

CHAPTER 3

GUARDIANSHIP, CUSTODY AND ACCESS: CURRENT DEFINITIONS AND INTERPRETATIONS OF THESE CONCEPTS

3 1 INTRODUCTION

In this chapter the concept of parental authority will be defined. In order to do this, international conventions governing the parent-child relationship will be explored. The current nature and content of parental authority in South Africa will also be examined and the paradigm shift from parental rights to parental responsibilities will be dealt with. The child's right to a family will be considered. Maintenance or the duty of support, as part of parental rights and responsibilities will also be explored. Lastly, the concepts of guardianship, custody and access will be examined in detail. The current definitions of guardianship, custody and access will be discussed and the development and interpretation of these concepts in South African law will also be explored.

The fact that the child's best interests¹ are now of paramount importance in every matter affecting the child, including guardianship, custody and access determinations, will be made clear in this chapter. Throughout this chapter the development of the South African legal system, most notably from a system that focused on the rights of parents to a system that emphasises the rights of children and places the welfare of children first, can be seen. During this

¹ The concept of the best interests of the child will be discussed in par 5 below.

discussion it will also become clear that the interpretation and application of the law relating to guardianship, custody and access, has at times been done well – with consideration of the future as well as the current views of society – whereas at other times this has not been the case.

3 1 1 The concept of parental authority

Parental authority refers to the rights and duties that vest in a parent.² Visser and Potgieter³ define parental authority as:

“the sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interests of such children and with due regard to the rights of the children.”

² Robinson “Children and Divorce” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 68. Traditionally parental authority is largely determined by common law, although legislative provisions are enacted from time to time.

³ *Introduction to Family Law* (1998) 199, this definition is a combination of the definitions of parental authority by Spiro and Lee and Honoré. Spiro *The Law of Parent and Child* (1985) 36 refers to parental power as “the sum total of rights and duties of parents in respect of minor children arising out of parentage”. Lee and Honoré *Family Law, Things and Succession* (1983) par 137 state that parental power should not be exercised for the benefit of the parent but must be exercised in the interest of the minor child. Robinson “Children and Divorce” in Davel (ed) 68 *Introduction to Child Law in South Africa* defines parental authority “as the sum total of rights and obligations which parents enjoy in relation to their (legitimate) child, the child’s estate and the administration thereof, and it includes assisting the child in legal proceedings”. Cronjé and Heaton *South African Family Law* (2004) 265 state that: “[p]arental authority or parental power refers to the rights, powers, duties and responsibilities parents have in respect of their minor children and those children’s property.”

Traditionally the term parental power⁴ was used instead of parental authority. Recently the term parental authority⁵ has been favoured.⁶ The Children's Act, once in force, will replace this with the term parental responsibility.⁷ Parental authority consists of guardianship, custody and access⁸ as well as the duty to maintain and to apply moderate corporal chastisement.⁹ Parental authority must not be exercised for the benefit of the child's parents but must always be exercised in the best interests of the child.¹⁰

⁴ *H v I* 1985 3 SA 237 (C); Spiro 36. Clark "From Rights to Responsibilities? An Overview of Recent Developments Relating to the Parent/Child Relationship in South African Common Law" 2002 *CILSA* 216, 217, calls the term parental power "outdated and unsatisfactory". Her viewpoint should be supported because the term parental power is indicative of a time when parental power was emphasised, instead of parental responsibility. The paradigm shift from parental power to parental responsibility is discussed in par 3 1 1 3 below.

⁵ *B v S* 1995 3 SA 571 (A).

⁶ See the discussion of the shift from parental power to parental authority at par 3 1 1 3 below and the sources referred to there.

⁷ For an explanation of this aspect see the South African Law Commission Discussion Paper *The Parent-Child Relationship* Project 110 as well as the discussion of the proposed new term parental responsibility in ch 4 and the discussion of the paradigm shift from parental power to parental responsibility in par 3 1 1 3 below. The SALC Issue Paper 13 *Review of the Child Care Act* First issue paper Project 110 (18 April 1998) looked at the changes taking place in South African law, with reference to the parent-child relationship. This aspect is discussed in ch 4. The comparative law dealt with by the Commission is dealt with in ch 5.

⁸ These concepts will be discussed individually below at pars 3 2, 3 3 and 3 4.

⁹ Van Heerden *et al* *Boberg's Law of Persons and the Family* (1999) 313; Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41. Van Heerden refers to parental authority as "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". Van Schalkwyk in Davel (ed) 41 says that parental authority has the following components: "(a) control of the person of the child (called custody); (b) control over the child's estate (called guardianship); (c) control over the child's legal action(s) (called guardianship); (d) the entitlement to appoint guardians for the child; and (e) the right of access to the child." He also states in Davel (ed) (41–42) that control over the person of a child means providing the necessities of life (shelter; food; clothing; medical care and education). The maintenance duty exists even if the parent has no parental authority over the child. See further the discussion of maintenance in par 3 1 1 5 below and children born out of wedlock in par 3 2 2 3 and 3 3 3 3 below.

¹⁰ S 28(2) of the Constitution of the Republic of South Africa Act, 1996. Clark 2002 *CILSA* 218 defines parental authority as "a complex set of rights, duties and responsibilities always to be performed in line with the paramount best interests of the child. It includes both guardianship and custody". The best interests of the child will be discussed in detail in par 3 5 below. Children below the age of 7, *infantes*, have no capacity to act. Their parents must act on their behalf. Children aged 7 to 21 have limited capacity to act. Their parents or guardians assist them to enter into contracts. The guardian can assist the minor by entering into the contract on the minor's behalf, giving consent to the minor to enter into the contract,

In the matter of *B v S*¹¹ it was stipulated that a parent's right cannot be enforced where it conflicts with the child's welfare.

There have been few attempts made to explain the legal nature of parental authority. The following three viewpoints exist.¹² Firstly, that parental authority can "be described as an office in the nature of a trust"¹³ because parental authority is concerned more with duties than powers. Secondly, parental authority is seen as "a competency ... awarded to parents by the law in objective sense".¹⁴ A competency can be said to be a competency to take part in legal traffic. This concept is distinguished from the concept "power", "which can be defined as that which a legal subject may do (as is entitled to do) with the legal object by virtue of his or her subjective right".¹⁵ Thirdly, the nature of parental

or ratifying the agreement after the minor has concluded it: Cronjé and Heaton *The South African Law of Persons* (2003) 77, 89. For a discussion of the minor's capacity to act, see 88–94. The age of majority will be lowered to 18 in the Children's Bill: see ch 4. Minority is terminated when the minor reaches the age of 21, when a minor enters into a valid marriage or when a minor applies to the High Court to be declared a major in terms of s 2 of the Age of Majority Act 57 of 1972: Cronjé and Heaton 95–96. It is submitted that the declaration of a minor to be a major in terms of the Age of Majority Act has replaced *venia aetatis* and release from tutelage: Cockrell in Van Heerden *et al Boberg's Law of Persons and the Family* 469; Cronjé and Heaton 96.

¹¹ 1995 3 SA 571 (A).

¹² Kruger "The Legal Nature of Parental Authority" 2003 *THRHR* 277.

¹³ Kruger 2003 *THRHR* 277. This viewpoint is also found in Van Heerden *et al* 592.

¹⁴ Kruger 2003 *THRHR* 277–278. This viewpoint is found in Van der Vyver and Joubert *Persone- en Familiereg* (1991) 592 and Joubert *Grondslae van die Persoonlikheidsreg* (1953) 120. Kruger 278, explains the relationship between the law in subjective and objective, also called normative or positive, sense as follows: "While the law in objective sense is a system of rules and norms, the law in subjective sense is a system of relations between members of the community. The system of norms forms the law in objective sense, while the system of relations between members of the community forms the law in subjective sense. In terms of the law in subjective sense, a legal subject has a right to a legal object, as well as against other members of the community." See also Du Plessis *An Introduction to Law* (1999) 130.

¹⁵ Kruger 2003 *THRHR* 278.

authority can be explained with reference to the doctrine of subjective rights. According to this doctrine:

“all legal subjects have subjective rights. Every subjective right is characterised by a dual relationship: firstly, the relationship between the legal subject and the object of the right; secondly, the relationship between the legal subject and all other persons. The subject-object relationship provides the legal subject with the powers of enjoyment, use and disposal in respect of a legal object. The contents of these powers is determined by the norms of the law in an objective sense. The subject-subject relationship implies that the legal subject may enforce his or her powers over a legal object against all other legal subjects and that a duty rests on all other legal subjects not to infringe upon the subject-object relationship.”¹⁶

Subjective rights are classified according to the type of legal object to which the right relates. Four classes of legal objects are distinguished. Firstly there are things, for example, a car. Secondly one finds personality property, for example a person’s good name or reputation. Thirdly immaterial property, for example a trademark is found. The fourth class of legal objects is performance, for example delivery by the seller of the thing sold. The respective subjective rights are real rights, personality rights, immaterial property rights and personal rights. A fifth category, namely personal immaterial property rights, has been identified.¹⁷ The

¹⁶ Kruger 2003 *THRHR* 278. See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387 where the court accepted the doctrine of subjective rights; Joubert *Grondslae van die Persoonlikheidsreg* 1958 *THRHR* 104, 119; Neethling, Potgieter and Visser *Law of Delict* (2006) 45–46.

¹⁷ Kruger 2003 *THRHR* 279.

doctrine of subjective rights can still develop further.¹⁸ The law will not recognise an individual interest as a legal object unless it is of value to the holder of the right.¹⁹ One must also be able to dispose of it and enjoy it.²⁰

“[T]he courts²¹ have stressed that interference with parental authority (specifically the parent’s authority to decide with whom the child may associate)

¹⁸ Neethling, Potgieter and Visser 47.

¹⁹ Kruger 2003 *THRHR* 279. See also Joubert 1958 *THRHR* 119–120. The nature of the content of the right depends on the nature of the right.

²⁰ Kruger 2003 *THRHR* 279. See also Joubert 1958 *THRHR* 120 and Neethling, Potgieter and Visser 48.

²¹ In *Meyer v Van Niekerk* 1976 1 SA 252 (T) the applicant wanted to prevent his 20-year-old daughter from having contact with a married man. The court emphasised that no interdict could be given unless the right of a parent to forbid a third party from coming into contact with the child existed. The court also said that the mental and moral education of a child diminishes as the child grows older. Parental power can include authority to act against third parties that interfere with these components, but this would only apply where the child was young, still living with her parents, still going to school and still having to be educated and disciplined in a very direct way. The court decided that the applicant had no enforceable right against the respondent (257A). In this case it was made clear that the parental power, in the case of a mature minor, becomes a dwindling right. Thus the interdict was not granted. See also *Hewer v Bryant* 1969 3 All ER 578 (CA) 582E and Spiro “The Nearly Adult Minor” 1979 *SALJ* 200, 201. In *Coetzee v Meintjies* 1976 1 SA 257 (T) the appellant’s son, aged 20 years and 3 months, was involved in a relationship with a divorced woman. The court said that it was not asked to act as upper guardian but to interdict a wrongful act (261G). The court said that part of the parental power is to decide with whom the child may associate and any person that interferes with this authority commits an *iniuria* and can be interdicted by the court (262B). The court’s point of departure was not the age or maturity of the child but the degree in which the parent maintains or relinquishes his or her parental power. Here the parent diminished the extent of his authority by sending the child to university, thus there could be no question of an *iniuria* and the interdict was not allowed (262C–H). In *Gordon v Barnard* 1977 1 SA 887 (C) the applicant’s daughter was 18 years old and still lived with her parents. Although she had been working for three years the applicant retained close parental control over her conduct, friends and activities (888A–C). The court said the questions that had to be answered were whether the parental control over the child is extant and, if so, what is the content and extent of that power and control and is the parent’s power reasonably exercised? (890A). The court allowed the interdict as the respondent’s conduct was a direct and unlawful challenge of the applicant’s authority and amounted to an *iniuria*. It could also not be said that the applicant had acted in a grossly unreasonable manner in respect of his supervision and control of his daughter (890F–G). The court also described the right of a parent to exercise custody over a child, with reference to *Hewer v Bryant* 1969 3 All ER 578 (CA) as a “dwindling right which the courts will hesitate to enforce against the child the older he is”. Kruger “The Legal Nature of Parental Authority” 2003 *THRHR* 277, 284 regards this as an acceptable point of view regarding the nature of parental authority. It starts with a right of control and ends with little more than advice”. In *H v I* 1985 3 SA 237 (C) the court said the test to be applied was whether the applicant was still exercising parental power over his child (245E–F). The court did not accept the view that because a child is no longer under the parental roof that the

by third parties is sometimes an *iniuria* which can form the basis of an interdict, without identifying the specific interest of the plaintiff that is worthy of protection.”²²

Explaining parental authority with reference to the subjective rights of the parent can let one “lose sight of the fact that these rights flow from an obligation to protect the child and act in his or her best interests. Subjective rights exist primarily in the interests of the legal subject.”²³ When exercising parental rights the primary consideration should be the interests of the child.²⁴ Parental authority is acquired by birth, legitimation or adoption.²⁵ Both parents of a

father had abandoned his right to interfere with his child’s choice of associates (245A). The interdict was allowed as the respondent had knowingly defied the applicant’s parental authority (248H–J). In the matter of *L v H* 1992 2 SA 594 (E) the father of an 18-year-old girl applied for an interdict restraining the 18-year-old respondent from coming into contact with his daughter. The applicant’s daughter had been involved in a sexual relationship, and became pregnant as a result of this, with the respondent. The court also said that the fact that a minor child leaves home to attend university does not necessarily result in the parent losing his right to determine the child’s choice of associates (596I–597G). The court referred to the questions formulated in *Gordon v Barnard* and said that, in this instance, the applicant has not relinquished his parental power and control over his daughter and the applicant’s exercise of his parental power and control had been reasonable. The interdict was allowed (597H–599E). Spiro 1976 SALJ 201, three decades ago, pointed out that no matter what the age of majority is that one would always have the problem situation of what to do in cases involving near-adults and that there will always be near-adults. Spiro (200–201) defines a near-adult as “a person who is still subject to parental power, but has nearly reached its termination point” and states that in such a case “the rights contained in the parental power may ... have been eroded to such an extent as to have reached vanishing point”. Sonnekus “Die Onwelkome Vryer en die Regsweg vir die Ontstoke Vader *L v H* 1992 2 SA 594 (OK)” 1992 *THRHR* 649, 657 states that it is the parent’s personality right to a feeling of security in his family which is protected in such an instance. Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998 Stell) 165 regards this approach as being too parent centred.

²² Kruger 2003 *THRHR* 281.

²³ Kruger 2003 *THRHR* 283: “and not the interests of the parent”.

²⁴ Kruger 2003 *THRHR* 281.

²⁵ Spiro 51; Van der Vyver and Joubert *Persone en Familiereg* (1985) 595; Van Heerden *et al* 317–323; Cronjé and Heaton *South African Family Law* 262–269: A child can be legitimised by the marriage of his or her natural parents, by an order of the authorities and by adoption. A natural person’s legal subjectivity commences at birth: Davel and Jordaan *Law of Persons* (2005) 11–13. This aspect, as well as the *nasciturus* fiction, will not be discussed in detail here as this paper focuses on the parent-child relationship after the birth of the

legitimate child have parental authority over such child.²⁶ Where a child is born outside of a legal marriage, the parental authority vests in the child's mother.²⁷ Parental authority ends upon the death of a parent or the death of the child,²⁸ or where a child is adopted²⁹. A parent may also be deprived of aspects of his or her parental authority if a child is found to be in need of care.³⁰

3 1 1 1 International Conventions Governing the Parent-Child Relationship

child. For a discussion of the *nasciturus* fiction, see Cronjé and Heaton *The South African Law of Persons* (2003) 24–25 and Davel and Jordaan (2005) 13–22.

²⁶ Guardianship Act 192 of 1993: both parents acquire equal parental power or natural guardianship over a legitimate child. Prior to this act the father of such a child was the child's guardian: *Van Rooyen v Werner* 1892 9 SC 425, 428–431; *Calitz v Calitz* 1939 AD 56, 62–63; *Edelstein v Edelstein NO* 1952 3 SA 1 (A) 10C; *H v I* 1985 3 SA 237 (C) 242E–J; *V v V* 1998 4 SA 169 (C) 177. Cronjé and Heaton *South African Family Law* 277; Visser and Potgieter 200; Van Heerden *et al* 317; Davel and Jordaan (2005) 102–104. Guardianship will be discussed in detail in par 3 2 below.

²⁷ *Edwards v Flemming* 1909 TH 234, 234–235; *Docrat v Bhayat* 1932 TPD 125, 127; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 2 SA 705 (E) 710; *Ex parte Van Dam* 1973 2 SA 182 (W); *F v L* 1987 4 SA 525 (W) 528J; *Ex parte Kedar* 1993 1 SA 242 (W) 243; *B v S* 1995 3 SA 571 (A) 577, 579H. Spiro 55; Van der Vyver and Joubert 597; Van Heerden *et al* 317, 320. Whether fathers of children born out of wedlock can acquire any aspects of parental authority will be discussed at par 3 3 3 3 and 3 4 3.

²⁸ Usually parental power will then vest in the other parent: Spiro 252. If both a child's parents have died and no testamentary guardian or custodian has been appointed then a tutor dative may be appointed to administer the minor's estate: s 73 Administration of Estates Act 66 of 1965; Van Heerden *et al* 323 n 32. A custodian can be appointed by means of a High Court application or by making use of s 15 of the Child Care Act 74 of 1983. Guardianship is discussed in par 3 2 below.

²⁹ Except if a child is adopted by his or her stepparent: s 20(1) Child Care Act 74 of 1983. For a discussion of who is competent to adopt a child, the requirements for and the effects of adoptions, see Cronjé and Heaton 268–275. Of particular interest in the case of adoption is that spouses or same-sex life partners may adopt jointly: s 17 Child Care Act 74 of 1983; *Du Toit v Minister for Welfare and Population Development* 2002 10 BCLR 1006 (CC), 2003 2 SA 198 (CC) (the court held that s 17(a) and (c), and s 20(1) of the Child Care Act as well as s 1(2) of the Guardianship Act 192 of 1993 are unconstitutional, as the sections discriminate against same-sex life partners on the grounds of sexual orientation and infringes their rights to dignity); Cronjé and Heaton *South African Family Law* 269. The Child Care Act also emphasises that the prospective adoption must serve the best interests of the child and be conducive to the child's welfare: s 18(4)(c). The best interests of the child standard will be discussed in par 3 5 below.

³⁰ S 14(4) Child Care Act 74 of 1983.

3 1 1 1 1 The United Nations Convention on the Rights of the Child³¹

According to section 39(1)(b) of the South African Constitution, a South African Court³² “must consider international law” when interpreting the Bill of Rights.³³ Section 233 of the Constitution specifies that the court must “prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. Due to these provisions of the Constitution the Convention on the Rights of the Child “enjoys a heightened status in the South African Legal Framework”.³⁴

³¹ UN Doc A/44/49 adopted by the General Assembly of the United Nations in 1989 and ratified by South Africa in 1995. The various applicable provisions of the Convention will be discussed here. Robinson “An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship” 2002 *Stell LR* 309, stresses that the 1980s were important in the development of children’s rights and that one of the significant developments was the adoption of the Convention on the Rights of the Child. See also Arts “The International Protection of Children’s Rights in Africa: the 1990 OAU Charter on the Rights and Welfare of the Child” 1992 *AJCL* 139–141 for an overview of “Children’s Rights at the International Political Agenda” and Woodrow *International Children’s Rights: An Introduction to Theory and Practice* 2001 (LLM thesis Loyola University of Chicago) 3–8 for a brief history of the CRC. For information about the Committee of the Rights of the Child, see arts 43 to 45 of the Convention and Robinson “Enkele Gedagtes oor die Komitee van die Regte van die Kind” 2002 *THRHR* 600. Viljoen (“Supra-National Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” 1998 *CILSA* 199, 200) states that African involvement in the drafting of the Convention on the Rights of the Child was limited and that only 3 African states took part in the working group for at least 5 of the 9 years that it took to draft the final proposal. See Viljoen 1998 *CILSA* 200–204 for a discussion of the composition of the committee on the rights of the child; the ratification of and reservations to the Convention and the reporting obligations by states, including the areas that the CRC had identified where protection had fallen short. Viljoen (1998 *CILSA* 204) points out that there are limitations in the reporting procedure, namely, that a “treaty body is powerless to address more comprehensive considerations on the socio-political and economic terrain”.

³² Or tribunal or forum.

³³ S 39(2) of the Constitution: “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.” “Seeing that the spirit, purport and objects of the Bill of Rights includes principles common to international law such as equality, freedom and human dignity, it opens the door to consider international law this way” Davel in Nagel (ed) (2006) 17.

³⁴ Davel in Nagel (ed) 2006 17. See also Sloth-Nielsen “Children’s Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child” 2002 *IJCR* 137, 139.

Both parents' rights as well as children's rights³⁵ are contained in this Convention. The Preamble of the Convention states 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 ... 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.”

This statement makes it clear that children³⁶ are cared for best in a family.³⁷ The role of parents is respected. Article 5 of the Convention states that:

³⁵ According to Woodrow (LLM thesis 2001) 26–29 some of the arguments advanced for granting children rights are that children are people and deserve respect, children have interests, denial of rights to a particular group has serious negative consequences, rights have both an empowerment function as well as a protective function, and we cannot deny that children are part of the human family and thus deserve to be treated as persons entitled to equal concern and respect.

³⁶ Art 1 defines children as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. This definition has been criticised as a weakness in the Convention by Toope and Van Bueren. The provision means that a State can evade the requirements of the Convention by lowering the age of majority: Toope “The Convention on the Rights of the Child: Implications for Canada” in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 43. Toope also states that the Convention has been criticised for being loosely drafted and that many provisions have been described as vague and that this will open up the possibility of debate as to the scope of these provisions. He stresses that the greatest problem is that, if the Convention is taken seriously, it will cost a lot of money to implement: Toope in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 43–45. Although Toope writes from a Canadian perspective, these concerns are relevant to South Africa today. See also Van Bueren *The International Law on the Rights of the Child* (1995) 32 where the definition of a child in international law is discussed. Van Bueren analyses all the terms used to refer to a child, such as baby, infant, juvenile, adolescent and youth and states that the usage of such terms has been characterised by a lack of consistency. She also states that “[t]raditionally a child has been defined as a comparative negative: a child is an individual who is not yet an adult. It is a definition which is laden with religious, cultural, physical and psychological practices and beliefs.” At 33–34 she looks at the importance of determining whether childhood begins at conception, as this would clearly have an influence on the child's right to life and states that the Convention on the Rights of the Child does not restrict a State's discretion to provide under domestic legislation the moment when childhood begins and thus

“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 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.”

Robinson³⁸ points out that this article is indicative of the approach followed in the case of *Gillick v West Norfolk Health Authority*³⁹ and that this case conveyed that children require different degrees of protection, as well as provision, participation and prevention, at different times of their lives and that the words “guidance” and

the beginning of childhood and life is determined by the State’s own domestic legislation. At 36–38 she explores the end of childhood. For the purposes of this discussion a child refers to a child as a person below the age of 18. Although sometimes the term minor will be used, this term currently still means someone under the age of 21 years in South African law. Childhood, or the beginning of legal personality, is seen in South Africa as beginning at birth. Cronjé and Heaton *The South African Law of Persons* (2003) 7: the common law requirements for the beginning of legal personality are that the birth must be fully completed, there must be complete separation between the mother’s body and that of the foetus, and that the child must live after this separation, even if for a short time. Van Bueren (35), also states that international law protects the beginning of childhood from birth. In *Meyer v The Master* 1935 SWA 3 the court looked at the classification of persons according to age, and especially dealt with the age of majority as being the reaching of the age of 21 years.

³⁷ The South African Constitution unfortunately does not directly protect the family. Robinson, in “Some Remarks on the Constitution of the Republic of South Africa Concerning the Protection of Families and Children” in Louw and Douglas (eds) *Families Across Frontiers* (1996) 229–330 stated, in 1996 already, that it is clear that the family as an institution is not protected in the Constitution and that this is a major flaw. See further the discussion on the child’s right to a family in par 3 1 4 4below.

³⁸ “Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship” 2002 *Stell LR* 310.

³⁹ 1986 AC 112; 1985 3 All ER 402. In this case a mother challenged the lawfulness of a memorandum issued to health authorities that informed doctors that if they prescribed contraceptives to a girl under the age of 16 that they would not be acting unlawfully and that they would not have to consult with the girl’s parents if in the doctor’s judgement it was necessary to prescribe the contraceptives. In this matter it was held that parental rights do not exist for the benefit of the child but for the benefit of the parent and that such right must yield to the child’s right to make his or her own decisions once the child has reached an age of sufficient understanding and intelligence: Robinson 2002 *Stell LR* 313.

“appropriate” demonstrate that parents do not have an “unlimited discretion to provide any type of direction for the child during the entire period of childhood”.⁴⁰

Article 7 recognises the right of a child to know and be cared for by his or her parents.⁴¹ Van der Linde⁴² believes that although the Convention does not contain a specific definition of “parental responsibilities” that the entire Convention is relevant in this regard.⁴³

The Convention recognises the rights of parents but also imposes duties on parents. The Convention also protects children from their parents and offers support to parents. Article 3 states:

⁴⁰ Robinson further states that “the direction of the parent lessens as the child becomes more mature”: 2002 *Stell LR* 313–314. Robinson’s statement describes the reality of the parent-child situation well. Human “Kinderregte en Ouerlike Gesag: ‘n Teoretiese Perspektief” 2000 *Stell LR* 71 states that this case is a prime example of where a court had to make a decision regarding family relations and the balance of power in a family. The court had to re-evaluate the nature and content of parental power and simultaneously try to find a balance between the individual interests of family members which came into conflict. The decision reached in the case can also be interpreted as indicating that parental authority ends when a child has the ability to make a decision on their own: 75. Human (76) points out that the decision did away with the idea of family autonomy and the public perception of parental authority. The *Gillick* case is discussed in more detail in ch 5.

⁴¹ As far as possible. The child has this right from birth. Art 8(1): “State Parties undertake to respect the rights of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.”

⁴² “*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 Vryghede van die Mens*” (LLD thesis 2001 UP) 310.

⁴³ Van der Linde (310) also questions whether if parents have common responsibilities they have equal responsibilities. He refers to art 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women which states that States shall ensure, on the basis of equality of men and women, the same rights and responsibilities as parents and art 23(4) of the International Covenant on Civil and Political Rights, which refers to spouses having equal rights and responsibilities as to marriage.

“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.”⁴⁴

It further states that:

“States 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 appropriate legislative and administrative measures.”⁴⁵

From these provisions it is clear that the rights, as well as duties, of parents are taken into account but the State will be able to override these where it will be in the child’s interest to do so.

Article 9(1) 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

⁴⁴ Art 3(1). Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 183: “the rule whereby the ‘best interests of the child’ must be the primary consideration can be looked at in two ways: as an objective which the state undertakes to pursue (see article 21) but also as a negative obligation, i.e. not to do anything which would go against ‘the best interest of the child’.” This statement embraces the true application of the best interests of the child principle.

⁴⁵ Art 3(2).

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."⁴⁶

The parent's will has to be respected, subject to the child's needs. In the case of a divorce or separation the court would determine who is to have custody of such child, subject to the standard of the best interests of the child.⁴⁷ Article 14(2) specifies that:

"State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to 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."

Both articles 14(2) as well as article 5 reiterate that parents have a right, or a duty, to shape the way their children grow up. Article 5 also recognises that children are part of a unit.⁴⁸ This unit has responsibility towards the child. The

⁴⁶ Own emphasis.

⁴⁷ A discussion of custody follows in par 3 3 below. The best interests of the child standard is discussed in par 3 5 below.

⁴⁸ The responsibilities, rights and duties of the family and community are recognised. The Constitution of the Republic of South Africa, 1996 unfortunately does not emphasise that the responsibilities and duties of the family must be recognised. See n 31 above and 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 Vryghede van die Mens*" (LLD thesis 2001 UP). The child's right to a family is discussed in par 3 1 1 4 below.

fact that the child is the bearer of the rights in the Convention is also clear.⁴⁹ The duties of parents are emphasised in article 18. This article states the following:

“State 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 for the upbringing and development of the child. The best interest of the child will be their basic concern.”⁵⁰

Article 27(2) specifies that:

“[t]he parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”

Support is provided for parents to assist them in their child-rearing function. Article 18(2) says that:

“States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall

⁴⁹ The fact that the child is a bearer of rights in the Convention is made clear in the following provisions, amongst others: Art 2: State Parties shall respect and ensure the rights of each child without discriminating against the child, for example on the basis of race or gender; Art 6: Child has a right to life; Art 7: Child has the right to a name from birth, right to know and be cared for by his or her parents; Art 8: State Parties shall respect the rights of the child to preserve his or her identity; Art 16: Children have a right to be protected from unlawful interference with their privacy. See also Toope "The Convention on the Rights of the Child: Implications for Canada" in Freeman (ed) *Children's Rights: A Comparative Perspective* 49, where it is stressed that children are independent rights-bearers in the Convention and that children are no longer just objects of social concern but have a right to be heard.

⁵⁰ Art 18(1).

ensure the development of institutions, facilities and services for the care of the children.”⁵¹

Article 27(3) states that State Parties shall:

“in accordance with national conditions and within their means ... take appropriate measures to assist parents and others 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.”

The State must thus assist parents in their duty of care but this must occur within the financial means of such State. The Convention also protects children from their parents. Article 12(1) of the Convention stipulates that:

“State 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.”⁵²

Article 12(2) states that:

⁵¹ Art 18(3): “States Parties shall take 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.”

⁵² Robinson 2002 *Stell LR* 310 states that the participation rights of the child are indicative of a kiddie liber approach. For the difference between the kiddie liber and saver approach see n 132 below.

“[f]or this purpose the child shall in particular be provided the opportunity to be heard in any judicial or 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.”⁵³

In some circumstances children may need to be protected from their parent’s views and be allowed to express their own views.⁵⁴ Davel⁵⁵ observes that

⁵³ Art 12 thus places an obligation on State Parties to ensure that a child can express his or her opinion freely and that his or her opinion will be taken into account in any judicial or administrative proceedings affecting the child: Van Bueren “The International Protection of Family Member’s Rights as the 21st Century Approaches” 1995 *HRQ* 732 742. The two determining factors are the age of the child and the maturity of the child. Both of these factors are of equal value. “For children truly to be heard the listener has to understand the language of the child in order to assess whether, in accordance with the Convention, the child is capable of expressing views. The sole test is that of capability, not of age or maturity”: Van Bueren quoted in Community Law Centre “Report on Children’s Rights: Children and the Creation of a New Children’s Act for South Africa” 2001 Community Law Centre UWC <<http://www.communitylawcentre.org.za/children/report-on-children's-rights.doc>> accessed on 2006-05-10. For a comparative law approach to the child’s right to be heard, see Tobin “Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights” 2005 *SAJHR* 86, this article will be discussed in ch 5.

⁵⁴ Note the difference between art 12 which is not subject to the rights of the parent and art 14(2) which allows parents to direct the child in exercising his or her rights to freedom of thought, conscience and religion. The interests of the child and the interests of the adult may not always intersect, so it is important that the child’s views are heard: Sloth-Nielsen and Van Heerden “Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa” 1996 *SAJHR* 247, 250. Toope “The Convention on the Rights of the Child: Implications for Canada” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 41, stresses that children’s rights make adults uncomfortable as they represent either new ideas or old ideas in new forms and are a signal that adults, and existing practices, have to change. He also says that a concept of children’s rights requires changes in social attitudes in almost all nations of the world. Toope also emphasises that the child’s right to freedom of expression is not conditioned by the parent’s right to filter expression or information, although it could be argued that all the children’s rights in the Convention are affected by the rights, responsibilities and duties of parents referred to in art 5 of the Convention. He also makes it clear that the scope of the parent’s duties, responsibilities and rights is not clear in the Convention and that this leaves many unanswered questions as to how far a child’s right to freedom of expression reaches and at what point a parent has a right, duty or responsibility to limit this freedom of expression. Toope expresses the view that courts will increasingly have to decide what is in the best interest of the child and parents will have to abide by the court’s interpretation: Toope in Freeman (ed) *Children’s Rights: A Comparative Perspective* 48. Toope’s viewpoint should be supported as the courts will probably increasingly have to decide what is in a child’s best interest. Robinson (2002 *Stell LR* 320) points out that “South African courts appear to be slow to acknowledge the right of the child to be heard, but at least some progress has been made. However, the same does not hold true for the adherence to arts 18 and 23 of the Convention. South African courts consider themselves

according to the Convention on the Rights of the Child there are two ways in which children can express their views, namely participation⁵⁶ and representation^{57, 58}.

obliged to make orders that result in both parents not being in a position to fulfil their common responsibilities in the upbringing of the child (even where such a ruling does not necessarily serve the best interests of the child)." This aspect needs to be addressed specifically against the backdrop of the Convention which was already ratified by South Africa in 1995. In divorce proceedings children's voices are often silent and their future is often simply part of a settlement agreement. Parents also use their children as weapons in their bitter battle with their spouse: Zaal and Skelton "Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts" 1998 *SAJHR* 539, 540. The fact that children are often used as weapons in their parents' fight during divorce cannot be ignored. This must be taken into consideration, and thus children must have a voice in divorce proceedings. In *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 613 par 36 "the child was knocked about between the parents like a football". This is still unfortunately true today. However, the implementation of the provisions of the Children's Act 38 of 2005 may change this. See further ch 4. For a discussion of the application of children's participation rights in Scotland, see Edwards "Hearing the Voice of the Child: Notes from the Scottish Experience" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 37 and the discussion in ch 5.

⁵⁵ "The Child's Right to Legal Representation" in Nagel (ed) *Huldigingsbundel vir JMT Labuschagne* (2006) 15, 18.

⁵⁶ "Participation would cover all the rules that allow the child to be heard directly, without an intermediary. It includes rules that demand that children be consulted about their opinion, or which enable children to become parties to legal actions, so that they have the right to interact with the proceedings and/or demand a certain remedy": Davel in Nagel (ed) (2006) 18.

⁵⁷ "Representation is used to indicate the rules that allow children to instruct attorneys, to seek legal advice or to have other kinds of adult representation in legal proceedings": Davel in Nagel (ed) 2006 18.

⁵⁸ "Article 12 is clear on a number of interesting issues: It concerns a child who is 'capable of forming his or her own views'. No lower age limit is set on children's right to express their views freely. The child has 'the right to express these views freely' implies that there are no boundaries or areas in which children's views have no place. The right is to be assured in relation to 'all matters affecting the child' and should thus apply in all matters, even those that might not specifically be covered by the Convention, whenever those matters have a particular interest for the child or may affect his or her life. The view of the child must be given 'due weight in accordance with the age and maturity of the child', which means that there is a positive obligation to listen to and take the views of children seriously. In deciding how much weight should be given to the child's view in a particular matter, the twin criteria of age and maturity must be considered. Once again the Convention rejects specific age barriers because age *per se* is not the standard. Children should be heard in a very broad scope of decisions: 'Any judicial or administrative proceedings affecting the child'. There is [a] ... need to adapt courts ... to enable children to participate ... States are left with a discretion as to how the child's views should be heard, but where procedural rules suggest that this be done through a representative or an appropriate body, the obligation is to transmit the views of the child. This principle should not be confused with the obligation in article 3 to ensure that the best interests of the child are a primary consideration in all actions concerning that child": Davel in Nagel (ed) (2006) 19. See also Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (1988) 151–152.

Article 12 does not, on the face of it, give “children the right to a say outweighing that of parents or families. It simply affords children the opportunity to express themselves when matters affecting them are discussed.”⁵⁹ Sloth-Nielsen holds the view that:

⁵⁹ Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” 1995 *SALJ* 401, 406. Sloth-Nielsen at 410–411 also states that art 12 is one of the four core elements providing the Convention with a “soul” as it recognises that children’s and adults’ interests are not always the same. See also Sloth-Nielsen and Van Heerden “New Child Care Protection Legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 289, 298. Robinson 2002 *Stell LR* 314 states that art 12 means that due weight must be attached to the age and maturity of the child and that these criteria are of equal value and that this article “places a duty on states to involve children *when they wish* in all matters which affect them”. For a discussion of the background of the UN Convention on the Rights of the Child, see Hamilton “Implementing Children’s Rights in a Transitional Society” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 14–19. For a discussion of monitoring and implementing the Convention, see *op cit* 22–28. Criticism against the Convention has been that “the generality of many provisions has resulted in a lack of protection ... [but] this is one of the paradoxes of international human rights law”: Hamilton in Davel (ed) *Children’s Rights in a Transitional Society* 29. There must be a degree of adaptability and flexibility in the Convention. There are a number of obstacles facing governments wanting to implement the Convention including a “lack of political will to change the status of children, the lack of money available to make a real change to children’s lives, the focus in a transitional society on ‘adult’ related matters, especially economic reform and the public’s attitude towards children”. State Parties also frequently fail to address the major problems facing children and these problems are exacerbated by weak monitoring and implementation of the Convention. These problems are also aggravated by a failure of State Parties to set minimum performance indicators or to interpret rights in greater detail: Hamilton “Implementing Children’s Rights in a Transitional Society” in Davel (ed) *Children’s Rights in a Transitional Society* 35–36. The unfortunate reality is that many States are unable to implement the Convention on the Rights of the Child adequately due to economic reasons. Although some protection, even if not implemented to its fullest extent, is better than none at all. Although a country may not have adequate resources to implement the Convention fully, the fact that they ratify the Convention is at least a move in the right direction. For an in-depth discussion of the implementation of the Convention, see Parker “Resources and Child Rights: an Economic Perspective” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries* (1995) 33–54. Parker emphasises that use must be made of traditional and non-traditional resources, human and organisational activities and that existing resources must be used to their maximum extent. Ledoger “Realizing Rights through National Programmes of Action for Children” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries* (1995) 55–68, explores the problem of how to avoid too many countries using the escape provided in art 4 of the Convention that State Parties shall undertake such measures to the maximum extent of their available resources. He also stresses that States should be made to dedicate their available resources, and the aid they receive from international sources, to the implementation of children’s rights. Ledoger states that an instrument with great potential for this purpose is the National Programme of Action. Ledoger discusses National Programmes of Action in depth (58–68). Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 176 point out that the “Convention’s monitoring mechanism involves no more than the obligation for state parties to report to the Committee on the Rights of the

“[t]he Convention cannot be said to be supportive of an anti-family stance. It should rather be seen to be striking a tenuous balance between establishing children as independent bearers of rights, not mere possessions of their guardians, yet at the same time acknowledging the importance of families and the difficulties occasioned by the child’s temporary inability to exercise many of those rights him or herself.”⁶⁰

Van der Linde⁶¹ states that an important dimension of the child’s right to be heard is the possibility that children must be protected against the views of their parents by giving the children opportunities to make their views known in juridical and other proceedings. However, the Convention does not examine this aspect in depth and the connection between articles 12 and 14⁶² is not dealt with in the Convention. The question thus arises: under which circumstances must a State respect the parents’ right to direct a child’s intellectual freedom and when must the child’s view enjoy preference? Van der Linde⁶³ agrees with Sloth-Nielsen⁶⁴ that the participation rights of children:

Child. This procedure is based on the idea that implementation of the Convention has to be monitored in a ‘positive spirit’ with a ‘constructive aid-oriented thrust’ and a strong emphasis on the need for international solidarity, co-operation, dialogue and technical assistance in fostering implementation.” The authors also state that the voluntary nature of the Convention “did not only come about to counteract possible infringement of children’s rights but also to act in favour of more respect for children” and that is why the Convention obliges State Parties to make its content widely known by all legal subjects. The coming into being of the Convention must be applauded. However, it is clear that there is room for improvement in the monitoring of the implementation of the Convention.

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Sloth-Nielsen 1995 SALJ 406.

⁶¹

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 Vryghede van die Mens (LLD thesis 2001 UP) 313–314.

⁶²

Art 14 is dealt with in this same paragraph, above.

⁶³

At 315.

⁶⁴

See n 52 above.

“kom alleen neer op ondersteunende en aktiewe deelneming en moet nie verwar word nie met 'self-beskikking' – 'n term wat nie alleen die reg om deel te neem aan besluitneming impliseer nie, maar ook die reg dat sienings (van die kind) inderdaad gevolg moet word.”

Van der Linde stresses that older children's ability to make decisions can be similar to the ability of adults and that every child's ability to make decisions will differ in each case.⁶⁵ Van der Linde⁶⁶ summarises the interaction between parents and children in the family, in the context of the Convention. Firstly, the Convention is not supportive of an anti-family stance; the Convention acknowledges the importance of families.⁶⁷ Secondly, the Convention is dualistic, on the one hand the child is seen as an independent being and the bearer of rights but on the other hand the Convention recognises that the primary responsibility for the child is within the family.⁶⁸ Thirdly, the Convention emphasises that there may be a conflict between the best interests of the child and the interests of the adult members of the family, by stating that the primary responsibility for the raising of children lies with the family but that the best interests of the child shall be their primary consideration. Lastly, the Convention

⁶⁵ Van der Linde (LLD thesis 2001) 320–321. In *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112, 186 the court stated that “parental rights yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision”. The court also stressed that “[i]t will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law”.

⁶⁶ 324–325.

⁶⁷ See also n 52 above.

⁶⁸ Sloth-Nielsen 1995 *SAJHR* 404: “the right to self-determination should be balanced by the child's inability to choose what is in fact in his or her best interest and that the child's notional independence should be countered by the enjoyment of a happy childhood as a child”.

sees the child as being part of a unit, the family, which carries the primary responsibility for the welfare of the child. Children are not children of the State. However, the Convention makes it clear that children are the bearers of the rights contained in the Convention on the Rights of the Child.⁶⁹

The Convention has had a large impact on judicial decisions which have been made in South Africa since it was ratified.⁷⁰ Unfortunately article 12, nor any other provision of the Convention on the Rights of the Child, is self-executing.⁷¹ However, the Convention has a heightened status in South African law for two reasons: firstly the Convention has been constitutionalised in section 28 of the Constitution; and secondly, the South African Constitution states that a court must consider international law when interpreting the Bill of Rights in the Constitution.⁷²

⁶⁹ Van der Linde (LLD thesis 2001) 326. Other than in the Convention, the African Charter on the Rights and Welfare of the Child expressly protects the family as an institution in art 18. See 3 1 1 1 3 below for a discussion of the African Charter and 3 1 1 4 below for a discussion of the child's right to a family.

⁷⁰ Sloth-Nielsen "Children's Rights in the South African Courts: An Overview Since the Ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137, 152: "arguably the Convention has played a bigger part in South Africa's judicial practice than in any other country in the world." Human "Teoretiese Oorwegings Onderliggend aan die Rol van die Staat en die Erkenning en Implementering van Kinderregte" 2000 *TvR* 123, 134: "Die Konvensie verteenwoordig die mees omvattende en gesagshebbende verklaring rakende fundamentele regte vir kinders."

⁷¹ 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* 54, 58–67. S 231(4) of the South African Constitution provides that: "Any 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."

⁷² Sloth-Nielsen 2002 *IJCR* 139. Sloth-Nielsen states that since children's rights that have been included in the Constitution are justiciable in court, the conclusion can be reached that the Convention has acquired legal significance via the Constitution. That the best interests of the child must be of primary importance in every matter affecting the child, which is one of the foundation rights of the Convention, is found in s 28(2) of the Constitution. The author points out that "the child's right to have their best interests taken into account as a paramount consideration creates a constitutional right which is independent of other constitutional provisions. Consequently, the best interests principle can potentially affect a

3 1 1 1 2 The European Convention on Human Rights⁷³

The European Convention on Human Rights specifies that “[e]veryone has the right to respect for his private and family life”⁷⁴ and that:

“[t]here shall be no interference by a public authority with the exercise of this right except such as 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.”⁷⁵

Article 12 of the Convention stipulates that:

“[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

vast arena of judicial activity.” Clearly the court will also have to consider other international law as well as the Convention in its deliberations. When implementing the specific rights of children, as specified in s 28 of the Constitution, the courts often refer to the Convention on the Rights of the Child: *S v Williams* 1995 3 SA 632 (CC) (whipping of juveniles as sentencing option); *Howells v S* 1999 2 All SA 233 (C) (child’s right to parental care taken into account when sentencing parent); *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (right to care, right to shelter); *Jooste v Botha* 2000 2 BCLR 187 (SCA) (right to parental care); *Christian Education South Africa v Minister of Education* 2000 10 BCLR 105 (CC) (banning of corporal punishment in schools).

⁷³ 1950.

⁷⁴ Art 8(1).

⁷⁵ Art 8(2).

Parents have a right to ensure that education and teaching conforms to their own religious and philosophical convictions.⁷⁶

Parental rights and responsibilities have been regarded as part of family life. In the matter of *Nielsen v Denmark*⁷⁷ the facts were the following: The applicant was Jon Nielsen, a Danish citizen. His parents never married and according to Danish law only his mother had parental rights over him. His father obtained a right of access through the authorities.⁷⁸ A close relationship developed between the applicant and his father. At the time Danish legislation did not provide for procedures to have custody rights transferred from the mother to the father, so the father made an application, complaining about this situation to the European Commission of Human Rights.⁷⁹ During the proceedings in front of the Commission the Custody and Guardianship of Children Act, 1976 was amended,⁸⁰ enabling a court to vest custody in the father of a child born out of wedlock, if certain conditions were fulfilled. Thus the Commission rejected the application.⁸¹

After this the father had regular access to the applicant. However in 1979 the applicant refused to go home to his mother after spending a holiday with his father. The applicant was placed in a children's home but disappeared and went back to his father. His father instituted proceedings to have custody rights of the

⁷⁶ Art 2 of the First Protocol to the European Convention.

⁷⁷ 1989 11 EHRR 175; Van Bueren *The International Law on the Rights of the Child* (1995) 73–75.

⁷⁸ Par 1 10.

⁷⁹ In 1976.

⁸⁰ As from 1978-10-01.

⁸¹ Par 1 11.

applicant transferred to him and the applicant and his father went “underground” until his father was arrested.⁸²

After this the applicant was placed in the Department of Child Psychiatry in the county hospital and his father’s rights of access were suspended.⁸³ The applicant disappeared some months later, and lived in hiding with his father. In custody proceedings it was held that it was not in the interest of the child to transfer custody to his father.⁸⁴ The father’s appeal against this decision failed. The applicant and his father lived “underground” for more than three years and then again instituted proceedings to have custody rights transferred to him. The city court found that there was no need to transfer custody rights. The father appealed but the city court’s judgment was upheld.⁸⁵ After the appeal hearing⁸⁶ the father was arrested for depriving the mother of the exercise of her parental rights and the applicant was placed in a children’s home then later in the State hospital’s child psychiatric ward.⁸⁷ The applicant then challenged the lawfulness of his placement in the child psychiatric ward. The case was dismissed, but the appellant appealed to the court of appeal. The decision of the city court was upheld.⁸⁸ The National Health Authority launched an investigation.⁸⁹ The applicant was supposed to be discharged in 1984, but disappeared. When he was found he was returned to the child psychiatric

⁸² Par 1 12.

⁸³ An appeal against this decision failed.

⁸⁴ Par 1 13–14.

⁸⁵ Leave was subsequently granted to bring the case to the Supreme Court: par 1 15–17.

⁸⁶ In 1983.

⁸⁷ Par 1 18–19.

⁸⁸ Par 3 21–24.

⁸⁹ Par 4 27–33.

ward. When the applicant was later discharged he was placed in the care of a family not known to his father.⁹⁰ The question that needed to be resolved was whether article 5 of the European Convention is applicable to this case. The court noted that:

“Family life ... encompasses a broad range of parental rights and responsibilities in regard to the care and custody of minor children. The care and upbringing of children normally and necessarily require the parents or an only parent to decide where the child must reside ... Family life ... and especially the rights of parents to exercise parental authority over their children, having due regard to their parental responsibilities, is recognised and protected by the convention, in particular by Article 8 ... the exercise of parental rights constitutes a fundamental element of family life.”⁹¹

Van Bueren⁹² points out that the Commission in this case did not find it necessary to set a fixed age limit below which a child’s opinion would be considered as unimportant or unable to override that of the parents, but they did hold that the wishes of very young children could not be decisive in matters of hospitalisation and treatment in psychiatric wards. Van Bueren also states that the Commission argued that there are specific areas in which the State is under a duty to respect the rights of parents, this includes education of their children and that in the remaining areas States must take the evolving capacities of each

⁹⁰ Par 5 34–36.

⁹¹ Par 2 61. For a discussion of the European Convention and the illegitimate child, see Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 176 and Davidson “The European Convention on Human Rights and the ‘Illegitimate’ Child” in Freeston *Children and the Law* (1990) 75–106. This aspect will be dealt with in ch 5.

⁹² 75.

child into consideration and that this is in line with the provisions of the Convention on the Rights of the Child.⁹³

The court decided that there was not a deprivation or restriction of liberty to which article 5 applies as the mother exercised her parental rights properly and the treatment administered to the applicant was appropriate.⁹⁴ The court thus held that article 5 was not applicable to the present case. In the matter of *B, H, O R and W v United Kingdom*⁹⁵ the court said that parental rights are not absolute and that they may be overridden if they are not exercised in accordance with the welfare of the child and where there is a conflict between the rights of the parent and the rights of the child the paramount consideration would have to be the welfare of the child. Thus, the interest of the child⁹⁶ is important.

3 1 1 1 3 The African Charter on the Rights and Welfare of the Child⁹⁷

⁹³ The Convention was discussed in par 3 1 1 1 1 above. For a discussion of the criminal capacity of a child in relation to age, see Davel "The Delictual and Criminal Capacity of a Child: How Big Can the Gap Be?" 2001 *De Jure* 604.

⁹⁴ Par 2 69–70 and 72.

⁹⁵ (1988) 10 EHRR 87, 95.

⁹⁶ This standard will be discussed in ch 5.

⁹⁷ OAU Doc CAB/LEG/24.9/49 1990. The Charter entered into force in 1999. It is "perhaps a less well-known international treaty with mere regional application, but nevertheless a supra-national document aimed at reconciling Western juristic thought and African traditional values": Davel in Nagel (ed) (2006) 20. For an in-depth discussion of all the aspects dealt with in this Charter, see Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 214–231. Viljoen (218–219) provides a background to and motivation for the adoption of the Charter. One of the reasons was that "a need was identified for a regional human rights instrument dealing with issues pertinent to children in Africa". Another reason is that certain issues were omitted from the Convention on the Rights of the Child. For ease of reference these will be included here: "(1) the situation of children living under apartheid was not addressed. (2) Disadvantages influencing the female child were not sufficiently considered. (3) Practices that are prevalent in African society, such as female genital mutilation and circumcision, were not mentioned explicitly. (4) Socio-economic conditions, such as literacy and low levels of sanitary conditions, with all their threats to survival, pose specific problems in Africa. (5) The community's inability to engage in meaningful participation in the planning and management of basic programmes

The preamble of the African Charter states that “for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. The special care needed by children is also emphasised in the preamble.⁹⁸

Article 2 of the Charter defines a child as being every human being below the age of eighteen years. Arts⁹⁹ describes this as “compared to the UN

for children was not taken into account. (6) The African conception of the community’s responsibilities and duties had been neglected. (7) In Africa, the use of children as soldiers and the institution of a compulsory age for military service are issues of great importance. (8) The position of children in prison and of expectant mothers was not regulated. (9) The Convention on the Rights of the Child negates the role of the family (in its extended sense) in the upbringing of the child and in matters of adoption and fostering.” It can be seen that when exploring the provisions of the Charter that the social situations and other reasons that gave rise to the Charter should be kept in mind, in order to have a clear understanding of the charter. See also Davel “The African Charter on the Rights and Welfare of the Child, Family Law and Children’s Rights” 2002 *De Jure* 281 and Viljoen 1998 *CILSA* 204–212. Lloyd “A Theoretical Analysis of the Reality of Children’s Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child” 2002 *AHRLJ* 11, 15 states that although the law appears to be neutral towards children, “in reality it embraces the language and thought processes of adults, highlighting children’s lack of power under the law and contributing to their traditionally perceived vulnerability” and that there is continually a need to give a voice to children, either by way of a constitutional order or by way of legislation. The African Charter has gone some way in establishing a legal framework for the recognition of children’s rights. See 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 *IJCR* 179, “How to Guarantee Credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child” 2004 *IJCR* 21, which are discussed in ch 5 hereunder, where the African Charter, with reference to its African perspective and usefulness as a regional legal instrument in Africa, is discussed.

⁹⁸ Arts 1992 *AJCL* 139, 144 submits that this is demonstrative of a “rather protective attitude” towards children. Gose “The African Charter on the Rights and Welfare of the Child” 2002 <www.communitylawcentre.org.za/children/publications/african_charter.pdf> accessed on 2006-05-03 24 states that the ACRWC has “a fairly traditional and apparently ‘welfarist’ approach that needs to be reconciled with the concept of the child as an independent being with rights to participate in matters affecting his or her life, the latter concept forming the basis of the participation rights contained in the Convention as well as in the Charter itself”.

⁹⁹ 1992 *AJCL* 145.

convention¹⁰⁰ ... a great step forward which allows for the protection¹⁰¹ of and provision to probably the widest group of young people”.

Article 4(1) states that the best interests of the child shall be the primary consideration “[i]n all actions concerning the child undertaken by any person or authority”. Article 4(2) states that:

“In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authorities with the provisions of appropriate laws.”

¹⁰⁰ Art 1 of the CRC defines a child as being every child under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Arts 1992 *AJCL* 145 describes this definition as “leav[ing] discretion to individual States to set the age of majority to below 18 years in their national laws and thus deprives the older-age group of the benefits of the Convention. The African Charter sets a strict definition, without exceptions.” Gose (27) stipulates that “[t]he Charter’s protection is therefore more comprehensive and inclusive [than that of the CRC] because the Convention restricts its application by including the phrase ‘unless majority is attained earlier’. Unlike the Convention, the Charter therefore applies to *everyone* below the age of 18.” Gose (28) criticises the definition of a child, as contained in the ACRWC, as seeming “to be in discordance with African culture and tradition ... in the African cultural context, childhood is not perceived and conceptualised in terms of age but rather in terms of inter-generational obligations of support and reciprocity. Traditionally, the termination of childhood has very little to do with the attainment of any predetermined age but with the physical capacity to perform acts which are normally reserved for adults (e.g. initiation ceremonies, or marriage). In this way the Charter’s notion of childhood clashes with the African traditional cultural understanding.” See further in this regard Ncube “The African Cultural Footprint” in Ncube (ed) *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa* (1992) 11, 18.

¹⁰¹ Art 3 of the Charter states that every child is “entitled to the enjoyment of the rights and freedoms in it, irrespective of the child’s or his or her parents or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status. It does not mention two grounds of discrimination which are included in the UN convention (article 2), these being property and disability. On the other hand it adds one new element, namely fortune”: Arts 1992 *AJCL* 146.

Article 4(2) provides that the child has a right to be heard either directly or by means of a representative.¹⁰² Davel¹⁰³ points out that the right to be heard that is provided for in the Charter is more restricted than the right in the Convention on the Rights of the Child.¹⁰⁴

Article 6 states that children have the right to a name and to acquire a nationality.¹⁰⁵

Article 9(1) specifies that children have the right to freedom of thought, religion and conscience and article 9(2) states that:

¹⁰² Thompson "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism" 1992 *ICLQ* 432, 435.

¹⁰³ In Nagel (ed) (2006) 20.

¹⁰⁴ Davel in Nagel (ed) (2006) 20: The Charter states that the child must be heard in all administrative and judicial proceedings affecting the child. The CRC states that states must assure that children express their views "in all matters affecting the child". "The opportunity of hearing the child is therefore much more restricted in its scope [in the ACRWC]." (See also Chirwa "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 157, 161, discussed in n 117 below.) The ACRWC states that the child will be heard "as a party to the proceedings" and that this implies that before a child can be heard, he or she must be a party to the proceedings. Art 12(2) of the CRC refers to a "representative", whereas art 4(2) of the ACRWC says that an "impartial representative" is required. In the ACRWC the child must be "capable of communicating his or her views", this capability may not only be related to the age of the child but also the level of education of the child or the articulacy of the child. The ACRWC stipulates that the child's views must be considered "in accordance with the provisions of appropriate law", this provision is less favourable than that of the CRC which states that view of the child must be given "due weight in accordance with the age and maturity of the child". In the ACRWC the best-interests principle appears in the same article as the principle that the child's voice should be heard. This could also relate to the more restricted application of the notion that children should have a separate voice.

¹⁰⁵ However, the Charter does not include the right for the child to know and be cared for by his or her parents, which is included in art 7 of the CRC: Arts 1992 *AJCL* 139, 146. Arts emphasises that the right to a nationality is "however, an empty shell if there is no particular State to turn to in order to apply for nationality. The UN Convention is quite vague about this matter, providing that State Parties shall ensure implementation of the right to a nationality in accordance with their national law and with international instruments, in particular where the child would otherwise be stateless." Art 5 goes on to state that some States feared that nationality would become an entitlement on the part of stateless children entering a territory and thus the entitlement was not codified. However, art 6 of the African Charter does make some provision in this regard, it states that "... a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws".

“Parents and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities¹⁰⁶, and best interests of the child.”

Article 9(3) says that “States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies”.¹⁰⁷

Article 10 deals with the protection of privacy and states that “parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children ...”.

Article 14 provides assistance to parents in caring for their children by the State providing primary health care, nutrition, drinking water and other health services to children. Article 16 stipulates that children must be protected against child abuse and torture.

¹⁰⁶ The CRC requires that parental guidance be given in a manner “consistent with” the evolving capacities of the child. Arts 1992 *AJCL* 147 submits that the “more political or participation rights and freedoms are formulated slightly more weakly in the African Charter than in the UN Convention. The African Charter, for example, only grants the freedom of expression to a child who is ‘capable of communicating his or her views’ and subjects this freedom to ‘such restrictions as prescribed by law’ (Article 7). The UN Convention contains a much broader provision which grants the right to ‘the child’ in general.”

¹⁰⁷ Arts 1992 *AJCL* 139, 147 submits that the ACRWC allows a slightly stronger role to be played by the parent or legal guardian. The CRC requires State Parties to respect the rights and duties of parents to direct the child in the exercise of the right to freedom, thought and religion. The ACRWC imposes a duty on parents to provide guidance and direction for the child in the exercising of these rights. Arts, 148, states that one can generally sense more emphasis on the role and rights of parents *vis-à-vis* the child than in the CRC.

Article 18(1) says that “[t]he family shall be the natural unit and basis of society, it shall enjoy the protection and support of the state for its establishment and development”.¹⁰⁸ Article 18(2) specifies that steps must be taken “to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution”. This article also states that provision must be made for the necessary protection of the child when a marriage is dissolved. Article 19 provides for parental care and protection and specifies that every child is “entitled to the enjoyment of parental care and protection and shall, wherever possible, have the right to reside with his or her parents” and that no child shall be separated from his or her parents unless it is in the best interest of the child.¹⁰⁹

Article 20 of the African Charter deals with parental responsibilities. It stipulates that:

“[p]arents¹¹⁰ ... shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times;

¹⁰⁸ Art 25(1) states that children permanently or temporarily deprived of their family environment shall be entitled to special protection and assistance. State Parties must ensure that a child who is parentless or deprived of his or her family environment be provided with alternative family care, which could include foster placement or placement in a suitable institution for the care of children: art 25(2)(a). State Parties must take all necessary measurements to trace and re-unite children with parents or relatives where separation is caused by displacement arising from natural disasters or armed conflicts. Art 25(3) stipulates that “[w]hen considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background”.

¹⁰⁹ Art 19(1) and (2).

¹¹⁰ Or other persons responsible for the child.

- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child."¹¹¹

Provision is also made for State Parties¹¹² to assist parents and provide material assistance in case of need, and to provide support programmes.¹¹³ The State must also assist parents in the performance of child-rearing and develop institutions that provide care for children,¹¹⁴ as well as “ensure that the children of working parents are provided with care services and facilities”.¹¹⁵

Article 31 deals with the responsibilities¹¹⁶ that every child has. It stipulates that “[e]very child shall have responsibilities towards his family and society, the State, and other legally recognised communities and the international community”. Subject to the child's age and ability he or she shall have the duty “to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need”.¹¹⁷

¹¹¹ Art 20(1).

¹¹² "In accordance with their means and national conditions": art 20(2).

¹¹³ Particularly with regard to nutrition, health, education, clothing and housing: art 20(2)(a).

¹¹⁴ Art 20(2)(b).

¹¹⁵ Art 20(2)(c).

¹¹⁶ Viljoen “The African Charter on the Rights and Welfare of the Child” in Davel (ed) *Introduction to Child Law in South Africa* 222: these duties “should be interpreted in light of the African Children's Charter as a whole and in the light of international human rights law. In this way, a child's duty to respect his or her parents and superiors ‘at all times’ need not be cause for alarm, as it has to be reconciled with a child's right to freedom of expression, association and thought”. This Charter is unique in placing responsibilities on children. This notion originated in the Bengal Charter. This is the “mother” document of the African Charter on the Rights and Welfare of the Child. See also Arts 1992 *AJCL* 139, 144–145.

¹¹⁷ Art 31(a). Art 31(b): “to serve his national community by placing his physical and intellectual abilities at its service”. For a discussion on protecting children against members of their family, see Van Bueren 86–90. For criticism of the Charter, see Chirwa “The Merits and

Arts¹¹⁸ observes that a key aspect of the African Charter on the Rights and Welfare of the Child is that the document represents a regional contribution¹¹⁹ to the development of international human rights law that is applicable to children. Additionally Arts describes the Charter as being “a document which clearly

Demerits of the African Charter on the Rights and Welfare of the Child” 2002 *IJCR* 157, 161, eg the Charter states that the views of a child must be taken into consideration “in accordance with appropriate law” which is less favourable than the provision contained in the CRC, which states that the child’s views must be given due weight in accordance with the age and maturity of the child. Another criticism is that the Charter qualifies that several participation rights, eg the right to freedom of association and freedom of assembly, have to be exercised “in conformity with the law” and the right to freedom of expression is subject to “such restrictions as prescribed by laws”. Chirwa states that “such clauses could render the rights granted meaningless.” Chirwa’s concerns are valid. See further Art 1992 *AJCL* 153–154: “the African Charter ... extends the line of the Bengal Charter, which also strikes a balance between rights and responsibilities”. Arts, 154, stipulates that “[s]ome of the duties mentioned, such as the right to work for the cohesion of the family and to preserve and strengthen the independence and integrity of their countries, seem quite demanding and hard for children to fulfil. Probably the provision is more of symbolic relevance than anything else, since most of the responsibilities mentioned are phrased in broad or vague terms to enforceable in practice. Nevertheless, it creates the risk of abuse by authorities”. Gose (39–40) emphasises that the “legal enforcement of the enunciated responsibilities is certainly difficult to conceptualise. One could say therefore that the normative value of these provisions is more of a morally persuasive than of a legal nature” and that these duties must be seen within the framework of the entire ACRWC, “duties would have to be given content in this way to be harmonized with the framework of already established rights”.

¹¹⁸ 1992 *AJCL* 144.

¹¹⁹ Arts 1992 *AJCL* 144 submits that the reason for the codification of a separate African Charter which deals with children’s rights is that “Africa’s recognition and protection of human rights should reflect the spirit of its traditional cultural values”. Gose (140–141) concludes that the ACRWC contains some innovative provisions, and the extent of the protection of children to all children under 18 years old is welcome. However, Gose stipulates that “[u]nfortunately, the Charter is not able to maintain these innovations throughout the whole document. Thus, even though some parts of the Charter can be said to bear the ‘African Cultural Footprint’ this is mostly not the case”. Gose further states that because the ACRWC does not substitute the CRC or lower the level of protection offered to children it “cannot do any real harm to the legal situation of children” and is welcome as it contains provisions that exceed the level of protection afforded by other instruments. Further, Gose emphatically states that “[o]nce authoritatively interpreted by an appropriate body under the Charter that clarifies the points in doubt and excludes possibilities of regressive interpretation, the Charter has the potential to step out of the Convention’s shadow. Particularly because of its enforcement provisions the Charter has the potential to be a living instrument that is able to adapt to changing circumstances and to be developed to the greatest possible benefit of children. This inherent potential is the real value of the Charter”. It is submitted that this view of Gose should be supported.

shows the priorities of the region, without affecting the relevance and status of the global UN Convention on the Rights of the Child”.¹²⁰

3 1 1 1 4 Other international instruments¹²¹

3 1 1 1 4 1 Declaration of the Rights of the Child (1924)¹²²

This declaration specified that the child must be given the means to develop normally, both materially and spiritually¹²³ and that:

“[t]he child that is hungry must be fed, the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and waif must be sheltered and succoured.”¹²⁴

¹²⁰ 1992 *AJCL* 144. Art 1 of the Charter provides that nothing in the Charter shall affect any provision in the law of a State Party or international convention or agreement that is in force in that State, which is more conclusive to the realisation of children’s rights. Arts submits, at 154, that the provisions of charter therefore form a minimum standard and that deviations from the Charter are permissible, provided that they are more conducive to the rights of the child than the ACRWC. For a discussion of the role of the Committee on the Rights and Welfare of the Child, see 155–157. Arts (155) submits that the role of the committee is to “promote and protect the rights and welfare of the child” (art 32 ACRWC).

¹²¹ In this section reference is made to some international documents that are not binding in South Africa. These international documents are nevertheless important in South Africa. S 39(1)(b)–(c) of the South African Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law. These international documents also serve to highlight the development of the notion of the rights of the child in international law.

¹²² The majority of these older international documents have been sourced from Van Bueren (ed) *International Documents on Children* (1998). Only the first page on which the relevant document is found in Van Bueren will be referred to in the notes. Also referred to as the Geneva Declaration of the Rights of the Child: Robinson 2002 *Stell LR* 310. Robinson points out that this was the first human rights declaration that was adopted by an inter-governmental organisation.

¹²³ S I.

¹²⁴ S II. Van Bueren 3.

Clearly these provisions emphasise care for the child, not the rights of the child.¹²⁵

Further provisions stipulate that the child must be the first to get relief in times of distress, and that the child must be protected against exploitation and put in the position to earn a livelihood.¹²⁶ The declaration also specifies that “the child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men”.¹²⁷ The fact that the child has duties towards others is also emphasised in the African Charter on the Rights and Welfare of the Child.¹²⁸

3 1 1 1 4 2 The Declaration on the Rights of the Child (1959)¹²⁹

The preamble of this Declaration states that “mankind owes to the child the best it has to give”. The intention of the Declaration was that the child may have a happy childhood and enjoy “for his own good and for the good of society the rights and freedoms herein set forth”. Robinson observes that:

“[t]he declaration served as an indication of a growing international awareness that the rights of children were indeed a public concern and that public law had

¹²⁵ Robinson 2002 *Stell LR* 310–311 states that the Convention is paternalistic in nature and that although it is titled the “Rights of the Child” it is mainly concerned with the economic, social and psychological needs of the child and “the language would be more appropriate to the field of child welfare”. The modern tendency is not to only take care of the child but also to give the child rights and the freedom of expression, as well as opportunity to express his or her own views. See further par 3 1 1 1 1 above regarding the child’s right to be heard as provided for in the CRC.

¹²⁶ S III and IV.

¹²⁷ S V.

¹²⁸ In art 31 of the Charter it specifies that every child shall have responsibilities to his or her family and society.

¹²⁹ Van Bueren 4.

to reflect on private subjection – *inter alia* the relationship between parents and their children.”¹³⁰

Principle one states that the child shall enjoy special protection and shall be given opportunities “to enable him to develop physically, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity”. It is also stated that when enacting laws for this purpose that the best interests of the child shall be the paramount consideration. Once more a caring attitude towards the child is shown and a concern with the healthy development of the child. The declaration also specifies that the child is entitled to a name and nationality from birth and that the child shall enjoy the benefits of social security.¹³¹

Principle six states the following:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstance, be separated from his mother. Society and the

¹³⁰ Robinson 2002 *Stell LR* 311, states further that “[i]t could not be accepted unconditionally any longer that ‘every man’s home (was) his castle’, the notion that carried with it the concept of privacy of the family and which consequently lead to a policy of minimum intervention.” Robinson also indicates that the declaration recognised that the family had become the environment where grievous abuse of children took place and that the approach of minimum intervention had left children vulnerable to the abuse of family members.

