufficient suitable foster families for children with serious emotional or behavioural problems. Whilst the placement of siblings in the same foster family is generally speaking preferred, there are few foster families who can practically accommodate this. Finally, there is a new trend noticeable in short-term foster care; namely, the aim to place the child in a foster family where there is indeed a prospect to stay for a longer period of time, if needed.<sup>498</sup> This is commendable because it prevents (unnecessary) transfers and safeguards the development and attachment possibilities of the child concerned.

Article 8 of the European Convention has become increasingly important with regard to the weighing of interests of the foster parent(s), foster child and biological parents. It is generally acknowledged that “family life” may develop between foster parents and foster child.<sup>499</sup> This brings about a difficult dilemma. On the one hand, it is the right of the child to grow up within his or her family and to have their family life protected. This implies that state interference should be justified<sup>500</sup> in order to protect and safeguard the well-being of the child concerned and that this in principle would be temporary. On the other hand, the child has the right to continuity and stability (including an uninterrupted attachment process).<sup>501</sup>

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<sup>497</sup> Both matters are presently being dealt with, resulting in a decline of numbers.

<sup>498</sup> This is on the increase even in emergency removals. See *Factsheet Pleegzorg* (2010) 4.

<sup>499</sup> See also Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 83.

<sup>500</sup> In the case of *Kopf and Liberda v Austria* the European Court noted that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. It was reiterated that the Court has repeatedly found that in cases concerning a person's relationship with his or her child there is a *duty to exercise exceptional diligence* (own emphasis) in view of the risk that the passage of time may result in a *de facto* determination of the matter. The aforementioned duty is decisive in assessing whether a case concerning access to children had been heard within a reasonable time as required by Article 6(1) of the Convention and also forms part of the procedural requirements *implicit* (own emphasis) in Article 8. For the facts of the case, see later in this section (case of 17 January 2012, Application no. 1598/06).

<sup>501</sup> See also Article 20 of the CRC. This might imply that in the case of long-term foster placement the (new) family merits to be protected. See also Bruning *Rechtvaardiging van*

Practically speaking, where under circumstances a supervision order is required, this is temporary in nature and aims to lift or prevent any threat regarding the child's moral or psychological interests or health. In this regard assistance and support are provided to the child and the parents which are directed at ensuring that the parents remain responsible for the care and upbringing, as far as possible.

As pointed out, a supervision order might be imposed in conjunction with a removal and placement of the child, for which court authorisation is needed. Where in the indication-decision foster care is indicated, this form of placement could carry on for a shorter or longer period of time.<sup>502</sup> Punselie points out that under these circumstances it is not practically realistic to hold parents fully responsible for the care and upbringing.<sup>503</sup> There is thus a discrepancy between the legal and the factual position of parents. At the same time, the foster parents are not in the position to take any decisions, whilst providing the daily care for the child, which is not an ideal situation either. This dichotomy needs to be addressed. It is submitted that the legal position of foster parents should be drastically improved, especially in the case of long-term foster care.<sup>504</sup>

In the case of long-term foster care, the question arises as to which of the two following options should prevail:

- (i) Further extension of the placement. This would leave the abovementioned discrepancy intact, unless the legislature steps in and strengthens the legal position of foster parents; or,
- (ii) The further-reaching child protection measure of relief of parental authority, which

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*Kinderbescherming* (2001) 484; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 288.

<sup>502</sup> See section 5.3.3.2 on the duration of the placement order.

<sup>503</sup> Punselie further explains that in practice there are many examples of situations where parents have no idea of the daily matters and decision-making pertaining to their child: *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 70.

<sup>504</sup> More (comparative) research is required. Where it has become evident that returning home is not feasible anymore, permanency planning comes to the fore and should be given priority. It is agreed with Punselie that we cannot allow children to remain in limbo for too long: *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 72.

would pave the way for a stable future with the foster family. In this case the foster parent(s) could be awarded guardianship.<sup>505</sup>

Another possibility is adoption, although this is not necessarily a given. The institution of adoption has its own conditions and legal consequences, which makes the adoption of a child who has been in foster care in terms of a child protection measure not necessarily desirable or even possible.<sup>506</sup> It should be pointed out that the conditions for adoption and the consequences of a supervision order, combined with the authorisation for removal, are to a certain extent incompatible. Article 1:228(1)(g) of the Civil Code provides that one of the conditions for adoption is that the authority should no longer rest with the parent(s).

However, in the case of placement in the context of a child protection measure (supervision and authorisation for removal), the parent(s) retain(s) (limited) parental authority, which makes it legally impossible to adopt. In order to solve this dilemma, a further-reaching measure of relief of parental authority could be considered, but this may have problems of its own. The latter child protection measure has its own specific grounds, which have to be complied with in order to effect the (desired) deprivation of parental authority, which grounds do not necessarily coincide with the facts and circumstances of the case.

Moreover, the (drastic) legal consequences of adoption may constitute a hurdle for the adoption of foster children placed in terms of a child protection measure. The family ties with the biological family will be severed; thus not only with the parents, but also with any siblings, grandparents and others. Furthermore, in the case of adoption of the child by the (foster) parents who are married, the child will (usually) obtain the new family name, which is not necessarily desirable or in the child's best interests. Since the (family) name forms part of the child's identity, this aspect should be given serious consideration, thereby having regard to the wishes of the child concerned.

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<sup>505</sup> In Dutch: *voogdij*. This entails authority exercised by someone else than the parent(s), see Article 1:280 and further and 1:299a of the Civil Code. See also section 4.1.2 above.

<sup>506</sup> Punselie has pointed out that the adoption of children who are placed in the context of a child protection measure (in Dutch: the so-called "*kinderbeschermingskinderen*") does not often occur. Yet, it might be important for them to become an "official" member of the family in which they are growing up/have grown up: *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 106, 108-109 and 120.

It is agreed with Punselie that the Civil Code should provide for the option of retaining the (previous) family name for the child.<sup>507</sup> Based on the aforementioned considerations, it is recommended that the Dutch law of family relations, including adoption legislation be reviewed, thereby giving due consideration to the system of weak (*zwakke*) adoption, which allow for the creation of new family ties whilst it preserves the existing ones. In addition, it should be possible for a child to retain the family name, if so desired. Therefore, it is (further) recommended that the Civil Code be amended, where necessary, in order to remove the present obstacles and to embrace progressive developments in international family law.

It is evident that for such consideration the child's best interests is paramount. The latter has been explicitly highlighted in a recent decision of the district court in Groningen,<sup>508</sup> the importance of which was extensively discussed in the journal *Het Kind Eerst*.<sup>509</sup> In this case the child had been in foster care for over five years, where she had been well taken care of and where the child had become attached to the members of the foster family. The biological father approached the court in order to bring about the return of his daughter. However, before the matter could be dealt with by the court, the child disappeared with her father to Greece in June 2010 during a contact exercise. After being traced, the child returned to the Netherlands in December 2010. The court was of the opinion that Article 1:268(2) of the Civil Code was *in casu* applicable, since the child had been in foster care for longer than one year and six months.

However, the latter provision demands that there needs to be a justified expectation that the removal (and placement) has been insufficient to avert a threat in terms of Article 1:254. In other words, the child's moral or psychological interests or health should be seriously threatened, due to the fact that the parent is unfit or unable to fulfil his duties pertaining to the care and upbringing of the child. Therefore the court had to pronounce on whether continuation of foster care was required and whether the return to the father's care would

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<sup>507</sup> Voor een pleegkind met recht een toekomst (Proefschrift 2006 Universiteit Leiden) 109 and 120.

<sup>508</sup> Rechtbank Groningen, Sector civielrecht, meervoudige kamer, zaaknummer: 122243/FA RK 10-2596, 22 May 2012.

<sup>509</sup> See "Het kind eerst – Samenwerking loont, resultaat motiveert" in *Het Kind Eerst - Vakblad voor jeugdzorg, kinderscherming en pleegzorg* (2012) 4 6-21.

indeed be prejudicial to the child. The court held that Article 3 of the CRC is the primary consideration, and that the residential prospect for the child lies with the foster family. The court concluded that the parental authority of the father was incompatible with the latter two considerations and therefore relieved the father of his parental authority.<sup>510</sup>

The outcome of this case is in line with a recent decision of the *Hoge Raad*.<sup>511</sup> In the latter case the Council for Child Protection had requested the court to deprive the parents of their parental authority. The children had been in foster care for almost four years. The court of appeal had held that the interests of the children demanded continuation of the foster care and that clarity was required pertaining to the future prospects of the children in this regard.<sup>512</sup> The court held that the parents were a threat to the development of the vulnerable children, due to the fact that they continued resisting the removal (and placement with the foster family) and the fact that they also expressed their discontentment to the children whilst exercising their right to contact. Based on the latter, the *Hoge Raad* held that the conclusion of the (lower) court that the parents were unfit and unable was justified, as well as the decision to relieve the parents of parental authority.<sup>513</sup> The court deliberated that the case law of both the European Court<sup>514</sup> and the *Hoge Raad* indicate that in the event of a long-

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<sup>510</sup> It is interesting to note that the court decided contrary the recommendation from the psychologists. Consanguinity (blood relationship) between the father and his daughter was considered the decisive criterion. Moreover, after individual examination of the parties involved, it had been established that the father and the step mother would be able to offer “good enough” parenthood and that the child showed attachment to the father. Therefore joint parenthood, equal time shared between the foster family and the family of the father was recommended. However, the court rejected the argument in favour of consanguinity and held that the removal of a young child who is attached to the foster family could cause permanent harm. Additional reasons why it was considered to be in the child's best interests to remain with the foster family where the fact that the father (and step mother) had seriously harmed the child's interests twice. Firstly, by removing her from the familiar environment of the foster family and taking her to Greece whilst the child was precluded from having any contact with the family to whom she was attached. And secondly, the fact that the father and step mother had conducted a crusade against the foster parents. See “Het kind eerst – Samenwerking loont, resultaat motiveert” *Het Kind Eerst* (2012) (4) 20.

<sup>511</sup> LJN: BV3405, *Hoge Raad*, 11/04143 of 30-03-2012. See [rechtspraak.nl](http://rechtspraak.nl), accessed on 13-8-2012.

<sup>512</sup> In Dutch: *toekomstperspectief*.

<sup>513</sup> See LJN: BV3405, *Hoge Raad*, 11/04143 of 30-03-2012, paragraph 6. The children were placed in foster care. When the parents were deprived of parental authority the Bureau for Youth Care was awarded guardianship of the children.

<sup>514</sup> See the case of *Kopf and Liberda v Austria* of 17 January 2012, Application no. 1598/06. In this case a two-year-old child had been placed in foster care after the mother had set the house on fire, due to the use of drugs. He stayed with the foster family for 46 months. The

term and presumable stable placement of children in a foster family:

- (i) The interests of the children demand clarity with regard to the future prospect of the children in the foster family as well as the continuity thereof; and
- (ii) That the interests of the foster parents with regard to their (developed) family life with the children plays a role, which increases in importance the longer the relationship between them lasts.

It was further held that the interests of the child (and possibly of the foster parents) could justify the deprivation of parental authority of the parents, where the latter would undermine the continuity of the (foster) family environment of the child.<sup>515</sup>

In order to establish what serves the child's interests best, the child's views are of utmost importance. The latter is also relevant for determining whether the return home is feasible and/or desirable. It is agreed with Doek and Vlaardingerbroek that clear guidelines need to be developed which provide for parental support in order to promote and enhance the child's return home. The outcome of the implementation of these guidelines might provide direction as to whether or not the return home is indeed feasible. This will possibly help in the weighing of interests on what will be best for the child concerned.<sup>516</sup> Moreover, it ensures

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mother recovered and the child returned home. The foster parents applied for contact with the child, which proceedings lasted for over 3 ½ years without any contact between the foster parents and the child. Eventually contact was refused since "it was in the best interests of the child not to bring him back into a situation of divided loyalties between her and his "former family" after 3 ½ years of not having had contact (see paragraph 43). The foster parents approached the European Court and submitted that the Austrian courts had failed to decide expeditiously and that this failure had a direct impact on the decision of the court not to grant access, due to the passage of time. The Court found that the domestic courts had not complied with their duty under Article 8 to deal diligently with the applicants' request for visiting rights and that this constituted violation of Article 8 of the (European) Convention, see paragraph 48/49. Austria had to pay the former foster parents approximately 5 000 Euros in respect of non-pecuniary damage and 5 000 Euros in respect of costs and expenses.

<sup>515</sup> See paragraphs 8 and 9 of the case.

<sup>516</sup> Interdisciplinary co-operation can be valuable as well, which should be promoted. Professionals in the field of pedagogics and psychology have developed certain methodology instruments which could serve as an assessment instrument. Schulze is of the opinion that, for example, with regard to foster care "de beoordelingsboog" could be useful: "Bestaansonzekerheid voor kinderen fnuikend" *Perspectief* (2008) 6 23-24. More interdisciplinary research is needed in order to determine which methodology and expertise is

some involvement of the parents in the sense that they are given an opportunity to participate.<sup>517</sup> Where the return home has proven not to be feasible, it could contribute to some level of acceptance for the parents, since they (possibly) have experienced that the child's return home is not in his or her best interests. This could potentially pave the way to accepting (merely) contact instead of continue "fighting" for the child's return, which would keep possible loyalty conflicts for the child to a minimum.

Foster care is more relevant than ever before due to the increase in the imposition of child protection measures in the past decade.<sup>518</sup> However, the effectiveness and quality of foster care should remain a focus in research.<sup>519</sup> This is not only required in terms of the international obligation to provide alternatives in care, which calls for innovation, but also to safeguard the interests and rights of the children concerned. This means that children should be involved in the decision-making, which includes the right to be heard. In addition, children should have the right to obtain legal representation when it comes to family intervention, especially in placement matters, that they have the right to lodge a complaint, and that the right to periodic review is secured.

Although in principle temporary, foster care may (eventually) result in the adoption of the child, although in the Netherlands this is not very common in terms of a child protection measure. The interests of the child have many facets which have to be taken into consideration.<sup>520</sup> The younger the child and the longer the placement, the more the focus should lie with permanency planning. It is welcome that shortly the proposed legislation pertaining to child protection measures will come into operation, which, *inter alia*, provides

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valuable and useful.

<sup>517</sup> This issue came also to the fore in the recent case of the *Hoge Raad* as discussed above, LJN: BV3405, *Hoge Raad*, 11/04143 of 30-03-2012, paragraph 12. The parents complained about the fact that they were never given a chance to prove themselves that they were able to offer a good environment for the child(ren). See [rechtspraak.nl](http://rechtspraak.nl), accessed on 13-8-2012.

<sup>518</sup> See Terpstra *Kindvriendelijke Opsluiting - Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 196-197.

<sup>519</sup> The Nederlands Institute for the Youth (Nederlands *Jeugdinstuut*) has indicated that in this regard more research is needed in the Netherlands. See <http://www.nji.nl/eCache/DEF/1/16/728>, accessed on 27-10-2010.

<sup>520</sup> For a more detailed discussion on the child's best interests, see sections 2.2.1.4 and 3.1.3 above.

for merely one measure of deprivation of parental authority.<sup>521</sup> There is nevertheless more required to realise the right of the child to a stable and permanent family environment.

It is agreed with Punselie that so-called “weak adoption” could provide a solution and should be seriously considered an option. In the case of weak adoption of a child, new family ties are established whilst simultaneously the existing family ties remain intact.<sup>522</sup> More interdisciplinary research is needed to provide a clear overview of the advantages and disadvantages. In view of the international obligation to provide for a variety of options regarding family care, parallel developments should not be prevented. Therefore, apart from, and in addition to, the aforementioned, it is submitted that the adoption legislation should be reviewed and amended, in order to discard specific stumble blocks which prevent so-called “*kinderbeschermingskinderen*”<sup>523</sup> to be adopted, if they have such a wish.<sup>524</sup>

### 5.3.2.2 Residential care in the Netherlands

Residential care is meant for children who (temporarily) cannot live with their own family, who cannot return home (yet), and who cannot be placed in foster families either. Children with regard to whom it was deemed necessary to be removed and placed in terms of a child protection measure, could until 2008 be placed in a youth custodial institution. These institutions were actually specifically meant for children placed in terms of juvenile criminal law.<sup>525</sup> This resulted into the combined placement of children on a civil law basis and those

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<sup>521</sup> See Article 1:266 of the Bill. The proposed grounds for deprivation of parental authority are clearly set out in this provision. It should be noted that where it is clear from the onset that the parent is not able to take responsibility for the care and upbringing of the child within a reasonable period of time, the court may immediately consider this child protection measure. See explanatory memorandum to the proposed amendments to the Civil Code regarding child protection measures (32 015) 35.

<sup>522</sup> In the case of the other form of adoption, namely strong adoption, the original family ties are severed.

<sup>523</sup> This means children who are subjected to court-imposed child protection measures, for example children who have been placed in foster care on the basis of a supervision order, combined with the authorisation for the removal (and placement) of the child. The term has been used by Punselie in *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 120.

<sup>524</sup> Adoption will be briefly discussed under permanency planning, see section 5.3.5 below.

<sup>525</sup> In Dutch: *justitiële jeugdinrichting*. See the Youth Custodial Institutions Act (in Dutch: *Beginselewet justitiële jeugdinrichtingen*).



on a criminal law basis.<sup>526</sup>

The joint placement of children who were placed under supervision and young offenders had clear disadvantages. This revolved not only around the danger of “contamination” but also the fact that the children placed on a civil law basis were subjected to a regime which was developed specifically for child offenders. In its *Concluding Observations* concerning the second periodic report of 2004, the Committee on the Rights of the Child already recommended to the Netherlands “to avoid detention of juvenile offenders with children institutionalised for behavioural problems”.<sup>527</sup> On 1 January 2008 an amendment to the Act on the Youth Care came into operation which provided for the inclusion of chapter IVa, which specifically deals with youth care in a closed setting, on the basis of civil law. In the following section, a brief overview will be presented on a number of options regarding residential care, followed by a brief discussion on the legal framework pertaining to closed settings.

#### ***5.3.2.2.1 Placement in an open residential setting***

Generally, there is a wide variety of options available in the Netherlands when it comes to residential placement. For example:

- (i) Crisis centres: This kind of care is available for children and adolescents between 12 and 23 years who are in need of immediate care for a short period of time, which ranges from six weeks to a maximum of three months. There are crisis centres specifically for girls as well as for Islamic girls, for young Moroccan males, and for children who have absconded from residential care.<sup>528</sup>
- (ii) Supervised residential care: This is meant for adolescents between 16 and 21 years who are not yet sufficiently independent but rent a room in a facility. The person needs to have an income from a job, social grant or study grant. They also need to

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<sup>526</sup> Doek & Vlaardingerbroek refer in this respect to the phenomena of “samenplaatsing”: *Jeugdrecht en Jeugdzorg* (2009) 352.

<sup>527</sup> CRC/C/15/Add.227 of 26 February 2004, paragraph 59(d).

<sup>528</sup> In Dutch: *crisisopvangcentra*, see <http://www.kennisring.nl>, last accessed on 15-6-2012.

work or study. This form of placement provides merely basic assistance which might relate to, for example, financial matters or daily routine.<sup>529</sup>

- (iii) Supervised sharing residence: This kind of facility offers a shared residence with supervision to adolescents between 14 and 18 years (sometimes up to 23 years) with psycho-social problems. The facility is usually linked to an institution.<sup>530</sup>
- (iv) Medical residential care: This form of residential care is for children between 5 and 12 years who have serious behavioural problems (and are sometimes behind in their physical development). These children live in groups of 7 – 10 children. They share the household but they have their own room. A team of specialised professionals provides the necessary support and treatment. The family of the child is involved in the treatment, and at the end of the period of placement the child usually returns home.<sup>531</sup>
- (v) So-called “*gezinshuizen*”: This kind of placement caters for children between birth and 18 years. These children live with a couple, who can be employed by the Bureau for Youth Care, which is different to foster care. There is a strict regime, which provides structure and simultaneously encourages the development of attachment. The biological parents also receive support from the Bureau for Youth Care which prepares them for the child's return home.<sup>532</sup>
- (vi) Residential care for children with physical, mental, social or pedagogical problems or disorders. Specialised care and treatment is offered in an open setting and thus the children may attend school outside the residence premises.

#### **5.3.2.2.2 Placement in a closed residential setting**

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<sup>529</sup> In Dutch: *begeleid wonen*, see <http://www.kennisring.nl>, last accessed on 15-6-2012.

<sup>530</sup> In Dutch: *kamertrainingscentra*, see <http://www.kennisring.nl>, last accessed on 15-6-2012.

<sup>531</sup> In Dutch: *medische kinderhuizen*, see <http://www.kennisring.nl>, last accessed on 15-6-2012.

<sup>532</sup> In Dutch: *gezinshuizen*, see <http://www.kennisring.nl>, last accessed on 15-6-2012. It is interesting to note that sometimes adolescents may spend a few months with a guest family in another European country, for example, via Intermezzo Gezinshuizen – Hoenderloo Groep. It is argued that such a placement has a surplus value in the sense that due to the distance from home, the opportunity arises to acquire different behaviour and social skills. See “Intermezzo Gezinshuizen – Hoenderloo Groep” *Perspectief - Jeugdzorg & Kinderbescherming & Pleegzorg* (2010) 4 9-11.

On 1 January 2008 an amendment to the Act on the Youth Care came into operation which provided for the inclusion of chapter IVa, which specifically deals with youth care in a closed setting. Closed youth care is called “*JeugdzorgPlus*” and provides the necessary care and treatment for children with very serious behavioural problems. The aim is to ensure the successful return of these vulnerable children into society by providing adequate treatment and education in order to equip them to find employment.<sup>533</sup> Previously reference has been made to the necessity of specific authorisation for the placement in a closed setting and the safeguards pertaining to the procedure.<sup>534</sup>

Paragraph 2 of the Act on the Youth Care provides rules with regard to the accommodation suitable for closed settings. The authorisation granted by the court can only be implemented in an accommodation which has been approved.<sup>535</sup> Articles 29m-29y of the Act on the Youth Care provide a basic legal framework which aims to ensure proper care and on the basis of which individual (closed) institutions have to regulate and determine their own policy. This includes, for example, which persons are permitted to invoke certain measures, methods or limitations, and the process of decision-making on how and when these may be invoked.<sup>536</sup> In order to ensure order, safety and a pedagogic climate in the institution, house-rules should be determined, which include rules pertaining to visiting hours, a safety-check of visitors and of objects which are not permitted for safety reasons.<sup>537</sup>

Chapter IVa, paragraph 3 of the Act on the Youth Care deals with measures which limit the freedom of the child and the circumstances when they will be made use of. It is important to note that Article 29o specifically refers to the individual treatment plan<sup>538</sup> to be drawn up for each individual child.<sup>539</sup> Although the Act on the Youth Care, among others, provides for measures of control, detention in the room or in an isolation cell, rules regarding leave and

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<sup>533</sup> See also [www.jeugdzorgnederland.nl/jeugdzorgplus/](http://www.jeugdzorgnederland.nl/jeugdzorgplus/), last accessed on 15-6-2012.

<sup>534</sup> See Article 29b of the Act on the Youth Care, as discussed in section 5.2.2.1.

<sup>535</sup> The required approval could be obtained from the ministers of Justice and WVC (Welzijn, Volksgezondheid en Cultuur) jointly, (previously the department of Jeugd en Gezin). See Articles 29k and 29m of the Act on the Youth Care.

<sup>536</sup> Article 29n(1) refers to paragraph 3 of the Act on the Youth Care which deals with measures which limit the freedom of the child and the circumstances when they will be made use of.

<sup>537</sup> Article 29n(2) and (3) of the Act on the Youth Care.

<sup>538</sup> In Dutch: *hulpverleningsplan*.

<sup>539</sup> See Article 13(3) of the Act on the Youth Care.

compulsory medication, these may only become applicable if included in the treatment plan of the child concerned.<sup>540</sup>

In 2008 the policy document “*Kwaliteitskader Gesloten Jeugdzorg*” was published. This document was specifically developed for institutions providing closed care to ensure the development of the quality of the care offered in these institutions.<sup>541</sup> The document is divided into seven main subjects, which deal among others, with the environment,<sup>542</sup> treatment and education planning,<sup>543</sup> upbringing, daily routine, collaboration with other stakeholders<sup>544</sup> and staffing. The purpose is that each institution should formulate its own specific implementation document according to the guidelines provided by the policy document “*Kwaliteitskader Gesloten Jeugdzorg*” and that the Inspection for Youth Care exercises control regarding compliance and implementation. It is indeed commendable that standards are developed and put in place, but that in itself is not sufficient. These children are especially vulnerable since they are hidden from the public view. It is submitted that a holistic approach is required, involving all role-players in the field of (closed) child care, to effectively ensure the protection of the legal status and the enhancement of the rights of the

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<sup>540</sup> Unless in emergency situations. See Article 29t of the Act on the Youth Care. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 356.

<sup>541</sup> This policy document was drafted under the responsibility of the Inspection for Youth Care, in collaboration with the Inspection of health (psychiatry) and the Inspection of Education (to ensure education for children in closed settings).

<sup>542</sup> This provides for the vision of the institution and matters like the establishment of a youth council, presence of a counsellor, the buildings, the legal status of the children (house-rules, leave, extra-mural activities), measures which limit the freedom and privacy (limitation of communication, visits, measures of control (examination of the body, clothes, urine, the room, post), complaint protocol and safety.

<sup>543</sup> For each child an individual treatment plan needs to be drawn up, which includes the (potential) problems, the purpose of the treatment and the method to achieve these aims, measures which restrict the liberty, involvement of the family and after care. It is important to mention that the child and the parents or guardian need to be involved in the formulation of the plan, which will also be discussed with the Bureau for Youth Care (see section 2.2.3 - 2.2.7 of the policy document “*Kwaliteitskader Gesloten Jeugdzorg*”. The latter parties will also be periodically informed about the treatment and care provided.

<sup>544</sup> The policy document states that the institution should organise the after care for the client/child until he or she is in a stable situation (section 6.1.1 of the policy document). It is hoped that this responsibility will get the necessary attention in the implementation in order to prevent that children fall between two stools. For a detailed discussion on the latter, see Steketee *et al.* “(Jeugd)zorg houdt niet op bij 18 jaar” (2009) 78.

affected children.<sup>545</sup>

In sum, the best interests of the child require a careful and child-sensitive assessment of the needs of the individual child, which ideally should result in a tailored decision regarding his or her placement. Where the family environment is (temporarily or permanently) not an option or not available, other solutions need to be found. The international and regional documents call systematically for alternatives with regard to placement. It is submitted that more comparative study is needed, in order to encourage a debate and the exchange of information on this topic. It seems there is a variety of alternatives in place already, which can be expanded on. At the same time, reinventing the wheel should be avoided. Comparative study may help prevent this. Apart from the aforementioned, more research is required to compare the regimes of institutions for closed care on a civil law basis and that on a criminal law basis. Due to the fact that these children are “hidden” from the public, their basic rights and the active exercise thereof has to be safeguarded at all times.<sup>546</sup>

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<sup>545</sup> At the seminar “Opsluiting van jeugdigen en hun recht op behandeling” of 31 May 2012 (Leiden), it became apparent that, among others, the legal safeguards for children in closed institutions are not adequate. The seminar was organised by the Nederlandse Juristen Comite voor de Mensenrechten and Defence for Children, see Nieuwsbrief Defence for Children, 1 June 2012 (defenceforchildren.nl). Doek & Vlaardingerbroek have referred to the fact that the safeguards for juveniles placed in terms of criminal law are better compared to that of the civil law placements: *Jeugdrecht en Jeugdzorg* (2009) 356. The Youth Custodial Institutions Act (in Dutch: *Beginzellenwet justitiële jeugdinrichtingen* (BJJ)) contains a detailed set of rules, which is quite rare (worldwide). See also Weijers & Liefwaard “Jong vast – 1995 tot 2005. Vrijheidsbeneming in het Nederlandse jeugdstrafrecht – deel 2” (2007) 5 *PROCES* 206. The standard for placements in terms of criminal law falls beyond the ambit of this thesis. It is submitted that research should be conducted on how the standard of safeguards for civil placements can be improved, comparable to the standard provided by the BJJ.

<sup>546</sup> On its website, Defence for Children International has reported certain disturbing issues pertaining to children who have been subjected to child protection measures. In the Article “Veiligheid voorop voor uit huis geplaatste kinderen” of 27 January 2011, reference was made to the Commission-Samson which has conducted research on the sexual abuse of children who are placed in institutions and foster families. This involved sexual abuse by staff as well as children among each other. In terms of Articles 19 (protection from abuse and neglect) and 3(3) of the CRC, the Dutch government is obliged to ensure the safety of children in institutions and facilities responsible for the care or protection of children.

Moreover, these children are entitled to extra protection on the basis of Article 20. It was suggested that the control mechanisms within institutions should be improved. See <http://www.defenceforchildren.nl>, accessed on 15-2-2012. It is submitted that complaint procedures should be put in place in institutions across the board but also with regard to family-like settings. However, fear, peer pressure and the risk of not being taken seriously might prevent children to report abuse. Regular visits of an independent confidant (in Dutch: *vertrouwenspersoon*) who is not attached to the institution concerned, could possibly assist

### 5.3.2.3 Miscellaneous matters relating to the removal and placement of children.

Where the child's own family, even with the necessary support, is not able to care for the child, the state is responsible not only for providing alternative care but also for protecting the rights of the child to which it is entitled in terms of the international and regional documents and national law.<sup>547</sup> Where the standards between these documents differ, the provision with the higher standard should always prevail, provided the country is a state party to the particular document(s). This way it will be ensured that the child will get the best protection attainable. Therefore it is important that these international standards become entrenched in the national legislation of a country.<sup>548</sup>

When brainstorming the topics “removal” and “placement” of a child, many related topics or matters come to the fore; some of which have already been discussed. For example, the importance of the family environment; which has been reiterated in many documents, and recently by the resolution of the General Assembly *Guidelines for the Alternative Care of Children* of 24 February 2010.<sup>549</sup> In this regard, the removal decision should be based on the procedural and substantive legislative provisions of a country, made by a court which ensures that the decision is lawful and non-arbitrary.

Another important right is the child's right to participation, which should be realised in all

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children and help counteract abuse. In addition, it is a priority that children become aware of the (existence and) functions of the Kinderombudsman. On 6 July 2011, Defence for Children International reported on the outcome of an investigation by the Inspectorate for Youth Care on the living conditions in five closed institutions. It was established that the standard in two institutions was not satisfactory, which required the necessary improvements. The standard regarding safe and sound living conditions concerns, among others, the availability of adequately trained (professional) staff, a caring environment which provides for sufficient rest and privacy for children; day programmes catering for the needs of the children and sufficient supervision and individual attention. Lastly, reference was made to the policy document “Kwaliteitskader Gesloten Jeugdzorg” of 2008, which contains specific standards, as discussed earlier in this section. See “Leefklimaat gesloten jeugdzorg onderzocht” of 6 July 2011, <http://www.defenceforchildren.nl>, accessed on 15-2-2012.

<sup>547</sup> See Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 159.

<sup>548</sup> In this respect the distinction between monism and dualism is relevant. South Africa subscribes to the system of dualism whereas the Netherlands maintains a moderate system of monism. See for a more detailed discussion, section 2.1 above.

<sup>549</sup> A/RES/64/142. Part IV of the document deals with “preventing the need for alternative care”, see paragraphs 31-51.

matters affecting the child. It was emphasised that this involves not only the possibility of expressing their views freely, but also that these views be given due weight.<sup>550</sup> With regard to a decision regarding placement in a closed setting or the extension thereof, Article 29f of the Act on the Youth Care provides explicitly for the hearing of the child prior to the decision-making.

Linked with participation is the importance of transparency. A judicial officer needs to inform a child about the fact that he or she, as a professional person, needs to make a decision on his or her own accord, based on the relevant information and the legislative provisions and thus not necessarily based on the input of the child.<sup>551</sup> What is considered best for the child should be explained to the child in clear, understandable language.<sup>552</sup>

Linked with the necessary transparency is also the right to information and documentation.<sup>553</sup> With regard to placement in a closed setting, Article 29g of the Act on the Youth Care provides that apart from the parents and/or foster parents, a child of twelve years or older in principle will receive a copy of the court decision pertaining to the placement or extension thereof and of other relevant documents. Moreover, child protection measures should be temporary, for the shortest possible duration and should, where possible, lead towards the child's return home.<sup>554</sup>

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<sup>550</sup> Van der Linden, ten Siethoff & Zeijlstra-Rijpstra have pointed out that although it is not provided for in the legislation, a child should be allowed to bring along a confidant to a hearing, who will be able to give the child the necessary support. This should be left to the discretion of the presiding officer: *Jeugd en Recht* (2001) 45.

<sup>551</sup> To provide some perspective to the process of decision-making will prevent the child feeling guilty or developing a loyalty conflict in his or her relation to the parents. Professionals should continuously be aware of the fact that the ultimate aim of the child protection measures is to help provide a future for the child and his or her parents, ideally in their own, home environment.

<sup>552</sup> This requires specific skills from a presiding officer. Sufficient training in child psychology should be imperative for these professionals.

<sup>553</sup> On the right to inspect and receive documentation, see section 4.4.2.3 above.

<sup>554</sup> For a discussion on the duration and termination of placement orders, see section 5.3.3. With regard to the matter of returning home *vis-à-vis* permanent placement, see section 5.3.5 below.

### 5.3.3 Duration, extension and termination of the placement order

Where a child has been placed by the competent authorities, Article 25 of the CRC instructs state parties to recognise the right of the child to a periodic review. This important provision reads as follows:

“States parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”.

From the wording it can be derived that placement orders are not definite in nature and that such decisions have to be re-considered on a regular basis.<sup>555</sup> However, no reference is made to the frequency of such periodic review. The phrase “periodic” has been defined in the *Cassell Concise English Dictionary*<sup>556</sup> *inter alia*, as “performed in a regular revolution; happening at fixed intervals”. It is therefore clear that review should take place at regular, fixed intervals. but the question remains how frequently reviews should take place. It is agreed with Liefwaard that this nevertheless should not prevent children and their parents from filing a request for the review of a placement decision, if such reason exists.<sup>557</sup> State parties are nevertheless required to give effect to this right, which means that they should regulate the periodic review of placement decisions by making provision for this in their national legislation.<sup>558</sup> The review concerns the reconsideration pertaining to the placement and/or treatment which is provided to the child concerned and all other relevant circumstances. Periodic review should thus be holistic in nature, meaning that all relevant

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<sup>555</sup> See also Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 213.

<sup>556</sup> 1994

<sup>557</sup> Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 116.

