

**CHILDREN IN NEED OF CARE  
AND PROTECTION AND THEIR  
RIGHT TO FAMILY LIFE**

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**by**

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Romans 9: 16: *“It does not, therefore, depend on human desire or effort, but on God’s mercy.”*

# Abstract

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This study was influenced by the circumstances of children in need of care and protection. I conducted the study through a lens that takes the perspectives of “family life” seriously. Section 28(1)(b) of South Africa’s Constitution provides for the right to family care, parental care, or appropriate alternative care to a child who is removed from family life. This provision prioritises the nurturing and development of children in families.

South Africa has a diversity of family models which provide family or parental care to children. Children also face various challenges and difficulties in the family environment, such as abuse, neglect, poverty, exploitation, and other traumatic experiences which make them more vulnerable and in need of care and protection. These circumstances are identified as grounds for mandatory intervention and often influence the decision by the children’s court to remove children.

The study demonstrates how family care, parental care, or appropriate alternative care are provided in South Africa’s Children’s Act, enforced by the judiciary, and have evolved in practice. Unfortunately, the Children’s Act does not explicitly provide for families, family care and the responsibility of the state to assist families to enable them to function optimally. Government and stakeholders therefore lack guidance in their engagement with the family to address the plight of children in families or raise the quality of life of the family on a continuous basis.

The social worker who conducts investigations into the circumstances of the child who is in need of care and protection, must facilitate the provision of prevention and early intervention services with a view to strengthening the family. Unfortunately, social workers sometimes

abuse their powers by removing children without prioritising the support needed to keep them in families. Furthermore, the state's assistance in supporting families may be challenging due to resource constraints, underspending on the state budget, and delay in the delivery of services.

Before the children's court decides to remove the child into alternative care it must, upon identifying a specific ground for mandatory alternative care intervention, conduct an investigation and hold an inquiry regarding the circumstances of the child. The parent and the child must have access to information and participate in the decision-making process. Once the decision to remove the child is reached, the children's court can opt for different alternative care options. It is crucial to decide on alternative care of a nature and quality that resembles family life. Such care must enable the child and the parent to mutually enjoy each other's company, as this is an essential element of family life. Thus, the state must put measures in place to ensure that the child establishes contact and has a continuous relationship with family members in view of possible reunification with the family.

Alternative care must also provide permanency planning which must explore the option of reuniting the child with his or her family after removal, or adoption if reunification efforts fail. Although adoption is preferred upon failure of reunification efforts, it is challenged by policy and practice which, if not carefully considered, may impact on the right of the child to family life. South Africa has ratified the United Nations Convention on the Rights of the Child (CRC) and is bound to develop its policies in line with the CRC. It is an issue of concern as to whether the implementation of the Children's Act goes far enough in meeting CRC standards or complying with the Constitution. Thus, the study is means of comparative research, which includes international standards and foreign jurisdictions, with the view of suggesting improvements for South African child legislation. Recommendations for the best possible

options towards refining the Children's Act are made. The proposed provisions could advance the reform of child and family services and thus make a difference in the lives of children in families.

## Key words

adoption

appropriate alternative care

care and protection

contact

family

family environment

grounds for removal

interference with family life

parental responsibilities and rights

permanency

prevention and early intervention services

removal

reunification

right to family life

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# CHAPTER 1: INTRODUCTION

## 1.1 Context and brief history

This research is a doctoral study in the area of child law and reflects on the topic: “Children in Need of Care and Protection and their Right to Family Life”. Thus, the study reflects on the grounds for mandatory alternative care interventions under the heading “children in need of care and protection” and measures that can be put in place for children to exercise the right to family life with quality and sustainable livelihoods under the heading “right to family life”.

In my introduction of the topic, I find it most significant to discuss the context and background of South Africa’s legal system governing the care and protection of children and their right to family life.

Prior to 1994, South Africa’s legal system was shaped by discriminatory laws and policies.<sup>1</sup>

In the context of this research, and its reflection on the child’s right to family life as

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<sup>1</sup> Amongst others, the Black Land Act 27 of 1913, hereinafter referred to as the “Black Land Act”; the Housing Act 4 of 1966 (the principal legislation regulating housing for whites), hereinafter referred to as the “Housing Act”; and Community Development Act 3 of 1966 (regulating houses for Black South Africans), hereinafter referred to as the “Community Development Act”. These statutes created a situation of inequality in South Africa, which indirectly contributed to the vulnerability of some children who are in need of care and protection.

entrenched in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> and family care as provided in the Constitution of the Republic of South Africa,<sup>3</sup> it is worth noting that some of South Africa's laws discriminated against children. To name but a few, these included the Births and Deaths Registration Act,<sup>4</sup> the Child Care Act,<sup>5</sup> the Children's Status Act,<sup>6</sup> (the former and the latter are repealed by the

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<sup>2</sup> (1950), hereinafter referred to as "ECHR": accessed from [www.echr.coe.int/NR/rdonlyres/Dscc24A7-DC13-4318-B457-5c9014916D7A/EngliasAnglais.pdf](http://www.echr.coe.int/NR/rdonlyres/Dscc24A7-DC13-4318-B457-5c9014916D7A/EngliasAnglais.pdf) on 2008-02-03. The ECHR was signed on 4 November 1950 and came into force on 3 September 1953. It set up a commission and a court. Art 8 provides that: "(1) [E]veryone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economical well-being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>3</sup> S 28(1)(b) of the Constitution of the Republic of South Africa Act, 1996, hereinafter referred to as the "Constitution". According to s 28(1)(b) "[e]very child has the right to family care or parental care or to appropriate alternative care when removed from the family environment".

<sup>4</sup> 51 of 1992 hereinafter referred to as the "Births and Deaths Registration Act". Amongst other provisions, s 10 of the Births and Deaths Registration Act used the term "illegitimate child", which attached potential stigma to illegitimate birth of children of unmarried parents. S 10 was replaced by s 2 of the Births and Deaths Registration Amendment Act 40 of 1996, hereinafter referred to as "Births and Deaths Registration Amendment Act" and uses the term "children born out of wedlock".

<sup>5</sup> 74 of 1983 hereinafter referred to as the "Child Care Act". Amongst other provisions of the Act, s 18(4)(d) stated that only the mother of a child born out of wedlock could give permission for the child's adoption (this position excludes the consent of the father). See *W v S* (1) 1998 (1) SA 475 (N) 496-497; *SW v F* 1997 (1) SA 796 (O). The original Child Care Act 25 of 1913 made provision for the protection of white children, see discussion by Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of

Children's Act),<sup>7</sup> and the Black Administration Act.<sup>8</sup> In other situations, these laws benefitted

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the Child Abuse: Some Conclusions in the Aftermath of Grootboom" (2001) *SAJHR* 211. This situation was reviewed by the Children's Act 33 of 1960.

<sup>6</sup> 82 of 1987. Provisions such as s 4 discriminated against children by stating that a child could be legitimated if his or her parents married each other. S 3(1)(a) of the Act discriminates against unmarried fathers by giving an unmarried mother sole parental rights over her child, that is, the right to care for and raise her child unless a competent court had ordered otherwise.

<sup>7</sup> The Children's Act 38 of 2005, hereinafter referred to as the "Children's Act". The proclamations of the legislation were signed by the President on 26 March 2010 for commencement on 1 April 2010. The Minister of the Department of Social Development approved the regulations to the Children's Act which also came into operation on 1 April 2010 and were published in *GG* No 33076 of 1 April 2010.

<sup>8</sup> 38 of 1927, hereinafter referred to as the "Black Administration Act". According to s 23(3) and regulation 2(e) of the Act, women and children were subject to customary tutelage, that is, a primogeniture rule and were not allowed to own property nor enter into any contract. Instead they were taken care of within the ambit of a family. See the discussion of the following cases in section 2 2 1 2. The case of *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) illustrated the need to reform this law. The applicant in *Bhe's* case (the mother of the two daughters born of a relationship between the applicant and the deceased father who died *intestate*) approached the Constitutional Court on behalf of the minors for an order declaring the primogeniture rule unconstitutional in order to enable the daughters to inherit. The rule was challenged on the grounds that it discriminated against female descendants, other than eldest descendants and extra-marital children, see par 10.

The Constitutional Court found the Black Administration Act discriminatory and in breach of ss 9(3), 10 and 28 of the Constitution, see *Bhe* 580 par 3 and the discussion in section 2 2 1 6. S 9 of the Constitution is an important provision that prohibits discrimination. S 9 provides that: "(1) Everyone is equal before the law and has the right to equal protection and benefit before the law. (2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3)

certain categories of children and discriminated against others. The most common cases where children were, and in other recent cases are still are discriminated against, are on the grounds of birth and the marital status of their parents.<sup>9</sup>

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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.” The Constitutional Court in *Bhe* provided a temporary solution to the effect that the distribution of intestate black estates were to be governed by s 1 of the Intestate Succession Act 81 of 1987, see *Bhe’s* case 582G. Although *Bhe’s* case influenced the reform of the Black Administration Act, the developments regarding the reform of customary law of succession were already advanced. In 1998 the South African Law Reform Commission, hereinafter referred to as the “SALRC”, submitted a draft Customary Law of Succession Amendment Bill to Parliament, which was withdrawn due to opposition by traditional leaders, who maintained that the Bill was published without consultation. The Bill was sent back to the SALRC and a further discussion paper and a draft Bill were issued by the SALRC. On 21 April 2009 the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which came into operation on the 20 September 2010, hereinafter referred to as the “Reform of Customary Law of Succession and Regulation of Related Matters Act” was passed into law. *Bhe’s* case best illustrates the influence of the reform of customary law of succession on the definition of “family”. See the discussion in section 2 2 1 6.

<sup>9</sup> In *F v B* 1988 (3) SA 948 (D); 948C-D and 950F-G. A child was born in a relationship where the applicant and the respondent had been living together as man and wife. The relationship came to an end. The respondent allowed the applicant reasonable access to the child for a period of five months, after such period the right of access was terminated. The respondent got married and the new husband had already applied to adopt the child. The Judge concluded that the court would not interfere with the parental authority of the mother of an illegitimate child except where extraordinary circumstances necessitate that such step be taken. The court relied on the case of *Douglas v Mayers* 1987 (1) SA 910 (ZHC) 914D-I and

In the early 1990s and present, South Africa has seen the review, repeal and enactment of laws<sup>10</sup> aimed at reversing the legacies of the past. These include, amongst others, the

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emphasised the fact that where the father simply states that he is the father of the child, pays maintenance for the illegitimate child and thereafter desires access, this is not sufficient to grant the father access to the child. The reluctance of courts to interfere with the rights of mothers in cases such as these is viewed as a concern by the courts for the best interests of the child. There has been a flood of litigation cases by unmarried fathers seeking access to their children born out of wedlock. The cases of *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 5 (A) are amongst others, related cases which confirmed the fact that an unmarried father has an inherent right under common law. At the same time, the case of *B v S* clarified that the unmarried father has a legally protected right to approach the court for an order granting certain rights such as access to the child. These rights may only be granted by the court if the court is satisfied that it would be in the best interests of the child: 582A-B. S 1(1)(xv) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hereinafter referred to as the “Equality Act”, provides that marital status “includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship”.

<sup>10</sup> South Africa established a new legal order that commenced with the enactment of the Interim Constitution of the Republic of South Africa 200 of 1993 on 27 April 1994, hereinafter referred to as the “Interim Constitution”. Amongst other newly enacted legislation relating to children are the following:

Adoption Matters Amendment Act 56 of 1998, hereinafter referred to as the “Adoption Matters Amendment Act”; Child Care Amendment Act 96 of 1996, hereinafter referred to as the “Child Care Amendment Act”; According to GG No 30030, the Children’s Act repeals the following legislation:

- Age of Majority Act 57 of 1972, hereinafter referred to as the “Age of Majority Act”;
- Children’s Status Act 82 of 1987, hereinafter referred to as the “Children’s Status Act”;
- General Law Further Amendment Act 93 of 1962, hereinafter referred to as the “General Law Further Amendment Act”;

Constitution,<sup>11</sup> social security law,<sup>12</sup> education law,<sup>13</sup> land reform laws,<sup>14</sup> housing law.<sup>15</sup>

The Constitution became the key legislation with supreme power over acts of parliament.<sup>16</sup>

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- Guardianship Act 192 of 1993, hereinafter referred to as the “Guardianship Act”; and
  - Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, hereinafter referred to as the “Natural Fathers of Children Born Out of Wedlock Act”.
- <sup>11</sup> The Preamble provides amongst others that: “We ... adopt the Constitution as the Supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental freedom set.”
- <sup>12</sup> The Social Assistance Act 13 of 2004, hereinafter referred to as the “Social Assistance Act” came into operation on 1 April 2006. S 4 and 6 of the Act provide for a child support grant; s 7 a care dependency grant to a parent, primary care-giver or foster parent of a child who requires and receives permanent care or support services due to the child’s physical or mental disability; and s 8 provides for a foster child grant for a child that needs such care.
- <sup>13</sup> South African Schools Act 84 of 1996, hereinafter referred to as the “South African Schools Act”.
- <sup>14</sup> Amongst other enacted land reform laws aimed at redressing past discriminatory practices in relation to the right to land and the establishment of communal families as discussed in section 2 2 1 10, are the following: Communal Property Associations Act 28 of 1996, hereinafter referred to as the “CPA”; Communal Land Rights 11 of 2004, hereinafter referred to as the “Communal Land Rights Act” or “CLRA”, the two statutes are important as they formally recognise communal structures that take care of the needs of vulnerable children living in rural communities, particularly orphans.
- <sup>15</sup> Housing Act 107 of 1997. The housing law was amended on numerous occasions to extend its application to the entire national community without discrimination on the basis of race. Ch 4 reflects on the obligation of the state to provide socio-economic rights to families, including adequate housing and protection rights under the theme “prevention and early intervention programmes”.
- <sup>16</sup> S2 of the Constitution provides that: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

South Africa had, before the enactment of the Constitution in 1996, ratified the United Nations Convention on the Rights of the Child of 1989<sup>17</sup> on 16 June 1995. The ratification of the CRC meant that South Africa is bound to develop its legislation and policies consistent with the CRC and is also required to report regularly to the United Nations Committee on the Rights of Children.<sup>18</sup> The CRC has laid down legal principles and rules to guide the development of compliant legislation on children's rights.<sup>19</sup> South Africa also ratified the African Charter on the Rights and Welfare of the Child on 7 January 2000.<sup>20</sup>

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<sup>17</sup> Hereinafter referred to as the "CRC" (Convention on the Rights of the Child): accessed from <http://untreaty.un.org/English/TreatyEvent2001/pdf/03e.pdf> on 2007-07-06. The CRC came into force on 2 September 1990.

<sup>18</sup> South Africa submitted its Initial Country Report towards the CRC on 4 Dec 1997 with Concluding Observations adopted on 28 January 2000. A report will be expected every 5 years: accessed from [www.unhcr.org/refworld/publisher.CRC.ZAF.0.html](http://www.unhcr.org/refworld/publisher.CRC.ZAF.0.html) on 2008-02-10.

<sup>19</sup> Lawrence-Karski "Legal Rights of the Child: the United Nations States and the United Nations Convention on the Rights of the Child" (1996) *IJCR* 40.

<sup>20</sup> (1990), hereinafter referred to as the "ACRWC" (African Children's Charter): accessed from [www.chr.up.ac.za/hr\\_docs/african/docs/oau/oau2](http://www.chr.up.ac.za/hr_docs/african/docs/oau/oau2) on 2007-02-03. The ACRWC was enforced on 29 November 1999. However, by 15 October 2010, South Africa had not yet submitted any of its overdue reports to the Committee on the ACRWC. According to the ACRWC a state party must submit an initial report within two years of ratification and thereafter, submit periodic reports every three years: see the discussion by Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart (ed.) *Child Law in South Africa* (2009) 344 and 349. This means that South Africa has three overdue reports towards the ACRWC. I use the ACRWC to reflect on aspects that are peculiar to Africa for African children and their impact on children and family life.

The Constitution has complied with the demands of the CRC<sup>21</sup> by incorporating chapter two of the Bill of Rights, which contains section 28 as a constitutional provision on children's rights. Most significant is the development of children's rights in South Africa through the enactment of the Children's Act. This Act aims to provide protection to children and improve the quality of lives of other sections of the community.<sup>22</sup> The inclusion of section 28<sup>23</sup> in the

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<sup>21</sup> Art 4 obliges state parties that have ratified the Convention to take legislative, administrative and other steps to give effect to all the rights contained in the Convention. According to Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" in Boezaart (ed.) *Child Law in South Africa* (2009) 313, state parties are encouraged to fulfil the socio-economic rights that apply to children in accordance with the maximum available resources of the state concerned.

<sup>22</sup> Preamble of the Children's Act.

<sup>23</sup> S 28(1) provides that: "Everyone has the right –

- (a) to name and nationality from birth;
- (b) to family care or parental care or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that –(g) are inappropriate for a person of that child's age; or
- (h) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (i) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
  - (i) kept separately from detained persons over the age of 18 years; and
  - (ii) treated in a manner and kept in conditions that take account of the child's age;



Constitution and the enactment of the Children’s Act represented a critical shift in South Africa’s legal framework governing children’s rights and the country’s fulfilment of its obligations in terms of the CRC.<sup>24</sup>

Sections 231(5)<sup>25</sup> and 232<sup>26</sup> of the Constitution govern the relationship between international law and South African law. The Constitution also provides that when interpreting the Bill of Rights a court, tribunal or forum “must consider international law”<sup>27</sup> and “may consider foreign law”.<sup>28</sup> Thus, in the discussion of this study I include international law to establish the extent

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- (j) to have a legal practitioner assigned to the child by the state, at the state’s expense, in civil proceeding affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict;
  - (2) a child’s best interests are of paramount importance in every matter concerning the child.
  - (3) In this section “child” means a person under the age of 18 years.”

<sup>24</sup> Art 4 of the CRC provides that: “State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention ...”

<sup>25</sup> The provision states that international agreements entered into by South Africa before the operation of the Constitution shall continue to bind South Africa.

<sup>26</sup> This provision confirms the fact that customary international law “is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

<sup>27</sup> S 39(1)(b).

<sup>28</sup> S 39(1)(c). See also discussions by academics on the latter provision, Dotard “International Law & the Final Constitution” (1995) *SAJHR* 241; Dugard “The Role of International Law in Interpreting the Bill of Rights” (1994) *SAJHR* 208; Keightley “Public International Law and the Final Constitution” (1996) *SAJHR* 405.

of South Africa's commitment towards the ratified international and regional human rights laws, with regard to respect for family life for children in need of care and protection.<sup>29</sup>

International law has influenced the development and implementation of the Children's Act in

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<sup>29</sup> Art 5 of the CRC states that: "states parties are obliged to respect the responsibilities, rights and duties of parents, members of extended family or community as provided by local custom, legal guardians or any person legally responsible to provide in a manner appropriate and consistent with the evolving capacities of the child guidance in the exercise by the child of the rights recognised by the Convention". Amongst others, Art 16(1) of the Universal Declaration of Human Rights (1948), hereinafter referred to as the "UDHR" (Declaration) adopted and proclaimed by General Assembly resolution 217 A (III), provides that: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights such as marriage, during marriage and at its dissolution": accessed from <http://www.yale.edu/lawweb/avalon/un/unrights.htm> on 2008-02-03. Art 23(1) of the International Covenant on Civil and Political Rights (1966), hereinafter referred to as the "ICCPR" provides that: "The right of men and women of marriageable age to marry and to found a family shall be recognized": accessed from <http://www2.chchr.org/english/law/ccpr.htm> on the 2008-02-03. The ICCPR entered into force on 23 March 1976, and was ratified by South Africa on 1999-03-10. Arts 18(1) and (2) of the ACRWC provide for the protection of the family as follows:

- "(1) the family shall be the natural unit and the basis of society. It shall enjoy the protection and support of the state for its establishment and development.
- (2) provides that State parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children in marriage and in the event of its dissolution, provision shall be made for the necessary protection of the child". the African Human and People's Charter 1986, hereinafter referred to as "ACHPR": accessed from <http://www.umn.edu/humanrts/instree/z1afchar.htm> on the 2008-02-03.

The ACHPR was adopted on the 27 June 1981 and entered into force on the 21 October in 1986. The International Covenant of Social Economic and Cultural Rights (1966): accessed from [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) on 2008-02-03, hereinafter referred to as "ICSECR". The ICSECR was entered into force on the 3 January 1976 and signed by South Africa on 1994-10-03.

South Africa.<sup>30</sup> It is therefore appropriate to consider international law to evaluate South African law for refinement.<sup>31</sup> I furthermore made use of foreign jurisprudence to widen the comparative options for South Africa. Given the length of this study, I analyse and draw inferences from specific foreign legislation, regulations and guidelines, and propose provisions which can fill the gaps that are identified in our law.<sup>32</sup>

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<sup>30</sup> The Articles of the CRC referred to in the study will be discussed as analyzed and described in Hodgkin & Newell *Implementation Handbook for the Convention on the Right of the Child* (2007) 1-589.

<sup>31</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) 958G. The CRC, ACRWC and the ECHR. I discuss the ECHR in relation to the concept “family life” and interference with “family life”. See Art 8(1) and (2) in n 2.

<sup>32</sup> I cite foreign legislation as follows, amongst others: Children and Young People Act (Australia), 2008; Children’s Protection Act (South Australia) 1993, Child Protection Act (Canada), 2010; Children and Family Services Act (The Nova Scotia, Canada), 1990; Child Family and Community Services Act (Victoria, Britain, Columbia and Canada), 1996; Child and Family Services Act (Ontario), 1990; Children’s Act (England), 2004; Children Act (United Kingdom) 1989; Child Protection Act (Queensland), 1999; Children, Young Persons and their Families Act (New Zealand), 1989; Children Northern Ireland Order 1995; Adoption Allowance Regulations (Northern Ireland) 438 of 1996; Children and Young Persons (Care and Protection Act) (New South Wales), 157 of 1998; Children’s Act (India), 1960; The Prohibition of Child Marriages Act (India) 6 of 2007, Children’s Act (United Kingdom), 1989; Consolidated Act on Social Services (Denmark) 346 of 2007. Denmark elected not to incorporate the CRC into its domestic law following its review in 2001. Nevertheless, where there is conflict with relevant national law the Danish courts consider all binding international conventions, including the CRC; Children’s Act (Scotland), 1995; the Adoption and Safe Families Act (United States of America), 1997; and Children’s Act (Kenya), 8 of 2001.

## 1.2 Research process

This section introduces the research process. The process commences with an outline on the problem statement of the study, the research approach, key research question and process and the overall aim of the study. Furthermore, I discuss the objective of the study and the motivation by referring to legislation, case law and commentaries by different authors. The motivation for the study serves to identify the challenges faced by children in the family environment which resulted in the drafting of the provision on “children in need of care and protection”.<sup>33</sup>

I also briefly discuss the contents of the study.<sup>34</sup> They are:

- Defining the “family”, “family care”, “parent”, “parental care” and “family life”;
- Grounds for mandatory alternative care interventions;
- Prevention and early intervention services aimed at keeping the child in the family - socio-economic right and protection aspect;
- Preparation for the removal of the child from family life and the decision-making process;
- Alternative care options upon the removal of the child from family life;

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<sup>33</sup> S 150(1) and (2) of the Children’s Act.

<sup>34</sup> See the discussion in section 1.6.

- The position of the child after removal into alternative care with emphasis on the right to maintain contact, access to information and reunification services; and
- Permanency planning upon failure of family reunification attempts.

The themes are discussed with reference to relevant legal authorities. Changes are proposed to the provisions of the Children's Act which currently do not address the circumstances of children in need of care and protection. Lastly, I discuss the methodology and the contribution of the study to South African child law and its relevance to development.

### **1.3 Problem statement**

The problem that is enunciated in this study is the high rate of abandonment, poverty, abuse, neglect and maltreatment suffered by children in the family environment.

### **1.4 Research approach**

This section addresses my approach to the main question of the study and the way the answers are sought and achieved in the different topics of discussion. There are numerous debates on the values of a legalistic or constitutional-based approach to understanding the right to family life within the literature study, as opposed to actual experiences. To accommodate the division in opinion, I found it more valuable to collect data from both perspectives to ensure that the recommendations and comparisons are made on *de jure* and *de facto* rights issues. This assists in understanding that the right to family life is not a social issue only, but that there are legal aspects to it as well.

A legal framework is currently in place identifying situations of children in need of care and protection, issues around parental responsibilities and rights and alternative care options. I therefore acknowledged the importance of using data concerning practical approaches to complement the law.

Different authors<sup>35</sup> use reflexive research principles in everyday life experiences, people's behaviour and social realities to find meaning in what people do and what has been happening to them. I have to some extent used a similar practice to clarify the circumstances that are determined by social workers as reasons for the removal of children from families.<sup>36</sup> I have also used reflexive research to formulate research questions to probe for answers to some of the inadequacies that are identified in law and practice to address the topic.

## 1.5 Key research question and process

The key question to facilitate the discussions throughout the study is phrased as follows: Is

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<sup>35</sup> Cohen *et al. Research Methods in Education* (2007) 23. See also Mouton *How to succeed in your master's and doctoral studies: a South African guide and resource book* (2001) 56.

<sup>36</sup> Reflexive research is more sensitive and plays out experiences and perceptions. These experiences are analysed as they influence neutrality. See Cohen *et al.* (2007) 310. Matthias *Removal of Children and the Right to Family life: South African Law and Practice* (1997) 17, covered this experience under the topic "Reality Versus Grounds: The Most frequently Cited Factors in the Removal of Children".

South Africa's constitutional provision on the right to "family care" and "parental care"<sup>37</sup> effective in preserving and protecting "family life"?

My key argument is that a child must grow up in a family environment for the full and harmonious development of his or her personality.<sup>38</sup> Thus, in the discussion I establish the efficiency of section 28(1)(b) and the extent, to which it recognises, protects and supports families in legislation.

From the key question, various sub-questions emerge as follows:

- (i) What constitutional and other legislative provisions protect and promote a "family", the right to "family care"<sup>39</sup> or "parental care"<sup>40</sup> and "family life"?<sup>41</sup> This question is answered in Chapter 2 of the study. The discussion establishes the efficiency of these laws in enforcing these concepts. I also propose what could be the most acceptable definition of "family" and what "family care" must entail in the context of the different family structures

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<sup>37</sup> S 28(1)(b).

<sup>38</sup> Preamble of the CRC; Preamble of the Children's Act. An overview of research on "The Child and Family" by UNICEF confirmed that: "when a child reaches school-age, the role of a family remains critically important. When the child reaches adolescence, family continues to play a protective role, particularly that adolescents often make decisions that have life-long consequences. It is at this time that adolescents need the continuing support and guidance from family in order to achieve their rights and development and participation": accessed from <http://www.Unicef.org/childfamily/index.html> on 2008-02-08.

<sup>39</sup> See the discussion in section 2 3.

<sup>40</sup> See the discussion in section 2 4 2.

<sup>41</sup> See the discussion in section 2 2 2 2.

that exist in South Africa.<sup>42</sup> Furthermore, I propose: for the enactment of a provision that prohibits marriages of all children below the age of eighteen;<sup>43</sup> also that regulations be promulgated to specifically assert the automatic<sup>44</sup> rights of unmarried fathers towards their children.<sup>45</sup>

(ii) What grounds or factors do courts consider for mandatory alternative interventions for children?<sup>46</sup> The answer to this sub-question is discussed in Chapter 3. I first discuss the phraseology “in need of care”, as previously provided by the Child Care Act and the improvements made by the Children’s Act.<sup>47</sup> Furthermore, I discuss each ground for

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<sup>42</sup> The following categories of families are discussed: married partnerships, see the discussion in section 2 2 1 1; polygamous marriages, see the discussion in section 2 2 1 3; religious marriages, see the discussion in section 2 2 1 4; domestic partnerships, see the discussion in section 2 2 1 5; same sex partners, see the discussion in section 2 2 1 6; child-headed households, see the discussion in section 2 2 1 8; families of grandparents, see the discussion in section 2 2 1 9; and communal families, see the discussion in section 2 2 1 10. See also the proposed definition of “family” and the fundamental elements of “family care” in section 2 5.

<sup>43</sup> Own emphasis. See the proposed provision in section 2 5.

<sup>44</sup> Own emphasis.

<sup>45</sup> See the discussion in sections 2 2 1 2, 2 2 2 2 & 3 3 5 1, see also the proposed provision in section 3 4.

<sup>46</sup> See the discussion in ch 3.

<sup>47</sup> S 14(4) of the Child Care Act as amended by Child Care Amendment Act and s 1 of Welfare Laws Amendment Act and s 150(1) and (2) of the Children’s Act. See also Matthias (1997) 17-26 for expanded discussion of this topic in terms of the Child Care Act. The causal research method (see the discussion in section 1 2 1 3 for an understanding and application of this method) will be used to reflect on what causes children to be vulnerable and in need of care and protection in the family environment.



mandatory alternative intervention as provided in the Children’s Act and foreign jurisdictions to establish gaps in our law.

Amongst others, I propose the enactment of the following provisions in the Children’s Act and relevant legislation: amendment of the regulations to the Social Assistant Act for “children without visible means of support”, for an increase in child-support grant and an additional provision for “special temporary family maintenance” for destitute families; that regulations be promulgated for the duty of the Department of Social Development and the Department of Education to provide education to children in order to curb sexual abuse, protect pregnant learners and provide services that will prevent child abandonment; a provision that prohibits harmful cultural practices against children, such as, early marriage, forced marriage, female genital mutilation, circumcision and virginity testing; a provision for training skills for positive behaviour for parents or care-givers with difficult-to-manage children; a framework for community-based service centres and home-based care service providers to monitor treatment of children who are addicted to dependence-producing substances; a provision for a table of penalties against sexual offences to guide the courts; a provision for the facilitation of intervention services for children in conflict with the law; and a special provision to be used as a standard by which the removal of the child may be decided by the courts.<sup>48</sup>

(iii) What laws protect, strengthen and preserve the right of the child to grow in a family? The answer to this sub-question is discussed in Chapter 4. I commence with the discussion

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<sup>48</sup> See the discussion in section 3 4 for the proposed provisions.

that reflects on the socio-economic and protection rights that are necessary to preserve family life. The discussion asserts the role of the state in assisting parents in their child rearing responsibilities.<sup>49</sup>

I propose, amongst others, an enactment of the following provisions in the Children's Act:<sup>50</sup> an explicit guiding principle for the primary responsibility of parents and the role to be played by the state in assisting parents to discharge their responsibilities; that regulations be promulgated for the promotion and support of the right of children to family care; a provision to monitor the implementation of prevention and early intervention programmes; regulations to guide social workers to consider less disruptive methods of intervention in matters concerning children in need of care; a provision to impose an obligation on government and its officials to spend money which is available and urgently needed by children. I also propose for enactment of: a provision for a coherent referral process for children in need of protection to Child Protection Organisations; provision for a strategy for the geographical location of these Organisations; provision for funding for the establishment of Child Protection Organisations; and provision for collaborative work by intersectoral government

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<sup>49</sup> Ss 150(3), 144 and 143(2)(a) of the Children's Act. Van der Linde "The Extent of the State's Duty to Reunite Parent and Child" in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 103-106. See also Kilkelly *The Children and the European Convention on Human Rights* (1999) 173-174; see the discussion in sections 4 2, 4 2 1, 4 3, see also the proposed provision in section 4 5.

<sup>50</sup> See the discussion in section 4 5 for the proposed provisions.

departments and non-governmental organisations.<sup>51</sup>

(iv) What measures are in place that help prepare the child and the parent for the removal of the child from family life?<sup>52</sup> The answer to this question is discussed in Chapter 5 and reached through examining the following:

- (a) how a child is brought into care; and
- (b) preparation for removal; and
- (c) the right of parent and child to participate in the decision-making process regarding the removal of the child.<sup>53</sup>

On these topics, I propose that provisions be enacted in the Children's Act as follows:<sup>54</sup> disciplinary measures of social workers who misuse their authority by taking children from their families without due cause; a provision for the judicial review of the decision to remove a child from care; the parent to share information during the investigation

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<sup>51</sup> Hereinafter referred to as "NGO" or "NGOs".

<sup>52</sup> As provided in ss 150(2), 50(1), 151(8) of the Children's Act.

<sup>53</sup> As provided in ss 151(4)-(7), 152(1)(a)-(c) and 152(2)(3) of the Children's Act. This section will also reflect on the discussion by Matthias (1997) 33 with regard to the decision-making process in terms of the Child Care Act. See the discussion in section 5 5; Van der Linde "The State's Duty to Support Family Life through Prevention and Early Intervention Programmes: A Reflection on the Children's Act 38 of 2005" in Verschraegen (ed.) *International Family Law* (2009) 110; Kilkelly (1999) 284-289; See SALRC *The Review of the Child Care Act* (1998) section 13 2 1; Davel "The Child Right to Legal Representation in Divorce Proceedings" in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 28.

<sup>54</sup> See the discussion in section 5 6 for the proposed provisions.

conducted by the social worker concerning the child, the parent to participate in the decision-making process regarding the removal of the child; and a provision for requiring the child to undergo medical assessment and examination to guide the medical practitioner of the treatment which the child may need for, for example, abuse, maltreatment or degradation.

I also propose that provisions be enacted: requiring the child to undergo medical assessment and examination for purposes of ascertaining the health and well-being of the child before placement into care; provision to prioritise mediation as an option to resolve issues relating to the care of children; a provision for details regarding what family care mediation is; who qualifies as a mediator; what training a mediator need; guidelines on how mediators should work with information including confidential information; regulations to guide the responsibilities of attorneys and advocates appointed as representatives for children; regulations to guide the different stages at which a child may participate including, presenting his or her wishes and the type of support that can be provided during participation; and a provision for the appointment of a legal representative with expertise to work collaboratively with other professionals and provide assistance in matters concerning children.

- (v) What legal measures are in place to ensure that appropriate alternative care is explored for the child in need of care and protection? The answer to this question is

discussed in Chapter 6.<sup>55</sup>

I propose that a provisions be incorporated where there are gaps in the Children's Act as follows:<sup>56</sup> for the placement of children in alternative care in the following order of priority, kinship care, foster care with a non-relative, placement in a communal family and placement in a child and youth care centre as the last option; a provision that makes a comprehensive care plan<sup>57</sup> a standard requirement for all alternative care arrangements; a provision for well co-ordinated services that promote the health, development and the well-being of children to be included in a comprehensive care plan; provision for cooperation between the social worker and foster parent in promoting the development and well-being of the child; provision for the strict monitoring of foster care placement by the designated social worker in order to marginalise situations of potential risk of the child in foster care; a provision for disciplinary measures against social workers who do not review care plans; a provision imposing an obligation on social workers to present the results of the review of foster care plans to a family care mediation forum for recommendations; and a provision to ensure that funding is directed to collaborative work by intersectoral government departments, private entities and NGOs for quality services for children in care.

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<sup>55</sup> Gallinetti & Loffell "Foster Care" in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 12-11; Skelton "Child and Youth Care Centres" in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 13-9; Kilkelly (1999) 263-271. See the discussion in sections 6 1, 6 2 1 and 6 3 1.

<sup>56</sup> See the discussion in section 6 5 for the proposed provisions.

<sup>57</sup> Own emphasis.

- (vi) What measures are in place to ensure that a child in alternative care is able to maintain contact with his or her family after removal from family life? And what measures are put in place to ensure that a child reunites with his or her family after removal from family life? These sub-questions are answered in Chapter 7. In this chapter, I propose that provisions be established in the Children's Act as follows:<sup>58</sup> for the right of the child to have personal relations and direct contact with the parent, siblings, family members or relatives; a provision for the responsibility of the state to facilitate contact between the child, his or her parents, family members including, anyone who has family ties with the child by making payment for expenses for visits and communication for purposes of contact; a provision for guidelines to the children's court and the designated social worker to arrange for a supervised contact; a provision for guidelines to social workers to ensure that visitations of children and toddlers are tailored differently; provision for visitation arrangements; provision for the role of the court in determining visitation; provision on how reunification of the child with his or her family is to be facilitated; and a provision giving children access to court when their rights are being ignored after removal into care. I am of the opinion that it is during this stage that permanency planning measures must be explored for purposes of either returning the child to his or her family or placing the child in adoption when reunification fails.<sup>59</sup>
- (vii) The study reflects on permanency planning upon failure of reunification attempts in

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<sup>58</sup> See the discussion in section 7 5 for the proposed provisions.

<sup>59</sup> See the discussion in section 8 1.

chapter eight.<sup>60</sup> I analyse the adoption legislation and practice in South Africa and assesses whether the processes in place and practice are adequate in facilitating permanency placement for a child. I propose that the following provisions be enacted in the Children's Act: for concurrent planning practice which includes, early assessment of a family to reunite the child with the family, availability of an alternative permanent placement, a concurrent plan for placement with care-givers willing to care for the child upon failure to reunite the child with birth parents, disclosure of information to the birth parents concerning the child, frequent parental visits; and a focus on timely permanency.

I also propose for a provision for the listing of names of *all*<sup>61</sup> child in need of permanency placement in the Register on Adoptable Children and Prospective Adoptive Parents (rather than matching specific children with adoptive parents); a provision for assistance that must be provided by the state for children with special needs, including medical, cultural and religious needs.

Furthermore, I propose that provisions be enacted for: the establishment of guidelines to monitor private adoptions; a provision for the registration of all adoptions, including customary law in order to keep them within the screen of the formal child protection system; provision for the age at which a person may be eligible to adopt; provision for contact between the child and his birth parents after adoption including, adoption under

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<sup>60</sup> *Ibid.*

<sup>61</sup> Own emphasis.

customary law; an express provision for children to apply to court to request the right to have contact with their biological parents; provision of an adoption allowance for parents with inadequate means to care for the child; provision for the appointment of a guardian to succeed the adoptive parent in the event of death or if the adoptive parent becomes incapacitated to care for the child; provision that allows children to be adopted in diverse families; and a provision for an application for a post-adoption order (in the absence of a post adoption agreement) for the child and his or her birth parents to have contact even after adoption.<sup>62</sup>

(viii) The discussion in every chapter reflects on the overall findings and make recommendations. The study is concluded in Chapter 9.

## 1.6 Overall aim of the study

The overall aim of this research is to analyse the extent to which the Children's Act in particular, supports the right of children to "family care, parental care or appropriate alternative care" in terms of sections 28(1)(b) of the Constitution. Thus, amendments that are proposed in the Children's Act and other measures, will be for purposes of promoting and protecting the right to family life of children to ensure that children grow up in families for the full and harmonious development of their personality, in an atmosphere of happiness, love

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<sup>62</sup> See the discussion in section 8 5 for the proposed provisions.



and understanding.<sup>63</sup>

## 1.7 Objective of the study

This research seeks to accomplish the following objective: to advocate for the adequate legal protection and promotion of the right of the child to “family care”, “parental care” and “family life”; and to advocate for the protection and preservation of families by contributing to research which may motivate for amendments in the Children’s Act that will ensure that children remain in families as opposed to the removal of children from families for placement in alternative care.

The objective of the study will be met by way of analysing the South African Children’s Act and relevant legislation, identifying key implementation strategies for preservation of family life, measuring the possible outcomes in the study based on the improvements made by the Children’s Act in comparison with foreign jurisprudence and international standards, and proposing legal provision that will enable children to remain in their families.

## 1.8 Motivation for the study

This section spells out what motivated the study. The study was motivated by concern about the plight of the many children who are not able to exercise the right to family life within the

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<sup>63</sup> The Preamble of the CRC and Preamble of the Children’s Act.

existing legislative framework. The key argument in the study is that a child must grow up in a family<sup>64</sup> environment for the full and harmonious development of his or her personality.<sup>65</sup> However, there is no definition of a “family” or “family care” in the Children’s Act.

The Children’s Act provides grounds for mandatory alternative care interventions as circumstances where a child is identified as a child in need of care and protection,<sup>66</sup> in that the child is an orphan,<sup>67</sup> without any visible means of support,<sup>68</sup> may have been maltreated, abused, deliberately neglected or degraded,<sup>69</sup> exploited, or lives in circumstances that

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<sup>64</sup> An overview of research by UNICEF “The Child and Family” 2003 confirmed that: “when a child reaches school-age, the role of a family remains critically important. When the child reaches adolescence, family continues to play a protective role, particularly that adolescents often make decisions that have life-long consequences. It is at this time that adolescents need the continuing support and guidance from family in order to achieve their rights and development and participation”: accessed from <http://www.Unicef.org/childfamily/index.html> on 2008-02-08.

<sup>65</sup> Preamble of the CRC; Preamble of the Children’s Act.

<sup>66</sup> Matthias & Zaal “The Child in Need of Care and Protection” in Boezaart (ed.) *Child Law in South Africa* (2009) 163-184.

<sup>67</sup> According to Kane-Berman *South Africa Survey 2007/2008* (2008) 44, to date, South Africa has 701 000 orphans. See the discussion in Carstens & Du Plessis “Medico-legal Aspects Pertaining to Children” in Boezaart (ed.) *Child Law in South Africa* (2009) 593.

<sup>68</sup> In terms of the number of people living in relative poverty by race, the measure of poverty trends in the South African black population was 16 275 067 during 1996-2008 as compared to the white population at 98 597 during the same period. See Kane-Berman (2008) 303. See also Sloth-Nielsen (2001) *SAJHR* 222; Proudlock “Children’s Socio-economic Rights” in Boezaart (ed.) *Child Law in South Africa* (2009) 294.

<sup>69</sup> Ss 150(1)(i) of the Children’s Act addresses this. See also ss 150(1)(f), 150(1)(g) and 150(1)(h) of the Children’s Act.

expose the child to exploitation.<sup>70</sup> Although it is difficult to obtain disaggregated statistics, it is estimated that 40 000 to 50 000 children are raped each year in South Africa.<sup>71</sup> Situations where children are exposed to “harmful cultural practices” are also considered as grounds for mandatory alternative care interventions.<sup>72</sup> “Harmful cultural practices” may be in the form of early marriage,<sup>73</sup> virginity testing,<sup>74</sup> female genital mutilation,<sup>75</sup> death arising from cultural

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<sup>70</sup> In the following form: forced marriage: early marriage, “ukungena” and “ukuthwala”; removal of body parts: female genital mutilation, circumcision; sexual exploitation. See Higson-Smith & Richter *et al.* “Commercial Sexual Exploitation and Trafficking of Children” *Sexual Abuse of Young Children in Southern Africa* (2004) 137.

<sup>71</sup> Accessed from [www.rapcan.org.za/piece/20for%20CRIN%202.pdf](http://www.rapcan.org.za/piece/20for%20CRIN%202.pdf) on 2007-07-22. The latter information confirms the fact that South Africa has the highest reported rape rate in Africa. Amongst others, s 150(1)(i) of the Children’s Act addresses this. The Sexual Offences and Related Matters Amendment Act 32 of 2007: ss 15(1), 16(2), 17(2) are discussed on issues relating to sexual exploitation of children. See Ramasar “The Impact of Child Abuse as a Life Experience on the Self and Self-concept of the Victim of Abuse” in Glanz & Spiegel *Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* (1996) 142; Minnie “Sexual Offences against Children” in Boezaart (ed.) *Child Law in South Africa* (2009) 537; Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* (2009) 540-541.

<sup>72</sup> S 12(1) and s 150(1)(f) of the Children’s Act addresses this. See Lamanna & Riedmann *Marriages and Families Making Choices in a Diverse Society* (2003) 604-605; Bowman & Kuenyehia *Women and Law in Sub-Saharan Africa* (2003) 30; Higson-Smith & Richter in Richter *et al.* *Sexual Abuse of Young Children in Southern Africa* 137; Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) South Africa Programme 34; Raj *Feminization of underdevelopment in Nigeria Some Theoretical Issues* (2007) 239; Minnie in Boezaart (ed.) *Child Law in South Africa* 537; Viljoen in Boezart (ed.) *Child Law in South Africa* 337.

<sup>73</sup> While there are no official statistics to confirm this, early marriage is rife in South Africa: see Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 34. South Africa has laws regulating marriages. However, there is lack of practical policy to monitor early marriages. Although the Recognition of

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Customary Marriages Act 120 of 1998, hereinafter referred to as the “Recognition of Customary Marriages Act” provides that prospective spouses must be above the age of 18 years, see s 3(1)(a)(i), the Act further provides that if the prospective spouse is a minor, both his or her parents or legal guardian in the absence of parents must give consent to the marriage, see s 3(3)(a). The Act permits the Minister of Home Affairs to declare a marriage of a minor valid, if he or she considers the marriage to be desirable and in the interests of the parties. See s 3(4)(c). The Act also recognises polygamous customary marriages, see s 2(4). See the discussion in section 2.2.1.2. Most customary marriages are not officially reported to the marriage officers of the district where the spouses reside. Hence in practice, girl-children could marry as early as 14 or 16 years of age. The foundation and conclusion of a valid customary marriage is as a result of private negotiations, including *lobolo* negotiations, between the family of the prospective bride and groom. Hence it is not easy to expose those abusing the practice of customary marriage. Parents also use religion and other customs to get their children into early, permanent relationships. Furthermore, South African civil law (s 26(1)) of Marriage Act 25 of 1961, hereinafter referred to as the “Marriage Act”, read with s 17 and 18(3)(1)(c)(i) of the Children’s Act), prohibit a girl who is below fifteen years-old and a boy below the age of eighteen to marry without the written consent of the Minister of Home Affairs or any officer in the public office who is authorised to grant consent. In essence, this revision allows these category of children to obtain the Minister’s consent if they want to marry, see the discussion in section 2 2 1 1. On the same note, s 12(2)(a) and (b) of the Children’s Act prohibits marriage of any child below the minimum age set by law for a valid marriage, see the discussion in section 2 2 1 1. In *The Star* (2007-06-13), a 16 year-old girl (Banza), who was kept away from Western influences by her parents, entered into an arranged marriage where she had to fulfil a role of subservient wife and mother. She was raped and routinely bitten by her husband. She moved out of the house to escape her husband’s violence and to run away from her family that was enraged as she defied family rules by wanting to divorce her husband. The 16 year-old was later murdered by her father, uncle and a group of family friends who plotted her killing by strangulating her with a bootlace and stuffed her body in a suitcase and buried it under a freezer. Children in early marriages are often ill-informed. Many are coerced by societal attitudes and wanting to be accepted by the community to enter into early marriages. Lamanna & Riedmann (2003) 604-605; Higson-Smith & Richter in

circumcision,<sup>76</sup> and other forms of abuse. Unfortunately, the Children's Act does not explicitly provide for the latter as children in need of care and protection.<sup>77</sup> Amongst other discussions, this study will break new ground on the section on abuse emanating from harmful cultural practices and also fill the gaps that exist in our law.<sup>78</sup> Patterns of child abandonment<sup>79</sup> reveal that many newborns are found exposed in public places; abandoned by their own parents

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Richter *et al.* *Sexual Abuse of Young Children in Southern Africa* (2004) 137; Viljoen in Boezart (ed.) *Child Law in South Africa* 337.

<sup>74</sup> S 12(4) and (5) of the Children's Act is addressing this.

<sup>75</sup> S 12(3) and of the Children's Act is addressing this.

<sup>76</sup> S 12(8) and (9) of the Children's Act is addressing this.

<sup>77</sup> According to s 150(1)(f) and s 150(1)(g) of the Children's Act, a child who is exposed to harmful cultural practices is a child in need of care and protection. However, a child who is exposed to such practices may not necessarily be removed from family life. There is a range of judicial remedies that may be considered: s 156(1) of the Children's Act. See also Gallinetti in "The Children's Court" in Davel & Skelton *Commentary on the Children's Act* (2007) 4-13. Amongst others, the remedies may include removing the perpetrator who is abusing the child from the family environment.

<sup>78</sup> Bless & Higson-Smith *Fundamentals of Social Research Methods: An African Perspective* (1995) 7.

<sup>79</sup> Kane-Berman (2008) 413. In 2006, more than 72 000 girls between the age of 13 and 19 (the survey includes children who are 19 years-old, though in terms of the Children's Act only persons who are 0 to 18 years-old are regarded as children) did not attend school because they fell pregnant while at school. S 150(1)(a) of the Children's Act provides that a child who is abandoned or orphaned and without any identifiable means of support is a child in need of care and protection. According to the *Sowetan* (2007-07-03), there 1 200 children were abandoned in at three provinces alone in South Africa. The number of children abandoned doubled as the report indicates that "more than 40 children are dumped in Free State province alone every month, the worst record in the country".

either in hospitals, forests, dump sites,<sup>80</sup> plastic bins or pit latrines.<sup>81</sup>

In some cases children leave their family homes to live on streets.<sup>82</sup> They leave due to conflict between them and their parents, poverty, uncontrollable behaviour,<sup>83</sup> long standing records of sexual abuse as children, or not wanting to overcrowd the family home. Many children who leave their family homes to live on the streets survive on handovers from motorists or earnings from prostitution. These children spend their lives from teenage to adulthood outside the confines of the family environment.

Teenage or learner pregnancy<sup>84</sup> and single parenting greatly contribute towards the increase in child abandonment, neglect, malnutrition and abuse of children. The HIV/Aids pandemic

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<sup>80</sup> *Capricorn Voice* (2007-05-23): in the provincial newspaper for Limpopo, it was reported that a body of a baby girl was discovered inside a plastic bag at the dumping site near Musina municipality by street kids who mistook the wrapped plastic bag for a bag of food. Police launched a search in the area to find the mother.

<sup>81</sup> *Sowetan* (2007-05-30): paramedics rescued a new-born baby who was dumped down a pit toilet by a 23 year-old mother in Edendale near Pietermaritzburg in the Kwa-Zulu-Natal Midlands. Although the baby was found covered in maggots, its umbilical cord was still intact.

<sup>82</sup> S 150(1)(c) of the Children's Act is addressing this. See Ennew "Outside Childhood: Street Children's Rights" in Franklin *The New Handbook of Children's Rights* (2002) 392.

<sup>83</sup> S 150(1)(b) of the Children's Act is addressing this. Matthias (1997) 20-21.

<sup>84</sup> According to the *Sunday Times Metro* (2006-03-26), 2 542 school girls fell pregnant over the past 2 years in Gauteng. Tembisa township had the highest figure at 61, Beverly Hills High School on the Vaal was the second highest at 43 and Eketseng Secondary School on the East Rand had 36 learners who fell pregnant. Teenage or learner pregnancy deprives the girl-child of her right to enjoy childhood. Instead of growing as a child, the pregnant learner must assume the role of parent and fend for her newborn. This is why many pregnant teenagers abandon their newborns.

also plays a major role as a contributory factor to child abandonment.<sup>85</sup> Fear and ignorance about HIV/Aids results in the abandonment of children by their HIV positive mothers. HIV/Aids has also worsened the state of vulnerability of children; particularly younger girls. This situation creates an environment where girl-children are no longer able to grow up as children and enjoy family life.

Instead many assume the role of parent and as head of households.<sup>86</sup> Children who are orphaned and are HIV positive as a result of infection from their HIV positive parents are often left alone or in the care of relatives or grandparents.<sup>87</sup> In some cases the financial instability of relatives makes it impossible for these children to receive adequate support. Alternatively, children may be left with the government's child-support grant as the only

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<sup>85</sup> *Sunday Times Metro* (2001-08-22): An unknown mother dumped a baby with a Brakpan (Gauteng) couple, while the couple was holidaying in Ballito North, Durban, on 29 December 2000. The baby was admitted to hospital a few days after abandonment and was discovered to have serious internal infection as a consequence of Aids.

<sup>86</sup> Kane-Berman *South Africa Survey 2008/2009* (2009) 43. According to the *General Household Survey* (Child Gauge) 2008/2009, South Africa had 148 000 child-headed households. S 150(2)(b) of the Children's Act is addressing this. See Jewkes "Child Sexual Abuse and HIV Infection" in Richter *et al. Sexual Abuse of Young Children in Southern Africa* (2004) 135; Kassin & Mahery "Special Child Protection Measures in the Children's Act" in Boezaart (ed.) *Child Law in South Africa* (2009) 197; Couzens & Zaal "Legal Recognition for the Child Headed Households: An Evaluation of the Emerging South African Framework" (2009) *Int Journal of Children's Rights* 300-304; DSD Unpublished Training Materials *Child-Headed Households in Draft Intermediate Phase* (2009) 2-4.

<sup>87</sup> *The Star* (2005-10-11).

means of support.<sup>88</sup> South Africa has 9 061 711 children who receive a child-support grant.<sup>89</sup> The child-support grant, which is currently R 260.00,<sup>90</sup> is insufficient in the context of ever-increasing inflation and the financially draining reality of children living with HIV/Aids. The Social Assistance Act has put an “income” test measure in place for eligible care-givers to qualify for the grant.<sup>91</sup> The “income” test may disadvantage children in the event that additional sources of income meant for other family responsibilities are taken into account. Where the primary care-giver fails the “income” test, the orphaned and HIV positive child suffers.<sup>92</sup> For children who have nutritional and medical needs<sup>93</sup> like those with HIV/Aids,<sup>94</sup> medical treatment may be costly and unaffordable. Most children who face situations of

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<sup>88</sup> Reg 6(1)(a) to the Social Assistance Act provides that a primary care-giver of a child is eligible for a child-support grant with effect from 1 January 2010 if the child is born after 31 December 1993.

<sup>89</sup> Kane-Berman (2009) 483.

<sup>90</sup> The grant is reviewed by the Minister of Social Development from time to time. See GG 31987 of 13 March 2009. See also Kibel (eds.) *South African Child Gauge 2009/2010* (2010) 107: from April 2010 the child-support grant had the value of R 250 per child per month. In April 2011 and at the time of writing this section of the study, the grant has the value of R 260 as amended in 2010 and 2011 respectively.

<sup>91</sup> Reg 19(1) sets out the criteria for the determination of “income” means.

<sup>92</sup> Reg 18(2) to the Social Assistance Act which provides that the income of the applicant and his or her spouse be taken into account in determining the financial criteria of the applicant for the grant.

<sup>93</sup> Sloth-Nielsen “Ratification of the Convention on the Rights of the Child: Some Implications for South Africa” (1995) *SAJHR* 401.

<sup>94</sup> Loewenson & Whiteside *The Impact of AIDS in Southern Africa* (1997) SAFAIDS 4-5. Symptoms which may include chronic fatigue or weakness, diarrhoea, minor skin infections, respiratory problems, sustained weight loss, persistent swelling of lymph nodes, and deterioration of the central nervous system.



financial need resort to any form of employment they can get to sustain their families and to improve their livelihoods.<sup>95</sup>

Children who live with separated or divorced<sup>96</sup> parents, (who in terms of section 47 of the Children's Act<sup>97</sup> may be in the course of proceedings in terms of, amongst others, the Divorce Act<sup>98</sup> or Domestic Violence Act<sup>99</sup>) may need alternative "care" and "protection" from family feuds, particularly when the family home becomes an environment of uncertainty, fear and distress. In other cases, a child who is sexually molested in the family environment may need "protection" only. Thus, "protection" may be provided as an intervention measure to keep the child in the family rather than removal. These measures may include removing the sexual molester from the family environment or issuing an order interdicting the sexual

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<sup>95</sup> S 28(1)(f)(i); s 150(2)(a) of the Children's Act, s 28(e) and (f)(i)(ii) of the Constitution are addressing this. In 2009, 1 489 000 people between the age of 15 and 24 were employed in South Africa, see Kane-Berman (2008) 222. See Melchiorre *At What Age? ...are School-children Employed, Married and Taken to Court?* (2002) 98.

<sup>96</sup> In 2006 alone, South Africa had a total of 31 270 children of parents who were divorced: accessed from [www.statssa.gov.za/publications/Html/P03072005/html/Po3072005.html](http://www.statssa.gov.za/publications/Html/P03072005/html/Po3072005.html) on 2007-06-30.

<sup>97</sup> A child who needs care and protection in terms of s 47 of the Children's Act is referred to a designated social worker for an investigation as stipulated in s 155(2) of the Children's Act which applies to all children in need of care.

<sup>98</sup> 70 of 1979, hereinafter referred to as the "Divorce Act".

<sup>99</sup> 116 of 1998, hereinafter referred to as the "Domestic Violence Act".

molester from contacting the child.<sup>100</sup>

On the other hand, financial assistance may be provided as an intervention measure for a child who lives in a poverty stricken family, rather than removing the child to alternative “care”. The review of the Child Care Act introduced another category of “vulnerable children” whom the Act proposes be covered under the comprehensive child legislation.<sup>101</sup> These children are identified as “children in especially difficult circumstances”<sup>102</sup> and include refugee children and children with disabilities.<sup>103</sup> However, this category of children is not covered in the Children’s Act as children in need of care and protection. Before a child is removed from the family environment, a designated social worker would conduct an investigation and hold an inquiry regarding the circumstances of the child.<sup>104</sup> The Children’s Act does not articulate the participation of the child in the decision-making process concerning his or her removal. Once the decision to remove the child is reached, the children’s court can opt for different alternative care options. The Constitution is explicit that the child must be placed in “appropriate alternative care” once removed from family life.<sup>105</sup> However, the Children’s Act

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<sup>100</sup> See Jones & Buckle *The Civil Practice of the Magistrates’ Courts in South Africa* (1988-1991) 87; Berry *The Law of Equitable Remedies* (2000) 12; Colin *The Law and Practice of Interdicts* (2009) 60-85; Mbazira *Litigating Socio Economic Rights in South Africa* (2009) 166-167. See the discussion in section 3 3 9 1.

<sup>101</sup> The Children’s Act, see also the SALRC *The Review of the Child Care Act* (1998) section 2 6.

<sup>102</sup> SALRC *The Review of the Child Care Act* (1998) section 2 6.

<sup>103</sup> *Ibid.*

<sup>104</sup> S 151 of the Children’s Act; Mahery *et al. Children’s Act Guide for Child and Youth Care Workers* (2011) 25.

<sup>105</sup> S 28(1)(b). “Appropriate alternative care” must provide care that should be of such a nature and quality that is as close to family or parental care as possible. A care order must be

does not articulate what an “appropriate alternative care” arrangement should be.

The Children’s Act does not provide for the right of the parent and the child to access information regarding the removal of the child from family life. Also, the Act does not clearly stipulate what the assistance of the state should be in facilitating contact<sup>106</sup> and the reunification of the child with his or her family when the reasons for placing the child in alternative care are met. Alternative care must provide permanency planning that will ensure the sustainable development and well-being of the child. Unfortunately, adoption practice and policies consider the physical and mental health,<sup>107</sup> age of the child,<sup>108</sup> race, religion and cultural identity,<sup>109</sup> or social circumstances to qualify or deny a child adoption. Customary adoptions deny the child the right to establish his or her identity and to know his or her parents.

Even though the Children’s Act uses post-adoption agreements to enable the child to have

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executed in a manner which respects the religious persuasion and philosophical convictions of the child’s parents: see Kilkelly (1999) 273. Alternative care can only be appropriate if it provides permanency for the development and stability of the child: see the Preamble of the CRC; s 229(b) of the Children’s Act. Adoption is therefore discussed as a permanency planning option that is preferred over foster care or child and youth care centre placement. See the discussion in ch 6 and ch 8 accordingly.

<sup>106</sup> This concern is addressed in sections 16(6) and 7(3).

<sup>107</sup> See the discussion in section 8(4)(2)(1)(3).

<sup>108</sup> See the discussion in section 8(4)(2)(1)(2).

<sup>109</sup> See the discussion in section 8(4)(2)(1)(4).

continuity of relationships with birth parents or care-givers, the Act fails to provide procedures to facilitate post-adoption applications initiated by birth parents or the adopted child in particular.<sup>110</sup> Also, parents who are eligible to adopt are those with sufficient means to provide care to the child. Although adoption is preferred, it is challenged by policy and practice which, if not carefully considered, may impact on the right of the child to family life.

## 1.9 Brief discussion of research content

In this section I briefly discuss the content of this research in terms of the themes highlighted in section 1.1.1 above. This section is relevant in that I provide a glimpse of the contents of the discussion in the study and recommendations for amendments to specific provisions in the South African Children's Act.

### 1.9.1 Defining the “family”, “family care”, “parent”, “parental care” and “family life”

Under the theme: “Defining the ‘family’, ‘family care’, ‘parent’, ‘parental care’ and ‘family life’”,<sup>111</sup> I discuss the content of phrases such as, “family”, “family care”, “parental care”<sup>112</sup> as they apply to case law,<sup>113</sup> legislation,<sup>114</sup> including the “official” customary law<sup>115</sup> and “living”

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<sup>110</sup> O'Halloran *Child Care and Protection: Law and Practice in Northern Ireland* (2003) 333.

<sup>111</sup> See the discussion in section 1.1.1.

<sup>112</sup> S 28(1)(b) of the Constitution.

<sup>113</sup> *Dawood* 959A-B, see n 31, identified “family” as a social institution that provides security and support to members of society; *Daniels v Campbell* 2004 (5) SA 331 (CC) reflected on “family” with regard to monogamous Muslim marriages; *Hassan v Jacobs* 2009 SACC 19 (CC)

customary law,<sup>116</sup> which made attempts these concepts, particularly, the definition of “family”

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referred to “family in relation to polygamous Muslim marriages; *Gory v Kolver* 2007 (4) SA 97 (CC) referred to “family” with regard to a survivor in a permanent same sex relationships, also *J & B Director General: Department of Home Affairs* 2003 (5) SA 621 (CC) referred to “family” in relation to a child born to same sex partners as a result of artificial insemination (the ovum of one same-sex woman partner was fertilised with donor sperm and implanted into the other woman who gave birth to twins). *Hoosein v Dangor* 2010 (4) BCLR 362 (WCC) used the word “spouse” for persons in a marriage concluded in terms of Islamic personal law.

<sup>114</sup> According to s 8 of the Bill of Rights, the Bill (including s 28(1)(b)) applies to all law and binds the legislature, the executive, the judiciary and all organs of state. This means *inter alia*, s150(2)(b) of the Children’s Act recognises child headed families; s 231(1)(a)(iii) recognizes communal families; s 21(1)(b) recognises an unmarried father as part of a family; s 30(1) Marriage Act, which infers to “family” as originating from marriage between a man and a woman; s 2 of the Recognition of Customary Marriages Act has a conservative definition of “family” and allows for polygamous marriage. The Act came into operation on 15 November 2000; Civil Union Act 17 of 2006 seems to widen the definition of “family” with regard to the recognition of families of same-sex unions; the draft Domestic Partnerships Bill [B–2008] GG 14 January 2001 No 30663 refers domestic life partnerships as “family”; Muslim Marriages Bill [B-2011] GG 21 January 2011 No 33946, published by the Department of Justice and Constitutional Development on 15 March 2011. The Bill provides for the recognition for Muslim marriages only; specifies the requirements for a valid Muslim marriage; regulates the registration of Muslim marriage; recognises the status and capacity of spouses in Muslim marriages; and regulate proprietary consequences of Muslim marriages and their termination. The Bill refers to monogamous and polygamous Islamic marriages when referring to “family”.

<sup>115</sup> “Official customary” is customary practice that is codified or written into law. See Bekker & Maithufi “The Dichotomy between ‘official customary law’ and non-official customary Law” 1992 *JJ S* 47-60; Bennett *Customary Law in South Africa* (2004) 337-345.

<sup>116</sup> The “living” customary law is the commonly practiced custom. This law is not necessarily written. See the case of *Sonti* 1929 NAC (C&O) 23. In *Mthembu v Letsela* 1997 (2) SA 936 (T) par 109, the court highlighted in the latter case that there was no sufficient evidence before it to allow it to determine the true content of the “living” customary law to develop it. The court

without success. The discussion of the concepts unravels the type of “family” that is recognised in South Africa through the diverse family arrangements.<sup>117</sup> I propose that “family” be defined in the Children’s Act<sup>118</sup> by inferring from the wide definition of “family” provided by the CRC,<sup>119</sup> relevant international law<sup>120</sup> and the attributes regarding the recognition of marriages by the Constitution.<sup>121</sup>

The European jurisprudence provides guiding principles as to what “family life” may entail. Since South Africa has not developed case law that enforces the fundamental elements of “family care”, and given the fact the concepts “family life” and “family care” seem somewhat interrelated and interconnected<sup>122</sup> insofar as fundamental elements of “family life” are

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held that the difficulty lies not necessarily in recognising the notion of “living” customary law but in determining and testing its content.

<sup>117</sup> See the discussion in section 2 2 1.

<sup>118</sup> See the proposed definition in section 2 5.

<sup>119</sup> Art 5. See the discussion in section 2 2 2 1.

<sup>120</sup> These laws referred to “family” as a unit or category of persons: see Art 16(3) of the UDHR, see the discussion in section 2 2 2 3; Art 18(1) of the ACHPR, see the discussion in section 2 2 2 6; Art 23(1) of the ICCPR, see the discussion in section 2 2 2 4; Art 10(1) of the ICSE, see the discussion in section 2 2 2 5.

<sup>121</sup> S 15(3) of the Constitution. See the discussion in section 2 2 1 2.

<sup>122</sup> This is the reason that I use the concept “family life” rather than “family care”. Later in the study, I use both concepts, “family life” and “family care”, interchangeably. By doing so, I do not suggest that the two concepts have similar meaning. Instead, I will be taking advantage of available information regarding the definition of the concepts.

concerned,<sup>123</sup> South Africa must learn from the ECHR which sets out specific rights which are protected by the state within the scope of “family life”.<sup>124</sup> In this section, I recommend for South Africa to refer to the fundamental elements of “family life” as in the ECHR to provide for the definition of “family care” in section 11 of the Children’s Act.<sup>125</sup>

Furthermore, I propose that emphasis to the right of the child to enjoy “family care”, be made in section 144(2) of the Children’s Act which provides for the implementation of prevention and early intervention programmes, particularly the provision on the preservation of family structure.<sup>126</sup> The latter creates an opportunity to promote the right of the child to “family care” as provided in section 28(1)(b) of the Constitution. I also propose that South Africa draw lessons from the Child Protection Act (Canada)<sup>127</sup> and incorporate a provision on measures that must be implemented to ensure that children enjoy the right to “family care”.<sup>128</sup>

The study discusses the concept “parental care”<sup>129</sup> in relation to the concept “parental

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<sup>123</sup> *Rieme v Sweden* (1992) 16 EHRR 181 section 54. Also discussed by Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 110. See also the discussion in section 2.2.2.3.

<sup>124</sup> That is, the right to respect for private life, “family life”, home and correspondence. See also Kilkelly *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention of Human Rights* (2003) 6.

<sup>125</sup> See the discussion in section 2.5.

<sup>126</sup> See the discussion in section 4.3.

<sup>127</sup> Section 2 of the Preamble.

<sup>128</sup> See the proposed provision in section 2.5.

<sup>129</sup> See the discussion in section 2.4.2.

responsibilities and rights” consistent with the interpretation provided by court cases.<sup>130</sup> “Parental responsibilities and rights” include four elements;<sup>131</sup> that is, the right to (a) care for the child;<sup>132</sup> (b) maintain contact with the child;<sup>133</sup> (c) to act as a guardian of the child;<sup>134</sup> and (d) to contribute to the maintenance of the child.<sup>135</sup>

However, the Children’s Act does not provide for equal parental responsibilities and rights. Thus, I propose that South Africa refer to the Children and Young People Act (Australia)<sup>136</sup> and a provision be enacted for equal parental responsibilities and rights of parents. I further propose that regulations be promulgated to the Children’s Act to cater for automatic<sup>137</sup> rights for unmarried fathers. Also, the Children’s Act does not explicitly provide for the primary aspects of responsibilities and rights of parents, when the assistance of the state may be considered and how the contact between the child and parent must be facilitated and supported. I propose that South Africa must refer to the critical arguments raised in,

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<sup>130</sup> *Stassen v Stassen* 1998 (2) SA 105 (W); 2000 (3) BCLR 277 (C); *Schmidt v Schmidt* 1996 (2) SA 211 (W); *Allsop v McCann* 2001 (2) SA 706 (C); *Heystek v Heystek* 2002 (2) SA 754 (T); *Fish Hoek Primary School v GW* 2010 (4) BCLR 331 (SCA). The latter are, amongst others, cases discussed in sections 2 4 1 and 2 4 2 with regard to the definition of “parent” and “parental care”.