¹³¹ Principles 3 and 4. Principle 5 states that a child who is physically, mentally or socially handicapped shall be given special treatment, education and care required by his particular condition.

public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance to the maintenance of children of large families is desirable.”

This principle not only emphasises care of children, but also the importance of the family,¹³² although the declaration was written in 1959 and thus is dated. For example, the child must not be separated from his mother, but no mention is made of the father. Yet, despite being written nearly 50 years ago the declaration emphasises the best interests of the child.¹³³ The protection of the child is also stressed.¹³⁴

¹³² The right to a family will be discussed in 3 1 1 4 below. Robinson (2002 *Stell LR* 312) points out that the declaration is still paternalistic and that it reflects what has become known as the “*kiddie saver* approach which focuses on the protection of children against discrimination and all forms of neglect and exploitation, the prevention of harm to children and the provision of assistance for the basic needs of children.” Robinson further states that the declaration is concerned with three of the four “p’s” and that the fourth p, namely participation of children would only be established in the 1989 Convention. The *kiddie liber* approach concentrates on the participation of a child in all matters affecting him or her. For a discussion of the four “p’s” as found in the Convention on the Rights of the Child, see Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” in Davel (ed) *Introduction to Child Law in South Africa* 203. See also Woodrow (LLM thesis 2001) 16–17 for a discussion of Hammaberg’s classification of rights (provision, protection and participation), as well as Donnelly and Howard’s classification (survival rights, membership rights, protection rights and empowerment rights). Woodrow proposes that the latter classification is useful in classifying children’s rights generally, whereas the former classification scheme is applicable to the CRC.

¹³³ Principles 2 and 7.

¹³⁴ Principle 8: The child shall be among the first to receive protection and relief. Principle 9: The child shall be protected from all forms of neglect or cruelty and exploitation. He shall not be the subject of traffic in any form. Principle 10: The child shall be protected from practices which may foster racial, religious or any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among people, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men. These principles use protection as their starting point compared to, for example the provisions of the Convention on the Rights of the Child, which emphasise the rights of children. Although the starting point may differ, the end result is that the child is protected.

3 1 1 1 4 3 Declaration of the Rights and Welfare of the African Child (1979)¹³⁵

This Declaration deals predominantly with the welfare and care of the African child and not really with the rights of a child, in the sense that we think of rights during the twenty-first century. The Convention focuses on the mobilisation of resources and the review of legal provisions relating to the rights of the child,¹³⁶ and focuses on the right to development as well as the right to health and education.

3 1 1 1 4 4 European Convention on the Exercise of Children's Rights (1995)¹³⁷

The preamble of the Convention states that the rights and best interests of children should be promoted and that to that end children¹³⁸ should be given the opportunity to exercise their rights, especially in family proceedings affecting them. The Convention sets out the procedural measures which should be used to promote the exercise of children's rights. Article 3 states that the child has the right to be informed and to express his or her view in proceedings.¹³⁹ Article 4 allows the child the right to apply for the appointment of a special representative

¹³⁵ Van Bueren 31.

¹³⁶ Particular taking into account the Declaration on the Rights of the Child (1959).

¹³⁷ Van Bueren 58.

¹³⁸ Under the age of 18: art 1(1).

¹³⁹ This applies if the "child is considered by internal law as having sufficient understanding". Such a child then has a right to receive all relevant information, to be consulted and to express his or her view and to be informed of the consequences of compliance with those views as well as the consequence of any action: article 3. Internal law will differ from State to State and although this article is laudable it would have perhaps been wiser to include an age limit where a child must be allowed the right to express his or her view, and to have specified that if the internal law allows a lower age limit, that such lower limit would then apply.

“before a judicial authority affecting the child where the internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter”.¹⁴⁰

Provision is also made for other possible rights, such as the right to apply to be assisted by an appropriate person of the child’s choice to assist the child to express its view.¹⁴¹ The Convention also specifies that the judicial authorities must ensure that they have sufficient information in order to take a decision that is in the best interests of the child and emphasises that due weight must be given to the views of the child.¹⁴² The Convention also makes allowances for mediation and for legal aid or advice for the representation of children.¹⁴³

3 1 1 1 4 5 Universal Declaration of Human Rights (1948)¹⁴⁴

¹⁴⁰ Art 4(2), unfortunately, states that: “States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.” Regardless of whether the child is considered to have sufficient understanding it could be argued that a child should be entitled to representation in all matters affecting the child, and especially so in a country that can afford the costs associated with the exercise of such a right. Even if a child is not yet able to express his or her view, someone must unabashedly ensure that the best interests of the child are protected. Traditionally, in South Africa, this has been the role of the Judiciary. Although this Convention does not apply to South Africa it does raise the question of representation of children. Art 9 states that where holders of parental responsibilities are precluded from representing the child the judicial authority shall have the power to appoint a representative for such child and that in proceedings affecting the child the judicial authority shall have the power to appoint a separate representative, which may be a lawyer if appropriate. Article 10 specifies that the role of representatives is to provide all relevant information to the child, provide explanations to the child concerning the possible consequence of actions and to determine the view of the child and to present these views to the judicial authority.

¹⁴¹ However, State Parties only have to “consider” granting this right.

¹⁴² Art 5. They must also ensure, where a child is of sufficient understanding, that the child has received all relevant information and consult with the child, in appropriate circumstances, and they must allow the child to express his or her view.

¹⁴³ Art 13–14.

¹⁴⁴ Van Bueren 69.

Article 12 stipulates that no one is subject to arbitrary interference with his privacy or his family. Article 25 states that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family” and that both childhood and motherhood are entitled to special care and protection. Provision is also made that regardless of whether children are born in or out of wedlock they are entitled to the same social protection.¹⁴⁵

3 1 1 1 4 6 International Covenant on Economic, Social and Cultural Rights (1966)¹⁴⁶

Article ten states:

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

Although the Covenant focuses on protection of children, such as protection during childbirth and against discrimination¹⁴⁷ and the right to education¹⁴⁸ it is important for our purposes as the importance of the family is stressed.¹⁴⁹

¹⁴⁵ Art 25(2). Quite a revolutionary idea for 1948! The declaration further makes provision for the right to education, in art 26, and also stipulates that no one may be discriminated against on the basis of race, religion, language, opinion, birth, social origin or status, in art 2.

¹⁴⁶ 1966. Van Bueren 71.

¹⁴⁷ Art 10(2)–(3).

¹⁴⁸ Art 13.

¹⁴⁹ The right to a family will be discussed in par 3 1 1 4 below.

3 1 1 1 4 7 International Covenant on Civil and Political Rights (1966)¹⁵⁰

Article 17 specifies that no one shall be subject to arbitrary interference with his family or privacy.¹⁵¹ Article 18 states that States must use their best efforts to ensure recognition of the principle that both parents have the common responsibility for the upbringing and development of the child. Article 23 stresses that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State” and also specifies that the right of men and women to marry and found a family shall be recognised and that marriage must be entered into with consent.¹⁵²

3 1 1 1 4 8 Convention on the Elimination of All Forms of Discrimination
Against Women (1979)¹⁵³

Although this Convention predominantly deals with the rights of women the Convention also looks at the interests of children. The Convention stresses the importance of the best interests of the child and that it must be the “primordial consideration in all cases.”¹⁵⁴ The Convention also states that men and women should have the same rights and responsibilities as parents and that the best interests of the child shall in all cases be paramount.¹⁵⁵

¹⁵⁰ Van Bueren 73.

¹⁵¹ Art 12 of the Universal Declaration of Human Rights, in par 3 1 1 1 4 5 above, states the same.

¹⁵² Robinson 2002 *Stell LR* 319 states that this means that equality must extend to all matters arising from the relationship, such as the education of children and the running of the household and that art 23 seems to convey a stronger message than art 18.

¹⁵³ Van Bueren 75.

¹⁵⁴ Art 5(b).

¹⁵⁵ Art 16(d).

3 1 1 1 4 9 Declaration on the Elimination of All Forms of Intolerance and of
Discrimination Based on Religion or Belief (1981)¹⁵⁶

Article five of this Declaration states that parents or legal guardians of a child have the right to organise the life within the family in accordance with their religion and belief¹⁵⁷ and that where the child is not under the care of his or her parents or guardians that due account must be taken of the wishes of the parents or guardians in the matter of religion or belief.¹⁵⁸

3 1 1 1 4 10 Various other conventions

There are many other conventions dealing with the rights of the child, or the protection of families. These will be briefly mentioned here.¹⁵⁹

The International Convention on the Protection of the Rights of all Migrant Workers and their Families (1990)¹⁶⁰ specifically deals with the human rights of migrant workers. The Convention emphasises that migrant workers and their

¹⁵⁶ Van Bueren 77.

¹⁵⁷ And that no child shall be compelled to receive teaching on religion or belief that is against the wishes of the parents or guardians of the child, the best interests of the child must be the guiding principle.

¹⁵⁸ Art 5(2)–(4).

¹⁵⁹ The *Convention on Contact Concerning Children* (European Treaty Series number 192 <<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>> accessed on 2005-12-01) aims to specify and reinforce the right to contact. This convention is not in force as yet. The preamble of this convention specifies that children should have the right of contact not only with parents but also “with certain other persons having family ties”. The objects of the convention are: “to determine general principles to be applied to contact orders; to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact; to establish co-operation between central authorities, judicial authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with them”: Art 1. Art 8 provides that State Parties shall encourage agreements to be made regarding contact, between parents and others who have family ties with the child.

¹⁶⁰ Van Bueren 78.

families have the right to life,¹⁶¹ the right to be free from torture,¹⁶² and the right not to perform forced labour.¹⁶³ Such workers also have the right to freedom of religion and the right not to be subject to arbitrary or unlawful interference with their home, family or privacy.¹⁶⁴ Provision is also made for protection of such workers and members of their families from violence and threats.¹⁶⁵ The importance of this Convention is that provision is not only made for the rights of the workers but also for the rights of their families. This emphasises the importance of family and that this is recognised by international bodies and States.

The European Social Charter (1961)¹⁶⁶ stipulates that “[t]he family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development” and that children, and their mother, have the right to social and economic protection.¹⁶⁷ Article sixteen makes provision for the right of the family to social, legal and economic protection and article seventeen makes provision for the establishment or maintenance of services or institutions to protect the rights of mothers and children.

¹⁶¹ Art 9.

¹⁶² Art 10.

¹⁶³ Art 11.

¹⁶⁴ Art 14.

¹⁶⁵ Art 16(2).

¹⁶⁶ Van Bueren 105.

¹⁶⁷ Part I (16).

The African Charter on Human and People's Rights (1981)¹⁶⁸ emphasises the importance of the family. It states that the family shall be protected by the State, which shall take care of its physical and moral health¹⁶⁹ and that every individual has duties towards his family and society as well as to the State and international communities.¹⁷⁰

The Convention on the Law Applicable to Maintenance Obligations Towards Children (1956)¹⁷¹ as well as the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973)¹⁷² regulated the payment of maintenance, and the enforcement of this right.¹⁷³

These international documents all emphasise the importance of protecting the child, but also the necessity of enforcing the rights of children and always considering the best interests of children in every matter concerning them. All international as well as regional documents which deal with the rights of the child are important in South Africa when interpreting the Bill of Rights.¹⁷⁴

3 1 1 2 The Nature and Content of Parental Authority in South Africa

¹⁶⁸ Van Bueren 111.

¹⁶⁹ Art 18.

¹⁷⁰ Art 27(1).

¹⁷¹ Van Bueren 129.

¹⁷² Van Bueren 131.

¹⁷³ The World Declaration on the Survival, Protection and Development of Children (1990) will be dealt with in par 3 1 1 5, where maintenance is discussed.

¹⁷⁴ Art 39 of the Constitution of the Republic of South Africa, 1996: "(1) When interpreting the Bill of Rights, a court, tribunal or forum– (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

There are various South African cases that deal with the nature and content of parental authority. In the matter of *Petersen v Kruger*¹⁷⁵ the facts were that the Petersen and Kruger babies were switched in hospital.¹⁷⁶ Mr Petersen claimed that the child was not theirs but since he had no evidence to prove this he decided to wait until the child was older and its appearance clearer.¹⁷⁷ Blood tests performed on the parties showed that the children were switched.¹⁷⁸ The applicants wanted their own child to be returned to them, but also indicated that they would be willing to keep the child currently residing with them if the Kruger's did not want the child returned.¹⁷⁹ The court explored the question of what the rights of parents are with regard to a child born from their marriage.¹⁸⁰ It was found that the "custody and control"¹⁸¹ of a child belongs to his or her natural parents. Various court cases were used to support this view.¹⁸² It was said that the court is the upper guardian¹⁸³ of all children and that where the interests of a child require it; such court can limit the parents' rights.¹⁸⁴ A court can interfere with the parental right of control and custody where the exercise of such rights could endanger the child's life, morals or health.¹⁸⁵ However, the authority of the court to interfere is not limited to these three grounds; any ground related to the

¹⁷⁵ 1975 4 SA 171 (C).

¹⁷⁶ 172C–H.

¹⁷⁷ 173A–B.

¹⁷⁸ 173D–G.

¹⁷⁹ 173G.

¹⁸⁰ 173H.

¹⁸¹ "Beheer en toesig" were the words used by the court.

¹⁸² *Calitz v Calitz* 1939 AD 56; *Van der Westhuizen v Van Wyk and Another*, 1952 2 SA 119 (GW); *Rowan v Faifer* 1953 2 SA 705 (E); *Short v Naisby* 1955 3 SA 572 (D); *September v Karriem* 1959 3 SA 687 (C) and *Kaiser v Chambers* 1969 4 SA 224 (C).

¹⁸³ This aspect will be discussed in more detail in par 3 2 4 below.

¹⁸⁴ 174A.

¹⁸⁵ 174A.

welfare of the child will serve as a reason for the court's interference.¹⁸⁶ To a court the interests of the child are the most important but the rights of the parents cannot be left out of account.¹⁸⁷ The court then explored the question of whether granting the application would be prejudicial to the welfare of the child.¹⁸⁸ The court concluded that the domestic arrangements, family life, morals and values, as well as the personal characteristics of the applicants were not a threat to the child.¹⁸⁹ The court granted the application.¹⁹⁰

In the case of *Coetzee v Meintjies*,¹⁹¹ the father of a boy, aged twenty years and four months applied for an interdict to prevent a divorced woman from communicating with his son.¹⁹² The court was asked to exercise its power as upper guardian in the interests of the minor.¹⁹³ The court decided that there was no room for interference by the upper guardian as the natural guardian was able to perform his duties.¹⁹⁴ The court said that guardianship rests with the father¹⁹⁵ and the court will interfere if he does not do his duty¹⁹⁶ or if his parental power is exercised in such a way that it endangers a child's life, health or morals.¹⁹⁷ The court acts as upper guardian if the child has no guardian¹⁹⁸ or if the guardian

¹⁸⁶ 174B.

¹⁸⁷ 174B.

¹⁸⁸ 174C.

¹⁸⁹ 174F–176F.

¹⁹⁰ 174F.

¹⁹¹ 1976 1 SA 257 (T).

¹⁹² The woman and his son were in a love relationship. For detailed facts, see 260B–261A.

¹⁹³ 260B.

¹⁹⁴ 261C.

¹⁹⁵ This case was decided prior to the Guardianship Act 192 of 1993.

¹⁹⁶ For a discussion of the definition of guardianship, see par 3 2 1 below. For a discussion of the duties of guardians, see par 3 2 3 below. For a discussion of the court as upper guardian, see par 3 2 4 below.

¹⁹⁷ 261C–D. See also *Calitz v Calitz* 1939 AD 56, 63.

¹⁹⁸ See the discussion of the court as upper guardian in par 3 2 4 below.

does not fulfill his duty or where parents disagree as to what is in the best interests of the child.¹⁹⁹ In the instance before the court, the court would not be granting the interdict as upper guardian but as a court of law.²⁰⁰ What the court must determine here is whether the respondent is acting illegally by continuing a relationship with the minor.²⁰¹ The court specified that part of parental power is the power to determine with whom a child may be friends with and where a child may spend his time.²⁰² Someone that interferes with this (right), interferes with the parental power and this would be an *iniuria* and an interdict could be asked for.²⁰³ The court said that the right to take action against someone who interferes with parental authority is not restricted to the “totally immature young child”.²⁰⁴

The starting point is not the stage of development or age of the child but rather the measure in which the parent has retained or abandoned authority over the child.²⁰⁵ Where the parent has diminished the scope of his authority, by allowing the child to go to university, where he chooses his own friends, there is no infringement of his parent’s authority as far as friends are concerned. The parent abandoned a part of his authority that is to determine with whom his child may associate. In such circumstances there can be no *iniuria*.²⁰⁶

¹⁹⁹ 261F.

²⁰⁰ 261G.

²⁰¹ 262B.

²⁰² 262B.

²⁰³ 262B.

²⁰⁴ 262D.

²⁰⁵ 262D.

²⁰⁶ 262E–F. Human (LLD thesis 1998) 163 points out that according to Judge Hiemstra in this case the child’s views and preferences do not play a role. Human states that this is an example of the model of parental power where children are regarded as their parent’s property and it is merely accepted that parents are acting in the best interests of their children. Human’s view is supported in this regard.

The court decided that the respondent did not transgress any legally enforceable prohibition²⁰⁷ and that an interdict is a matter for the discretion of the court and since the minor would obtain majority in eight months time, such interdict would be futile. The court did not grant the interdict.

The case of *L v H*²⁰⁸ dealt with parental control over a minor. The applicant wanted an interdict preventing the respondent from contacting or communicating with the applicant's eighteen-year-old daughter, who was still living at home, until she reached the age of majority.²⁰⁹ The court stressed that the applicant was exercising parental power and control over his daughter and as her guardian he was allowed to decide with whom she may associate and he decided that she was not to associate with the respondent.²¹⁰ The court looked at the case of *Meyer v Van Niekerk*²¹¹ where the court refused an application where the applicant's daughter who was twenty years old had formed a relationship with a divorced man.²¹² In the *Meyer* case the girl had been sent from Pretoria to attend university in Port Elizabeth and the court said that the applicant relinquished his parental authority to determine with whom his daughter may associate.²¹³ The court also looked at the decision of *Coetzee v Meintjies*.²¹⁴ The court said that it does not think that where a minor leaves home to attend university that a guardian will always lose his right to determine with

²⁰⁷ 262G.

²⁰⁸ 1992 2 SA 594 (E). See also Cronjé and Heaton *Casebook on South African Family Law* (2004) 447–450.

²⁰⁹ 595D–E. For detailed facts, see 595C–596G.

²¹⁰ 596G–H.

²¹¹ 1976 1 SA 252 (T).

²¹² 596I.

²¹³ 597A.

²¹⁴ 1976 1 SA 257 (T). This case was discussed above.

whom the child may associate.²¹⁵ Another case referred to by the court was that of *Gordon v Barnard*.²¹⁶ In this case an application to prevent a married man from communicating with the applicant's daughter, who was eighteen years old and had been working for nearly three years but who resided with her parents, was granted.²¹⁷ It was decided in this case that three questions need to be asked and answered in such a matter, namely:

“(1) is the parental power and control over the child extant? (2) if so, what is the extent and content of that power and control, and (3) is such power as the parent is exercising reasonably exercised?”²¹⁸

The court also referred to the case of *H v I*²¹⁹ in which a similar application, in respect of a seventeen-year-old girl, was successful. In *H v I* the court held that the girl was immature and gullible; that further association with the respondent was not in her interests; that the applicant had not abandoned his right to determine who could associate with his daughter and that the respondent defied the applicant's parental authority.²²⁰ The correctness of statements made in the case of *Coetzee v Meintjies* were also questioned in this judgment.²²¹ The court in the present case agrees with such questioning and states that the court will uphold the decisions of the natural guardian if the power exercised by such

²¹⁵ 597G. The court did not concern itself further with the question in this instance as the minor was still living with her parents.

²¹⁶ 1977 1 SA 887 (C).

²¹⁷ 597H.

²¹⁸ 597H-I.

²¹⁹ 1985 3 SA 237 (C).

²²⁰ 598A.

²²¹ 598B.

guardian is being exercised in a reasonable manner.²²² The court decided that in the present case the applicant did not relinquish his parental power and control over his daughter and was entitled to determine with whom she can associate.²²³ The court decided that applicant's exercise of his parental power and control over his daughter is not unreasonable and granted the order.²²⁴

In the case of *Jooste v Botha*²²⁵ an illegitimate child sued his father for damages.²²⁶ Since the plaintiff's birth the defendant had not admitted that the plaintiff was his son, did not show any interest in him, did not communicate with him and did not give him love or recognition.²²⁷ It was alleged that the defendant is under a legal duty to render love and attention to the plaintiff, or in the alternative that the defendant is obliged in terms of the South African Constitution²²⁸ to render such love, affection, attention and interest as can normally be expected of a father with respect to his natural son,²²⁹ or alternatively

²²² 598D–E.

²²³ 598E–F.

²²⁴ 599D–E and I. The court was concerned about the fact that the daughter was pregnant and that if the court confirmed the rule *nisi* the child would be illegitimate as his or her parents would not be able to marry one another until they were 21 years old. The court concluded however that the child to be born should not have a bearing on the court's decision: 599E–I. It can be argued that the court's decision that the interests of the unborn child should not have a bearing on the decision, as the best interests of the child must be taken into consideration in every matter concerning the child, is incorrect. Even though the unborn child is not regarded as a legal subject in terms of South African law until he or she is born alive, the future interests of an unborn child, if born alive, should be considered. It is doubtful whether the same decision would be made today. For a discussion of the *nasciturus* fiction and the effect thereof, see Cronjé and Heaton *The South African Law of Persons* (2003) 24–25.

²²⁵ 2000 2 SA 199 (T).

²²⁶ In the form of *iniuria*; emotional distress and loss of amenities of life: 201H–I; Sloth-Nielsen 2002 *IJCR* 142.

²²⁷ 201H.

²²⁸ The Constitution of the Republic of South Africa, 1996.

²²⁹ 2011.

that the defendant, as natural father, has a duty to protect the plaintiff, which includes the duty to protect his general welfare.²³⁰

Van Dijkhorst J said that “[a] father has no greater duty to his natural offspring than to provide for their material welfare if he was not married to their mother”.²³¹ The judge also stipulated that the plaintiff’s claim must thus find its legal foundation in the South African Constitution or fail.²³² Van Dijkhorst J then explored the various provisions of the South African Constitution that could have a bearing on this case.²³³ Of importance here is section 28(1)(b) which states that every child has the right to family care or parental care; section 28(3) which indicates that a child means a person under the age of eighteen years as well as section 28(2) which stipulates that in every matter concerning a child the child’s best interests are of paramount importance. Section 8 states that the Bill of Rights applies to all law and binds the Legislature, the Executive, the Judiciary and all organs of State²³⁴ and that it binds a natural or a juristic person.²³⁵ Section 8 also stipulates that when applying the Bill of Rights to a natural or juristic person a court must apply or, if necessary, develop the common law in order to give effect to a right in the Bill and may develop the rules of common law to limit the right.²³⁶ It is also stated that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the

²³⁰ Therefore the defendant is obliged to act as aforementioned: 202A.

²³¹ 202E.

²³² 202F.

²³³ As well as the Interim Constitution Act 200 of 1993: 202G–206A.

²³⁴ S 8(1).

²³⁵ “If, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”: s 8(2).

²³⁶ Provided the limitation is in accordance with s 36: s 8(3)(a)–(b).

rights and the nature of that juristic person”.²³⁷ Section 9 of the Constitution stipulates that everyone is equal before the law and entitled to equal protection and benefit of the law.²³⁸

Van Dijkhorst J specifies that section 9 “is a useful starting point to determine the rights of a child born in wedlock against his divorced non-custodian father who cold shoulders him”.²³⁹ The judge specifies that five questions need to be dealt with. Firstly, whether the alleged right is applicable.²⁴⁰ Secondly, “[w]hat is the nature of this ‘right’? Is it a right in a legal sense?”²⁴¹ Thirdly, “[i]s the ‘right’ that every child has in terms of section 28(1)(b)²⁴² a horizontal right?”²⁴³ Fourthly, whether the defendant is a parent within the meaning of section 28(1)(b).²⁴⁴ Lastly, “[i]s it in the public interest that the courts should create this right which cannot be enforced?”²⁴⁵ The court also had to consider whether, in terms of section 8 of the Constitution, the common law had to be amended, redrafted or amplified.²⁴⁶ The court considered whether there was a conflict between the common law and the Constitution or whether the Constitution

²³⁷ S 8(4).

²³⁸ S 9(1). “Equality includes the full and equal enjoyment of all rights and freedoms”: s 9(2). “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”: s 9(3). “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of s 8(3)”: s 9(4). “Discrimination on one or more of the grounds listed in s 8(3) is unfair unless it is established that the discrimination is fair”: s 9(5).

²³⁹ 204G.

²⁴⁰ “Taking into account its nature and the nature of the duty imposed thereby”: s 8(2). Only a finding in terms of this section will bring into operation the provisions of s 8(3): 204H.

²⁴¹ 204H.

²⁴² Right “to family care or parental care”.

²⁴³ 204H.

²⁴⁴ 204I.

²⁴⁵ 204I.

²⁴⁶ 204I.

contains a provision for where the common law contains a void. In order to answer this, the court had to explore the scope of the relevant common law provisions and had to determine whether these had been modified or amplified by statute law.²⁴⁷ The court also had to determine whether the provisions of the Constitution create a right on a vertical or a horizontal plane.²⁴⁸ The court said that the horizontal application of the Bill of Rights has to be done with circumspection.²⁴⁹ It was also said that if the right is found to be horizontal, the question that must be asked is whether this right must be created piecemeal by the courts or in one legislative act by parliament?²⁵⁰ Furthermore it was specified that if it is found that a constitutional right exists and has horizontal application, the court would have to determine the nature of the remedy that would have to be created.²⁵¹ The court concluded here that there “exists no legal obligation on parents to love their legitimate offspring”²⁵² and there is “none in respect of illegitimate children”.²⁵³ The father of an illegitimate child must maintain such child, but this duty to maintain does not “create rights to access or parental authority”.²⁵⁴ The court also referred to the *locus standi* of fathers of children

²⁴⁷ 205B.

²⁴⁸ 205C.

²⁴⁹ 205H.

²⁵⁰ 205I.

²⁵¹ 206A.

²⁵² 206F.

²⁵³ 206F–G.

²⁵⁴ 206H and sources referred to there: *F v L and Another* 1987 4 SA 525 (W) 526E and 527B–C; *Van Erk v Holmer* 1992 2 SA 636 (W) 647; *B v S* 1995 3 SA 571 (A) 575D–H and 579G–H; *T v M* 1997 1 SA 54 (SCA) 57H–I. Van Zyl and Bekker “*Jooste v Botha* Case no 1554/1999 (T) unreported” 1999 *De Jure* 149, state that the fact that Van Dijkhorst J persisted in referring to the plaintiff as an illegitimate child, in a society where children are no longer regarded as being illegitimate, in the sense of being progeny from illicit and sinful relations, is not an innocent act. They point out that “[t]he choice of words by a judge to deal with the relationship between parents and their children has moral, purposive, social and legal implications” and that it is insensitive in today’s society to maintain a distinction between so-called legitimate and illegitimate children and it is also out of line with current legal developments both inside and outside of South Africa. “If the premise is illegitimacy a

born out of wedlock to approach the court for access²⁵⁵ and emphasised that the Natural Fathers of Children Born out of Wedlock Act does “not grant the illegitimate child the right to apply that his father should be granted rights of access to him and there never existed any such right in the common law”.²⁵⁶ The court found that “[a] bond of love is not a legal bond”.²⁵⁷ Thus, as far as the plaintiff’s claim is based on common law it failed.²⁵⁸

The Constitution does not state that parents must cherish or love their children, or give them attention.²⁵⁹ Section 28(1)(b) of the Constitution is said to mean that every child is entitled to be in the care of somebody who has custody over him or her.²⁶⁰ The word “parental” in section 28(1)(b) is said to mean a custodian parent and thus section 28(1)(b) does not apply to the natural father of an illegitimate child.²⁶¹ The court also specified that “[t]he law will not enforce the

judge may very well reach a conclusion on fallible grounds.” It can be argued that the view held by Van Zyl and Bekker is correct, the court should never have labelled the child as being “illegitimate” as the term has many negative meanings and may well have been an indication of the judge’s underlying personal beliefs with regards to children who are born out of wedlock.

²⁵⁵ Or apply for custody or guardianship according to the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997: 206H.

²⁵⁶ 207B.

²⁵⁷ 207C.

²⁵⁸ 207C.

²⁵⁹ 207G–H.

²⁶⁰ 208F.

²⁶¹ 208G. The court also refers to art 7(1) of the United Nations Convention on the Rights of the Child which states that the child “shall as far as possible [have] the right to know and be cared for by his or her parents” and specifies that the family in the Convention is the custodial relationship: 208H–209B. Sloth-Nielsen 2002 *IJCR* 143 also stresses the fact that the father was here held not to be a parent within the meaning of the words “parental care” and that the care refers to custodial care, and that since the father here had never performed any care function in relation to a child he was not a parent. Van der Linde (LLD thesis 2001) 335 states that this position has a negative influence on the child’s right to parental care. He also states that the Natural Fathers of Children Born Out of Wedlock Act “doen geensins afbreuk aan die voorkeurposisie van moeders van buite-egtelike kinders nie. Die belang van die wet is egter dat die beste belang van die kind as oorwegende maatstaf beskou en dit is duidelik dat daar omstandighede kan wees waar dit in die kind se beste belang sal wees indien sy natuurlike vader voogdyskap of toegang en/of beheer oor hom wil hê.” See ch 4

impossible. It cannot create love and affection where there are none. Not between legitimate children and their parents and even less between illegitimate children and their fathers.”²⁶² Van Dijkhorst J further specified that “[a]ffection cannot be qualified and attention is relative”.²⁶³ The court also specified that such a right would be unenforceable.²⁶⁴

for a discussion of the provisions of the Children’s Act regarding fathers of children born out of wedlock.

²⁶² 209G–H. Pieterse “Reconstructing the private/public dichotomy? The enforcement of children’s constitutional social rights and care entitlements” 2003 *THRHR* 1, 13 states: “Whereas I too do not wish to take issue with the finding that love cannot be legally compelled, it needs to be pointed out that this is not what was asked for in *Jooste*. Rather, the plaintiff argued for the development of existing common law rules aimed at compensating emotional loss for alienation of affection, which in itself does not seem at all feasible.” See also Sloth-Nielsen 2002 *IJCR* 144.

²⁶³ 209I.

²⁶⁴ 209I. Sloth-Nielsen 2002 *IJCR* 144 points out that the “real sting in the tail” is that when the judge considered costs he stated that the real plaintiff was not the child but the child’s mother. See also 149–150 where Sloth-Nielsen indicates that often the non-litigant children are invisible in cases and that adult litigants are usually at the forefront of actions to ensure that children’s rights influence judicial decisions where this would improve the prospects of the adult litigant’s case. She stresses that no *ex parte* applications dealing with children’s rights are found in our law reports yet. [The *Ex parte Centre for Child Law* case no 34054/2003 (TPD) <www.childlawsa.com> was an *ex parte* application for the appointment of a legal representative of a child. This case is discussed in par 3 7 below.] Additionally it is adults who decide whether a child needs a guardian *ad litem*, although such a person fulfills an important role in allowing children’s voices to be heard. In South African law a guardian *ad litem* is only appointed in restricted circumstances, such as where the view of a minor child conflict, or have the potential to conflict, with the views of the parent. A guardian *ad litem* can be appointed in the following circumstances: “(1) if the minor does not have a parent or guardian; (2) if the parent or guardian cannot be found; (3) if the interests of the minor are in conflict with those of the parent or guardian, or if there is the possibility that this could happen; or (4) if the parent or guardian unreasonably refuses to assist the minor or is not readily available to assist the minor”: Davel and Jordaan (2005) 94. See also Van Heerden *et al* (1999) 904; Van der Vyver and Joubert *Persone en Familiereg* (1985) 178; Cronjé and Heaton *The South African Law of Persons* (2003) 102. As well as *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T); *Wolman v Wolman* 1963 2 SA 452 (A) 459; *Ex parte Visser: In re Khoza* 2001 3 SA 524 (T). In *Ex parte Oppel* 2002 5 SA 125 (C) the court stated that if the minor’s guardian is alive then a guardian *ad litem* will only be appointed in exceptional circumstances. These circumstances are: “where the guardian refuses to act, where the minor litigates against the guardian or where there is a clash of interests between that of the minor and that of the guardian”: 31D–E. The child also does not need to consent to the appointment of such curator. For a discussion of the views of the child, especially in relation to the Convention on the Rights of the Child see par 3 1 1 1 1 above.

The claim here was dismissed. Whether the decision of the court was correct, has been severely criticised.²⁶⁵ The judgment has been criticised as being based

²⁶⁵ Bekker and Van Zyl 1999 *De Jure* 151–153 state that although another court may also have found on the facts that the plaintiff is not entitled to damages, they submit that the reasons given by the court are not a fair reflection of the legal principles involved. First, they deal with the statement made by the court that the husband-wife relationship is a comparable situation in a sense that these rights are also not legally enforceable and state that there are in fact legal sanctions to enforce such rights, such as a claim for damages for adultery, alienation of affection and an action for divorce. They point out that although the moral basis for actions such as damages for alienation of affection may be waning that in the case of parental care there is an increasing awareness that children need appropriate legal protection. Second, the judges words that “[n]either common law nor our statutes recognize the right of a child to be loved, cherished, comforted or attended by a non-custodian parent as creating a legal obligation”, are analysed. The authors state that it is unclear why the court did not quote s 28 of the Constitution, considering that the matter had to be decided upon on the basis of s 28, and that “the Constitution contains many open-ended standards or principles” and that “the art does not lie in categorically deciding that they are not enforceable by traditional interdict. The art lies in determining whether an infringement of such right gives rise to a claim for damages or other appropriate relief. It is a familiar principle of law that rights and remedies are complementary.” The Constitutional Court has indicated that courts will have to develop measures to protect rights contained in the Constitution: *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 799. The preamble of the Convention on the Rights of the Child also points out that children are entitled to “happiness, love and understanding”. Thirdly, although the judge says that this is a subject that can be left to the Legislature he finds that the non-custodian parent of an illegitimate child does not fall within the scope of the term parent in s 28(1)(b) of the Constitution. The authors state that they believe that since the Convention refers to parents that illegitimacy was not a consideration. The child is entitled to the care of both parents, although it is often emphasised that there is sometimes only one parent who is responsible for the day-to-day activities of a child, this does not mean that the non-custodian parent does not have a duty of care. The courts have also emphasised that children have a right to meaningful access to the non-custodian parent. In *Duncombe v Willies* 1982 3 SA 311 (D) it was stated that it would be in children’s best interests to have sound relationships with both parents and children have a right of access to their non-custodian parent. Access means more than seeing the child, the concept of care as found in s 28(1)(b) of the Constitution adds meaning to the term access. The authors also stress that the word access can be misleading and that other countries use the term “omgangsrecht” and “umgangsrecht”, which means a right of association. Fourthly, regarding the statement by the court that the family of the Convention is the normal bonded custodial relationship, the authors indicate that this is a select provision of the Convention and that the idea of parental care is found throughout the Convention. Art 7(1) states that a child has the right to know and be cared for by his or her parents. Art 9(3) provides that the child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents, on a regular basis, unless this is contrary to the child’s best interests. Fifthly, the court said that the natural father of a child born out of wedlock is not a parent within the term parental care as found in the Constitution. The authors state that there is no substance in limiting the word parent and that in access, custody and adoption matters the rights of the natural father are recognised. “It is a paradox to say that when the child relies on his or her rights to parental care the self-same fathers are no longer parents. Neither the Constitution nor the Convention defines parent. There is no reason to deviate from the ordinary meaning.” Lastly, the court states that the plaintiff is too young to have an inkling as to what the matter is all about. The authors hold the view that this is a blunt statement for which there is no support in the judgement and that the statement implies that the child was put up

on a strict separation between law on the one side and morality on the other.²⁶⁶ The court should also have dealt with all the relevant provisions of the

to institute the action. Art 12(1) and (2) of the CRC make provision for a child to express his or her view freely in matters affecting him or her and a child must be given the opportunity to be heard in judicial proceedings affecting him or her. Van Zyl and Bekker maintain that the child's opinion should bear weight, depending on the maturity of the child, and that often children have sound views of their own family relations. In conclusion, the authors state that the *ratio decidendi* was ill-conceived and that there was cause for an action and that no weighing-up of the interests of the child against those of the parents took place. It is submitted that the reasoning of the authors is correct. The court should have looked more closely not only at the provisions of the Convention but also at the developments occurring in South African law. It is shocking that the court decided that the non-custodian father of a child born out of wedlock is not a parent for purposes of the child's right to parental care. Custody is not the only requirement in order to be seen as a parent that must care for a child.

²⁶⁶ Van Marle and Brand "Enkele Opmerkings oor Formele Geregtigheid, Substantiewe Oordeel en Horizontaliteit in *Jooste v Botha*" 2001 *Stell LR* 408, 410–411 state that the judgement of Van Dijkhorst J is based on a strict separation between the law on one side and political and moral considerations on the other and that the court refers to this a number of times, eg at 195A "A bond of love is not a legal bond" and at 195C "I bear in mind the tendency in this century to describe in international instruments needs as 'rights' and moral obligations as duties, leading to uncertainty whether rights in the legal sense are intended". The authors state that the judge had a positivistic approach. This approach, in contrast with a value-orientated approach, is an approach where the law is applied as it is and morals or norms apparently play no role in the decision. In a value-orientated approach morals and norms as well as judgement, "oordeel", play a role. Van Marle and Brand (412–413) state that although at first sight it appears that the judge follows a positivistic approach, in reality "bevestig die hof egter 'n bepaalde siening van reg en moraliteit verberg agter die skyn van neutraliteit" and further that the court in *Jooste* "toon ...eienskappe van onpartydige rede en bevestig die onderskeid tussen die publiek en die privaat deur alleenlik 'n etiek van geregtigheid te volg en 'n etiek van sorg buite rekening te laat". The authors also state that "[s]org word nog genome nog omskryf deur die hof, [die hof] volg 'n liberale teenstelling tussen afhanklikheid en onafhanklikheid en negeer relasionaliteit en interafhanklikheid, [die hof] volg 'n funksionalistiese benadering en sluit die moontlikheid van alternatiewe morele vraagstukke uit deur die navolging van 'n liberale en positivistiese moraliteit": 414. The authors state that the Constitution requires that our courts weigh up economic, political and moral interests against each other in order to make a political decision and that one can say that our Constitution requires judges, when enforcing constitutional rights, to follow a different approach than the liberal approach: 415. This case also gives rise to the question of the horizontal application of the Constitution, since the applicant – a private person – claimed that his constitutional right to parental care was infringed. The judge does not reach a definite conclusion regarding this aspect, he merely states that s 28(1)(b) is *primarily* of vertical application. The court also looked at the predecessors to s 28 and said that they were not horizontally enforceable. Van Marle and Brand point out that "[d]ie moontlike horisontale toepassing van regte in die Grondwet is een van die meer radikale verskille tussen die Grondwet en sy voorgangers". The authors also question why the court did not rather concentrate on the question of what the nature of parental care entails: 419. It is submitted that the view held by Van Marle and Brand, that the court could have approached this matter from a different angle and that the court should have determined what was meant by the term parental care, is correct. The court should also not have made a rash decision that s 28(1)(b) is not applicable horizontally, but vertically. It can be argued that the court erred in its judgement of this case. Even if the applicant was not entitled to damages for the

Convention on the Rights of the Child, and should also have looked at the meaning of the term “parental care” as found in section 28(1)(b) of the Constitution.

In the matter of *Grootboom v Oostenberg Municipality*²⁶⁷ it was found that the primary obligation to maintain a child rests on its parents, however where parents are not able to provide shelter for their children, the State is obliged to do so.²⁶⁸

infringement of his right to parental care, the court should have explored other ways in which the child’s right could be enforced.

²⁶⁷ 2003 3 BCLR 277 (C), this case is discussed in more detail in par 3 3 below.

²⁶⁸ In terms of s 28(1)(c) of the South African Constitution. Sloth-Nielsen 2002 *IJCR* 149 indicates that the court in this case indicated that the constitutional rights in s 28 of the Constitution are a mechanism to meet the obligations imposed under the Convention regarding the protection of the rights of children, but that there is no evidence of the influence of the Convention as regards the final decision of the Constitutional Court and that the concern of the lower court that the best interests of children should be paramount “was supplanted with the warning that ‘the carefully constructed constitutional scheme for the progressive realization of socio-economic rights would make little sense if it could be trumped in every case by the rights of the children to get shelter from the state on demand’”. It is submitted that the concerns expressed by Sloth-Nielsen in this regard are correct. The interpretation of children’s rights should never be such that their rights could be seen as being unenforceable, or even worse, unimportant. Van der Linde (LLD thesis 2001) 341 states: “Gevolgtlik is die kwessie van beperkings in die begroting nie van toepassing by die bepaling van die omvang van die regte in artikel 28(1)(c) nie. Dit blyk egter nietermin slegs die geval te wees indien die ouers onbevoeg is om die nodige skuiling te verskaf.” The obligation to provide shelter is imposed primarily on the parents or family and only alternatively on the State. Clearly the child’s right to shelter is, according to the *Grootboom* case, only enforceable against the State when the parents are unable to provide shelter. Thus only in the most desperate cases of need would a child be able to make use of the right stipulated in s 28(1)(c) of the Constitution. Pieterse “Reconstructing the Private/Public Dichotomy? The enforcement of Children’s Constitutional Social Rights and Care Entitlements” 2003 *TSAR* 15–17 criticises the decision reached by the court: “The effect of *Grootboom* is to confine [children’s] claim for basic survival necessities to the private sphere, leaving the public sphere intact to perform its so-called neutral, capacitating and non-interventionist functions” and “[i]n addition to going against the principles underlying common law and the UN Children’s Rights Convention, it is submitted that the decision in *Grootboom* that the state may abdicate its social responsibility towards children with parents is contrary to the purpose of section 28 and damaging to the founding values of the constitution. The neo-liberal discourse of private welfare responsibility that underlies these aspects of the decision loses sight of the structural causes of social inequality, and further disempowers vulnerable members of society through tasking them with their own social upliftment ... it is imperative that ... children be afforded the opportunity to enforce their social rights in the public sphere. Confining such children to the private sphere places them at the whim of social factors for which they (and, in many instances, their parents) are not responsible... It is necessary that the liberal dichotomy between the public and private spheres with the accompanying premise against private intervention be deliberately

*Christian Education SA v Minister of Education of the Government of the RSA*²⁶⁹ dealt with the question of whether section 10 of the South African Schools Act,²⁷⁰ which prohibits corporal punishment in schools, constituted a violation of the right of freedom of religion of parents. It was alleged that the section violated the parents' right to religious freedom as it stopped them from exercising an important part of their Christian religion, namely allowing teachers to inflict corporal punishment on their children.²⁷¹ In this matter the court drew a distinction between the "power and duty of a parent to administer corporal

transcended if the private enforcement of children's rights is to be a realistic option at all." Pieterse (14–16) also compares the decisions reached in the *Grootboom* and *Jooste v Botha* cases. He states that the case of *Grootboom* accords with the neo-liberal view of the state and family. Whereas the *Jooste* case represents a traditional liberal conception of the public and private spheres and it "reinforces the distinction between the 'altruistic' private environment and the 'neutral' and 'non-interventionist' public domain". Pieterse also states that the reluctance of liberalism to intervene in private relationships is also clear from the *Jooste* case. In *Grootboom* the court held that according to s 28(1)(c) of the Constitution "social rights must be understood as ancillary to the right to parental care", whereas "the *Jooste* judgement conversely characterises parental care as a socio-economic right". Pieterse states that the court in *Jooste* was unwilling to "extend the existing duties beyond traditional confines". See also Clark 2002 *CILSA* 234 and Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and the Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 *SAJHR* 210; Cronjé and Heaton *The South African Law of Persons* 80–81.

²⁶⁹ 1999 9 BCLR 951 (SE) 953J. *S v Williams* 1995 3 SA 632 (CC) held that corporal punishment of child offenders was unconstitutional. The case of *R v Janke and Janke* 1913 TPD 382, 385–386 dealt with the scope of a parent's authority to inflict punishment. The court held that the factors that must be taken into consideration when determining whether chastisement is moderate and reasonable are: the nature of the transgression; the degree of punishment inflicted; the physical and mental condition of the person punished; the means of correction and the motive and purpose of the person inflicting the punishment. See also Neethling, Potgieter, and Scott *Casebook on the Law of Delict* (1995) 153–156. In *Du Preez v Conradie* 1990 4 SA 46 (B) the court held that a parent has the right to delegate the right of chastisement, including the right to administer corporal punishment. In this case the mother delegated the right to the children's stepfather. The court held that the person to whom the right to punish was delegated may not exceed the bounds of reasonableness and moderation when they chastise the children. See also Cronjé and Heaton *Casebook on South African Family Law* (2004) 442–445.

²⁷⁰ 84 of 1996.

²⁷¹ 955D–956G and 956I–957E. The constitutional provisions relied upon, were s 15(1) (freedom of religion); s 29(3) (right to education and right to establish independent educational institutions); s 30 (right to language and culture), s 31(1) (cultural, religious and linguistic communities).

punishment to his child and that of a teacher to administer corporal punishment to his or her learner”.²⁷² The court said that parents have a common law right to administer corporal punishment to their children, when their children have misbehaved, and such punishment must be justified and not excessive.²⁷³ Teachers have a similar right, which originates from the relationship between teacher and pupil.²⁷⁴ The judge in this case was “not persuaded that it has been shown to be a sincere belief on *religious* grounds that teachers and schools should be empowered to administer corporal punishment”.²⁷⁵ The court applied the test of “whether [section 10 of the Schools Act] substantially burdens religious freedom”²⁷⁶ and concluded that it did not.²⁷⁷ The court also emphasised that to allow corporal punishment at the applicant’s schools would be allowing applicant’s members to practice their religion in a manner that is inconsistent with the Bill of Rights.²⁷⁸

3 1 1 3 A Paradigm Shift: From Parental Rights to Parental Responsibility

There has been a change in emphasis, from parental rights to parental responsibility.²⁷⁹ Various international instruments concerning children have

²⁷² 958H.

²⁷³ 958I.

²⁷⁴ See further *R v Scheepers* 1915 AD 337, 338; Spiro 89–90. This aspect will not be discussed in more detail.

²⁷⁵ 959D.

²⁷⁶ 959G.

²⁷⁷ 961A.

²⁷⁸ Also in contravention of s 31(2) of the Constitution: 965C.

²⁷⁹ Sinclair *The Law of Marriage* (1996) 111. Van Heerden *et al* 314: “The twentieth century has seen a dramatic shift in emphasis from the notion of rights of parents *vis-à-vis* their children ... to the idea of children as bearers of their own rights and entitlements, especially the right to a certain degree of self determination.” Clark 2002 *CILSA* 217: “Parental authority is increasingly seen to operate without hierarchical control; the aim is to encourage rather than

been adopted. The most important of these instruments is the United Nations Convention on the Rights of the Child.²⁸⁰ The South African Constitution also protects children's rights.²⁸¹

In the matter of *V v V*²⁸² the following was stated:²⁸³

to restrict by promoting agreement rather than control. Parents, like teachers, are increasingly viewed as facilitators rather than instructors and the control between parent and child is viewed in terms of mutual obligations and responsibilities ... The interests and responsibilities of parents must constantly be reconciled with the rights of their children." For an overview of the international literature dealing with the children's rights movement, see Van Heerden *et al* 314 n b. See also Sinclair "From Parent's Rights to Children's Rights" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 62. For a general discussion of the rights of children in international law, see De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289. Parental responsibilities have been defined as: "a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular taking care of the child, by maintaining a personal relationship with him and by providing for his education, his maintenance, his legal representation and the administration of his property": Van Der Linde (LLD thesis 2001) 312. See also par 3 1 1 2 above for the definition of parental authority and par 3 2 1 below for the definition of guardianship as well as par 3 3 1 below for the definition of custody. "... [N]ot only can it be argued that the South African common law concept of 'parental power' is outmoded and unsatisfactory, it would also appear that, as a State Party to the CRC, South Africa has an international legal obligation to recognize in its legislation the shift away from this concept towards the concept of parental responsibility": SALC *Report on the Children's Bill* Ch 8 The Parent/Child Relationship 197.

²⁸⁰ 1989, ratified by South Africa on 1995-06-16. In older international instruments adoption was seen as providing parents with a child, rather than from the child's viewpoint. However, the balance has changed and contemporary international law distinguishes the rights of the child from the rights to a child: Van Bueren (1995) 95. See also Davel and Jordaan (2005) 55-56 where it is stated that although numerous reasons can be given for the change in emphasis from parental rights to children's rights, that the most important is South Africa's ratification of the CRC and the inception of the South African Constitution.

²⁸¹ S 28. Human "Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding" 2000 *THRHR* 393, 399-401 is adamant that the practical implication of the recognition of children's rights in South Africa is that the age of majority must be lowered from 21 to 18; there must be legislation governing the exercise of parental authority in the parent-child relationship, and emphasising that parents have duties; and that a child's right to participate in decision making must be extended and promoted. This can be accomplished by means of legislation which recognises the child's right to participate in decision making and a child's right to legal representation must be implemented. "Kinderregte is kontroversieel omdat dit bekende juridiese en sosiale oorwegings ten diepste raak. Dit skep spanning tussen bemagtiging en beskerming, dit impliseer veranderinge aan 'n aanvaarde regs-kultuur en dit gryp in die lewens van ouers en kinders in": 402. It is submitted that Human's argument is correct. The acceptance and recognition of children's rights has changed the recognised legal culture in South Africa. For analysis of the child's right to be heard, see also ch 4. For a comparative law approach, including an analysis of the Scottish law, to which Human referred, see ch 5.

²⁸² 1998 4 SA 169 (C). This case is discussed in more detail in par 3 3 3 1 below.

²⁸³ 176D. Van der Linde (LLD thesis 2001) 337. For a discussion of the theories of children's rights, see Human "Kinderregte en Ouerlike Gesag: 'n teoretiese perspektief" 2000 *Stell LR*

“There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children’s rights. Children’s rights are no longer confined to the common law, but also find expression in S 28 of the Constitution of the Republic of South Africa ... not to mention a wide range of international conventions.”

The Convention on the Rights of the Child emphasises parental responsibilities and duties.²⁸⁴ The rights of the child are stressed throughout the Convention. Article 7(1) states that a child shall have the right to know and be cared for by his or her parents.²⁸⁵ Article 14(1) ensures that the child’s right to freedom of religion, thought and conscience must be respected, whilst article 14(2) says that parents have the right and duty to provide direction to the child in the exercise of such right and this must be respected. Note that the term “rights and duties” is used in the article; so clearly the rights of a parent are coupled with duties. Article 18(1) stipulates that “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“ and “[t]he best interest of the child will be their basic concern”.

71, 80–82. Provisions of the Convention were previously discussed in par 3 1 1 1 1 above. Applicable provisions will only be discussed briefly here.

²⁸⁴ Art 5 states that: “State Parties shall respect the responsibilities, rights and duties of parents ... 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 Convention.”

²⁸⁵ As far as possible.

The fact that the emphasis has changed in South African law from rights to responsibility, or authority to care is clearly explained by Robinson:²⁸⁶

“By using the word *care* the Constitution²⁸⁷ radically deviates from the parental *authority* notion of the common law. There can be little doubt that the *authority* of the *pater* has lost much of its harshness in modern South African law, and the best interests of the child almost always serve as a qualification to the exercise of parental power. However, its origins as an institution serving the interests of the parents, rather than those of the child, remains.”

A nuance is placed on the parent-child relationship by using the word “care”. The use of the word “care” also indicates recognition that children are vulnerable and lack experience and maturity.²⁸⁸ Robinson explains as follows:²⁸⁹

“The concept of care consequently has a radically different basis, namely that the parent-child relationship is to be defined in terms of the care that is owed to the child to assist him or her to overcome its own vulnerability and lack of maturity relating to judgement and experience.”

The concept “care” is also found in the Children’s Act.²⁹⁰ The reasoning behind changes in terminology is to emphasise the responsibilities of parents and to

²⁸⁶ “The Child’s Right to Parental and Family Care” 1998 *Obiter* 329, 333.

²⁸⁷ S 28(1)(b) which states that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment.

²⁸⁸ Robinson 1998 *Obiter* 333.

²⁸⁹ *Loc cit.*

downplay their rights.²⁹¹ The underlying philosophy is that parents have certain responsibilities towards their children and rights flow from these responsibilities.²⁹² In other words “[p]arental rights are derived from parental duty”.²⁹³

The African Charter on the Rights and Welfare of the Child²⁹⁴ also emphasises parental responsibilities²⁹⁵ or duties. For example, parents have to administer discipline humanly and “in a manner consistent with the inherent dignity of the child”.²⁹⁶ The best interests of the child are also emphasised.²⁹⁷

According to Pieterse,²⁹⁸ “difficulties have arisen in regard to balancing the constitutional rights of children with the common law powers of their parents”. He also states that “the constitutionalisation of children’s rights has led some courts to reconceptualise entitlements formerly associated with parental power as children’s rights”.²⁹⁹ He cautions that children’s rights must not be used “to accommodate parental interests in this way [as this] may upset existing legal

²⁹⁰ The Children’s Act will be discussed in detail in ch 4.

²⁹¹ Human 2000 *Stell LR* 76.

²⁹² Human 2000 *Stell LR* 77: “die begrip *parental responsibility* [word] as die mees gepaste term gesien om uitdrukking aan ouerlike gesag te gee”.

²⁹³ Human 2000 *Stell LR* 80. See also Van der Linde (LLD thesis 2001) 306–312, where parent’s rights and responsibilities in terms of the CRC are discussed.

²⁹⁴ This Charter was discussed in par 3 1 1 1 3 above.

²⁹⁵ See also par 3 1 1 1 3 above for a discussion of parental responsibilities as provided for in the ACRWC.

²⁹⁶ Art 20(1)(C).

²⁹⁷ Art 4(1), even more so than in the CRC.

²⁹⁸ 2003 *THRHR* 6.

²⁹⁹ Pieterse 2003 *THRHR* 7. This is clear from cases awarding access rights to fathers of extra-marital children. See *B v P* 1991 4 SA 113 (T); *B v S* 1995 3 SA 571 (A); *T v M* 1997 1 SA 54 (SCA). These and the current position of fathers of children born out of wedlock are discussed below in pars 3 1 1 3, 3 3 3 3 and 3 4 3.

balances between competing parental interests and may detract from the primary focus of section 28".³⁰⁰

An important parental responsibility is to support the child. A common law duty rests on both parents to support their child.³⁰¹ According to Pieterse³⁰² the common law position:

“[s]hows the links between the constitutional right to parental care (which would imply the duty to maintain) and the rights to basic nutrition, shelter, basic health care services and social services which may be interpreted to represent the minimum content of parental care. Also self-evident from the common law position is that children’s social rights and care entitlements have always been horizontally enforceable against parents, at least to the extent that parental care relates to the fulfillment of children’s basic social needs.”³⁰³

Sinclair³⁰⁴ advocated a comprehensive redrafting of the rules governing children³⁰⁵ as well as the codification of the common law and statutory rules governing children. The purpose of the codification would be to simplify the law

³⁰⁰ Pieterse 2003 *THRHR* 7.

³⁰¹ For the duty placed on a stepparent to maintain, see Van Schalkwyk and Van der Linde “Onderhoudspilg van Stiefouer *Heystek v Heystek* 2002 2 SA 754 (T)” 2003 *THRHR* 301.

³⁰² Pieterse 2003 *THRHR* 7–8.

³⁰³ Pieterse 2003 *THRHR* 8. Children can also enforce certain rights against the state: *Grootboom v Oostenberg Municipality*. See n 268 above in this regard.

³⁰⁴ “From Parents’ Rights to Children’s Rights” in Davel (ed) (1999) 63.

³⁰⁵ She also recommended joint custody as the starting point in divorce. Joint custody is discussed in par 3 3 below.

and rules concerning children. Such a codification will also emphasise the shift from parental rights to parental responsibilities.³⁰⁶

Human³⁰⁷ states that this change in terminology, from parental rights or power to parental responsibility, is not merely cosmetic. The philosophy behind the change is an attempt by the law to define parenthood in such a way that parental responsibility is emphasised and any rights that parents have are in the background. Parents have certain responsibilities towards their child and, as a result of this, they have certain rights. The change in terminology also mirrors the practical reality in the parent-child relationship. Parents have many responsibilities towards their children, such as to supply the child with food, clothing as well as care and advice. Parents see the performance of such tasks as their responsibility, not their right.³⁰⁸ The importance of this new terminology is that parents' status in relation to their child is no longer formulated in terms of parents' rights. Human³⁰⁹ proposes that there are two models for parental authority. According to the first model parents have fundamental rights due simply to their status as parents and their responsibilities and duties are underplayed. The parents are entitled to some benefit as a result of their parenthood and have the right to make decisions on behalf of the child because

³⁰⁶ The Children's Act is discussed in ch 4.

³⁰⁷ 2000 *Stell LR* 76–81.

³⁰⁸ The exercise of parental authority is often referred to as direction and guidance. However, there is no doubt that parents do have rights as well: 2000 *Stell LR* 77 and 84. Human, (78) defines parental authority as "... die somtotaal van ouers se regte en verpligtinge teenoor hul minderjarige kinders wat uit hoofde van hul ouerskap ontstaan. Dit is juis hierdie besondere wisselwerking tussen die regte en verpligtinge wat ouerlike gesag in die besonder kenmerk". She also points out there can never only be one viewpoint of the nature of parental authority as it is something which is deeply rooted in the structure and views of a community. It is submitted that this view that the concept of parental authority has its origins in the history of a community, and even in the past history of humankind, is correct.

³⁰⁹ 2000 *Stell LR* 79–80.

they are the head of the family. In the second model parents have rights and powers in order to fulfill their obligations towards the child and the focus is on the responsibility of the parents. Parental rights also lessen as the child's ability to make decisions increases.³¹⁰ Human³¹¹ proposes that the first model does not provide room for the recognition of children's rights³¹² and thus cannot be accepted. The second model is reconcilable with the idea of children's rights, as according to it the child is seen as an individual with separate interests.

It is clear that the shift from parents' rights to parental responsibilities is connected to the increasing recognition of children's rights. It is submitted that Human's view, that where parental responsibility is emphasised and children are seen as individuals, with individual needs, children's rights are catered for and protected, is correct. The importance of this as background will become clear during the discussion of guardianship, custody and access.³¹³

3 1 1 4 The Child's Right to a Family

3 1 1 4 1 Definition of a family

³¹⁰ Freeman's theory of children's rights, as well as that of Eekelaar, is reconcilable with the second theory: 2000 *Stell LR* 81. Freeman emphasises liberal paternalism, where the child's development is taken into consideration. Eekelaar emphasises social interests, such as the right of development. See further Freeman *The Rights and Wrongs of Children* (1983) 40–52 and Eekelaar "The Emergence of Children's Rights" 1986 *Oxford Journal of Legal Studies* 161–182.

³¹¹ 2000 *Stell LR* 82.

³¹² Due to the fact that it does not distinguish between the child's interests and the parent's rights: Human 2000 *Stell LR* 83.

³¹³ This follows below at pars 3 2, 3 3 and 3 4.

The exercise of guardianship, custody and access usually takes place within a family relationship, of some sort. Thus it is important to explore the child's right to a family before dealing in detail with guardianship, custody and access. The child's right to a family is emphasised in various international documents. Amongst these are the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the Universal Declaration of Human Rights and the European Convention on Human Rights.³¹⁴

In order for a child's right to family to be protected, the institution of the family needs to be protected, as well as respected, in South African law. In this paragraph³¹⁵ relevant international law will first be dealt with and then current South African law that deals with the child's right to a family will be explored.

A family is defined as a "group consisting of parents and their children" and can also consist of "close relatives".³¹⁶ According to Cronjé and Heaton³¹⁷ the

³¹⁴ These international conventions were discussed in par 3 1 1 above and will only be discussed here within the context of the child's right to a family.

³¹⁵ 3 1 1 4.

³¹⁶ The *Oxford Advanced Learners Dictionary*. "South African law has no single definition of a 'family'. Different pieces of legislation recognise individual relationships for particular purposes. It is, however, abundantly clear that the 'traditional nuclear family form', based on the relationship of a married man and woman and their biological or adopted children, does not reflect the reality of South African Society": SALC *Report on the Children's Bill* Ch 8 The Parent/Child Relationship 175–184. Some of this legislation is the Welfare Laws Amendment Act 106 of 1997, which amended the Social Assistance Act 59 of 1992. In terms of s 1 of the Social Assistance Act, a "primary care giver" is defined as "a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child". S 1 of the Domestic Violence Act 115 of 1998 defines a "domestic relationship" as meaning "a relationship between a complainant and a respondent in any of the following ways: (a) they were married to each other, including marriage according to any law, custom or religion; (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other; (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time); (d) they are family members related by consanguinity, affinity or adoption;

concept of the “family” can be used in a narrow as well as a wide sense. In a wide sense it means all people who are blood relations or who have become related through marriage, or through adoption. In the wide sense it can also mean the family unit which is created when people enter into a marriage-like relationship which is not recognised by law. In the narrow sense the term means spouses in a valid marriage and their children.

Pieterse³¹⁸ states that “[f]amily is difficult, if not impossible to define. Various people are regarded as each other’s family in various contexts and children grow up in diverse family arrangements.”³¹⁹

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or (f) they share or recently shared the same residence.” The South African Schools Act 84 of 1996 defines a “parent” as: “(1) the parent or guardian of the learner; (2) the person legally entitled to custody of the learner; or (3) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner’s education at school.”

³¹⁷ *South African Family Law* (2004) 3.

³¹⁸ 2000 *Stell LR* 328.

³¹⁹ “This makes it difficult to determine not only the level of protection to be awarded to different family relationships, but also the rights and duties attached to each.” Pieterse (2000 *Stell LR* 329) also emphasises the fact that the Western nuclear family has degenerated, that a shift has taken place from group-based structures to individual structures. He states that “new” forms of family have come into being as a result of changing morality and socio-economic circumstances. Often families consist of members of the nuclear family, extended family, as well as outsiders. “While Western Society remains characteristically individualistic, an increasing number of children are growing up in families where they develop strong emotional ties with individuals other than their biological family. Because unconventional family relationships are not legally protected, children who develop such emotional ties are left particularly vulnerable when these relationships are disrupted by family turmoil”: 329. Pieterse also refers to the extended African family, and says that “a plurality of family forms exists in contemporary African society and there are a legion of different care arrangements regarding custody and day-to-day care of children”: 331. Clark 2002 *CILSA* 217: “The legal concept of parenthood, which has in the past been linked to the model of a nuclear family, is not consonant with the reality of many homes in South Africa, where social or psychological parenthood may be more common in the extended family, or a family where a divorce had occurred.” It is submitted that the view that the family, as found in South Africa, occurs in a multitude of forms is correct. The Law Reform Commission also recognised this fact; see SALC *Report on the Children’s Bill* Ch 8 The Parent/Child Relationship 180. See also Bonthuys 1997 *SAJHR* 633: “[F]amilies can be defined in many different ways, varying from only those people who have very close genetic ties, such as the members of western nuclear families, through to extended family groups formed by a wider group of people with more tenuous biological ties to each other, such as families in

The term “family” is not defined in either the Convention on the Rights of the Child or in the South African Constitution. The preamble of the Convention states that the family is the fundamental group of society and the natural environment for the growth of children and thus it must be protected and it must be given assistance in order to fully assume its responsibilities. Article 3 of the Convention on the Rights of the Child states that “whilst State Parties must ensure that a child has protection and care, the rights and duties of the [child’s] parents, legal guardians or other individuals responsible for him or her” must be taken into account. Article 5 refers to the “extended family”. Article 7 refers to “parents” and article 8 to “family relations”. Clearly, the State has a duty to recognise and protect the family in terms of the Convention on the Rights of the Child.³²⁰

Article 19 of the African Charter on the Rights and Welfare of the Child refers to “parental care”. No precise definition of family is provided. The non-provision of a precise definition can be both positive and negative. The fact that there is no precise definition can possibly lead to confusion and lack of clarity. Yet any

customary law, to a purely social construction of families as people who have emotional, social and material things in common, but not necessarily genetic material.” Bonthuys also states that if families were defined socially instead of only biologically, then biological bonds would not be relevant in deciding what is in the best interests of children. See also the discussion on access by interested persons other than parents in par 3 4 4 below.

³²⁰ Human (LLD thesis 1998) 135. Woodrow (LLM thesis 2001): “The CRC sees the institution of family as compatible with children’s rights. For this is the fundamental social group within which children exercise many of their rights, and the body that will guide the child in the exercise of his or her rights. The family is the most natural and potentially valuable place to foster child development. The development of capacity leading to full autonomy is facilitated by the family environment. The CRC achieves an important balance between child, family and state.” The duty of the State as well as the role of legislation in recognising the rights of children will be discussed in more detail in ch 4.

definition of family would have to be flexible as family life can vary greatly depending on cultural, social and economic conditions and such diversity must be respected in any definition of a family. A definition of family would have to, at the very least, include close relatives of the child, as well as unmarried parents.³²¹ Van Bueren³²² states that “the family is a concept in transitional development [and that] it is conceptualised both as a cohesive association of autonomous people and as a group of individuals subject to a higher law which protects competing claims”.³²³

Since 15 November 2000 the Recognition of Customary Marriages Act³²⁴ has recognised customary marriages in South Africa. Muslim marriages will also

³²¹ Smith “Parenthood in Modern Society” in Eekelaar and Sorcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the 21st Century* (1993) 447.

³²² *The International Law on the Rights of the Child* (1995) 68.

³²³ Van Bueren also explores the various forms in which families are found, for example the Akans of Ghana do not have an equivalent for the English word “aunt”. To them all aunts are mother, younger mothers and older mothers. She states that “kinship terminologies are related to the expected behavioural patterns which govern family members. Hence individual members of the extended family other than the parents can be as important to the child, because they have been involved in the child’s development” and that child care is regarded as a communal activity and this leads to minimum State intervention. Van Bueren (69) points out that it is incorrect to state that Europe and North America have nuclear families and Asia, Africa and South America have extended families and that most societies are mixed. She also points out (95) that although a child has a right to respect for his or her existing family life, a child does not *per se* have a right to a family life and that the consequence of this is that children do not have a right to be adopted in international human rights law. Van Bueren states that she believes that this explains the absence of any reference to adoption or fostering in either of the Declarations on the Rights of the Child. In terms of South African law, it could be argued that children have such a right and that even if adoption is not seen as a right to family care, it would fall within “appropriate alternative care” as stated in s 28(1)(b) of the Constitution. Chirwa 2002 *IJCR* 167 states that the family is an important institution in Africa and that it “forms the basis of the community within which rights are supposed to be enjoyed”.

³²⁴ 120 of 1998. The Births and Deaths Registration Amendment Act 40 of 1996 extended the definition of marriage to include a customary marriage. In a recent equality court sitting (EC004/06) the court found that the Recognition of Customary Marriages Act was unconstitutional as it only recognised customary marriages entered into between African people and not customary marriages contracted according to the tenants of Islam. The amendment of the Recognition of Customary Marriages Act falls outside the jurisdiction of the court and will be decided before the Constitutional Court: <legalbrief@legalbrief.co.za> received on 21-09-2006.

soon be recognised: a number of cases have already recognised the legal consequences resulting from a Muslim marriage.³²⁵ In *Daniels v Campbell NO*³²⁶ the court held that the term “spouse” in the Intestate Succession Act³²⁷ and the Maintenance of Surviving Spouses Act³²⁸ includes parties to a Muslim marriage. The South African Law Reform Commission’s Report on Islamic Marriages and Related Matters³²⁹ contains a draft Bill recognising Muslim marriages.