<sup>558</sup> In the *General Guidelines for Periodic Reports* 1996/11/20, the Committee on the Rights of the Child has requested state parties to “indicate the measures undertaken, including of a legislative, administrative and judicial nature, to recognise the right of the child who has been placed by the competent authorities, to a periodic review of the treatment provided to the child in public and private institutions, services and facilities, as well as all other circumstances relevant to his or her placement”, see paragraph 86 (CRC/C/58 of 20 November 1996). See [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.En), accessed on 17-5-2010.



facts and circumstances should be taken into account.<sup>559</sup>

Article 25 neither mentions which authority is competent in this regard, nor what “periodic” entails. Firstly, the mere reference to “competent authorities” is unclear and might contribute to uncertainty and inconsistency.<sup>560</sup> This should be dealt with urgently on a national level, in order to do justice to the entitlement of children in terms of Article 25.<sup>561</sup> It is submitted that (regular) reviews could be done by the same level court which made the placement order; this for reasons of efficacy and efficiency. Since this court is already informed about the case, it will be in a better position to establish whether any improvement in the situation has occurred, and will therefore be able to provide a “prompt” decision.<sup>562</sup> Where parties are dissatisfied with the court order, the possibility of an appeal should be provided for. In this case the appeal court would be the appropriate forum. For clarity reasons it is recommended that legislation contains specific rules regarding the request for a review and the lodging of an appeal, in order to avoid these applications being dismissed (unnecessarily).

Since the international and regional instruments do not provide specific time frames for the duration of child protection measures, the formal (maximum) duration of these measures is determined by the national legislature of the country concerned. Based on that, the relevant authorities/children's courts determine the specific time frame for the duration of a child protection order, which should be based on the facts and circumstances of the specific case

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<sup>559</sup> In other words, the periodic review is not limited to the treatment a child receives during placement but all relevant circumstances ought to be taken into consideration. Also Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 115.

<sup>560</sup> Although the international instruments provide a minimum standard for the protection of the rights of children and on this level strives for adherence, there is some discretion left to the individual state parties on how to enhance these rights. This might lead to inconsistency between countries. The *General Comments* issued by the Committee on the Rights of the Child provide the necessary guidance in assisting countries to implement the provisions in the CRC.

<sup>561</sup> See the *General Guidelines for Periodic Reports* (CRC/C/58 of 20 November 1996), in which the Committee on the Rights of the Child has requested the states parties to provide information on the authorities considered competent for the purpose of periodic review, including any appropriate independent mechanism established, see paragraph 87.

<sup>562</sup> This is required in terms of Article 37(d) of the CRC. Where families have moved to another district, in which case another district court will have jurisdiction, it is submitted that the existing files should move along, providing the other court with relevant information. This would ensure efficient and prompt decision-making.

(and should ultimately serve the child's interests best). The same applies to the most far-reaching measure which is the removal of a child from the family environment and his or her subsequent placement. Because of the seriousness of the action and the consequences thereof, special protection should be given to these vulnerable children.<sup>563</sup> The latter is also emphasised in Article 20 of the CRC<sup>564</sup> which intends to provide special protection and assistance provided by the state, resulting, among others, in alternative care.<sup>565</sup>

Since Article 25 focuses on the evaluation of a placement decision of an individual child, there is also a link with Article 37(d) on which basis the legality of a placement decision may be challenged by the child before a court or other competent authority. It is argued that these provisions overlap and therefore would seem redundant.

Liefwaard identifies four differences which support the opinion that the Articles 25 and 37(d) are indeed complementary and important for children who are deprived of their liberty.<sup>566</sup> In the first place, Article 25 provides for the periodic review of the treatment provided to the child, whilst Article 37(d) provides for the right to challenge the legality of the placement decision. Secondly, based on the phrase “the right to challenge”, Article 37(d) suggests that the child has to submit a request, whilst Article 25 is neutral, suggesting that periodic review could take place *ipso iure* or upon request. Thirdly, Article 37(d) covers all forms of deprivation of liberty, whilst Article 25 explicitly refers to “placement”, which is also referred to in Article 20, as a form of alternative care.

The final difference revolves around the competent authority. Article 37(d) refers to “court or other competent independent and impartial authority”, whereas Article 25 merely mentions “competent authorities”, which is not sufficiently clear. In its *General Guidelines for Periodic*

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<sup>563</sup> See Article 20 of the CRC and Article 25 of the African Children's Rights Charter, as discussed in section 5.1.2 above.

<sup>564</sup> Article 25 of the African Children's Rights Charter is similar in content. However, this regional instrument does not contain a provision on the periodic review of placement decisions, which implies that the CRC offers a higher standard. Both South Africa and the Netherlands are thus bound by Article 25 of the CRC.

<sup>565</sup> See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 436. For a more detailed discussion on Article 20, see section 5.1.1.3 above.

<sup>566</sup> See the discussion in Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 116.

*Reports* the Committee on the Rights of the Child urges state parties to indicate measures relating to a periodic review, including information on the authorities which are considered competent, the circumstances taken into account in deciding on the placement, and the frequency of review.<sup>567</sup> Reference has been made to Article 5(4) of the European Convention, which entitles everyone who is deprived of their liberty to take proceedings to have the lawfulness of the detention decided upon.<sup>568</sup> It has to be reiterated that this right should include the right to periodic review of a placement.<sup>569</sup> The latter was referred to by the European Court in *Wynne v the United Kingdom*.<sup>570</sup> It was held that persons deprived of their liberty “were entitled under Article 5 paragraph 4 (Article 5-4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals”.<sup>571</sup> Due to the far-reaching consequences of any detention, a court should thus at regular intervals re-examine the lawfulness of the detention and determine whether there would be room for a less intrusive measure.<sup>572</sup>

It is self-evident that in the case of review all the procedural rights which accrue to a child and his or her parents should be adhered to. This would mean that the right to periodic review includes, *inter alia*, the right to information regarding any documentation which would form the basis of any decision-making by the authorities, the right to comment on these reports (as well as the obligation of the authorities to inform the affected parties about these

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<sup>567</sup> CRC/C/58 of 20 November 1996, paragraphs 86 and 87.

<sup>568</sup> See section 5.1.2 above.

<sup>569</sup> In the *Bulger Case (T. and V. v the United Kingdom)* the European Court found that an infringement of Article 5(4) of the European Convention had taken place, due to the absence of the possibility of periodic review of the lawfulness of the detention of the person concerned, see ECHR 16 December 1999, Application no. 24724/94 and 24888/94. See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 439.

<sup>570</sup> ECHR of 18 July 1994, Application no. 15484/89, via [Http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/echrwynnecase.html](http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/echrwynnecase.html), last accessed on 22-4-2012.

<sup>571</sup> See paragraph 33 of the case. See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 439; Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 218.

<sup>572</sup> This would also be in line with the Rules 17 and 19 of the *Beijing Rules*, which aim to limit the restrictions on the personal liberty of children and restricts the use of institutionalisation. It can be said that Rule 17 calls for the development and application of alternatives to institutionalisation, which should be given serious attention by state parties. It is submitted that the aforementioned is also applicable to the civil law placement of a child, which is in line with Rule 3.2 of the *Beijing Rules* which extends the important principles embodied in the Rules to all juveniles/children who are dealt with in welfare and care proceedings.

rights), the right to a hearing and to be given the opportunity to participate in a meaningful way,<sup>573</sup> and also the right to a fair and speedy process.<sup>574</sup>

In sum: in the case of deprivation of liberty a court should regularly pronounce on the lawfulness thereof, due to its far-reaching impact. Although it could be argued that not every placement implies deprivation of liberty, it nevertheless might be perceived or experienced as such by the child and his or her parents. In order to avoid arbitrary decision-making and to prevent any wrongful perceptions in this regard, the state parties' legislatures should step in and provide for specific legislation pertaining to (a) the competent forum, (b) fixed intervals for the (regular) review of placement decisions,<sup>575</sup> (c), the right of review conferred to children (and their parents), which would be in line with the formulation of Article 25 of the CRC (it is submitted that children should be able to act independently in this regard),<sup>576</sup> and (d), rules for the filing of a request and the lodging of an appeal.

The inclusion of these specific rules in the (existing) legislation will provide the necessary clarity to all parties, enhance the rights of children, and ensure consistent application which ultimately contributes to legal certainty. It is submitted that a children's court should deal

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<sup>573</sup> See also *General Comment No. 12* (2009), paragraphs 52 and 53 in which the Committee on the Rights of the Child emphasises that in removal cases the views of the child must be taken into account in order to determine the child's best interests. Therefore the Committee has recommended that state parties must ensure, via legislation, regulation and policy directives, that the child expresses his or her views and that due consideration will be given to those considerations (CRC/C/GC/12 of 20 July 2009). See also the *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010). From paragraph 5 read in conjunction with paragraph 6 it can be derived that regular review of the appropriateness of the (alternative) care arrangement should be provided thereby ensuring the child's right to be consulted on the basis of his or her access to all necessary information.

<sup>574</sup> The latter rights have been explicitly included in the Articles 5(4) and 6(1) of the European Convention. In *S.T.S v the Netherlands* (7 June 2011, Application no. 277/05) the European Court reiterated on the importance of speedy proceedings and decision-making. The court held that there had been a violation of Article 5(4) of the European Convention in that "the lawfulness of the applicant's detention was not decided "speedily", see paragraph 50.

<sup>575</sup> See the *General Guidelines for Periodic Reports* (CRC/C/58 of 20 November 1996), in which the Committee on the Rights of the Child has requested the states parties to provide information *inter alia* on the authorities considered competent and the frequency of review of the placement and treatment provided, paragraph 87. See also Liefwaard in the context of juvenile criminal law: "Vrijheidsbeneming van kinderen in het licht van internationale mensenrechten" (2009) *NJCM-Bulletin* (4) 367. Thus regulation of the aforementioned aspects will generally contribute to the enhancement of child justice.

<sup>576</sup> In this respect reference should be made to the importance of independent access of children to the courts, which right can be derived from Article 12 of the CRC.

with placement decisions and also the periodic review thereof. This nevertheless should leave the possibility of an appeal intact, of which possibility the affected parties need to be informed.<sup>577</sup> Therefore, it is recommended that where placement is ordered for three, six or 12 months, specific rules should be put in place which automatically provide for regular review of the placement decision. This should take place at least half-way through the period of duration of the order, or at an earlier stage, when such is deemed necessary or when a legitimate reason comes to the fore.

### **5.3.3.1 Duration, extension and termination of the placement order in terms of South African law**

With regard to the statutory framework in South Africa, section 156(3)(b) of the Children's Act provides that a placement order may be considered by a children's court at any time, and be confirmed, withdrawn or amended as may be appropriate, which is a welcome provision. Time will tell whether this remedy will be frequently invoked or not.

It is hoped that the affected parties will be made aware of this provision, for which sufficient training of professionals (jurists and social workers) is essential. However, although it is certainly a positive development that the legislature has included this possibility of review, it does not necessarily equate/constitute "periodic" review. It is submitted that in order to realise the right to periodic review, specific rules should be put in place which automatically and systematically provide for regular review, thus independent from whether an affected party has made an application to this effect or not. In addition, section 159 of the Children's Act determines that a placement order lapses on expiry of two years from the date the order was made or such shorter period for which the order was made.<sup>578</sup> On the basis of the latter provision, the courts may thus determine the placement "standard" of two years. It is submitted that a period of two years is too long, because of the risk that the passage of time

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<sup>577</sup> In this respect, the South African Promotion of Administrative Justice Act 3 of 2000 provides a good example of the obligation of a decision-maker to inform the person affected by the decision. On the basis of section 3(2)(b)(iv) an administrator is obliged to provide in the decision "adequate notice of any right of review or internal appeal". See Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 228. Although the aforementioned Act is applicable to administrative actions and thus not applicable to any judgments of the courts, it nevertheless could serve as an example of a transparent approach regarding the information provided to lay persons.

<sup>578</sup> See also section 4.6.1.

may present stumbling blocks, thus potentially preventing the child from returning home.<sup>579</sup> In addition, these kinds of orders should be subject to interim review by the court as well.<sup>580</sup> This way it can be sooner and more frequently established whether short term early intervention programmes have had any effect, or that alternative measures are required, in order to safeguard and protect the child's interests and well-being.

Placement orders may be extended by a children's court for a period of not more than two years at the present time.<sup>581</sup> Section 159(2) states that when deciding whether an extension is required, the court needs to take cognisance of the views of:

- (i) The child;
- (ii) The parent and any other person who has responsibilities and rights in respect of the child;
- (iii) Where appropriate, the management of the centre where the child is placed; and

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<sup>579</sup> The child might have settled in his or her new environment, or might have built up family life with the foster parents. It is interesting to compare the concept of time and the possible consequences or implications with the time frame as provided in the Hague Convention on the Civil Aspects of International Child Abduction, see Schedule 2 of the Children's Act 38 of 2005. Article 12(1) requires the authority of the contracting state to order the return of the child forthwith, when wrongfully removed from or retained in any contracting state, within a period of less than one year. However, Article 12(2) acknowledges the possibility that after one year the child might have settled in its new environment, which might prevent the return of the child. Undoubtedly, the child's best interests will be paramount, see section 28(2) of the Constitution. Based on the aforementioned, it can be argued that the time frame of one year seems crucial and therefore should be considered as a yard-stick regarding placement orders. See also Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 361-362.

<sup>580</sup> See also section 4.7 above. This would be more in line with the CRC, Articles 9(1) and 25 which ensure judicial review and period review where removal is inevitable. See also Article 19 of the African Children's Rights Charter. For a more detailed discussion, see section 2.2.3.1. It is submitted that these provisions should come into play with regard to any kind of intervention pertaining to the family life of a child and his or her parents.

<sup>581</sup> In terms of section 16(2) of the repealed Child Care Act 74 of 1983, the Department of Social Development made final decisions regarding extensions. It is commendable that the children's court, as an independent and impartial forum, has the exclusive authority to deal with the extension of orders in this regard. See also Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 183; also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 184.

(iv) Any alternative care-giver of the child concerned.

Thus on the basis of section 159, the children's court has the discretion to extend an order for a period of not more than two years at a time. The court is thereby statutory obliged to consider the views of the affected parties, which is commendable and in line with Article 12 of the CRC. Apart from extending an existing order the court may also replace it with another order, or alternatively order the child to be returned home.<sup>582</sup>

Based on the above, it is recommended that where placement is ordered for three, six or 12 months, specific rules be put in place which automatically provide for regular reviews of the placement decision. The latter is even more urgent where the placement is ordered for two years. A review should take place *at least*<sup>583</sup> half-way the period of duration of the order, or at an earlier stage, when such is deemed necessary or when a legitimate reason comes to the fore. In addition, research is needed to establish the needs of young adults, who might still be in need of care and protection, which should result in legislative provisions or regulations, which aim to secure their well-being.

It should be noted that section 159(3) explicitly states that no (placement) order, made in terms of section 156, extends beyond the date on which the child in respect of whom it was made reaches the age of eighteen years.<sup>584</sup> It is submitted that although a person becomes a major at the age of eighteen, this does not necessarily mean that the person concerned has the capacity to act fully independently and responsibly. Research in the Netherlands has indicated that it might be beneficial for some young adults who are still considered in need of care and protection shortly before turning eighteen, to continue with the care or placement for some time.<sup>585</sup> In other words, a transitional phase should be put in place in order to secure the well-being of young adults who might be at risk of falling between the cracks. It is submitted that research is required in South Africa to specifically look into the needs of these young and vulnerable adults (still) in need of care and protection. This

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<sup>582</sup> See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 184.

<sup>583</sup> Own emphasis.

<sup>584</sup> Unlike in the Netherlands, where under certain circumstances the (entitlement to) youth care and thus placement (where applicable) can continue beyond the age of eighteen. See Article 1(b)(3) of the Act on the Youth Care, which is discussed in section 5.3.3.2.

<sup>585</sup> See Steketee *et al. (Jeugd)zorg houdt niet op bij 18 jaar* (2009) 6 and 91 and further.

research should include after care and improving the connection with social work services available to adults.<sup>586</sup>

Since time is of essence for these young adults, it is submitted that in the meantime, as an interim solution, wider application should be given to the so-called “drop-in centres”. Reference was made to the fact that the Children's Act is meant to give effect to the rights of children, which is limited in application on the basis of age.<sup>587</sup> It is, however, recommended that the so-called “drop-in centres” be made accessible to both children and young adults, who otherwise might be at risk. Chapter 14 of the Children's Act specifically deals with drop-in centres.<sup>588</sup> Article 213 of the Act provides that “a drop-in centre is a facility providing basic services aimed at meeting the emotional, physical and social development needs of vulnerable children”.<sup>589</sup> Apart from being statutory obliged to offer certain basic services,<sup>590</sup> it may offer a wide variety of programmes which are appropriate to the developmental needs of the children attending the specific centre.

Section 213(3) states:

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<sup>586</sup> This research might possibly result in the enactment of legislation and/or regulations.

<sup>587</sup> “Child” has been defined as a person under the age of 18, see sections 28(3) of the Constitution and 1(1) of the Children's Act. For a more detailed discussion, see section 3.1.1 above.

<sup>588</sup> Drop-in centres are also (to be) included in the provincial profile (and relevant national strategy), see DSD Regulation 2(f) (GN R261/2010). In terms of section 214 of the Children's Act the Minister of social development is obliged to ensure an appropriate spread of drop-in centres throughout South Africa, thereby specifically having regard to children with disability or chronic illnesses. In addition, national norms and standards are required to be adhered to, the supervision of which falls under the responsibility of the province concerned. The process of application for registration of drop-in centres, the registration, its rejection and the possibility of an appeal is covered by regulations 92-97 (see also the Consolidated Forms in terms of the regulations, 52-57). It is regretful, though, that the MEC for social development has a discretion to fund drop-in centres. However, funding thereof must be prioritised in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children and to make the centres accessible to children with disabilities, see section 215. Bosman-Sadie & Corrie have pointed out that there are no set standards with regard to “basic necessities of life”, which may result in disparities between various provinces: *A Practical Approach to the Children's Act* (2010) 236.

<sup>589</sup> Section 1(1) of the Children's Act defines “drop-in centre” as a facility referred to in section 213. The provisions in chapter 14 were inserted into the Children's Act by section 10 of the Children's Amendment Act No. 41 of 2007.

<sup>590</sup> Section 213(2) of the Children's Act provides that a drop-in centre must offer any of the following basic services, namely (a) provision of food; (b) school attendance support; (c) assistance with personal hygiene; or (d) laundry services.



"A drop-in centre may offer any of the following programmes appropriate to the developmental needs of the children attending that centre:

- (a) Guidance, counselling and psychosocial support;
- (b) Social skills and life skills;
- (c) educational programmes;
- (d) recreation;
- (e) community services;
- (f) school holiday programmes;
- (g) primary health care in collaboration with the local health clinic;
- (h) reporting and referral of children to social workers or social service professionals;
- (i) promotion of family preservation and reunification;
- (j) computer literacy;
- (k) outreach services; and
- (l) prevention and early intervention".

This wide range of services is in principle promising, but is unfortunately optional.<sup>591</sup> It is submitted that, although section 213(3) provides for discretion, option (h) should be made

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<sup>591</sup> See section 213(3) which states that a drop-in centre "may" offer any of the following programmes. More seriously, Bosman-Sadie & Corrie have pointed out that the state is not obliged to fund all services: *A Practical Approach to the Children's Act* (2010) 236.

subject to compliance across the board. In other words, all drop-in centres should be reporting and referring children to social workers or social service professionals, if such would be in the best interests of the child concerned. It is important to note that with regard to the admission to these services, no formal court order is required. In this respect Matthias and Zaal point out that one of the striking features of this form of care is the fact that children can “simply refer themselves”, which is not only welcome but also a necessity.<sup>592</sup> Where these centres are available this should be made well known in the communities. Thus the wide scope of services potentially offered means that these centres have tremendous potential for assisting children who are in need (of these services). It is commendable that the support and assistance can be tailored to the needs of the children in the area concerned. It is hoped for that the government prioritises and facilitates the realisation of these centres speedily and that they will also be accessible to young adults.

### **5.3.3.2 Duration, extension and termination of the placement order in terms of Dutch law**

Article 262(1) of the Civil Code determines that the authorisation for the removal of the child in the context of a supervision order is granted for a period of maximum one year. However, in the case of an emergency removal, Article 1:261(3) of the Civil Code provides that under these circumstances the authorisation remains valid until an indication-decision, as provided for in Article 6 of the Act on the Youth Care, is taken. The latter decision needs to be taken within four weeks, otherwise the entitlement to youth care comes to an end<sup>593</sup> and thus the validity of the authorisation for the removal lapses.<sup>594</sup> As indicated above, the period of

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<sup>592</sup> It is argued that it is a sad reality that there are too many children in need of care interventions, which in itself is costly. See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 184. Apart from the costs considerations pertaining to care and protection procedures (and placement) the alternative of drop-in centres could provide some relief for the courts. Not all cases require court intervention. In addition, the right to respect of family life of a child and the parents' demands that state intervention should be kept to a minimum, thereby safeguarding the interests and protection of the child. Moreover, especially with regard to young adults, support and assistance should be available in a voluntary context. At the same time it is crucial to ensure that the target group is reached or at least that these young adults are made aware of these services. Collaboration between the relevant agencies should be improved and services attuned.

<sup>593</sup> The entitlement for youth care could entail the placement with foster parents or residential placement.

<sup>594</sup> With regard to the entitlement in emergency situations and the termination thereof, see Article 14(2) of the Implementation Decree on the Act on the Youth Care. See Doek &

validity of the authorisation will usually be linked with the duration for the required care, as mentioned in the indication-decision.<sup>595</sup> The duration of the entitlement to youth care is in principle (also) one year, unless for example, the child has stayed with a foster parent for two years or longer and it is anticipated that the return home is not feasible.<sup>596</sup> Where a child has already been placed under supervision by a court order, the duration of the authorisation and the subsequent placement will be granted only for the remaining period of the supervision order.<sup>597</sup>

The extension of the authorisation/placement comes to the fore in Article 1:262 of the Civil Code. Upon the request of the Bureau for Youth Care or the Council for Child Protection, the placement may be extended for one year at a time.<sup>598</sup> Where the order is granted for one year or where it is extended for another year, it means that the court will deal with the matter again just before the expiry of the existing order.<sup>599</sup> It is important to note that with each request for extension of the authorisation, the Bureau for Youth Care needs to submit a new indication-decision, which indicates that this specific care is still required. In addition, a progress report needs to be submitted to court.<sup>600</sup> Earlier, reference was made to the fact that where the Bureau for Youth Care is of the opinion that extension is not required, the control function of the Council for Child Protection comes to the fore.<sup>601</sup> In such a case, Article 1:262(2) of the Civil Code instructs the Bureau for Youth Care to inform the Council for Child Protection of its decision “as soon as possible”. The latter phrase has been clarified in the so-called “*Afstemmingsprotocol ondertoezichtstelling* (1995): eight weeks

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Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348. See also section 5.2.2 above.

<sup>595</sup> However, on the basis of Article 3(4) of the Act on the Youth Care, the court may determine a shorter duration for the authorisation and subsequent placement. See also Bakker & Bentem in Forder, Duijst & Wolhuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van Mensenrechten* (2012) 115. See also section 5.3.4.2. below.

<sup>596</sup> See Article 23 of the Implementation Decree to the Act on the Youth Care. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>597</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 349.

<sup>598</sup> In case the Bureau for Youth Care decides not to request the extension of the placement, it has to inform the Council for Child Protection on the basis of Article 1:262(2), as discussed in section 5.2.2 above.

<sup>599</sup> Unless the court determines the duration of the placement for a shorter period or when an appeal has been lodged against the court order by any of the affected parties.

<sup>600</sup> See Article 1:265(2) of the Civil Code. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 359.

<sup>601</sup> See section 5.2.2 above.

before the lapse of the existing authorisation.<sup>602</sup> This will enable the Council for Child Protection to still consider the case, and where necessary, investigate and/or file a request to the court for the extension of the authorisation.

This measure of control is important due to the fact that extension can only be requested by the Bureau for Youth Care and the Council for Child Protection.<sup>603</sup> This implies that the parent(s), foster parent(s) or child cannot request the extension of the placement. It is agreed with Doek and Vlaardingerbroek that this might be problematic, especially for the foster parent(s) (and the child). If there is no extension the child will return home after the order has lapsed, which might not necessarily be in the child's best interests.

This is indeed a dilemma, since the purpose of a supervision order, combined with the authorisation for removal/placement, is to provide temporary assistance to the child and parents in order to alleviate/end the existing problems. In this regard the collaboration between professionals in the child care arena is indispensable. Professionals trained in the field of pedagogics are able to provide information on the risk assessment concerning the return of children to their home environment. It is submitted that first and foremost, serious consideration needs to be given to the possibility of the child returning home.<sup>604</sup> However, where it can be reasonably expected on objective grounds that the return home will not serve the child interests best, permanency planning should come to the fore.<sup>605</sup>

Another aspect to be considered is the need of children for continuity and stability in the

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<sup>602</sup> See "Mededelingen van GVI (gezinsvoogdij instelling or Bureau for Youth Care) aan Raad voor de Kinderbescherming)", paragraph II.2 under (2) of the Protocol, 13.

<sup>603</sup> It has to be remembered that the Council for Child Protection is a so-called "tweedelijnsvoorziening", which means that they are not the first approachable body and will act upon the request of the Bureau for Youth Care. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 301.

<sup>604</sup> The child and parents have the right to be together or to be reunified. For a detailed discussion on the rights of the child and his or her parents, see sections 2.2 and 3.2 above.

<sup>605</sup> Schulze, an *orthopedagoog* (pedagogic professional, specialised in remedial studies) has indicated that it can be harmful to a child's development when there is uncertainty about where he or she belongs, for extended periods of time: "Bestaansonzekerheid voor kinderen fruikend" (2008) 6 *Perspectief* 23. Family-like placement should be given preference above long-term residential placement, unless the child requires specialised care which cannot be offered by a therapeutic foster family. For a discussion on the various forms of placements in the Netherlands, see section 5.3.2.

upbringing. In this respect, the factor “passage of time” plays a crucial role, since based on the latter, family life might have developed between the foster parents and the child.<sup>606</sup> Coming back to the present lack of legal standing for foster parents, as referred to above, the proposed amendments regarding child protection measures might bring the necessary relief by providing a right of veto to foster parents. For a change of residence of the child (the return home), Article 1:265k of the Civil Code (Bill) requires the consent from the person who has cared for and raised the child as belonging to his or her family for at least one year immediately prior to any decision-making in this regard.<sup>607</sup>

From the case law it can be derived that the courts are well aware of the serious consequences of a removal. A strict approach is maintained in testing the grounds mentioned in Article 1:261 against the facts of the case, in order to determine whether the placement is still justified. The court has the discretion to determine the duration of the placement at six weeks or three months. It is submitted that shorter time frames should be considered more frequently in order to be able to establish whether or not any progress has been made. In addition, alternatives to the removal should be considered at all times, instead of opting (too quickly) for the most serious form of intervention.<sup>608</sup> This duty should be even more compelling in the case of satisfactory progress, and such situation can be derived from the progress report.<sup>609</sup>

In sum, the initial placement of a child cannot be longer than one year but the placement may generally be extended for one year at a time. This means, in practice, that placements can carry on for a number of years. The question arises as to whether this is desirable, but as importantly, whether this is in line with the rights of the child in terms of the

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<sup>606</sup> For a more detailed discussion on permanency planning, see section 5.3.5 below.

<sup>607</sup> See also Asser/De Boer *Personen- en familierecht* (2010) 796. It is interesting to note that the same right accrues to the institution providing the necessary care as meant by Article 1(g) or (h) of the Act on the Youth Care. Although institutions cannot develop family life with a child, it might be in the child's best interests to continue with the care and upbringing provided, where the child has been placed for a year or longer.

<sup>608</sup> In considering what would serve the interests of the child best, early intervention programmes should also be taken into consideration. For a more detailed discussion, see section 4.2.2 above.

<sup>609</sup> This includes alternatives to procedure. For example, family group conferencing has proven to have a lot of potential in involving affected parties and their social network to finding a solution. This is also one of the recommended mechanisms mentioned in the document *Children without parental care* (CRC/C/153) of 17 March 2006, paragraph 664.

international/regional documents. As discussed above, children have the right to be cared for by their parents, which family relations warrant protection against unlawful interference. In addition, a child should not be separated from his or her parents against their will, unless specific and stringent criteria are met.<sup>610</sup> Where the removal of a child is requested in the context of a supervision order, the purpose of these protection measures, as well as the feasibility of achieving these aims, should be considered.

The purpose of a supervision order is to provide assistance to the parent and the child whilst simultaneously the parent should remain responsible for the care and upbringing of the child or to be increasingly encouraged to take responsibility for the child.<sup>611</sup> In the case of the child's removal and placement, this implies that in principle all efforts should be directed at the return of the child to the home environment. However, if this is not feasible, the continued extension of the placement would constitute improper use of this child protection measure, which is undesirable.

Under these circumstances a suitable permanent solution should be provided for the child; for example, in an alternative stable family-based setting.<sup>612</sup> In this respect Doek and Vlaardingbroek refer to the difficult dilemma of opting for the continuation of a supervision order (linked with placement) or for termination of parental authority, which would pave the way for permanency planning.<sup>613</sup>

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<sup>610</sup> See the discussion in section 5.1 above. Also sections 2.2 and 3.2.

<sup>611</sup> See Article 1:257(2) of the Civil Code. See also sections 4.5.2.1 above.

<sup>612</sup> Previously Bruning posed the question as to what stage a supervision order combined with placement needs to be converted into the child protection measure of deprivation of authority of the parent concerned, especially with regard to (young) children who have been in foster care for an extended period of time: "OTS of ontheffing by pleeggezinplaatsing: een vervolg – is de Hoge Raad 'om'?" *Tijdschrift voor Familie- en Jeugdrecht* (2000) 157. See also *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010) paragraph 59 and further. See also the discussion on the dilemma of the child returning home *vis-à-vis* permanent alternative placement, in section 5.3.5 below.

<sup>613</sup> *Jeugdrecht en Jeugdzorg* (2009) 350. An outline of the child protection measures of relief of parental authority (in Dutch: *ontheffing*) and dismissal of parental authority (in Dutch: *ontzetting*) is provided in sections 4.5.2.2, 4.5.2.3 and 4.5.2.4. It is interesting to note that the Bill on the review of the child protection measures (32 015) contains only one measure of deprivation of parental authority, namely "termination of (parental) authority", see the proposed Article 1:266 (new) of the Civil Code. This Bill is expected to come into operation in the course of 2013.

With regard to the extension of a placement, the *Hoge Raad* has started to develop a stricter approach, already in 2000, even where such placement would take place on a voluntary basis.<sup>614</sup> Previously, in line with the established jurisprudence of the *Hoge Raad*, there would be no reason for the court to order the relief of parental authority, as long as the parent agreed to the placement of the child.<sup>615</sup>

However, in its decision of 7 April 2000, the *Hoge Raad* confirmed the judgment of the court of appeal, in which the latter ordered the mother to be relieved from parental authority. It was held that the mere parental consent regarding the existing placement should not be decisive for the decision not to terminate parental authority, as requested by the Council for Child Protection.<sup>616</sup> Furthermore it was held that an undisturbed continued attachment in the foster family would be in the interests of the child. It is agreed with Bruning that the outcome of this case paved the way for a more child-friendly approach pertaining to the dilemma of subsequent extensions of placements or termination of parental authority combined with permanency planning.<sup>617</sup> It is submitted that although the position of parents and their wishes and intentions should be taken into consideration, the child's best interests and his or

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<sup>614</sup> In the case HR 7 April 2000 the facts were as follows: shortly after being born in 1995, the court issued a supervision order combined with the authorisation for the removal and placement of the baby in a foster family, upon the request of the Council for Child Protection. The father was not known and the mother was mentally challenged and required treatment. The mother had contact with the child once every six weeks. After subsequent extensions of the court orders, the Council for Child Protection requested in 1998 termination of parental authority of the mother. This was based on the fact that the perspectives regarding the child returning home had not improved.

<sup>615</sup> In the case under discussion the mother averred in cassation, that not all the requirements for the further-reaching measure of deprivation of parental authority were fulfilled, since she had given consent (unconditionally) from the onset with regard to the existing placement.

<sup>616</sup> *In casu* the following was taken into consideration: the lack of feasibility of the child returning home, the mother being mentally challenged and having undergone psychiatric treatment several times in the past and the fact that the mother in her interaction with her son still seemed very tense, uncertain and emotional. Moreover, based on the fact that the mother considered approaching the court for extension of contact with her son and her intention of moving house to ensure more regular contact, the court was not convinced that in future the mother would continue to agree with the placement on a voluntary basis.

<sup>617</sup> Bruning refers in this respect to the fact that termination of parental authority of the parent(s) and the continuation of the placement in the foster family creates the certainty that the child can grow up in a stable family setting without the uncertainty of annual returning court proceedings for the extension of the placement. In "OTS of ontheffing by pleeggezinplaatsing: een vervolg – is de *Hoge Raad* 'om'?" *Tijdschrift voor Familie- en Jeugdrecht* (2000) 7/8 159. See also Versteeg & Weterings "De onbeschermdde positie van het pleegkind, een juridisch en maatschappelijk probleem" *Tijdschrift voor Familie- en Jeugdrecht* (2000) 7/8 163.

her need for stability, permanency and attachment should prevail at all times.<sup>618</sup>

In addition to the aforementioned developments, the *Hoge Raad* delivered a bench mark decision on 4 April 2008, which had a profound effect on the child protection cases to follow. Instead of an extension of the supervision order combined with the authorisation for the placement of the child in foster care, the Dutch courts changed their course. In this case the mother of the child had disappeared when the child was two years old. A supervision order was granted with authorisation for the removal and placement of the child in a foster family (*in casu* the family of his mother's sister). In the meantime the father of the child had been found guilty on a charge of attempted murder of his wife.

In 2006 the district court ordered the father to be deprived of his parental authority pertaining to the child, which decision was confirmed on appeal. The appeal court emphasised, among others, the need of the child for certainty, continuity in the placement and an undisturbed attachment process, and the right of the child and his foster parents to respect for their (already established) family life.<sup>619</sup> In cassation the father averred that deprivation of parental authority could not be ordered against his will on the basis of Article 1:268(1) of the Civil Code, and that the criteria for such protection measure were not met. The *Hoge Raad* dismissed the appeal in cassation and confirmed the reasoning and decision(s) of the court of first instance and appeal court. In conclusion, it can be said that regarding applications for extensions, a child-oriented approach has become entrenched in the Dutch child protection jurisprudence, with the emphasis on the (best) interests of the child.