<sup>131</sup> See the discussion in section 2 4 2.

<sup>132</sup> S 18(2)(a) of the Children’s Act. See the discussion in section 2 4 2.

<sup>133</sup> S 18(2)(b) of the Children’s Act. See the discussion in section 2 4 2.

<sup>134</sup> S 18(2)(c) of the Children’s Act. See the discussion in section 2 4 2.

<sup>135</sup> S 18(2)(d) of the Children’s Act. See the discussion in section 2 4 2.

<sup>136</sup> Ss 15(a); 15(b); 19(1); 20(1) of Division 1.3.2, see the discussion in section 2 4 4.

<sup>137</sup> Own emphasis.



amongst others, *Government of the Republic of South Africa v Grootboom*,<sup>138</sup> the CRC<sup>139</sup> and the ACRWC<sup>140</sup> and incorporate a provision which emphasises the role of parents and the assistance required from the state for parental responsibilities and rights.

### 1.9.2 Grounds for mandatory alternative interventions<sup>141</sup>

The theme “grounds for mandatory alternative care interventions”, discusses the grounds identifying children in need of care and protection.<sup>142</sup> In the study, I make some recommendations with regards to the question whether a particular ground warrants removal or not. However, in this section I will only highlight a few of the recommendations I have made in the discussion of this chapter, given the long list of the grounds for mandatory alternative care interventions and the length of the discussion.

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<sup>138</sup> 2001 (1) SA 46 (CC) 8; *Grootboom v Oostenberg Municipality* 2000 (11) BCLR 1169 (CC) 77. Although the case of *Grootboom* was about s 28(1)(c), that is, the right of the child “to basic nutrition, shelter, basic health care services and social services”, the court found in terms of s 28(1)(b) that parents have the responsibility to provide care to their children. The state may assist parents in the event that parents are not capacitated to discharge their responsibilities. See also Van der Linde *Constitutional Recognition of Rights in Respect of the Family and Family Life with Reference to Aspects of Section 8 of the European Convention for the Protection of Human Rights and Freedoms Grondwetlike Erkenning van Regte ten Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mense* (LLD Thesis 2001 UP) 342. See the discussion in section 2 4 2.

<sup>139</sup> See the discussion in section 2 4 3 1.

<sup>140</sup> *Ibid.*

<sup>141</sup> See ch 3.

<sup>142</sup> S 150(1) and (2) of the Children’s Act.

Children are removed from the family environment on the recommendations by social workers.<sup>143</sup> Social workers would consider numerous factors before deciding to remove or not remove the child.<sup>144</sup> This is a comprehensive list of grounds for alternative care interventions.<sup>145</sup> However, I am of the view that South Africa can improve on the list provided by the Children's Act. The list is not exhaustive of other social and economic factors which

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<sup>143</sup> S 12 of the Child Care Act.

<sup>144</sup> S 151(5)(b) of the Children's Act. The improvements made by the Children's Act are discussed in contrast with ss 14(4) and 15 (1)(a)-(d) of the Child Care Act as amended by Child Care Amendment Act and s 1 of Welfare Laws Amendment Act, hereinafter referred to as the "Welfare Laws Amendment Act"; Matthias (1997) 33. See the discussion in section 3.3.

<sup>145</sup> S 150(1): "A child is in need of care and protection if, the child –

- (a) has been abandoned or orphaned and is without any visible means of support;
  - (b) displays behaviour which cannot be controlled by the parent or care-giver;
  - (c) lives or works on the streets or begs for a living;
  - (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
  - (e) has been exploited or lives in circumstances that expose the child to exploitation;
  - (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
  - (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
  - (h) is in a state of physical or mental neglect; or
  - (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is;
- (2) A child found in the following circumstances which may be a child in need of care and protection and must be referred for investigation by a designated social worker:
- (a) a child who is a victim of child labour; and
  - (b) a child in a child-headed household."

make children vulnerable in the family environment.<sup>146</sup> Thus, I propose that South Africa learn from Kenyan<sup>147</sup> and Canadian<sup>148</sup> legislation and add more grounds for children in need of care and protection.<sup>149</sup>

I also make further recommendations for the listed grounds for mandatory alternative care interventions. Amongst others, I propose that South Africa learn from the Northern Ireland Order<sup>150</sup> and promulgate additional regulations to the Social Assistance Act<sup>151</sup> or new regulations to section 150(1)(a) of the Children's Act for an increase in the amount of child-support grant for children who are "without visible means of support".<sup>152</sup> I also propose that South Africa learn from the Consolidated Act on Social Services (Denmark),<sup>153</sup> Children Act (England)<sup>154</sup> and the Young Persons and their Families Act (New Zealand),<sup>155</sup> which provide grants to families and to children according to their age and stages of development. I recommend that South Africa must learn from these countries and promulgate regulations to the Social Assistance Act for "special temporary family maintenance"<sup>156</sup> to families without means of subsistence in order to improve the conditions of children in families.

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<sup>146</sup> See the discussion in section 3 4.

<sup>147</sup> S 119, see the discussion in section 3 2 3.

<sup>148</sup> S 9, see the discussion in section 3 2 3.

<sup>149</sup> *Ibid.*

<sup>150</sup> S 18(1).

<sup>151</sup> Regs 18 and 19.

<sup>152</sup> See the proposed provision in section 3 4.

<sup>153</sup> Ss 2(1); 19(1) and (2), see the discussion in sections 3 3 1 2 2 and 3 4.

<sup>154</sup> Ss 17(1) and (6), see the discussion in sections 3 3 1 2 2 and 3 4.

<sup>155</sup> Ss Preamble (a) and (b), see the discussion in sections 3 3 1 2 2 and 3 4.

<sup>156</sup> See the proposed provision in section 3 4.

According to the South African Child Justice Act,<sup>157</sup> a child justice court<sup>158</sup> that convicts a child of an offence, may sentence a child to compulsory residence in a child and youth care centre providing a programme.<sup>159</sup> This category of children, in terms of the Child Protection Act (Canada),<sup>160</sup> identified those children in need of care and protection. South Africa must learn from Canada and establish additional provisions in section 150(1) of its Children's Act to include children who are in trouble with the law as children in need of care and protection for consistency with the South African Child Justice Act.

With regard to the decision to remove the child, I propose that South Africa adopt an approach used by the ECHR in terms of Article 8(2) of providing a threshold criteria, also a limitation clause for the right to family life, to determine whether the action taken by the public authorities to interfere with family life, is justifiable or not. Given the fact that the grounds for mandatory alternative care interventions may never be exhausted, I propose that an additional provision be incorporated in subsection 150(4) of the Children's Act to limit the decisions to remove children from family life.<sup>161</sup> The additional provision must find expression in the Children's Act also, be enforced consistently with section 36<sup>162</sup> of the Constitution.

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<sup>157</sup> S 76(1) of the Child Justice Act 75 of 2008. See ss 191(2)(j) and 144(1)(h) of the South African Children's Act.

<sup>158</sup> See s 1 (1) of the Child Justice Act.

<sup>159</sup> S 167(1)(b) of the Children's Act.

<sup>160</sup> S 9, see the discussion in section 3 2 3; see s 50(a) of the Child Justice Act; see the discussion in section 4 3.

<sup>161</sup> See the proposed provision in section 3 4.

<sup>162</sup> According to s 36:

### 1.9.3 *Prevention and early intervention services aimed at keeping the child in the family as a socio-economic right and protection measure*

This section discusses preventative and early intervention services necessary to strengthen and support families with the aim to keep children in families.<sup>163</sup> The study discusses these services as socio-economic and protection rights of children that may be claimed primarily from parents and if parents fail, from the state.<sup>164</sup> For instance, in situations where the decision to remove the child is influenced by a lack of “visible means of support”<sup>165</sup> in the family, the state must take appropriate measures to provide the means for support in order to

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- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (i) the nature of the right;
  - (ii) the importance of the purpose of the limitation;
  - (iii) the nature and extent of the limitation;
  - (iv) the relation between the limitation and its purpose; and
  - (v) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>163</sup> S 144(1) and (2) of the Children’s Act; Mahery *et al.* (2011) 12. See the discussion in section 4 3.

<sup>164</sup> See the discussion in sections 4 2 and 4 2 1.

<sup>165</sup> S 150(1)(a) of the Children’s Act.

enable the child to remain in the family.<sup>166</sup>

Thus, I propose that South Africa must refer to the Child Family and Community Services Act (Canada) and the Children, Young Persons, and their Families Act (New Zealand) and provide for intervention methods that are less likely interfere with the right to family life. Further provisions must be incorporated in section 144(3) and (4) of the Children's Act that would enable a designated social worker to monitor the implementation of prevention and early intervention programmes.<sup>167</sup>

The Children's Act provides for the establishment of Child Protection Organisations to provide services to support children's court proceedings and implement orders of the court for children who have suffered, amongst others, abuse, maltreatment, neglect and exploitation.<sup>168</sup> However, the Children's Act does not provide information regarding the

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<sup>166</sup> S 7(2) of the Constitution provides that the "state must respect, protect, promote and fulfil those rights". The Preamble of the Children's Act also provides that the "state must respect, protect, promote and fulfil those rights". S 4(2) of the Children's Act requires state organs to take reasonable measures to the maximum extent of their available resources to achieve the objectives of the Act. S 28(1)(c) realizes the socio-economic rights of children. See Sloth-Nielsen (2001) *SAJHR* 210, 220; SAHRC *6<sup>th</sup> Economic and Social Rights Report (2003-2004)* (2006) 113. According to the latter report, these rights include the implementation of legislation, the adoption of a national strategy, and the development of plans directed towards the full realization of the rights. See also Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* (2009) 110. See the discussion in sections 4 2 and 4 2 1.

<sup>167</sup> See the discussion in section 4 5.

<sup>168</sup> S 107(1). See also s 48(1)(a) of the Children's Act provides for, amongst other powers the children's court has in addition to the orders it is empowered to make, an interdict as a state

referral process of children in need of care and protection to Child Protection Organisations, the period of stay in a Child Protection Organisation,<sup>169</sup> the need for a comprehensive case plan<sup>170</sup> for the care of the child, when a child protection order can be granted, the types of child protection orders which can be made by the court, and the period of effectiveness and monitoring of the order. South Africa must learn from the Child Protection Act (Queensland)<sup>171</sup> which entrenched similar provisions and amend section 110 of the Children's Act accordingly.<sup>172</sup>

Given the dire need for child protection services, I propose with reference to the Child Protection Act (Queensland), that a provision be established as to whom should fund the establishment of Child Protection Organisations. South Africa must establish regulations to section 105 of the Children's Act as a guide to the strategy required from the Minister of Social Development regarding the geographical location of Child Protection Organisations, the collaborative work of intersectoral government departments and civil society providing child protection services, and the monitoring of services provided by Child Protection

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intervention. See also Gallinetti in Davel & Skelton *Commentary on the Children's Act* 4-15. See the discussion in sections 3 3 9 1 and 4 2 1.

<sup>169</sup> Ss 3(2)(c), 3(3)(b) and 3(3)(d) of the Child Protection Act (Queensland).

<sup>170</sup> See the discussion in section 5 6 and 6 5 regarding the proposed provision.

<sup>171</sup> See ss 54(1) and (2), 56 and 59.

<sup>172</sup> See the proposed provision in section 4 5.

Organisations.<sup>173</sup>

#### *1.9.4 Preparation for the removal of the child from family life and the decision-making process*

Under this theme I discuss, amongst others, the stages that a social worker engages in, in preparing the child for removal, alternative dispute resolution in children's proceedings,<sup>174</sup> the right of the parent and child to participate in decision-making processes, and the right of the child to legal representation. A child who is identified as a child in need of care and protection<sup>175</sup> is referred to a designated social worker for investigation.<sup>176</sup> The child may be removed upon obtaining a court order.<sup>177</sup>

In cases of emergency, the child can be removed without a court order. A preliminary inquiry is made to decide, amongst others, the placement of the child in temporary care.<sup>178</sup> The children's court may make a legal determination regarding the ground for removal and only thereafter, can the child be removed from family life. In the recent Constitutional Court judgment of the *Centre for Child Law v Department of Health and Social Development*,

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<sup>173</sup> See the proposed provision in section 4 5.

<sup>174</sup> Hereinafter referred to as "ADR".

<sup>175</sup> S 150(1) and (2) of the Children's Act. See the discussion in section 5 2 1.

<sup>176</sup> S 151(1) of the Children's Act. See the discussion in section 5 2 2.

<sup>177</sup> S 151(2) of the Children's Act. See the discussion in section 5 2 1.

<sup>178</sup> S 155(6)(i) of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child law in South Africa* 170. See the discussion in sections 7 3 1 and 5 2 3.



*Gauteng*,<sup>179</sup> the court decided on an application regarding the confirmation of constitutional invalidity of section 151 and 152 of the Children’s Act,<sup>180</sup> to the extent that the provisions fail to provide judicial review of the removal and placement decision made by social workers or police.<sup>181</sup> The court issued an order of reading-in of words into the Children’s Act to remedy the defect. I propose<sup>182</sup> that the words “read-in” be incorporated in the Act.<sup>183</sup>

The Children’s Act introduces alternative dispute resolution<sup>184</sup> as an option to resolving matters relating to children in need of care and protection before the main care and protection hearing.<sup>185</sup> ADR is a formal and simple dispute resolution process, and mediation is a form of ADR. In mediation, a child is bound to understand issues of debate more easily and such process may assist in reaching mutually satisfying decisions. ADR is also more accessible than litigation.

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<sup>179</sup> 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC): where the children of the applicants were removed from the streets by the social workers of the Department of Social Development without a court order: see discussion in sections 4 3, 5 2 and 5 5.

<sup>180</sup> The application in this case was brought in two parts, the first part on an urgent basis with the aim to restore the children to their parents. The second part of the application included (a) a declaratory order pertaining to the wrongful conduct of the social workers, and (b) a declaration of constitutional invalidity relating to ss 151 and 152 of the Children’s Act.

<sup>181</sup> Section 12.

<sup>182</sup> See the proposed provision in section 5 6.

<sup>183</sup> Section 96.

<sup>184</sup> *Supra* n 174.

<sup>185</sup> S 155(4)(b) of the Children’s Act. See the discussion in section 5 2 3.

The Young Persons and Families Act (New Zealand)<sup>186</sup> prioritises mediation in cases of disagreements where the child is involved and considers a court hearing mainly in cases where there are no prospects of success in mediation. Like New Zealand, the Children and Young Persons Act (New South Wales)<sup>187</sup> provides that in responding to a report concerning a child, the Director-General is to consider the appropriateness of using an alternative dispute resolution services in order to resolve problems at an early stage.<sup>188</sup> Thus, I recommend that section 6(4) of the South African Children's Act be amended by inserting a provision that will give effect to mediation.

Given the gap in the South African Children's Act regarding guidelines to mediation proceedings, I propose that South Africa must refer to, amongst others, the Children's Act (Scotland)<sup>189</sup> and information that guides mediation amend subsection 6(5) of the Children's Act to provide for the general principles of mediation proceedings.

The Children's Act provides that the parent<sup>190</sup> and the child<sup>191</sup> have the right to participate in

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<sup>186</sup> S 20.

<sup>187</sup> S 37

<sup>188</sup> S 37(2) of the New South Wales Children and Young Persons Act.

<sup>189</sup> See Schedule 4 section 59(a) and (b); Adoption and Children Act (Scotland), see Schedule 2 section 8 and Schedule 3 section 1; see also College of Mediators in Scotland Code of Practice for Mediators (2008) section 4 7.

<sup>190</sup> Ss 60(1)(b), 60(1)(c) and 63(3)(b)(i); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 167; Haarsma "Children's Participation in Residential Care" in Verhellen (ed.) *Monitoring Children's Rights* (1996) 284-285. See the discussion in section 5 5.

decision-making processes that affect the child. The views of the child are to be considered consistent with the age, maturity and development of the child.<sup>192</sup> The Children's Act further provides that the child has the right to "participate in an appropriate way"<sup>193</sup> and that the views expressed by the child must be taken into consideration. I propose that guidance and diverse methods that may enable the child to participate be provided. I propose that South Africa use "Roger Hart's Participation Ladder"<sup>194</sup> to identify the different stages of participation and the guidance that may be provided to the child. I propose that regulations be promulgated to section 10 of South African Children's Act to ensure that the child participates "in an appropriate way".<sup>195</sup>

The Constitution provides that the child has the right to have legal representation assigned to him or her by the state at the state expense.<sup>196</sup> On the same note, the South African Children's Act simply provides that where it appears before the children's court that it will be in the best interests of the child for him or her to be represented by a legal representative,

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<sup>191</sup> S 10 of the Children's Act; Matthias & Zaal "Hearing only a Faint Echo? Interpreters and Children in Court" (2002) *SAJHR* 350; Bosman-Sadie and Corrie *A Practical Approach to the Children's Act* (2010) 25. See the discussion in section 5.5.

<sup>192</sup> *Ibid.*

<sup>193</sup> S 10.

<sup>194</sup> Hart *Children's Participation from Tokenism to Citizenship* (1992) 2; Franklin in Verhellen (ed.) *Monitoring Children's Rights* 324. See the discussion in sections 5.5.1 and 5.6.

<sup>195</sup> See the proposed provision in section 5.6.

<sup>196</sup> S 28(1)(h). See Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 24-27, see also discussion in SALRC *The Review of the Child Care Act* (1998) section 7.2.3.

the court must refer the matter to Legal Aid.<sup>197</sup> I am of the view that legislation that facilitates proceedings where children are party to, including matters of removal of children from the family, must provide an appropriate degree of legal representation for children.

I therefore propose, with reference to the Children, Young Persons, and their Families Act (New Zealand), amendments to section 55 of the Children's Act to cater same.<sup>198</sup> There is also a gap in the provision for legal representation of children. The legislation does not provide as to who bears the responsibility to appoint the legal representative. I therefore propose that South Africa must learn from Children, Young Persons, and their Families Act (New Zealand)<sup>199</sup> and insert subsections to section 55 of the Children's Act and impose the responsibility of appointing legal representation on the clerk of the children's court or the Registrar of the High Court.<sup>200</sup>

South Africa must further refer to the Care of Children's Act (New Zealand)<sup>201</sup> and incorporate a provision on the duties of a legal representative.<sup>202</sup> South Africa must also learn from the Children, Young Persons, and their Families Act (New Zealand)<sup>203</sup> and incorporate a provision on access to documents and payment of fees for legal representation for the

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<sup>197</sup> S 55(1).

<sup>198</sup> See the proposed provision in section 5 6.

<sup>199</sup> Ss 7 and 159(1).

<sup>200</sup> See the proposed provision in section 5 6.

<sup>201</sup> S 7(3) and (4).

<sup>202</sup> See the proposed provision in section 5 6.

<sup>203</sup> S 161.

child.<sup>204</sup>

I further propose that a provision on the right of the parent and child to have their views heard and taken into consideration be incorporated in section 10 of the Children's Act.<sup>205</sup> South Africa must learn from the European case law,<sup>206</sup> which reveals the importance of the parent and the child to have access to information in order to enable them to participate in proceedings concerning the child. I therefore propose that a provision be incorporated under section 10 of the Children's Act to give effect to same.<sup>207</sup>

#### *1.9.5 Alternative care options upon the removal of the child from family life*

On the theme "appropriate alternative care", I discuss the different types of alternative care that may be considered once the decision to remove the child is made.<sup>208</sup> Alternative care options include placing a child in foster care,<sup>209</sup> child and youth care centres,<sup>210</sup> and

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<sup>204</sup> See the proposed provision in section 5 6.

<sup>205</sup> *Ibid.*

<sup>206</sup> *McMichael v UK* (1995) 20 EHRR 205 section 92. See the discussion in section 1 1 1 2 6.

<sup>207</sup> See the proposed provision in section 5 6.

<sup>208</sup> See the discussion in section 6 2.

<sup>209</sup> According to s 180(3) of the Children's Act, a children's court may place a child with a person who is not a family member of the child, a family member who is not the parent or guardian of the child or in a registered cluster foster care scheme. See also ss 46(1)(a) and 167(1)(a) of the Children's Act; Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-11; Bosman-Sadie & Corrie (2010) 190. See the discussion in section 6 3 1.

<sup>210</sup> S 167(1)(b) of the Children's Act. S 29 of the Child Justice Act amends s 167(1)(b) and 191(2)(j) of the Children's Act to such an extent that a presiding officer may order the

temporary safe care.<sup>211</sup>

The Children's Act introduces the establishment of cluster foster care.<sup>212</sup> This is a scheme which allows not more than six children to be placed with a single foster parent. South African state care institutions are merged into multi-purpose centres called child and youth care centres.<sup>213</sup> The centres provide, amongst others, programmes relating to residential care,<sup>214</sup> treatment of children with addictions,<sup>215</sup> psychiatric conditions,<sup>216</sup> development for children with disabilities or illnesses.<sup>217</sup> South Africa must learn from New South Wales<sup>218</sup> and incorporate a provision for placement that determines the choice of alternative care by order of priority. The South African Children's Act does not provide for a care plan for a child who is placed in other forms of alternative care, except for a foster care plan. South Africa

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detention of the a child who is alleged to have committed any offence in a specified child and youth care centre. See Currie & De Waal *The Bill of Rights Handbook* (2005) 608; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-9; Bosman-Sadie & Currie (2010) 189.

<sup>211</sup> S 167(1)(c) of the Children's Act.

<sup>212</sup> Ss 183 and 185.

<sup>213</sup> See the discussion in section 6 4 1.

<sup>214</sup> Ss 194(2)(a) and 201(a) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>215</sup> S 191(3)(c). See the discussion in section 6 4 1.

<sup>216</sup> S 191(3)(d). See the discussion in section 6 4 1.

<sup>217</sup> S 194(2)(c). See the discussion in section 6 4 1 1.

<sup>218</sup> S 13 of the Children and Young Persons (Care and Protection) Act.

must also learn from the New South Wales<sup>219</sup> and the Ireland jurisdiction,<sup>220</sup> and incorporate a provision which makes a care plan a standard requirement for all alternative care arrangements, except for adoption.<sup>221</sup>

I am concerned that children in care are not properly monitored so as to reunite them with their families when the reasons for care are met. I propose that South Africa refer to the Children and Young Persons Act (New South Wales)<sup>222</sup> and incorporate a provision with stringent monitoring measures in the Children's Act to facilitate a process for reunification of children with their families.<sup>223</sup> There is a *lacuna* in the South African Children's Act with regard to the review of care orders. In the absence of such provision, I recommend for South Africa to refer to section 150 of the Children and Young Persons Act (New South Wales) and incorporate a provision for the review of care orders before section 175 of the Children's Act.<sup>224</sup>

The Children's Act provides for training programmes to enhance the capacity of foster parents to provide care to children.<sup>225</sup> However, there is still a need to monitor foster care placements to marginalise situations of potential risk that come with incapacities of foster

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<sup>219</sup> S 78 of the Children and Young Persons (Care and Protection) Act.

<sup>220</sup> *Eastern Health Board v District James Paul McDonnell* (1999) 2 1 JFL 26. See the discussion in section 6 2 3.

<sup>221</sup> See the proposed provision in section 6 5.

<sup>222</sup> S 76.

<sup>223</sup> See the proposed provision in section 6 5.

<sup>224</sup> *Ibid.*

<sup>225</sup> Regs 71(7), 72(1) and (2) to the Children's Act.

parents. I recommend that South Africa must learn from the Children and Young Persons Act (New South Wales)<sup>226</sup> and promulgate regulations to the Children's Act that give a designated social worker a supervisory responsibility over children in all types of alternative care except adoption.<sup>227</sup>

### *1.9.6 The position of the child after removal into alternative care with emphasis on the right to maintain contact, access to information and reunification services*

In this section, I discuss the position of the child after removal from family life. I discuss the right of the parent and the child to access information as it is currently considered subject to the Promotion of Access to Information Act.<sup>228</sup> I propose that South Africa enact a provision in the Children's Act to give effect to the right of the child and parent to access any information relevant, or which may be used in matters affecting the child.<sup>229</sup> I also discuss the right of the child to maintain contact with family members and to reunite with the family after removal.<sup>230</sup> The Children's Act attaches importance of the child maintaining contact<sup>231</sup> with his or her parents when placed into care.<sup>232</sup> The Act also provides that the child must be

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<sup>226</sup> S 140(a)-(d).

<sup>227</sup> See the proposed regulations in section 6 5.

<sup>228</sup> 2 of 2000, hereinafter referred to as "PAIA". See the discussion in section 7 2 1.

<sup>229</sup> See the proposed provision in section 7 5.

<sup>230</sup> See the discussion in sections 7 3 and 7 4.

<sup>231</sup> S 1(1) of the Children's Act defines "contact". See the discussion in section 7 3 1.

<sup>232</sup> See ss 35(1), 7(1)(e), 7(1)(f)(ii) and 46(1)(h)(x) of the Children's Act. The latter prioritize contact between the child and the parent after the removal of the child from family life. See Van der Linde "Access to Children: Involvement of the Unmarried Natural Father in the



reunited with his or her parents when the reasons for his or her removal are met.<sup>233</sup>

However, the Children's Act is, unlike the CRC<sup>234</sup> and the ACRWC<sup>235</sup> not explicit that the contact between the child and his or her parents, family members or relatives must be personal relations and direct contact. South Africa must refer to the ECHR and incorporate a provision<sup>236</sup> which guarantees the parent and the child the right to receive and communicate information and ideas to each other.<sup>237</sup> South Africa must also enforce contact between the child and other persons who have family ties such as uncles, siblings and aunts or any persons whose contact would be in the best interests of the child. Thus, South Africa must learn from the Children and Young Persons Act (New South Wales)<sup>238</sup> and incorporate a provision on contact orders before subsection 46(1)(h)(x) of the Children's Act.<sup>239</sup>

South Africa must further learn from the Children Order (Northern Ireland) and enact a provision after subsection 46(1)(h)(x) of the Children's Act which provides that parents must

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Decision-Making Process - A European Perspective" (2003) *Obiter* 168. See also the discussion in section 7 3 1.

<sup>233</sup> Ss 157(1)(b)(ii), 156(1) and s 156(3)(a)(i) of the Children's Act; See the discussion in Bosman-Sadie & Corrie (2010) 179-180. See also the discussion in section 7 4 1.

<sup>234</sup> Arts 9(3), 10(2) and 22(2). See the discussion in section 7 3 2.

<sup>235</sup> Art 19(2). See the discussion in section 7 3 2.

<sup>236</sup> See the proposed provision in section 7 5.

<sup>237</sup> Art 10; Kilkelly (1999) 127.

<sup>238</sup> S 86(1), (2) and (3) of the Children and Young Persons Act (New South Wales). The Act also It has a provision for an order to limit contact to the child.

<sup>239</sup> See the proposed provision in section 7 5.

be informed of the change of address of the child in care.<sup>240</sup> Section 30(2) of the Children Order (Northern Ireland) provides that the authority may make payment for expenses incurred by the parent when visiting the child. This is remarkable in that it assists parents who do not have the financial means to visit the child. I therefore propose that South Africa enact a provision for financial assistance for parents who lack the financial means to contact their children who are kept in care.<sup>241</sup>

With regard to the reunification of the child back into his or her family, I propose that since the Children's Act is silent on how reunification is to be facilitated, South Africa must learn from the Children and Young Persons Act (New South Wales)<sup>242</sup> and incorporate a provision in the Children's Act which facilitates the development of a reunification plan.<sup>243</sup>

#### *1.9.7 Permanency planning upon failure of family reunification attempts*

Under this topic, I discuss permanency planning.<sup>244</sup> I refer to the jurisdiction of the United States of America, amongst others, Minnesota, as the first country to implement permanency planning programme, to make recommendations for South Africa to prevent the separation of

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<sup>240</sup> S 29(2)(b).

<sup>241</sup> See the proposed provision in section 7 5.

<sup>242</sup> S 83(b).

<sup>243</sup> See the proposed provision in section 7 5.

<sup>244</sup> S 157(1)(a)(iii) of the Children's Act. See the discussion in sections 8 1 and 8 3 1.

children from their families.<sup>245</sup> I submit that South Africa must provide support services to children in their own homes<sup>246</sup> and make placement of children in alternative care the last resort.

I also discuss the negative and positive impact of South African adoption practice and policies on children.<sup>247</sup> For instance, the Children's Act<sup>248</sup> provides that the children's court must have regard to the religious and cultural background of the child and his or her birth parents against that of the prospective adoptive parents when considering adoption applications. I point out that the matching of children with prospective adoptive parents has been negatively criticised.<sup>249</sup> Thus, I recommend that adoption agencies must focus their attention on case law which argues for permanent placement, rather than using the "matching principle" to deny a child the opportunity to live in a family.

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<sup>245</sup> Adoption and Safe Families Act, Public Law 105-89; Office of the Legislature Auditor, State of Minnesota Report *Child Protection Services, A Programme Evaluation* (1998); Maluccio *et al. Permanency Planning for Children* (1986) 22. See the discussion in sections 8 3 3 and 8 4 5.

<sup>246</sup> *Ibid.*

<sup>247</sup> Amongst other topics, this chapter discusses "children who can be adopted" in section 8 3 2 1, "persons who can adopt a child" in section 8 3 2 2, "subsidised adoption" in section 8 3 2 2 3 and "post-adoption agreements" in section 8 3 2 6.

<sup>248</sup> Ss 240(1)(a), 240(1)(b), 240(1)(c), 240(2)(a) of the Children's Act.

<sup>249</sup> Joubert "International Adoptions: Can We Learn from the Americans?" (1993) *SALJ* 726; Zaal "Avoiding the Best Interests of the Child. Race Matching and the Child Care Act 74 of 1983" (1994) *SAJHR* 372; Mosikatsana "Transracial Adoption: Are We Learning the Right Lessons from the Americans and Canadians? – A Reply to professors Joubert and Zaal" (1995) *SALJ* 606; Mosikatsana "Examining Class and Racial Bias in the Adoption Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati & Zaal" (1997) *SAJHR* 602.

A positive aspect about adoption is that the Children's Act<sup>250</sup> allows the birth parent or guardian of the child to enter into a post-adoption agreement with prospective adoptive parents for the child to reconnect with his or her parents after adoption.<sup>251</sup> However, the Children's Act omitted to provide a procedure that would allow the parent or guardian of the child to make an application for a post-adoption order. I propose that South Africa refer to the Child and Family Services Act (Ontario)<sup>252</sup> and incorporate a provision for the children's court to give the birth parent or care-giver notice to apply for a post-adoption or an openness order.<sup>253</sup> I also propose for a provision for the registration of all adoptions, including customary adoptions so as to regulate the adoption system for the protection of children.<sup>254</sup>

Also, South Africa does not provide adoption allowance to prospective adoptive parents. I recommend for South Africa to enact a provision that would follow the approach of, amongst others, Northern Ireland<sup>255</sup> for the provision of adoption allowance to prospective adoptive parents who develop strong relationships with children but lack financial means to adopt children.<sup>256</sup>

South Africa must also learn from the Children's Act (Kenya)<sup>257</sup> and incorporate a provision

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<sup>250</sup> S 234.

<sup>251</sup> See the discussion in section 8 4 2 6.

<sup>252</sup> S 145.1.2.

<sup>253</sup> See the proposed provision in the discussion in section 8 5.

<sup>254</sup> *Ibid.*

<sup>255</sup> Adoption Allowance Regulations (N.I) 1996 to the Adoption (N.I) Order.

<sup>256</sup> O'Halloran (2003) 414. See the discussion in section 8 4 4.

<sup>257</sup> S 158(1)(a). See the discussion in section 8 4 5.

for the age at which a prospective adoptive parent can adopt.<sup>258</sup> Most importantly, South Africa must learn from the Children's Act (Kenya)<sup>259</sup> and incorporate a provision which allows an adoptive parent to appoint a care-giver to provide care to the child in the event of the death of the adoptive parent.<sup>260</sup>

## 1.10 Research methodology

I use various research methods to establish if South Africa's legislative framework in the area of this research has done enough to ensure that children enjoy family life consistent with ratified international human rights instruments. I draw from the reflexive research approach principles which allows for the creation of an appropriate unit of analysis of data that is collected.<sup>261</sup> Where the unit of analysis comprises South African prescripts, I will explore, evaluate, analyse and compare with foreign jurisdiction and international human rights laws to establish consistencies and the level of compliance.

I use the exploratory research method to introduce new insights on the research topic.<sup>262</sup> I use the principles and practice on exploratory research to respond to data as presented.<sup>263</sup> This research method will clarify concepts, highlight challenges confronted by children in the

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<sup>258</sup> See the proposed discussion in section 7 5.

<sup>259</sup> S 164(1) Children's Act (Kenya). See the discussion in section 8 4 5.

<sup>260</sup> See the proposed discussion in section 7 5.

<sup>261</sup> Cohen *et al.* (2007) 302-305 and 471-472. See also Mouton (2001) 56.

<sup>262</sup> Bless & Higson-Smith (1995) 7.

<sup>263</sup> Cohen *et al.* (2007) 506.

family environment for recommendations that may influence the work of the study. An exploratory research method, as used in this study, will to some extent be used as an evaluative method to analyse legislation, policy and programmes that give effect to family life and alternative care. Exploratory research is used to ensure objectivity in the answers sought to the study's problem question.

Legislation and case law will be evaluated to assess if they promote the right to family life for children in need of care and protection. The evaluative research method<sup>264</sup> is used to answer questions that may emerge during discussion in the study, such as: is section 28(1)(b) of the Constitution on the right to "family care" clear enough to assist the legislature and courts to establish the definition of "family"? In what way does section 28(1)(b) ensure that children have appropriate alternative care? Is the available legislation and case law adequate in providing recognition of children living in different families? Does the available legislation contain an exhaustive list of grounds that may be considered by the Children's Court on whether to remove or not remove a child from family life? What intervention can be sought for a child in need of care before the social worker decides to remove or not to remove a child? Finally, what comparative research is available to evaluate the South African experience and to fill gaps in our law?

Causal research<sup>265</sup> is a very complex method of research as there is no certainty that there

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<sup>264</sup> Use direct and central questions to determine information that is sought to contribute to the solution of the problem, see Cohen *et al.* (2007) 43.

<sup>265</sup> Cohen *et al.* (2007) 34.

are no other factors influencing the cause of the problem. Cohen *et al.* argue that, “one cannot be certain that a simple cause brings a simple or single effect”, thus, the authors emphasise the need for multiple causality and effects.<sup>266</sup> I use causal research to analyse and critique data to establish what causes the problem.

The study also uses comparative research<sup>267</sup> to match data on the South African legal system against relevant laws that have a bearing on this research in order to identify areas of improvement in our law. This method of research will also assist South Africa to draw lessons from other jurisdictions and ensure that there is expanded research to influence the recommendations of this study.

### 1.10.1 Research instruments

National legislation, international human rights instruments, precedents,<sup>268</sup> discussion papers, reports, newspapers, accredited journals, accredited research, website information,<sup>269</sup> seminars,<sup>270</sup> conferences,<sup>271</sup> focus group discussions,<sup>272</sup> observation research,<sup>273</sup> statistics<sup>274</sup>

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

<sup>267</sup> Cohen *et al.* (2007) 270.

<sup>268</sup> Case law will be analysed to determine the extent to which courts enforced or omitted to enforce available legislation, foreign jurisdiction and international laws that protect and promote the right to family life.

<sup>269</sup> Articles published on websites will be used to support the discussion.

<sup>270</sup> The instruments will include both published and unpublished reports.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

and interviews<sup>275</sup> will be used in the discussions on the research topic.

### 1.10.2 Data collection and analysis

There are also more technical aspects to research, such as data collection and other

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<sup>273</sup> Observation research method will be used to acquire data on, for example, “living customary law”, see Cohen *et al.* (2007) 168-169. I will use observational techniques to assess areas which manifest a particular custom. This will assist in identifying explicit and implied practice.

<sup>274</sup> The value of using statistical information in this study is amongst others, to provide sufficient grounds for accepting the hypothesis around the extent of vulnerability of children in the family environment. The significance of statistical information is to highlight the plight and the depth of the problem and to motivate for intervention and communicate its urgency. Information that is analysed and recorded, such as information gathered by Statistics South Africa and other reports is used to support key arguments in the study.

<sup>275</sup> I have used purposive sampling. I handpicked respondents based on their roles, functions and occupation such as, government officials, chief executive officers and managers of child youth care centres. I have asked questions on procedures and the general policies of government and child care institutions relating to specific topics of the study. The participants could indicate distinctly the information that is required. I have also used convenience sampling where I obtained information from participants who were available and accessible to represent a particular group, such as, the low income earners (those in formal employment, informal employment and cheap labour) that is, a domestic worker and a farm worker: see Cohen *et al.* (2007) 114-115. I have asked questions relating to information on trends and composition of social expenditure and not personal opinion. In other situations, questions were asked as they emerged from the immediate context and in the natural course of the conversation. Thus, an Ethical Protocol was not required. See Attached the Ethical Clearance Certificate from the Ethical Committee, Faculty of Law, University of Pretoria: ANNEXURE “A”. See also the questionnaires, including responses used for the interviews: ANNEXURE “B”, “C”, “D”, “E”, “F”, “G”, “H”, “I” and “J”.



searches to support discussion and verify details. Research that has been gathered will be compiled, sorted and analysed as per the different research topics.

#### 1.10.2.1 *Literature*

The research study uses Henning's<sup>276</sup> design of data analysis, particularly on content analysis. This design will assist in the interpretation and theorisation of the content of data. The research will analyse the data collected to find consistency in argument and establish whether authors are bringing new knowledge in the area of children in need of care and protection and their right to family life.

#### 1.10.2.2 *Legislative analysis*

Legislative analysis will mainly entail discussion of specific sections of legislation that impacts<sup>277</sup> or has the potential to impact on the promotion and protection of the right of the

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<sup>276</sup> *Finding your way in qualitative research* (2004) 91. In the data analysis, I will paraphrase by explaining the content of the literature and understanding how the authors, legislators and the courts understood the issues in place. Observation research will be analysed as recorded by authors to enable the flow of discussion in the study. Statistical information will be used to support discussion by way of either affirming or rejecting arguments.

<sup>277</sup> Henning (2004) 94: Although not as chronologically outlined below, relevant sections of different legislation will be analysed in the following manner:

- (i) section number and description of content;
- (ii) impact on the right to family life and appropriate alternative care;
- (iii) nature and extent of consistency and inconsistency with the Constitution;

child to family life. Legislation will be analysed<sup>278</sup> for its consistency with the Constitution and relevant international law. Comparison with Kenyan and other jurisdictions may indicate ways to augment the South African legislative framework.

### 1.10.2.3 Case law

Case law is analysed to establish whether legislation has been properly enforced and if legislation is adequate.<sup>279</sup> Case law, particularly decisions concerning the right to family life, alternative care, and the fundamental rights of children as decided by the children's court, the Constitutional Court and other courts, will be examined to establish situations where children's interests were compromised.

## 1.11 Importance of the study in South Africa

The study is important in that the South African government has ratified international human rights instruments dealing with the rights of children as confirmation of the country's

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- (iv) consistency and inconsistency with internationally ratified instruments and other international law;
  - (v) reference to foreign jurisprudence; and
  - (vi) recommendations for South Africa.

<sup>278</sup> Henning (2004) 94.

<sup>279</sup> *Centre for Child Law v Department of Health and Social Development Gauteng*, see section 16.4.

acceptance and desire to abide by global human rights ideals.

There are many children in need of care and protection in South Africa. This research therefore seeks to conscientise legislators, government departments, the courts, civil society, academics and child activists by advocating for the rights of children and their full protection in law in order to address the plight of children in the family environment as identified in the problem statement of this study.

## 1.12 Relevance to development

The research focus will serve broader social development objectives as it argues for the family as the ideal place to raise children. This will afford children an opportunity to live in communities with their parents, guardians or care-givers as their role models for the development of their well-being.<sup>280</sup> It is also expected that the study will contribute to enabling courts and social workers to prioritise giving children in need of alternative care, appropriate care, as well as providing care and protection to a child in a family home and considering the decision to remove the child from family life as the last resort.

It is important for the authorities to realise that the family life of both parent and child should be protected prior to the removal of a child, through all the different stages, with the ultimate aim of reunification. For example, family life must be protected through prevention and early

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<sup>280</sup> *Ibid.*

intervention services; once the child has been removed, family life must be protected through maintaining contact with each other (the parent and the child); and during contact, possible reunification must be explored. If this fails, permanency planning in the form of, for example, adoption procedures becomes relevant.

### **1.13 Conclusion**

I intend fulfilling a critical role through this study by enabling academics, government officials, legal practitioners and child rights activists to remain in contact with the needs and concerns of children in need of alternative care and protection, particularly in the context of being raised in a family. I hope to contribute towards the greater knowledge in the area of child law and family law. I ultimately envisage that this study will result in an improvement in the lives of many children, allowing them to become responsible South African citizens.

## CHAPTER 2: DEFINING THE “FAMILY”, “FAMILY CARE”, “PARENT”, “PARENTAL CARE” AND “FAMILY LIFE” IN THE CONTEXT OF REMOVING THE CHILD FROM THE FAMILY

### 2.1 Introduction

This chapter discuss the definition of “family”, “family care” and “parental care”. There is no clear definition of “family” in South Africa, apart from the definition of “family member”.<sup>1</sup> Where an attempt is made to define “family”,<sup>2</sup> the definition is not consistent with the types of “families” acknowledged by the Children’s Act and international standards. In South African society, the concept of “family”<sup>3</sup> changes as it traverse different stages of development. Hence, there is the need to define “family”, “family care” and “parental care” to enable a child to exercise his or her right to family life and other constitutional rights.

It is with this reason that I discuss these concepts in this chapter, including the social realities that define them. The discussion of these terms is necessitated by the key question, namely

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<sup>1</sup> See the discussion in sections 2 2 1 and 2 2 1 2.

<sup>2</sup> *DSD Norms, Standards and Practice Guidelines for the Children’s Act (2010)* 24, hereinafter referred to as “guidelines documents”, see the discussion in section 2 2 1. The guidelines document was drafted in May 2010 in fulfilment of the national Department of Social Development’s responsibility to interpret the Children’s Act for practice and to guide and support provinces in the implementation of the Children’s Act. The document was made available for use to the officials of the Department of Social Development on the 28 July 2012. See also the discussion in sections 2 2 2 1 and 2 2 1 10.

<sup>3</sup> Green Paper on Families GG 3 October 2011 No 34657, 11-12.

whether section 28(1)(b) of the Constitution is adequate in protecting and preserving the right of the child to “family care” or “parental care”.<sup>4</sup>

In my discussion of the definition of “family”, I reflect on, amongst others, children in “families” of: parents in civil marriage;<sup>5</sup> adoptive parents;<sup>6</sup> parents in polygamous customary marriages;<sup>7</sup> domestic partnerships;<sup>8</sup> parents married in terms of monogamous and polygamous religious marriages;<sup>9</sup> parents in partnerships in terms of customary law;<sup>10</sup>

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<sup>4</sup> See the discussion in section 1 2 2.

<sup>5</sup> Children of parents (husband and wife) married in terms of s 30(1) of Marriage Act, see ch 1, n 73.

<sup>6</sup> In the case of *SW v F* 1997 (1) SA 796 (O) 799B, the court held that a child’s right to family or parental care as provided in s 28(1)(b) of the Constitution includes care by an adoptive parent.

<sup>7</sup> S 2 of the Recognition of Customary Marriages Act gives full recognition to polygyny regardless of the number of wives a husband may have. See also Bennett *Customary Law in South Africa* (2004) 243.

<sup>8</sup> In the case of *Ally v Dinath* 1984 (2) SA 451 (T) 452, the court acknowledged a partnership because it was proven and valid. S 21(1)(a) of the Children’s Act specifically grants unmarried fathers who live with the mother of the child in a permanent life-partnership full responsibilities and rights, under certain circumstances.

<sup>9</sup> Although Muslim and Hindu marriages are not legally enforced in South Africa: see SALRC *The Review of the Child Care Act* (1998) section 9 3 5, the current position in South Africa is that the courts recognise the some of the consequences of these relationships. See *Ryland and Edros* 1997 (2) SA 690 (C); 1996 4 All SA 557 (C); 1997 1 BCLR 77 (C).

<sup>10</sup> In most black communities and villages cohabitation is labelled as a “vat and sit” relationship. The “vat and sit” label has a derogatory meaning and is a stigma on parents and children living in these families. Most importantly, parents and children living in domestic partnerships are not recognised as families in terms of customary law and may not be considered for any benefits that emanate from a customary marriage, including inheritance. The case of *Mthembu v Letsela* 1997 (2) SA 936 (T) hereinafter referred to as “the first *Mthembu*

parents in same sex partnerships or married in terms of the Civil Union Act;<sup>11</sup> single-parents;<sup>12</sup> child-headed households;<sup>13</sup> families of grandparents;<sup>14</sup> communal families;<sup>15</sup> and

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judgment”; 1998 (2) SA 675 (T) hereinafter referred to as “the second *Mthembu* judgment”; 2000 (3) SA 867 (SCA), hereinafter referred to as “the judgment on appeal” excluded a child of an unmarried father from inheriting *intestate*. The case exposed some elements of discrimination against a child on the basis of gender and marital status in terms of inheritance in customary law. The case of *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) discussed later in this chapter emphasised the need to reform this law. The SALRC proposed amendments to the customary law of succession allowing illegitimate children to inherit *intestate*.

<sup>11</sup> Same-sex partners can now establish families by entering into civil unions governed by the Civil Union Act. Same-sex couples can also adopt children jointly and raise them in a family setting as it is the case in *Du Toit v Minister for the Welfare and Population Development* 2002 (10) BCLR 1001 (CC); 2003 (2) SA 198 (C), which challenged the section of the Child Care Act 74 of 1983, which excluded same-sex partners from joint adoption.

<sup>12</sup> S 20 of the Children’s Act gives unmarried parents full parental rights and responsibilities. Nevertheless, our law allows guardianship and custody of a child of unmarried parents to remain with the biological mother who eventually carries out parental responsibilities as a single parent, see 21(1)(a)-(b) of the Children’s Act. Where the mother is still a minor, the mother of the minor child has guardianship of the child. See s 19(2)(a) and (b) of the Children’s Act which currently applies and has repealed the Children Status Act. See also Bennett *African Customary Law* (1991) 166 who argues that child-rearing has become a female responsibility.

<sup>13</sup> S 150(2)(b) of the Children’s Act recognizes children in child-headed families as children identified to be in need of care and protection.

<sup>14</sup> In the case of *Bam v Bhabha* 1947 (4) SA 798 (A) 810, the court decided that a 7 year-old girl who spent most of her life with her grandparents had to be returned to the mother as the court believed that the mother would properly take care of the child. However the court may interfere with parental rights where it causes danger to the child’s life, health and morals.

include a comprehensive discussion on various laws and a comparative analysis to formulate the definition of “family” that embrace this diversity.<sup>16</sup>

I also discuss the concept “family life” as understood in the European jurisdiction, in tandem with the fundamental elements of “family life”,<sup>17</sup> the approach for application of Article 8(1) with regards to the right to “family life”,<sup>18</sup> and a threshold criteria which must be satisfied before interference with “family life” is justifiable or not.<sup>19</sup> I use the discussion to draw lessons for South Africa and propose for the enactment of a provision for the fundamental elements of “family care” in the Children’s Act.<sup>20</sup>

I also reflect on the concept “parental care” in the Children’s Act which is about the

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According to s 231(1)(a)(iii) of the Children’s Act, a grandparent may have total responsibility and authority over his or her grandchild if he or she chooses to adopt the child.

<sup>15</sup> S 231(1)(a)(iii) of the Children’s Act provides for the adoption of a child in need of alternative care by persons sharing a common household and sharing a permanent family unit with the child.

<sup>16</sup> See the discussion sections 2 2 2, 2 2 3 and 2 5.

<sup>17</sup> See the discussion in section 2 2 2 2 3.

<sup>18</sup> See the discussion in section 2 2 2 2 2

<sup>19</sup> See the discussion in section 2 2 2 2 4. Furthermore, I propose that a provision for a “threshold criteria” to be considered before the court grants a care order, up and above the list of “grounds for mandatory alternative care interventions”, be incorporated in the Children’s Act, see discussion in sections 3 3 and 3 4.

<sup>20</sup> See the discussion in section 2 5.



acquisition of parental responsibilities and rights.<sup>21</sup> The discussion reveals the imbalance in the provision for parental responsibilities and rights in the Children's Act, that it elevates the rights of the biological mother over the unmarried father. In this case, I refer to information guidelines developed by a NGO,<sup>22</sup> for the automatic right of the "absent" parent (more often the unmarried father) and the right of the child to have meaningful contact, guidance, nurture and participation of both parents in major decisions concerning the child.<sup>23</sup> I propose that regulations be promulgated that would explicitly stipulate the responsibilities and rights of the unmarried father who more often is disadvantaged in the exercise of parental responsibilities and rights as the relationship between him and the biological mother deteriorates.<sup>24</sup> I also highlight the absence of real provision on the obligation of the state to assist parents in the event that parents fail to discharge their responsibilities towards children.<sup>25</sup>

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<sup>21</sup> See ch 3 of the Act.

<sup>22</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 15-17. "Father-4-Justice" is a global civil rights movement for truth, justice and equality in family law for children, their parents and grandparent. The information guideline document was established after the enactment of the Children's Act: accessed from [www.f4j.co.za](http://www.f4j.co.za) on 2012-08-14. Non-governmental organisation, hereinafter referred to as "NGO".

<sup>23</sup> See the discussion section 2 5.

<sup>24</sup> See the discussion in sections 2 4 2 and 2 5.

<sup>25</sup> *Government of the Republic of South Africa v Grootboom 8; Grootboom v Oostenberg Municipality* section 78, see 288B, see ch 1, n 138: The court argued that in the event that parents are unable to provide shelter for their children, s 28(1)(c) imposes an obligation on the state to do so, albeit that by the use of the word shelter the Constitution envisaged that such an obligation falls far short of adequate housing. Although the section does not employ the adjective "basic" to qualify the concept "shelter" as is the case with "nutrition" and "health care", it follows from the dictionary definition that a shelter is a significantly more rudimentary

The discussion and proposed amendments will attempt to clarify the concepts “family”, “family care” and “parental care”, and furthermore, provide a record of the content and scope of these concepts.<sup>26</sup> I also propose that adequate provisions for the concepts be incorporated in the Children’s Act for application for the promotion and protection of children who are cared for in different “family” arrangements.

## 2.2 Definition of “family”

In this section I reflect on a few authors who discuss the definition of “family”. In my discussion, I assess similarities and difference in opinion with regard to the definition of “family”. The writers seem to reflect on a wide concept of “family”. Thus, I recommend that lessons be drawn from the CRC for a broader definition of “family”.<sup>27</sup>

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form of protection from the elements that are provided by a house. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 300, see ch1, n 67. I discuss the role of the state to assist parents to fulfil their responsibilities in detail in ch 4. In the discussion, I propose that a provision be enacted for the obligation of the state, see the discussion in section 4 5.

<sup>26</sup> Although the concepts of the “family” and “family life” have been addressed in other doctoral theses (Van der Linde (2001), see ch 1, n 138; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD Thesis 2007 UP)) some development has occurred since then. This chapter therefore serves as a summary and update of the current position.

<sup>27</sup> See the discussion in sections 2 2 2 1 and 2 5.

The meaning of “family” is broad. According to Heaton,<sup>28</sup> “family” includes an arrangement of a group of people with blood relations, or who are related to one another through adoption or marriage; or members of a household created by people who have entered into a marriage-like relationship. Bekker and Boonzaaier,<sup>29</sup> share the view that a “family” home or “family” is regarded by its members as a group of relatives that belong together. The dictionary meaning of “family” is also confined to a group of people who are united because of a common conviction, affiliation or belief.<sup>30</sup>

Budlender<sup>31</sup> argues that the term “household” may entail blood or kinship, common living quarters, shared shelter or an arrangement where child-rearing activities are shared. This meaning ties in with the definition provided by Bennett<sup>32</sup> who associates “family” with a group of people who are of the same clan, ancestry or tribe in a community. Prior to the developments made in legislation and case law<sup>33</sup> in recognising diverse “family” forms, South

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<sup>28</sup> *South African Family Law* (2010) 3; *The Concise Oxford Dictionary of Current English* (1995) 487, a “family” is defined as a set of parents and children living together or not, the members of the household serving the needs of children.

<sup>29</sup> “In Search of African Customary Law: The Role of Anthropologists *vis-a-vis* that of Jurists” in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 192.

<sup>30</sup> According to *The Concise Oxford Dictionary of Current English* 487, a “family” may be “... a group of people from a common stock or groups of people united by either a religious or political tie”.

<sup>31</sup> *The Debate about Household Headship* (2003) 48. *The Concise Oxford Dictionary of Current English* 659: A household is defined as a unit, a house and its affairs.

<sup>32</sup> See the discussion in section 2 2 1 2. Bennett further argues that a “family” is the basic social unit that manifests itself in the form of a nuclear family which abounds today, see (2004) 180.

<sup>33</sup> See the discussion in section 2 2 1.

Africa adopted a traditional approach in focusing on the nuclear “family”. The South African judicial system does not define “family” *per se*, but recognises the changing “family” patterns. This is evident in, amongst other cases, *Du Toit v Minister for the Welfare and Population Development*,<sup>34</sup> where the court acknowledged the fact that the legal conception of “family” and what constitutes a “family” changes as social practices and traditions change.<sup>35</sup>

It is for this reason that writers discuss the definition of “family” but avoid providing a strict definition of same. For instance, instead of defining a “family”, Sanchez<sup>36</sup> places emphasis on “family” as an institution that plays a significant role in the socialisation of the child. Sanchez<sup>37</sup> supports his argument by saying that a child acquires habits and starts to form his or her system of values, and personality in a “family”. On the same token, Van Bueren<sup>38</sup> reflects on the major changes in “family” structures and argues that to be able to protect the rights of all “family members” adequately, international law must be both sufficiently flexible to accommodate a wide range of different “family” structures and values and enshrine universally-agreed minimum standards on the rights of those “family members”.<sup>39</sup>

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<sup>34</sup> 2002 10 BCLR 1001 CC; 2003 (2) SA 198 CC.

<sup>35</sup> 1013.

<sup>36</sup> “The Rights of People with Disabilities” in Verhellen (ed.) *Monitoring Children’s Rights* (1996) 770.

<sup>37</sup> In Verhellen (ed.) *Monitoring Children’s Rights* 770.

<sup>38</sup> *Families Across Frontiers: Crossing the Frontier – The International Protection Family Life in the 21<sup>st</sup> Century* (1996) 812-813.

<sup>39</sup> Van Bueren (1996) 812.

In my view, these authors<sup>40</sup> argue for a wide definition of “family” although they omit to define same.<sup>41</sup> Thus, the discussion could have added more value in the context of “family life” if the authors inferred from the CRC to provide for the definition of “family”.<sup>42</sup>

### 2.2.1 *Definition of “family” in terms of different family arrangements – a South African perspective: legislation and case law*

In this section, I discuss legislation and case law that came close to provide the definition of “family”. I use the discussion to reveal the attempts made in defining “family” and the *lacunae* that still exist in the definition of “family” in the current legal prescripts.

I further propose that South Africa must refer to foreign jurisdictions and international standards to provide for the definition of “family” in the Children’s Act.

South African “families” are diverse in character.<sup>43</sup> This means that the right to “family care”

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<sup>40</sup> Bennett (2004) 180; Bekker & Boonzaaier in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 192; Budlender (2003) 48; Sanchez in Verhellen (ed.) *Monitoring Children’s Rights* 770; Van Bueren (1996) 812-813; Heaton *South African Family Law* (2010) 3.

<sup>41</sup> See the proposed definition of “family” in section 2 5.

<sup>42</sup> See the discussion in 2 2 2 1.

<sup>43</sup> In *Dawood* 960D, see ch 1, n 31. O’ Regan J confirms the fact that: “South African families are diverse in character ...” For instance, the following relationships are recognised as forms of “families”: civil union partners or same-sex partnerships (established in terms of the Civil Union Act 17 of 2006) are newly legally recognised “families”; domestic partnerships (see the Domestic Partnership Bill [B–2008] in section 1 1 1 2), the is Bill not yet law; the Muslim

or “parental care” may be exercised in different “family” arrangements.<sup>44</sup> For instance, marriage is, amongst others, one of the arrangement through which a “family” can be established. The Constitutional Court in the case of the *National Coalition for Lesbian and Gay Equality v Minister of Justice*<sup>45</sup> considered how the objective of protecting a narrow definition of family life conflicted with the values of the Constitution.<sup>46</sup> Hence in terms of South African experience, families are established under several different legal regimes, which include customary law, religious, civil or common law.<sup>47</sup>

The Children’s Act<sup>48</sup> provides that children must grow in “families”, but does not describe what constitutes a “family”. Instead, the Act defines a concept that relates to “family” such as “family member”.<sup>49</sup> A “family member” is defined in relation to the connection the member

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Marriages Bill [B-2011] (see section 1 1 1 2) recognizes marriages entered in terms of Islamic religion; the Green Paper on Families GG 3 October 2011 No 34657, 11 recognises the diverse “families” that exist in South Africa. See also the discussion in section 2 2 1.

<sup>44</sup> The reason for this chapter being so lengthy is that it contains an elaborate discussion of the different “family” arrangements that illustrate the realities of “family life” in South Africa. Children in need of care and protection are found in all these arrangements. The right to be part of a “family” and to be sustained in the “family” must be protected. This discussion therefore, to a certain extent, illustrates the wide scope and possible application of section 28(1)(b) in society, a study that has not been explored before.

<sup>45</sup> 2000 (2) SA 1 (CC).

<sup>46</sup> Sections 45-53.

<sup>47</sup> *Dawood* 960D.

<sup>48</sup> Preamble.

<sup>49</sup> S 1(1)(a)-(d).

has with the child such as a parent of the child;<sup>50</sup> any other person who has parental responsibilities and rights in respect of the child;<sup>51</sup> or a grandparent; the child's siblings; uncle; aunt; or cousin.<sup>52</sup> The provision "any other person who has parental responsibilities and rights in respect of the child"<sup>53</sup> simply means that a person who has a duty towards the child does not necessarily have to be related to the child biologically. Furthermore, the definition of "family member" in the Children's Act, includes categories of persons who have a significant relationship with the child based on emotional and psychological attachment, which resembles a "family" relationship.<sup>54</sup>

The Children's Act<sup>55</sup> promotes the right of the child to be raised in a family environment as follows: for children to,

"... fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding".

The Children's Act points to specific elements in a family environment, that is, "an

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<sup>50</sup> S 1(1)(a) of the Children's Act.

<sup>51</sup> S 1(1)(b) of the Children's Act.

<sup>52</sup> S 1(1)(c) of the Children's Act.

<sup>53</sup> *Ibid.*

<sup>54</sup> S 1(1)(d) of the Children's Act. Lessons in this regard can be obtained from the discussion on the definition of "family life" by the ECtHR in terms of the ECHR, see the discussion below in section 2 2 2.

<sup>55</sup> Preamble.

atmosphere of happiness”, “love” and “understanding”. The Act further provides that it is necessary to effect changes in existing law to give children protection and assistance for them to grow in a “family”.<sup>56</sup>

According to the Children’s Act,<sup>57</sup> marriage must be “concluded in accordance with a system of religious law subject to specified procedures, and any reference to husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly”. Furthermore, the Act prohibits marriage of a child that is below the minimum age set by law.<sup>58</sup> Thus, a child who is not eligible to marry in terms of a statute that prescribes a valid marriage may not establish a new “family”. The Children’s Act<sup>59</sup> has included a number of categories of persons who qualify to adopt a child jointly such as “partners in a permanent domestic life-partnership”.<sup>60</sup> This provision is all-inclusive and accommodates different partnerships such as homosexual couples and domestic life partners.

According to the Green Paper on Families,<sup>61</sup> a “family” is a system of interconnected and interdependent individuals that cannot be understood separately from one another. The Green Paper was as a result of a joint effort between government and other stakeholders in

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<sup>56</sup> *Ibid.*

<sup>57</sup> S 1(b).

<sup>58</sup> S 12(2)(a).

<sup>59</sup> S 231(1)(a).

<sup>60</sup> S 231(1)(a)(ii).

<sup>61</sup> GG 3 October 2011 No 34657, 13.



order to raise the quality of life of the “family” on a continuous basis.<sup>62</sup> It aims to promote “family life” and strengthen “families”<sup>63</sup> by way of addressing the multiplicity of social ills from the past discriminatory policies in the political economy<sup>64</sup> to ensure that economic benefits filter directly into “families”. I agree with the points expressed in the Green Paper that there is a need for policy intervention in this area because the focus of government is primarily on providing assistance to individual household members, as opposed to quality of life in “families”.<sup>65</sup>

The Green Paper acknowledges various types of “families” in South Africa such as, three generation, that is, grandparent with parents and children; nuclear “family” (two parents with at least one child); skip generation, that is, grandparent with grandchildren but no children of

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<sup>62</sup> *Ibid*, 15.

<sup>63</sup> *Ibid*, 21, the further aims of the Green Paper on Families are:

- a. the enhancement of the socializing, caring, nurturing, loving and supporting capabilities of families, so that their members are able to contribute effectively to the overall development of the country.
- b. the empowerment of family members by enabling them to identify, negotiate around and maximize economic, labour market and other opportunities available in the country.
- c. the improvement of the capacities of families to establish people-to-people interaction which makes a meaningful contribution towards a sense of community, social cohesion and human solidarity”.

<sup>64</sup> *Ibid*, 17-18.

<sup>65</sup> For example, government provide for different individuals in a house, free basic services, school feeding schemes, free medical care and various social grants. This is the reason that social grants are making significant contribution towards poverty reduction because they are used as a family benefit, see Green Paper on Families GG 3 October 2011 No 34657, 18-19.

his or her own; single unmarried parent with at least one child; single married parents (with an absent spouse) with at least one child; elderly “family” (one or multiple single adults (as one member “family”); child headed (all members of the “family” are children); married couple (husband and wife); married couple with adopted children; one adult with adopted children; siblings only (all “family” members are children including individuals below the age of eighteen); extended “family” (a multigenerational in character and includes “family” members who are bound by either blood or legal relations; this category includes cohabiting “families” that comprise of two adults staying together, without any agreement, with or without children); polygamous “families”; migrant and refugee “families”; and same sex “families”.<sup>66</sup>

The Green Paper on Families does not define “family”. Instead, it highlights the fact that “family” in South Africa is confused with “household” and that the two are not synonymous.<sup>67</sup> According the Green Paper, individuals that live in the same dwelling constitute a “household”. These individuals may or may not have the same “family” ties, but may still share the same living space, food and other essentials that are important for human survival.<sup>68</sup> The policy further provides that a “household” can also mean a single person living in a structure.<sup>69</sup> The exclusion of “households” in the context of “child-headed households” and its replacement with “child-headed families” creates confusion. I am not certain as to how the term “child-headed families” will be reconciled with the term “child-headed households” because research reveals that the definition of “family” is wide enough

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<sup>66</sup> GG 3 October 2011 No 34657, 29.

<sup>67</sup> *Ibid*, 28.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

to include “households” and other structures.<sup>70</sup>

Contrary to the Green Paper, the guidelines document regards a “household” as a characteristic of “family”.<sup>71</sup> The Children’s Act also recognizes “common households”.<sup>72</sup>

What we are able to learn from the Green Paper is the position taken by South Africa in promoting and protecting “family life”.<sup>73</sup> Like the CRC,<sup>74</sup> the Green Paper recognises “extended families”. However, the Green Paper omitted an opportunity to define “family”. Even where it acknowledged various “families” in South Africa, it omitted to expand on the list to include the difference between polygamous cultural and polygamous religious “families”.<sup>75</sup> This is important in that polygamous cultural “families” have legal recognition which speak to the promotion of “family life” and the protection that children who are reared in polygamous cultural “families” have.

According to the guidelines document for the Children’s Act:<sup>76</sup>

“A ‘family’ is a group of persons united by the ties of marriage, blood, adoption or

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<sup>70</sup> See Heaton *The South African Family Law* (2010) 3, see the discussion in section 2 2.

<sup>71</sup> See the discussion later in this section.

<sup>72</sup> S 231(1)(a)(iii), see the discussion in section 2 2 1 10.

<sup>73</sup> *Ibid*, 19.

<sup>74</sup> See the discussion in section 2 2 2 1.

<sup>75</sup> See the difference between the two polygamous “families” in sections 2 2 1 3 and 2 2 1 4.

<sup>76</sup> Department of Social Development *Norms, Standards and Practice Guidelines for the Children’s Act* (2010).

cohabitation, characterized by a common residence or not, interacting and communicating with one another in their respective 'family' roles, maintaining a common culture and governed by 'family' rules.”

The definition is in line with the African Plan of Action for Families in Africa,<sup>77</sup> which delineates three dimensions of a “family” and the recognition of “family” as a “unit”. The guidelines document provides the following:

“The ‘family’ as –

- (i) A psycho-biological unit where members are linked together by blood ties, kinship relationship, personal feelings, and emotional bonds of its members.
- (ii) A social unit where members live together in the same household and share tasks and social functions.
- (iii) And a basic production unit.”<sup>78</sup>

Unlike the Green Paper, the guidelines document for the Children’s Act uses a “household” as an element that describes a “family”. Like the Green Paper,<sup>79</sup> the guidelines document uses the term “unit” to describe “family”.<sup>80</sup> The term is used by international instruments, such as (UDHR),<sup>81</sup> (ICCPR),<sup>82</sup> (ICESCR),<sup>83</sup> (ACHPR)<sup>84</sup> and (ACRWC).<sup>85</sup> Thus, the Green

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<sup>77</sup> 16 July 2004: Accessed from [www.iag-agi.org/bdf/en/corpus/fiche-document-1194html](http://www.iag-agi.org/bdf/en/corpus/fiche-document-1194html) on 2012-08-01.

<sup>78</sup> Department of Social Development *Norms, Standards and Practice Guidelines for the Children’s Act* (2010) 24.

<sup>79</sup> *Ibid.*

<sup>80</sup> *DSD Norms, Standards and Practice Guidelines for the Children’s Act* (May 2010) 25.

<sup>81</sup> See the discussion in section 2 2 2 3.

<sup>82</sup> See the discussion in section 2 2 2 4.

Paper on Families and the guidelines document use “unit” as the characteristic of “family”.

Similar to the Children’s Act, the guidelines document considers the fact that a “family” can comprise of any person<sup>86</sup> who has parental responsibilities and rights in respect of the child.<sup>87</sup> Meaning, parental responsibilities and rights can be exercised by “any person”.<sup>88</sup> However, the Green Paper took a position that is different from the Children’s Act<sup>89</sup> and the guidelines document<sup>90</sup> by not recognising “common households” or “communal families”.<sup>91</sup>

This position is founded in the CRC which recognises that children can be brought up in a “community as provided by local custom”.<sup>92</sup> The guidelines document does not recognise “community” as an aspect that forms part of a “family”. Once more, the guidelines document is in this case not consistent with the CRC with regards to the characteristics of a “family”.