The position of parties of the same sex who want to found a family has also changed. In the case of *J v Director-General, Department of Home Affairs*³³⁰ same-sex life partners had twins as a result of assisted reproduction.³³¹ The woman wanted the birth mother to be registered as the children's mother and the other woman to be registered as a parent. The Director-General refused to register the children's birth in this way. The woman attacked the constitutionality of section 5 of the Children's Status Act.³³² The court found that the section was unconstitutional and specified that the child is deemed to be the same-sex life partner's legitimate child and that the child can be registered under the surname

³²⁵ *Ryland v Edros* 1996 4 All SA 557 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA).

³²⁶ 2004 5 SA 331 (CC).

³²⁷ 81 of 1987.

³²⁸ 27 of 1990.

³²⁹ Project 106.

³³⁰ 2003 5 BCLR 463 (CC).

³³¹ The ovum of the one woman was fertilised with donor sperm and then implanted into the other woman, who gave birth to the children.

³³² 82 of 1987, which stipulates that children born of artificial insemination are legitimate if the birth mother was married. S 5(3) of the Act defines “artificial insemination” as “(a) the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) the placing of the product of the union of a male and female gamete or gametes which have been brought together outside the human body in the womb of the woman, for the purpose of human reproduction”. See further Davel and Jordaan (2005) 104–106.

of either parent or a double-barrel surname consisting of both life partners' surnames.

The Constitutional Court recently recognised the right to same-sex marriages, in the case of *Minister of Home Affairs v Fourie*.³³³ Here the court held that same-sex couples should enjoy the same entitlements and responsibilities of marriage law as applies to heterosexual couples. The court gave Parliament twelve months to correct the defect in the Marriage Act,³³⁴ which refers to “husband” and “wife”, and if the defect is not corrected then the words “or spouse” will automatically be inserted into the Marriage Act.³³⁵ The Constitutional Court held that same-sex couples are entitled to get married based on their right to dignity and their right to equality. Although the court did not refer to a right to a family, the right to marry can be regarded as an important part of the right to a family.³³⁶

Same-sex partners will now be regarded as spouses and thus as family. From the above-mentioned cases it is clear that the form of the family in South Africa is varied and this variation is getting more recognition and protection in South African law.

³³³ 2006 3 BCLR 355 (CC). In the case of *Fourie v the Minister of Home Affairs* 2005 1 All SA 273 (SCA) the court had expanded the common law definition of marriage to include same-sex partners.

³³⁴ S 3(1) of Act 25 of 1961.

³³⁵ There is currently much public debate about this ruling that was made on same sex-marriages. In a recent newspaper report the Cabinet warned against defying the Constitutional Court ruling on same-sex marriages. Cabinet stated that although every group has the right to express their views openly, “[p]articipants in the debate should not conduct themselves in a manner that suggests that they want to defy the decision of the Constitutional Court on this or any other matter”: “Cabinet Issues Warning on Same Sex Marriage Bill” *Mail and Guardian* online <<http://www.mg.co.za/articlePage.aspx=284611&area=/breakingnews/breakingnewsnational>> accessed on 2006-09-12.

³³⁶ The right of persons of the same sex to marry is protected and regulated by the Civil Union Act 170 of 2006.

In South Africa a “family” could include only a mother, a father and their children (the “narrow” definition of family). A “family” could also mean a single parent and his or her children, or the extended family, including grandparents and aunts and uncles (the “wider” definition of family). The term can also be used to mean children living together in a child-headed household, or parties living together who are not biologically related but have an emotional, psychological or social bond. To conclude the term “family” includes more than just the “nuclear family” of parents and their children.

3 1 1 4 2 International documents

The African Charter on the Rights and Welfare of the Child specifies in the preamble 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”. Article 18 of the African Charter specifies that “the family shall be the natural unit and basis of society; it shall enjoy the protection and support of the state for its establishment and development”. Article 19 stipulates that every child has the right to parental care and protection and that, where possible, they should reside with their parents.³³⁷ Article 20(2) provides that parents and other persons responsible for caring for children should be

³³⁷ Art 19 also regulates what should happen when a child is separated from his or her parents. It stipulates that every child has the right to maintain personal relations and direct contact with both parents on a regular basis. Art 19(3) stipulates that if the separation results from the action of a State Party the child shall be provided with information regarding the absent member of the family.

assisted by the State. The State is to do this by providing material assistance and support programmes, particularly with regard to health, education, clothing and housing and must assist parents in the performance of their child-rearing functions and develop institutions responsible for caring for children. Article 31 of the Charter stresses the responsibilities³³⁸ that children have towards their families.

The conclusion can be drawn that the family enjoys special protection³³⁹ under the African Charter and that the child has a right to a family. The State's duty to protect the family, as well as support the establishment and development of the family is emphasised.³⁴⁰

The preamble of the Convention on the Rights of the Child states that:

“the family, as the fundamental group of society and the natural environment for the growth and well-being of its members, and particularly children, should be afforded the necessary protection and assistances so that it can fully assume its responsibilities within the community (and that) the child for the full and

³³⁸ See also par 3 1 1 1 3 and 3 1 1 3 in this regard.

³³⁹ See especially art 18 and art 20(2) of the Charter. Chirwa 2002 *IJCR* 167 stipulates that in Africa the responsibility over the children will fall on particular members of the family, depending on whether the family is matrilineal or patrilineal and that “[t]he charter alters this position by providing that State Parties must take appropriate steps to ensure equality of rights and responsibilities of children during and after the dissolution of marriage. This is a necessary inroad considering that although the extended structure of the family still exists, its survival is facing many challenges in contemporary times and, as a result, the traditional mechanisms of ensuring the protection of the child are increasingly diminishing”. It is submitted that this view is correct. The child needs protection in Africa as the traditional family support systems are being eroded in many instances.

³⁴⁰ The duty of the State to provide material assistance and support programmes is subject to the available means of the State to fund such programmes: art 20(2); Van Bueren 78.

harmonious development of his or her personality should grow up in an atmosphere of happiness, love and understanding.”

State Parties must also respect the responsibilities, rights and duties of parents, extended family and guardians.³⁴¹ Family relations are seen as forming a part of the child’s identity³⁴² and where a child is illegally deprived of an element of his or her identity State Parties must provide assistance and protection so that he or she can speedily re-establish his or her identity.³⁴³

Article 9 of the Convention specifies that a child shall not be separated from his or her parents against their will, unless such separation is necessary for the best interests of the child.³⁴⁴ The right of the child to maintain personal relations and direct contact with parents when separated from them is also recognised.³⁴⁵ A child also has the right to information concerning the whereabouts of an absent family member where such absence has resulted from an action initiated by the State.³⁴⁶ Article 10 deals with the rights of parents and children to enter and leave States for the purpose of family reunification.³⁴⁷ The Convention also

³⁴¹ Art 5. State Parties are under a duty in the Convention to provide “appropriate assistance” to parents and guardians in performing their child-rearing functions and must ensure the development of institutions and facilities that care for children. Appropriate assistance means that the assistance must be at a level which enables the family to fully assume its responsibilities in the community: Van Bueren 77. Van der Linde (LLD thesis 2001) 303 stresses that the preamble emphasises that children are in the first place members of a family and that children are best raised in families.

³⁴² Art 8(1).

³⁴³ Art 8(2).

³⁴⁴ Art 9(1).

³⁴⁵ Art 9(3).

³⁴⁶ Art 9(4).

³⁴⁷ Arts 10(1) and (2).

specifies that both parents have the primary responsibility for the upbringing and development of their child.³⁴⁸

The Convention also specifically stipulates that State 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.³⁴⁹ According to the Convention children of working parents have the right to benefit from childcare facilities³⁵⁰ and State Parties must take appropriate measures to ensure this right.³⁵¹

The above articles place a burden on the State to provide the necessary protection and assistance of the family. It is abundantly clear that the Convention fully recognises the right to a family and that such right is protected by the Convention.³⁵² Article 3(2)³⁵³ protects the rights of the child but the rights and

³⁴⁸ Art 18(1). Van der Linde (LLD thesis 2001) 310 questions whether the fact that parents have “common responsibilities” for their children means that they have “equal responsibilities”? To answer this question he refers to art 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women which states that men and women shall have the same rights and responsibilities as parents in matters relating to their children. He also refers to art 23(4) of the International Covenant on Civil and Political Rights which also emphasises the equal rights and responsibilities of spouses in marriage.

³⁴⁹ Art 18(2).

³⁵⁰ “For which they are eligible.”

³⁵¹ Art 18(3).

³⁵² In order to give effect to the child's right to live in a family the State must adopt preventative measures to improve the living conditions so that families can raise and educate their children: Grossmann "Argentina – Children's Rights in Family Relationships: the Gulf between Law and Social Reality" in Freeman (ed) *Children's Rights: a Comparative Perspective* (1996) 11. Although Grossmann focuses on the relevance of the Convention in Argentina, her comments are relevant to the South African situation as the CRC is also part of South African law. Grossmann also emphasises that the Convention places a duty on parents to nurture and educate their children but also specifies that the State must help them to discharge this duty. She stresses that it is necessary to consider what the State and the community must do so that social rights become effective policies for employment, living, culture and education that is rooted in family life: Grossmann in Freeman (ed) 29. For a comparison of South African law with the laws of other countries, see ch 5.

duties of parents or others responsible for the child are also taken into account. The drafting of this article led to a disagreement and the final article is a compromise. The child needs protection but the parents did not want the State to have control over their children without their support. Likewise the State did not want parents to have arbitrary control over their children, without the children having the protection of the State.³⁵⁴ This is why the present article states “protection and care as is necessary for [the child’s] well being”. When State protection for a right to family is implemented in practice the above points will have to be taken into consideration.

The Universal Declaration of Human Rights³⁵⁵ states that no one shall be subject to arbitrary interference with his family³⁵⁶ and that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.³⁵⁷

The European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵⁸ specifically states that everyone has the right to respect for his

³⁵³ Art 3(2) states that: “States 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 of other individuals legally responsible for him or her, and, to this end shall take all appropriate legislative and administrative measures.”

³⁵⁴ For a discussion of this matter see Fortin *Children’s Rights and the Developing Law* (1998) 41.

³⁵⁵ 1948.

³⁵⁶ Art 12.

³⁵⁷ Art 16(3). Art 16(1) states that “men and women of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family”. Art 23(3) stipulates that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection”.

³⁵⁸ 1950. A regional document, but referred to here in the context of the content of international documents generally, which refer to a right to a family.

private and family life and that men and women of marriageable age have the right to marry and found a family.³⁵⁹

The International Covenant on Economic, Social and Cultural Rights³⁶⁰ specifies that:

“the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for the right of everyone to have an adequate standard of living for himself and his family, its establishment and while it is responsible for the care and education of dependant children.”³⁶¹

Article 11 recognises having adequate food, clothing and housing, and the continuous improvement of living conditions. The article stipulates that State Parties shall take appropriate steps to ensure the realisation of this right.

The International Covenant on Civil and Political Rights³⁶² also states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.³⁶³ It also stipulates that every child shall

³⁵⁹ Arts 8(1) and 12. For a discussion of European cases dealing with the right to a family, see Boucard “Recourse Procedures in Europe” in Nijhoff (ed) *Monitoring Children’s Rights* (1996) 146–151 and ch 5 below.

³⁶⁰ 1966.

³⁶¹ Art 10(1).

³⁶² 1966.

³⁶³ Art 23(1). Van der Linde (LLD thesis 2001) 142–143 states that this article emphasises that, in spite of different social and cultural structures, the family is the smallest group unit. The family is the pillar of all societies. He also (142) emphasises that “as ‘n instellingswaarborg verskil artikel 23 van die negatiewe verpligting teen inbreukmaking in die gesinslewe soos gewaarborg deur artikel 17 ICCPR’ and that this has been described as obliging State

have the right to measures of protection as are required by his status as a minor, on the part of his family, society and the State.³⁶⁴

The African Charter on Human and People's Rights³⁶⁵ clearly specifies 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 and moral health."³⁶⁶ The Charter further states that "the State shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community".³⁶⁷ Article 27 of the Charter stipulates that every individual has duties towards his family and society, as well as other legally recognised communities, as well as the international community. Article 29 of the Charter goes even further and states that the individual has the duty "to preserve the harmonious development of the family and to work for the cohesion and respect of the family".³⁶⁸

Various other declarations also stress that the family is the fundamental unit of society and that the family must be assisted and protected in order to assume its responsibilities within the community.³⁶⁹

The World Declaration on the Survival, Protection and Development of Children³⁷⁰ states that "[t]he family, as the fundamental group and natural

Parties to establish marriage and the family as "*special institutions under their private law systems* and to protect them against interference by State organs and private parties".

³⁶⁴ Art 24(1).

³⁶⁵ 1981.

³⁶⁶ Art 18(1).

³⁶⁷ Art 18(2).

³⁶⁸ And to "respect his parents at all times, (and) to maintain them in case of need".

³⁶⁹ For example, art 4 of the Declaration on Social Progress and Development (1969).

environment for the growth and well-being of children, should be given all necessary protection and assistance”³⁷¹. The Declaration also emphasises that State Parties:

“will work for respect for the role of the family in providing for children and will support the efforts of parents, other care-givers and communities to nurture and care for children, from the earliest stages of childhood through to adolescence. We also recognise the special needs of children who are separated from their families”.³⁷²

In the Draft Provisional Outcome Document: A World Fit For Children³⁷³ South Africa affirmed its obligation to safeguard the rights of all children, by means of national action and international cooperation, utilising the maximum available resources.³⁷⁴ The document further states that economic and social pressures are undermining the role of parents and families in ensuring children grow up in a stable environment, and that families today exist in diverse forms and that the State needs to support families.³⁷⁵

The fact that the family has the primary responsibility for the nurturing and protection of children is also emphasised. That all institutions of society shall respect and support the efforts of parents and other care providers to nurture and

³⁷⁰ 1990.

³⁷¹ Art 14.

³⁷² Art 20(5).

³⁷³ 2000-12-04.

³⁷⁴ Par I 6.

³⁷⁵ Par II 13.

care for children in a safe and supportive environment is stressed.³⁷⁶ One of the goals stated by the document is the review of national legislation to ensure conformity with the standards of the Convention on the Rights of the Child by 2005.³⁷⁷ South Africa will have to make certain that its national legislation fully complies with the Convention.³⁷⁸

The United Nations Document Emerging Issues for Children in the Twenty First Century³⁷⁹ specifies that external support and services are important to improve children's situations and that "a family's ability to protect and provide for its children is ... the single most decisive factor in children's well being".³⁸⁰ A "good start in life, within a nurturing family environment" is specified as the "cornerstone of a child's future growth and development".³⁸¹ Once more the role of the family is emphasised and action needs to be taken by the State to work with families and communities to give children a good start within the family.³⁸²

The Concluding Observations of the Committee on the Rights of the Child: South Africa³⁸³ recommended that the State provide support such as training for parents.³⁸⁴ The Committee also stated its concern that the law still does not

³⁷⁶ Par VA 40.

³⁷⁷ Par 34(b).

³⁷⁸ This aspect will be discussed in more detail when the South African Constitution is dealt with, later in this paragraph, as well as during the discussion of the changes to the South African law that are being brought about by the implementation of the Children's Act, to be discussed in ch 4.

³⁷⁹ 2000-04-04.

³⁸⁰ Par IV E59.

³⁸¹ Par V A67.

³⁸² Par IV E59.

³⁸³ Concluding Observations of the Committee on the Rights of the Child: South Africa (2000-01-28).

³⁸⁴ Par D5 22.

reflect the principles and provisions of the Convention and that the State must continue to reform its domestic legislation.³⁸⁵ The Committee was also concerned about the insufficient efforts to involve community-based organisations in the implementation of the Convention and the lack of inter-ministerial coordination for the implementation of the Convention.³⁸⁶ South Africa still has a long way to go to implement the Convention³⁸⁷ but progress has been made in this regard.³⁸⁸

3 1 1 4 3 South African Case Law and the South African Constitution

There have been some cases that have dealt with the child's right to family life in South Africa. One of these is *In re: Certification of the Constitution of the Republic of South Africa, 1996*.³⁸⁹ In this matter the court dealt with³⁹⁰ marriage and family rights. An objection was made that international instruments and the constitutions of various countries contain provisions recognising the family as the basic unit of society or protecting the right to marry.³⁹¹ The court looked at various international instruments on human rights, which expressly protect the right to family life³⁹² and concluded that the duty on States to protect family life had been interpreted in a multitude of different ways.³⁹³ The court also stated

³⁸⁵ Par D1 10.

³⁸⁶ Par D1 12.

³⁸⁷ Of course, financial resources are required for this. See the discussion below on the implementation of the right to a family.

³⁸⁸ See, for example, the Children's Bill discussed in ch 4.

³⁸⁹ 1996 10 BCLR 1253 (CC).

³⁹⁰ Amongst other things.

³⁹¹ Par 96.

³⁹² Par 97.

³⁹³ Par 98.

that there is no “universal acceptance of the need to recognise the rights to marriage and family life as being fundamental in the sense that they require express constitutional protection”.³⁹⁴ The court refers to “express constitutional protection” and the fact that many foreign constitutions do not contain such express protection. However, international instruments such as the African Charter expressly protect the right to family life. The Constitution in its current form now states in section 39 that international law must be considered and foreign law may be considered when interpreting the Bill of Rights. Of course, this is when interpreting the Constitution itself in its current form. Surely the court should have paid more attention to international law than foreign constitutions, considering that the final Constitution has to be interpreted in accordance with these principles. The court also stated that families are constituted and dissolved in a variety of ways and that “the possible outcomes of constitutionalising family rights are uncertain”.³⁹⁵ The court also stated that disagreements would be prevented over the definition of a family if this right were not expressly included in the Constitution.³⁹⁶ It seems to be the easy way out not constitutionalising a right merely because it will be difficult to define such right. International instruments have expressly included the right to a family although faced with the same

³⁹⁴ *Ibid.* Sloth-Nielsen 1995 *SAJHR* 401, 417, stated that “this lacuna may hamper the indigenous development of a children’s rights philosophy for instance in the interpretation of the right to parental care”. Robinson “An Overview of the Provisions of the South African Bill of Rights with Specific Reference to its Impact on Families and Children Affected by the Legacy of Apartheid” 1995 *Obiter* 99: “In fact, not only should the protection of the family as an institution have been provided for but, concomitantly, the right of parents to care for, and educate their children. At the same time the duty of the state to watch over a parent’s exercising of his rights should have been stipulated for.” Robinson (108) also states that this may constitute a deviation from the CRC and that the right to a family should have been expressly protected in the South African Constitution. Van der Linde (LLD thesis 2001) 491 also agrees with Robinson that the right to a family should have been included in the Constitution. It is submitted that this viewpoint is correct.

³⁹⁵ Par 99.

³⁹⁶ *Ibid.*

problem. The court further stipulated that the provisions in the then proposed Constitution “either directly or indirectly supports the institution of marriage and family life”.³⁹⁷ The court also said that the right to parental or other appropriate care is guaranteed.³⁹⁸

The court concludes that the Constitutional Assembly followed a “middle road”³⁹⁹ and that the objection could not be sustained. It can be argued that there is insufficient protection and enshrinement of a child’s right to family in the Constitution and that the Constitutional Assembly as well as the court should have followed the provisions of international instruments in this regard.

In *Dawood; Shalabi; Thomas v The Minister of Home Affairs*⁴⁰⁰ the case dealt with provisions of the Aliens Control Act⁴⁰¹ which stipulated that an immigration permit can only be issued if the applicant concerned is outside of the Republic at the time of the authorisation of such a permit and that the only exemption is if she or he is in possession of a temporary residence permit at the time of the authorisation of the issue of the permit.⁴⁰² The applicants applied for an order declaring this, and certain other provisions, to be in conflict with the Constitution.

³⁹⁷ Par 101. An example is given in par 102 of the right of a detained person to be visited by their spouse. It can be argued that the current provisions of the Constitution, that indirectly protect the right to a family, are inadequate.

³⁹⁸ Par 102.

³⁹⁹ Par 103: that between those States that expressly protect the family in their constitutions and those that do not.

⁴⁰⁰ 2000 1 SA 997 (C).

⁴⁰¹ 96 of 1991, particularly s 25(9)(b).

⁴⁰² See 997–1000 in this regard.

The court held that section 25(9)(b) of the Act “fell foul of the right to human dignity protected in S10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also such alien spouses”.⁴⁰³ The court said that this was because the effect of the provision was that an alien spouse living in South Africa with his or her spouse could be compelled to leave South Africa while his or her application was being considered.⁴⁰⁴ The court said that this would result in a violation of a core element of the alien spouse's right to family and thus his or her right to human dignity.⁴⁰⁵ In reaching the above conclusion the court considered section 10 of the Constitution.⁴⁰⁶ The applicants had argued that although not expressly incorporated in the Bill of Rights, the right to family life is included in, and protected under, the right to human dignity.

In this judgment a right to family life, at least in so far as spouses have the right to live together as man and wife, was recognised by our courts.⁴⁰⁷ Judge Van Heerden admitted that the right to family is not expressly enshrined in the Constitution but had to view this right as falling within the ambit of human

⁴⁰³ 999 par I.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ 1000 par A.

⁴⁰⁶ “Everyone has inherent dignity and the right to have their dignity respected and protected.”

⁴⁰⁷ Cronjé and Heaton *South African Family Law* 227–228 stipulate that this case recognised that the family is a social institution of vital importance and that families come in different shapes and sizes, and that care should be taken not to entrench certain forms of family at the expense of other forms. The legal concept of what a family is should change as society changes. See also *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC). Cronjé and Heaton, at 228, also stress that marriages between heterosexuals represent only one form of life partnership and that many relationships create obligations and have a social value which is similar to marriage. See also *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC). The right of same-sex partners to marry was recognised in the recent case of *Fourie*, this case is discussed at 3 1 1 4 1 above. For a discussion of heterosexual as well as same sex life partnerships see Cronjé and Heaton 227–240.

dignity⁴⁰⁸. The respondents stated that this was “overshooting”⁴⁰⁹ the purposes of section 10 of the Constitution and the judge set out to prove that this was not the case. Whether we agree or disagree that he did prove this, if he wished to protect the applicant's right to family he had no other choice but to follow this route. Due to the court allowing the Constitutional Assembly to take the “middle ground”⁴¹⁰ when deciding whether or not to include a right to family in our Constitution, a situation has arisen where such express protection of a right was necessary, but such protection had not been expressly stipulated in the Constitution.

If a child's right to family was jeopardised and in need of protection the court may well have followed the same route of interpretation as was followed in this case. This case demonstrates that our courts believe that a right to family exists but they have to be creative when interpreting the Constitution in order to protect such right.⁴¹¹

⁴⁰⁸ 1033–1034. Robinson 1998 *Obiter* 329, 333: “[t]he concept of care, which is typically reflected in terms of exclusivity as set out in sources relating to the common law, must be elaborated upon by a definition of *family* which lacks such exclusivity. This interpretation would also leave room for typical indigenous and religious views on the family to be considered as included in the meaning of what is meant by *family* in the constitution”. See also Van der Linde (LLD thesis 2001) 335–336.

⁴⁰⁹ 1036 Par I–J.

⁴¹⁰ This is discussed above, in this par.

⁴¹¹ For a discussion of regulating domestic partnerships, see Goldblatt "Regulating Domestic Partnerships – A necessary step in the Development of South African Family Law" 2003 *SALJ* 610. Recognition of domestic partnerships would support recognition of the right to a family.

Already in 1996 Robinson⁴¹² spoke of the omission of family protection measures in the Constitution and that it was only political expediency which led to the omission of such measures and that the insertion of such a right would bring about a positive obligation on the State to preserve and further the family institution. Van der Linde states that “om die kind te beskerm moet sy gesin beskerm word” and that a right to a family and a family life will contribute positively to the situation of families in dire circumstances.⁴¹³

The case of *J v Director-General, Department of Home Affairs*⁴¹⁴ demonstrated the recognition of a right to family by our courts.⁴¹⁵ In this case same-sex life partners had twins as a result of assisted reproduction and the children were

⁴¹² 231 Robinson “Some remarks on the Constitution of the Republic of South Africa concerning the protection of families and children” in Lowe and Douglas (eds) *Families across Frontiers* (1996) 229. Robinson clearly states that not protecting the family as an institution is a major flaw in the Constitution. He further says that institutional guarantees contained in Bills of Rights are normally not set out comprehensively and that such guarantees relate to the nature and structure of the institution and indicates whether the existence of the institution is considered to be important. He clearly indicates that the guarantees are not aimed primarily at protecting individual rights but that it is left to the Legislature to concretise the constitutional prescriptions regarding the institution and that the Legislature is bound by the Constitution and may not destroy the institution or limit the unique nature of such institution. Robinson stresses that customary law, in South Africa, attaches a different meaning to what is understood by westernised families by the term family and that the constitutional protection of family should also include family in its traditional customary form. He says that the effect of such a provision would be to “establish the family as a private sphere in which the state is constitutionally prohibited from interfering”. Thus individuals in the family could prevent State interference, as they would have a preventative constitutional right. Robinson also states that the insertion of such a right would bring about a positive obligation on the State to preserve and further the family institution. See also Van der Linde (LLD thesis 2001) 343.

⁴¹³ Van der Linde 344.

⁴¹⁴ 2003 5 BCLR 463 (CC). This case was previously discussed above. See also Cronjé and Heaton 233.

⁴¹⁵ In *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC), it was found that s 1(2) of the Guardianship Act and certain provisions of the Child Care Act are unconstitutional as they do not make provision for same-sex life partners as adoptive parents and thus not only discriminate against such parties but also do not take the best interest of the child into account. The Constitutional Court read words into the Acts so that same-sex life partners are also included. Thus same-sex life partners may jointly adopt children, one same-sex partner may also adopt the other partner’s children and both partners will be joint guardians of such children. This case is discussed in Cronjé and Heaton *South African Family Law* 233–234.

allowed to be registered in the name of either partner or a double-barrel surname.⁴¹⁶

3 1 1 4 4 Recommendations

What could the effects be of a right to family? Aside from the obvious such as not to be removed from the family without just cause⁴¹⁷ others could be that a child's parent who is an alien to South Africa would possibly have the right to come and stay in South Africa if his or her child is lawfully here; children who have been separated⁴¹⁸ from parents or other caregivers will have the right to be reunited. Programmes will have to be implemented to ensure unification of families and the costs of implementing such programmes will be high.⁴¹⁹ Since a child has a right to nutrition; shelter *etcetera* as well as a right to family this may be interpreted to mean that the child's family will also be entitled to for example shelter, as the child may not be separated from the family unless completely necessary and unavoidable. This right may even change the way that the court approaches custody orders in divorce matters.⁴²⁰

The Convention on the Rights of the Child states that the State must undertake such measures implementing rights "to the maximum extent of their available

⁴¹⁶ The ovum of the one woman was fertilised with donor sperm and then implanted into the other woman, who gave birth to the children.

⁴¹⁷ For example the abuse of the child.

⁴¹⁸ This could be as a result of war or even poverty, eg, street children

⁴¹⁹ South Africa's other agencies are overburdened already.

⁴²⁰ Joint custody orders may become more common. See the discussion of the Children's Act in ch 4 for an explanation of the effect of the Act.

resources”.⁴²¹ State Parties should be bound to set objectives with a specified budget in order to avoid using the excuse of poverty too often.⁴²² There are various ways in which resources can be made increasingly available for children such as the use of non-traditional resources and using existing resources to their maximum potential.⁴²³ South Africa will require additional funding for programmes and this will have to come from foreign donors as well as the private sector.⁴²⁴

It is submitted that South Africa’s children indeed have the right to a family but the implementation of this right to its fullest extent will require resources, funding, patience as well as the passage of time. Van der Linde⁴²⁵ proposes that a specific right to a family be incorporated into the Constitution, namely that:

- (1) the family enjoys the special protection of the State, and
- (2) everyone has the right to respect for his or her family life.

It can be argued that Van der Linde’s proposal should be supported. South Africa has come a long way in recognising a child’s right to a family, but it would be better to expressly state that the child has a right to a family in order to simplify enforcement of this right and in order to avoid any confusion in this regard. To start this process our Legislature can enact legislation specifically,

⁴²¹ Art 4.

⁴²² Ledoger “Realising rights through National Programs of Action for Children” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low-Income Countries* (1995) 55. Ledoger specifies that the National Program of Action has great potential for this purpose.

⁴²³ Parker 40–48 “Resources and Child’s Rights: an Economic Perspective” in Hinnes (ed) (1995) provides an in-depth discussion of this aspect.

⁴²⁴ For a detailed discussion of financing, see Parker in Hinnes (ed) (1995) 48.

⁴²⁵ 491.

and expressly,⁴²⁶ protecting the right to a family and mechanisms to enforce this legislation can start to evolve.

3 1 1 5 Maintenance

3 1 1 5 1 General

Maintenance or the parental duty of support arises by operation of law when a child is born.⁴²⁷ Spiro⁴²⁸ defines maintenance as meaning not only the necessities of life, such as food or clothes but also education and that a child must be provided with all those things which are required for his or her proper upbringing.

⁴²⁶ See par 4 4 7 1 below, where it is stated that children do have a right to family in terms of the Children's Act, however it would be better if this had been expressly stipulated in our Constitution.

⁴²⁷ S 15(3)(a) of the Maintenance Act 99 of 1998; Cronjé and Heaton *South African Family Law* 291. According to Clark *et al* an *ex lege* duty of support exists only when three prerequisites are met, namely (a) a relationship;(b) need on the part of the person to be supported; and (c) adequate resources on the part of the person who is called upon to provide support. A parent's duty of support is said to arise *ex lege* and to be based on piety or affection. A parent's duty of support does not exclude a delictual claim by a minor against a wrongdoer, for example a claim for loss of amenities of life: *Family Law Service* <[http://Butterworths.uwc.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myLNB:10.1048?E nu](http://Butterworths.uwc.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myLNB:10.1048?E nu)> accessed on 2005-03-08. See also *In re Estate Visser* 1948 3 SA 1129 (C) (*ex lege* duty of support) and *Guardian National Insurance v Van Gool* NO 1992 4 SA 61 (A) (delictual claim by minor). According to Cronjé and Heaton 291 the parental duty of support is not a component of parental authority. This point is debatable. See the discussion in ch 4 below on the definition of care, as a component of parental responsibility and rights, as contained in the Children's Bill. Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41 stipulates that one of the components of parental authority is control over the person of the child. He further stipulates that this aspect encompasses certain duties, such as providing the necessities of life (food, clothing, shelter, medical care) as well as the education of the child and certain other rights and duties, such as expecting obedience from the child. Van Schalkwyk (42) submits that a parent's maintenance duty toward his or her child "could be seen as part of parental authority but not limited to it. The maintenance duty exists even if the parent has no parental authority over the child". This opinion of Van Schalkwyk can be supported.

⁴²⁸ *The Law of Parent and Child in South Africa* (1985) 397: reference is made to the common-law difference between *alimentia naturalia* (the bare necessities of life) and *alimentia civilia* (further maintenance according to the circumstances and standing of the parties).

Both parents have a duty to support their child regardless of whether the child was born in or out of wedlock.⁴²⁹ The parental duty of support is apportioned between the parents according to their respective means.⁴³⁰ The duty of parents to maintain their child continues after the child is a major, and thus no longer subject to parental authority, if the child is unable to support him- or herself.⁴³¹

The parents' duty to maintain their child is terminated by the child's death. However it is not terminated by the parent's death. The child of a deceased parent may claim maintenance from the estate of the deceased parent.⁴³² The child's claim to maintenance from a deceased parent's estate exists only to the extent that the child is unable to support him- or herself.⁴³³

⁴²⁹ A child born from artificial insemination is regarded as a child born from the parties, where the insemination was performed on a married woman, with her husband's consent: s 5 Children's Status Act 82 of 1987; Cronjé and Heaton *South African Family Law* 265.

⁴³⁰ The obligation to maintain falls on both parents: *Union Government v Warneke* 1911 AD 657, 663 and 668; *Herfst v Herfst* 1964 4 SA 127 (W) 130C. According to parents' means: *Woodhead v Woodhead* 1955 3 SA 138 (SR) 141D; *Herfst v Herfst*; *Lamb v Sack* 1974 2 SA 670 (T) 672–673; *Burse v Bursey* 1999 3 SA 33 (SCA) 36C; s 15(3)(a) of the Maintenance Act 99 of 1998 stipulates that: "the Maintenance Court will take into consideration (i) that the duty of supporting a child is an obligation which the parents have incurred jointly; (ii) that the parent's respective shares of such obligation are apportioned between them according to their respective means; and (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage." S 15(3)(b) says that the amount determined will be such amount as the Maintenance Court considers fair under the circumstances. Van Schalkwyk in Davel (ed) *Introduction to Child Law in South Africa* 46; Cronjé and Heaton *South African Family Law* 291. This apportionment applies regardless of whether the parties are divorced or married: *Kemp v Kemp* 1958 3 SA 736 (D) specified that the common law duty to maintain children lies on divorced parents, depending on their means and circumstances. See also Van Schalkwyk 1992 *Huweliksreg-Bronnebundel* (1992) 412.

⁴³¹ *Gliksman v Talekinsky* 1955 4 SA 468 (W); *Burse v Bursey* 1997 4 All SA 580 (E); *Burse v Bursey* 1999 3 SA 33 (SCA), this was also reported as *B v B* 1999 2 All SA 289 (SCA); Cronjé and Heaton 291.

⁴³² *Carelse v Estate De Vries* 1906 23 SC 532; *In re Estate Visser* 1948 3 SA 1129 (C); *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A); *Ex parte Jacobs* 1982 2 SA 276 (O); *Lambrakis v Santam Ltd* 2000 3 SA 1098 (W); Cronjé and Heaton 291. The claim of the child enjoys preference over the claim of heirs and legatees but not over the claim of creditors of the estate: *In re Estate Visser* 1948 3 SA 1129 (C), see also Cronjé and Heaton

A parent in general has no right of recourse against the child for maintenance spent on the child. An exception to this is where the parent continued to support a child who is able to support him- or herself. In such an instance the parent would have a right of recourse against the child.⁴³⁴ One parent may recover any amounts he or she spent on the child's maintenance that are in excess of the parent's *pro rata* share from the other parent.⁴³⁵

If the parents are unable to support the child then the grandparents are liable to maintain the child. In the past a distinction was made between children born in wedlock and children born out of wedlock. In the case of *Motan v Joosub*⁴³⁶ it was held that the grandparents could not be held liable to maintain their son's extra-marital child. This rule was found to be unconstitutional in the matter of

Casebook on the South African Law of Maintenance (2004) 456–461: *Visser's* case was strongly criticised, but it was held in *Glazer v Glazer* 1963 4 SA 694 (A) that it was too late to reverse the decision as it had become settled law; *Barnard v Miller* 1963 4 SA 426 (C); Cronjé and Heaton 291. See also Clark *et al* par C21 <[http://butterworths.uwc.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myLNB:10.1048?Enu](http://butterworths.uwc.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myLNB:10.1048?Enu)> accessed on 2006-01-30. In *Visser's* case it was also held that a child's claim for support from her deceased parent's estate is not restricted to the necessities of life but that the amount of maintenance depends on the circumstances of each case. Factors that will be considered include the family's social standing and standard of living as well as the child's age. For a discussion of the dependant's action for a loss of support, see Van Zyl L *Handbook of the South African Law of Maintenance* (2005) 44. This aspect falls outside the scope of this discussion, as it deals with a right of recourse against third parties by means of a delictual claim for loss of support. Since this discussion focuses on the parent-child relationship in a narrower context, this aspect will not be discussed in detail here.

⁴³³ So if the child's inheritance is large enough to supply the maintenance needs of the child then the child cannot claim maintenance from the estate of the deceased parent: *In re Estate Visser, Ex parte Zietsman: In re Estate Bastard* 1952 2 SA 16 (C); *Barnard v Miller* 1963 4 SA 426 (C); Cronjé and Heaton 291.

⁴³⁴ Unless the parent intended to make a donation to the child: Clark in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (1999) 248.

⁴³⁵ This can be done regardless of whether the court has apportioned the duty of support between the parents: *Woodhead v Woodhead* 1955 3 SA 138 (SR); *Herfst v Herfst* 1964 4 SA 127 (W); *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C); Cronjé and Heaton *South African Family Law* 292. For a discussion of liability for debts against third parties, see Cronjé and Heaton 292.

⁴³⁶ 1930 AD 61, see also *Bethell v Bland* 1996 2 SA 194 (W).

Petersen v Maintenance Officer Simonstown Maintenance Court.⁴³⁷ In this case it was held that such a rule violates the extra-marital child's right to not be unfairly discriminated⁴³⁸ against on the ground of birth as well as such child's right to dignity.⁴³⁹ The court also found that if such a rule is applied⁴⁴⁰ the best interests of the child are not paramount.⁴⁴¹

If neither the parents nor the grandparents of a child can support such child then the duty to support falls to the child's siblings, provided that the person claiming maintenance is indigent.⁴⁴²

The stepparent has traditionally not had a duty to support his or her stepchild.⁴⁴³ In *Heystek v Heystek*⁴⁴⁴ the court held that the child's right to parental care extends to stepparents and that this includes the child's need for

⁴³⁷ 2004 2 SA 56 (C). The facts of this case were that the applicant was an unmarried student, who gave birth to a child in 2003. The child's father had admitted paternity but did not adequately contribute to the maintenance of the child. The applicant had no income. A Maintenance Court enquiry showed that the father of the child also did not have the means to support the child. The applicant requested the maintenance officer to summon the paternal grandparents to attend a maintenance enquiry. The maintenance officer refused to do so, as she thought the law did not recognise a legal duty of support by the paternal grandparents of an extra-marital grandchild. The applicant then approached the High Court. See further n 1263 below and the sources referred to there.

⁴³⁸ Ss 9(3) and (4) of the Constitution of the Republic of South Africa, 1996.

⁴³⁹ S 10 of the Constitution of the Republic of South Africa, 1996. For a discussion of how a child's right to dignity is affected by sex tourism, see Labuschagne "Sekstoerisme, die Kind se Reg op Waardigheid en Vrye Psigoseksuele Ontplooiing en Kulturele en Ekonomiese Magsmisbruik" 2000 *THRHR* 264. This topic will not be discussed in detail here but is alluded to in order that the full extent of a child's right to dignity is appreciated.

⁴⁴⁰ It is not clear whether the grandparent's duty to maintain will pass to their estate. There is conflicting case law in this regard: *Lloyd v Menzies* 1956 2 SA 97 (N) said that it does pass to their estate, whereas *Barnard v Miller* 1963 4 SA 426 (C) held the opposite: Cronjé and Heaton *South African Family Law* 292.

⁴⁴¹ S 28(2) of the Constitution of the Republic of South Africa, 1996. The best interest of the child standard is discussed at par 3 5 below.

⁴⁴² See Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 49, Cronjé and Heaton *South African Family Law* 292.

⁴⁴³ *S v MacDonald* 1963 2 SA 431 (C); *Mentz v Simpson* 1990 4 SA 455 (A).

⁴⁴⁴ 2002 2 All SA 401 (T).

nutrition, shelter and health care services.⁴⁴⁵ Thus the right to care includes the child's maintenance needs. The court said that the spouses have a shared responsibility to maintain the common household and this results in the step-parent having a duty of support to her spouse's children from a previous marriage. According to Cronjé and Heaton⁴⁴⁶ the only part of the judgment that might provide support for conferring the duty to maintain on a stepparent is the child's right to parental care.⁴⁴⁷

3 1 1 5 2 Extent of maintenance

The extent of the maintenance that must be provided depends on the circumstances of each case. According to the Maintenance Act⁴⁴⁸ food, clothing, medical care, accommodation and a suitable education are included in maintenance. A child may be entitled to more than just the bare necessities. A child may even be entitled to tertiary education. This would depend on the intellectual ability of the child as well as the financial resources of the parents.⁴⁴⁹

⁴⁴⁵ The court relied on the child's constitutional rights to parental or family care; basic nutrition; shelter; basic health services and social services as well as the child's best interest. These matters are dealt with in ss 28(1)(b)-(c) and s 28(2) of the Constitution of the Republic of South Africa, 1996.

⁴⁴⁶ *South African Family Law* 294.

⁴⁴⁷ See also Van Schalkwyk and Van der Linde 2003 *THRHR* 301. It can be argued that the duty of support does not fall to a stepparent. A stepparent is only liable to maintain his or her spouse's child where they are married in community of property, and then only to the extent that such maintenance, which the spouse is liable to pay, is owed from the joint estate. However, if stepparents are to be recognised as social parents of a child, they should also be liable to maintain a child. This also applies to other social parents, such as aunts or uncles. This would be due to the child having a right to "parental care". See Cronjé and Heaton *South African Family Law* 294 where they state that the only support for the decision in the *Heystek* case would be the right of a child to parental care.

⁴⁴⁸ S 15(2) Act 99 of 1998.

⁴⁴⁹ *Mentz v Simpson* 1990 4 SA 455 (A); *Douglas v Douglas* 1996 2 All SA 1 (A). Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 42–43 and 50–52. According to Van Schalkwyk the standard of living of the parents of the

In order to decide how much maintenance a child needs a court looks at certain factors. Amongst these are the child's needs, age, the parent's means, income and social status. The child's needs must first be established and then the parent's contribution must be calculated, taking the parent's means into account.⁴⁵⁰ The court issuing the order for maintenance may specify one amount and the amount must then be used for all the elements of maintenance, including school fees and medical expenses. In practice, however, settlement agreements in divorce cases often specify one amount for maintenance and additional amounts are specified for medical expenses and school fees.⁴⁵¹

3 1 1 5 3 Enforcement of maintenance

The Maintenance Act 99 of 1998, which came into operation on 26 November 1999, repealed the Maintenance Act 23 of 1963. There was a growing perception that right of children to be properly maintained required the law relating to maintenance to be restated. The need for the Maintenance Act to be reconsidered was highlighted by section 28 of the Constitution which protects the

child, when the parents are living together, determines the extent of the maintenance that must be supplied. He submits that where parties do not live together that the standard of living of the person who is liable to provide maintenance is not irrelevant and that this standard may be used to determine whether the maintenance is reasonable or not. Maintenance is not limited to necessities alone: *Chamani v Chamani* 1979 4 SA 804 (W); *Mentz v Simpson* 1990 4 SA 455 (A).

⁴⁵⁰ *Ibid*; see also *Farrell v Hankey* 1921 TPD 590, 596; *Hartman v Krogscheepers* 1950 4 SA 421 (W); *Woodhead v Woodhead* 1955 3 SA 138 (SR); *Herfst v Herfst* 1964 4 SA 127 (W); *Lamb v Sack* 1974 2 SA 670 (T); *Sager v Bezuidenhout* 1980 3 SA 1005 (O); *Zimelka v Zimelka* 1990 4 SA 303 (W); *Osman v Osman* 1992 1 SA 751 (W); Cronjé and Heaton *South African Family Law* 294.

⁴⁵¹ Cronjé and Heaton 295.

rights of children and section 28(2) which emphasises that the child's best interests are paramount.⁴⁵²

The Convention on the Rights of the Child⁴⁵³ as well as the World Declaration on the Survival, Protection and Development of Children⁴⁵⁴ give a high priority to children's rights.⁴⁵⁵ The preamble of the Maintenance Act states:

“Whereas the Constitution of the Republic of South Africa ... was adopted so as to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life for all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;

And whereas the Republic ... is committed to give *high priority to the rights of children*, to their survival and to their protection and development as evidenced by the signing of the World Declaration on the Survival, Protection and Development of Children⁴⁵⁶ [and] the Convention on the Rights of the Child ...

⁴⁵² *Soller v Maintenance Magistrate, Wynberg and Others* 2006 2 SA 66 (O) 71. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 427G–429A.

⁴⁵³ Discussed in 3 1 1 1 1 above.

⁴⁵⁴ 1990.

⁴⁵⁵ *Soller v Maintenance Magistrate* 71.

⁴⁵⁶ 1990. The declaration makes the appeal to “give every child a better future”: art 1. The fact that “[t]he children of the world are innocent, vulnerable and dependent. They are curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation [and that] [t]heir lives should mature, as they broaden their perspectives and gain new experiences” is stressed in the declaration (art 2). The fact that the “reality of childhood is altogether different” for many children is acknowledged (art 3). Art 8 emphasises the opportunity for improving the lot of children: “Together, our nations have the means and the knowledge to protect the lives and to diminish enormously the suffering of children, to promote the full development of their human potential and to make them aware of their needs, rights and opportunities. The [CRC] provides a new opportunity to make respect for children's rights and welfare truly

And whereas art 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child ...

And whereas the recovery of maintenance in South Africa is possibly falling short of the Republic's international obligations in terms of the said Convention;
And [the reform of the maintenance system is being investigated and pending implementation of the Law Commission's recommendations] certain of those laws be restated with a view to emphasizing the importance of a sensitive and fair approach to the recovery of maintenance."

The South African maintenance system is in a process of change. International obligations have caused us to emphasise the rights of children in all areas of our law.⁴⁵⁷ Van Zyl J⁴⁵⁸ states that the Legislature appears to be contemplating an overhaul of the maintenance system and that this is being done in order to establish a just system for recovering maintenance. The measures introduced by the Act must be seen as temporary or interim.⁴⁵⁹

universal". Art 18 emphasises that "[t]he well-being of children requires political action at the highest level". In art 19 State Parties commit themselves to making the rights of children a high priority. The rights of children must be respected in all matters affecting the child, including applications for maintenance. In art 24 State Parties undertook to "make available the resources to meet these commitments".

⁴⁵⁷ Thus resulting in many changes to the parent-child relationship as well as legislation governing this relationship. See ch 4. See also n 578 below for cases dealing with the protection of the best interests of the child and the role of the court as upper guardian of all minor children in its area of jurisdiction.

⁴⁵⁸ In *Soller v Maintenance Magistrate 72D–F*.

⁴⁵⁹ *Ibid*.

The Maintenance Act provides for both civil as well as criminal sanctions⁴⁶⁰ for failure to comply with a maintenance order. If a maintenance debtor does not make payment within ten days from the date when the payment of maintenance was due then the maintenance creditor can apply for a warrant of execution against the maintenance debtor's property, an order for the attachment of emoluments due to the maintenance debtor⁴⁶¹ and an order for the attachment of any present or future debt owing to the maintenance debtor.⁴⁶²

⁴⁶⁰ Criminal sanctions are contained in s 50(2) of the Child Care Act 74 of 1983: it is an offence for someone who is liable to maintain a child under the age of 18 years not to provide such child with adequate food, lodging, clothing and medical aid, if he or she is able to do so. If convicted there is a fine not exceeding R20 000 or imprisonment for a period not exceeding 5 years, or both the fine and imprisonment; s 31(1) of the Maintenance Act 99 of 1998: if the person with the duty to maintain fails to do so then they can be accused of an offence. They can be fined or imprisoned and their details can be provided to organisations that provide credit. There is also the common law offence of contempt of court. See further Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 62–63.

⁴⁶¹ S 28 of the Maintenance Act 99 of 1998.

⁴⁶² S 26(2)(a) and s 27–30. For a detailed discussion of these aspects, see Cronjé and Heaton *South African Family Law* 61–63. S 37A(1) of the Pension Funds Act: "Save to the extent permitted by this Act, the Income Tax Act, 1962 ..., and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or a right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or to be liable to be attached or subjected to any form of execution under a judgement or order of a court of law ... Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine". In *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 5 SA 388 (D) it was held, at 392F, that s 26 of the Maintenance Act did not deal with amounts which became due in the future but with arrear maintenance. However, the court also referred to s 37A(1) of the Pension Funds Act 24 of 1956 and held that the Legislature did not intend to restrict the applicant to the remedies contained in the Act. The court held that the provisions of the pension fund, and particularly s 37A(1), apply to the payment of future maintenance with full force: 396E–397B. In the *Mngadi* case the pension fund was ordered to retain the withdrawal benefit of the third respondent in order to make provision for the maintenance of the children. In *Magewu v Zozo and Others* 2004 4 SA 578 (C) the judge confirmed a creditor's common-law right to obtain an interdict against a creditor in order to prevent the creditor from disposing of funds with the purpose of frustrating the claim of the creditor: 371H–372C. The court also clearly stated that the Maintenance Act and Pension Funds Act work together in order to provide relief to the applicant and that the Maintenance Act "opened new legal avenues to deal with recalcitrant fathers": 583I–584A. The court also stipulated that the Maintenance Act "does not create a closed list of mechanisms available in law to assist children who have claims for

An order made in the Maintenance Court has the effect of an order in a civil action⁴⁶³ and thus can be enforced in the ordinary way, in the ordinary courts. Enforcement does not have to take place in accordance with the Maintenance Act.

Our courts⁴⁶⁴ have held that an order can be made against a provident fund to retain the maintenance debtor's lump sum in order to use it for the maintenance debtor's future maintenance payments. The court ordered that monthly payments be made from the provident fund to maintain the dependent children of

maintenance and their specific situations are not expressly set out in the Act [and] there is no reason, in logic, why such an order should not be made having regard to the best interest of the child": 584B–D. The court also stated that it has a constitutional duty "to develop new mechanisms of granting the applicant a means to vindicate her constitutional rights by a narrow reading of the law": 584E–G. See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 826G–I (courts are obliged to shape new remedies in order to vindicate the infringement of an entrenched right). *Soller v Maintenance Magistrate, Wynberg* 75D–E: "The Maintenance Act clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered. They would certainly be justified if the rights and best interests of the child ... should be threatened." 75J–D: "[The] court ... must ... be fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities or the like ... The maintenance court functions as a unique or *sui generis* court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the relevant provisions of the Constitution ... specifically s 28(2) thereof. This constitutional provision overrides any real or ostensible limitation relating to the jurisdiction of the magistrate's courts. It would be absurd ... if an applicant for relief in a maintenance court should be compelled to approach the High Court for such relief because of jurisdictional limitations adhering to the Magistrate's court. This could never have been the intention of the Legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining and recovering maintenance 'sensitive and fair'." In this case an order was made for yearly withdrawals from the third respondent's annuity until such time as the child became self-supporting.

⁴⁶³ S 24(1) Maintenance Act. Due to the enforcement of maintenance orders being a part of procedural law this aspect will not be discussed here. For a practical guide to the enforcement of maintenance as well as how to apply for a maintenance order see Van Zyl L *Handbook of the South African Law of Maintenance* (2005) esp 57–83.

⁴⁶⁴ In *Mgnadi v Beacon Sweets and Chocolate Provident Fund* 2003 2 All SA 279 (D).

the maintenance debtor.⁴⁶⁵ In *Soller v Maintenance Magistrate, Wynberg* the court ordered that a lump sum be paid.⁴⁶⁶

A maintenance debtor who does not pay can be charged with the crime of not making payment in accordance with a maintenance order.⁴⁶⁷ The accused can raise the defence that the failure to make the payment was due to a lack of means but if this failure is due to the accused's unwillingness to work or own misconduct he will not be acquitted. If the accused is convicted of failure to comply with a maintenance order, a fine or a term of imprisonment, with or without the option of a fine, can be imposed on him.⁴⁶⁸ Ignoring a maintenance order constitutes contempt of court and the accused can be imprisoned.⁴⁶⁹

3 1 1 5 4 Termination of maintenance duty

The duty to maintain a child ends when the child becomes self-supporting, is adopted or dies.⁴⁷⁰ If a child marries the duty to maintain rests on the child's

⁴⁶⁵ See further Cronjé and Heaton 63.

⁴⁶⁶ See n 462 above.

⁴⁶⁷ S 31(1) of the Maintenance Act.

⁴⁶⁸ S 31(1). For further orders that the court can make, including execution against property, see Cronjé and Heaton *South African Family Law* 64.

⁴⁶⁹ In *Bannatyne v Bannatyne (Commission for Gender Equality as amicus curiae)* 2003 2 BCLR 111 (CC) the High Court's power to commit a maintenance defaulter to prison for contempt of court was unsuccessfully challenged. The court held that if there is good and sufficient reason then imprisonment would be appropriate relief: pars 20, 23.

⁴⁷⁰ Unless the adoptive parent is the child's stepparent or same-sex life partner of the child's biological parent: Child Care Act 74 of 1983, s 20(1) and s 17(c); for further detail in this regard, see Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 56–62 and Cronjé and Heaton 295. Van Schalkwyk also discusses gross ingratitude as a reason for the termination of the duty to maintain: 62. Here he refers to Voet's opinion, as referred to in *Smit v Smit* 1980 3 SA 1010 (O) 1021D–1024C, that the personal conduct of the child is, generally speaking, irrelevant in determining the right to maintain. Mention is made of an instance where the conduct of the child could be relevant, namely an older child is receiving tertiary education. However, it is noted that the child's

spouse. Only if the spouse cannot support him or her may they claim maintenance from their parents, grandparents or siblings.⁴⁷¹ If a maintenance order stipulates that maintenance must be paid until a child reaches a certain age such order will automatically lapse when the child reaches the specified age.⁴⁷² It is not clear whether the duty to maintain terminates automatically when a child becomes self-supporting. According to *B v B*⁴⁷³ it does not terminate automatically when the child becomes self-supporting, unless the order stipulates that it only operates until the child becomes self-supporting.⁴⁷⁴ Other courts have held that the maintenance order will lapse if no age has been specified in the maintenance order and the child becomes self-supporting.⁴⁷⁵ It has also been held that the maintenance order will lapse if the child becomes self-supporting before reaching the age specified in the maintenance order.⁴⁷⁶

3 1 1 5 5 Reciprocity of the duty to maintain

A legitimate child must support his or her parents and grandparents. An extra-marital child must support his or her mother and maternal grandparents.⁴⁷⁷ The

conduct would at best be a factor which would, in most cases, be subsidiary to the necessity of providing the child with the "development of his talents which is proper in all circumstances". Van Schalkwyk (62) also stipulates that insolvency of the person liable to pay maintenance does not terminate the maintenance obligation or order.

⁴⁷¹ Cronjé and Heaton 295.

⁴⁷² *Kemp v Kemp* 1958 3 SA 736 (D); *B v B* 1999 2 All SA 289 (SCA). However, if the child is not self-supporting the maintenance duty will continue.

⁴⁷³ 1999 2 All SA 289 (SCA).

⁴⁷⁴ This was stipulated *obiter dicta*. See also *Kemp v Kemp* 1958 3 SA 736 (D) and *Phillips v Phillips* 1961 2 SA 337 (D).

⁴⁷⁵ *Gold v Gold* 1975 4 SA 237 (D); *Van Dyk v Du Toit* 1993 2 SA 781 (O); Cronjé and Heaton *South African Family Law* 295.

⁴⁷⁶ *Rheeder v Rheeder* 1950 4 SA 30 (C); *S v Dannhauser* 1993 2 SACR 398 (O); Cronjé and Heaton *South African Family Law* 295.

⁴⁷⁷ *D 25 3 5 4*; Cronjé and Heaton *South African Family Law* 295.

position of the father and paternal grandparents of an extra-marital child is not very clear.⁴⁷⁸ However, it would be unconstitutional to deny the father, and his relations, the right to claim maintenance from his extra-marital child.⁴⁷⁹

The law considers a grandparent or a parent unable to support him- or herself only if they are indigent. That is, the person must be in a situation of extreme need or want of the necessities of life.⁴⁸⁰ The duty to support a grandparent will only exist if the grandparent has no spouse or child who can support him or her.⁴⁸¹

3 1 1 5 6 Financial assistance by the government

The United Nations Convention on the Rights of the Child stipulates that every child has the right to benefit from social security.⁴⁸² Section 28(1)(c) of the South African Constitution stipulates that a child has a right to basic shelter, nutrition, basic health-care services and social services.⁴⁸³ In the case of *Grootboom v Oostenberg Municipality*⁴⁸⁴ it was decided that the government has an obligation

⁴⁷⁸ See Cronjé and Heaton *South African Family Law* 296 for a discussion of this matter as well as Cronjé and Heaton *Casebook on South African Family Law* (2004) 466.

⁴⁷⁹ S 9(1) of the Constitution; Cronjé and Heaton *South African Family Law* 296.

⁴⁸⁰ Considering his or her station in life, Cronjé and Heaton *South African Family Law* 296.

⁴⁸¹ *Barnes v Union and South West Africa Insurance Co Ltd* 1977 3 SA 502 (E), *Tyali v University of Transkei* 2002 2 All SA 47 (Tk), Cronjé and Heaton *South African Family Law* 296. The scope of the duty of support depends on the parties' social status and means. If there is more than one child or grandchild, the children or grandchildren must contribute according to their respective means: *Oosthuizen v Stanley* 1938 AD 322.

⁴⁸² International conventions were discussed in par 3 1 1 1 above.

⁴⁸³ The State has provided for these duties in various ways, such as the child support grant: Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 64.

⁴⁸⁴ This case was previously discussed in par 3 1 1 2 above, so will not be dealt with in detail here.

to supply necessities, such as shelter, for children when their parents are unable to do so. In South African law there is now a duty on the government to provide children with the bare necessities of life. However, the government is only obliged to do so where the parents cannot afford to provide these necessities. The government's duty to maintain children is also very limited in that it only covers basic necessities such as shelter, not housing, and basic health-care services, and not all medical expenses.⁴⁸⁵

3 2 GUARDIANSHIP

3 2 1 Current definition

The *Oxford Advanced Learner's Dictionary*⁴⁸⁶ defines a guardian, in law, as a “person who is legally responsible for [somebody] who cannot manage his own affairs, e.g. an orphaned child”. A guardian is also defined as “one who guards or protects something”.⁴⁸⁷ Guardianship is said to be the “position or office of a guardian”.⁴⁸⁸ *Bell's South African Legal Dictionary*⁴⁸⁹ defines guardianship as “the lawful authority of one person over the person and property of another,

⁴⁸⁵ Children are entitled to so-called base-line goods. “Children’s socio-economic rights are intended to guarantee for children a certain basic subsistence level of the same social and economic goods that are provided for in more advanced form in sections 26 and 27 ... [t]he benefits to which a child is entitled in terms of section 28(1)(c) are ... of a narrower or lower level than those they are entitled to in terms of section 26 and 27”: Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 187.

⁴⁸⁶ Cowie (ed) Oxford University Press (1989) 554.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Milne, Cooper and Burne (eds) (1951) 341. The Children’s Act 33 of 1960 defines a guardian as “a tutor testamentary, tutor dative or assumed tutor to whom letters of confirmation have been granted under the law relating to the administration of estates”: s 1(1).

introduced for purposes of special utility ... [t]he person over whom the guardianship extends is called the ward". It further states that guardianship is "a legal custody of the person of another who, by reason of his tender years or incapacity is unable to protect himself". This dictionary also specifies that "[guardianship] of a legitimate child is vested in the father and the father has the custody and a duty to look after the child".⁴⁹⁰ Of course, the father is no longer the sole guardian of a child today.⁴⁹¹ The Afrikaans terminology is also important for the purposes of this study as some court cases which dealt with these terms were in Afrikaans. The Afrikaans term for guardian is *voog*, the term for natural guardian is *natuurlike voog* and that of sole guardian is *alleenvoog* and upper guardian is *oppervoog*. Guardianship is *voogdy*; placing under sole guardianship is *alleenvoogdy* or *uitsluitlike voogdy*.⁴⁹²

Cronjé and Heaton⁴⁹³ state that guardianship has both a wide and a narrow meaning and that "[i]n the narrow sense, it refers to the capacity to administer a minor's estate on his or her behalf, and to assist the minor in legal proceedings and the performance of juristic acts. In the wide sense, it includes custody."⁴⁹⁴

⁴⁹⁰ See also *Smith v Berliner* 1944 WLD 35, 37.

⁴⁹¹ This aspect will be discussed in more detail in par 3 2 2 4 below.

⁴⁹² Hiemstra and Gonin *Trilingual Legal Dictionary* (1986) 60.

⁴⁹³ *South African Family Law* (2004) 162 and 277.

⁴⁹⁴ In this section guardianship will mainly be discussed in the narrower sense. Custody will be dealt with separately in par 3 3 below. However, due to the very nature of guardianship, the issues of custody and guardianship may interflow at times in this section. *Butterworths Legal Resources* par 30 <<http://Butterworths/butterworthslegal/lpext.d11.LPFLLib/FAMLWSER.nfo/abb/C70/d0>> accessed on 2003-05-27, also stipulates that the word "guardianship" is used in two ways. Firstly, the broader term guardianship "is equated with parental authority and includes all its incidents". This is typically used to describe the legal status of the parents of a marital child or the mother of an extra-marital child in their capacity as "natural guardians". Secondly, the narrower term guardianship means "that portion of parental authority which relates to the control and administration of the child's estate and the capacity to assist or represent him or her in legal proceedings or in the performance of

Visser and Potgieter⁴⁹⁵ define guardianship as “a parent’s authority to administer the assets and estate of the child, to manage his affairs, conclude contracts on his behalf, and assist him in concluding contracts and when he has to appear in court as plaintiff or defendant”. Davel⁴⁹⁶ says that guardianship “entails the capacity to act on behalf of a child, to administer his or her property and to supplement any deficiencies in his or her judicial capacities”.

*V v V*⁴⁹⁷ states that “[g]uardians take decisions regarding a child’s property and person”. Both parents have guardianship of a legitimate child⁴⁹⁸ and either parent may exercise any aspect of guardianship independently.⁴⁹⁹ However, the consent of both parents is required for certain transactions, such as the minor’s marriage.⁵⁰⁰

juristic acts”. This source also states that: “The term ‘natural guardian’ has no apparent source in Roman Dutch law and appears to have been translated, unnecessarily, from English law. In English law natural guardianship was restricted to the father of a marital child and an extra-marital child had no natural guardian. Natural guardianship is incompatible with the rule of Roman Dutch law that parental authority was shared between both parents of a marital child.” *Van Rooyen v Werner* 1829 9 SC 425 demonstrates this.

⁴⁹⁵ *Introduction to Family Law* (1998) 208: Sole guardianship is said to mean “that the parent in question has exclusive powers concerning guardianship and may in his testament, appoint a third party (in other words someone other than the surviving parent) to exercise the powers of guardianship at his death. If a person has sole guardianship, only the consent of such parent is required if a minor intends to marry.” Cronjé and Heaton 162: “If sole guardianship is awarded to a parent upon divorce, that parent becomes the child’s only guardian to the exclusion of the other parent. Sole guardianship means that, apart from the child’s adoption, the sole guardian is the only parent whose consent needs to be obtained for those acts in respect of which both parent’s consent is normally required. The sole guardian also has the power to appoint his or her successor as sole guardian in a will.”

⁴⁹⁶ *Introduction to Child Law in South Africa* (2000) 33.

⁴⁹⁷ 1998 4 SA 169 (C) 176G. Sinclair (1996) 112 also states this. *Coetzee v Meintjies* 1976 1 SA 257 (T) 261C: “Voogdy omvat die plig om die minderjarige op te voed, sy belange en sy goed te beskerm en hom by te staan by die aangaan van ‘n huwelik of ander verbintenis.” In *Smith v Berliner* it was held that guardianship of a child implies a duty to look after the child.

⁴⁹⁸ This aspect will be discussed in detail in par 3 2 2 below.

⁴⁹⁹ Cronjé and Heaton 277.

⁵⁰⁰ These will be discussed in detail in par 3 2 2 below.

3 2 2 Acquiring guardianship

3 2 2 1 Introduction

Previously the father of a child born during the marriage between the parties was the guardian of the child.⁵⁰¹ The Guardianship Act⁵⁰² now stipulates that “both father and mother are equal guardians of their children and enjoy equal powers in this regard”.⁵⁰³ The father and/or the mother or even a third party can be the guardian of a child.⁵⁰⁴ The High Court is the upper guardian of all minors.⁵⁰⁵

3 2 2 2 Parents of a Child Born During the Marriage

The father and mother of children born during the marriage between the parties have equal guardianship of their children. Thus either of them can exercise a

⁵⁰¹ Spiro *Law of Parent and Child* (1985) 47, Visser and Potgieter *Family Law* 208.

⁵⁰² 192 of 1993, s 1(1).

⁵⁰³ Visser and Potgieter *Family Law* 186. See Van Wyk “Voogdyskap” 2000 *De Rebus* 29 for a short summary of guardianship. For a discussion of the previous position of women as guardians, see Spiro “Women as Guardians” 1956 *THRHR* 215. For a discussion of whether the Guardianship Act truly gives recognition to the principle, of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979), that both parents have common responsibilities for the upbringing and development of their children, see Van Heerden and Clark “Parenthood in South African Law – Equality and Independence? Recent development in the Law Relating to Guardianship” 1995 *SALJ* 140. Paternity is relevant to establishing guardianship and other parental responsibilities and rights: for a discussion of the proof of paternity of the children of married persons, see Cronjé and Heaton *The South African Law of Persons* (2003) 48–58 and Davel and Jordaan (2005) 108–119. See also Singh “The Power of the Court to Compel any Person to Submit to Identification Tests in Paternity Disputes: the Unquestionable Need for a Rule” 1993 *De Jure* 115, this article looks at the law relating to paternity testing before and after the case of *Seetal v Pravitha* NO 1983 3 SA 827 (D) and proposes that there should be legislation governing paternity testing.

⁵⁰⁴ Visser and Potgieter *Family Law* 207. Children of a putative marriage are legitimate: *H v C* 1929 TPD 992; *Ex parte Azar* 1932 OPD 107; *Potgieter v Bellingan* 1940 EDL 264; *Prinsloo v Prinsloo* 1958 3 SA 759 (T); *W v S and Others* 1988 1 SA 475 (N).

⁵⁰⁵ This aspect will be discussed in detail in par 3 2 4 below.

power or perform a duty arising from guardianship without the other's consent. The consent of both parties will be needed if the minor child wishes to get married,⁵⁰⁶ if the parties wish to have a child adopted; if the child is to be removed from South Africa; where one of the parents wants to apply for a passport in which the minor is specified as his/her child; where the parties want to sell or encumber immovable property belonging to the minor child.⁵⁰⁷

These provisions only apply to joint guardianship over a marital child by its parents.⁵⁰⁸ If joint guardianship is granted by the court to a non-parent and a parent, it would seem that the non-parent's capacity as guardian is limited to exercising joint control over the child's estate and representing (or assisting) the

⁵⁰⁶ S 24(1) of the Marriage Act 25 of 1961: "no marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent of the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing." If a minor has no parent or guardian or if the minor, for any good reason, is unable to obtain the consent of his parents or guardian then the Commissioner of Child Welfare may grant written consent to such minor to marry a specific person. The Commissioner will not grant consent if one or other of the minor's parents or his guardian, whose consent is required by law, refuses to consent to such marriage.

⁵⁰⁷ S 1(2)(a)–(e) of the Guardianship Act; Visser and Potgieter *Family Law* 208; Cronjé and Heaton 277. Private or "underhand" adoption does not have any legal consequences in South Africa and does not create a parent-child relationship: *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW), in this case the mother of a child and her late husband gave the custody of their child, shortly after the child's birth, to a married couple. No adoption ever took place. The mother of the child was granted the return of the child. The court stated that a court will not deprive a parent of custody of a child and give such custody to a third party, unless the parent's custody of the child was a danger to the child's life, health or morals. If an adoption order is rescinded the child must also be returned to his or her biological parents. See also *Sibiya v Commissioner of Child Welfare (Bantu)*, *Johannesburg* 1967 4 SA 347 (T) 348H. Where one parent has parental authority over a child and the other parent does not, the parent who has parental authority cannot confer this on the other parent merely by a private agreement between them: *Ex parte Van Dam* 1973 2 SA 182 (W) 185C–D; *Girdwood v Girdwood* 1995 4 SA 698 (C) 708–709; *Rowe v Rowe* 1997 4 SA 160 (SCA) 167C; SALC *Report of the Law Commission on the Children's Bill* Ch 8 The Parent/Child Relationship 313–314.