Termination of a placement is regulated by Article 1:263 of the Civil Code. A placement can be terminated by the Bureau for Youth Care, in which case the latter is obliged to inform the Council for Child Protection and submit a progress report on the placement.<sup>620</sup> In addition, a

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<sup>618</sup> See also the decision of the European Court of 26 February 2004, in which it was held that whilst the national authorities should strike a fair balance between the interests of the child and those of the parents, the best interests of the child may, depending on their nature and seriousness, override those of the parents. See also HR 04-04-2008 *NJ* 2008, 506 (2.5).

<sup>619</sup> See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 379.

<sup>620</sup> Doek and Vlaardingerbroek point out that the Bureau for Youth Care can terminate the placement at any time and that the requirement of due care demands that that the affected parties need to be heard: *Jeugdrecht en Jeugdzorg* (2009) 360; Asser/De Boer *Personen- en Familierecht* (2010) 765.



parent, foster parent or child of twelve years or older may request the Bureau for Youth Care or the children's court to terminate the placement or shorten its duration on the basis of change of circumstances.<sup>621</sup> The Bureau for Youth Care needs to provide a written decision within two weeks after having received the request.<sup>622</sup> In case the Bureau for Youth Care has dismissed the request, the party concerned may approach the children's court. On the basis of Article 1:263(4) of the Civil Code, the children's court may withdraw the authorisation, fully or partially, or shorten the duration of the placement, by which the placement comes to an end.<sup>623</sup>

With regard to placement in a closed setting, specific rules come into play.<sup>624</sup> Article 29h(3) of the Act on the Youth Care determines that the validity of the authorisation, and thus the placement, is linked to the duration of the entitlement of the child to the care.<sup>625</sup> The duration for which the care is indicated amounts usually to one year.<sup>626</sup> The same applies to an extension. On the basis of Article 29h(4) of the Act on the Youth Care, the authorisation for the placement will be cancelled where the Bureau for Youth Care decides that the client should no longer be entitled to youth care.<sup>627</sup>

In addition, the implementation of the authorisation can be suspended by the placement institution concerned, when it is deemed no longer necessary to prevent that the child will

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<sup>621</sup> The burden of proof rests on the person who submits the request for termination or shortening of the duration of the placement. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 360.

<sup>622</sup> See Article 1:263(3) of the Civil Code.

<sup>623</sup> Whether or not an appeal is possible is not clear. It is agreed with Doek and Vlaardingerbroek that since Article 807 of the Code of Civil Procedure a court order on the basis of Article 1:263 of the Civil Code is not excluded, it is assumed that it should be possible to lodge an appeal: *Jeugdrecht en Jeugdzorg* (2009) 361. It is recommended that the legislature provides a clear overview of all decisions which are subject to appeal, which will contribute to the necessary legal certainty.

<sup>624</sup> On 1 January 2008 chapter IVa of the Act on the Youth Care came into operation, which contains specific rules on closed placement (in Dutch: *gesloten jeugdzorg*).

<sup>625</sup> For a more detailed discussion on the relevance of an indication-decision, which indicates the kind of care which is required, see section 5.2.2 above.

<sup>626</sup> See Article 23(1) of the Implementation Decree to the Act on the Youth Care. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 348.

<sup>627</sup> Where the Bureau for Youth Care previously had issued an indication-decision, on the basis of which the authorisation for removal/placement was granted, it may decide that the child is no longer in need of the care on the basis of Article 5(2) of the Act on the Youth Care.

shirk him or herself from the required care or that there is a risk that he or she will be shirked by someone else.<sup>628</sup> This will make it possible for the child to be transferred from a closed setting to a more open setting, with the ultimate goal of returning home (with or without further care and assistance), depending on the court order. This provides a step-by-step route which can be tailored to the needs of the child and possible changes in the circumstances, which is commendable.<sup>629</sup>

Generally, child protection measures can be imposed up to the age of eighteen, the latter which marks the age of majority.<sup>630</sup> Above reference was made to the critical situation that some young adults, above eighteen, might find themselves in.<sup>631</sup> On the basis of Article 1(b)(3) of the Act on the Youth Care, persons of eighteen years and older can still be entitled to youth care.<sup>632</sup> Thus there might be an entitlement to support and assistance pertaining to (potential) problems relating to the upbringing or education.<sup>633</sup>

Reference was made to the placement of a child in a closed setting, for which chapter IVa of the Act on the Youth Care contains specific rules.<sup>634</sup> It should be noted that for this kind of

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<sup>628</sup> The suspension can also be withdrawn on the basis of Article 29h(6) of the Act on the Youth Care. Doek & Vlaardingerbroek have pointed out that with regard to the decision-making by the institution concerned, the responsibility of the latter has increased, whilst that of the social worker (in Dutch: *gezinsvoogd*) has decreased): *Jeugdrecht en Jeugdzorg* (2009) 353.

<sup>629</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 353. However, where a child has been institutionalised, the importance of the role of the social worker in terms of a supervision order should not be underestimated. It is important to maintain a trust relationship with the child concerned in order to assist the child when he or she is able to return to the family environment. In addition, the social worker has a “bridging function” between the authorities and the child and his or her family.

<sup>630</sup> See Article 1:233 of the Civil Code, which is discussed in section 3.1.1 above.

<sup>631</sup> See section 5.3.3.1 above. See also the case of the Rechtbank Amsterdam (23 January 2009, LJN: BH0778), where the Bureau for Youth Care argued that “after care” (after placement) fits in with societal developments, thereby ensuring the provision of care, where needed.

<sup>632</sup> Young adults of eighteen years up to 23 years of age are included in the definition “young person” (in Dutch: *jeugdige*). Article 1(b)(3) provides that a “young person” includes a person who has reached the age of majority but not (yet) the age of 23 years, and for who the continuation of youth care is necessary, provided that the youth care commenced or of which the application was submitted before becoming a major. The same applies to the person for who, within six months after termination of youth care (which had started before becoming a major), the resuming of youth care is necessary.

<sup>633</sup> See the definition of “youth care” in Article 1(c) of the Act on the Youth Care.

<sup>634</sup> In Dutch: *gesloten jeugdzorg*. See section 5.2.2.1 above, which deals with the ground for removal and placement in a closed setting. Chapter IVa of the Act on the Youth Care came

placement, which in effect deprives the child of his or her liberty, authorisation is required specifically for closed care.<sup>635</sup> Article 29a(1) states that chapter IVa is applicable to minors/children as well as young persons up to the age of 21, with regard to whom authorisation for placement had already been granted at the time they became a major. The effect of the present formulation of this Article indicates that for the purpose of (implementation of) chapter IVa of the Act, these young adults are thus to be regarded as minors/children. In addition, the children's court may grant such authorisation against the will of the child or young person/adult. Although the latter is not desirable in any event,<sup>636</sup> the deprivation of liberty of a major poses a specific legal dilemma.

In the discussion on specific international provisions relating to civil placement or detention,<sup>637</sup> it was highlighted that Article 5(1)(d) of the European Convention only permits the detention of a *minor*<sup>638</sup> in terms of civil law, for the purpose of educational supervision.<sup>639</sup> Doek and Vlaardingebroek, in this respect, refer to the criticism of the Council of State regarding Article 29a(1), which indicates that the provision was contrary to international standards.<sup>640</sup> In its order of 23 January 2009, the district court in Amsterdam declared Article 29a(1) of the Act on the Youth Care non-binding on the basis of conflict with Article 5

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into operation on 1 January 2008.

<sup>635</sup> More stringent requirements are provided with regard to placement in a closed setting, see Article 29b(3)-(6) of the Act on the Youth Care. For a more detailed discussion, see section 5.2.2 above.

<sup>636</sup> To impose a measure of detention against someone's will, after having heard the child/young person on the basis of Article 29f, might have a detrimental effect on the co-operation of the affected party and the process of child protection. Asser/De Boer have indicated that the requirements of subsidiarity and proportionality imply that compulsion only becomes an option where there are no alternatives (anymore) in a voluntary context: *Personen- en familierecht* (2010) 802.

<sup>637</sup> See section 5.1.2 above.

<sup>638</sup> Own emphasis.

<sup>639</sup> The relevant part of Article 5(1) of the European Convention reads as follows: "Everyone has the right to liberty and security of person. No. one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority." For a discussion, see section 5.1.2 above.

<sup>640</sup> In Dutch: *Raad van State*. See the comments to the proposed legislation pertaining to closed youth care, Kamerstukken II 2005/06 (30 644), paragraph 4. In *Jeugdrecht en Jeugdzorg* (2009) 354.

of the European Convention.<sup>641</sup> In this case the child was placed in a closed setting, the extension of which was (rightfully) challenged, since the child in the meantime had reached the age of majority. The court tested Article 29a(1) of the Act on the Youth Care against the standard provided in Article 5(1)(d) of the European Convention.<sup>642</sup> The court deliberated that the Convention does not provide a definition of the phrase “minor” and that therefore the national legislation should come to the fore, hereby referring to Article 1:233 of the Civil Code.<sup>643</sup>

In addition, the court referred to the comments of the Council of State<sup>644</sup> and the case *Koniarska t. v the United Kingdom*,<sup>645</sup> and held that the detention of a major for the purpose of educational supervision is not consistent with Article 5(1)(d) of the European Convention, and subsequently dismissed the application.<sup>646</sup> However, approximately six months later, the district court in Amsterdam re-opened the door slightly. The court confirmed the above principle, but in addition held that, “special and serious circumstances might demand a closed setting beyond the age of eighteen”, but merely as a transitional measure and for a maximum duration of two months.<sup>647</sup> Thus the main principle of Article 5(1)(d) of the European Convention is clear and unambiguous, which is commendable.

However, with regard to the case law of the lower courts in the Netherlands, there seems

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<sup>641</sup> LJN: BH0778, Rechtbank Amsterdam, 08-3254/411312.

<sup>642</sup> Article 5 of the European Convention is “self-executing” and has “direct effect”, which means that it has binding force upon anyone in the Netherlands. For a more detailed discussion on the direct effect of international provisions, see section 2.1.2 above.

<sup>643</sup> The phrase “child” has been discussed in section 3.1.1 above.

<sup>644</sup> As referred to earlier, see Kamerstukken II 2005/06 (30 644), paragraph 4. Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 354.

<sup>645</sup> ECHR 12 October 2000, Application no. 33670/96.

<sup>646</sup> See also LJN: BH5398, Rechtbank Rotterdam of 19 February 2009 (323923/J1 RK 09-155). The court posed the question whether in terms of the CRC young adults of eighteen years or older may be regarded or treated as minors. The court held that on the basis of Article 1 of the Convention the legislature of a state party is allowed to regard a child as a major before he or she reaches the age of eighteen, but does not provide for the possibility to treat an eighteen-year-old or above still as a minor/child. For a more detailed discussion on the definition of “child” in terms of the CRC, see section 3.1.1 above.

<sup>647</sup> In Dutch: *overbruggingsfase*. For example, whilst waiting for placement in a psychiatric institution. See Forder & Olujić in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 35.

some lack of consistency whether or not slight exceptions are permitted.<sup>648</sup> It is hoped that the *Hoge Raad*, as the supreme court in the Netherlands, will shortly provide the necessary legal certainty.

Lastly, the question comes to the fore as to whether an appeal should still be allowed whilst the authorisation for the removal and placement has already lapsed. Previously, the Appeal courts and the *Hoge Raad* declared such an appeal inadmissible due to the lack of interest, since the authorisation (and thus placement/detention) had already lapsed. However, under the influence of the European Court for Human Rights, the *Hoge Raad* had to go back on this jurisprudence of “lack of interest”. In the case of *S.T.S. v the Netherlands*<sup>649</sup> the European Court deliberated that “in declaring the applicant's appeal on points of law inadmissible as having become devoid of interest, the Supreme Court (*Hoge Raad*) deprived it of whatever further effect it might have had”. The Court made it clear that “a former detainee may well have a legal interest in the determination of the lawfulness of his or her detention even after having been liberated”, hereby referring to Article 5(5) of the European Convention, which provides that everyone who has been a victim of an unlawful detention shall have an enforceable right to compensation.<sup>650</sup>

The Court concluded that Article 5(4) had been violated in that the proceedings for deciding

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<sup>648</sup> See the decisions of the district court Rotterdam of 27 August 2009 (LJN BJ963) and 20 October 2009 (LJN BK1694) in terms of which the detention of a young adult was permitted (as exception to the rule), whereas the appeal court 's-Gravenhage decided otherwise. See the case of 8 October 2009 (LJN BK2806). See also Forder & Olujić in Forder, Duijst & Wolthuis (eds.) *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 36.

<sup>649</sup> ECHR 7 June 2011, Application no. 277/05.

<sup>650</sup> See paragraph 61 of the case. The relevant sections of Article 5 of the European Convention are:

- “(1) Everyone has the right to liberty and security of person. No. one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (a) the lawful detention of a person after conviction by a competent court ...
  - (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
  - (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

the lawfulness of the applicant's detention were not “effective”.<sup>651</sup> The Court also held that there had been a violation of Article 5(4) in that the lawfulness of the applicant's detention was not decided “speedily”.<sup>652</sup> It is submitted that this case is of utmost importance in the sense that it guarantees persons who have been deprived of their liberty of: (1) the right to a speedily decision on the lawfulness of the detention, and (2) the right to have the lawfulness of the detention determined, even where the person in the meantime has been liberated.<sup>653</sup>

Where a court determines that the detention was unlawful, the affected person is entitled to compensation.<sup>654</sup> The combination of the two abovementioned considerations should urge state parties to get their house in order in the sense that judicial authorities should ensure that urgent matters are indeed dealt with speedily. The latter is even more pressing in the case of deprivation of liberty.<sup>655</sup>

Following the decision by the European Court, the *Hoge Raad* altered its course which became evident in the case of 24 June 2011.<sup>656</sup> The child was temporarily placed in a facility for closed care causing him to be deprived of his liberty. The child lodged an appeal to the Appeal court, which was dismissed on the basis of lack of interest, due to the fact that the authorisation for the placement had already lapsed. The *Hoge Raad* held that the person who institutes a legal remedy against a temporary measure, which causes him to be deprived of his liberty, should be enabled to challenge such measure, even after the period of the measure has lapsed. Such interest should also not be denied in the case where the

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<sup>651</sup> See paragraphs 43, 47 and further.

<sup>652</sup> See paragraphs 43, 48 and 50 of the case. Based on these considerations, the Netherlands was ordered to pay the applicant 2 000 Euros in respect of non-pecuniary damage, see paragraph 75.

<sup>653</sup> See also the newsletter of Defence for Children International “Europese Hof: Rechtmatigheid reeds verstreken machtiging uithuisplaatsing moet ook door de *Hoge Raad* worden getoetst” of 23 June 2011, <http://www.defenceforchildren.nl>, accessed on 15-2-2012.

<sup>654</sup> For a more detailed discussion on the right to compensation in the case of unlawful detention, see Forder & Olujić *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 43 and further. Reference is made to the need for a legislative framework which provides for these kinds of financial claims. As suggested by Forder & Olujić, in the meantime Article 89 of the Code of Criminal Procedure could be applied by analogy. On the basis of the latter provision, the court may award damages, which may include non-pecuniary damages.

<sup>655</sup> See also paragraph 48 of the case.

<sup>656</sup> LJN: BQ2292, *Hoge Raad*, 10/04946 of 24-06-2011. See <http://www.Rechtspraak.nl>, accessed on 23-5-2012.

lawfulness of the placement was not challenged.<sup>657</sup>

In a subsequent case the *Hoge Raad* expanded on the recent jurisprudence, by including the parent who challenged the placement of his or her child with the non-custodial parent. The *Hoge Raad* held that on the basis of the right to respect of family life in terms of Article 8, the parent has a legal interest to have the lawfulness of the placement tested, which should not be dismissed on the basis that the period for the placement had already lapsed.<sup>658</sup> It is submitted that this new trend in the jurisprudence is most welcome since it allows the directly affected parties to challenge these far-reaching measures and to have the lawfulness thereof determined.<sup>659</sup>

In sum, child protection measures and thus the placement of a child, come to an end the moment a child turns eighteen. In principle, it is commendable that the entitlement to youth care (support and assistance pertaining to (potential) problems relating to the upbringing or education) can be extended to young adults.<sup>660</sup> This way it might be prevented that vulnerable young adults will fall between the cracks. On the one hand they have been protected and cared for up to their eighteenth birthday, and on the other hand they are not yet ready to function completely independently. An aggravating factor which increases the aforementioned risk is the lack of transition with regard to the social services available to adults. However, as pointed out, any deprivation of liberty of a major in terms of civil law will be in contravention of the international standards. Therefore, alternatives have to be explored in order to safeguard the interests of these young adults.

A significant contribution in this regard has been made already by Steketee *et al.*<sup>661</sup> It is

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<sup>657</sup> See the deliberation of the *Hoge Raad* in paragraph 3.7 of the case.

<sup>658</sup> See LJN: BR5151, *Hoge Raad*, 10/04582 of 14-10-2011. See <http://www.Rechtspraak.nl>, accessed on 23-5-2012.

<sup>659</sup> Bruning poses the question whether these positive developments relating to legal interest will also allow a brother or sister of a removed child to challenge such a decision: "Rechtsmiddel bij uithuisplaatsing" *Tijdschrift voor Familie- en Jeugdrecht* (2012) 1 1.

<sup>660</sup> See Article 1(b)(3) and (4) of the Act on the Youth Care.

<sup>661</sup> See the report of the *Verwey-Jonker Institute* "(Jeugd)zorg houdt niet op bij 18 jaar" (2009) 101-107. Based on extensive field research it was recommended that specific programmes be developed for the target group of 18-23 years, which aim to increase their independence; to provide the necessary assistance regarding work, living, finances, social networking and health; to improve the transition between youth care and social welfare pertaining to adults; to

submitted that more applied research is required to ensure that the available resources are linked with each other, which increases the efficiency and efficacy of the social welfare agencies and from which ultimately these young adults will benefit.

In addition, more comparative research is recommended in order to determine how other countries deal with these challenges. Options for young adults on a voluntary basis should be considered; for example drop-in centres, as provided for in the South African Children's Act. Above it was recommended that the so-called "drop-in centres" to be made accessible to both children and young adults.<sup>662</sup> Tailored to the needs of young adults in the Netherlands, the availability of the necessary support and assistance in this context can go a long way.

#### 5.3.4 The child's right to contact with the family

Where a child has been separated from one or both parents, Article 9(3) of the CRC demands that state parties shall respect the right of the child to maintain personal relations and *direct* contact with both parents *on a regular basis*,<sup>663</sup> unless this would be contrary to the best interests of the child concerned. In other words, the only exception which forms the basis for the limitation or denial of contact seems to be the child's best interests.<sup>664</sup>

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improve the collaboration with the fields of education and labour and to decentralise the present system, hereby delegating the responsibility to local government. In addition, it is submitted, the target group should be made aware of the (existing) programmes and possibilities for assistance.

<sup>662</sup> See chapter 14 of the Children's Act 38 of 2005. Article 213 of the Act provides that "a drop-in centre is a facility providing basic services aimed at meeting the emotional, physical and social development needs of vulnerable children". There is no court intervention and children attend on a voluntary basis. It is submitted that the combination of the offering of basic services and a wide variety of programmes which are tailored to the (developmental) needs of the young adults concerned has enormous potential. For a more detailed discussion, see section 5.3.3.1 above.

<sup>663</sup> Own emphasis, in order to stress the importance of the wording. Article 19(2) of the African Children's Rights Charter conveys the same right to the child, but does not include the exception "contrary to the child's best interests". It is submitted that all measures pertaining to children should always be measured against the yardstick of the child's best interests. Therefore, the fact that it is not explicitly included in Article 19(2) does not matter, it is relevant by implication.

<sup>664</sup> See Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 113.



Detrick points out that in this regard the Committee on the Rights of the Child has requested state parties to provide the following information in their periodic reports.<sup>665</sup> Firstly, to indicate the measures adopted which ensure that the child can exercise the right to maintain personal relations and direct contact with his or her parent(s) on a regular basis. Secondly, to indicate the extent to which the views of the child are taken into consideration in this regard.<sup>666</sup>

Although the *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*,<sup>667</sup> does not refer explicitly to contact, it may be derived from some of the provisions. Article 11 acknowledges that foster care is in principle temporary in nature and should not preclude, among others, a return to the child's own parents. In addition, Article 12 provides that in all matters of foster family care the child and his or her own parents should be properly involved. The fact that foster placement of children should be regulated by law,<sup>668</sup> means that the national law should include contact, in order to ensure that the parents will be involved. This applies not only with regard to the proceedings but also for the duration of the placement with the foster family, the latter with a view to the possible return of the child.<sup>669</sup> Whether it is feasible for a child to eventually return home depends, among others, on whether regular and appropriate contact has been materialised. Therefore it is crucial to try to maintain the child as close to his or her habitual place of residence, in order to facilitate contact with the family.<sup>670</sup>

Apart from the above, Article 37(c) of the CRC also refers to the right to contact. It provides,

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<sup>665</sup> *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 176.

<sup>666</sup> See paragraph 70 of the *General Guidelines for Periodic Reports* (CRC/C/58) of 20 November 1996.

<sup>667</sup> (A/RES/41/85) of 3 December 1986.

<sup>668</sup> See Article 10 of the *Declaration*.

<sup>669</sup> It is needless to say that the child's best interests should be the ultimate test in this regard, which is stipulated in Article 5. The latter provides that "in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration". Moreover, Article 11 of the *Declaration* provides that foster care may continue, if necessary, until adulthood, but should not preclude either prior return to the child's own parents or adoption.

<sup>670</sup> See paragraph 10 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

*inter alia*, that every child deprived of liberty shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances. Furthermore, the right to contact is worked out in detail in the Rules 59 to 61 of the *Havana Rules*.<sup>671</sup> Rule 59 provides that adequate communication with the outside world forms an integral part of the right to fair and humane treatment. This obviously includes contact with the family, which is also explicitly mentioned in this Rule.<sup>672</sup>

On the basis of this Rule, children should also be allowed to leave (detention) facilities for a visit to their home and family and to receive special permission to leave the facility for educational, vocational or other important reasons. The right to receive regular and frequent visits is covered by Rule 60. It is interesting to note that this Rule provides the meaning of “regular and frequent visits”, namely, in principle once a week and not less than once a month, and this should take place in circumstances that respect the need of privacy. In addition, it provides that a child should have the right to contact and unrestricted communication with the family, which regrettably is not further regulated. It is hoped that the persons responsible for the care of a child, and the professionals involved, will respect this right and interpret and accommodate this extensively. Rule 61 deals with the right to communicate in writing or by telephone, which should be possible at least twice a week, unless legally restricted. It is clear that in order to be able to enjoy this right, there is an obligation (for the person/professionals in charge) to assist where necessary.<sup>673</sup>

The importance of regular contact cannot be over emphasised. Only then true meaning can be given to the child's right to maintain personal relations and direct contact. After all, the separation is meant to be of a temporary nature; where after the child in principle should return home. It is submitted that specific research is needed to make an inventory of any existing rules in institutions and that these should be tested against the relevant provisions in

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<sup>671</sup> The United Nations Rules for the Protection of Juveniles deprived of their Liberty, Resolution 45/113 of 14/12/1990. According to Liefwaard, “family contact” is one of the four general principles of the Rules. The other three are: (1) “integration into the community”; (2) “respect for the dignity of the juvenile”; and (3) “the right to be treated fairly”, which involves disciplinary measures and procedures, inspection and complaints: *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 98-100.

<sup>672</sup> See also Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 99.

<sup>673</sup> Where these rights are not effectively realised, complaints procedures should be available and children should be informed about the available remedies.

the *Beijing* and *Havana Rules*.

In 2007 the Committee on the Rights of the Child issued *General Comment No. 10*, which deals with children's rights in juvenile justice. Although the focus in this thesis is on placement in terms of civil law, a child thus placed is in effect deprived of his or her liberty. The latter document explicitly states that children deprived of liberty have the right to maintain contact with their family through correspondence and visits. In addition, paragraph 87 makes it obligatory that the child should be placed in a facility that is as close as possible to the place of residence of the family of the child, in order to facilitate visits.<sup>674</sup>

In order to enhance the rights of these vulnerable children “behind closed doors”, complaint procedures should be put in place at all institutions. Children should also be able to lodge a complaint regarding contact (or any complaint for that matter) to an objective forum, like a children's ombudsman. It is hoped that in this regard the Optional Protocol to the Convention on the Rights of the Child on a communications procedure will provide children the necessary support in realising their fundamental rights.

#### **5.3.4.1 The child's right to contact in terms of South African law**

In terms of both the CRC and the African Children's Rights Charter, South Africa is bound to respect the child's right to maintain personal relations and direct contact with both parents on a regular basis, in the case of removal. This means that contact needs to be facilitated by the care-givers or professionals in the child's present/new environment. It is submitted that this should be seen as a positive obligation, which should enable the child and the parents to practically exercise this right and therefore maintain meaningful contact whilst placed elsewhere. This will also improve the chances of the ultimate goal of the child returning home.<sup>675</sup>

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<sup>674</sup> It is interesting to note that the same paragraph concludes with the following: “exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities”. This way the possibility of arbitrary decision-making is minimal, which is commendable. See also Forder & Olujić *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 53.

<sup>675</sup> See Van der Linde “The extent of the state's duty to reunite parent and child: A European

Article 9(3) of the CRC provides that the right to contact may be precluded or limited if such would be contrary to the child's best interests.<sup>676</sup> In order to come to a reasonable decision in this regard, the child, the parent(s) and care-giver(s) should be given the opportunity to express their views, which need to be duly taken into consideration. Where the decision regarding contact is contrary to the wishes of the parents and the child concerned, it is submitted that explicit reasons should be provided.

Section 18(2)(b) of the Children's Act entitles the person having parental responsibilities and rights to maintain contact in respect of a child. This means that where a child has been removed from the family environment, the parents have the right of reasonable contact with their child.<sup>677</sup> It is commendable that the Act under these circumstances provides for communication on a regular basis and in person, or in any other manner. The latter allows for arrangements which can be tailored to the needs of the child and his or her parents. Where contact, due to circumstances, is not feasible in person, the definition in section 1(1) of the Children's Act explicitly provides, among others, for communication via the post, by telephone or any other form of electronic communication.<sup>678</sup>

In addition, it is commendable that section 45(1)(b) of the Children's Act provides the children's court with the necessary jurisdiction to deal with cases pertaining to contact. It is agreed with Matthias and Zaal that social workers involved in care and protection cases should feel free to request the court for a structured contact order, if the circumstances demand such.<sup>679</sup> The advantage of structured contact is that it will be clear to all parties

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human rights perspective" in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 107.

<sup>676</sup> For example, in the case of domestic violence or where a parent is abusive. However, apart from these serious cases, it should not be concluded too lightly that contact is contrary to the child's best interests. It is interesting to note that the African Children's Rights Charter does not refer to any possible limitation pertaining to the child's best interests. It is submitted though that the child's best interests prevails in all matters involving the child, thus including the possibility of contact between the child and his or her parents, or, where necessary the limitation or preclusion thereof.

<sup>677</sup> The right of reasonable contact entitles the parents to visitation rights at appropriate times and intervals. See *Van Schoor v Van Schoor* 1976 (2) SA 600 (A). Also Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 181.

<sup>678</sup> The use of technology includes, for example, skype. See also Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 67. Supervised contact is also possible, in which case contact materialises in the presence of a social worker.

<sup>679</sup> See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 182.

what to expect in this regard.

Apart from contact between the parents and the child, contact may also be relevant with regard to a wider circle of persons during placement, and even after placement has come to an end. On the basis of section 23 of the Children's Act, any person who has an interest in the care, well-being or development of a child, may approach the court for an order pertaining to, among others, contact.<sup>680</sup> In considering the application, the court is obliged to take the following factors into account:

- (i) the best interests of the child;
- (ii) the relationship between the applicant and the child, and any other relevant person and the child;
- (iii) the degree of commitment that the applicant has shown towards the child;
- (iv) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- (v) any other factor that should, in the opinion of the court, be taken into account.<sup>681</sup>

Thus, where a child has been placed with a foster family, he or she may (continue) having contact with, for example, grandparents or other relatives. Conversely, where a child has returned home, the foster parents, in turn, could have an interest in maintaining contact with the child and vice versa. Due to its general formulation, section 23 provides for a welcome

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<sup>680</sup> For an application in terms of section 23, section 29 comes into play which provides that the application may be granted (unconditionally or subject to conditions determined by the court) or refused, but an application may be granted only if it is considered to be in the best interests of the child, see section 29(3) of the Children's Act. See also Bosman-Sadie & Corrie A *Practical Approach to the Children's Act* (2010) 49.

<sup>681</sup> See section 23(2) of the Children's Act.

flexibility.<sup>682</sup>

Finally, with its entry into force, the Children's Act introduced a *novum* pertaining to contact in relation to adoption; namely, the so-called “post-adoption agreement”.<sup>683</sup> This is an interesting development, since South Africa, like the Netherlands, has a system of strong adoption.<sup>684</sup> The latter means that an adoption order terminates all parental responsibilities and rights of any person, including a parent, in respect of the child immediately before the adoption. On the basis of section 242 the adoption order terminates all claims to contact with the child as well. Moreover, it also terminates all rights and responsibilities the child had in respect of the parent(s). It has been argued that consideration should be given to moving towards a system of weak adoption, where a child could benefit from both family environments without having to face the harsh consequences of the present system, but this is still under (international) debate.<sup>685</sup>

However, despite the fact that given the circumstances it is in the best interests of the child to be adopted, it might be that the biological parents would still like to play a role in the child's life. In order to achieve this, a post-adoption agreement can be entered into.

Section 234 of the Children's Act, reads as follows:

“(1) The parent or guardian of a child may, before an application for the adoption of a child is made in terms of section 239, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for -

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<sup>682</sup> This provision also provides for the assignment of care by the court, to an interested person. The relevance of this has been outlined by Bosman-Sadie & Corrie who refer in this respect to the human tragedies from the past, where a child had been living with a family member for an extended period of time, often grandparents, and suddenly was claimed back by a parent, causing separation between family members and the child to lose crucial contact: *A Practical Approach to the Children's Act* (2010) 43.

<sup>683</sup> See also Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 150. The institution of adoption will be briefly discussed under permanency planning, in section 5.3.5.1.

<sup>684</sup> For a brief discussion pertaining to the Netherlands, see section 5.3.5.2 below.

<sup>685</sup> See the discussion in section 5.3.5.2 below. Skelton refers in this respect to a worldwide trend which allows for more “open” forms of adoption: in Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 295.

- (a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and
- (b) the provision of information, including medical information, about the child, after the application for adoption is granted”.

A post-adoption agreement has to be drawn up before the adoption application is made and it takes effect only if made an order of court.<sup>686</sup> It should be noted that the child's participation is of decisive importance in this regard. Section 234(2) stipulates that the above agreement may not be entered into without the consent of the child who is able to understand the implications thereof.<sup>687</sup> In addition, the agreement may be amended or terminated only by an order of court on application by any of the parties or the adopted child.<sup>688</sup> On the one hand it is certainly positive that a child has the right to initiate proceedings in this respect, but this simultaneously begs the question as to how he or she should go about this. Does this require the assistance of the adoptive parents, or can the child approach the court in terms of section 14 of the Children's Act? Boezaart and De Bruin conclude that apparently the common law rules pertaining to the child's capacity to litigate have not been affected by the coming into force of the Children's Act. It therefore seems that the child concerned indeed needs the assistance of the adoptive parent, or alternatively, has to resort to the time-honoured mechanism of a curator *ad litem*.<sup>689</sup>

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<sup>686</sup> The formalities are outlined in DSD regulation 103 (GN R261/2010), which in turn refers to DSD Form 66 (Consolidated forms in terms of the regulations under the Children's Act, 2005). The particulars of the adoption social worker involved are also to be completed on the form. Moreover, regulation 103(2) provides that a party to a post-adoption agreement must inform all other parties to the agreement of any change to any of the particulars as referred to in the completed form, within seven days of such change.

<sup>687</sup> This is an important provision and in line with Article 12 of the CRC. It is interesting that it does not merely ensure participation, but it stipulates explicitly that the agreement may only be entered into with the consent of the child concerned, who is sufficiently mature to understand the consequences thereof. It is, however, regretful that the format for consent is not prescribed. It is submitted that the court, before making an order of adoption (and making the post-adoption agreement an order of court) should hear the child in person to verify whether consent was indeed provided.

<sup>688</sup> Where the implementation of the agreement gives reason for concern or the arrangement does not seem to serve the best interests of the child, the agreement can be amended or terminated.

<sup>689</sup> In “Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate” 2011 (2) *De*

The fact that the post-adoption agreement is a new concept means that the public and professionals might not know (yet) about this important provision,<sup>690</sup> which is (potentially) prejudicial to the biological and (prospective) adoptive parents and the child. The latter, in combination with the strict requirements of section 234(1), means that for some parties it may simply be too late. It is submitted that where parents have not entered into a post-adoption agreement, they should be able to resort to section 23, if the parties involved would so wish. The court, as the competent authority,<sup>691</sup> has the responsibility, with the assistance of the professionals involved, to establish whether contact will be in the best interests of the child concerned and grant or refuse contact accordingly.

#### 5.3.4.2 The child's right to contact in terms of Dutch law

Where a child has been separated from her or his parents, the CRC ensures that the child has the right to maintain personal relations and direct contact with both parents on a regular basis.<sup>692</sup> In addition, in terms of Article 8 of the European Convention, any person having “family life” with the child should be entitled to having regular contact, which is also applicable in the case of the removal/placement of a child.<sup>693</sup> It is argued that this reciprocal right to contact between the parent(s) having parental authority and the child is naturally part of parental authority.<sup>694</sup> Contact and information is regarded as very important, hence the fact that this is regulated in a separate part, namely in Title 15 of Book 1 of the Civil Code.

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*Jure* 437-438.

<sup>690</sup> Training of professionals in the field is indispensable. In addition, the modules family law and social work law or social welfare law, offered at tertiary level should pay sufficient attention to the various innovations brought by the Children's Act.

<sup>691</sup> Paragraph 5 of the *Guidelines* determines that it is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care. See the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

<sup>692</sup> See Article 9(3) of the CRC, unless this would be contrary to the interests of the child concerned.

<sup>693</sup> In addition, Article 14 of the European Convention determines that the enjoyment of the rights in the Convention shall be secured without discrimination on the ground of, for example, birth. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 173 and further; Forder & Olujić *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 53.