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<sup>83</sup> See the discussion in section 2 2 2 5.

<sup>84</sup> See the discussion in section 2 2 2 6.

<sup>85</sup> See the discussion in section 2 2 2 7.

<sup>86</sup> Whether linked by blood ties, kinship relationship, personal feelings and emotional bonds. See definition of “family” in the *Norms, Standards and Practice Guidelines for the Children’s Act*.

<sup>87</sup> S 1(1)(b) of the Children’s Act.

<sup>88</sup> See the discussion in section 2 4 2.

<sup>89</sup> See the discussion in section 2 2 1 10.

<sup>90</sup> The *Norms, Standards and Practice Guidelines for the Children’s Act* (2010) 24 recognizes “common residence”.

<sup>91</sup> See the discussion in section 2 2 1 10 on communal “families”.

<sup>92</sup> The position of the CRC regarding the definition of “family” is discussed in section 2 2 2 1.

Also, the definition does not follow the idea of “family” that is expressed in the Children’s Act, particularly, the recognition of the role played by the community in promoting “family life” to children. It is confusing and also embarrassing to have two documents,<sup>93</sup> developed by the same ministry<sup>94</sup> that are not consistent.

This clearly depicts the directorates that developed the documents<sup>95</sup> working in silos and the lack of synergy of research conducted in this area.

The types of “families” that are recognised in the guidelines document for the Children’s Act are nuclear “families”;<sup>96</sup> extended “families”;<sup>97</sup> cohabiting “families”;<sup>98</sup> single parent “families”;<sup>99</sup> child or youth headed “families”;<sup>100</sup> same sex “families”;<sup>101</sup> grandparents “families”;<sup>102</sup> foster “families”;<sup>103</sup> adoptive “families”;<sup>104</sup> non households,<sup>105</sup> reconstituted<sup>106</sup> “families” with one

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<sup>93</sup> *Norms, Standards and Practice Guidelines for the Children’s Act* and the Green Paper on Families.

<sup>94</sup> Department of Social Development.

<sup>95</sup> *Norms, Standards and Practice Guidelines for the Children’s Act* was developed by the Chief Directorate on Children and the Green Paper on Families by the Directorate on Families.

<sup>96</sup> In this context, I have discussed civil marriage families in section 2 2 1 1.

<sup>97</sup> Extended families are discussed in the context of grandparent “families” in section 2 2 1 9.

<sup>98</sup> See the discussion in section 2 2 1 5.

<sup>99</sup> See the discussion in section 2 2 1 7.

<sup>100</sup> One child or youth heading a household, see the discussion on child in a child-headed household “family” in sections 2 2 1 8 and 3 3 11.

<sup>101</sup> Same sex cohabiting, with or without children, see the discussion in section 2 2 1 6.

<sup>102</sup> See the discussion in section 2 2 1 9.

<sup>103</sup> See the discussion in section 6 3.

member living apart due to work circumstances; and polygamous “families”.<sup>107</sup> These “families” are viewed as having the following characteristics: intimacy and dependency; relative stability over time; being grounded by rules; separated from other groups; with an identity; performing supportive tasks and sharing responsibilities and resources; related by blood and related by other circumstances; having a common goal and functioning as a “unit”,<sup>108</sup> and with or without intimacy.<sup>109</sup>

The types of “families” in the guidelines document are diverse and include additional types of “families”<sup>110</sup> not included in the list of “families” provided in the Green Paper on Families. However, like the Green Paper Policy, the guidelines document omitted to recognise communal “families”. I also expected the guidelines, as a document that interprets the Children’s Act for implementation, to differentiate between polygamous religious “families” and polygamous cultural “families”. The guidelines document also mentions same-sex “families” as cohabiting partners and not couples married in terms of the Civil Union Act.

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<sup>104</sup> Child placed through statutory processes in care of a “family” that is not related to the child. See the discussion in ch 8.

<sup>105</sup> Friends staying together, bound by household rules.

<sup>106</sup> Biological parent, stepparent, biological children or step children.

<sup>107</sup> One husband having more than two wives and their children, see the discussion in sections 2 2 1 3 and 2 2 1 4.

<sup>108</sup> See the discussion in section 2 2 2.

<sup>109</sup> *DSD Norms, Standards and Practice Guidelines for the Children’s Act* (May 2010) 25.

<sup>110</sup> Non-households, reconstituted “families” and “families” with one member living apart due to work circumstances.

According to the SALRC Report,<sup>111</sup> the style of any new legislation, as well as the conceptualisation of the role of children, parents and families “... should match” the framework and principles of the terminology used in the Constitution, the CRC and the Inter-Ministerial Committee policy.<sup>112</sup> There are therefore, inconsistencies in the Green Paper on Families, the guidelines document and the Children’s Act with regards to the definition of “family”. I propose that the legislature must, once it has taken a stance as to what the definition of “family” should be, amend the guidelines document with reference to the relevant legal prescripts that define “family”.<sup>113</sup>

#### 2.2.1.1 *Family in terms of civil marriage*

In this section I discuss what marriage is in terms of civil law. The definition in a way, suggests how a “family” is viewed using civil marriage. Before the enactment of the Recognition of Customary Marriages Act,<sup>114</sup> the Civil Union Act<sup>115</sup> and the development in case law which recognised marriages conducted in terms of religious law<sup>116</sup> and cultural practices,<sup>117</sup> South African law defined “family” by inferring from, amongst others, the institutional arrangement of marriage, comprising a “husband” and “wife” to find a socially

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<sup>111</sup> *The Review of the Child Care Act* (1998) section 11 3.

<sup>112</sup> A structure formulated to conduct investigations regarding the deficiencies in the Child Care Act.

<sup>113</sup> See the proposed definition of “family” in the discussion in section 2 5.

<sup>114</sup> See ch 1, n 73, see the discussion in section 2 2 1 2.

<sup>115</sup> See the discussion in section 2 2 1 6.

<sup>116</sup> See the discussion in section 2 2 1 2.

<sup>117</sup> See the discussion of *V v De Wet NO 1953 (1) SA 613 (O)*, in section 2 2 1 4.



acceptable definition of “family”.<sup>118</sup> The Marriage Act excludes other marriage-like relationships, domestic partnerships, polygamous unions and same sex unions in its definition of marriage.<sup>119</sup> These affiliations are excluded because the Act applies only to unions between one “wife”<sup>120</sup> who is a female and one “husband”<sup>121</sup> who is a male, who enter into a marriage a marriage officer.<sup>122</sup>

I am also of the opinion that the Marriage Act permits marriages between persons where one party or both parties are children as defined in the Children’s Act.<sup>123</sup> This view is based on my interpretation of the following provisions: for instance, section 24(1) of the Marriage Act provides that:

“No marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.”

Initially, this provision prohibits the solemnisation of a marriage between parties whom one or both are minors. In the same statement, a consideration is made that the marriage between

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<sup>118</sup> S 30(1) of the Marriage Act.

<sup>119</sup> *Ibid.* See also the discussion in section 2 2 1 5 on the definition of common law marriage with some characteristics of civil marriage, however, it is excluded from the definition of marriage.

<sup>120</sup> A wife is defined as a married woman: see *The Concise Oxford Dictionary of Current English* 1602.

<sup>121</sup> A husband is defined as a married man: see *The Concise Oxford Dictionary of Current English* 664.

<sup>122</sup> S 30(1).

<sup>123</sup> S 1(g).

minors shall be solemnised once consent of a party who is legally required to give consent (the party referred to, is the parent or guardian of the minors) is obtained. This means that if the parent of the minor or minors to the marriage grants consent to a marriage of a minor, such move is key to orchestrate the marriage officer to solemnise the marriage of a minor.

Another provision to strengthen my argument is that the Marriage Act permits marriages between minors is section 24A of Marriage Act, which provides that:

- “(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of the child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made –
- (a) by a parent or guardian or the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or
  - (b) by the minor before he attains majority or within three months thereafter.”

Once more, marriage between one or two minors, entered into without the consent of the parent shall not be void. However, the marriage may be rendered void if, amongst other persons, the parent lodges an application to dissolve the marriage for reasons that consent was not granted. The fact that the parent or guardian of a minor or minors who enter into married is permitted apply to dissolve the marriage, means that the consent of the parent or guardian is vital for one minor or both minors to enter into marriage.

The danger with the above provisions is that they promote marriage of minor children. This position is not different from the living customary law which permits marriages of young

children. As is the case with early marriages, parents or guardians are prone to lure children to enter into early marriage. I am of the view that marriages of children below the age of 18 must be prohibited to avoid situations where children enter into marriage under 18 years of age instead of enjoying their childhood and development.

Similar to the above provisions, section 25 of the Marriage Act also shows the fact that the legislature clearly intended to allow one minor or minors to enter into marriage. The provision permits a marriage officer to solemnise marriage of a minor or minors whose parent or guardian cannot be found, or for some reason where the minor or minors to the marriage are not able to obtain consent of the parent or guardian as follows:

“(1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any reason unable to obtain the consent of his parents or guardian to enter into a marriage, such commissioner of child welfare may in his discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.”

The case of *B v B*,<sup>124</sup> clearly illustrates the application of section 25. The court in *B v B* granted an application of an applicant who was 16 years of age, who wanted to marry Moodley, the latter was 22 years old. The parents of the applicant opposed the marriage on the grounds that the applicant was too young and that she was a Muslim while Moodley was a Hindu. Although the parents of the applicant tried everything in their power to prevent the applicant from marrying Moodley, the applicant left her home to stay with Moodley and his parents who approved of the relationship. Moodley converted to the Islamic faith.

The applicant brought an application in terms of section 25(4) of Marriage Act for a rule calling upon her parents to show cause why she should not be granted leave to marry Moodley. The court applied section 25(4) of the Marriage Act.<sup>125</sup>

Section 26 provides that:

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<sup>124</sup> 1983 (1) SA 496 (N).

<sup>125</sup> Heaton *Casebook on the South African Family Law* (2010) 23.

“(1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any office in the public service authorised thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.”

This means that a girl who is below 15 years-old and a boy below the age of 18 may not marry without the written consent of the Minister of Home Affairs or any officer in the public office who is authorised to grant consent. Thus, the requirement in section 26(1) means that the above minors must obtain the minister’s written consent to marry.<sup>126</sup> The minister may only grant consent if he or she considers the marriage desirable, in the interests of the parties and if all the legal requirements have been complied with.<sup>127</sup>

However, this provision is not explicit on whether the consent of the minor’s parents or legal guardian must also be obtained; we can assume that the statement “Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law ...” means, amongst others, the consent of the parent or legal guardian must be obtained or that the parties must be a “wife” and a “husband” as part of “all other requirements prescribed by law”. Nevertheless, the provision clearly articulates the fact that the consent of the minister may not be necessary if the

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<sup>126</sup> Heaton *Casebook on the South African Family Law* (2010) 19.

<sup>127</sup> *Ibid.*

consent of a judge or court that has jurisdiction in the matter is granted.

Heaton<sup>128</sup> is of the view that the difference in the ages which girls and boys are prohibited to marry is based on the biological fact that boys reach maturity later than girls. Thus it does not constitute unfair discrimination between the two sexes. However, I argue based on section 26(1) that a girl who is 16 years of age is still regarded a child.<sup>129</sup> Furthermore, the fact that a girl is permitted to marry at an age that is earlier than a boy, constitutes unfair discrimination on the grounds of gender in terms of the Constitution.<sup>130</sup> On a similar note, the Children's Act acknowledges marriage of a child who is at a minimum age set by law.<sup>131</sup> In essence, the Children's Act promotes marriage that is set by any law, despite the fact that such law may stipulate age requirements that are below 18.

I propose that sections 24, 24A, 25, 26 and other provisions in the Marriage Act which provide for marriages of parties where one or two of the parties to the marriage are minors, be prohibited. Furthermore, the provisions must provide a clear directive as to what "all other requirement prescribed by law" means.<sup>132</sup> Thus, a provision must be enacted in the

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<sup>128</sup> *Casebook on the South African Family Law* (2010) 20.

<sup>129</sup> S 28(3) of the Constitution; s 1(g) of the Children's Act.

<sup>130</sup> S 9(3); ch 1, n 8.

<sup>131</sup> S 12(2)(a) and (b). See also ss 17 and 18(3)(1)(c)(i) of the Children's Act.

<sup>132</sup> See the proposed provision in section 3 4.

Children's Act that prohibits marriages of all children *below the age of 18*.<sup>133</sup>

The case of *Van der Merwe v Road Accident Fund*<sup>134</sup> illustrates the protection that our courts give to marriage. The court had to decide on whether section 18(a) and (b) of the Matrimonial Property Act<sup>135</sup> had the effect of preventing spouses from claiming damages for patrimonial loss arising out of bodily injury.<sup>136</sup> The High Court found that the Act discriminated against persons married in community of property.

The court found section 18(b) invalid in so far as it includes the words "other than damages for patrimonial loss". The court ordered that the latter words be struck out and replaced with the words "including damages for patrimonial loss".<sup>137</sup> An application was made to the Constitutional Court to pronounce upon the invalidity of section 18(b).<sup>138</sup> The Constitutional Court found the differentiation by section 18(b) to be between proprietary interests and protection, which the section attaches to the two marital regimes.<sup>139</sup>

The recognition of marriages consummated in terms of the Marriage Act also gave rise to

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<sup>133</sup> Own emphasis. See the discussion in section 2 2 1 2 where I make the same proposal with regard to marriages of children below the age of 18. See the proposed provision in section 3 4. See further the discussion in sections 3 3 5 2 and 3 4.

<sup>134</sup> 2006 ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC).

<sup>135</sup> 84 of 1988.

<sup>136</sup> 233.

<sup>137</sup> *Ibid.*

<sup>138</sup> The application was made in terms of s 172(2)(d) of the Constitution.

<sup>139</sup> 255C-D.

situations where children of married parents were the *only*<sup>140</sup> category of children who were legally recognised and guaranteed maintenance from both parents, as was the case in *Motan v Joosub*.<sup>141</sup> The court in this case differentiated between children born in wedlock and children born out of wedlock and found that the paternal grandparents of an extramarital child owed no duty of support to the child.<sup>142</sup>

Amongst other writers, Heaton<sup>143</sup> found the ruling in *Motan* unconstitutional and against several provisions entrenched in the Bill of Rights. This case is no longer good authority in the light of the Constitution and the recent developments in child law.<sup>144</sup> The case of *Petersen v The Maintenance Officer, Simon's Town Maintenance Court*<sup>145</sup> took a positive

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<sup>140</sup> Own emphasis.

<sup>141</sup> 1930 AD 61.

<sup>142</sup> 61.

<sup>143</sup> *Casebook on South African Family Law* (2010) 429-429. Amongst other rights in the Bill of Rights, s 9(1), (2) and (3); s 28 and s 36 of the Constitution. See also Van Schalkwyk "Maintenance for Children" in Boezaart (ed.) *Child Law in South Africa* (2009) 45.

<sup>144</sup> The enactment of the Children's Act.

<sup>145</sup> 2004 (2) BCLR 205 (C): The applicant in the case of *Petersen* is a single female who was not able to obtain maintenance of the child born out of marriage from its natural father. The single female and her parents supported the child but also lodged an inquiry in terms of s 10 of the Maintenance Act requiring the natural father to contribute the minimum necessary to maintain the child. Wherefore the applicant lodged a complaint with the Maintenance officer (first respondent) asserting that the paternal grandparents of the child were legally liable to maintain the child and had not done so. The Maintenance officer refused to call the paternal grandparents to an inquiry relying on the fact that the law does not impose the duty of support on paternal grandparents of an extramarital child. The applicant approached the Cape High Court to direct the Maintenance officer to take the necessary steps to hold an inquiry in terms



step forward and developed common law by considering the duty of support of an extramarital child from paternal grandparents in the event that the natural parents are unable to support the child.<sup>146</sup> These developments make it crucial for this research to reflect on other family structures and how they influence the definition of “family”.

### 2.2.1.2 *Family in terms of customary law*

The Constitution permits the law-maker to recognise various systems of marriage and personal law. Thus, the Constitution creates a *diverse*<sup>147</sup> approach with regard to the interpretation of the concept “family”.<sup>148</sup> This conclusion is drawn from the provision of the Constitution, which reads as follows:

“This section does not prevent legislation recognising – (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.”<sup>149</sup>

The South African tribal system includes extended “family” as a structure by which a person’s

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of s 10 of the Maintenance Act 99 of 1998, hereinafter referred to as “Maintenance Act”. The Maintenance officer refused, despite instructions from the High Court.

<sup>146</sup> 206B.

<sup>147</sup> Own emphasis.

<sup>148</sup> Robinson “The Child’s Right to Parental and Family Care” (1998) *Obiter* 332.

<sup>149</sup> S 15(3)(a).

status is determined within the framework of his or her “family”.<sup>150</sup>

Robinson<sup>151</sup> finds the recognition of the extended “family” of particular significance in the South African context as this type of “family” arrangement is commonly embraced and adhered to by indigenous people. This change is likely to influence the definition of a “family” in our common law. For instance, the definition of a child of unmarried parents will have to be re-considered.<sup>152</sup>

The approach in defining “family” in customary law is similar to civil law in that in, amongst other definitions, “family” is inferred from marriage. The Recognition of Customary Marriages Act which governs South African customary marriages, came into operation on 15 November 2000. However, different from civil marriages, the Act recognises that a “spouse” may enter into more than one customary marriage.<sup>153</sup> The Recognition of Customary Marriages Act also provides that customary marriages must have complied with the customs and tradition of an indigenous group, with norms best understood by a particular community as part of

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<sup>150</sup> Robinson (1998) *Obiter* 332-333.

<sup>151</sup> (1998) *Obiter* 335.

<sup>152</sup> *Ibid.*

<sup>153</sup> S 2(4). Also, s 2(3) provides that: “If a person is a spouse in more than one customary marriage all such marriages entered into before the commencement of the Recognition of Customary Marriages Act are for all purposes recognized as marriages.” Thus, the Act grants full legal recognition to monogamous and polygamous marriages. According to *The Concise Oxford Dictionary of Current English* 1059, “polygamous” marriage means having more than one wife or husband at the same time. However, I use the term “polygyny” to refer to an arrangement where a man marries or married more than one wife.

their culture or traditional customs.<sup>154</sup> Thus, the Act recognises the payment of *lobolo* or *bogadi*<sup>155</sup> by the prospective “husband” to the family of the prospective “wife” as a consideration for customary marriage with the wife’s family.

This Recognition of Customary Marriages Act is clear in the description of who a “spouse” in a marriage should be: “husband” and “wife” or “male” and “female”. This definition is similar to the Marriage Act, particularly given the fact that the two statutes exclude other relationships.<sup>156</sup>

The Recognition of Customary Marriages Act makes it peremptory for all customary marriages to be registered within a period of three months after conclusion of marriage.<sup>157</sup>

The Act requires that customary marriages entered into before the commencement of the Act<sup>158</sup> be registered<sup>159</sup> within 12 months after the commencement of the Act.<sup>160</sup> However,

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<sup>154</sup> S 1(iii) of the Recognition of Customary Marriages Act, see ch 1, n 73.

<sup>155</sup> According to s 1(iv) of the Recognition of Customary Marriages Act. *Lobolo* means “property in cash or in kind whether known as *lobolo*, *bohali* ... by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.”

<sup>156</sup> Same sex couples and domestic partnerships.

<sup>157</sup> S 4.

<sup>158</sup> 15 November 2000.

<sup>159</sup> According to the information obtained from the Department of Home Affairs, amongst others, the following documents are required for registration of customary marriage: *lobolo* agreement containing the date of marriage, *lobolo* amount and any other information agreed between the parties concerned. If the marriage was concluded in rural areas, a written confirmation from

“failure to register a customary marriage does not affect the validity of that marriage”. Where late registration cannot be made, an order may be obtained from the court that a customary marriage be registered.<sup>161</sup> I agree with Maithufi and Bekker<sup>162</sup> that little attention was given to the opportunities to register customary marriages. The authors argue on the basis of the fact that many people who have claims or who are entitled to rights, based on customary marriages have not registered their marriages.

They further argue that what worsens the situation is the fact that the Recognition of Customary Marriages Act requires spouses in customary marriages entered into before the

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the Tribal Chief or King from that area to the effect that marriage took place in that area: information accessed from [www.home-affairs.gov.za](http://www.home-affairs.gov.za) on 2012-04-16.

<sup>160</sup> S 4(3)(a) and (b).

<sup>161</sup> S 4(7)(a) of the Recognition of Customary Marriages Act.

<sup>162</sup> See s 4(9) of the Recognition of Customary Marriages Act. See Maithufi & Bekker “The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims” (2009) *Obiter* 173, relate the fact that the Road Accident Fund is still bound by the provisions of the Black Laws Amendment Act of 1963 and that the Act is applied subject to the repealed s 22 of the Black Administration Act. The Black Laws Amendment Act required a claimant for damages to produce a certificate issued by a commissioner (later magistrate) in cases where a customary marriage had been entered and relied upon at the time of the death of the deceased partner. Many of these certificates were said to be questionable as they were issued after cursory enquiries. However, the Road Accident Fund relied on them even though it may have to question the findings of the magistrate in the High Court for which it would have to produce its own evidence to the contrary.

commencement of the Act to register such marriages.<sup>163</sup> Thus, they find the requirement particularly unfair for the poor and middle class people, given the costs involved to access High Court or Family Court.

The requirement to register customary marriages is not unfair *per se*. I am of the view that registration of marriages is an important requirement to regulate the marriage institution and to curb incidences of child brides.<sup>164</sup> However, I agree with Maithufi and Bekker that it is unfair to expect poor people to incur travelling costs with attempts to access courts for registration. Thus, I propose that the state must facilitate for the registration of all marriages by providing mobile stations in less resourced areas, or use markets and government offices that accessible by people, including rural communities for registration.<sup>165</sup>

The Recognition of Customary Marriages Act further provides that:

“Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under Marriage Act, 1961 (Act No 25 of 1961), during the subsistence of such customary marriage.”<sup>166</sup>

The Act also provides that:

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<sup>163</sup> The Act requires that customary marriages entered into after the commencement of the Act be registered within 12 months. The period was later extended to another 12 months.

<sup>164</sup> See the discussion in section 3 3 5 1.

<sup>165</sup> See the proposed provision in section 3 4.

<sup>166</sup> S 3(2).

“A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.”<sup>167</sup>

Sections 3(2) and 10(1) of the Recognition of Customary Marriages Act were enforced in *Thembisile v Thembisile*,<sup>168</sup> where the court held that a civil marriage contracted while a man

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<sup>167</sup> S 10(1).

<sup>168</sup> 2002 (2) SA 209 T. The first applicant was the wife of the deceased married in terms of customary union in June 1979. The second applicant was the eldest male son born out of the customary union who was a minor at the time of the application. The applicants sought a declaratory order that they were entitled to bury the deceased (who died in May 2001) at his ancestral home at the locality of their choice. The deceased had a second wife who opposed the application as a second respondent in the matter. The respondent had entered into what purported to be a civil marriage with the deceased in May 1996. The civil marriage was documented by a marriage certificate followed by a customary union in October 1999. The respondent alleged that the deceased divorced the first applicant prior to entering into a civil union with her. She relied on the fact that the deceased brought the children of the customary union with the first applicant to live with him and the respondent in Rustenburg. She also alleged that the first applicant left the kraal she occupied with the deceased and had taken occupation in another kraal and had two children with another man. The respondent argued that the deceased has wished to be buried in Rustenburg and approved her as an heir. The first applicant disputed the allegations by the first respondent. She stated that the children stayed with the deceased in Rustenburg for purposes of education when she had to be hospitalised. She denied divorce, including committing adultery. The allegations of the first applicant were confirmed by a male family member. The court held that the first respondent bore the onus of persuading the court that the union had dissolved and that the respondent had to adduce proof on balance of probabilities to support the contention of the dissolution of customary union between the deceased and first applicant. The court held that the evidence by the first respondent, that the deceased had divorced the first applicant fell far short of the required evidentiary standard: 213EF and 214D.

was a partner in an existing customary union with another woman was void.<sup>169</sup> The court held further that it was not disputed that a valid customary union between the first applicant and the deceased exist irrespective of whether the customary union had been properly registered or not. The court relied on section 4(9) of the Recognition of Customary Marriages Act, which clearly articulates the fact that the validity of customary marriage is not affected by failure to register the marriage.<sup>170</sup>

The *Thembisile* judgment is likely to cause disagreement in that it undermines the consequences of an unregistered customary marriage; amongst others, that a spouse (in an unregistered customary marriage) may misrepresent himself or herself as an unmarried person in a new marriage. This is evident in *Ngwenyama v Mayelane*.<sup>171</sup> The deceased in

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<sup>169</sup> 215A-D.

<sup>170</sup> 211A-212A and 212B-C.

<sup>171</sup> (474/11)[2012] 94 ZASCA (1 June 2012) Neutral citation section 3. In terms of the facts of this case, the respondent was married to the deceased, according to customary law and tradition in 1984. 3 children were born out of the union. The marriage was not registered. The deceased died in 2009 and the marriage was still subsisting. When the respondent sought to register the customary union at the Department of Home Affairs after the death of the deceased, she was advised that the appellant had also sought to register a customary marriage allegedly contracted between her and the deceased in 2008. The respondent argued that the purported marriage between the deceased and the appellant was null and void *ab initio* as she had not been consulted before it was concluded and that the deceased failed to comply with s 7(6) of the Recognition of Customary Marriages Act. The deceased's elder brother deposed to an affidavit confirming the respondent's marriage to the deceased. In addition, he stated that in terms of custom and tradition, the first wife must be consulted before a second customary marriage is concluded and such a marriage should be witnessed by the blood relatives.

the case entered into the first customary marriage which was not registered. The deceased later entered into an allegedly second customary marriage which was also not registered, and also did not consult his wife about the second marriage. The Supreme Court of Appeal relaxed the requirement in the Recognition of Customary Marriages Act that:

“A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”<sup>172</sup>

The court also noted that the court *a quo* interpreted section 7(6) to mean that before the husband can contract a further customary marriage, he must enter into a contract regulating the future matrimonial property system of his marriages and that such contract must be approved by the court.<sup>173</sup> Ndita AJ’s argument for the decision to relax the requirement in section 7(6) is that it would be unjust to invalidate a marriage that is clearly valid on the basis of *the husband’s failure to make an application to court to approve a written contract*<sup>174</sup> when no duty was placed on the wife.<sup>175</sup>

Ndita AJ further argued that if non-compliance with section 7(6) renders a wife, whose customary marriage as unregistered is unmarried, and as such defeats the purpose for which

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<sup>172</sup> S 7(6) of the Recognition of Customary Marriages Act.

<sup>173</sup> Par 16.

<sup>174</sup> Own emphasis.

<sup>175</sup> Par 23.



the Recognition of Customary Marriages Act was intended; that is, the equal recognition of spouses of customary marriages.<sup>176</sup> I am of the view that the requirement that the husband in a customary marriage must make an application to court to approve a written contract which will regulate the future matrimonial property system of his marriages as in section 7(6), is obviously intended to protect the wife in the existing marriage.<sup>177</sup> I agree with Ndita AJ that the same requirement must be made for the wife in a customary marriage. Otherwise section 7(6), as it stands, discriminates against the wife on the basis of gender.<sup>178</sup> Thus I propose that section 7(6) of the Recognition of Customary Marriages Act be amended accordingly to provide for the rights of the wife.<sup>179</sup>

Maithufi and Moloji<sup>180</sup> argue that where there is non-compliance with the requirement to apply to court to approve a written contract to regulate the matrimonial property of the marriage, such a marriage will be regarded as a marriage out of community of property and of profit and loss. The authors argue that section 7(6) does not necessarily mean that the marriage is null and void.<sup>181</sup> Bakker<sup>182</sup> confirms Maithufi and Moloji's argument with regard to section 7(6) by arguing that it is not a requirement for a valid customary marriage. If it were, it would

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<sup>176</sup> Par 21.

<sup>177</sup> *Ngwenyama* case, par 19.

<sup>178</sup> S 9(3) of the Constitution.

<sup>179</sup> See the proposed amendment in section 2 5.

<sup>180</sup> "The Current Legal Status of Customary Marriages in South Africa" (2002) *TSAR* 599, see also *Ngwenyama* case, par 15.

<sup>181</sup> (2002) *TSAR* 609.

<sup>182</sup> "The New Unofficial Customary Marriage: Application of Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998" (2007) *THRHR* 482, *Ngwenyama* case, par 15.

have been incorporated in section 3 of the Recognition of Customary Marriages Act which provides for the requirements for a valid customary marriage concluded after 15 November 2000.

Bakker<sup>183</sup> also argues that the second marriage should be valid, irrespective of whether section 7(6) has been complied with.<sup>184</sup> He further argues that if non-compliance with section 7(6) invalidates the second marriage, such would be contrary to the purpose of the Act and that of section 7(6). The interest of all the wives will not be protected if non-compliance leads to invalidity of the second marriage.<sup>185</sup> He also reaffirms the position by Maithufi and Moloji<sup>186</sup> buy arguing that the only contract that can be drafted is an agreement to continue with the marriage out of community of property.<sup>186</sup> This means that non-compliance will have no effect on the first customary wife if the marriage is out of community of property.

Maithufi and Moloji<sup>187</sup> also argue with regard to section 7(7)(b)(iii) of the Act<sup>188</sup> that the court may refuse to register a proposed contract to avoid unnecessary litigation concerning property that is brought into the marriage and property that may be acquired during the subsistence of the marriage.

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<sup>183</sup> (2007) *THRHR* 484.

<sup>184</sup> (2007) *THRHR* 487.

<sup>185</sup> (2007) *THRHR* 488.

<sup>186</sup> *Ibid.*

<sup>187</sup> (2002) *TSAR* 609.

<sup>188</sup> It provides that: "When considering an application in terms of subsection 6 the court may refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract."

What I am depicting from the above discussion is the fact that the registration of customary marriage and the requirement that the husband must make an application to court to approve a written contract to regulate the matrimonial property regime of his existing customary marriage are overlooked. I am of the view that an unregistered marriage has potential to open a room for child marriages.<sup>189</sup> Also, where there is no written contract to regulate the matrimonial property regime of spouses to a customary marriage, such may perpetuate, amongst others, situations where a spouse may enter into a second or third marriage with intention to disadvantage his spouses with regard to property that is acquired during the customary marriage.<sup>190</sup>

Thus, I maintain a staunch view that the requirement to apply to court to approve a written contract to regulate the matrimonial property system of spouses in a customary marriage must be a strict requirement. I argue that spouses who enter into customary marriages are not all literate and that spouses may forget the property brought into marriage and accumulated during marriage. I propose that a written contract must be made available at state's expense, in the language understood by the parties who entered into a customary marriage. The contract should be approved by the court before the parties enter into a customary marriage. Furthermore, an interpreter must be solicited to explain the contract to the parties to avoid any misunderstandings.<sup>191</sup> I am of the opinion that this proposal would be

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<sup>189</sup> See the discussion in section 3 3 5 1.

<sup>190</sup> *Ngwenyama* case, par 12 it is stated that s 7(6) is intended to protect matrimonial property rights of the spouses by ensuring a fair distribution of the matrimonial property in circumstances where a husband is desirous of entering into a further customary marriage.

<sup>191</sup> See the proposed provision in section 2 5.

more valuable to the rural poor as they are the ones who more often conclude customary marriages.

The Recognition of Customary Marriages Act also requires, amongst others, that both prospective spouses to a customary marriage must be above the age of 18 to conclude a valid customary marriage.<sup>192</sup> However, if either of the prospective spouses is a minor, both his or her parents, or if he has no parents his or her legal guardian, must consent to the marriage.<sup>193</sup> If there is no legal guardian, the Act provides that a Minister<sup>194</sup> in public service must grant written permission to the minor child to enter into a customary marriage.<sup>195</sup>

The implication of sections 3(3)(a)<sup>196</sup> and 3(4)(a)<sup>197</sup> of the Recognition of Customary Marriages Act are, that a child can still establish a “family” before marriageable age. I am of the view that these provisions contradict the prohibition of child marriage provided in section

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<sup>192</sup> S 3(1)(a)(i).

<sup>193</sup> S 3(3)(a).

<sup>194</sup> S 3(b), also in terms of s 25 of Marriage Act.

<sup>195</sup> S 3(4)(a).

<sup>196</sup> The section provides that “if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage”.

<sup>197</sup> The section provides that “... the Minister or any officer in the public service authorized in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question”.

3(1)(a)(i) of the Act<sup>198</sup> and have potential to strengthen the tradition of early marriage.

Apart from these provisions, there are few provisions in different South African legislation which indirectly allow children to enter into marriages. Section 26(1) of Marriage Act,<sup>199</sup> read with s 18(3)(c)(i) of the Children's Act,<sup>200</sup> also sections 12(2)(a) and (b)<sup>201</sup> of the Children's Act and sections 3(1)(a)(i), 3(3)(a), 3(b),<sup>202</sup> 3(4)(a), 3(4)(c)<sup>203</sup> and 4(9)<sup>204</sup> of the Recognition of Customary Marriages Act by implication, allow marriages of children below the age of 18. I recommend that these provisions, provisions discussed the previous section and related

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<sup>198</sup> The provision regards 18 years as a marriageable age. See also the discussion in section 3 3 5.

<sup>199</sup> See the discussion in section 2 2 1 1.

<sup>200</sup> The section provides that: "... a parent or other person who acts as a guardian of a child must give or refuse any consent required by law in respect of the child, including consent to the child's marriage".

<sup>201</sup> The provision prohibits marriage of any child below the minimum age set by law for a valid marriage. See the discussion in section 2 2 1.

<sup>202</sup> The section provides that "If the consent of the parent or legal guardian cannot be obtained, section 25 of Marriage Act, 1961, applies."

<sup>203</sup> The section provides that: "If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage."

<sup>204</sup> The provision is not firm to require compulsory official registration of a customary marriage. This means that children may enter into early marriage with consent of their parents or guardians and not be discovered because of non-registration. See also the discussion in section 3 3 5 1.

others, be amended by a provision that prohibits marriage of *any child below the age of 18*.<sup>205</sup>

I support this recommendation on the basis that most South African customary marriages are concluded outside civil institutions; particularly the marriage negotiations between the families of the prospective husband and wife and the payment of *lobolo*. Thus, the normally private family affairs may allow marriages of children unnoticed. I further support my recommendation based on the fact that we may have too many young “families” which are unable to nurture children or fend for themselves. The latter may also lead to too many children in need of care.<sup>206</sup>

Nhlapo argues that a family is the foundation upon which Africans construct their social lives.<sup>207</sup> Pieterse<sup>208</sup> also argues 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 ...”.

Thus, the role of customary law is to preserve the family unit. The family is preserved and maintained through marriage and family ties.<sup>209</sup> Unfortunately, the responsibility to preserve

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<sup>205</sup> Own emphasis, see the proposed provision in section 3 4.

<sup>206</sup> See the discussion in section 3 3 5 4 1.

<sup>207</sup> “Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate” 1995 *IJL&F* 208.

<sup>208</sup> “In Loco Parentis: Third Party Parenting Rights in South Africa” (2000) *Stell LR* 324, 331.

<sup>209</sup> Nhlapo (1995) *IJL&F* 211.

the family was in terms of customary law left with men as heads of the households.<sup>210</sup> Women were, and in some situations still are, regarded as perpetual minors under customary law, without the capacity to neither negotiate business nor act as guardians for their children.<sup>211</sup> Women and children would be taken care of within the ambit of a “family” by male heads.

This patriarchal system led to discrimination, particularly against children of cohabiting couples. The case of *Mthembu v Letsela*,<sup>212</sup> a well-known customary law case, exposed some elements of discrimination against a child on the basis of gender and marital status with regard to inheritance in customary law. On two occasions, before the case went on appeal, the High Court in this case excluded a child of an unmarried father from inheriting

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<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> 1997 (2) SA 936 (T); 1998 (2) SA 675 (T); 2000 (3) SA 867 (SCA). In terms of the second *Mthembu* judgment, Mr Letsela lived with Ms Mthembu and their 5 year-old daughter in a house in the township. Mr Letsela owned the house under a 99 year leasehold. The parents of Mr Letsela lived with them. On 13 August 1993 Mr Letsela was killed by an unknown assailant and died without leaving a will. Mr Letsela and Ms Mthembu were in a process of entering into a legally recognised customary marriage and Mr Letsela had paid the first instalment of *lobolo* to Ms Mthembu's parents. The case was decided on the basis that there was no legally recognised marriage between Mr Letsela and Ms Mthembu. The issue of debate was whether the daughter of Mr Letsela was an heir to the estate of the deceased. The customary law of intestate succession operates on the principle of the male primogeniture rule in terms of which the eldest male descendant inherits everything and the wife and children are taken care of within the ambit of a family. If there is no male descendant, as in the case of Mr Letsela, his father inherits his estate and the responsibility to take care of his wife. The courts in all three judgments failed to recognise the customary law of intestate succession, including aspects of the law that were contrary to the Constitution.

*intestate*.<sup>213</sup>

In terms of the “living”<sup>214</sup> customary law, if a child is born from a relationship where *lobolo* has not been paid, the child cannot inherit from the natural father, regardless of whether or not the child is a son. Thus, the “living” customary law discriminates against children of unmarried parents by either barring contact between the child and the paternal grandparents or excluding children from inheriting from their father’s estate. Although this study will not discuss the three judgments of *Mthembu*, it is important to note that these judgments leaned

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<sup>213</sup> Intestate Succession Act 81 of 1987, hereinafter referred to as the “Intestate Succession Act” as amended by s 1(a) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, see ch 1, n 8. s 1 of the Act provides that a descendant means: “a person who is a descendant in terms of the Intestate Succession Act, and includes – (a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and (b) a woman referred to in section 2(2)(b) or (c)”. See details of s 2(2)(b) or (c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act.

<sup>214</sup> The “living” customary law is the commonly practiced custom by the community or a group of people and it is neither legislated nor written. See the case of *Sonti* 1929 NAC (C&O) 23; *Mthembu v Letsela* 1997 (2) SA 936 (T) par 109. The court highlighted in the latter case that there was no sufficient evidence before it to allow it to determine the true content of the “living” customary law. The court held that the difficulty lies not necessarily in recognising the notion of “living” customary law but in determining and testing its content. See also the discussion on the “official customary law” in section 8 3 3. In *Mabena v Letsoalo* 1998 (2) SA 1068 (T) wherein the mother of a girl had negotiated and received *lobolo* for her daughter. The court held that it had to recognise the principle of “living” or observed law as it would constitute a development of the law which is in line with the spirit, purport and object of the Bill of Rights.



more towards believing the “living customary law”<sup>215</sup> rather than to challenging the aspects of such law that are unjust to children who have no power in the decision made by parents not to marry.

The child in *Mthembu* case was excluded from benefiting from the estate of the deceased on the basis of her gender (as a female) and the marital status of her parents<sup>216</sup> (the fact that the marriage of the parents is not legally recognised). This practice is inconsistent with the right of the child to equality,<sup>217</sup> “parental care” or “family care”.<sup>218</sup> Furthermore, the practice discriminates against the child on the grounds of birth,<sup>219</sup> the fact that the child was born from parents who are not married should not be used to exclude the child from inheritance.

The duty of support for the child includes the right to inherit from the estate of any person

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<sup>215</sup> In the first *Mthembu* judgment the Transvaal High Court quoted the right to participate in a cultural life of one’s choice, that is, s 30 of the Constitution. In the second *Mthembu* judgment the High Court gave the impression that the adjustment of the customary law of succession consistent with the Constitution is the responsibility of Parliament and not of courts of law. The Supreme Court in the third judgment of *Mthembu* said that to strike down the primogeniture rule would be to deal away with an African institution without assessing its objectives. The Supreme Court also declined the opportunity to develop common law, relying on the fact that the court has insufficient information to do so.

<sup>216</sup> S 9(3), see also ch 1, n 8.

<sup>217</sup> *Ibid.*

<sup>218</sup> S 28(1)(b) of the Constitution.

<sup>219</sup> The fact that the status of a child who is born out of marriage is used to discriminate against the child in favour of other children, is in itself an infringement of the child’s right to equality as entrenched in s 9(3) of the Constitution, see ch 1, n 8.

who has an obligation or duty to support the child.<sup>220</sup> Thus, children of unmarried fathers are allowed to inherit intestate.<sup>221</sup> The Act also has implications for the definition of “spouse”, in that, “spouse” includes “a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act ...”.<sup>222</sup> Thus, the Reform of Customary Law of Succession and Regulation of Related Matters Act is consistent with the principles of equality entrenched in the Constitution with regards to succession of spouses and children.<sup>223</sup>

*Maithufi*<sup>224</sup> argues that, given the fact that customary law is not static, the principles relating to primogeniture have changed. He notes the clear distinction between succession to the

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<sup>220</sup> S 2(1) of the Maintenance Act.

<sup>221</sup> See n 213, that is, Reform of Customary Law of Succession and Regulation of Related Matters Act.

<sup>222</sup> S 1.

<sup>223</sup> *Ibid*, s 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act provides that: “In the application of the Intestate Succession Act - (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child’s portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice in the *Gazette*, whichever is the greater; (b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house must, if she survives him, be regarded as a descendant of the deceased; (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.” See also s 9 of the Constitution, see ch 1, n 8.

<sup>224</sup> “The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession” (1998) *THRHR* 147.

status of the deceased and succession to the inheritance of the property of the deceased. He argues that succession to the status of the deceased does not necessarily entail succession to the property of the deceased, and that the issue in Mthembu deals with succession to status. The eldest son still “steps into the shoes of the deceased”; however, the eldest son does not inherit the whole estate of the deceased.<sup>225</sup>

I agree with Maithufi’s argument; however I bring a further argument that, with the change in cultural practice and individual family members garnered to feed their own selfish ambitions, it is questionable whether the “primogeniture rule” will in all circumstances serve the interests of the descendants of the deceased. I am already pondering two situations, where the successor inherits the assets and liabilities of the deceased on false pretence that he will take care of the interests of the descendants of the deceased; also, where the successor succeeds in the status of the deceased for simple reasons of wanting to gain power over the affairs of the deceased’s family.

I am of the view that the “primogeniture rule” would only serve the interests of the descendants of the deceased if the family meeting that discusses issues of succession could prioritise the descendants. Actually, it is also easy to target the interests of the wife and

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<sup>225</sup> *Ibid.* According to Maithufi, approximately three weeks after the burial of the deceased, a family meeting is arranged to determine the devolution of the estate. In most circumstances, the decision that is arrived at will benefit all the children (sons and daughters, irrespective of age) and the widow of the deceased.

children by allowing them to express their wishes in the family meeting<sup>226</sup> rather than have male elders speak on their behalf.<sup>227</sup>

I submit on account of the argument by Kerr<sup>228</sup> that:

“It has long been recognised that society has changed since the rule of primogeniture of males through males and universal succession developed ... It is important in a democratic state that the democratic process in regard to changes in law be followed and those affected by customary law be given the opportunity to discuss possible reforms and to convey their views to their elected representatives and/or to a commission appointed by legislature.”

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<sup>226</sup> Bekker & de Kock “Adaptation of the Customary Law of Succession to Changing Needs” (1992) *CILSA* 369-370. The position of women under customary law does not accord with modern notions of the dignity and worth of the individual and of the equal rights of men and women. Despite the enactment of laws prohibiting unfair discrimination on the grounds of gender, men have and still participate in decision-making forums in exclusion of women and children.

<sup>227</sup> An incident that flags the argument by Bekker & de Kock, *ibid* and the circumstances that are to some extent similar to *Mthembu* took place, in which I was a victim. When my father was buried on the 2000-05-14, a family meeting was arranged in the afternoon of the day of the funeral. A decision had to be taken as to who (amongst the male elders from my father’s clan) should “step into the shoes of the deceased” since my brothers were (according to the male elders participating in that meeting) young. The meeting excluded all adult females including young males from participating. Thus, only adult males were allowed to speak and take a decision on behalf of the family. My mother was also not allowed to participate as the “chief mourner”. If we (females) did not organise ourselves and disperse that meeting, a decision would have been taken on our behalf.

<sup>228</sup> “Customary Law, Fundamental Rights, and the Constitution” (1994) *SALJ* 732; Van der Linde “Recent Case Law – *Mthembu v Letsela* 1998 2 SA 675 (T)” (1998) *De Jure* 383.

I agree with Kerr<sup>229</sup> that the addition to primogeniture of the words “of males through males” conflict with the equality clause.<sup>230</sup> Kerr<sup>231</sup> correctly puts it that “those affected by customary law be given the opportunity to discuss possible reforms”. However, Kerr should have been explicit in his argument and point out that women and *children who are mainly affected by customary law must be given the opportunity to discuss possible reforms.*<sup>232</sup>

Apart from the discriminatory practise in customary law of succession, Bekker<sup>233</sup> brings in some of the valuable aspects in customary law in that it is communal or socialist, whereas the general law is more individualistic or capitalist in nature. The underlying principle of customary law is social solidarity. It is based on groups of extended families, clans and tribes which serve as a social support system for the family. This means groups play a prominent role, and members in a group do not only have rights but also responsibilities.<sup>234</sup> This also applies in the context of the responsibilities and rights of parents to provide care to their children. Thus I am of the view that where parents lack the means to provide for their children’s needs, a communal decision, where everyone is allowed to participate, may work to provide for needs of the child.<sup>235</sup>

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<sup>229</sup> (1994) SALJ 726.

<sup>230</sup> S 9(3) of the Constitution.

<sup>231</sup> (1994) SALJ 725.

<sup>232</sup> Own emphasis.

<sup>233</sup> “How Compatible is African Customary Law with a Human Rights? Some Preliminary Observations” (1994) THRHR 441.

<sup>234</sup> (1994) THRHR 442.

<sup>235</sup> See the discussion in section 2 2 1 10.

Bekker and de Kock<sup>236</sup> also bring a perspective that is often ignored in customary law of succession. The authors argue that customary law of succession perpetuates the family and to distribute the property of the deceased amongst the survivors. Thus it preserves and strengthens families.<sup>237</sup> This means that the objective to preserve and strengthen families in the Children's Act is nothing new to South Africa.<sup>238</sup> I am of the view that a provision must be enacted in the Children's Act to recognise the values that customary law place in communities as structures better suit to solve, amongst others, the need for care of children.<sup>239</sup> Thus, customary practice may assist with regards to keeping children in families and communities, thus enhancing their lives, sense of dignity and self-worth. Apart from poverty that came as a result of apartheid, it is rare to find children who live in a communal arrangement to be in need of care.

My concluding argument regarding the views shared by these authors is that the "primogeniture rule" is not necessarily a bad practice. However, caution must be exercised to ensure that everyone is treated equally without discrimination on the grounds of gender or age.<sup>240</sup> Also, in circumstances where the primogeniture rule is applied with the result that a male elder succeeds to the status and property of the deceased, the interests of the wife and children of the deceased can only be taken care of if the successor is competent in

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<sup>236</sup> (1992) *CILSA* 367.

<sup>237</sup> (1992) *CILSA* 367-368; Kerr (1994) *SALJ* 730 customary law puts value upon the unity of the family.

<sup>238</sup> S 2(a). See also the discussion in section 4 3.

<sup>239</sup> See the discussion in sections in 2 2 1 10, 2 5.

<sup>240</sup> Women are often discriminated against on the grounds of gender and children on the grounds of age, see s 9(3) of the Constitution, see ch 1, n 8.

accordance with the goal to promote family life.

In critiquing the *Mthembu* judgment, I submit that it is important to point out the following facts: that the child in *Mthembu* case was born from a union between the deceased and the applicant; the deceased and the applicant lived together until the child was five years old; and that there are no facts in the case which pointed to the fact that the deceased did not acknowledge his daughter to be his child. The father of the deceased disputed that the customary union existed between the deceased and the applicant and that he was the only heir in his deceased son's estate in accordance with the rule of primogeniture.

The following factors must be taken into account in response to the father of the deceased's argument: firstly, the fact that the deceased was the father of his child simply says that the daughter was entitled to maintenance from the deceased; secondly, the fact that the deceased had paid the first instalment of *lobolo* was clear intention on the part of the deceased to marry the applicant had death not overtaken him. The court should have advanced the "best interests of the child" argument to enable the child to benefit as the heir in terms of the Intestate Succession Act, rather than considering the argument that the deceased's father was the sole heir based on the rule of male primogeniture.

The case of *Zondi v President of the Republic of South Africa*,<sup>241</sup> brought the first change in the customary law of succession. The applicant, who was an illegitimate child of the

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<sup>241</sup> 2000 (2) SA 49 (N); Ngidi "Upholding the Best Interests of the Child in South African Customary Law" in Boezaart (ed.) *Child Law in South Africa* (2009) 232.

deceased, sought an order that would declare the law and regulations of primogeniture which were applied to the devolution of the deceased estate unconstitutional. The deceased and the mother of the applicant were married out of community of property and of profit and loss in terms of the repealed section 22(6) of the Black Administration Act. No children were born of the marriage between the deceased and his surviving spouse. Since the deceased had died intestate, his estate had to devolve according to regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks<sup>242</sup> and in terms of customary law.

The applicant argued that the regulation offended against the equality provisions of the Constitution to the extent that it distinguished between the estates of black persons married under ante-nuptial contract or in community of property for purposes of intestate succession, thus was invalid. According to the court, it did not have to determine the constitutionality of

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<sup>242</sup> GG 6 February 1987 No 10601, reg 2(d) provides that: "If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following ... When any deceased Black is survived by any partner (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or (ii) with whom he had entered into a customary union; or (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and if the said Black had been a European."



customary law, particularly the rule of primogeniture. The Constitution recognised customary law.<sup>243</sup> The court held that regulation 2 be struck down and that all children of unmarried fathers be given succession rights, and directed that the estate of the deceased devolve according to the Intestate Succession Act.

The applicant in *Bhe v Magistrate, Khayelitsha*<sup>244</sup> was the mother of the two daughters born of a relationship between the applicant and the deceased father who died intestate. The applicant approached the Constitutional Court on behalf of the minors for an order declaring the primogeniture rule, which excluded her daughters from benefiting from the deceased's estate, to be unconstitutional in order to enable the daughters to inherit. The rule was also challenged on the grounds that it discriminated against female descendants other than the eldest descendants and extra-marital children. The Constitutional Court in *Bhe v Magistrate, Khayelitsha* acknowledged the fact that modern urban communities and families are structured differently and not along traditional lines.<sup>245</sup> Nuclear families have replaced traditional extended families in that an heir does not necessarily live with the spouse of the deceased and other dependants and descendants according to the primogeniture rule in customary law.<sup>246</sup> Instead the heir simply acquires his or her estate without assuming any of the deceased's responsibilities.<sup>247</sup>

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<sup>243</sup> 52B-D.

<sup>244</sup> 2005 (1) SA 580 (CC).

<sup>245</sup> Section 618D-F.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.* See also Ngidi in Boezaart (ed.) *Child Law in South Africa* 234.

With regard to the customary law of succession, it was acknowledged in the *Bhe* case that the Constitutional Court has in recent years extended the ambit of the Intestate Succession Act in the light of its intentions to amongst others; defend the fundamental right to equality, to cases that sought benefit from the Intestate Succession Act.<sup>248</sup> Amongst others, the case of *Bhe* found the provisions of Intestate Succession Act which affirm the Black Administration Act<sup>249</sup> to the effect that minor children did not qualify to be heirs in the *intestate* estate of their deceased father, inconsistent with the Constitution and invalid.<sup>250</sup>

The Court held that according to the customary law of succession an heir did not merely succeed to the assets of the deceased. Succession in customary law is primarily concerned with the preservation and perpetuation of the family unit. Property is collectively owned and the family-head administers it for the benefit of the family unit.<sup>251</sup> The heir to the deceased estate acquired the duty to maintain and support all the members of the “family”.<sup>252</sup> The rule of primogeniture was central to customary succession to the effect that women did not participate in the intestate succession of the deceased, including a deceased’s spouse.<sup>253</sup>

Critics of the provisions of the Intestate Succession Act found it inadequate to accommodate various factual situations that arise out of customary succession as the Act was premised on

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<sup>248</sup> 624B.

<sup>249</sup> S 23, particularly reg 2(e) of Act, see ch 1, n 8.

<sup>250</sup> 582E-G.

<sup>251</sup> 585E.

<sup>252</sup> *Ibid.*

<sup>253</sup> 585G-H.

the nuclear family model.<sup>254</sup> These were, amongst others, the reasons customary succession was found to be out of touch with modern trends or social realities.<sup>255</sup> Also, the reason why the legislature intervened in African family affairs by enacting the Reform of Customary Law of Succession and Regulation of Related Matters Act was to, amongst others, modify the customary law of succession to protect children born out of customary marriage and provide for the welfare of “family members” under customary law.<sup>256</sup>

The African “family” was, and still is, taken to be “extended”.<sup>257</sup> This is viewed by Bennett<sup>258</sup> as an augmentation of the nuclear “family”, an extension of the descending and ascending generation, linking a series of conjugal units by polygamous marriages. Nhlapo<sup>259</sup> corroborates Bennett’s argument and maintains that the right to “family life” should be confined to relationships arising out of marriage. Nhlapo’s view corroborates the fact that “family” in both customary and civil law is firstly associated with marriage and extends to other persons who play the role of parenthood. The customary law definition of “family” is broad and may include extended “family members” who will always be available to take

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<sup>254</sup> 628E-F.

<sup>255</sup> (1991) 145.

<sup>256</sup> Preamble, see n 213.

<sup>257</sup> *Ibid.*

<sup>258</sup> According to Bennett (1991) 146. Families that extend vertically are described as clans, that is, groups of descendants who are believed to be related to a common ancestor, although their genealogical link can no longer be traced.

<sup>259</sup> “International Protection of Human Rights and the Family: African Variations on a Common Theme” (1989) *IJL&F* 12; Van der Linde (2001) 83.

orphaned children into their care in the event of the death of their parents.<sup>260</sup>

In terms of South African customary law, a child is attached to a “family” by both physical parentage and his or her connection with a socially approved relationship, which may be by way of marriage.<sup>261</sup> Children born of cohabiting parents are recognised as such and do not enjoy the same rights as children who are born from marriage or approved unions.<sup>262</sup> Cotran and Rubin<sup>263</sup> are of the view that the fact that a child is born out of marriage is irrelevant to his or her status in the “family” and the community. The principal rule of regulating “legitimacy” is to determine who bears the responsibility of raising the child.<sup>264</sup> On the other hand, any child, whether born of a married or unmarried father, was readily included in the “family”, given the need for more hands to tend crops and herd livestock.<sup>265</sup>

This position is also adopted in the Children’s Act<sup>266</sup> which provides full parental responsibilities and rights to unmarried fathers in certain circumstances.<sup>267</sup>

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<sup>260</sup> Nhlapo (1989) *JL&F* 12.

<sup>261</sup> Bennett (2004) 307.

<sup>262</sup> *Ibid.*

<sup>263</sup> (eds.) Reading in African Law (1970) 44.

<sup>264</sup> Bennett (2004) 307.

<sup>265</sup> *Ibid.*

<sup>266</sup> S 18. See Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

<sup>267</sup> See the discussion in section 2 4 2.

### 2.2.1.3 Families in terms of polygamous customary marriages

South African law has, through the enactment of the Recognition of Customary Marriages Act,<sup>268</sup> given full recognition to polygyny regardless of the number of wives a husband may have.<sup>269</sup> Even with these developments, the definition of a “family” is not established in the context where a polygamous marriage applies. Logically, “family” for a child whose father is in a polygamous marriage may include members of the other “family” units; that is, the wives of the father of the child.<sup>270</sup>

According to Bennett,<sup>271</sup> polygamous marriages are traditional family structures or models of households that include polygamous wives, their offspring, grandchildren, siblings and any other people who are attached to the “family”. This means a child whose parent is in a polygamous marriage belongs to a larger group of “family members”, made up of the wives

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<sup>268</sup> S 2.

<sup>269</sup> “Polygamy” and “polygyny” do not have the same meaning. “Polygamy” includes both “polygyny” and “polyandry”: “Polygyny” is a form of marriage in which a man has more than one or two wives. Polyandry is a form of marriage in which a woman has more than one or two husbands at the same time: see Bennett (2004) 243; (1991) 146; Starkweather *Exploration into Human Polyandry: An Evolutionary Examination of the Non-Classical Cases* (Masters Dissertation 2010 University of Nebraska at London). According to *The Concise Oxford Dictionary of Current English* 1059: “polygyny” means “polygamy” in which a man has more than one wife. This study will refer to the concept “polygyny”.

<sup>270</sup> S 2(3)(4) of the Recognition of Customary Marriages Act.

<sup>271</sup> (2004) 181. Bennett views polygynous marriages as traditional family structures or models of a household that include polygynous wives and their offspring, and grandchildren, siblings and any other people who are attached.

of his or her father and many siblings. Thus, it would serve the best interests of a child who loses a mother in a polygamous marriage to have him or her taken care of by the other wives of the father in the event there are no remaining “family members” within his or her mother’s household.

The SALRC<sup>272</sup> saw the need for the joint adoption of a child by, amongst others, the husband who is the head of the kraal and his three or four wives in a customary structure in a practical application of the spirit of *ubuntu*.<sup>273</sup> This is a new dimension arising from polygamous customary law marriages. This reflects the right of an orphaned child (whose deceased mother was in a polygamous marriage) to be cared for by the other wives or “family” group. Thus, the proposed definition of “family” must be wide enough to accommodate children with parents in polygamous “families”.<sup>274</sup> It would make an important shift from the promotion of the rights of the wives and the husband in a polygamous marriage to claim an equitable distribution of the matrimonial property upon dissolution of a polygamous customary marriage, to the right of the child to be cared for in a “family”.<sup>275</sup> This is relevant for the promotion of the right of the child to “family life”.

Although polygamous marriages were recognised by the Recognition of Customary Marriages Act on the 15 November 2000, they were practised from time immemorial, not only

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<sup>272</sup> *The Review of the Child Care Act* (1998) section 18 6 3.

<sup>273</sup> Louw “Adoption” in Boezaart T (ed.) *Child Law in South Africa* (2009) 138.

<sup>274</sup> See the discussion in section 2 2 4.

<sup>275</sup> Ss 7(a)(ii), 8(4)(b).

in terms of customary law, but also in Muslim marriages.<sup>276</sup> Polygamous marriages were not recognised by the Intestate Succession Act until the enactment of the Reform of Customary Law of Succession and Regulation of Related Matters Act.<sup>277</sup>

Mbatha<sup>278</sup> argues with regard to the Intestate Succession Act that the Act would not naturally accommodate extended families, which are a feature of the customary environment, nor would it have regard to polygamous unions.<sup>279</sup> Mbatha<sup>280</sup> is of the opinion that the indigenous law may serve to prevent the disintegration of the family unit and prevent members of the “family” being sent to orphanage or old-age homes.

Lessons to be learned from the discussion in this section are that, when a couple considers entering into a customary marriage, it is highly recommended that they consult a legal practitioner to ascertain the requirements that must be met, and also draft a contract to

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<sup>276</sup> With regard to Muslim marriages and intestate succession see: *Hassam v Jacobs* 2009 BCLR 1148 (CC), as discussed in section 2.2.1.4.

<sup>277</sup> S 3(3) provides that: “In the determination of a child’s portion for the purposes of dividing the estate of the deceased in terms of the Intestate Succession Act, paragraph (f) of section 1(4) of that Act must be regarded to read as follows: (f) a child’s portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a),(b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008.”

<sup>278</sup> “Reforming the Customary Law of Succession” (2002) *SAJHR* 259 and 285. See also *Bhe* 628E-F.

<sup>279</sup> *Bhe* 628E-F.

<sup>280</sup> See *Bhe* 661F.

protect their rights when the marriage dissolves.

We learnt that extended “family”, such as grandparents, uncles and aunts, play a huge role in providing care to children; including second wives in polygamous marriage. However, children growing up in these “families” may need care and protection. Thus these arrangements must be protected and respected by way of giving them legal recognition and providing the necessary support for the protection of children and the welfare of “family members” that are subject to customary law. In the event children are removed from these arrangements, they must be reunified and reintegrated as soon as possible. Polygamous marriages in terms of religious law are discussed further in the next section.

#### *2.2.1.4 Families in terms of monogamous and polygamous religious marriages*

This section discusses Muslims and Hindu monogamous and polygamous marriages. These marriages are not legislated in South Africa.<sup>281</sup> The SALRC published the Muslim Marriages Bill,<sup>282</sup> inviting comments and responses regarding regulating Islamic marriages. The Commission submitted a report regarding the Muslim Marriages Bill to the Department of Justice and Constitutional Development in July 2003. The report brought about internal

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<sup>281</sup> SALRC *The Review of the Child Care Act* (1998) section 9 3 5, the latter report has a Bill attached to it on Muslim marriages.

<sup>282</sup> Published by the Department of Justice and Constitutional Development on 15 March 2011, see ch 1, n 114.



differences within the Muslim community.<sup>283</sup> Hence there is to date, no conclusion regarding the Bill.<sup>284</sup> Thus far, Muslim marriages, like Hindu and Jewish marriages are not valid in terms of the South African legal system.

However, the courts have in numerous cases recognised the legal consequences arising from Muslim and Hindu marriages. This recognition is evident in the following cases: In *Ryland and Edros*<sup>285</sup> the court held that it could not be said that, since the new Constitution came into operation, a Muslim marriage and the customs related to it are *contra bonos mores*.<sup>286</sup> In another case of *Amod v Multilateral Motor Vehicle Accident Fund*<sup>287</sup> the court held that the dependant in the case could have an action for compensation for loss of support if the deceased was under a legally enforceable contractual duty to support her flowing from a *de facto* monogamous marriage in accordance with a recognised and acceptable faith such as Islam.<sup>288</sup> Accordingly, the dependant had to meet certain requirements.<sup>289</sup>

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<sup>283</sup> Skelton *et al.* (eds.) *Family Law in South Africa* (2010) 197.

<sup>284</sup> The differences within the Muslim community concern the group which will interpret the guiding principles of the legislation. Will it be the traditionalist or the modernist, despite the fact that the Qur'an and Shari'a law will be the guiding principles?

<sup>285</sup> 1997 (2) SA 690 (C); 1996 4 All SA 557 (C); 1997 1 BCLR 77 (C).

<sup>286</sup> 710I-711A-B.

<sup>287</sup> 1999 (4) SA 1319 (SCA); 1999 4 All SA 421 (SCA).

<sup>288</sup> 1330G-H and 1331B.

<sup>289</sup> See 1331C-D: dependent had to prove that: (1) the deceased had a legally enforceable duty to support the dependant; (2) it was a duty that arose from a solemn marriage in accordance

The court in *Daniels v Campbell*<sup>290</sup> considered whether an interpretation that fails to accommodate widows in polygamous Muslim marriages could survive the constitutional muster. The court held that such discrimination would not only amount to a violation of the widows in Muslim marriages' rights to equality on the basis of marital status, religion and culture, but would also infringe their right to dignity.<sup>291</sup> In the *Daniels* case, Sachs J held with regard to monogamous relationships that a party in a monogamous Muslim marriage is a "spouse".<sup>292</sup> Accordingly, the court found it not necessary to "read-in"<sup>293</sup> words into the Intestate Succession Act and the Maintenance of the Surviving Spouses Act.<sup>294</sup>

Moseneke J and Madala J, concurring,<sup>295</sup> differed with Sachs J and held that the word "spouse" has a specific and settled meaning in our law and must refer to a party married under the Marriages Act.<sup>296</sup> The majority in the *Daniels* case remarked that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by some legislations and that such cannot be interpreted so as to exclude them, contrary to the spirit, purport and objects of the Constitution. The

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with the tenets of a recognised and accepted faith; and (3) it was a duty that deserved recognition and protection for the purposes of the dependant's action.

<sup>290</sup> 2004 ZACC 14; 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC).

<sup>291</sup> 741F.

<sup>292</sup> 750.

<sup>293</sup> 757D-E.

<sup>294</sup> 27 of 1990.

<sup>295</sup> 772F.

<sup>296</sup> 757H-I.

*Daniels* case pointed to a shift in legislative policy, which also indicates trends consistent with the constitutional values in legislation.<sup>297</sup>

In another case of *Khan v Khan*,<sup>298</sup> which involved a polygamous marriage, the then Transvaal Provincial Division held that it would be discriminatory to grant a Muslim wife in a monogamous Muslim marriage the right to maintenance and deny the same right to a Muslim wife in a polygamous marriage.<sup>299</sup> The court stated that: “partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance”.<sup>300</sup> The implication of a marriage of polygamous arrangement is that it joins all

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<sup>297</sup> 746H-J. Amongst others, the following legislation: Civil Proceedings Evidence Act 25 of 1965 (s 10A which recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (s 195(2) that recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); the Pension Funds Act 24 of 1956 (s 1(b)(ii): definition of “dependant”); the Value Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognises religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); the Transfer Duty Act 40 of 1949 (s 9(1)(f) read with the definition of “spouse” in s 1 exempts from transfer duty, property inherited by the surviving spouse in a religious marriage); the Estate Duty Act 45 of 1955 (s 4(q) read with the definition of “spouse” in s 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage).

<sup>298</sup> 2005 (2) SA 272 (T).

<sup>299</sup> 283.

<sup>300</sup> 283C-D.

the wives as parties in a divorce action.<sup>301</sup>

The interests of children whose mother is the wife in a polygamous marriage, who is joined in divorce proceedings, may have her matrimonial property, benefits and other interests at stake when their father divorces one of his wives. This is the case as each wife's estate, which is in many cases linked to the husband, is made subject to any settlement between the parties to the divorce action. The practice of including other wives of the polygamous marriage in matters concerning their husband also applies in situations where there are benefits, such as inheritance.<sup>302</sup>

The applicant in the case of *Govender v Ragavayah*,<sup>303</sup> was successful in seeking a relief for recognition as "spouse" in a monogamous Hindu marriage, for purposes of section 1 of the Intestate Succession Act in order to inherit from her deceased husband's estate.<sup>304</sup> The Constitutional Court in *Hassam v Jacobs NO*, found section 1(4)(f) of the Intestate Succession Act to have excluded widows of polygamous marriages celebrated according to the tenets of the Muslim religious faith from the protection of the Act, which concerns proprietary consequences of a polygamous Muslim marriage and that it is constitutionally

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<sup>301</sup> Hahlo & Kahn *The South African Law of Husband and Wife* (1972) 623. The law governing the joint or separate estate of the spouses is applied on the property attached to the marriage upon divorce.

<sup>302</sup> S 3(3) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, see n 213.

<sup>303</sup> 2009 (3) SA 178 (D) 179J.

<sup>304</sup> Par 44.

unacceptable.<sup>305</sup> The Constitutional Court confirmed the order of the Western Cape High Court that the above section was inconsistent with the Constitution and invalid to the extent that it excluded more than one spouse in a polygamous Muslim marriage in the protection it affords to a “spouse”.<sup>306</sup>

*Singh v Rampersad*,<sup>307</sup> amongst others, is a case that was widely criticised for lack of recognition of religious marriages, due to the fact it may lead to the marginalisation of women. However, in my discussion I will focus specifically on the shortcomings that lead to non-recognition and what needs to be considered for recognition. The plaintiff in *Singh* approached the court for an order declaring amongst others, that the Marriage Act recognised the solemnisation and legal validity of religious marriages.