⁵⁰⁸ S 1(2) refers to the situation "[w]here both a father and mother have guardianship of a minor child of their marriage": *Butterworths Legal Resources* par E33.

child in performing juristic acts or in judicial proceedings.⁵⁰⁹ A non-parent guardian would not be able to consent to adoption of the child.⁵¹⁰ It is thus not clear which of the incidents of parental guardianship found in the Guardianship Act would also extend to a joint guardian who is not a parent.

3 2 2 3 The Mother of a Child Born Out of Wedlock

When a child is born out of wedlock the mother of such child is the sole guardian of the child.⁵¹¹ If the mother is herself a minor, guardianship over her child vests in her guardian.⁵¹² The mother has custody of the child.⁵¹³ If such a mother becomes a major guardianship of her child passes to her.⁵¹⁴ The father of an extra-marital child “has no parental authority over the child”.⁵¹⁵ An unmarried father may apply for the guardianship of his extra-marital child.⁵¹⁶

⁵⁰⁹ An example of the granting of joint guardianship to a parent and a non-parent is found in *Ex parte Kedar* 1993 1 SA 242 (W).

⁵¹⁰ S 18(4) of the Child Care Act 74 of 1983 requires the consent of a “father” or a “mother” but not a guardian.

⁵¹¹ Davel and Jordaan *Law of Persons* (2005) 124. See also *Edwards v Flemming* 1909 TH 132, 234–235; *Engar and Engar v Desai* 1966 1 SA 621 (T) 625H; *Ex parte Van Dam* 1973 2 SA 182 (W). A court may transfer guardianship of an extra-marital child from its mother to a third person: *Van Rooyen v Werner* 1892 9 SC 425, 431; *Ex parte Kedar* 1993 1 SA 242 (W) 243I. For a discussion of the proof of paternity of the children of unmarried persons see the Children’s Status Act 81 of 1987 s 1 and s 2, Cronjé and Heaton *Law of Persons* 48–58 and Davel and Jordaan (2005) 120–123. See par 3 1 1 above for a discussion of the concept “parental authority”.

⁵¹² S 3(1)(a) of the Children’s Status Act 82 of 1987. According to *Dhanabakium v Subramanian* 1943 AD 160: a mother who is a minor must be assisted by her guardian when consenting to an adoption order of her illegitimate child. See also Cronjé and Heaton 277.

⁵¹³ S 3(1)(b) of the Children’s Status Act. See also Cronjé and Heaton 59 and Van Heerden in Van Heerden *et al* (ed) 395.

⁵¹⁴ S 3(2) of the Children’s Status Act.

⁵¹⁵ Visser and Potgieter *Family Law* 208.

⁵¹⁶ S 2(1) of the Natural Fathers of Children Born out of Wedlock Act.

In the case of *Ex parte Kedar*⁵¹⁷ the facts were that the first applicant was the employer of an unmarried mother (the second applicant) of a ten-year-old boy. They wanted to enrol the child at a local school but because the child's guardian did not own property within the vicinity of such school, the minor was refused admission. The parties applied for joint guardianship of the child. The court stated⁵¹⁸ that the mother of an illegitimate child is the guardian of such child and referred to South African case law that supports this view. The court held that special circumstances were present here and also stressed that the court is the upper guardian of all minors and that the prime consideration here is the best interests of the child.⁵¹⁹ The court emphasised that the second applicant was only educated to standard one⁵²⁰ level and that she was "unable to administer the proprietary and legal affairs of the minor without assistance"⁵²¹ and that the first applicant would be able to assist her. The court stressed that the "second applicant is ... an excellent mother who is more than capable of catering for the emotional needs of the minor, who will remain under her custody".⁵²² In this case Judge Van Zyl emphasised that the awarding of joint custody would be in the best interests of the minor as it would enable the minor to attend school in the same area as he and his mother lived. Since it is no longer a requirement that the child's guardian must own property in the area of the school in order for the child to attend that school, this consideration would not be applicable today. It is questionable whether the motivation given by the judge that the second applicant

⁵¹⁷ 1993 1 SA 242 (W).

⁵¹⁸ 243J.

⁵¹⁹ 244.

⁵²⁰ Now grade 3.

⁵²¹ 243B.

⁵²² *Ibid.*

is only educated to standard one level, and thus not able to administer the proprietary and legal affairs of the minor without assistance, is sufficient reason to award guardianship, considering that many South African parents do not even have a basic education. This factor alone should not be deemed adequate reason to award joint guardianship. As long as the broader family and the community can assist the parent with her and the minor's proprietary and legal affairs, if and when necessary, this should not be the only reason for awarding joint guardianship.

In the matter of *Ex parte Van Dam*⁵²³ the mother of an illegitimate child wanted the father of such child to be appointed as the child's guardian and entered into such an agreement with him. The parties were previously married and had one child born from this marriage.⁵²⁴ After the parties were divorced they continued to live together and a child was born from this relationship. The parties entered into an agreement that the mother would have custody of the children and that the father would be the guardian of both children and applied to court to have this made an order of court.⁵²⁵ The court said that the father is not the natural guardian of an illegitimate child. In such a case the mother is the natural guardian.⁵²⁶ The court also referred to the statutes of the time and concluded that none dealt with the guardianship of an illegitimate child.⁵²⁷ The court then referred to common law and concluded that there was much authority on the

⁵²³ 1973 2 SA 182 (W).

⁵²⁴ The position of the legitimate child will not be discussed here. For a discussion thereof, see *Ex parte Van Dam* 182–183.

⁵²⁵ *Ex parte Van Dam* 182.

⁵²⁶ *Ex parte Van Dam* 183.

⁵²⁷ *Ibid.*

position of legitimate children but not much for illegitimate children.⁵²⁸ The court referred to the matter of *Rowan v Faifer*⁵²⁹ where the court held *obiter* that “although the father of an illegitimate child has no right to custody, he has *locus standi* to appear on the question of custody”.⁵³⁰ Margo J also stated that the court, as upper guardian of all minors, may find that such father is best suited to be custodian. It is also stipulated that since a court can deprive the natural guardian of legitimate children of guardianship and give it to someone else that the court can therefore act similarly in the case of illegitimate children.⁵³¹

In the present set of facts the mother wished to give guardianship to the father because it would be in the best interests of the child. The court made it clear that a natural guardian cannot give their guardianship to a third person at will and that guardianship is a duty, much more than it is a right. Margo J concluded that the present case has special circumstances and that it would be in the best interests of the child that guardianship be given to the father.⁵³²

⁵²⁸ In the case of legitimate children the court could deprive the father of his guardianship and vest it in the mother or some other person. In *Calitz v Calitz* 1939 AD 56 it was held that the court may not deprive the father of custody of his minor child except on special grounds, under the court's power as upper guardian of all minors, for example if there was danger to the child's life, health or morals. For judicial changes in guardianship in connection with actions for divorce or separation, see the cases referred to in *Ex parte Van Dam* 184B and for judicial changes not directly related to a claim for divorce or separation, see 184E.

⁵²⁹ 1953 2 SA 705 (E).

⁵³⁰ 184I.

⁵³¹ Reference was also made to Spiro, who stipulates that if the interests of a minor illegitimate child demand it, custody or even guardianship may be awarded to the natural father: *Ex parte Van Dam* 183.

⁵³² Such an order was made: *Ex parte Van Dam* 185.

3 2 2 4 Sole Guardianship

A court can award sole guardianship to one parent if the other has “refused or neglected to look after the interests of the children or acted irresponsibly or negligently, or lives in a foreign country, or intends to emigrate to a foreign country”.⁵³³ The High Court may grant sole guardianship⁵³⁴ to either parent, in divorce proceedings⁵³⁵ or if a parent is divorced or separated from his or her spouse.⁵³⁶

An order of sole guardianship is only granted if it is in the child’s best interest.⁵³⁷ Such an order would be granted if the other parent agreed to it⁵³⁸ or where the parent has not provided financial support or has shown no interest in the child,⁵³⁹ or where he or she has not shown an interest in performing his or her duties as guardian.⁵⁴⁰ If a person to whom sole guardianship of a minor child has been awarded (in a divorce order) appoints persons in her will “as guardians” of

⁵³³ Visser and Potgieter *Family Law* 171. See also Spiro 47.

⁵³⁴ The references to “sole” guardianship and “sole” custody in s 5 of the Matrimonial Affairs Act 37 of 1953 has resulted in confusion, see, eg *Fortune v Fortune* 1955 3 SA 348 (A) 353A–B. It is now accepted that there is a distinction between sole custody awarded in terms of the Act, and custody awarded to one parent. *S v Amas* 1995 2 SACR 735 (N): “The same distinction is thought to apply to ‘sole’ guardianship awarded in terms of the act as opposed to single guardianship or guardianship *simpliciter*.” *Hornby v Hornby* 1954 1 SA 498 (O) 500G: a sole guardian has the power of consenting to the marriage of his minor child, even if the other parent withholds consent and may in his will appoint any person to be the sole guardian of his minor child. *Hornby v Hornby* 501B: appointment of the sole guardian must be in the interests of the child.

⁵³⁵ S 6(3) of the Divorce Act 70 of 1979.

⁵³⁶ S 5(1) of the Matrimonial Affairs Act 37 of 1953.

⁵³⁷ *Walters v Walters* 1949 3 SA 906 (O): “mere desertion” and failure to maintain are not necessarily sufficient to deprive a parent of guardianship. Cronjé and Heaton 162 state that sole guardianship is not readily awarded and may, for example, be awarded where the other parent has shown no interest in the child, or in performing his or her functions as guardian.

⁵³⁸ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁵³⁹ *Ibid.*

⁵⁴⁰ *Hornby case.*

the child and does not use the words “sole guardianship” or “exclusive guardianship” it does not mean that her ex-husband’s joint guardianship has relived.⁵⁴¹

A sole guardian is subject to all the duties and has all the powers imposed by Roman Dutch law and can also appoint a testamentary guardian.⁵⁴² A sole guardian may consent to the marriage of the child without the other parent’s consent.⁵⁴³

The consent of both parents will, however, be required for the adoption of the child.⁵⁴⁴

The non-guardian parent may challenge the appointment of a testamentary guardian by the sole guardian, after the death of the sole guardian.⁵⁴⁵ A testamentary appointment will lapse if the court order made in terms of the Matrimonial Affairs Act or the Divorce Act, lapses or is rescinded or varied.⁵⁴⁶

When a court orders sole guardianship when granting a decree of divorce, the court can order that when the sole guardian dies that someone other than the

⁵⁴¹ *Wehmeyer v Nel* 1976 4 SA 966 (W).

⁵⁴² *Van Aswegen*; s 5(3)(a) of the Matrimonial Affairs Act.

⁵⁴³ *Hornby* case. According to the Guardianship Act 192 of 1993 a sole guardian can anyway consent to all matters in s 1(2) without reference to the other parent, but the other parent must still consent to adoption. S 25(1A) of the Births and Deaths Registration Amendment Act 1 of 2002 provides that the written consent of the natural father to alteration of the child’s surname is not required where the mother has sole guardianship of the child.

⁵⁴⁴ S 18(4)(d) of the Child Care Act 74 of 1983: consent of both parents is required if the child is born in wedlock.

⁵⁴⁵ S 5(5) of the Matrimonial Affairs Act.

⁵⁴⁶ S 5(6) of the Matrimonial Affairs Act.

surviving parent will succeed him or her as guardian, either jointly with or to the exclusion of the surviving parent.⁵⁴⁷ A sole guardianship order will lapse if a minor whose parents were living apart once again live together as husband and wife.⁵⁴⁸ Variation or rescission of a sole⁵⁴⁹ guardianship order is possible.⁵⁵⁰

3 2 2 5 Single Guardianship

The court may make an order in terms of the Divorce Act, in terms of which guardianship will vest in one parent to the exclusion of the other. An order of single guardianship does not exclude the other parent from all other incidents of parental authority, especially custody. An order of single guardianship will deprive the parent of his or her independent and equal powers of guardianship but it is uncertain whether such an order would render the non-guardian's consent unnecessary in respect of the matters listed in section 2 of the Guardianship Act. Cronjé and Heaton⁵⁵¹ state that the only difference between an award of single⁵⁵² and an award of sole guardianship is that the former does not enable the guardian to appoint a successor to the exclusion of the other parent and that the consent of both parents will be required for their minor child to marry.

⁵⁴⁷ S 6(3) of the Divorce Act.

⁵⁴⁸ S 5(2) of the Matrimonial Affairs Act.

⁵⁴⁹ Or single.

⁵⁵⁰ S 5(6) of the Matrimonial Affairs Act. Presumably in accordance with the procedure to vary or rescind a single/sole guardianship order in terms of the Divorce Act.

⁵⁵¹ 162.

⁵⁵² Or guardianship *simpliciter*.

3 2 2 6 Testamentary Guardians

According to Visser and Potgieter⁵⁵³ a testamentary guardian is a guardian nominated by a guardian in his or her will. The Master of the High Court must confirm the appointment of such a guardian. A testamentary guardian does not have to accept his or her nomination. If the father or mother of a legitimate child has been awarded sole guardianship he or she may nominate a testamentary guardian for such child (in his or her will).⁵⁵⁴ In the case of an illegitimate child the mother may nominate a guardian in her will for such child.⁵⁵⁵ Where parents are married the first dying cannot appoint a guardian for the children.⁵⁵⁶ However, the surviving spouse may however do so.

3 2 2 7 Joint Guardianship With a Third Party

In *Ex parte Kedar* a court awarded joint guardianship of a child to the child's mother and her employer. This was done to enable the minor to attend the local school and was seen as being in the best interests of the minor.⁵⁵⁷

⁵⁵³ 239. For a discussion of proceedings regarding the nomination of tutors and curators in a will, see s 72 the Administration of Estates Act 66 of 1965. If no tutors were nominated s 73 of the same act governs this.

⁵⁵⁴ Visser and Potgieter *Family Law* 171.

⁵⁵⁵ Visser and Potgieter *Family Law* 171. See also Van Wyk April 2000 *De Rebus* 29.

⁵⁵⁶ Unless a court order prohibits the other parent from exercising guardianship: S 72(1)(a) of the Administration of Estates Act. A parent who bequeaths property for his or her child may appoint a curator to administer the property. However, the curator will not share parental authority with the other parent. Whether the fact that the first-dying spouse cannot appoint a guardian in his or her will, is consolable with the principle of equal guardianship, is questionable. It is submitted that it is not and that it discriminates against the first-dying spouse. However, the best interest of the child should always prevail in any matter concerning the child and it may at times not be in the best interest of the child to have another guardian. Every case would then have to be judged according to its particular circumstances. This may lead to unnecessary and costly litigation. This inequality in our law must be corrected but it will take some time before a proper and fair solution can be found.

⁵⁵⁷ See also par 3 2 2 3 above.

3 2 2 8 Other Types of Guardians

3 2 2 8 1 Assumed guardian (tutor)

This “is a guardian nominated by a testamentary guardian to act with him, or in his place, as guardian”.⁵⁵⁸ The will must expressly authorise the testamentary guardian to make this appointment. The Master of the High Court must also confirm the appointment.⁵⁵⁹

3 2 2 8 2 Guardian dative (nominated guardian)

This guardian is nominated by the High Court or the Master of such court. This would be necessary if the child receives, for example, property but does not have a guardian to assist him in administering these assets.⁵⁶⁰

3 2 3 The rights and duties of guardians

Someone cannot be appointed as a guardian unless he or she is not mentally ill; is at least twenty-one years old; is able to provide financial security; is not

⁵⁵⁸ Visser and Potgieter *Family Law* 240.

⁵⁵⁹ S 72(2) of the Administration of Estates Act.

⁵⁶⁰ Visser and Potgieter *Family Law* 240; Cronjé and Heaton *South African Family Law* 300. A putative guardian is also found. This is “someone who ... acts as the guardian of a minor whilst he is under the incorrect impression that he is authorized to do so”: Cronje and Heaton 300. In such an instance the court can ratify the guardian’s conduct if this is in the best interests of the child: *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T).

insolvent and if he or she were appointed as a testamentary guardian and did not sign the will appointing him or her as guardian.⁵⁶¹

A guardian must always act in the best interests of the child and has various duties, such as drawing up an inventory of the minor's estate and submitting it to the Master; providing for the maintenance and education of the minor and assisting the minor in juristic acts and litigation.⁵⁶² The guardian must always act with the necessary care. A guardian is entitled to remuneration for his services.⁵⁶³ When guardianship ends the guardian has to give an account of his guardianship to the minor.

The guardian must administer the minor's estate, although the minor is the owner of his estate. Thus, the guardian may make purchases, conclude contracts, make investments and sell property.⁵⁶⁴ The guardian may use capital in the child's estate to maintain such child but may not use the capital for the guardian's personal use.

The guardian must also assist the minor to perform juristic acts. In the case of an *infans*⁵⁶⁵ a guardian must act for and on behalf of the infant. When a minor is between the age of seven and twenty-one years the guardian may perform acts

⁵⁶¹ Visser and Potgieter *Family Law* 241, mental illness of a natural guardian will not automatically end that person's guardianship.

⁵⁶² Visser and Potgieter *Family Law* 242.

⁵⁶³ As prescribed; s 83 of the Administration of Estates Act 66 of 1965.

⁵⁶⁴ Visser and Potgieter *Family Law* 229; see also s 80 Administration of Estates Act 66 of 1965, which limits the value of immovable property that can be sold without the consent of the Master of the High Court; Cronjé and Heaton 278.

⁵⁶⁵ Younger than 7 years old.

on behalf of the minor or assist the minor to perform the acts himself.⁵⁶⁶ Where a guardian acts on behalf of a minor such acts must be legally possible and in the interest of the minor.

Guardianship ends when either the minor or the guardian dies; when the minor attains majority; if the period for which the guardian has been appointed lapses or when the guardian has completed the tasks for which she was appointed. A guardian can also resign or be removed by the court or the Master of the High Court.⁵⁶⁷

3 2 4 High Court as upper guardian

The High Court is the upper guardian of all minors within the jurisdictional area of that court. Thus, the High Court can make orders, in respect of minors which override the authority of a parent or guardian.⁵⁶⁸ The minor himself or herself, someone with an interest in the minor's welfare, such as a foster parent, or the Commissioner of Child Welfare may request the court to interfere with the exclusion of parental authority. Children's Courts are also found, which oversee the interests of minor children.⁵⁶⁹ The High Court has this authority both from the

⁵⁶⁶ Visser and Potgieter *Family Law* 230.

⁵⁶⁷ S 4(1)(a) and (b) and s 5 of the Administration of Estates Act 66 of 1965; Visser and Potgieter *Family Law* 242–243. In the case of a natural guardian becoming mentally ill an application can be brought before the court to end such guardianship.

⁵⁶⁸ Visser and Potgieter 236. For an in-depth discussion of this aspect, see further Van der Vyver and Joubert 620–626 and Van Heerden *et al* (eds) 497–608 for a discussion of interference with parental power.

⁵⁶⁹ S 5(1) of the Child Care Act 74 of 1983; Visser and Potgieter *Family Law* 236.

common law as well as from various statutes.⁵⁷⁰ If the parents are a danger to the child's life, health, morals or property then the courts can interfere.⁵⁷¹

Guardianship and custody can then be taken away from parents and given to someone else. The court also makes orders regarding guardianship and custody during divorce proceedings. This power also originates from common law.⁵⁷² The best interests of the child standard is used by the court to determine whether to interfere with the parent's/guardian's authority.⁵⁷³

In the matter of *Coetzee v Meintjies*⁵⁷⁴ the following was said:

*“Voogdy omvat die plig om die minderjarige op te voed, sy belange en sy goed te beskerm en hom by te staan by die aangaan van 'n huwelik of ander verbintenis. Die plig berus in die eerste plaas by die vader en die hof sal ingryp as hy nie sy plig doen nie.”*⁵⁷⁵

⁵⁷⁰ See par 3 3 4 below.

⁵⁷¹ *Calitz v Calitz* 1939 AD 56. The application for the court to interfere can be brought by one of the parents (eg where a request is made that the custody of the other parent should be ended); by the minor himself or herself (eg where asking for substitute permission to marry); any other person having an interest in the welfare of the child (eg foster parents) and the Commissioner of Child Welfare (eg an invalid adoption order): Van der Vyver and Joubert 623.

⁵⁷² Visser and Potgieter *Family Law* 236.

⁵⁷³ Visser and Potgieter *Family Law* 236. See further the discussion of the best interests standard, at par 3 5 below. *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 2 SA 699 (T): the Supreme (now High) Court follows the practice of reviewing adoption orders not as a court of review, or as an emergency court but as the upper guardian of minor children.

⁵⁷⁴ 1976 1 SA 257 (T).

⁵⁷⁵ Translated: the various duties of a guardian rest on the (as it was then) father and the court will interfere if he does not perform these duties: 261C.

In the case of *Calitz v Calitz*⁵⁷⁶ it was held that "[t]he court will interfere with parental power if it is exercised by a parent in a manner which constitutes a danger to the child's life, health or morals".⁵⁷⁷

In *S v L*⁵⁷⁸ the upper guardianship of the court was also dealt with. In this matter the legal question was whether the court could "supply its own consent", in its capacity of upper guardian of minors, for a minor to undergo blood tests. The court explored the provisions relating to the ordering of blood tests. Apart from the provisions of the Criminal Procedure Act⁵⁷⁹ the court has no statutory power to order blood tests to be taken.⁵⁸⁰ The Children's Status Act⁵⁸¹ creates a presumption that "the refusal to submit to blood tests is with the intention of concealing the truth regarding parentage"⁵⁸² but cannot compel parties to undergo such tests. The court referred to the matter of *Seetal v Pravitha NO*⁵⁸³ in which it was held that the court, as upper guardian, may overrule a guardian's objection to blood tests. The court must act purely in the interests of the child, as it would be consenting to the taking of these tests on the child's behalf. Mullins J states that the prior mentioned statement is open to question. The courts in South Africa act as upper guardian of minors in disputes relating to custody.⁵⁸⁴ In later cases it was held that the grounds for interference are not

⁵⁷⁶ 1939 AD 56.

⁵⁷⁷ 63.

⁵⁷⁸ 1992 3 SA 713 (E). Also see *D v K* 1997 2 BCLR 209 (N).

⁵⁷⁹ 51 of 1977.

⁵⁸⁰ 720F.

⁵⁸¹ 82 of 1987, in s 2.

⁵⁸² 720G.

⁵⁸³ 1983 3 SA 827 (D).

⁵⁸⁴ 721. *Calitz v Calitz*, discussed above, was referred to, as well as *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW).

limited to danger to the child's life, health or morals and the court can exercise its powers relating to custody whenever the interests of the minor require it.⁵⁸⁵

The courts have also, in the past, acted in the interests of a minor who has no guardian.⁵⁸⁶ In *Coetzee v Meintjies*⁵⁸⁷ it was stipulated that the Supreme Court acts as upper guardian of minors where the minor has no guardian; if the guardian neglects his duty or if the parents cannot agree what is in the interests of the child. Mullins J stated further that the powers of the Supreme Court are thus not unlimited.⁵⁸⁸ The judge also referred to the decision of *Nugent v Nugent*⁵⁸⁹ where it was stated⁵⁹⁰ that the exercise of parental power is always subject to the right of the court, as upper guardian to interfere and enforce what is in the best interests of the children. Mullins J said that this does not mean that the court can interfere with a decision made by the guardian of the child only because the court disagrees with their decision.⁵⁹¹ Mullins J stated that unless a parent neglects his or her duty in this regard the court does not have the power to interfere with the decision of the custodian as to the religion of the children.⁵⁹² The court concluded that the court, as upper guardian of minors,

⁵⁸⁵ 721. See also *Bam v Bhabha* 1947 4 SA 798 (A); *Goodrich v Botha* 1952 4 SA 175 (T); *Short v Naisby* 1955 3 SA 572 (D); *September v Karriem* 1959 3 SA 687 (C); *Ex parte Van Dam* 1973 2 SA 182 (W); *Ex parte Kommissaris van Kindersorg, Oberholzer. In re AGF* 1973 2 SA 699 (T); *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C).

⁵⁸⁶ 721. In *Ex parte Kropf* 1936 WLD 28 leave to marry was granted to a minor who had no guardian, this matter is now regulated by statute.

⁵⁸⁷ 1976 1 SA 257 (T).

⁵⁸⁸ 721F.

⁵⁸⁹ 1978 2 SA 690 (R).

⁵⁹⁰ 692A.

⁵⁹¹ 721G.

⁵⁹² This is an incidence of the custodian parent's day-to-day control.

does not in the present case have the power to interfere with a decision of the guardian that the child should not undergo blood tests.⁵⁹³

In the case of *Soller v Maintenance Magistrate, Wynberg*⁵⁹⁴ the court unequivocally stated that the court, “as the upper guardian of all minor children in its jurisdiction, has the inherent jurisdiction to review all manner of orders or rulings affecting the rights of such children”.⁵⁹⁵ The statutes regulating the powers of the court include the Child Care Act,⁵⁹⁶ the Matrimonial Affairs Act,⁵⁹⁷ the Marriage Act,⁵⁹⁸ the Administration of Estates Act⁵⁹⁹ and the Divorce Act.⁶⁰⁰

⁵⁹³ 721I.

⁵⁹⁴ 2006 2 SA 66 (C).

⁵⁹⁵ The court referred to the following cases as authority: *Narodien v Andrews* 2002 3 SA 500 (C) 506F–507C (the High Court in its capacity as upper guardian of minor children in its area of jurisdiction has an inherent common law jurisdiction to review protection orders made by the Magistrate’s Court because such orders directly concern the interests of a minor child in the area of the court’s jurisdiction. The court was in favour of a pro-active approach to reviewing children’s court proceedings. The court said that this approach is more in keeping with the best interests of the child principle which forms part of our common law and has been entrenched in s 28(2) of the South African Constitution as well as in the CRC). *In re Moatsi se Boedel* 2002 4 SA 712 (T) 717B–F the court referred to a number of cases in which “*die beste belange van kinders vooropgestel en [die hof] sy hersieningsbevoegdheid ten spyte van die afwesigheid van ‘n uitdruklike magtigende bepaling uitgeoefen*”: 717B. The court also referred to the case of *Narodien v Andrews* and stressed that “*die belange van minderjarige kinders voorrang moet geniet in alle aangeleenthede wat kinders raak*”, *Bannatyne v Bannatyne (Commissioner for Gender Equality as amicus curiae)* 2003 2 SA 363 (CC) 375B–376A (s 38 of the Constitution permits a court to grant appropriate relief where it is alleged that a right contained in the Bill of Rights has been infringed or threatened). The court also identifies that the right in question in children’s maintenance matters is contained in s 28(2) of the Constituion. The court further states that children have a right to proper parental care and that “[i]t is universally recognised in the context of family law that the best interests of the child are of paramount importance”: 375C. The court stipulates that although the obligation to ensure that children are properly cared for falls first on the children’s parents, “there is an obligation on the State to create the necessary environment for parents to do so”: 376A. The fact that South Africa has committed itself to giving high priority to the rights of children is also recognised by the court. The court regards the Maintenance Act as “a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of parents’ obligations to maintain their children”.

⁵⁹⁶ 74 of 1983, s 11–s 14. These statutes will be referred to later in the text, where relevant.

⁵⁹⁷ 37 of 1953, s 5.

⁵⁹⁸ 25 of 1961, s 25(4).

⁵⁹⁹ 66 of 1965, s 80.

⁶⁰⁰ 70 of 1979, ss 6 and 8.

3 2 5 Orders that South African courts can make regarding guardianship

The High Court may make any order regarding guardianship of a child, as it sees fit.⁶⁰¹ Courts are generally reluctant to interfere with the vesting of guardianship, especially since parents now have equal status as joint guardians.⁶⁰² However, where appropriate, the court will make an order of single guardianship, joint guardianship or sole guardianship.⁶⁰³ The powers of the Children's Courts are dealt with in section 31 of the Children's Act 33 of 1960. If a Children's Court is satisfied that a child is in need of care it may make an order regarding the custody of the child.

Section 4(1) of the Mediation in Certain Divorce Matters Act⁶⁰⁴ stipulates that after the institution of an action for divorce or after an application has been lodged for the suspension, variation or rescission of an order with regard to the custody, guardianship of or access to a child made in terms of the Divorce Act,⁶⁰⁵ the Family Advocate⁶⁰⁶ shall institute an enquiry and furnish the court at the trial

⁶⁰¹ S 5(1) of the Matrimonial Affairs Act 37 of 1953 provides: "Any provincial or local division of the Supreme Court ... may, on application of either parent of a minor whose parents are divorced or are living apart, in regard to custody, guardianship of or access to the minor, make any order it may deem fit, and may in particular or if in its opinion it would be in the best interests of the minor to do so, grant to either parent the sole guardianship ... or the sole custody of the minors ..." S 6(3) of the Divorce Act 70 of 1979 stipulates: "A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may ... grant to either parent the sole guardianship or the sole custody of the minor." See also Cronjé and Heaton 157–180.

⁶⁰² *Butterworths Legal Resources* par E36 2003-05-17.

⁶⁰³ Where a guardian is deprived of custody after divorce it reverts back to him or her on the death of the custodian parent: *Landmann v Mienie* 1944 OPD 59; *Bloem v Vucinovich* 1946 AD 501; *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁶⁰⁴ 24 of 1987.

⁶⁰⁵ 70 of 1979.

⁶⁰⁶ If requested by a party to such proceedings, or by the court. For a discussion of the role of the Family Advocate, see also Van Heerden *et al* (eds) 520–523 and the discussion below.

of such action with a report and recommendations on any matter concerning the welfare of each minor child of the marriage. If the Family Advocate deems it in the interest of any minor of the marriage concerned, he may apply to court for an order authorising him to institute an enquiry.⁶⁰⁷

In *Van Vuuren v Van Vuuren*⁶⁰⁸ the court stipulated when the Family Advocate should ask the court, in terms of section 4(2) of the Mediation in Certain Divorce Matters Act, for authority to launch an investigation. This must be done, firstly where there are serious problems concerning access to the children. Secondly, where there is an intention not to place young children in their mother's custody. Thirdly, where there is an intention to separate siblings. Fourthly, where there is an intention to award custody to someone other than the child's parents. Lastly, where the arrangement regarding custody appears not to be in the interests of the child. In a customary marriage the position of minor children born of such marriage is exactly the same as that of minor children born of a civil marriage. The court granting a divorce order for a customary marriage has the power to make orders regarding the custody, guardianship or maintenance of a minor child born from such customary marriage.⁶⁰⁹

⁶⁰⁷ S 4(2).

⁶⁰⁸ 1993 1 SA 163 (T).

⁶⁰⁹ Van Schalkwyk "Law Reform and the Recognition of Human Rights within the South African Family Law with Specific Reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic Marriages" 2003 *De Jure* 289 309. See also s 8(4)(d) and (e) of the Recognition of Customary Marriages Act 120 of 1998. The Mediation of Certain Divorce Matters Act 24 of 1987 and s 6 of the Divorce Act 70 of 1979 also apply to a customary marriage: Van Schalkwyk 2003 *De Jure* 289, 309. For a comprehensive discussion of the patrimonial consequences of a customary marriage, see Cronjé and Heaton 191–211.

Section 8(1) of the Divorce Act⁶¹⁰ stipulates that an order regarding guardianship⁶¹¹ of a child, made in terms of the Divorce Act, may at any time be varied or rescinded.⁶¹²

According to the Natural Fathers of Children Born Out of Wedlock Act⁶¹³ a court can, on application by the natural father of a child born out of wedlock make an order giving the natural father guardianship, or custody, or access rights to the child.⁶¹⁴ Such an application will not be granted unless the court is satisfied that it is in the best interests of the child and that the Family Advocate instituted an enquiry and the court considered the report and recommendations of the Family Advocate.⁶¹⁵ When considering such application the court shall take the following circumstances into account:⁶¹⁶ the relationship between the natural mother and the applicant and whether either of them have a history of violence or abuse against the child or each other; the relationship of the child with the natural mother and the applicant;⁶¹⁷ the effect that separating the child from its natural mother, or the applicant⁶¹⁸ will have on the child; the attitude of the child to the granting of such application; the degree of commitment shown to the child by the applicant;⁶¹⁹ whether the child was born from a customary union or marriage

⁶¹⁰ 70 of 1979.

⁶¹¹ Or custody, or access, or maintenance.

⁶¹² Or suspended in the case of a maintenance order or access.

⁶¹³ 86 of 1997. The position of fathers of children born out of wedlock will be discussed further in pars 3 3 3 3 and 3 4 3 below.

⁶¹⁴ S 2(1) of Act 86 of 1997, on the conditions determined by the court.

⁶¹⁵ S 2(2)(a) and (b).

⁶¹⁶ S 2(5)(a) and (g).

⁶¹⁷ Or with proposed adoptive parents or any other person: s 2(5)(b).

⁶¹⁸ Or proposed adoptive parents or any other person.

⁶¹⁹ In particular his contribution to lying in expenses incurred by the natural mother at the birth and his contribution towards maintenance of the child from the child's birth to the date on

concluded under religious law; any other fact the court deems should be taken into account. The Act further stipulates that⁶²⁰ the court may make any order it deems fit and may if it is in the best interests of the child, grant sole guardianship or sole custody of the child to either party and may order that when such party dies sole guardianship or sole custody will be granted to a person other than the surviving parent or jointly with the surviving parent. An order made in regard to guardianship, custody, or access to a child born out of wedlock may on application be rescinded or varied or access rights may be suspended.⁶²¹ If an enquiry is instituted by the Family Advocate such order shall not be rescinded or varied before the report and recommendations have been considered by the court, unless the court believes that the best interests of the child requires otherwise.⁶²²

It must be borne in mind that, in general, orders will only be amended if the best interest of the children requires such an amendment.⁶²³

which an order for maintenance (if any) has been made and whether the applicant complies with such orders: s 2(5)(e).

⁶²⁰ S 2(6).

⁶²¹ S 4(1).

⁶²² S 4(1). S 4(2) stipulates that a court other than the court which made the order in subsec 1 may rescind, vary or suspend such order if the child is either ordinarily resident or domiciled in the jurisdiction of the first mentioned court.

⁶²³ *Manning v Manning* 1975 4 SA 659 (T); *Baart v Malan* 1990 2 SA 862 (E); *Märtens v Märtens* 1991 4 SA 287 (T). For a discussion of the best interests of the child, see par 3 5 below.

3 3 CUSTODY

3 3 1 Current definition

3 3 1 1 Dictionary Definitions

The *Oxford Advanced Learner's Dictionary*⁶²⁴ defines custody as the “(right or duty of) taking care of [somebody/something] ... The court gave the mother custody of the child e.g. after a divorce ... parents involved in a battle over custody i.e. disputing who should have the right to look after the children”. A custodian is defined as a “person who takes care of or looks after [something]”.

3 3 1 2 Legal Definitions

Cronjé and Heaton stipulate that custody refers to a person's capacity to have the child with them and to control and supervise the child's everyday life,⁶²⁵ this "includes caring for the child, supporting and leading the child, controlling the child's life on a day-to-day basis and assuming responsibility for the child's

⁶²⁴ 294.

⁶²⁵ 163. Custody has also been defined as “[t]he physical ‘control and supervision’ of children. The child will physically live with the parent who has custody. Such parent will provide accommodation, food, clothes, medical care and education; and this is also the parent who will control a child’s daily life, school attendance, what clothes the child wears, the friends the child may have, religious matters etcetera”: Visser and Potgieter *Family Law* 167. Olivier *Die Suid-Afrikaanse Persone en Familiereg* (1975) 306: “Beheer en toesig is ... die bevoegdheid van ‘n persoon om die werklike fisiese ‘besit’ van die minderjarige te hê, om saam met die minderjarige te leef, hom op te pas en by te staan in sy daaglikse handel en wandel.” The term “beheer en toesig” (custody and control) should be replaced with “custody”: *Stassen v Stassen*, discussed in par 3 3 1 2 below. For an interesting discussion of gender specific vulnerabilities and parenthood, see Du Toit “Integrating Care and Justice in South African Family Law: Dealing with Maternal and Paternal Vulnerabilities” 2002 *TSAR* 526 as well as the discussion of the maternal preference rule in par 3 3 3 1 below.

upbringing, health and education as well as his or her physical and emotional safety and welfare".⁶²⁶

Davel⁶²⁷ says that “[b]y custody is meant control over the person of a child i.e. taking responsibility for his or her physical well-being, where the child lives and where he or she is educated, as well as overseeing the child’s spiritual development and determining his or her creed etc”. In the matter of *Dreyer v Lyte-Mason*⁶²⁸ it was held that a custodian may control the religious education of his or her minor child. Custodians are said to “have control over the day-to-day life of the child”.⁶²⁹ A custodian may also restrict the associates of his or her minor child.⁶³⁰

⁶²⁶ Cronjé and Heaton 279: This means that the custodian may decide with whom the child may associate, where the child may reside, which school the child may attend, what religious education the child should receive, what language the child is to be brought up in, whether the child may attend specific social events, and so forth. See eg *Simleit v Cunliffe* 1940 TPD 67; *Landmann v Mienie* 1944 OPD 59; *Oosthuizen v Rex* 1948 2 PH B65 (W); *Wolfson v Wolfson* 1962 1 SA 34 (SR); *Engar and Engar v Desai* 1966 1 SA 621 (T); *Mentz v Simpson* 1990 4 SA 455 (A). This also includes the right to discipline the child. Discipline includes moderate and reasonable corporal punishment: *R v Janke and Janke* 1913 TPD 382; *Du Preez v Conradie* 1990 4 SA 46 (B). In the *Du Preez* case it was held that the mother may delegate her right of chastisement to the children's stepfather but that the punishment must be reasonable. Whether corporal punishment by parents is constitutional is undecided. This matter will not be discussed further here, as it deserves intensive scrutiny. For a discussion of this aspect see Devenish *A Commentary on the South African Bill of Rights* (1999) 90–91 and Human (LLD thesis 1998) 165–167.

⁶²⁷ “The Status of Children in South African Private Law” in Davel (ed) *Introduction to Child Law in South Africa* 35 n 298. See also *W v S* 1988 1 SA 475 (N) 494–495 and *Stassen v Stassen* 1998 2 SA 105 (W) 107.

⁶²⁸ 1948 2 SA 245 (W).

⁶²⁹ *V v V* 1998 4 SA 169 (C) 176G; Sinclair 112, Cronjé and Heaton 279.

⁶³⁰ *Vucinovich v Vucinovich* 1944 TPD 143; *Wolfson v Wolfson* 1962 1 SA 34 (SR); *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 877 (C); *H v I* 1985 3 SA 237 (C).

In the matter of *Myers v Leviton*⁶³¹ it was specified that custody comprises the following:

- “1 The right to personal control of the minor.
- 2 Which personal control is reserved solely to the custodian parent.
- 3 The personal control is a day-to-day affair.
- 4 As a general rule the custodian parent is entitled to have the child with him.
- 5 In the case of a difference of opinion on any point of policy, relating to education, religion, holidays, place of residence, etc. the will of the custodian parent must prevail, subject to the right of the other parent to satisfy the court that some other arrangement is in the best interests of the minor.
- 6 That the rights of the parent who is given custody will not be interfered with, nor will such parent be deprived of his right of custody unless it be shown that he is unfit to continue to have custody.”⁶³²

⁶³¹ 1949 1 SA 203 (T). See also *Engar and Engar v Desai* 1966 1 SA 621 (T).

⁶³² 208. This was an appeal case. The facts were briefly that the parties were previously married and had a son, age 7½ years. An agreement had been part of the order of the divorce: The father (applicant) was to be given custody of the child after his return from military service. He was to pay £50 maintenance per month for the child and the respondent, and the respondent was not allowed to take the child out of the Tvl (as it then was). The appellant was discharged from the army in 1944 and took the child with him to Durban. In 1945 the appellant visited Johannesburg with the child and the child spent 3 weeks with his mother. Appellant also wrote to say the child could spend the June vacation with his mother. The appellant remarried early 1945. December 1945 appellant and his wife visited Johannesburg and allowed the child to spend a month with his mother. In April 1946 the respondent found out the child had been sent to boarding school in Hillcrest. She asked the headmaster to arrange for the child to write to her. The child referred to the appellant's second wife as his mother. The respondent asked her attorneys to write a letter reminding appellant that, at the time of the divorce, he agreed to let the child spend Christmas holidays with his mother. There was no reply to the letter. The respondent telephoned the appellant who said the child was going to the Cape for Christmas but the respondent could have him

In this appeal case it was argued that the right of access, which the first judgment stipulates, deprives the appellant of custody during the holidays when the child is with the respondent.⁶³³ The appellant argued that where a child sleeps over with the parent who is only entitled to access, “access merges into custody” and that the parent who has custody may only keep the child for a day but must return the child for bedtime. Price J stipulates that:

“[T]his is ... artificial and arbitrary ... – and I am unable to accept it as a rule of law. Matters of access and custody and how rights of access shall be enjoyed are largely matters of discretion, adjustment and arrangement ... [t]he law should as little be rigid as it should be vague. When too close a definition of the application of principles is attempted, the only effect is to produce the kind of rigidity and formalism that is characteristic of primitive law.”⁶³⁴

Price J also stipulates that a developed system of law “avoids too close a definition of detail and is satisfied with broad principles of justice, the detailed application of which must be left to be suited to the infinite variety of

for the July holidays. In October 1946 the respondent’s attorneys wrote a letter requesting the child to go to his mother for Christmas, in accordance with the alleged agreement. A reply said that the child would not be allowed to visit his mother and if she wanted to see him, she could come to Durban. The respondent said she could not come to Durban but she would pay expenses for him to see her in Johannesburg and asked to be allowed to have the child December holidays and one short holiday of each year. She also asked to see the child at his school or at reasonable times in Durban. The appellant refused that the child should spend holidays with his mother because when he got back from holidays with his mother in January 1946 his behaviour became “intolerable”: 205–207. In the court *a quo* Blackwell J granted the application allowing the child to spend Christmas holidays with his mother and stipulating that it was in the best interests of the child to visit his mother. Blackwell J stipulated that his order merely related to access and did not affect the father’s right to custody (208A).

⁶³³ 208.

⁶³⁴ 208J–209C.

circumstances that may arise”.⁶³⁵ The judge explored the meaning of custody and access, as found in court cases. In *Bloem v Vucinovich*⁶³⁶ it was said that “an order awarding custody in a decree of divorce implies personal control of the person of the minor”. In *Calitz v Calitz*⁶³⁷ it was specified that if a mother is given custody of the child it “certainly gives the mother sole control over the person and education of the minor”.

In the matter *Vucinovich v Vucinovich*⁶³⁸ it was said that “the custodian parent has the right to control the day-by-day life of the child and I think the right of custody *prima facie* includes the right of saying what houses and homes the child shall be allowed to enter”. In *Simleit v Cunliffe*⁶³⁹ it was said that an order of custody made in favour of the mother means that the court entrusts to her the nurture and upbringing of the minor children and that this includes all that makes up the daily life of the child, such as shelter, nourishment, and the training of the mind. It was specified in *Mitchell v Mitchell*⁶⁴⁰ that where one parent has custody “that parent has the right to regulate [the children’s] lives, to have them with him or her, as a general rule, and to direct the lines on which their education should proceed”.

In *Myers v Leviton* Price J went on to specify that a parent who is entitled to access has not been given the rights of the custodian when the child is with the

⁶³⁵ 208D.

⁶³⁶ 1946 AD 501, 512.

⁶³⁷ 1939 AD 56, 63.

⁶³⁸ 1944 TPD 143, 147. This case will also be discussed in par 3 4 below.

⁶³⁹ 1940 TPD 67, 75.

⁶⁴⁰ 1904 TS 128, 130.

parent entitled to access. The judge explained that the rights and duties that the parent has during periods of access are the same as those that the headmaster of a boarding school, or a nursemaid taking the child for a walk would have.⁶⁴¹

The court further specified that if a custodian parent has to, or chooses to live elsewhere and such parent is acting in good faith, the court will not prevent the parent from taking such children out of the court's jurisdiction. The court referred to *Lourens v Lourens*⁶⁴² where it was specified "that a parent who was deprived of the physical possession [*sic*] of the child retained nevertheless the custody of such child".⁶⁴³ The judge concluded that where a child is to spend for example, a holiday with the parent who has access, such order does not deprive the custodian of his rights but defines how the access must be enjoyed.⁶⁴⁴ The judge concluded that the order made by the court *a quo* is reasonable.⁶⁴⁵

In *Kastan v Kastan*⁶⁴⁶ it is specified that:

⁶⁴¹ 211I. See also *Du Preez v Du Preez* 1969 3 SA 529 (D) (child placed in the temporary care of grandmother); *Germani v Herf* 1975 4 SA 887 (A) (parent wanting access to child may expect custodian to persuade child to submit to access. The fact that children do not want to go to the non-custodian is not sufficient reason for depriving such parent of access) and *Gold v Commissioner of Child Welfare, Durban* 1978 2 SA 301 (N) (mother placed child in temporary foster care. It was held that the custodian parent had not lost her right to control the child's upbringing).

⁶⁴² 1946 WLD 309.

⁶⁴³ 212D; *Myers v Leviton* 1949 1 SA 203 (T). The use of the term physical possession is indicative of an emphasis being placed on the rights of parents. This emphasis is not unusual, considering that the case was reported in the 1940's. Par 3 1 1 3 above deals with the shift from parental rights to parental responsibility.

⁶⁴⁴ 212E–F.

⁶⁴⁵ 214G. Leave to appeal to the Appellate Division was granted as the judge said that rights of custody and rights of access have not been authoritatively defined.

⁶⁴⁶ 1985 3 SA 235 (C) 236G. The Social Assistance Act 59 of 1992, in s 1, defines a "primary care-giver" as "a person whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child but excludes a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or b) a person who does not have an implied or express consent of a parent, guardian or custodian

“[c]ustody 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.”

In *Stassen v Stassen*⁶⁴⁷ the Afrikaans term “toesig en beheer”⁶⁴⁸ was examined. The court concluded that the Divorce Act mentions the words “bewareing” and “custody” and that the term “beheer” or “control” has no precise meaning, and thus in future the phrase “toesig en beheer” must in the Afrikaans be replaced by the word “bewareing”.⁶⁴⁹

of the child”. This definition does not define a custodian but a “primary care-giver”. The importance of this definition will become clear when the proposed new definitions are discussed hereunder in ch 4. Regarding the term “in the care of”, with regard to an enquiry made in terms of s 5 of the Maintenance Act 23 of 1963, it has been said to be an elastic one, as it will differ from case to case. At one end of the scale it may mean custody and at the other “a temporary entrusting of the welfare of a child to another for a matter of minutes. It does not require a continuous physical proximity to the child and ... more than one person in different places from each other may be simultaneously ‘in care’ of a child ... such as where a parent delegates a part of his or her authority to another person on a temporary basis” such as when a child is at school or at hospital: *Nguza v Nguza* 1995 2 SA 954 (Tk) 958E–G. In *Bloem v Vucinovich* 1946 AD 501 it was held that although a father had appointed a tutor in his will (ito s 71 of Act 24 of 1913) “to take care of the person” of his minor child this did not mean that the mother had been deprived of her custody and control. In *Johnson v Johnson* 1963 1 SA 162 (T) 165–167 it was held that where a custodian places her children with her parents and visits them often and is able to remove them when she is able or wants to she has not deprived herself of the association of her children. See also *Horsford v De Jager and Another* 1959 2 SA 152 (N). In *Gold v Commissioner of Child Welfare, Durban* 1978 2 SA 301 (N) it was held that where a mother, who has custody of her child, has delegated her responsibilities for the care and well-being of the child to another then the child cannot be declared a child in need of care unless there is evidence to suggest that proper control was not exercised over the child.

⁶⁴⁷ 1998 2 SA 105 (W).

⁶⁴⁸ Custody and control.

⁶⁴⁹ 107B–D, 108D and 109C–D.

3 3 2 Duties of custodians

The custodian has many duties, including the duty to provide the child with food, clothing, medical care and accommodation;⁶⁵⁰ the duty to train and educate the child and to support and maintain the child and care for his or her emotional and physical well-being.⁶⁵¹

The matter of *Grootboom v Oostenberg Municipality and Others*⁶⁵² dealt with a group of squatters, made up of 390 adults and 510 children who were homeless. The applicant had applied for subsidised housing from Oostenberg Municipality but had received no information as to when they would receive accommodation. They decided to move to vacant land and were evicted.⁶⁵³ As a result of this eviction and their "homelessness" they launched an urgent application based on section 26 and section 28 of the Constitution,⁶⁵⁴ asking the respondent to provide sufficient and adequate temporary shelter and/or housing for the applicant and adequate basic nutrition, shelter, health and care services

⁶⁵⁰ Voet *Commentarius* 25 3 4. See also Human (LLD thesis 1998) 158–161. S 50(2) the Child Care Act 74 of 1983 specifies that someone is guilty of an offence when they are liable to maintain a child, and able to do so, but neglect to provide the child with housing. According to this section the parents must also supply the child with clothing, food and medical treatment and it is an offence not to do so, where you are able to. For a discussion of child custody and the division of matrimonial property at divorce, see Bonthuys "Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce" 2001 *THRHR* 192.

⁶⁵¹ Grotius *Inleiding* 1 9 9; Van Leeuwen *RHR* 1 13 8; Voet *Commentarius* 25 3 4; *Simleit v Cunliffe* 1940 TPD 67; *Martin v Martin* 1949 1 PH B9 (N); *Niemeyer v De Villiers* 1951 4 SA 100 (T); *Edwards v Edwards* 1960 2 SA 523 (D); *Edge v Murray* 1962 3 SA 603 (W); *Meyer v Van Niekerk*. See also the South African Schools Act 84 of 1996: s 3(1) schooling is compulsory from year in which a child turns 7 until the year child turns fifteen or reaches grade 9, whichever comes first. Thus this duty of parents is regulated by legislation. See further Human (LLD thesis 1998) 161.

⁶⁵² 2000 3 BCLR 277 (C). See also 3 1 1 2 above.

⁶⁵³ In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, 281D–E; Jazbhay "Recent Constitutional Cases: Human Rights: Children's Rights to Basic Nutrition, Shelter etc." June 2000 *De Rebus* 45–46.

⁶⁵⁴ S 26 deals with housing and s 28 with children's rights.

for all of the applicants' children.⁶⁵⁵ The respondents here were found to have taken reasonable measures to achieve the right to housing⁶⁵⁶ and a housing programme had been started at all levels of government. The court was cautious in its approach and found that the applicants had not shown they were entitled to relief based on section 26 of the Constitution.⁶⁵⁷

However, the court found a way to protect the applicants' children. The court said it is the duty of parents to maintain their children⁶⁵⁸ and if parents were unable to do this section 28(1)(c) of the Constitution imposed an obligation on the State to provide shelter.⁶⁵⁹ A shelter is a "temporary lodging". It was also found that this shelter should be of such a nature that the children's parents could stay there with them.⁶⁶⁰ The court emphasised that this right extends only to children who are homeless and whose parents cannot provide shelter for them. It is the primary duty of a child's parents to provide them with shelter.⁶⁶¹ The court also emphasised that this right of children was an "unqualified constitutional right" which means that budgetary limitations or scarce resources are not applicable.⁶⁶² Thus, although a parent has a duty to maintain and provide shelter for his or her child, if he or she is unable to do so this obligation will fall on the State.

⁶⁵⁵ The latter prayer was abandoned.

⁶⁵⁶ 285A–B.

⁶⁵⁷ 287A–B.

⁶⁵⁸ This includes providing shelter.

⁶⁵⁹ 288B–C.

⁶⁶⁰ 289F.

⁶⁶¹ 289I.

⁶⁶² 291G.

3 3 3 Acquiring custody

As in the case of awarding guardianship to a party, the child's best interests are the main standard that a court uses to determine which parent should be awarded custody of a minor.⁶⁶³ In the case of *Zorbas v Zorbas*⁶⁶⁴ the husband and wife both applied for the custody of their nine-year-old daughter. During the time of the court case the parents resided in Athens, although they were domiciled in South Africa. The court held that a Greek court was in the best position to determine what would be in the minor's best interests and thus it did not make any order.⁶⁶⁵ The court here referred to the case of *Shawzin v Laufer*⁶⁶⁶ in which it was specified that "[t]o the court as upper guardian the problem of custody is a somewhat singular subject in which there is substantially one norm to be applied, namely the predominant interests of the child".

⁶⁶³ *Stapelberg v Stapelberg* 1939 OPD 129, Visser and Potgieter *Family Law* 183. The best interests standard will be discussed in par 3 5 below. Before the enactment of the Divorce Act 70 of 1979 divorces were based on fault as a ground for divorce. This influenced the division of property upon divorce, as well as the awarding of custody prior to 1948: *Cook v Cook* 1937 AD 154. The case of *Fletcher v Fletcher* 1948 1 SA 130 (A) changed this situation, when it was held that the best interests of the child are paramount. *Dionisio v Dionisio* 1981 3 SA 149 (ZA) 151–152: "[i]t is a fundamental principle of our common law that the sins and quarrels of parents are not visited on the children; where in the course of matrimonial disputes questions arise concerning children their interests are paramount". See also Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 75 for a discussion of the influence of fault of the parents on the award of custody.

⁶⁶⁴ 1987 3 SA 436 (W).

⁶⁶⁵ See esp 437, 439–440.

⁶⁶⁶ 1968 4 SA 657 (A) 662H–663.

3 3 3 1 Custody After Divorce

The High Court may award custody, sole custody or joint custody to either or both parents.⁶⁶⁷ The court does not have to make a custody order simultaneously with the divorce order, but this usually occurs.⁶⁶⁸ The case of *McCall v McCall*⁶⁶⁹ specified that the issue that had to be determined when making a custody order was which parent is “[b]etter able to promote and ensure the child’s physical, moral, emotional and spiritual welfare”.⁶⁷⁰ The court here made it clear that “the court is determining what is in the best interests of [the] child. The court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The court’s concern is for the child.”⁶⁷¹ The court said that the onus to prove that the present situation is detrimental to the child’s interests rests on the non-custodian parent.⁶⁷² The court stated that in order to assess which parent is more able to promote and

⁶⁶⁷ In *Van Rensburg v Labuschagne* 1958 3 SA 557 (O) 558 it was held that where custody (“the term custody and control” was still used in this case) is awarded to a child’s mother, she can at any time waive such right and then this right reverts to the father until the mother wants to use it again. Sinclair “From Parents’ Rights to Children’s Rights” in Davel (ed) *Children’s Rights in a Transitional Society* 62 states: “The meaning of a joint custody award needs clarification. It need not and should not entail the child’s moving from one parent to the other on a weekly or monthly basis ... joint custody should imply shared legal custody, permitting both parents to participate in decisions about the child’s future, while it resides with one parent, the other having rights of access.”

⁶⁶⁸ *Zorbass v Zorbass*. If the child has been placed in custody of an institution, by the order of a Children’s Court the court granting a divorce must still make an order regarding custody of the child. Such order will apply when the child is released from the institution: *Lochenbergh v Lochenbergh* 1949 2 SA 197 (E). The prayers should ask only for “custody” not for “custody and control”: *Stassen v Stassen*.

⁶⁶⁹ 1994 3 SA 201 (C) here the father applied for custody of his son, who at that stage was in the custody of the child’s mother.

⁶⁷⁰ 204J.

⁶⁷¹ 204J, 203G.

⁶⁷² 204J, 204I.

ensure the child's moral, physical, spiritual and emotional welfare reference has to be made to the following criteria:⁶⁷³

- "a. the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- b. the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- c. the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity of the child's feelings;
- d. the capacity and disposition of the parent to give the child the guidance which he requires;
- e. 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;
- f. the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- g. the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- h. the mental and physical health and moral fitness of the parent;
- i. the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;

⁶⁷³ 205. The concept of the best interests of the child will be discussed in more detail in par 3 5 below.

- j. the desirability or otherwise of keeping siblings together;
- k. the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;⁶⁷⁴
- l. the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and
- m. any other factor which is relevant to the particular case with which the court is concerned."⁶⁷⁵

The judge here specified that if the child has the necessary intellectual and emotional maturity to express his or her true feelings; weight must be given to the child's preference.⁶⁷⁶ The factors mentioned in *McCall v McCall* have been approved in several cases.⁶⁷⁷

⁶⁷⁴ In the matter of *Meyer v Gerber* 1999 3 SA 650 (O) due weight was given to a minor's (15 years old) preference and choice. Here the boy had chosen to reside with his father. The court found that the boy was intellectually and emotionally mature enough to make such a decision, and that he had not been influenced by his father to make such a decision: 655B–D, 655I–J.

⁶⁷⁵ In this case the custody of the boy, Rowan, was given to his father as he had "now reached the stage of his development, at the doorstep of puberty, where his need for the discipline of a father is greater than his need for the protectiveness of a mother": 206J.

⁶⁷⁶ 207H–I. The judge referred to the cases of *French v French* 1971 4 SA 298 (W) 299H; *Manning v Manning* 1975 4 SA 659 (T) 661H, in this case it was held that the parent applying for variation of the custody order does not have to show the court that there is misbehaviour or shortcomings on the part of the other parent or that the child is suffering injury, he only has to show that it is in the best interest of the child to make the variation; *Greenshields v Wyllie* 1989 4 SA 898 (W). In the last mentioned case Flemming J said he was not inclined to give "much weight" to the preferences of children aged 12 and 14. In *Märtens v Märtens* 1991 4 SA 287 (T) 294–295 the court was satisfied that if a child is intellectually and emotionally mature enough, it may give weight to the child's preference.

⁶⁷⁷ *Bethell v Bland* 1996 2 SA 194 (W); *Madiehe (born Ratlhogo) v Madiehe* 1997 2 All SA 153 (B), clearly stated that custody is not a gender privilege or a right: 157F. In this case custody of a 5-year-old boy was given to his father. The court referred to the factors, as specified in *McCall v McCall*, which can be used to determine the best interests of the child and specified that most of the requirements are met by both parties. The court also emphasised that the

When the court looks at the moral fitness of a parent, the court has to disregard whether any of the parents acted in breach of court orders.⁶⁷⁸ The case of *Van der Linde v Van der Linde*⁶⁷⁹ dealt with the question of the desirability of separating siblings as well as what constitutes the concept of mothering. Hattingh J referred to the case of *McCall v McCall*⁶⁸⁰ and said that the applicant has to prove why it would be in the best interests of the female child that the consent paper be amended. With regard to the question of whether the children should be separated from each other, the judge looked at the expert evidence, which said that siblings should not be unnecessarily separated from one another.⁶⁸¹ The judge also stressed the good relationship between the siblings.⁶⁸² It was stressed that it would be necessary to separate siblings if one was not being properly cared for or was neglected.⁶⁸³

father mentioned educating the child, and that he has a better physical environment in which to raise his son, as he was renting a large house, whereas the boy's mother was staying with her parents and the boy had to share a room with his mother. It is submitted that the last-mentioned factor should have played any role at all in determining who should have custody of the child. Inadequacies in accommodation, caused by financial reasons, can be solved by ordering the other party to contribute more towards maintenance of the child and should not be a factor used to determine custody. In the case at hand the court does mention other factors and it is hoped that these played a greater role in the court's decision than the accommodation that was available for the child. See also *Krasin v Ogle* 1997 1 All SA 557 (W).

⁶⁷⁸ *Märtens v Märtens* 1991 4 SA 287 (T).

⁶⁷⁹ 1996 3 SA 509 (O): The facts of this case were that the non-custodian parent brought an application that the consent paper be amended so that she would obtain custody of the minor children, a boy aged 14 and a girl aged 9, or alternatively custody of one of the children. For a discussion of this case, and the role of gender matching in custody orders, see Robinson and Wessels "Die Rol van die Geslag van die Ouer by Beheer en Toesig Bevele *Van der Linde v Van der Linde* 1996 3 SA 509 (O)" 1998 *Obiter* 187. See also Cronjé and Heaton *Casebook on South African Family Law* 323.

⁶⁸⁰ 1994 3 SA 201 (C) 204I.

⁶⁸¹ 514C.

⁶⁸² 514D.

⁶⁸³ 514E.

In answer to the question of whether a parental role is determined by gender, the judge said that the opinion expressed in the case of *Myers v Leviton*⁶⁸⁴ that “[t]here is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the normal psychological development of a healthy child” was applicable to the era in which the decision was made and that the opinion at that time was that mothering was only part of a woman’s being.⁶⁸⁵ The judge also stated that such assumption can still be helpful today, especially when the children are still of tender years.⁶⁸⁶

⁶⁸⁴ 1949 1 SA 203 (T) 214.

⁶⁸⁵ 514J–515B.

⁶⁸⁶ Where he refers to the case of *Manning v Manning* 1975 4 SA 659 (T) 662E–663F, it was said that the boy is 9 years and 8 months old and it is usual that children of tender years should be in the custody of their mother. However, the court said that “there comes a time ... especially in the case of boys, when all things being equal, they require the care and guidance of their father more than of their mother; this is especially the case when the boy is approaching the difficult age of puberty”: 662E. The court also referred to an English case where it was held that it was better for a boy of 8 to be with his father, rather than his mother. The court clearly stated that this has never been adopted as a general principle in our law and each case is rather judged on its own particular facts. The court also said that, as far as the factor of the boy’s sex and age are concerned, the scale is tipped in favour of the applicant. It was emphasised that it would be better for the boy to enjoy guidance from his own natural father, than from another father figure. The court stressed that the decision to put the boy in his father’s care was in the child’s best interests, at that stage of his development. *Dunsterville v Dunsterville* 1966 NPD 594, 597: “[E]xperience goes to show that a child needs both a father and a mother, and that, if he grows up without either he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child’s life than the paternal, and if not forged early may never be forged at all. The psychological need of a father ... only arises later ... the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realize they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the parental link”. Robinson in Davel (ed) *Introduction to Child Law in South Africa* 79 states that the best interests of the child should be the paramount consideration, and if the father can provide what is in the best interests of the child then he should have custody of the child, and the same applies in the case of the mother. Differentiating on a biological basis can only apply when the children are very young and the care given by the mother is very direct. Cronjé and Heaton 163–164 stress that the rejection of the assumption that mothers make better caretakers is in accordance with the equality clause of the South African Constitution. *SALC Report on the Children’s Bill* Ch 8 The Parent-Child Relationship 245 states that although the maternal preference rule “appears to violate a requirement of **formal equality**, there are strong arguments in favour of the view that the maternal preference rule does not violate a deeper notion of

He goes on to say that in our present time period mothering can also be part of a man's being and that the term "mothering" is indicative of a function rather than a person and that this function does not necessarily lie in the biological mother.⁶⁸⁷ He further stated that mothering:

“behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoefte aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging.”⁶⁸⁸

It is stressed that only the parent who can satisfy this need will succeed in creating a psychological bond with the child and when in this parent's care the child will feel that his existence has meaning and that he is protected and

substantive equality which underpins our constitutional commitment to egalitarianism.' Substantive equality requires us to examine the actual social and economic conditions that prevail in South Africa and, in particular, the gender-based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities. Despite the constitutional commitment to equality, the reality in this country is still that it is predominantly women who care for children, whether born in or out of wedlock. This sexual division of labour is further exacerbated by the inadequate provision of child-care facilities, keeping women out of the formal work sector because they have no one to look after their children." It is submitted that the view held by the Law Commission is correct. For a discussion of the gender-based division of work in a household, and specifically in the raising of children, see Bonthuys "Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce" 2001 *THRHR* 192. There is a great difference between equality in reality and equality in practice, in South Africa. It is an unfortunate reality that women in South Africa bear the predominant responsibility for the care and raising of children, regardless of whether they have work outside the home or not. This reality must be reflected in any new legislation governing the parent-child relationship in South Africa. It can be argued that the Law Commission's proposal, 246, that "the mere existence of a biological tie should not justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role" takes cognisance of the current social realities in South Africa. See ch 4 below for a discussion of the changes to the parent-child relationship in South Africa, specifically with reference to guardianship, care and contact.

⁶⁸⁷ *Leviton v Leviton* 515B–C.

⁶⁸⁸ 515C–D. This is translated in the headnote as "[I]t includes the sensitive attachment which flows from the attention devoted from day to day to the child's needs of love, physical care, nutrition, comfort, peace security, encouragement and support".

sheltered.⁶⁸⁹ Mothering is said to be the showing of unconditional love, without expecting anything in return.⁶⁹⁰ The judge further stressed that the concept of mothering does not just form part of a woman but also part of a man and in the past the community expected men to suppress that part of their being.⁶⁹¹ Men were expected to be emotionally uninvolved, to be masters, hunters and protectors. Women were expected to bear children and care for them.⁶⁹² Nowadays men may live out their mothering feelings, more and more men are prepared to accept mothering as part of their personality and to give expression to it.⁶⁹³ In this case the decision of the court was that the siblings should remain together, in the custody of their father.⁶⁹⁴ The court in *Ex parte Critchfield*⁶⁹⁵ held that the so-called maternal preference rule, according to which

⁶⁸⁹ 515D.

⁶⁹⁰ *Ibid.*

⁶⁹¹ 515E–F.

⁶⁹² 515F–G.

⁶⁹³ 515H. The judge also stressed that there is resistance against all forms of racism, fascism, chauvinism and sexism in the world and that the roles of modern spouses are less like the traditional roles.

⁶⁹⁴ But the mother's access rights were specified, in order to safeguard these: 516.

⁶⁹⁵ 1999 1 All SA 319 (W). In this case the father said that the maternal preference rule constituted unfair discrimination, the court rejected this and relied on what was in the best interests of the child, as specified in s 28(2) of the South African Constitution. See also the discussion of the best interests of the child in par 3 5 below and Jazbhay "Recent Constitutional cases: Maternal Preference Rule" April 1999 *De Rebus* 58. For a discussion of present sex and gender images see Van Marle "To Revolt Against Present Sex and Gender Images: Feminist Theory, Feminist Ethics and a Literary Reference" 2004 *Stell LR* 247. The South African Constitutional Court has also had a number of opportunities to make decisions related to discrimination based on gender. In *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) the court had to decide whether it amounted to unfair discrimination to release single mothers but not single fathers, in order that they could fulfill their role as primary caregivers of their children. Unfortunately the court did not challenge the stereotype of women as primary caregivers. In *Harksen v Lane NO and Another* 1997 11 BCLR 1489 (CC) certain provisions of the Insolvency Act 24 of 1936 were challenged as treating spouses unequally. The majority of the court held that the guarantee of equality before the law was not violated by the provisions of the Act and that the discrimination contained in the Act was fair and did not affect their human dignity adversely. The minority judgement, however, stated that the Act engendered a stereotypical idea of what marriage is and the roles played by persons in a marriage, and that it works from an assumption that there is only one business mind in a marriage and that spouses lose their individual selves in a marriage. In *Jordan v S* 2002 6 SA 642 (CC) the constitutionality of s 20(1) of the Sexual Offences Act 23 of 1957 was questioned. The court found that the section was not invalid

the mother is often given preference in custody disputes, does not constitute unfair discrimination. It was found not to be unconstitutional for the court to use maternity as a factor in determining who will receive the custody of young children.⁶⁹⁶ The court also stressed that maternity could not be the only consideration in determining custody.⁶⁹⁷ In *Van Pletzen v Van Pletzen*⁶⁹⁸ it was held that “mothering” is not only a part of a woman but is also part of a man’s being and that, depending on the circumstances, a father can possess the capability to exercise custody as well as a mother.⁶⁹⁹

If the child has the necessary intellectual and emotional maturity to accurately reflect his feelings towards his parents, weight must be given to his preference.⁷⁰⁰ In the case of *Meyer v Gerber*⁷⁰¹ the child’s wishes were

and that the section is gender-neutral. Van Marle 2004 *Stell LR* 248 states that “implicit in the court’s deliberations is a traditional view of sex and sexuality. Sex, especially for women, should take place within the parameters of safe (heterosexual) relationships where the aim is ultimately to procreate, for women to become mothers and to fulfill their roles accordingly.” The abovementioned cases clearly show that there are still many sex and gender stereotypes in South African law. In reality the roles played by many men and women do often fall within the stereotypical views of what their roles in society should be. When deciding whether a father in a particular instance is able to fulfill a “mothering” role the court should look at the practical reality present in the particular circumstances, not only at the theoretical possibility that a father can perform a mothering role, or that a mother can perform the role traditionally associated with a father. Already in 1978 “[i]t [was] strongly suggested that custody awards made largely on the basis of the sex of the parent are not necessarily serving the best interests of the children ... the merits and demerits of each parent should be considered in relation to his or her suitability as the custodian parent. The bond established between a child and a particular parent is of crucial importance. Evidence points towards consideration of each case in terms of its unique circumstances, and away from generalizations based primarily upon sex”: Rosen “Is There Any Real Basis for the Preference Accorded to Mothers as Custodial Parents?” 1978 *SALJ* 246, 248.