<sup>694</sup> Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 104; Asser/De Boer *Personen- en familierecht* (2010) 882-883. However, Article 1:253a(4) of the Civil Code does refer to relevant provisions in the case of conflict regarding the joint exercise of parental authority by parents.



Article 1:377a provides that the child has the right to contact with his or her parents and with the persons with whom he or she has a close and personal relationship. Moreover, the non-custodial parent has the right to and the duty to contact with his child.<sup>695</sup> The parent may approach the court in order to obtain an order regulating visitation rights. However, the child cannot formally submit a request to the court to regulate or change his or her visitation rights.<sup>696</sup> But the child has an informal possibility to contact the court (see hereafter). It is submitted that in such a case a special curator should be appointed.<sup>697</sup>

On the basis of Article 809 of the Code of Civil Procedure, the child will be given the opportunity to express his or her views on the matter.<sup>698</sup> Where the child of twelve years or older at the hearing expresses a serious objection against having contact with the parent or other person with whom he or she has a close and personal relationship, the court will deny the right to contact. Other reasons for denying contact in terms of Article 1:377a(3) are: where contact would result in serious harm for the mental or physical development of the child; the parent or other person is deemed unfit or not capable of having contact ;or where contact otherwise would be contrary to important interests of the child.<sup>699</sup>

It is regrettable that children cannot (formally) approach the court in connection with their right to contact. Meuwise *et al.* have pointed out that this is contrary to Article 6 of the European Convention, which entitles “everyone” to the right to have their civil rights and obligations determined by an independent and impartial tribunal.<sup>700</sup> But the child has the right to informally (by letter, phone or email) contact the presiding officer and ask for the

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<sup>695</sup> It is interesting to note that the non-custodial parent has the right to and (since 2009) the duty of contact with his child, see Article 1:377a(1). The latter is not reciprocal. In other words, there is no duty for the child concerned but it is self-evident that any decision-making in this regard should serve the best interests of the child. See Asser/De Boer *Personen- en familierecht* (2010) 889.

<sup>696</sup> See Article 1:377a(2) of the Civil Code.

<sup>697</sup> A special curator may be appointed by the court on the basis of Article 1:250 of the Civil Code.

<sup>698</sup> The court is obliged to hear the child of twelve years or older and has a discretion to hear a child younger than 12 years. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 104.

<sup>699</sup> In other words, the court may only deny the right to contact on limited grounds. See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 176 and 216; also Asser/De Boer *Personen- en Familierecht* (2010) 891.

<sup>700</sup> See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 105.

arrangement of his or her visitation right or for a change of the existing arrangement. The presiding officer can arrange a hearing and take a decision on his own accord.<sup>701</sup> Whilst it is commendable that a child can approach the court in an informal manner, this so-called “informal access to the court” comes only to the fore in limited instances.<sup>702</sup> Therefore it is submitted that children, in all matters affecting them, should be able to approach the court and that it is recommended that this right be included in the Civil Code.<sup>703</sup>

When a child is subjected to a child protection measure, his or her right to contact with the parent(s) remain in principle unaffected. For instance, the parent relieved from his or her parental authority can still request the court to arrange visitation with his or her child, with of course the best interests of the child as the decisive benchmark. The supervision order merely limits the authority of parents in the sense that they have to follow the instructions issued by the Bureau for Youth Care. Usually this would not affect the right to contact between the parent(s) and child, meaning that the contact would in principle be

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<sup>701</sup> In Dutch: *een ambtshalve beslissing*. See Article 1:377g of the Civil Code. An appeal can only be lodged by the parent(s) concerned.

<sup>702</sup> These involve the following: to make an arrangement for contact (Article 1:377a Civil Code); an arrangement pertaining to access to information (Article 1:377b); a change regarding parental authority (Article 1:253a) and concerning a change pertaining to an existing contact arrangement (Article 1:377e Civil Code). See “De bijzondere curator, een lot uit de loterij?” Adviesrapport over waarborging van de stem en de belangen van kinderen in the praktijk 2012 *De Kinderombudsman* 11.

<sup>703</sup> Similar to section 14 of the South African Children's Act 38 of 2005, which provides the following: “Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court”. However, the full realisation of this right is not yet feasible. According to Boezaart and De Bruin the coming into operation of section 14 of the Children's Act has apparently not done away with the limitation on the child's capacity to approach the court independently. It was also mentioned that the latter was never the intention of the legislature and that section 14 was not intended to amend the existing formal requirements. Therefore one has to resort to the existing remedies, for example, the curator *ad litem*. The latter was also recommended by the Supreme Court of Appeal in *Legal Aid Board in re Four Children* (512/10 [2011] ZASCA 39 (2011-03-29). It is submitted that this is an opportunity missed by the court. See Boezaart & De Bruin “Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate” *De Jure* (2011) 2 437-438. In order to realise the rights of children to stand up for their rights it is important that they, apart from participating in proceedings - for which they are still dependent on adults, should also be able to approach the court. This should preferably be directly, but if this is not feasible, then at least via a curator *ad litem* or having access to legal representation, in the case where there is a conflict of interests with regard to the parents. For example, were they have a different opinion or are not willing to assist. See also *General Comment No. 12* (2009) paragraphs 35 and 36. Lastly, it should be noted that the South African courts are under the obligation to developing the common law on the basis of section 39(2) of the Constitution.

unaffected.<sup>704</sup> But there are some specific provisions regarding the matter of visitation.

First, the Bureau for Youth Care can ask the presiding officer to change an existing court ordered arrangement of the visitation right if that is necessary with a view to the goal of the supervision order.<sup>705</sup> The decision of the presiding officer to grant this request can be changed at the request of the parent (with parental authority), or the child if he or she is twelve years or older, in case of a change in circumstances.

Secondly, when a child has been removed from the family environment, the child and the parents maintain the right to contact with one another, despite the placement. However, Article 1:263a of the Civil Code allows the Bureau for Youth Care to limit the right to contact between the parent (with parental authority) and the child. Such limitation is possible only “as far as necessary for the purpose of the placement”, and applies only for the duration of the placement.<sup>706</sup> When the child is placed with a foster family, the foster parent(s) will be responsible for the care and upbringing of the child. This includes the responsibility for the mental and physical well-being and safety of the child, as well as to promote the development of the child's personality.<sup>707</sup> Therefore, foster parents have to facilitate contact between their foster child and the biological parents. Since the authorisation for the removal/placement is combined with supervision, the social worker from the Bureau for Youth Care will be able to assist in the matter, and where necessary, make a decision to restrict contact.<sup>708</sup>

When a child is placed in residential care, the abovementioned plan of action for the child will provide guidance concerning contact with the parents. When in the interests of the child, contact will be realised according to this individual plan (of action), thereby having regard to

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<sup>704</sup> See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 105.

<sup>705</sup> See Article 1:263b of the Civil Code.

<sup>706</sup> The decision of the Bureau for Youth Care to limit the right to contact is meant as a directive, which instruction needs to be followed, see Article 1:263a(2). However, the parent of the child of twelve years or older may approach the court and apply for the annulment of the directive on the basis of Article 1:259. Alternatively the affected parties may request the Bureau for Youth Care to withdraw the directive, see Article 1:260 of the Civil Code.

<sup>707</sup> See Articles 1:248 and 247(2) of the Civil Code. Also Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 71.

<sup>708</sup> This would be based on Article 1:263a of the Civil Code, as discussed earlier in this section.

the house rules of the institution concerned.<sup>709</sup> With regard to the placement in a closed setting, a specific policy document has been developed, which aims to provide quality norms for closed institutions. This document, called “*Kwaliteitskader Gesloten Jeugdzorg*”, provides that the institution will offer opportunities to (physical) contact with parents, guardian, social worker, family and friends. Although it is commendable that the right to contact is explicitly mentioned in the document, it still has to be seen how this right will be exercised in practice and whether this will be implemented consistently.<sup>710</sup>

Coming back to the plan of action and the house rules of the institution concerned, it is clear that the professionals involved have a crucial function regarding the realisation of contact between the child and his or her parents. The obligation to facilitate contact between the child and the parents was dealt with by the European Court in the case *Scozzari & Giunta v Italy*.<sup>711</sup> In this case the applicant (the mother) and her children had been separated for a year and a half. The first visit proved to be disappointing, which in the opinion of the court, was “perfectly understandable after such a long separation following events that were traumatic for the child”. The court deliberated that the situation “should have incited social services to organise visits at regular intervals to help the children get through such a difficult period”.<sup>712</sup> Furthermore it was argued that “continued separation can certainly not be expected to help re-cement family bonds that have already been put under considerable strain”. The court failed to understand why the initial visit was not speedily followed by subsequent visits. The court criticised both social services for their handling of the matter,<sup>713</sup> and the youth court for not conducting any thorough review. It held that the authorities had failed to strike a fair balance between the interests of the first applicant's children and her

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<sup>709</sup> These house rules should be subject to control by the Inspectorate for Youth Care.

<sup>710</sup> See section 4.7.3 of the policy document “*Kwaliteitskader Gesloten Jeugdzorg*” (Jeugdzorg Plus). This policy document is the product of collaboration of the Inspectorate for Youth Care, in conjunction with the Inspectorates for Health Care and Education. The practical implementation of the right to contact should fall under the control function of the Inspectorate for Youth Care. Such control is indispensable, especially in a closed setting, where children are “invisible” to the outside world. See also Forder & Olujić *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 58.

<sup>711</sup> ECHR 13 July 2000, Application no. 39221/98 and 41963/98. See also Forder & Olujić *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 53.

<sup>712</sup> See *Scozzari & Giunta v Italy* ECHR 13 July 2000, paragraph 174.

<sup>713</sup> The court was of the opinion that so far “social services had helped to accentuate the rift between the first applicant and the children, creating a risk that it will become permanent”, see paragraph 179.

rights in terms of Article 8 of the European Convention, and that therefore this constituted a violation of the said Article 8.<sup>714</sup>

In the case *Roda & Bonfatti v Italy*<sup>715</sup> the European Court held that there had been a violation of Article 8 on the basis of both the prolonged suspension of contact as well as inadequate arrangements for meetings between the mother and the child.<sup>716</sup> Since a placement order is of a temporary nature, its implementation should be geared towards reunification of the child and his or her parents. For the latter to materialise, sufficient contact between the family members is indispensable.<sup>717</sup> It is submitted that in the process of establishing contact or increasing the frequency of contact the professionals involved should take responsibility. When making a placement order, the children's court should remind those professionals of their responsibility with regard to the implementation of the order.

Another aspect regarding Article 8 of the European Convention was spelt out by the European Court in the case of *Kopf and Liberdá v Austria*,<sup>718</sup> namely the duty of (national) authorities to exercise exceptional diligence. The Court held that the latter duty is decisive in assessing whether a case concerning access to children had been heard within a reasonable time as required by Article 6(1) of the Convention, and which, in addition, also forms part of the procedural requirements implicit in Article 8. In this case the foster parents attempted to gain contact rights with their former foster child. It was decided that after more

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<sup>714</sup> See paragraph 183 of the case.

<sup>715</sup> ECHR 19 December 2006, Application no. 10427/02.

<sup>716</sup> The child had been removed from the family home due to sexual abuse. Since evidence revealed that the father had been involved and the mother had not been able to protect the child, contact between the family and the child had been suspended, which lasted for over three years. In the meantime the child was placed in foster care and had (supervised) contact with the mother circa six times a year but was not interested to see the mother more frequently. See also <http://www.familylaw.co.uk/Articles/roda-and-bonfatti-v-italy>, last accessed on 18-8-2012.

<sup>717</sup> See also *Zaal Court services for the child in need of alternative care: a critical evaluation of selected aspects of the South African system* (LLD dissertation 2008 University of the Witwatersrand) 292.

<sup>718</sup> ECHR 17 January 2012 (Application no. 1598/06).

than three years of no contact it was not in the best interests of the child (anymore).<sup>719</sup>

The Court held that whilst Article 8 contains no explicit procedural requirements, the decision-making process regarding measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. The Court continued that it had repeatedly found that in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. *In casu* the passage of time had had a direct and adverse impact on the position of the foster parents. Based on the aforementioned, the Court found that the Austrian court(s) had not complied with their duty in terms of Article 8 to deal diligently with the applicants' request for visiting rights which resulted in a violation of Article 8 of the Convention.

Where parents have been deprived of parental authority, a guardian will be appointed. This may be the Bureau for Youth Care, a foster parent, or another natural person.<sup>720</sup> The party concerned may decide on the arrangement of contact between the biological parents and the child. However, the plan of action, which contains the aims pertaining to the

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<sup>719</sup> In this case the child was placed with foster parents after the mother had set fire to their home, due to the use of drugs. After her recovery the child was returned to the mother. The foster parents attempted to gain contact with the child, which was finally decided on by the Austrian court after three years. During this period they were precluded from having contact. By then the court refused the request on the basis that the child had re-established a positive relationship with this biological mother and that it was not in his interests to put him in a situation of divided loyalties between her and his "former family" (foster family). See *Kopf and Liberda v Austria* 17 January 2012, Application no. 1598/06, paragraphs 43 and 47.

<sup>720</sup> In practice, after the deprivation of parental authority the court will usually appoint the Bureau for Youth Care as a guardian but this is also possible for the foster parents, see Article 1:275 of the Civil Code. See Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 369 and 380-381. Punselie has pointed out that there is a clear advantage regarding the Bureau for Youth being assigned guardianship, namely that it can function as a "buffer" between the foster parents and the biological parents and it may assist in facilitating contact between the child and his or her parents.

The disadvantage, however, is that the foster parents are required to remain in close contact with the Bureau for Youth Care, since they have no decision-making authority: *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 229. Although guardianship will not be further discussed, it is interesting to note that there has been an increase pertaining to guardianship in the past ten years (1999: 4863) and (2009: 6469), which is a result of a general increase in the imposition of child protection measures in the past decade in the Netherlands. See Terpstra *Kindvriendelijke opsluiting – Gesloten plaatsing van jeugdigen in het licht van mensenrechten* (2012) 196-197. For a more detailed discussion on the deprivation of parental authority, see section 4.5.2.2 en 4.5.2.3 and 4.5.2.4 above.

guardianship, needs to be drawn up in consultation with the child, the biological parents, and foster parents, where applicable. Such a plan should regulate contact between the affected parties.<sup>721</sup> The general provisions of Title 15, as referred to earlier in this section, are applicable. Thus parents may, for example, on the basis of Article 1:377a of the Civil Code, approach the court for the determination of structured contact with their child.<sup>722</sup>

Moreover, Article 42(2) of the Implementation Decree to the Act on the Youth Care states that contact between the child and his or her original milieu or environment will be encouraged, unless this would be harmful to the child. The reference to “original milieu” implies that contact is not necessarily limited to the parents.<sup>723</sup> In terms of the proposed amendments of the measures of child protection, the right to contact after deprivation of parental authority is also explicitly mentioned in the Explanatory Memorandum.<sup>724</sup>

Where a conflict arises between the parents and the foster parent/guardian regarding contact, the role of a curator *ad litem* to be appointed in order to assist the child should not be underestimated.<sup>725</sup> It is submitted that where children cannot approach the court formally

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<sup>721</sup> See the Articles 40 and 42 of the Implementation Decree to the Youth Care Act.

<sup>722</sup> Weterings has averred that the position of the foster parent/guardian should be strengthened and protected with regard to the biological parents of the child. To care for and raise the child as their own should be regarded as immensely valuable for society. As a part of this, foster parents are expected to assist in developing a positive bond between the child and his or her parents. Therefore it should be avoided that foster parents and biological parents become opponents instead of collaborating for the same interests, namely that of the child concerned. The stability of the placement environment of the (foster) child needs to be secured at all times, in order to avoid any threat to the child's development, which could have a detrimental effect on these already vulnerable children. In order to achieve this, Weterings recommends the Bureau for Youth Care to provide for the supervision of the parents of foster children (via a so-called indication-decision). It is agreed that this may neutralise the possibly difficult relationship between the biological parents and foster parents. Moreover, Weterings suggests that where the biological parents commence legal proceedings, legal representation should be provided to foster parents (by the Bureau for Youth Care), instead of them having to pay for this from the foster grant or their own budget. It is said that the abovementioned lack of support will make foster parents reluctant to consider becoming a guardian: “Is pleegoudervoogdij aan te raden”? *Perspectief* (2009) 3 23.

<sup>723</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 382.

<sup>724</sup> Parents deprived of parental authority are entitled to contact with the child unless it would be contrary to the interests of the child. See the Explanatory Memorandum to the Bill (Parliamentary document 2008/09, 32 015) 35.

<sup>725</sup> See Article 1:250 of the Civil Code specifically provides for a special curator (in Dutch: *bijzondere curator*) in matters relating to the care and upbringing of the child. See also Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 103.

due to their limited capacity, a curator *ad litem* should be appointed more frequently in matters affecting the child, especially in cases of conflict of interests or where there is no legal representation for the child.<sup>726</sup>

Even in the case of adoption of a child, contact with the biological parent(s) can be relevant. Article 1:229(1) and (2) of the Civil Code indicates that because of the adoption family relations are created between the adoptive child, the adoptive parent(s) and their blood relations, and that simultaneously the family relation between the adoptive child and the biological parents and their blood relations cease to exist. However, where at the moment of

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See the research conducted by the office of the Kinderombudsman which resulted in the document “De bijzondere curator, een lot uit de loterij?” 2012 Adviesrapport over waarborging van de stem en de belangen van kinderen in the praktijk *De Kinderombudsman* 14. The general finding is that although Article 12 of the CRC demands that the opinion of the children needs to be safeguarded in matters affecting their interests, this is not sufficiently realised in practice. The report concludes with a number of recommendations, among others, to ensure the appointment of a special curator in terms of Article 1:250 of the Civil Code more frequently and to provide more publicity to the possibility of such an appointment, to professionals in the field of family law and child law as well as the public at large (including children) 49-53. It is interesting to note that the report also refers to the European Convention on the Exercise of Children's Rights, which came into operation on 1 July 2000. The Netherlands has not ratified this Convention but it is suggested that this might still happen, see page 11. In terms of Article 4 of the latter Convention the child shall have the right to apply for a special representative, which would strengthen the position of children in member states. See <http://conventions.coe.int/treaty/en/treaties>, accessed on 19-9-2011. It should be noted that Article 5 of the latter Convention confers additional procedural rights to children. It reads as follows:

“Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- (a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;
- (b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;
- (c) the right to appoint their own representative;
- (d) the right to exercise some or all of the rights of parties to such proceedings”.

It is argued that the European Convention on the Exercise of Children's Rights has limited additional value, since the right to be heard has been expressly included in the Articles 809 and 811 of the Code of Civil Procedure and is therefore sufficiently safeguarded, see Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 36. It is nevertheless submitted that especially Articles 4 and 5 of this Convention would significantly contribute to enhancing the procedural rights of children, thereby subsequently improving the compliance with Article 12 of the CRC. It is therefore hoped that the Netherlands will still ratify the document, alternatively that a speedy (legislative) process will be put in place to ensure the same standard in the Dutch legislation as provided by the said Convention. In other words, that children will be entitled to approach the court and will have the right to appoint their own representative in matters affecting them.



the adoption the child has *de facto* contact with a parent with whom the family relations will cease to exist, the court may determine that these parties will remain entitled to have contact with one another. This means that the latter should be explicitly included in the adoption order.<sup>727</sup> It is submitted that where a child and the biological parent(s) have had contact since the removal of the child, this should continue as long as it would be in the best interests of the child concerned.<sup>728</sup>

### 5.3.5 Returning home *vis-à-vis* permanent placement in alternative care

The removal and placement of a child should in principle be of a temporary nature. Both South Africa and the Netherlands have specific legislation, regulations and case law relating to the removal and placement of children. This includes procedures as well as stipulated criteria leading to the ultimate decision as to whether the circumstances justify the removal of a child from his or her family environment.<sup>729</sup>

Reference was made to the importance of alternatives to the removal of children.<sup>730</sup> Therefore, the possibilities of alternative care should be thoroughly explored by professionals/social workers; preferably being part of a multi-disciplinary team.<sup>731</sup> Although presiding officers tend to follow the recommendations tabled by the social worker concerned, the courts could nevertheless become more creative and actively involved in the solution-finding process instead of anticipating and following what the recommendations entail. This

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<sup>727</sup> See Article 1:229(4) of the Civil Code. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 100; Asser/De Boer *Personen- en Familierecht* (2010) 651. For a brief discussion on adoption, see section 5.3.5 below.

<sup>728</sup> Article 1:229(4) also refers to Article 1:377a, on the basis of which the court has the discretion to deny the parent(s) to have contact with their biological child. This will come to the fore where contact would result in serious prejudice pertaining to the mental or physical development of the child, the parent is not considered capable to have contact with the child, the child of twelve years or older has indicated at the hearing that he or she has serious objections against having contact or where contact otherwise would be contrary the best interests of the child.

<sup>729</sup> The procedures and criteria for South Africa will be discussed in section 5.2.1 and for the Netherlands in section 5.2.2. In the following sections the term “removal” will be used instead of “separation”.

<sup>730</sup> In the international instruments the importance of alternative care has been emphasised on, see also section 5.3 above.

<sup>731</sup> This is also emphasised by paragraph 56 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

is not only relevant with regard to the decision “to remove” or “not to remove”, but also pertains to any efforts towards the child returning home.<sup>732</sup>

It is submitted that the courts should take the lead in urging professionals to work towards reunification. This implies that after the removal all efforts should be directed towards the return of the child to the family environment, provided that it will be stable and safe and that the well-being of the child will be secured. In this regard the *Guidelines for the Alternative Care of Children* (2010) indicate that removal of a child from the care of the family should be for the shortest possible duration and the return of the child to parental care should be assured once the original causes of removal have been resolved or have disappeared.<sup>733</sup> Moreover, it should be noted that frequent changes in a care setting should be avoided because it has not only an adverse effect on the child's development but also on his or her ability to form attachments.<sup>734</sup>

During a (short-term) placement, all efforts should be geared towards finding a permanent solution. Every child has the right to live in a caring and safe environment, preferably with the family or in a family resembling setting.<sup>735</sup> The *Guidelines* (2010) demand that “permanency should be secured for the child without undue delay, through reintegration in his or her nuclear or extended family, or if this is not possible, in an alternative stable family setting or in stable and appropriate residential care”.<sup>736</sup> In the purpose of the *Guidelines*, reference is made to the importance of keeping children in, or to return them to, the care of their family, or where this is not possible, to find another appropriate and permanent solution, including adoption and *Kafala* of Islamic law.<sup>737</sup>

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<sup>732</sup> The effect of the attitude of the various professionals involved should not be underestimated. Therefore sufficient (continuous) training is indispensable, which should cover the whole spectrum of norms and standards, including international and regional documents.

<sup>733</sup> See *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

<sup>734</sup> See *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010, paragraph 59.

<sup>735</sup> The South African Constitution refers explicitly to this entitlement: “Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”.

<sup>736</sup> See paragraph 59.

<sup>737</sup> A/RES/64/142 of 24 February 2010, paragraph 2(a).

In exceptional cases reunification does not seem feasible from the outset; for example, where the parents, even with the appropriate support, are not able to sufficiently or adequately care for the child,<sup>738</sup> or where the child is abandoned or relinquished.<sup>739</sup> Especially when the child is very young, the focus should shift to alternative permanency planning, in order to avoid that the child will be, or remains, in limbo unnecessarily. In this respect the realisation of a family-like setting needs to be prioritised. The international instruments refer in this respect to adoption and *Kafala* of Islamic law. The latter provides for alternative care for children who cannot be raised by their biological parents and occurs in Islamic countries.<sup>740</sup>

Adoption, however, is part of both South African law and Dutch law and has come a long way in both countries.<sup>741</sup> Adoption can be defined as a formalised legal process by which the existing responsibilities and rights of the parents are terminated and vested in the adoptive parent(s), on the basis of a court order.<sup>742</sup> The institution of adoption is regarded as a form of alternative placement and has thus far-reaching legal consequences. Since this provides for the ultimate form in permanency planning, this institution will be briefly outlined next.<sup>743</sup> It should be noted that the institution of adoption merits research on its own. Therefore, since a number of legislative provisions in South Africa and the Netherlands in essence correspond with one another, mainly some of the differences between the two

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<sup>738</sup> For example, due to a history of abuse, violence or drug or alcohol addiction. It is evident that “care” encompasses all the needs of a child, including the protection and enhancement of the development of the child.

<sup>739</sup> See paragraph 5 of the *Guidelines* (2010).

<sup>740</sup> In the Islamic tradition legal family ties are created at birth, and such blood relationship remains in existence. Therefore the institution of adoption is not recognised. For a more detailed discussion, see Blaak “Alternatieve zorg voor kinderen volgens de Islam – Kafala” *Tijdschrift voor de Rechten van het Kind* (2008) 4 K7. See also section 5.3 above. However, *Kafala* has neither been provided for in the South African Children's Act nor in the Dutch Civil Code and will therefore not be further discussed.

<sup>741</sup> The first Act which provided for the adoption of children in South Africa was the Adoption of Children Act 25 of 1923, which eventually was included in the Children's Act 31 of 1937. See Mosikatsana in Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 435 and further; Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 283. In the Netherlands, adoption was incorporated in the Civil Code almost two decades later (in 1956). See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 83; Asser/De Boer *Personen- en Familierecht* (2010) 626 and further.

<sup>742</sup> See also Heaton *South African Family Law* (2010) 291.

<sup>743</sup> The institution of adoption is a specialised field within family law (for inter-country adoption, also international law). An in-depth discussion falls beyond the ambit of this thesis.

countries will be highlighted in the following section. At first sight it seems that the new legislative framework in South Africa provides for a modern and extensive system of adoption. The categories of persons who may adopt, individually and jointly, have been substantially extended, which is most commendable and could serve as an example. It is hoped that it will contribute to an increase in the number of adoptions, which is so needed for children who will otherwise depend on the care and protection system.

### 5.3.5.1 Returning home *vis-à-vis* permanency planning in South Africa

Once the placement order of the children's court has been implemented, a social worker is required to monitor any progress. To this effect, DSD regulation 53(5) determines that the monitoring of the implementation of the permanency plan should take place at six months' intervals.<sup>744</sup> This way it can be established whether or not a child can return home. As indicated above, ideally the court should (automatically) review placement decisions regularly.<sup>745</sup> It is submitted that the international documents require the pronouncement of the lawfulness of the placement by a competent authority and that consequently this should not be left to the opinion of a social worker.<sup>746</sup>

Apart from the necessity for regular review in terms of international standards,<sup>747</sup> Zaal rightfully indicates that the Children's Act does not provide for various types of hearings in care and protection cases,<sup>748</sup> which indeed is regrettable. Compared with the Child Justice Act,<sup>749</sup> the Children's Act falls short in this respect. It is submitted that the provisions in the Children's Act need to be expanded on in order to provide for regular and automatic review.

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<sup>744</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* (2009) 180.

<sup>745</sup> See section 5.3.3.1 above, which deals with the duration, extension and termination of placement orders.

<sup>746</sup> See the Articles 9(1) of the CRC and 19 of the African Children's Rights Charter.

<sup>747</sup> See Article 25 of the CRC which is discussed in section 4.7 above.

<sup>748</sup> In *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system* (LLD dissertation 2008 University of the Witwatersrand) 262-264.

<sup>749</sup> Chapter 7 of the Child Justice Act 75 of 2008 provides for preliminary inquiries. Moreover, section 85 deals with automatic review in certain cases. Therefore it can be concluded that these procedural aspects are not unfamiliar in South African child law.

Foster care placement is essentially temporary in nature.<sup>750 751</sup> Apart from the international documents this can also be derived from the contents of chapter 12 of the Children's Act, which specifically provides for foster care. Apart from providing the child with a safe, stable and healthy environment, the purpose is to promote the goals of permanency planning which is initially focused on family reunification.<sup>752</sup> Alternatively, section 181 provides that permanency planning can be realised by connecting children to other safe and nurturing family relationships intended to last a lifetime.<sup>753</sup> This becomes even more relevant the longer the foster placement has lasted, and can be achieved by either a court order which indicates that the foster care placement subsists until the child turns eighteen years,<sup>754</sup> or by adoption.<sup>755</sup> This way the necessary stability is created or safeguarded, which ultimately will serve the interests of the child concerned.

It is agreed with Skelton and Carnelley that the statutory emphasis on permanency plans is indeed welcome.<sup>756</sup> The latter indicates the child's developmental needs are aimed at achieving stability and forms part of the report of the social worker, which will be scrutinised

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<sup>750</sup> See also the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Specific Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85 of 3 December 1985, Article 11); and Articles 20 of the CRC and 25 of the African Children's Rights Charter include foster care placement as one of the forms of alternative care.

<sup>751</sup> To increase the chances of the child returning home, it is preferred to place a child in the foster care of a person with a similar background to that of the child. Section 184(1) refers in this respect explicitly to the cultural, religious and linguistic background of the child. It is interesting to note that the Children's Act prescribes that this might only be deviated from, in the case of an existing bond or when a suitable and willing person with a similar background is not readily available. The continuity in the care thus provided, facilitates a smooth transition from the foster care environment back into the child's own family environment. Apart from the entitlement to family or parental care, or appropriate alternative care in terms of section 28(1)(b) of the Constitution, children also have a constitutional right to enjoy their culture, practice their religion and use their language, see section 31(1)(a). The importance of this aspect is highlighted in one of the purposes of foster care, namely to respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity, see section 181(c) of the Children's Act. Also Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 319-320.

<sup>752</sup> See section 181 of the Children's Act.

<sup>753</sup> See also Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 142.

<sup>754</sup> See section 186(1)(c) and (2). See also Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 152.

<sup>755</sup> See Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 319.

<sup>756</sup> See Skelton & Carnelley (eds.) *Family Law in South Africa* (2010) 325.

by the court before being able to make an order.<sup>757</sup> It should be noted that the detailed statutory framework implies that speedy action is required, also on the side of the biological parents, in order to get their house in order. Failing this, it may result in long-term foster care or adoption of their child.<sup>758</sup>

When reunification with the biological parents beforehand seems viable and in the child's best interests, reunification services should be provided shortly after the child has been removed. The court may determine conditions relating to the facilitation of reunification by the social worker on the basis of section 156(3)(a).<sup>759</sup> The latter provision indicates that reunification services will be rendered to the child and the child's parents or care-giver by a designated social worker or authorised officer. Section 187(2) determines that where the child has not been reunited with his or her biological parents two months before the expiry of the court order, the responsible social worker has to submit a report with reasons and recommendations to the children's court concerned. The court has a discretion to order the continuation of (facilitating) the reunification process or to order the termination thereof, due to lack of prospect.

It should be kept in mind that a foster parent in South Africa is awarded the care of the child, but not guardianship; the latter which remains with the biological parents.<sup>760</sup> However, when family reunification is not feasible or contrary the child's best interests, the court may give additional parental rights and responsibilities to a foster parent.<sup>761</sup> This facilitates long-term foster placement and may be practical whilst awaiting the (possible) adoption of the child.

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<sup>757</sup> The provisions on foster care in chapter 12, need to be read in conjunction with the sections 156 and 157 which deal with the placement orders and securing stability in the child's life.

<sup>758</sup> See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 203.

<sup>759</sup> The placement order was issued, subject to conditions determined by the court, like supervision services, reunification services or requiring the foster parent to co-operate with the supervising designated social worker or authorised officer or to comply with any requirement laid down by the court.

<sup>760</sup> For a discussion on the various elements of parental responsibilities and rights and the distinction between the concepts care and guardianship, see section 4.1.1 above. See also DSD regulations 65 and 66 which sets out the responsibility of the foster parent for providing for the day to day needs of the foster child. See also the discussion on foster care in South Africa in section 5.3.1.1.2. See also section 188(2)(b) on the basis of which a foster parent may not take any major decisions concerning the child, as contemplated in section 31(1)(b), without giving due consideration to the views and wishes of the parent.

<sup>761</sup> See section 188(3)(c).

Although adoption does not fall under the term “alternative care” in terms of the Children's Act, it is a form of alternative placement of a permanent nature which provides for a stable family environment.<sup>762</sup> Section 242 of the Children's Act sets out the effects of an adoption order and reads as follows:

- “(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates -
- (a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;<sup>763</sup>
  - (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
  - (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
  - (d) any previous order made in respect of the placement of the child.
- (2) An adoption order -
- (a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;
  - (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;

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<sup>762</sup> In the case *SW v F* 1997 (1) SA 796 (O), the court held that the child's constitutional right to family care or parental care in terms of section 28(1)(b) encompasses the care provided by an adoptive parent. See also Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 133.

<sup>763</sup> In terms of section 235, the court might already have relieved or freed the parent from parental responsibilities and rights pending the adoption. The latter provision is a novum in South African adoption legislation.

- (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
  - (d) does not affect any rights to property the child acquired before the adoption.
- (3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child”.

In addition to the above consequences, Himonga points out that adoption also creates a reciprocal duty of support, that the adopted child is regarded as being born from the adoptive parent(s) with regard to the interpretation of a will, and has the right to inherit *ab intestato*.<sup>764</sup> Thus, based on the far-reaching legal consequences, it can be said that adoption provides more security for a child compared with foster care.<sup>765</sup> In addition, considering the need for stability and security or the continuation thereof, it is submitted that adoption should be considered especially where the child is very young<sup>766</sup> and where foster care has been in place for an extended period of time.

Since the coming into force of the Children's Act, a whole (partially new) range of persons may adopt a child, which is certainly commendable. Section 231(1) provides in this regard that:

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<sup>764</sup> In Du Bois (ed.) *Wille's Principles of South African Law* (2007) 197.

<sup>765</sup> See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 201.

<sup>766</sup> On the basis of section 135(2), an application for the suspension or termination of parental responsibilities and rights of the parents, may be brought without the consent of the latter, where the child,

- (a) is older than seven years and has been in alternative care for more than two years;
- (b) is older than three years but not older than seven years, and has been in alternative care for more than one year; or
- (c) is three years or younger, and has been in alternative care for more than six months.

The latter provision acknowledges the need for stability in the life of an already vulnerable child and paves the way towards permanency planning. See also the discussion in section 4.1.1.1 above. Also Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 143.



“a child may be adopted -

- (a) jointly by -
  - (i) a husband and wife;
  - (ii) partners in a permanent domestic life-partnership; or
  - (iii) other persons sharing a common household and forming a permanent family unit;
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock;<sup>767</sup>
- (e) by the foster parent of the child”.<sup>768</sup>

Himonga highlights that the latter two categories of persons have “a right” to be considered as prospective adoptive parents.<sup>769</sup> It is interesting to note that in South Africa the transition

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<sup>767</sup> It would be recommended that this provision be amended as to refer to the biological unmarried father of a child, see the discussion in section 4.1.1.2.2 above.