The purpose of the order sought by the applicant was to have the court declare her Hindu marriage legally valid. The plaintiff also attacked the constitutionality of section 11(3) of Marriage Act. This section provides that unauthorised solemnisation of a marriage in accordance with religious rites or formulary is not an offence if the marriage ceremony does not purport to bring about a valid marriage. The plaintiff wanted the court to declare section

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<sup>305</sup> 1162B.

<sup>306</sup> 1167G-H.

<sup>307</sup> 2007 (3) SA 445 (D). Plaintiff and her husband married in terms of Hindu religion, that is, the Vedic branch which does not recognise divorce. The spouses were aware of the fact that their marriage would not be recognised unless it was solemnised in terms of the Marriage Act. The marriage relationship between the parties broke down and the parties separated, thus, were not able to obtain a divorce in terms of Hindu religion, see also Cronjé & Heaton *Casebook on the South African Family Law* (2010) 341-343.

11(3) unconstitutional to the extent that it precludes the solemnisation and legal validity of religious marriages which are not solemnised in terms of the Marriage Act.<sup>308</sup> As an alternative, she sought to have an order declaring the Divorce Act<sup>309</sup> applicable to her marriage, and accordingly that the court recognise her religious marriage as falling within an ambit of the Divorce Act and grant her a divorce.

The court in *Singh* alluded to the fact that the Marriage Act accommodates the registration of marriages solemnised by Hindu rites and rituals chosen by the parties. Alternatively, the parties to the marriage can choose to have their marriage performed by Hindu law, by a marriage officer who is registered in terms of Marriage Act.<sup>310</sup> The marriage officer must have the capacity to perform a civil marriage and issue a marriage certificate in terms of the Marriage Act.<sup>311</sup> The court found that the requirements of the Marriage Act are not unreasonable and do not discriminate on the basis of religion because it applies commonly in Christians, Hindus, Jews and Muslims,<sup>312</sup> and dismissed the action with costs.<sup>313</sup>

What we are able to learn in this section is that the requirement that the monogamous Hindu

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<sup>308</sup> Parties that are married in terms of Hindu rites in a monogamous marriage, could have their marriage registered in terms of the Indians Relief Act 22 of 1914, repealed by the General Law Amendment 92 of 1971.

<sup>309</sup> 70 of 1979.

<sup>310</sup> Members of all religious faiths, including Hindus are allowed to register as marriage officers, see 453C.

<sup>311</sup> 449D-E.

<sup>312</sup> 455E-F.

<sup>313</sup> 457H.

marriage be registered in terms of Marriage Act to qualify as marriage in terms of the South African law has the effect of changing the religious marriage into civil marriage.<sup>314</sup> Also, the requirement clearly indicates that the Marriage Act is a yardstick to qualify religious marriages as legally valid marriages. Thus religious marriages without a civil law component are not legally valid marriages.

The exclusion of the Hindu marriage from the Marriage Act says that the court wanted to consider a strictly secular marriage,<sup>315</sup> but also narrow the definition of South African marriage.<sup>316</sup> I find the requirements of the Marriage Act as discriminating against persons who wish to marry according to their system of belief or culture. This approach also discriminates against children who are born into marriages that are not registered in terms of Marriage Act on the grounds of the marital status of their parents. This means that children who are born of religious marriages are not recognised as children of married parents and they may also not benefit from the rights that accrue to a legally recognised marriage.

What may be done to accord religious marriages the same status as civil marriages is that legislation must be enacted to regulate marriages that are solemnised in terms of different religious rites and beliefs. Already, customary marriages are regulated by the Recognition of Customary Marriages Act, and marriages of same sex couples by the Civil Union Act. Thus,

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<sup>314</sup> 449D-E. Registration as a marriage officer was open to members of all religious faiths, including Hindus.

<sup>315</sup> Cronjé & Heaton *Casebook on the South African Family Law* (2010) 342.

<sup>316</sup> De Waal "The Law of Succession Including the Administration of Estates and Trusts" 2009 *Annual Survey of South African Law* 1047.

the proposal to have legislation regulating the diverse marriage arrangements is nothing new to South African family law. These marriages must receive legal recognition to the extent that they remain consistent with section 15(3) of the Constitution.<sup>317</sup> Section 15(3) provides that the Constitution does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.<sup>318</sup>

Section 15(3) of the Constitution<sup>319</sup> plays an important role in promoting marriages that are recognised in terms of different cultures and religion. Thus the values and principles entrenched in these marriages would be intact if legally recognised. Thus if legislation is enacted to govern the cultural and religious as alluded above, such a move would be consistent with section 15(3) of the Constitution. Given that we already have the Muslim Marriages Bill in place, I propose, for purposes of protecting the interests of children in diverse families, that the definition of “family” must accommodate children of parents in marriages of diverse belief and culture. I am adamant that the definition must be wide enough to acknowledge the diverse traditional and religious “units” providing “family life” to children.<sup>320</sup>

In the recent case of *Hoosein v Dangor*,<sup>321</sup> the respondent contended that the action sought by the applicant against him is not a matrimonial action as contemplated in Rule 43(1)(b) of

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<sup>317</sup> See the discussion in section 2 2 1 2.

<sup>318</sup> 18C-D.

<sup>319</sup> See the discussion in section 2 2 1 2.

<sup>320</sup> See n 149, see also the discussion in section 2 2 1 2.

<sup>321</sup> 2010 (4) BCLR 362 (WCC).



the Uniform Rules of Court.<sup>322</sup> Apart from the expressed developments for the recognition of polygamous marriages in customary and Islamic law, there are contradicting opinions regarding the practice in society.

Whilst I acknowledge polygyny for the potential it has to provide orphaned children an opportunity to be cared for by the remaining wives in the polygamous “family”, I am also concerned about situations where parents in a polygamous marriage cannot afford education, medical treatment and food for the multiple “families”. Whilst appreciating that polygyny exists, it should not be encouraged in modern age with the alarming spread of HIV/Aids infections,<sup>323</sup> since a man with many wives may easily spread the virus. Thus, the Committee on the Rights of the Child required that polygyny be investigated for any negative impact it may have on children.<sup>324</sup>

#### 2.2.1.5 *Family in terms of domestic partnerships*

A domestic partnership refers to people who, irrespective of their gender, live together without being legally married to one another. South African law does not yet recognise domestic partnerships.<sup>325</sup> This is about to change with the introduction of the draft Domestic

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<sup>322</sup> 362G. Rule 43(1) provides that: “This rule shall apply wherever a spouse seeks relief from the court in respect of one or more of the following matters: (b) a contribution towards costs of a pending matrimonial action.”

<sup>323</sup> See the discussion in section 3 3 11.

<sup>324</sup> Hodgkin & Newell (2007) 77. See the discussion in section 2 5.

<sup>325</sup> Skelton *et al.* (eds.) (2010) 208.

Partnerships Bill<sup>326</sup> in January 2008. The Bill defines “family” as including partners in a domestic partnership and their dependants.<sup>327</sup> The Bill provides that the reference to “spouse” in the Intestate Succession Act includes a registered domestic partnership.<sup>328</sup> If the Bill is promulgated, it will regulate domestic partnerships in South Africa.<sup>329</sup> The Bill intends to, amongst others, reform family law to comply with the applicable provisions of the Bill of Rights through the recognition of the legal status of domestic partnerships.<sup>330</sup>

According to the Domestic Partnerships Bill, a domestic partnership may be registered between any persons who are 18 years or older.<sup>331</sup> Any person who is not married in terms of the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act, may register a domestic partnership.<sup>332</sup> Domestic partners must declare their willingness to register by signing prescribed documents in the presence of a registered officer.<sup>333</sup> The registration officer must certify that the declaration was signed voluntarily in his or her presence<sup>334</sup> and indicate the existence of a domestic partnership where applicable, on the

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<sup>326</sup> See ch 1, n 114.

<sup>327</sup> S 1.

<sup>328</sup> S 20.

<sup>329</sup> Skelton *et al.* (eds.) (2010) 208.

<sup>330</sup> S 2(a).

<sup>331</sup> S 6(1).

<sup>332</sup> S 4(2).

<sup>333</sup> S 6(3).

<sup>334</sup> S 6(4).

registration certificate.<sup>335</sup>

According to the Estate Duty Act,<sup>336</sup> a “spouse” in relation to a deceased person includes a person who was a partner of the deceased at the time of his or her death:<sup>337</sup> (a) in a marriage or customary union recognised by the laws of the Republic; (b) in a union recognised as marriage in accordance with the tenets of any religion; and (c) in a same sex or heterosexual union which according to the Commissioner satisfies the fact that the union is intended to be permanent.<sup>338</sup> The Children’s Act acknowledges the existence of permanent life partnerships only in so far as parental responsibilities and rights of the unmarried father are concerned. According to the Children’s Act,<sup>339</sup>

“[t]he biological father of a child who does not have parental responsibilities and rights in respect of a child in terms of section 20, acquires full parental responsibilities and rights in respect of the child - (a) if at the time of the child’s birth he is living with the mother in a permanent life-partnership”.

The notion of shared parental responsibilities is fully endorsed in the Children’s Act.<sup>340</sup> The

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<sup>335</sup> S 6(5).

<sup>336</sup> 45 of 1955.

<sup>337</sup> The definition of “spouse” is inserted by s 1(1) of Act 59 of 2000 with effect from 27 April 1994 and amended by s 3 of Act 5 of 2001 with effect from 27 April 1994.

<sup>338</sup> Section (c) is substituted by s 3(a) of Act 5 of 2001 with effect from 27 April 1994.

<sup>339</sup> S 21(1)(a).

<sup>340</sup> S 18(1).

Maintenance Act<sup>341</sup> also recognises the responsibilities and rights of the unmarried father. The Act imposes an obligation on both the unmarried father and the mother (as parents of the child) to maintain the children.<sup>342</sup> The Maintenance Act imposes the duty of support for the child on “any person” with the legal duty to support the child.<sup>343</sup>

The constitutional guarantee of equality on the basis of marital status also means that a person can choose to marry, cohabit, or be in any other form of relationship. The latter is affirmed by the decision in the case of *President of the Republic of South Africa v Hugo*.<sup>344</sup> The Constitutional Court in *Hugo*'s case held that the reason for doing away with unfair discrimination is mainly that the aim of the Constitution and the democratic order is to establish a society in which all human beings will be accorded equal dignity and respect regardless of the fact that they belong to a particular group.<sup>345</sup>

In reference to the decision in *Hugo*, unfair discrimination would, as argued in the case of *Prinsloo v Van der Linde*,<sup>346</sup> within the context of section 8 of the Interim Constitution, mean treating persons differently in a way that injures their dignity when they are automatically equal in dignity with any other person.<sup>347</sup> There is a common element of “partnership” in civil

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<sup>341</sup> S 2(1).

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> 1997 (4) SA 1 (CC).

<sup>345</sup> 2E-F.

<sup>346</sup> 1997 (3) SA 1012 (CC).

<sup>347</sup> 1026F.

marriage and permanent life partnership; namely, both couples acquire possessions together for the continuance of the partnership and contribute their skills with a view to making a profit for their common benefit.<sup>348</sup> The court in *Ally v Dinath*,<sup>349</sup> found that once a partnership is proven, the partnership is valid, even though the agreement can be entered into expressly or tacitly.<sup>350</sup>

*Richard Gordon Volks NO v Ethel Robinson*,<sup>351</sup> provides the elements of a permanent life partnership as follows: commitment to a shared household; financial and other dependence between the parties; the duration of the relationship; and the roles played in the relationship by the parties in relation to one another.<sup>352</sup> The court in *Volks* found that there is a fundamental difference regarding the position of spouses or survivors who are predeceased

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<sup>348</sup> In the case of *V v De Wet*, see n 117, the applicant entered into a partnership with L who was a married man. The partnership appeared to involve painting and decoration. The applicant had done office work, clerical work and made out tenders for L since L was illiterate. The applicant also attended to all domestic chores and raised children belonging to herself and L. The court held that the fact that both parties brought something into the partnership was essential to establish that a partnership did exist.

<sup>349</sup> See n 20: the plaintiff and defendant lived together for 15 years in an Islamic relationship. The plaintiff and defendant shared household assets and income and laboured jointly for the benefit of the household. The relationship broke down irretrievably and the plaintiff sought an order dissolving the relationship and an appointment of a receiver to wind up the partnership. The court held that community of property could take place tacitly or expressly and that such community of property could be created by the conduct of the parties to a partnership.

<sup>350</sup> 454H.

<sup>351</sup> 2005 (5) BCLR 446 (CC).

<sup>352</sup> 454A.

by their husbands.<sup>353</sup> The court acknowledged a wide range of benefits that are triggered by the contract of marriage in that in marriage the spouses' rights are fixed by law and not by agreement.

The latter is the case with couples who cohabit.<sup>354</sup> The maintenance benefit that is provided in the Maintenance of Surviving Spouses Act<sup>355</sup> falls within the scope of the maintenance obligation attached to marriage.<sup>356</sup> Sachs J found the law discriminatory to people that by a written agreement or implication agree to live together, to maintain each other and to give each other support of every kind.<sup>357</sup> Sachs J also contended that couples that choose to marry enter into an agreement fully aware of the legal obligations, which arise by operation of law. These obligations extend beyond the termination of marriage even after death.<sup>358</sup> The obligations between permanent life partners arise in as far as the agreement provides. Sachs J found it fair to make a distinction between survivors of marriage and survivors of a heterosexual cohabitation relationship and that it is appropriate not to impose a duty upon the estate where no such duty existed by operation of law.<sup>359</sup>

I support Sachs J's argument on the basis that cohabiting partners certainly have an option

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<sup>353</sup> 463C.

<sup>354</sup> 463D.

<sup>355</sup> S 2(1).

<sup>356</sup> 463E.

<sup>357</sup> 464A.

<sup>358</sup> 464C.

<sup>359</sup> 464G.

to formalise their living arrangements and enter into marriage. The fact that they omit to do so and opt for cohabitation, does not mean that their relationship should be treated like marriage when their intention was not to enter into marriage. The distinction between marriage and cohabitation is clear. Thus, these relationships must not be equated.<sup>360</sup>

The case of *Rippoll-Dausa v Middleton NO*,<sup>361</sup> follows a pattern that is to some extent similar to *Volks*, by providing for the elements of a permanent life partnership as a monogamous cohabitation, obligation of mutual emotional support and reciprocal financial support. The court postponed the case to arrange for a hearing to deal with, amongst other issues, whether the applicant and respondent were same-sex partners in a permanent life partnership.<sup>362</sup>

There are remarkable developments in the area of domestic partnerships in South Africa. Nevertheless, children born of domestic partnerships are still discriminated against in society

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<sup>360</sup> The decision by the court a quo in the case of *Volks* found the omission of the definition of the word “survivor” in the Maintenance of Surviving Spouses Act unconstitutional and in violation of the right to equality and dignity (447B-C). The words “the surviving partner of a life partnership” were introduced in the legislation. Skweyiya J found that the distinction between married and unmarried people cannot be said to be unfair when considered “in the larger context of the rights and obligations uniquely attached to marriage” (463D-E). There is a reciprocal duty of support between married persons and the law imposes no such duty upon unmarried persons. Skweyiya J declined to confirm the order that s 1 of the Maintenance of the Surviving Spouse Act is inconsistent with the Constitution (467B) by stating that the Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance by operation of the law if he or she had not died.

<sup>361</sup> 2005 (3) SA 141 (C).

<sup>362</sup> 155C.

and the community on, amongst other grounds, birth,<sup>363</sup> marital status<sup>364</sup> and family status.<sup>365</sup> These children are classified in society as children of parents in a *vat and sit*<sup>366</sup> relationship, a label that creates a social stigma and gives a child a particular status in the “family” and community.<sup>367</sup> Smith<sup>368</sup> acknowledges the fact that society generally condoned cohabitation more now, however, societal prejudices against such relationships had not been completely eradicated.<sup>369</sup> This section revealed that, in practice, couples have an option to marry or enter into a domestic partnership. It is also clear in the discussion that domestic partnerships provide “family life” to many children born from these relationships. Thus I am of the view that domestic partnerships must be protected for the promotion of “family care” or “parental care” of children. However, domestic partnerships must not be equated with marriage. Instead, I hold the view that couples who choose to formalise their union through marriage must be given the opportunity to do so. Those who opt to enter into domestic partnerships must have their partnership recognised as such, and not place the two relationships on the same footing.

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<sup>363</sup> S 9(3) of the Constitution.

<sup>364</sup> *Ibid.*

<sup>365</sup> S 1(1)(xii) of the “Equality Act”, see ch1, n 9.

<sup>366</sup> Literally meaning “take and stay”. The term is often used in situations where a woman is taken by a man, with her consent, however, without any commitment, to reside permanently with a man.

<sup>367</sup> The stigma emanates from societal attitudes and religious convictions against cohabitation, which affect children of domestic partnerships.

<sup>368</sup> “Rethinking *Volks v Robinson*: the Implication of applying a ‘Contextualised Choice Model’ to Prospective South African Domestic Partnership Legislation” 2010 *Potchefstroomse Eletroniese Regsblad* 4: accessed from [www.scielo.org.za/scielo.php?pid](http://www.scielo.org.za/scielo.php?pid) on 2012-07-24.

<sup>369</sup> *Volks* sections 200-203.



### 2.2.1.6 *Families in terms of same-sex unions/and marriages in terms of Civil Union Act*

My discussion on same-sex families reveals how same-sex families are becoming highly visible,<sup>370</sup> including the many changes in legislation and case law for the recognition of the rights of same-sex partners. The legislative move towards the recognition of same-sex unions is seen in, amongst other laws, the Basic Conditions of Employment Act<sup>371</sup> which provides family responsibility leave to homosexual employees in the event of death of a partner of a same-sex relationship.<sup>372</sup> On the same note, the Equality Act includes same-sex relationships under the definition of marital status.<sup>373</sup> The Civil Union Act specifically extends the definition of marriage to include civil union partnerships. A “civil union partner” is, in terms of the Act, defined as a “spouse” in a marriage or a partner in a civil union partnership concluded in terms of the Act.<sup>374</sup>

The marriage of same-sex partners or civil union partnership must be solemnised by a marriage officer. The person officiating the marriage or civil union partnership is designated

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<sup>370</sup> This is case, even though they may still face an uphill battle to be fully recognized in communities. *The Start* (2012-07-24), recently reported that 10 lesbians, gays, transgender, bisexuals and intersex (LGBTI) people were brutally murdered in June and July 2012 alone. LGBTI and their supporters marched to Luthuli House, that is, the headquarters of the African National Congress in Johannesburg to demand safety and protection from the ruling party.

<sup>371</sup> 75 of 1997.

<sup>372</sup> S 27(2)(c)(i).

<sup>373</sup> S 1(xv).

<sup>374</sup> S 1.

in terms of the Marriage Act.<sup>375</sup> However, same-sex unions are not embraced in other social circles. This attitude is fed by, amongst others, societal mindsets<sup>376</sup> and spiritual convictions.<sup>377</sup>

The position of same-sex partners who want to be recognised as “families” has also changed in case law. In the decision of *Van Rooyen v Van Rooyen*,<sup>378</sup> prior to the coming into force of

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<sup>375</sup> S 2.

<sup>376</sup> Amongst other newspapers, *Mail & Guardian* (2011-05-06); *City Press* (2011-06-26): recently published an article with the title “Lesbians Still Face Constant Attack in Ekasi ‘South Africa Needs Laws to Deal with Corrective Rape’”: the article revealed that there are tensions between heterosexual men and lesbians which result in hate crimes, hate speech including, “corrective” rape, a term used by men who rape lesbian women under guise of correcting their sexual orientation from homosexual to heterosexual. Thus, lesbians are constantly insulted by men, physically attacked and brutally murdered in the township. One 20 year-old man said: “Lesbians invade spaces and they take up all the attention when they are around. They are pathetic and I hate their presence”. In some parts of the townships in South Africa, such as Kwa-Thema in Gauteng and Boystown in Cape Town, lesbians have to stay indoors or walk in groups for their safety and protection. This situation continues despite government’s undertaking to develop interventions which include introducing the Sexual Offences and Related Matters Act, see ch 1, n 71. See the discussion in section 3 3 9 1 1.

<sup>377</sup> It is my belief that God condemns people who are in homosexual relationships. *International Bible Society* (1984) “Genesis 18:20-21” Holy Bible 9: in the Old Testament, there was a great outcry against Sodom and Gomorrah (two cities which practiced homosexuality). The sin of the two cities grieved God so much that He destroyed them.

<sup>378</sup> As was the case in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W): the applicant in the case, was the mother of 2 minor children born of the marriage between the applicant and the respondent. The applicant and respondent were divorced. They incorporated an order in the decree of divorce that the custody of the children will be with the respondent and applied for an order defining the rights of access of the applicant to the minor children. The main difficulty in the case arose when the applicant participated in a lesbian relationship, sharing a house

the Interim Constitution, Flemming DJP was not prepared to recognise that homosexuals could have joint parental responsibilities as a “family” unit.<sup>379</sup> Even though parental responsibilities of homosexual couples may be similar to a heterosexual one, arguments were only made in the *Van Rooyen’s* case to facilitate the best interests of the children. The court found the need to protect the children from their mother’s homosexual lifestyle and exposure to “wrong signals” as to human relationships.

Contrary to *Van Rooyen’s* case, in *V v V*<sup>380</sup> joint custody was awarded to both parents by Foxcroft J, who took the opposite view from Flemming DJP, and said that in the light of the equality clause<sup>381</sup> in the Constitution it is wrong to describe homosexual orientation as abnormal. In his debate regarding the provision of “family life” by same-sex partners, De

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and bedroom with her lesbian partner. The order made by the court was on, amongst others, that the applicant shall be entitled to have her minor children with her on every alternate school holidays on the basis that: during such holiday, she does not share the same residence and/or sleep under the same roof as her lesbian partner and the children, see 331H. The experts in the case concluded that some safeguard is necessary, see 328DE. It was argued that any person who thinks right, would say that it is important that children stay away from “confusing signals” as to how the sexuality of a male and female should develop, see 328J. However, *Van Rooyen* was explicitly rejected in South African law. In *V v V*, the court found that *Van Rooyen* has made a moral judgment with regards to what was normal and correct in relation to sexuality and about homosexuality which it found to be abnormal.

<sup>379</sup> 329-330B.

<sup>380</sup> 1998 (4) SA 169 (C) 188.

<sup>381</sup> S 9.

Vos<sup>382</sup> reflected on human dignity and the right to “family life” by making reference to the *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act 108 of 1996* judgment<sup>383</sup> that the South African Constitution deliberately omitted to include the right to “family life” in the matter which concerned same-sex couples so as not to cause debate on the issue surrounding the composition of a “family”.

Sloth-Nielsen<sup>384</sup> supports the argument that the Constitution intentionally omitted the inclusion of the right to “family life” in section 28 or anywhere else. Failure to protect marriage and “family life” was raised as a ground for objection to the “Certification” of the final Constitution. The Constitutional Court in the *In re Certification* judgment found that the absence of such provision did not preclude the “Certification” of the Constitution as families are constituted, function, and dissolved in different ways in a multi-cultural, multi-faith society such as South Africa and that it may render the constitutionalisation of family rights uncertain and undesirable.<sup>385</sup>

In terms of *Langemaat v Minister of Safety and Security*,<sup>386</sup> a lesbian who was cohabiting with

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<sup>382</sup> De Vos “Same Sex Sexual Desire and the Re-Imaging of the South African Family” (2004) *SAJHR* 193.

<sup>383</sup> 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (C). See also the discussion in section 2 3 2.

<sup>384</sup> “Children” in Cheadle *et al.* in *South African Constitutional of Rights Law: The Bill of Rights* (2010) 23-4.

<sup>385</sup> 99.

<sup>386</sup> 1998 (3) SA 312 (T).

her partner brought the case to court arguing that the benefits of a medical aid scheme which were available to “dependants”, defined by the scheme as “the legal spouse or widow or widower or a dependant child”, should be declared unconstitutional as they failed to provide adequately for the duty of support between same-sex couples. The court found that the duty of support did indeed exist in the case of same-sex couples and found judgment in their favour. The High Court stated that in terms of section 39(2) of the Constitution the court was obliged to develop the law to recognise same-sex unions as requiring ‘respect’ and ‘protection’.<sup>387</sup> In the case of *Dawood*<sup>388</sup> the court found in relation to international human rights law that a “family” is the natural and fundamental unit of our society.<sup>389</sup> The court further acknowledged that the definition of a “family” also changes with social practice and tradition and cautioned that we must not establish particular forms of “family” at the expense of others.<sup>390</sup> I agree with this argument. Hence it was not easy to propose for a provision for the definition of “family”.

Ackerman J pointed out in *National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs*<sup>391</sup> that:

“[a] notable and significant development in our statute law in recent years has been the

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387 316G-I.

388 See ch 1, n 31.

389 959A-B. The court found in terms of Art 23(1) of the ICCPR, see section 2 2 2 4 for full citation.

390 960.

391 37D-E.

extent of express and implied recognition the legislature has accorded same-sex partnerships”.

The court in this case expressed the opinion that an important process of transformation had taken place in family relationships, and societal and legal concepts regarding the “family” and what it entails.<sup>392</sup> The court found section 25(5) of the Aliens Control Act<sup>393</sup> discriminatory against same-sex life partnerships that are permanently and lawfully resident in the Republic on the grounds of sexual orientation and marital status, by omitting to confer benefits it extends to “spouses”.

Section 25(5) was declared to be inconsistent with the Constitution.<sup>394</sup> Section 25(5) was to be read as if the words “or partner, in a permanent same-sex life partnership” appear therein after the word “spouse”.<sup>395</sup>

Previously, the courts made attempts to bring forth the understanding that same-sex partnerships do not connote the same meaning as heterosexual marriages. This is evident in the averment considered by the Constitutional Court in *National Coalition for Gay & Lesbian Equality* where the High Court concluded that the word “spouse” is not defined in the Act but its ordinary meaning connotes a married “wife” or “husband” and that the context in

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<sup>392</sup> 47C.

<sup>393</sup> 96 of 1991.

<sup>394</sup> 98C.

<sup>395</sup> 98D.

which the word “spouse” is used, does not suggest a wider meaning.<sup>396</sup>

In the case of *Satchwell v The President of the Republic of South Africa*,<sup>397</sup> the High Court made an order declaring section 8 and 9 of the Judges’ Remuneration Conditions of Employment Act,<sup>398</sup> regulations 9(2)(b) and 9(3)(a) of the Regulations in respect of “Judges, Administrative Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence”<sup>399</sup> inconsistent with the Constitution, to the extent that the two sections afforded benefits to spouses of judges but excluded same-sex life partners. The court recognised same-sex cohabitation to involve some form of familial responsibilities.<sup>400</sup>

It acknowledged that at all times the partners conducted themselves as members of a “family” and that their “families” had expressly accepted them as a “family”.<sup>401</sup> Further reference was made to comparative jurisprudence that the relationship of the couple was a committed one, identical to marriage in that the couple maintained a loving and functional

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<sup>396</sup> 25D-E and F-G.

<sup>397</sup> 2001 (12) BCLR 1284 (T).

<sup>398</sup> 88 of 1989, hereinafter referred to as the “Conditions of Employment Act”.

<sup>399</sup> 1286G.

<sup>400</sup> *Satchwell* 1287D: the court contended that the respondent did not dispute that the same-sex relationship of applicant constituted a committed, loyal and continuous relationship, which survived 14 years. The fact that a joint home was purchased and registered in the partners’ names and that the partners had joint finances, made joint decisions and had benefited each other in their insurance policies and that their families have expressly accepted them as a family, was not ignored.

<sup>401</sup> *Ibid.*

family-type relationship.<sup>402</sup>

The applicant in the case of *Satchwell* argued that the concept of “family” as provided in the legislation is inconsistent with the values of the Constitution and relied on the Canadian judgment of the Supreme Court of *Miron v Trudel*<sup>403</sup> where the court held that:

“‘Family’ means different things to different people and failure to adopt the traditional ‘family’ form of marriage may stem from a multiplicity of reasons, all of them equally valid and all of them equally worthy of concern, respect, consideration and protection under the law.”<sup>404</sup>

The court ordered in the *Satchwell* case that the word “or partner, in a permanent same-sex life partnership” be read after the word “spouse” in both section 8 and 9 of the Judges’ Remuneration Conditions of Employment Act. The court had, by allowing spouse benefits to same sex life partners, acknowledged the fact that the relationship of same-sex partners does involve what is defined as a “family” relationship in numerous ways.

The case of *J v Director-General: Department of Home Affairs*<sup>405</sup> concerned same-sex life partners who had twins as a result of artificial insemination. They wanted the birth mother to be registered as the children’s mother and the other woman to be registered as a parent, but were refused to have such registration by the Director-General of Home Affairs. The woman

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<sup>402</sup> *Satchwell* 1295J.

<sup>403</sup> 29 CRR (1995) 189.

<sup>404</sup> 189.

<sup>405</sup> See ch 1, n 113.



challenged the constitutionality of section 5 of the Children’s Status Act.<sup>406</sup> The court found that section 5 was inconsistent with section 9(1) of the Constitution, which prohibits the state from discriminating against persons on, amongst other grounds, sexual orientation.<sup>407</sup> The Constitutional Court said that: “the mutual relationship between parent and child is complex, valuable and multifaceted”<sup>408</sup> and further considered the relationship that the children have with the extended “family”.<sup>409</sup>

The case of *Du Toit v Minister for the Welfare and Population Development*<sup>410</sup> successfully recognised adoption by same-sex partners. The court in *Du Toit* found that adoption is a valuable way of affording children the benefit of “family life” which may not be available to them.<sup>411</sup> In this case, section 17(a) of the Child Care Act was challenged for excluding same-sex partners from joint adoption.<sup>412</sup> Section 17(a) of the Child Care Act was declared inconsistent with the Constitution and invalid as it omitted the words “or by the two members of a permanent same-sex partnership jointly” in the sentence “by a husband and wife jointly”.<sup>413</sup>

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<sup>406</sup> Now repealed by the Children’s Act, see ch 1, n 10.

<sup>407</sup> 622C and 627A-B, see ch 1, n 8.

<sup>408</sup> 631B.

<sup>409</sup> *Ibid*, see also Sloth-Nielsen in Cheadle *et al.*, *South African Constitutional Law: The Bill of Rights* 23-5.

<sup>410</sup> See n 11.

<sup>411</sup> 1013H.

<sup>412</sup> 2C-D.

<sup>413</sup> 44D-E.

Section 20(1) of the Child Care Act was also challenged in that it omitted the words “or permanent same-sex life partner” after the word “spouse”.<sup>414</sup> A further provision which was challenged by *Du Toit* was section 1(2) of the Guardianship Act<sup>415</sup> which allows “spouses” to have joint guardianship of their child, requires consent of both parents in acts relating to the child, and also allows joint guardianship of the adopted child by married “spouses”,<sup>416</sup> but excludes permanent same-sex life partners. The court held that section 1(2) does not contemplate that same-sex life partners will be joint guardians of children, and found it in conflict with the Constitution.<sup>417</sup> The court ordered that the words “or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child” be read as though they appear after the word “marriage”.<sup>418</sup>

In the case of *Du Plessis v Road Accident Fund*<sup>419</sup> the court extended the action of loss of support to partners in a same-sex permanent life relationship similar to marriage with regard to the duty to support one another.<sup>420</sup> Cloete JA<sup>421</sup> said that it:

“... would be an incremental step to ensure that the common-law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and

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<sup>414</sup> 2C-E.

<sup>415</sup> See ch1, n 10.

<sup>416</sup> 12C-D.

<sup>417</sup> 13E.

<sup>418</sup> 44J.

<sup>419</sup> 2004 (1) SA 359 (SCA); 2003 (11) BCLR 1220 (SCA).

<sup>420</sup> 375B-C.

<sup>421</sup> 374A-B.

judicial pronouncements”.

The court, in the case of *Minister of Home Affairs v Fourie*,<sup>422</sup> held that same-sex couples should enjoy the same entitlements and responsibilities of marriage law that apply to heterosexual couples. Section 30(1) of Marriage Act was found to have the potential to discriminate against other couples and groups. Thus, the *Fourie* judgment found the common law prohibition of same-sex marriages unfair in that it barred same-sex parties from establishing a *consortium omnis vitae*, of constituting a “family”, and enjoying and benefiting from family life.<sup>423</sup>

In extending the provision of section 30(1) of the Marriage Act to include other couples, the benefits that accrue to married couples, because of the status of marriage, were extended to include other categories of couples who live in relationships that are to some extent similar to marriage.<sup>424</sup> The court had, in the case of *Fourie*, read-in the words “or spouse” after the words “or husband”<sup>425</sup> in order for the section to read as follows: “... lawful wife (or husband), (or spouse)...” to include same-sex couples in the benefits afforded in the Marriage Act to married couples.

Although the court in *Fourie*’s case made attempts to recognise same-sex couples for the purposes of section 30(1) of the Marriage Act as persons who are in a relationship, section

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<sup>422</sup> 2005 ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) par 60.

<sup>423</sup> 535GH.

<sup>424</sup> 542B-D.

<sup>425</sup> 539A and 586F.

30(1) is still found to be inconsistent with section 9(1), (2) and (3) of the Constitution<sup>426</sup> in that it does not provide equal protection and benefit of the law to all couples.<sup>427</sup> Section 30(1) of the Marriage Act provides for a “husband” and “wife” as a legally recognised married couple and discriminates against domestic partners on the grounds of marital status,<sup>428</sup> and same-sex partners on the grounds of sexual orientation.<sup>429</sup> A child born of a relationship that is not recognised as marriage in the context of section 30(1) is likely to be discriminated against on the grounds of birth.<sup>430</sup>

In the case of *Gory v Kolver*,<sup>431</sup> the court ruled that the Intestate Succession Act, which granted intestate succession to “spouses” but not to same-sex partners, unfairly discriminated against same-sex couples on the basis of sexual orientation. To rectify the unconstitutionality, the court read the words “or partner in a permanent same-sex life partnership in which partners have undertaken the reciprocal duties of support” into the Act after the word “spouse”.<sup>432</sup> The discussion in this section clearly illustrates the fact that same-sex unions have now gained legal recognition as families in South Africa.

However, even with the developments thus far of the legal recognition of same-sex unions,

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<sup>426</sup> 555-6, see ch 1, n 8.

<sup>427</sup> 535E-F.

<sup>428</sup> S 9(3) of the Constitution, see ch 1, n 8.

<sup>429</sup> *Ibid.*

<sup>430</sup> S 9(2) of the Constitution.

<sup>431</sup> 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC).

<sup>432</sup> 110C-D.

the societal attitudes towards same-sex relationships say that it is not viewed on the same footing as marriage.<sup>433</sup>

Bonthuys,<sup>434</sup> shares the views of De Vos J<sup>435</sup> about who is in a same-sex relationship. The author describes the problems and fears that the judge, her partner and their children experienced in public as same-sex parents. Amongst other experiences, the author relates about how the public would judge the judge's moral worth as a person. I am of the view that the experiences which the judge went through has implications for children in need of alternative care (who are placed with same-sex parents),<sup>436</sup> in view of stigmatisation. This is so, even though the Civil Union Act grants the marriage officer who solemnises civil union, powers, duties and responsibilities as conferred under the Marriage Act.<sup>437</sup>

It was expected of the Civil Union Act to provide a definition of "family" due to the challenges faced by the courts in determining whether same-sex partners constitute "family" and scepticism on whether to grant same-sex partners joint parental or "family" responsibilities.

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<sup>433</sup> See n 370 and 376.

<sup>434</sup> "The Personal and the Judicial: Sex, Gender and Impartiality" (2008) *SAJHR* 239. Research on how the public or private dichotomy enables or constrains women from becoming recognised as judges. She argues by using concepts which illuminate gender equality.

<sup>435</sup> Who exposed details of her family life to the public in order to elicit sympathetic judgment of her cause and that of other same-sex families. See (2008) *SAJHR* 242.

<sup>436</sup> It is concerning that these children face the potential to be marginalised, the same way as their parents given the negative attitude already depicted in communities, see also the discussion in section 8 4 2 2 1 2.

<sup>437</sup> S 4(2).

Most significantly, and for the best interests of children, I recommend that when the decision to place a child in alternative care is reached, the investigative social worker must constantly assess the “family” environment where the child is to be placed. Where necessary, the investigative social worker must make recommendations in respect of the experiences of the child, including the general acceptance of the child in the community, his or her safety, and human dignity in order to promote the right to “family care” and the well-being of the child.<sup>438</sup>

### 2.2.1.7 *Family in terms of single parenting*

The court, in the case of *Van der Linde v Van der Linde*,<sup>439</sup> noted that it had been accepted for decades that parental roles were determined by gender and that “mothering” was an inherent part of a woman’s psychological makeup.<sup>440</sup> The *Van der Linde* case found this perception to be wrong and held that “mothering” was also part of a man’s inborn personality, but that in the past society had expected men to consciously avoid it, as it was not in accordance with their role as breadwinner or protector.<sup>441</sup>

Currie and De Waal<sup>442</sup> hold the view that awarding the greater share of parental rights to mothers on the basis of their gender simply perpetuates harmful stereotypes, which puts the

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<sup>438</sup> In some cases, measures may need to be taken to protect the child and his or her family against possible, humiliation and abuse, see also the discussion in section 8 4 2 2 1 2.

<sup>439</sup> 1996 1 All SA 43 (O).

<sup>440</sup> 43.

<sup>441</sup> *Ibid.*

<sup>442</sup> *The Bill of Rights Handbook* (2005) 608.

burden of child care exclusively on women. In the case of *President of the Republic of South Africa v Hugo*,<sup>443</sup> the court considered the position of women in society in relation to their role as mothers and primary care-givers. The court noted how this role had been a source of social and economic inequality in employment and in society.<sup>444</sup> In acknowledging the primary responsibility of women for child care, Mokgoro J,<sup>445</sup> drew an explicit link between ineffective enforcement of maintenance orders and the social and economic vulnerability suffered by women after divorce, and exhorted the lower courts to develop effective remedies for the enforcement of maintenance orders in order to enhance gender equality. In the case of *Fraser*<sup>446</sup> the court noted the deep disadvantage that is experienced by single mothers in our society. The Children's Act<sup>447</sup> grants full parental responsibilities and rights to

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<sup>443</sup> 1997 (6) BCLR 708 (CC).

<sup>444</sup> Section 38.

<sup>445</sup> *Bannantyne v Bannantyne* 2003 (2) SA 363 (CC) 29.

<sup>446</sup> Par 43.

<sup>447</sup> According to: "s 21(1) The biological father of the child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child - (a) if at the time of the child's birth he living with the mother of the child in a permanent life-partnership, or (b) if he, regardless of whether he has lived or is living with the mother –

- (i) consents to be identified or successfully applies in terms of section 26 to be identified as the father's child or pays damages in terms of the customary law;
- (ii) contributes or has attempted in good faith to contribute towards the child's upbringing for a reasonable period; and
- (iii) contributes or has attempted to contribute towards expenses in connection with the maintenance of the child for a reasonable period." Reg 12(1) to the Children's Act provides that where a dispute arises between the biological mother and the biological father concerning the fulfilment of the conditions for acquisition of parental responsibilities and rights, a family advocate, social worker, social service

an unmarried father if he meets certain conditions, regardless of whether the unmarried father has lived with the mother of the child or not.<sup>448</sup>

The unmarried father must have consented to be identified as the father of the child or paid damages in terms of customary law;<sup>449</sup> contributed in good faith towards the upbringing of the child for a reasonable period;<sup>450</sup> and contributed towards the expenses in connection with maintenance of the child for a reasonable period.<sup>451</sup> In essence, section 21(1)(b) requires the unmarried father to make contributions that are noticeable and valuable for him to acquire full parental responsibilities and rights. The effect that this provision has, is that if the unmarried father is not able to satisfy the criteria, it may create an impression that the unmarried father is irresponsible or uninterested in the affairs of the child.<sup>452</sup> Furthermore, if the unmarried

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professional or other suitably qualified person who conducts mediation in the case of a dispute between the unmarried parents of the child with regard to the fulfilment of the conditions set out in s 21(1) of the Children's Act, may certify the outcome of that mediation. According to the Department of Social Development *Norms, Standards and Practice Guidelines for the Children's Act (2012)* 51, if the High Court requires proof of whether the conditions have been met, it may refer the matter to a social worker for investigation and the social worker must report to the court.

<sup>448</sup> S 21(1)(b).

<sup>449</sup> S 21(1)(b)(i).

<sup>450</sup> S 21(1)(b)(ii).

<sup>451</sup> S 21(1)(b)(iii).

<sup>452</sup> This may be the case if an unmarried father lives in a relatively disadvantaged circumstance where he finds it difficult to meet the requirements in s 21(1)(b).



father is not able to satisfy the requirements,<sup>453</sup> such may deny the child the opportunity to know and relate with his or her father. The requirements have the potential to constitutionally ostracise the rights of the unmarried father and to exclude him from identifying with the child,<sup>454</sup> which may also affect the child.

The biological mother of the child who is unmarried has guardianship of the child.<sup>455</sup> The guardian of the biological mother is also the guardian of the child.<sup>456</sup> Furthermore, the biological mother of the child has full responsibilities and rights over the child if the biological father does not have guardianship of the child.<sup>457</sup> The biological mother who is a minor acquires guardianship when she becomes a major.<sup>458</sup> If she marries a man who is not the father of the child, she becomes the child's only guardian.<sup>459</sup>

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<sup>453</sup> There could be few unmarried fathers who use the court system to address disputes over guardianship, contact, maintenance and care. Given the fact that in cases of separation between parents, particularly when there are young children involved, it is far more common to have guardianship and care granted to the mother over the father.

<sup>454</sup> McKeown Report to the Department of Health and Children *Father and Families: Research and Reflection on Key Questions* (2001) 32: accessed from [www.dcy.gov.ie/.../Fathers\\_and\\_Families\\_-\\_Research\\_and-Reflecti](http://www.dcy.gov.ie/.../Fathers_and_Families_-_Research_and-Reflecti) on 2012-08-13.

<sup>455</sup> S 19(2)(a) of the Children's Act.

<sup>456</sup> Department of Social Development *Norms, Standards and Practice Guidelines for the Children's Act* (2012) 49.

<sup>457</sup> S 19(2)(b) of the Children's Act.

<sup>458</sup> S 1(b) of Births and Deaths Registration Amendment Act 40 of 1996, hereinafter referred to as "Births and Deaths Registration Amendment Act". This Act has lowered the age of majority to 18 years, consistent with s 28(3) of the Constitution.

<sup>459</sup> S 3 of the Births and Deaths Registration Amendment Act.

The Domestic Partnerships Bill grants the male person who is the biological father of the child born in a domestic partnership legal responsibilities and rights in respect of the child.<sup>460</sup> These full responsibilities and rights would have been conferred on the biological father if he were married to the mother of the child.<sup>461</sup> In view to the discussion and purpose behind this chapter, it has become apparent that the responsibilities and rights of unmarried fathers regarding their children have theoretically changed.<sup>462</sup> However, in practice, the unmarried father may face challenges (as I have highlighted earlier) if he fails to meet the section 21(1) criteria. Section 21(1) is not specific as to what the full responsibilities and rights are that are guaranteed to the unmarried father. Also, section 21(1) does not provide outright responsibilities and rights to the unmarried father.

The only opportunity the unmarried father may have to exercise his parental responsibilities and rights “in substantially the same manner”<sup>463</sup> as the biological mother is when he has a parental responsibilities and rights agreement.<sup>464</sup> Parents of the child can also be co-holders of responsibilities and rights over the child. However, this arrangement is often used by

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<sup>460</sup> S 17.

<sup>461</sup> S 20(a) of the Children’s Act.

<sup>462</sup> Previously, the “unmarried father” was known as the “father of the child born out of wedlock”.

<sup>463</sup> Reg 10(2) to the Children’s Act, the unmarried parents may make an application for the registration of the agreement. The agreement may be made an order of the court if it is in writing, in a form corresponding with Form 5 (annexed to the regulations to the Children’s Act).

<sup>464</sup> S 22(1)(a) of the Children’s Act. The agreement will provide for the acquisition of parental responsibilities and rights with regards to the child in terms of section 20, 21 (see n 447) or by order of the court.

married parents.<sup>465</sup> The Children's Act<sup>466</sup> also provides for parenting plans which may be used by co-holders of parental responsibilities and rights.

The co-holders may agree on parenting plans to determine the exercise of their respective responsibilities and rights in respect of the child. I agree that the latter may assist in situations of conflict between parents. However, my proposal is that automatic rights be granted to all parents, on the same footing. Other arrangements such as the use of parenting plans, making an application to the High Court for an order for contact and guardianship will apply over and above an explicit provision for the responsibilities and rights of parents in legislation.

An insight into situations of children who live with one unmarried parent shows the consequences that are associated with extreme forms of economic and emotional deprivation on the side of the child.<sup>467</sup> This may be perpetuated by the fact that the child cannot see, speak with and enjoy the company of both parents equally.<sup>468</sup> The situation may be worse if there is animosity between the parents. The right of the child to "family care" or "parental care" requires equal participation of both parents in order to give the child an

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<sup>465</sup> S30(1).

<sup>466</sup> S 33.

<sup>467</sup> Ministry of the Attorney-General, British Columbia *Parenting after Separation: for Your Child's Future* (2007) 7, a handbook which focused on the experiences and the needs of children when parents separate.

<sup>468</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 1. This publication is as a result of a grandmother and his son who fought tirelessly against the judicial system that prevented them from seeing their son and grandson.

opportunity to participate in society with a full sense of worth. Thus, I am of the view that provisions must be enacted for equal<sup>469</sup> responsibilities and rights for unmarried parents. These responsibilities must be clearly articulated in legislation in order to lessen the effects that result with the separation of parents on the child.<sup>470</sup>

I also propose that regulations be promulgated to section 21 of the Children's Act to provide specifically for automatic responsibilities and rights for unmarried fathers. My proposal is motivated by the fact that there are factors that are contentious, which also have the potential of resulting into adverse effects on children of unmarried parents when automatic parental responsibilities and rights are given to one parent, such as contact, care, consent, religion, education and other elements relevant to parental responsibilities and rights.<sup>471</sup> These factors are some of the grounds that influence the courts to mandate alternative care intervention for a child.<sup>472</sup>

South Africa must refer to, amongst others, aspects of case law in the European jurisdiction

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<sup>469</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 15-17, see sections 2 1 and 2 5 (Recommendations and Conclusion).

<sup>470</sup> Whitehead *Dan Quayle was Right* (1993), is of the view that a child whose parents separate or divorce may amongst others, find difficulty in coping at school, exhibit aggressive behaviour, become truant, be in trouble with the law for want for attention or get confused regarding the relationship that he or she would have, particularly with the "absent" parent, more often the unmarried father: accessed from [www.theatlantic.com/pasr/docs/unbound/bookauth/divorce.htm](http://www.theatlantic.com/pasr/docs/unbound/bookauth/divorce.htm) on 2012-07-31.

<sup>471</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 15-17, see the proposed provision in section 2 5.

<sup>472</sup> See the discussion in section 3 3.

in relation to “family life” and incorporate regulations which emphasise the existence of “family” ties<sup>473</sup> as, amongst others, an element that must be considered in granting the unmarried father full parental responsibilities and rights. This will point out the fact that connectivity and factual relationship between the child and the unmarried father should be considered in the enactment of a provision for full and equal responsibilities and rights of the unmarried father.<sup>474</sup>

#### 2.2.1.8 *Family in terms of children in child-headed households*

According to the Children’s Act, a child is identified as a child in need of care and protection if the child lives in a “child-headed household”.<sup>475</sup> According to the Children’s Act<sup>476</sup> the provincial head of social development may recognise a “household” as a child-headed household if:

- “(1) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;
- (2) no adult family member is available to provide care for the children in the household;
- (3) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and
- (4) it is in the best interests of the children in the household”.

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<sup>473</sup> See the discussion in sections 2 2 2 2 and 2 2 2 2 3.

<sup>474</sup> See the discussion in section 2 5.

<sup>475</sup> S 150(2)(b). See the discussion in section 3 3 1 1.

<sup>476</sup> S 137.

Before a “household” may be recognised as a “child-headed household”, the “household” must meet the above criteria.<sup>477</sup> The SALRC recommended that the necessary support mechanisms under which such a “household” should function must be put in place.<sup>478</sup> The Department of Social Development identified factors that would be considered when deciding whether it would be in the best interests of the children to recognise their “household” as a child-headed household as follows:<sup>479</sup>

- (i) The nature of the personal relationship amongst siblings;
- (ii) The attitude of the siblings towards being in a child-headed household;
- (iii) The capacity of the older sibling to provide for the needs of the younger children, including their emotional and intellectual needs, bearing in mind that many such older siblings had been taking care of the younger siblings during the illness of the parent or care-giver, hence their ongoing responsibilities are extensions of responsibilities already assumed;
- (iv) The likely effect that placement in another setting may have on the children in the household, including the likely negative effects of any separating from other siblings; and the need for the children to maintain a connection with the siblings and family traditions.

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<sup>477</sup> Kassan & Mahery “Special Child Protection Measures in the Children’s Act” in Boezaart (ed.) *Child Law in South Africa* (2009) 197.

<sup>478</sup> SALRC *The Review of the Child Care Act* (1998) section 4 2 7; Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 196.

<sup>479</sup> Mambo *Child-Headed Households in Draft Intermediate Phase* (Unpublished Training Materials 2009 Department of Social Development). See also the discussion in Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 198.

On the other hand, it may not be in the best interests of the children to remain in a child-headed household if:

- (i) There is a child with a disability or a child who suffers from a chronic illness, requiring constant care and there is no support for his or her care;
- (ii) If the older child is not of sufficient maturity to take charge of the needs of the children in the household, that is the child is not developmentally mature enough to understand the decision, the responsibilities involved, has unrealistic expectations, lacks experience in caring for household, in making decisions and understanding advice given;
- (iii) There is no stable home environment, for example, there are no rules, boundaries, discipline or sense of family unit which typifies a household;
- (iv) There is a threat to the children's safety; and
- (v) Being in a child-headed household will deprive the older siblings of opportunities for education, work or other developmental opportunities.

The Children's Act has made improvement in legislation by acknowledging the existence of child-headed households and providing supervisors for children who are heading households.<sup>480</sup> However, the Act failed to express the fact that a child-headed household is a "family". Since a child in a child-headed household is cared for in a "unit" consisting of "family" members, namely siblings, it suffices to include child-headed households in the broader definition of "family" to accommodate them as "family" structures.

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<sup>480</sup> *Ibid.* See a full discussion in section 3 3 11.

These structures are a reality and must be protected in view of the child's right to "family care" by providing early intervention and preventative measures such as, financial assistance<sup>481</sup> and protecting children in these units from maltreatment, neglect, abuse or degradation.<sup>482</sup>

### 2.2.1.9 Family in terms of grandparenting

According to Bennett,<sup>483</sup> extended "families" existed predominantly during the pre-colonial era. I argue that to some extent, these "families" were recognised even later.<sup>484</sup> Extended "families" included grandparents, aunts, uncles, cousins, nephews, nieces etc.<sup>485</sup> These structures were destroyed by urbanisation, wage labour, colonisation and the policies of segregation.<sup>486</sup> The decision in *Bethell v Bland*<sup>487</sup> is evidence of the preference that was

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<sup>481</sup> See the discussion in sections 3 3 1 and 4 1 1.

<sup>482</sup> S 28(1)(d). See the discussion in sections 2 3 1, 2 4 2, 3 3 9 1 and 4 2 1.

<sup>483</sup> (2004) 180.

<sup>484</sup> In the case of *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E), the court ruled that: "If the father and mother are lacking, or are needy, the burden of maintaining grand-children and other further descendants has been laid by the civil law on paternal and maternal grandfather and the rest of the ascendants": 510A.

<sup>485</sup> According to Cronjé and Heaton *The South African Family Law* (2010) 3, the relationship within an extended "family" would be based on kinship, that is, biological or putative blood relationship and affinity, that is, relationship between blood relationship of one marriage partner and those of the other marriage partner. This type of a "family" would include foster and adopted children. See the discussion in section 6 3 1.

<sup>486</sup> Bennett (2004) 181.

<sup>487</sup> 1996 (2) SA 194 (W) 209G-H: *Bethell* case was criticised by not being in keeping with the best interests of the child in that biological parenthood does not always imply that the best interests



given to a nuclear “family” over an extended “family”. In the case of *Bethell*, the maternal grandfather of a child born out of wedlock brought an application for the custody of the child. The paternal grandparents brought a counter-application and the father of the child intervened in the same case. The court awarded custody of the child to the natural father to the exclusion of the maternal grandfather and paternal grandparents. The court referred to both sets of grandparents as “outsiders”, or third parties; who did not have inherent rights to custody. According to Boniface,<sup>488</sup> this is a narrow definition of “family”.

I agree with Boniface; however, argue strongly against the reasons given by the court that grandparents are “outsiders”. In view of the rights entrenched in the Children’s Act for

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of the child are taken care of. In the case of *Townsend-Turner v Morrow* 2004 (2) SA 32 (C) 44, different from the facts in *Bethell*, the grandparents approached the High Court for an order granting them the right to access to their grandchild. The court applied the same reasoning as *Bethell* and held that while the grandparents were increasingly playing a role in modern society, apart from blood relations between the grandparents and their grandchildren, their position in law was similar to that of the father of a child born out of wedlock and had no inherent right to access. In *Hlophe v Mahlalela* 1998 (1) SA 449 (T); the paternal grandparents sought custody of their grandchild under customary law against the father of the child. The father claimed custody of the child under common law. In avoiding applying customary law, the court held that since the mother and the father of the child entered into a civil marriage subsequent to a customary union, the parent-child relationship was to be decided in terms of civil law. Accordingly, the court rejected the claim by the grandparents that because *lobolo* (the definition of *lobolo* is discussed in section 2 2 1 2) was not fully paid they were entitled to retain custody of the child. The court stated that it would not enforce an arrangement that amounts to trafficking in children: 458E-F and 459C.

<sup>488</sup> *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD Thesis 2007 UP) 147.

unmarried fathers over their children, it would have been appropriate for the court to argue that the unmarried father is given preference on the basis of the full parental responsibilities and rights that he has, similar to the mother. Thus, exclusion of grandparents from the providing care was carelessly done. The grandparents are the next in line to provide care for the child when the unmarried father is incapable of doing so.

The court should have pointed out that grandparents would only be considered if the unmarried father was not available or incapable of providing care, if the child expressed his or her wishes to be cared for by them, or if it would be in the best interests of the child. The latter leaves room for the child to be cared for by the grandparents in the event of the unmarried father's death or should such an opportunity arise. I am of the view that a provision must be incorporated in the Children's Act to allow for the placement of the child to different kinship carers by order of priority in the event the parents (the biological father and the mother) are not available.<sup>489</sup>

In terms of development in case law, "family care" was viewed as an important feature of "family life". The Constitutional Court in the case of *Du Toit*<sup>490</sup> found that the right of the child to "family or parental care" includes care by the extended "family" of the child, which is a paramount feature of South African family life. A non "family member" can also acquire

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<sup>489</sup> See the discussion in section 6.5 for the proposed provision.

<sup>490</sup> 206.

parental responsibilities and rights in respect of the child by way of an agreement.<sup>491</sup> The parent, or anyone with parental responsibilities and rights over the child, may enter into an agreement with any person who has interest in the care, well-being and development of the child to take care of the child. On the same note, any person who has interest in the care, well-being and development of the child, can apply to the relevant court for and order for the care of the child.<sup>492</sup> It is only proper for these categories of persons to be considered to provide care to the child if there are no family members or relatives to take care for the child.

I agree with Gallinetti and Loffell<sup>493</sup> that the Children's Act failed to explicitly<sup>494</sup> recognise court-ordered kinship care and informal kinship care.<sup>495</sup> I submit that the position in the Children's Act shows that the nuclear "family" was, and to some extent still is, held in high regard. My proposed definition of "family"<sup>496</sup> includes extended "family". I further propose for a provision that ensures that when a child is found to be in need of care and protection, placement with grandparents be prioritised, and foster care by a non-family member is the

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<sup>491</sup> S 22(1)(b) of the Children's Act. See also s 180(3)(a) of the Children's Act provides that: "A children's court may place a child in foster care with a person who is not a family member of the child." See the discussion in section 6 3 1.

<sup>492</sup> S 23(1) of the Children's Act.

<sup>493</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 12-14.

<sup>494</sup> Own emphasis.

<sup>495</sup> "Care" by relatives or group of persons in the community. See the discussion in sections 2 2, 2 2 1 10 and 6 3 1.

<sup>496</sup> See the discussion in section 2 5.

second option.<sup>497</sup>

#### 2.2.1.10 *Family in terms of communal institutions*

The Children's Act<sup>498</sup> provides that a child who is in need of alternative care may be adopted by persons sharing a "common household" and sharing a permanent "family" unit with the child. The Act does not define what a "common household" is. On a similar note, Viljoen<sup>499</sup> opines that children are guaranteed communal rights and membership of the broader community.

There is no clear description of what a "common household", "communal rights" or "communal family" is. In the absence of any, we may care to reflect on the view expressed by the SALRC that in addition to members of the extended "family", children have relationships with people who are not biologically related to them, like stepparents, friends and other care-givers. The Commission further proposed that the definition of "family member" in the new child legislation should focus on relationships that may extend beyond traditional and nuclear "family" forms.<sup>500</sup> This view may well cover situations where children are taken care of by extended "family" members and the community. The latter is taken into account in my proposed definition of "family".

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<sup>497</sup> See the proposed provision in section 6 5, "Recommendations and Conclusion".

<sup>498</sup> S 231(1)(a)(iii). See the discussion in section 8 4 2 2 1 4.

<sup>499</sup> In Boezaart (ed.) *Child Law in South Africa* 338, see ch 1, n 20.

<sup>500</sup> *The Review of the Child Care Act* (1998) 191.

Since the 1990s, South Africa has encouraged the formation of communal property associations in communities to take care of the needs of community members.<sup>501</sup> A community that forms a communal property association would list the names of the members of the community that are to form part of the communal property association in an agreement known as the constitution of the association.<sup>502</sup> The agreement normally comprises the objectives of the association, the list of committee members appointed by the community<sup>503</sup> to run the affairs of the community, and the list of beneficiary members. The agreement of the communal property association is registered in the name of the community with the Department of Rural Development.<sup>504</sup> Thus, a communal property association is a legal body with rights and obligations.<sup>505</sup>

The purpose of the communal property association is not to provide “family care” to children

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<sup>501</sup> Between 1996 and 2002 South Africa established more than 500 legally recognised communal properties in rural communities. Communal property associations may be established by the Trust Control Property Act 57 of 1988, hereinafter referred to as the “Trust Property Control Act”; Communal Property Associations Act, see ch 1, n 14; Communal Land Rights Act, see ch 1, n 14.

<sup>502</sup> S 6 of the CPA. S 1(ix) of the CPA Act defines a CPA member as a community member who belongs to the association; this means children of community members including orphans are protected as beneficiaries of the association through membership of their parents.

<sup>503</sup> S 1 of the CPA.

<sup>504</sup> Schedule to the CPA Act; s 5(2)(a)(iii) of the Communal Land Rights Act.

<sup>505</sup> The ownership of the communal properties is entrusted to trustees who administer the property for the benefit of community members who own the property in terms of s 1(a) and (b) of the Trust Property Control Act. This method is used to protect vulnerable community members from abuse, exclusion from the community and to ensure access to service infrastructure.

in need of alternative care. The association is entrusted with the responsibility to administer land rights, and service infrastructure and the welfare rights of community members jointly.<sup>506</sup> Furthermore, the association is used to protect vulnerable community members from abuse and exclusion from the community. However, many communal property associations in rural communities have ensured that children who are orphaned belong to a legally recognised communal associations and hold an identity that may be attributed to the communal structure as beneficiaries of the deceased who was a member of the communal property association.<sup>507</sup>

Thus communal property associations may be viewed as a legally advanced method of structuring communal “families” in South Africa. I agree with Robinson<sup>508</sup> that the recognition of the extended family and communal families,<sup>509</sup> will serve the best interests of the child. This is so, in that the care provided by extended “family” may be carried out as a communal activity, leading to a minimum of state intervention.<sup>510</sup>

The discussion in this section<sup>511</sup> serves for the proposed definition of “family” as provided in section 23(1) of the Children’s Act. The section provides that anyone who has an interest in

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<sup>506</sup> Preamble of the CLRA.

<sup>507</sup> S 5(2)(a)(iii) of the Communal Land Rights Act.

<sup>508</sup> (1998) *Obiter* 335.

<sup>509</sup> Own emphasis.

<sup>510</sup> *Ibid.*

<sup>511</sup> Referring to section 2 2, including the sub sections 2 2 1, 2 2 1 1, 2 2 1 2, 2 2 1 3, 2 2 1 4, 2 2 1 5, 2 2 1 6, 2 2 1 7, 2 2 1 8, 2 2 1 8, 2 2 1 9 and 2 2 1 1 0.

the care, well-being or development of the child may apply to the High Court, divorce court or children's court to acquire care and contact of the child.<sup>512</sup> A "family member" includes anyone who has acquired parental responsibilities and rights, and therefore such a situation must also be protected. If a child is found to be in need of care, the situation of the child must be addressed for purposes of preserving the "family" structure.<sup>513</sup> If the child is removed from the "family" environment, he or she must be reunified with his or her "family" as soon as possible.<sup>514</sup>

### 2.2.2 Definition of "family" in terms of international law

This section examines the definition of a "family" as provided by international instruments, amongst others, the CRC,<sup>515</sup> the ECHR,<sup>516</sup> UDHR,<sup>517</sup> the ICCPR,<sup>518</sup> the ICESCR,<sup>519</sup> the ACHPR<sup>520</sup> and the ACRWC.<sup>521</sup> Thus, apart from drawing lessons from the South African legal authorities to define "family", I will also refer to international instruments and foreign

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<sup>512</sup> S 23(1)(a)-(b) of the Act.

<sup>513</sup> See the discussion in sections 4 2 and 4 2 1.

<sup>514</sup> See the discussion in section 7 4.

<sup>515</sup> See ch 1, n 17. See the discussion in section 2 2 2 1.

<sup>516</sup> See ch 1, n 2. See also the discussion in section 2 2 2 2 .

<sup>517</sup> See ch 1, n 29. See the discussion in section 2 2 2 3.

<sup>518</sup> See ch 1, n 29. See the discussion in section 2 2 2 4.

<sup>519</sup> See ch1, n 120. See the discussion in section 2 2 2 5.

<sup>520</sup> See ch 1, n 120. See the discussion in section 2 2 2 6.

<sup>521</sup> See ch 1, n 20. See the discussion in section 1 1.

jurisdictions,<sup>522</sup> which made attempts to define “family”, to propose for the definition of “family”.<sup>523</sup> This section further discusses “family life”<sup>524</sup> in terms of the European jurisdiction to draw lessons for South Africa for the definition of the term “family care”.<sup>525</sup> This is necessary because if an arrangement that provides care to a child qualifies as a “family”, it can be protected, including the right of the child to stay in such an arrangement in terms of section 28(1)(b).

### 2.2.2.1 *United Nations Convention on the Rights of the Child*

There is no strict definition of a “family” in the CRC. The extent to which the concept is used in the CRC opens the possibility for a wider interpretation of the term.<sup>526</sup> The CRC includes in its provisions, which I have considered in my proposed definition of “family”, a wide category of persons and groups that may be responsible for the child, as follows:

“States Parties are obliged to respect the responsibilities, rights and duties of parents, members of extended family or community as provided by local custom, legal guardians or any person legally responsible to provide in a manner appropriate and consistent with the evolving capacities of the child guidance in the exercise by the child of the rights recognised

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<sup>522</sup> See the discussion in section 2 2 3.

<sup>523</sup> See the discussion in section 2 5.

<sup>524</sup> See the discussion in section 2 2 2 2 3.

<sup>525</sup> See the discussion in section 2 3.

<sup>526</sup> Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” (1995) *SAJHR* 406.



by the convention.”<sup>527</sup>

The category of persons who are responsible for children includes, amongst others, “extended family members” or kinship, “community” arrangements and other persons who may be “legally responsible” for the child.<sup>528</sup> The CRC has also acknowledged the increase in child-headed and grandparent-headed households or “families”.<sup>529</sup> According to Hodgkin and Newell,<sup>530</sup> the CRC acknowledges that the concept “family” may differ in some respects from one state to another, and even from one region to another within a state, and that it is therefore not possible to provide a standard definition of a “family”. Since there are different forms of “families”, such as unmarried couples and single parents, state parties must indicate the extent to which such types of “families” and their members are recognised and protected by domestic legislation.<sup>531</sup>

The CRC specifically refers to “family” as the “fundamental group of society” and the “natural environment” for the growth and well-being of its members, particularly children.<sup>532</sup> The

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<sup>527</sup> Art 5.

<sup>528</sup> *Ibid.* See Hodgkin & Newell (2007) 77.

<sup>529</sup> Hodgkin & Newell (2007) 76.

<sup>530</sup> (2007) 77.

<sup>531</sup> *Ibid.*

<sup>532</sup> The Preamble provides as follows: “Convinced that the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” It provides further that: “Recognising that the child for the full and harmonious development of his or her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding.”

“family” is an essential foundation in society.<sup>533</sup> The CRC recognises that the fundamental responsibility for the child rests with the “family”.<sup>534</sup> This means that a “family” is the basic institution necessary for the development and well-being of the child.<sup>535</sup> However, it remains questionable what the “natural environment” may mean to a particular community or society.

Some communities in South Africa are unequivocal about what “marriage” and “family” should consist of.<sup>536</sup> The marriage union was confined to a “husband” and a “wife” relationship, rather than same-sex and domestic partnerships. However, there are legislative and jurisprudential developments that acknowledge the growing recognition of different types of families, such as domestic partnerships and same-sex unions.<sup>537</sup> The enactment of the Civil Union Act and the draft Domestic Partnerships Bill are, amongst others, examples.

The CRC further provides for the right of a refugee child to a “family” environment and not “family life”.<sup>538</sup> This provision addresses the plight of refugee children by obliging state

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<sup>533</sup> According to *The Concise Oxford Dictionary of Current English* 549 “fundamental” means serving as a foundation, essential or base.

<sup>534</sup> Sloth-Nielsen (1995) *SAJHR* 404-405.

<sup>535</sup> Preamble of the CRC also states that “Recognising that the child for the full and harmonious development of his or her personality should grow in a family environment, in an atmosphere of happiness, love and understanding”. See *The Concise Oxford Dictionary of Current English* 549.

<sup>536</sup> *National Coalition for Gay & Lesbian Equality* 25D-G. In terms of South African law and societal values, marriage is a unit that comprises of a “man” and a “woman”.

<sup>537</sup> *Du Toit* 32B-C.