⁶⁹⁶ 330A.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ 1998 4 SA 95 (O).

⁶⁹⁹ 101B D–E. Here the child was, however, placed in her mother’s custody, as she was a girl of 4½ years old. The court said that the mother would serve as a role model for the child.

⁷⁰⁰ See the *McCall* case. As well as *French v French* 1971 4 SA 298 (W); *Manning v Manning* 1975 4 SA 659 (T); *Märtens v Märtens*.

⁷⁰¹ 1999 3 SA 650 (O).

decisive. The court, as upper guardian, may decline to give effect to children's preferences, as children's perspectives may change with time.⁷⁰²

Previously the maternal preference rule⁷⁰³ was followed. This meant that custody of young children and of girls of all ages was awarded to the mother, unless there were powerful reasons not to do so.⁷⁰⁴ Nowadays it is recognised that neither parent is a more suitable custodian only because of his or her gender.⁷⁰⁵ A child's mother may still be favoured where there is doubt⁷⁰⁶ but courts have recognised that a father can equally fulfill the mothering role.⁷⁰⁷ According to *Ex parte Critchfield*⁷⁰⁸ unfair discrimination may result if the court gives undue weight to the role of the mother and maternity can never be the only consideration that is of any importance in determining the custody of young children.⁷⁰⁹

⁷⁰² *Greenshields v Wyllie* 1989 4 SA 898 (W). In *Horsford v De Jager* 1959 2 SA 152 (N) the children were returned to their mother's custody although they did not want to go.

⁷⁰³ Or tender years doctrine. See also Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 77–79. Clark 2002 *CILSA* 220 states that "[t]he law, mindful of the constitutional right of each person not to be unfairly discriminated against on grounds of sex or gender, has moved away from gender differentiation in divorce or disputed custody, towards a focus on the welfare of the child which can always 'trump' an allegation of gender discrimination".

⁷⁰⁴ *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 (W); *Goodrich v Botha* 1954 2 SA 540 (A); *Madden v Madden* 1962 4 SA 654 (T). See also *Schwartz v Schwartz* 1984 4 SA 467 (A).

⁷⁰⁵ See the discussion of the *Van der Linde* case above. *Mohaud v Mohaud* 1964 4 SA 348 (T) recognised that there are certain needs that young children of both sexes have that are best provided for by their mother.

⁷⁰⁶ *Madiehe (born Ratlhogo) v Madiehe*. Cronjé and Heaton 163, referring to this case, state that because of the physical demands made on the mother in carrying the child and giving birth, the court may well, in case of doubt, favour the mother. It can be argued that although mothering may form part of a man's being every case must be judged on its own merits and often it will be in the child's best interest to place the child or children with their mother.

⁷⁰⁷ *Van der Linde* case.

⁷⁰⁸ 1999 1 All SA 319 (W).

⁷⁰⁹ 143C–D. "Maternity is recognised as a consideration but no more than that": Clark 2002 *CILSA* 222. Bonthuys "Of Biological Bonds, New Fathers and the Best Interests of Children" 1997 *SAJHR* 623, 630–632 stresses the fact that, although the definition of fatherhood has changed, that "no corresponding shift in the definition of motherhood has taken place" and

A parent's homosexual orientation will not prevent him from being awarded custody; the sole standard is whether custody would be in the child's best interests.⁷¹⁰ In the matter of *V v V* the plaintiff, the husband, wanted to be awarded sole custody of their two children because the defendant, his wife, was involved in a lesbian relationship.⁷¹¹ The parties had been exercising joint custody for two years, in terms of a separation agreement.⁷¹²

that the image of mothers as nurturers remains accepted by our courts. Bonthuys also is critical of the fact that "[t]he idea that fathers can care for children is extended from those fathers who actually do this to an essential capacity of *all* fathers, thus vindicating the assignment of parental rights to all biological fathers" and that it is assumed that nurturing capacities exist between parents and children solely on the basis of biology or genetic relation. The fact that the modern idea of fatherhood as a father who contributes to the daily care and emotional nurturing of his children and at the same time is the breadwinner who cares financially for the family is criticised as keeping domestic labour divided according to gender lines, which "gives rise to an inherent tension and contradiction in the concept of fatherhood, in which intensive childcare is to be reconciled with the ethos of the hardworking, absent father". Bonthuys further argues that the ideology of the new, participating father and the need for the presence of a father in a family have been used to justify the extension of rights of all fathers and that these ideologies have been included in the best interests of the child standard. The fact that biology alone should not be the only reason to consider placing children in the custody of a parent or to allow access to a child is also stressed (632). The author states that the universally accepted idea that fathers naturally nurture their children tests the reality of biological fathers who refuse to pay maintenance for their children or who do not maintain contact with their children after a divorce. The author (634) is adamant that focusing on making the rights of fathers equal with that of mothers causes us to lose sight of what is supposed to be the most important consideration, namely the best interest of the child. The focus is also not on equal caring responsibilities of fathers and mothers. It is submitted that the concerns expressed by Bonthuys are valid. For a discussion of the focus of the Children's Act see ch 4. The best interests of the child standard is discussed in par 3 5 below.

⁷¹⁰ *V v V* 1998 4 SA 169 (C). In *Ex parte Critchfield* the father's "occasional homosexual encounters" before and during marriage were held to be irrelevant to the issue of custody. Van Schalkwyk "Bewaring- en Toesigbevele van Minderjarige Kinders by Egskeiding: Faktore" 2000 *THRHR* 295, 297 welcomes the decision by the court that homosexual encounters cannot be seen as more serious than heterosexual adulterous encounters. See also Bonthuys "Awarding Access and Custody to Homosexual Parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)" 1994 *Stell LR* 298 and Cronjé and Heaton *Casebook on South African Family Law* 334. For a discussion of same-sex life partnerships in general see Cronjé and Heaton 227–240. See also par 3 4 below.

⁷¹¹ In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) the mother was given access subject to conditions. The father also alleged that she suffered from a psychiatric condition.

⁷¹² The children moved between the homes of their mother and father and spent part of each week with them. For a summary of the facts see *V v V* 173–175.

The plaintiff was prepared to only allow the defendant access to the children if such access was supervised.⁷¹³ Unsupervised access during school holidays and alternate weekends would be granted only if a psychiatrist certified that the access would be in the best interests of the children. It was also stipulated in the access conditions that when the defendant exercises her access no third person would share the same residence or sleep under the same roof as the defendant and the children.⁷¹⁴

It was a concern of the plaintiff that “his children may become subjected to the allegedly harmful influence of a relationship between their mother and her partner in a lesbian relationship”.⁷¹⁵ Foxcroft J emphasised in this case that the position of fathers has changed in our law, so that the father may also be considered a suitable parent for young children.⁷¹⁶ The fact that husbands and wives now have equal guardianship over their children was also emphasised.⁷¹⁷ It was also made clear that section 28 of the Constitution stipulates that children under eighteen years old are entitled to family or parental⁷¹⁸ care and the best interests of a child are of paramount importance in every matter concerning the child.⁷¹⁹

⁷¹³ By plaintiff or his nominee: 173J.

⁷¹⁴ Unless plaintiff has consented thereto in writing: 174D.

⁷¹⁵ 174D–E. See also *Du Preez v Du Preez* 1969 3 SA 529 (D) which dealt with heterosexual couples. There was a proviso in an agreement that when the child was with the mother “one C (with whom the mother was living but not married to) shall not reside under the same roof as the mother and the child”.

⁷¹⁶ 176G.

⁷¹⁷ 176I–177A. See the discussion of guardianship in par 3 2 above.

⁷¹⁸ Not maternal or paternal.

⁷¹⁹ 177B.

Foxcroft J also explored the development of the law of custody. Firstly, he referred to the case of *Calitz v Calitz*⁷²⁰ in which it was stated that custody has a particular character in Roman Dutch law.⁷²¹ The courts' approach to awarding custody and guardianship where a marriage terminated was influenced by the superior rights of custody and guardianship which a father had during the marriage. Custody of very young children was usually given to the mother and custody of older children was usually awarded to "innocent fathers".⁷²² Before the best interests of the child came to be considered an important standard the courts were influenced by the guilt or innocence of the spouses.⁷²³ The court mentioned that *Fletcher v Fletcher*,⁷²⁴ in 1948, finally placed the paramount or best interests rule "at the pinnacle of its consideration".⁷²⁵ The judge indicated that he had sympathy for the views expressed supporting joint custody.⁷²⁶

The judge also referred to an Irish case⁷²⁷ in which it was said that it is impossible for a judge or court to take upon itself the role of resolving disputes between distinguished scientists and that the function of the court is "to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories".⁷²⁸ The judge referred to Schäfer's

⁷²⁰ 1939 AD 56.

⁷²¹ 177C.

⁷²² 177G.

⁷²³ 177H.

⁷²⁴ 1948 1 SA 130 (A). See also par 3 5 2 2 1 1 below.

⁷²⁵ 177I.

⁷²⁶ Schwartz in "Towards Presumptions of Joint Custody" 1984 18 *Fam LQ* 231–232: "A Judge cannot look into the future and predict what is the best interests of the child. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two 'good enough' parents, one cannot choose who should parent." For a further discussion of the best interests of the child, see par 3 5 below.

⁷²⁷ *Best v Wellcome Foundation Ltd and Others* referred to in 1994 5 *MLR* 178.

⁷²⁸ 178E.

lecture⁷²⁹ where he looked at the evolution that occurred in England regarding joint custody. The court also referred to the disadvantages⁷³⁰ of an order for joint custody. Firstly, the “imagined need for the security of one decision maker”.⁷³¹ Secondly, that parents who have not been able to maintain a stable marriage, will not be able to “achieve the degree of co-operation required for joint custody”.⁷³² Thirdly, that joint custody runs counter to the “clean-break” principle in divorce.⁷³³ Fourthly, where ex-spouses do not live near to each other there are logistical objections to joint custody. Fifthly, joint custody may be seen as an easy way out in that the court does not have to make a decision regarding sole custody.⁷³⁴ The judge examined these disadvantages and concluded that the first objection is based on the patriarchal legal past of our country. In the case of the second objection there are many cases where parents who can no longer stand each other still love their children as they always have. The judge said that the “clean-break” principle has little to do with the best interests of the child. Regarding the first objection the judge said it is obviously beneficial for joint custodians to live near one another. The last objection was dismissed as it cannot apply to the situation where a month has been spent “grappling with the respective merits of sole custody to the father, or joint custody”.⁷³⁵

⁷²⁹ 1987 SALJ 104, 169.

⁷³⁰ Listed by Schäfer.

⁷³¹ 178A.

⁷³² 179A.

⁷³³ 179B.

⁷³⁴ 179C.

⁷³⁵ 179G: it “might apply in some situations where a decision is reached in the motion court in an unopposed trial with a consent paper”.

The judge referred to the case of *Kastan v Kastan*⁷³⁶ in which an order was granted in terms of a consent paper providing for joint custody. The criticism of Schäfer that such a case did not specify whether joint physical or joint legal custody was granted was also mentioned.

The matter of *Schlebusch v Schlebush*⁷³⁷ was also referred to. Here the judge refused to grant an order in terms of a consent paper providing for joint custody.⁷³⁸ His reason for not granting such order was that a child must know where he or she stands, that there must be one person who controls the child and makes long-range and day-to-day decisions.⁷³⁹ The judge criticised the decision reached by Millins J in *Schlebusch v Schlebusch* and said that “a failure to consider the desirability of a joint custody order is as much an abdication of the responsibility to reach the best possible solution as any other”.⁷⁴⁰ Foxcroft J stressed that although a continuing relationship between the child and spouses cannot be ensured by an order for joint custody there is a better prospect of a continuing relationship with both parents where custody is shared.

The case of *Venton v Venton*⁷⁴¹ was also referred to. In this case Didcott J said that requests for joint custody are rare and that “the personal circumstances of

⁷³⁶ 1985 3 SA 235 (C).

⁷³⁷ 1988 4 SA 548 (E). Here the court also refused to grant joint custody (the parties had entered into an agreement which provided for this) and instead made an order that the wife should have custody. The court thought it desirable that there should be one parent directly responsible for the child.

⁷³⁸ 179I. See also *Edwards v Edwards* 1960 2 SA 523 (D) where the court refused to grant an order where the custody of a child would be shared equally between the mother and father and referred to the matter of *Heimann v Heimann* 1948 4 SA 926 (W).

⁷³⁹ *Whiteley v Leyshan* 1957 1 PH B9 (D).

⁷⁴⁰ 180E–F.

⁷⁴¹ 1993 1 SA 763 (D).

parents who live separately are seldom conducive to the request”.⁷⁴² Didcott J referred to *Heimann v Heimann*⁷⁴³ where joint custody was regarded as undesirable but no reasons were given for the refusal to grant joint custody. Didcott J emphasised that “neither decision⁷⁴⁴ lends support to the notion that irrespective of the circumstances; joint custody is unobtainable and should never be decreed”.⁷⁴⁵ Didcott J said the following:

“Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the court that no practical impossibility of any consequence seems likely to ensue. And, if some unforeseen trouble happens to develop after the grant of the order and a dispute erupts over it that will hardly be a calamity. The court will simply have to be approached to resolve the dispute.”⁷⁴⁶

Foxcroft J emphasised that in *Venton’s* case “the situation positively cried out for a joint custody order”⁷⁴⁷ as the parties were mature and temperamentally stable; their relationship was remarkably good; they respected and trusted each other; they shared the duties of parenthood constructively and amicably; they had similar values; they coped with differences by means of compromise and they never disparaged each other in the eyes of their children. They had also acted as joint custodians since they were separated.⁷⁴⁸ Foxcroft J said that this is not

⁷⁴² 180F.

⁷⁴³ 1948 4 SA 926 (W).

⁷⁴⁴ *Schlebusch v Schlebusch; Heimann v Heimann*.

⁷⁴⁵ *Venton v Venton* 765B.

⁷⁴⁶ *Venton v Venton* 766E, quoted at 180J.

⁷⁴⁷ 180J.

⁷⁴⁸ 181A.

the position in the present case, as the parties are at arm's length and each accuses the other of undermining their positions with the children.⁷⁴⁹ However, both parents are concerned for their children. The concern of the plaintiff is that he does not want his children to be exposed to “what he regards as unhealthy practices in their mother’s home”.⁷⁵⁰ Foxcroft J then explored the question of whether a homosexual lifestyle and orientation constitutes a moral or other threat to the children’s well-being.⁷⁵¹ In order to answer this question he referred to the opinions of various experts.⁷⁵² The judge stated that he:

“became convinced that the defendant had grown in the past few years, particularly in her work with survivors of violence, incest and sexual abuse, while plaintiff had become obsessed by the case and his quest for the salvation of his children from an imagined enemy or monster in the shape of a lesbian relationship, on the one hand, and the perceived risk that his wife might harm the children when entering another psychotic phase, on the other”.⁷⁵³

It became clear that the plaintiff’s main objection to joint custody was his wife’s sexual orientation.⁷⁵⁴

The plaintiff referred to the case of *McCall v McCall*⁷⁵⁵ where the best interests of children were examined. The plaintiff said that he was a suitable custodian

⁷⁴⁹ 181B–C.

⁷⁵⁰ 181H.

⁷⁵¹ 181J.

⁷⁵² For a discussion regarding these opinions, see 181J–187B. The question of whether the defendant was suffering from a mental illness was also explored.

⁷⁵³ 186H.

⁷⁵⁴ 187D.

⁷⁵⁵ 1994 3 SA 201 (C). For a discussion of the best interests of the child see par 3 5 below.

parent as he met all the criteria stated in such case. Foxcroft J emphasised that checklists serve only as guides and each case is different and must be decided on its own facts.⁷⁵⁶ The plaintiff also did not challenge the defendant's ability to pass the test in *McCall v McCall* except that he did not want his children to be exposed to the lesbian relationship of his wife and he was concerned about her mental and physical health.⁷⁵⁷ The plaintiff relied on the case of *Van Rooyen v Van Rooyen*.⁷⁵⁸ This matter was decided before the interim Constitution⁷⁵⁹ was in force and the court made a moral judgement as to what is normal and correct as far as sexuality is concerned and regarded homosexuality as abnormal.⁷⁶⁰ Foxcroft J stated that section 9 of the Constitution⁷⁶¹ makes it clear that the State may not unfairly discriminate against anyone on the basis of sexual orientation and no person may unfairly discriminate against anyone based on sexual orientation.⁷⁶² Foxcroft J concluded that it is wrong to regard homosexual orientation as abnormal.⁷⁶³

It is emphasised that, in a custody case, one is dealing indirectly with parents' rights. The child's rights are paramount and action may be taken, when it is in

⁷⁵⁶ 187G.

⁷⁵⁷ 188B–D.

⁷⁵⁸ 1994 2 SA 325 (W).

⁷⁵⁹ 200 of 1993.

⁷⁶⁰ 188H.

⁷⁶¹ 108 of 1996.

⁷⁶² S 9(4). The view has been expressed that "it may be in the best interests of the child to discriminate against its homosexual parent if that would be the only way in which the child would be spared unnecessary suffering": Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 65, see also De Vos "The Right of a Lesbian Mother to have Access to her Children: Some Constitutional Issues" 1994 *SALJ* 687.

⁷⁶³ 189A.

the best interests of the child which cut across parents' rights.⁷⁶⁴ "[T]he right which a child has to have access by its parents is complemented by the right of the parents to have access to the child."⁷⁶⁵ It is a two-way process. Access is part of the continuing relationship between parent and child and the more extensive the relationship with both parents, the greater the benefit to the child.⁷⁶⁶ It was said that the court may override the equality clause where it is in the best interests to protect the child but such limitations would have to be reasonable.⁷⁶⁷

Foxcroft J stated that the matter at hand is not just a problem of a mother having the right of access to her children but the children's right to access.⁷⁶⁸ A situation where both parents are committed to making joint custody work because they love their children is required.⁷⁶⁹ The case of *Pinion v Pinion*⁷⁷⁰ was also referred to. In that case it was emphasised that a child should know which parent has the ultimate say and should not be able to play one parent off against another. Foxcroft J said that the situation can be regulated so that the dangers of disagreement are removed as far as possible.⁷⁷¹ Foxcroft J stipulated that the certainty of the child knowing "where it stands" is not the only important

⁷⁶⁴ 189B. See also Sloth-Nielsen 2002 *IJCR* 142 where she stresses that Foxcroft J emphasised the importance of the children's constitutional rights as well as the Convention on the Rights of the Child, and that he linked this to s 28(1)(b) of the Constitution, which provides for the right of the child to parental care.

⁷⁶⁵ 189C. See also Sloth-Nielsen 2002 *IJCR* 142. It is submitted that the approach followed by the court was correct and that the issue of access must now be dealt with as a right of the child, which forms part of the right to parental care as found in s 28(1) (b) of the Constitution.

⁷⁶⁶ 189D. Access will be discussed in par 3 4 below.

⁷⁶⁷ 189J–190A.

⁷⁶⁸ 190C. Access is discussed in detail in par 3 4 below.

⁷⁶⁹ 191C.

⁷⁷⁰ 1994 2 SA 725 (D).

⁷⁷¹ 191G.

consideration. There are greater benefits to a child when both parents contribute on a regular and reasonably equal basis to the upbringing of the child.⁷⁷² In the present case the judge felt that the parties still had a measure of respect for each other and had never “used the children as weapons of war to get at each other”.⁷⁷³

The judge said that the defendant is a suitable mother and that if she was only able to visit her children because of her lifestyle it would be unfair to the children and her.⁷⁷⁴ The defendant would be punished for the risk that her lifestyle might influence the children in the wrong direction. “What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other?”⁷⁷⁵ The judge concluded that joint custody is in the best interests of the children.⁷⁷⁶

⁷⁷² 191H.

⁷⁷³ 191I–J: If they had joint custody this “would be unthinkable.” One of the reasons why the courts have, in the past, been hesitant to grant joint custody is the risk of parental conflict and disagreement, and this is often used as an argument against joint custody: Cronjé and Heaton 165. It can be argued that this factor alone would be insufficient reason to not award custody, unless the resulting conflict would be so bad that it would harm the child. After all, when married couples have joint custody there is often conflict over certain issues; divorced couples are certainly not immune to this sort of conflict.

⁷⁷⁴ 192C.

⁷⁷⁵ 192D.

⁷⁷⁶ 192H–I, and gave directions intended to iron out difficulties: 192I–195.

In *Krugel v Krugel*⁷⁷⁷ the court did not support the traditional disapproval of joint custody orders. The court held that the advantage of joint custody is that the child is cared for by both parents.⁷⁷⁸ The court also said that general hostility between parents should not be a bar to a joint custody order as long as both parents are fit and proper persons, even if the input from parents is sometimes disharmonious it is preferable to an uninvolved parent, disagreement and negotiation are a part of life.⁷⁷⁹ The court also said that a joint custody order would help promote the rights of children after the divorce of their parents and help to establish equality between the sexes.⁷⁸⁰

The reasons given⁷⁸¹ to not award joint custody are that it is better if one parent controls the child's life,⁷⁸² that there is a risk of parental conflict and that it puts one parent in a position of power without responsibility.⁷⁸³ Another reason to not award joint custody is that logistical difficulties will arise, unless the parents live near to each other. Another objection is that there is a danger of instability, which will be caused by the inconsistency in living arrangements.⁷⁸⁴

⁷⁷⁷ 2003 6 SA 220 (T). In *Corris v Corris* 1997 2 SA 930 (W) the court granted a joint custody order. The court said that the court cannot foreshadow the future. A custody order must be made on the evidence, as well as experience, probability and hope. If circumstances change parties can approach the court for a variation: 934C–E. The court also held that the risk of future disagreement (between parents) was not necessarily greater where an award of joint custody has been made. See also Cronjé and Heaton *Casebook on South African Family Law* 332.

⁷⁷⁸ 227C.

⁷⁷⁹ 227H–228D.

⁷⁸⁰ 227B and 228D.

⁷⁸¹ This list is based on the work of Cronjé and Heaton 165–166.

⁷⁸² This may or may not be beneficial to the child, depending on the circumstances. The argument also does not work as children of married parents are also often "controlled" by more than one parent. It is submitted that the term *guided* is preferable, but the word *control* is still used by our courts and authors.

⁷⁸³ As it often does not include the sharing of the day-to-day care of the child.

⁷⁸⁴ It can be argued that there is no inconsistency in living arrangements if the child has a "bedroom at Mommy and one at Daddy". However, logistical problems can occur and

The reasons given to award joint custody are thus, amongst others, that it ensures a continuing personal relationship between the child and both parents,⁷⁸⁵ it avoids a "winner takes all" situation,⁷⁸⁶ it reduces instances of child abduction and it counteracts gender stereotypes and alleviates the burden of the mother who enters the job market after divorce.⁷⁸⁷

3 3 3 2 Custody of a Marital Child

The court may award custody to one parent or both parents⁷⁸⁸ or even to a third party.⁷⁸⁹ If parties agree who will get custody, the court will usually confirm such agreement unless it is not in the best interests of the child.⁷⁹⁰ The South African courts have expressed varying views regarding joint custody. In the case of *Kastan v Kastan*⁷⁹¹ the parties agreed to share joint custody of the children and

parents will have to put the child's best interests before their own, for example, moving to a neighbourhood that is near to the child's school.

⁷⁸⁵ "Neither parent assumes the dominant role in the child's life while the other parent becomes an 'absent' parent": Cronjé and Heaton 165.

⁷⁸⁶ This is said to worsen conflict between parents: Cronjé and Heaton 165.

⁷⁸⁷ Cronjé and Heaton 165.

⁷⁸⁸ *Petersen v Kruger* 1975 4 SA 171 (C). Both parents are entitled to custody of their marital child, this case clearly illustrated this. See also Cronjé and Heaton *Casebook on South African Family Law* 445. Both parents are entitled to custody of their marital child. See further, for a discussion of joint custody and equality, Kaganas "Joint Custody and Equality in South Africa" in Murray (ed) 1994 *Gender and the New South African Legal Order* 169. For a general discussion of joint custody see Schäfer "Joint Custody" 1987 *SALJ* 149 (the remarks on 150, regarding guardianship vesting in only the father, are outdated) and Clark and Van Heerden "Joint Custody: Perspectives and Permutations" 1995 *SALJ* 315.

⁷⁸⁹ This will only be done in exceptional circumstances: *Edge v Murray* 1962 3 SA 603 (W); *Hoyi v Hoyi* 1994 1 SA 89 (E); Visser and Potgieter *Family Law* 184, Cronjé and Heaton 166.

⁷⁹⁰ *Märtens v Märtens* 1991 4 SA 287 (T).

⁷⁹¹ 1985 3 SA 235 (C). For a general discussion of joint custody as an alternative, see Westing *Konkretisering van Ouerlike Gesagsbevoegdheid – met Besondere Verwysing na Regte van Toegang by Buite-Egtelike Kinders en Gesamentlike Toesig en Beheer oor Kinders in 'n Serie-Huwelik* (LLM dissertation 1994 RAU) 26–32 and Hoffman and Pincus *The Law of Custody* (1989) 53–56.

agreed upon a formula. King AJ specified that section 6(3) of the Divorce Act⁷⁹² is wide and allows for an order of joint custody.⁷⁹³ The court further said that it is the upper guardian and that its discretion should be free and unfettered. However, the court said that such discretion “must be exercised to promote the welfare and protect the interests of young children”.⁷⁹⁴ The judge specified that an award of joint custody is rare, as leaving decisions to both parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been preceded by acrimony⁷⁹⁵ and disharmony between the parents. The court considered the evidence and both parents were found to be competent and experienced and the children were bonded equally to both their parents. The parties had established a better relationship and they were conciliatory towards one another. The decision was made that it was in the best interests of the children to make an order in terms of the consent paper.⁷⁹⁶

In *Venton v Venton*⁷⁹⁷ the court approved of joint custody as this was in the interests of the children. Didcott J specified that requests for joint custody in Natal are rare and counsel in this case only cited three reported decisions where joint custody had been claimed in South Africa.⁷⁹⁸ These cases were *Heimann v Heimann*,⁷⁹⁹ *Kastan v Kastan*⁸⁰⁰ and *Schlebusch v Schlebusch*.⁸⁰¹ Only *Kastan's*

⁷⁹² 70 of 1979.

⁷⁹³ 236D–E.

⁷⁹⁴ 236E.

⁷⁹⁵ 236G.

⁷⁹⁶ Or agreement 236I–237.

⁷⁹⁷ 1993 1 SA 763 (D).

⁷⁹⁸ 764H–I.

⁷⁹⁹ 1948 4 SA 926 (W).

claim succeeded. Didcott J referred to King AJ's decision in the case of *Kastan* that the power bestowed by section 6(3) of the Divorce Act⁸⁰² is wide enough to cover an order for joint custody and his referral to the protection of the interests of children and the remarks made by King AJ that joint custody is fraught with risks.⁸⁰³ Didcott J also referred to the case of *Edwards v Edwards*⁸⁰⁴ where joint custody was not claimed and the parties were already divorced and no order for the custody of their son had been made. The parties had agreed that custody would be "shared equally" between them. The court had to settle a dispute about the child's schooling. Jansen J made the following remarks:

"It seems to me to be a legal impossibility that the legal custody of a child should be shared equally between two individuals. The legal custody involves the privilege and responsibility of taking certain decisions in regard to, for example, the education of the child ... If the responsibility is shared between two individuals there is the continuing possibility of a deadlock arising over every triviality."⁸⁰⁵

Didcott J concluded that it is not a legal impossibility to grant joint custody;⁸⁰⁶ it was also specified that if a dispute arises the court would have to be approached to resolve the dispute.⁸⁰⁷ The judge specified that the court has the power to

⁸⁰⁰ 1985 3 SA 235 (C). This case was discussed above. Cronjé and Heaton *Casebook on South African Family Law* 327.

⁸⁰¹ 1988 4 SA 548 (E). This decision was discussed above.

⁸⁰² 70 of 1979.

⁸⁰³ *Kastan v Kastan* 236C–F.

⁸⁰⁴ 1960 2 SA 523 (D).

⁸⁰⁵ 524F–H.

⁸⁰⁶ 766B–G.

⁸⁰⁷ 766G.

award joint custody and it should be used cautiously but “its exercise is required once the best interests of the child or children appear to call clearly for such”.⁸⁰⁸

The judge here concluded that:

“[The parties were] sensible; mature; responsible and temperamentally stable people [and] [t]he relationship between them was a remarkably good one for a couple whose marriage had collapsed. They respected, trusted and remained fond of each other ... they shared the duties of parenthood ... co-operating amicably and constructively ... [they had] similar outlooks and values ... [c]ompromise rather than altercation had been their way of coping with any difference of opinion that happened to arise ... they were committed to the experiment of joint custody and dedicated to its success. In effect they had acted as joint custodians ever since their separation [and] planned to continue doing so ... The children appeared to have adopted themselves well to their altered pattern of life, and to be happy and contented.”⁸⁰⁹

The judge concluded that although he is not sure whether the state of affairs is a utopian one that the prospects for joint custody looked good and that persuaded him that the interests of the children called for such an award.⁸¹⁰

⁸⁰⁸ 766G. The judge referred to the advantages and disadvantages of joint custody that were discussed by Schäfer in 1987 *SALJ* 149, 158–160 and in Hoffman and Pincus *Law of Custody* 53 and concluded that there are not any hard or fast rules except that the interests of the children are paramount: 768H.

⁸⁰⁹ 767.

⁸¹⁰ *Ibid.*

In the matter of *Schlebusch v Schlebusch*⁸¹¹ the court had opposed the principle of joint custody. Mullins J specified that courts in South Africa have not been in favour of joint custody.⁸¹² The judge also referred to the case of *Heimann v Heimann*⁸¹³ in which Murray J stated that one parent should be directly responsible for the child. The case of *Whitely v Leyshan*⁸¹⁴ was also referred to. In the case of *Whitely* the court stressed that the true interests of the child are what predominantly concerns the court and that the rule that gave the custodian parent the right to direct the whole life of the child

“was merely an off-shoot from the principle that the court was concerned primarily with the true interests of the child, it being recognized that it was in the child’s best interests that it should know that there was one definite person who in the last instance controlled it.”⁸¹⁵

The judge also referred to the case of *Edwards v Edwards*⁸¹⁶ which specified that it was a legal impossibility that legal custody could be shared.⁸¹⁷ The judge specified that he did not agree that an order of joint custody would ensure a continuing relationship between the child and both the parents.⁸¹⁸ The judge

⁸¹¹ 1988 4 SA 548 (E). The facts of this case were that it was an undefended divorce action; the parties entered into a consent paper which stipulated that the custody of the minor children should be awarded to the parties jointly but if the court did not do so that the custody should be awarded to the plaintiff subject to the reasonable visitation by the defendant and that the consent paper was to be made an order of court: 549.

⁸¹² 549H.

⁸¹³ 1948 4 SA 926 (W).

⁸¹⁴ 1957 1 PH B9 (D).

⁸¹⁵ As quoted in *Schlebusch v Schlebusch* 550B–D.

⁸¹⁶ 1960 2 SA 523 (D).

⁸¹⁷ See the opposing view expressed by King AJ in *Kastan v Kastan* discussed above and Didcott J in *Venton v Venton* discussed above.

⁸¹⁸ 552A.

stipulated that modern children are aware of the consequences of divorce and appreciate that divorce involves change in domestic control and discipline. The judge⁸¹⁹ also does not agree that such an order will improve parental co-operation or eliminate the kidnapping of children, but says it would instead encourage a tug of war between the parents.

An order of joint custody has the advantage that both parents control the child's daily life, so neither parent plays a dominant role in the child's upbringing.⁸²⁰ The disadvantage of joint custody is that the parents must co-operate and be compatible. It is also difficult to predict what their future relationship will be like.⁸²¹ According to Clark and Van Heerden⁸²² joint custody may be unfair to women, or other persons in a weak bargaining position, as joint custody⁸²³ "puts the care-taking parent in a position of responsibility without power whilst giving the non-care-taker parent (usually the father) power without responsibility".

Sole custody may be granted together with sole guardianship.⁸²⁴ The Matrimonial Affairs Act introduced the concept "sole custody" into our law.⁸²⁵

⁸¹⁹ 552. The judge here decided to award custody to the plaintiff (their father) subject to the mother's right of access.

⁸²⁰ Clark and Van Heerden 1995 *SALJ* 315, 323: Joint custody "might well work to the benefit of the child as regards the maintenance of a dual parental relationship and the preservation of the stability and security so vital to the satisfactory maturation of a child".

⁸²¹ *Schlebusch v Schlebusch*: Reservations were expressed whether an order of joint custody has any advantages. See also Cronjé and Heaton *Casebook on South African Family Law* 328; *Heimann v Heimann* 1948 4 SA 926 (W); *Edwards v Edwards* 1960 2 SA 523 (D); *W v S and others* 1988 1 SA 475 (N).

⁸²² 1995 *SALJ* 315, 323.

⁸²³ As presently formulated.

⁸²⁴ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁸²⁵ 37 of 1953. According to s 5(1) of this Act the court can give sole custody to one parent in divorce proceedings. S 6(3) covers an application by a parent living apart from his or her spouse or divorced.

Courts have assumed that “sole custody” means (single) custody.⁸²⁶ In *S v Amas*⁸²⁷ it was held that there is a distinction between “sole custody” and “single custody”. The sanctions imposed by the General Law Further Amendment Act⁸²⁸ were held to apply to a sole custodian denying access and not to a (single) custodian doing so. A parent who has sole custody has all the powers in relation to custody, including the power to appoint a person in their will to have the sole custody of the child after their death.⁸²⁹ The parent is also subject to all the duties imposed by Roman law relating to custody. Due to the fact that the powers of the non-custodian parent are severely curtailed by an order of sole custody, the order is granted sparingly.⁸³⁰

Guidelines followed by the court seem to be that the mother is awarded custody of young children and of girls, of any age. The father is normally awarded custody of older boys.⁸³¹ However, in *Whitehead v Whitehead*⁸³² the father of a nine-year-old boy was awarded custody of the child. Such custody was awarded to the father pending the divorce action and the plaintiff (mother) was allowed access to the child on alternative weekends.⁸³³ The court here decided that it would be unwise to make a change to the existing situation so soon before the

⁸²⁶ *Fortune v Fortune* 1955 3 SA 348 (A): “sole” was introduced to “[c]ontrast effect of the order with the position where the parents were living together” 353B; *Mohaud v Mohaud* 1964 4 SA 348 (T); *Botes v Daly* 1976 2 SA 215 (N).

⁸²⁷ 1995 2 SACR 735 (N).

⁸²⁸ 93 of 1963.

⁸²⁹ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O); *S v Amas* 1995 2 SACR 735 (N). If the parent does not do so custody will revert to the surviving parent.

⁸³⁰ Eg *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O): here the non-custodian parent had not visited the mother in hospital during pregnancy and had never seen the child. He had also not provided any financial support for the mother or child.

⁸³¹ Visser and Potgieter *Family Law* 184.

⁸³² 1993 3 SA 72 (SE).

⁸³³ 75C.

divorce.⁸³⁴ Sometimes the court first awards custody to the mother and then, when the children are older, to the father. Children may even be split between parents, with some going to the mother and some to the father.⁸³⁵

3 3 3 3 Custody of an Extra-Marital Child

The custody of an extra-marital child vests in the mother alone.⁸³⁶ If such mother is a minor guardianship vests in her guardian⁸³⁷ but she still has custody.⁸³⁸ The father of a child born out of wedlock may apply for custody of his child.⁸³⁹ The court will only award custody to such father if it is in the child's best interests to do so.⁸⁴⁰ When the custodian parent dies the non-custodian may apply for custody of the child.⁸⁴¹

⁸³⁴ 75E. For the facts of the case see 73–75C. Here the judge was also critical of the role of the Family Advocate: 75.

⁸³⁵ Visser and Potgieter 184.

⁸³⁶ *Matthews v Haswari* 1937 WLD 110; *Dhanabakium v Subramanian* 1943 AD 160; *Engar and Engar v Desai* 1966 1 SA 621 (T); *Douglas v Mayers* 1987 1 SA 910 (Z); *F v B* 1988 3 SA 948 (D); *Bethell v Bland* 1996 2 SA 194 (W).

⁸³⁷ S 3(1)(a) Children's Status Act 82 of 1987.

⁸³⁸ S 3(1)(b) Children's Status Act. In *Rowan v Faifer* 1953 2 SA 705 (E) the court held that the respondent, the father of an illegitimate child, had *locus standi* to appear before the court to oppose an application by the mother of such child, calling upon the respondent (to whom the applicant had willingly handed over the child) to deliver the child to her. The court also decided that removal of the child would endanger its health and it was in the child's best interest to remain where it was. In *Engar and Engar v Desai* 1966 1 SA 621 (T) the court held that where a putative marriage is declared invalid and the children of such marriage declared legitimate, the father as natural guardian (under the law of that time) is entitled to custody unless there are sufficient reasons to deny him custody.

⁸³⁹ Or guardianship, or access: s 2(1) of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

⁸⁴⁰ *Krasin v Ogle* 1997 1 All SA 557 (W) in this case the mother was given custody of the child, as the court held that the child was emotionally attached and bonded to her and that the child had a transparent need to be with her mother. The best interests standard is discussed in par 3 5 below.

⁸⁴¹ *Wepener v Warren and Van Niekerk NO* 1948 1 SA 898 (C). Previously the father of an illegitimate child could not claim custody of the child as of right after the mother's death. As the child was illegitimate the applicant had no *locus standi* as far as custody of the child was concerned: *Docrat v Bhayat* 1932 TPD 125. This case dealt with the child of parents married by Mohammedan rights. This position has improved since. For a discussion of the

3 3 3 4 Relocation by Parents

Relocation by custodian parents poses problems. Tension occurs between the rights to custody and access. This is often hidden behind the requirement that the best interests of the child must take precedence in any matter concerning the child.⁸⁴²

The criteria used in relocation decisions by South African courts are the following. Initially South African courts said that “the custodian parent has a right to decide where the children should live, and that, unless the non-custodian can illustrate that it would be clearly detrimental to the children, relocation would be authorised”.⁸⁴³ Access rights of the non-custodian parent were initially not considered relevant to the query.⁸⁴⁴ In the matter of *Lecler v Grossman*⁸⁴⁵ a shift in emphasis occurred. Here it was held that the non-custodian parent automatically had a right to reasonable access, even where no agreement or

constitutional approach to dealing with African customary marriages, see Nhlapo “South African Family Law at the Crossroads: From Parliamentary Supremacy to Constitutionalism” 1994 *ISFL* 419. See also Maithufi and Bekker “The Dissolution of Customary Marriages in South Africa” 2001 *Obiter* 259 and “The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa” 2002 *CILSA* 182. For a discussion of fundamental rights and customary marriages as well as children born outside of marriages, see Visser “Enkele Gedagtes oor Fundamentele Regte en die Familiereg” 1995 *THRHR* 702, 705–706. Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116 for a discussion of cultural values and the custody of the African child. The authors, at 117, submit that when looking at the best interests of the African child, African cultural values and belief systems should be taken into account.

⁸⁴² Bonthuys “Clean Breaks: Custody, Access and Parents’ Rights to Relocate” 2000 *SAJHR* 486. See also Kruger “Emigration by a custodian parent after divorce” 2001 *THRHR* 452 and Louw “The Power of a Custodian to Remove a Child from the Country After Divorce: Some Comments” 2003 *De Jure* 115.

⁸⁴³ Bonthuys 2000 *SAJHR* 486. See also *Etherington v Etherington* 1928 CPD 220.

⁸⁴⁴ *Van Wijk v Creighton* 1925 5 PH B21.

⁸⁴⁵ 1939 WLD 41, 44.

court order to this effect existed.⁸⁴⁶ It thus seems that relocation primarily depended on the rights of the parents.⁸⁴⁷ In *Shawzin v Laufer*⁸⁴⁸ this approach was rejected and it was held that the interests of the child were the norm to be applied. The factors used to determine the interests of children⁸⁴⁹ are contact with the non-custodian parent;⁸⁵⁰ relationship with the custodian parent;⁸⁵¹ conflict between the parents;⁸⁵² bona fides of the custodian parent;⁸⁵³ stability;⁸⁵⁴ children's preferences⁸⁵⁵ and relationships with new family members.⁸⁵⁶

In the case of *Grgin v Grgin*⁸⁵⁷ an application for the right to remove a child from South Africa was dismissed. The court held that the non-custodian parent was entitled to the protection afforded him by an agreement which had been made an order of court in divorce proceedings.⁸⁵⁸

⁸⁴⁶ Bonthuys 2000 SAJHR 489.

⁸⁴⁷ "The interests of the children are taken into account in the sense that the move may not prejudice them but they are not central to the inquiry": Bonthuys 2000 SAJHR 489. See also *Edge v Murray* 1962 3 SA 603 (W). In *Johnstone v Johnstone* 1941 NPD 279 the court even said that the interests of the children were not relevant to relocation as these had been considered by the court at the time of the divorce: 288, 297–298. What is in the best interests of a child may differ from time to time. See further par 3 5 below.

⁸⁴⁸ 1968 4 SA 657 (A).

⁸⁴⁹ These are discussed in detail by Bonthuys 2000 SAJHR 486, 490–499. These factors will not be discussed in detail here. For a discussion of the best interests of the child see par 3 5 below.

⁸⁵⁰ *Stock v Stock* 1981 3 SA 1280 (A); *Wicks v Fisher* 1999 2 SA 504 (N); *Godbeer v Godbeer* 2000 3 SA 976 (W); Ferreira "Custodian Parent Wishes to Emigrate with Children – *Godbeer v Godbeer* 2000 3 SA 976" 2001 *Codicillus* 65. See also *Shawzin v Laufer*; *Theron v Theron* 1939 WLD 355.

⁸⁵¹ *Johnstone v Johnstone* 1941 NPD 279; *Edge v Murray* 1962 3 SA 603 (W); *Shawzin v Laufer* 1968 4 SA 657 (A); *Bailey v Bailey* 1979 3 SA 128 (A); *Wicks v Fisher* 1999 2 SA 504 (N); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C); *Godbeer v Godbeer* 2000 3 SA 976 (W). *Bailey v Bailey*; *Stock v Stock*.

⁸⁵² *Edge v Murray*.

⁸⁵³ *Shawzin v Laufer*; *Bailey v Bailey*; *Van Rooyen v Van Rooyen*; *Godbeer v Godbeer*.

⁸⁵⁴ *McCall v McCall* 1994 3 SA 201 (C).

⁸⁵⁵ *Manning v Manning*; *Johnstone v Johnstone*; *Mayer v Mayer* 1974 1 PH B47 (C).

⁸⁵⁶ 1961 2 SA 84 (W).

⁸⁵⁷ This agreement specified that the custodian parent was not to remove the child from the jurisdiction of the court without the prior consent in writing of the other parent.

The case of *Van Oudenhove v Grüber*⁸⁵⁹ did not deal with permanent relocation but the variation of custody⁸⁶⁰ as the father wanted to take the children to Austria for a year. It was held that such an order would deprive the custodian parent of her rights of access for a whole year, and the welfare of the children is the paramount consideration but regard must also be held to the rights of the custodian. There would have to be good grounds to interfere with the mother's decision not to allow the children to go to Austria.

The case of *K v K*⁸⁶¹ dealt with the removal of a boy, by his custodian mother, from the United States of America to South Africa. The boy's father, who had been awarded access to the child in America, instituted proceedings in South Africa to have the child returned to America.⁸⁶² The court made it clear that the paramount consideration in exercising its discretion as upper guardian of minor children was always the best interest of the child in the particular circumstances of the case.⁸⁶³

In the case of *Schutte v Jacobs (2)*⁸⁶⁴ the mother of a four-year-old daughter was the custodian of the child. She wanted to take the child with her to

⁸⁵⁹ 1981 4 SA 857 (A).

⁸⁶⁰ Custody had been awarded to the mother.

⁸⁶¹ 1999 4 SA 1228 (C).

⁸⁶² The court also had to determine whether the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 was applicable to the matter at hand. It was found that, as far as South Africa was concerned, the Convention only applied from the date of the legislation. The removal had occurred prior to that date on 1997-10-01. Thus the Convention was not directly applicable to the matter: 701D–E, 702F–G. The court applied the common law principle of the best interest of the child and looked at constitutional as well as international law in this regard: 702G–I, 704C.

⁸⁶³ 702G–I, 704C. In the case at hand the mother and her child were ordered to return to the jurisdiction of the York County Family Court in the United States of America and certain orders were made regarding the safe keeping of passports.

⁸⁶⁴ 2001 2 SA 478 (W).

Botswana. The man with whom she was living had been transferred to Gabarone and she had also obtained a post there. The court said that three factors have to be weighed against each other namely, the best interests of the child, the right of the custodian parent to carry on with her life as well as the impact of the emigration on the non-custodian's right of access. The court found that although the non-custodian father's right of access would be curtailed by the move reasonable arrangements could be made for him to have access.⁸⁶⁵

In *Latouf v Latouf*⁸⁶⁶ the custodian mother wanted to emigrate to Australia with the children. Here the court adopted the same approach as in *Schutte v Jacobs* and granted the mother's application. In *H v R*⁸⁶⁷ the custodian mother wanted to emigrate to England with her new husband. The court here concluded that the custodian had carefully considered the ramification of emigration and had done everything in her power to ensure that the move would be in her son's best interests. The court allowed the application, subject to generous access by the child's father.⁸⁶⁸

⁸⁶⁵ As he lived in Johannesburg, which was not far from Gabarone.

⁸⁶⁶ 2001 2 All SA 377 (T).

⁸⁶⁷ 2001 3 SA 623 (C).

⁸⁶⁸ In this case the court said that a choice had to be made between two alternatives. Namely either to grant the custodian parent permission to remove the child, thereby curtailing the non-custodian parent's rights of access or to withhold such permission. This would oblige the custodian parent to remain in the country for the sake of the child. The court referred to the American notion to support the ability of custodian parents to relocate with their children and emphasised that a family that has been broken by divorce can never be put together in exactly the same way. The court also stressed that the relationship between parents and children is different after divorce and that, in some instances, it would not be realistic to preserve the non-custodian parent's close involvement in the child's life at the expense of the custodian parent's efforts to start a new life, or form a new family unit: 629H–I, 630B–G. In this case the court was satisfied that the mother had properly considered the ramifications of the move, that she had done everything possible to ensure that the move would not be contrary to her child's interests and that she had taken steps to ensure that the relationship between her son and his father would not be negated: 630H–631A.

In *Jackson v Jackson*⁸⁶⁹ custody of two girls was awarded to their father and generous access was given to their mother.⁸⁷⁰ When the parties were still married they had decided to emigrate with their daughters to Australia. Six months after the parties were divorced the respondent (mother) still wanted to emigrate but she later changed her mind.⁸⁷¹ The appellant (father) applied for a variation of the custody order so he could emigrate with the girls to Australia. The court had to decide whether it was in the best interests of the children that the custody order be varied⁸⁷² and decided that it was not in the children's interests to do so.

The reasons for the decision⁸⁷³ were that in this case there had been no real separation between the mother and children and the parents had an "almost equal parenting role"⁸⁷⁴ and that if the children were taken to Australia this would be replaced with "no more than biannual visits of a few weeks each".⁸⁷⁵ Scott JA emphasised that the interests of the children are the "first and paramount

⁸⁶⁹ 2002 2 SA 303 (SCA); Davel and Boniface "Cross-Border Relocation of Children and Custodial Parent *Jackson v Jackson* 2002 2 SA 303 (SCA)" 2003 *THRHR* 138; Bekker and Van Zyl "Application by Custodian Parent to Emigrate with Children Opposed. How Should the Best Interests of the Children be Evaluated? *Jackson v Jackson* 2002 2 SA 303 (SCA)" 2003 *THRHR* 146.

⁸⁷⁰ She was allowed to have the girls every Monday, Tuesday and Wednesday from 5:30 pm until 7 am the following morning and every second Sunday from 7 am until 7 am the following Monday, as well as alternative school holidays. The appellant also had to consult the respondent with regard to the health and education of the children: 307F, 313B.

⁸⁷¹ 308E.

⁸⁷² 320C.

⁸⁷³ Only the majority decision will be dealt with here. For a discussion of the minority decision see *Jackson v Jackson* 307.

⁸⁷⁴ 321C.

⁸⁷⁵ *Ibid.*

consideration”.⁸⁷⁶ Scott JA also said that a court will not lightly refuse a custodian parent who wishes to emigrate leave to take the children out of the country if the custodian parent’s decision is reasonable and bona fide. The reason for this being that “because of the so-called right of the custodian parent ... it would not be in the best interests of the children that the custodian be thwarted in his or her endeavour to emigrate”.⁸⁷⁷ Scott JA also emphasised that the father was awarded custody in the first place on the premise that the existing relationship between mother and children be maintained.

Bonthuys⁸⁷⁸ stipulates that the “... best interests test by itself is too vague to function as a legal rule and needs to be supplemented by clear policy guidelines in relation to relocation”.⁸⁷⁹

The consequences of the court refusing permission to relocate can limit the custodian⁸⁸⁰ parent’s career interests and influence his or her right to choose his or her own domicile.⁸⁸¹ “The differing outcomes and the difference of opinion in the judgments of the court of first instance and the court *a quo* reflect just how difficult these human (rather than legal) problems are.”⁸⁸² Implementing the

⁸⁷⁶ 318E.

⁸⁷⁷ 318F–G. Scott JA also stressed that no two cases are the same, that each case must be decided on its own particular set of facts and that past decisions may provide useful guidelines but that they do no more than that: 318H–I.

⁸⁷⁸ 2000 SAJHR 499.

⁸⁷⁹ Bonthuys discusses the best interests of children 2000 SAJHR 500–501. The best interests of children will be discussed in par 3 5 below. For a discussion of gender equality and women’s childcare responsibilities, see Bonthuys 2000 SAJHR 501–505.

⁸⁸⁰ Usually the mother.

⁸⁸¹ Bonthuys 2000 SAJHR 505.

⁸⁸² *Jackson v Jackson* 324H.

recommendations of the South African Law Reform Commission⁸⁸³ may alleviate some of the problems involved in cross-border relocation cases.

It must be remembered that:

“[t]he number of people wishing to emigrate to other countries is more likely than not to increase in the future and will most probably give rise to an increase in the disputes surrounding the extent of the custodian’s power to remove children from the country.”

It is difficult to predetermine the outcome of a case involving the relocation of custodian parents; past cases can only provide guidelines as no two cases are precisely the same.⁸⁸⁴

3 3 4 When the High Court (as upper guardian) can interfere with custody

A custodian parent enjoys a broad discretion⁸⁸⁵ to act and the High Court is reluctant to displace this authority. An order by the court, can at any time, be

⁸⁸³ As found in the “Review of the Child Care Act” Discussion paper 103 Project 110 (2002) ch 14. Davel and Boniface 2003 *THRHR* 145: Amongst these recommendations are that s 6 of the Divorce Act 70 of 1979 be amended to allow a court to appoint an interested third party to support a child experiencing difficulties in a divorce and that the regulations to the Mediation in Certain Divorce Matters Act 24 of 1987 should be amended to allow the child’s view to be recorded. It is also recommended that words like “care” and “contact” should be used which are neutral and conflict-reducing instead of words like “sole custody”. It is also recommended that parenting programmes should be obligatory and mediation and other means of dispute resolution should come to the fore.

⁸⁸⁴ *Jackson v Jackson* 119H.

⁸⁸⁵ Although the custodian enjoys a broad discretion this may be curtailed when specific provisions are made in a court order: *Edge v Murray*.

varied for good reason.⁸⁸⁶ An agreement relating to custody can be made an order of the court but also varied by the court for "good cause".⁸⁸⁷ An application to vary an agreement differs from an ordinary application as, although the onus is on the applicant to show good cause, the court can "depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties".⁸⁸⁸ In the end, it could be said that while in form there is an application for variation of the order of court, in substance there is an investigation by the court acting as upper guardian.

In the matter of *Abrahams v Abrahams*⁸⁸⁹ an order was granted⁸⁹⁰ awarding the custody of a minor child to its father, the applicant, and he applied for an order that this order should be enforced by the Bophuthatswana Supreme Court. The mother averred that she had not appeared at the trial as the applicant had led her to believe that he had withdrawn the action. The court determined that the order could not be final and the court, as the upper guardian of the child who was presently within its jurisdiction, should decide what is in the best interests of the child despite the custody order having already been granted.

⁸⁸⁶ *Shawzin v Laufer* 1968 4 SA 657 (A) 622H–663. In *Cook v Cook* 1937 AD 154 the court on appeal said it would be slow to interfere with an order of custody made by a trial judge who had the opportunity of judging the character and temperament of the parties, not only from the documentary evidence, but also from their demeanour at the trial. In *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW) a widow and her late husband gave her child to third parties and had promised to fill in the adoption forms, which they never did. The widow applied for the return of her child. The court held that unless the child's life, health or morals were in danger because of the parental custody, the court as upper guardian had no right to deprive a parent of custody and entrust such child to a third party.

⁸⁸⁷ *Shawzin v Laufer* 1968 4 SA 657 (A) 663. *Short v Naisby* 1955 3 SA 572 (D) the court can deprive a parent of custody on the instance of third parties under its power as upper guardian, on special grounds. The court must decide what is in the best interests of the child.

⁸⁸⁸ *Ibid.*

⁸⁸⁹ 1981 3 SA 593 (B).

⁸⁹⁰ In the Northern Cape division.

In order for the court to rescind or vary a custody order made in terms of the Divorce Act the applicant who seeks the rescission or variation must satisfy the court that the order sought would be in the child's best interests and that the existing arrangements are detrimental to the child.⁸⁹¹

When the court considers such an application it must look at the position of the custodian parent⁸⁹² but the child's wishes can be decisive.⁸⁹³ These same considerations apply to the variation by the court of other custodial arrangements, regardless of whether these arrangements were granted by court

⁸⁹¹ It was held in *Niemeyer v De Villiers* 1951 4 SA 100 (T) (custody vested in the mother of an extra-marital child by s 3(1)(b) of the Children's Status Act 82 of 1987, this was varied). "[A]n order of the court as to custody and access may at any time be varied by the court for good cause. An agreement relating to custody may be made an order of court if the court is satisfied that what has been agreed upon is in the best interests of the child ... such order can also be varied by the court for good cause": 662I–J. In *Shawzin v Laufer* 1968 4 SA 657 (A) the court found that there were not "substantial grounds to reverse the order". See also *Stock v Stock* 1981 3 SA 1280 (A), where there was an appeal against an order authorising the children's mother to remove the children to France. A consent paper entered into between the mother and the father had specified that the mother, who had the custody of the children, would not remove them from South Africa without an order of court authorising her to do so. The court held that the consent of the father, who has access, is relevant and if he withholds consent it is necessary to determine whether he is acting reasonably or not. The court held that the norm that applies in cases of this nature is the predominant interests of the child. The parent will have to satisfy the court why the order made at the time of the divorce must now be varied. The court uses many factors to determine whether the welfare of the children requires that the order must be varied. The court will try not to separate siblings. More weight will be given to the effect that the order will have on younger children. The court will also look at the fact that the interests of one child will be seriously prejudiced by moving him to another country, whereas the other children will benefit only slightly. In such an instance, the prejudice to the one child will be a weightier consideration than the slight benefit to the other children: 1290F–1291C; see also *McCall v McCall* 1994 3 SA 201 (C) and Cronjé and Heaton *Casebook on South African Family Law* 317. This case is discussed in par 3 3 3 1 below.

⁸⁹² *Van Oudenhove v Grüber* 1981 4 SA 857 (A).

⁸⁹³ Where the child is considered mature enough for weight to be given to his preference: *Meyer v Gerber* 1999 3 SA 650 (O); Cronjé and Heaton 166. This approach is in line with s 12(1) of the CRC, which stipulates that any child capable of forming his or her own view should be given the chance to express those views, and that due weight must be given to those views in accordance with the child's age and maturity. The CRC was discussed in par 3 1 1 1 1.

order or not.⁸⁹⁴ Where an application has been made for the variation or rescission of a custody order⁸⁹⁵ the Family Advocate must institute an enquiry if requested by the court or a party to the proceedings to do so.⁸⁹⁶ The Family Advocate may also institute an enquiry where it is deemed in the child's interests.⁸⁹⁷ If an enquiry has been instituted the court may not make an order until it has considered the Family Advocate's report.⁸⁹⁸ Although parties may reach an agreement regarding the variation of a custody order they cannot displace the court's inherent jurisdiction as upper guardian and the courts will not automatically sanction such an agreement.⁸⁹⁹ The decisive standard remains the child's best interests.⁹⁰⁰

⁸⁹⁴ *Rowan v Faifer* 1953 2 SA 705 (E) where custody vested in the father of an extra-marital child by means of an agreement with the mother: the court varied this. In *Bethell v Bland* it was held that the court has no jurisdiction to interfere with a custodian's exercise of discretion in the choice of school for the children unless there is proof before the court that the custodian parent has abused his or her power; that there had been no exercise of discretion at all or that no reasonable person could have arrived at such a decision or that the decision was inspired by a motive which was foreign to the proper regard for the interests of the children. In *Dreyer v Lyte-Mason* 1948 2 SA 245 (W) it was decided that where the mother had been given custody she has the duty to care for the religious upbringing of the child as well as the right to decide what form the religious upbringing should take. If she acts incorrectly and not in the children's interests the court will interfere, and, where proper, deprive the mother of custody. In *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 (W) it was held that even if parties have signed an agreement regarding the custody of the child, the court will interfere if it is in the interests of the child and if the parties had not given real regard to those interests.

⁸⁹⁵ In *Byliefeldt v Redpath* 1982 1 SA 702 (A) it was held that where there is an agreement to vary custody and there is an application for confirmation of such agreement it is the duty of the court, as upper guardian, to look after the interests of the minor and not to confirm the agreement without considering it. *Terblanche v Terblanche* 1992 1 SA 501 (W) held that the definition of "divorce action" in s 1 of the Divorce Act includes an application *pendente lite* or for interim custody. This definition is expressly incorporated in the Mediation in Certain Divorce Matters Act 24 of 1987 and thus the court is entitled to refer an application for interim custody, in terms of rule 43 of the Uniform Rules of Court, to the Family Advocate for an enquiry and a report.

⁸⁹⁶ S 4(1)(b) of the Mediation in Certain Divorce Matters Act 24 of 1987.

⁸⁹⁷ S 4(2)(b). In *Davids v Davids* 1991 4 SA 191 (W) it was decided that the appointment of the Family Advocate in terms of s 4 of the Mediation in Certain Divorce Matters Act could not be made as rule 43 proceedings were not "at the trial" of the divorce action.

⁸⁹⁸ S 8 of the Divorce Act.

⁸⁹⁹ *Byliefeldt v Redpath* 1982 1 SA 702 (A).

⁹⁰⁰ When the court is asked to approve a variation of a custody order, the court's approach is a judicial investigation into the child's best interests: *Shawzin v Laufer* 1968 4 SA 657 (A).

The Divorce Act⁹⁰¹ specifies that the court shall not grant a decree of divorce until the court is satisfied that the provisions made regarding the welfare of any minor child are satisfactory.⁹⁰² For these purposes the court may cause an investigation to be carried out and the court may order any person to appear before it.⁹⁰³ A court granting a decree of divorce may make any order in regard to the custody⁹⁰⁴ of a dependent child of the marriage and the court may grant sole custody of the minor child to either parent.⁹⁰⁵ A custody order⁹⁰⁶ may at any time be varied or rescinded if the court finds that there is sufficient reason therefore.⁹⁰⁷ A court other than the court which made an order may rescind or vary such order if the parties are domiciled in the area of the first-mentioned court or the applicant is domiciled in the area of jurisdiction of such court and the respondent consents to the jurisdiction of that court.⁹⁰⁸

The Matrimonial Affairs Act⁹⁰⁹ specifies that any provincial or local division of the Supreme Court⁹¹⁰ may on the application of a parent of a minor whose parents

⁹⁰¹ 70 of 1979.

⁹⁰² S 6(1)(a). If an enquiry has been instituted by the Family Advocate in terms of s 4(1)(a) or 2(a) of the Mediation in Certain Divorce Matters Act, the court must first have considered the report and recommendations: s 6(1)(b) of Act 70 of 1979.

⁹⁰³ S 6(2)(a) and may order the parties or any of them to pay the costs of such investigation and appearance. The court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

⁹⁰⁴ Or guardianship, or access, or maintenance.

⁹⁰⁵ S 6(3).

⁹⁰⁶ Or maintenance order, or an order in regard to guardianship or access to a child.

⁹⁰⁷ S 8(1). But if an enquiry is instituted by the Family Advocate in terms of s 4(1)(b) or 2(b) of the Mediation in Certain Divorce Matters Act, such order shall not be rescinded or varied before such report and recommendations have been considered by the court.

⁹⁰⁸ S 8(2).

⁹⁰⁹ 37 of 1953.

⁹¹⁰ Or any judge thereof.

are divorced or living apart, may make any order in regard to custody⁹¹¹ of the minor as it may deem fit.⁹¹² The court may, if it is in the court's opinion in the interests of the minor to do so, grant to either parent the sole custody of the minor.⁹¹³ A parent to whom sole custody⁹¹⁴ has been granted may appoint any person by testamentary disposition to be vested with the sole custody of the minor.⁹¹⁵ Where a parent has appointed a custodian in his/her will and is deceased, upon application of the other parent the court may make an order in regard to the custody⁹¹⁶ of the minor as the court or judge deems in the interests of the minor.⁹¹⁷

The Child Care Act⁹¹⁸ specifies⁹¹⁹ that no person other than the manager of a hospital, maternity home, children's home or place of safety may receive a child under the age of seven years or a child for the purposes of adopting him or her and to care for that child for a period of longer than fourteen days. Unless that person has applied to adopt the child or has obtained written consent of the Commissioner of the district in which the child was residing.⁹²⁰

⁹¹¹ Or guardianship or access.

⁹¹² S 5(1).

⁹¹³ S 5(1). S 5(2): an order in regard to a minor whose parents are living apart shall lapse if the parents reconcile and live together again as husband and wife. See the discussion on sole custody in par 3 3 above.

⁹¹⁴ Or sole guardianship, under s 1 of the Divorce Act.

⁹¹⁵ Or to be the sole guardian, as the case may be: s 3(a).

⁹¹⁶ Or guardianship.

⁹¹⁷ S 5(5). S 5(6): if an order granting sole custody (or guardianship) lapses or is rescinded or varied that the parent no longer has sole custody or is sole guardian of the minor, then such testamentary disposition shall lapse.

⁹¹⁸ 74 of 1983.

⁹¹⁹ S 10(1)(a)–(b).

⁹²⁰ In the case of a child under the age of 7 years and if the person is over 18 years of age and is the grandfather, grandmother, sister, brother, half-sister, half-brother, uncle or aunt of the child. A designated relative is said to be a person who is a spouse of a relative of a child – those already mentioned – or related to the child in the third degree of consanguinity or affinity: s 10(4)(a)–(b).

In terms of the Child Care Act⁹²¹ if at any proceedings, before any court, it appears that any child has no parent or guardian or that it is in the interest of the welfare and safety of the child, that court can order that such child be taken to a place of safety and be brought as soon as possible thereafter before a Children's Court.⁹²² If it appears to any Commissioner of Child Welfare⁹²³ that there are reasonable grounds to believe that any child within its area of jurisdiction has no parent or guardian or that it is in the interest of the safety and welfare of the child, then the Commissioner may issue a warrant authorising any social worker or policeman or any other person to search for and take such child to a place of safety, until the child can be brought before a Children's Court.⁹²⁴ The provisions of subsections 12(2) and (3) also apply in respect of a child removed to a place of safety in terms of section 11.⁹²⁵ Subsection 12(2) specifies that any authorised person who removes a child must inform the parent or guardian or person, in whose lawful custody the child is, of his removal;⁹²⁶ inform the Children's Court assistant what the reasons are for the child's removal;⁹²⁷ and must bring the child⁹²⁸ before the Children's Court of the district from which the child was removed from.⁹²⁹ Subsection 12(3) stipulates that any person who

⁹²¹ 74 of 1983.

⁹²² S 11(1).

⁹²³ On information given under oath by any person.

⁹²⁴ S 11(2). S 11(3) states that such policeman or social worker may enter any house or premises, by force if necessary, and remove the child. S 11(4) says that if the warrant is issued in terms of subs 2 it will not be necessary to state the name of the child who must be removed.

⁹²⁵ S 11(5).

⁹²⁶ S 12(2)(a): "if such parent or guardian or person is known to be in the district from where the child was removed and can be traced without delay."

⁹²⁷ S 12(2)(b).

⁹²⁸ Or cause him to be brought.

⁹²⁹ S 12(2)(c).

hinders or obstructs any policeman or social worker or authorised officer in exercising their powers shall be guilty of an offence. Subsection 12(1) provides that any policeman, social worker or authorised officer may remove a child to a place of safety without a warrant, if such person has reason to believe that such child is a child in need of care⁹³⁰ and that delay in obtaining a warrant would be prejudicial to the welfare and safety of the child.

Section 13 of the Child Care Act deals with the bringing of children before the Children's Court. Of importance for our purposes is that notice of such inquiry and notice that such person must attend, must be given to the parents or guardian or person having custody of the child.⁹³¹ Section 15 specifies that after a Children's Court has held an inquiry, and is satisfied that the child is in need of care, the court can make the following orders. The court can order the child to remain in the custody of his parents or guardian in whose custody he was before the court proceedings, under the supervision of a social worker and subject to

⁹³⁰ S 14(4) defines a child in need of care as a child that has no parent or guardian or the parent or guardian of the child cannot be traced; or the child has been abandoned or has no visible means of support, or the child displays behaviour that cannot be controlled by his parents or custodian; the child lives in circumstances likely to cause his seduction, sexual exploitation or abduction; the child is exposed to or lives in circumstances which may seriously harm the physical, social or mental well-being of the child; the child is mentally or physically neglected; the child has been emotionally, physically or sexually abused or ill treated by his parents, guardian or custodian; or if the child is maintained in contravention of s 10. S 10 was discussed above.

⁹³¹ S 13(5)(a): If such parent, guardian or custodian has received such notice but fails to attend such inquiry, such person may be dealt with as provided in subs 74(6) and (7) of the Criminal Procedure Act 51 of 1977. S 14 of the Child Care Act deals with the holding of inquiries for this purpose. This will not be discussed in detail here. The definition of a child in need of care has already been discussed above in n 930.

compliance with requirements prescribed by the court;⁹³² order that the child be sent to a children's home or school of industries.⁹³³

A court which made any order under subsection (1)(b), (c) or (d) may also order that the child be kept in a place of safety until effect can be given to the court's order.⁹³⁴ Any order made under section 15 will lapse two years after the date on which the order was made or after expiry of such shorter period that the court has determined.⁹³⁵ The minister⁹³⁶ may order that any pupil or former pupil in a school of industries whose period of retention has expired or is about to expire must remain or return to that school of industries for any further period which the minister may fix. No such order can extend beyond the year in which the pupil will reach the age of twenty-one years.⁹³⁷

Section 50 of the Child Care Act stipulates that any parent or guardian or anyone having custody of a child⁹³⁸ who abandons the child or ill-treats or allows the child to be ill-treated shall be guilty of an offence.⁹³⁹ Any person who is legally liable to provide such child with adequate clothing, food, lodging and medical aid shall be guilty of an offence.⁹⁴⁰

⁹³² S 15(1)(a).