<sup>768</sup> DSD regulation 66 deals with the rights of foster parents. Regulation 66(4) states that a foster parent has the right to apply for the adoption of the child and has the right to be informed of any application to adopt the foster child in his or her care. With regard to the application for the adoption of a foster child, a written statement of the foster parent is required, in a form substantially corresponding with Form 41, see DSD regulation 99(3)(a). See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 249. It is interesting to note that in the Netherlands the adoption of children who have been subjected to placement orders is not very common, which, it is submitted, calls for legislative reform, see section 5.3.5.2 below.

<sup>769</sup> In Du Bois (ed.) *Wille's Principles of South African Law* (2007) 194. See section 231(7). The same applies to a family member of a child who has given notice to the clerk of the children's court that he or she is interested in adopting the child, see subsection (8). “Family member” has been defined widely in section 1(1).

from foster care to adoption is thus statutory facilitated. Any child may be adopted as long as this serves his or her best interests, the child is adoptable, and the statutory provisions of chapter 15 are complied with. Section 230(3) determines that a child is “adoptable” if -

- “(a) the child is an orphan and has no guardian or care-giver who is willing to adopt the child;
- (b) the whereabouts of the child's parent or guardian cannot be established;
- (c) the child has been abandoned;<sup>770</sup>
- (d) the child's parent or guardian has abused<sup>771</sup> or deliberately neglected<sup>772</sup> the child, or has allowed the child to be abused or deliberately neglected; or
- (e) the child is in need of a permanent alternative placement”.

With the inclusion of these objective criteria, especially criteria (d) and (e), a potentially wide group of children is available for adoption.<sup>773</sup> With regard to orphaned and abandoned children specific regulations are put in place.<sup>774</sup> It is evident that the above grounds under (d) might have serious consequences for the biological parent(s) and may consequently

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<sup>770</sup> This means the obvious desertion of the child concerned by the parent, guardian or care-giver or where the child had no contact with any of the aforementioned parties for a period of at least three months, for no apparent reason, see section 1(1) of the Children's Act.

<sup>771</sup> Abuse means any form of harm or ill-treatment deliberately inflicted on a child and includes, among others, assault and sexual abuse, see section 1(1).

<sup>772</sup> This means depriving the child concerned of the basic physical, intellectual, emotional or social needs, see section 1(1). Also Himonga in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 194.

<sup>773</sup> Louw in Boezaart (ed.) *Child Law in South Africa* (2009) 140.

<sup>774</sup> See DSD regulation 56, on the basis of which the social worker must cause an advertisement to be published in at least one local newspaper circulating in the area where the child has been found, calling upon any person to claim responsibility for the child. Moreover, time frames are put in place before the children's court may determine that a child has been abandoned or orphaned (GN R261/2010).

hamper family reunification services or make them undesirable altogether.<sup>775</sup>

Due to the serious implications and far-reaching legal consequences it is commendable that the adoption (including procedures) are provided for in detail in the Children's Act and that only the children's court is considered as the competent authority in this regard.<sup>776</sup> Therefore it is submitted that South Africa meets the standard as provided in Article 21(a) of the CRC and Article 24(a) and (b) of the African Children's Rights Charter. Reference was made above to the fact that South Africa, like the Netherlands, has a system of strong adoption.<sup>777</sup> This means that an adoption order terminates all parental responsibilities and rights any person, including a parent, had in respect of the child immediately before the adoption. In addition, the order in principle also terminates all claims to contact with the child by any family member. Conversely, full parental rights and responsibilities will be conferred upon the adoptive parent.

However, it is argued that children should be able to benefit from the inputs of both the biological and adoptive family, if this would be desirable under the given circumstances. Pending the international debate on strong adoption versus weak adoption, it is recommended that more (comparative) research is required in order to establish which system would be most beneficial in the South African context. In this regard cognisance should be taken of the (informal) adoptions which exist in terms of customary law.<sup>778</sup> This

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<sup>775</sup> See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 248.

<sup>776</sup> See also Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 247.

<sup>777</sup> For a brief discussion pertaining to the Netherlands, see section 5.3.5.2 below.

<sup>778</sup> Bekker has averred that the statutory rules provided by the Children's Act did not modify or replace the customary law of adoption and referred to in *Kewana v Santam Insurance Company Limited* 1993 (4) SA 771 (Tk). In addition, he suggests the Act to be amended: "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" 2008 (3) *Obiter* 400. However, Himonga is of the opinion that although the Children's Act is silent on customary-law adoptions, it can be derived from the (imperative) language that it has repealed the customary law on adoption: in Du Bois (ed.) *Wille's Principles of South African Law* (2007) 198. It is a reality that the lives of many people in South Africa are governed by informal arrangements based on the customary law of the area where they reside. All children are entitled to the protection of their rights in terms of the Constitution, which cuts across the whole spectrum of rights. Children should not be withheld from benefiting from aspects of customary law. At the same time it should be ensured that the rules of customary law are in line with the Constitution as the supreme law of the Republic. In an attempt to put a hold to the uncertainty it is recommended that specific research be conducted, to try to establish whether and to which extent the two systems coincide or can exist parallel.

will ensure that the implementation of the statutory framework will be effective and tailored to the needs of all children in South Africa.<sup>779</sup>

### 5.3.5.2 Returning home *vis-à-vis* permanency planning in the Netherlands

During the placement, regular review of the treatment, including of the treatment plan, is necessary (and mandatory under Article 25 of the CRC) with a view to assess whether return of the child to his or her parents or family is still possible or whether it is necessary to move to permanent placement in alternative care. This means, amongst others, that with regular intervals it has to be determined whether the continuation of the authorisation for removal and placement is still justified.<sup>780</sup> In this respect it is important that the purpose of the court order is made explicit in the order concerned and that this includes the plan of action, tailored to the needs of the child.<sup>781</sup> The Bill for the revision of the measures of child protection provides that when a supervision order is imposed, the children's court determines the purpose(s) to be attained and establishes simultaneously the duration of the measure.<sup>782</sup>

The determination of the aim(s) of the supervision order will provide a measure of clarity to the child and the parents on the way forward. It should be emphasised that the right to a periodic review of a placement is not dependent on a change of circumstances.<sup>783</sup> On the basis of Article 25 of the CRC the child has the right to have the lawfulness and the efficacy

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<sup>779</sup> It is agreed with Louw that due to the fact that many children in need of adoption have an African background, the success of these procedures and the implementation of adoption orders will depend on the extent to which African customs and values are accommodated: in Boezaart (ed.) *Child Law in South Africa* (2009) 162.

<sup>780</sup> Generally speaking, the review of an existing order takes place once a year, or when the child protection measure was ordered for a shorter period of time, just before the order lapses. For a discussion on the periodic review in terms of Article 25 of the CRC, see sections 2.2 and 4.7 above and section 5.3.6 below.

<sup>781</sup> The child should be involved in the drafting of the plan.

<sup>782</sup> See Article 1:255(3) of the Bill.

<sup>783</sup> However, a change of circumstances may be a ground for requesting the court to change its previous order. It is submitted that criteria be developed to provide guidelines on what constitutes "change of circumstances".

of the placement considered at reasonable intervals.<sup>784</sup>

The longer the child has been removed from the family environment, the more pressing the question “which child protection measure will be most adequate given the circumstances of the child”. This depends, among others, on the form of placement.<sup>785</sup> Bruning outlines that where a child has been placed in residential care, the efforts will be directed at realising the possibility of the child returning home. In the above it was outlined that the latter is in line with the purpose of a supervision order. Although assistance and support are provided by the Bureau for Youth Care, the purpose is to ensure that the parents retain responsibility for the care and upbringing, where possible.<sup>786</sup>

However, in the case of foster care the picture is different. The longer the child has been part of the foster family, the better the chance that the child has become attached to the foster parents. This poses the question whether the return of the child to the biological family will indeed be in the best interests of the child. In this respect Bruning has referred to the importance of the attachment theory, which has become more prominent in the field of pedagogics.<sup>787</sup> In short, the attachment theory distinguishes three phases linked to different age groups. Phase 1 includes children between 0-5 years;<sup>788</sup> phase 2 concerns children

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<sup>784</sup> See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 439.

<sup>785</sup> As discussed above, see section 5.3. Another consideration is the existing bond of the child and the father and/or the mother.

<sup>786</sup> See Article 1:257 of the Civil Code. In addition, the Bureau for Youth Care promotes the family bond between the parent having authority and the child. In case the child concerned is more mature, Article 1:257(3) provides that the focus should shift to promoting the independence of the child concerned. See also the discussion in section 4.5.2.1 above.

<sup>787</sup> The latter stresses the importance of an interdisciplinary approach. Child law, pedagogics and child psychology all focus on children. Collaboration and exchange of expertise will be more beneficial to children. The latter requires training at tertiary institutions and for practicing professionals in the respective fields.

<sup>788</sup> During this phase the basic attachment is formed, whereby the child mainly focuses on a specific person on whom he or she is dependent for survival, the so-called “hechtingspersoon” or “attachment person”. Weterings & Van den Bergh have pointed out that the child will (only) become attached if the primary care-giver is able to continuously interact with the child in a child-sensitive manner. In other words, the primary care-giver should be able to pick up the signals of the child and respond with adequate care, love and attention.

Via this continuous interaction, the child develops trust in the primary care-giver and himself or herself, which contributes to the development of a healthy self-esteem. It is agreed with the authors that if the children's courts and social workers/professionals working with children were to best ensure or protect the interests of the child, they have to be sensitive to the voice

between 6-11 years,<sup>789</sup> and phase 3 children between 12-18 years.<sup>790</sup> The younger the child, the more important the attachment seems to be, not only for basic survival but also for the ability to form relationships later in life.<sup>791</sup> In other words, when a child below the age of six is placed in foster care, he or she will be able to become attached to the foster parent(s) in a short period of time. Bruning emphasises that the threat of discontinuation of such an existing bond can be very harmful to the child.<sup>792</sup> Therefore, it is argued that temporary foster care for young children should be of a short duration.<sup>793</sup>

Reference has been made to the fact that in practice placements can carry on for a number of years. Asser/De Boer indicate that the passing of time may become a crucial factor. As the period of time progresses since the removal and placement of the child, the chances decrease that it will be in the interests of the child to have his or her *de facto* family situation changed again.<sup>794</sup> In the case *Haase v Germany*,<sup>795</sup> the European Court held that “experience showed that when children remained in the care of youth authorities for a

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and the signals of the child: “De stem van het pleegkind” *Het Kind Eerst* (2012) 3, 4 and 9. The importance of ensuring the development of the child is also referred to in Article 6(2) of the CRC and Article 5(4) of the Act on the Youth Care. The aforementioned undoubtedly will serve the best interests of any child. In this regard it is commendable that the Bill for the revision of the measures of child protection (in terms of the Civil Code, Code of Civil Procedure and the Act on the Youth Care) refers to the right of the child to a healthy and balanced development; see the Memorie van Toelichting 32 015 nr 3 (MvT or Explanatory Memorandum) 2. Also Slot in Bruning & Kok (eds.) *Herziening Kinderbeschermingsmaatregelen* (2008) 87.

<sup>789</sup> The child is becoming less vulnerable and more independent from the person he or she had to rely on for survival. Other persons also become important in the life of the child.

<sup>790</sup> The child becomes increasingly independent as he or she matures. Although the emotional relationship with the attachment person will change, the availability of the attachment person is still necessary. See Bruning *Rechtvaardiging van kindbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 220-221.

<sup>791</sup> The ability to establish relationships is crucial regarding all facets of life. It is agreed with Bruning that more research is required with regard to the attachment theory, since the acceptance of the attachment theory has not yet been scientifically founded. It is submitted that in general more interdisciplinary research is needed in the field of child law, including psychology and juvenile criminal law, including criminology.

<sup>792</sup> See also Weterings & Van den Bergh “De stem van het pleegkind” *The Kind Eerst* (2012) 3 11.

<sup>793</sup> The duration of temporary foster care placement should ideally not exceed six months. For children between 6-12 years up to 12 to 18 months. See Bruning *Rechtvaardiging van kindbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 221.

<sup>794</sup> *Personen- en Familierecht* (2010) 751.

<sup>795</sup> ECHR *Haase v Germany* 8 April 2004, Application no. 11057/02, see <http://sim.law.uu.nl/sim/caselaw/Hof.nsf>, last accessed on 16-11-2011.

protracted period, a process was set in motion, driving them towards an irreversible separation from their family”.

According to Asser/De Boer it is striking that in the European case law much emphasis is given to the reunification and rebuilding of the *de facto* family life of the child and his or her parents.<sup>796</sup> The requirement of due care<sup>797</sup> in conjunction with the relevant provisions in the international documents<sup>798</sup> urge the competent authorities to duly and cautiously weigh the interests of the affected parties in the light of the circumstances before imposing or extending a child protection measure. In addition, the implementation of the child protection measure should in principle be focused at the ultimate purpose, which is the return of the child to his or her parents and the continuation of their family life. This implies that ideally siblings should not be separated in the case of their removal,<sup>799</sup> and that contact between the child(ren) and the parents should be facilitated and improved.<sup>800</sup>

Pertaining to the implementation of a supervision order combined with the authorisation for the removal/placement which preferably should result in foster care, two types of foster care are distinguished; namely foster care for the purpose of the rendering of assistance<sup>801</sup> and foster care for the purpose of upbringing.<sup>802</sup> The first mentioned focuses on the short-term placement of the child in the foster family. During this time assistance will be rendered to the parents in order to enable them to take full responsibility for the child again, after which the child will return to the parents.<sup>803</sup> The second type of foster care relates to the upbringing of

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<sup>796</sup> In *Personen- en Familierecht* (2010) 751.

<sup>797</sup> In Dutch: *het zorgvuldigheidsbeginsel*.

<sup>798</sup> Articles 3, 6, 9, 12, 16, 18, 19, 20, 25 and 37b of the CRC and Articles 5 and 8 of the European Convention. See also “Pleegzorg en Kinderrechten” *Tijdschrift voor de rechten van het kind – DCI* (2001) 3, annexure on foster care 2.

<sup>799</sup> In the case of siblings having existing bonds, see paragraph 16 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010.

<sup>800</sup> Provided that contact will be in the best interests of the child(ren). For a discussion on contact, see section 5.3.4.

<sup>801</sup> In Dutch: *de hulpverleningsvariant*.

<sup>802</sup> In Dutch: *de opvoedingsvariant*. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 176. The terminology came to the fore in the “vision-document Foster care” in 2000 by project Trillium (which organisation is focused on innovation and quality improvement in foster care). See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 263.

<sup>803</sup> This corresponds with the temporary child protection measure of supervision, combined with the authorisation for the removal and placement of the child. The aim of the supervision is to

the child, which focuses on permanent placement in the foster family. This would come to the fore where, in the light of the circumstances, the interests of the child require a new primary family environment. After a reasonable period of time it needs to be decided what would serve the interests of the child best: extension of an existing order or permanent placement.<sup>804</sup>

It is important to note that it is possible to convert the type of foster care which renders assistance into the type of foster care relating to the upbringing of the child.<sup>805</sup> However, as indicated in the Explanatory Memorandum to the Bill for the revision of the measures of child protection,<sup>806</sup> these two distinguished approaches require in principle two different legal responses, in order to avoid unnecessary uncertainty. Short-term foster care is consistent with the purpose of a supervision order since it focuses on the temporary rendering of assistance.<sup>807</sup> However, foster care which focuses on permanent placement is incompatible with the temporary nature of a supervision order and authorisation for removal/placement. The annual review relating to the possible extension of the child protection measure does not correspond with the long-term vision which characterises this type of foster care.<sup>808</sup> Under these circumstances the continued extension of the authorisation for the placement would constitute improper use of the supervision order, which is undesirable.<sup>809</sup> Therefore, for the sake of clarity for all affected parties, the child protection measure of deprivation of parental authority would be more adequate.<sup>810</sup> This would make it possible to transfer

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limit or eliminate any serious threat regarding the child's moral or mental interest or his or her health, see Article 1:254 of the Civil Code. To that effect assistance and support will be provided by the Bureau for Youth Care, on the basis of Article 1:257 of the Civil Code. See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 101; also Asser/De Boer *Personen- en Familierecht* (2010) 760.

<sup>804</sup> Parents should be given sufficient time to get their house in order and to improve their parenting skills. In other words, they should be given a real opportunity to achieve these objectives, but at the same time it should be ensured that the child's best interests is not compromised in the process.

<sup>805</sup> The decision to that effect is called "*het opvoedbesluit*". See also *Memorie van Toelichting* 32 015 nr 3 (MvT or explanatory memorandum) 5.

<sup>806</sup> Parliamentary document 2008/09 (32 015).

<sup>807</sup> In Dutch: *de hulpverleningsvariant*. For a more detailed discussion on the supervision order and its purpose, see section 4.5.2.1 above.

<sup>808</sup> *Memorie van Toelichting* 32 015 nr 3 (MvT or explanatory memorandum) 5.

<sup>809</sup> The supervision order is temporary in nature. For a more detailed discussion on the supervision order as one of the Dutch child protection measures, see section 4.5.2 above.

<sup>810</sup> The child protection measure of relief of parental authority is dealt with in Article 1:268 of the



authority pertaining to the child to the Bureau for Youth Care or the foster parents.<sup>811</sup>

An issue relating to the question whether the child should be returned to the biological family was raised by Weterings and Van den Bergh. They express their concern that presently the answer to that question depends to a large extent on the “performance” of the parent. This seems to revolve around issues like whether or not the parent can run the household independently, or the stability of the personal life of the parent.<sup>812</sup> It is agreed with Weterings and Van den Bergh that more professional attention is required to provide skills development to the parent(s) and child in how to adequately deal with their interactions.<sup>813</sup> This would contribute to, and enhance, the success of the child's return home.<sup>814</sup> The ultimate test to be applied, however, remains the child's best interests.<sup>815</sup>

Although it is preferred and necessary to opt for the least intrusive child protection measure and for the shortest duration possible,<sup>816</sup> there is, apart from the aforementioned, another

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Civil Code. See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 176. For a more detailed discussion of relief of parental authority, see section 4.5.2.2 above.

<sup>811</sup> Authority comprises both parental authority and guardianship. Article 1:245(3) of the Civil Code provides that parental authority is exercised by both parents jointly or one parent, whereas guardianship is exercised by someone else than the parent(s), a so-called third party. The provisions pertaining to guardianship can be found in 1:280 Civil Code and further (Book 1, Title 14, paragraph 6). See also Doek & Vlaardingebroek *Jeugdrecht en Jeugdzorg* (2009) 120.

<sup>812</sup> “De stem van het pleegkind” *Het Kind Eerst* (2012) (3) 13.

<sup>813</sup> It is evident that the assistance and support should not only be directed at the physical care of a child. Interpersonal and personality dynamics need attention as well and the relevance of these aspects should not be underestimated. Parenting skills programmes should be readily available to parents. In terms of their international obligation both South Africa and the Netherlands should allocate sufficient resources for the realisation of parenting skills programmes, instead of (long-term) separation. The latter could in this manner possibly be avoided. See also “Day of general discussion - Children without parental care” (CRC/C/153) of 17 March 2006, paragraph 646.

<sup>814</sup> Weterings & Van den Bergh aver that children are very capable to “express their voice”, namely via their behaviour and (stage of) development. The signals expressed by the child should be picked up and be included in important decision-making regarding the child's life: “De stem van het pleegkind” *Het Kind Eerst* (2012) 3 4.

<sup>815</sup> In this respect paragraph 13 of *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010 provides as follows: “The child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child.” See also Article 3 of the CRC and the case law of the European Court and the Dutch courts.

<sup>816</sup> In terms of the international documents and additional relevant documents, for example *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children*,

problem regarding long(er) term foster care. When foster care is ordered in the context of a supervision order, the latter is inadequate to ensure the child's right to continuity in the upbringing,<sup>817</sup> to which he or she is entitled in terms of Articles 3 and 20(3) of the CRC. This becomes particularly relevant when there is no real prospect of returning home. The latter comes to the fore where parents, even with the necessary support or assistance, are not able to provide adequate care for the child within reasonable time.<sup>818</sup> The importance of continuity in the upbringing of these already vulnerable children has been acknowledged in a few legislative provisions in the Civil Code as well as in a number of court decisions. In the past decade various courts have pronounced on the importance of the interest of the child which demands continuity in the upbringing and an uninterrupted process of attachment in the foster family.

When it is reasonably not anticipated that the child will be able to return home, the aforementioned interests of the child should prevail above the interests of the parent(s) to be reunited with the child. In a case where a child had been with the same foster family for a period of 3 ½ years, the appeal court held that the possibility of reunification with the mother and the uncertainty caused by this might interrupt the attachment process of the foster family and forms an unjustified infringement on the right of the child to respect for the family life

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*with Special Reference to Foster Placement and Adoption Nationally and Internationally* (A/RES/41/85) of 3 December 1986, Articles 3, 4 and 5; "Day of general discussion - Children without parental care" (CRC/C/153) of 17 March 2006, paragraphs 654, 656 and 665; *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010, paragraphs 2, 3, and 5. Paragraph 13 reads as follows: "[R]emoval of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration."

<sup>817</sup> The supervision order is meant as a temporary measure which the court (upon application) may order for one year at the time. The aim of this measure of child protection is to diminish or lift the (serious) threat pertaining to the child's moral or psychological interests or health. For this purpose the necessary support and assistance will be provided by a social worker from the Bureau for Youth Care. When the ground for the supervision order does not longer exist, or where the threat has sufficiently diminished or can be addressed in another way, the court may set the supervision order aside. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 337-338. See also section 4.5.2.1.

<sup>818</sup> It is submitted that this should not be decided lightly. Proper preparation and investigation is required. This is also required in terms of paragraph 48 of the *Guidelines for the Alternative Care of Children* (A/RES/64/142) of 24 February 2010. It is agreed with Bruning that more attention is needed for the justification requirements (in Dutch: *motiveringseisen*) of court orders. Proper justification and substantiation will possibly improve the understanding and co-operation of the affected parties. Moreover, it will contribute to the possibility of review of court orders, which will help prevent arbitrariness: *Rechtvaardiging van kindbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 453.

between the child and the foster parents. Based on the Articles 3 and 20(3) the child is entitled to certainty about her or his upbringing.<sup>819</sup> In addition, the uncertainty caused by the annual review of a supervision order (for the extension thereof) should not unnecessarily be prolonged where it is not feasible that the child will be able to return home.<sup>820</sup> It is submitted that these circumstances require a further-reaching measure of child protection, namely the deprivation of parental authority and permanent placement.

In the Netherlands, the Bureau for Youth Care decides on the *de facto* placement of the child, when the court has ordered supervision combined with the authorisation of removal and placement of the child. If foster care is indicated, the foster parents would care for and raise the child as part of their family; however, without any decision-making authority regarding the child.<sup>821</sup> It is interesting to note that when a child has been in foster care for a prolonged period of time on the basis of consent by the biological parents, the Civil Code prevents the sudden claim for the child's removal from the foster family by the biological parents.<sup>822</sup> Moreover, whilst in the care of a foster family, the Bureau for Youth Care may

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<sup>819</sup> Hof 's-Gravenhage 4 November 2003, LJN AO4525 and Hof 's-Hertogenbosch 5 August 2004, LJN AR2251.

<sup>820</sup> Rechtbank Zwolle 19 March 2003, LJN AF6180. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 178-182. It is agreed with Punselie that the uncertainty caused by the annual review of the extension of the supervision order combined with the authorisation for removal/placement might actually result in a threat to the moral and mental development of a child: *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 89. See also Punselie "Langdurige pleegzorg en gezag" *Tijdschrift voor de rechten van het kind – Defence for Children International* (2001) 3 18.

<sup>821</sup> The biological parents continue with having parental authority, which is limited by the supervision order imposed by the court. This means that all affected parties are required to follow the instructions provided by the Bureau for Youth Care, which has the responsibility for the implementation of the supervision order. The fact that the parents still have parental authority makes the adoption of a (long-term) foster child legally impossible. See Article 1:228(1)(g) of the Civil Code, as discussed below in this section. It is submitted that the various legislative provisions should be reconsidered and be brought in line with each other. This would provide a modern-day child protection framework which should include options that can be tailored to the needs of a specific child and his families, both foster family and biological family. In this day and age it is archaic to restrict a child to being involved with one family only. Due to, for example, the divorce statistics it can be argued that these days children are increasingly getting used to forming part of more than one family.

<sup>822</sup> Article 1:253s of the Civil Code determines that where a child has been cared for by foster parents for at least a period of one year, the parents may only change the residence of their child with the consent of the foster parents. This is called in Dutch "*het blokkaderecht*", a right of veto which accrues to foster parents. However, this right can only be exercised where the child was placed in foster care with the consent of the biological parents. In other words, it is not relevant in the case where a child protection measure has been imposed by the children's court. In the latter case, the Bureau for Youth Care is authorised by the court to determine the

decide at any time to transfer the child to another foster family or to return the child to her or his own parents.<sup>823</sup>

In their attempt to secure the continuation of the foster care, foster parents may file a request to the Bureau for Youth Care to disregard an intended (authorised) residential transfer, based on change in circumstances; however, without being able to approach the court straight away.<sup>824</sup>

In addition, where this previously would not be successful and in case the Council for Child Protection would not request the court for extension of the foster placement,<sup>825</sup> the foster parents had no legal recourse. In other words, up to now (generally speaking) the legal position of foster parents taking care of a child in terms of an imposed child protection measure has been weak. Based on the developments in the case law, though, foster parents are entitled to approach the court in order to prevent the removal of their foster child.<sup>826</sup> Protection of the foster care placement is also possible by the termination of parental authority via the measure of dismissal of parental authority.

In terms of Article 1:269(1)(e) of the Civil Code the court may dismiss a parent from parental authority, when there is serious and reliable information that the child's interests will be neglected, if the parent were to demand the child back from the foster parents. It is agreed with Doek and Vlaardingbroek that in the latter situation the foster parents, at their request, should be granted joint guardianship. If that (joint) guardianship is granted, the foster parents will no longer be dependent on the social worker of the Bureau for Youth Care with

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placement of the child concerned, which includes the discretion of placing the child back with the biological parents. Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 271.

<sup>823</sup> In the case of the return home, the Bureau for Youth Care has to inform the Council for Child Protection in terms of Articles 1:262(2) and 1:263, as discussed above, see section 5.2.2.

<sup>824</sup> Article 1:263(2). The same applies to the child of twelve years and older. The transfer of residence comprises the placement elsewhere as well as the placement with the parent who has parental authority.

<sup>825</sup> This would be based on the control function of the Council for Child Protection, which has been discussed in section 5.2.2 above.

<sup>826</sup> Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 176. As indicated by the authors, the question arises how the extended supervision order (and placement) will be effectively implemented when the Bureau for Youth Care is responsible for the implementation, whilst they are in favour of the child's return home. However, Article 1:254(5) provides for the replacement of the Bureau for Youth Care, see also section 5.2.2 above.

regard to decision-making pertaining to their foster child.<sup>827</sup>

The Bill for the revision of the child protection measures provides for the necessary innovation and direction.<sup>828</sup> Where it has become evident (after investigation) that parents will not be able to take responsibility for the child anymore, the requirements for the new ground for a supervision order are not complied with. Article 1:255(1)(b) of the Bill will give the children's court the discretion to order the supervision of the child only if there is a legitimate expectation that the parents will be able to take responsibility for the care and upbringing, within a reasonable period of time. When this is not to be expected, it will immediately lead to the further-reaching measure of deprivation of parental authority.<sup>829</sup> This will pave the way for a suitable permanent solution which should be tailored to the child's needs, for example, permanent foster care or even adoption.<sup>830</sup> Moreover, the discrepancy between the *de facto* and the *de iure* position can be alleviated under these circumstances. Where the continuing authority of parents would prevent the foster parents to have any authority of decision-making regarding the daily life of the child, authority will be transferred to the Bureau for Youth Care or the foster parents.<sup>831</sup> It is submitted that for the sake of consistency, and with the view to realising family-like placements, the transfer of (limited)

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<sup>827</sup> *Jeugdrecht en Jeugdzorg* (2009) 274-275. Also Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 229.

<sup>828</sup> As already indicated, the Bill (Parliamentary document 2008/09, 32 015) has been approved by the Second Chamber of Parliament in June 2011 and is still pending with the First Chamber. In terms of Article 1:255 of the Bill, the children's court may place a child under supervision if this is deemed necessary for the uninhibited upbringing of the child and where the required assistance is not or is not sufficiently accepted by the parent(s), but in which case there is a legitimate expectation that the parents having parental authority will be capable to take responsibility for the care and upbringing within a reasonable period of time.

<sup>829</sup> In terms of the Bill for the revision of the measures of child protection, the two "dated" forms of deprivation of parental authority will be converted into one ground. In other words, the measures "relief of parental authority" (*onthefing*) and "dismissal of parental authority" (*ontzetting*) will be changed into the single ground of "deprivation of parental authority", to which effect Article 1:266 of the Civil Code will be amended. For a more detailed discussion, see sections 4.5.2.2 and 4.5.2.3 above.

<sup>830</sup> For example, placement in an alternative stable family-like setting. See *Guidelines for the Alternative Care of Children* (A/RES/64/142 of 24 February 2010) paragraph 59 and further. See also the discussion on the dilemma of the child returning home *vis-à-vis* permanency planning, in section 5.3.5.

<sup>831</sup> Authority can consist of parental authority or guardianship. The latter will be exercised by someone else than the parent. See Article 1:245 of the Civil Code, as discussed in section 4.1.2 above.

authority to the foster parent(s) should be preferred.<sup>832</sup>

For decades, the concluding part of the system of child protection measures in the Netherlands has been the institution of adoption.<sup>833</sup> Since 1956 the adoption legislation has been part of the Dutch Civil Code and is presently regulated in Articles 1:227-232 of the Civil Code.<sup>834</sup> Initially adoption was seen in the context of child protection measures and introduced to protect foster families against authority claims by the biological parents.<sup>835</sup> Although the interests of the adopted child and the child's permanent care were the main focus,<sup>836</sup> Doek and Vlaardingerbroek outline that the institution of adoption has developed over time more towards formalising an existing (foster) relationship into establishing family relations, which is reciprocal in nature.<sup>837</sup>

In the Netherlands a child can be adopted upon the request to the children's court by two persons jointly or by one person.<sup>838</sup> In comparison with South Africa, it is interesting that one

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<sup>832</sup> See Bruning *Rechtvaardiging van kindbescherming* (Proefschrift 2001 Vrije Universiteit Amsterdam) 467; Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 222.

<sup>833</sup> See Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 103 and 236.

<sup>834</sup> Title 12 of Book 1 of the Dutch Civil Code. In the following, merely some of the aspects of adoption are highlighted. Since the ambit of adoption is quite extensive, many aspects will be left out of the discussion. For example, the various stages toward the adoption of a child, like, the preparation phase or the court proceedings. Also the distinction between national adoption and inter-country adoption in terms of Article 21 of the CRC will be left out of the discussion. See also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 185 and further.

<sup>835</sup> See Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 85.

<sup>836</sup> The child's best interests has been and still is the primary criterion, see also Article 1:227(3) of the Civil Code. It is interesting to note that adoption was not introduced for the benefit of the adoptive parents in order to "secure" the continuation of the family line.

<sup>837</sup> *Jeugdrecht en Jeugdzorg* (2009) 84; also Meuwise *et al. Handboek Internationaal Jeugdrecht* (2005) 188; Asser/De Boer *Personen- en Familierecht* (2010) 627. Since the mid 50's of the previous century the legislative provisions of adoption have been amended regularly, which contributed to the development of adoption as an institution. Up to 1 April 1998 only a married couple could adopt a child. Since then a heterosexual couple, unmarried or people in a registered partnership, could adopt jointly. The so-called "homo-adoption" by a same-sex couple became a legal possibility on 1 April 2001.

<sup>838</sup> Article 1:227(1) of the Civil Code. A joint request cannot be made where these persons would not be able to conclude a valid marriage in terms of Article 1:41. The same applies to partners in a registered partnership. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 91. In South Africa the various categories of persons who may adopt are listed in section 231 of the Children's Act, see section 5.3.5.1 above.

of the conditions for adoption relates to the duration of the cohabitative relationship of the prospective adoptive parents, which should have lasted at least three consecutive years before filing the request for adoption.<sup>839</sup> The adoption order can only be granted when the adoption is clearly in the best interests of the child and that it is anticipated that the child will not have any future expectations concerning his or her parent(s) in their capacity as parents.<sup>840</sup> Other requirements as provided for by Article 1:228 involve the following:

- “a) on the day of the initial request the child should be a minor and if the child is 12 years or older (or younger but capable of a reasonable opinion about her/his interests) he or she should not have expressed objections against the granting of the adoption request of the adoptive parents;<sup>841</sup>
- b) the adoptive child should not be the grand child of the adoptive parent;
- c) the adoptive parent(s) should be at least eighteen years older than the adoptive child;
- d) the biological parents should not object to the adoption of the child;<sup>842</sup>

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<sup>839</sup> Article 1:227(2) of the Civil Code, unless the child is born during the relationship of the adoptive parent and the parent of the child. This requirement contributes to the expectation of a stable milieu or relationship. See Asser/De Boer *Personen- en familierecht* (2010) 632. The requirement regarding the duration of the cohabitative relationship between the prospective foster parents is foreign to the South African legislation.

<sup>840</sup> Article 1:227(3) of the Civil Code. In other words, it is made explicit that consideration should be given to the expectations regarding the parenting role or capacity of the biological parents to take responsibility in the care, upbringing or exercise of authority pertaining to the child. See Asser/De Boer *Personen- en familierecht* (2010) 635. The question arises when or how exactly it can be established beyond reasonable doubt that there should be no expectations at all. Although on the one hand it is acknowledged that the aforementioned consideration is important, it might on the other hand, hamper the adoption process (unnecessarily), especially if weak adoption/*zwakke adoptie* were to be recognised. It is submitted that biological ties are inherently part of a child, whether adopted or not. If the child's best interests is the leading principle, the law should provide for various options which can be tailored to the needs of the specific child in his or her specific circumstances, instead of trying to provide for a one size fits all, which is a fallacy. The main focus is to secure the rights and the interests of the child concerned, thereby taking the wishes of the child into account.

<sup>841</sup> In other words, a child of twelve years or older has the right of veto. The same accrues to a child younger than twelve years, provided that he or she is capable of a reasonable opinion about his or her interests.