<sup>538</sup> Art 22(2) the CRC: “For this purpose state parties shall provide as they consider appropriate co-operation by the United Nations and other competent intergovernmental organisations or

parties to engage other measures in order to combat the separation of “family members”.<sup>539</sup> Thus, the CRC promotes “family life” by obliging state parties to ensure that members of the “family” live together, remain connected, and are not separated.<sup>540</sup>

### 2.2.2.2 *European Convention on Human Rights*

Kilkelly,<sup>541</sup> Forder<sup>542</sup> and Harris *et al.*<sup>543</sup> have contributed to discussions on the ECHR and the concept “family life” rather than “family”. But before there can be a mention of “family life” there must be a “family”. Amongst other authors, Kilkelly<sup>544</sup> argues that the ECHR favours the concept “family life” but does not provide a definition of same. Article 8(1) of the ECHR expresses the need for the protection of “family life” rather than the “family” as a unit or institution. The right to “family life” applies to “everyone” rather than to children only, as is

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non- governmental organisations co-operating with the United Nations to protect and assist such a child and trace the parents or other members of the family of the refugee child in order to obtain information necessary for reunification with his or her family members. In cases where no parents or members of the family can be found, the child shall be accorded protection the same as any other child permanently or temporarily deprived of his or her family environment, for any reason, as set forth in the present convention.”

<sup>539</sup> *Ibid.*

<sup>540</sup> Art 22(2).

<sup>541</sup> (1999) 187, see ch 1, n 49.

<sup>542</sup> “Article 8 EHRC: The Utter Limits of Family Life and the Law of Parenthood” 1996-1997 *Maastricht Journal of European and Comparative Law* 135.

<sup>543</sup> *The Law of the European Convention on Human Rights* (2009) 396.

<sup>544</sup> (1999) 188.

the case with the right to “family care” in the context of section 28(1)(b).<sup>545</sup> The concept “family life” is revealed by judicial policy, which also took social change into account.<sup>546</sup> This is the reason it is difficult to give a fixed definition of “family”.

Forder<sup>547</sup> expresses the view that the right to “family life” in terms of Article 8 should also extend to all biological fathers purely on the basis of biological links. The father of the child falls under the definition of “family” and his rights can always be restricted when the mother, or the child’s interests, so require.<sup>548</sup> But, this is, unfortunately not the legal position held by the ECHR in *Lebbink v The Netherlands*.<sup>549</sup> This judgment clearly depicts the fact that the ECHR has been willing to embrace *de facto* “family life” by enabling unmarried fathers who can demonstrate the existence in practice of “close personal ties” between himself and the child to claim protection of Article 8.<sup>550</sup> Also, in circumstances where the father’s desires pose a threat to the child’s well-being, the father’s interest in establishing a legal affiliation would have to give way to the interests of the child.<sup>551</sup> Although the ECHR does not contain a definition of “family” or “family life”, the protection afforded by Article 8(1) presupposes the existence of a “family”. Only if a person finds him or herself in a “family” can he or she enjoy protection of his or her “family life”.

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<sup>545</sup> Van der Linde (2003) *Obiter* 168, see ch 1, n 232.

<sup>546</sup> Kil Kelly (1999) 187.

<sup>547</sup> (1996-1997) *MJECL* 135.

<sup>548</sup> Forder (1996-1997) *MJECL* 142.

<sup>549</sup> (2004) 40 EHRR 417.

<sup>550</sup> Par 36.

<sup>551</sup> *Ibid.*

The expansion of the concept “family” and “family life” by the ECHR is one of the best examples of how the authorities interpreted the ECHR to keep track of new social trends. The ECHR has concluded that “family life” (and thus a family) exists in the following circumstances:

- (a) Between a mother and a child solely based on birth,<sup>552</sup>
- (b) Between spouses in marriage (formal relationships),<sup>553</sup>
- (c) Polygamous marriages,<sup>554</sup>
- (d) Certain informal relationships.

“Family life” in these relationships will depend on whether there are sufficient close personal links between the adults or between the adults and the child.<sup>555</sup> The notion of “family life” and

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<sup>552</sup> *Marckx v Belgium* 330. See the discussion in section 2 2 2 2 1.

<sup>553</sup> *Abdulaziz Balkandali and Cabales v United Kingdom* (1985) 7 EHRR 421. See the discussion in section 2 2 2 2 1.

<sup>554</sup> *Khan v UK* 7 July 1986 (Appl no 11579/85).

<sup>555</sup> *Kroon v The Netherlands* 291 par 3. The brief facts of the case are that the applicant and second applicant were living together in a stable relationship. The first applicant gave birth to the third applicant in her marriage, after which her husband left their marital home to a place that was unknown to the first applicant. After the birth of the third applicant, the first applicant divorced her husband in his absence. The action was not defended and the divorce became final. The first and second applicant made an application to court for the first applicant to make a statement that the husband is not the father but that the second applicant is the father of the third applicant. The request was refused on the basis that the husband did not bring proceedings to deny paternity and that recognition of the second applicant as the father was impossible. It was argued that this contention was justified in the interests of legal certainty and by the need to protect the rights and freedoms of others. The court of appeal held that Art

thus “family”, is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties where parties live together outside marriage;<sup>556</sup>

- (a) Factual relationships (*de facto*) between social parent and child, sperm donor and child, grandparents and grandchildren, foster parents and foster children are also protected if sufficient close “family” ties exist;<sup>557</sup>
- (b) No protection yet exists for homosexual couples,<sup>558</sup> although “family life” was found to exist between heterosexual couples and children born through artificial insemination because of *de facto* “family” ties,<sup>559</sup>
- (c) “Family life” can exist between uncle or aunt, nephew or niece, once again depending

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8 was applicable; it had not been violated. In *Keegan v Ireland* 291, a man and a woman had sexual intercourse for one night only and the woman conceived and gave birth to a child. The man who had sexual intercourse with her came to know about the child and wanted to establish if he was the father. The mother refused. The man commenced with proceedings at the Maastricht District Court requesting the court to order the woman and the baby to undergo blood tests to establish paternity. The man claimed that he had a relationship of “family life” with the baby and that it was necessary to order the blood tests to establish and protect his rights. The court found that the man’s right to “family life” was at stake and ordered that the tests take place. The mother appealed to the Hertogenbosch High Appeal Court and the court supported the man’s claim.

<sup>556</sup> *Kroon* 263 and *Keegan* 242.

<sup>557</sup> See *Hoge Raad* (1996) NJ 17; *Bronda v Italy* (2001) 33 EHRR 81.

<sup>558</sup> *X, Y & Z v UK* (1997) 24 EHRR 143. See the discussion in section 2 2 2 2 1.

<sup>559</sup> *Ibid.*

on factual circumstances;<sup>560</sup>

(d) Between collaterals, that is, brothers and sisters;<sup>561</sup>

(e) Unfortunately, the biological unmarried father and his child do not, automatically, based on biological links, enjoy protection under Article 8. Once again, there need to be sufficiently close personal links between them.<sup>562</sup>

The development of the concepts “family” and “family life” is not complete. So far, the definition of these concepts is pinned on family institutions that are essentially social phenomena that change as society changes.<sup>563</sup>

#### 2.2.2.2.1 Content of “family life”

This section discusses the content of “family life”, the application of the right to “family life”<sup>564</sup> and highlights the fundamental elements of “family life”,<sup>565</sup> which set the parameters of what

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<sup>560</sup> *Boyle v UK* (1996) 19 EHRR 179: family life was found to exist between and uncle and his nephew in the light of the fact that the boy stayed for weekends with his uncle, who was deemed by the domestic authorities to be a “good father figure” to him.

<sup>561</sup> *Boughanemi v France* (1996) 22 EHRR 228. See the discussion in section 2 2 2 2 1.

<sup>562</sup> *Kroon* par 3; Forder 1996-1997 *MJECL* 130-131.

<sup>563</sup> *Dawood* 960C; *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act 108 of 1996 par 99; National Coalition of Gay and Lesbian Equality par 47-48; Van der Linde (2001) 45-88, see ch 1, n 138.

<sup>564</sup> See the discussion in section 2 5 2 for a full discussion in this topic.

<sup>565</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102, with reference to case law of the ECtHR.

the right to “family life” should be. Van der Linde<sup>566</sup> reflects on the content of the right to respect for “family life” and confirms the fact that “family life” involves, *inter alia*, the mutual enjoyment between the parent and the child of each other’s company. This constitutes a fundamental element of “family life”.<sup>567</sup> This aspect is relevant and applicable to my discussion in the chapter to follow.<sup>568</sup> It will form the basis of argument as to the content of the child’s right to “family care” in section 28(1)(b).

The father and the mother of the child in *Kroon* did not live together in their relationship and there was no marriage.<sup>569</sup> The court was simply satisfied with the fact that the relationship between the parents showed “sufficient constancy” to create *de facto* “family ties”.<sup>570</sup> The *de facto* “family tie” is simply a rule that is not supported by the living together of parents for a significant period of time as a priority.<sup>571</sup> The decision in *Kroon*’s case clearly puts across the point that the court relied in showing “sufficient constancy” on the fact that the mother and father had four children born of their relationship who are *ipso jure* part of that “family unit” from the moment of birth.<sup>572</sup> Although, as a rule, living together may be a requirement for such a relationship, other exceptional factors may serve to demonstrate that a relationship

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<sup>566</sup> (2003) *Obiter* 166; see *Rieme v Sweden* pars 54-56, see ch 1, n 123.

<sup>567</sup> See the discussion in section 2 2 2 2 3 on the fundamental elements of “family life”.

<sup>568</sup> See the discussion in section 2 2 2 2 2.

<sup>569</sup> *Kroon* par 3, 283 par 30; Van der Linde (2001) 56; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102-103; Forder 1996-1997 *MJECL* 132.

<sup>570</sup> *Ibid.*

<sup>571</sup> Liddy “Current Topic: The Concept of Family Life Under ECHR” 1998 *EHRLR* 15 20.

<sup>572</sup> *Kroon* par 3; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102-103; Forder 1996-1997 *MJECL* 132.



has “sufficient constancy” to create *de facto* “family ties”. This means that the amount of care and contribution to the upbringing made by the father creates a bond that amounts to “family life”<sup>573</sup> to which Article 8 applies.<sup>574</sup>

In *K v United Kingdom*<sup>575</sup> it was stated that the question of the existence or non-existence of “family life” is essentially a question of fact depending upon the real existence in practice of close personal ties.<sup>576</sup> In the case of *Liddy*<sup>577</sup>

“[t]he ‘family life’ between the natural father and the child exists from the moment of birth and only when the relationship between the mother and the father is of sufficient constancy to create *de facto* ‘family ties’, which as a rule, but not necessarily, is evidenced by their living together for a significant period of time”.

The ECtHR found in the case of *Johnston v Ireland*,<sup>578</sup> that the father who was living with the mother and child in a marriage-like family shared “family life” with the child. In this case, the mother of the child was married to another man (who was not the father of her child) whom she was not able to divorce under Irish law. The fact that the mother was residing fully with the new man, led the court to conclude that the child and the new man had more “family life”

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<sup>573</sup> Forder 1996-1997 *MJECL* 132.

<sup>574</sup> Van der Linde (2001) 56.

<sup>575</sup> (1986) 50 DR 199 and 207.

<sup>576</sup> Van der Linde (2001) 47.

<sup>577</sup> (1998) *EHRLR* 15; Van der Linde (2001) 58.

<sup>578</sup> (1986) 9 *EHRR* 203.

than the man in the Irish marriage which subsists by record.<sup>579</sup> The court stated that it is clear that the applicants who had lived together for approximately fifteen years constitute a “family” for purposes of Article 8, and are thus entitled to its protection.<sup>580</sup>

The ECtHR found in the case of *Abdulaziz Balkandali and Cabales*, where the conception of the unborn baby was planned by both parents, who also had plans to marry, that the facts in the matter were enough to establish the existence of “family life” under Article 8.<sup>581</sup> On the contrary, the European Commission for Human Rights held the view that there is no “family life” between the child and the father when the child is not yet born which entitles the father to interfere with the mother’s decision to have an abortion.<sup>582</sup> It is clear in the *Abdulaziz Balkandali and Cabales* case that the court, in examining whether there is “family life” between an unmarried father and his child, examines the quality of the relationship between the mother and the father and the nature and degree of interest the father has shown in the child.<sup>583</sup>

“Family life’ ... includes a relationship that arises from lawful and genuine marriage even where the “family” is not yet fully established. It normally also comprises cohabitation in the

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<sup>579</sup> The Commission reached the same conclusion in no 9597/82 *Johnston v Ireland*, Comm Rep, 5 3 85, 8 EHRR 214 that there was a void in Irish law of a legal system reflecting normal “family” ties and that this amounted to a failure to respect the child’s “family life” under Article 8.

<sup>580</sup> 220 par 55-56, see also Van der Linde (2001) 51.

<sup>581</sup> Forder (1996-1997) *MJECL* 131.

<sup>582</sup> *Ibid.*

<sup>583</sup> *Ibid.*

case of a married couple ...”<sup>584</sup>

Kilkelly<sup>585</sup> emphasises the point that the extension of Article 8 to include “family” outside marriage does not apply to all non-marital relationships. Parents who live together with their children as a “family” are most likely to enjoy the automatic protection of Article 8.<sup>586</sup> In *Marckx v Belgium*<sup>587</sup> the court found that respect for “family life” implies the legal existence of safeguards that make the child’s integration in the “family” possible from the moment of birth. The court in *Marckx* held that:

“‘Family life’ does not only include social, moral or cultural relations, for example in the sphere of children’s education, it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance.”<sup>588</sup>

The court recognises that support and encouragement of the traditional “family” is in itself legitimate or even praiseworthy. However, in the achievement of this end, recourse must not be had to measures whose object or result is, as in the present case, to prejudice the “illegitimate family”.<sup>589</sup> According to Van der Linde,<sup>590</sup> members of the “illegitimate family” enjoy the guarantees of Article 8 on an equal footing with members of the traditional “family”.

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<sup>584</sup> *Abdulaziz* 496 par 62, see also Van der Linde (2001) 53.

<sup>585</sup> (1999) 189.

<sup>586</sup> *Ibid.*

<sup>587</sup> 330.

<sup>588</sup> 351 par 52.

<sup>589</sup> 346 par 40, see also the discussion in Van der Linde (2001) 52.

<sup>590</sup> (2001) 52.

In *C v Belgium*.<sup>591</sup>

“The court reiterates that the concept family on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate.”<sup>592</sup>

The court in *Kerkhoven v Netherlands* found that:

“Despite the modern evolution of attitudes towards homosexuality ... the applicants’ relationship does not fall within the scope of the right to respect for ‘family life’ enshrined by Article 8.”<sup>593</sup>

The court found that “the relationship of a homosexual couple constitutes a matter affecting their private life”.<sup>594</sup>

In the case of *M v The Netherlands*,<sup>595</sup> a biological father donated sperm and later regretted the donation. The court found that he is not able to attract the protection of Article 8. In this case the state denied the sperm donor an opportunity to establish a legal link between himself and the recipient donor.

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<sup>591</sup> (1996) NJ 540.

<sup>592</sup> Par 25; Van der Linde (2001) 79.

<sup>593</sup> 19 May 1992 (Appl no 15666/89); *X and Y v United Kingdom* (1983) 32 DR, 220; Van der Linde (2001) 67.

<sup>594</sup> *Ibid*; Van der Linde (2001) 66.

<sup>595</sup> 8 February 1993 (Appl no 16944/90).

The ECHR held that there was no “family life” between the sperm donor and the child in this case.<sup>596</sup> *Forder*<sup>597</sup> raises a concern based on the decision of the ECHR about a situation where the recipient donor had not wanted the child and whether the sperm donor would in such circumstances be allowed to establish his link to the child. In the case of *Boughanemi v France*<sup>598</sup> the court stated that Mr Boughanemi’s parents and 10 brothers and sisters are legally resident in France and there is no evidence that he has no ties with them.<sup>599</sup> The court found that Mr Boughanemi’s deportation had the effect of separating him from his parents and siblings.<sup>600</sup>

Parental responsibilities and rights are regarded as part of “family life”. In the case of *Nielsen v Denmark*<sup>601</sup> the applicant, a Danish citizen whose parents were according to Danish law not married, the applicant’s mother was the only parent who could exercise parental rights over the child. The father of the applicant obtained the right of access through authorities. A close relationship developed between the applicant and his father. The father of the applicant made an application to the ECHR to have custody rights transferred from the mother to him by complaining that the Danish law at that time did not provide for a procedure for such transfer. The Custody and Guardianship of the Children’s Act 1976 was amended during the proceedings in Nielsen’s matter, which enabled the court to vest custody in the

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<sup>596</sup> *Forder* 1996-1997 *MJECL* 134.

<sup>597</sup> 1996-1997 *MJECL* 135.

<sup>598</sup> (1996) 22 EHRR par 15 and 19, see also Van der Linde (2001) 75.

<sup>599</sup> 228 par 35.

<sup>600</sup> *Ibid.*

<sup>601</sup> (1989) 11 EHRR 175.

father of a child born out of wedlock if certain conditions were met.

Although the application was not granted, the father of the applicant continued to have regular access to the applicant.<sup>602</sup> Later on the applicant refused to go 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. The father of the applicant instituted proceedings to have the custody rights of the applicant transferred to him. The applicant and his father went into hiding until the father was arrested.<sup>603</sup> The applicant was placed in the Department of Child Psychiatry in hospital and the rights of access of his father were suspended. The applicant disappeared once more and lived with his father in hiding. In the custody proceedings it was held that it was not in the interests of the child to transfer custody to his father.<sup>604</sup> The applicant lived with his father for more than three years after the appeal against the decision in the custody proceedings failed. The father of the applicant was arrested for depriving the mother of the applicant the right to exercise her parental rights and the applicant was placed in a children's home and later placed in a psychiatric ward.<sup>605</sup> The applicant challenged the legality of his placement in a child psychiatric ward. The applicant was not successful at first instance but succeeded on

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<sup>602</sup> Par 1 11.

<sup>603</sup> Par 1 12.

<sup>604</sup> Par 1 15-1 17.

<sup>605</sup> Par 1 18-1 19.

appeal.<sup>606</sup>

When the applicant was to be discharged in 1984, it was discovered that he had disappeared. The applicant was apprehended and returned to the psychiatric ward. Upon discharge from the ward the applicant was placed in the care of a family not known to his father.<sup>607</sup> The concern, which needed to be addressed in Nielsen case, was whether Article 5 of the ECHR is applicable to this case. In responding to this concern the court noted that “family life” consists of a broad range of parental responsibilities and rights concerning the care and contact of minor children.

The case of *Williamson v Secretary of State for Education and Employment*<sup>608</sup> explained why it is important to acknowledge that parents have rights over their children:

“Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and primary right to do this. The state steps in to regulate the exercise of that responsibility in the interests of children and society as a whole. But ‘the child is not the child of the state’ and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities. A free society is premised on the fact that people are different from one another. A free society respects individual differences. ‘Only the worst dictatorships try to eradicate those differences’: see *El Al Israeli Airlines Ltd v Danielowitz* [1994] Isrl LR 478 at para 14 per Barak J. Often they try to do this by intervening between parent and child. That is one reason why the European

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<sup>606</sup> Par 3 21-24.

<sup>607</sup> Par 5 34-36.

<sup>608</sup> (2005) *UKHL* 15.

Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) restricts the power of the state to interfere in ‘family life’ (Art 8) or to limit the manifestation of religious or other beliefs (Art 9) and requires it to respect the religious and philosophical convictions of parents in the education of their children (First Protocol, Art 2).<sup>609</sup>

On the issue of contact between children and their parents, the ECHR is clear. Where a person has a right to respect for “family life” under Article 8(1), such right includes the right to have contact with the child.<sup>610</sup> *Komopoulou v Greece*<sup>611</sup> stated that the mutual enjoyment by the parent and the child of each other’s company constitutes a fundamental element of “family life”, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8 of the ECHR.<sup>612</sup> With regard to the maintenance of children, the commission rejected a complaint in *Burrows v UK*<sup>613</sup> by the father of a child that having to pay twenty percent of his gross income in maintenance affected his “family life” with his new family. The Commission found that:

“... while one of the specific aim of the measures is to make absent parents, who are able to do so, pay for the maintenance requirements of their children, the measures are not intended solely for the benefit of the children but for the benefit of the tax-payer in general who bears the burden of paying for single parents who claim social welfare [When] benefits are

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<sup>609</sup> Par 72.

<sup>610</sup> See the discussion in section 2 2 2 2 3 on the fundamental elements of “family life”.

<sup>611</sup> (2004) 1 *FLR* 800.

<sup>612</sup> Par 47.

<sup>613</sup> 27 November 1996 (Appl No 27558/95) 415.



removed and replaced with payments by the absent parent, the burden of the tax-payer in general is reduced. The commission considers that the aims of reducing taxation and increasing parental responsibility must be considered as in the public interest for the purposes of Art 1 of Protocol No 1 ... the commission does not consider the relevant measures to be disproportionate to the legitimate aim they pursue and considers that a fair balance has been struck between the interests of the community as a whole and those of the individual”.<sup>614</sup>

The rights of parents to exercise parental authority over their children, taking into account their parental responsibilities is recognised and protected by the ECHR.<sup>615</sup> However, the ECHR is not a children’s statute and it is not created with the rights of children as a primary issue in mind.<sup>616</sup> Hence the ECtHR acknowledged the importance of the CRC.<sup>617</sup> On the other hand, the ECtHR is viewed as having been more relaxed with the notion that parents have rights over their children. Instead, the rights of parents are protected on a regular basis.<sup>618</sup>

#### 2.2.2.2.2 The approach for application of Article 8(1) with regards to the right to “family life” for children in need of care and protection

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<sup>614</sup> Par 40; 416.

<sup>615</sup> *Nielsen* par 261.

<sup>616</sup> Choudhry & Herring (2010) 224.

<sup>617</sup> *Ibid.*

<sup>618</sup> *Hokkanen v Finland* 1996 1 FLR 289: It was found in this case that the state was not required to enforce a contact in a case where a 12 year-old child did not want to see her father. The ECtHR held that the father’s rights were justifiably infringed instead of saying that no such rights exist.

Situations where Article 8 applies directly to children are especially found in matters concerning their removal from the “family” home by the authorities in order to place them in alternative care.<sup>619</sup> There is no express provision with regard to the removal of children from the “family” home in Article 8. Instead, the approach that is generally used, deals with the scope of the states’ obligation in terms of Article 8(1) of the ECHR.<sup>620</sup>

For Article 8(1) to apply, the merits of the case need to be analysed to establish whether the relationship can be described as “family life” and falls within the ambit of Article 8(1).<sup>621</sup> The usual approach for application of Article 8(1) is to determine whether the state has a “positive” or “negative” obligation to protect or not to intervene in “family life”. There is no precise definition of “positive” or “negative” obligation. Case law clearly illustrates the degree to which “positive” and “negative” obligation can overlap in practice. For instance, there is an instance in which elements of abstention and action coexist, or in the conduct of state may overlap, but at the same time, remain distinct from each other.<sup>622</sup> This may also be seen in circumstances where the state has interfered but where the assessment of the proportionality of that interference brings the “positive” obligation into play.<sup>623</sup>

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<sup>619</sup> Kil Kelly (1999) 263. See also the discussion in section 6 2 1.

<sup>620</sup> *Ibid.*

<sup>621</sup> Forder 1996-1997 *MJECL* 129; Kil Kelly (1999) 197.

<sup>622</sup> Akandji-Kombe *Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (2007) 12.

<sup>623</sup> Akandji-Kombe (2007) 13. In circumstances where death is caused by the agents of the state, particularly the police or security forces, the ECHR will want to verify with regard to firstly, whether during the preparation and control of the operations, the competent authorities took

A brief discussion on “positive” and “negative” obligation follows:

#### 2.2.2.2.1 Positive obligation

The definition of “positive” obligation can easily be reconstituted from individual cases. In *Belgian Linguistic case*,<sup>624</sup> the applicants argued that such obligations should be recognised as “obligations to do something”. The court in *Belgian Linguistic case* found the essential objective of Article 8 being “that of protecting the individual against arbitrary interference by the public authorities in his private or family life”.<sup>625</sup> However, the court acknowledged that the child, who speaks French and lives in a Dutch unilingual region, might be separated from his parents in order to pursue an education in French as a result of the measures. However, the measures did not violate the right to respect for private and family life. The separation was not imposed by the Article but resulted from the choice of the parents who chose to

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all appropriate measures, that is, whether death was not due to failure of preparation or of stringent control of execution. In terms of cases of alleged interference, the ECHR will set the positive obligations on the public authorities before considering whether they were satisfied.

<sup>624</sup> (1968) 1 EHRR 252. This is the leading Strasbourg authority on the content of Art 2 Protocol 1 to the European Convention on Human Rights provides that: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” The case arose from the wish of French-speaking Belgian parents that their children should be taught in French.

<sup>625</sup> 282.

avoid their children being taught in Dutch.<sup>626</sup> Thus, the right to respect for private and family life was seen as not guaranteeing the right to be educated in the language of one's parents by the public authorities or with their aid.

Akandji-Kombe<sup>627</sup> argues that the prime characteristics of “positive” obligations is that they, in practice, require national authorities to take the necessary measures to safeguard a right, or more precisely, to take the necessary measures to safeguard a right or to adopt reasonable and suitable measures to protect the rights of the individuals. Such measures may be judicial. All the “positive” obligations pursue the same goal, being the effectiveness of the rights it secures.

Akandji-Kombe uses the *Airey v Ireland*<sup>628</sup> judgment to illustrate the fact that a “positive” or “negative” obligation may apply. Akandji-Kombe<sup>629</sup> argues that “hindrance in fact can contravene the Convention just like a legal impediment”. The applicant in the *Airey* case wished to obtain a separation and chose to do so through a judicial course open to her and the Irish law. The applicant had, in view of her low income and the fact that there was no system of legal aid in Ireland at the time, chosen to abandon her application. She believed

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<sup>626</sup> As one of Belgium's national languages.

<sup>627</sup> (2007) 6.

<sup>628</sup> (1979-1980) 2 EHRR 305.

<sup>629</sup> (2007) 7, reflects on the measures which prison authorities are required to take in certain circumstances, to prevent prisoners' suicides or to prevent prisoners inflicting on others treatment as variance with the European Convention. Both legal and practical measures may be necessary at the same time, however, depend on the nature of circumstances.

that having regard to the complexity of the procedure, she could not defend herself alone without the assistance of legal counsel. She alleged before the ECHR that Article 6, paragraph 1 was violated by failing to make an effective remedy available to her. The court eventually accepted her claim. The court considered her application after considering the wording that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.” Thus, it is sufficient for legal remedies to exist; it must also be possible for them to be real and usefully exercised.<sup>630</sup>

Robinson<sup>631</sup> defines the responsibility of the state towards the “family” in “positive” and “negative” terms. He argues that Article 8(1) of the ECHR, which reads: “Everyone has the right to respect for his private and family life ...” is in the positive.<sup>632</sup> He finds that Article 8(1) does not only compel the state to abstain from interference, but that the state also has a “positive” obligation which entitles the child to expect the state to take “positive” measures to ensure protection of the rights of the child.<sup>633</sup> Marckx’s judgment also seems to me to have taken a decision which required a “positive” intervention, where the court held that the state must act in a manner calculated to allow those concerned to lead a normal “family life”.<sup>634</sup> The court found that the state had a “positive” obligation to provide a system of domestic law,

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<sup>630</sup> Akandji-Kombe (2007) 10.

<sup>631</sup> Robinson (1998) *Obiter* 336.

<sup>632</sup> Robinson (1998) *Obiter* 335.

<sup>633</sup> Robinson (1998) *Obiter* 338.

<sup>634</sup> 330; Kilkelly (1999) 95; Harris *et al.* (2009) 392.

which safeguards the integration of the child born outside of marriage into the “family”.<sup>635</sup>

According to Kilkelly,<sup>636</sup> the respect for “family life” may require a “positive” action in order to secure the enjoyment of that right. The notion of respect for “family life” may vary in terms of conditions that relate to state parties and from one case to another.<sup>637</sup> This diversity entitles states to a wide margin of interpretation in the manner in which they *promote*<sup>638</sup> and respect “family life”.<sup>639</sup> The idea that a child is someone entitled to *special protection* is connected to the maintenance of “family life”.<sup>640</sup> This notion aims to preserve “family life” by developing and protecting the “family”.<sup>641</sup> The responsibility to preserve “family life” is imposed on society and the state.<sup>642</sup> The state has the responsibility to ensure that “family ties” are developed and maintained.<sup>643</sup> The existence and scope of a “positive” obligation under Art

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<sup>635</sup> See the discussion in section 2 2 2 2 3 on the fundamental elements of “family life”.

<sup>636</sup> (1999) 198.

<sup>637</sup> *Ibid.*

<sup>638</sup> Emphasis drawn from the fact that the state has the responsibility to ensure that everyone enjoys family life. This means that the state must make provisions to ensure that family life is enjoyed.

<sup>639</sup> Kilkelly (1999) 198.

<sup>640</sup> Doek *et al.* “Protecting the Human Rights of Refugee Children: Some Legal and Institutional possibilities” in *Children on the Move How to Implement their Right to Family Life* (1996) 101.

<sup>641</sup> *Ibid.*

<sup>642</sup> *Ibid.*

<sup>643</sup> See *Kroon* par 3: “There was a positive duty on the part of the competent authorities to allow complete legal family ties to be formed...”; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102-103; Forder 1996-1997 *MJECL* 132.

8(1) is considered a matter of an interference, which fails to be justified under Article 8(2).<sup>644</sup>

#### 2.2.2.2.2 Negative obligation

Robinson's<sup>645</sup> opinion that the state has a "negative" obligation stems from Article 17(1) of the ICCPR which provides as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home ...". This provision prohibits arbitrary or unlawful interference and is viewed as a "negative" obligation. According to Kilkelly,<sup>646</sup> Article 8(2) requires states to refrain from taking action that interferes unjustifiably with "family life". In the event that the state interferes with "family life", to justify its action, the state must prove that its interference is: "in accordance with the rule of law",<sup>647</sup> pursues one of "the legitimate purposes or aims"<sup>648</sup> listed in Article 8(2) and is "necessary in a democratic society"<sup>649</sup> or proportionate to the pursuit of that aim. For instance, restricting contact between the parent and the child or placing a child with foster or adoptive parents automatically interferes with "family life". The latter action may only be justified if the interference or measure taken is in "accordance with the law" and has a "legitimate aim", which suggests that the action or interference is "necessary in a democratic society".

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<sup>644</sup> Harris *et al.* (2009) 396. See the discussion in sections 4 2, and 4 2 1 for a detailed discussion regarding the positive obligation of the state in promoting "family life".

<sup>645</sup> Robinson (1998) *Obiter* 337.

<sup>646</sup> (1999) 199.

<sup>647</sup> Harris *et al.* (2009) 399-407.

<sup>648</sup> Harris *et al.* (2009) 407.

<sup>649</sup> Harris *et al.* (2009) 407-422.

I am of the view that Article 8 imposes an obligation on the state to refrain from interfering with privacy or family life, at the same time, another obligation is imposed on the state to ensure that no person (outside the state) interferes with the privacy or family life of another. In other words, like I have discussed in the section “positive obligation”,<sup>650</sup> the state has a double obligation; to refrain from interference and to protect those whose lives are interfered with.

### 2.2.2.2.3 The margin of appreciation

The ECtHR acknowledges the diversity that exists in child-care and state interference.<sup>651</sup> The court has, in examining cases that fall under the ECHR, recognised the fact that perceptions as to the appropriateness of the intervention by public authorities in the care of children differs from one state to another, consistent with the traditions that apply to the role of the “family”, the intervention in family affairs, and the availability of resources for these measures.<sup>652</sup> This approach, known as the margin of appreciation doctrine, is inferred by the court to interpret the concept “family life” independent of national laws of other member states.<sup>653</sup> Thus, it does not give the contracting states an unlimited power of appreciation.<sup>654</sup>

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<sup>650</sup> See the discussion in section 2 2 2 2 1.

<sup>651</sup> Kilkelly (1999) 204.

<sup>652</sup> *Ibid.*

<sup>653</sup> *Handyside v United Kingdom* par 48-49: The case concerned seizure, forfeiture of hundreds of copies of the Schoolbook of the applicant. The applicant claimed that his right to freedom of expression guaranteed by Art 10(1) of the ECHR was infringed. The ECtHR considered that the ruling on Art 10 applies equally in Art 8 cases and held that by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a



Where common practise is apparent between the laws of the convention states, the margin of appreciation will be narrow and deviation from it will be difficult to justify.<sup>655</sup>

The ECtHR also acknowledges the fact that domestic authorities are better placed to determine the most appropriate measure.<sup>656</sup> Strict scrutiny is applied to limitations such as restrictions on parental contact and any safeguard to protect the right to respect for “family life”.<sup>657</sup> The court also reviews decisions taken by domestic administrative and judicial authorities in assessing whether the states have exercised their discretion reasonably and in good faith.<sup>658</sup> There is also support for courts to adopt a procedural approach to review child-care issues.<sup>659</sup>

#### 2.2.2.2.3 Fundamental elements of “family life” as applicable to children in need of care and protection

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better position than the international judge to give an opinion on the necessity of a restriction or penalty. The court found that Art 10(2) leaves to the contracting states a margin of appreciation. This margin of appreciation is left to, amongst others, the national legislature and judicial bodies that have the mandate to interpret and apply the laws in force.

<sup>654</sup> *Ibid.*

<sup>655</sup> *Rasmussen v Denmark* (1984) 7 EHRR 471 par 40.

<sup>656</sup> *Kilkelly* (1999) 204.

<sup>657</sup> *Kilkelly* (1999) 205.

<sup>658</sup> *Ibid.*

<sup>659</sup> *Ibid.*

What follows in this section is a brief exposition of what the content and principles are of “family life” as they emerge in European family law, with regards to the topic of my thesis “Children in Need of Care and Protection and their Right to Family Life”.<sup>660</sup> The ECtHR developed principles with regard to the right to “family life”.

These principles are based on the rule that “family life” survives the removal of the child from the “family” home and his or her placement with alternative care-givers. Thus, case law that enforced the right to “family life” focused on the following principles which are the fundamental elements of “family life”:<sup>661</sup>

Firstly, the mutual enjoyment by parents and the child of each other’s company, which entails maintaining contact and keeping “family” ties, is critical,<sup>662</sup> secondly, the basis or grounds for mandatory alternative care interventions and the justification thereof in terms of Article 8(2)

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<sup>660</sup> Ch 3 discusses “grounds for mandatory alternative care interventions”; ch 4 focuses on “prevention and early intervention services in relation to protection and socio-economic aspects; ch 5 covers “the preparation for the removal of the child from family life and the decision-making process”; ch 6 reflects on “alternative care options available upon removal from family life”; ch 7 reflects on “the position of the child after removal from family life” and covers, amongst others, the following topics: contact by parent and the child; the state’s duty to facilitate the child’s return after removal; reunification and reintegration of the child into the family. Ch 8 discusses “permanency planning upon failure of reunification attempts”, amongst others, adoption is discussed as a form of permanency planning. The study discusses adoption policy and practice and the improvements made by the Children’s Act in this area.

<sup>661</sup> I have also used the principles in the topics of the different chapters of this study.

<sup>662</sup> *Rieme v Sweden* par 54; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102. See ch 7.

must be ascertained. This means that a child may not be removed from the “family” environment willy-nilly. Instead, there must be pressing grounds to justify the removal of the child from “family life” and such removal must be “necessary in a democratic society”.<sup>663</sup> Before the state may consider removing the child from the “family”, the state has a positive duty to preserve “family life” by protecting the child from being removed from “family life”. Preservation of “family life” may be done by way of protecting the child against abuse or neglect<sup>664</sup> and in other instances, the alleviation of poverty in the “family” home where the child lives in order to avoid removal.<sup>665</sup> The state must support the parents to carry their parental roles. In this case, the state can only intervene in the functions of the parents where the parents interfere with the right of the child to “family life”.<sup>666</sup>

Thirdly, it is fundamental for the parent and child to participate in the decision-making process concerning the removal of the child.<sup>667</sup> Thus, parents have the right to be heard regarding important decisions that concern the child.<sup>668</sup> Likewise, children must be heard in

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<sup>663</sup> *K & T v Finland* (2001) 2 FLR 707. See Kilkelly (1999) 95; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 108. See also the discussion in section 2 2 2 2 3.

<sup>664</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 110; Wright “Local Authorities, the Duty of Care and the European Convention on Human Rights” (1998) *OJLS* 1-28. See the discussion in sections 4 1 1 and 4 3 1.

<sup>665</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 109. See a full discussion in ch 4.

<sup>666</sup> Forder 1996-1997 *MJECL* 128-129.

<sup>667</sup> *H and W v United Kingdom* (1987) 10 EHRR I12 par 80. See the discussion in section 5.

<sup>668</sup> Kilkelly (1999) 286.

decision-making processes that involve matters affecting them.<sup>669</sup> This also entails the importance of parent and the child being heard before a final order is made, as well as the right of the parties to access to relevant documentation and information in the possession of the local authorities pertaining to the removal. Fourthly, in the event that the child is removed from “family life”, the parent must be able to contact the child in public care. This involves aspects such as the need to be placed closely to his “family” and the need to facilitate contact between parent and child through visitation, communication etc.

The right of the child to grow in a “family” is fundamental for the development and well-being of the child. This means that, fifthly, the state also has the duty to facilitate the return of the child and to ensure reintegration into the family upon his or her return from public care.<sup>670</sup> However, if the efforts to reunify the child back into his or her “family” fail, permanency planning must be considered for the child. The relevance of the ECHR and the decisions based thereon serve as reference for South Africa, particularly in areas where South Africa has not developed case law that enforces the fundamental elements of “family care”.

#### 2.2.2.2.4 A threshold criteria: justification, or not, for interference with “family life”

This section discusses a threshold criteria set under Article 8 (2) of the ECHR which must be

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<sup>669</sup> Children need to be heard in matters affecting them: see SALRC *The Review of the Child Care Act* (1998) par 13 2 1; see also Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 18. See the discussion in section 5 2.

<sup>670</sup> *Rieme* par 69, see also Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 103. See ch 7.

satisfied before interference with “family life” is justifiable or not. The criteria can be applied by the court when granting an order for mandatory alternative care to satisfy itself that the making of the order is the following:

#### **2.2.2.2.4.1 In accordance with the law**

Any measure that is assumed to be an interference with “family life” must be consistent with the prescripts of the law.<sup>671</sup> The law that is acted upon regarding the measure taken does not only refer to domestic law but includes any measure of protection against any wrong-doing by public authorities as enforced by the law.<sup>672</sup> Kil Kelly<sup>673</sup> gives an example of an incident that may be viewed as not “in accordance with the law”; that is, where the ECtHR gives permission for the removal of children from “family life” to institutional care, where the children’s health is jeopardised, but where the state fails to require proof of actual harm caused to children.

This is a typical scenario that requires safeguards to be taken against arbitrary interference.<sup>674</sup> In *Eriksson v Sweden*<sup>675</sup> the Swedish courts found that there was a *lacuna* in the national child-care law because there was no legal basis for the conditions imposed by social workers limiting access of parents to their children who were in public care. Thus, the

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<sup>671</sup> Kil Kelly (1999) 200.

<sup>672</sup> *Ibid.*

<sup>673</sup> *Ibid.*

<sup>674</sup> Kil Kelly (1999) 200-201.

<sup>675</sup> (1989) 12 EHRR 183 par 67.

ECtHR found that the restrictions were not “in accordance with the law”.<sup>676</sup>

#### 2.2.2.2.4.2 Legitimate aim: the best interests of the child

Once interference has been found to be in “accordance with the law” under Article 8(2), the court has to further examine whether the interference has a “legitimate aim”.<sup>677</sup> The state needs to identify the aim that is pursued in interfering with “family life”.<sup>678</sup> In most cases, the state claims either “protection of health or morals” or “protection of the rights and freedoms of others” as the legitimate aim for taking measures, which interfere with “family life”.<sup>679</sup> These are, amongst others, situations where the state has interfered with “family life” and little is said about the rights or freedoms that are being protected.<sup>680</sup>

For instance, the state has been able to convince the courts in, amongst others, *Olsson v Sweden*,<sup>681</sup> that the separation of children from their parents was done in the interests of the rights of children. In the case of *Margareta and Roger Andersson v Sweden*<sup>682</sup> the state justified the fact that it acted for the protection of the health or morals of children when the children were applicants in the matter. The state has to convince the court that it was acting

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<sup>676</sup> Harris *et al.* (2009) 404.

<sup>677</sup> Harris *et al.* (2009) 407.

<sup>678</sup> Kil Kelly (1999) 201.

<sup>679</sup> *Ibid.*

<sup>680</sup> *Ibid.*

<sup>681</sup> (1988) 11 EHRR 259.

<sup>682</sup> (1992) 14 EHRR 615.

for a proper purpose, even where this had been disputed by the applicants.<sup>683</sup>

In cases that pertain to children, the “best interests of the child” standard is used as the basis on which consistency with Article 8(2) of the state interference with “family life” is determined.<sup>684</sup> According to Kilkelly,<sup>685</sup> most states have used the more traditional approach by applying the “best interests of the child” standard in determining issues that pertain to children. In addition to the “best interests of the child” standard, Kilkelly<sup>686</sup> favours the approach in the CRC which takes into account the “evolving capacities of the child” and the child’s “right to be heard”, in establishing the aim of the interference. These are some of the issues that, according to Kilkelly,<sup>687</sup> fall within the margin of interpretation, which states enjoy when applying Article 8. However, Article 8 requires the reconciliation of competing interests and that all factors must be taken into consideration in establishing the aim.<sup>688</sup>

#### **2.2.2.2.4.3 Necessary in a democratic society**

The principle of proportionality is applied to maintain a balance between the interference made by the state in “family life” with the aim of protecting the interests of affected members

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<sup>683</sup> Harris *et al.* (2009) 407.

<sup>684</sup> *Ibid.*

<sup>685</sup> (1999) 202.

<sup>686</sup> *Ibid.*

<sup>687</sup> *Ibid.*

<sup>688</sup> *Ibid.*

and the rights of the child.<sup>689</sup> It is therefore up to the state to indicate the objective of its interference and to demonstrate the “pressing social need” for limiting the enjoyment of the applicant’s right.<sup>690</sup> In this case, the court will consider, on the basis of the facts in place, whether the authorities had “relevant and sufficient reasons” for taking contentious measures.<sup>691</sup> In the case of *Berrehab v Netherlands*,<sup>692</sup> Mr Berrehab was married to a Dutch woman, which relationship enabled him to have a Dutch residence permit.<sup>693</sup> A child was born of the relationship but the couple divorced two years later, resulting in Mr Berrehab being unable to renew his residence permit and his eventual expulsion from The Netherlands.<sup>694</sup>

He experienced difficulties in obtaining a *visa* every three months in order to exercise his right to visit his child. The court examined the litigious inferences preventing the petitioners from maintaining their relationship.<sup>695</sup> The court pointed out that Mr Berrehab and his daughter had been very close, that the refusal to issue him the residence permit was a threat to their ties, and that the state had failed to strike a proper balance between their interests and those of the state.<sup>696</sup> This approach implies that stronger reasons are needed to justify

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<sup>689</sup> KilKelly (1999) 203.

<sup>690</sup> Harris *et al.* (2009) 407.

<sup>691</sup> KilKelly (1999) 203.

<sup>692</sup> (1988) 11 EHRR 322 par 29.

<sup>693</sup> Boucaud in Verhellen (ed.) *Monitoring Children’s Rights* 151.

<sup>694</sup> *Ibid.*

<sup>695</sup> *Ibid.*

<sup>696</sup> Harris *et al.* (2009) 419; Boucaud in Verhellen (ed.) *Monitoring Children’s Rights* 152.



the prohibition of contact between the child and his or her parents.<sup>697</sup> Kilkelly<sup>698</sup> argues that the latter is a fair and justifiable approach in applying Article 8.

### 2.2.2.3 *Universal Declaration of Human Rights*

The UDHR protects every person from arbitrary interference in his or her privacy, home, family, and correspondence, including an attack on reputation and honour. The UDHR guarantees every person protection of the law in the event that such interference or attack occurs.<sup>699</sup> The UDHR also provides that:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>700</sup>

As in South African law, marriage is viewed as the foundation of a “family”.<sup>701</sup> The UDHR further provides that: “The family is the natural and fundamental group ‘unit’ of society and is entitled to protection by society and the State”.<sup>702</sup> The words “natural” and “fundamental group unit” are entrenched in the UDHR. Since the CRC and other international instruments were adopted after the adoption of the UDHR, it makes sense to conclude that the words

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<sup>697</sup> Kilkelly (1999) 203.

<sup>698</sup> *Ibid.*

<sup>699</sup> Art 12.

<sup>700</sup> Art 16(1). See also the discussion in section 1 1.

<sup>701</sup> *Dawood* 959F.

<sup>702</sup> Art 16(3).

“natural” and “fundamental group unit” were borrowed from the UDHR.

The UDHR is clear about the type of marriage that is protected by the provision, that is, a marriage between a “man” and a “woman”.<sup>703</sup> This provision is likely to attract criticism in countries that recognise other family arrangements, not only those emanating from heterosexual marriages.<sup>704</sup> The UDHR also discriminates against cohabiting partners by guaranteeing equal rights to partners in a marriage, during the marriage, and its dissolution.<sup>705</sup> The manner in which Article 16(1) is written simply means that the “equal rights” guaranteed by it may not apply to domestic partnerships and same-sex partners.<sup>706</sup>

#### 2.2.2.4 *International Covenant on Civil and Political Rights*

The ICCPR provides that: “a family is the natural and fundamental group ‘unit’ in society and is entitled to protection by society and the State”.<sup>707</sup> It further provides for the recognition of the right of “men” and “women” of marriageable age to marry and to found a “family”.<sup>708</sup> The ICCPR<sup>709</sup> also makes provision for the protection of children whose parents’ marriage may

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<sup>703</sup> Art 16(1).

<sup>704</sup> *Ibid.*

<sup>705</sup> *Ibid.*

<sup>706</sup> UDHR.

<sup>707</sup> Art 23(1).

<sup>708</sup> Art 23(2).

<sup>709</sup> Art 23(4) states that: “States Parties to the present Convention shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and

have dissolved. Like the UDHR,<sup>710</sup> it<sup>711</sup> recognises a “family” as an institution that may be established by a “man” and a “woman” in their definition of marriage.<sup>712</sup> Furthermore, it recognises a “family” as a *unit*,<sup>713</sup> which refers to one person or a set of many people.

In my recommendation for the definition of “family”, I propose that the term “unit” be included to ensure that children who are in different family arrangements have a sense of belonging and protection in a wider whole family institution.<sup>714</sup> The ICCPR<sup>715</sup> also guarantees protection of the equal rights of the spouses to marriage, during marriage and its dissolution, the same way as the UDHR.<sup>716</sup>

#### 2.2.2.5 *International Covenant on Economic, Social and Cultural Rights*

The ICESCR provides for the protection and assistance of the “family” with regard to its

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its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

<sup>710</sup> Art 16(1).

<sup>711</sup> Art 23(2) of the ICCPR.

<sup>712</sup> *Joslin v New Zealand* (17 July 2002) Communication No 902/1999. The committee stated that: “The treaty obligation of States...is to recognize as marriage only the union between a man and a woman wishing to be married to each other.”

<sup>713</sup> Own emphasis.

<sup>714</sup> See the proposed definition of “family” in section 2 5.

<sup>715</sup> Art 23(4).

<sup>716</sup> Art 16(1).

responsibility to children.<sup>717</sup> The ICESCR caters for the rights of children and young persons without discrimination on the basis of parentage or other conditions.<sup>718</sup> Like other international instruments, the ICESCR reflects on the “family” as a “natural and fundamental group ‘unit’ in society”.<sup>719</sup> For the purposes of the discussion in this chapter, it is important to reflect on the first part of Article 10(3) of the ICESCR which provides that: “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions ...”

In terms of this provision, the ICESCR prohibits discrimination against “all” children for reasons of parentage.<sup>720</sup> The word “all” in the above provision, acknowledges the fact that not all children are raised in families of married parents.<sup>721</sup> This accommodates children in different family arrangements.

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<sup>717</sup> Art 10(1) provides that: “State Parties to the present Convention recognize that: The wide possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society particularly for its establishment and while it is responsible for the care and education of dependent children, marriage must be entered into with the free consent of the intending parties.”

<sup>718</sup> Art 10(3) provides that: “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health dangerous to life or likely to hamper their moral development should be punishable by law.”

<sup>719</sup> Art 10(1).

<sup>720</sup> Art 10(3).

<sup>721</sup> *Ibid.*

### 2.2.2.6 African Charter on Human and People's Rights

The ACHPR provides that: "The family shall be the natural 'unit' and the basis of society. It shall be protected by the state which shall take care of its physical health and morals".<sup>722</sup> The ACHPR further provides that: "The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community".<sup>723</sup>

The ACHPR<sup>724</sup> refers to the "family" as the natural unit. This means that other family units that are not accepted as natural units are not protected.<sup>725</sup> The ACHPR<sup>726</sup> also acknowledges the "family" as the basis of the development of community morals and traditional values and that the state should assist the "family" in that regard. The care of children within the ambit of a "family" is seen as a virtue in the African "historical tradition".<sup>727</sup> Since same-sex partnerships are not the basis of the development of community morals and traditional values, they may not be guaranteed assistance from some of the African states as a "family".<sup>728</sup>

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<sup>722</sup> Art 18(1).

<sup>723</sup> Art 18(2).

<sup>724</sup> Art 18(1).

<sup>725</sup> *Ibid.*

<sup>726</sup> Art 18(2).

<sup>727</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 334.

<sup>728</sup> Recently, Zimbabwe police arrested 44 members of the Gays and Lesbians of Zimbabwe organisation, hereinafter referred to as "GALZ". GALZ members were preparing to launch a report on violations against gays and lesbian people in Zimbabwe. 15 anti-riot police officers

The position of the African Commission on Human and People's Rights on same-sex relationships became evident recently when it refused to grant observer status to the Coalition of African Lesbians before the Commission.<sup>729</sup> This decision reinforces the ongoing non-recognition of same-sex relationships in Africa, as there is an ongoing trend in various African states aimed at tightening laws that criminalise homosexuality.<sup>730</sup>

#### 2.2.2.7 *African Charter on the Rights and Welfare of the Child*

The ACRWC<sup>731</sup> acknowledges the fact that a child must grow up in a “family” environment, in an atmosphere of happiness and understanding, for his or her full and harmonious development. In curbing marriages of children, the ACRWC requires the “compulsory official registration” of all child marriages.<sup>732</sup> The ACRWC expressly protects the “family” and states

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stormed a meeting at their offices on the 11 August 2012. GALZ' members were beaten with baton sticks and open hands, verbally abused, forced to assault each other and their gender was questioned before detaining them without charge: accessed from [www.global.christianpost.com/.../zimbabwe-gay-rights-activists-allegedly-a](http://www.global.christianpost.com/.../zimbabwe-gay-rights-activists-allegedly-a) on 2012-08-23.

<sup>729</sup> Vilakazi & Ndashe *The Day the African Commission Disvowed Humanity* (2010): accessed from <http://pambazuka.org/en/category/features/68947> on 2010-11-22.

<sup>730</sup> *Ibid.*

<sup>731</sup> The Preamble of the ACRWC states that: “Recognising that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow in a family environment in an atmosphere of happiness, love and understanding.”

<sup>732</sup> Art 21(2) of the ACRWC provides that: “Child marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation shall be taken to specify the

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”.<sup>733</sup> The key words, “natural unit” and the “basis of society” are viewed as communal rights and guarantee a child membership of the broader community.<sup>734</sup>

The ACRWC<sup>735</sup> defines a “family” as an important building block in society. The Charter provides that a “family” shall be “...the basis of society”, that is, a foundation of society.<sup>736</sup> The words “basis of society” mean that a “family” is made and shaped by the views of society. These views may include principles, values and morals that guide society. If societal views and practice are that a “family” comprises a “husband” and a “wife” who are a “male” and a “female”, it may be difficult for that particular society to embrace same-sex families. The fact of the matter is that any other form of “family” that is not acceptable in society is likely to face discrimination and unfair treatment, even in circumstances where the law guarantees every “family” support and protection.<sup>737</sup> It may also be difficult for the state to protect a “family” that is marginalised by a community or society; the community may continue to isolate that

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minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.” I refer to the ACRWC when I propose an enactment of a provision that curbs child marriages, see the discussion in sections 3 3 5 4 1 and 3 4.

<sup>733</sup> Art 18(1).

<sup>734</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 338.

<sup>735</sup> Art 18(1).

<sup>736</sup> *Ibid.*

<sup>737</sup> According to Art 18(1) “The family shall ... enjoy protection and support of the State for its establishment and development.”

particular “family” even with state intervention.

Unlike the Constitution and the CRC, the ACRWC makes a “special provision” for the protection of a “family”.<sup>738</sup> In the ACRWC a “family” is defined as the natural unit and the foundation of society that enjoys protection and support from the state for its establishment and development. The protection and support for the establishment and development of a “family” that is provided by the ACRWC is similar to the intervention expected from the state provided for in the ECHR.<sup>739</sup>

The ACRWC makes provision for “all” children to receive maintenance, regardless of the marital status of the parents of the child.<sup>740</sup> The ACRWC also guarantees spouses rights and responsibilities to their children before and after the dissolution of the marriage by providing that:

“State parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children in marriage and in the event of its dissolution, provision shall be made for the necessary protection of the child.”<sup>741</sup>

It is explicit that the ACRWC does not guarantee the same responsibilities and rights to the

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<sup>738</sup> Art 18.

<sup>739</sup> Art 8(2) of the EHRC.

<sup>740</sup> Art 18(3) provides that: “No child shall be deprived of maintenance by preference to the parent’s marital status.”

<sup>741</sup> Art 18(2).



“families” of unmarried parents.<sup>742</sup> By implication, children in the “families” of unmarried parents and other “families” are covered by the ACRWC on maintenance issues only.<sup>743</sup>

#### 2.2.2.8 *International Convention on the Elimination of All Forms of Discrimination against Women*

The International Convention on the Elimination of All Forms of Discrimination against Women<sup>744</sup> obliges state parties to take all appropriate measures to eliminate discrimination against women in every matter that relates to marriage and “family” relations.<sup>745</sup> The responsibilities and rights of parents are, according to the CEDAW, equal in matters relating to their children, irrespective of the parents’ marital status.<sup>746</sup> In this case, the CEDAW considers the interests of children paramount<sup>747</sup> rather *than promoting a particular family*

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<sup>742</sup> *Ibid.*

<sup>743</sup> Art 18(3): “no child shall be deprived of maintenance by reference to the parent’s marital status”.

<sup>744</sup> Adopted in 1979 and entered into force on the 3 September 1981: accessed from <http://www.hrweb.org/legal/cdw.html> on 2008-06-20. The CEDAW was ratified by South Africa on 1996-01-14. Art 16(1) of the CEDAW provides that: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women -

(d) the same rights and responsibilities as parents irrespective of their marital status, in matters relating to their children; in all cases the interests of children shall be paramount.”

<sup>745</sup> Art 16(1)(d).

<sup>746</sup> *Ibid.*

<sup>747</sup> *Ibid.*

*model for parents.*<sup>748</sup> However, the Committee on the Elimination of Discrimination against Women in 1994 acknowledged the fact that the “family” arrangement in which a child is reared does matter. The Committee proposed that bigamy and polygyny be prohibited for the protection of children’s rights.<sup>749</sup> I am of the view that polygyny does not have negative effects only, but positive ones too. For instance, an orphaned child can be cared for by the wives of his or her father.<sup>750</sup>

### 2.2.3 Foreign jurisdictions

In this section I discuss foreign jurisdictions that define “family”. Amongst others, the Children’s Protection Act (South Australia) defines “family” in relation to a child to mean:

“a child’s immediate family (including all guardians) and the child’s extended family (that is to say, all other persons whom the child is related by blood or marriage) and, in relation to an Aboriginal or Torres Strait Islander child, includes any person held to be related to the child according to Aboriginal kinship rules, or Torres Strait Islander kinship rules, as the case may require”.<sup>751</sup>

The Children’s Protection Act (South Australia) broadened the definition of “family” from what it would have been if the focus was on a nuclear “family” consisting of a husband (male) and

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<sup>748</sup> Own emphasis.

<sup>749</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, 1994, HRI/GEN/1Rev.8, par 39; Hodgkin & Newell (2007) 77.

<sup>750</sup> See the discussion in section 2 2 1 3.

<sup>751</sup> S 6(1).

wife (female). This provision shows that the definition of “family” can be wide. The Child Family and Community Services Act (Canada) does not define “family”.<sup>752</sup> The Act, however, provides that members of extended “family” include kinship care, such as care by grandparents or any persons related by blood, marriage or adoption. This position was also taken in the CRC.<sup>753</sup>

Nigeria has a federal system that recognises various customary marriages<sup>754</sup> because of its diversity in religion and ethnicity. It recognises religious marriages and civil marriages.<sup>755</sup> The age at which persons may marry varies depending on the policies and practice in the region. In the southern parts of the country, the average age of marriage is between 18 and 21, and in the north is between 12 and 15 years. In other instance, girls are given into marriage before puberty,<sup>756</sup> including girls who are as young as nine years.<sup>757</sup> Islam<sup>758</sup> is

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<sup>752</sup> S 2(e).

<sup>753</sup> See the discussion in section 2.2.2.1.

<sup>754</sup> Government of Nigeria 2003, 54-55.

<sup>755</sup> Matrimonial Causes Act (Cap 220), Laws of the Federation of Nigeria 1990; Marriage Act (Cap 218), Laws of the Federation of Nigeria 1990. See Rahmatian “Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzania Experience” 1996 *International Journal of Law, Policy and the Family* 281.

<sup>756</sup> Medical dictionary defines “puberty” as a period of human development in which physical growth and sexual maturation occurs: accessed from <http://medical-dictionary-thefreedictionary.com/puberty> on 2012-08-14.

<sup>757</sup> Government of Nigeria 2003, 55.

<sup>758</sup> Note “Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism” 2004 *Harvard Law Review* 2365; Abdullah “Religious Revivalism, Human Rights Activism and the Struggle for Women’s Rights” in Nigeria in An Na’im (ed.) *Cultural Transformation and Human Rights in Africa* (2002) 157-161.

recognised in Nigeria with respect for constitutional principles of freedom of religion which allows polygyny;<sup>759</sup> this is the case with customary marriages in Nigeria.

Ghana recognizes registered<sup>760</sup> and unregistered<sup>761</sup> customary, civil or Christian<sup>762</sup> and Islamic<sup>763</sup> marriages. However, the Children's Act (Ghana) provides that regardless of the type of marriage entered into, the minimum age of marriage is 18.<sup>764</sup> The Act clearly prohibits forced marriage.<sup>765</sup> Drawing inference from South African experience, I am of the view that it is difficult to enforce this law because not all Ghanaian marriages are registered. Cases that were discussed in South African courts regarding unregistered customary marriages revealed that it is fatal not to register marriage.

Furthermore, those marriages that were not registered were because of ignorance of the law.<sup>766</sup> Like I have recommended for South Africa, Ghana must make the requirement for

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<sup>759</sup> Government of Nigeria 2003, 54. See definition of polygyny in section 2 2 1 3.

<sup>760</sup> Customary Marriage and Divorce (Registration) Law 112 PNDC 1985, see also Woodman "Family Law in Ghana under the Constitution 1992" in Bainham (ed.) *International Survey of Family Law* (2003) 199-200.

<sup>761</sup> *Ibid*, see also Woodman in Bainham (ed.) *International Survey of Family Law* 200.

<sup>762</sup> Marriage Ordinance 1884 (Cap 127).

<sup>763</sup> Marriage of Mahommedans Ordinance 1907 (Cap 129).

<sup>764</sup> 1998, s 14(2), see also Woodman in Bainham (ed.) *International Survey of Family Law* 196-197 and 199-202; Kuenyehia & Ofei-Aboagye "Family Law in Ghana and its Implications for Women" in Kuenyehia (ed.) *Women and Law in West Africa* (1998) 23.

<sup>765</sup> Woodman in Bainham (ed.) *International Survey of Family Law* 298.

<sup>766</sup> Dzidzornu "Human Rights and Widow's Material Security: The Case of the 'Intestate' Ghanaian Widow" (1995) *Law Politics in Asia, Africa and Latin America* 489-521.

registration of marriages compulsory.

Kenya recognises marriage according to custom, religion and civil law. Marriage that is conducted by the Marriage Act, Hindu rites and Divorce Act<sup>767</sup> is monogamous. Christian marriages may be registered under the African Christian Marriage and Divorce Act.<sup>768</sup> Contrary to the latter, marriages contracted under Islamic law are regulated by the Mahommendan Marriage and Divorce Act.<sup>769</sup> The Kenyan law permits a person who is married according to Christian rites or the customary law of any group, to contract an Islamic law marriage.<sup>770</sup> According to Banda,<sup>771</sup> this law in a way prevents situations where people start marrying different women under different laws, thus causing uncertainty as to their marital status. There has also been recognition of what became known as “affidavit marriages”; that is, unions registered with the local authority to enable a couple to obtain state housing. These marriages have similar importance as marriage registered by the state which provide marriage certificate.<sup>772</sup>

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<sup>767</sup> 1960 (Cap 157).

<sup>768</sup> 2008 (Cap 151).

<sup>769</sup> 1962 (Cap 156).

<sup>770</sup> Centre for Reproductive Law and Policy New York *Women of the World Report: Anglophone Africa* (1997) 48.

<sup>771</sup> Banda “Between a Rock and a Hard Place: Courts and Customary in Zimbabwe” in Bainham (ed.) *International Survey of Family Law* (2002) 471.

<sup>772</sup> Kabebiri-Machaira & Nyamu “Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya” in Eekelaar & Nhlapo (eds.) *The Changing Family: Family Forms and Family Law* (1998) 206.

“Families” in Burkina Faso are governed by the Individual and Family Code.<sup>773</sup> This law allows spouses to choose persons they want marry, parties to consent to marriage, and to have their marriage registered.<sup>774</sup> The law provides that men can marry at the age of 20 and women at 17.<sup>775</sup> This marriage is presumed to be monogamous. However, spouses are allowed to agree before the marriage that the husband may marry further wives. This means that the wife has an opportunity to apply and declare any further marriages of her husband null and void. It is questionable though, whether women have used this opportunity, given their economic dependence on men.

This section gives us an idea that there are different legislations that indirectly define “family” in Europe and Africa using various marriage systems. What is common in these jurisdictions is that the laws of these countries acknowledge any structure that is considered by local custom to be marriage or family as such. I recommend that South Africa refer to the South Australian Children’s Protection Act and the Canadian Child Family and Community Services Act and incorporate extended “families”, kinship “families” and other persons regarded to be related to the child in the definition of “family”.<sup>776</sup> These groups of people help children to maintain “family” relationships, and more often, community connections. Furthermore, South Africa must draw lessons from Ghana and outlaw marriages of children below the age of 18. Also, South Africa must learn from Burkina Faso and require compulsory registration of all marriages.

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<sup>773</sup> 1989, see also Government of Burkina Faso (1998) 4.

<sup>774</sup> *Ibid*, 26.

<sup>775</sup> *Ibid*.

<sup>776</sup> See the proposed definition of “family” in section 2 5, “Recommendations and Conclusion”.

## 2.3 Definition of “family care”

In this section, I reflect of the concept “family care” as incorporated in section 28(1)(b) of the Constitution. In particular, I reflect on the aspect of “care” as provided in the Children’s Act applied in case law, and the meaning attached to it, with the purpose of proposing the definition of “family care” in the Children’s Act. Thus, I propose that South Africa must refer to the European jurisdiction and enact a provision on “family care”.

The right to “family care” and “parental care” is entrenched in South Africa’s Constitution.<sup>777</sup> Section 28(1)(b) of the Constitution guarantees every child the “right to family care or parental care, or to appropriate alternative care...”. Section 28(1)(b) forms part of section 28 of the Constitution, which is a special provision that applies to children only.<sup>778</sup>

Different authorities and authors have clarified the objective of the right to “parental care” or “family care” as a shift from the tradition of parental authority and duty of support to parental and family care.<sup>779</sup> On the other hand, the court in *Patel v Minister of Home Affairs*,<sup>780</sup> found

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<sup>777</sup> S 28(1) (b).

<sup>778</sup> Skelton “Constitutional Protection of Children’s Rights” in Boezaart (ed.) *Child Law in South Africa* (2009) 279.

<sup>779</sup> The new move to recognise the parental rights and responsibilities of parents over their children in South Africa began prior to the drafting of the Children’s Act 38 of 2005. In the case of *V v V* 1998 (4) SA 169 (C), the father of the children sought sole custody of his children for, amongst other reasons, the fact that the mother of the children was in a lesbian relationship. Foxcroft J pointed out the fact that over the past years the emphasis in thinking in regard to questions of relationships between parents and their children, often rested with

that the right to “parental care or family care, or to appropriate alternative care...” can serve the purpose of protecting children from actions by the state.<sup>781</sup> In *S v M*<sup>782</sup> the court read

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one authoritarian parent. The child’s rights are paramount and need to be protected. The judge further acknowledged that situations may well arise where the best interests of the child require that action be taken for the benefit of the child, which effectively cuts across the rights of the parent: 179D and 189C. In *Heystek v Heystek* 2002 (2) SA 754 (T) 757E-F, the court considered the shift from parental authority to parental care and family care as provided in s 28(1)(b) of the Constitution in its decision that the father of three step children should pay maintenance for the period of the subsistence of the marriage on the basis of shared responsibility of the spouses in a marriage in community of property. See Clark “From Rights to Responsibilities? An Overview of Recent Developments Relating to the Parent/Child Relationship in South African Common Law” (2002) *C&LJSA* 217: “parental authority is increasingly seen to operate without hierarchical control, the aim is to encourage rather than 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”; Skelton in Boezaart (ed.) *Child Law in South Africa* 285; Skelton “Parental Responsibilities and Rights” in Boezaart (ed.) *Child Law in South Africa* (2009) 64; Van Schalkwyk & Van der Linde “Onderhoudspelig van Stiefouer; *Heystek v Heystek* 2002 2 SA 754 (T)” (2003) *THRHR* 301.

<sup>780</sup> 2000 (2) SA 343 (D): the officials of the Department of Home Affairs arrested and sought to deport an alien who was married to a South African citizen with whom he had children. The court rejected the respondent’s contention that the second applicant was not protected by the Constitution and ordered that the applicant be released from detention: 359-350. More importantly, the court found that the respondent had failed to consider the right of the applicant’s children in terms of s 28(1)(b) to family care and parental care: 350F-G. See Bonthuys & Mosikatsana “Law of Persons and Family Law” 2000 *Annual Survey of South African Law* 128, 152; Skelton in Boezaart (ed.) *Child Law in South Africa* 285.

<sup>781</sup> 350B-C. See also Bonthuys & Mosikatsana (2000) *Annual Survey of South African Law* 152.

<sup>782</sup> 2008 (3) SA 232 (CC); 2007 (2) SACR 539 (CC).



section 28(1)(b) and section 28(2)<sup>783</sup> to best illustrate the intention of the legislature to provide “parental care or family care” to children.

The court concluded that the legislature wants to avoid the breakdown of family life or parental care that may put children at risk.<sup>784</sup> It must be noted that a child cannot exercise the right to “family care or parental care” at the same time as the right to “appropriate alternative care”. It is only in circumstances where the “family” environment or other living conditions become inadequate, causing harm, or with the potential to cause harm to the child, that an option for alternative care may be explored.<sup>785</sup> Thus, I discuss alternative care as a separate topic in the study.<sup>786</sup>

### 2.3.1 *Definition of “family care” in terms of South African law*

In this section I discuss the concept “family care” as it features in section 28(1)(b) of the Constitution. In the discussion I propose that South Africa must refer to the ECHR which provides for the right to “family life”<sup>787</sup> and enact a provision for the definition of “family care” in the Children’s Act.