⁹³³ S 15(1)(c) and (d).

⁹³⁴ S 15(3).

⁹³⁵ S 16(1): the Minister may extend the validity of such order for a further period not exceeding two years: s 16(2).

⁹³⁶ S 1.

⁹³⁷ S 16(3).

⁹³⁸ Or any other person who ill-treats a child.

⁹³⁹ S 50(1).

⁹⁴⁰ S 50(2). Any person convicted of any offence under this section may be fined up to R20 000 or imprisoned for maximum 5 years, or both: s 50(3).

Section 53 deals with the transfer of certain parental powers. This section stipulates that if any child has been placed in the custody of someone other than his parent or guardian, the parent or guardian shall be divested of his right to control over and custody of that child, including the right to punish and exercise discipline, such rights shall vest in the person in whose custody the child was placed or the manager of the institution to which the pupil was sent.⁹⁴¹

If a minor is living with his parent or guardian and has been placed under the supervision of a social worker, then the parent or guardian must exercise his right of control over the minor in accordance with any directions received from the social worker.⁹⁴² The rights transferred from a parent or guardian to any other person or to the management of any institution do not include the power to consent to the marriage of a pupil or child, or to deal with any property of the child or to consent to any operation or medical treatment to the child which is attended with serious danger to life.⁹⁴³

⁹⁴¹ S 53(1)(a). S 53(1)(b): the management of an institution may authorise the head of such institution to exercise powers in consideration with punishment and discipline on its behalf.

⁹⁴² S 53(2).

⁹⁴³ S 53(3). If the head of the institution, or the person in whose custody the child is, has reasonable grounds to believe that such operation or medical treatment is necessary to save the child's life or to save him from serious and lasting physical disability or injury and the need to have such operation or medical treatment is so urgent that it cannot wait for the purpose of consulting with the child's parents or guardian, or the Minister, then the person concerned, or the head of the institution, may authorise such procedure himself: s 53(4). The marriage of any such child, whether contracted with or without the consent of the parent or guardian of the child may, within 6 months after date of marriage, on application to the Minister, be annulled if such annulment is in the interests of the pupil or child.

A Children's Court does not have jurisdiction to make an interim custody order pending the conclusion of a hearing to determine whether the child is in need of care in the face of an existing order by the High Court.⁹⁴⁴

The Natural Fathers of Children Born Out of Wedlock Act⁹⁴⁵ empowers the court to make an order giving custody rights to a child to the natural father of such child.⁹⁴⁶

In the matter of *Zorbas v Zorbas*⁹⁴⁷ the question of custody was not determined by our courts as it was said that the Greek courts were in a better position to determine this.⁹⁴⁸ It was also specified in this case "the concept of the court's guardianship involved a responsibility which transcended the strictures of the law of evidence".⁹⁴⁹

The Recognition of Customary Marriages Act⁹⁵⁰ stipulates that a court granting a divorce may make any order with regard to the custody⁹⁵¹ of any minor child of

⁹⁴⁴ *Raath v Carikas* 1966 1 SA 756 (W).

⁹⁴⁵ 86 of 1997. Sinclair describes the Act as "a non-event that has been recognized already to have been inadequate" and that the legislation enacts powers for the court to award guardianship, custody or access to the father of a child born out of wedlock, but that the court already had these powers in terms of common law and that the fundamental inequality between parents remained intact after the enactment of this legislation: in Davel (ed) *Children's Rights in a Transitional Society* 65. It is submitted that Sinclair's view that the legislation had an insignificant effect on the common law is correct. However, the Natural Fathers of Children Born out of Wedlock Act did help pave the way for the enactment of a comprehensive children's statute.

⁹⁴⁶ The relevant sections of this Act have already been discussed above.

⁹⁴⁷ 1987 3 SA 436 (W). This case was discussed above.

⁹⁴⁸ It is submitted that the Greek courts were in a better position to determine the best interests of child.

⁹⁴⁹ 438G–H the court as upper guardian could not ignore the evidence on the grounds of its inadmissibility.

⁹⁵⁰ 120 of 1998, which came into operation on the 2000-11-15.

⁹⁵¹ Or guardianship.

the marriage.⁹⁵² Thus children born from a customary marriage are subject to the same power as the court has to make orders regarding the children born from a civil marriage.

Section 1 of the General Law Further Amendment Act⁹⁵³ specifies that any parent who has custody, whether sole custody or not, in terms of a court order whereby the other parent is entitled to access to such child shall upon any change in his or her residential address notify the other parent of such change.⁹⁵⁴

3 3 5 Conclusion

It is clear from the above discussion that custody was originally regarded as a parental right. Certain assumptions, such as that only a mother can perform the "mothering" role, existed in our law. Changes have occurred in both society's as well as the courts' perceptions of what the role of a custodian should be as well as the notion of who is able to fulfill that role. There has been a definite movement away from the belief that custody is a right towards the notion that custody is a duty. In this discussion it was also made clear that throughout the development of the concept of custody the courts have looked at the interest of the child. As our law has developed the best interests of the child⁹⁵⁵ have

⁹⁵² As discussed in *New Legislation January 2001: Recognition of Customary Marriages Act*. <<http://www.derebus.org.za/scripts/derebus=s.pl?ID=4714&index=200101-update8hit...>> accessed on 2003-05-18.

⁹⁵³ 93 of 1963.

⁹⁵⁴ S 2(1).

⁹⁵⁵ The best interests of the child standard is discussed in par 3 5 below.

acquired a more prominent role. By changing the definition of custody to care⁹⁵⁶ the work and duty involved in caring for children will be emphasised and enhanced.

3 4 ACCESS

3 4 1 Current definition

The *Oxford Advanced Learner's Dictionary*⁹⁵⁷ defines access as the “opportunity or right to ... approach [somebody]”. The word “reasonable” is defined as “ready to use or listen to reason; sensible ... in accordance with reason, not absurd, logical ... not unfair or expecting too much, moderate ...”⁹⁵⁸

Cronjé and Heaton⁹⁵⁹ state that “access refers to the right and privilege to see, visit, spend time with, have contact with, and enjoy the company of one's child”. When the children visit the non-custodian parent the custodian parent still retains the powers relating to custody.⁹⁶⁰ The right of access has been said to be the

⁹⁵⁶ This is dealt with in ch 4 below.

⁹⁵⁷ 7.

⁹⁵⁸ 1046.

⁹⁵⁹ 280 and 167. Visser and Potgieter 170 give the following definition of access: “[a]ccess means that the non-custodian parent and the children have contact with each other. Reasonable access is aimed at maintaining some form of relationship between the children and the non-custodian parent.” For a discussion of the practical problems of access, see Schäfer *The Law of Access to Children* (1993) 11–18 and for a discussion of the advantages and disadvantages of access and practical dilemmas confronting the courts, see Schäfer 19–23.

⁹⁶⁰ *Vucinovich v Vucinovich* 1944 TPD 143, 147: “[A] right of reasonable access is subject to the right of the custodian parent to say to what homes the child should go ... the right of access must be exercised in a way which is compatible with the right of custody and control.” *Myers v Leviton* 1949 1 SA 203 (T) 210–211: “If the parent – entitled to access has the child for a day, then during that day such parent will have physical control of the child ... always

right of the child rather than the parent.⁹⁶¹ When a court orders that the non-custodian parent is to have access to the child over certain weekends, or by the child spending certain holidays with him, the right of custody is not divided by such order. Such orders define how the right of access is to be enjoyed.⁹⁶²

In *Myers v Leviton* Price J cautions that:⁹⁶³

“[m]atters of access and custody and how rights of access shall be enjoyed are largely matters of discretion, adjustment and arrangement, and I should be sorry to see the court tie its hands by laying down rigid and artificial rules, which would certainly in many cases make it impossible to make just, equitable and rational orders, having regard to the infinite variety of circumstances that must

subject to the controlling parent’s overriding right to object to the other parent’s arrangements where such objection is reasonable.” See also *Lecler v Grossman* 1939 WLD 41; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E); *Du Preez v Du Preez* 1969 3 SA 529 (D). Cronjé and Heaton 280: “[w]hen the parent exercises his or her right of access, he or she is temporarily empowered to exercise powers that are normally exercised by the custodian parent. These powers include caring for, supporting and leading the child, taking decisions which need to be taken on a day-to-day basis, and assuming responsibility for the child’s upbringing, health, education, safety and welfare. For example, in *Allsopp v McCann* [2000 3 All SA 475 (C), 2001 2 SA 706 (C)] the court held that a father to whom access had been awarded has the right to give his children religious instruction even if his religious views differ from those of the custodian.” However, Cronjé and Heaton make it clear that if the difference in religious instruction causes confusion that is harmful to the children, the court could be asked to intervene.

⁹⁶¹ Cronjé and Heaton 167: In the case of legitimate (this term is used by Cronjé and Heaton) children it is more accurate to refer to it as a reciprocal right. In *V v V* 1998 4 SA 169 (C) 189C–E, it was stated that “the right which a child has to have access to its parents is complemented by the right of the parent to have access to the child ... [a]ccess is ... not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child”. It is submitted that this reasoning would not only be applicable to a child born in wedlock, but that it should also be applicable to a child born out of wedlock. The right to access should, in all instances, be regarded as a unilateral right subject, of course, to the best interests of the child. As regards access there is no practical difference in the position of a child born in wedlock and a child born out of wedlock; in both instances it must be in the best interest of the child or it will not be granted: *B v S* 1995 3 SA 571 (A) 582F–583E; Davel “Status of Children in South African Private Law” in Davel *Introduction to Child Law in South Africa* (ed) 37.

⁹⁶² *Myers v Leviton* 211.

⁹⁶³ 209.

inevitably arise from time to time ... [a] developed system of law avoids too close a definition of detail and is satisfied with broad principles of justice, the detailed application of which must be left to be suited to the infinite variety of circumstances that may arise”.⁹⁶⁴

There are two kinds of access, undefined access and defined or structured access.⁹⁶⁵ Undefined access does not mean unlimited access. It is still limited by the circumstances of each case and is subject to such reasonable terms and conditions that may be imposed by the custodian parent.⁹⁶⁶ Defined or structured access is where the courts “prescribe the parameters within which access must be exercised”⁹⁶⁷ and is regarded as “an explicit statement of what in the court's authoritative opinion constitutes reasonable access”.⁹⁶⁸ Both parents have to act in accordance with the court's order.⁹⁶⁹ In practice, reasonable access is often defined as entailing visits by the child to the non-custodian on alternate weekends and alternate school holidays.⁹⁷⁰ Defined or structured access usually allows the non-custodian parent to remove the child during periods of access. However, the court may restrict access to visits at the

⁹⁶⁴ In *Tromp v Tromp* 1956 4 SA 738 (N) the court had to determine what "reasonable access" entailed for a father living at a distance. The court took “all the circumstances into account i.e. the interests of the children, their removal from Pietermaritzburg and the manner of such removal, as well as the attitude of the parties, and so forth” into account. The father was given access to the children in Pietermaritzburg during one long school holiday and one short school holiday in each year and in *Wepener* during his annual vacation: 750A–C.

⁹⁶⁵ Schäfer *The Law of Access to Children* 67.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ *Butterworths Legal Resources* Par E54. <<http://butterworths/butterworths/legal/lpexd/11.LPFLlib/FAMLWSER.nfo/abb/c70/db>> accessed on 2003-05-27.

⁹⁶⁸ Schäfer 68, quoting *Lecler v Grossman* 1939 WLD 41, 44.

⁹⁶⁹ *Lecler v Grossman*.

⁹⁷⁰ *Kok v Clifton* 1955 2 SA 326 (W) and *Marais v Marais* 1960 1 SA 844 (C). In *Willers v Serfontein* 1985 2 SA 591 (T) the court limited access to one weekend per month and every alternate school holiday.

custodian parent's home. The court can also order that visits must occur in the presence of a third party.⁹⁷¹

A type of defined access is divided access. This is where custody is awarded to a third party and access is divided between the child's parents. This can be where custody of some of the children is given to one parent and custody of the remaining children is given to the other parent or where a parent has access to some of his children but not all, for example due to sexual abuse or violence.⁹⁷²

Visiting access is also found, this is where the access "takes place 'on a particular day or days and the duration and frequency of the access may be defined and the place where it is to take place'".⁹⁷³ Staying access "involves staying over night, for example, over a weekend or during a holiday period".⁹⁷⁴ Non-physical access is "appropriate where physical access is deemed undesirable but some form of alternative access is considered necessary"⁹⁷⁵ for example, telephone calls or letters. Deferred access is "a

⁹⁷¹ This is usually where there is a clear risk to the child from contact with the non-custodian (eg the *Van Rooyen* case) or where the non-custodian has been absent from the child's life for a long time. For a discussion of supervised access, see Schäfer 69–70. For a discussion of the conditions, or restrictions that may be imposed on access, see Cronjé and Heaton 168. Of course, the court can deny the non-custodian any access at all, if this is in the best interests of the child: *Van den Berg v Van den Berg* 1959 4 SA 259 (W); *Dawn v Dawn* 1968 1 PH B3 (D).

⁹⁷² Schäfer 71–72.

⁹⁷³ Schäfer 72: this is appropriate in the case of young children, where parents live within visiting access of each other. *Miles v Miles* 1925 EDL 259; *Clutton v Clutton* 1929 EDL 174; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E).

⁹⁷⁴ Schäfer 73.

⁹⁷⁵ Schäfer 74–75: this may be where the child has been abused or is at risk from being removed from the jurisdiction of the court.

temporary denial of access leaving the way open for an application for access to be made at a later stage”.⁹⁷⁶

Access can also be granted to persons that are not the child’s parents, where this is in the interests of the child.⁹⁷⁷ The right to access is a right which vests primarily in a child.⁹⁷⁸ It is generally recognised that a child’s welfare is usually best promoted through access by the non-custodian parent, especially where there is already a developed parent-child relationship.⁹⁷⁹ No one has a right of access to a child that cannot be limited; even a parent’s right of access must yield to what is in the child’s best interests.⁹⁸⁰ The court must weigh-up the interests of the custodian parent with the interests of the non-custodian parent. The custodian parent has the right to control the child’s upbringing and the non-custodian parent has a right to access in order to maintain his or her relationship with the child.⁹⁸¹ The right of access always remains subject to the custodian’s right of control,⁹⁸² but this does not allow the custodian to impose unreasonable restrictions.⁹⁸³

⁹⁷⁶ Schäfer 75, examples are *Visagie v Visagie* 1910 OPD 72; *Potgieter v Potgieter* 1943 OPD 462 (here the father could renew his application for access after 12 months if he could satisfy the court that he had curbed his violent behaviour); *Duncombe v Willies* 1982 3 SA 311 (D); *Pommerel v Pommerel* case 4042 of 1986 (SECL).

⁹⁷⁷ *Bethell v Bland* 1996 2 SA 194 (W); South African Law Commission Report *Access to Minor Children by Interested Persons* Project 100 (1996): This report recommends that laws be made which enable persons, other than parents, with whom a child has a relationship to apply for access. For a further discussion of this aspect see par 3 4 4 below.

⁹⁷⁸ *B v S* 1995 3 SA 571 (A). In *Haskins v Wildgoose* 1996 3 All SA 446 (T) and *V v V* 1998 4 SA 169 (C) the practical difficulties of this approach were sorted out.

⁹⁷⁹ *T v M* 1997 1 SA 54 (SCA); *Wicks v Fisher* 1999 2 SA 504 (N); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C).

⁹⁸⁰ *B v S* 1995 3 SA 571 (A).

⁹⁸¹ *Marais v Marais* 1960 1 SA 844 (C).

⁹⁸² See par 3 3 above for a discussion of custody, including the so-called right of control.

⁹⁸³ *Wolfson v Wolfson* 1962 1 SA 34 (SR). But *Vucinovich v Vucinovich* 1944 TPD 143 did not require such restrictions to be reasonable. Restrictions must not be so austere as to render access a nullity: *Vucinovich v Vucinovich*; *Du Preez v Du Preez* 1969 3 SA 529 (D).

A homosexual parent cannot be denied access solely because of his or her homosexuality.⁹⁸⁴ Access to a minor child who is still at school must not interfere with scholastic, religious and social activities.⁹⁸⁵

3 4 2 Access after divorce

⁹⁸⁴ Conditions can be imposed, if this is in the interests of the children. In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 333H the mother of the children was granted access but subject to the condition that she and her partner would not sleep under the same roof when her children visited. For a discussion of this case see Bonthuys “Awarding Access and Custody to Homosexual Parents of Minor Children: A discussion of *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)” 1994 *Stell LR* 298 and see the section on custody in par 3 3. See also Brits “Toegang tot Kinders, Lesbianisme en die Konstitusie *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)” 1994 *THRHR* 710. These cases were discussed previously in par 3 3 above. In *V v V* 1998 4 SA 169 (C) the court granted joint custody to the father and the lesbian mother of the children. This case is discussed above at par 3 3. For a summary and short discussion of this case, see Cronjé and Heaton *Casebook on South African Family Law* 334 and Cronjé and Heaton *South African Family Law* 169. De Vos “The Right of a Lesbian Mother to have Access to her Children: Some Constitutional Issues” 1994 *SALJ* 687 discusses the constitutional issues (690–694). The author focuses on two issues. Firstly, the attitude adopted by the court and the reasons for its judgment and secondly, he assesses whether discrimination against the mother on the ground of her sexual orientation in decisions about the best interests of the children will always be unconstitutional. Regarding the first issue, the author emphasises that judge Flemming’s views that homosexuality is abnormal and that the children must be protected from it, have no basis in scientific fact. He also states that the views held by the court seem to be the views of the average heterosexual white male in South Africa and that these views conflict with s 8 of the South African Constitution. One of the grounds on which one may not unfairly discriminate against a person, in s 8, is sexual orientation. The author clearly states that the judge discriminated against the applicant solely on the basis of her sexual orientation. Regarding the second issue, De Vos states that this right is not absolute and may be limited, in accordance with s 33(1) of the South African Constitution. The author then questions whether a more subtle justification for the same order would then be constitutionally valid, for example to state that the child would be ostracised by peers or be confused by his mother’s unwillingness to conform to a generally accepted norm? De Vos concludes that people are discriminated against because of the bias and prejudice of society and that the right not to be discriminated against is necessary because of such prejudices. If the law allows the right to be limited it would mean that the law is giving effect to what the individuals are supposed to be protected against. This would mean that the rights are suspended and not only limited. The author concludes that “a discriminatory order by the court against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass constitutional muster”: 694.

⁹⁸⁵ *Grobler v Grobler* 1978 3 SA 578 (T).

If parents of legitimate children are divorced and one parent has custody then the other parent has a right of reasonable access to the children.⁹⁸⁶ The welfare and best interests of the child are the paramount consideration.⁹⁸⁷ Usually parents reach an agreement specifying that the children may visit the non-custodian parent during certain weekends or school holidays.⁹⁸⁸ If the parties cannot agree on how access may be implemented the court may lay down certain principles. In *Van Vuuren v Van Vuuren*⁹⁸⁹ the court would not approve an agreement where the children would spend some of their school holidays with their father because their father abused alcohol.

Where reference is made to access in a divorce order, the order usually provides for reasonable access.⁹⁹⁰ In the matter of *Schwartz v Schwartz* the court would not define a right to access and said that the parties must use their good judgement to make arrangements as to how the father must exercise his right of access.⁹⁹¹

⁹⁸⁶ Visser and Potgieter 185. The non-custodian is *prima facie* entitled to reasonable access. *Mitchell v Mitchell* 1904 TS 128; *Lecler v Grossman* 1939 WLD 41. No specific order needs to be made to give effect to this right: *Lecler v Grossman* 1939 WLD 41; *Theron v Theron* 1939 ELD 355; *Williams v Williams* 1946 CPD 49; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E); *Marais v Marais* 1960 1 SA 844 (C).

⁹⁸⁷ *B v P* 1991 4 SA 113 (T) 116.

⁹⁸⁸ Visser and Potgieter 185, Cronjé and Heaton 167.

⁹⁸⁹ 1993 1 SA 163 (T). In this case subs 4(1) and 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987 (dealing with when the Family Advocate should investigate) were explored.

⁹⁹⁰ *Schwartz v Schwartz* 1984 4 SA 467 (A).

⁹⁹¹ 480F–G: “With reference to the provisions ... to the effect that appellant’s right of access is to include having the children with him for one weekend per month and for alternate school holidays, I do not think that in the circumstances of this particular case ... it is either practical or prudent to define the right in this way. I would prefer to leave it to the good sense of the parties to make mutually acceptable arrangements to how and when ... [the] right of access is to be exercised.”

Where parents cannot agree on the terms on which access will be exercised either parent can approach the High Court for an order defining the terms of the non-custodian's access.⁹⁹²

When the custodian parent wants to remove the child from the country the consent of the non-custodian parent, who has access, is required.⁹⁹³ If the non-custodian parent refuses to grant consent the court will determine whether such refusal is reasonable.⁹⁹⁴ The non-custodian parent may prevent the custodian parent from emigrating until his access rights have been defined in a court order.⁹⁹⁵ The child's interests are the overriding consideration and the custodian parent's reasons for wanting to emigrate are an important factor that must be considered by the court.⁹⁹⁶ Emigration by the custodian parent with the child does not extinguish the non-custodian parent's right to access⁹⁹⁷ but the non-custodian's ability to see the child is curtailed.⁹⁹⁸ This factor may be considered not being in the child's interests. By allowing the child to be removed from South Africa the court ousts its own jurisdiction in respect of any future disputes about the child.⁹⁹⁹

⁹⁹² *Marais v Marais* 1960 1 SA 844 (C); *Bongers v Bongers en 'n ander* 1965 2 SA 82 (O); *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

⁹⁹³ S 1(2)(c) of the Guardianship Act 192 of 1993: consent is required from the child's other parent if such parent still has joint guardianship.

⁹⁹⁴ *Stock v Stock* 1981 3 SA 1280 (A).

⁹⁹⁵ *Botes v Daly* 1976 2 SA 215 (N).

⁹⁹⁶ *Wicks v Fisher* 1999 2 SA 504 (N) where permission to remove a child to England was refused pending the hearing of a custody application. In *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) permission to remove children to Australia was granted.

⁹⁹⁷ *Botes v Daly*.

⁹⁹⁸ *Theron v Theron* 1939 WLD 355.

⁹⁹⁹ *Handford v Handford* 1958 3 SA 378 (SR); *Van Rooyen v Van Rooyen* (here the court imposed a condition that the custodian had to have the order made an order of the Australian Family Court).

In the case where the custodian parent imposes a condition that the child should not be allowed, while in the care of the non-custodian parent, to associate with a particular person who was the person responsible for or connected with the break-up of the marriage, the courts have in the past held that the custodian was entitled to impose the condition.¹⁰⁰⁰

In the case of *Wolfson v Wolfson* the various cases dealing with this matter were explored. It was specified that the object must be genuine, not unreasonable and must “not go to the point of whittling down to a nullity the right of access which the [parent] possesses”.¹⁰⁰¹ It was specified that the objection must not be unreasonable even if it was not specified that the objection must be a reasonable one.¹⁰⁰² It was held that, in the case at hand, the respondent’s objection is a reasonable one and that the respondent may impose the condition of non-association.¹⁰⁰³ In such a case “[t]he court will not lightly interfere with a decision of the custodian parent”.¹⁰⁰⁴

In *Vucinovich v Vucinovich*¹⁰⁰⁵ it was held that the:

¹⁰⁰⁰ *Wolfson v Wolfson* 1962 1 SA 34 (SR) 37D–E.

¹⁰⁰¹ 37E, referring to *Vucinovich v Vucinovich* 1944 TPD 143, 146.

¹⁰⁰² 37H. *Van Schalkwyk v Van Schalkwyk* 1942 2 PH B66 (C) also dealt with such a matter but was not followed in *Wolfson*. *Scholtz v Thomas* 1952 1 PH B17 (O) was followed in *Wolfson*. In the *Scholtz* case the objections of the respondent were found to be reasonable. The reasons for the judgment are from the *Digesta*, and they support the view taken by the judge in the *Wolfson* case.

¹⁰⁰³ 38E. The children were allowed to associate with the respondent’s children, but not with Dr Wolfson or his wife.

¹⁰⁰⁴ Robinson “Children and Divorce” in Davel (ed) *Introduction to Child Law in South Africa* 86. The court will only interfere if no discretion has been exercised or if no reasonable person could have arrived at the decision, or if the discretion was inspired by an improper motive, without due regard to the interests of the child. See also *Niemeyer v De Villiers* 1951 4 SA 100 (T).

¹⁰⁰⁵ 143.

“... right of access must be interpreted as being subject to the right of the custodian parent to say to what homes the child should go ... right of access must be exercised in a way which is compatible with the right of custody and control which is enjoyed by the other parent ... the respondent has the right, *prima facie*, to say ‘my child shall not live in the house of my enemy’ ”.¹⁰⁰⁶

In *Duncombe v Willies*¹⁰⁰⁷ the mother and custodian of the minor children refused to allow the non-custodian father access to their children. Her reason for doing so was that the father was a Jehovah’s Witness who was trying to inculcate in his children the tenets of his faith, and such beliefs were contrary to those of the Methodist Church, which was the children’s religion as determined by the custodian parent.¹⁰⁰⁸ The father had made it clear that if he were allowed access to the children he would try to convert them to his faith.¹⁰⁰⁹ The court stipulated that it is the custodian parent’s right to determine her children’s religious education.¹⁰¹⁰ The court further specified that access is “a question of the rights of the children”¹⁰¹¹ and that it is generally in the children’s interests to continue to have a relationship with both parents. However, sometimes it is in their interests to deprive them of access of the non-custodian.¹⁰¹² The court

¹⁰⁰⁶ If that was the only place where appellant could live, consideration would be given to that fact but in this instance it was not.

¹⁰⁰⁷ 1982 3 SA 311 (D).

¹⁰⁰⁸ 313E–F.

¹⁰⁰⁹ 314A–C.

¹⁰¹⁰ 315E. The court also said that the non-custodian’s attempts to inculcate in the children “the tenets of a religious belief contrary to the applicant’s religious belief and contrary to the religious beliefs of the schools which they now attend ... [constitutes an interference with the right of the custodian parent to determine the religion of the children]”: 315G–H.

¹⁰¹¹ 315H.

¹⁰¹² 316A–B.

specified that although it was not interfering with freedom of religion it was considering the future of young children and that it would not be in their interests to be raised as Jehovah's Witnesses.¹⁰¹³ The order that the non-custodian parent will have no access was given for a period of three months.¹⁰¹⁴ It is questionable whether the reasoning of the court, namely that the beliefs of Jehovah's Witnesses would bring them into conflict with authority, would be acceptable today, especially since the right to freedom of religion¹⁰¹⁵ is entrenched in the South African Constitution as well as the fact that military service is no longer compulsory. However, the fact that the custodian parent may determine the children's religion cannot be overlooked, and this would form the basis of such a decision today, coupled with the best interests of the children.¹⁰¹⁶

¹⁰¹³ One of the reasons given was that it would "undoubtedly bring them into conflict with authority and when older the boys may refuse to perform military service and be punished": 317A and C.

¹⁰¹⁴ 317F.

¹⁰¹⁵ S 15.

¹⁰¹⁶ In *R v H and Another* 2005 6 SA 535 (C) the Jewish mother of a child was awarded custody of the child after her divorce from her Christian husband. The mother of the child alleged that the child's father suffered from a personality disorder, that he abused his rights of access to the child and that he was not capable of making decisions which were in the best interests of the child. An allegation was also made that during times of access the father tried to expose him to a religion different to that which his custodian mother had determined he would practice. The court found that the father had denigrated the child's mother, her family and her value system in the eyes of the child and that this conduct was not in the best interests of the child and an abuse of the father's right of access to the child. The father of the child was ordered to undergo psychological or psychiatric assessment and, if necessary, therapy. The court postponed making a decision regarding awarding sole guardianship and custody to the child's mother. Importantly, the court said that a court will only deprive a parent of guardianship or custody of his child in exceptional circumstances and only if this is in the best interests of the child: 549E. This was the reason why the child's father was ordered to undergo therapy, as it was held to be in the best interests of the child. Regarding the exposure to different religions, and whether this would be in the best interests of the child, the court said that "it would depend on the purpose of the exposure. If the exposure is meant to be educational and extend his knowledge of other world religions, the court cannot see any objections thereto. If the object is to proselytise [the child] it is highly undesirable as it could only create confusion in [the child's] spiritual upbringing and would, in my opinion, not be in his best interests": 549A–C. *Duncombe v Willies* was followed in this case.

Singh¹⁰¹⁷ dealt with the question of whether a custodian parent could refuse the non-custodian access to their children. The basic view is that it is in the interests of children that they should not be estranged from either of their parents.¹⁰¹⁸ The General Law Further Amendment Act¹⁰¹⁹ provides that any parent who has the sole custody of a child and refuses or prevents¹⁰²⁰ the other parent from having access is guilty of an offence.¹⁰²¹ The South African Constitution¹⁰²² states that each child has the right to parental care. The court will only deny the non-custodian access in exceptional circumstances.¹⁰²³ The courts take the best interests of the children into account and courts have refused access where the non-custodian was reluctant to exercise contact; had neglected or abused the child or where access prejudices the child's well-being.¹⁰²⁴ There is, however, controversy where the custodian is hostile towards the non-custodian and does not allow access because she does not want to.¹⁰²⁵ This is a criminal offence if there is no reasonable cause to not allow access.¹⁰²⁶

¹⁰¹⁷ "The non-custodian parent's 'Right of Access': A note to the Complacent" 1996 *SALJ* 170.

¹⁰¹⁸ Singh 1996 *SALJ* 171, referring to *Kok v Clifton* 1955 2 SA 326 (W) 330. Studies have also shown that access to the non-custodian parent is better for the children's well-being: 171.

¹⁰¹⁹ S 1 of Act 93 of 1963.

¹⁰²⁰ Without reasonable cause: Singh 1996 *SALJ* 171; Van Rooyen "Non-Custodian Parent's Rights to Children: Some Comments on the Application of the General Law Further Amendment Act 93 of 1963 in the Criminal Law Protection of Non-Custodian Parent's Rights to their Children" February 2000 *De Rebus* 23.

¹⁰²¹ And is liable upon conviction to a fine or imprisonment.

¹⁰²² S 30(1). Singh also discusses the CRC and the ACRWC: 1996 *SALJ* 172. These were previously discussed at par 3 1 1 1 1 and 3 1 1 1 3.

¹⁰²³ Singh 1996 *SALJ* 172.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Singh 1996 *SALJ* 173.

¹⁰²⁶ *Ibid.* See s 1 General Law Further Amendment Act.

Singh refers to the case of *Kougianos v Kougianos*¹⁰²⁷ in which an agreement entitled the non-custodian to access. However, the non-custodian had difficulties in exercising his right of access to his children. The mother made efforts to frustrate any contact.¹⁰²⁸ Three months after the divorce the custodian mother brought an application to deprive the non-custodian of any contact with his minor children and the matter was referred to the Family Advocate to investigate and report.¹⁰²⁹ The court was satisfied that the applicant, the mother, was the better custodian and denied the father any right of access “on the grounds that the intense antipathy of the mother ... towards the respondent would have a detrimental effect of the children”.¹⁰³⁰

The view of the court was that, despite its power to enforce compliance with any order of court under the General Law Further Amendment Act, without the co-operation of the custodian such formal compliance would be of no real assistance to the respondent, for the applicant would continue to undermine any endeavour on his part to establish a relationship with the children.¹⁰³¹

The judge recognised that the order was unfair towards the non-custodian but it is clear that the applicant had clearly achieved what she had wanted, namely, to deprive the non-custodian of any contact with his children.¹⁰³² It is doubtful

¹⁰²⁷ Singh 1996 SALJ 173, unreported case (DCLD case 957/93 1994-06-23). The discussion of the appeal case of this matter is dealt with below.

¹⁰²⁸ Singh 1996 SALJ 173.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ Singh 1996 SALJ 174.

¹⁰³¹ Singh 1996 SALJ 175: Here Singh notes that “[o]ne wonders ... whether if she was faced with a term of imprisonment her attitude would relax somewhat”.

¹⁰³² Singh 1996 SALJ 175.

whether this was the proper decision. In *B v B*¹⁰³³ it was held that for a court to deprive a good parent completely of access to his child is to make a dreadful order.¹⁰³⁴ According to Hahlo the court will only make any order refusing access if the custodian parent is not a fit and proper person to have contact with the child or if the access will be used as a "means to an improper end".¹⁰³⁵ In *Kougianos's* case the non-custodian father was not found to be an unsuitable person yet the court "did not even contemplate deferred access, with the possibility of the mother and children being directed to psychological counselling in the interim".¹⁰³⁶

In *Re W*¹⁰³⁷ a child was brought up believing his stepfather was his biological father. After no contact for two years the father applied to court for an order defining his access. The mother and stepfather said that they would not obey an order for access and would rather go to jail. The Appeal Court held that the opposition of the mother alone was not sufficient to refuse contact, and an order would be made reintroducing the child to his father.¹⁰³⁸ "[T]he postponement of contact leads to the situation where contact at a later date becomes an improbability."¹⁰³⁹ It is in the interest of both the child and the parent that they should have contact. The question of what a court can do when a custodian

¹⁰³³ 1971 3 All ER 682 (CA).

¹⁰³⁴ Quoted by Singh 175.

¹⁰³⁵ Singh 1996 SALJ 175: referring to Hahlo *The South African Law of Husband and Wife* (1985) 398.

¹⁰³⁶ Singh 1996 SALJ 175: This approach was adopted in *Pommerel v Pommerel* (SECLD unreported case 4042 of 1986); here counselling failed to bridge the gap between father and children yet the judge did not deny contact.

¹⁰³⁷ 1994 2 FLR 441 (A).

¹⁰³⁸ Singh 1996 SALJ 176. For the position of the Canadian Courts, see Singh 1996 SALJ 177.

¹⁰³⁹ Singh 1996 SALJ 177. See *Re H* 1992 1 FLR 148 (CA) 152E–F, referred to by Singh 1996 SALJ 177 and *Germani v Herf* 1975 4 SA 887 (A) 905, also referred to by Singh 1996 SALJ 177.

does not comply with an order of court, will be discussed below.¹⁰⁴⁰ Singh concludes that “[w]hen faced with an access dispute turning on the implacable hostility of one parent to the other, courts should be wary of allowing themselves to be dictated to by the obdurate attitude of the hostile parent”.¹⁰⁴¹

The matter of *Kougianos v Kougianos* was also dealt with on appeal.¹⁰⁴² Here the court rejected the finding that it would be in the child’s interests for access to be prohibited.¹⁰⁴³ The court decided that there would first be a period of reduced contact which would be increased the following year.¹⁰⁴⁴ Despite the objections of the trial court that without the custodian’s co-operation “nothing can be achieved”, the appeal court allowed the appeal.¹⁰⁴⁵ The hostile custodian parent is not the only problem faced by our courts; the other is the apathetic non-custodian who does not visit.¹⁰⁴⁶

The mere fact that children do not want to go to the non-custodian parent is not sufficient reason for depriving such parent of access.¹⁰⁴⁷ It has been held in the past that if a young child refuses or is reluctant to submit to access that the attitude of a child, especially when nearing adulthood, should be taken into

¹⁰⁴⁰ Par 4.3.

¹⁰⁴¹ Singh 1996 SALJ 181.

¹⁰⁴² This case is dealt with by Singh in “*Kougianos v Kougianos* on appeal” 1996 SALJ 701.

¹⁰⁴³ Singh 1996 SALJ 202: The court stated that “we are not in Heaven or in Utopia, we are on this earth and ... there are no children, even in the happiest of families, and certainly no adults ... who suffer not stress or trauma in their daily lives. If an absence of stress should be the standard for deciding access cases hardly any access would be granted.”

¹⁰⁴⁴ For the exact terms of this access, see Singh 1996 SALJ 702–703.

¹⁰⁴⁵ And stated that if the custodian was to die and the appellant had such access there would be no reason to deprive him of his right to be the children’s custodian.

¹⁰⁴⁶ It has even been suggested that non-custodians be ordered to visit their children and that if they do not do so they must pay the custodian increased child support to cover their child care: Singh 1996 SALJ 708.

¹⁰⁴⁷ Robinson in Davel (ed) *Introduction to Child Law in South Africa* 85.

account but that when a child is young and impressionable the position must be different. The custodian parent may use force in order to procure access, which was granted to the non-custodian by a court order, or to ask the non-custodian to do so.¹⁰⁴⁸

3 4 3 Right of access of fathers of children born out of wedlock

In terms of South African common law the mother of a child born out of wedlock is the sole guardian of such child and has sole custody of such child.¹⁰⁴⁹ Traditionally, the father of a child born out of wedlock had no parental authority over the child.¹⁰⁵⁰

In 1984 the South African Law Reform Commission¹⁰⁵¹ performed an investigation into the legal position of illegitimate children. The recommendation by the Commission was that “the father of an illegitimate child should not acquire parental power *ex lege*”.¹⁰⁵² Regarding access of the father to his illegitimate

¹⁰⁴⁸ *Germani v Herf* 1975 4 SA 887 (A) 899D–E, 902B–F. See also *Dann v Dann* 1968 1 PH B3 (D). In *Oppel v Oppel* 1973 3 SA 675 (T) it was held that the daughter’s attitude was no justification for not complying with the court’s order and that the mother should have taken positive steps to get her daughter to submit to access. In this case the daughter was approximately 9 years old. It is doubtful whether use of force would be sanctioned today.

¹⁰⁴⁹ “Een moeder maakt geen bastaard.” For a summary of the South African legal position until 1999, see Van Heerden, Cockrell and Keightley (eds) *Boberg’s Law of Persons and the Family* 404–418. In *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) the Constitutional Court endorsed the view that the word “illegitimate” is discriminatory: “[n]o child can in our Constitutional court order be considered ‘illegitimate’ in the sense that the term is capable of bearing, that they are ‘unlawful’ or ‘improper’”: 5H. The court also stated that illegitimacy is “illogical and unjust”: 21E.

¹⁰⁵⁰ Visser and Potgieter 217; Cronjé and Heaton *Law of Persons* 60. It was said that there is no relationship between a father and his child who was born out of wedlock, except that he had an obligation to maintain such child: *F v L* 1987 4 SA 525 (W) 526–527.

¹⁰⁵¹ South African Law Commission, Working Paper 7, Project 38 *Investigation into the Legal Position of Illegitimate Children*, October 1984.

¹⁰⁵² Working Paper 7, 86.

child it was said that although it is denied that such a father has parental power over the child some were of the opinion that the father does have reasonable access to his illegitimate child.¹⁰⁵³ The recommendations of the Commission were that the direction in which the law was tending to go was to grant access to such a father, although this would only be allowed by an order of court, and thus they found that it was doubtful that the Legislature should interfere at that stage.¹⁰⁵⁴

In *F v L*¹⁰⁵⁵ it was decided that the natural father of a child born out of wedlock has no *prima facie* right of access and does not acquire parental authority over the child. In *Douglas v Mayers*¹⁰⁵⁶ it was held that the natural father has no inherent right of access¹⁰⁵⁷ and that the court would only grant him reasonable access if the court was satisfied that it would be in the best interests of the child. Here the applicant failed to satisfy the court that there was some ground in the interest of the child that required the court to interfere.

¹⁰⁵³ Working Paper 7, 82–83.

¹⁰⁵⁴ Working Paper 7, 83–84.

¹⁰⁵⁵ 1987 4 SA 525 (W). In this case the applicant applied for an order declaring him the natural father of a child. He had had sexual intercourse with the mother of the child when she was married to the second respondent. The mother had also had sexual intercourse during that time with the second respondent and she had chosen the second respondent as the father of the child. The court held that the applicant did not have a *prima facie* right to have himself declared the natural father as the mother had chosen the second respondent as the father.

¹⁰⁵⁶ 1987 1 SA 910 (Z). The facts of this case were that the applicant had seduced the respondent and she had a child. The applicant had not offered to marry the respondent but he occasionally paid maintenance. The respondent said that as she was 22 years old she had a good chance of marrying and wanted the guardianship of her child to go to the stepfather and she wanted to care for the child without interference from the applicant.

¹⁰⁵⁷ Or custody.

In the case of *F v B*¹⁰⁵⁸ the father of an illegitimate child applied to court to have access to such child.¹⁰⁵⁹ The father and mother¹⁰⁶⁰ of the child had lived together as man and wife. After they parted the respondent had at first allowed the applicant access to the child. However, since May 1987 she refused the applicant such access.¹⁰⁶¹ The judge found that it would not be in the child's interests that the applicant be allowed access to him.¹⁰⁶² The court made it clear that the father of an illegitimate child has no inherent right of access.¹⁰⁶³ The father, in the same way as other third parties, must prove to the court that access would be in the best interests of the child.¹⁰⁶⁴

In the matter of *B v P*¹⁰⁶⁵ the appellant was the natural father of an illegitimate child. He had been living with the respondent at the time of the child's birth but later parted from her.¹⁰⁶⁶ The mother had allowed the appellant to see the child and take her for weekends¹⁰⁶⁷ but then refused to allow him to see or speak to the child. The respondent had agreed to restore access if the child was willing to

¹⁰⁵⁸ 1988 3 SA 948 (D).

¹⁰⁵⁹ 949.

¹⁰⁶⁰ Applicant and respondent respectively.

¹⁰⁶¹ 950.

¹⁰⁶² 953. See 952–953 for the considerations taken into account, among these was that the respondent's new husband wanted to adopt the child and the judge did "not consider the fact that [the respondent's husband] is not [the child's] biological father to be of any particular significance": 952. Other reasons were the acrimony between the applicant and the respondent and the potential for conflict and tension in the child's life which can only cause serious psychological harm. It was decided that there could be no basis whatever for any finding that it could be in the child's interests that applicant be allowed access to him.

¹⁰⁶³ Or custody: 949. The court referred to *Douglas v Mayers* 1987 1 SA 910 (Z).

¹⁰⁶⁴ 949.

¹⁰⁶⁵ 1991 4 SA 113 (T). For a summary of the legal position and arguments found during this time period in our law, see Van Onselen "TUFF – the Unmarried Father's Fight" 1991 *De Rebus* 499; Ohannessian and Steyn "To See or Not to See – That is The Question (The Right of Access of a Natural Father to His Minor Illegitimate Child)" 1991 *THRHR* 254 and Eckhard "Toegangsgeregte tot Buite-Egtelike Kinders – Behoort die Wetgewer in te Gryp?" 1992 *TSAR* 122.

¹⁰⁶⁶ The child was aged 5 at that time.

¹⁰⁶⁷ The child was 9 years old.

see the appellant. The respondent then indicated that the child did not want to see her father. This view was challenged by the appellant.¹⁰⁶⁸ In this case the court stressed that “guardianship and custody of an illegitimate child are vested in the mother and the father has no right of access”.¹⁰⁶⁹ The court referred to *F v L*¹⁰⁷⁰ and *F v B*¹⁰⁷¹ in this regard. The court also stipulated that the judgment in *Matthews v Haswari*¹⁰⁷² is not authority for the proposition that the father of an illegitimate child has a right of access to such child.¹⁰⁷³ The court did however stipulate that the father of an illegitimate child may¹⁰⁷⁴ approach the court for an order limiting the mother’s right of custody by granting him access to his child and, in an appropriate case, the court may deprive a mother of her custody.¹⁰⁷⁵ The father of an illegitimate child has no inherent right of access¹⁰⁷⁶ but can claim this¹⁰⁷⁷ and will have to satisfy the court that this is in the best interests of the child.¹⁰⁷⁸ The court, as upper guardian of illegitimate minors, would apply the same procedure and the same standards¹⁰⁷⁹ as applied when deciding what is in the best interests of legitimate children.

“[T]he paramount consideration is what is in the best interests of the illegitimate child. The other consideration is the right of the custodian parent which, in the

¹⁰⁶⁸ For the complete facts of this case, see 113–114.

¹⁰⁶⁹ 114.

¹⁰⁷⁰ *F v L* 1987 4 SA 525 (W) 527H–J.

¹⁰⁷¹ 1988 3 SA 948 (D) 950E.

¹⁰⁷² 1937 WLD 110.

¹⁰⁷³ 114.

¹⁰⁷⁴ 115A: “like other parties”.

¹⁰⁷⁵ 115A.

¹⁰⁷⁶ Or custody.

¹⁰⁷⁷ In terms of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 2.

¹⁰⁷⁸ 115: The onus is on the applicant to satisfy the court on the matter and usually the court will not intervene unless there is some very strong compelling reason to do so. The onus of proof is discharged on a balance of probabilities.

¹⁰⁷⁹ 117.

case of an illegitimate child, is not subject to the right of access by the non-custodian parent.”¹⁰⁸⁰

The court also referred to the matter of *Duncombe v Willies*¹⁰⁸¹ where it was said that the matter is a question of the rights of the children to have access to the non-custodian parent and that it is in their interests that they should have a sound relationship with both parents. However, sometimes it is in the interests of the children to deprive them completely of access to the non-custodian parent.¹⁰⁸² The court concluded that when considering an application such as the present one the court must follow an approach similar to that followed in *Van Oudenhove v Grüber*,¹⁰⁸³ namely that:

“an applicant must prove on a preponderance of probability that the relief sought, i.e. access, is in the best interests of the illegitimate child (the paramount consideration) and that such relief will not unduly interfere with the mother’s right of custody. The court’s decision in any particular case will depend upon the facts thereof”.¹⁰⁸⁴

¹⁰⁸⁰ 117.

¹⁰⁸¹ 1982 3 SA 311 (D) 315H–316A.

¹⁰⁸² *Ibid.*

¹⁰⁸³ 1981 4 SA 857 (A) 867D–E.

¹⁰⁸⁴ 117. This matter was referred for the hearing of oral evidence to determine when access shall be granted to the applicant and, if so, what such access should be: 119. No interim access was granted: 120.

In *Van Erk v Holmer*¹⁰⁸⁵ it was held that the father of an illegitimate¹⁰⁸⁶ child has an inherent right of access to his child, which can only be taken away if it is in conflict with the best interests of the child. In this case the applicant, the father of an illegitimate child, brought an application that he be granted access to the child as the respondent, the child's mother, did not allow him access to the child.¹⁰⁸⁷ The matter was first referred to the Family Advocate for an investigation. The Family Advocate had recommended that the applicant be granted defined rights of access to the child.¹⁰⁸⁸ The parties then settled the matter on the basis that the applicant would be allowed the right of reasonable access to the child and this agreement was made an order of court.¹⁰⁸⁹

However, due to the importance of this matter the parties requested reasons for the court's decision to accept the Family Advocate's recommendation particularly in view of the suggestion put forward that, despite the existence of precedents to the contrary, the time might have arrived for the recognition by our courts of an inherent right of access by a natural father of his illegitimate child.¹⁰⁹⁰ The court

¹⁰⁸⁵ 1992 2 SA 636 (W). For a discussion of this case, see Hutchings "Reg van Toegang vir die Vader van die Buite-Egtelike Kind – Outomatiese Toegangsregte – Sal die Beste Belang van die Kind Altyd Seëvier? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1993 *THRHR* 310 and Clark "Should the Unmarried Father have an Inherent Right of Access to his Child? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1992 *SAJHR* 565. Kruger, Blackbeard and De Jong "Die Vader van die Buite-Egtelike Kind se Toegangsreg" 1993 *THRHR* 696, 699, welcomed the decision that the father of a child born out of wedlock should have an automatic right of access to his child. Sinclair draws attention to the fact that many of the writings on the *Van Erk* case, as well as the *B v S* case missed the constitutional dimension of the debate, and that questions were not squarely confronted regarding the rights of children as contained in the Constitution and the United Nations Convention on the Rights of the Child: Sinclair "From Parent's Rights to Children's Rights" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 62, 64.

¹⁰⁸⁶ The term *illegitimate* instead of *extra-marital* is used in this case.

¹⁰⁸⁷ 636.

¹⁰⁸⁸ 636–637.

¹⁰⁸⁹ 637. The decision in this case did not follow the *stare decisis* rule, as the court did not follow the full-bench judgment in *B v P* 1991 4 SA 113 (T).

¹⁰⁹⁰ *Ibid.*

then explored the Roman and Roman Dutch law and concluded that the father of an illegitimate child had no rights to such child.¹⁰⁹¹ The case law was then explored and it was found that the maintenance obligation prompted the court in *Wilson v Elf*¹⁰⁹² to hold that the father of an illegitimate child is entitled to access to such child.¹⁰⁹³ In *F v L and Another*¹⁰⁹⁴ it was held that a right of access is not a *quid pro quo* for the payment of maintenance by a natural father.

In *Matthews v Haswari*¹⁰⁹⁵ a right of access was granted to the father of an illegitimate child. In *Docrat v Bhayat*¹⁰⁹⁶ the court held that the father of an illegitimate child does not have a legal claim¹⁰⁹⁷ to such child. In the case of *Rowan v Faifer*¹⁰⁹⁸ it was held that although the father of an illegitimate child has no right of custody of such child he does have the *locus standi* to oppose a custody application brought against him.¹⁰⁹⁹ The finding was approved in *Ex parte Van Dam*,¹¹⁰⁰ where it was said that the father of an illegitimate child may be awarded the custody and even the guardianship of the child should it be in the child's best interests. The court made it clear that this obviously includes a right of access.¹¹⁰¹

¹⁰⁹¹ 637–638. For a discussion of the history of the concepts guardianship, custody and access, see ch 2.

¹⁰⁹² 1914 WR 34.

¹⁰⁹³ 638.

¹⁰⁹⁴ 1987 4 SA 525 (W) 527B.

¹⁰⁹⁵ 1937 WLD 110.

¹⁰⁹⁶ 1939 TPD 125.

¹⁰⁹⁷ 639: "It would appear that the 'legal claim' should include a right of access to the child. Which right is therefore denied."

¹⁰⁹⁸ 1953 2 SA 705 (E).

¹⁰⁹⁹ 639.

¹¹⁰⁰ 1973 2 SA 182 (W) 184G.

¹¹⁰¹ 639.

The court said that the paramount importance of the illegitimate child's best interests has been emphasised in a number of recent cases but that simultaneously it has been stated that the father of such child has no inherent right of access to the child.¹¹⁰² The judge also referred to the report of the South African Law Commission¹¹⁰³ on the "Investigation into the Legal Position of Illegitimate Children". The court says that:

"... it would appear that the Law Commission approves the principle that the father of an illegitimate child should have an inherent right of access to the child, but that it is not necessary to create or confirm such right by legislation, since the courts appear to be moving in the direction of recognising it ... [however] [t]he expectation of the Law Commission has not been met by judicial acting on this terrain in recent times".¹¹⁰⁴

Van Zyl J then returned to the cases that did not recognise an inherent right of access to an illegitimate child by the father of such child.¹¹⁰⁵ The judge referred to the Zimbabwean decision of *Douglas v Mayers*¹¹⁰⁶ in which the decisions in *Wilson v Eli*¹¹⁰⁷ and *Matthews v Haswari*¹¹⁰⁸ were rejected. In *Douglas v Mayers*

¹¹⁰² *Ibid.*

¹¹⁰³ Project 38, October 1985. In this report it was said that the aim of access is "to give the non-custodian parent the opportunity to preserve to some extent a parent-child relationship in the interests of parent and child": par 8.16. This report also refers to Thomas "Investigation into the Legal Position of Illegitimate Children" 1985 *De Rebus* 336–341 where it was said that a father who acknowledges his illegitimate (this is the term used here) child should have parental power over the child, not only access to the child. The report further says, par 8.19, that if the father of an illegitimate child is given access it may foster his sense of responsibility and "may prompt him to support the child adequately": *Van Erk v Holmer* 639.

¹¹⁰⁴ 640: The court indicated that it understood that a further report on this vexed question was expected.

¹¹⁰⁵ 640.

¹¹⁰⁶ 1987 1 SA 910 (Z).

¹¹⁰⁷ 1914 WR 34.

it was specified that the father of an illegitimate child has a right to claim access, in the same way as other third parties and he must satisfy the court that this is in the best interests of the child. The court will only intervene if there is some very strong ground that compels it to do so.¹¹⁰⁹ In *F v L*¹¹¹⁰ it was held that the father of an illegitimate child has no *prima facie* right of access to the child.

In *F v B*¹¹¹¹ the decision in *Douglas v Mayer* was followed. In *B v P*¹¹¹² the court accepted the finding in *F v L*.¹¹¹³ Here the interests of the child as the paramount consideration were emphasised but it was also said that regard must be had to the right of the custodian parent.¹¹¹⁴

Van Zyl J says that it is not clear what will constitute “undue interference” with the mother’s right of custody but that this factor should not be elevated to more than a factor to which regard should be had when assessing what is in the best

¹¹⁰⁸ 1937 WLD 110.

¹¹⁰⁹ *Douglas v Mayers* 914E quoted in *Van Erk v Holmer* 640. The court in *Douglas v Mayers* also specified that the fact that the father is paying maintenance for the child is also taken into account.

¹¹¹⁰ 1987 4 SA 525 (W).

¹¹¹¹ 1988 3 SA 948 (D).

¹¹¹² 1991 4 SA 113 (T).

¹¹¹³ *Van Erk v Holmer* 641. Here it was said that the onus of proof was the discharge thereof on a preponderance of probabilities. See also *Van Oudenhove v Grüber* 1981 4 SA 857 (A) 867A–C. The qualification in *Douglas v Mayers* and *F v B* that such a right would only be granted in exceptional circumstances and if there are compelling reasons to intervene was rejected.

¹¹¹⁴ Here the court looked at the *Van Oudenhove* decision 867 (as seen in *Van Erk v Holmer* 641) where it was said that: “[i]n applications for the variation of custody orders, the court, whilst not losing sight of the paramount consideration, nevertheless will have regard to the rights of the custodian parent, ... the right to have the children with her, to control their lives, to decide all questions of education, training and religious up-bringing”, and that the access is in the best interests of the child and will not unduly interfere with the mother’s right of custody: *B v P* 117F.

interests of the child.¹¹¹⁵ In *Terezakis v Van der Westhuizen*¹¹¹⁶ the decision of *B v P* was followed and it was found that the father of an illegitimate daughter had proved that it was in her best interests that he should have access to her.¹¹¹⁷

Van Zyl J then looks at the opinions of Boberg.¹¹¹⁸ His opinion is that many people live together without being married and that the court should rather affirm the right of access. He criticises the decision of *F v L and Another* and states that the objections that were raised to the father's claim for access to his child in the case of *F v L* would also be applicable in most cases where access to a legitimate child is sought and emphasises that no court would think of denying the legitimate father access on those grounds.¹¹¹⁹

He goes on to say that the married father has a *prima facie* right of access and he cannot be deprived of this right unless it is detrimental to the child.¹¹²⁰ This right comes from the child's legitimate birth, which originates from the valid marriage between the child's parents. Boberg further states:

¹¹¹⁵ 641, the court referred here to *Duncombe v Willies* 1982 3 SA 311 (D) 315H–316B where Milne DJP said that: "I prefer to approach the matter by attempting to ascertain the real interests of the children. Courts not infrequently talk of the 'right of access' of the non-custodian parent. I prefer ... to think of the matter as being a question of the rights of the children, viz their right to have access to the non-custodian parent. It is in their interests, generally speaking, even where a family has broken up, that they should continue to have a sound relationship with both parents ... It is only in unusual and special cases that the court will come to the conclusion that it is not in the interests of the children that they should continue to have a healthy, well nourished relationship with the parent who does not have custody of them."

¹¹¹⁶ Unreported case 2840/91 (WLD) 1991-12-06.

¹¹¹⁷ *Van Erk v Holmer* 642.

¹¹¹⁸ 642, as expressed in "The Would-Be Father and the Intractable Court" 1988 17 *BML* 112–115 and "The Sins of the Father and the Law's Retribution" 1988 18 *BML* 35–38.

¹¹¹⁹ Boberg 1988 *BML* 38 quoted in *Van Erk v Holmer* 642.

¹¹²⁰ 642: "in some special and peculiar way".

“[W]hy should a father’s access to his child depend on whether he was lawfully married to the child’s mother? Why should the continuation and burgeoning of that most important and fundamental of human relationships – between parent and child – be at the whim of the law’s attitude to the legitimacy of the relationship between the parents themselves? In principle, the legal status of the parents’ union is relevant to determine only the rights and duties of the parents *inter se*, it has nothing to do with the relationship between each parent, respectively, and the child he or she has procreated. The parental duty of support is clearly founded on paternity, not legitimacy ... where custody and guardianship are in issue, regard should be had to the legitimacy of the parent’s relationship ... authority decrees that a mother should win that contest ...¹¹²¹ [b]ut access is not the subject of a contest. It is the booby prize awarded to the loser in the competition for greater rights. It is little enough to give him ... it is essential to the child’s normal emotional development. And it should not be withheld merely because the parents were not married, or the custodian and her johnny-came-lately new spouse – who really has nothing to do with the matter at all – want the child all to themselves.”¹¹²²

Van Zyl J also explores the opinions of other authors that attack the judgments of *F v L*¹¹²³ and *Douglas v Mayers*. These authors suggested that the courts must formulate a legally and socially equitable solution.¹¹²⁴

¹¹²¹ But see the discussion on custody and the maternal preference rule in par 3 3 above.

¹¹²² Boberg 1988 *BML* 38 quoted in *Van Erk v Holmer* 642–643.

¹¹²³ See Ohannessian and Steyn 1991 *THRHR* 254–263.

¹¹²⁴ 643.

The authors state that if the father of an illegitimate child had an inherent right of access he would not have to approach the Supreme Court¹¹²⁵ for an order granting him access and that if the father abuses such right or the exercise of such right is not in the child's best interest, then he could be stripped of it. The court mentioned that emphasis should be placed on the child's right to see the father rather than on the father's right of access. Judge Van Zyl also held the view that there should be no distinction between legitimate and illegitimate children.¹¹²⁶ It is immoral to penalise the children born of cohabitation by placing curbs on the rights of access by their fathers.¹¹²⁷

Van Zyl J then explores the comparative law and looks at the law in England, Australia, Canada and the United States regarding illegitimacy¹¹²⁸ and concludes that the question relating to the father's right of access, if any, to his illegitimate child has not been ventilated or debated.¹¹²⁹ Van Zyl J concluded his judgment by stating as follows:

“[I]n the common law ... the maxim relating to a mother ... not bastardising her illegitimate child is clearly based on her cognate or blood relationship with the child. Similarly, the father's duty to maintain a child born out of wedlock is based on his paternity and hence on his cognate biological relationship with the child. This makes nonsense of the fiction that the father is regarded as not

¹¹²⁵ Now known as the High Court.

¹¹²⁶ 644. The authors also emphasise that children born from Mohammedan, Hindu or Black customary unions are classified as illegitimate. However, this is not the case anymore.

¹¹²⁷ 644. The opinion of Clark and Van Heerden that the father of an illegitimate child, who acknowledges and voluntarily undertakes the duties of a father, should have custodial rights, including access, is also discussed: *Van Erk v Holmer* 644–645.

¹¹²⁸ 645–647. Comparative law will be discussed in ch 5 below.

¹¹²⁹ 646.

being related to the child. Should he be no relation he should have neither rights nor duties in respect of the child.”¹¹³⁰

Van Zyl J states that in the case of legitimate children access to a child is regarded as an incident of parental authority but this is not so where the court grants access to the father of an illegitimate child because it is in the child’s best interests. In such circumstances the court is not conferring parental authority upon the father.¹¹³¹ Judge Van Zyl disagrees with *F v B*¹¹³² which said that the rights of the custodian should not be interfered with unless this was in the interests of the child and that the father of an illegitimate child has no right of access to his child.¹¹³³

The judge emphasises that, in a legal issue, there is no legislation, precedent or custom in point, the judge must “decide the case in accordance with the principles of reasonableness, justice, equity and ... the *boni mores* or public policy, which cannot be ignored in these times of change”.¹¹³⁴

Van Zyl J says that none of the cases dealt with the Report of the Law Commission on the legal position of illegitimate children and that he believes that

¹¹³⁰ *Ibid.*

¹¹³¹ 647.

¹¹³² 1988 3 SA 948 (D).

¹¹³³ *Ibid.*

¹¹³⁴ 648. Van Zyl J refers here to two sources dealing with the importance of public policy for legal development namely, Corbett “Aspects of the Role of Policy in the Evolution of our Common Law” 1987 *SALJ* 52–69 and Van Zyl “The Significance of the Concepts ‘Justice’ and ‘Equity’ in Law and Legal Thought” 1988 *SALJ* 272–290.

the Law Commission's contentions are worthy of consideration.¹¹³⁵ Van Zyl J also agreed with the opinions of the authors Boberg and Ohannessian and Steyn.¹¹³⁶ The judge emphasises that “social *mores* and attitudes have changed considerably and that legally binding marriages are not the only lasting unions between a man and a woman and that the emphasis is on children’s rights rather than on those of the parents”.¹¹³⁷ Van Zyl J also looked at the general public’s views of a father’s relationship with his illegitimate child. Van Zyl J reaches the following conclusion:

“[J]ust as there should be no distinction between a legitimate and an illegitimate child, just so there is no justification for distinguishing between the fathers of such children. By this I do not propose that they should be equated with each other in one fell swoop. Certain parental rights have been legislatively enacted and will require amendments to such legislation to provide for more extended rights. It is the least of these rights ... the right of access, which public policy requires should be inherently available to all fathers.”¹¹³⁸

The judge further says that a gross injustice occurs when a father has to pay maintenance for a child that he will never be able to see, although he is committed to the interests of the child. It is in the child’s interests to develop as normal a relationship as possible with both parents.¹¹³⁹ The judge emphasised that this is in fact a right which should not be denied unless it is clearly not in the

¹¹³⁵ 648.

¹¹³⁶ Discussed above.

¹¹³⁷ 648. The judge, however, does not support the restrictions on access suggested by Clark and Van Heerden, discussed in par 3 3 3 2 above.

¹¹³⁸ 649.

¹¹³⁹ *Ibid.*

best interests of the child.¹¹⁴⁰ Van Zyl J said that he believed that the time was right for the recognition by our courts of a natural father of an illegitimate child to have an inherent right of access to such child.

"That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed if the access should be shown to be contrary to the best interests of the child."¹¹⁴¹

When the judge applied the principles discussed above, it was clear that the respondent did not prove that granting access to the applicant would be in conflict with the child's best interests. Thus the judge accepted the Family Advocate's recommendation that access should be granted to the applicant and made the agreement relating to reasonable access an order of court.¹¹⁴²

¹¹⁴⁰ *Ibid.*

¹¹⁴¹ 649–650.

¹¹⁴² 650. For criticism of this decision, see Hutchings 1993 *THRHR* 314–315 where it is said that the judge laid too much emphasis on the *boni mores* of the community "en daardeur tred verloor het met die beste belang van die kind wat as primêre oorweging moet dien ... [d]ie primêre oorweging is tog die beste belang van die kind en nie die belang van die vader nie" (referring to Sonnekus and Van Westing 1992 *TSAR* 255). Church (1992 *Codicillus* 36) welcomed the decision but said that the mother now has to prove that it is in the best interests of the child that the father's right of access be taken away and that this would be problematic, especially in black communities. Horak ("Om te trou of nie te trou nie – besluit in *Van Erk v Holmer aangeval*" 1992 *De Rebus* 515) says that this decision "... as 'n pleidooi gesien word vir die gelykstelling van die saamleef verhouding aan die huwelik" and that such an approach undermines the importance of a healthy family life as the core of a healthy society. According to Hutchings the case emphasised the access rights of the father rather than the best interests of the child. The best interests of the minor child should be the primary consideration. Most women are not financially able to approach a court to prove that the access rights are not in the interests of the child, as the judge in this case said they could. She is also of the opinion that an automatic recognition of access rights will not always be in the child's best interests. It was also suggested that it is time for the Legislature to intervene. Clark (1992 *SAJHR* 565–567) is of the opinion that "[t]o bestow an inherent right of access on a father who has maintained no relationship with the mother and child and who has made no effort either to voluntarily acknowledge paternity or discharge his obligations there is ... to place the interests of an unmarried father above the welfare of a

In the case of *S v S*¹¹⁴³ the father of a child born out of wedlock¹¹⁴⁴ wanted access to such child. The court held that the mother has sole parental authority over the child, and that if the court decides to interfere with the discretion exercised by the mother as custodian then it must be remembered that the mother, not the court, has this discretion and the order must not constitute undue interference with the mother's right. The best interests of the child is the standard that must be applied. It must be established whether the interests of the child require access to a specific person.¹¹⁴⁵ In this case the court found that the father had no right to access to the child. The court followed *B v P* but criticised *Van Erk v Holmer*. This criticism stated that the principle known as *stare decisis* is part of our legal system. Flemming DJP said that he had to analyse whether the *Van Erk* decision breached the *stare decisis* principle.¹¹⁴⁶ Flemming DJP goes on to say that in the *Van Erk* case no authority was given for regarding the decision in *F v L* as wrong. The fact that parental power vests in the mother of a child born out wedlock and that the father has no

child" and later (569) "[o]nly where there is a father who is both willing and able to act as such and one who gives evidence thereof, should it be decided that the unmarried father should have a right of reasonable access". It can be argued that Clark's opinion is correct.

¹¹⁴³ 1993 2 SA 200 (W); Kruger, Blackbeard and De Jong 1993 *THRHR* 696.

¹¹⁴⁴ The term illegitimate is used in the case and will thus be used in the discussion of the decision in this case.

¹¹⁴⁵ The facts of this case were that the applicant and respondent had a relationship, during which the respondent became pregnant. The applicant was engaged to someone else and refused to break off the engagement, although he and the respondent lived together. The respondent moved out due to his sexual misdeeds and was later evicted from the flat where she stayed. The applicant showed no interest in the child, he disputed paternity and refused to contribute to maintenance. Applicant now pays maintenance and said that he feels he should have access because he is paying maintenance. The applicant also said that due to the decision in the *Van Erk* case he has a right to access: 202–203.

¹¹⁴⁶ 203.

parental authority is emphasised by the court.¹¹⁴⁷ Flemming DJP asks the question:

“on what authority can it be said that alongside the mother’s uncurtailed rights the father, like a divorced father, has a concurrent and to some extent competing right? Where did the ruling law recognise an ‘inherent right’ of access?”¹¹⁴⁸

Flemming DJP states that no matter what the common law may have been, there is unanimity on what the law is now. The mother of an illegitimate child is the sole guardian and custodian of her child and she may decide who may have access to such child.¹¹⁴⁹ The judge concludes that the *stare decisis* principle barred the conclusion reached in the *Van Erk* case.¹¹⁵⁰ Flemming DJP also cannot find any legitimate reason for the principle applied in *Van Erk* that a court can design the law to suit justice when it is “bereft of binding legislation, precedent or modern custom”.¹¹⁵¹ The judge states that there are many precedents in existence.¹¹⁵² Flemming DJP also states that “silence does not imply assent”¹¹⁵³ and that it is no “assumption” that an illegitimate child is not related to its father.¹¹⁵⁴

¹¹⁴⁷ 204.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ 204–205. The judge refers here to *F v L*, as quoted in *J v O* (unreported case 1407/90 (W)).

¹¹⁵⁰ 205.

¹¹⁵¹ *Ibid.*

¹¹⁵² 205. The court also says “[t]hat no single authority can be found anywhere to the effect that a father has a right of access to an extra-marital child is a strong indication that no such right exists” and that this reasoning was not followed in the *Van Erk* decision.

¹¹⁵³ 205.

¹¹⁵⁴ *Ibid.*

Flemming DJP then explores public policy, fairness and desirability and how they can influence discretion. The first very important point entails the following:

“The law must be applied even when a Judge believes that the law requires revision or is in an undesirable state. It is alien to a Judge’s functions or powers to act as an alternative for Parliament. That is salutary because the state of the law should not be determined by the preference of one single individual ... a Judge is not equipped ... to ascertain the true preferences and desirabilities which operate in society.”¹¹⁵⁵

Secondly, project 38 is said not to be "risk-free"¹¹⁵⁶ as the author refers to a "right"¹¹⁵⁷ of access which is inconsistent with the view against giving parental authority to the father.¹¹⁵⁸ Thirdly, it is made clear that “[t]he ascertainment of public views is a process fraught with risks of error”.¹¹⁵⁹ Flemming DJP also states that the mother’s side of the matter and the problems of the long-term development of the child and crisis management must also be considered.¹¹⁶⁰ Fourthly, that may have been a reaction of society that the existing approach is the only means of putting pressure on the natural father to give serious consideration to the situation and the plight of the expecting mother and the totally helpless result”.¹¹⁶¹

¹¹⁵⁵ 206.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ 206: “Risks are increased by relying on magazines striving for circulation; persons who represent the fringes of opinion, etc.”