<sup>842</sup> Article 1:228(2) determines that in some instances the objection of a parent regarding the

- e) the mother of the child, when a minor, should have reached the age of 16 years;
- f) the adoptive parent(s) should have cared for and have raised the adoptive child for at least one year.<sup>843</sup>
- g) that the biological parent(s) do not (any longer) have authority pertaining to the child”.

It is evident that apart from the general requirements, the views of the child should carry major weight in the determination of the best interests of the child and the granting of an adoption order.<sup>844</sup> With regard to children who have been subjected to child protection measures the ground (g) is of particular relevance: before a child can be adopted; the biological parent(s) need to be deprived from their authority with regard to the child concerned. To this effect an application has to be made to court for the relief of parental authority. The problem which might arise is that deprivation of parental authority is presently only possible on limited grounds.<sup>845</sup> If this child protection measure is granted the consequence is that the parents are deprived of their authority and guardianship will (usually) be vested in the Bureau for Youth Care.<sup>846</sup>

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adoption can be disregarded, for example, when the child and the parent have not or have hardly shared the same family residence, when the parent has seriously neglected the care and upbringing of the child or when the parent has been convicted of any of the crimes against the minor as specified in Article 1:228(2)(c). See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 96-97.

<sup>843</sup> The ratio behind this is that ideally there should be a close personal relationship between the adoptive parent and the adopted child before the court grants the adoption order. Asser/De Boer *Personen- en familierecht* (2010) 646.

<sup>844</sup> See Article 1:228(1)(a) of the Civil Code in conjunction with Article 809 of the Code of Civil Procedure. The first mentioned provision demands that the child should be heard in person. Due to the far-reaching consequences this requirement should be strictly adhered to. Therefore a written note from the child will not suffice. See also Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 93.

<sup>845</sup> Deprivation of parental authority is only possible when any of the (limited) grounds in the Articles 1:266 and 1:269 of the Civil Code are complied with. These provisions have been discussed in sections 4.5.2.2, 4.5.2.3 and 4.5.2.4.

<sup>846</sup> See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 369. For a more detailed discussion on the deprivation of parental authority in the Netherlands, see sections 4.5.2.1 and 4.5.2.2 above. It should be noted that in terms of the upcoming amendments of the child protection legislation for 2012/2013, there will be one measure of deprivation of parental authority.



However, Punselie points out that the adoption of children who have been subjected to child protection measures is rare in the Netherlands.<sup>847</sup> The legislative provisions in the Civil Code are not sufficiently attuned to facilitating adoption under these circumstances, which is regrettable. It is agreed with Punselie that it can be very important for a child to become “formally” part of a family.<sup>848</sup> In the light of the present restrictions concerning the adoption of children in the Netherlands, it has been argued that the Dutch law of family relations, including adoption legislation, should be reconsidered and updated,<sup>849</sup> which requires specific research.<sup>850</sup>

It is submitted that specific research is needed concerning foster care and adoption, especially in the light of the anticipated reform of the child protection measures.<sup>851</sup> Where it can be determined, after sufficient investigation and careful consideration of the findings, that the parents will not be able to provide the necessary care for the child within a reasonable time, permanency planning comes to the fore. A child has the right to grow up in a family environment and should not be left in limbo for too long. Although the developments in the case law on foster care indicate that the family life between foster parents and foster child is afforded legal protection, the inherent temporary nature of foster care continues to create uncertainty.<sup>852</sup>

Since this might prevent the development of a full bonding process to which both the child and the foster parents are entitled to and should benefit from, the institutions foster care and adoption should be reconsidered in conjunction and attuned with one another. Especially where the parties involved express the wish (for the child) to be adopted, based on an

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<sup>847</sup> *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 104 and 109.

<sup>848</sup> *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 104.

<sup>849</sup> Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 119.

<sup>850</sup> This (comparative) research should focus on foster care and adoption in order to address specific stumble blocks in realising these forms of permanency planning. It is evident that the recommended research should include the Bill for the revision of the measures of child protection, which is presently pending in the First Chamber of Parliament in the Netherlands.

<sup>851</sup> Which probably will come into operation in the course of 2013.

<sup>852</sup> In addition it can be said that presently the legal position of foster parents in terms of the Civil Code is weak since they do not have any authority of decision-making with regard to the child. The question arises whether the Bill for the revision of the measures of child protection will be sufficient in this regard.

informed decision,<sup>853</sup> it should be legally possible to realise this. It is recommended that the proposed legislation, drafted on the basis of extensive research, should provide a link between the present system of (strong) adoption and adoption which provides for maintaining the family ties between the adoptive child and his or her biological parents.

Provided this would be considered in the best interests of the child concerned, this so-called “weak” form of adoption would acknowledge the two families which are considered important in the child's life. This ensures, on the one hand, the *de iure* recognition of the *de facto* relationship between the child and his or her foster family, and on the other hand, the continuation of the legal bond between the child and his or her biological family.<sup>854</sup>

### 5.3.6 Remedies and complaints regarding the removal and placement

Previously reference was made to the monitoring of the implementation of the CRC by the Committee on the Rights of the Child<sup>855</sup> and of the African Children's Rights Charter by the African Committee of Experts.<sup>856</sup> Via the regular submission of reports by state parties, these monitoring bodies examine the progress made by the respective countries and provide individual countries with comments and recommendations.

Although very important, these monitoring activities need to be distinguished from the so-called remedial activities.<sup>857</sup> The latter aim to address individual cases of infringements of human rights, which have been brought to the attention of the relevant body (for example the court), which in turn will consider the complaint.

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<sup>853</sup> The affected parties should be well informed about the legal consequences of both foster care and adoption in order to make an informed decision. This includes any information relating to the right to contact with a child, to which the (biological) parents generally would be entitled to, unless this would be contrary to the child's best interests.

<sup>854</sup> This should be desirable in the light of the circumstances of the case and should serve the best interests of the child. This so-called weak adoption (in Dutch: *zwakke adoptie*) would be particularly relevant where the child is older and thus has an established family bond with the biological parents. See also Punselie *Voor een pleegkind met recht een toekomst* (Proefschrift 2006 Universiteit Leiden) 115, 120

<sup>855</sup> See Articles 43 and 44 of the CRC. See also the discussion in section 2.1.

<sup>856</sup> See Articles 42 and 43 of the African Children's Rights Charter. See also section 2.1.

<sup>857</sup> See Vucovic, Doek & Zermatten *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: all about Children's Rights* (2012) 68.

It is outlined by Vucovic, Doek and Zermatten that the right to an effective remedy, as provided for in Article 8 of the Universal Declaration of Human Rights (1948), is neither explicitly nor implicitly recognised in the CRC. Article 8 of the Declaration reads as follows:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

“Everyone” clearly includes children. Although the CRC itself does not provide any direction in this regard, the Committee on the Rights of the Child nevertheless holds the opinion that children should be entitled to an effective remedy in case their rights have been (allegedly) infringed upon. In *General Comment No. 5*,<sup>858</sup> the Committee elaborated on the importance of an effective remedy by stating:

“For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by Article 39”.<sup>859</sup>

It is evident that a major stumbling block in the exercise of the right to a remedy is the general lack of capacity of children to initiate legal proceedings. Children are generally speaking dependent on their parents or guardians who are expected to act on their behalf. In the case of a conflict (of interests), another person might represent the child; for example

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<sup>858</sup> CRC/GC/2003/5 of 27 November 2003.

<sup>859</sup> See *General Comment No. 5*, paragraph 24.

a curator *ad litem* or a legal representative.<sup>860</sup>

When it comes to the removal of a child from her or his family environment, followed by the placement in an unfamiliar setting, the child is particularly vulnerable, even more so when placed in a closed setting. This requires the establishment of mechanisms to ensure that children have the right to (formally or informally) approach the court. In this regard Article 37(d) of the CRC is particularly relevant. It provides that:

“Every child deprived of his or her liberty shall have the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action”.

Based on this provision, a child has thus the right of access to the court and to claim a remedy.<sup>861</sup> In this regard it should be reiterated that state parties, like South Africa and the Netherlands, are obliged to adhere to the standard provided in this provision of the CRC.

Apart from the right to challenge the legality of a (placement) decision, it is also important that children are able to lodge a complaint about an infringement of their rights whilst being deprived of their liberty. In the case of a removal and subsequent placement, the protection of human rights should be secured at all times.

This means that the rights of dignity, privacy, religion, expression, health care, food and education, in principle, should not be limited in any way.<sup>862</sup> It is submitted that in order to prevent arbitrary actions or decision-making during placement, the possibility of any limitation(s) to these important rights need to be included in the relevant policy document of the institution concerned, in order to ensure that the affected parties are well informed. In addition, these policy documents need to state the circumstances under which such actions

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<sup>860</sup> For a discussion on the curator *ad litem* and legal representation for children, see section 3.1.4.

<sup>861</sup> See also Vucovic, Doek & Zermatten *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: all about Children's Rights* (2012) 70. See also section 5.1.2.

<sup>862</sup> In a closed setting there might be specific limitations required for the purpose of safety of the child and/or others, due to serious behavioural (or other) problems. However, caution is required and complaint mechanisms should be put in place.

are deemed inevitable and contain a complaint procedure.

The possibility of violation of the rights of children in institutions is a major concern since these children are (partially or fully) hidden from the public and therefore are particularly vulnerable. In this regard complaints and control mechanisms pertaining to these institutions are indispensable and should comply with the standards provided in the *Havana Rules* (1990). Section M of the *Havana Rules* provides a clear standard with regard to complaints and inspection. In terms of Rules 75 and 76 every child should have the right and the opportunity to make requests or complaints, without censorship as to substance, and to be informed of the response without delay.<sup>863</sup>

Liefwaard correctly points out that these procedures have both a specific and a general function. On the one hand it ensures the protection of the child's rights, and on the other hand it might serve as an (early) indicator of (anticipated) problems, which consequently can be addressed.<sup>864</sup> It is agreed with Liefwaard, that although the matter of complaint is not necessarily always (legally) relevant or there is a chance that a child may abuse the right, this does not justify the proposition to withhold or limit the right to complaint. In addition, he refers to the misconception that the right to complaint does not allow for alternative solutions or mechanisms, like to settle a matter amicably or mediation.

It is submitted that children have the right to be heard, which cuts across all aspects of their lives, wherever they are. During placement, however, the right of contact might have been limited or not adequately used,<sup>865</sup> which limits the child's right to have his or her voice heard by the persons with whom a trust-relationship exists. As an alternative, the office of an independent confident<sup>866</sup> at an institution could be considered. In this respect it would be important that each child will meet with this professional informally and at (regular) intervals.<sup>867</sup> Finally, consideration should be given to involving children/young persons in the

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<sup>863</sup> Complaint structures for institutions are indispensable and any information concerning these procedures should be readily available to the affected parties.

<sup>864</sup> "Ridiculisering van het beklagrecht voor jeugdigen" *Tijdschrift voor Familie- en Jeugdrecht* (2004) 72.

<sup>865</sup> Due to circumstances like distance and costs considerations pertaining to transport.

<sup>866</sup> In Dutch: *vertrouwenspersoon*.

<sup>867</sup> This would be relevant in order to avoid possible stigmatisation due to being seen at the

policy-drafting processes on the matters they consider relevant to have a say about what mechanisms would be considered adequate in relation to these matters.

In addition, the establishment of an independent office, a Children's Ombudsman, is also recommended, which has been in place in the Netherlands since 2011.<sup>868</sup> After having received a complaint or an expressed concern, the office of the children's ombudsman may investigate the matter and thus will be able to keep checks and balances.<sup>869</sup> Finally, some international documents contain a complaint procedure, in terms of which an international authority may pronounce on a matter in a state party, which is not only relevant to the country concerned but also have international implications/effects. The valuable considerations and decisions from these authorities guide the way in the protection and enhancement of the rights of children in the international context. In this respect the Optional Protocol to the Convention on the Rights of the Child on a communications procedure is long awaited for.<sup>870</sup>

It is hoped that this procedure will be up and running shortly, in order to contribute to the protection and enhancement of the rights of children. The following paragraphs will briefly discuss some of the mechanisms which are in place in the respective countries.

### 5.3.6.1 Remedies and complaints pertaining to South Africa

In South Africa, children have limited capacity to act and therefore need the assistance of their parent(s) or guardian, or they go to Legal Aid in order to effect the appointment of a

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office. Further discussion on the internal procedures pertaining to institutions falls beyond the ambit of this thesis.

<sup>868</sup> See Rule 77 of the *Havana Rules* (Res. 45/113 of 14/12/1990). The office of the Children's Ombudsman has become effective in the Netherlands on 1 April 2011. The establishment of this office is also recommended for South Africa.

<sup>869</sup> See also Vucovic, Doek & Zermatten *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: All about Children's Rights* (2012) 70.

<sup>870</sup> See (A/HRC/17/L.8) of 9 June 2011. The Optional Protocol has been opened for signature since 28 February 2012. At present, there are 35 signatories and two parties (Gabon and Thailand). Neither South Africa nor the Netherlands have yet signed this important Protocol. See "Status as at: 23-11-2012", available via [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en), last accessed on 23 November 2012.

curator *ad litem*. Section 28(1)(h) of the Constitution provides that: “Every child has the right to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”.<sup>871</sup> Apart from this constitutional right, the Children's Act also ensures that the child's voice will be heard and given due consideration; namely sections 10 and 61 of the Children's Act.

Moreover, section 14 provides that “every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court”. The latter provision seems to grant children access to the court, which at first sight creates the impression that the child has been provided (general) capacity to litigate. However, the effectiveness of the latter provision is debatable. De Bruin and Boezaart aver that section 14 did not amend the common law (restrictions) in this regard. As a result, it seems that one still has to resort to the common law “mechanism” of the curator *ad litem*.<sup>872</sup> However, although the CRC does not explicitly impose a duty on state parties to provide the child with independent access to the court, this may nevertheless be derived from the purport of the CRC, and in particular Article 12.<sup>873</sup>

Although it might not be impossible for children to approach the court on the basis of section 14, it could mean that they still need to be assisted due to a limited understanding or knowledge on how to advance their rights effectively and independently. In this regard the assistance rendered to children by Legal Aid South Africa is indispensable.<sup>874</sup>

A matter which needs urgent attention and serious consideration is the establishment of the office of a Children's Ombudsman in South Africa. It is not only important that the placement order (or extension thereof) can be challenged, but that once the placement order is implemented, children should be able to lodge a complaint when they are of the opinion that

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<sup>871</sup> For a discussion of legal representation for children in South Africa, see section 3.1.4.1 above.

<sup>872</sup> See the discussion in section 3.1.4 above, which discusses the child's right to participation.

<sup>873</sup> See also Steketee *et al.* who have rightfully recommended that children should be able to commence legal proceedings. In “Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen” *Verwey-Jonker Instituut* (2003) 92. It is submitted that this is a general right and thus relevant for both South Africa and the Netherlands.

<sup>874</sup> For a more detailed discussion, see section 3.1.4.1.

their rights have been infringed upon. Structures and policies should be put in place to ensure these mechanisms. It is commendable that with regard to residential settings, the regulations to the Children's Act prescribe that child and youth care centres are obliged to have a written complaints procedure, of which the child concerned must be made aware.<sup>875</sup> Finally, whilst awaiting the developments pertaining to the communications procedure in terms of the Optional Protocol to the Convention on the Rights of the Child,<sup>876</sup> reference should be made to the African Children's Rights Charter. This regional document provides for two mechanisms to ensure compliance with the standard of protection of the rights listed in the document, namely the submission of state reports<sup>877</sup> and the right of petition. Article 44 provides that the African Committee of Experts may receive communication from any group or non-government organisation recognised by the African Union or the United Nations relating to any matter covered by the Charter. Viljoen points out that therefore the African Children's Committee has much wider powers than its counterpart in terms of the CRC.<sup>878</sup> The latter, however, might change in the near future. Ultimately, as a state party it is not only important to acknowledge and confer basic rights on children, but it is as important to ensure the realisation thereof.

### 5.3.6.2 Remedies and complaints pertaining to the Netherlands

The right to be heard is generally regarded as an integral part of the proceedings in child protection cases,<sup>879</sup> which is commendable.<sup>880</sup> However, the latter can clearly not be

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<sup>875</sup> See DSD regulation 74 (GN R261/2010). More research is required and control mechanisms should be put in place, to ensure compliance with the regulations.

<sup>876</sup> A/HRC/17/L.8 of 9 June 2011.

<sup>877</sup> In terms of Article 43 state parties are required to submit a report every four years (initially within two years), on the measures they have adopted in order to give effect to the provisions in the Charter and on the progress made pertaining to the enjoyment of these rights. See section 5.3.6. Also section 2.1.

<sup>878</sup> In Boezaart (ed.) *Child Law in South Africa* (2009) 347. With the possible ratification of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, this might change shortly, see (A/HRC/17/L.8) of 9 June 2011.

<sup>879</sup> See Article 809 of the Code of Civil Procedure. The child concerned has a choice whether or not he or she would like to make use of the right to be heard. For a more detailed discussion, see section 4.4.2.2 above.

<sup>880</sup> However, due to the fact that Article 809 of the Code of Civil Procedure differentiates on the basis of age, it is argued that the Netherlands at this point is in contravention of Article 12 of the CRC. See Steketee *et al.* "Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen" *Verwey-Jonker Instituut*



equated with the capacity to initiate legal proceedings, or rather, the lack thereof. In the Netherlands, children do not have a general right or capacity to initiate legal proceedings independently.<sup>881</sup> Due to their limited legal capacity, they require, generally speaking, the assistance of a parent or guardian,<sup>882</sup> or alternatively, a special curator or a legal representative.<sup>883</sup> However, the Civil Code and the Act on the Youth Care do contain a number of exceptions. For example, in a procedure relating to a supervision order, the child of twelve years or older may file a request with the court for the replacement of the social worker, on the basis of Article 1:254(5) of the Civil Code.

In addition, a child of twelve years or older may approach the court in order to request the termination of the supervision order in terms of Article 1:256(4).<sup>884</sup> Moreover, a child of above the age of twelve may approach the Bureau for Youth Care in connection with an application for the annulment of a directive issued by a social worker<sup>885</sup> or an application for the withdrawal of a directive in terms of Article 1:260 of the Civil Code.

However, pertaining to the placement itself, there are also a few provisions which provide children with the right to a remedy. A child of twelve years and older may request the Bureau for Youth Care to terminate or shorten such placement on the basis of change of circumstances.<sup>886</sup> In addition, Article 1:263(4) of the Civil Code determines that the affected party, including the child of twelve years and older can approach the children's court to request the revocation of the placement order or to have the duration of the placement order shortened.<sup>887</sup> Furthermore, with regard to the placement in a closed setting, Article 29a of

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(2003) 92, [www.verwey-jonker.nl](http://www.verwey-jonker.nl), last accessed on 8-5-2012.

<sup>881</sup> Except in terms of administrative law, which will not be further discussed in this thesis.

<sup>882</sup> See Article 1:245(4) of the Civil Code.

<sup>883</sup> For a general discussion on aspects of Article 12 of the CRC, a special curator (Article 1:250 of the Civil Code) and legal representation in particular, see section 3.1.4.2 above, which deals with child participation.

<sup>884</sup> See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 77 and 124; Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 241. Steketee *et al.* have rightfully recommended that children/minors should be able to commence legal proceedings: "Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen" *Verwey-Jonker Instituut* (2003) 93.

<sup>885</sup> See Article 1:259(1) of the Civil Code.

<sup>886</sup> See Article 1:263(2) of the Civil Code.

<sup>887</sup> See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 119 and 216; Doek &

the Act on the Youth Care comes to the fore. Article 29a(2) provides specifically that a child of twelve years and older has full legal capacity with regard to legal proceedings. Thus a child is, among others, able to lodge an appeal against a placement decision.<sup>888</sup>

Whilst the latter is commendable, it is recommended for the purpose of clarity to extend this to all child protection measures across the board. It should be noted that the possibility of granting children a general right to initiate legal proceedings independently, has been subject of research.

Although neither the CRC nor the European Convention indicate any obligation for the facilitation of an independent legal standing for children, it is argued that this nevertheless can be derived from the purport of these international documents.<sup>889</sup> Other reasons in favour of supporting general independent access to the courts revolve around the inadequacy of the (access to a) special curator, and the fact that the legislation is scattered and inconsistent with regard to the procedural rights of children.<sup>890</sup>

Although, based on the above, the effectiveness of a special curator has been subject of debate, this option can be resorted to where there is a conflict of interests between the child and the parent(s) or other care-givers. On the basis of Article 1:250 of the Civil Code, the court may appoint a special curator in order to assist the child concerned.<sup>891</sup> Recent research conducted by the office of the Children's Ombudsman reveals that the

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Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 241.

<sup>888</sup> In addition, Article 29a(2) of the Act on the Youth Care states that the same applies to children below the age of 12, when the child is capable of a reasonable opinion about his or her interests. See Doek & Vlaardingerbroek *Jeugdrecht en Jeugdzorg* (2009) 242.

<sup>889</sup> Steketee *et al.* have rightfully recommended that children/minors should be able to commence legal proceedings. In "Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen" *Verwey-Jonker Instituut* (2003) 92.

<sup>890</sup> Steketee *et al.* "Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen" *Verwey-Jonker Instituut* (2003) 94. Van der Bijl *et al.* refer in this respect to the situation that in the past decades the Dutch law of persons and family law has become a "patchwork quilt" (in Dutch: "*lappendeken*"), with regard to the procedures available for children: "De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk" *Kinderombudsman* (2012) 11-12.

<sup>891</sup> See Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 120.

aforementioned legal remedies are not well known among professionals and the public alike. Therefore the report contains the following recommendations: to provide for an extensive interpretation of the present Article 1:250 of the Civil Code, in order to ensure that the interests of children in a wide spectrum can be safeguarded; to provide for more publicity pertaining to the appointment of a special curator as well as other procedural rights which accrue to children;<sup>892</sup> to replace the age criterion of twelve years by the criterion of “maturity of the child”; and to set specific criteria for the appointment and job description of special curators.<sup>893</sup>

Finally, as a High Contracting Party to the European Convention, the Netherlands is bound to comply with the Convention and the jurisprudence as developed by the European Court for Human Rights. Article 34 of the Convention provides that the Court may receive applications from any person, non-governmental/civil organisation or group of individuals claiming to be a victim of an infringement in terms of the Convention. Since Article 1 refers to “everyone”, it goes without saying that the provisions in the European Convention are also applicable to children. However, the Court may only deal with the matter after all the remedies in the country concerned have been exhausted.<sup>894</sup>

In the Netherlands the right of complaint with regard to child protection agencies like the Council for Child Protection or the Bureau for Youth Care is provided for in the Act on the Youth Care and in the complaints protocol of the particular organisation.<sup>895</sup> With regard to placement in a closed setting, the right of complaint has been incorporated in the Act on the Youth Care. Article 29w provides that complaints regarding a number of decisions can be directed in writing to the complaints committee of the institution responsible for providing

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<sup>892</sup> The public and the professionals in the field of family- and child law (care and protection) should be informed. Brochures, websites, and training of professionals at tertiary level are required.

<sup>893</sup> See Van der Bijl *et al.* “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” *Kinderombudsman* (2012) 49-53.

<sup>894</sup> See Article 35 of the European Convention. Also Meuwise *et al.* *Handboek Internationaal Jeugdrecht* (2005) 33.

<sup>895</sup> Information brochures regarding the Council for Child Protection and the Bureau for Youth Care are generally made available to clients (affected children and parents or other care-givers).

care.<sup>896</sup> This right accrues to the child as well as the person having authority pertaining to the child. Within four weeks after receipt of the complaint, the committee must have decided on the matter. Where the committee has concluded that the complaint was founded, it may (partially) nullify the decision and instruct new decision-making. It is interesting to note that under the circumstances, there is a possibility for financial compensation for the child.<sup>897</sup>

The policy document “*Kwaliteitskader Gesloten Jeugdzorg*” also instructs institutions to include a complaints procedure in their own policy document and to ensure that the child, parents or guardian can lodge a complaint with the complaints committee. Moreover, the affected parties need to be informed about this.<sup>898</sup>

In sum, apart from the regular automatic review in terms of Article 25 of the CRC, mechanisms should be put in place to ensure that children have the right to complaint effectively and have access to remedies pertaining to placement issues. Sufficient training of lawyers, children's court staff and social workers in family and child law and psychology is required to ensure that these professionals can adequately respond to the needs of children they deal with on a daily basis.<sup>899</sup> Last, but certainly not least, children should be made aware of their rights, which requires serious attention of state parties. It is therefore submitted that both South Africa and the Netherlands have to address the latter matters urgently.

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<sup>896</sup> In Dutch: *klachten commissie van de zorgaanbieder*. Article 68 of the Act on the Youth Care provides that a procedural policy should be adopted regarding any complaints about the behaviour of staff regarding children or their parents or others, of which the latter parties need to be informed. The Committee should consist of at least three members who are not employed by the institution or the Bureau for Youth Care.

<sup>897</sup> Article 29w(7) of the Act on the Youth Care. See Doek & Vlaardingbroek *Jeugdrecht en Jeugdzorg* (2009) 357.

<sup>898</sup> See “*Kwaliteitskader Gesloten Jeugdzorg*”, paragraphs 1.6.2 and 1.6.5.

<sup>899</sup> For a detailed discussion on legal representation for children in terms of South African law, Du Toit in Boezaart (ed.) *Child Law in South Africa* (2009) 97 and further. See also sections 2.2.1.6 and 3.1.4 above.

## 5.4 Conclusion

### 5.4.1 Introduction

In this chapter the provisions in the international and regional documents pertaining to the removal and placement of children in need of care and protection were under discussion.<sup>900</sup> These standards were subsequently linked to the national legislation in South Africa and the Netherlands, followed by a comparative analysis between the two countries.

Where the child's own family, even with the necessary support, is not able to care for the child, the state is not only responsible for providing alternative care but also for protecting the rights of these vulnerable children to which they are entitled in terms of these international and regional documents.<sup>901</sup> When the standards between these documents differ, the provision with the higher standard should always prevail, provided the country is a state party to the particular document(s). Nevertheless, in some instances the law of a country may also be inspired by provisions of international instruments and the jurisprudence of the treaty bodies, whilst the country is not committed as a state party.<sup>902</sup> Therefore, the relevance of testing the national legislation against the international standards and subsequent comparative analysis lies in that it may contribute to ensuring that children will get the best protection and treatment attainable. Therefore it is important that these international standards become fully entrenched in the national legislation of a country.<sup>903</sup>

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<sup>900</sup> For a more in-depth discussion, see chapter 2, titled “the standards set by international and regional law relating to the placement of children in need of care and protection” and chapter 3 on “the national law in South Africa and the Netherlands relating to the general principles in the CRC and family life, in the context of international standards”.

<sup>901</sup> See Liefwaard *Deprivation of Liberty of Children in light of International Human Rights Law and Standards* (2008) 159.

<sup>902</sup> For example, the notion of “family life” as referred to in Article 8 of the European Convention has had enormous impact not only in member states but also far beyond.

<sup>903</sup> Moreover, it is important that monitoring of the implementation of these instruments takes place. See section 2.1. For the distinction between monitoring and remedies, see section 5.3.6. Also Vučović, Doek & Zermatten *The Rights of the Child in International Law. Rights of the Child in a Nutshell and in Context: All about Children's Rights* (2012) 68.

### 5.4.2 International standards

The Preambles of the international instruments acknowledge that children ideally should grow up in a family environment, and that they, in principle, have the right to be cared for by their parents, but it is a reality that this is not always feasible. Whilst the international and national norms leave the quality of the care and how parents discharge of their parental duties largely to the discretion of the parents concerned, this is nevertheless not unlimited. When a child is in need of care and protection, the state has to take responsibility to provide for the necessary protection with a view to ensure the child's right to a full and harmonious development of her or his personality.

It was submitted that, as a matter of principle, all efforts should be joined in order to preserve the family life of a (nucleus) family. This has various implications. State parties are obliged to render appropriate assistance to parents relating to the performance of their child-rearing responsibilities. It is recommended that Article 18(2) of the CRC in this regard be interpreted as widely as possible. On the one hand this should include prevention and early intervention measures which are aimed at preserving the family unit. The legislative framework pertaining to prevention and early intervention programmes in South Africa is impressive and could serve as a blue print for the Netherlands in order to develop a comprehensive and accessible system of prevention and early intervention services available nation-wide. On the other hand, material assistance and support programmes should be made available when needed.

In this respect, a word of caution is called for. The governments of both countries need to prioritise the development and/or implementation of prevention and early intervention programmes in order to assist “families in need” and thereby possibly preventing more children of becoming in need of care and protection to the extent that they must be placed in alternative care.

It is interesting that the concept of “family life” as referred to in Article 8 of the European Convention has by means of the European Court developed into an autonomous and universal notion and has had and still has an impact (far) beyond European borders. Although the concept *per se* has not been incorporated explicitly in the South African legislation, it nevertheless has become part of South African law via the case law of the

Constitutional Court.<sup>904</sup> It is welcome that the European Court has developed the concept of family life in such a way that various forms of non-recognised biological and factual relationships have been awarded recognition.<sup>905</sup> This ultimately has influenced the national legislation of member states and non-member states alike. It is submitted that based on the above, the term “family life” should be given the widest possible interpretation whenever it would serve the best interests of the child concerned.

Based on the three international/regional instruments, the CRC, the African Children's Rights Charter and the European Convention, the family life of children and their parents should be afforded the necessary protection, which includes the protection against unlawful interference from the state. Both South Africa and the Netherlands subscribe to this. This can be derived from the respective legislation (and regulations) and the case law of the two countries. Both Articles 9 of the CRC and 19 of the African Children's Rights Charter contain similar elements, which partially correspond with Article 8(2) of the European Convention. It is evident that the national legislation in both countries has to comply with these standards.

The “competent authority” lies with the (children's) courts in South Africa and the Netherlands. “Judicial review” ensures the possibility to challenge the lawfulness of decisions, which mechanism is provided for in both countries.<sup>906</sup> Substantive and procedural national legislation has been put in place, which at specific instances requires improvement; not only for the sake of clarity but especially for the advancement of the rights of children. For example, the right to participation in terms of Article 12 of the CRC needs to be further developed in order to ensure that children practically participate in all matters affecting them, and that their views are given due consideration.<sup>907</sup> Moreover, both the CRC and the African Children's Rights Charter demand that a child, in principle, shall not be separated from his or her parents against their will. Although Article 19(1) of the African Children's Rights Charter refers to “against his will”, is it argued that the opinions of both the parents and of the child

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<sup>904</sup> See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). See also sections 5.1.1.1 and 5.1.1.2.

<sup>905</sup> See also section 2.2.2.3.

<sup>906</sup> See the discussion in section 5.1.1.2.

<sup>907</sup> For some recommendation in this regard, see section 6.3.

need to be considered and measured against the yardstick of the best interests of the child. In this regard it is evident that the child's right to be heard in terms of Article 12 is intertwined with the best interests of the child.

### 5.4.3 Grounds and order for removal

The legal framework pertaining to the grounds for removal is worked out in detail in both South Africa and the Netherlands, and ultimately aims to ensure the safety and well-being of the children concerned. In order to ensure that the removal decision is lawful, the criteria provided in the legislation need to be strictly adhered to by the courts. Pertaining to the substantive provisions, the following should be noted.

Sections 151 and 152 of the South African Children's Act have been rightfully challenged in the case *C and Others v Department of Health and Social Development, Gauteng and Others*.<sup>908</sup> The Constitutional Court confirmed the invalidity of sections 151 and 152 of the Children's Act due to the failure to provide for the automatic review by a court in the presence of the child and parents. It was held that, pending the possible amendment of the Act, some provisions needed to be read-in, in order to provide the necessary (interim) relief.

This has resulted in the inclusion of a new subsection (2A) into section 151, which provides that:

“the court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

- (i) the removal is placed before the children's court for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian or care-giver as the case may be are,

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<sup>908</sup> 2012 (2) SA 208 (CC).



unless this is impracticable, present in court”.<sup>909</sup>

Pertaining to the inclusion of the new subsection (2A) into section 151, the following should be noted. It is evident that social workers in the field of care and protection are expected to be informed about the sequence of (procedural) steps they are required to take for the discharge of their duties.<sup>910</sup>

However, based on the outcome of the abovementioned case, the question comes to the fore whether, for reasons of efficacy, a social worker is the right professional to being assigned the duty to place the removal before the children's court for review. It is submitted that since on the basis of section 151 the court has been involved (already) in issuing the removal order, it would have been more desirable to instruct the clerk of the same court to place the removal before the children's court for review,<sup>911</sup> instead of the social worker. It is therefore recommended that section 151(2A), as provided for by the Constitutional Court in *C and Others v Department of Health and Social Development, Gauteng and Others*, be amended to the extent that the phrase “social worker” be deleted and replaced by “clerk of the court”.

In addition, although it is commendable that sections 151(2A)(ii) and 152(2)(d)(ii) provide that the child concerned, the parents, guardian or care-giver in principle should be present at the review hearing, this does not explicitly confer the right to be heard and thus offers a discretion, which is undesirable. For the sake of compliance with the international/regional instruments and consistency, it is recommended that section 155(1) of the Children's Act be amended in order to provide that the court will not come to any decision before hearing the affected parties, including the child. In other words, a similar but wider formulation to that in Article 809 of the Civil Code of Procedure in the Netherlands, which ensures the direct

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<sup>909</sup> The court held that another sub-provision needed to be read-in, namely pertaining to the emergency removal, which resulted in the inclusion of sub-paragraph (d) in section 152(2). See section 5.2.1 and further.

<sup>910</sup> Continuous training of professionals in the field of child care and protection is important, which needs to be adequately budgetted for by the Department of Social Development.

<sup>911</sup> Before the expiry of the next court day after the removal. For a more detailed discussion, see section 5.2.1.3.

hearing of children.<sup>912</sup>

In terms of section 151(7) of the Children's Act, the person who has removed the child on the basis of a court order has the statutory duty to inform the parent or care-giver without delay but within 24 hours, provided that the person can be readily traced. It is submitted that 24 hours is too long. The fact that the parents or care-givers are readily traceable, combined with the absence of emergency, demands a high (ethical) standard regarding the preparation of the case and the subsequent treatment of the affected parties. The latter should not cause any additional or unnecessary (psychological) harm or trauma to any of the parties. Therefore the parents or other care-givers should be informed promptly, which should be explicitly provided for in the legislation.

In the abovementioned case, the Constitutional Court also confirmed that the emergency removal in section 152 failed to provide for automatic review by a court in the presence of the child and parents. On the basis of the aforementioned, it is recommended that the concerned provisions be expressly included in the Children's Act for the sake of clarity and to ensure the consistent application thereof.