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<sup>783</sup> It provides that: “A child’s best interests are of paramount importance in every matter concerning the child.”

<sup>784</sup> Par 20.

<sup>785</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South African Law* 163, see ch 1, n 56.

<sup>786</sup> See the discussion in ch 6.

<sup>787</sup> Art 8(1).

There is no express definition of “family care” in South African law. Before I draw inferences on what “family care” means from case law and legislation, I opine that “care” in the context of section 28(1)(b) means that the child is at least entitled in the elements of “care”, as mentioned in section 1 of the Children’s Act, and that this “care” must be provided by the “family” or parent. Secondly, the child must be placed in “alternative care” if removed from “family”; thus, “family” must include these elements of “care” in section 1.

“Care”, that is envisaged by the Children’s Act is within the idea of parental responsibilities and rights shared between both parents of the child. The Children’s Act defines “care” as follows:

- “(a) within available means, providing the child with –
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child’s health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child’s education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
- (f) guiding, advising and assisting the child’s decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development;
- (g) guiding the behaviour of the child in a human manner;

- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and generally ensuring that the best interests of the child is the paramount concern in all matters affecting the child”.<sup>788</sup>

A child must receive “care” “within available means”<sup>789</sup> of the parents. Where the child lives with a custodian parent, both custodian and non-custodian parents have the responsibility to ensure that the child lives in “appropriate accommodation”,<sup>790</sup> in conditions that are conducive to the health and well-being of the child<sup>791</sup> and his or her development<sup>792</sup> and has financial support.<sup>793</sup> The child must be protected from maltreatment, abuse, neglect, degradation, discrimination, physical or emotional exploitation, moral harm or hazards.<sup>794</sup>

“Care” that is provided to a child must also be consistent with the rights of the child enshrined in the Bill of Rights and the principles set out in Chapter 2 of the Children’s Act.<sup>795</sup> The child’s education and upbringing must be guided and secured in a manner appropriate to the child’s age, maturity and stage of development.<sup>796</sup> Guidance, advice and assistance provided to the decisions made by the child must be consistent with the child’s age, maturity and stage of

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<sup>788</sup> S 1(1); see Skelton in Boezaart (ed.) *Child Law in South Africa* 66.

<sup>789</sup> S 1(1)(a) of the Children’s Act.

<sup>790</sup> S 1(1)(a)(i) of the Children’s Act.

<sup>791</sup> S 1(1)(b) of the Children’s Act.

<sup>792</sup> S 1(1)(a)(ii) of the Children’s Act; see the discussion in Skelton in Boezaart (ed.) *Child Law in South Africa* 66.

<sup>793</sup> S 1(1)(a)(iii) of the Children’s Act.

<sup>794</sup> Ss 1(1)(c) and 150(1)(i) of the Children’s Act; see also 28(1)(d) of the Constitution.

<sup>795</sup> S 1(1)(d).

<sup>796</sup> S 1(1)(e).

development.<sup>797</sup> The child's behaviour is to be guided in a humane manner<sup>798</sup> and he or she must maintain a sound relationship with the persons responsible for him or her.<sup>799</sup> A child with special needs must be accommodated and the best interests of the child must be of paramount importance in all matters affecting the child.<sup>800</sup> According to Robinson,<sup>801</sup> "care" for a child suggests that children are vulnerable, and lack maturity of judgement and experience. Therefore the concept "care" denotes that the parent-child relationship is to be defined in terms of "care" that is owed to the child to assist the child to overcome his or her own vulnerability.<sup>802</sup>

The court in *Ww v Ew*<sup>803</sup> held that the term "care" and "custody" corresponds broadly with their common law equivalents. The difference is that the statutory definition is wider than the common law. Because the aspects of "custody" and "access" are shared by "care" and "custody" respectively, it means that the legislature equated "custody" and "care", "access" and "contact". Although the court in *Ww v Ew* found that "custody" and "care", "contact" and "access" can be used interchangeably, it held that it would be preferable for the new terminology to be used in pleadings.<sup>804</sup>

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<sup>797</sup> S 1(1)(f).

<sup>798</sup> S 1(1)(g).

<sup>799</sup> S 1(1)(h).

<sup>800</sup> S 1(1)(i).

<sup>801</sup> (1998) *Obiter* 333.

<sup>802</sup> *Ibid.*

<sup>803</sup> 2011 (6) SA 53 (KZP).

<sup>804</sup> Paras 21, 26, 28, 59F-G, 60E-F and 60I-61A.

Although the concept “custody” is no longer used,<sup>805</sup> since the definition of “care” includes “custody”, it is worthwhile to reflect on how “custody” used to be defined to clarify the rights and responsibilities that parents have towards their children. Van Heerden *et al.*<sup>806</sup> define “custody” as forming part of the parental power, which pertains to the personal life of the child. Spouses who live together share “custody”. Where the *consortium* is terminated either by divorce or separation, “custody” is awarded to one parent, giving the other parent “residuary guardianship”.<sup>807</sup> In this arrangement, the rights, powers, and responsibilities of the custodian parent are defined.

According to Solomon J in *Simleit v Cunliffe*,<sup>808</sup> an award of “custody” to a parent entrusts to

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<sup>805</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 65-66. The difference between “custody” and “care” is that when a parent has custody this meant that the child lived with such a parent, and that the custodial parent made most of the day-to-day decisions relating to the child. The definition of care is broader, in that it spells out the various facets of caring for a child. It includes financial support, promoting the well-being of the child, promoting his or her rights and guiding and directing the child. Clearly, some of the tasks relating to care do not fall solely on the parent with whom the child lives. It must be remembered that the idea of parental responsibilities and rights is that these are to be shared. Thus, both of the parents have a responsibility to ensure that the child has a suitable place to live in conditions that are conducive to the child’s health, well-being and development. Whilst the parent with whom the child lives, both parents will contribute financially to the child having a suitable place to live. In similar vein – both parents should maintain a sound relationship with the child, no matter who the child lives with. So whilst the term custody is now subsumed into the term care, the term care encapsulates a broader concept.

<sup>806</sup> “Personal Proprietary Aspects of the Parental Power” (eds.) in *Boberg’s Law of Persons and the Family* 661.

<sup>807</sup> *Ibid.*

<sup>808</sup> 1940 TPD 67.

him or her all that is meant by the nurturing and upbringing of the minor child. This includes all that makes up the ordinary, daily life of the child; shelter, nourishment, and the training of the child's mind. The child must find all that is necessary to its growth in mind and body.<sup>809</sup> The custodian parent has the right and duty to regulate the life of the child, determining the persons that the child should associate with, how the child should be educated,<sup>810</sup> the type of religious training the child should receive, and how the health of the child should be provided for. The non-custodian parent has no right to interfere with these responsibilities but has the right to approach the court in the event the custodian parent has exercised his or her rights contrary to the interests of the child.

In the event that the custodian parent waives his or her "custody" of the child, "custody" will remain with such parent until the competent court orders otherwise.<sup>811</sup> The court may order that "custody" be restored to the other parent. In the event of death of the custodian parent, the court may restore "custody" to the surviving parent if the court is satisfied that the surviving parent is able to carry out such responsibility.<sup>812</sup>

In terms of the decision to vary a "custody" order, the court in the case of *Jackson v*

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<sup>809</sup> 75-76.

<sup>810</sup> *Mentz v Simpson* 459D-F. Custody includes the determining as to whether the child should go to a boarding school, receive tertiary training on condition that the decision made by the custodian parent does not unreasonably burden the non-custodian parent with an obligation to provide maintenance to the child.

<sup>811</sup> *Coetzee v Singh* 1996 (3) SA 153 (D).

<sup>812</sup> *S v Lewis* 1987 (3) SA 24 (C) 26B-C.

*Jackson*<sup>813</sup> had to decide whether it was in the best interests of the child that “custody” be varied. The court decided that it was not in the best interests of the child to vary the order.<sup>814</sup> The court took this decision on the basis that there had been no real separation between the mother and the children, and that the parents had an almost equal parenting role.<sup>815</sup> Scott JA argued that the father was in the first place given “custody” on the basis that the mother and the children must maintain the existing relationship.<sup>816</sup>

The application of section 1(1)(e) of the Children’s Act on the definition of “care” is seen in *Kotze v Kotze*.<sup>817</sup> The court in the *Kotze* case was considering a settlement agreement in a divorce where the parents undertook to ensure that subsequent to their divorce their three-year old son must be educated in a specified church. The settlement read as follows: “Both parties undertake to educate the minor child in the Apostolic Church and undertake that he will fully participate in all the religious activities of the Apostolic Church.”<sup>818</sup> Fabricius AJ took

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<sup>813</sup> 2002 (2) SA 303 (SCA): the court awarded custody of 2 girls to their father and access rights were given to their mother. When the parties were still married, they decided to immigrate with their daughters to Australia. Six months after the parties were divorced the respondent (mother) still wanted to emigrate but eventually changed her mind for personal reasons which had nothing to do with the welfare of the children: 308E. The appellant (father) applied for a variation of the custody order so that he could emigrate with the 2 girls to Australia. See the discussion in Davel & Boniface “Cross-Border Relocation of Children and Custodial Parent *Jackson v Jackson* 2002 2 SA 303 (SCA)” (2003) *THRHR* 138.

<sup>814</sup> 320C.

<sup>815</sup> 321C.

<sup>816</sup> 318F-G.

<sup>817</sup> 2003 (3) SA 628 (T).

<sup>818</sup> 629E.

cognisance of the fact that although a child may be subject to parental control, the child is entitled to education, which may involve participating in a religion of whatever form.

According to Fabricius AJ, the religion must firstly, not deprive the parents of the right to educate, monitor the child's educational progress and make appropriate adaptations.<sup>819</sup> The religion must, secondly, not place the child under obligation, which effectively deprives him or her of the right to declare his or her religious belief or the absence of same, openly without fear and constraint.<sup>820</sup> In examining the best interests of the child, the court concluded that the child's right to freedom of religion, belief and opinion would be unduly jeopardised by such an agreement. The court found that the clause predetermines the child's future and places on him constraints from which he may never be freed. In consequence, the court modified the clause.<sup>821</sup> The court in the *Kotze* case varied the agreement entered into by parents in order to secure the best interests of the child, which were regarded by the court as paramount.<sup>822</sup>

Labuschagne *et al.*<sup>823</sup> criticised the *Kotze* decision, arguing that in some way or another, religion is inherently part of most human beings. The practice, value and place of religion is

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<sup>819</sup> 632A.

<sup>820</sup> 632G.

<sup>821</sup> 631.

<sup>822</sup> 628F.

<sup>823</sup> "Parental Rights to Participate in a Child's Personality Development and its Religious and Moral Upbringing and the Child's Right to Freedom of Choice: Observance on the Field of Tension Caused by the Irrational in a Human Rights Dispensation" (2004) *Obiter* 48.



taught “at the mother’s knee”, within family gatherings, at church or a shrine as a meeting place for like-minded people. The authors view religion as a practice that starts at home. Religious upbringing is primarily seen as the responsibility of the parents. The authors are of the opinion that judges should regard religion as “an important, if not an indispensable, factor in custody cases” rather than eliminating it.<sup>824</sup> According to Labuschagne *et al.*,<sup>825</sup> parents have the right and the duty to participate in the development of their children’s personality, value system, spiritual, moral and religious well-being as long as it is in the best interests of the children.

Labuschagne *et al.*<sup>826</sup> argue that while religious beliefs are relevant in determining the best interests of the child, a court cannot use religious beliefs to disapprove of parental decisions except where a parental decision, premised on religious tenets, manifests a total disregard for the welfare of the child. The authors found it difficult to conceive how the clause in the agreement might have undermined the rights of the child unless the clause was meant to bind the child throughout his childhood. According to Labuschagne *et al.*,<sup>827</sup> to aver that it is a constitutional principle that a child should grow up in a religious vacuum is tantamount to state interference in the private practice of religion.

Parental guidance in the area of religion, like other aspects of the upbringing of children, cannot be seen as indoctrination by parents. The same applies to teaching children to follow

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<sup>824</sup> (2004) *Obiter* 50.

<sup>825</sup> (2004) *Obiter* 51.

<sup>826</sup> (2004) *Obiter* 52.

<sup>827</sup> (2004) *Obiter* 55.

a particular work schedule when they come back from school. This cannot be classified as indoctrination, but the zeal by parents to encourage their children to follow a particular routine. I submit that there is certainly no doubt that the intention of the parents in the *Kotze* case in incorporating a clause on religion in the agreement was not to place constraints on the child which would limit the freedom of the child when he reaches maturity. Incorporating the clause about religion in the agreement does not guarantee the fact that the child will end up following the religious path chosen by the parents. The child has an opportunity when he reaches maturity to either affirm the religion chosen by the parents or choose his own.

When it comes to issues of religious persuasion within the family and the role of the parents, as was evident in *Allsop v McCann*,<sup>828</sup> that the courts have to allow some degree of accommodation. However, this does not mean that parents have complete discretion over their children. Instead, at all times the guiding principle should be what is in the best interests of the child.<sup>829</sup>

The term “care” has now a broader meaning in the Children’s Act compared to “custody” as previously incorporated in the Child Care Act. “Custody” was used in terms of court orders in relation to the person who would have “custody” of the child. The improvement made by the Children’s Act regarding the two concepts is to expand the meaning of “care” to include “custody”. “Care” spells out the different ways of caring for the child and makes the “care” of the child a shared responsibility between the parents. The definition of “care” was

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<sup>828</sup> 2001 (2) SA 706 (C) 715.

<sup>829</sup> (2004) *Obiter* 55.

appropriately thought of in that a person with responsibilities and rights to “care” for the child may not easily abdicate himself or herself from the responsibilities that are explicit in the Children’s Act, nor avoid responsibility for reasons that he or she in a non-custodian parent.

The Children’s Act<sup>830</sup> has, amongst other objectives, to give effect to the constitutional right of children (in terms of section 28(1)(b)); namely, “family care or parental care or appropriate alternative care when removed from the family environment”. This provision demonstrates the importance of “family” and the “care” it provides to children. However, the Children’s Act fails to provide a definition of “family care”. The legislature was, in this case, presented with a golden opportunity to define “family care” but it omitted to do so. This implies there is reluctance on the part of the legislature to provide a definition of “family” or “family care”. As discussed, the Children’s Act defines “care”.

The right to “family care” as entrenched in the Constitution seems *loaded*.<sup>831</sup> It reads like a right that may be unpacked to find other rights linked to it, such as the right to “care” for the child which includes provision of basic nutrition, health care, social security, protection from abuse, neglect and maltreatment, and the right to shelter, education and other needs.<sup>832</sup> These rights are entrenched in separate provisions in the Constitution but incorporated in a single clause in section 1 of the Children’s Act.

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<sup>830</sup> S 2(b)(i).

<sup>831</sup> Own emphasis.

<sup>832</sup> Amongst others, s 26, 27, 28(1)(c),(d) and s 29.

It would have been more valuable if these rights formed part of the provision on the right to “family care”<sup>833</sup> as the definition of “family care” would be easily inferred from them. Sloth-Nielsen<sup>834</sup> holds a similar view that the rights to basic nutrition, shelter, basic health care services and social services must be read in the right to “family care” or “parental care”, or “appropriate alternative care” when removed from the family environment. She adds that the right to “parental care” and “family care” ensures that children receive proper parental or familial care and alternative care in the absence of “parental or family care”.<sup>835</sup> The socio-economic rights encapsulate the scope of care that children should receive in society.<sup>836</sup>

Cockrell<sup>837</sup> does not define the concepts “family care” or “parental care” but notes that with regard to the concepts, that the Constitution does not protect a right on the part of parents to “family life” but the child’s right to “family care or parental care”, which “in no way entrenches the parental power as a constitutional right on the part of parents”.<sup>838</sup> Sloth-Nielsen<sup>839</sup> is of the view that “family care” may be understood as “care” provided by a unit, persons, group of persons, or members of a “family” of a child. Once more, this view is similar to the provision in section 1.

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<sup>833</sup> S 28(1)(b).

<sup>834</sup> (2001) SAJHR 225, see also *Grootboom* case par 76.

<sup>835</sup> *Ibid.*

<sup>836</sup> *Ibid.*

<sup>837</sup> “The Law of Persons and the Bill of Rights” in *Bill of Rights Compendium* (1996) par 3E12.

<sup>838</sup> *Ibid.*

<sup>839</sup> (1995) SAJHR 406.

The Constitution guarantees every child the right to “family care” but fails to provide a clear definition of the right, thus leaving the interpretation of the right to “family care” to the courts. The aforementioned argument is evident in the case of *Dawood* where the court overlooked the necessity to define a “family” and instead decided the matter on the basis of the fact that the primary right that is implicated in the *Dawood* case is human dignity.<sup>840</sup> This position was taken by the Constitutional Court because the situation in *Dawood* concerned the ability of an individual to achieve personal fulfilment in an aspect of life that is of central importance.<sup>841</sup> In this case, the court recognised right to “family life”, in so far as spouses have the right to live together as a man and wife.<sup>842</sup> Sloth-Nielsen<sup>843</sup> argues for the right to “family life” with the view that the omission of the right to “family life” in the Constitution is of little importance in the light of, amongst others, the *Dawood* judgment, which dealt with the importance of “family life”. The Constitutional Court in *Dawood* supported the judgment of the lower court, which derived the right to “family life” from the right to dignity provided in section 10 of the Constitution.<sup>844</sup> In my opinion, this means that “family care” includes the right to “parental care” and the “human dignity” of the child as the court recognised the link between the

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<sup>840</sup> 962E.

<sup>841</sup> 963A. The constitutional obligation to respect the institution of “family” has been read into s 10 (the right to human dignity) by the Constitutional Court.

<sup>842</sup> The applicants made an application for an order for an immigration permit. S 25(9)(b) of the Aliens Control Act states that an immigrant permit can only be issued if the applicant concerned is outside of the Republic at the time of the authorisation of the permit except if the applicant is in possession of a temporary residence permit at the time of the authorisation.

<sup>843</sup> In Cheadle *et al.* (eds.) *South African Constitutional Law: The Bill of Rights* 510.

<sup>844</sup> *Dawood* 837.

three.<sup>845</sup> O' Regan in *Dawood* took cognisance of the fact that states are obliged in terms of international law to protect the right of persons to marry and freely raise a "family".<sup>846</sup> The Constitutional Court supported the argument by the lower court that the right to dignity implies that protection should be given to the institutions of marriage and "family life".

*Booyesen v Minister of Home Affairs*<sup>847</sup> reaffirmed the *Dawood* decision in that the applicants in *Booyesen* argued that section 26(2)(a) and section 26(3)(b) of the Aliens Control Act<sup>848</sup> are not consistent with the Constitution. Section 26(2)(a) provides that a spouse who is a foreign national seeking work in South Africa must apply for a work permit outside the country and not enter the country until the permit has been issued.<sup>849</sup> Section 26(3)(b) provides for the issuing of work permits to spouses of South Africans if they are not likely to pursue an occupation in which a sufficient number of persons are available in South Africa to meet the requirement.<sup>850</sup>

In the proceedings of the High Court the applicants argued that the consequences of section 26(2)(a) were to disrupt their "family life" and impede the possibilities of them living together and giving each other marital support.<sup>851</sup> The Constitutional Court supported the orders

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<sup>845</sup> 957H.

<sup>846</sup> Par 28.

<sup>847</sup> 2001 (7) BCLR 645 (CC).

<sup>848</sup> 96 of 1991.

<sup>849</sup> 646G.

<sup>850</sup> 647H-I.

<sup>851</sup> 647D.

made by the High Court in part, by suspending section 26(3)(b) for 12 months to enable parliament to pass legislation to correct the inconsistency,<sup>852</sup> and by ordering that the respondent must finalise any application made by the foreign non-resident spouse of a South African permanent resident for the issue or extension of a work permit within thirty days.<sup>853</sup>

In the *In Re: Certification* judgment, the Constitutional Court the court was very cautious not to constitutionalise the right to “family life”, nor to take a position on whether the “family” to be protected was a nuclear or an extended “family”.<sup>854</sup> The court looked at various international instruments on human rights which “expressly protect the right to family life”<sup>855</sup> and concluded that it is the state’s responsibility to protect “family life” without providing a proper definition of it.

According to Robinson,<sup>856</sup> the words “any tradition” as entrenched in the Constitution<sup>857</sup> convey that the right of the child to “family care” extends beyond the nuclear family to the extended family. The provision on the right to “family care” appears first, before the right to “parental care”, which may be construed to mean that the right to “family care” attaches more weight than “parental care”.<sup>858</sup> I am of the view that part from enacting a provision for “family

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<sup>852</sup> 649I-J.

<sup>853</sup> 650F.

<sup>854</sup> 744 par 99.

<sup>855</sup> 1253 par 97.

<sup>856</sup> (1998) *Obiter* 333.

<sup>857</sup> S 15(3)(a)(i). See the discussion in section 2 2 1 2.

<sup>858</sup> Robinson (1998) *Obiter* 333.

care”,<sup>859</sup> inferences must be drawn from case law and legislation that applied the concept “family care”, “family life” and related terms such as “family responsibilities”, on what “family care” entails. For instance, the Equality Act<sup>860</sup> defines “family responsibility” as a concept that applies in relation to a complainant spouse, partner, dependent, child or other members of the family *who are owed the duty of care and support*.<sup>861</sup>

Robinson<sup>862</sup> is of the view that section 28(1)(b) should have not only protected the “family” as an institution, but also the right of parents to care for the child and educate their children collaboratively with the duty of the state to watch over a parent’s exercising of his or her right. Contrary to Robinson’s argument, I did not expect the Constitution and the Equality Act to provide a definition of “family care” or “family responsibility”. Instead, definition of concepts such as, “family responsibility” and “family care” in relation to children would be more valuable if provided by a children’s statute, given the obligation of care and support owed to children by parents. I also support the idea that the responsibilities of children should be placed with parents, as emphasised in Article 5 of the CRC. However, parental responsibility should be prioritised and the child’s right to safety and education<sup>863</sup> must be the role carried out by the state, in the event parents lack such capacity.

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<sup>859</sup> See the proposed provision in section 2 5.

<sup>860</sup> See the discussion in section 2 2 1 2.

<sup>861</sup> Chapter 1(xi).

<sup>862</sup> “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 Policy of Apartheid” (1995) *Obiter* 99; Van der Linde (2001) 337-338.

<sup>863</sup> Van der Linde (2001) 339.



Judgments that found that children do not have a special status in the Bill of Rights used the “best interests of the child” principle to argue for the status the child holds in section 28 of the Constitution; including the right to “family care”. In *Howells v S*<sup>864</sup> the court considered in its sentencing the appellant’s personal circumstances, particularly the interests and needs of her minor children.<sup>865</sup> The court considered the constitutional injunction that “a child’s best interests are of paramount importance in every matter concerning the child”<sup>866</sup> and the constitutional right of every child “to family care or parental care, or to appropriate alternative care when removed from the family environment”.<sup>867</sup> According to the court in *Howells*, the children’s interests would best be served by a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act<sup>868</sup>

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*,<sup>869</sup> Epstein AJ held that:

“a child’s best interests ... is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable”.<sup>870</sup>

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<sup>864</sup> 1999 2 ALL SA 233 (C).

<sup>865</sup> 239F.

<sup>866</sup> S 28(2) of the Constitution. See the discussion in section 5.5.

<sup>867</sup> 239G-H. See s 28(1)(b) of the Constitution.

<sup>868</sup> 51 of 1977.

<sup>869</sup> 2003 (3) SA 389 (W). See the discussion by Currie & De Waal (2005) 600-610.

<sup>870</sup> Par 10.

The Constitutional Court overruled this view in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*<sup>871</sup> by saying that if it is said that section 28(2) of the Constitution “trumps” other rights in the Bill of Rights, then it is foreign to the approach adopted by the Constitutional Court, in that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.<sup>872</sup>

### 2.3.2 Definition of “family care” in terms of international law

There is no provision on the right to “family care” in the CRC. The CRC provides for, amongst other responsibilities of parents and legal guardians, the duty to ensure that a child grows in a family,<sup>873</sup> and the primary duty for the upbringing and development of the child.<sup>874</sup> The discussion on “family life” in terms of the European jurisdiction<sup>875</sup> provided us with the essential elements of “family life”; namely, the right of parent and child to mutual enjoyment of each other’s company and everything that entails. I therefore recommend that South Africa refer to same to add to the definition of “care” in section 1 of the Children’s Act.<sup>876</sup>

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<sup>871</sup> 2004 (1) SA 406 (CC).

<sup>872</sup> Par 55.

<sup>873</sup> As provided in the Preamble of the CRC.

<sup>874</sup> *Ibid.* These provisions are discussed in the next section, under the topic “parental care”.

<sup>875</sup> See the discussion in section 2 2 2 2 3.

<sup>876</sup> See the discussion in section 2 5 for the proposed provision for the fundamental elements of “family care”.

## 2.4 Definition of “parent” and “parental care”

In this section I discuss the definition of a parent and parental care, as recognised in the Children’s Act. The definition of “parent” will assist the study with regard to persons with an obligation to provide for the parental responsibilities and rights of the child. The discussion on the definition of “parental care” will provide details as to what “parental care” entails in the context of section 28(1)(b) of the Constitution and the Children’s Act, with regard to the aspect of “contact”, “maintenance” and “guardianship”. The definition on “parental care” will also assist the study in determining the responsibilities of the parents to provide for the child and situations where the state may be required to assist in the event parents fail. In the discussion, I propose that a provision be enacted in the Children’s Act for *equal* responsibilities and rights of the parents in relation to the child.<sup>877</sup>

### 2.4.1 Definition of “parent”

The South African Schools Act<sup>878</sup> defines a “parent” as the custodian of the child by operation of the law, the guardian of the learner<sup>879</sup> or the person other than the parent legally entitled to the custody of the learner.<sup>880</sup> According to the Children’s Act, a “parent” in relation to a child

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<sup>877</sup> See the discussion in section 2.5.

<sup>878</sup> See ch 1, n 13.

<sup>879</sup> S 1(a).

<sup>880</sup> S 1(b).

includes adoptive parents.<sup>881</sup> This means the definition of “parent” may not be confined to biological parents only.<sup>882</sup> This is so in that adoption bestows full parental responsibilities and rights upon adoptive parents in respect of an adopted child.<sup>883</sup>

In *McCall v McCall*,<sup>884</sup> the definition of “parent” was found important as it recognises the ability (of a person(s) labelled as parent(s)) to provide the child with emotional, psychological, cultural and environmental development. The non-custodian parent of a learner in the case of *Fish Hoek Primary School v GW*<sup>885</sup> contended that he is not liable for the payment of outstanding school fees of the learner. The court relied on the proper interpretation of the definition of “parent” in section 1 of the South African Schools Act<sup>886</sup> to establish liability on the part of the non-custodian parent. The court held that it matters not whether or not the non-custodian parent is married to the mother of the child (this also speaks to an unmarried

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<sup>881</sup> S 1(1): (a) the definition of “parent” excludes the biological father of a child conceived through rape; (b) any person related to a child as a result of gamete donor for purposes of artificial fertilization; and (c) a parent whose parental responsibilities in respect of a child have terminated.

<sup>882</sup> *Heystek* case 404.

<sup>883</sup> S 20 of the Child Care Act and s 242(1) of the Children’s Act have the same legal effect in terms of an adoption order. An order of adoption terminates all parental responsibilities and rights the child had immediately before adoption. This includes the rights and any claim of contact the child had in respect of the person who had parental responsibilities and rights over the child.

<sup>884</sup> 205, looked at the capacity of a parent in relation to the best interests of the child.

<sup>885</sup> 332G, see ch 1, n 130.

<sup>886</sup> The provision defines a parent as “(a) parent or guardian of the learner; (b) the person legally entitled to the custody of the learner; or (c) the person who undertakes to fulfil the obligations of the person referred to in (a) and (b) towards learner’s education of school”.

biological father). I am of the view that the legislature has chosen a far wider definition of “parent” to include persons not comprehended by its plain meaning.

#### 2.4.2 Definition of “parental care” in terms of South African law

The rights of parents are diminishing with the emergence of children’s rights. Sinclair<sup>887</sup> is of the opinion that the development of children’s rights entails a shift in our law from parental power to “parental responsibility”. The change is also visible in the South African Constitution in its deviation from the common law notion of parental authority,<sup>888</sup> and parental power to “parental responsibility” and children’s rights. The modern trend in the parent-child relationship focuses on the rights and interests of children rather than parents.<sup>889</sup> Thus the rights of children found expression in the Constitution, including the right of the child to “parental care”<sup>890</sup> and the fact that parental rights are to be decided in the light of the best

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<sup>887</sup> In Davel (ed.) *Children’s Rights in Transitional Society* 62.

<sup>888</sup> Robinson (1998) *Obiter* 333.

<sup>889</sup> *V v V* 176C-D. Foxcroft J stated that over the past years emphasis with regard to the relationships between parents and children has shifted from the concept of parental power of parents to parental responsibilities 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 not to mention a wide range of international conventions”. See also Van Heerden *et al.* “Personal and Proprietary Aspects of the Parental Power” in *Boberg’s Law of Persons and the Family* (1999) 658.

<sup>890</sup> S 28(1)(b).

interests of the child.<sup>891</sup>

The Constitution provides for the right to “parental care”, “family care” or “appropriate alternative care” in a single section, although the Interim Constitution provided for the right to “parental care” only.<sup>892</sup> This means that the right of the child to “parental care” as a fundamental right has constitutional protection.<sup>893</sup> Another view with regard to the latter is discussed later in this section in *Jooste v Botha*.<sup>894</sup>

The right to “parental care” as entrenched in the Constitution recognises the common responsibility of parents by virtue of them being parents and provides the child with the right to “parental care” and “not maternal care”.<sup>895</sup> According to *Stassen v Stassen*,<sup>896</sup> a parent who has been given custody of the child is also given certain competencies. These competencies enable the parent to discharge his or her responsibilities and exact obedience from the child. According to *Schmidt v Schmidt*,<sup>897</sup> maintenance does not only comprise the basic necessities of life such as food, clothing and shelter, but includes education and care in sickness and the child must be provided with all things required for his or her upbringing. In

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<sup>891</sup> S 28(2); *Bennett Customary Law in South Africa* 311.

<sup>892</sup> S 30(1)(b).

<sup>893</sup> S 28(1)(b); Heaton “Family Law and the Bill of Rights” in *Bill of Rights Compendium* (1996) 3C54; Mosikatsana “Children’s Rights and Family. Autonomy in the South African Context: A Comment on the Children’s Rights under the Final Constitution” (1998) *MJR&L* 376.

<sup>894</sup> 2000 (2) SA 199 (T); 2000 (2) BCLR 187 (T).

<sup>895</sup> Sinclair in Davel (ed.) *Children’s Rights in a Transitional Society* 71-72.

<sup>896</sup> 1998 (2) SA 105 W 107.

<sup>897</sup> 1996 (2) SA 211 (W) 220B.

*Jooste v Botha*,<sup>898</sup> it was decided that:

“It follows that in the sub-section the word ‘parental’ must necessarily be read as pertaining to a custodian parent ... Thus interpreted the non-custodian legitimate parent and the natural father of an illegitimate child (who does not have custody) fall outside the scope of section 28(1)(b).”<sup>899</sup>

The view in the *Jooste* judgment was criticised as it is contrary to the access that is sought by non-custodian parents where biological parenthood is put on the same footing with legal parenthood, and in cases where the courts seek to protect a family unit which includes non-custodian parents.<sup>900</sup> The court held in *Jooste* that neither the common law nor the Constitution compel the unmarried father to afford the child love, attention and affection.<sup>901</sup> Van Dijkhorst J said that the father of the child does not have a greater responsibility to his natural offspring, other than to provide for the child’s material welfare if he was not married to

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<sup>898</sup> 280F-G: An 11 year-old child of an unmarried father sued his father for damages: 201H-I. Since the plaintiff’s birth, the defendant had neither admitted that the plaintiff was his son, shown interest in the child, communicated with the child nor given him love and recognition:201 H. It was argued that the defendant is under a legal duty to render love, attention, affection and interest to the plaintiff as may be expected from a father with respect to his natural son: 201I. Furthermore, the defendant has the duty to protect the plaintiff and his welfare: 202A.

<sup>899</sup> See Van der Linde (2001) 82 and 334.

<sup>900</sup> Currie & De Waal (2005) 608; Pieterse “Reconstructing the Private/ Public Dichotomy? The Enforcement of Children’s Constitutional Social Rights and Care Entitlements” (2003) *TSAR* 1; Bonthuys “The South African Bill of Rights and the Development of Family Law” (2002) *SALJ* 748.

<sup>901</sup> 209H.

the mother of the child.<sup>902</sup> Exploring different provisions in the Constitution<sup>903</sup> that could be implicated in the *Jooste* case, Van Dijkhorst<sup>904</sup> concluded that there is no legal obligation on the part of parents to love their legitimate offspring and so there is none on the side of illegitimate ones.

The court further argued that the unmarried father must maintain the child and specifically indicated that this duty to maintain the child does not create the right to access or parental authority.<sup>905</sup> Van Dijkhorst held that the reference to “parental care” as provided in the Constitution refers to a child in the care of somebody with custody of the child and that the word “parental” must appropriately be read as referring to a custodian parent. Since the unmarried father in *Jooste* case had never performed any care function in relation to the child

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<sup>902</sup> 202E.

<sup>903</sup> 202G-206A. The Judge reflected on both the Interim and final Constitution, amongst other rights. The following rights were explored: s 8 which states that the Bill of Rights applies to all law and binds the Legislature, Executive and the Judiciary and all organs of state and that it binds natural or juristic persons 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. The provision further 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 to limit the right consistent with s 36 and s 8(3)(a)-(b) of the Constitution; to determine the rights of the child unmarried parents against his divorced non-custodian father. The court reflected on s 9(1): which guarantees everyone the right to equality which includes full and equal enjoyment of all rights and freedoms; s 9(3): lists the grounds upon which a person may be discriminated against, including, birth. The court has to reflect on s 28(1)(b) in determining whether the right that every child has to family care and parental care is a right that applies horizontally or a right that may be claimed against persons and whether the father is a parent within the meaning of s 28(1)(b).

<sup>904</sup> 206F-G.

<sup>905</sup> 206H.



he was not a “parent”.<sup>906</sup> I agree with Van der Linde<sup>907</sup> that this position has a negative influence on the right of the child to “parental care”. Despite the decision in *Jooste*, in the case of *Allsop*,<sup>908</sup> the Cape Provincial Division held that the right to “parental care” also applies to a non-custodian parent.<sup>909</sup>

Van Zyl and Bekker<sup>910</sup> criticise Van Dijkhorst<sup>911</sup> by stating the fact that the judge persisted in referring to the plaintiff as an “illegitimate child” in a society where children are no longer regarded as “illegitimate” in the sense of being born from illicit relationships, is not a conduct to be ignored. The authors were concerned about the choice of words used by the judge to deal with the relationship between parents and their children in that “it has moral purposive, social and legal implications” and that it is insensitive to today’s society to maintain a distinction between so-called “legitimate” and “illegitimate” children.

It is also out of line with current legal development, both inside and outside of South Africa. If the premise is illegitimacy, the judge may easily reach a conclusion on grounds that are misled. I submit, like Van Zyl and Bekker, that the judge was insensitive in using the word “illegitimate”, which does not only discriminate against children of unmarried fathers but has

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<sup>906</sup> Sloth-Nielsen (2002) *IJCR* 143.

<sup>907</sup> (2001) 335.

<sup>908</sup> 2001 (2) SA 706 (C).

<sup>909</sup> 713G-H.

<sup>910</sup> (1999) *De Jure* 151-153.

<sup>911</sup> “*Jooste v Botha* Case no 1554/1999 (T) unreported”; see also (2000) *De Jure* 149.

a derogatory meaning. Van Zyl and Bekker<sup>912</sup> argue that although another court may have reached the conclusion that the plaintiff is not entitled to damages, the reasons given by the court are not a fair reflection of the legal principles involved. They add that although the moral basis for actions such as damages for alienation of affection may be declining, there is increasing awareness that children need appropriate legal protection.

Van Zyl and Bekker analysed the words of the judge that “neither common law nor our statutes recognise the right of a child to be loved, cherished, comforted or attended by a non-custodian parent as creating a legal obligation”. The authors argue that it is not clear why the court did not use section 28 of the Constitution, realising that the matter had to be decided upon on the basis of section 28, in that “the Constitution contains many open-ended standards and principles”. They argue further that the judges should be sensitive in determining whether the infringement of the right gives rise to a claim for damages or other appropriate relief.

Van Zyl and Bekker criticise the fact that the judge found that the non-custodian parent does not fall within the scope of the term “parent” in terms of section 28(1)(b). They argue that the CRC *simply*<sup>913</sup> refers to “parents”, which means that “illegitimacy” was not a consideration. Although a child may receive day-to-day care from one parent, this does not mean that a non-custodian parent does not have a duty of care. With regard to the issue of “access”, the authors also point out that the word “access” can be misleading and that other countries use

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<sup>912</sup> *Ibid.*

<sup>913</sup> Own emphasis.

the term “*omgangsrecht*” and “*umgangsrecht*” which mean “a right of association”. Thus, “access” means more than visiting the child.

The court stated that the concept “family” in terms of the CRC is the normal bonded custodial relationship. The authors argue that the idea of “parental care” is mentioned repeatedly in the CRC<sup>914</sup> and that the court has in this case used a selective approach. Van Zyl and Bekker maintain that there is no substance in limiting the word “parent” and that in “access”, “custody” and adoption matters, the rights of the unmarried father are recognised. Lastly, the court stated that the plaintiff is too young to have an understanding of the details of the matter at hand. The authors argued that this is a blunt statement for which there is no support in the judgment, and that the statement implies that the child was staged to institute the action.

Van Zyl and Bekker are of the opinion that the child’s opinion must bear weight, depending on the maturity of the child, and that children often have sound views regarding their family relations.

I am of the view that the opinion by Van Dijkhorst in *Jooste*, that reference to the word “parental” as provided in the Constitution, must be read as referring to a custodian parent,<sup>915</sup>

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<sup>914</sup> Art 7(1) states that a child has the right to know and be cared for by his or her parents. On the same note, Art 9(3) states 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.

<sup>915</sup> 208F-G.

is misplaced. The word “parental” applies to any person who is a parent of the child, whether married, divorced or unmarried. The term also applies to a care-giver who may not biologically be related to the child. Thus, I argue that when parents live separately, the non-custodian parent must continue to enjoy the right to participate in decision-making processes concerning the child, and to maintain contact with the child whilst the child lives with a custodian parent. I submit that it was certainly not the intention of the Constitution to discriminate against “parents” with regards to their responsibilities and rights over the child. Otherwise, such exclusion may be against the best interests of the child.<sup>916</sup> In relation to the child, I am of the view that the child has the right to know and be cared for by his or her parents. I opine further, that in the event the child is separated from one or both parents, he or she 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.<sup>917</sup>

The term “parent” or “parental care” is used lightly in “living” customary law.<sup>918</sup> In terms of South African culture, a child owes respect to members of the family, relatives, the community or any members of society he or she lives in by order of seniority. Any person (related or not related to the child) who is older than the child must receive respect from the child and in that relation, a parent to the child, even though he or she does not provide any duty of care and support to the child. In terms of “living” customary law, a parent is therefore not necessarily defined by biological relations; neither is he or she defined by the

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<sup>916</sup> S 28(2) of the Constitution.

<sup>917</sup> See the section 7 3.

<sup>918</sup> Bekker & Maithufi “The Dichotomy between ‘official customary law’ and non-official customary Law” (1992) *JJS* 47-60.

responsibility a person has towards the child.

In terms of official customary law, the natural father of the child does not have absolute rights over the child, except by marrying the mother.<sup>919</sup> However, most systems of customary law allow the natural father to obtain parental rights if the natural father has tendered a consideration to the child's guardian.<sup>920</sup> The consideration paid by the natural father is the payment of seduction damages.<sup>921</sup> The definition of such consideration varies from one ethnic group to another.<sup>922</sup> In Zulu and Xhosa culture, the consideration is called *isondlo*, in Tswana it is *dikotlo*.<sup>923</sup> The consideration may be set off against any amount ordered by a maintenance court.<sup>924</sup>

The court granting an order of termination of a registered domestic partnership may,<sup>925</sup> with regard to the maintenance and education of the dependent child of the registered partnership<sup>926</sup> and the custody or guardianship of, or access to a minor child of the registered

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<sup>919</sup> *Montjoze v Jaze* 1914 AD 144, 152: in this case the court held that marriage was the only way in which an unmarried father of a child could acquire custody. The court held further that as the unmarried father had never been willing to marry the woman, the Native High Court erred in giving him custody.

<sup>920</sup> Bennett (2004) 310.

<sup>921</sup> *Ibid.*

<sup>922</sup> *Ibid.*

<sup>923</sup> Bennett (2004) 312.

<sup>924</sup> Bennett (2004) 316.

<sup>925</sup> See the discussion in section 2 2 1 5.

<sup>926</sup> S 16(5)(a) of the Domestic Partnership Bill.

domestic partnership, make any order it deems fit in the best interests of the minor child.<sup>927</sup>

The Bill allows a partner or both partners to an unregistered domestic partnership to apply to the court for a maintenance order, intestate succession order, or division of estate after the termination of the partnership.<sup>928</sup> When making the order, the court must have regard to all the circumstances that may be relevant. This includes care and support of the children of an unregistered domestic partnership.<sup>929</sup>

In South Africa, the notion of “parental care” is closely connected to “parental responsibilities and rights”. There is no provision on “parental care” in the Children’s Act. Instead the Act<sup>930</sup> reflects on the concept “parental responsibilities and rights” rather than “parental care”. The ratification of the CRC and the enactment of section 28 of the Constitution set the pace for replacing concepts such as, “parental power” and “parental authority” with “parental responsibilities and rights”.<sup>931</sup> The concept “parental responsibilities and rights”, highlights the importance of the responsibilities of parents over their children instead of rights. The rights that parents have over their children, are, in essence, the role that parents are expected to play in the lives of children rather than the power<sup>932</sup> that is vested or imposed

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<sup>927</sup> S 16(5)(b) of the Domestic Partnership Bill.

<sup>928</sup> S 26(1).

<sup>929</sup> S 26(1)(f) of the Domestic Partnership Bill.

<sup>930</sup> S 18.

<sup>931</sup> *V v V 191B*, see Louw (2009) 37.

<sup>932</sup> “Parental power” is in terms of the common law defined as “the complex of rights, powers, duties and responsibilities vested in parents, see Van Heerden “Judicial Interference with Parental Power: The Protection of Children in Van Heerden *et al.* (eds.) *Boberg’s Law of Persons and the Family* (1999) 313.

upon parents by virtue of their parenthood with regard to their children and the property which their children have.<sup>933</sup> The term “parental responsibilities and rights” corresponds broadly with “parental authority”.<sup>934</sup> The concept includes four elements; that is, the right to (a) care for the child,<sup>935</sup> (b) maintain contact with the child,<sup>936</sup> (c) to act as a guardian of the child,<sup>937</sup> and (d) to contribute to the maintenance of the child.<sup>938</sup> Thus, the Children’s Act use terms such as, “care” and “contact”, even though it did not abolish the previously used common law terms of “custody” and “access”.<sup>939</sup>

The element of “care”, within the broader concept of “parental responsibilities and rights” is as discussed in the section dealing with “family care”.<sup>940</sup> I will therefore discuss the element of “contact”, “guardianship” and “maintenance” in this section. The Children’s Act<sup>941</sup> uses the term “contact” rather than the previously used term “access” as another element of “parental rights and responsibilities”.<sup>942</sup>

“Contact”, as an element of “parental rights and responsibilities” denotes maintaining a

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<sup>933</sup> *Ibid*, see also Sinclair in Davel (ed.) *Children’s Rights in Transitional Society* 62.

<sup>934</sup> *LB v YD* 2009 (5) SA (T) par 37.

<sup>935</sup> S 18(2)(a): the element of “care” is discussed in the previous section.

<sup>936</sup> S 18(2)(b).

<sup>937</sup> S 18(2)(c).

<sup>938</sup> S 18(2)(d).

<sup>939</sup> I refer to *WW v EW* par 30, that the use of both the common law terms and the Children’s Act’s, would not be wrong but that it should be avoided.

<sup>940</sup> See the discussion in section 2 3 1.

<sup>941</sup> S 1(1).

<sup>942</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

personal relationship with the child.<sup>943</sup> The concept “contact” may be established by way of reflecting on the scenario of a custodian parent who lives with the child. The person who does not live with the child must communicate with the child on a regular basis,<sup>944</sup> including visiting the child<sup>945</sup> or being visited by the child.<sup>946</sup> Communication may also be done through the post or any electronic communication.<sup>947</sup>

The Appeal Court in the case of *B v S*<sup>948</sup> considered the right of an unmarried father to have an inherent “access” to a child. The court held that there are sound sociological and policy reasons for granting an unmarried father an inherent right of “access” to his child.<sup>949</sup> In the *Townsend-Turner* case, the court reflected on the “access” right of the unmarried father and stated that the legislature had not granted an unmarried father an inherent right of “access”. The unmarried father could only be given “access” if he applied to the court to have such right given to him.<sup>950</sup> The court also acknowledged the important role played by grandparents in the development of a child.<sup>951</sup> Thus, the court argued that an interested third party might approach the court for “access” to the child if such “access” is in the interests of the child.<sup>952</sup>

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<sup>943</sup> S 1(1)(a) of the Children’s Act.

<sup>944</sup> S 1(1)(b) of the Children’s Act.

<sup>945</sup> S 1(1)(b)(i) of the Children’s Act.

<sup>946</sup> S 1(1)(b)(ii) of the Children’s Act.

<sup>947</sup> S 1(1)(b)(ii)(aa)-(bb) of the Children’s Act. See the discussion in section 7 3 1.

<sup>948</sup> 1995 (3) SA 571 (A).

<sup>949</sup> 579I-J.

<sup>950</sup> 41.

<sup>951</sup> 43E.

<sup>952</sup> 45A-B.



Bonthuys and Mosikatsana,<sup>953</sup> in their comments regarding *Jooste*, point out that if the law can create and protect relationships between children and parents by awarding “access” rights to non-custodian parents, then there is no reason why it cannot do so by awarding similar rights to children.

It is by no means the case that “access” is awarded only to unmarried fathers who have already established relationships with their children. If children will benefit by having “access” to their fathers at the request of their fathers, the same ought to occur where children request contact.<sup>954</sup> These are, amongst others, arguments that lead to the development of the concept “contact”. Unlike “access” which was the right of the parent to have “access” to a child, “contact” is child-centred.<sup>955</sup>

The concept “contact” as incorporated in the Children’s Act focuses on the right of the child and parent to maintain “contact” with each other. “Access” as applied during the operation of the Children’s Act, was used to enforce the right of the non-custodian parent to have “access” to the child. “Contact” is not limited to physical contact; the parent and the child have different options to have “contact” with each other. The Children’s Act also allows for “contact” between the child and the biological parent as part of a post-adoption agreement.<sup>956</sup>

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<sup>953</sup> *Hlophe v Mahlalela* 1998 (1) SA 449 (T) 458E-F and 459C; see Bonthuys & Mosikatsana “Law of Person and Family Law Reform: Children and Child Care” 2000 *Annual Survey of South African Law* 152.

<sup>954</sup> Bonthuys & Mosikatsana 2000 *Annual Survey of South Africa* 152.

<sup>955</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

<sup>956</sup> See the discussion in section 8 4 2 6.

I opine that the Children’s Act has appropriately improved the law for children in relation to “contact” with their parents. However, there is still room for more improvement with regard on how the state must support the right of the child and the parent to have “contact” with each other.<sup>957</sup> The Children’s Act also omitted to provide a procedure that would enable the parent or guardian of the child to make an application for a post-adoption order.<sup>958</sup> Thus, I propose for provisions that will give effect to same later in the study.<sup>959</sup>

Furthermore, the Children’s Act ensures that the child enjoys “care” and “contact” from persons who are interested in the care, well-being or development of the child. Heaton<sup>960</sup> argues in terms of section 23 of the Children’s Act that persons who may have interest in the care, well-being or development of the child may be, amongst others, the child’s unmarried father, grandparents and a parent’s life partner. Such persons may approach, amongst others, the High Court, (in terms of divorce matter) or the children’s court for a “contact” or “care” order. However, when considering the application, the court must take into account the following factors:

“(1) the best interests of the child; (2) the relationship between the applicant and the child, and any other relevant person and the child; (3) the degree of commitment that the applicant has shown towards the child; (4) the extent to which the applicant has contributed to expenses in connection with the birth and maintenance; and (5) any other fact that should,

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<sup>957</sup> See the discussion in section 7 3.

<sup>958</sup> See the discussion in section 8 4 2 6.

<sup>959</sup> See the discussion in sections 7 5 and 8 5.

<sup>960</sup> *The South African Family Law* (2010) 289-290.

in the opinion of the court, be taken into account”.<sup>961</sup>

“Guardianship” forms part of the element of parental responsibilities and rights. The Children’s Act has repealed the Guardianship Act and made provision for the guardianship of the child in section 18(3). Previously, a father who was married to the mother of the child had “guardianship” and the mother of the child of an unmarried father also had “guardianship”.<sup>962</sup>

According to the Children’s Act, the biological mother of the child, whether married or not, has full “parental responsibilities and rights” in respect of the child.<sup>963</sup> If the biological mother of the child is unmarried and does not have “guardianship” and the biological father of the child does not have “guardianship” in respect of the child, the Act confers “guardianship” of the child on the guardian of the biological mother.<sup>964</sup>

During the operation of Guardianship Act,<sup>965</sup> “guardianship” was shared between the father and mother of the child whether the child was born within marriage or outside marriage.<sup>966</sup> The Children’s Act<sup>967</sup> now grants a parent or any person who acts as a guardian of the child the responsibility to administer and safeguard the child’s property and property interests.

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<sup>961</sup> S 23(2)(a)-(e) of the Children’s Act.

<sup>962</sup> *Ibid.*

<sup>963</sup> S 19(1) of the Children’s Act; Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

<sup>964</sup> S 19(2) of the Children’s Act; Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

<sup>965</sup> See ch 1, n 10.

<sup>966</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

<sup>967</sup> S 18(3)(a); Skelton in Boezaart (ed.) *Child Law in South Africa* 67.

The parent or guardian of the child is entrusted with the duty to assist or represent the child in administrative, contractual and other legal matters.<sup>968</sup>

The parent or guardian must refuse or give consent in respect of the child in situations where consent is sought to the child's marriage;<sup>969</sup> adoption;<sup>970</sup> the removal of the child from the Republic;<sup>971</sup> application for a passport;<sup>972</sup> and disposal or encumbrance of any immovable property belonging to the child.<sup>973</sup> If the child has more than one guardian, each guardian is competent to exercise his or her right independently and without the consent of the other. The consent of all persons who are guardians of the child may, if necessary, be sought by the court in matters pertaining to section 18(3)(c). Apart from guardianship that may be provided by parents or another person who acts as a guardian of a child, Van Zyl J stated in *Girdwood v Girdwood*<sup>974</sup> that the High Court as an upper guardian of all minor children has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that the interests of children are effectively served and safeguarded. No agreement between the parties can encroach on the authority that the court has over such children.<sup>975</sup>

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<sup>968</sup> S 18(3)(b) of the Children's Act.

<sup>969</sup> S 18(3)(c)(i) of the Children's Act.

<sup>970</sup> S 18(3)(c)(ii) of the Children's Act.

<sup>971</sup> S 18(3)(c)(iii) of the Children's Act.

<sup>972</sup> S 18(3)(c)(iv) of the Children's Act.

<sup>973</sup> S 18(3)(c)(v) of the Children's Act.

<sup>974</sup> 1995 (4) SA 678 (C).

<sup>975</sup> 708J.

The Children’s Act expressly makes “guardianship”, including consent that is required from a parent with regard to matters concerning the child, a shared responsibility between parents. This marks another improvement in the area of child law. Previously, “guardianship” resided with the father of the child born inside marriage or the mother of the child born outside marriage. I submit that since “guardianship” is a parental responsibility and right that entails, amongst others, granting of consent to key decisions concerning the child, it is proper for the Children’s Act to provide for the joint consent of parents in such matters.

“Maintenance” is expressly considered as an element of “parental responsibilities and rights of parents”.<sup>976</sup> “Maintenance” is considered as an issue for automatic acquisition of parental responsibilities and rights.<sup>977</sup> In situations where parents are divorced or unmarried and no longer living together, the Maintenance Act<sup>978</sup> is applicable to regulate the responsibility to maintain the child. The court in the case of *Mentz v Simpson*<sup>979</sup> found that “maintenance” might mean proper living and upbringing according to the means of the parents, standard of living and station in life. The obligation to maintain the child applies to parents jointly.

The court in the case of *Mngadi v Beacon Sweets and Chocolates Provident Fund*<sup>980</sup> decided that section 26 of the Maintenance Act did not deal with amounts which became due in the

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<sup>976</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 68.

<sup>977</sup> S 21(1)(b)(iii) and s 23(2)(d) of the Children’s Act; Skelton in Boezaart (ed.) *Child Law in South Africa* 68.

<sup>978</sup> 99 of 1998.

<sup>979</sup> 1990 (4) SA 455 (A) 457J and 458.

<sup>980</sup> 2004 (5) SA 388 (D).

future but with arrear “maintenance”.<sup>981</sup> The court also referred to section 37A(1) of the Pension Funds Act<sup>982</sup> and held that the provisions of the Act (section 37A (1)) apply to the payment of future “maintenance”.<sup>983</sup> The court ordered the payment of the pension with the retention of a withdrawal benefit of the third respondent in order to provide for the “maintenance” of the child.

The *Heystek v Heystek*<sup>984</sup> judgment recognised the responsibilities and rights of a non-custodian parent. The Acting Judge in *Heystek* analysed the issue of “parental care” and the person it relates to.<sup>985</sup> The Acting Judge stated that the right to “parental care” is not confined to natural parents but extends to stepparents, adoptive parents and foster parents.<sup>986</sup> The court in *Heystek* found that a stepparent is obliged to maintain a stepchild in terms of section 28(1)(b) and (c) of the Constitution.

Van Schalkwyk and Van der Linde<sup>987</sup> discuss the case of *Heystek* with regards to the maintenance requirement of stepparents, and point out the argument raised in *Wilkie-Page v*

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981 392F.

982 24 of 1956.

983 396E-397B.

984 2002 (2) SA 754 (T) 757B-C and G: The court was aware of s 28(1)(b) and the fact that there is a shift from the tradition of parental authority and the duty of support to parental and family care. Thus, it decided that the stepfather of three children should pay maintenance for the period the marriage subsists based on the shared responsibility of the spouses in a marriage in community of property.

985 757C-D.

986 757C-D and F. See also the discussion in section 2 4 2.

987 (2003) *THRHR* 301.

*Wilkie-Page*<sup>988</sup>, that the duty of support owed by the mother who is in a marriage in community of property to the child becomes a charge upon the joint estate of the mother and the stepfather who is liable in terms of civil law by reason of his administration and control of the common purse.<sup>989</sup> Thus, the stepfather becomes civilly liable by reason of his administration and control of the common purse.<sup>990</sup> The court argued that a man who marries a woman who has a child, whether the child is biologically related to the man who is marrying the mother of the child or not, if the man resides with the child, he normally stands in loco parentis.<sup>991</sup> Contrary to the above argument, the court in *Wilkie-Page* found that there is a complete lack of any relationship in law between the unmarried father and his biological child.<sup>992</sup>

In *Heystek Patel* AJ relied on the fact that “...the inevitable concomitant of a marriage in community of property is the shared responsibility for both spouses for the maintenance of the common household, which in this case, certainly includes the applicant’s children since the respondent had and has consortium with the children’s mother...” Whilst the marriage survives, the consortium prevails. “In the circumstances, the respondent<sup>993</sup> is to provide maintenance for the applicant even if portion of the maintenance is utilized for the

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<sup>988</sup> 1979 (2) SA 258 (R).

<sup>989</sup> 259H.

<sup>990</sup> *Heystek* 259G-H, see also Van Schalkwyk & Van der Linde (2003) *THRHR* 302.

<sup>991</sup> *Heystek* 262C-D.

<sup>992</sup> 261D.

<sup>993</sup> Stepfather of the child.

children”.<sup>994</sup> The notion of “parental care” is “...the child’s right to basic nutrition, shelter and basic health care services and social services...”<sup>995</sup> Patel AJ argued that:

“... the constitutional notion of parental care and the paramountcy of the best interests of the child require an attitudinal shift from an antiquated Germanic parent and child relationship, which formed the foundation of the common law, to the rights of the child, which includes parental care and family care. Common law needs to be aligned to serve the constitutional imperatives of the child in a heterogeneous democratic society. In the final analysis, by virtue of s 8(1) of the Constitution, the Court as the upper guardian of every child in this country must be mindful of the child’s rights since the shift is from the tradition of parental authority and the duty of support to parental and family care”<sup>996</sup>

The *Jooste* case is similar to *Grootboom*, which enforced the rights of children to live with members of their families. The Constitutional Court in *Grootboom* held that the rights entrenched in section 28(1)(b) of the Constitution impose a duty which rests primarily on parents or family and only alternatively on the state if parents fail to provide such responsibility.<sup>997</sup> Section 28(1) of the Constitution clearly depicts the state’s power and resources that can implement these rights.<sup>998</sup> Section 28(1)(b) primarily intends, according to

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<sup>994</sup> *Heystek* 756I-757B, see Van Schalkwyk & Van der Linde (2003) *THRHR* 304.

<sup>995</sup> *Ibid.*

<sup>996</sup> *Ibid.*; see also Van Schalkwyk & Van der Linde (2003) *THRHR* 306.

<sup>997</sup> Par 77. Although the case of *Grootboom* was about s 28(1)(c), that is, the right of the child “to basic nutrition, shelter, basic health care services and social services”, the court found in terms of s 28(1)(b) that parents have the responsibility to provide care to their children. The state may assist parents in the event that parents are not capacitated to execute same. See also Van der Linde (2001) 342.

<sup>998</sup> Robinson (1995) *Obiter* 99; Van der Linde (2001) 338.



*Jooste*, to preserve a healthy parent-child relationship in the family environment against unwarranted legislative, executive and administrative acts of state that interfere with the delivery of “parental care” or any action that seeks to separate children from parents.<sup>999</sup>

The court in *Grootboom* held the view that section 28(1)(b) defines those responsible for “providing care” to children and section 28(1)(c) “lists a number of entitlements to care”.<sup>1000</sup> In terms of the *Grootboom* case, the extent of the responsibility of the state to provide “parental care or family care” is to take steps to ensure that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children.<sup>1001</sup> This means that children have the right to have their socio-economic needs met firstly by their families.<sup>1002</sup> Where children are not living with their parents or families, the state has the direct responsibility for their socio-economic needs.<sup>1003</sup> The court in *Grootboom* reflected its view of section 28(1)(c) in an analysis of parental responsibilities towards the upbringing of children,<sup>1004</sup> and opined that:

“Through legislation and the common law, the obligation to provide shelter in ss (1)(c) was imposed primarily on the parents or family and only alternatively on the state. The

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<sup>999</sup> *Ibid*, see also Sloth-Nielsen in Cheadle *et al.* (eds.) *South African Constitutional Law: The Bill of Rights* 512.

<sup>1000</sup> *Grootboom* par 76; see also the discussion by Sloth-Nielsen in Cheadle *et al.* (eds.) *South African Constitutional Law: The Bill of Rights* 512; Van der Linde (2001) 342.

<sup>1001</sup> Par 75.

<sup>1002</sup> See Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 110.

<sup>1003</sup> See ch 4 regarding the extent of state obligation in providing socio-economic rights of children.

<sup>1004</sup> Sloth-Nielsen in Cheadle *et al.* (eds.) *South African Constitutional Law: The Bill of Rights* 510.

subsection therefore did not create any primary State obligation to provide shelter on demand to parents and their children if children were being cared for by their parents or families. The State did, however have to provide the legal and administrative infrastructure necessary to ensure that children were accorded the protection contemplated by s 28 and its obligation in this regard would normally be fulfilled by passing laws creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation and other forms of abuse and in addition providing families with access to land, adequate housing and services.”<sup>1005</sup>

Pieterse<sup>1006</sup> criticises *Grootboom* by arguing that the effect of the *Grootboom* judgment is to confine claims for basic survival necessities that pertain to children to the private sphere, leaving the public sphere intact to perform what is labelled “neutral, capacitating and non-interventionist functions”. Pieterse<sup>1007</sup> further submits that the *Grootboom* decision, whose consequence may be that the state may abdicate its social responsibility towards children with parents, is contrary to the objective of section 28 and damaging to the founding values of the Constitution. Pieterse compares the decisions reached in *Grootboom* and *Jooste* and states that in the *Grootboom* case the court held that according to section 28(1)(c) the rights must be understood as ancillary to section 28(1)(b), the right to parental care, whereas in *Jooste* parental care is characterised as a socio-economic right. Pieterse<sup>1008</sup> states that the court in *Jooste* was unwilling to extend the existing duties “beyond traditional confines”.

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<sup>1005</sup> 51G-H.

<sup>1006</sup> “Reconstructing the Private/Public Dichotomy? The Enforcement of Children’s Constitutional Social Rights and Care Entitlements” (2003) *TSAR* 15-17.

<sup>1007</sup> *Ibid.*

<sup>1008</sup> (2003) *TSAR* 14-16.

According to Currie and De Waal<sup>1009</sup> the *Grootboom* judgment relegates the duty to provide economically to parents and the *Jooste* judgment<sup>1010</sup> limits these rights by implying that section 28 applies vertically against the state.<sup>1011</sup> Robinson<sup>1012</sup> argues that section 26 of the Constitution provides that everyone the right to have access to housing and section 27 provides everyone with the right to have access to health care services, sufficient food, water and social security. All these rights require the state to take reasonable steps to provide access on a programmatic and co-ordinated basis subject to the availability of resources.<sup>1013</sup> Robinson<sup>1014</sup> finds the right to “family care” and “parental care” different from section 26 and section 27 rights, in that the state is, in terms of section 28(1)(b), not directly responsible to provide “family care” and “parental care”.<sup>1015</sup>

If the state was directly responsible, the implication would be that the common law right of parents and the customary law right of families as institutions of first responsibility towards the child would be disregarded.<sup>1016</sup> However, the state incurs a primary obligation where children are removed from or lack a family environment; that is, where they are orphaned or

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<sup>1009</sup> 612-613.

<sup>1010</sup> 205E.

<sup>1011</sup> *Ibid.*

<sup>1012</sup> (1998) *Obiter* 336.

<sup>1013</sup> *Grootboom* 78, see also Van der Linde (2001) 343.

<sup>1014</sup> (1998) *Obiter* 336.

<sup>1015</sup> *Ibid.*

<sup>1016</sup> *Ibid.*

abandoned.<sup>1017</sup> The *Jooste* judgment also resulted in the fact that children who do not have parents are in a better position to claim from the state than children with parents who are poor.<sup>1018</sup>

Van der Linde<sup>1019</sup> is also of the view that where children are not living with their parents or families, the state has the direct responsibility for their socio-economic needs. Where parents lack the capacity to meet the needs of their children, the state has the responsibility to make such provision.<sup>1020</sup> The above arguments were criticised in that they encourage families in a poverty-stricken environment to abandon children since that is the only way to establish responsibility on the part of the state.<sup>1021</sup>

Sloth-Nielsen<sup>1022</sup> reflected on municipal policies on child protection and raises concerns as to whether a “constitutional socio-economic rights” analysis derived from the *Grootboom* judgment can be of assistance. Sloth-Nielsen<sup>1023</sup> acknowledges the argument that the CRC rights must be interdependent, inter-related and indivisible. She reflects on the reporting requirements made by the Committee on the Rights of the Child for every state party to report on topics of special relevance. Amongst others, these topics include: “Basic Health

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<sup>1017</sup> *Grootboom* par 77, see also Sloth-Nielsen in Cheadle *et al.* (eds.) *South African Constitutional Law: The Bill of Rights* 514.

<sup>1018</sup> Par 613.

<sup>1019</sup> In Verschraegen (ed.) *International Family Law: Family Finances* 110.

<sup>1020</sup> *Ibid.*

<sup>1021</sup> Sloth-Nielsen (2001) *SAJHR* 230.

<sup>1022</sup> (2001) *SAJHR* 210.

<sup>1023</sup> (2001) *SAJHR* 216.

and Welfare”, “Family Environment and Alternative Care” and “Special Protection Measures.”<sup>1024</sup> The section “Basic Health and Welfare” entails the child’s right to survival and development.<sup>1025</sup> “Family Environment and Alternative Care” requires state parties to adhere to Articles 19(1) and (2) and 39<sup>1026</sup> of the CRC, which pertain to parental guidance and responsibilities.<sup>1027</sup> In this regard, Sloth-Nielsen<sup>1028</sup> finds that the responsibilities of parents and families with regard to children are linked to the protection of children against abuse and neglect.

Although the case of *Grootboom* concerns the right to shelter rather than social services, some conclusions about the scope, content and enforceability of the right to social security and social assistance can be inferred from the reasoning of the court.<sup>1029</sup> Given the judgment and reasoning, the Constitutional Court had to consider the relationship between everyone’s right to housing and the child’s right to shelter. The court ruled that there was an overlap between section 26 and 27 of the Constitution, which creates the right of access to socio-economic rights for everyone and section 28, which concerns the rights of children alone.<sup>1030</sup> It was found that section 28(1)(c) did not create a direct and enforceable claim upon the state to provide shelter on demand to parents and their children if children are being cared for by

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<sup>1024</sup> South Africa’s initial Country Report towards the “United Nations Convention on the Rights of the Child” in November 1997, see ch 1, n 18.

<sup>1025</sup> Sloth-Nielsen (2001) *SAJHR* 216.

<sup>1026</sup> The obligation to promote recovery and reintegration.

<sup>1027</sup> Sloth-Nielsen (2001) *SAJHR* 217.

<sup>1028</sup> *Ibid.*

<sup>1029</sup> Sloth-Nielsen (2001) *SAJHR* 224.

<sup>1030</sup> Par 74.

their parents.<sup>1031</sup> Sloth-Nielsen<sup>1032</sup> argues that section 28(1)(c) must be understood in the context of the primary duty which parents owe to their children.

The court in the *Grootboom* judgment held that the right of the child in terms of section 28(1)(c) must be ascertained within the confines of the socio-economic rights entrenched in section 25(5), 26 and 27 of the Constitution.<sup>1033</sup> These sections oblige the state to take reasonable legislative and other measures to foster conditions within the available resources to achieve these rights.<sup>1034</sup> Heaton<sup>1035</sup> finds that the above sections overlap and hold that because of this, the Constitutional Court found that section 28(1)(c) does not create a separate and independent right for children. The constitutional scheme for progressive realisation of socio-economic rights would make little sense if it is trumped in every case by the rights of children to shelter from the state on demand and that “[c]hildren could become stepping stones to housing for their parents instead of being valued for who they are”.<sup>1036</sup>

Section 28 differs from section 26 of the Constitution in that there is no qualification of the constitutional rights as they appear in section 26(2).<sup>1037</sup> A child has the right to “parental care” or “family care” in the first place, and the right to appropriate alternative care when that

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<sup>1031</sup> Par 77. See the discussion by Sloth-Nielsen (2001) *SAJHR* 224-225.

<sup>1032</sup> *Ibid.*

<sup>1033</sup> Par 74.