¹¹⁶⁰ 206.

¹¹⁶¹ 206: “To destroy that pressure would then be a cut into the nerve system of the operation of society.”

Fifthly, the suggestion that the established law is unduly sectarian because it is based upon Christian views¹¹⁶² is criticised. It is stipulated that there is no necessary logic therein that because a rule has a known origin it is against public policy or is unjust¹¹⁶³ and the approach of our law is maintained because it has an underlying view on what is good and fair.¹¹⁶⁴

Lastly, the undesirability of giving the law the content preferred by a single individual¹¹⁶⁵ is emphasised and it is stated that the weight of opinion is against the conceding of an inherent right which may be denied only if it is clearly not “in the best interests of the child”.¹¹⁶⁶

In conclusion Flemming DJP states that until Parliament¹¹⁶⁷ may change the law the following is the background for applying views about the interests of the extra-marital child.¹¹⁶⁸ Firstly, the father of an extra-marital child has *locus standi*.¹¹⁶⁹ Secondly, the mother of an extra-marital child has sole parental authority over such child and she has control over who has access to the child.¹¹⁷⁰ Thirdly, when the court must decide whether to interfere with the mother’s discretion as custodian the court will approach the matter on the basis

¹¹⁶² 207.

¹¹⁶³ *Ibid.*

¹¹⁶⁴ 207. The comparative law of England, Scotland, Germany and Holland is then explored. The Muslim and indigenous systems are also dealt with. The exploration by the court of these matters will not be discussed here. Comparative law will be dealt with in ch 5.

¹¹⁶⁵ 207.

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ “[O]r the Appellate Division if it finds room to override preceding authority and has certainty about what the law should be.”

¹¹⁶⁸ 207.

¹¹⁶⁹ 208.

¹¹⁷⁰ *Ibid.*

that due weight should be given to the fact that the mother and not the court is vested with the discretion. The court must be satisfied that an order will not constitute undue “interference with the mother’s right”.¹¹⁷¹ Flemming DJP also emphasises that the parent has to exercise this discretion in the child’s best interests.¹¹⁷² Lastly, the court can enforce access to someone who is important to the child’s emotional development.¹¹⁷³ Flemming DJP emphasises that it is neither possible nor advisable to attempt to define when and with what cogency existing bonds between natural father and extra-marital child should be a factor.¹¹⁷⁴ Flemming DJP then explored how the best interests of the extra-marital child should be approached.¹¹⁷⁵ The application was dismissed.¹¹⁷⁶

¹¹⁷¹ *Ibid.*

¹¹⁷² 208: “The best interests of the child is the yardstick. But, unlike a custody dispute between spouses or ex-spouses, the issue is not which of two parents it is best to choose to benefit the child most. The issue is whether it is established that the interests of the child require that there must be access to a specific person (someone who has no parental authority).”

¹¹⁷³ 208.

¹¹⁷⁴ 208: “Or if none exist in which circumstances it is desirable that (a) the child be informed that the person with whom he lives is not his genetical (*sic*) father and (b) ties with the biological father be developed.”

¹¹⁷⁵ 209. This aspect will not be discussed here. The best interests of the child is discussed in par 3.5 below.

¹¹⁷⁶ 210. Kruger, Blackbeard and De Jong (1993 *THRHR* 701) said the following about this judgment: The judgment is in line with the (then) current legal position; however considerations of public policy must also play a role in the current debate about the access rights of a father to his child born out of wedlock. The idea that the current legal position is possibly a way that the community can pressurise the natural father to seriously consider the matter is also criticised. The authors question whether the judge meant that the idea is to force the father to consider marriage. They also point out that “[d]ie siening dat alle vaders van buite-egtelike kinders sleg of onbelangstellend is, is onwaar en verouderd.” This was said in reaction to the statement made by the judge (209F) that: “why should the father get any prize? For the joy brought by a drunken one night stand without any emotional involvement? For seduction? Or inadequate safety of technique?” The authors also comment that some writers are of the opinion that an inherent right of access is not desirable but that the father must be a participating parent in order to get access to a child or that he must show responsibility, or that there must be an established parent-child relationship. Others support an inherent right of access. The word father here means fathers of children born out of wedlock. Arguments for an inherent right of access are that each child needs both a mother and father in order to develop his or her own identity and personality; that fathers who want access to their children will, generally, not misuse this right; that the classification of children as illegitimate (I use this word intentionally) was a result of efforts to encourage Christian marriages and illegitimacy was a punishment for not entering into such a marriage; and that civil marriages based on Christian values are not the

In the case of *B v S*¹¹⁷⁷ the applicant applied for rights of access to his illegitimate child.¹¹⁷⁸ In this matter the applicant relied on the decision in *Van Erk v Holmer*¹¹⁷⁹ so that the natural father of an illegitimate child should be accorded the same rights of access to his illegitimate child as are recognised in respect of a father of a legitimate child.¹¹⁸⁰ Judge Spoelstra agreed with the judgment of Flemming DJP in the matter of *S v S*.¹¹⁸¹ Spoelstra J states that the *Van Erk* decision ignored the *stare decisis* rule as well as the judgement in *B v P*.¹¹⁸² Spoelstra J states that until our law¹¹⁸³ is overruled either by Parliament or by the Appellate Division, courts in this province are bound to follow it and that he

only lasting relationships between men and women in South Africa. Arguments against an inherent right of access are that there are risks attached to allowing the father an inherent right of access in South Africa; the mother of the child may find it difficult to get access to a court to prove that the father is a danger to the child. Another reason given is that allowing automatic access rights to fathers will result in a father that wants nothing to do with the child, being able to exercise his rights when it is to his benefit and whenever the mood strikes him. The authors state that fathers will generally not misuse this right and disagree with the reasons why a father should not have automatic access rights. Kruger *et al* are of the opinion that the best interests of the child ought to allow automatic access rights for the father. There is no easy road to follow here. The arguments both for and against an inherent right of access have merit although it is submitted that many of the concerns expressed regarding automatic access rights are valid. The Children's Act has tried to reach the best compromise. The Children's Act is discussed in ch 4 4.

¹¹⁷⁷ 1993 2 SA 211 (W). For a summary of the South African law up until this decision, see Goldberg "The Right of Access of a Father of an Illegitimate Child: Further Reflections" 1996 *THRHR* 282. See also the author's other article on this topic: "The Right of Access of a Father of an Extra-marital Child: Visited Again" 1993 *SALJ* 261.

¹¹⁷⁸ 211. For the complete facts, see 211–213.

¹¹⁷⁹ Discussed above.

¹¹⁸⁰ 214.

¹¹⁸¹ Discussed above.

¹¹⁸² 1991 4 SA 113 (T), discussed above.

¹¹⁸³ 214: referring to the judgment of *B v P*, where *Douglas v Mayers* 1987 1 SA 910 (Z) 914E was quoted: "there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and be granted this if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so."

does so without any reservation as to the soundness of the principles stated therein.¹¹⁸⁴

Spoelstra J concluded with the following statement:

“Circumstances that may move a court to grant relief such as the present seem to me to be those where the parties have had a long and enduring relationship akin to marriage or where the marriage is, for some or other reason, not recognised by the laws of the land. I do not say that those are the only circumstances under which a father of an illegitimate child may be accorded relief, but they are the most obvious ones.”¹¹⁸⁵

The court dismissed the application as, according to the court, it was not shown that a refusal of access by the applicant is or would be harmful or detrimental to the child or that the child would be better off if access were to be granted to the applicant.¹¹⁸⁶

In *Chodree v Vally*¹¹⁸⁷ the court held that it was in a child’s interests that his father be awarded access. The child had been born from a Muslim

¹¹⁸⁴ 214.

¹¹⁸⁵ 215.

¹¹⁸⁶ 215: “These are matters upon which a court should not speculate. Facts justifying a finding, on the preponderance of probabilities, should be proved by an applicant such as the present one.”

¹¹⁸⁷ 1996 2 SA 28 (W).

marriage. The court held that it was to the advantage of the child to have communication with both its parents.¹¹⁸⁸

In *Krasin v Ogle*¹¹⁸⁹ it was held that the main factor in determining whether access should be granted to a non-custodian parent is the best interests of the child. The court referred to the matter of *B v S*¹¹⁹⁰ in support of its view.

In the matter of *I v S*¹¹⁹¹ the court held that the applicant had a right of access to the children if this was in their best interest and that due weight had to be given to the wishes of the children.¹¹⁹² The court also said that the children were mature and old enough to give an opinion and that their refusal to have contact

¹¹⁸⁸ 32F. In *Bethell v Bland* 1996 2 SA 194 (W) custody was awarded to the natural father instead of maternal grandparents. The reason for this being that it was the maternal grandparents and not the mother asking for custody. For a summary of the South African law position, up until 1997, in this matter, see Wolhuter "Balancing the Scales – Access by a Natural Father to his Extra-Marital Child" 1997 *Stell LR* 65, 65–71. The matter of *Ryland v Edros* 1996 4 All SA 557 (C) dealt with a Muslim marriage. The women were awarded maintenance and compensation for the pain of separation. This case went same way in recognising Muslim marriages, although only those which are factually monogamous. According to Mahomed "Case Notes: *Ryland v Edros* [1996] 4 All SA 557 (C)" 1997 *De Rebus* 189: "[i]t further means that children born from muslim marriages which are factually monogamous can no longer be deemed illegitimate ... however [there is] a need to fill all the gaps in our family law, in particular the need for consistency between theory and practice ... [and] we require implementation of new legislation to overcome the hardships that people still suffer: for example when trying to register the birth of a child of Muslim parents ... [have] to complete a form stating that their children are officially deemed illegitimate." For a discussion of Islamic marriages and divorce, see Moosa "Muslim Divorce and the 1996 Divorce Amendment Act" <<http://www.derebus.org.za/scripts/derebus-s.pl?ID=4714&index=199910-articles&hi...>> accessed on 2003-05-21.

¹¹⁸⁹ 1997 1 All SA 557 (W). The facts were that the applicant and respondent had a child born out of wedlock; the minor assumed the applicant's surname and lived with the parties in their common home. The respondent left the common home, taking her child with her. The applicant launched an application claiming custody of the child. The court said the fact that the mother was in a worse off financial position was not a material factor.

¹¹⁹⁰ 566.

¹¹⁹¹ 2000 2 SA 993 (C). The facts were that the parties had been married in terms of Islamic law. When the marriage was dissolved the parties had concluded an agreement relating to the access of the child. The applicant had irregular access and then such access terminated. He applied in terms of s 2 of the Natural Fathers of Children Born out of Wedlock Act to have the agreement relating to access made an order of court.

¹¹⁹² As s 2(5)(d) of the Act lists the attitude of the child in relation to the granting of the application as one of the factors the court must consider.

with their father had to be respected. Thus the father's application for access was dismissed and weight was given to the view expressed by the children that they do not want to have contact with their father. The Natural Fathers of Children Born out of Wedlock Act¹¹⁹³ empowers the court to make an order giving the natural father access rights to the child. The relevant sections of this Act have already been discussed.¹¹⁹⁴ Even if a child has been adopted, this does not prevent a court from granting access to the child's natural father.¹¹⁹⁵

*Fraser v Children's Court, Pretoria North and Others*¹¹⁹⁶ dealt with the question of whether the requirement of, as it was then, section 18(4)(d) of the Child Care Act¹¹⁹⁷ that the consent of only the mother of the illegitimate child to adoption is necessary is unconstitutional as it unfairly discriminated against unmarried fathers. Although this case dealt with the question of adoption it opened the way for the rights of unmarried fathers to be recognised.¹¹⁹⁸

¹¹⁹³ 86 of 1997.

¹¹⁹⁴ In par 3 2 5.

¹¹⁹⁵ *Haskins v Wildgoose* 1996 3 All SA 446 (T). The formation of a new family unit can, however, go against permitting the natural father access: *V v H* 1996 3 All SA 579 (SE). For a discussion of "Children Born out of Wedlock: Their Fight for Legitimacy and Justice for Natural Fathers" by Mahomed <<http://www.derebus.org.za/scripts/derebus-spl?ID=4714Cindex=199811-articles&hi>> accessed on 2003-05-27.

¹¹⁹⁶ 1997 2 SA 261 (CC).

¹¹⁹⁷ 74 of 1983.

¹¹⁹⁸ The section first remained in force and Parliament was given 2 years to correct it. These rights were recognised by the amendment of the Child Care Act to include the consent of the father of an illegitimate child (the relevant sections will not be discussed in detail here) and later, the introduction of the Natural Fathers of Children Born out of Wedlock Act. See also Davel (ed) *Introduction to Child Law in South Africa* 35 and 115. Sloth-Nielsen 2002 *IJCR* 140–141, points out that no aspect of children's rights' arguments were raised in the first reported *Fraser* case decisions, see *Fraser v Children's Court, Pretoria North* 1997 2 SA 218 (T); *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC); *Naude and Another v Fraser* 1998 4 SA 539 (SCA); *Fraser v Naude and Others* 1999 (1) SA 1 (CC), that these were dominated by considerations of equality and that children's rights were only mentioned in the Constitutional Court case, which took place 3 years after litigation had started. The Constitutional Court determined that the best interests of the child were paramount and that the rights of the adopted child were to be the main consideration as to whether it would be in

It must always be remembered:

“[p]aternity involves more than just concessions and acknowledgement; it is the active involvement of the father in the life of his child. Paternity therefore involves emotional, material and social consequences and should be seen in terms of a legal, social and moral responsibility that is earned, rather than deemed a negotiable concession or a favour bestowed upon a father”.¹¹⁹⁹

3 4 4 Access by interested persons other than parents

Usually access is only assigned to a child’s biological parents; however, the court as upper guardian can confer such access on a third party.¹²⁰⁰ Families are

the interest of justice to continue with litigation. The court here held that the best interests of the child required that litigation about the adoption should not continue, since the child had settled in happily with his adoptive parent for 3 years.

¹¹⁹⁹ Mahomed 1998 *De Rebus* <<http://www.derebus.org.za/scripts/derebuspl?ID=4714Cindex=199811-articles&hi>> accessed on 2003-05-27.

¹²⁰⁰ *Short v Naisby* 1955 3 SA 572 (D) and *September v Karriem* 1959 3 SA 687 (C): where in the best interests of a child a court can ignore biological ties. According to s 6 of the Divorce Act 70 of 1979 a court may award guardianship, custody or access to a third party where this is in the best interests of the child. According to s 5 of the Matrimonial Affairs Act 37 of 1953 a parent who was awarded sole guardianship may appoint a third party as sole guardian or custodian in his or her will. The court may also make an order that when a parent dies who has sole guardianship, that the guardianship will vest in someone other than the surviving parent, either jointly with the surviving parent or not. According to s 15–17 of the Child Care Act children may be placed under foster care or adoption, and their parents’ parental powers taken away. See also Pieterse “*In Loco Parentis*: Third Party Parenting Rights in South Africa” 2000 *Stell LR* 324, 325. See also SALC *Report on the Children’s Bill* Ch 8 The Parent/Child Relationship 277–279: “As a general rule, if any ‘social parent’ wants a legal relationship with the child in question, he or she must obtain a court order in this regard”. Relatives; foster parents and stepparents can be social parents of a child. See also Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623–624. Bonthuys states (635): “[i]mplying that a natural capacity to nurture exists as a result of a parent-child bond, but not as a result of other biological bonds, is not only illogical, but excludes other people with or without genetic ties to children from being regarded as ‘family’.” It is submitted that the view that a family cannot only be defined on the basis of biological or genetic ties is correct. Although many families are constituted based on genetic ties there are also many families which are formed based on social ties, or a

found in various forms in South Africa.¹²⁰¹ Pieterse¹²⁰² emphasises that the Western nuclear family has degenerated and various new forms of family now exist.¹²⁰³ As a result of this a large number of children are growing up in families where they are forming emotional ties with people who are not their biological parents and that because these unconventional relationships are not legally protected, children are vulnerable when there is family turmoil.¹²⁰⁴ He also looks at the extended African family and stresses that there are numerous family forms which exist in contemporary African society and there are various arrangements made regarding custody and the day-to-day care of children. Pieterse also states that:

“[a]t customary law, children ‘belong’ to families as a whole rather than to individual parents, and greater emphasis is placed on the development and maintaining of family ties than is the norm in Western societies. Western notions of guardianship and custody are often inadequate for explaining the nuances of these family relationships. Our legal systems, despite recent changes (such as the legal recognition of African customary marriages) remains tailor-made for the nuclear family. This poses particular problems and renders

combination of social and biological ties. See par 3 4 5 below for a discussion of the orders that a South African court can make regarding access.

¹²⁰¹ See par 3 1 1 4 above for the discussion of the right to a family, where some of these forms are dealt with.

¹²⁰² 2000 *Stell LR* 329–331.

¹²⁰³ Often a family consists of members of the nuclear family as well as the extended family and outsiders.

¹²⁰⁴ Many Western countries have adopted legislation awarding access to grandparents, stepparents and even outsiders: Pieterse 2000 *Stell LR* 329–331. See also ch 5 hereunder.

particularly unfair results when considering third party parenting rights in African countries.”¹²⁰⁵

In 1996 the South African Law Commission¹²⁰⁶ made recommendations regarding access to children by other interested persons, for example grandparents. The Commission studied the case law and stated that it was clear that the court will interfere with parental rights mainly where it causes danger to the child’s life, health and morals.¹²⁰⁷ However, the Commission also clearly stated that the courts’ power to interfere with the rights of parents is not limited to these grounds and “... any ground which relates to the child’s welfare can serve

¹²⁰⁵ Pieterse 2000 *Stell LR* 331. It can be argued that Pieterse is correct this regard. Pieterse (332) also states that African societies have always placed strong emphasis on social parenthood, where the roles of parenthood are delegated or split, while the link between the biological parent and the child remains in place. “Not only does a focus on biological parenthood ignore socio-cultural relationships in extended African families, but it also marginalizes those Western families who deviate from the (changing) ideal of the heterosexual nuclear family. Increasing instances of social parenthood in practice mean that a number of close relationships between children and adults who are not their biological parents are rendered vulnerable in the event of legal disputes concerning the children.” It is submitted that Pieterse is correct, often children in families today form bonds with other caregivers other than their biological parents, and these people may or may not be members of the child’s extended family. Biology alone should not be the only factor taken into consideration by our courts when dealing with the issue of access by a third party to a child. See also Bennett 1999 *Obiter* 157 who warns against the danger of passing Western conceptions of what is in a child’s best interests, such as that only biological parents are qualified to raise their children, as universal norms. See also *Horsford v De Jager and Another* where the court held that children ought, in the nature of things, to live with their mother. This case is discussed in par 3 4 4 above.

¹²⁰⁶ SALC Project 100 *Access to Minor Children by Interested Persons* Report (June 1996) iii. Pieterse 2000 *Stell LR* 338 criticises the Law Commission’s report as “being Eurocentric in its approach and for paying no attention to the particular needs of African families” and that the Commission did not do a comparative study of African countries. It is submitted that this criticism of Pieterse is correct. He also states (340) that it is unfortunate that the report did not also deal with the granting of custody and guardianship to third parties.

¹²⁰⁷ SALC Working Paper 62, Project 100 “The Granting of Visitation Rights to Grandparents of Minor Children” (1996) 6. Cases referred to by the Commission are *Calitz v Calitz* 1939 AD 56 see also pars 3 2 4, 3 3 1 2 and 3 3 3 1 ; *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) the facts of this case are given in n 507 above; *Rowan v Faifer* 1953 2 SA 705 (E) see further pars 3 2 2 3 and 3 4 3, and *Petersen en ‘n ander v Kruger en ‘n ander* 1975 4 SA 171 (C) see 3 1 1 2 and 3 3 3 2.

as a reason for the court's interference".¹²⁰⁸ The Commission also referred to the case of *B v P*¹²⁰⁹ where it was held that the father of an illegitimate child, like any party, may approach the court for an order to gain access to a child and *Bam v Bhabha*¹²¹⁰ where the court decided that a girl, aged seven, who had spent most of her life with her grandparents had to go back to her mother, as the court believed that the mother would properly take care of the child.¹²¹¹ The Commission was of the opinion that the adjustment of our law by way of legislation is necessary.¹²¹²

In *Horsford v De Jager*¹²¹³ young children lived with their aunt and uncle for five and a half years. Although the court realised that the children would experience a major emotional disturbance if they were placed in the care of their mother, the court granted the mother's application. The Commission also referred to the *Petersen* case, where the court said that there is a guideline that can be used in such matters, namely, that where the advantages that the child enjoyed at the foster parent¹²¹⁴ weigh more or less equally with those that the child would be able to enjoy with his natural parent and where there is an opinion that the transfer will not cause the child permanent psychological damage. The report

¹²⁰⁸ SALC Working Paper 62, Project 100 *The Granting of Visitation Rights to Grandparents of Minor Children* (1996) 6.

¹²⁰⁹ 1991 4 SA 113 (T). The court also referred to the case of *F v B* 1988 3 SA 948 (D) 950F–G where it was held that the court will not interfere with the parental authority of the mother of an illegitimate child except under exceptional circumstances. See also pars 3 4 2 and 3 4 3 above.

¹²¹⁰ 1947 4 SA 798 (A).

¹²¹¹ It must be remembered that this is an old case, which was decided at a time when parents' rights were emphasised instead of parental duties and the rights of the child were not at the forefront of South African law.

¹²¹² 23.

¹²¹³ 1959 2 SA 152 (N).

¹²¹⁴ In this instance.

also recognises the fact that although the court may exercise its authority as upper guardian¹²¹⁵ the court's powers are not unlimited and that the court cannot intervene just because its opinion differs from that of the parent.¹²¹⁶ In exercising its authority as upper guardian the court may deprive parents of parental powers and vest them in the other parent or even a third party.¹²¹⁷ The Commission concluded¹²¹⁸ that a grandparent could apply to the court for an order granting access to him or her, in terms of existing law. However, the Commission was afraid that different courts would, due to uncertainty, give different judgments and that this would in turn leave the question of access of grandparents in uncertainty.

Concept legislation was drawn up¹²¹⁹ which states:¹²²⁰

“(1) If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to the court for an order granting him or her access to the child and

¹²¹⁵ See the discussion of the High Court as upper guardian in par 3 6 below.

¹²¹⁶ *S v L* 1992 3 SA 713 (E).

¹²¹⁷ *Short v Naisby* 1955 3 SA 572 (D) and *Wehmeyer v Nel* 1976 4 SA 966 (W).

¹²¹⁸ 9. A discussion of the comparative study performed by the Commission is discussed in ch 5 below.

¹²¹⁹ Project 100: *Access to Minor Children by Interested Persons* (June 1996). The Commission was concerned about the fact that often both parents work and thus the child is in the care of another person and a special relationship could develop between the two parties, and that a change in circumstances may require that visitation rights to the child be granted to such third party. The fact that there are extended families and that a stepparent may need to be granted access to stepchildren in the case of death or divorce of his spouse, was also a cause for concern. The Commission also mentioned that in the case of adoption an order for access may need to be granted to a person with whom the child has a special relationship. The Commission also recommended that such applications be heard by the Family Court, in order to save expenses, although they would have to be heard in the High Court (then called Supreme Court) until the Family Court is established, and that the Family Advocate should be used to make any investigation into these matters it deems necessary: 20–21.

¹²²⁰ In art 2.

the court may grant the application on such conditions as the court thinks fit.

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

The court may only make such order if it is in the best interests of the child.¹²²¹ The court may refer any such applications to the Family Advocate for investigation and recommendations.¹²²²

Labuschagne and Van der Linde¹²²³ are of the opinion that this proposed legislation is insufficient due to its limited nature. They state that article 8 of the European Convention on Human Rights gives the right to everyone to have respect for their family life, including the minor, but according to the proposed legislation only a grandparent or other third party would be able to bring such an application. They also argue that article 2(2) of the proposed legislation states

¹²²¹ Art 2(3).

¹²²² As referred to in s 1 of the Mediation in Certain Divorce Matters Act 24 of 1987. It was also recommended that s 4(3) of the Mediation in Certain Divorce Matters Act will apply to proceedings concerning the application by grandparents or other interested persons. A comparative study was also made. Comparative law is discussed in ch 5 below. Cronjé and Heaton 168 stipulate that if the court is convinced that it is in the child's best interests, it may award custody to a grandparent or even a sibling or stepparent. The court does this in its capacity as upper guardian of all minors. See also Labuschagne and Van der Linde "Sosiale Toegangsreg van Grootouer en Kleinkind" *Stell LR* 2002 415.

¹²²³ 2002 *Stell LR* 433.

that third parties must show that there is a particular family tie or relationship between them and the child, whereas grandparents do not need to prove this. The authors propose that the existence of a family life, although this would differ from the family life between a parent and child, would provide an important guideline in determining what is in the best interests of the child.¹²²⁴

The authors point out that, in modern society, contact between grandparents and grandchildren can be problematic. Parents are, in the first instance, responsible for the care and education of their children and where there is conflict, the wishes of the parents should enjoy priority. However, this parental right is not absolute and it is subject to the best interests of the child.¹²²⁵ The authors also propose that the concept legislation, with amendment, be implemented so that the grandparent as well as the grandchild would have the right to apply for access.¹²²⁶ In 2001 the South African Law Commission performed a further investigation into the granting of parental responsibilities to third parties.¹²²⁷ The recommendations were that children would also be able to approach such a forum and that the best interests of the child are the most important factor that must be considered by the court. In determining what the best interests of the child are, the factors which the court will look at include the relationship between the applicant, the child, and the father or mother of the child, as well as the

¹²²⁴ *Ibid.*

¹²²⁵ Labuschagne and Van der Linde 2002 *Stell LR* 434.

¹²²⁶ *Ibid.* The comparative law of the United States of America and the Netherlands, as discussed by Labuschagne and Van der Linde, will be dealt with in ch 5.

¹²²⁷ Project 110 *Review of the Child Care Act* (2001) 310. The summary is based on the discussion of Labuschagne and Van der Linde "Omgangsreg (Toegangsreg) van Siblings Onderling, Verwyderde Verwante en Sosiale Ouers met Minderjarige Kinders" 2003 *De Jure* 344, 369.

degree of commitment of the applicant towards the child. The third party does not have to have lived with the child.

In *Ngake v Mahahle*¹²²⁸ there was a matrimonial dispute between the child's parents and the child was placed in the care of his grandmother. The mother was unable to take care of the child herself. The father wanted custody of the child. The grandmother refused to hand over the child and relied on the practice of *phuthuma*.¹²²⁹ The court held that the practice of *phuthuma* could not be relevant as the parties were married according to civil law and had Western values.¹²³⁰ The court ordered the child to be placed in the care of his father.

In *Hlophe v Mahlalela*¹²³¹ a child had been residing with her grandparents for many years, even after her mother had died. The father applied for custody of the child. The grandparents said that there were emotional ties between them and their grandchild. They also said that a Swazi custom dictated that custody of children went to the father of the child unless no *lobolo* had been paid. In the matter at hand no *lobolo* had been paid and thus custody would vest in the

¹²²⁸ 1984 2 SA 216 (O); Pieterse 2000 *Stell LR* 336.

¹²²⁹ Where a wife and her children can return to her parents where there is a marital dispute. They then only return on payment of a fine. Pieterse 2000 *Stell LR* 336; Olivier *et al Indigenous Law* (1995) 71.

¹²³⁰ See also Pieterse 2000 *Stell LR* 331 where he explains that often African families have a mixed value system, containing elements of both Western and African culture and that our civil law system does not cater for the needs of the African family. It can be argued that the court's view, that because the parents were married in terms of civil law they had embraced solely Western customs, is incorrect. Many African couples marry in terms of civil law, yet still remain true to their traditional culture and values.

¹²³¹ 1998 1 SA 449 (T).

maternal family. The court refused to take notice of the custom and said that the customary law had been excluded in favour of the best interests of the child.¹²³²

When the court looked at the best interests of the child, the court placed emphasis¹²³³ on the fact that the father was a Christian and wanted to raise the child as a Christian, whereas her grandparents wanted to raise her according to traditional African values. Custody was granted to the father but the

¹²³² 458E–459G. Knoetze “Custody of a Black Child: *Hlophe v Mahlalela* 1998 1 SA 449 (T)” 1999 *Obiter* 207, 208, 211, “The Role of Custom in the Interpretation of the Child’s ‘Best Interests’ Principle” 2002 *Obiter* 348. Other cases in which best interests of the child were applied in a customary law situation are (this summary is based on that given by Knoetze 2002 *Obiter* 349) *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk): a woman had adopted a child according to customary procedure and the court held that the duty to support the child was an enforceable duty and that it was derived from customary law. *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T): a child born from his mother’s previous relationship was entitled to damages for loss of support when his mother’s husband died, as the man had paid *lobolo* for the child’s mother, and thus “acquired” the child. The court said that customary law was applicable in terms of s 1(1) of the Law of Evidence Amendment Act 45 of 1988. In *Mthembu v Letsela* 2000 3 SA 867 (SCA) the court said that the male primogeniture laws of customary intestate succession did not unfairly discriminate on the basis of sex or gender. The court did not use the opportunity to develop customary law and did not enquire as to whether the customary law discriminated on the basis of illegitimacy. The court also felt that the rule could best be developed by the Legislature. *Mabena v Letsoalo* 1998 2 SA 1068 (T): the girl’s mother had negotiated for and received *lobolo* for her daughter. The court said that it had to recognise the principle of living, actually observed law, as this would constitute a development of the law which is in line with the spirit, purport and object of the Bill of Rights. *Metiso v Padongelukfonds* 2001 3 SA 1142 (T): a child was adopted in terms of customary procedure, but the child’s mother was not notified. The court decided that the adoption was valid and it would be against the best interests of the child to decide that the adoption was invalid because the mother’s family had not been notified. The court also said that the duty to maintain the child rested in the adoption of the child and that the adoption should be accepted as it was in the best interests of the child, thus the defendant was held liable for loss of maintenance claimed by the child. For an in-depth discussion of custody issues and customary law, see Bekker “Children and Young Persons in Indigenous Law” in Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 185; Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116. The fact that the patrilineal home should be recognised is stressed (125) as well as the fact that “... a mother should not be denied custody merely because the accommodation that she has to offer is ‘inadequate’. Refusal to award her custody merely for that reason would be cruel – a form of punishment for being poor.”

¹²³³ Pieterse 2000 *Stell LR* 337 refers to this emphasis as “undue”.

grandparents were given reasonable access to the child, due to the close relationship which she had developed with them.¹²³⁴

In the case of *P v P*¹²³⁵ the court assigned custody and guardianship to the aunt and uncle of a ten-year-old girl.¹²³⁶ The court pointed out that guardianship and custody should not be seen as a right of the parents but rather as a duty which they have and section 28(2) of the South African Constitution stipulates that the exercise of this duty must be performed in the best interests of the child.¹²³⁷ Labushagne and Van der Linde¹²³⁸ submit that due to the approach followed by the court in this case an aunt and uncle would also be able to be granted access to a child, when they are in a special relationship with the child. However, they caution that strong criteria must be put in place to determine the circumstances based upon which a strong personal bond between a child and a third party can be established.¹²³⁹ The authors conclude that:

“indien ‘n omgangsreg met ander persone as juridiese ouers die beste belang van die kind dien, moet selfs die ouerlike gesagsregte daarby aangepas

¹²³⁴ 462A–E. Knoetze (*Obiter* 2002 352), states that although the court was correct in applying the best interests of the child standard, it seems that the court approached the test only from a Eurocentric perspective and did not allow the test cultural flexibility. See also Bonthuys “Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity” 2002 *SAJHR* 41, 57.

¹²³⁵ 2002 6 SA 105 (N).

¹²³⁶ The child had lived with her aunt and uncle for a period of 4 years after the child’s mother had said that she was unable to care for the child. The aunt and uncle wished to go to the United States of America for 4 years, for employment reasons. The parents of the child had indicated that they were afraid that this would have a negative influence on the parent-child relationship. The court indicated that it would not be in the interests of the child to place the child in the custody of her parents. Custody and guardianship of the child were assigned to the aunt and uncle for as long as they were in the United States of America.

¹²³⁷ 108.

¹²³⁸ 2003 *De Jure* 370.

¹²³⁹ *Ibid.*

word. Die beste belang van die kind sal feitlik deurgaans veronderstel dat daar vir 'n wesenlike tydperk 'n interaksieverhouding tussen die kind en die betrokke persoon bestaan het. In geval van twyfel of onduidelikheid behoort, as algemene reël, aan ouerlike gesagsregte en vryhede prioriteit gegee te word".¹²⁴⁰

Pieterse¹²⁴¹ states that overemphasis is placed on biological relationships instead of social ones¹²⁴² and that:

“[p]lacing such a strong emphasis on genetic ties ignores the social reality within which the majority of modern families function and devalues the role played by primary caregivers. The best interests criterium should

¹²⁴⁰ 2003 *De Jure* 371. The authors also deal with German; American and Netherland's law.

¹²⁴¹ 2000 *Stell LR* 331 and 337.

¹²⁴² For example, in *Bethell v Bland* the biological father was awarded custody of his child instead of any of the primary caretakers. The father was favoured over any “outsiders” due to his biological relationship with the child: 209G–H. Pieterse 2000 *Stell LR* 331 states that giving custody to the father was the least obvious choice in this instance and that the grandparents would probably remain the child’s caretakers in practice. See also Bonthuys 1997 *SAJHR* 628 who states that the overriding reason for preferring the father to the grandparents appears to be the father’s biological relationship with the child. In *Chodree v Vally* access was awarded to the father of a child born from a Muslim marriage although the child did not know the father and there had been no contact between the father and child for 4 years. The court said that the “father has a preferential position as against non-parents when the grant of access is considered. The biological relationship and genetic factors must favour him as a provider of love and other emotional support”: 35A. This indicates that it is considered as a natural paternal function to have strong emotional ties with one’s child: Bonthuys 1997 *SAJHR* 628. In *Ex parte Critchfield* at 145E the court granted access to not only the mother of the children, but also provided for access by the great-grandmother on the mother’s side. Van Schalkwyk 2000 *THRHR* 299–300: “Hieruit lyk dit myns insiens dat toegangsregte nie alleen daar is om die (uitgebreide) familiebetrekkings te handhaaf nie, maar ook om dit te koester.” The parties were also allowed to make amendments to the access and maintenance arrangements by means of a signed agreement between the parties. According to Van Schalkwyk at 300–301 the parties will not be able to change the access order themselves and any change would have to be made an order of court.

accommodate primarily concerns about the welfare of the child, or rather, should attach more priority to such concerns than it does to mere genetics”.¹²⁴³

In the matter of *Townsend-Turner v Morrow*¹²⁴⁴ the facts were that the grandparents of a child applied for access to their grandchild. They were at first granted interim access. The first applicant (grandparent) alleged that the respondent (father of the child) did not comply with the interim order.¹²⁴⁵ The Family Advocate and a clinical psychologist reported to the court¹²⁴⁶. The Family Advocate and the respondent had submitted that access should not be granted.

The court found that there is currently nothing to be found in South African common law which indicates that anyone has the “right” of access to a minor child, other than the parents of children born of a marriage.¹²⁴⁷ The court also looked at the access rights of unmarried fathers and stated that the Legislature has not granted an unmarried father an inherent right of access, but only the right to apply to court for such right.¹²⁴⁸ The court also specified that the powers of the

¹²⁴³ 338. He also emphasises that custody must be granted to the primary caretaker of a child, even if that caretaker is a member of the extended family or an outsider: 340.

¹²⁴⁴ 2004 2 SA 32 (C). In the case of *Price v United Kingdom* app no 12402/86 DR 55 244 it was held that deciding who has access to a child usually falls within the discretion of the parents of the child, and when a child is placed in care that it cannot be expected of the State to consult with or take the grandparents into consideration to the same extent to which they must consult with the parents of the children. See also Van der Linde (LLD thesis 2001) 293.

¹²⁴⁵ The child’s mother was deceased.

¹²⁴⁶ For a discussion of criteria used by family counsellors in private practice and at the office of the Family Advocate, see Africa, Dawes, Swartz and Brandt “Criteria used by Family Counsellors in Child Custody Cases: a Psychological Viewpoint” in Burman (2003) *The Fate of the Child: Legal Decisions on Children in the New South Africa* 122–144.

¹²⁴⁷ 41C–D.

¹²⁴⁸ 41.

High Court as upper guardian of minor children are not unlimited¹²⁴⁹ and that the court may not interfere with a decision made by the guardian of a child merely because the court disagrees with that decision.¹²⁵⁰

The court also recognised that “any intervention in a family may have unsettling effects on the dynamics of that family, and this may in turn affect the welfare and interests of the child”.¹²⁵¹ The court also held that “a court must exercise circumspection before intervening”.¹²⁵² The fact that there is growing recognition of the importance of the role that grandparents play in the development of a child is acknowledged by the court.¹²⁵³

The fact that other jurisdictions did not favour non-parents having inherent rights of access but rather allowed such persons to have *locus standi* to apply for such rights and the fact that legislation has increasingly been promulgated in this regard, is mentioned by the court. Of specific importance is that few of these “have gone so far as to allow grandparents an inherent right of access”¹²⁵⁴ but that “[i]n all jurisdictions the best interests and welfare of the child is of paramount importance”.¹²⁵⁵ The court also stresses the fact that:

“[w]hat emerges, too, is that courts in foreign jurisdictions will generally not allow access by a grandparent where there is conflict between the grandparents

¹²⁴⁹ The court here referred to *S v L* 1992 3 SA 713 (E) 721.

¹²⁵⁰ 42H.

¹²⁵¹ 43A.

¹²⁵² 43B.

¹²⁵³ 43E.

¹²⁵⁴ 43F.

¹²⁵⁵ *Ibid.*

and parents of the minor child, as such conflict would seldom be in the child's best interests."¹²⁵⁶

This reason seems to have influenced the court's decision in this matter.

The court also looked at the recommendations made by the South African Law Commission's Report.¹²⁵⁷ The matter of *B v S* was dealt with after the publication of the Report, and although it deals with the access rights of a father to his illegitimate child, the effect is that any interested third party may approach the court for access to a child, if such access is in the interests of the child.¹²⁵⁸ The court concluded that due to the conflict within the family¹²⁵⁹ and, despite the fact that the child's "attitude towards his grandmother [was] a positive one"¹²⁶⁰ and that "the [grandmother] forms and integral and important part of [the minor's] life,

¹²⁵⁶ 43G. The fact that the law regulating access by grandparents is in a "state of flux" is also mentioned by the court. The *Oxford Dictionary* 473 defines the term flux as: "continuous change or succession of changes, unsettled state".

¹²⁵⁷ As it was then called 43H–J. These recommendations were: "(a) if a grandparent of a minor child is denied access to the child by the person who has parental authority over that child, such grandparent may apply to the court for an order granting him or her access to the child and the court may grant the application as the court may think fit; (b) the court shall not grant access to a minor child unless it is satisfied that it is in the best interests of the minor child; and (c) the Family Advocate be involved in such cases. The Commission held the opinion that the current common law position, in terms of which parents have the exclusive right to decide to whom and under what circumstances to grant access rights or visitation rights, does not, in all cases, meet the current needs of society and that the adjustment of our law by way of legislation regarding this matter is necessary."

¹²⁵⁸ 45A–B: These parties do not have an inherent right of access. At that time the father of an illegitimate child was in a position no different to that of any other third party wanting access to the child.

¹²⁵⁹ The child is the only grandchild of the applicant. The child's mother is deceased. There were allegations of invasion of privacy in the home of the child's father: 45B. There was a strained relationship between the grandmother and the child's father due to disputes regarding a family trust: 45C. There were allegations of intrusion into the private and business affairs of the child's father by the grandmother: 45F. The grandmother slapped the child's father at his business premises: 45G. There were allegations of inappropriate remarks made to the child when the grandmother had access to him: 46A. The grandmother had called the child when she was not supposed to and had thrown sweets over a wall for the nanny to give to the child: 46B–D.

¹²⁶⁰ 46G.

that [the minor] likes to visit his grandmother who fulfils the role of a fun and ‘activity’ partner and that [the minor] experiences warmth and emotional affection from her”,¹²⁶¹ it would not be in the child's interest to allow the applicant access to him.¹²⁶² The court dismissed the application for access.¹²⁶³ The parties were

¹²⁶¹ *Ibid.*

¹²⁶² 48G–H: “and so to place him in the middle of a situation which will confuse him and lead him to feel guilt and divided loyalties.” The minor’s “relationship with his grandmother is less of a problem to him than the ongoing fights in the family. This is a typical situation where [the minor] had been caught in the middle” and children of the minor’s age “often feel responsible for the conflicts of their family members”: 45G. The view was held that the “conflicts in the family were those of the adults and that the parties should take every step to resolve the conflict between them” and that the minor was suffering as a result of these conflicts: 47A. Dr Bredenkamp recommended that the grandmother stop interfering in the respondent’s domestic and business life and that she stop conversing about the child’s deceased mother. The grandmother was found to be “compulsive, narcissistic, schizoid and aggressive” and “an intrusive person who ‘can consume one’s life and invade one’s private space’”: 47B–C. The court also states that the grandmother “does not fully appreciate what is in the best interests of [the minor]. She is rather more concerned that her own needs be fulfilled”: 47G. The court states that “the ideal situation is that a normal relaxed access to his grandmother ... on a regular basis, at the instance of [the minor] or at the suggestion of [his father], should happen. This, clearly, cannot happen until first applicant takes responsibility for her role in the conflict and understands why respondent has refused her access to [the minor] in the past. Furthermore, there is pressing need for the adults to try to resolve their conflicts and to build up an atmosphere of tolerance towards each other and respect for each other’s points of view”: 48A. The court clearly stated that the grandmother must show respect for the decisions made by the child’s father and she must not interfere with the respondent’s family and work life. She must accept that her role in the child’s life “is ancillary to that of his nuclear family” and she must behave towards the minor in a way that is appropriate to the minor’s age: 48A–F. The court also held that the “abnormality of judicially-sanctioned, enforced visitation has been shown not to be desirable in this matter”: 48H and that any relationship between the child and the grandparents should be allowed to develop “spontaneously and in an atmosphere of accord between the parties” and that spontaneous contact should be encouraged but only “when the relations between the adults have mended to the extent that contact might take place in a manner that would benefit [the minor]”: 48I.

¹²⁶³ 48J. Another recent case dealt with the obligation on paternal grandparents to support their extra-marital grandchildren to the same extent that maternal grandparents have to. Here the court found that the common-law position that paternal grandparents do not have to support such grandchildren was unfair discrimination on the ground of birth as well as an infringement of such children’s dignity and not in the interests of extra-marital children. Thus the court imposed a legal duty on paternal grandparents of extra-marital grandchildren to support such grandchildren. This judgment did not, however, deal with the matter of access or custody between paternal grandparents and extra-marital grandchildren (67G): *Petersen v Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (C). The decision in this case has been criticised, as the doctrine of *stare decisis* was not followed: Tshiki “Precedent, *stare decisis* and the Constitution: Does S 173 Read with S 39(2) of the Constitution Exclude the Operation of the Doctrine of *Stare Decisis*?” October 2004 *De Rebus* 55–56. Davel (“*Petersen v Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (K) Onderhoudsverpligting Van Grootouers Aan Vaderskant Ten Opsigte Van Buite-Egtelike Kleinkind – Herontdekking Van Gemeenereg of Grondwetlike Hervorming?” 2004 *De Jure* 381) emphatically states that this decision is welcome and “is nog ‘n tree in die

also ordered to attend mediation in order to resolve the conflict between them and, if the issues of conflict have been resolved, to attempt to mediate the issue of access.¹²⁶⁴

This case demonstrates how often a child is caught up in the conflicts of adults. Although the grandmother played an important part in the life of the child and, all things being equal, access would have been in the best interest of the child, the

moeisame proses om met diskriminasie teen buite-egtelike kinders weg te doen” (381). Davel also analyses the decision of the court and emphasises that the court did not bind itself to the decision of *Motan v Joosub* 1930 AD 61 but stated that article 173 of the South African Constitution gives the court the inherent ability to develop the common law in the interests of justice (384–385). Davel is also of the opinion that “[b]uite-egtelike kinders word deur die hof as ‘n besondere kwesbare groep beskou wie se regte nougeset beskerm behoort te word” (386). This principle of non-discrimination on the basis of birth is not only constitutional but also protected in international law, such as art 2 of the CRC and art 3 of the ACRWC. Davel here identifies a key aspect which underlies the court’s decision. Namely, that the reason for the decision reached by the court is due to the then current legal situation being unconstitutional. Davel (387) also states that the decision reached in the *Petersen* case appears to fall within the confines stated in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), that “[t]he Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”. It is submitted that this opinion is correct. Davel (387) concludes that “[r]egsonwikkeling het gevolglik die stadium bereik waar erken word dat die Grondwet ‘n radikale invloed op onderhoudsverpligtings het. In die lig van die wetgewer se slakkegang is ons skynbaar op regterlike waagmoed aangewese.” Cronjé and Heaton *Casebook on South African Family Law* (2004) 466 state that the decision in the *Petersen* case to extend the duty of maintenance to paternal grandparents of a child born out of wedlock is most welcome. However, they stress that it is still not clear whether the child is obliged to support his or her father or paternal grandparents. (Davel 387 also states this). The view that the father cannot claim maintenance is based on the mistaken belief that the father of a child born out of wedlock is not related to the child. Cronjé and Heaton state that the father does not lack a relationship to the child but parental authority and denying such father maintenance from his child is unconstitutional. See also Cronjé and Heaton *South African Family Law* 2004 295–296 and Van Heerden in Van Heerden *et al* (eds) *Boberg’s Law of Persons and the Family* 422.

¹²⁶⁴ If after 4 sessions or 4 months, whichever comes first, the mediation cannot be resolved then the mediators must file a certificate with the office of the Family Advocate stating this: 55A–E. In *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) where the parties sought a custody order after divorce, the court ordered the parties to privately mediate any disputes that may arise in the future concerning their 10-year-old daughter and that the parties would only be allowed to approach the court after such mediation had taken place. De Jong “Judicial Stamp of Approval for Divorce and Family Mediation in South Africa” 2005 *THRHR* 95: “In delivering this decision the court effectively subjected the parties to mandatory family mediation”. In *G v G* 2003 5 SA 396 (ZH) 412D–E the court found that there was greater satisfaction amongst both parents and children where mediation had been used instead of the traditional adversarial approach.

conflict between the child's grandmother and father resulted in the child being unable to exercise his right to access.¹²⁶⁵ This was due to the adult's conflict and the court deciding that access under such circumstances would not be in the child's best interests as the child would feel as if he was being torn between the two parties. The court had a difficult decision to make and the fact that, although access was not allowed, mediation was ordered must be applauded. However, it is submitted that the court could have allowed some measure of access, even if supervised at the offices of a psychologist, in order that some form of relationship be maintained between the child and his grandmother until such time as the mediation is complete.

Article 8 of the European Convention on Human Rights states that:

- “(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

¹²⁶⁵ Pieterse 2000 *Stell LR* 341 proposes “that third party parenting rights should not be seen as the rights of children, but rather as the rights of adults, the exercise of which serve to further the interests of the child. This would not only mirror the reality that children cannot legally enforce rights to be nurtured against adults, but also acknowledges that parental rights go hand in hand with certain duties.” Parental rights do indeed go hand in hand with parental duties; however, it is submitted that it is not advisable to only regard access being a right of an adult and not of a child. Children can indeed enforce rights against adults, although there is a difficulty regarding accessibility of the legal process to children, some centres are now focused on promoting and enforcing the rights of children, and assisting children in this regard. Pieterse says that children “cannot legally enforce the right to be nurtured against adults”. The term “nurture” (*Oxford Dictionary* 846) means “to care for and educate (a child)”. A child has a right to be cared for by his or her parents or family and will be able to enforce such right. In the case of *Jooste v Botha* the court held that a child cannot force a parent to provide love or affection. Nurturing is not necessarily love, but it is physical care for someone, which falls within the traditional concept of custody. For a discussion of *Jooste v Botha*, as well as an examination of the criticism of this case, see par 3 1 1 2 above.

a democratic society in the interests of national security, public safety or the economic wellbeing 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.”

Labuschagne¹²⁶⁶ says that a better position for grandparents can result from the interpretation of the term “family life” in section 8 of the European Convention on Human Rights.¹²⁶⁷ In South Africa children grow up in many different family environments and the role of parent may be filled by a variety of people. This reality must be taken into consideration when determining the best interests of a child when awarding access to a third party.¹²⁶⁸

3 4 5 Orders the court can make

In many custody or access disputes the innocent victims of marital discord are the children.¹²⁶⁹ It is important to the well-being of a child that he or she has access to both parents, unless this is not in the best interests of the

¹²⁶⁶ “Hoge Raad 25 Junie 1993, NJ 1993, 628: Omgangsreg van Grootmoeder met Kleinkind” 1994 *De Jure* 422 425. From the *Hoge Raad* case it appears that that a grandparent can get a right of access to a grandchild in the Netherlands. Labuschagne (425) also states that rights and duties already exist in South Africa between grandparents and grandchildren, for example in the case of maintenance and succession. He also mentions that in some black tribes in South Africa a child born out of wedlock “belongs” to the father or guardian of the mother, who maintains the child and is entitled to *lobolo* for the child in the case of a girl.

¹²⁶⁷ See further the discussion of the right to family life and international documents in par 3 1 1 4 2 above.

¹²⁶⁸ Pieterse 2000 *Stell LR* 331.

¹²⁶⁹ *Richies v Richies* 1981 1 PH B4 (C): “regrettably children wounded by the marital conflict lose their objectivity and use, as very effective clubs with which to beat the foe, the objects both profess to love more than life itself: their children, who suffer further trauma in the process.”

child.¹²⁷⁰ When granting a decree of divorce a court can make any order it deems fit regarding access to a child of the marriage.¹²⁷¹ The court acts as upper guardian of the child.¹²⁷² The Domestic Violence Act¹²⁷³ empowers a Magistrate's Court to make orders regarding the access to a minor child where the parties are involved in a dispute about access. This section is meant to

¹²⁷⁰ *Landmann v Mienie* 1944 OPD 59, 62: "When a marriage is dissolved, a triangular conflict of interests arises: the minor children are entitled to proper maintenance and education and to the guidance and society of their parents. As the home has been broken up and the parents are now at arm's length, and as the child is indivisible, some adjustment must be made in this respect. Similarly, each parent has a natural right to the society of his children; since they cannot both exercise this right, the matter calls for adjustment on the most equitable grounds."

¹²⁷¹ S 6(3) of the Divorce Act 70 of 1979. S 5 of the Matrimonial Affairs Act 37 of 1953 states that any provincial or local division of the High Court has the same power where a child's parents are divorced or living apart, upon application by either parent.

¹²⁷² *Shawzin v Laufer* 1968 4 SA 657 (A) 662; *Stock v Stock* 1981 3 SA 1280 (A) 1290C–D; *B v P* 1991 4 SA 113 (T) 116. In *Stock v Stock* 1290C–D it was said that: "the court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show a good cause, depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties."

¹²⁷³ 116 of 1998, s 7(6) stipulates that if any court is satisfied that it is in the best interests of any child, it may refuse a parent contact with a child or order that contact with such child must take place on conditions that it may consider appropriate. Clark (2002 *CILSA* 223) states that a non-custodian parent will only be deprived of access in exceptional circumstances and when this is in the best interests of the child. Access was denied to a father who was an alcoholic and used abusive language and threatened the child's mother with violence, in *Potgieter v Potgieter* 1943 CPD 462. In *Van den Berg v Van den Berg* 1959 4 SA 259 (W) access was denied to a father who had threatened and assaulted the mother and refused to return the ill child to the mother. In contrast, in the case of *Katzenellenbogen* the court found that although the father was abusive towards his wife he was devoted to the child. In *B v S* 1995 3 SA 571 (A) the court distinguished between violence to which the child's mother was subjected and "the general desirability of the father-child bond". Clark cautions that: "[t]he general assumption of the judgements appears to be that the violent and abusive treatment towards the mother will cease with divorce. The danger is that, where divorce is based on no-fault grounds, the existence of domestic violence may never emerge. The interests of children in this area appear to be inadequately considered in judicial decisions on custody, access and guardianship." It is submitted that Clark's view that the danger of family violence can "slip through" the court when a divorce is brought on the no-fault ground of irretrievable breakdown of marriage and the spouse instituting the divorce has tried to keep the issue of domestic violence out of the particulars of claim in the hope that the abusive spouse will then not oppose the action, so that the matter can be dealt with quickly as an unopposed divorce, is correct. In such a case the danger of potential family violence to children will also go unnoticed by our courts. It is further submitted that where a parent is abusive towards his or her spouse, while their child is residing with them, there is no evidence to suggest that such abusive behaviour will stop when the spouses are no longer residing together, or no longer married to each other. If one spouse is abusive towards the other spouse this is indicative of an abusive nature and the child ought to be protected in this instance, although the abuse was not directed at the child. For a discussion of domestic violence, see further Cronjé and Heaton *South African Family Law* 243–254.

address the lack of an express provision in other family violence legislation. It allows for the courts granting family violence interdicts to make ancillary orders relating to contact with minor children, and thus ensures that children at risk are protected from domestic violence as well as that the adult applicant's protection is not compromised by arrangements relating to contact between the respondent and the children living with the applicant. This purpose is a far cry from the interpretation of section 7(6) which empowers the Magistrate's Court to make a protection order which consists solely of an order granting access to a minor child or regulating the exercise of such access.¹²⁷⁴

Any order made concerning access, in terms of section 7(6), is ancillary to a protection order, as envisaged in section 7(1), and a stand-alone order regarding access does not fall within the ambit of the powers of the Magistrate's Court.¹²⁷⁵

According to section 6(3) of the Divorce Act¹²⁷⁶ a court granting a decree of divorce may make any order regarding access to a minor child of the marriage as it may deem fit. According to section 8 of the Divorce Act an order made in regard to the access to a child may at any time be rescinded, varied or suspended by a court if the court finds that there is sufficient reason to do so. If the Family Advocate institutes an enquiry¹²⁷⁷ then such an order regarding access shall not be varied, rescinded or suspended before the report and

¹²⁷⁴ <Butterworthslegalresources: <http://butterworths.up.ac.za/butterworthslegal/lpext.d11/CURRLAW.nfo/339/51a/531?...>> accessed on 2003-04-17 par Y2033. See also *Narodien v Andrews* 2002 3 SA 500 (C).

¹²⁷⁵ As found in s 7(1)(h).

¹²⁷⁶ 70 of 1979.

¹²⁷⁷ In terms of s 4(1)(b) or 2 (b) of the Mediation in Certain Divorce Matters Act.

recommendations of the Family Advocate have been considered by the court. A court, other than the court which made the order, may suspend, rescind or vary the order if the parties are domiciled in the area of jurisdiction of such court.¹²⁷⁸ An access order will be rescinded or varied if the court finds that there is sufficient reason therefore.¹²⁷⁹

According to the Matrimonial Affairs Act¹²⁸⁰ any division of the High Court may, on application of either parent of a minor whose parents are either living apart or divorced, make any order in regard to access which it may deem fit.¹²⁸¹

In the case of *Van Vuuren v Van Vuuren*¹²⁸² the court explained when the Family Advocate should investigate a matter in terms of section 4(1) or (2) of the Mediation in Certain Divorce Matters Act.¹²⁸³ Here Judge De Villiers said that it would not be in the interests of the children to stay with their father, over holidays and weekends, if the defendant's drinking habits were those as described by the plaintiff.¹²⁸⁴ The judge mentioned that the Family Advocate had written "Kennis Geneem"¹²⁸⁵ on the settlement agreement but the allegations in paragraph 6.2 of the plaintiff's particulars of claim were not taken into consideration by the Family

¹²⁷⁸ S 8(2): or if the applicant is domiciled in the area of jurisdiction of the court and the respondent consents to the jurisdiction of such court.

¹²⁷⁹ S 8 of the Divorce Act 70 of 1979; *Butterworths legal resources*: <<http://butterworthslegal/lpext.D11/LPLLib/FAMLWSER.nfo/abb/C70.db>> accessed on 2003-05-27 par E56. The court must be satisfied on a balance of probabilities that the order should be varied: *Manning v Manning* 1975 4 SA 659 (T) 661D–E.

¹²⁸⁰ 37 of 1953, s 5.

¹²⁸¹ S 5(1). S 5(2): If parents who were living apart became reconciled such order, made under subs (1), lapses from the date on which the parties started living together again.

¹²⁸² 1993 1 SA 163 (T). For the facts of this case see par 3 4 2 above.

¹²⁸³ 24 of 1987.

¹²⁸⁴ 165A.

¹²⁸⁵ Notice taken.

Advocate.¹²⁸⁶ On the form that the plaintiff had to fill in, in terms of the regulations of the Family Advocate,¹²⁸⁷ the plaintiff asked that her husband only be allowed reasonable access in their presence due to his serious drinking problem.¹²⁸⁸ However, in the prayers of the particulars of claim the defendant's right of access was not restricted.¹²⁸⁹

The judge also said that there was no letter on file from the Family Advocate warning the plaintiff's attorney to change the prayers of the particulars of claim.¹²⁹⁰ De Villiers J further said that parties and their legal representatives do not make enough use of section 4(1) of the Mediation in Certain Divorce Matters Act.¹²⁹¹ The judge also explained that if the parties themselves do not ask the Family Advocate to investigate a matter, the Family Advocate can ask the court for authorisation to undertake an investigation.¹²⁹² De Villiers J said that this should have occurred in the present case.

As a guide for the Family Advocate the judge also named certain other instances where the Family Advocate ought to approach the court for an order in terms of section 4(2).¹²⁹³

¹²⁸⁶ 165E: in this paragraph it was stipulated that the defendant drinks excessively and that he seriously assaulted the plaintiff on a number of occasions.

¹²⁸⁷ Reg 2.

¹²⁸⁸ 165G.

¹²⁸⁹ 165H.

¹²⁹⁰ *Ibid.*

¹²⁹¹ This section enables parties to request the Family Advocate to investigate and report on aspects concerning the welfare of children.

¹²⁹² 166D: in terms of s 4(2) of the Act.

¹²⁹³ 166F.

These circumstances are:

- “(a) Waar dit blyk dat daar ‘n voorneme is om jong kinders nie onder die beheer en toesig van hulle moeder te plaas nie;
- (b) waar daar ‘n voorneme is om kinders van mekaar te skei deur beheer en toesig van sê een van die kinders aan een ouer en die ander aan ‘n ander ouer te wys;
- (c) waar daar ‘n voorneme is dat die beheer en toesig van ‘n kind aan iemand anders as sy ouers toegewys word;
- (d) waar daar ‘n voorneme is om ‘n reëling te tref ten opsigte van beheer en toesig of toegang wat *prima facie* nie in belang van die kind is nie.”¹²⁹⁴

The court must, of course, still determine whether an investigation must be authorised every time such a matter is placed before it.¹²⁹⁵ The report and suggestions of the Family Advocate enable the court to decide whether a settlement agreement is in the interests of the children or not.¹²⁹⁶

When a child is placed in the custody of another person,¹²⁹⁷ this does not divest the non-custodian parent of the right of reasonable access to such child¹²⁹⁸ and

¹²⁹⁴ 166G.

¹²⁹⁵ 166H.

¹²⁹⁶ 167B. In this case the matter was referred to the Family Advocate to decide whether the access arrangements contained in the settlement agreement were in the interests of the children.

¹²⁹⁷ Under s 31(1) of the Children’s Act 33 of 1960.

¹²⁹⁸ le s 59 does not divest the non-custodian of this right; *Van Schoor v Van Schoor* 1976 2 SA 600 (A).

thus an order of the Children's Court, under section 31(1) is no bar to a High Court action by the non-custodian parent for reasonable access.¹²⁹⁹

What happens when a custodian parent does not obey the order of court and refuses to allow the non-custodian access?¹³⁰⁰ The General Law Further Amendment Act¹³⁰¹ provides as follows:

“[a]ny parent having custody, whether sole custody or not, of his or her minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent access to such child or prevents such other parent from having such access, shall be 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.”¹³⁰²

Singh¹³⁰³ deals with case law that dealt with the issue of the custodian parent not allowing the non-custodian parent to exercise his right to access. In the matter of

¹²⁹⁹ *Van Schoor v Van Schoor*. Soni (The Right of Reasonable Access by a Non-Custodian Parent) 1976 *SALJ* 383 described this case as “refreshing” as the basic common-law rights of non-custodian parents have not been obliterated by legislation. In this case it was held that the non-custodian has a right of reasonable access to his or her child.

¹³⁰⁰ For a discussion of abduction, see Van der Linde en Labuschagne “Strafregtelike Aanspreeklikeheid Weens die Skending van ‘n Omgangsreg van ‘n Ouer met sy/haar Kind deur die Ander Ouer” 2001 *Obiter* 153, 157–159.

¹³⁰¹ 93 of 1963.

¹³⁰² S 1(1). Another remedy is to apply for committal of contempt or to request the court to reverse the custody order in the favour of the non-custodian parent. Hole (The Law Must Change to Protect Non-Custodian Parent and their Children) <http://www.derebus.org.za/scripts/derebus_s.pl?ID=471&index=200010_articles&hi> accessed on 2003-05-21 points out that this section cannot be used by a parent who is separated without divorce, and that such a parent must first obtain an order regulating access before such access can be enforced. Hole proposes that s 1(1) of the Act should be extended to include such parents.

¹³⁰³ 1996 *SALJ* 178–181.

*Oppel v Oppel*¹³⁰⁴ a custodian mother was sentenced to imprisonment for three weeks as she refused to allow the father to exercise his right of access. Her sentence was suspended on condition that she complies with the earlier order of the court defining access. In *Germani v Herf*¹³⁰⁵ the custodian mother, who had not handed over their daughter to the father, was sentenced to six weeks imprisonment for contempt of earlier court orders but this was suspended on condition that she comply with the orders of court and enable the father to exercise his rights of access. In *Evans v Evans*¹³⁰⁶ the respondent had not attended certain sessions with a psychiatrist, which had been an order by the court. The applicant wanted the respondent to be committed for contempt. The court held that it was premature and inappropriate to send the respondent to jail but did find the respondent to be in contempt of the previous order of court and ruled that a fresh order be made which, if broken, would result in a penal sanction. The court also ordered the respondent to pay the cost of the application.

In *S v Amas*¹³⁰⁷ the custodian parent failed to grant her former husband access to the children. She claimed that section 1(1) of the General Law Further Amendment Act¹³⁰⁸ did not apply to her as she had not been given sole custody of the children. The court decided that the section did not apply in the case at hand. The General Law Further Amendment Act was later amended so that

¹³⁰⁴ 1973 3 SA 675 (T).

¹³⁰⁵ 1975 4 SA 887 (A).

¹³⁰⁶ 1982 1 SA 370 (W).

¹³⁰⁷ 1995 2 SACR 735 (N).

¹³⁰⁸ 93 of 1963.

section 1(1) applies both in the case of parents that have sole custody as well as those who do not.

In *Laubscher v Laubscher*¹³⁰⁹ the respondent had denied the applicant telephonic access to the children while the respondent was absent from South Africa. The applicant held that he was entitled to a civil contempt order. The applicant had discharged his evidentiary burden and the respondent had failed to rebut the presumptions of *mala fides* and willfulness. The respondent was declared to be in contempt of court and committed to prison for thirty days, suspended for one year or until the final order of divorce, on condition that she adhered to the court order. Our courts clearly have the power to enforce access.

In the case of *Van den Berg v Van den Berg*¹³¹⁰ it was stated that the court has the power to deprive a divorced person of all rights of access to his child in a special case if such an order would be to the benefit of the child.¹³¹¹ This is in line with section 28(2) of the South African Constitution.

3 5 THE BEST INTERESTS OF THE CHILD STANDARD

3 5 1 Introduction

¹³⁰⁹ 2004 4 All SA 95 (T).

¹³¹⁰ 1959 4 SA 259 (W).

¹³¹¹ 260C. In this instance the defendant had used his right of access to the child to break the plaintiff down and had threatened to kill the plaintiff.

In this section the best interests of the child standard will be discussed.¹³¹² Already in 1948¹³¹³ the South African courts decided that the best interest of the child was the main consideration where a custody order was made after divorce. Now the best interest of the child standard is used in every matter affecting the child.¹³¹⁴ The South African Constitution specifies that “[a] child’s best interests are of paramount importance in every matter concerning the child”.¹³¹⁵ The United Nations Convention on the Rights of the Child also states that “[i]n all actions concerning children ... the best interests of the child shall be a primary consideration”.¹³¹⁶ From these provisions it is clear that the best interests standard is entrenched in South African law. The common-law rule¹³¹⁷

¹³¹² Many of the cases that will be mentioned in this section have already been discussed above in pars 3 3 and 3 4. The purpose of using the cases in this section is to stress the importance of the best interests of the child standard in cases that deal with children, and specifically in cases dealing with guardianship, custody and access disputes.

¹³¹³ *Fletcher v Fletcher* 1948 1 SA 130 (A).

¹³¹⁴ Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid Afrikaanse Reg* (LLD thesis 1998 US) 1: the timeperiod between these two dates can be described as a new era in the developments in the parent-child relationship.

¹³¹⁵ S 28 (2) of Act 108 of 1996. *Smith v Smith* 1999 JOL 5397 (C) dealt with the Hague Convention on the abduction of children. The court held that it was intolerable for a child under one year to be parted from his or her mother and it would not be done. Here the mother refused to return to the UK with the children although she had agreed to do so after a two-month holiday. *LS v AT* 2001 2 BCLR 152 (CC) dealt with art 13 of the Hague Convention. Here the court found that the Hague Convention clearly recognised and safeguarded the paramountcy of the best interests of the child: Jazbhay *Recent Constitutional Cases* <http://www.derebus.org.za/scripts/derebus_spl?ID=4714&index=200104_lawrep&hit...> (April 2001) accessed on 2003-05-21.

¹³¹⁶ Art 3. See also the African Charter on the Rights and Welfare of the Child, art 4. These provisions were dealt with in par 3 1 1 1 above.

¹³¹⁷ See *Fletcher v Fletcher* 1948 1 SA 130 (A). Human (Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding) 2000 *THRHR* 393 unequivocally states that this case represents the first recognition of the child as a role-player in family matters upon divorce and that it was a milestone in the development of the law regulating the parent-child relationship in South Africa. She stresses (396) that, in the light of the historically paternalistic nature of the parent-child relationship in South Africa, the decision was very important for the timeperiod within which it occurred. In the case the best interests of the child were placed above common law considerations such as fatherhood or the guilt or innocence of spouses at divorce. It is submitted that Human was correct in her view that this case was a milestone in the development of South African law. For an historical overview of the concepts guardianship, custody and care, see ch 2.

has been constitutionalised.¹³¹⁸ In the *Fitzpatrick*¹³¹⁹ case it was said section 28(2) gives a right to children distinct from those mentioned in section 28(1). The best interests principle has also been incorporated in many international instruments, such as the Convention on the Rights of the Child.¹³²⁰

During the determination of access, custody or guardianship the best interests of the minor child will always be taken into account. Various provisions provide that the interests of the child must be considered at such determinations, for example at divorce.¹³²¹ From these provisions it is clear that the Family Advocate plays an important role in determining what is in the best interests of a child.¹³²²

¹³¹⁸ In s 28(2) of the South African Constitution. The child's best interest "has been described as 'a golden thread which runs throughout the whole fabric of our law relating to children': 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. S 21(7) of the Child Care Act affirms the paramount importance of the best interests of the child in adoption proceedings. For a discussion of adoption rights of natural fathers and the best interests of the children in such instances see, Louw "Adoption Rights of Natural Fathers with Reference to *T v C* 2003 2 SA 298 (W)" 2004 *THRHR* 102.