Furthermore, before making an order pertaining to the removal of a child in terms of section 156 of the Children's Act, a presiding officer needs to be aware of the possibility of section 148. This section provides discretion to order an early intervention programme or the participation in a prescribed family preservation programme instead of the removal of the child, which is commendable. However, neither section 156 nor section 157, which both deal with considerations pertaining to removal orders, refer to section 148. In this regard it should be noted that section 148 forms part of chapter 8 of the Children's Act, which deals with prevention and early intervention services, whilst the sections 156 and 157 are situated in chapter 9, the child in need of care and protection, which construction lacks clarity.

Therefore it is recommended that section 156(1) be amended to the extent that a reference to early intervention services as provided for in section 148 be included.<sup>913</sup> This will ensure that the professionals involved will not overlook section 148, which is important since it has

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<sup>912</sup> For a formulation of the proposed wording, see section 6.3.

<sup>913</sup> For the proposed wording in this respect, see section 6.6.1.

much potential in preventing the removal of children from their family environment. In the meantime, additional training of officers of the court and other relevant professionals is required to ensure adequate expertise with regard to this complex part of the Children's Act.

Another aspect relating to the process of deliberation of the court before it decides on the question whether the child should be removed from the care of the child's parent or caregiver, concerns section 157(1). As outlined previously,<sup>914</sup> the court is obliged to, *inter alia*, consider a report of the social worker which should contain details of family preservation services which have been considered or attempted. However, although it can be derived from the phrase "family preservation services" that it revolves around prevention and early intervention programmes, it has not been defined in the definition provision of the Children's Act, and therefore lacks clarity and consistency.<sup>915</sup> It is therefore recommended that section 157(1)(a)(ii) be amended.<sup>916</sup>

#### 5.4.4 Forms of alternative care

Since the international documents demand that deprivation of liberty shall be used only as a measure of last resort, it is implied that there should be alternatives available in order to do just to the rights of children. In both South Africa and the Netherlands preference is given to family-like settings, like foster care. Thus residential care will and should (only) be considered when other options are not suitable or not available, which is in line with the CRC and the African Children's Rights Charter.<sup>917</sup> It should be reiterated that the removal decision imposes a responsibility on the state party.

In South Africa a number of alternatives in care have been incorporated in the Children's Act. New and exciting are the placement options of cluster foster care and shared care,<sup>918</sup>

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<sup>914</sup> See section 5.3.1.1.1.

<sup>915</sup> Section 1(1).

<sup>916</sup> For the recommended wording for section 157(1)(a)(ii), see section 6.6.4.

<sup>917</sup> See also section 158(1) of the Children's Act as discussed in section 5.3.1.2. For a recommendation in this regard in order to ensure that residential placement will be a measure of last resort, see section 6.7.4.

<sup>918</sup> See section 156(1)(e)(ii) and (iv), as discussed in section 5.3.1.

which both will go a long way in preventing the institutionalisation of children. Another benefit is that it would be feasible for a child to remain in his or her familiar environment. The same applies to the possibility of a child being placed in a child-headed household on the basis of a children's court order.<sup>919</sup> The latter is in theory regulated in the Children's Act, which is commendable.

Above reference was made that foster care faces serious challenges, which applies to both South Africa and the Netherlands.<sup>920</sup> Budget constraints impact negatively on the foster grants and the budget available for the recruitment (including publicity campaigns), selection and supervision of foster families. As a result the availability of foster placements is limited, whilst the demand for (temporary) placement has increased. As it has been pointed out it is a reality in South Africa that many children are being cared for by the extended family, whilst at present the South African law does not explicitly recognise kinship care. As suggested previously, there is a need for various forms of foster care which, *inter alia*, should include foster care in the traditional sense,<sup>921</sup> and kinship care.<sup>922</sup>

The latter is divided in two options; namely, court-ordered kinship care for children in need of care and protection and informal kinship care, in which case families do not require social services but need financial support.<sup>923</sup> It is therefore recommended that section 167 of the Children's Act, which provides for alternative care, be amended in order to include informal kinship care, which does not require social work services but which entitles families in financial need to a grant to be obtained via the social assistance system.

Therefore the government needs to prioritise the sufficient allocation of funds in order to

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<sup>919</sup> See the sections 46(1)(b) and 156(1)(f) of the Children's Act. See also section 5.3.1.1.1.

<sup>920</sup> See the sections 5.3.1.1 and further and 5.3.2.1 and further.

<sup>921</sup> This is meant for a child in need of care and protection, who will be placed in the care of a person unrelated to the child on the basis of a court order. Since this form of placement is in principle temporary, reintegration services need to be provided by social workers.

<sup>922</sup> For a distinction between court-ordered kinship care and informal kinship care, see Skelton "Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa" *The International Survey of Family Law* (2012) 337. See also section 5.3.1.1.

<sup>923</sup> This requires in addition the amendment of the Social Assistance Act 13 of 2004, in order to provide for the so-called kinship care grant. See section 5.3.1.1.

ensure the realisation of an adequate number of placements, which should include specialised foster care. The latter would cater for children with serious emotional or behavioural problems, which requires specialised training of foster parents in order to be able to offer adequate care. This in turn contributes to a measure of stability, thereby preventing the (unnecessary) transfer of children between foster families and/or institutions.<sup>924</sup>

This applies to both South Africa and the Netherlands. It should be noted though, that more priority should be given to prevention and early intervention services, which may prevent (an increase of) children becoming in need of care and protection in the first place. It is hoped that the Committee on the Rights of the Child will continue emphasising this aspect.

Another challenge concerns the lack of co-operation between foster care organisations, the agencies requesting removal, and the courts granting authorisation for placement (and extension thereof). It is further recommended that mechanisms be put in place for the co-ordination of foster care organisations and the improvement of co-operation between private child care organisations, the relevant government agencies, and the courts.

The position of foster parents in the Netherlands is at the moment still precarious, since they are not in the position to take any formal (binding) decision regarding the upbringing of their foster child, whilst simultaneously they provide for the daily care of the child concerned. It is submitted that the legal position of foster parents should be drastically improved, especially in the case of long-term foster care. When the Bill for the revision of the measures of child protection comes into operation in the course of 2013, the position of foster parents will improve, which is commendable. Since foster care has so much potential as a family-resembling alternative, it is recommended that more comparative study pertaining to foster care be conducted in order to produce a comprehensive and systematic set of rules and regulations, similar to that provided for in chapter 12 of the South African Children's Act.

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See the decision of the Eastern Cape high court in *Anna Jonker v The Manager, Gali Thembani/JJ Serfontein School and Others* (94/2011) of 19 March 2012, as referred to in section 5.3 above. In this case the court found that the children in need of care and protection cannot be relocated to a more restrictive facility without the children's court's ratification of the transfer-order as made by the provincial head of social development, in terms of section 171.

Although residential placement does not always amount to deprivation of liberty, chances are that it will nevertheless be perceived as such and therefore should only be permitted as a measure of last resort and for the shortest period of time possible. Pertaining to South African law, reference was made to the fact that in terms of section 158(1) the children's court has discretion to order residential care, but only "if another option is not appropriate". It was argued that the latter phrase is too vague and not sufficiently in line with the standard of "a measure of last resort" as provided by the international instruments.<sup>925</sup> Although a strict interpretation by the courts may ensure the more frequent use of other forms of care, instead of residential care, it is recommended that for the sake of clarity and consistent application, section 158(1) be amended as follows:

A children's court may issue an order placing a child in the care of a child and youth care centre only as a measure of last resort and after it has been established by the court that another option is not appropriate.

In the Netherlands, the criterion "as a measure of last resort" is not explicitly mentioned in the Civil Code. In this respect it should be reiterated that the authorisation for the removal of a child is usually given in the context of a supervision order in terms of Article 1:254. One of the criteria in the latter provision demands that only where it is evident that "other measures to avert the threat have failed or expectedly will fail", the children's court may impose such measure. Therefore, on the basis of the Articles 1:261 and 254, read in conjunction with each other, combined with legal practice and the jurisprudence of the *Hoge Raad*, it can be argued that the Netherlands is (indirectly) in compliance with the criterion of "measure of last resort" in terms of the international and regional instruments. It is recommended that with regard to the Bill for the revision of the measures of child protection, the criterion be explicitly included in the legislation.

Since 1 January 2008 specific legislation has come into operation in the Netherlands which aims to regulate youth care in a closed setting in terms of civil law. Chapter IVa of the Act on the Youth Care provides for a number of safeguards for the child and his or her family. It is submitted that these specific rules relating to the placement in a closed setting, could

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<sup>925</sup> See section 5.3.1.2. For a more detailed discussion on the principle "measure of last resort", see section 5.1.2 above.

serve as an example for secure placements in South Africa. It is evident that the rules relating to the placement in a closed setting on a civil law title need to be distinguished from detention in terms of criminal law. However, the regime pertaining to the latter has specific and detailed safeguards which ensure the protection of the rights of children. These safeguards are basically contained in the Youth Custodial Institutions Act.<sup>926</sup> It is recommended that more research be conducted to compare the regimes of institutions for closed care on a civil law basis and that on a criminal law basis. The emanating recommendations could inform policy documents and/or legislation, in order to attain the highest possible standard of protection for children who are “hidden” from the public in terms of civil law.

It is submitted that South Africa and the Netherlands are partially in line with these child-specific requirements. In the first place, the least intrusive measures have to be resorted to first, and secondly, more serious criteria are to be adhered to where the placement results in the deprivation of liberty of the child. However, due to the lack of interim or periodic review, at least half-way through the placement, it is submitted that neither country can aver that placements generally speaking are indeed “for the shortest period of time possible”. It is therefore recommended that an explicit provision will be included in the legislation of the respective countries to ensure the periodic review of a placement, which is even more critical in the case of placement in a closed setting.

#### **5.4.5 Duration of placement orders**

Since placement orders are in principle temporary, they have to be re-considered on a regular basis in order to meet the standard provided in Article 25 of the CRC. However, it has become clear that no reference is made to the frequency of such periodic review. The lack of specific provisions in this regard means that in practice the courts will only pronounce on the necessity of the placement for the purposes of care, protection or treatment, towards the end of the duration of an existing order, which is seriously insufficient. It is recommended that where placement is ordered for three, six or 12 months, specific rules be put in place which automatically provide for regular or periodic review of the placement decision.

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<sup>926</sup> In Dutch: *Beginnelsenwet justitiële jeugdinrichtingen*. See also section 5.3.2.2.2.

The latter is even more urgent where the placement is ordered for two years, like in South Africa. Review of the placement should take place *at least*<sup>927</sup> half-way through the period of duration of the order or at an earlier stage, when such is deemed necessary or when a legitimate reason comes to the fore. Therefore, it is recommended for both countries, that legislation or regulations be enacted which:

- (i) Contain specific rules on the competent authority which will review the adequacy of the placement, for reasons of clarity, efficacy and efficiency;
- (ii) Provide for automatic review as well as the possibility for the filing of a request for review by any of the parties, if such reason exists. In this regard, it is recommended that a non-exhaustive list of reasons be included, for the sake of clarity for the parties involved;
- (iii) Explicitly confer the right to children (and their parents) to request review, in line with the formulation of Article 25 of the CRC. It is submitted that children should be able to act independently in this regard.<sup>928</sup>

Even where the duration of the placement has lapsed or has been terminated, everyone, including a child, should have the right to have the lawfulness of the deprivation of liberty established. This is necessary in order to prevent that the formal system of time frames regarding legal procedures has a detrimental effect on the possibility to have the lawfulness determined timeously. It is most welcome that the European Court has set an example by ruling that the lawfulness of the detention should be challengeable even after the person has been released, and where found unlawful, the right to compensation comes to the fore. It is recommended that in both South Africa and the Netherlands specific legislative provisions be adopted to ensure the entitlement to compensation for children.

#### **5.4.6 Contact with the family**

In case a child has been removed from the family environment, the importance of regular

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<sup>927</sup> Own emphasis.

<sup>928</sup> For some formulated recommendations, see section 6.4.



contact cannot be over emphasised. After all, the removal/separation is meant to be of a temporary nature after which the child in principle should return home. In order to increase the viability of the latter, true meaning should be given to the child's right to maintain personal relations and direct contact, which requires practical implementation.

Therefore there is an obligation on the foster parent(s), the professional(s) involved, and the relevant institutions in charge, to accommodate contact. Where these rights are not effectively realised, complaints procedures should be available and children should be informed about the available remedies. In addition, it is recommended that specific research is needed to make an inventory of any existing rules pertaining to contact in institutions in both South Africa and the Netherlands and that these should be tested against the relevant provisions in the *Beijing* and *Havana Rules*. Whilst both South Africa and the Netherlands presently (still) maintain a system of strong adoption,<sup>929</sup> the South African Children's Act has introduced a *novum* pertaining to contact in relation to adoption; namely, the so-called "post-adoption agreement". Despite the fact that given the circumstances it is in the best interests of the child to be adopted, it might be that the biological parents would still like to play a role in the child's life. The post-adoption agreement may accommodate communication, visitation and information-sharing, provided that the child has given the required consent thereto.

However, it is recommended that more publicity be given to the post-adoption agreement, and as important, more training of the relevant professionals, who in turn have the duty to inform the affected persons beforehand. Whilst in principle applaudable, the requirement that the agreement has to be entered into before an application for the adoption of a child is made, may be cause for concern. Where parents have not opted for such an agreement, due to lack of awareness, it is already too late. However, an application in terms of section 23 of the Children's Act could bring the necessary relief in this respect. Alternatively, a "safety net" could be included in the Act; for example, a provision similar to Article 1:229(4) of the Dutch Civil Code, which also provides for contact after the adoption of a child, where at the moment of the adoption the child has *de facto* contact with a parent regarding whom the family relations will cease to exist, the court may determine that these parties will remain

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<sup>929</sup> This means that an adoption order terminates all existing responsibilities and rights between the child and his or her biological parents, which includes contact.

entitled to have contact with one another.<sup>930</sup> This means that the latter should be explicitly included in the adoption order.<sup>931</sup> The advantage of such a provision is that the court will still determine whether contact will be in the best interests of the child concerned and that there are no formalities to comply with in terms of an agreement between the biological and adoptive parents.

#### **5.4.7 Returning home *vis-à-vis* permanent placement in alternative care**

Since the removal and placement are in principle of a temporary nature, serious efforts need to be made to effect the possibility of returning home. In the case of an application for the extension of a placement order or authorisation, consideration will be given to the question whether the child's return home is feasible and/or desirable. This also applies in the case of periodic review. It is evident that the child should be heard (preferably directly) and that her or his views should be given due consideration. From the moment the court has ordered the removal and placement of the child, the child and his or her parents should be informed of what is expected from them in order to minimise or lift the existing problems which gave rise to the intervention. This in turn may increase the possibility of the child's return home.

As pointed out by Punselie, the so-called "*kinderbeschermingskinderen*" are not readily adopted in the Netherlands because the legislative provisions in the Civil Code are not sufficiently attuned to facilitating adoption. It has been argued that consideration should be given to moving towards a system of weak adoption, but this is still under (international) debate.<sup>932</sup> It is nevertheless recommended that the Dutch law of family relations, including adoption legislation be reviewed, thereby giving consideration to the system of weak (*zwakke*) adoption, which allows a child to benefit from both family environments without having to face the harsh consequences of the present system. It is further recommended that where necessary, the Civil Code be amended in order to remove the present obstacles and to accommodate progressive developments in international family law.

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<sup>930</sup> For a recommendation to be included in the Children's Act, see section 6.7.3.

<sup>931</sup> See Article 1:229(4) of the Civil Code.

<sup>932</sup> See the discussion in section 5.3.5.

#### 5.4.8 Remedies and complaints

The possibility of violation of the rights of children who have been removed is a major concern since these children are vulnerable and may be (partially or fully) hidden from the public. In a case of an alleged infringement by the state, the affected parties should have an effective remedy. As Doek points out, this is also relevant pertaining to children in connection with the implementation of their human rights. It is submitted that in this respect in both South Africa and the Netherlands a key element is missing; namely, the right of the child to institute an effective remedy independently.<sup>933</sup>

It is commendable that the child's right to litigate has been given (at least) some consideration in both South Africa and the Netherlands.<sup>934</sup> However, practically speaking, children are generally still dependent on being assisted by their parent(s) or guardian or dependent on the appointment of a curator *ad litem* or a legal representative. In the Netherlands a child can act independently in limited instances which are provided for in the legislation.<sup>935</sup> Although the latter is a step in the right direction, it is recommended that this be extended to all matters affecting the rights of children.<sup>936</sup> It is praiseworthy (and hopefully a sign of changing times) that the procedural legal position of children has lately been the subject of research.<sup>937</sup>

Therefore it is submitted that Article 12 of the CRC, as one of the core provisions, be given the widest possible and most progressive interpretation and application, thereby giving effect to the child's right to independently approach the court. It is recommended that more comparative research be conducted to ascertain how this right can be accommodated best in both countries; thereby having regard for practical implications like costs, staffing and expediency.

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<sup>933</sup> In Dutch: *een eigen rechtsingang voor kinderen*.

<sup>934</sup> See the discussion in section 3.1.4.

<sup>935</sup> For example, when a child is placed in a closed setting, the child of twelve years and older has the capacity to litigate (and below the age of twelve when she or he is capable of a reasonable opinion about her or his interests).

<sup>936</sup> It is hoped that in due course, a provision construed in general terms, will be included in Book 3, Title 6 of the Dutch Code of Civil Procedure.

<sup>937</sup> See section 5.3.4.2.

With regard to both South Africa and the Netherlands, it is recommended that complaint procedures and control mechanisms be put in place in institutions across the board, which should comply with the standards provided in the *Havana Rules* (1990). Complaint procedures and control mechanisms are also relevant pertaining to family-like settings, like foster care or adoption.

However, fear, peer pressure, and the fear of not being taken seriously might prevent children reporting matters like abuse or neglect. With regard to institutions, regular visits of an independent confidant (in Dutch: *vertrouwenspersoon*) who is not attached to the institution concerned, could possibly assist children and help counteract abuse. The institution of such an independent confidant should be further researched. In the Netherlands the Ombudsman may receive complaints from children, which is commendable. However, it is a priority that children in the Netherlands become aware of the (existence and) functions of the *Kinderombudsman*. The institution of the office of the Children's Ombudsman is not only highly recommended for South Africa but also considered a necessity for the enhancement of the rights of children in this country.

## CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

### 6.1 Introduction

The Dutch NGO report “*Jongerenrapportage over kinderrechten in Nederland 2012*” reveals that the participants bring home the message that anno 2012, the youth is in need of love, care and personal attention; whether they live with both parents, a single parent household, foster care or in residential facilities.<sup>1</sup> It is interesting to note that the expressed need of children coincides with the aims of the CRC and the African Children's Rights Charter, as stated in the Preamble of both documents.<sup>2</sup> It is evident that whilst growing up, all children need to be protected, which is even more prevalent in the case of children in need of care and protection, due to their vulnerability. However, more than protection is needed to ensure the full and harmonious development of children which will provide a solid basis on which they can build their lives.<sup>3</sup> For example, by changing decision-making about children into decision-making involving them,<sup>4</sup> or by having more regard for the evolving capacities of children towards becoming responsible and independent individuals. In other words, moving away from a more traditional approach towards a participatory approach, based on dignity and self-determination.<sup>5</sup>

Where the child's own family, even with the necessary support, cannot adequately protect or care for the child, the state is required to take responsibility in order to ensure the safety and

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<sup>1</sup> This report of June 2012 is based on the collaboration of the NJR (Nederlandse Jeugdraad, or Dutch Youth Council) and the Kinderrechtencollectief and forms part of the fourth periodic report of the Netherlands to the Committee on the Rights of the Child (2012/2013). The report is available via [www.kinderrechten.nl](http://www.kinderrechten.nl), see also <http://www.defenceforchildren.nl/p/21/2441/mo89-mc21/mo45-mc52>, accessed on 22-6-2012.

<sup>2</sup> Paragraph 6 of the Preamble of the CRC reads as follows: “Recognising 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.” See also paragraph 5 of the African Children's Rights Charter.

<sup>3</sup> See paragraph 6 of the Preamble of the CRC and paragraph 5 of the Preamble of the African Children's Rights Charter.

<sup>4</sup> See the recommendations pertaining to participation below.

<sup>5</sup> This should not be equated with equality. Parents and other care-givers have parental responsibilities and rights or parental authority, on the basis of which they are required to protect and care for the child and provide the necessary guidance. For a discussion on the role of parents and other care-givers, see sections 3.2, 3.2.1 and 3.2.2.

well-being of the child concerned. In this regard the state is not only responsible for providing alternative care but also for protecting the other rights of the child to which he or she is entitled in terms of the international and regional documents. It has become evident that being a signatory to an international or regional document is not free from obligations. To the contrary, a state party is obliged to conform to the standards as set by the instruments to which it has committed itself.<sup>6</sup> One of the aims of this comparative study was to compare the relevant provisions in international and regional instruments pertaining to children in need of care and protection. In this regard the CRC, the African Children's Rights Charter, and some provisions in the European Convention, have been discussed. It was indicated that where the standards between these documents differ, the higher standard should prevail, provided the country is a state party to the particular document(s).

The second aim of this comparative study was to determine whether the national law of South Africa and the Netherlands are in line with these standards, and if not, to make recommendations for improvement. Thirdly, comparisons were made between South Africa as a developing country and the Netherlands as a country with an established removal practice. The overall aim of the comparative analysis has been to inquire how the two countries deal with children who are found to be in need of care, in order to ensure that these vulnerable children are protected and adequately cared for. In order to achieve the latter, it is important that these international standards become entrenched in the national legislation, regulations, and practice of the respective countries.

During the research on the topics "removal" and "placement" of a child, a number of related topics or matters come to the fore, some of which have been discussed in detail. For example, the importance of the family environment or a family resembling environment, which was emphasised in the international and regional documents.<sup>7</sup> The latter has also been reiterated in the United Nations *Guidelines for the Alternative Care of Children* (2010).<sup>8</sup> Since the removal of a child from her or his environment inevitably has a major impact on the lives of the child and his or her family, such a decision should be based on the procedural

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<sup>6</sup> See section 2.1.

<sup>7</sup> See section 5.3.

<sup>8</sup> See Resolution 64/142 of the General Assembly (A/RES/64/142) of 24 February 2010. Part IV of the document deals with "preventing the need for alternative care", see paragraphs 31-51. See also sections 2.2.2, 3.2 and 5.1.1.

and substantive legislative provisions of a country, and a lawful and non-arbitrary court order.<sup>9</sup>

From the fact that five years ago a new Children's Act came into operation in South Africa and that in the Netherlands it is expected that the Bill for the revision of the measures of child protection will take effect in 2013, it can be derived that the field of care and protection is certainly topical. Although South Africa and the Netherlands are historically connected,<sup>10</sup> both countries had, and still have, their own societal developments and challenges.<sup>11</sup> One of the challenges concerns the apparent increase in cases of children in need of care and protection.<sup>12</sup>

On the basis of the comparative analysis in the previous chapters, some specific issues were identified, some of which require further research and some which can possibly forthwith be dealt with by the national legislatures. The recommendations below might therefore be relevant for future legislation, or at least contribute to a debate pertaining to the legal position of children in South Africa and the Netherlands. Therefore, in the following paragraphs, a number of overall recommendations are made; followed by some proposals for legislative reform. For the purpose of clarity, the recommendations are structured according to topic, although it should be noted that the topics are interrelated and therefore might overlap.

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<sup>9</sup> See sections 2.2.2.3, 2.2.3 and further, 4.4, 4.5, 5.1.1.2 and 5.2.

<sup>10</sup> See section 1.2.

<sup>11</sup> Some of these challenges overlap; for example, an increase in unemployment rates and domestic violence. See section 1.1.

<sup>12</sup> The children's courts statistics for April 2008 to March 2009 for South Africa show a figure of 60051 regarding children in need of care, whereas the statistics for April 2009 to March 2010 indicate a total of 88619, which is a significant increase: Annual reports Department of Justice and Constitutional Development, available via [www.justice.gov.za](http://www.justice.gov.za), accessed on 28-11-2012. According to Defence for Children there has been an increase in implemented supervision orders in the Netherlands of 34% between 2005 and 2008 and extensions of 48%. The percentages pertaining to the implementation of the authorisation for the removal of children up to 2007 are as follows: 47% and extensions of authorisation for removal: 58%, via [defenceforchildren.nl/.../toename-aantal-ondertoezichtstellingen-en-machtigingen-uithuisplaatsingen](http://defenceforchildren.nl/.../toename-aantal-ondertoezichtstellingen-en-machtigingen-uithuisplaatsingen), last accessed on 28-11-2012.

## 6.2 Best interests of the child

From the child care and protection legislation and practice it can be derived that in all matters pertaining to a child the best interests of the child should prevail. Whereas the South African Children's Act contains both a general provision and a provision which contains factors for determining the best interests of the child, the Dutch Civil Code has a few Articles which merely refer to this important standard.<sup>13</sup> Although the application of the standard is prescribed in South Africa, the consistent application thereof in the child care and protection practice does not necessarily follow as a matter of course.

Conversely, although systematic reference to the standard is lacking in the Dutch Civil Code, the courts seem to apply the principle quite consistently.<sup>14</sup> For reasons of transparency and consistency the following is recommended. As already outlined, the best interests principle in Article 4 of the African Children's Rights Charter provides a higher standard than its counterpart in the CRC,<sup>15</sup> a standard to which South Africa has to adhere. Therefore it is recommended that section 28(2) of the Constitution be amended as follows:

“A child's best interests are the paramount consideration in every matter concerning the child”.

For the Netherlands it is recommended that a general provision containing the best interests of the child-standard be included in the Civil Code, as well as a list of factors which should be taken into account. It is submitted that sections 7 and 9 of the Children's Act could serve as an example, which need not to be repeated here.<sup>16</sup> However, it should be emphasised

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<sup>13</sup> See for example, Article 1:227(3) of the Civil Code, in terms of which a request for the adoption of a child, among others, may only be granted when the adoption is in the “apparent interests of the child” (in Dutch: *in het kennelijk belang*). For a discussion on the other requirements for an adoption in terms of the Civil Code, see section 5.3.5.2.

<sup>14</sup> Since the standard of the child's best interests is so fundamentally entrenched in the Dutch child law it is debatable whether a specific Article would be necessary. See the discussion in section 3.1.3.2.

<sup>15</sup> Article 3 of the CRC. For a more detailed discussion, see section 2.2.1.4.

<sup>16</sup> See section 3.1.3.1 which deals with the best interests of the child-standard in terms of South African law.



that the listing of factors should be non-exhaustive.<sup>17</sup> The provision should thus end with the wording “and, any other relevant factor”. The latter will provide for the necessary flexibility.

## 6.3 Participation of children

It was pointed out that Article 12 of the CRC is one of the central provisions in the Convention, since it is interrelated with the other rights, and should form an integral part of any decision-making relating to children.<sup>18</sup>

### 6.3.1 Towards realising direct hearing of children in South Africa

With regard to South Africa, it is recommended that more opportunities be created to ensure the direct hearing of children in matters affecting them. Although section 10 of the Children's Act confers a general right to participation on the child, it is subject to the clause “in an appropriate way”, which provides too much leeway for the court or other decision-makers.<sup>19</sup> It is therefore recommended that the wording of section 10 be amended as follows:

“(1) Every child that is of such an age, maturity and stage or development as to be able to participate in any matter concerning that child has the right to be heard directly or via a representative before a decision is made”.<sup>20</sup>

This subsection aims to ensure real and meaningful participation of children who are capable of doing so. In addition, in the case *C and Others v Department of Health and Social Development, Gauteng and Others*<sup>21</sup> it was held that in terms of the court's formulated sections 151(2A)(ii) and 152(2)(d)(ii), the affected parties should in principle be present at the review hearing.<sup>22</sup> Although commendable, it was submitted that such presence does not

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<sup>17</sup> See also Chapter 4, footnote 586.

<sup>18</sup> See sections 2.2.1.6 and 3.1.4.

<sup>19</sup> See section 3.1.4.1.

<sup>20</sup> Section 10(2) of the Children's Act concerns “views of the child given due weight” which is dealt with below.

<sup>21</sup> 2012 (2) SA 208 (CC).

<sup>22</sup> See sections 5.2.1 and 5.4.3.

automatically provide for the opportunity to be heard. In order to ensure the hearing of the parties before any decision-making by the court, it is recommended that section 155(1) of the Children's Act be amended as follows:

“A children's court must decide the question whether a child who was the subject of proceedings in terms of section 47, 151, 152 or 154 is in need of care and protection provided that the child and his or her parents have been heard in person”.

### 6.3.2 Hearing of children below twelve-years-old in the Netherlands

Whereas in the Netherlands children above the age of twelve years old have to be heard on a matter affecting him or her before a presiding officer takes a decision, is the presiding officer who has discretion pertaining to younger children.<sup>23</sup> Due to the fact that children below the age of twelve are usually not invited for a hearing, they find it more difficult to have access to the courts. Since children these days are generally speaking more mature, it is recommended that the courts should make use of their discretion generously. This will ensure that a child who is able to express his or her views in a meaningful way, and wishes to do so, will be granted the right to be heard, even though he or she might be below the age of twelve.<sup>24 25</sup>

### 6.3.3 Due weight accorded to views of the child

Apart from hearing a child, preferably in person, Article 12 of the CRC also demands that the views of the child be “given due weight in accordance with the age and maturity of the child”.

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<sup>23</sup> See Article 809 of the Code of Civil Procedure, as discussed in sections 3.1.4.2 and 4.4.2.2.

<sup>24</sup> The latter implies that children should be made aware of the possibility to be heard. It is recommended that the relevant professionals should inform children of their right to participate or of the possibility of participating when the child is younger and such participation would be meaningful.

<sup>25</sup> The Committee on the Rights of the Child has emphasised that Article 12 of the CRC does not impose an age limit on the right of the child to express his or her views and discourages state parties from introducing age limits. See *General Comment No. 12 (CRC/C/GC/12)* of 20 July 2009, paragraph 21. In this respect it has been argued that the age-restriction in Article 809 of the Code of Civil Procedure be removed and replaced with a criterion based on maturity. As has been pointed out, this would place a burden on the court to first establish the maturity of the child, which is not appropriate. See also the discussion in section 5.2.2.

The latter phrase has not been qualified in section 10 of the Children's Act. Moreover, neither the Civil Code nor the Code of Civil Procedure contains any reference or guidance pertaining to the latter. It is submitted that this *lacuna* needs to be urgently addressed, since the affected parties are entitled to information on how the child's views have been taken into consideration in the decision-making process. It is therefore recommended that both countries include a specific provision in their legislation, which makes it imperative for the courts to take the views of the child into consideration.

As discussed above, Article 12(1) of the CRC does contain the two qualifiers; “age and maturity”.<sup>26</sup> Therefore, for South Africa, it is recommended that the following sub-section be included in section 10 of the Children's Act:

“(2) The views expressed by the child in accordance with subsection (1) must be given due consideration thereby having regard to the age and maturity of the child concerned. Where the decision is likely to have an adverse effect on the child, he or she is entitled to reasons in writing”.<sup>27</sup>

Pertaining to the Netherlands, the following wording could be included as a last sentence to Article 809(1):

“In de besluitvorming dient de rechter de mening van de minderjarige in overweging te nemen daarbij rekening houdende met de leeftijd en ontwikkeling van de desbetreffende minderjarige. Ingeval de beslissing bezwaarlijke consequenties heeft voor de minderjarige, is deze gerechtigd op een met redenen omklede beslissing”.<sup>28</sup>

The latter provision aims to provide the child (and his or her parents) with some insight into the decision-making process by the court, which might contribute positively to a co-operative

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<sup>26</sup> For a more detailed discussion, see section 2.2.1.6. With regard to South Africa and the Netherlands, see sections 3.1.4.1 and 3.1.4.2.

<sup>27</sup> For the proposed section 10(1) of the Children's Act, see page 725.

<sup>28</sup> In English: In the decision-making process the presiding officer is required to take the views of the child into consideration, thereby having regard to the age and maturity of the child concerned. Where the decision has an adverse effect on the child, the latter is entitled to reasons in writing.

attitude of the parties concerned.<sup>29</sup> Although it has been argued that the older and/or more mature the child concerned is, the more consideration should be given to the views of the child, which is in line with the evolving capacities of the child.<sup>30</sup> However, this does not imply that the views of a young(er) child may be disregarded as it should be reiterated that each child has the right to be taken seriously.<sup>31</sup> An open and interactive approach is recommended in this regard. The duty to provide reasons will contribute to a higher level of transparency, and moreover, may assist in an appeal, if necessary.

In addition, reference should be made to the fact that previously a more inquisitorial approach has been recommended in children's court proceedings, for the sake of expediency and the need of active fact finding.<sup>32</sup> The possible limited ability of the child<sup>33</sup> to participate may, to some extent, be compensated by the latter approach.

#### 6.3.4 Participatory models as an alternative

Although in the Netherlands family group conferencing is still expanding, it is evident that over the past decade an established practice has emerged.<sup>34</sup> It has been pointed out that family group conferencing provides a platform for children on the basis of which they form part of the process towards solution-finding. This kind of alternative mechanism empowers both children and their social network, which effects should not be underestimated. Due to the fact that family group conferences can be called for on short notice and on an *ad hoc* basis, they might even help to prevent a child becoming in need of care and protection<sup>35</sup> or

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<sup>29</sup> See also sections 2.2.1.6 and 3.1.4.

<sup>30</sup> See Article 5 of the CRC, as discussed in section 2.2.2.2. See also section 2.2.1.6.

<sup>31</sup> See also Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (2002) 165; Melton "Background for a general comment on the right to participate: Article 12 and related provisions of the Convention on the Rights of the Child" (2006) *Institute on Family and Neighborhood Life* 37-38.

<sup>32</sup> See section 5.2.2. See also Zaal who has indicated that in terms of section 50 of the Children's Act, presiding officers have a (limited) inquisitorial capability in children's court matters; in *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (LLD thesis 2008 University of Witwatersrand) 238 and 244.

<sup>33</sup> Due to age or a less developed maturity.

<sup>34</sup> See section 3.1.4.2.

<sup>35</sup> See "*Families voorkomen ondertoezichtstelling*", via [www.eigen-kracht.nl/nl/artikel/families-](http://www.eigen-kracht.nl/nl/artikel/families-)

prevent the removal of a child.<sup>36</sup>

Based on the aforementioned, it is recommended that collaboration between the organisation for family group conferencing (*Eigen Kracht*) in the Netherlands be established in South Africa; for example, the Centre for Child Law, a relevant NGO, Legal Aid, and/or the Department of Justice and Constitutional Development. On the basis of such collaboration a number of selected persons (across the board)<sup>37</sup> in South Africa might be able to attend training for independent co-ordinators.