<sup>1034</sup> *Ibid.*

<sup>1035</sup> *The South African Family Law* (2010) 273.

<sup>1036</sup> *Grootboom* par 71. This is discussed in detail in ch 4.

<sup>1037</sup> *Grootboom v Oostenberg Municipality* 290D; Van der Linde (2001) 341.

is lacking.<sup>1038</sup> The state must provide the legal and administrative infrastructure to ensure the protection of section 28. This requirement will be fulfilled by passing laws and enforcing mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect and the prevention of other forms of abuse stipulated in section 28.<sup>1039</sup> I submit that the responsibility of the state in assisting parents to perform their parental rights and responsibilities is also clearly spelled out in the Children's Act, and that the statute must be implemented by organs of state in the national, provincial and local sphere of government where appropriate.<sup>1040</sup>

The Act further tasks the three organs of the state to use their maximum resources to ensure that the objects of the Act are fulfilled.<sup>1041</sup> Van der Linde<sup>1042</sup> argues that despite the constitutional obligation on the part of the state to fulfil the fundamental rights of individuals, the state's responsibility has in most cases been enforced to the extent of the availability of resources.

According to Van der Linde,<sup>1043</sup> the programmes that are implemented by the state are intended to prevent the recurrence of problems that may harm children or affect their

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<sup>1038</sup> *Ibid.*

<sup>1039</sup> *Ibid.*

<sup>1040</sup> S 4(1). See the discussion in section 4 1 1.

<sup>1041</sup> S 4(2). See the discussion in section 4 1 1.

<sup>1042</sup> In Verschraegen (ed.) *International Family Law: Family Finances* 110; s 27(2) of the Constitution.

<sup>1043</sup> In Verschraegen (ed.) *International Family Law: Family Finances* 103.

development in the family environment. These express the importance of the preservation of the family structure and the responsibility of the state to intervene *in time* to prevent the removal of children from families.

### 2.4.3 Definition of “parental care” in terms of international law

#### 2.4.3.1 United Nations Convention on the Rights of the Child

The CRC replaces the concept of parental authority with parental rights and duties<sup>1044</sup> or parental responsibilities.<sup>1045</sup> Several articles in the CRC express the primary responsibility of parents and place restrictions on intervention by the state in the event of separation of children from their parents. Hodgkin and Newell<sup>1046</sup> are of the view that Article 5 must be read in conjunction with, amongst other Articles, 3(2), 7, 9, 10, 18, 20 and 27 of the CRC. According to the CRC, state parties are obliged to ensure that the child receives protection and care in accordance with his or her well-being and that due regard must be had to the rights and duties of parents and legal guardians or any persons responsible for the child.<sup>1047</sup> The CRC also states that: “... the child shall ... as far as possible, have the right to know and be cared for by his or her parents”.

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<sup>1044</sup> Art 5; Sloth-Nielsen (1995) *SAJHR* 405.

<sup>1045</sup> Hodgkin & Newell (2007) 79. The concept “parental responsibilities” is also used in the Children’s Act.

<sup>1046</sup> (2007) 75 and 97.

<sup>1047</sup> Art 3(2). See the discussion in section 4 1 2.



This Article acknowledges the primacy of parents and legal guardians for the upbringing and development of children and to determine that the best interests of the child will be their basic concern.<sup>1048</sup> Other Articles, which affirm that both parents of the child have common responsibilities for the upbringing and development of the child, provide as follows:

“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 guardian, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”<sup>1049</sup>

This implies a more active involvement by both parents, including the absent parent, rather than simply paying maintenance for the child. The CRC also identifies the relationship between the state, family and child.<sup>1050</sup> It does so by imposing a duty on the state to respect the rights and duties of parents to provide direction to the child when the parents exercise their rights.

Parents are expected to exercise their rights in a manner consistent with the evolving

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<sup>1048</sup> Art 7(1); Hodgkin & Newell (2007) 108; Sloth-Nielsen (1995) *SAJHR* 402.

<sup>1049</sup> See Art 18(1). According to Bainham & Cretney in Bainham *A Children-The Modern Law* (1998) 95, parents have by virtue of their title as “parents”, the right to care for and support their children, hence their participation in the development and growth of children is viewed as a right rather than a role.

<sup>1050</sup> Art 5. See also the discussion in section 2 2 2 1.

capacities of the child.<sup>1051</sup> The inclusion of the latter statements in the Article<sup>1052</sup> has the potential for conflict;<sup>1053</sup> that is, between the interests of the child and the interests of the adult members of the family who are required to use their best efforts to ensure the recognition of the principles of their common responsibilities for the upbringing and development of the child.<sup>1054</sup>

Article 18(1) endorses the principle that both parents have joint responsibilities for caring for their children, appropriately supported by the state.<sup>1055</sup> Article 18(1) seems to suggest that the parents of the child would be a father and a mother, as it appears to exclude legal guardians, extended relatives and other persons who may care for the child. The right to be cared for by parents is qualified by the words “...as far as possible ...”.<sup>1056</sup> It may not be possible if the parents are dead or are repudiating or have repudiated the child. It may also not be possible for the parents to care for the child if they are abusive or neglectful, and thus the onus is on the state to prove this.<sup>1057</sup>

Furthermore, the CRC requires state parties to provide assistance to parents and legal

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<sup>1051</sup> Art 5 of the CRC.

<sup>1052</sup> Art 18(1).

<sup>1053</sup> Sloth-Nielsen (1995) *SAJHR* 401.

<sup>1054</sup> Art 18(1).

<sup>1055</sup> See Baiham & Cretney (1998) 95.

<sup>1056</sup> Hodgkin & Newell (2007) 108.

<sup>1057</sup> Hodgkin & Newell (2007) 109.

guardians in their child rearing responsibilities.<sup>1058</sup> These responsibilities include parental care, love, happiness, stability in the family, adequate nutrition, housing, medical care etc. The state is required to ensure the development of institutions, facilities and services for the care of children.<sup>1059</sup>

State parties are also obliged to recognise the right of the child to a standard of living adequate for the child's development.<sup>1060</sup>

Hodgkin and Newell are of the opinion that:

“[The] State should respect the primacy of parents in promoting the child's well-being and support them by reducing circumstances which prevent them from fulfilling their responsibilities. Parenting may impact negatively if parents are under material or psychological stress, are neglectful, abusive or inconsistent, or there is conflict between parents.”<sup>1061</sup>

The CRC obliges state parties to curb separation between the child and his or her parents

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<sup>1058</sup> Art 18(2); Bainham & Cretney (1998) 87. According to Eekelaar, children also have developmental interests which may be claimed from the state and the community.

<sup>1059</sup> Art 18(2) provides that: “For the purpose of guaranteeing and promoting the right set forth in the present Convention, 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 the child.”

<sup>1060</sup> Art 27(1): This Art refers to the child's physical, mental, spiritual and social development. See the discussion in section 4 1 2.

<sup>1061</sup> (2007) 243.

against their will<sup>1062</sup> and provides that where there is separation, the rights of the child and parents to maintain personal relations and direct contact on a regular basis must be respected.<sup>1063</sup> Hodgkin and Newell point out that in other circumstances it may be necessary to separate the child from both parents or from one of them.<sup>1064</sup> Separation of the child from parents is appropriate when parents have abused or neglected the child, or when the parents live apart.<sup>1065</sup>

The responsibilities and rights of parents also include the duty to provide direction to the child in the exercise of religion, thought and conscience.<sup>1066</sup> Thus, the CRC requires that parents be respected for their role in ensuring that their children receive religious and moral education that conforms with their own convictions and is consistent with the evolving capacities of the child.<sup>1067</sup> I am of the view that since the responsibilities and rights of the biological mother and married fathers are clearly articulated in the Children's Act, it is important that the automatic rights of the unmarried father to provide guidance, nurture and participate in major decisions concerning the child be incorporated in the Children's Act, in accordance with the statements in the CRC as discussed. Thus, I propose that detailed

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<sup>1062</sup> Art 9(1).

<sup>1063</sup> Art 9(3); Art 10: is concerned with the right to family reunification of children whose parents are involved in entering and leaving a country. The CRC requires state parties to deal with family reunification in a humane and expeditious manner and allow children and parents to visit each other when they live in different states. See also Hodgkin & Newell (2007) 135.

<sup>1064</sup> (2007) 122.

<sup>1065</sup> *Ibid.*

<sup>1066</sup> Art 14(1).

<sup>1067</sup> Art 14(2).

regulations on the exact content and scope of parental responsibilities and rights of unmarried fathers be promulgated in the Children's Act.<sup>1068</sup>

#### 2.4.3.2 *The African Charter on the Rights and Welfare of the Child*

The ACRWC provides that in all actions concerning the child, which actions are undertaken by any person or authority, the best interests of the child shall be of paramount consideration.<sup>1069</sup> According to the ACRWC, parental responsibilities for the child are, amongst others, the upbringing and development of the child.<sup>1070</sup> Parents have the duty "to secure, within their abilities and financial capacities, conditions of living necessary to the child's development".<sup>1071</sup> Furthermore, the ACRWC also requires state parties:

"... in accordance with their means and national conditions the all appropriate measures; (a) to assist parents and other persons responsible for the child and in the case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing; (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of child; and (c) ensure that children of working parents are provided with care

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<sup>1068</sup> See the discussion in section 2 5.

<sup>1069</sup> Art 4: this clause acknowledges the fact that a person, guardian, state or any person responsible for the child may take an action on behalf of the child. See also Art 20(1)(a) which provides that parents shall have the duty to ascertain that the best interests of the child are their basic concern on all occasions.

<sup>1070</sup> Art 20(1).

<sup>1071</sup> Art 20(1)(b).

services and facilities”.<sup>1072</sup>

Thus, the ACRWC primarily imposes on parents to provide for the upbringing and development of their children.<sup>1073</sup> The states are only responsible to provide assistance to parents. The responsibility imposed on states to provide such assistance is on condition of their means.<sup>1074</sup> The ACRWC has a specific provision focusing on parental care and protection which includes the right of the child to reside with his or her parents.<sup>1075</sup> Every child is entitled to parental care and protection and shall not be separated from his or her parents but shall whenever possible reside with his or her parents.<sup>1076</sup> A child who is separated from his or her parents has, according to the ACRWC, the right to maintain relations and contact with the parents.<sup>1077</sup> If the contact between the child and parent(s) is a result of the action of the state, the state party shall provide the child or a family member, where appropriate, with information regarding the whereabouts of the family members of the child.<sup>1078</sup>

The omission by the Children’s Act to protect a “family” as an institution makes it inconsistent with Article 5 of the CRC, Article 16(3) of the UDHR, and Article 10(1) of the ICESCR, which

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<sup>1072</sup> Art 20(2). See the discussion in section 4 1 2.

<sup>1073</sup> Art 20(2)(a).

<sup>1074</sup> *Ibid.*

<sup>1075</sup> Art 19(1).

<sup>1076</sup> Art 19(2).

<sup>1077</sup> *Ibid.*

<sup>1078</sup> Art 19(3).

are clear in providing that protection and assistance must be given to a “family”.<sup>1079</sup>

#### 2.4.4 Foreign jurisdictions

The Children and Young People Act (Australia) expressly provides for daily<sup>1080</sup> and long-term<sup>1081</sup> parental responsibilities for the child. Most significantly, the provision for parental

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<sup>1079</sup> Robinson (1998) *Obiter* 336.

<sup>1080</sup> S 15(a) of Division 1.3.2 and Children and Young People Act (Australia). According to s 19(1) of the Children and Young People Act (Australia), “A person who has daily care responsibility for a child or young person has responsibility for, and may make decisions about, the child or young person’s daily care. Examples:

- (i) daily care responsibilities and decisions
- (ii) where and with whom the child or young person lives
- (iii) people with whom the child or young person may, or must not have contact
- (iv) arrangements for temporary care of the child or young person by someone else
- (v) every day decisions, including, for example, about the personal appearance of the child or young person
- (vi) daily care decisions about education, training and employment.”

A notice is incorporated in the legislation that: “An example is part of the Act, it is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.” See the proposed provision in the Children’s Act in par 2 5, “Recommendations and Conclusion”.

<sup>1081</sup> SS 15(b); 20(1) of Division 1.3.2 and Children and Young People Act (Australia). According to s 20(1) of the Children and Young People Act (Australia), “A person who has long-term care responsibility for a child or young person has –

- (a) responsibility for the long-term care, protection and development of the child or young person; and
- (b) all the powers, responsibilities and authority a guardian of the child or young person has by law in relation to the child or young person

Examples:

responsibilities applies to all parents, biological mother and unmarried father.<sup>1082</sup> The daily and long-term responsibilities include, amongst others, the responsibilities which the unmarried father in terms of the South African experience have already accessed the court for a claim. I therefore recommend for South Africa to draw lessons from the latter and incorporate a provision for equal parental responsibilities and rights of parents in families.<sup>1083</sup>

I also propose that South Africa must improve on the provision for parental responsibilities and rights in the Children's Act<sup>1084</sup> and refer to CRC, ACRWC, the Children and Young People Act (Australia), Children's Protection Act (South Australia) and establish a provision that clearly spells out *equal* responsibilities and rights of parents over their children and

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- (i) long-term care responsibilities:
  - (ii) administration, management and control of the child or young person's property
  - (iii) religion and observance of racial, ethnic, religious or cultural traditions
  - (iv) obtaining or opposing the issuing of a passport for a child or young person
  - (v) long term decisions about education, training and employment."

A notice is incorporated in the legislation that: "An example is part of the Act, it is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears." S 20(2) provides that "A person who has long-term care responsibility for a child or young person may, on the advice of a health care practitioner or health professional, consent to health care treatment that involves surgery for the child or young person." The Act further provides that consent to minor dental surgery may be given by a person who has daily care responsibility for a child or young person. See the proposed provision for the Children's Act in section 2 5.

<sup>1082</sup> Ss 17; 18 of Division 1.3.2 and Children and Young People Act (Australia). See the proposed provision for the Children's Act in section 2 5.

<sup>1083</sup> See the discussion in section 2 5.

<sup>1084</sup> S 18.



articulate what the *automatic* responsibilities and rights of unmarried father should be.<sup>1085</sup>

## 2.5 Recommendations and conclusion

This chapter discussed legal authorities on the definition of a “family”, “family care”, “parent”, “parental care” and “family life” as found in legislation, international instruments and case law, for insight into the concept “family life”. The discussion further contributed towards the proposed definition of “family” and “family care”. I also proposed the promulgation of regulations for *automatic* responsibilities and rights of unmarried fathers.

The discussion on the concept “family” in the context of South Africa revealed that there are many family forms in South Africa which include arrangements that are recognised by legislation, systems of personal law and tradition. The Green Paper on Families and the guidelines document identified the types of “families” it sought to protect. Despite these efforts, these documents failed to include in their description of families; families that are considered in the Children’s Act and the CRC. Thus, in my recommendation for the definition of “family”, I propose that South Africa adopt an all-inclusive<sup>1086</sup> approach for the definition of “family”, which recognises the different “family” models to afford children an opportunity to be reared by adults in legally recognised units.<sup>1087</sup> It is understandable that this

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<sup>1085</sup> See the discussion in section 2 5 on the additional provisions proposed in the Children’s Act on “parental responsibilities and rights”.

<sup>1086</sup> Own emphasis.

<sup>1087</sup> See the discussion in sections 2 2 1 2, 2 2 2 1 and 2 2 3.

approach may be open to abuse as new patterns of families may emerge and demand legal recognition. However, I opine that if the all-inclusive definition of “family” is meant to promote the best interests of children, a purpose which outweighs abuse by new families seeking recognition, it is crucial to provide the all-inclusive definition of “family”.

The Committee on the Rights of the Child recommended that polygyny be investigated, including any negative impact it may have on children.<sup>1088</sup> The recommendations of the Committee of targeting polygamous families for investigations may subject polygamous families to discrimination. Hence, I propose the definition of a “family” must include any structure that has characteristics of a “family” and recognised as such for the protection of children in “families”.

I do not agree holistically with Van Bueren’s<sup>1089</sup> view, that it is not easy to define “family” using international laws. She further<sup>1090</sup> argues that the reason why it is not easy to provide the definition of “family” using international law is that the definition of “family” changes and that there is no Convention on the Rights of the Family.

I submit that, the fact that international law<sup>1091</sup> provides a broad definition of “family”, leaves

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<sup>1088</sup> See the discussion in section 2 2 1 3.

<sup>1089</sup> (1996) 811.

<sup>1090</sup> (1996) 811-812.

<sup>1091</sup> These laws referred to “family” as a unit or category of persons: see Art 16(3) “UDHR”, see the discussion in section 2 2 2 3; Art 18(1) of the ACHPR, see the discussion in section 2 2 2

room for state parties to refer to it, its national legislation, societal views, religion and culture to provide a proper definition of “family”.

Apart from the definition of “family” as provided in the guidelines document, I am motivated to provide the definition of “family” firstly, because the guidelines document omitted to include some of the characteristics of “family” that are specifically recognised in the CRC.<sup>1092</sup> Secondly, the definition of “family” must be incorporated in the Children’s Act to avoid inconsistencies in different legal documents defining “family”. This is already the case with the Green Paper policy and the guidelines document.<sup>1093</sup> I am of the view that the definition of “family” will be well placed in the Children’s Act for purposes of children in need of care and protection. If “family” is defined in the Children’s Act, such may bar major legal dislocations when it comes to protecting the right to “family life” of children. In the event “family” is defined in other legislation, I opine that the legislature must infer or take cognisance of the definition provided in the Children’s Act.

I propose for South Africa to improve on the definition of “family as provided in the guidelines document.<sup>1094</sup> South Africa must refer to the CRC,<sup>1095</sup> the Children’s Protection Act (South

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6; Art 23(1) of the ICCPR, see the discussion in section 2 2 2 4; Art 10(1) of the ICSECR, see the discussion in section 2 2 2 5.

<sup>1092</sup> See the discussion in section 2 2.

<sup>1093</sup> The types of “families” that are recognised by the two documents are different from each other.

<sup>1094</sup> See the discussion in section 2 2.

Australia)<sup>1096</sup> and the attributes regarding the recognition of marriages by the Constitution<sup>1097</sup> and provide a wide definition of “family” to accommodate the diverse family forms to read as follows:

- “1 A ‘family’ is a unit or category of persons, such as parents, members of extended ‘family’,<sup>1098</sup> network of relatives, community or any person legally responsible for the child -
- (i) as recognised under any tradition, a system of religious, personal or ‘family’ law or practice; or
  - (ii) a system of personal and ‘family’ law under any tradition, practice or adhered to by persons professing a particular religion or practice, with a significant connection which resembles a ‘factual family relationship’ or ‘family life’ with the child”.

A question may arise as to what is a “family relationship”? South African courts may be guided by the interpretation given to this concept by the ECHR.<sup>1099</sup> The concept of “family relationship” or “family life” is not static and changes as society changes. It is therefore up to the courts to define or re-define a “family relationship” from time to time. The most comprehensive interpretation is found in *X, Y and Z v United Kingdom*<sup>1100</sup> where the ECHR

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<sup>1095</sup> Art 5. See the discussion in section 2 2 2 1.

<sup>1096</sup> S 6(1), see the discussion in section 2 2 3.

<sup>1097</sup> S 15(3)(a) of the Constitution. See the discussion in section 2 2 1 2.

<sup>1098</sup> S 2(e), see the discussion in section 2 2 3.

<sup>1099</sup> See the discussion in section 2 2 2 2 1.

<sup>1100</sup> (1997) 24 EHRR 143. The court found that the relationship of a female to man transsexual and his child born of his female partner by artificial insemination by donor, hereinafter referred

said that “family life” relates to “factuality living with a child (even) without the presence of biological links”.<sup>1101</sup> This is a helpful definition of “family relationship with a child”. When deciding whether a relationship can be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by other means.<sup>1102</sup>

The discussion on the definition of “family life”, including the expanded case law in which the right to “family life” was enforced in terms of the ECHR, includes the responsibilities and rights of parents towards their children. These parental responsibilities and rights are elements of “family life”. Most significantly, the European jurisprudence is clear on the fact that, once “family life” is established it is not terminated upon divorce,<sup>1103</sup> or when the parties no longer live together,<sup>1104</sup> or by a decision to place a child in care.<sup>1105</sup>

The ECtHR established the fact that although the subsequent events such as adoption may

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to as “AID”, amounted to “family life”. It was significant that their relationship was distinguishable from that enjoyed by the traditional “family”.

<sup>1101</sup> See the discussion in section 2 2 2 2.

<sup>1102</sup> *Kroon v Netherlands* 55-56 par 30.

<sup>1103</sup> *Hendricks v Netherlands* (1982) 5 EHRR 223 par 5.

<sup>1104</sup> *Berrehab v Netherlands*, see the discussion in section 2 2 2 2 4 3.

<sup>1105</sup> *Margareta & Roger Andersson v Sweden* par 72.

break the tie of “family life”,<sup>1106</sup> this can only happen in exceptional cases.<sup>1107</sup> Hence contact between the adopted child and his or her birth parents or care-givers after the adoption of the child is considered as a valuable tie which could create “family life” that is comparable to that protected under Article 8 of the ECHR.<sup>1108</sup> The mutual enjoyment between the parent and child of each other’s company is identified as the fundamental element of “family life” that needs to be considered in every situation of interference with “family life”. Adamec and Pierce<sup>1109</sup> hold the view that “family life” entails “basic safety, nurturing and a commitment to permanent care-taking of the child”. These needs are parental responsibilities and rights and form part of “family life”.

It has become evident from the discussion on the right to “family care” in terms of the Constitution that the court has been confronted with challenges each time it had to enforce the right. Thus, I propose for South Africa to draw reference from the ECHR<sup>1110</sup> to develop South Africa’s jurisprudence on the right to “family care”. There is currently no definition of “family care” in the Constitution in the context of section 28(1)(b). I propose that the definition of “family care” be included in the Children’s Act in so far as it has application to chapter 7 of the Act<sup>1111</sup> in particular, on which my thesis is based. The definition of both “family” and “family care” provide some kind of introduction also facilitate the interpretation of

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<sup>1106</sup> *X v United Kingdom* 11 July 1977 (Appl no 7626/76).

<sup>1107</sup> *Boughanemi v France* as discussed in sections 2 2 2 and 2 2 2 2 1.

<sup>1108</sup> See the discussion in section 8 4 4.

<sup>1109</sup> “Washington State Division of Children and Family Service Family-Centred Practice Model: The Encyclopaedia of Adoption” (2000) *American Journal of Orthopsychiatry* (AJO) 3.

<sup>1110</sup> As discussed in section 2 2 2 2.

<sup>1111</sup> “Children in need of care and protection”.

these concepts with regard to chapter 7 of the Children's Act.

The definition of "family care" must read as follows:

- "1 'family care' entails –
- (a) 'care' for the child in terms of section 1;
  - (b) the mutual enjoyment by parents and the child of each other's company;<sup>1112</sup>
  - (c) the right of the parent and child to participate in the decision-making process concerning the removal of the child;<sup>1113</sup>
  - (d) the right of the parent to contact the child in alternative care in the event the child is removed from 'family care';<sup>1114</sup>
  - (e) the right of the child to grow in a 'family',<sup>1115</sup> which includes kinship and other "family" arrangements for the development and well-being of the child;<sup>1116</sup>
  - (f) the positive duty on the state to preserve 'family care' by protecting the child from being removed from 'family life';
  - (g) the positive duty on the state to protect the child against abuse, or neglect,<sup>1117</sup>

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<sup>1112</sup> *Rieme v Sweden* par 54; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102; see ch 7.

<sup>1113</sup> *H and W v United Kingdom* par 80. S 1(h) of the Children's Act (maintaining a sound relationship with the child); see the discussion in section 2 3 1.

<sup>1114</sup> *Rieme* par 69, see also Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 103. See the discussion in ch 7.

<sup>1115</sup> See the proposed definition of "family" in section 2 5, "Recommendations and Conclusion".

<sup>1116</sup> *K & T v Finland* 707. See Kilkelly (1999) 95; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 108. See also the discussion in section 2 2 2 2 3.

<sup>1117</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 110; Wright "Local Authorities, the Duty of Care and the European Convention on Human Rights" (1998) *OJLS* 1-28. See the discussion in sections 4 1 1 2 1 and 4 3 1.

- or poverty in order to avoid the removal of the child from ‘family life’”.<sup>1118</sup>
- (h) the positive duty on the state to see to the re-unification of the child and his or her ‘family’; and
  - (i) the positive duty on the state to provide permanency planning.”

Section 7(6) of the Recognition of Customary Marriages Act should be amended to: recognise the right of the wife in a customary marriage to make an application to court to approve a written contract regarding their matrimonial property system; make the written contract available in the language of the parties to the contract and require the assistance of an interpreter to interpret the contract at the state’s expense as follows:

- “1 A husband or a wife in a customary marriage who wishes to enter into a further customary marriage with another man or woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of their marriages.
- 2 A written contract shall be made available in the official languages of the Republic of South Africa listed in the Constitution for the parties who entered into a customary marriage.
- 3 The Department of Home Affairs shall make the services of an interpreter available to explain the contract to the parties who entered into a customary marriage to avoid any misunderstandings.”

The recognition of responsibilities and rights of unmarried fathers has been, amongst others, a highlight in the area of South African child law. This development is not only consistent with international standards on children’s rights, but is in the best interests of the child.

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<sup>1118</sup> Inferred from the discussion by Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 109, see the discussion in ch 4.



However, there is failure in the Children’s Act to provide for the definition of “parental care” and in particular, the equal responsibilities and rights of unmarried fathers.

It is significant that I create separate provisions for the concepts “parental care” and “family care”. The discussion in this chapter revealed that the concepts are different in meaning and to some extent, by application. In practice, and as revealed by the discussion in this chapter, “family care” is a family-based “care”, “care” in a home, at home or within a structural arrangement.<sup>1119</sup> Such “care” may rest with any “family member” available in the “family” unit to provide “care” to the child, including relatives. On the other hand, “parental care” *strictly* applies to “parents” and includes adoptive parents or anyone who is identified as such, to nurture the growth and development of the child. This “care” is provided by specific individuals by virtue of their status and role as “parents” of the child. I refer to critical arguments raised in the judgments of *Schmidt v Schmidt*,<sup>1120</sup> *Allsop*,<sup>1121</sup> by Van Zyl and Bekker,<sup>1122</sup> *Kotze*<sup>1123</sup> and *Heystek*,<sup>1124</sup> which in my view acknowledge *equal*<sup>1125</sup> responsibilities and rights of parents with the argument that the non-custodian parent falls within the scope of the term “parent” in terms of section 28(1)(b).<sup>1126</sup>

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<sup>1119</sup> See the discussion in sections 2 2 2 2 3 and 2 5.

<sup>1120</sup> 220B. See the discussion in section 2 4 2.

<sup>1121</sup> See the discussion in section 2 4 2.

<sup>1122</sup> (1999) *De Jure* 151-153. See also the discussion in section 2 4 2.

<sup>1123</sup> 629E. See also the discussion in section 2 4 2.

<sup>1124</sup> 757C-D and F. See also the discussion in section 2 4 2.

<sup>1125</sup> Own emphasis.

<sup>1126</sup> See the discussion in section 2 4 2.

Furthermore, I refer to *Grootboom*,<sup>1127</sup> the CRC,<sup>1128</sup> ACRWC,<sup>1129</sup> and the Children and Young People Act (Australia),<sup>1130</sup> to propose for additional provisions in section 18(2) of the Children's Act to read as follows:

- "18(2) (a) Parental care means the equal<sup>1131</sup> responsibilities and rights of the parents of the child to -
- (i) provide 'daily care'<sup>1132</sup> for the child, which includes -
    - (aa) responsibilities and decisions as to with whom and where the child lives;
    - (bb) people with whom the child, may, or may not have contact;
    - (cc) arrangements for temporary contact by someone else;
    - (dd) every day decisions including, for example, the personal appearance of the child;
    - (ee) daily care decisions about the child's education, training and employment;<sup>1133</sup>
  - (ii) provide 'long-term care'<sup>1134</sup> for the child, which includes –
    - (aa) management and control of the child's property;
    - (bb) observance of the child's religious, racial, ethnic and cultural traditions;
    - (cc) obtaining or opposing the issuing of the child's passport;
    - (dd) long-term decisions about the education, training and employment of the child;
  - (iii) providing for the upbringing and development of the child and determine what is in the best interests of the child;<sup>1135</sup>

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<sup>1127</sup> Par 77. See also the discussion in section 2 4 2.

<sup>1128</sup> See the discussion in section 2 4 3 1.

<sup>1129</sup> See the discussion in section 2 4 3 2.

<sup>1130</sup> See the discussion in section 2 4 4.

<sup>1131</sup> Own emphasis.

<sup>1132</sup> S 15(a) of Division 1.3.2 and Children and Young People Act (Australia).

<sup>1133</sup> S 19(1) of Division 1.3.2 and Children and Young People Act (Australia).

<sup>1134</sup> Ss 15(b); 20(1) of Division 1.3.2 and Children and Young People Act (Australia).

<sup>1135</sup> Art 7(1) of the CRC.

- (iv) providing maintenance, as both parents have common responsibilities for the upbringing and development of the child;<sup>1136</sup>
- (v) exercising their responsibilities and rights for the child in a manner consistent with the evolving capacities of the child;<sup>1137</sup>
- (vi) providing direction to the child in the exercise of religion, thought and conscience; and<sup>1138</sup>
- (vii) securing within their abilities<sup>1139</sup> a standard of living adequate to the development of the child.<sup>1140</sup>

Since the parental responsibilities and rights of the biological mother seem clear,<sup>1141</sup> I am of the view that there is a need for promulgation of regulations to section 21 of the Children's Act to clearly articulate the responsibilities and rights of the unmarried father. The ambiguity in this provision has potential to lead unmarried fathers to unwittingly give up their responsibilities and rights for not being able to meet section 21(1) criteria. The responsibilities and rights of the unmarried father are more often limited to those of the biological mother, particularly when the parents do not reside together. This creates inequalities in the responsibilities and rights of unmarried parents and threatens the development and well-being of children.

I am of the view that, apart from proposing the enactment of a provision for equal parental

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<sup>1136</sup> Art 18(1) of the CRC.

<sup>1137</sup> Art 5 of the CRC.

<sup>1138</sup> Art 14(1) of the CRC.

<sup>1139</sup> Art 20(1)(b) of the ACRWC.

<sup>1140</sup> Art 27(1) of the CRC. This Art refers to the child's physical, mental, spiritual and social development, see the discussion in section 4 1 2.

<sup>1141</sup> See the discussion in section 2 2 1 7.

responsibilities and rights of parents, regulations must be promulgated to section 21(1) of the Children's Act to cater for *automatic*<sup>1142</sup> rights of unmarried fathers. My proposal is based on the fact that if the child lived with the two parents before, and circumstances necessitate that he or she live with one parent (such as the biological mother), this change may make the child feel insecure, loose contact with one parent, suffer economic hardship also create tension between the parents. Thus, I am hoping the proposed regulations would provide outright responsibilities and rights for the unmarried father towards his children.<sup>1143</sup> The regulations are also aimed at preserving some degree of parent-child relationship between unmarried fathers and their children, and must read as follows:

- “1 The unmarried father shall have automatic the responsibilities and rights over the child, if -
- (a) he acknowledges paternity of the child -
    - (i) by signing a registration of live birth after the birth of the child, identifying himself as the father;
    - (ii) by agreeing with the mother of the child to use either his last name or a hyphenated combination of both surnames of the mother and the unmarried father, in the live birth registration form;
    - (iii) by agreeing with the biological mother of the child to amend the birth registration to list himself in the live birth registration form as the father;
    - (iv) where he is incapable to sign, using any convenient method that identifies him as the father;
    - (v) by going to court to apply to establish the child's parentage and to ask for a change in the child's last name, which application will be

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<sup>1142</sup> Own emphasis.

<sup>1143</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 15-17.

- considered if it is in the best interests of the child; or
- (vi) by deposing in an affidavit or any document about the existence of close or de facto “family” ties between himself and the child.<sup>1144</sup>
- 2 (a) The unmarried father shall have the automatic right of care for the child, if -
- (i) he lives with the biological mother, they shall both exercise care over the child;
- (ii) he does not live with the biological mother, he shall be entitled to collect the child from the care of the biological mother or school, for purposes of exercising any agreed responsibilities and rights in relation to the care of the child;<sup>1145</sup>
- (b) The unmarried father shall have contact with the child, if -
- (i) he does not live with the biological mother or have specified contact arrangement with the child, he shall have contact with the child -<sup>1146</sup>
- (aa) every second weekend, commencing on Friday afternoons until Sunday afternoon, with the child being dropped off directly at the residence of the biological mother who lives with the child, if it is in the best interests of the child;<sup>1147</sup>
- (bb) every alternate long weekend, commencing on the day the school closes until the last day of the long weekend, if it is in the best interests of the child;<sup>1148</sup>
- (cc) every long or short school holiday as agreed between the biological mother and the unmarried father, if it is in the best interests of the child;<sup>1149</sup>

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<sup>1144</sup> In terms of the European jurisdiction, “family life” exists between a mother and a child solely based on birth; and between the unmarried father and the child where there is sufficiently close personal links between them. See the discussion in section 2 2 2 2.

<sup>1145</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 16.

<sup>1146</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 15.

<sup>1147</sup> *Ibid.*

<sup>1148</sup> *Ibid.*

<sup>1149</sup> *Ibid.*

- (dd) anytime at the child's school as this provides encouragement and moral support to the child's school sporting or cultural activities, if it is in the best interests of the child;<sup>1150</sup>
- (ee) by communicating with the child telephonically at all reasonable times, if it is in the best interests of the child;<sup>1151</sup>
- (ff) by installing a fixed line telephone in the residence of the child, provide a mobile telephone or any other communication device at his own cost in order to maintain contact with the child, if it is in the best interests of the child;<sup>1152</sup>
- (gg) communicating with the child during important calendar days, including the child's birthday, if it is in the best interests of the child;
- (hh) communicating with the child on special days such as Christmas day, also allow exchange gifts or greetings with the child, if it is in the best interests of the child;
- (ii) by way of collecting the child from the care of the biological mother or school for purposes of exercising any agreed rights in relation to contact, if it is in the best interests of the child;
- (jj) by the biological mother or guardian of the child permitting the child to travel to the unmarried father's domicile by whichever is convenient for this purpose and in the best interests of the child; or
- (ii) by both parents ensuring that the child is transported to the agreed destination on time, whichever is convenient and in the best interests

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<sup>1150</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 16.

<sup>1151</sup> *Ibid.*

<sup>1152</sup> *Ibid.*

- of the child for the child for this purpose.<sup>1153</sup>
- (iii) the child is being breastfed on a regular basis by the mother, the child shall not be allowed to spend the whole day or weekend with the unmarried father;<sup>1154</sup>
  - (iv) either parent wishes to relocate, he or she must write his or her intention in at least 3 calendar months' notice to the other parent and the children;
  - (v) in the event the biological mother relocates further than 20km from the unmarried father, (an arrangement that is in the interests of the biological mother) rather than the child, the biological mother must<sup>1155</sup>
    - (aa) keep the unmarried father informed at all times of the residential address where the child and the biological mother live, be provided with a fixed line telephone number or mobile numbers for purposes of contacting the child; and
  - (vi) the child is obtained from the biological mother with written consent, for purposes of removing the child from the Republic of South Africa for specified days (such as holidays) or events, the child shall not be unreasonably withheld.
- 3 Both parents (unmarried) have the responsibilities and right to joint guardianship, to decide on the religion, education, scholastic and other activities of the child, including<sup>1156</sup>
- (a) consulting with each other by seeking written consent concerning the change of school, which consent shall not be unreasonably withheld, if it is in the best interests of the child;
  - (b) agreeing on the participation of the child in any new extra mural activities which are not presented by the school which the child is attending, if it is in

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<sup>1153</sup> *Ibid.*

<sup>1154</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 17.

<sup>1155</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 16.

<sup>1156</sup> Father-4-Justice *Information Guidelines Custody and Access to Children Related Crimes* (2010) 17.

- the best interests of the child;
- (c) agreeing on the costs thereof;
  - (d) obtaining directly from school, doctor, social worker, psychologist, university, church, any association, body, reports, photographs and any matter relating to the performance, health and or progress;
  - (e) making certain that during the times that the child is residing with one parent, where practically possible, the child attends regular the scheduled extra-mural activities, school functions, religious and other activities which the child is involved in; and
  - (f) making certain that the child does not change his or her religion without the other parent's written consent and that both parties shall, where practically possible, ensure that the child attends regular church services and relevant religious instruction classes."

I submit that there are many aspects of protection and care which parents do not have the capacity to provide; for instance, protection against an outbreak of a disease and in other serious cases, lack of food. In cases where the "family" or parents are simply not able to, or are unwilling to protect the child, it is appropriate that the state makes provision for such care and protection to preserve "family life".<sup>1157</sup> This will be discussed in detail in chapter four, with a focus on the responsibility of the state to provide prevention and early intervention services in order to keep children within the family environment rather than them being removed.

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<sup>1157</sup> Adamec & Pierce (2000) *AJO* 3.



## CHAPTER 3: GROUNDS FOR MANDATORY ALTERNATIVE CARE INTERVENTIONS

### 3.1 Introduction

Chapter two defined the concepts “parental care”, “family care” and “family life” and reflected on the definition of a “family” in the context of existing family arrangements. This chapter primarily discusses legislative grounds for finding a child to be in need of care and protection.<sup>1</sup> These grounds are the different challenges that are encountered by children in the family environment. The grounds are entrenched in the Children’s Act,<sup>2</sup> discussed by amongst other authors, Matthias and Zaal,<sup>3</sup> Gallinetti,<sup>4</sup> and Matthias.<sup>5</sup>

The discussion in this chapter is structured as follows: I reflect on the meaning of the phrase “children in need of care and protection”. I further engage in a comprehensive discussion on

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<sup>1</sup> S 150 of the Children’s Act.

<sup>2</sup> S 150(1) and (2).

<sup>3</sup> Matthias & Zaal “Children in Need of Care & Contribution Orders” in Davel & Skelton *Commentary on the Children’s Act* (2010) 9-3; Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 163-184.

<sup>4</sup> Gallinetti “The Children’s Court” in *Commentary on the Children’s Act* (2007) 4-14.

<sup>5</sup> Matthias (1997) 17 under the topic “Reality Versus Grounds: The Most Frequently Cited Factors in the Removal of Children”. The discussion demonstrates the fact that the grounds for removal cited in s 14(4) of the Child Care Act do not reflect the practical problems encountered by children in the family environment, which should justify mandatory alternative care intervention for a child.

the listed grounds for mandatory alternative care interventions as follows: the circumstances or situations identifying children in need of care and protection; South African law; international law;<sup>6</sup> and foreign jurisdictions. In my analysis of the information regarding the grounds for mandatory alternative care interventions, I assess current legislative intervention and its ability to address the circumstances that distinguish children, as children in need of care and protection.

I further establish whether a particular ground is critical to influence the children's court to mandate alternative care for the child.<sup>7</sup> I am of the view that if a child is found to be in need of care and protection, the court should not be quick to mandate alternative care for the child. Instead, it should prioritise keeping the child in the family. Thus, I agree with Zaal<sup>8</sup> that the grounds for mandatory alternative care interventions should not be limited by matching them with definitions and concepts which would easily justify the placement of the child in alternative care,<sup>9</sup> and instead, we can provide proof to the grounds that are asserted.

Where there are gaps in legislation, I recommend that South Africa refer to foreign

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<sup>6</sup> I reflect on the extent to which the international law speaks to a particular ground for removal. Hodgkin & Newell (2007) 75 and 97: the Arts in the CRC are inter-dependent. Thus, the discussion on each ground for removal will not discuss all Arts that relate to the ground but will reflect on specific Art which applies.

<sup>7</sup> Cohen *et al.* (2007) 34. See also the discussion in section 1 2 1 3 regarding the use of causal research method.

<sup>8</sup> Zaal *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (PHD Thesis 2008 Wits) 324.

<sup>9</sup> Own emphasis.

jurisdictions to enactment, amongst others, the following provisions: to include a more exhaustive list of grounds in the Children's Act;<sup>10</sup> with regard to a child who suffers "abuse, maltreatment and degradation".<sup>11</sup> I propose that regulations be promulgated to the Children's Act to provide for the duty of the Department of Social Development and the Department of Education<sup>12</sup> to provide teachings and other assistance for the protection of children; on issues relating to learner pregnancy which often result in "child abandonment", I recommend that regulations be promulgated to the Children's Act to curb sexual abuse, protect pregnant

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<sup>10</sup> South Africa must refer to, amongst others, the Children's Act (Kenya), which has a list of fundamental children's rights that are particularly relevant in Africa: UNICEF "Convention and Law Reform" *Reforming Child Law in South Africa: Budgeting and implementation Planning* (2007) 5. S 119 of the Kenyan provision on the grounds for mandatory alternative care interventions is to some extent similar to the provision in s 150 of the Children's Act, see the discussion in section 3 2 1. Also refer to the Child Protection Act (Canada) which has the most significant list of grounds. S 9 of the Child Protection Act (Canada) also has provision which identifies children who are in trouble with the law as a ground for mandatory alternative care interventions. I propose that early marriage, forced marriage, female genital mutilation, circumcision, virginity testing, child prostitution and child trafficking, sexually abused children, corporal punishment, children who suffered domestic violence be provided in the Children's Act as additional grounds mandatory alternative care interventions. See the discussion in section 3 4, "Recommendations and Conclusion".

<sup>11</sup> South Africa must refer to the National Guidelines for the Protection and Welfare of Children drawn up by the Children First organisation, see *Children First National Guidelines for the Protection and Welfare of Children* (2004) par 681-682. See the discussion in section 3 3 9.

<sup>12</sup> Teachers are particularly well placed to observe and monitor children for signs of abuse. My view is based on the argument that teachers are the main care-givers outside the family context. The fact that they establish regular contact with children at school and have the responsibility to provide care, they must ensure that children are protected from harm whilst in their care. Thus, the Department of Education must provide resources to enable teachers to put measures in schools for the safety and security of children. See the discussion in section 3 4, "Recommendations and Conclusion".

learners and provide services that will prevent child abandonment.<sup>13</sup>

In situations of “children without visible means of support”, I recommend that amendments be made to the regulations of the Social Assistance Act or regulations be promulgated to section 150(1)(a) of the Children’s Act for provision for child-support grant that is in accordance with the age of the child, of an amount that meets the basic needs of the child on monthly basis, and a “special temporary family maintenance” for destitute families.<sup>14</sup> I also recommend that any form of “exploitation”, child marriages, abuse or harmful cultural practises against children be prohibited.<sup>15</sup>

Furthermore, I propose that a provision be enacted to prohibit incidences of early marriage,

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<sup>13</sup> South Africa must refer to Wolf’s Report for Centre for Assessment and Development Policy *Using the Title IX of the Education Amendments Act to protect the rights of Pregnant and Parenting Teens* (1999) Attachment A-2; the Title IX of the Education Amendments Act (United States of America) 235 of 1972. See the discussion in sections 3 3 1 1 and 3 4, “Recommendations and Conclusion”.

<sup>14</sup> South Africa must draw lessons from the Northern Ireland Order and amend the regulations to the Social Assistance Act with regard to child-support grant or promulgate regulations to s 150(1)(a) of the Children’s Act for the state to assist “children without visible means of support”. Also refer to the Consolidated Act on Social Services (Denmark) to enact a provision for financial assistance for children consonant with their age and development. Furthermore, South Africa must draw lessons from the Children, Young Persons and their Families Act (New Zealand) and Children Act (United Kingdom) for enactment of a provision for “special temporary family maintenance” to families without financial means. See the discussion in sections 3 3 1 2 and 3 4, “Recommendations and Conclusion”.

<sup>15</sup> South Africa must draw lessons from the Prohibition of Child Marriages Act (India) and establish a provision to curb child marriages. See the discussion in sections 3 3 5 4 1 and 3 4, “Recommendations and Conclusion”.

forced marriage, tampering with or removing the body parts of the child including, female genital mutilation, circumcision and virginity testing. I also propose for a provision for care, treatment, counselling and other support services to children who are subjected to harmful cultural practices.

I recommend that regulations be promulgated for the provision of skills to parents or anyone who has care of the child “who displays behaviour which cannot be controlled by the parent or care giver” to promote positive behaviour in the lives of children.<sup>16</sup> I recommend that the Department of Social Development must collaborate with non-governmental organisations and the community to implement a programme that will reintegrate “children who live or work on the streets or beg for a living”<sup>17</sup> back into their families. I also propose that a framework be established to be used by community-based service centres and home-based care service providers to monitor treatment services provided to children who are “addicted to dependence-producing substances”.<sup>18</sup>

In the discussion on child sexual offences, I have noted that the Sexual Offences and Related Matters Amendment Act does not have penalties for sexual crimes committed

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<sup>16</sup> South Africa must refer to s 122 of the Child Protection Act (Queensland) regarding the provision for a statement of standards that promote good behaviour in children. See the discussion in section 3 3 2 2.

<sup>17</sup> See the discussion in sections 3 3 3 1 and 3 4, “Recommendations and Conclusion”.

<sup>18</sup> South Africa must refer to the home care system used in the United Kingdom for care of older persons to establish a provision for home-based treatment for children who are addicted to dependence-producing substances, see the discussion in section 3 3 4 and 3 4, “Recommendations and Conclusion”.

against children.<sup>19</sup> Thus, I propose that a table of offences be developed to guide the courts to impose penalties to satisfy the victims of these crimes also reduce the escalation of sexual offences.<sup>20</sup> With regards to children who are in conflict, I recommend that a provision be enacted to facilitate for the diversion of criminal matters concerning children from the punitive system to alternative dispute resolution in order to limit prosecution and detention of children.<sup>21</sup>

I am emphatic that the Children's Act must not limit itself to the listed grounds for mandatory alternative care interventions. I recommend that South Africa establish threshold criteria<sup>22</sup> to be used on listed, unlisted and any new grounds. I conclude the discussion with arguments regarding the pros and cons of using a discretionary approach in other circumstances. I

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<sup>19</sup> S 56A, [B 19 – 2012] of the Sexual Offences and Related Matters Amendment Act Amendment Bill does not provide for penalties. The Bill provides that the courts have discretion to impose penalties for certain offences. See the discussion in sections 3 3 5 4 3 and 3 4, "Recommendations and Conclusion".

<sup>20</sup> I propose that South Africa refer to the New South Wales and develop a table for penalties of offences against children to save legal costs. See the discussion in sections 3 3 5 5 and 3 4 "Recommendations and Conclusion".

<sup>21</sup> The Children's Act must be consistent with the Child Justice Act which provides for imprisonment of children as a measure of last resort. I also propose for South Africa to draw lessons from the Child Protection Act (Canada) and include children who are in conflict with the law as an additional ground for mandatory alternative care interventions. See the discussion in section 3 4, "Recommendations and Conclusion".

<sup>22</sup> I propose for South Africa to refer to the European jurisdiction and incorporate the threshold criteria, see the discussion in sections 2 2 2 2 4, 3 2 2 (regarding the threshold criteria) and 3 4 (regarding the proposed provision for the threshold criteria in the Children's Act), "Recommendations and Conclusion".

argue that the discretionary approach can be considered in circumstances where information is provided by professionals and is accurate. I also recommend that a Children’s Advocate be established to deal with matters relating to children in need of care and protection. The Children’s Advocate must be placed in an independent office that must gather research, deal with complaints relating to children, provide remedies, and monitor the implementation of international laws ratified by South Africa in relation to children’s rights.<sup>23</sup>

## **3.2 Children in need of care and protection: a brief overview of phraseology used**

### *3.2.1 Children “in need of care and protection” in terms of South African law*

This section discusses the phraseology “in need of care and protection” and how key law enforcers relate to it in the context of mandatory alternative care interventions. The discussion will assist in formulating provisions as an additional list of mandatory grounds for alternative care interventions. The discussion will also assist in determining whether the already listed grounds require that the child be removed from family life or other prevention measures.

A child may be identified as potentially in need of care and protection, which requires statutory intervention in the form of removal to an alternative care, if his or her present family

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<sup>23</sup> *Ibid.*

environment and the circumstances faced by the child in the family are likely to cause harm.<sup>24</sup> The phrase “in need of care” was first provided in the Child Care Act.<sup>25</sup> Later on, the phrase “alternative care” was captured in South Africa’s Constitution, which provides that every child has “the right to ... alternative care when removed from the family environment”.<sup>26</sup> The current Children’s Act provides for children “in need of care ...” with the additional words “... and protection”.<sup>27</sup>

The Constitution guarantees a child alternative care if the child is removed from the family environment. This simply means that the child must be kept in the family environment and alternative care interventions must be considered when the child is removed from family life. It was not anticipated that the Constitution would provide the grounds for mandatory alternative care interventions. Thus the Constitution makes it the duty of the legislature to establish legislation to give effect to the Bill of Rights or to develop the common law to the extent that legislation does not give effect to the right.<sup>28</sup>

Previously,<sup>29</sup> the Child Care Act<sup>30</sup> provided the grounds for mandatory alternative care

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<sup>24</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 163.

<sup>25</sup> S 1 of the Child Care Act as amended provided the definition of a “child in need of care” as a child that is referred to in s 14(4) of the Child Care Act. See also s 15(1)(a) and reg 13 of the Child Care Act as amended by Child Care Amendment Act.

<sup>26</sup> S 28(1)(b).

<sup>27</sup> S 150(1) and (2).

<sup>28</sup> S 8(3)(a).

<sup>29</sup> Before the amendment of the Child Care Act in 1996.

<sup>30</sup> S 14(4).



interventions that could be considered by the children’s court in its decision on whether to remove the child from family life or not. Those grounds provided the definition of the phrase “in need of care”.<sup>31</sup> If the children’s court is satisfied that the child is “in need of care”, it may

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<sup>31</sup> S 14(1) of the Child Care Act required that an inquiry be held in order to determine any matter affecting the child or his or her parents, guardian or any person having the custody of the child. Amongst others,

- “(4) At such inquiry the children’s court shall determine whether –
- (a) the child has a parent or guardian;
  - (b) or the child has a parent or guardian or is in the custody of a person who is unable or unfit to have the custody of the child, in that he –
- (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child;
  - (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated;
  - (iii) has caused or conducted to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts;
  - (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child;
  - (v) fails to maintain the child adequately;
  - (vi) maintains the child in contravention of par 10;
  - (vii) neglects the child or allows him to be neglected;
  - (viii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance;
  - (ix) has abandoned the child; or
  - (x) has no visible means of support.” See also the discussion in Matthias (1997) 12-26. S 14(4)(b) of the Child Care Act as amended by Child Care Amendment Act 96 of 1996 and s 1 of Welfare Laws Amendment Act 106 of 1997 and replaced by s 14(4)(aB), provided that a child is in need of care in that:  
“(aB) the child –
- i has been abandoned or is without visible means of support;

order that the child be removed from family life to alternative care.<sup>32</sup> An argument that was raised with regard to the phrase “in need of care” is that the phrase does not necessarily attract other protection measures, such as special family maintenance grants. Rather, it focuses on taking the child from family life to alternative residential care.<sup>33</sup> Furthermore, the grounds for mandatory alternative care interventions provided in section 14(4)(b) were viewed as focusing more on the inadequacies of the parent; that is, parents who are “unfit/unable”, and section 14(4)(aB)<sup>34</sup> was seen as having taken a child-centred approach.<sup>35</sup>

Matthias<sup>36</sup> conducted research, which was part of an ongoing programme on reforming child protection laws and procedures in South Africa, with the aim of contributing towards

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- ii displays behaviour which cannot be controlled by his her parents or the person in whose custody he or she is;
  - iii lives in circumstances likely to cause or conduce to his or her seduction or sexual exploitation;
  - iv lives in or is exposed to circumstances of which may seriously harm the physical, mental or social well-being of the child;
  - v is in a state of physical or mental neglect;
  - vi has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person whose custody he or she is; or
  - vii is being maintained in contravention of par 10.”

<sup>32</sup> S 15(1).

<sup>33</sup> Matthias (1997) 44.

<sup>34</sup> Provision of the Child Care Amendment Act.

<sup>35</sup> Matthias (1997) 13. See the discussion in section 3 2 1.

<sup>36</sup> (1997) 14.

improved legislation with regards to children's removal by the state and reconstruction services designed to enable children to return to their families.<sup>37</sup> This research revealed that four categories of social workers used different criteria to remove children from family life:<sup>38</sup> those who preferred the "unfit or unable" ground; those who preferred a "child-centred" or "in need of care" ground; those who were keen on the combination of the two; and lastly, those who did not experience any problem with either ground and had no particular preference.<sup>39</sup>

Social workers who preferred the "unfit or unable" grounds were of the view that in using this approach they were able to concentrate on the behaviour of the parents.<sup>40</sup> This approach was found appropriate, particularly when dealing with parents who are alcoholics, abusive and of low morals in that social workers would easily hold such parents to account.<sup>41</sup> On the other hand, parents did not like to be labelled and once they are labelled as "unfit or unable", they were prone to change.<sup>42</sup> Thus, the "unfit or unable" grounds was seen as a catalyst for change.<sup>43</sup> The possibility of care-giver fault was expressly mentioned only in grounds (i),<sup>44</sup> thus, the state will in most cases need to focus primarily on the situation of the child to prove

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<sup>37</sup> The study was commissioned by the Children's Rights and Advocacy Project of the University of Western Cape in 1997.

<sup>38</sup> Matthias (1997) 12.

<sup>39</sup> Matthias (1997) 13.

<sup>40</sup> Matthias (1997) 14.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> S 14(4)(aB) of the Child Care Act: "the child ... has been abandoned or is without visible means of support".

this ground.<sup>45</sup> According to Matthias and Zaal,<sup>46</sup> the emphasis on the grounds for alternative care intervention indicates an intention by the legislature to ensure that stigmatising care-givers as inadequate is as far as possible avoided. Avoiding such a stigma is often important because it alienates and angers care-givers. Furthermore, this may discourage care-givers from subsequently providing co-operation that may be urgently needed in the child's best interests.<sup>47</sup>

Social workers who preferred the "child-centred" or "in need of care" grounds were of the view that when the underlying problem was unemployment, poverty or lack of money, parents were unnecessarily labelled in that such problems could be beyond their control, particularly when they tried to solve the problem.<sup>48</sup> Social workers find it difficult to work with parents who had been labelled and stigmatised at the children's court inquiry. They would rather use the term "unable" than the "unfit" grounds. However, both "unfit" and "unable" could provoke parents to be defensive.<sup>49</sup> Most social workers acted in terms of regulation 4(2)(b) to the Child Care Act where they would consider early intervention results before taking the decision whether or not to remove to remove the child.<sup>50</sup> However, there was neither definition nor clear description of what early intervention entails in terms of the Child Care Act. This means that the decision whether or not to remove to remove the child was, in

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<sup>45</sup> Matthias & Zaal in Davel & Skelton *Commentary on the Children's Act* 9-6.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Matthias (1997) 15.

<sup>50</sup> Matthias (1997) 33.

terms of the regulations 4(2)(b) to the Child Care Act, entrusted with the social worker, rather than the child or the parent.

Few social workers preferred the “child-centred” approach for the removal of the child.<sup>51</sup> Those who favoured this approach felt that it focussed on the child rather than the parents, and that it enabled social workers to concentrate on the child and consider his or her best interests before removing the child.<sup>52</sup> An example of a child who is uncontrollable was made. It was said that the cause of the problem could be about the child who is uncontrollable as a result of peer pressure, which is not a shortcoming on the side of the parent.<sup>53</sup> Matthias<sup>54</sup> is of the view that in the light of the opinion on the two approaches, “unfit or unable” and “in need of care”, in some cases it is more appropriate to have a parental focus, while in other cases the child focus is more appropriate. However, the “in need of care” approach is seen as absolving parents of their parental responsibilities to the state.<sup>55</sup> I submit that the phrase “in need of care” does not necessarily relieve parents of their responsibilities;<sup>56</sup> it is simply a child sensitive approach and focuses more on the needs of the child.

The phrase “in need of care and protection” as used by the Children’s Act<sup>57</sup> refers to the

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<sup>51</sup> *Ibid.*

<sup>52</sup> Matthias (1997) 17.

<sup>53</sup> *Ibid.* See also the discussion in section 3 3 2.

<sup>54</sup> (1997) 15-16.

<sup>55</sup> Matthias (1997) 16.

<sup>56</sup> See the discussion in section 2 4 2.

<sup>57</sup> S 1(1)(d).

grounds that motivate the children’s court as to whether or not to remove the child.<sup>58</sup> Apart from using a phrase that is similar to that of the Child Care Act, the Children’s Act recognises that the list of children “in need of care and protection” goes beyond the list identified in section 14(4) of the Child Care Act.<sup>59</sup> Thus, the Children’s Act<sup>60</sup> increased the list to allow for more grounds, as follows:

“A child is in need of care and protection if, the child –

- (a) has been abandoned or orphaned and is without any visible means of support;
- (b) displays behaviour which cannot be controlled by the parent or care giver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being;
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is;

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<sup>58</sup> S 150(1) and (2). See the discussion in Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 174.

<sup>59</sup> See the discussion in section 3 2 1.

<sup>60</sup> Gallinetti in *Commentary on the Children’s Act* 4-14.

- (2) A child found in the following circumstances which may be a child in need of care and protection and must be referred for investigation by a designated social worker:
- (a) a child who is a victim of child labour; and
  - (b) a child in a child-headed household.”<sup>61</sup>

Children may generally be said to require “care and protection” in varying degrees.<sup>62</sup> However, the inclusion of additional words “... and protection” in the phrase “in need of care” demonstrates the requirement for the state to provide a broad range of support to the child.<sup>63</sup> Thus, Matthias and Zaal<sup>64</sup> hold the view that the phrase “in need of care and protection” has a special meaning in that it requires that additional or alternative care measures and services be imposed as a compulsory measure by the state. The phrase emphasises that not only the nurturing, but also the safety needs of the child must be taken into account in the provision of mandatory welfare services for children.<sup>65</sup> Thus, the grounds for mandatory alternative care interventions that are stipulated in the Children’s Act are viewed as predominantly “child-focused”.<sup>66</sup>

Chapter 2 of this study pointed out that parents have the primary duty to meet the “care” needs of children. The discussion in Chapter 2 reflected on the fact that when parents are incapacitated or fail to fulfil their parental responsibilities and rights, they depend on

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<sup>61</sup> S 150(1) and (2).

<sup>62</sup> Matthias & Zaal in Davel & Skelton *Commentary on the Children’s Act* 9-3.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 174.

assistance from the state to meet their family responsibilities.<sup>67</sup> Thus, the responsibility of both the parents and the state will apply with regards to “children in need of care and protection” in this context.

The Children’s Act has added more grounds on which the children’s court may consider designating a child as a child “in need of care and protection”. These include, amongst others, a “child who is a victim of forced labour”<sup>68</sup> and a “child in a child-headed household”<sup>69</sup> who must be referred by a designated social worker for investigation. The purpose of such an investigation is to determine if such a child is in need of care and protection as stipulated in section 150(1).<sup>70</sup> Furthermore, the Children’s Act provides that other categories of children who may be designated as “in need of care and protection” are those in situations which prompt the court to issue an order referring the child to a designated social worker for investigation, if in the course of proceedings the court forms an opinion that a child that is involved in, or affected by, the proceedings is “in need of care and protection”.<sup>71</sup>

The course of proceedings referred to in the Children’s Act may be in terms of the Administration Amendment Act,<sup>72</sup> the Matrimonial Affairs Act,<sup>73</sup> the Divorce Act,<sup>74</sup> the

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<sup>67</sup> S 28(1)(c) of the Constitution; Art 18(2) of the CRC; Hodgkin & Newell (2007) 243. See the discussion in sections 2 4 2, 2 4 3 1 and 2 4 3 2.

<sup>68</sup> S 150(2)(a).

<sup>69</sup> S 150(2)(b).

<sup>70</sup> Matthias & Zaal in Davel & Skelton *Commentary on the Children’s Act* 9-7.

<sup>71</sup> S 47(1).

<sup>72</sup> 9 of 1929.

<sup>73</sup> 37 of 1953.



Maintenance Act, the Domestic Violence Act<sup>75</sup> or the Recognition of Customary Marriages Act. Thus, if the court forms an opinion that a child of any of the parties to the proceedings has been abused or neglected, the court may suspend the proceedings pending an investigation as to whether the child is in need of care and protection.<sup>76</sup> In these circumstances, the court will request the Director for Public Prosecution to attend to the allegations of abuse or neglect.<sup>77</sup> The Children's Act further widens the definition of "in need of care and protection" by including a child that the court finds it is in his or her best interest to designate as a child "in need of care and protection".<sup>78</sup>

I submit that the phrase "in need of care and protection" as it reads, accommodates two categories of children: firstly, those who need to be removed from the family environment to alternative "care" and receive "protection" there; and secondly, those who need protection to be able to enjoy family life. The latter category of children may not need to be removed from the family environment. Protection of such children may be in the form of social services that will ensure their development and quality livelihoods. Protection entails providing safeguards that will combat abuse, maltreatment or any conduct that may be harmful to the well-being of the child.

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<sup>74</sup> 70 of 1979, hereinafter referred to as the "Divorce Act".

<sup>75</sup> 116 of 1998, hereinafter referred to as the "Domestic Violence Act".

<sup>76</sup> S 47(2)(a) of the Children's Act.

<sup>77</sup> S 47(2)(b) of the Children's Act.

<sup>78</sup> S 156(1).

My argument is best illustrated by an example given by Matthias and Zaal<sup>79</sup> of a child who has no visible means of support but has loving parents. An order that may be made by the children's court for such a child is a "special temporary family maintenance" grant for the child.<sup>80</sup> Nevertheless, Matthias and Zaal<sup>81</sup> hold the view that assessing and assisting children who are potentially "in need of care" is not merely a welfare role. Thus, a child living on the street may firstly need to be physically removed from the street to a new environment to receive shelter; and secondly, receive protection services such as basic necessities and other professional services, such as counselling.

### *3.2.2 Children in need of care and protection in terms of international law*

This section discusses the phrase "in need of care and protection" as incorporated in international laws. I will refer to the discussion in this section to establish provisions in the area of "in need of care and protection", consistently with international standards.

The phrase "in need of care and protection" is rarely used in international law governing children's rights. Furthermore, there is little content available regarding the definition and application of the phrase "in need of care and protection". Generally, the following phrases: "special care and assistance",<sup>82</sup> "special safeguards and care",<sup>83</sup> "protection and care"<sup>84</sup> and

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<sup>79</sup> In Boezaart (ed.) *Child Law in South Africa* 175.

<sup>80</sup> *Ibid.* See also the discussion in section 3 4 1 2.

<sup>81</sup> In Boezaart (ed.) *Child Law in South Africa* 163-164.

<sup>82</sup> Preamble of the CRC, par 4.

“care or protection”<sup>85</sup> etc. are used. The words “care” and “protection” are incorporated into domestic legislation, and inferred from international law, amongst others, the CRC.

The words “care” and “protection” appear to mean different things in different Articles of the CRC. For instance, the CRC imposes an obligation on states to develop legislative and administrative measures to ensure that the child receives “care and protection” as is necessary for the development and well-being of the child.<sup>86</sup> The interpretation of “care and protection” in the context of Article 3(2) is that the state is required to take into account the rights and duties of parents.<sup>87</sup> The roles of parents and the state are found to be inter-related in that the state has the duty to provide compulsory, free primary education and parents have the duty to ensure that education is in line with the best interests of the child. The concept “care or protection” is used in Article 3(3) and applies to institutions, facilities and services that provide care or protection to children. These must conform to the standards set by competent authorities by providing safety, health, suitable personnel and competent

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<sup>83</sup> Preamble of the CRC, par 9.

<sup>84</sup> Art 3(2) of the CRC 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 all appropriate legislative and administrative measures”.

<sup>85</sup> Art 3(3) of the CRC.

<sup>86</sup> Art 3(2). See also the discussion in Lawrence-Karski (1996) *Int Jour of Children's Rights* 40.

<sup>87</sup> Hodgkin & Newell (2007) 40.

supervision for children.<sup>88</sup>

In other Articles where the words “care” and “protection” are used, the CRC requires state parties to take all relevant legislative, administrative, social and educational measures to “protect” the child from all forms of physical or mental violence, abuse, including sexual abuse, injury, neglect or negligent treatment, maltreatment or exploitation whilst the child is under the “care” of his or her parents, legal guardian or other person.<sup>89</sup> The CRC acknowledges the fact that the child may be in need of “protection” even when the child is under the “care” of his or her parents and other persons who are not necessarily his or her parents. Thus, Hodgkin and Newell<sup>90</sup> argue that the word “care”, as referred to in Article 19, reflects on what happens in the “family” and within other caring institutions such as foster care, day care, schools and so forth.

The CRC also obliges state parties to take all appropriate national, bilateral and multilateral measures to “protect” the child from all forms of sexual exploitation and sexual abuse, to prevent the enticement or coercion of a child to engage in any unlawful sexual activity,<sup>91</sup> exploitative use of children in prostitution or other unlawful sexual practices,<sup>92</sup> and the

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<sup>88</sup> Art 3(3) of the CRC.

<sup>89</sup> Art 19(2); see the discussion in section 4 2 2; see also O`Halloran (2003) 23-24.

<sup>90</sup> (2007) 258.

<sup>91</sup> Art 34(a).

<sup>92</sup> Art 34(b).

exploitative use of children in pornographic performances and material.<sup>93</sup> “Protection” that is sought from state parties is “all appropriate” measures of “protection”.

The Committee on the Rights of the Child noted that there are other legal instruments that are relevant to the “protection” of the child.<sup>94</sup> The Committee also took an international initiative, amongst others, to appoint a Special Rapporteur who conducts country visits and prepares country-specific reports on the sale and trafficking of children, and child pornography and reports to the Human Rights Council.<sup>95</sup> The CRC specifically acknowledges other categories of children as children in need of “protection”. For instance, refugees, particularly those who do not have family members, must, according to the CRC, be provided with the same “protection” as any child who is permanently or temporarily deprived of his or her family environment.<sup>96</sup> The CRC further encourages the co-operation of relevant governmental and non-governmental organisations to “protect” and assist the child

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<sup>93</sup> Art 34(c): according to Hodgkin & Newell (2007) 514, the Committee on the Rights of the Child stressed the important framework established to deal with such matters: “that the child affected by the situation of sale, prostitution and pornography should be considered mainly as a victim and that all measures adopted should ensure full respect of his or her full dignity, as well as special protection and support within the family and society”.

<sup>94</sup> Hodgkin and Newell (2007) 514: amongst others, CEDAW for the protection of children against exploitation; ILO Forced Labour Convention for the protection of children against forced labour.

<sup>95</sup> Hodgkin and Newell (2007) 515.

<sup>96</sup> Art 22(2); Art 20 obliges the state to protect a child without a family; see also O`Halloran (2003) 24.

in obtaining the information necessary for the reunification of the child with his or her family.<sup>97</sup>

The ACRWC provides that every child is entitled to parental “care” and “protection” and that the child shall, whenever possible, have the right to reside with his or her parents.<sup>98</sup> The words that are relevant for the purposes of this discussion are “care” and “protection” from parents. Furthermore, the word “protection” as used in the ACRWC imposes the responsibility on states to “protect” children against all forms of exploitation and abuse.<sup>99</sup> States are also obliged to “protect” children from being recruited into the armed forces.<sup>100</sup> Furthermore, states must assist and “protect” refugee children and trace the parents or other close relatives or an unaccompanied refugee child in order to obtain the information

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<sup>97</sup> Art 22(2).