¹³¹⁹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC). The facts of this case are discussed in n 1332 below.

¹³²⁰ Due to the, previous, paternalistic approach to children's rights the best interests standard was not included in certain human rights instruments, eg the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The inclusion of the best interests standard is an indication that the participation rights of children have been incorporated into the instrument: Robinson 2002 *Stell LR* 315. Robinson also points out that the phrase "a paramount consideration", eg found in art 3 of the CRC, technically weakens the status of the best interests of the child. The term "primary consideration" is used in the African Charter on the Rights and Welfare of the Child and Robinson emphasises that State Parties may then be allowed to balance the best interests of the child against other primary considerations, such as economic considerations, where the phrase "a paramount consideration" occurs.

¹³²¹ See eg s 6(1) of the Divorce Act 70 of 1979, that was discussed above. See also Van Heerden, Cockrell and Keightley 514–516 and Van Zyl "A Watching Brief" April 2000 *De Rebus* 27. See also Robinson in Davel (ed) *Introduction to Child Law In South Africa* 69–71. "[T]he primary purpose of the office of the Family Advocate is to identify and establish what is in the best interests of the children": Van Heerden *et al* 522.

¹³²² Any recommendations of the Family Advocate are not binding on the court. The court is still upper guardian of minors and may decide for itself what is in the child's best interests: Van Heerden *et al* 520–521. The role of the court as upper guardian of minors is discussed in pars 3 2 4 and 3 3 4 and 3 6.

What is in the best interests of a particular child is a question that must be answered individually, according to the facts of each case. In the matter of *Van Deijl v Van Deijl*¹³²³ it was said that:

“[t]he interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes cannot be ignored”.

*Van Heerden et al*¹³²⁴ add that “a child’s need for a sense of stability, security and continuity” must also be considered. In *McCall v McCall*¹³²⁵ the court listed criteria which should be used to determine the best interests of a child, in a custody determination.¹³²⁶

¹³²³ 1966 4 SA 260 (R) 261H. See also Robinson in Davel (ed) *Introduction to Child Law In South Africa* 66–68 for a discussion of the role of the Family Advocate.

¹³²⁴ 527.

¹³²⁵ 1994 3 SA 201 (C) 204J–205G.

¹³²⁶ These were mentioned above in par 3 3, but are included in this footnote for ease of reference. The criteria are: (a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child; (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires; (c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of, and sensitivity to the child’s feelings; (d) the capacity and disposition of the parent to give the child the guidance which he requires; (e) 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; (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development; (h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*; (j) the desirability or otherwise of keeping siblings together; (k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration; (l) the desirability or otherwise of applying the doctrine of same-sex matching; (m) any other factor which is relevant to the particular case with which the court is concerned.

Hoffman and Pincus¹³²⁷ list fourteen aspects which they believe represent the most important things which the court should consider when placing children. These are:

- “1 The child’s cultural and religious environment.
- 2 The importance of the custodial parent being able to support the child and provide him with a home.
- 3 The morality of the custodial parent (values and belief systems).
- 4 The value of an adequate support-system (family, friends, interests and activities).
- 5 The importance of not subjecting the child to unnecessary moves.
- 6 The importance of a loving environment.
- 7 The importance of an on-going relationship between the mother and children who are still extremely young, particularly in the case of young girls.
- 8 The importance of not separating siblings.
- 9 The importance of not undermining the image a child has of either one or both parents.
- 10 The importance of a child knowing that there is only one parent who is responsible for the administration of its day to day activities.
- 11 The importance of the parent being a capable, stable and adequate personality.
- 12 The importance of considering the wishes of the older child.
- 13 The importance of effective discipline.

¹³²⁷ *The Law of Custody* 17–18.

- 14 The importance of the parent taking easily to advice and not frustrating access.“

According to Van Zyl¹³²⁸ there has been concern in recent years that “the adversarial divorce procedure does not adequately safeguard the best interests of the children ... [and] this has led to the introduction of family mediation in South Africa”. Whether the Family Advocate is practising mediation is questionable.¹³²⁹ There has been criticism that the best interests standard¹³³⁰ is “too broad and vague to provide a clear standard against which to test decisions”.¹³³¹ However, it has also been held that the best interests standard must remain flexible, to cater for the needs of specific children in specific circumstances.¹³³² Our courts have applied the best interests standard in various

¹³²⁸ “Family Mediation” in Davel (ed) *Introduction to Child Law in South Africa* 87. For a discussion of the impact that divorce has on children, see Davel (ed) 88–90 and see further 92–99.

¹³²⁹ Van Zyl in Davel (ed) *Introduction to Child Law in South Africa* 94–95. See also De Jong “Judicial Stamp of Approval for Divorce and Family Mediation in South Africa” 2005 *THRHR* 95, discussed in ch 4 par 4 4 8 See *contra* Davel in Nagel (ed) (2006) 23 who states that the office of the Family Advocate has three functions: to monitor all settlement agreements and court documentation in order to ensure that the agreements are *prima facie* in the best interests of the child, to mediate between the parties and to carry out evaluations and compile a report that sets out their findings and present this to the court. These functions could be somewhat contradictory: *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 606–610. The Family Advocate may also appear in court when requested to do so by the court or when he or she deems it to be in the child’s interest to do so: s 4(3) Mediation in Certain Divorce Matters Act 24 of 1987. See also *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 166 and Van Heerden *et al* *Boberg’s Law of Persons and the Family* (1999) 519. On the role of the Family Advocate, see further Van Zyl L “*Whitehead v Whitehead*: Fair Comment on the Family Advocate?” 1994 *De Rebus* 469–470; Burman and McLennan “Providing for Children? The Family Advocate and the Legal Profession” 1996 *Acta Juridica* 69–81; Burman, Derman and Swanepoel “Only for the Wealthy? Assessing the Future for Children of Divorce” 2000 *SAJHR* 535; Van Zyl “The Family Advocate: 10 Years Later” 2000 *Obiter* 372–389; Kassan “The Voice of the Child in Family Proceedings” 2003 *De Jure* 164–167; Glasser “Taking Children’s Rights Seriously” 2002 *De Jure* 223–235; Barratt “The Child’s Right to be Heard in Custody and Access Determinations” 2002 *THRHR* 556, 571–573.

¹³³⁰ Or rule or standard or right.

¹³³¹ Bekink and Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* 194.

¹³³² *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) par 18C; Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 194. In the

circumstances, even “where the decision ... was not itself about the welfare of the child”.¹³³³

Heaton¹³³⁴ specifies that “[w]hat is best for a specific child or for children in general cannot be determined with any degree of certainty”. For an answer to:

“what would be in the child’s best interests ... all options must be known ... all the possible outcomes of each option must be known ... the probabilities of each outcome occurring must be known and ... the value attached to each outcome must be known”.¹³³⁵

Heaton¹³³⁶ continues by saying that when making a decision regarding custody not all options are available, for example the children cannot remain with both parents in a common home; it is also not possible to know what the outcome of each option would be; it is not possible to access the probability of each outcome occurring.¹³³⁷ Heaton also identifies another problem regarding the standard of the best interests of the child, namely, the difficulty in deciding which factors

Fitzpatrick case a couple wished to return to their country together with their foster child, whom they wished to adopt. At the time s 18(4)(f) of the Child Care Act 74 of 1983 prohibited foreign citizens who did not qualify to become naturalised from adopting a child. The court held that due to the best interests of the child being paramount that the provisions of the Child Care Act were to be changed. See also Sloth-Nielsen 2002 *IJCR* 141–142.

¹³³³ Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 195. For example *Hlophe v Mahlalela* 1998 1 SA 449 (T); *Fraser v Naude* 1998 11 BCLR 1357 (CC); *Fitzpatrick* case; *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

¹³³⁴ “Some General Remarks on the Concept ‘Best Interests of the Child’” 1990 *THRHR* 95.

¹³³⁵ Heaton 1990 *THRHR* 95.

¹³³⁶ *Ibid.*

¹³³⁷ Thus “... the best interests of the child cannot be determined with absolute certainty but rather rests largely on speculation”: 96.

should be taken into account to determine the child's best interests and the weight that each should carry.¹³³⁸

Heaton specifies that it is

“impossible and undesirable to try to give a comprehensive definition of what should be understood under the concept ‘best interests of the child’, because the concept cannot have a fixed meaning and content that are valid for all communities and all circumstances.”¹³³⁹

Heaton concludes that the *boni mores* concept is also indeterminate yet not impossible to apply and that the best interests standard should always remain flexible.¹³⁴⁰

Van Zyl¹³⁴¹ regards the best interest principle as being indeterminate and she calls for identifying its meaning. According to her the main disadvantage of the standard is its vagueness.¹³⁴² Van Zyl also explores whether guidelines reduce

¹³³⁸ Heaton 1990 *THRHR* 96. However, the court in *McCall v McCall* provided some guidelines in this respect. Hoffmann and Pincus (18–53) also provide guidelines, these were dealt with above. Bonthuys (1997 *SAJHR* 637) cautions against using the best interests of the child to further the interests or protect the rights of parents. The importance of ensuring that it is indeed the best interests of the child that are being considered, and not that of the child's parents, cannot be stressed enough.

¹³³⁹ Heaton 1990 *THRHR* 98.

¹³⁴⁰ *Ibid.*

¹³⁴¹ Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 5.

¹³⁴² Van Zyl 8: “While past events may provide some guidance, the person having to make the decision is looking to what will be best for the child in the future, which can never be clear cut. In addition, each decision on the child's best interests is influenced by the decision-makers particular background and values. The case literature, while highlighting certain guidelines, is nevertheless of limited help because in each case different persons and different personal circumstances are involved ... [t]he inherent vagueness of the criterion

the vagueness of the standard¹³⁴³ and concludes that in order to reduce vagueness guidelines would have to be specific. However, each case differs and if guidelines are too specific they would not be appropriate in all cases.¹³⁴⁴ Van Zyl also stresses that legislators will need to think carefully before they lay down guidelines.¹³⁴⁵

Bonthuys¹³⁴⁶ cautions that “[t]he apparent impartiality of such a test obscures its value-laden character”. Although it would appear that the court need only hear the evidence of the parties and the various expert witnesses and then make an impartial decision, in reality this is not the case. The court must decide what factors will be in the best interests of the child and also what weight must be granted to each of these factors in a decision where the best interests of the child are determined.¹³⁴⁷ Thus, a judge must decide which conditions are to be

usually makes it difficult for parents or their legal advisers to predict the outcome of custody litigation, with the result that litigation is encouraged.”

¹³⁴³ Van Zyl 9–12. Human (Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding” 2000 *THRHR* 393, 396) emphasises that the standard of the best interests of the child has still not really contributed much to the fact that the child is not really recognised as a family member with individual interests. Human states that this is due to three factors. Firstly, the inherent vagueness of the best interests of the child standard which lends itself to the situation where people in positions of power over children decide for themselves what is in the best interests of a child and in so doing provide content to the term. Secondly, respect for parental authority and family autonomy contributes to the perception that parents are in the best position to determine what is in the best interests of their children in a family context. Lastly, the status of a child as a helpless and dependent person, who is too immature to make his or her own decisions, warrants decision making by adults, such as parents or the State. Human further accepts that the exercising of parental authority comprises a decision making process, or a weighing-up of interests of the parent and the child.

¹³⁴⁴ Van Zyl 12.

¹³⁴⁵ *Ibid.*

¹³⁴⁶ “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623.

¹³⁴⁷ Bonthuys 1997 *SAJHR* 623.

regarded as good and what is to be regarded as bad for children.¹³⁴⁸ Bonthuys also cautions that due to the elasticity of the best interest of the child standard it can be used to justify many, often contradictory, outcomes.¹³⁴⁹

Clark¹³⁵⁰ cautions that decision making that takes place in custody disputes is very different to that which occurs during other litigation. Custody disputes are person-oriented¹³⁵¹ whereas other litigation focuses on the act or subject-matter of the litigation itself. In custody disputes one also has to look into the future and reach a decision regarding what will be in the best interests of the child in years to come, whereas other litigation deals with past acts and facts. Thus applying the best interests of the child standard can be a difficult process. Instead of a best interests test, Clark proposes a test “based on the ‘least detrimental alternative for safeguarding the child’s growth and development’”¹³⁵² or a primary caretaker test.¹³⁵³

¹³⁴⁸ *Ibid*: Whether this decision is conscious or unconscious it still occurs. This decision depends on the views held in the society within which the judge operates. Factors used to define the best interests of the child will therefore “... reflect judicial and community values and prejudices, and will vary over time, space and culture”. It is submitted that Bonthuys’ opinion in this regard is correct. See also Heaton 1990 *THRHR* 98.

¹³⁴⁹ 1997 *SAJHR* 623, 636. Bonthuys (624–630) examines how the court has regarded the biological bond of parents and their children as an important factor in determining what is in the best interests of the child, whereas in other instances the court has not regarded this as an important factor and has ignored biological ties completely. In *September v Karriem* 1959 3 SA 687 (C) the court held that there was no good reason to draw a distinction between relations and strangers and that the court can interfere with the rights of parents where the best interests of a child demand it. See also the discussion of access by third parties in par 3 4 4 below and the cases mentioned there.

¹³⁵⁰ 1992 *SALJ* 394–395.

¹³⁵¹ *Ibid*: “[a]pplication of the best-interest test necessitates a comparison of parental qualities to determine which parent would be the preferable custodian.”

¹³⁵² 1992 *SALJ* 396: this test emphasises the psychological aspects of the best interests test. A child must feel wanted and must have a relationship with at least one parent who is his or her psychological parent.

¹³⁵³ 1992 *SALJ* 396: this test focuses on who has primary responsibility for caring for the child on a daily basis and for taking general interest in the daily life of the child. Clark proposes that the benefits of this test are that it reduces the need for investigation into family life in order to

In determining the best interests of the child the wishes of the custodian must also not be disregarded.¹³⁵⁴ Van Zyl suggests that it is best “to weigh up the child’s wishes against the suggestions of adults” as children require adult protection and adults often display more maturity, balance and wisdom than the child does.¹³⁵⁵

Who should decide what is in the child’s best interests? Other than the children and the parents, the judge has to make the final decisions. Other professionals may be called on to give input during divorce proceedings.¹³⁵⁶ Van Zyl

determine parental suitability; it reduces the possibility of children being used as a bargaining tool in settling property matters in divorce proceedings; lessens feelings of bitterness as it does not focus on comparing the fitness of parents. However, this test is more applicable in the case of young children. The ways in which this test can be applied are: to award custody to the primary caretaker unless he or she is not suitable; to award custody to the non-caretaker parent only if there is evidence that he or she is the most suitable parent to have custody; or to only apply the test where there is, after production of evidence, still uncertainty as to which parent should be granted custody of the child. Clark proposes that the best application would be the application of the primary caretaker test unless the other parent brings convincing evidence that he or she is more suitable to be custodian. The test concentrates on the actual nature of the parent-child relationship instead of on the character of the parents.

¹³⁵⁴ Although today more emphasis is placed on the welfare of the child, parents also have a right to custody of their child and their right should not be completely left out of the equation: Van Zyl 13.

¹³⁵⁵ Van Zyl 14.

¹³⁵⁶ Van Zyl 21–22, the parts played by these people are discussed at 22–37. Judges have been criticised for being too conservative and uninformed about children’s needs. They have even been criticised as displaying their personal prejudice and bias in their decisions. Van Zyl asks whether a conservative approach is always to be condemned, as this approach is often balanced by input from other professionals who are more aware of the latest trends: Van Zyl 23. There are also problems surrounding the use of behavioural scientists and social workers in court cases. For a discussion of these, see Van Zyl 24–32. Whether State interference in family life is justified has been questioned in the past. It is suggested that in certain instances it is justified, for example parents who are going through a divorce may not have their children’s best interest in mind but are instead trying to hurt their soon-to-be ex-spouse. However, we must guard against the State ever having too wide a power that would enable it to interfere in daily family life when it is not necessary and not in the best interest of the child to do so. This is a very difficult balance to maintain. For a discussion of whether interference in family life is justified, see Van Zyl 15–21. The South African High Court has the power, in its capacity as upper guardian of all minors, to

concludes that “[t]he chief merit of the criterion lies in its emphasis on the welfare of the children at a time when the divorcing parties may be engrossed in all sorts of other issues”.¹³⁵⁷ There are unfortunately no guarantees that whoever determines what will be in the child’s best interests will come up with the right decision.¹³⁵⁸ The best decision under the circumstance, after hearing the input of all the parties involved, as well as professionals in the behavioural sciences, is the best that one can hope for.

The view of the child must be considered when determining the best interests of the child.¹³⁵⁹ Anderson and Spijker¹³⁶⁰ explore the guiding principles used to measure the best interests, specifically the child’s right to voice his opinion. They refer to the case of *McCall v McCall*¹³⁶¹ in which a list of important aspects to consider was provided by the court.¹³⁶² Among the criteria listed by the court is the ability of the parents to communicate with the child and to understand the child’s feelings. The temperament and character of the parent is also considered, as is the child’s preference.¹³⁶³ *I v S*¹³⁶⁴ stipulated that, although the child’s preference is not always indicative of the child’s best interests, an intelligent and mature opinion can carry substantial weight.

intervene in the family where there is good reason to do so and in order to protect children. The role of the court as upper guardian is discussed in par 3 6 below.

¹³⁵⁷ Van Zyl 38. Van Zyl also suggests that members of the legal profession and social work and behavioural science professions should gain a better understanding of each other’s contribution: 39.

¹³⁵⁸ Van Zyl 38.

¹³⁵⁹ See also par 3 5 2 2 1.

¹³⁶⁰ "Considering the View of the Child when Determining her Best Interest" 2002 *Obiter* 365.

¹³⁶¹ This case was discussed in detail above and is also mentioned in par 3 3 3 1.

¹³⁶² Anderson and Spijker 2002 *Obiter* 366.

¹³⁶³ *McCall v McCall* 1994 3 SA 201 (C) 205A–G; Anderson and Spijker 2002 *Obiter* 366.

¹³⁶⁴ 2000 2 SA 993 (C) 977G–H.

The Mediation in Certain Divorce Matters Act¹³⁶⁵ provides for the involvement of the Family Advocate in divorce proceedings. “[O]ne of the main functions of the Family Advocate is to institute an enquiry and ... ascertain the wishes of the child ... [but] no explicit provision is made for the hearing of the opinion of the child.”¹³⁶⁶

According to the Natural Fathers of Children Born out of Wedlock Act¹³⁶⁷ the court must take the child’s attitude regarding the application in account.

There is currently no compulsion on a judge,¹³⁶⁸ when making decisions relating to the guardianship, custody or access of a child, to take the child’s preference into consideration or to let the child voice his or her opinion.¹³⁶⁹ Clearly the current law needed to be reformed in this regard.¹³⁷⁰

Cultural values should also be recognised when interpreting what would be in the best interests of the child.¹³⁷¹ In the past, our courts have reached a compromise

¹³⁶⁵ 24 of 1987. These provisions were discussed in 3 2 5 above.

¹³⁶⁶ Anderson and Spijker 2002 *Obiter* 366: the prescribed questionnaire is parent oriented and does not include questions on the child’s wishes: 367.

¹³⁶⁷ 86 of 1997.

¹³⁶⁸ Except in the case of applications in terms of the Natural Fathers of Children Born Out of Wedlock Act.

¹³⁶⁹ Anderson and Spijker 2002 *Obiter* 368.

¹³⁷⁰ For a discussion of these changes see ch 4 below. The CRC also provides for the child to voice his or her opinion: arts 12(1) and (2). This Convention was discussed in par 3 1 1 1 1 above. A similar provision is found in the African Charter on the Rights and Welfare of the Child. Art 7 provides that a child who is freely capable of forming his own view shall be assured of his or her right to express opinions freely. This Charter was discussed in par 3 1 1 1 3 above. See also the discussion of this aspect in Anderson and Spijker 2002 *Obiter* 370.

¹³⁷¹ Knoetze “The Role of Custom in the Interpretation of the Child’s ‘Best Interests’ Principle” 2002 *Obiter* 348, 354: “[o]n the one hand there should be basic minimum standards or principles of equality and dignity applicable to all children, transcending customary laws. On the other hand, customary practices deserve sensitive treatment and should be

between customary law and the best interests of the child.¹³⁷² Bennett¹³⁷³ states that it would be misleading to say that customary law ignored the interests of children. In customary law a child's fate was linked to the well-being of his or her family. A child's best interests were linked to the best interests of his or her family.¹³⁷⁴

acknowledged in so far as they are not detrimental to the rights of children. Thus, in so far as the principle of a child's best interests is general and abstract, when applied in concrete situations, it can be given a more precise definition, taking into account relevant and applicable custom." See also *McCall v McCall*, where one of the criteria listed is the ability of the parent to provide for the child's psychological, emotional, cultural and physical development and *Märtens v Märtens* 1991 4 SA 287 (T), where the court looked at the suitability of a custodian parent by referring to his or her ability to guide the religious, moral and cultural development of the child. It is important that one of the factors that must be considered when determining the best interests of a child is the cultural development of the child.

¹³⁷² Bennett "The Best Interests of the Child in an African Context" 1999 *Obiter* 145, 147–148: This compromise had three implications: it introduced the separation of guardianship and custody and allowed these to vest in different people; a tacit presumption that customary rules should apply to custody evolved, if someone alleged that it was not in the child's best interests for their father to have custody had to prove this, custody of young children was given to the mother; any agreement which suggested the "sale" of a child, such as where a woman with a child from another man got married to someone else, her husband could not acquire rights in the child by paying bridewealth. Bennett questions "[w]hether application of the best interests principle in these circumstances involved a discreet merger of customary and common law or the outright exclusion of customary law in favour of common law" and says that this was never clear. Whether mothers actually obtained any rights to their children is also unclear, as when they were granted custody of a child. It meant that they were entitled to the child's physical presence only, which included being responsible for maintenance, while the father took any benefits.

¹³⁷³ 1999 *Obiter* 150–151.

¹³⁷⁴ The bearing of rights by individuals was contrary to African culture, where the emphasis was on duties; a rights culture is characteristic of Western legal systems whereas customary law is concerned with substantive justice. Children were not powerless in customary law; they could make their views known by means of dance and song, and could also appeal to their grandparents, their father's aunt and their mother's brother. "Given all these considerations, the best interests principle would have been irrelevant to the African social order. But it must be immediately conceded that this social order has changed radically": Bennett 1999 *Obiter* 151. Bennett (152–153) is critical of the South African courts' interpretation and application of customary law and says that the courts distorted their source materials and failed to reform the customary law. They also did not advance the interests of children by tolerating customary regimes. Bennett is also critical of the Legislature's inability to reform the customary law. Bennett (154–156) indicates the usefulness of the Constitution in assisting in determining the best interests of the child in a customary law context, and indicates that, since the best interests of the child standard is vague, the courts can apply whatever cultural norms are apparent. Bennett (156) suggests that an outright confrontation between customary and Western conceptions of child care should be avoided, as many South Africans regard children's interests as being of paramount importance but have not abandoned their traditions. However, we must guard against Western perceptions of what is

3 5 2 Cases dealing with the best interests standard

3 5 2 1 Introduction

Various South African court cases have dealt with the best interests of the child standard.¹³⁷⁵ Already in 1939 the court held in *Stapelberg v Stapelberg*¹³⁷⁶ that it had “to decide the matter on the facts as to what would be in the interests of the child”¹³⁷⁷. In *Kallie v Kallie*¹³⁷⁸ the court held that:

“the paramount consideration is what is best in the interests of the child. That question is usually determined by considering which of the spouses would best care, not only for the bodily well-being of the child, but which is best fitted to guide and control her moral, cultural and religious development”.¹³⁷⁹

In *Fletcher v Fletcher* it was also said that the interests of the children are paramount.¹³⁸⁰

in a child's best interests, for example that only biological parents are qualified to raise children, being accepted as universally applicable norms for child care.

¹³⁷⁵ Or principle, rule, standard or right. A discussion of some of these cases follows.

¹³⁷⁶ 1939 OPD 129.

¹³⁷⁷ 131.

¹³⁷⁸ 1947 2 SA 1207 (SR).

¹³⁷⁹ 1208.

¹³⁸⁰ Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623 points out that the best interests standard is a refinement of the rule in Roman Dutch law that the custody of children is a matter which falls within the discretion of the judge and that “it directs the judge to exercise his discretion towards the promotion of the interests of the child instead of focusing on the rights and entitlements of parents”. For an historical overview, see ch 2 above.

3 5 2 2 Custody and the Best Interest Standard¹³⁸¹

3 5 2 2 1 The child's wishes¹³⁸²

3 5 2 2 1 1 General

In *Fletcher v Fletcher*¹³⁸³ it was held that in a custody dispute the welfare of the child is the primary consideration.¹³⁸⁴ In *French v French*¹³⁸⁵ the court held that when determining the best interests the most important consideration is the child's sense of security and of feeling loved. Then the suitability of parents and material considerations should be examined. Finally the child's wishes should be taken into consideration, in the case of more mature children, by considering "their well-informed judgement, albeit a very subjective judgement".¹³⁸⁶ In *Manning v Manning*¹³⁸⁷ the court stated that when a child "reaches the age of discretion" then his or her personal preferences can be taken into account.¹³⁸⁸ In *McCall v McCall*¹³⁸⁹ the court looked at the child's view and held that weight should be given to the child's preference if the court is satisfied that the child has the necessary intellectual and emotional maturity to give a genuine and accurate reflection of his feeling towards a relationship with both parents. The court

¹³⁸¹ The majority of the cases mentioned in this section are discussed in detail in par 3 3 above.

¹³⁸² This discussion is partly based on the discussion of Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 557, 560–566.

¹³⁸³ 1948 1 SA 130 (A).

¹³⁸⁴ Already in *Simey v Simey* 1881 1 SC 171, 176, this principle was used.

¹³⁸⁵ 1971 4 SA 298 (W).

¹³⁸⁶ 1971 4 SA 298 (W) 299H.

¹³⁸⁷ 1975 4 SA 659 (T).

¹³⁸⁸ 661G.

¹³⁸⁹ 1994 3 SA 201 (C).

emphasised that in order to make an informed judgement weight must be given to the child's expressed preference.¹³⁹⁰ This decision has been followed in a number of cases, such as *Meyer v Gerber*,¹³⁹¹ *Lubbe v Du Plessis*,¹³⁹² *I v S*,¹³⁹³ *Hlophe v Mahlalela*¹³⁹⁴ and *Van Rooyen v Van Rooyen*.¹³⁹⁵

3 5 2 2 1 2 The child's wishes are not mentioned

In the case of *Van Rooyen v Van Rooyen*,¹³⁹⁶ where the court ruled that the mother's same-sex partner could not share her bedroom during the weekends when the children visited their mother, the court said that this was to protect the children from confusing signals regarding sexuality. However, there is no referral to the views of the children, aged eleven-and-a-half and nine-and-a-half.

In *Godbeer v Godbeer*¹³⁹⁷ a mother wanted to emigrate, with her two children, to the United Kingdom. The children were aged fourteen and eleven. No mention was made of the children's wishes in the judgment.

In *Schlebusch v Schlebusch*¹³⁹⁸ the court said that due weight must be given to the preference of the children but no consideration was actually given to the children's views. The children were aged thirteen and sixteen. In *Manning v*

¹³⁹⁰ 207H–J.

¹³⁹¹ 1999 3 SA 650 (O).

¹³⁹² 2001 4 SA 57 (C).

¹³⁹³ 2000 2 SA 993 (C).

¹³⁹⁴ 1988 1 SA 449 (T).

¹³⁹⁵ 1999 4 SA 435 (C) as well as *Van Rooyen v Van Rooyen* 2001 2 All SA 37 (T).

¹³⁹⁶ 1994 2 SA 325 (W).

¹³⁹⁷ 2000 3 SA 976 (W).

¹³⁹⁸ 1988 4 SA 548 (E).

*Manning*¹³⁹⁹ the child's preference was also mentioned as a factor that should be considered but in practice it was not considered. The child was almost ten years old. In *Baart v Malan*¹⁴⁰⁰ the views of the children were not considered. The children were aged fifteen, thirteen, eleven and nine.

In some of the cases mentioned above it is clear that the court could not have said that the children were too immature to express their opinion. In many instances the children were teenagers. It is submitted that even if the children concerned are very young every effort should still be made to hear their views. After all it is not the only factor used to determine what is in their best interests but one of a number of factors, which will be weighed up against each other.

3 5 2 2 1 3 The wishes of children are ignored because the evidence of their preference is contradictory or insufficient

The wishes of children have been ignored in a number of cases where the court found that evidence of their preference was insufficient or that such evidence was contradictory. In *Stock v Stock*¹⁴⁰¹ no weight was given to the preference of the children as they did not give evidence and there was conflicting evidence as to what the children's preference was.¹⁴⁰²

¹³⁹⁹ 1975 4 SA 659 (T).

¹⁴⁰⁰ 1990 2 SA 862 (E).

¹⁴⁰¹ 1981 3 SA 1280 (A).

¹⁴⁰² 1297A.

3 5 2 2 1 4 The child's wishes are not taken into account because the child is said to be immature or the opinion expressed by the child is said to be unwise

Often the courts have not taken the wishes of a child into account because of the chronological age of such child. In *Matthews v Matthews*¹⁴⁰³ the wishes of a thirteen-year-old child were held not to carry much weight. The court was also not inclined to give much weight to the preferences of children aged twelve and fourteen in the case of *Greenshields v Wyllie*.¹⁴⁰⁴

In *Germani v Herf*¹⁴⁰⁵ a child refused to spend a weekend a month with his father, as was specified in the court order. The court held that the child, aged fourteen, was young, immature and impressionable and was unable to decide for himself what was in his best interests.¹⁴⁰⁶

In *Märtens v Märtens*¹⁴⁰⁷ the court took the view of eleven-year-old twins into consideration. They told the judge that they did not want to return with their mother, from whom they had been abducted by their father a number of years

¹⁴⁰³ 1983 4 SA 136 (SE).

¹⁴⁰⁴ 1989 4 SA 898 (W) 899F.

¹⁴⁰⁵ 1975 4 SA 887 (A).

¹⁴⁰⁶ 899E.

¹⁴⁰⁷ 1991 4 SA 287 (T). The facts of this case were that the parents of the children were German citizens. They had four children, the elder children aged 22 and 20, and twins aged 11. Custody was awarded to the children's mother. The father abducted the twins and took them to the USA with him. The mother was, once more, given custody of the twins when the divorce order was obtained. The father of the children appealed against this order but the appeal was dismissed. The father went to England, taking the twins with him. He then moved to South Africa, with the twins.

earlier, to Germany.¹⁴⁰⁸ The judge said that the children were intelligent and able to express their views without prompting. In this case the psychologist and a social worker had, however, described the children as confused and angry.¹⁴⁰⁹

In *Van Rooyen v Van Rooyen*¹⁴¹⁰ the children's mother wanted to emigrate with them to Australia. The court did not consider the views of the children as it found that their views were childish and immature and that the court would be irresponsible to have any regard to their wishes.¹⁴¹¹ The children were aged eight and ten.

3 5 2 2 1 5 The child's views are not taken into consideration on the grounds of undue parental influence

Young children may express the views held by their custodian parent. They may also express a different view to each parent. This was a concern in a number of cases, for example *Van Rooyen v Van Rooyen*,¹⁴¹² where the children were aged

¹⁴⁰⁸ Clark "Custody: the Best Interests of the Child" 1992 *SALJ* 391, 392–394 criticises the decision reached by the court in this case. She states that the court should have simply ordered the return of the children to Germany, as the court there was in the best position to determine what would be in the best interests of the child. The court should also not have reached its decision independently, without relying on the decision reached by the foreign court in the matter at hand.

¹⁴⁰⁹ 290E, 290I–J. Clark (1992 *SALJ* 394) stresses that although a child's wishes should be considered that the weight given to such wishes depends on the age of the child. The wishes of children are given more weight after the age of puberty. In the case at hand the court found the children to be intelligent but to not be mature due to their youthfulness. Clark is also critical of the fact that the court relied on the wish of the children to remain with their father and thus granted custody to the father, as the children had also expressed their desire to re-establish their relationship with their mother. The children had also wanted to return to Germany.

¹⁴¹⁰ 1999 4 SA 435 (C).

¹⁴¹¹ 439J.

¹⁴¹² 1999 4 SA 435 (C).

eight and ten and *Hlophe v Mahlalela*,¹⁴¹³ where the child was aged twelve. In *H v R*,¹⁴¹⁴ where the child was eight years old, and in *Evans v Evans*,¹⁴¹⁵ where the child was aged ten, the court was also concerned about this aspect.

In *Märtens v Märtens*,¹⁴¹⁶ where the children were aged eleven, and *Van Rooyen v Van Rooyen*,¹⁴¹⁷ where the child was aged seventeen, the court specifically said that the children did not seem to merely be expressing the wishes of a parent. This was a factor that helped the court decide to give effect to the children's wishes.

In *Meyer v Gerber*¹⁴¹⁸ the court took cognisance of the view of a fifteen-year-old boy. In this instance the father had applied for a variation of the consent paper, which had granted custody to the child's mother. The minor had stated that his preference was to reside with his father. The court stated that it had to consider the minor's view and that this was "duidelik ... nie iets wat oornag by hom posgevat het nie – dit was 'n langdurige en goedorwoë proses".¹⁴¹⁹ The court concluded that it would be in the child's best interests to be in the custody of his father.

¹⁴¹³ 1998 1 SA 449 (T).

¹⁴¹⁴ 2001 3 SA 623 (C).

¹⁴¹⁵ 1982 1 SA 370 (W).

¹⁴¹⁶ 1991 4 SA 287 (T).

¹⁴¹⁷ 2001 2 All SA 37 (T).

¹⁴¹⁸ 1999 3 SA 650 (O).

¹⁴¹⁹ *Supra* 656D. The minor had even written a letter to his mother expressing this view.

3 5 2 2 2 Character of the parents

In *Manning v Manning* the court held that when considering what is in a child's best interests the court must take into account the character as well as temperament of each parent, as well as their behaviour towards the child in the past.¹⁴²⁰

3 5 2 2 3 Educational and religious needs of the child

In *Manning v Manning*¹⁴²¹ the court said that when determining what is in a child's best interest one of the factors that must be considered is the educational and religious needs of the child.¹⁴²² The case of *French v French*¹⁴²³ also considered the religion that a child will be brought up in to be a factor that must be considered by the court.

3 5 2 2 4 Sex, age and health of the child

According to *Manning v Manning*¹⁴²⁴ the sex, age and health of the child are factors that help determine what is in a child's best interest. The court referred to the tender years doctrine¹⁴²⁵ and said that although children of tender years should be in the care of their mother there comes a time when boys should be

¹⁴²⁰ 1975 4 SA 659 (T) 661G. See also *McCall v McCall* 1994 3 SA 201 (C).

¹⁴²¹ 1975 4 SA 659 (T). See also *McCall v McCall* 1994 3 SA 201 (C).

¹⁴²² 661.

¹⁴²³ 1971 4 SA 298 (W).

¹⁴²⁴ 1975 4 SA 659 (T) 661G.

¹⁴²⁵ 662E. The tender years doctrine or maternal preference rule was discussed above in par 3 3 3 1.

placed in the care of their father, especially when such boy is approaching the age of puberty. In this case the boy was almost ten years old. The court found that it would be preferable for the boy to have guidance from his natural father, rather than from a father figure and that it would be in the child's best interests, at this stage of his development, to be in his father's custody.¹⁴²⁶

3 5 2 2 5 Social and financial position of the parents

In *Manning v Manning*¹⁴²⁷ it was stated that the social and financial position of each parent must be taken into consideration when determining the best interests of a child in a custody decision.

3 5 2 2 6 Keeping siblings together

In the case of *Meyer v Gerber*¹⁴²⁸ siblings were separated. The boy aged fifteen had expressed the desire to live with his father and the court had granted his wish. The other child, a girl, remained with her mother.

In *Goodrich v Botha and Others*¹⁴²⁹ it was held that when considering an award of custody the court must consider the best interests of the minor. In *Fortune v Fortune*¹⁴³⁰ it was also held that the interests of the minor are paramount and that

¹⁴²⁶ 1975 4 SA 659 (T) 663E–663G.

¹⁴²⁷ 1975 4 SA 659 (T) 661G.

¹⁴²⁸ 1999 3 SA 650 (O).

¹⁴²⁹ 1954 2 SA 540 (A).

¹⁴³⁰ 1955 3 SA 348 (A).

this is an established principle.¹⁴³¹ *Madden v Madden*¹⁴³² stated that the “paramount interests of the children must ... prevail”.¹⁴³³ The court questioned whether the children should be separated from their mother or from each other. The court also explored the characters of the two parties.¹⁴³⁴ In *Segal v Segal*¹⁴³⁵ the custodian mother refused to allow the non-custodian father to have the children with him for a particular holiday. The court found that the mother’s refusal was not detrimental to the children’s interests.

In *French v French*¹⁴³⁶ a test for determining the best interests of a child in an application for the variation of a custody order, was set out. The court said that firstly, “[i]n respect of a young child its (*sic*) sense of security should be preserved and protected above all. The child must feel that it is welcome, wanted and loved.”¹⁴³⁷ Secondly, “... the suitability of the proposed custodian parent is to be tested by enquiring into his or her character ... and by enquiring into the religion and language in which the children are to be brought up”.¹⁴³⁸ Thirdly, “material considerations relevant to the child’s well-being will also be considered”.¹⁴³⁹ Lastly, “the wishes of the child will be taken into account – with young children as a constituent element in the enquiry where they will attain a sense of security, and with more mature children a well informed judgement,

¹⁴³¹ 1955 3 SA 348 (A) 354.

¹⁴³² 1962 4 SA 654 (T).

¹⁴³³ 657.

¹⁴³⁴ 657. The maternal preference rule was referred to in this case: 657–658.

¹⁴³⁵ 1971 4 SA 317 (C).

¹⁴³⁶ 1971 4 SA 298 (W).

¹⁴³⁷ 298. Here the court referred to *Tromp v Tromp* 1956 4 SA 738 (N) and *Hassan v Hassan* 1955 4 SA 388 (D).

¹⁴³⁸ 299.

¹⁴³⁹ 299. Here the court referred to *Katznellenbogen v Katznellenbogen and Joseph* 1947 2 SA 528 (W) and *Goodrich v Botha* 1954 2 SA 540 (A).

albeit a very subjective judgement, of what the best interests of the child really demand”.¹⁴⁴⁰

*F v B*¹⁴⁴¹ dealt with the question of whether the father of an illegitimate child has a right of access to such child. The court held that there was no such right and that the court will only interfere with the *de jure* position if the interests of the child compel it to do so.

*Märtens v Märtens*¹⁴⁴² specified that the function of a court is to establish what is in the best interests of a child and to make a custody order accordingly. *Van Erk v Holmer*¹⁴⁴³ stated that the natural father should have a right of access to his child and such right should only be removed if such access is not in the best interests of the child.

In *S v S*¹⁴⁴⁴ it was said that the best interests of the child must be the yardstick in access disputes, “[t]he issue is whether it is established that the interests of the child require that there must be access to a specific person”.¹⁴⁴⁵ It was further held that:

“[r]egarding the best interests of the child as the predominant consideration does not mean that it figures as the first item on a list but may be ousted by the

¹⁴⁴⁰ 299.

¹⁴⁴¹ 1988 3 SA 948 (D).

¹⁴⁴² 1991 4 SA 287 (T); Clark “Custody: the Best Interests of the Child” *SALJ* (1992) 391.

¹⁴⁴³ 1992 2 SA 636 (W).

¹⁴⁴⁴ 1993 2 SA 200 (W).

¹⁴⁴⁵ 208.

joint or several importance of other facts. It is the end of the day measure for the soundness of the decision of the parent.”¹⁴⁴⁶

*McCall v McCall*¹⁴⁴⁷ listed factors (or criteria) which could be used to determine what is in the best interests of the child.¹⁴⁴⁸

*Krasin v Ogle*¹⁴⁴⁹ stated that the best interests of the child determine whether access should be granted to a non-custodian parent. It has also been stated that this is the standard for determining the awarding of the custody of a child.¹⁴⁵⁰ In *V v V*¹⁴⁵¹ the court found that joint custody was in the best interests of the children.

*K v K*¹⁴⁵² made it clear that under the common law the court’s paramount consideration as upper guardian of minors is the best interests of the child and that both international as well as constitutional law have enshrined the best interests of the child as the primary consideration when dealing with a matter concerning children in South Africa.¹⁴⁵³

¹⁴⁴⁶ 209: the court also held that “[w]hat is in a child’s best interests may not be cluttered by preconceived notions about the fairness of the law. The views about policy and about views of communities stated in the *Van Erk* case may not operate through the back door. Firstly, there is a lack of cogency ... secondly they wrongly and necessarily blinker assessment of what is good for the specific child in his specific situation in his specific community ...” The court also stressed that “[f]acts are rarely truly identical the interplay with other facts will vary, and the importance of any given fact is not a constant”.

¹⁴⁴⁷ 1994 3 SA 201 (C); Robinson “Die Beste Belang van die Kind by Egskeiding Gedagtes na Aanleiding van *McCall v McCall* 1994 3 SA 201 (K)” 1995 *THRHR* 472. See also *I v S* 2000 2 SA 993 (C): here the parties were married according to Islamic law.

¹⁴⁴⁸ These criteria are listed in n 1326 above and in par 3 3 3 1 above.

¹⁴⁴⁹ 1997 1 All SA 557 (W).

¹⁴⁵⁰ *Madiehe (born Ratlhogo) v Madiehe* 1997 2 All SA 153 (B).

¹⁴⁵¹ 1998 4 SA 169 (C). This case was discussed above in par 3 3 3 1.

¹⁴⁵² 1999 4 SA 1228 (C).

¹⁴⁵³ 702G–H and 704C. Palmer provides an overview of the best interests standard in “The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985–1995” 1996 *Acta Juridica* 98. Glasser “Can the Family Advocate

Sometimes our courts have regarded the views of the child as important and sometimes the view of the child has been ignored.¹⁴⁵⁴

In *Van Deijl v Van Deijl*¹⁴⁵⁵ the court said that the wishes of older children could not be ignored. In *Manning v Manning*¹⁴⁵⁶ the court said that a child's personal preferences may also be taken into account by the court, where the child reaches the age of discretion.

In *Stock v Stock*¹⁴⁵⁷ the judge was of the opinion that no great weight could be attached to the children's¹⁴⁵⁸ preference. In *Greenshields v Wyllie*¹⁴⁵⁹ the court did not give much weight to the preference of the children.¹⁴⁶⁰ In *Meyer v*

Adequately Safeguard our Children's Best Interests?" *THRHR* (2002) 74, questions whether the Family Advocate is actually protecting the best interests of children. See also Act 86 of 1997, the provisions of which have been previously discussed; s 6(4) of the Divorce Act 70 of 1979 provides that a legal practitioner to represent a child can be appointed by a court in divorce proceedings. For a discussion of the child's right to be heard, in light of the CRC, see 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* 54, as well as Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 556 and the discussion in par 3 3 above. See also Rosen "Access: Expressed Feelings of Children of Divorce on Continued Contact with the Non-Custodial Parent" 1977 *SALJ* 342–345 where the views of children were studied and many of them indicated that they would like the non-custodian parent to have free access, instead of reasonable access. The author proposes that the emphasis should be on the right of the child to have a continuing relationship with a parent and thus the view of the child should also be taken into consideration. From the above it is clear that already in the 1970s studies were conducted which took the views of children into account and that these studies showed that what is desirable from a child's point of view, in this instance free access, and what is desirable from the court's and/or parents' point of view, in this case reasonable access, is not always the same. More than 3 decades ago the importance of the child having a view, and being able to make that view known, has started to be implemented in South Africa.

¹⁴⁵⁴ The discussion of cases that follows is based on Anderson and Spijker (2002) *Obiter* 365.

¹⁴⁵⁵ 1996 4 SA 260 (R).

¹⁴⁵⁶ 1975 4 SA 659 (T).

¹⁴⁵⁷ 1981 3 SA 1280 (A). This case was discussed above.

¹⁴⁵⁸ Aged 14 and 17.

¹⁴⁵⁹ 1989 4 SA 898 (W). This case was discussed above.

¹⁴⁶⁰ Aged 12 and 14: because "children grow up and their perspectives change".

*Gerber*¹⁴⁶¹ weight was attached to the child's preference. In *I v S* it was held that the best interests of the children would be served by giving weight to their preference.¹⁴⁶²

Davel and De Kock¹⁴⁶³ suggest that in order to address the accusation of vagueness that we follow the checklist approach; however, the courts must not be restricted and must be able to consider all the relevant circumstances and facts in each case.¹⁴⁶⁴ In *Van Rooyen v Van Rooyen*¹⁴⁶⁵ it was held that where the child's mother was involved in a lesbian relationship the best interests of the child must be protected and the child must be protected from harmful signals.

¹⁴⁶¹ For a discussion of new concepts of family and the child's best interests, see Clark "Competing Custody Rights: New Concepts of 'Family' and the Best Interests of the Child" *CILSA* (1998) 288. For a discussion of the best interests of the child and customary law, see Maithufi "Children, Customary Law and the Constitution" *Obiter* (1999) 198 esp 205–206, "Best Interests of the Child and African Customary Law" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 140–146. See also Vahed "Should the Question 'What is in a Child's Best Interest?' Be Judged According to the Child's own Cultural and Religious Perspectives? The Case of the Muslim Child" 1999 *CILSA* 364 and Van Schalkwyk "Law Reform and the Recognition of Human Rights within the South African Family Law with Specific Reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic Marriages" 2003 *De Jure* 289. See SALC Issue Paper 13, Project 110, *Review of the Child Care Act* First Issue Paper (18 April 1998) 107–116 for a discussion of religious laws applicable to children in South Africa and Nasir 2002 *The Islamic Law of Personal Status* for an in-depth discussion, from an international viewpoint, of the Islamic laws regulating parentage 145–149, custody and access 156–172 and guardianship 186–196.

¹⁴⁶² This case was an application i/o s 2 of the Natural Fathers of Children Born Out of Wedlock Act, so the court was obliged to take the views of the child into account, as stipulated in s 2(5)(d).

¹⁴⁶³ "In 'n Kind se Beste Belang" 2001 *De Jure* 272.

¹⁴⁶⁴ Bekink and Bekink "Defining the Standard of the Best Interests of the Child" *Modern South African Perspectives* *De Jure* 2004 21 discuss recent cases dealing with the Standard of the Best Interest of the Child. See 22–25 for a discussion of "[t]he South African Legal Foundation of the Best Interest Standard" and 25–30 for comparative International and Regional Influences. The discussion of the cases that follows is partly based on their discussions. Comparative law is dealt with in ch 5 below.

¹⁴⁶⁵ 1994 2 SA 325 (W), this case was discussed above.

In *V v V*¹⁴⁶⁶ the court held that a lesbian mother could not be regarded as abnormal in terms of our law. However, if circumstances occur where action must be taken to protect the best interests of the child, such actions can cut across the rights of parents.

In *Ex parte Critchfield*¹⁴⁶⁷ the court said that undue weight must not be placed on the role that mothers play in their children's lives, instead the standard of the best interests of the child must be taken into account. In *Allsop v McCann*¹⁴⁶⁸ the court said that neither parent must dictate which religion their child must follow, each parent may provide religious instruction. In *H v R*¹⁴⁶⁹ the court held that the best interest standard must be taken into account in every matter concerning the child.

Cases regarding access¹⁴⁷⁰ have also dealt with the best interests standard. In *B v S*¹⁴⁷¹ the court held that the child's best interests dictated issues of access and that the court should not only look at the papers before it but also at oral evidence and expert witnesses.¹⁴⁷² In *T v M*¹⁴⁷³ the court held that the right of access is that of the child, not of the parent.

¹⁴⁶⁶ 1998 4 SA 169 (C), this case was discussed above.

¹⁴⁶⁷ 1999 3 SA 132 (W), discussed above.

¹⁴⁶⁸ 2001 2 SA 706 (C).

¹⁴⁶⁹ 2001 3 SA 623 (C).

¹⁴⁷⁰ Which have previously been discussed above.

¹⁴⁷¹ 1995 3 SA 571 (A).

¹⁴⁷² Bekink and Bekink 2004 *De Jure* 34.

¹⁴⁷³ 1997 1 SA 54 (SCA).

3 5 2 3 Conclusion

For some time the best interests of the child have been taken into consideration in custody disputes. The best interests of the child are now regarded as being of paramount importance in every matter concerning the child.¹⁴⁷⁴ When determining what is in the best interests of the child the courts take various factors into consideration. These factors include the wishes of the child.¹⁴⁷⁵ However, at times the wishes of the child have not been considered¹⁴⁷⁶ and on occasion the wishes of the child have been ignored.¹⁴⁷⁷ The importance of the child being allowed to express his or her views is supported by article 12 of the Convention on the Rights of the Child¹⁴⁷⁸ and article 4(2) of the African Charter on the Rights and Welfare of the Child.¹⁴⁷⁹ International law clearly provides for the right of a child to be heard and this right must be enforced when determining what is in the best interests of a child in a custody dispute.¹⁴⁸⁰

When determining whether the granting of custody will be in the best interests of the child the character of the parents;¹⁴⁸¹ the educational and religious needs of

¹⁴⁷⁴ S 28(2) South African Constitution.

¹⁴⁷⁵ Par 3 5 2 2 1 above.

¹⁴⁷⁶ Par 3 5 2 2 1 2 above.

¹⁴⁷⁷ Either because the evidence of their preference is contradictory or insufficient, par 3 5 2 2 1 3 above, or because the child is said to be immature or the view expressed by the child is said to be unwise: par 3 5 2 2 1 4 above. The views of the child have also not been taken into consideration on the grounds of undue parental influence: par 3 5 2 2 1 5 above.

¹⁴⁷⁸ See par 3 1 1 1 1 above.

¹⁴⁷⁹ See par 3 1 1 1 3 above.

¹⁴⁸⁰ See also par 3 7 below where the child's right to have a legal practitioner assigned to him or her is discussed.

¹⁴⁸¹ Par 3 5 2 2 2 above.

the child;¹⁴⁸² as well as the sex, age and health of the child¹⁴⁸³ are considered by the South African courts.

The best interests of the child standard is an important tool that is used to protect the rights of the child. Although the best interests of the child standard are indeterminate this should not only be viewed negatively, as the standard is indeterminate in order to remain flexible.¹⁴⁸⁴ Guidelines used by our courts "... should always evolve to reflect constitutional and international norms".¹⁴⁸⁵

3 5 3 Relocation of custodian and the best interest of the child standard

Regarding the relocation of a custodian parent and children, in *P v P*¹⁴⁸⁶ the court said that "[a]lthough the biological bond between a child and parent is almost sacrosanct, such bond may be disrupted if the best interest standard so dictates".¹⁴⁸⁷

Bonthuys¹⁴⁸⁸ proposes that:

"... the best interests test by itself is too vague to function as a legal rule and needs to be supplemented by clear policy guidelines in relation to relocation ...

¹⁴⁸² Par 3 5 2 2 3 above.

¹⁴⁸³ Par 3 5 2 2 4 above.

¹⁴⁸⁴ Davel and Boniface 2003 *THRHR* 143–144.

¹⁴⁸⁵ 144: for suggestions for alleviating some of the problems found in cross-border relocation cases, see Davel and Boniface 2003 *THRHR* 138, 145, discussed above.

¹⁴⁸⁶ 2002 6 SA 105 (N).

¹⁴⁸⁷ Here, however the court ruled against the removal of the child from his environment: Bekink and Bekink *De Jure* (2004) 33.

¹⁴⁸⁸ In "Clean Breaks: Custody, Access and Parents' Rights to Relocate" 2000 *SAJHR* 486.

such a policy would constitute a development of the common law and should be informed by constitutionally endorsed values and objectives”.¹⁴⁸⁹

Bonthuys also suggests that such a policy “should go further by considering the interests of parents and other family members separately from those of the children”.¹⁴⁹⁰

*Shawzin v Laufer*¹⁴⁹¹ dealt with the removal of children from the jurisdiction of the court. The court made it clear that when deciding the issue of custody, one norm is applied, the “predominant interests of the child”.¹⁴⁹² In *H v R*¹⁴⁹³ it was held that the paramount consideration is the best interests of a child.

*Jackson v Jackson*¹⁴⁹⁴ also dealt with an application by a custodian parent to remove minor children permanently from South Africa. Here it was also stated that the interests of the children are the paramount consideration.

Bekker and Van Zyl¹⁴⁹⁵ suggest that a solution to such trials being needed in order to determine what is in the best interests of the child:

¹⁴⁸⁹ Bonthuys 2000 *SAJHR* 499–500.

¹⁴⁹⁰ Bonthuys 2000 *SAJHR* 510.

¹⁴⁹¹ 1968 4 SA 657 (A).

¹⁴⁹² 662.

¹⁴⁹³ 2001 3 SA 623 (C): this was an application by a custodian parent in terms of s 1(2)(c) of the Guardianship Act 192 of 1993 for leave to remove minor children permanently from the court's jurisdiction.

¹⁴⁹⁴ 2002 2 SA 303 (SCA), this case was discussed above.

¹⁴⁹⁵ “Application by Custodian Parent to Emigrate with Children Opposed. How Should the Best Interests of the Children be Evaluated? *Jackson v Jackson* 2002 2 SA 303 (SCA)” 2003 *THRHR* 146.

“would be to give the Family Advocate more facilities and other means to launch an investigation into cases where there are serious disputes. A full-blown pre-trial mediation process – not the Family Advocate type of enquiring could be instituted”.¹⁴⁹⁶

3 6 THE HIGH COURT AS UPPER GUARDIAN

As has been mentioned previously¹⁴⁹⁷ the High Court is the upper guardian of all minor children. It has been held¹⁴⁹⁸ that the court's position as upper guardian is "analogous to that of the English courts in relation to wards of court under English law"¹⁴⁹⁹ and that a legal advisor must provide the address of such children to court "... even if the address has been disclosed to him by his client with instructions that he is not to disclose it".¹⁵⁰⁰ In *Shawzin v Laufer*¹⁵⁰¹ the court commented on what the duty of the court is, as upper guardian. The court held

¹⁴⁹⁶ Bekker and Van Zyl 2003 *THRHR* 146, 151. For a discussion of the distinction between the roles of the Family Advocate and a legal representative assigned in terms of s 28(1)(h) of the Constitution, see *Soller v G* par 20. The office of the Family Advocate must monitor all court documentation and settlement agreements in order to ensure that the agreements are in the best interests of the child, mediate between the parties and carry out full evaluations and submit a report: par 22. The Family Advocate is not appointed to represent anybody but is neutral and assists the court in making a balanced recommendation: pars 23 and 24. The legal practitioner appointed in terms of s 28(1)(h) of the Constitution presents the wishes of the child, but must also provide adult insight into those wishes and must apply his or her 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": par 27. See also Van Zyl "Whitehead v Whitehead: Fair Comment on the Family Advocate" June 1994 *De Rebus* 469–470; Burman and McLennan "Providing for Children? The Family Advocate and the Legal Profession" 1996 *Acta Juridica* 69–81; Kassan "The Voice of the Child in Family Proceedings" 2003 *De Jure* 164–179.

¹⁴⁹⁷ In pars 3 2 4 and 3 3 4. This topic will not be discussed in detail here, only a brief overview will be provided.

¹⁴⁹⁸ In *Botes v Daly and Another* 1976 2 SA 215 (N) 222A–H.

¹⁴⁹⁹ 222A.

¹⁵⁰⁰ 222B.

¹⁵⁰¹ 1968 4 SA 657 (A) 662G.

that the "one norm to be applied [is] ... the predominant interests of the child"¹⁵⁰² and that "...while in form there is an application for variation of the order of the court, in substance there is an investigation by the court acting as upper-guardian".¹⁵⁰³

The High Court, as upper guardian, has the power to interfere with the parental power.¹⁵⁰⁴ The High Court may, upon application by one or both parents, make an order regarding the custody or access to a child born from a marriage.¹⁵⁰⁵ The Divorce Act enables a court that grants a divorce to make such order as it sees fit regarding the guardianship, custody and access to the children.¹⁵⁰⁶ According to common law the court may take guardianship away from the natural guardian and award it to someone else. The court may also appoint a guardian for a child that has no guardian. The court may remove a child from one or both of its parents' custody and give such custody to a third party.¹⁵⁰⁷ The court may also interfere with parental power and set a decision made by a parent aside.¹⁵⁰⁸

¹⁵⁰² 662G–H.

¹⁵⁰³ 663A. See also Glasser "Taking Children's Rights Seriously" 2002 *De Jure* 223: the High Court "has always been charged with determining what is best for children in all matters concerning them [and] ... was ... granted various statutory powers to intervene between parent and child": 223. The South African Constitution now firmly enshrines the best interest of children, as was discussed above in par 3 5. See also Swanepoel, Fick and Strydom "Custody and Visitation Disputes: a Practical Guide" (1998) 29–39.

¹⁵⁰⁴ See Kruger "Enkele opmerkings oor die bevoegdheids van die Hooggeregshof as oppervoog van minderjariges om in te meng met ouerlike gesag" 1994 *THRHR* 304, as well as the discussion of parental power above.

¹⁵⁰⁵ S 5(1) of Act 37 of 1953. The court can make such order if the parents are divorced or living apart. S 25(4) of the Marriage Act 25 of 1961 enables the court to give permission to a minor when his parent refuses without sufficient reason.

¹⁵⁰⁶ S 6(3) of Act 70 of 1979. The Child Care Act provides for the removal of children to places of safety, ss 11, 12 and 13.

¹⁵⁰⁷ Kruger 1994 *THRHR* 306.

¹⁵⁰⁸ For example, an order that the child must undergo bloodtests: Kruger 1994 *THRHR* 306, 308.

The importance of the High Court as upper guardian cannot be underestimated. Although a divorce court or other court does provide a more affordable means of litigation the wisdom of the High Court is sometimes necessary to determine what is in a minor child's best interest during a guardianship, custody or access dispute.

3 7 LEGAL PRACTITIONER ASSIGNED TO THE CHILD

Section 28(1)(h) of the Constitution states 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.”¹⁵⁰⁹

Davel¹⁵¹⁰ observes that “[a]lthough this provision has been on the statute books for nearly a decade, the nature and the content of this right is still clouded with

¹⁵⁰⁹ “This subsection is an extension of the right of an accused person in criminal matters to legal representation at state expense if substantial injustice would otherwise result to cases of civil litigation affecting children. This potentially far-reaching right is therefore applicable to a whole range of proceedings affecting children, including custody and access disputes in divorce cases. It is furthermore available to every child and not limited to children capable of forming or expressing his or her own views. In terms of section 28(1)(h), child participation will have to be accomplished by (legal) representation”: Davel in Nagel (2006) 21. S 35(3)(g) of the South African Constitution provides for the right to legal representation in criminal matters. The section applies to both adults and children: Bekink and Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 169, 193. A child must be assisted by a legal practitioner, not just any “representative”: Kassan “The Voice of the Child in Family Law Proceedings” 2003 *De Jure* 164, 167.

¹⁵¹⁰ In Nagel (ed) 2006 21.

uncertainty and a torrent of questions¹⁵¹¹ challenge practitioners, the courts and academics alike”.

In *Fitschen v Fitschen*¹⁵¹² an application was brought for a legal practitioner to be assigned to the children, but the application failed as the court held that the views of the children were taken into account in the reports by the Family Advocate and the psychologist and thus substantial injustice would not result.

In *Du Toit v Minister of Welfare and Population Development*¹⁵¹³ an *obiter* remark was made that where there is a risk that substantial injustice would result to children then a court is obliged to appoint a curator *ad litem* to represent the children's interests.

The reported case of *Soller NO v G*¹⁵¹⁴ dealt with the custody of a fifteen-year-old boy. The boy sought a variation of his custody order, as he wanted the custody to be awarded to his father. An attorney who had been struck from the roll had brought the application in terms of section 28(1)(h) of the Constitution. The judge decided that the matter needed a legal representative to be assigned and she contacted an attorney who agreed to act as legal representative for the child on a

¹⁵¹¹ The main issues that need to be addressed are: “What is the correct procedure related to the assignment of a legal practitioner? Which body should make the assignment, for instance, is it the State Attorney or the Legal Aid Board? Can a legal representative be assigned by the High Court? What will constitute “substantial injustice”? Who will decide whether “substantial injustice” will otherwise result? According to which principle will this decision be made?”: Davel in Nagel (ed) 2006.

¹⁵¹² Unreported case 9564 1995 (C).

¹⁵¹³ 2003 2 SA 198 (CC) 201–202.

¹⁵¹⁴ 2003 5 SA 430 (W).

pro bono basis.¹⁵¹⁵ There had been a lot of litigation which resulted in emotional distress and family animosity.¹⁵¹⁶ The child had expressed his wish to live with his father and had even run away from home in order to prove this. However, the child suffered from parental alienation syndrome and was the victim of a manipulative and obsessive father.¹⁵¹⁷ Usually when determining the best interests of a child the child's expressed wish to live with a particular parent is only a persuasive factor, however, in this matter it became the determinate factor.¹⁵¹⁸ There were obvious ties of love and affection between the father and the child.¹⁵¹⁹ The Family Advocate recommended that the child be allowed to live with his father and the legal representative recommended that the child be put in the care of his father immediately and that the order must be an interim one in order to monitor the situation. He also recommended that the arrangements for the child be supervised or monitored.¹⁵²⁰ Satchwell J relied on the recommendation made by the child's legal representative, as she left the child in his mother's custody but allowed him to live with his father, so that the parenting of the father could be controlled.¹⁵²¹

¹⁵¹⁵ Pars 1–19.

¹⁵¹⁶ Par 11.

¹⁵¹⁷ Par 52.

¹⁵¹⁸ Pars 55–58. See also the discussion on the best interests of the child at par 3 5 below and the cases referred to there.

¹⁵¹⁹ Par 62.

¹⁵²⁰ Pars 70–71.

¹⁵²¹ Pars 72 and 75. This case also clarified the difference between the roles of the Family Advocate and a legal representative assigned in terms of s 28(1)(h) of the Constitution. See also par 3 5 below and Davel in Nagel (ed) 23.

In *Ex parte Centre for Child Law*¹⁵²² the Centre for Child Law brought an *ex parte* application on behalf of two sisters, aged twelve and thirteen. The case was an attempt to establish the content of children's right to legal representation. The children's father had previously applied for his access rights to be reinstated by the court, after the mother of the children had obtained a domestic violence interdict against him and the access rights he had obtained under the divorce order had been interrupted. During the application for the reinstatement of access the children had frequently said that they wanted to speak to the court or the judge but they were never allowed to. The girls also said that the Family Advocate had only spent ten minutes with each of them and had not taken their views regarding their father's behaviour into account. The court had made a final order stating that the children and their parents had to go for counselling in order to phase in contact with their father and the children had refused to go for counselling.

The Centre for Child Law requested either the appointment of a curator *ad litem*¹⁵²³ or the appointment of a legal representative.¹⁵²⁴ The judge agreed that

¹⁵²² Case 34054/2003 (TPD) available at www.childlawsa.com accessed on 2006-02-02; Davel in Nagel (ed) (2006) 24–26; Venter "Ruling a Triumph for Kid's Rights" 2004-06-23 *Pretoria News*.

¹⁵²³ On the basis that the interests of the children might be in conflict with the interests of the mother as she was supposed to comply with the order to take the children to counselling, and the children's refusal to go could cause her to be in contempt of court. A curator *ad litem* may be appointed for a child in such a circumstance, or where the minor has no parent or guardian, a parent or guardian is not found or is unavailable or the parent or guardian unreasonably refuses to assist the minor: Spiro *Law of Parent and Child* (1985) 200; Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (1999) 902; Davel *Introduction to Child Law in South Africa* (2000) 29; Cronjé and Heaton *The South African Law of Persons* (2003) 98 and 102. See also *Ex parte Oppel* 2002 5 SA 125 (C).

¹⁵²⁴ In terms of s 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." Zaal "When Should

the children needed legal assistance and favoured the assignment of a legal representative in terms of section 28(1)(h) of the Constitution. The judge raised a technical point about the wording of this section, as it states that a legal representative must be assigned by the State. The Centre for Child Law approached the Legal Aid Board and the State Attorney requesting that a legal practitioner be assigned. The State Attorney agreed to assign senior counsel.

The assignment of a legal practitioner, in terms of section 28(1)(h) of the Constitution was successful in this case, however, the State Attorney is not readily accessible to the public and thus the case does not provide a solution to

Children be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution” 1997 SALJ 334, examines this section of the Constituion, specifically in the light of legal representation in care proceedings. However, many of his views are equally relevant to any civil proceedings involving a child. Zaal proposes that “lawyers with appropriate motivation, knowledge of the relevant legal provisions and ability to relate to and communicate with the child should be utilized [to represent children]” (342). He also suggests that children should be given legal representation in care proceedings, however, due to the cost involved, such a representative should only be utilised under the following circumstances: “(a) where it appears or is alleged that the child has been physically or emotionally abused; (b) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contests the placement recommendation of a social worker who has investigated the circumstances of the child; (c) where two or more adults are each contesting in separate applications for placement of the child with him or her; (d) where the child is able to understand the nature of the proceedings, but differences in languages spoken prevent direct communication between the commissioner and the child; in such a case a representative who speaks both the relevant languages must be selected if the child speaks an official language of South Africa; (e) where any other party besides the child will be legally represented at the hearing; (f) where it is proposed that a child be transracially placed with adoptive parents who differ noticeably from her in ethnic appearance; (g) where there is reason to believe that any party or witness intends to give false evidence or to withhold the truth from the court; (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child [and] ... where the child is in disagreement with anyone else involved” (343). Zaal (344) also puts forward the idea of having a nationwide network of full-time “children’s law officers” who are independent from the courts. These individuals would scrutinise all the cases in the Children’s Court and decide whether a representative needs to be appointed for the child. A representative would then be selected from the roll of legal practitioners available. Zaal stresses that only a small number of children’s law officers would be needed and that this would be a cost-effective exercise. Although this proposal was made almost a decade ago, it is still relevant today. Cases such as *Ex parte Centre for Child Law* emphasise the importance of having clarity in our law regarding the legal representation of children and when the State must be liable to pay for such representation.

the question of how and where the public can access legal representation¹⁵²⁵ for children, when this is required in terms of section 28(1)(h) of the Constitution.

Davel¹⁵²⁶ suggests that the wording of section 28(1)(h) be changed so that the words “would probably” replace the word “would”:

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

This analysis of the section is important as, without, the necessary amendment it would be difficult to prove that substantial injustice *would* result in every case where a request is made for the assignment of a legal representative to a child.

3 8 CONCLUSION

In this chapter the current definitions of guardianship, custody and access were explored. The role of the High Court as upper guardian was also dealt with and the standard of the best interest of the child was examined.

¹⁵²⁵ The Family Advocate does not fulfill the role required by the legal representative specified in the Constitution. The Family Advocate is required to be neutral and not to represent any party to the dispute: *Soller v G* pars 23 and 24, Davel in Nagel (ed) (2006) 24.

¹⁵²⁶ In Nagel (ed) (2006) 27.

It is clear from the above discussion that South African law has developed and grown, especially since the best interest of the child standard is now firmly entrenched in the South African Constitution. However, there is still work to be done, especially regarding the question of access to minors by interested persons, other than parents, as well as the definition of and powers of a custodian.¹⁵²⁷

In any future legislation safeguards must be in place in order to ensure that the interests being protected are truly the best interests of the child and not those of the child's parents, or other interested parties. Mechanisms to minimise conflict in situations involving disputes as to the guardianship, custody or access of a child must also be put in place, as often the child is used as a weapon in his or her parents' divorce war.¹⁵²⁸

The next chapter will explore the new definitions, and relevant changes, to the concepts of guardianship, custody and access and the benefits of such changes will be explored.

¹⁵²⁷ For example, where a grandmother looks after her grandchildren, whose mother lives and works very far from home.

¹⁵²⁸ Or other disagreement.