It is recommended that the group be mixed with Dutch participants, which will benefit the experiences. In addition, a number of staff from *Eigen Kracht* could be invited to offer lectures and training in South Africa, which will result in the involvement of a larger group of persons, and therefore might be more effective.

## 6.4 Access to the courts and the ability to initiate legal proceedings

Reference was made to section 14 of the South African Children's Act 38 of 2005, which specifically provides that “[e]very child has the right to bring, and to be assisted in bringing, a matter to a court”. In both South Africa and the Netherlands children generally need to be assisted in bringing a matter to the court, via their parent(s) or guardian, a curator *ad litem* or a legal representative.<sup>38</sup> Although section 14 is a welcome provision, it has a limited effect, since a child still has to resort to the common law remedies.<sup>39</sup> Another aspect which

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voorkomen-ondertoezichtstelling, accessed on 13-10-2012.

<sup>36</sup> See the report “Eigen Kracht-conferenties bij gezinnen in de regio Amsterdam – Wat levert het op?” 2011 *Kalliope Consult/Antropol* 28.

<sup>37</sup> A wide range of persons is recommended, including social workers and community workers. It should be emphasised that no specific training or degree is required in order to become an independent co-ordinator in the Netherlands. The fact that any interested person in principle may attend the training to become an independent co-ordinator ensures that there is a wide pool of co-ordinators with different backgrounds available, which is commendable. However, since the training is quite involved, it can be said that it serves as a selection process.

<sup>38</sup> See sections 3.1.4 and 4.7.

<sup>39</sup> See Boezaart & De Bruin “Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate” 2011 (2) *De Jure* 437-438.

hampers access to the court is the fact that children are not sufficiently informed on how to obtain the necessary assistance when the parent(s) cannot or will not assist.

In the Netherlands, a general provision in the line of section 14 of the Children's Act does not exist, although earlier it was pointed out that a child in limited instances does have formal access to the court, and can thus act independently.<sup>40</sup> The fact that the topic “independent (formal) access of children to the courts” is under discussion in the Netherlands, is certainly commendable. In anticipation of future developments in this regard, it is recommended that a general provision in line with section 14 of the Children's Act be included in Book 3, Title 6 of the Dutch Code of Civil Procedure.

The wording in Dutch could be formulated as follows:

“In zaken betreffende minderjarigen, heeft de minderjarige het recht om de kinderrechter te verzoeken een beschikking te geven in een zaak welke rechtstreeks betrekking heeft op de desbetreffende minderjarige”.

In the meantime, and in the absence of the aforementioned independent capacity to approach the court, more publicity is required to increase the awareness with regard to the appointment of a curator *ad litem*/special curator or a legal representative, and how to obtain the assistance thereof. It should be emphasised that this is relevant for both South Africa and the Netherlands. Children, parents, members of the legal fraternity and professionals in the field of care and protection should become fully aware of the important role of a curator *ad litem*,<sup>41</sup> and should assist children in accessing these services. In addition, more training of relevant professionals is required to ensure the optimal functioning of these services, which will contribute to the realisation of the rights of children.

It is submitted that children should have easy access to legal services or be assisted in

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<sup>40</sup> See section 5.3.6.

<sup>41</sup> Relevant professionals, for example social workers and professionals providing legal advice, should assist a child in this respect. In the Netherlands more publicity is needed pertaining to the possible appointment of a special curator in terms of Article 1:250 of the Civil Code; see “De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk” (2012) *De Kinderombudsman* 49. See also section 3.1.4.2.

obtaining the required assistance. Moreover, it is recommended that comparative research be conducted in order to establish to what extent, and how other countries have provided for independent access to the courts for children. It is evident that in this respect the role of Legal Aid needs to be considered in order to establish how this could be synchronised with independent access to the court. Based on this research it may be ascertained whether or not the latter will be feasible or desirable in South Africa and/or the Netherlands.

## **6.5 Matters relating to the child in need of care and protection**

Firstly, section 68 of the South African Children's Act states that if it comes to the attention of the clerk of the children's court that a child may be in need of care and protection, he or she has the duty to refer the matter to a designated social worker for investigation in terms of section 155(2). This means in effect that the clerk must refer the matter on his or her own accord without first having to obtain the permission from the children's court. Although it may be considered a formality, the subsequent investigation will impact on the child and family concerned. Therefore it is recommended that such referral would be subject to the approval of the children's court to whom the clerk is attached.

Section 68 would thus read as follows:

"If it comes to the attention of the clerk of the children's court that a child may be in need of care and protection, the clerk must refer the matter to a designated social worker for investigation in terms of section 155(2), after having obtained the necessary approval by the relevant children's court".

## **6.6 Decision-making process by the children's court**

Before resorting to the most drastic form of interference, namely the removal of a child, the children's court needs first to consider less intrusive options. This approach is not only in line with the international instruments but is also contained in the care and protection

legislation and practice in South Africa and the Netherlands.<sup>42</sup>

### 6.6.1 Prevention and early intervention

It has been pointed out that the statutory basis for prevention and early intervention programmes is strong in South Africa, which, theoretically speaking, has a lot of potential in preventing the removal of a child. However, the success of the implementation thereof is dependent on a number of factors; among others, the awareness and attitude of the relevant professionals and budget related considerations. Therefore it is recommended that the professionals in the care and protection arena be sufficiently trained in order to be able to value and prioritise the option of prevention and early intervention, thereby possibly avoiding the removal of the child.<sup>43</sup>

In addition, before making an order pertaining to the removal of a child in terms of section 156 of the Children's Act, a presiding officer needs to be aware of the possibility of section 148. On the basis of the latter, the court may order, among others, an early intervention programme instead of the removal of the child, which is commendable. As has been pointed out, neither section 156 nor section 157, which both deal with considerations pertaining to removal orders, refer to section 148.<sup>44</sup> This poses the risk that section 148 will be overlooked, whilst it has enormous potential in preventing the removal of a child. Therefore it is recommended that in the first sentence of section 156(1) reference is made to section 148 and thus should read as follows:

“If a children's court finds that a child is in need of care and protection the court may, after having considered section 148, make any order which is in the best interests of the child [...]”.

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<sup>42</sup> See the discussion on prevention and early intervention in sections 4.2 and 4.2.1 and the discussion on assistance in child rearing responsibilities in the Netherlands in section 4.2.2. Moreover, the grounds for removal are clearly stipulated in the applicable legislation; see section 5.2 and further.

<sup>43</sup> Section 144(1)(a), (b)-(e) and (i). See section 4.2.1.

<sup>44</sup> It was pointed out that section 148 forms part of chapter 8 of the Children's Act, which deals with prevention and early intervention services, whilst the sections 156 and 157 are situated in chapter 9, The child in need of care and protection, which construction lacks clarity.



Pertaining to the Netherlands, it is recommended that a wider variety of prevention and early intervention programmes be developed, for which Chapter 8 of the South African Children's Act may serve as a guideline.

### 6.6.2 Towards non-violent forms of domestic discipline

Whilst it has been outlined that every child has the right not to be subjected to neglect, abuse or degradation,<sup>45</sup> it is evident that there is a need to prioritise the prevention thereof. Although section 144(b) was discussed in the context of (and is thus linked with) prevention and early intervention in South Africa, it has the potential to effect change pertaining to domestic discipline, which is necessary in South Africa.<sup>46</sup>

The latter section provides for parenting skills programmes which focus on the promotion of positive, non-violent forms of discipline, which should include corporal punishment.<sup>47</sup>

Although it is submitted that a provision in the line of clause 139 of the Amendment Bill<sup>48</sup> is necessary in South Africa,<sup>49</sup> it might, for the time being, from a strategic point of view, be more feasible to include the following provision in the definition of "care" in section 1(1). This could be formulated as follows:

"The person(s) holding parental responsibilities and rights in respect of a child and other care-givers have the duty to ensure the safety and psychological and physical well-being of the child whilst in their care. They are obliged to refrain from any psychological or physical force

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<sup>45</sup> See the Articles 19 of the CRC and 16 of the African Children's Rights Charter, which both aim to protect children from all forms of harm. For a discussion on the international/regional and national provisions, see sections 2.2.2.5 and 4.3.

<sup>46</sup> See the discussion on domestic discipline in South Africa in section 4.2.1.

<sup>47</sup> See also section 4.2.1 on prevention and early intervention in South Africa.

<sup>48</sup> See Children's Amendment Bill [B19F-2006 (Reprint)]. For a more detailed discussion, see section 4.2.1.

<sup>49</sup> For a discussion on the issue of domestic discipline and the occurrence of crime and violence in South Africa, see section 4.2.1.

or any other humiliating treatment”.<sup>50</sup>

The latter provision is comparable to Article 1:247(2) of the Dutch Civil Code. It should be emphasised that the statutory duty to refrain from any form of violence or degradation should not merely rest on parents only. Due to the fact that many children do not live with their parent(s), it is crucial that this duty extends to all relevant persons forming part of the child's daily environment. It is recommended that the above provision be included under the heading “co-exercise of parental responsibilities and rights”, as section 30A, for reasons of visibility, thereby ensuring general awareness of the provision and its contents.

### **6.6.3 Family-based solutions in the context of early intervention in the Netherlands**

Pertaining to the Netherlands, the Committee on the Rights of the Child has indicated that although services for families and children are widely available in the Netherlands, there has been a problem relating to waiting lists and sufficient family-based services to ensure prevention and early intervention at a local level. In this respect it is promising that family group conferencing in the past decade has already made a significant contribution in so-called “network-based care and assistance”.<sup>51</sup>

In providing an opportunity to solution-seeking by the network surrounding a child in need of care and protection and his or her parents, the action plans as drafted will assist in reducing waiting lists in the field of youth care. It is therefore recommended that sufficient funding be allocated to local government in order to encourage family group conferencing and to support upcoming network-based alternatives like, for example, family coaches who provide families with the necessary support and assistance.<sup>52</sup> It is suggested that South Africa can learn from experiences in the Netherlands in this regard. A South African delegation (Social Development, Justice, interested academics and NGOs) could meet with the relevant organisations in the Netherlands in order to find out how these initiatives are implemented in

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<sup>50</sup> This would be in line with *General Comment No. 13* (CRC/C/GC/13 of 2011). See also section 4.3.1.2.

<sup>51</sup> See also section 6.3 on participation.

<sup>52</sup> See also section 4.2.2.

the Netherlands and to create a formula which will be feasible for South Africa,

#### 6.6.4 Consideration of reports

As outlined previously,<sup>53</sup> the court is obliged to, *inter alia*, consider the report of the social worker which should contain details of family preservation services which have been considered or attempted. However, although it can be derived from the phrase “family preservation services” that it revolves around prevention and early intervention programmes, it has not been defined in the definition provision of the Children's Act, and therefore lacks clarity and consistency.<sup>54</sup>

It is therefore recommended that section 157(1)(a)(ii) be amended<sup>55</sup> and formulated as follows:

“Before a children's court makes an order in terms of section 156 for the removal of the child from the care of the child's parent or care-giver, the court must –

- (a) obtain and consider a report by a designated social worker on the conditions of the child's life, which must include -[...];
- (ii) details of any prevention and/or early intervention services in terms of sections 143 and 144 which have been attempted or rendered, and the results thereof”.<sup>56</sup>

In addition, at present section 157(1)(a)(ii) states that the court must obtain and consider a report of the social worker which includes details of family preservation services “that have been considered”. Due to the seriousness of the matter, which possibly might result in the child's removal, it is submitted that the phrase “services that have (merely) been considered”, without having attempted to practically implement such services, will not suffice

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<sup>53</sup> See section 5.3.1.1.1.

<sup>54</sup> Section 1(1).

<sup>55</sup> See also the discussion in section 5.4.3.

<sup>56</sup> The current subsections (ii) and (iii) should be retained, but the numbering will change.

in this regard, and therefore the word “considered” should be deleted.

## 6.7 Children's court orders and forms of placement

Both South Africa and the Netherlands have a detailed set of substantive and procedural provisions relating to children in need of care and protection, supervision measures, and the temporary removal of a child, if so required.

### 6.7.1 A distinction between child protection measures and specific placement orders for South Africa

One of the innovations of the Children's Act has been the extensive range of court orders which the children's courts have to their disposal. It has been pointed out that both sections 46 and 156 provide for court orders, which partially overlap.<sup>57</sup> It is submitted that this should be more streamlined. It is therefore firstly recommended that the provisions relating to the various court orders, the duration thereof, and remedies, be grouped together in one separate chapter.<sup>58</sup>

In addition, in order to prevent overlap of provisions, which lacks clarity, section 46 should provide for general orders, whilst section 156 specifically provides for various forms of placement.<sup>59</sup> Other provisions could be relocated elsewhere.<sup>60</sup> Due to the seriousness of the removal and subsequent placement, it is submitted that the latter should only be ordered when a child is found to be in need of care and protection in terms of section 150. In other words, the placement related orders should be removed from section 46 and should be placed together in section 156.

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<sup>57</sup> See section 4.5.1.

<sup>58</sup> In other words, it is recommended that the sections 45, 46, 48, 51, 156, 157, 158 and 159 be grouped together in a separate Part or Chapter, with cross references to the chapter on children in need of care and protection.

<sup>59</sup> Compare with the Netherlands, see the discussion in section 4.5.2 and further.

<sup>60</sup> For example, 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; instructing that a person be removed from the child's home; see the present section 46(1)(h)(vii) and (ix).

The general provision, section 46, could be formulated as follows:

“A children's court may make any of the following orders which is in the best interests of the child,

- (a) 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;
- (b) 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;
- (c) a partial care order, instructing the parent or care-giver 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, on a non-permanent basis, which includes care in case of physical or mental disability or chronic illness;
- (d) a shared care order instructing different care-givers and/or a child and youth care centre to take responsibility for the care of the child at different times or periods, on a part-time basis;
- (e) a child protection order, which includes an order -
  - (i) giving consent to medical treatment of, or to an operation to be performed on, a child;

- (ii) 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;
  - (iii) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
  - (iv) 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;
  - (v) limiting access of a person to a child or prohibiting a person from contacting a child, as specified in the court order;
- (f) any other order which a children's court may make in terms of any other provision of this Act”.

The latter sub-paragraph provides for a measure of flexibility, which is important when some of the present sub-paragraphs are relocated elsewhere. The provision is meant to deal specifically with the placement after the child who has been removed from the family environment. Although the removal and placement is of a temporary nature, it is reserved for full-time placement; in other words, for day and night.<sup>61</sup> Therefore it is recommended that section 156 only contains orders pertaining to placement, and could be formulated as follows:

“Where a child has been found in need of care and protection, the children's court may, when this would be in the child's best interests, order the child to be placed -

- (a) on the basis of an alternative care order in
  - (i) temporary safe care;

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<sup>61</sup> This would coincide with the so-called “uithuisplaatsing” or placement in the Netherlands, see section 5.2.

- (ii) foster care, with a suitable foster parent or in cluster foster care
  - (iii) a child and youth care centre in terms of section 158 that provides a residential care programme suited to the child's needs;
- (b) 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) in terms of an adoption order, which includes an inter-country adoption order;
  - (d) in a facility designated for the care of children with disabilities or chronic illnesses, if the court finds that the child should be cared for in such facility on a full-time basis”.

It is submitted that for the purpose of clarity, the details pertaining to the various forms of care can be outlined in the specific sections providing for the respective forms of care. In other words, any detailed regulation pertaining to the placement in child and youth care centres should be placed in the relevant chapter, which *in casu* is chapter 13 of the Children's Act.

### **6.7.2 The inclusion of kinship care in the Children's Act**

Moreover, an appeal was made for the inclusion of kinship care in the Children's Act, as a form of alternative care.<sup>62</sup> In order to accommodate and to distinguish between the various forms of family resembling care, it is recommended that:

- (i) The term “foster care” only be used in the context of placement of a child with unrelated foster parents.
- (ii) Section 167 be amended in order to include court-ordered kinship care as a

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<sup>62</sup> See Skelton “Kinship care and cash grants: In search of sustainable solutions for children living with members of their extended families in South Africa” (2012) *The International Survey of Family Law* 333 and further. This is also in line with the *Guidelines for the Alternative Care of Children (A/RES/64/142)* of 24 February 2010, paragraph 28(b) and (c).

form of alternative care, which would become section 167(1)(d).

Since many children in South Africa are cared for by relatives who are in need of financial assistance, it is also recommended that:

- (iii) Informal kinship care be formally recognised, in connection with which a specific grant will be provided for in the Social Assistance Act,<sup>63</sup> namely the kinship care grant. This kinship care grant should be included in section 4 and further regulated in chapter 2 of the Social Assistance Act.

### 6.7.3 Contact and/or information after adoption

One of the novelties in the Children's Act is the so-called post-adoption agreement as provided for in section 234. It is commended that, if it is possible, contact be maintained after a child has been adopted.<sup>64</sup> However, apart from the lack of general awareness, it contains a specific limitation, which is cause for concern. Section 234 requires that the agreement has to be entered into before an application for the adoption of a child is made, which is too limiting. It might be that the parties have not concluded such an agreement, due to lack of awareness. Although section 23 of the Children's Act may bring some relief,<sup>65</sup> it is recommended that a provision similar to Article 1:229(4) of the Dutch Civil Code be included in the Children's Act.<sup>66</sup>

The following wording should be included in section 242 of the Children's Act; this provision could entail the following:

“When at the moment of the adoption the child has *de facto* contact with a parent regarding whom the family relations will cease to exist, the court may order that these parties will be

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<sup>63</sup> 13 of 2004. See Skelton (2012) in *The International Survey of Family Law* 343.

<sup>64</sup> It is also very welcome that the child in principle is required to give consent when he or she is able to understand the implications of the agreement; see section 234(2). See also the discussion in section 5.3.5.

<sup>65</sup> In terms of section 23 the court may assign contact (and care) to an interested party.

<sup>66</sup> The latter provision deals with the effect of an adoption order.



entitled to maintain contact with one another, which will be provided for in the court order”.

The advantage of such a provision is that the court will still determine whether contact will be in the best interests of the child concerned and that there are no formalities to comply with in terms of an agreement between the biological parents of the child and the adoptive parents.

#### **6.7.4 “Measure of last resort” explicitly included in the legislation**

In Chapter 5 it was highlighted that on the basis of section 158(1) of the Children's Act, the children's court has the discretion to order residential care, but only “if another option is not appropriate”. It was argued that since the latter phrase is too vague and cannot be equated with the standard of “a measure of last resort”,<sup>67</sup> it was recommended that section 158(1) be amended.<sup>68</sup>

It was also pointed out that in the Netherlands the criterion “as a measure of last resort” is not explicitly mentioned in the Civil Code. Although it could be argued that the Netherlands is (indirectly) in compliance with the criterion of “measure of last resort”,<sup>69</sup> it was nevertheless recommended that, with regard to the Bill for the revision of the measures of child protection, the criterion be explicitly included in the legislation.

Therefore the first sentence of Article 265d(1) of the Bill would read as follows:

“Indien dit noodzakelijk is in het belang van de verzorging en opvoeding van de minderjarige

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<sup>67</sup> See section 5.3.1.2. For a more detailed discussion on the principle “measure of last resort”, see section 5.1.2.

<sup>68</sup> The recommended text has been formulated as follows: “A children's court may issue an order placing a child in the care of a child and youth care centre only as a measure of last resort and after it has been established by the court that another option is not appropriate”, see section 5.3.1.2.

<sup>69</sup> Reference was made to the fact that the authorisation for the removal of a child is usually given in the context of a supervision order in terms of Article 1:254. One of the criteria in the latter provision demands that only where it is evident that “other measures to avert the threat have failed or expectedly will fail”, the children's court may impose such measure. Therefore, on the basis of the Articles 1:261 and 254, read in conjunction with each other, combined with legal practice and the jurisprudence of the *Hoge Raad*, it can be concluded that deprivation of liberty will be considered as a measure of last resort.

of tot het onderzoek van diens geestelijke of lichamelijke toestand, kan de kinderrechtster, als uiterste maatregel,<sup>70</sup> de stichting op haar verzoek machtigen de minderjarige gedurende dag en nacht uit huis te plaatsen”.<sup>71</sup>

## 6.8 Duration of court orders

Whereas in South Africa orders pertaining to children in need of care and protection may be valid for a maximum of two years, in the Netherlands these orders need to be extended on a yearly basis. In this respect the following should be noted.

According to section 156(3)(b), a court order made in terms of section 156(1) may be reconsidered by a children's court “at any time”, and be confirmed, withdrawn, or amended as may be appropriate. Although this provision is very welcome, it begs the question as to who may file such a request; the child, her or his parents, or jointly? At present it is evident that the parents or care-giver may file the request in terms of section 156(1). The child, however, needs to be assisted in this regard. This matter overlaps with the topic “access to the courts and the ability to initiate legal proceedings”, or rather, the inability to do such. In the absence of a child's capacity to approach the court independently, more publicity is required to increase the awareness pertaining to a curator *ad litem* and how to obtain the assistance thereof.<sup>72</sup>

### 6.8.1 Periodic review for both South Africa and the Netherlands

Due to the far-reaching consequences of removal and placement, regular review of such a decision is necessary in order to establish whether the needs of the child have changed or the situation at home has improved. In the latter case it could mean that the child, shortly or within a reasonable time, could return home.

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<sup>70</sup> In other words, as a measure of last resort.

<sup>71</sup> When necessary, in the interests of the care and upbringing of the child or with regard to the examination of his or her psychological or physical state, the children's court may, as a measure of last resort, grant the Bureau for Youth Care authorisation for the removal (and placement) of the child for day and night.

<sup>72</sup> See also section 6.4 above.

Therefore, a child who has been placed in alternative care, including temporary care, foster care, residential care and adoption, should be automatically entitled to a periodic review of such placement with six-month intervals, or at least half-way through the placement as may be determined by the court, from the date of making the initial placement order. The child, the parents, and/or other interested parties should be given the opportunity to express their views in the matter. Since the right to a periodic review of the placement is neither provided for in the South African Children's Act nor in the Dutch Civil Code of Procedure, it is recommended that an explicit provision be included in the legislative documents of both countries.<sup>73</sup>

For South Africa, periodic review could be included as a separate sub-section in section 159, which deals with the duration and extension of orders, and could read as follows:

“When the order results in the placement of the child, the child has the right to a periodic review of the placement and the treatment, every six months or earlier as determined by the court, as from the date of the initial placement order”.

For the Netherlands, it is recommended that a specific provision be included in Book 3, Title 6 of the Code of Civil Procedure, which could read as follows:

“Iedere beschikking betreffende de uithuisplaatsing van de minderjarige, geeft de desbetreffende minderjarige het recht op periodieke evaluatie betreffende diens opvang, begeleiding en behandeling. Zulks zal plaatsvinden ieder half jaar of eerder zoals vast te stellen door de rechter”.<sup>74</sup>

### **6.8.2 Compensation for an unjustified removal and placement of a child**

A child who has been prejudiced by a placement order, which has subsequently been established by a court to have been unlawful, shall have an enforceable right to

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<sup>73</sup> For a more detailed discussion on periodic review, see section 4.7.

<sup>74</sup> Every order which results in the removal and placement of a child, creates an entitlement for the child to the periodic review of the care, supervision and treatment. This will take place every six months, or earlier as may be determined by the court.

compensation. It is recommended that a specific provision be enacted for both South Africa and the Netherlands. The following is suggested for inclusion in the provisions dealing with placement orders, which would be section 156 of the Children's Act.

“In case it becomes apparent that the removal and subsequent placement of a child have been unlawful, the court may upon request and at state expense, award compensation to the child for his or her deprivation of liberty”.

With regard to the Netherlands, reference was made to the suggestion that Article 89 of the Code of Criminal Procedure could serve as a guideline in this respect.<sup>75</sup> Therefore, the following provision could be explicitly included in the Code of Civil Procedure, which could be formulated as follows:

“Ingeval de afgifte van de machtiging voor een uithuisplaatsing onrechtmatig blijkt en tenuitvoer is gelegd, kan de rechter op verzoek van de desbetreffende minderjarige, hem of haar een vergoeding ten laste van de Staat toekennen voor de schade welke de minderjarige tengevolge van de uithuisplaatsing heeft geleden. Onder schade is begrepen het nadeel dat niet in vermogensschade bestaat”.

## 6.9 Training and publicity on children's rights

Although five years have passed since the Children's Act came into operation, it is submitted that professionals in the field of care and protection need (ongoing) training with regard to the legislative innovations brought by the Children's Act. This applies to social workers, family advocates, lawyers and officers of the court across the board. Professionals need to be well-informed about the options of care, and the preparation and assessments of individual cases, in order to adequately respond to the needs of the children they deal with.

Thorough knowledge and insight is required to give effect to court orders, and ultimately to ensure that the child's interests are served best. In addition, it is recommended that the various professionals become familiar with each other's field of expertise, which might

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<sup>75</sup> See also Forder & Olujić in Forder *et al.* (eds.) *Kindvriendelijke Opsluiting – Gesloten Plaatsing van Jeugdigen in het Licht van Mensenrechten* (2012) 46.

improve the level of mutual understanding and co-operation. Moreover, children and the public at large need to become better informed about the contents of the CRC, which call for immediate action on the side of the government in both South Africa and the Netherlands.

National and regional publicity campaigns in the media will ensure that a large part of the population is reached. However, these actions are necessary at regular intervals in order to ensure that children's rights become inherently part of social life and are implemented in society across the board. In addition, children's rights should form part of the school curriculum at primary level in both South Africa and the Netherlands. This requires adequate training of school managers, teaching staff, and curriculum development teams in the Education Department.

## 6.10 Towards ensuring the realisation of children's rights

In order to improve the realisation of children's rights, monitoring processes are called for. This is/can be done by the establishment of the Children's Ombudsman. Although the *Kinderombudsman* in the Netherlands has been in office (only) since 1 April 2011, it has made its mark already. Research has been conducted, and news on children's rights is regularly made available via the website of the *Kinderombudsman*.<sup>76</sup> Above, the importance of the right of children to complain effectively has been outlined.<sup>77</sup> Since the *Kinderombudsman* may receive complaints from children, this office has a crucial function in the protection of children and the realisation of their rights. Therefore the office should be readily accessible and a speedy response and action, if required, is necessary.

Although the latter is important for all children, it is even more important for children involved in child care and protection cases, and especially for children who have been removed from their families and placed elsewhere. In order to improve the monitoring of children's rights in South Africa, it is recommended that the office of the Children's Ombudsman be established as a matter of urgency. In addition, an umbrella organisation, similar to the *Kinderrechten*

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<sup>76</sup> See the report "De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk" (2012) *De Kinderombudsman*. The website is [kinderombudsman.nl](http://kinderombudsman.nl)

<sup>77</sup> See section 5.3.6 and further.

*Collectief* in the Netherlands is recommended. This would consist of a conglomerate of NGO's/civil organisations which can join hands in order to monitor the progress pertaining to the actual/effective realisation of children's rights in South Africa (or delays thereof) and to act as a watchdog with regard to the occurrence of possible infringements of children's rights.

It is submitted that the Children's Institute at the University of Cape Town<sup>78</sup> and the Centre for Child Law at the University of Pretoria,<sup>79</sup> as well-established centres could play a major role in identifying and mobilising the various role-players.

## 6.11 Conclusion

All children are entitled to the rights as provided for in the international and regional documents. However, these are merely standards which state parties have to adhere to in order to ensure the protection of children and the enhancement of their rights. The practical implementation of these valuable standards lies to a large extent with the various societies and the people who form part thereof. The children's rights documents are meant as an instruction to everyone in society; which includes parents, families, teachers, social workers, psychologists, police, medical professionals, lawyers, presiding officers, and last but not least, the children themselves.<sup>80</sup>

However, a *conditio sine qua non* is that all persons involved need to be aware, or have been made aware, of these rights.<sup>81</sup> This applies to adults and children alike, and state parties have a duty to realise this.<sup>82</sup> In order to monitor the progress of state parties, the

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<sup>78</sup> [www.ci.org.za](http://www.ci.org.za).

<sup>79</sup> [www.centreforchildlaw.co.za](http://www.centreforchildlaw.co.za).

<sup>80</sup> See "Jongerenrapportage over kinderrechten in Nederland 2012" 2012 *Kinderrechtencollectief* and *NJR* 44.

<sup>81</sup> According to Defence for Children International, the Dutch youth is less informed about their rights compared with previous years. The general awareness has moved from 62% in 2002 to 30% in 2007, and decreased further to 19% in 2012, which is cause for concern. See the newsletter of Defence for Children International "Jongeren spreken zich uit over kinderrechten in Nederland" of 14 June 2012, available at <http://www.defenceforchildren.nl/p/21/2441/mo89-mc21/mo45-mc52>, accessed on 22-6-2012.

<sup>82</sup> See the Articles 42 and 44(6) of the CRC.

work of the Committee on the Rights of the Child is indispensable. In addition, the appointment of Sloth-Nielsen to the Committee of Experts looks promising for the implementation of the African Children's Rights Charter.<sup>83</sup> The realisation of the office of the *Kinderombudsman* in the Netherlands has been highlighted already, and it is hoped that South Africa will follow suit in the near future.

On the basis of the above comparative legal analysis, it can be said that both South Africa and the Netherlands are, generally speaking, on the right track with regard to the implementation of the standards as provided for in the international/regional documents. Although the progress which has been made in the past decade should be acknowledged, it has to be realised that at the same time the quest to improve the protection of children and the enhancement of their rights continues.

As pointed out, there are various aspects which require the attention of the respective legislatures and/or courts.<sup>84</sup> For the sake of the already vulnerable group of children who are in need of care and protection, it is recommended that the Committee on the Rights of the Child increase the bar for compliance with the standards as time passes, thereby having regard for the (limited) resources of developing countries, like South Africa.

In so doing, state parties will be kept on their toes, and be internationally pressurised to deal with the care and protection cases in an appropriate manner, thereby being obliged to adhere to the standards set. The reporting duty will remind state parties continuously of their duty to protect and safeguard the interests of children, to which they submitted themselves in 1995. The participation of children, the full utilisation of alternatives in care and protection proceedings, and the development of a wider variety of alternatives in care, should be high on the agenda of legislatures and policy makers; both in South Africa and the Netherlands. In addition, it is hoped that apart from the important contributions of the Committee on the

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<sup>83</sup> See "African Children's Rights Charter: Prof Sloth-Nielsen, African Committee of Experts, briefing", Parliamentary Monitoring Group, available at [www.pmg.org.za/report/20111116-department-women-children-and-persons-disabilities-sadc-gender-protoc](http://www.pmg.org.za/report/20111116-department-women-children-and-persons-disabilities-sadc-gender-protoc), accessed on 9-10-2012.

<sup>84</sup> For example, to ensure the direct hearing of children in matters affecting them and that the child's views are taken into consideration. Moreover, instead of formal procedures, preference should be given to a more child-friendly approach in which the child is not only able to participate in a meaningful way, but that he or she forms part of the solution-finding process.

Rights of the Child and of the European Court for Human Rights, the soon be expected communications procedure will enhance the rights of all South African and Dutch children even further.<sup>85</sup>

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<sup>85</sup> As well as all children in the other state parties to the CRC.



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## LIST OF ABBREVIATIONS

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### Journals

<i>AHRJ</i>	African Human Rights Journal
<i>CILSA</i>	Comparative and International Law Journal of South Africa
<i>DJ</i>	De Jure
<i>FJR</i>	Tijdschrift voor Familie- en Jeugdrecht
<i>HRLJ</i>	Human Rights Law Journal
<i>IJCR</i>	International Journal of Children's Rights
<i>IJLF</i>	International Journal of Law and the Family
<i>JAL</i>	Journal of African Law
<i>JJS</i>	Journal for Juridical Science
<i>NJB</i>	Nederlands Juristenblad
<i>NJCM</i>	Nederlands Juristen Comité voor de Mensenrechten (Bulletin)
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>TSAR</i>	Journal of South African Law from the Faculty of Law at the University of Johannesburg
<i>WPNR</i>	Weekblad voor Privaatrecht, Notariaat en Registratie

## Law Reports

All SA All South African Law Reports

BCLR Butterworths Constitutional Law Reports

EHRR European Human Rights Reports

NJ Nederlandse Jurisprudentie

RvdW Rechtspraak van de Week

SA South African Law Reports

## Other

A-G Advocaat-Generaal

AIDS Acquired Immune Deficiency Syndrome

AJ Acting Judge

AMK Advies- en Meldpunt Kindermishandeling

AWBZ Algemene Wet Bijzondere Ziektekosten

Bjj Beginselenwet justitiële jeugdinrichtungen

Bjz Bureau jeugdzorg

BW Burgerlijk Wetboek

CBS Centraal Bureau voor Statistiek

CI Children's Institute (University of Cape Town)

CJ Chief Justice

Constitution Constitution of the Republic of South Africa

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women (United Nations)

CRC	Convention on the Rights of the Child (United Nations)
DCI	Defence for Children International
ECHR	European Court for Human Rights
ECPAT	End Child Prostitution, Child Pornography and the Trafficking of Children for sexual purposes (Independent organization, merged with DCI since 2003)
EVRM	Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden
GG	Government Gazette
GN	Government Notice
GW	Grondwet
HIV	Human Immune Deficiency Virus
Hof	Gerechtshof (Court of Appeal)
HR	Hoge Raad der Nederlanden (Supreme Court of the Netherlands)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
J	Judge
JA	Judge of Appeal
JIN	Jurisprudentie in Nederland
JJI	Justitiele Jeugdinrichtingen
JOL	Jurisprudentie Online
JP	Judge President
LJN	Landelijk Jurisprudentie Nummer

MEC	Member of the Executive Council (Province)
NGO	Non-governmental Organisation
OM	Openbaar Ministerie
Rb	Rechtbank, Arrondissements rechtbank (district court)
Rv	Wetboek van Burgerlijke Rechtsvordering
RvdK	Raad voor de Kinderbescherming
RvS	Raad van State
SA	South Africa or South African
SALC	South African Law Commission
SALRC	South African Law Reform Commission
Sr	Wetboek van Strafrecht
Stb	Staatsblad van het Koninkrijk der Nederlanden
Sv	Wetboek van Strafvordering
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNICEF	United Nations Children's Education Fund
VWS	Volksgezondheid, Welzijn en Sport
Wjz	Wet op de Jeugdzorg
Wet BOPZ	Wet Bijzondere Opnemingen in Psychiatrische Ziekenhuizen
WMO	Wet Maatschappelijke Ondersteuning