<sup>98</sup> Art 19(1) provides that: “Every child shall be entitled to the enjoyment of parental care and protection and shall whenever possible, have the right to reside with his or her parents ...”

<sup>99</sup> Art 21 requires states to protect the child against harmful social and cultural practices, in particular, practices that are prejudicial to the health and life of the child and are discriminatory to the child on the grounds of sex and other status; Art 15 states that every child shall be protected from all forms of exploitation and from performing any work that is likely to be hazardous or interfere with the development of the child; Art 16 requires states to take measures to protect the child against all forms of torture, inhuman or degrading treatment, particularly physical, mental injury or abuse, neglect or maltreatment including sexual abuse; Art 27 requires states to undertake to protect the child from all forms of sexual exploitation and sexual abuse, and Art 28 requires states to take all appropriate measures to protect the child from the use of narcotics and the illicit use of psychotropic substances. Viljoen in Boezaart (ed.) *Child Law in South Africa* 339.

<sup>100</sup> Art 22(3) states have an obligation to ensure the protection and care of children who are affected by armed conflicts, tension and strife. Viljoen in Boezaart (ed.) *Child Law in South Africa* 339.

necessary for reunification with their family.<sup>101</sup>

The involvement of the state in the “care and protection” of the child is also invoked in order, amongst other things, to ensure the provision of assistance to parents and other persons responsible for the child, and, in case of need, to provide material assistance and support programmes, particularly with regard to nutrition, health, education, clothing and housing.<sup>102</sup>

The ACRWC and the CRC are child-centred international pieces of legislation. It was thus expected that they would provide clarity on phrases such as “in need of care and protection”. If the CRC had done so, the ACRWC would follow, given the fact that the ACRWC was enacted after the CRC with a mandate to supplement the CRC with regional specifications.<sup>103</sup>

I am of the view that if the concept “in need of care and protection” had been fully defined in the CRC, this would have enabled the South African legislature to refer to the CRC when drafting the Children’s Act, given that South Africa is bound to develop its legislation and policies in line with the CRC following its ratification of the CRC.<sup>104</sup> While South Africa ratified the ACRWC on 10 October 2010,<sup>105</sup> it has not submitted any of its overdue reports to the African Children’s Rights Committee,<sup>106</sup> and neither has any communication been sent to

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<sup>101</sup> Art 23(2) states have an obligation to protect refugee children and children seeking refugee status and give them humanitarian assistance.

<sup>102</sup> Art 20(2) of the ACRWC. This provision is discussed in detail in section 4 2 2.

<sup>103</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 331-332 and 342.

<sup>104</sup> See the discussion in sections 1 1 and 3 2 2.

<sup>105</sup> At the time of writing this section of the study.

<sup>106</sup> A supervisory body, the African Committee of Experts on the Rights and Welfare of the Child. See the discussion by Viljoen in Boezaart (ed.) *Child Law in South Africa* 342.

South Africa requesting submission of reports.<sup>107</sup> This means that South Africa has so far not complied with the terms of the ACRWC.<sup>108</sup>

The ECHR has expanded legal resources in the area of interference with family life. A threshold criteria is set under Article 8(2) which must be satisfied before interference with family life is justifiable.<sup>109</sup> The Children Act (United Kingdom)<sup>110</sup> followed the trend under Article 8(2) of the ECHR; however, added further that the court must be satisfied that making the order will promote the welfare of the child and that it is better to make such an order rather than not making one at all.<sup>111</sup> Although South African courts are not bound by the ECHR, the Constitution requires a court, tribunal or forum to consider international law when

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<sup>107</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 349.

<sup>108</sup> *Ibid.*

<sup>109</sup> See the discussion in section 2 2 2 2 4.

<sup>110</sup> S 31(2) provides that: “A court may only make a care order or supervision order if it is satisfied-

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of the harm, is attributable to –
  - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
  - (ii) the child’s being beyond parental control.” See also Choudhry & Herring (2010) 299.

<sup>111</sup> Ss 1(1) of the Children Act provides that: “When a court determines any question with respect to – (a) the upbringing of a child ... the child’s welfare shall be the court’s paramount consideration.” and s 1(5) provides that: “When the court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.” See further the discussion in this section.



interpreting the Bill of Rights.<sup>112</sup> Thus, much can be learned from the judgments of the ECtHR. However, this chapter refers to the CRC and the ACRWC in my discussion on international law, where the ECHR does not cover specific grounds for mandatory alternative care interventions.

The ECHR protects everyone, including children.<sup>113</sup> This means that children are not necessarily protected as a special group in the ECHR. Reference is made here to the ECHR in selected areas for discussion. The ECHR does not specifically use the phrase “care”.<sup>114</sup> Thus, instead of using the phrase “in need of care and protection” for the discussion on ECHR, the phrase “respect for his private and family life” will be used.<sup>115</sup> The latter phrase may, in the context of a child mean *respect for the child’s right to family life*,<sup>116</sup> which includes care and protection for the child to enjoy family life. According to Article 8(2) of the ECHR interference with family life must be as a result of state action for the purposes of “protecting the rights of others”.<sup>117</sup> For instance, the state may interfere with the right of the parent and/or child to family life if the child is in “need of care and protection”.<sup>118</sup>

From the point of view of the ECHR, any intervention that amounts to the removal of the child

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<sup>112</sup> S 39(1).

<sup>113</sup> Arts 8(1) and (2). See the discussion in section 1 1.

<sup>114</sup> *Ibid.*

<sup>115</sup> Art 8(1).

<sup>116</sup> Own emphasis.

<sup>117</sup> Art 8(2); Kilkelly (1999) 187-188.

<sup>118</sup> Art 8(2).

to alternative care, will amount to interference with the right to family life under Article 8(1) unless it can be proved that the state's action meets the threshold criteria, if it can be shown that making the order:<sup>119</sup> was "necessary"<sup>120</sup> in the interests of the child that is removed or was "necessary" for the protection of public health and morals. The element "necessary" was unpacked in the case of *Kurtzner v Germany*<sup>121</sup> where the following statement was made:

"The fact that a child could [be] placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the 'necessity' for such an interference with the parents' right under Article 8 of the Convention to enjoy a family life with their child."<sup>122</sup>

Thus, mandatory alternative care intervention may not be considered for the child on the mere proof that it would be in the interests of the child to be removed.<sup>123</sup> Only if it is shown that the child is facing significant harm will the threshold criteria be met. This contention was affirmed in *Gnahore v France*<sup>124</sup> where the court justified the removal of the child to alternative care based on the fact that the father of the child wounded the child and that the father had a domineering personality, which limited the child from developing socially and

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<sup>119</sup> See the discussion in section 2 2 2 2 4.

<sup>120</sup> See the discussion in section 2 2 2 2 4 3.

<sup>121</sup> (2003) 34 EHRR 38 par 56.

<sup>122</sup> Par 60.

<sup>123</sup> *L v Sweden* (1984) 40 DR 140, 151; Choudhry & Herring (2010) 299.

<sup>124</sup> (2002) EHRR 38 par 56.

educationally.<sup>125</sup>

Where there is serious harm to the child, there is no difficulty in finding interference with the right to respect for family life as “necessary” and justified.<sup>126</sup> In the case of *Olsson v Sweden*<sup>127</sup> the ECtHR also affirmed the fact that it is not enough that a child would be better taken care of in care. The court found, amongst others, that splitting up a family must be supported by “sufficiently sound and weighty considerations”.<sup>128</sup> The principles emphasised in *Olsson’s* case are that domestic authorities may interfere with family life only in specified cases and where they have adequate background knowledge to the effect that no lesser measure would suffice in order to protect the interests of the children.<sup>129</sup>

Furthermore, mandatory alternative care intervention for a child can only be justified if it is “in accordance with the law”<sup>130</sup> and such law must be sufficiently accessible.<sup>131</sup> Thus, even if the interference of the state is “necessary” to protect the child, if it lacks legal foundation to

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<sup>125</sup> Choudhry & Herring (2010) 300-301.

<sup>126</sup> *Ibid.*

<sup>127</sup> 259; Kilkelly (1999) 270.

<sup>128</sup> *Ibid.*

<sup>129</sup> Kilkelly (1999) 270.

<sup>130</sup> See the discussion in section 2 2 2 2 4 1.

<sup>131</sup> In the case of *R (G) v Nottingham CC* 2008 EWHC 152, the social workers who were concerned about a young woman who was pregnant, removed the baby shortly after birth without a court order. Although the social workers were acting in what they called the best interests of the baby, they were acting without a formal court order or authorisation. Such action was regarded as illegal.

protect the child, it will infringe Article 8.<sup>132</sup> There must also be a “legitimate aim”<sup>133</sup> on the part of the state as set out in Article 8(2), to protect the rights and freedoms of others or to protect health or morals to justify the taking of the child into care. When the child is taken into care, it does not mean that family life between the child and the parent comes to an end. Instead, contact between the child and the parent may continue even after the child has been removed from family life.<sup>134</sup>

If contact between the child and the parent is barred, such action may be construed as interference with the right to family life of both the child and the parent.<sup>135</sup> However, the court can interfere with the right of the child and parent to contact each other when the child is in care. This will be discussed in Chapter 7 of this study.

Lastly, in terms of the threshold criteria, the ECHR has accepted the fact that where the removal of the child to care is justifiable in a particular state and not another, such is a matter over which contracting states may differ; thus there is a “margin of appreciation”.<sup>136</sup>

### 3.2.3 *Children in need of care and protection in terms of foreign jurisdictions*

There are few foreign jurisdictions that have laws that contain lists of grounds for mandatory

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<sup>132</sup> Choudhry & Herring (2010) 300.

<sup>133</sup> See the discussion in section 2 2 2 2 4 2.

<sup>134</sup> See the discussion in section 7 2 2.

<sup>135</sup> *Johansen v Norway* 33; see the discussion in section 7 2 2.

<sup>136</sup> See the discussion in sections 1 1 1 2 2 and 2 2 2 2 3.

alternative care that may be considered by the court to remove a child from family life. In this section, I reflect on Kenya<sup>137</sup> and Canada specifically, because they contain expanded and most significant list of grounds. I also discuss other jurisdictions where Canada and Kenya omitted grounds that I regard important for the study. Thus, I draw lessons from these jurisdictions to propose that South Africa must incorporate additional grounds which are significant for children “in need of care and protection”.<sup>138</sup>

The Children’s Act (Kenya) provides for children “in need of care and protection”; a phrase that is similar to the South African Children’s Act. Like the South African Act, the Children’s Act (Kenya) provides for the grounds of mandatory alternative care interventions which may be considered by the children’s court in its decision whether or not to remove the child.<sup>139</sup>

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<sup>137</sup> Kenya is one of the nine African countries that conducted a review of child related legislation and enacted a comprehensive children’s statute in line with the CRC: accessed from [www.unicef.org/esaro/5480\\_child\\_protection.html](http://www.unicef.org/esaro/5480_child_protection.html) on 2011-07-20.

<sup>138</sup> See the proposed provision in section 3 4.

<sup>139</sup> S 119:

- (1) provides that: “For the purposes of this Act, a child is in need of care and protection –
- (a) who has no parent or guardian or has been abandoned by his parent or guardian or is destitute, or
  - (b) who is found begging or receiving alms, or
  - (c) who has no parent or the parent has been imprisoned; or
  - (d) whose parents or guardian find difficulty in parenting; or
  - (e) whose parent or guardian does not or is unable, or unfit to exercise proper care and guardianship; or
  - (f) who is truant or is falling into bad associations; or
  - (g) who is prevented from receiving education; or

However, the Children's Act (Kenya)<sup>140</sup> has a wider list of children "in need of care and

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- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or who is kept in any premises which, in the opinion of a medical officer are overcrowded, unsanitary or dangerous; or
  - (j) who is exposed to domestic violence; or
  - (k) who is pregnant; or
  - (l) who is terminally ill, or whose parent is terminally ill; or
  - (m) who is disabled and is unlawfully confined or is ill-treated; or
  - (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
  - (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
  - (p) who is displaced as a consequence of war, civil disturbances, natural disaster; or
  - (q) who is exposed to any circumstances likely to interference with his physical, mental and social development; or
  - (r) if any of the offences mentioned in the Third Schedule of this Act has been committed against him or if he is the member of the same household as a child against whom any such offence has been committed, or is a member of the same household as person who has been convicted of such an offence against a child; or
  - (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.
- (2) A child apprehended under this section shall be placed in separate facilities from a child offender's facilities.
- (3) The provision of this section shall be in addition to, and not in derogation of, those of the Penal Code in relation to offences involving children, or the Employment Equity Act in relation to safeguards for working children."

<sup>140</sup>

*Ibid.*

protection”.<sup>141</sup> The Child Protection Act (Canada)<sup>142</sup> also has an expanded list of children “in

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<sup>141</sup> The provisions of the Children’s Act (Kenya) that are different from South African Children’s Act are s 119(1)(g), (h), (i), (j), (k), (l), (m), (o), and (p). Kenya has ratified the CRC on the 30 July 1990. Kenya has, (to date) submitted the initial and second report to the Committee on the Rights of the Child on the implementation of the rights of children in Kenya in accordance with the CRC. Concluding Observation No 58, Kenya Initial Country Report; Concluding Observation No 63, Kenya Second Country Report towards the “United Nations Convention on the Rights of the Child”; World Organisation Against Torture an Alternative Report to the “UN Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child in Kenya” (2007) par 325: accessed from [www.crin.org/.../KENYAOMCT%20Alternative%20Report%20to%20the%20CRC-Final%20v](http://www.crin.org/.../KENYAOMCT%20Alternative%20Report%20to%20the%20CRC-Final%20v) on 2010-02-05.

<sup>142</sup> The Act provides that:

- “9 A child is in need of protection where-
- (a) the child has suffered physical harm inflicted by a parent;
  - (b) the child is at substantial risk of suffering physical harm inflicted by a parent;
  - (c) the child has suffered harm caused by
    - (i) neglect of the child by a parent;
    - (ii) failure of a parent to adequately supervise or protect the child, or
    - (iii) failure of a parent to provide for the adequate supervision or protection of the child;
  - (d) the child is at substantial risk of harm caused by
    - (i) neglect of the child by a parent;
    - (ii) failure of a parent to adequately supervise or protect the child, or
    - (iii) failure of a parent to provide for the adequate supervision or protection of the child;
  - (e) the child has been sexually abused by the parent or by another person where the parent knew or ought to have known of the possibility of sexual abuse of the child and the parent failed to protect the child;
  - (f) the child is at substantial risk of sexual abuse by the parent or by another person where the parent knew or ought to have known of the possibility of sexual abuse of the child and the parent failed to protect the child;

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- (g) the child has been harmed as a result of being sexually exploited for purposes of prostitution and the parent has failed or been unable to protect the child;
  - (h) the child is at substantial risk of being sexually exploited for purposes of prostitution and the parent has failed or been unable to protect the child;
  - (i) the child has been harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;
  - (j) the child is at substantial risk of being harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;
  - (k) the child has suffered emotional harm inflicted by a parent, or by another person, where the parent knew or ought to have known that the other person was emotionally abusing the child and the parent failed to protect the child;
  - (l) the child is at substantial risk of suffering emotional harm inflicted by a parent, or by another person, where the parent knew or ought to have known that the other person was emotionally abusing the child and the parent failed to protect the child;
  - (m) the child has suffered physical and emotional harm caused by being exposed to domestic violence by or towards a parent;
  - (n) the child is at substantial risk of suffering physical and emotional harm caused by being exposed to domestic violence by or towards a parent;
  - (o) the child requires a specific medical, psychological, psychiatric treatment to cure, prevent or ameliorate the effects of a physical or emotional condition or harm suffered, and the parent does not, or refuses to obtain treatment or is unavailable or unable to consent to treatment;
  - (p) suffers from a mental, emotional, or developmental condition that, if not addressed, could seriously harm the child and the parent does not or refuses to obtain treatment or is unavailable or unable to consent to services or treatment to remedy or ameliorate the effects of the condition;



need of protection”. The grounds which I regard significant in the Child Protection Act and not contained in South Africa’s Children’s Act are (i), (j), (m), (n), (o), (p), (r), (s)(i), (ii), (iii) and (t). Also, ground (g), (h), (i), (j), (k), (l), (m), (p), (r) and 119(2) in the Children’s Act (Kenya) are not provided for in South Africa’s Children’s Act. It is therefore, appropriate for South Africa to refer to Kenya and Canada for an expanded list of grounds to improve on South Africa’s legal jurisprudence in this area.<sup>143</sup>

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- (q) the child has been abandoned or, the only parent of the child has died or is unavailable to take custody of the child, and adequate provision has not been made for the care of the child;
  - (r) the child is in the custody of the Director or another person and the parent of the child refuses or is unable to resume custody of the child;
  - (s) the child is less than 12 years old, and the child, in the opinion of the Director,
    - (i) may have killed or seriously injured another person;
    - (ii) poses a serious danger to another person; or
    - (iii) may have caused significant loss or damage to property, and the parent of the child does not obtain or is unwilling to consent to treatment for the child which may be necessary to prevent a recurrence of the incident or danger; or
  - (t) the past parenting by the parent has put the child at significant risk of harm within the meaning of this section.”

<sup>143</sup> See the discussion in section 3 4 for the additional grounds that are proposed for the South African Children’s Act.

### **3.3 Circumstances identifying children in need of care and protection: grounds for mandatory alternative care interventions**

This section discusses the grounds for mandatory alternative care interventions listed in section 150 of the Children's Act. I discuss the definition of the grounds, the circumstances that identify a child under such grounds in terms of South African law comparing it with international law and foreign jurisdictions.

According to Matthias and Zaal,<sup>144</sup> in general, grounds (a), (b), (c), (d), (e), (h) and (i) in section 150 will be easier to apply in practice, since they require only proof of past and or present circumstances. Grounds (f) and (g), on the other hand, will require a convincing and well motivated assessment about what is likely to happen to a child.<sup>145</sup> Thus, the social worker may request the court to draw inferences based on what has happened.<sup>146</sup>

The discussion on the circumstances identifying children in need of care and protection will be guided by the factors or grounds cited in the Children's Act, which influence the decision of the children's court to remove the child from the family environment as follows:

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<sup>144</sup> In Davel & Skelton *Commentary on the Children's Act* 9-6-9-7.

<sup>145</sup> Matthias & Zaal in Davel & Skelton *Commentary on the Children's Act* 9-7.

<sup>146</sup> *Ibid.*

### 3.3.1 *The child has been abandoned or orphaned and is without any visible means of support*<sup>147</sup>

This section analyses the grounds where a child who “has been abandoned or is without visible means of support”. I discuss the manner in which the provision is worded; that is, the combination of two factors being a child who “has been abandoned” or a child “without visible means of support”; and the circumstances surrounding the two factors.

Prior to the Children’s Act, the Child Care Act provided that the children’s court may consider a child who “has been abandoned or is without visible means of support” in its decision to remove a child from family life.<sup>148</sup> The Child Care Act did not provide a definition of the phrase “has been abandoned or is without visible means of support”. The word “or” in the provision indicated that there are two categories of children that were protected by the Act; that is, a child who is “abandoned” and a child who is “without any visible means of support”.<sup>149</sup>

The Children’s Act provision “child has been abandoned or orphaned and is without any visible means of support” is combined by the word “and”.<sup>150</sup> The provision implies that a child

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<sup>147</sup> S 150(1)(a).

<sup>148</sup> S 14(4)(aB)(i); Matthias (1997) 21-22.

<sup>149</sup> Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

<sup>150</sup> *Ibid.*

who is abandoned or orphaned *must*<sup>151</sup> be without visible means of support for him or her to be considered as a child in need of care and protection.

The circumstances surrounding an “abandoned or orphaned” child and a child “without any visible means of support” although inter-related, have in fact two different requirements. It will be valuable to separate the two phrases to ensure a focused and detailed discussion of the two circumstances of children in need of care and protection. I also propose that section 150(1)(a) be amended by separating the phrase “has been abandoned or is without visible means of support” into two grounds.<sup>152</sup>

### 3.3.1.1 *The child has been abandoned or orphaned*

This section discusses the circumstances that cause orphans and abandoned children to be vulnerable and in need of care and protection. I discuss the intervention that may be sought for children under these circumstances. Furthermore, I propose that regulations be promulgated to the Children’s Act to provide services that will curb sexual abuse, protect pregnant learners, and prevent child abandonment.<sup>153</sup>

According to the Children’s Act, a child is abandoned<sup>154</sup> if the child has been deserted by the

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<sup>151</sup> Own emphasis.

<sup>152</sup> See the proposed provision in section 3 4.

<sup>153</sup> *Ibid.*

<sup>154</sup> S 1(1).

parent, guardian or care-giver, or is a child who has had no contact with the parent, guardian or care-giver for a period of at least three months without reason. An orphaned child is a child who has no surviving parent caring for him or her.<sup>155</sup> One should note that a child is an “orphan” even if he or she has a parent, provided that the parent is not currently caring for him or her. South Africa has 701 000 orphaned children.<sup>156</sup>

Child abandonment is rife in South Africa,<sup>157</sup> particularly as a result of sexual abuse,<sup>158</sup> learner pregnancy, and in situations where a pregnant learner has also contracted HIV/Aids.<sup>159</sup> Most often, abandoned children are found left exposed in public places, hospitals, forests, plastic bins and pit latrines.<sup>160</sup> Social factors such as the breakdown of the extended African family system, urbanisation, the migratory labour system, and poverty

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<sup>155</sup> S 1(1) of the Children’s Act.

<sup>156</sup> Kane-Berman *South Africa Survey 2007/2008* (2008) 44.

<sup>157</sup> Sinclair “From Parent’s Rights to Children’s Rights” in Davel (ed.) *Children’s Rights in a Transitional Society* (1999) 76; *Sowetan* (2007-07-03): according to the newspaper report, 1 200 children were abandoned in 3 provinces alone in South Africa. The number of children abandoned doubled, and the report indicates that “more than 40 children are dumped in Free State province alone every month, the worst record in the country”.

<sup>158</sup> Sexual abuse has been much of a constant feature of South Africa schools: accessed from [www.info.gov.za/otherdocs/2002/sexual.htm](http://www.info.gov.za/otherdocs/2002/sexual.htm) on 2012-11-07.

<sup>159</sup> *Sowetan* (2008-06-21): “A mother in Northern Zululand dumped her 3 day old baby on the street after an argument with the baby’s father...She told the police that after the argument with the baby’s father she had no choice but to dump the baby on the street.”

<sup>160</sup> Leoning “Adolescent Pregnancy: A medical perspective” in Burman & Preston-Whyte (eds.) *Questionable issue: Illegitimacy in South Africa* (1992) 23.

contribute to the increase in child abandonment.<sup>161</sup> Often an unsuccessful termination of pregnancy by a teenager also leads to the abandonment of a child.<sup>162</sup>

Reports<sup>163</sup> in the press recently raised alarm around the rate of learner pregnancy in South African schools. Learners, girls in particular, are aware that pregnancy robs them of their childhood and the right to parental care. This is amongst the reasons why many girls abandon their newborns rather than raise them.<sup>164</sup> On the other hand, lack of family support in raising the newborns compels many girls to leave school to assume parenthood roles.

The General Law Amendment Act prohibits the concealing, abandoning or exposure of

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<sup>161</sup> Leoning in Burman and Preston-Whyte (eds.) *Questionable issue: Illegitimacy in South Africa* 23.

<sup>162</sup> *Sowetan* (2007-07-03).

<sup>163</sup> Kane-Berman (2008) 413. In 2006, more than 72 000 girls between the age of 13 and 19 did not attend school because of pregnancy. See also *Sunday Times Metro* (2006-03-26): according to this newspaper article, 2 542 school girls fell pregnant over the past 2 years in Gauteng Province in South Africa. Over the same period, Tembisa township had the highest figure at 61, Beverly Hills High School on the Vaal was the second highest at 43 and Eketseng Secondary School in the East Rand had 36 pregnant learners.

<sup>164</sup> *Sowetan* (2008-06-21): teachers and pupils of the Masisebenze Secondary School in Tembisa, East Rand, were shocked when a 17 year-old pupil gave birth while at school. Teachers say the pregnancy rate has caused high levels of absenteeism and failure as girls attend to their babies during school hours. The *Annual Surveys for Ordinary Schools* for (2009-2010) revealed that in Grade 3 alone, about 109 pupils fell pregnancy in 2009 as against “only” 17 in the same grade in 2008. In Grade 4, the number increased to 107 from 69 in 2008, and in Grade 5, 297 girls fell pregnant in 2009. The highest concentration of pregnant pupils was in high schools, from Grade 7 to Grade 9. In 2009, a total of 45 276 girls became pregnant: see also, *The Times* (2012-05-31) 1 and 4.

newborns.<sup>165</sup> The legislation is often not enforced because most mothers who abandon their children or expose their newborns escape without trace.<sup>166</sup> Hence prosecution for child abandonment is very rare.<sup>167</sup> The person who abandons a child is normally charged with murder or culpable homicide when the abandoned child is found dead, alternatively, with attempted murder if the abandoned child is found alive.<sup>168</sup> If the whereabouts of the abandoned child's parents cannot be traced, the child becomes an orphan.

According to the case of *S v Prins*,<sup>169</sup> "abandon" means to "(1) give up; (2) desert or leave permanently".<sup>170</sup> The grammatical meaning of "abandon" in the context of section 50(1)(b) of the Child Care Act is a disregard of parental duty.<sup>171</sup> The accused in the case of *Prins* was

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<sup>165</sup> S 113 of Act 46 of 1935 provides that: "(1) Any person who disposes of the body of any child with intent to conceal the fact of its birth, whether the child died before or after birth, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding three years. (2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child's birth, unless it is proved that he had no such intent". Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* 593, see ch 1, n 67.

<sup>166</sup> Snyman *Criminal Law* (1995) 406; Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* 593.

<sup>167</sup> Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* 593: a parent or guardian who abandons or exposes a child may be charged with the unlawful and intentional exposure and abandonment of a new-born in such a place or in such circumstances that its death from exposure is likely to result.

<sup>168</sup> Snyman (1995) 406.

<sup>169</sup> 2003 (2) SACR 510 (C).

<sup>170</sup> 512G.

<sup>171</sup> 512H.

charged with two counts of contravening section 50(1)(b) and section 50(2) of the Child Care Act in that she had abandoned her two children by failing to comply with her parental duty to maintain them as envisaged under the Child Care Act.<sup>172</sup>

Section 50(1) of the Act provided that any parent or guardian of a child or any person having custody of the child who – (a) ill-treats the child or allows it to be ill-treated; (b) or abandons that child, shall be guilty of an offence. Section 50(2) provided that any person who is legally liable to provide adequate food, clothing, lodging and medical aid, shall be guilty of an offence if he or she fails to do so.<sup>173</sup> This means that the word “abandon” does not have the literal interpretation of giving up or deserting a child; a parent who fails to comply with his or her parental duty also abandons his or her child.<sup>174</sup> Thus, it is an offence for any parent, guardian, a care-giver or other person who has parental responsibilities and rights in respect of a child or who voluntarily cares for the child to either indefinitely, temporarily or partially abandon the child.<sup>175</sup> I recommend for South Africa to promulgate regulations to the Children’s Act to provide services that will curb situations of sexual abuse, protect pregnant learners and prevent child abandonment.<sup>176</sup>

### 3.3.1.1.1 The child has been abandoned or orphaned in terms of international law

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<sup>172</sup> 510J.

<sup>173</sup> 511B-C.

<sup>174</sup> 511C.

<sup>175</sup> S 305(3)(b). See also Minnie in Boezart (ed.) *Child Law in South Africa* 540, see n 274.

<sup>176</sup> *Ibid.*



The CRC does not include a specific Article that defines orphans nor address situations of orphaned or abandoned children. However, UNICEF defines a child who has lost both parents as a double orphan.<sup>177</sup> The Article in the CRC that seem to target orphaned or abandoned children is the one dealing with children who are permanently unable to live with their families as follows:

“A child temporarily or permanently deprived of his or her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”<sup>178</sup>

According to Hodgkin and Newell,<sup>179</sup> children who fall under Article 20(1) are not able to live with their families either because of death or their parents, abandonment, displacement or because the state has determined that they be removed in their best interests. These children have lost family ties and their identity. Their stability in a family environment has also been severely disrupted. The CRC emphasises the fact that these children deserve “special protection and assistance”.<sup>180</sup> Thus, care that is envisaged for such children, according to the CRC includes:

“ ... inter alia, foster placement, kafala of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious,

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<sup>177</sup> Accessed from [http://www.unicef.org/media/media\\_45290.html](http://www.unicef.org/media/media_45290.html) on 2011-04-08.

<sup>178</sup> Art 20(1).

<sup>179</sup> (2007) 277.

<sup>180</sup> See the discussion in section 3 2 2.

cultural and linguistic background”.<sup>181</sup>

Children who are deprived of family life have greater needs than simply providing them with alternative care.<sup>182</sup>

The Committee on the Rights of the Child,<sup>183</sup> in its concluding remarks regarding South Africa’s Initial Report to the CRC, recommended South Africa train parents to nurture their children in a family environment and discourage the abandonment of children, given the insufficient facilities for alternative care. The ACRWC states that where the whereabouts of parents, legal guardians or close relatives of the child are not known, the child should be given the same protection “as any other child ... deprived of his family environment for any reason”.<sup>184</sup> On the other hand, with regard to the removal of newborns, the ECtHR appears reluctant to find such removal justifiable under the ECHR.<sup>185</sup> Hence the court in the case of *P, C, and S v UK*<sup>186</sup> found such removal “extremely harsh”. The court found that the reasons for justifying an application for removal of a newborn need to be “extraordinarily compelling”, detailed and precise.<sup>187</sup>

### 3.3.1.1.2 The child has been abandoned or orphaned in terms of Kenyan law

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<sup>181</sup> Art 20(3).

<sup>182</sup> Hodgkin & Newell (2007) 280.

<sup>183</sup> Concluding Observation No 25, par 3 2 2.

<sup>184</sup> Art 23(3); Viljoen in Boezaart (ed.) *Child Law in South Africa* 339.

<sup>185</sup> Choudhry & Herring (2010) 305.

<sup>186</sup> (2000) 3 FCR 1.

<sup>187</sup> *Ibid.*

In this section, I compare South Africa with Kenya because the ground “child has been abandoned or orphaned” is to some extent similar to that of Kenya. The Children’s Act (Kenya) provides that a child “who has no parent or guardian or has been abandoned by his parent or guardian or is destitute” is in need of care and protection.<sup>188</sup> The difference between the Children’s Act (Kenya) and the South African Children’s Act<sup>189</sup> is that Kenya covers three categories of children in a single provision, that is, “a child who has no parent or guardian”, “a child who is abandoned”, or “a destitute child”. On the other hand, the South African Children’s Act covers two categories of children, that is, “orphaned” or “abandoned” children, and both of them must be “without any visible means of support”. There may be challenges for an abandoned or orphaned child to meet the “without any visible means of support” requirement in that, for example, there may be “visible means of support” for an orphaned child who lives in a child-headed household.

According to a 2007 report, Kenya had 2 430 000 orphans and 443 000 double orphans.<sup>190</sup> One of the ways in which Kenya has responded to the orphan crisis is by seeking to provide support for family members to be able to take care of orphaned children.<sup>191</sup> The support

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<sup>188</sup> Art 119(1)(a).

<sup>189</sup> S 150(1).

<sup>190</sup> Accessed from <http://www.thewayforwardproject.org/countries/kenya>; see the discussion in section 3 4 1 1 1 for the definition of the different categories of orphans.

<sup>191</sup> Ministry of Gender, Children and Social Development *The National Plan of Action for Orphans and Vulnerable Children, Kenya 2007-2010* (2008): accessed from <http://www.ovcsupport.net/libsys/Admin/d/DocumentHandler.ashx?id=942> on 2011-04-28.

includes cash subsidies to households caring for the orphans,<sup>192</sup> promotion of domestic adoption, guardianship and foster care.<sup>193</sup> As noted earlier, Kenya has submitted its Second Report to the CRC.<sup>194</sup> However, the Committee on the Rights of the Child did not share any observations regarding “a child who has no parent or guardian”, “a child who is abandoned”, or “a destitute child” in Kenya.

### 3.3.1.2 *The phrase: “... and is without any visible means of support”*

This section discusses the situation of poverty that many children find themselves in, in the family environment. I also discuss the intervention measures that may be explored to address the poverty situation in order to enable children to remain in families rather than removing them to alternative care. Amongst others, I reflect on information gathered from interviews to support the argument that the child-support grant that is currently provided to children be reviewed. Thus, I propose that South Africa refer to foreign jurisdictions and amend the Social Assistance Act also incorporate additional provisions for the provision of adequate financial means for children in families.<sup>195</sup>

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<sup>192</sup> Biemba *et al.* *Situational Analysis on Orphans and other Vulnerable Children: Country Brief* (2009): accessed from <http://www.ovcsupport.net/libsys/Admin/d/DocumentHandler.ashx?id=1053> on 2011-04-28.

<sup>193</sup> *The National Plan of Action for Orphans and Vulnerable Children, Kenya 2007-2010* (2008).

<sup>194</sup> See the discussion in section 3 2 3.

<sup>195</sup> *Ibid.*

The weakness of the phrase “... and is without any visible means of support”<sup>196</sup> is that it emphasises the fact that it is insufficient that a child is abandoned or orphaned as provided in section 150(1)(a).<sup>197</sup> It must further be proved that there is an absence of means of support.<sup>198</sup> On the other hand, it will no longer be possible to use poverty alone as grounds for removal of a child from family life.<sup>199</sup> The Child Care Act did not define the phrase “or is without visible means of support”.<sup>200</sup> There is also no definition of the phrase “and is without any visible means of support” in the Children’s Act. The literal meaning of the phrase “and is without any visible means of support” is lack of means to nurture and develop the child.

Discussions that emanate from this phrase reflect on situations of poverty as a manifestation of lack of means for support.<sup>201</sup> Thus, the Children’s Act provides for measures that may be explored for a child who is without visible means of support such as prevention, early intervention services<sup>202</sup> which include assisting families to obtain the basic necessities of life<sup>203</sup> and empowering families to obtain such necessities for themselves.<sup>204</sup> The duty on the

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<sup>196</sup> S 150(1)(a) of the Children’s Act.

<sup>197</sup> Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> S 14(4)(aB)(i); Matthias (1997) 21-22.

<sup>201</sup> SALRC The Review of the Child Care Act (1998) par 5 6.

<sup>202</sup> S 150(3). See the discussion in section 4 3.

<sup>203</sup> S 144(2)(a). See the discussion in section 4 3.

<sup>204</sup> S 144(2)(b). See the discussion in section 4 3.

state to provide support to children and their families is discussed in the next chapter.<sup>205</sup>

To alleviate the poverty experienced by many children, the South African government introduced the child-support grant as a means of financial support for children who live in families that are unable to maintain their children.<sup>206</sup> The grant is provided for children below a prescribed age through their primary care-givers<sup>207</sup> and is steadily being extended to include children all eligible children under the age of 18 by 2012.<sup>208</sup>

South Africa has 9 061 711 children who receive the child-support grant.<sup>209</sup> Thus, the poorest families in South Africa turn to the social assistance grant provided by the state for basic subsistence of children in their care.<sup>210</sup> According to the SALRC report,<sup>211</sup> the child-support grant is means-tested and based on the household income of the primary care-giver. The means threshold is used to target the poor within the state's limited resources, with the aim of reaching its objectives at the lowest possible cost. However, there are concerns about the means threshold in that it excludes many people living in poverty and that it has

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<sup>205</sup> Ss 4(2) and 146 of the Children's Act; ss 28(1)(c) and 28(1)(d) of the Constitution. See the discussion in sections 4 2 1 and 4 3.

<sup>206</sup> The child-support grant was introduced on 1 April 1998 in terms of the Social Assistance Act and came into operation on the 1 April 2006. See the discussion in sections 4 2 and 4 2 1.

<sup>207</sup> S 2(2) and Preamble to the Social Assistance Act.

<sup>208</sup> Kibel (eds.) *South African Child Gauge 2009/2010* (2010) 84.

<sup>209</sup> Kane-Berman (2009) 483. See also the discussion in section 1 5.

<sup>210</sup> Sinclair & Davel "Poverty, Welfare and the Family: South Africa's Miracle Transition at Risk" *International Survey of Family Law* (2009) 457.

<sup>211</sup> The Review of the Child Care Act (1998) par 5 6.

corrupt administration.<sup>212</sup> On the other hand, mothers and children who are receiving the grant have been stigmatised as morally corrupt and undisciplined after research revealed that mothers fall pregnant deliberately in order to access the grant.<sup>213</sup>

A concern regarding the means threshold that is raised, amongst others, is the question of whether South Africa should provide social assistance on a universal basis rather than using the threshold. The fact that the means threshold determines eligibility and that it has not been adjusted since the inception of the programme in 1998 was also a major shortcoming.<sup>214</sup>

In 2008 the Minister for Social Development established new regulations under the Social Assistance Act.<sup>215</sup> Amongst others, the amendments made in the regulations were to deal away with the rural and urban divide which targeted a limited number of beneficiaries. The

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<sup>212</sup> Sinclair & Davel *International Survey of Family Law* 458: the means threshold focuses on the income means of the primary care-giver and requires information that the applicant may not be in a position to provide.

<sup>213</sup> Schram *After Welfare: The Culture of Postindustrial Social Policy* (2000) 1-2; Barchiesi "The Debate on Basic Income Grant in South Africa: Social Citizenship, Wage Labour and Reconstruction of Working-Class Politics: Engaging Silences and unresolved Issues in the Political Economy of South Africa" (2006) *Harold Wolpe Memorial Trusts Tenth Anniversary Colloquium*, Cape Town, Unpublished conference paper 4. See the discussion in section 4 2 1.

<sup>214</sup> *Ibid*: the means threshold was R1100 per month for rural communities and some urban households. R800 was the means threshold for urban households and informal dwellings despite inflation.

<sup>215</sup> GG 22 August 2008 No 31356.

child-support grant has recently increased to R 280 per month.<sup>216</sup> Davel and Sinclair<sup>217</sup> argue that this clearly shows that government is not prepared to introduce a non-targeted universal child-support grant. I am of the view that the child-support grant is not doing enough to target the needs of children in different households.

Jacobs *et al.*<sup>218</sup> reflect on various options on how social grant payments might be made. The researchers present the following methods for making social grants: “cash grants”,<sup>219</sup> “in kind food handouts”<sup>220</sup> and “vouchers”<sup>221</sup> as an as a way of transferring public support to the poor.<sup>222</sup> The development of local infrastructure and markets are critical determinants of how effectively each instrument is likely to work in practice.<sup>223</sup>

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<sup>216</sup> GG 3 March 2012 No 35205.

<sup>217</sup> *International Survey of Family Law* 458.

<sup>218</sup> “Developmental Social Policies for the Poor in South Africa: Exploring Options to Enhance Impacts?” (2010) *Overcoming Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development Conference* Johannesburg, South Africa Unpublished conference paper 2.

<sup>219</sup> *Are cash transfers. They promote human capital development, mitigate risk by providing a cushion against livelihood shocks but are prone to corruption: Jacobs et al.* (2010) Unpublished conference paper 4.

<sup>220</sup> Are in a form of food parcels given to individuals, household or communities that are vulnerable as a result of food insecurity: *ibid.*

<sup>221</sup> Is a coupon or certificate against which social grant benefits are dispensed to qualifying beneficiaries. A “voucher” is exchangeable for specific goods and services and work best when government contracts out the provision of services: *ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> Jacobs *et al.* (2010) Unpublished conference paper 5.



The above three methods have both advantages and disadvantages. A “cash transfer” offers the beneficiary the greatest level of discretion in spending.<sup>224</sup> On the other hand, it has the potential for loss and being misused by the beneficiary. I opine that the grant may be misused by, for example, purchasing items that are not necessary such as, cosmetics, or buying items that are unaffordable. The “in kind food handouts” give the assurance that beneficiaries would definitely receive parcels. On the other hand, the beneficiary may not have cash to travel to the place where food parcels are handed out or have cash for other services that he/she needs.

The “voucher” has more disadvantages compared to a “cash transfer” and “in kind food handouts”. A “voucher” may limit the beneficiary, particularly when it contains conditions of exchange; that is, if it is exchangeable in specific markets and dealers and not others. A “voucher” ties the beneficiary to an exchange of goods and services stipulated in the “voucher” and it may (unless the voucher is also exchangeable for cash) not be used to receive cash. Like a “cash transfer”, it is easy to lose a “voucher”. Thus, I find the “cash transfer” the most convenient option.

Despite the availability of the social grant, Zaal and Matthias<sup>225</sup> argue that in situations where children have no visible means of support, the children’s court should be allowed to issue a “special temporary maintenance” order. The authors argue that they must apply where poverty emerges as the sole reason for inadequate care without making any formal

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<sup>224</sup> Jacobs *et al.* (2010) Unpublished conference paper 4.

<sup>225</sup> In Boezaart (ed.) *Child Law in South Africa* 127.

designation of the child being in need of care and protection. This grant is also provided in the United States of America through a Temporary Assistance to Needy Families program.<sup>226</sup>

I submit that if a “special temporary maintenance” is considered for destitute families,<sup>227</sup> it should be targeted at the family with the aim of providing the basic needs of the family; that is, what it costs to maintain the family on a monthly basis and the grant must terminate when the family is self-sustaining. Thus, if the “special temporary maintenance” is meant to cover the basic necessities of the family monthly, it should be more in amount compared to the child-support grant. The “special temporary maintenance” must be sufficient to meet the costs of running the household per month.<sup>228</sup>

Apartheid and past inequalities deprived the most disadvantaged groups in South African society of social and economic rights.<sup>229</sup> During the apartheid era, white people exploited the labour of black South Africans.<sup>230</sup> Since they lacked power to influence the terms of employment, many black families were, and still are, employed for low remuneration even

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<sup>226</sup> Hereinafter referred to as “TANF”. Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 10. See the discussion in section 3.3.1.2.2.

<sup>227</sup> Matthias (1997) 31. See also the discussion in sections 4.2, 4.4 and 5.1.3.

<sup>228</sup> See my recommendations later in the discussion.

<sup>229</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 294.

<sup>230</sup> Bennett *African Customary Law* (1991) 166. According to Bennett, unemployment and the decline in agricultural production led to greater poverty, which eroded the foundation of kingship. Income is no longer shared amongst members of the extended family. Instead it is concentrated in the earner’s household. See also Ntlama “Jurisprudence on Equality in respect of Socio-economic Rights” (2006) *De Jure* 94.

though they have financial responsibilities in their households.<sup>231</sup> Thus, many parents are not to blame for their circumstances of poverty.<sup>232</sup> In 2008, amongst other initiatives, the then President of South Africa, Thabo Mbeki, committed himself to renewing his government's efforts to deal with poverty, although the details of his strategy were not known.<sup>233</sup> A "basic income grant",<sup>234</sup> which takes the form of a transfer of money to individual recipients and is not related to means testing or employment status, was recommended by the President.<sup>235</sup> The idea of a BIG was supported by some as a way of tackling unemployment, helping workers to retrain for new occupations, and facilitating self-employment.<sup>236</sup> Debates on a universal basic income grant are relevant in the South African context given the massive long-term unemployment and the predominance of low-skilled workers among the jobless with limited hopes for full-time employment with benefits.<sup>237</sup> I submit that if the BIG is implemented it can only meet the needs of poor families if the amount is consistent with the basic needs and quality of livelihoods of families. If this is not the case, a BIG may do little to

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<sup>231</sup> The number of African people living in poverty from 1996-2008 was 16 275 067 compared to 98 597 whites during the same period. Kane-Berman (2008) 303.

<sup>232</sup> Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

<sup>233</sup> Sinclair & Davel *International Survey of Family Law* 464.

<sup>234</sup> Hereinafter referred to as "BIG".

<sup>235</sup> Gorz *A Reclaiming Work: Beyond the Wage-Based Society* (1999) 1; Barchiesi (2006) Unpublished conference paper 8. An important report which was commissioned by government recommended BIG: the Taylor Report "Transforming the Present – Protecting the Future: Report of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa" (2002); see Sinclair & Davel *International Survey of Family Law* 464: the report recommended that BIG be provided to every South Africa irrespective of need or employment and that it be funded through a wealth tax system.

<sup>236</sup> Gorz (1999) 1; Barchiesi (2006) Unpublished conference paper 8.

<sup>237</sup> Barchiesi (2006) Unpublished conference paper 5.

meet households' basic needs, as is the case with child-support grant, which does very little to provide for the needs of children in poverty stricken families.

There are other measures that might be adopted in addition to a BIG. I recommend that a "special temporary family maintenance" or an income assistance cash grant of at least R2 500 per month be provided to families without income and families with a monthly income that is less than R2 500. This amount is motivated on the basis of the information gathered from interviews held with beneficiaries of the child-support grant with an income threshold of less than R 2 500 per month.<sup>238</sup> The interviews provide an estimation of what may be the basic groceries and costs incurred by families per month. I have not provided a substantial geographical variation of costs for the basic needs in families. Thus, I rely on a rough estimation that a family requires at least R2 500 for basic necessities each month.<sup>239</sup>

I recommend that South Africa establish regulations to the Social Assistance Act, or to the Children's Act,<sup>240</sup> and provide "special temporary family maintenance" for families.<sup>241</sup> The

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<sup>238</sup> An interview with "Mr Mahlangu", a farm worker in Emmerpan, rural area in the Limpopo province (who has a family of four members, held on the 2011-06-27, revealed that "Mr Mahlangu" earns R1000 per month and spends R1 312 per month towards household goods, borrows R 350 every month to cover the remaining needs of his family and uses his son's child-support grant for travelling costs: see Annexure "B". Also, an interview held on the 2011-06-27 with Ms Mokoena, who has 3 dependents, revealed that Ms Mokoena earns R 1 600 per month and often spends R 1 805 (the latter includes her daughter's child support grant) for household goods on monthly basis: see Annexure "C".

<sup>239</sup> *Ibid.*

<sup>240</sup> S 150(1)(a) of the Children's Act.

“special temporary family maintenance” grant must be in addition to the child support grant; adjusted consistently with the annual inflation rate; to the amount of R 2 500 for families where there is no income earner; adjusted accordingly for single parent families; and families with income that is less than R 2 500.<sup>242</sup> I recommend that eligible families must receive R2 500 “special temporary family maintenance” and not more. This amount may be sufficient to contribute towards direct costs and to some extent, costs not budgeted for.<sup>243</sup>

There is clearly no provision for financial assistance to save families who are dedicated to providing care to their children.<sup>244</sup> Matthias<sup>245</sup> argues that it would be “far better for the children’s court to have the power to order the state grant than ever to remove a child because of poverty”. I support this argument with the view that parental responsibilities and rights should not be confined to parents’ financial capacity only. It is less expensive to take care of the needs of a child in his or her family rather than in a residential care facility.<sup>246</sup> Where parents cannot provide for their families, the state must assist.

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<sup>241</sup> See the discussion in sections 3 3 1 2 2 and 3 4.

<sup>242</sup> See the discussion in section 3 4.

<sup>243</sup> See also the discussion in sections 4 3 and 4 3 1 regarding measures that may be considered in securing prevention and early intervention measures in order to keep children in families.

<sup>244</sup> Matthias (1997) 21-22.

<sup>245</sup> (1997) 22.

<sup>246</sup> Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

Sloth-Nielsen<sup>247</sup> argues that in recognising the primary duty of the state regarding families in need, such need should not encourage families in dire poverty to abandon their responsibilities and leave their children at the doorstep of the state. However, researchers agree that where child neglect stems from poverty alone, the state should adopt meaningful preventive measures, which must include a level of financial assistance for family preservation.<sup>248</sup> As I have argued with regard to the BIG and the child-support grant, I submit that financial assistance to families must be consistent with the basic needs of running a family. I support the idea that poverty alone must not be used to justify removing a child from family life.

### 3.3.1.2.1 The phrase: “and is without any visible means of support” in terms of international law

The CRC does not have a provision that specifically speaks to the phrase “and is without any visible means of support”. Instead the CRC responds to the needs that arise from the phrase “and is without any visible means of support” by obliging state parties to undertake measures to the “maximum extent of their available resources”, and where necessary, within the framework of international co-operation to provide for the economic, social and cultural rights

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<sup>247</sup> (2001) *SAJHR* 229-230.

<sup>248</sup> S 27 of the Constitution requires the state to implement progressively and within available resources, social welfare, material assistance to families in need. See, amongst others, Sloth-Nielsen (2001) *SAJHR* 231; Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

of children.<sup>249</sup> Thus, Hodgkin and Newell are of the view that:

“ ... Whatever their economic circumstances, States are required to undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups.”<sup>250</sup>

Other Articles<sup>251</sup> that impose the duty on states to provide for socio-economic needs are, amongst others, 3,<sup>252</sup> 5,<sup>253</sup> 6(2),<sup>254</sup> 6,<sup>255</sup> 19,<sup>256</sup> 28(2),<sup>257</sup> 37(a), (c)<sup>258</sup> and 39.<sup>259</sup> The CRC also recognises that every child has the right to benefit from social security, including social

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<sup>249</sup> Art 4. See the discussion in section 4 2 2.

<sup>250</sup> (2007) 52.

<sup>251</sup> These articles are discussed in the next chapter: see the discussion in section 4 2 2.

<sup>252</sup> States have the duty to ensure that in all matters concerning the child, the best interests of the child is a primary consideration.

<sup>253</sup> States have the duty to respect the rights and responsibilities of parents over their children and the role of parents to provide direction and guidance to children consistent with the evolving capacities of their children. See the discussion in section 2 2 2 1.

<sup>254</sup> States have an obligation towards the survival and development of children to the maximum extent they are capable of.

<sup>255</sup> See the discussion in section 4 2 2.

<sup>256</sup> States have an obligation to take measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation, including sexual abuse. Furthermore, states are required to take measures to establish social programmes and to provide the necessary support for the child. See the discussion in sections 4 2, 4 2 1 and 4 2 2.

<sup>257</sup> See the discussion in section 3 3 3 1.

<sup>258</sup> See the discussion in section 3 3 3 1.

<sup>259</sup> See the discussion in section 3 3 3 1; Hodgkin & Newell (2007) 261.

insurance.<sup>260</sup> The benefits that the child is entitled to, should, where appropriate, be consistent with the resources and the circumstances of the child and the persons who are tasked with the responsibility for the maintenance of the child.<sup>261</sup> According to Hodgkin and Newell,<sup>262</sup> Article 26 applies to situations where there is a need for financial support. Children are primarily dependent on adults for financial resources.<sup>263</sup>

In the event that adults are not able to provide for them, either because they are not able to find employment, or because their circumstances, such as old age, illness, or disability prevent them from working, then the state has the responsibility to ensure that the child is provided with financial support.<sup>264</sup>

The ACRWC like the CRC<sup>265</sup> provides for the situation where a child “is without any visible means of support” by obliging state parties, consistent with their means and national conditions, to do what is possible to assist parents and other persons responsible for the child who are in need, and to provide material assistance, particularly nutrition, clothing and housing for the child.<sup>266</sup> Hodgkin and Newell<sup>267</sup> find Article 27(3) “self-protective” in that it provides that states will assist parents in their primary duty to secure children’s living

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<sup>260</sup> Art 26(1). See the discussion in section 4 2 2.

<sup>261</sup> *Ibid.*

<sup>262</sup> (2007) 385.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> Art 27(3).

<sup>267</sup> (2007) 397.



conditions rather than requiring that states will directly support the child. This Article affirms Article 18, which states that while the parents of the child have the primary responsibility for the upbringing and development of the child, the state also has a role to support parents in promoting and protecting the well-being of the child.<sup>268</sup>

The Committee on the Rights of the Child,<sup>269</sup> in its concluding remarks on South Africa's Initial Report regarding the provision of welfare services, highlighted its concern about the age for eligibility in accessing the child-support grant. The Committee concluded that South Africa must expand its support grant or develop other programmes to include all children below the age of 18.<sup>270</sup> South Africa recently amended its regulations relating to the application and payment of social assistance and its requirements in respect of eligibility for social assistance. Primary care-givers who receive the child support grant on behalf of the child will continue to receive the grant until the child reaches the age of 18.<sup>271</sup>

In terms of the ECHR, the House of Lords in the case of *Re G (Residential Assessment)*<sup>272</sup> felt that there is no Article 8 right that would make a parent a better parent at the public expense.<sup>273</sup> The House of Lords further questioned whether applying Article 8 would improve the ability of parents to provide for their children and, as such, would do away with the need

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<sup>268</sup> *Ibid.* See the discussion on Art 18(1) in section 2 4 3 1.

<sup>269</sup> Concluding Observation No 24.

<sup>270</sup> *Ibid.*

<sup>271</sup> Reg 6(2) published in GG No 9218 of 31 December 2009.

<sup>272</sup> *Re G (Residential Assessment)* (2005) UKHL 68.

<sup>273</sup> Par 24.

to remove the child. A parent may not have the right under Article 8, but that does not mean the child does not have the right not to be removed from parents without the state being convinced that it is necessary to do so.<sup>274</sup> Thus, the assessment of parents' ability had to be considered before the removal of the child could be justified.

### 3.3.1.2.2 The phrase: “and is without any visible means of support” in terms foreign jurisdictions

In this section, I continue to discuss the Kenyan jurisdiction to conclude the discussion under the ground “child has been abandoned or orphaned and is without any visible means of support”. Furthermore, I discuss Denmark as, amongst others, a jurisdiction that addresses situations of children without visible means of support, given its experience of providing grants to children in accordance with the age of the child.

I discuss the jurisdiction of the United States of America with regard to the Temporary Assistance to Needy Families programme that is implemented for families with no income or low income. I also discuss New Zealand and United Kingdom laws, which provide services for children and their families. Thus, I propose that South Africa must refer to these jurisdictions and incorporate a provision in the Children's Act for children without visible means for support.

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<sup>274</sup> *Ibid.*

Unlike the South African Children’s Act which uses the phrase “and is without any visible means of support”, the Children’s Act (Kenya) uses the word “destitute”<sup>275</sup> which defines a situation of lack of subsistence or total impoverishment.<sup>276</sup> Like the South African phrase “and is without any visible means of support”, it may be difficult to determine the extent to which the means of support is or is not visible without using a means test.<sup>277</sup> Instead, the income of the household in which the child is a member needs to be properly assessed to confirm the fact that the child lives in deprivation.<sup>278</sup>

In response to Kenya’s Second Report towards the CRC, the Committee on the Rights of the Child noted with concern the existing constraints with regard to limited access to services and the high level of poverty in Kenya.<sup>279</sup> Kenya has a total population of 39 002 772 with 50% of the population living below the poverty line, which includes 9% children living in absolute poverty.<sup>280</sup> The Committee recommended that Kenya provide further support to families in the form of family counselling, parenting education, social workers at local level, financial allowances, and that public awareness campaigns should be conducted in this

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<sup>275</sup> S 119(1)(a).

<sup>276</sup> Hanks *et al.* *Collins English Dictionary* (1985) 403.

<sup>277</sup> *The Review of the Child Care Act* (1998) par 5 6.

<sup>278</sup> See the interviews in Annexure “Bvii and Bviii”, see also the discussion in section 3 3 1 2.

<sup>279</sup> Concluding Observation No 36(a).

<sup>280</sup> According to the Central Intelligence Agency, hereinafter referred to as the “CIA” July 2010: accessed from <https://www/cia.gov/library/publications/the-world-factbook/geos/ke.html> on 2011.04.28: absolute poverty means a state of poverty in which income is insufficient to cover the basic necessities, that is, food, clothing and shelter.

regard.<sup>281</sup>

The Committee noted with concern the widespread poverty and the increasing number of children who do not enjoy an adequate standard of living, including access to food, clean drinking water, adequate housing and latrines.<sup>282</sup> The Committee urged Kenya to reinforce its efforts to provide support and material assistance to marginalised and disadvantaged families and to guarantee children the right to an adequate standard of living.<sup>283</sup>

The Consolidated Act on Social Services (Denmark)<sup>284</sup> provides for payment of a family allowance to all families with children below the age of 18 years. The Act also provides for child benefit which is granted consistent with the age group of the child.<sup>285</sup> Likewise, New

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<sup>281</sup> Concluding Observation No 37(a).

<sup>282</sup> Concluding Observation No 55.

<sup>283</sup> Concluding Observation No 56(a). Furthermore, in Concluding Observation No 56(b) the Committee urged Kenya to pay particular attention to the rights and needs of children in, amongst others, the implementation of the Poverty Eradication Plan, Poverty Reduction Strategy, Constituency Development Fund and other programmes intended to improve the standard of living of children.

<sup>284</sup> Ss 2(1); 19(1) and (2). Family allowance schemes belongs to the Danish Ministry of taxation even though it is administered according to the rules of social policy in the Ministry of Social Affairs: Wehner and Abrahamson Report *Welfare Policies in the Context of Family Change: The Case of Denmark* (2003) 11-13.

<sup>285</sup> Children between 0-2 years, 3-6 years and 7-17 years: EU Directorate-General Employment and Social Affairs, Unit G1 "Equality between Women and Men" Emerek Report *Fiscal System and Female Employment in Denmark* (2009) 20; Ministry of Social Affairs and Ministry of Education Report *Early Childhood Education and Care Policy in Denmark* (2000) 29. See the proposed provision in section 3 4.

Zealand and United Kingdom laws provide services for children in need and their families.<sup>286</sup>

The Children Act (United Kingdom) provides:<sup>287</sup>

- “(1) It shall be the general duty of every local authority ...
- (a) to safeguard and promote the welfare of children within their area who are in need; and
  - (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those services.”

The Act further provides:

- “(6) The services provided by a local authority in the exercise of functions conferred on them ... may include providing accommodation and giving assistance in kind or, in exceptional circumstances, in cash.”

Similarly, the Preamble of the Children, Young Persons and their Families Act (New Zealand) provides that the Act seeks -

- “(a) to advance the well-being of families and the well-being of children ... as members of the families ... and family groups;
- (b) to make provision for families ... and family groups to receive assistance in caring for

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<sup>286</sup> See the proposed provision in section 3 4. However, the duty on the state to provide assistance to promote the preservation and strengthening of families is discussed in detail in ch 4.

<sup>287</sup> S 17.

their children ...”<sup>288</sup>

I propose for South Africa to refer to Denmark and incorporate regulations to the Social Assistance Act and provide for a child-support grant to children below the age of 18, in accordance with specific age groupings. South Africa must further learn from New Zealand and United Kingdom and incorporate provisions either in the Children’s Act or the Social Assistance Act for “special temporary family maintenance” to destitute families. This financial assistance will provide needy families the best possible capacity of taking charge of their responsibilities.<sup>289</sup>

The United State of America implements the Temporary Assistance to Needy Families program which assists families with no income or low income.<sup>290</sup> States use the TANF funds to provide cash and other forms of assistance to help families in financial need.<sup>291</sup> Over and above the provision that is made to families, TANF can be used in child only cases to support child welfare services such as, family preservation, foster care, kinship care, support and employment programmes for the youth.<sup>292</sup> However, the United State of America does not make any guarantee for the availability of the grant.

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<sup>288</sup> Preamble of the Act, ss (a) and (b).

<sup>289</sup> See also the discussion in section 4 2 1.

<sup>290</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 10.

<sup>291</sup> The programme is a federally mandated block grant that is created under the Personal Responsibility and Work Opportunity Act 1996.

<sup>292</sup> North America Council on Adoptable Children *Child Welfare Financing* (2007) 101: accessed from [www.nacac.org/policy/financing101.pdf](http://www.nacac.org/policy/financing101.pdf) on 2012-10-20.

The TANF is subject to competing budget priorities at the federal, in the states and local levels. What we are able to learn from the United States of America's TANF programme is that the recommendation for South Africa to introduce a "special temporary maintenance" is not a new phenomenon. Unlike, the United States of America, South Africa must ensure that the fund is guaranteed, and that it is able to guarantee the right to family care to children. Thus, "special temporary maintenance" must be sustainable and not made subject to competing budgets.

### 3.3.2 *The child who displays behaviour which cannot be controlled by the parent or care-giver*

This section discusses the ground concerning a child who "displays behaviour which cannot be controlled by the parent or care giver"<sup>293</sup> or children who are identified as difficult-to-manage or hard-to-handle.<sup>294</sup> In the discussion I propose that regulations be promulgated for the provision of skills to parents or care-givers with children who are uncontrollable or difficult to manage. The skills that I propose are meant to promote positive behaviour in the lives of children.<sup>295</sup>

A child may be regarded as "uncontrollable" if he or she acts with outburst of anger,

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<sup>293</sup> S 150(1)(b) of the Children's Act.

<sup>294</sup> Davis *Report for the Department of Family and Consumer Sciences North Carolina: Positive Guidelines for Hard-to-Handle Kids: Parenting Education for Foster Parents* (1998) 4: accessed from [www.ces.ncsu.edu/.../discipline%20kids](http://www.ces.ncsu.edu/.../discipline%20kids) on 2012-06-21.

<sup>295</sup> See the discussion in section 3 4 for the proposed provision.

rebellious, argument, disobedient, irritable, and defiant or fail to accept responsibility for his or actions.<sup>296</sup> Some child development experts<sup>297</sup> believe that some behaviours which cannot be controlled by parents may be hereditary, influenced by the upbringing of the child, thus, result into the child being active or emotionally intense. Matthias<sup>298</sup> is also of the opinion that a child is “uncontrollable” if he or she cannot be nurtured or cared for.

Parents or guardians may use different methods to manage or control children, make children compliant, respect, obedient or regulate children’s behaviour to make them adapt to certain standards and rules prescribed in the family home.<sup>299</sup>

I am of the view that parents who use physical methods to manage children may injure or inflict pain to children. This may result in a child being violent or leaving the family environment to live and beg on the streets. Thus, the child may automatically become a child who lives and begs on the streets and no longer a child who is “uncontrollable”. In other circumstances, an “uncontrollable” child may continue to live in the family home but refuse to adhere to parental guidance, support and discipline.<sup>300</sup> “Uncontrollable” children often go astray and may commit petty crimes, use drugs or be involved in gangsterism.<sup>301</sup> An “uncontrollable” child who lives in the company of older children, who are also

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<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid*, s 150(1)(b) of the Children’s Act.

<sup>298</sup> (1997) 19-21.

<sup>299</sup> Matthias (1997) 20.

<sup>300</sup> Matthias (1997) 20.

<sup>301</sup> *Ibid.*



“uncontrollable”, may be even more difficult to control due to the influence of older children.<sup>302</sup>

In terms of the Child Care Act, the children’s court could consider the situation of a child “who displays behaviour which cannot be controlled by his or her parents or the person who has custody of the child”<sup>303</sup> as the ground for mandatory alternative care. The Children’s Act maintains a position which is to some extent, similar to the Child Care Act. I am of the view that the provision is parent-centred and cannot be justifiable in that it carves out areas that protect the rights of parents rather than the well-being of the child.

The distinction between the Child Care Act<sup>304</sup> and the Children’s Act<sup>305</sup> is that the Children’s Act protects the child who is under the care of “a parent or care-giver” and the Child Care Act protected a child who was cared for by “parents or any person who has custody of the child”. I am of the view that section 150(1)(b) of the Children’s Act should be amended with a provision that reads “a child is in need of care and protection, if the child needs guidance and support that instils positive behaviour by parents or any person who has care of the child”. The use of the provision “... parents or any person who has care of the child” ensures consistency with provisions which recognise the fact that children can be cared for by

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<sup>302</sup> Matthias (1997) 21.

<sup>303</sup> S 14(4)(ii).

<sup>304</sup> *Ibid.*

<sup>305</sup> S 150(1)(b).

different persons and in different family settings, including communal families,<sup>306</sup> foster parents<sup>307</sup> and adoptive parents.<sup>308</sup> Also, the term “care”<sup>309</sup> must be in accordance with the changes made in the Children’s Act, instead of “custody”.<sup>310</sup>

Section 150(1)(b) of the Children’s Act identifies a child who “displays behaviour which cannot be controlled by the parent or care-giver” as a child in need of care and protection. Furthermore, the Act provides for prevention and early intervention programmes which include promoting appropriate interpersonal relationships within the family.<sup>311</sup> Such programmes have great potential if both the child and his or her parents or care-givers participate in it, as this promotes understanding, love and sound relationships in the family. However, there is no clarity in the Act with regard to what early intervention programmes entail for “uncontrollable children”. The regulations<sup>312</sup> the Children’s Act provide for persons who are authorised to remove children, orders of placement that may be issued by the courts and situations which may require the child to appear in court regarding the grounds for mandatory alternative intervention. Thus, I argue that since the temperamental tendencies of a child with “uncontrollable” behaviour can, in some situations be recognised early in life, it is important to address such misbehaviour at that stage.

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<sup>306</sup> S 231(1)(a)(iii) of the Children’s Act, see the discussion in sections 2 2 1 10 and 8 4 2 2 1 4.

<sup>307</sup> Ss 46(1)(a) and 167(1)(a) of the Children’s Act, see the discussion in section 6 1.

<sup>308</sup> Ss 240(1)(a) and 231(3) of the Children’s Act, see the discussion in ch 8.

<sup>309</sup> According to the broader meaning that is given to “care”, see s 18(2)(a) of the Children’s Act, see also the discussion in section 2 3 1.

<sup>310</sup> The concept previously used in the Child Care Act. See also the discussion in section 2 3 1.

<sup>311</sup> S 144(1)(d). See the discussion in section 4 3.

<sup>312</sup> 59-60 to ss 150-160 of the Act.

Furthermore, where an “uncontrollable child” is as a result of the upbringing of a child, for example, where the child learnt certain behaviours from parents, family or community, it is important to firstly, provide parents with skills and secondly, have parents impart positive practice and promote positive behaviour in the life of the child. Positive practice may take different innovative ways aimed at re-correcting the child.<sup>313</sup> For instance, if the child refused to do his or her homework, the parent may remove privileges or give more serious consequences such as not allowing the child to watch television or attend a friend’s birthday party.

Seymour<sup>314</sup> uses a case study of an “uncontrollable” child and examines the usefulness of the language in illuminating disputes between parents and teenage children. The author argues that if teenagers have the right to be free of control, the effective exercise of this right depends on the society’s acceptance of a duty to provide the necessary supporting services to ensure that children are indeed free of control. Thus, I am of the view that the rights which parents have over their children are derived from their responsibilities and rights which are also supporting services that must be provided by parents. If parents are not able to support their children because of financial lack, the state must empower parents to discharge such responsibility.

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<sup>313</sup> Davis *Report for the Department of Family and Consumer Sciences North Carolina: Positive Guidelines for Hard-to-Handle Kids: Parenting Education for Foster Parents* (1998) 4.

<sup>314</sup> “An ‘Uncontrollable’ Child: A Case-Study in Children’s and Parents’ Rights” (1992) *International Journal, Policy and the Family* 98.

There is therefore a gap for a legal provision for support that must be provided to difficult-to-manage children, for their development and emotional growth. I propose that regulations be promulgated to the Children's Act to provide for early intervention programmes as corrective actions for children who are difficult-to-manage. The regulations must also enable parents or anyone who has care of the child to work collaboratively with teachers to ensure continuity of intervention between school and home.<sup>315</sup> While appreciating the fact that there is no one method that works in instilling guidance and good behaviour in a child, I am also of the view that parents, guardians and teachers can use the simple self-help technique to manage the behaviour of children. Parents, guardians and teachers can establish good relationship with children, establish constant contact with children by communicating, playing, sharing activities, being sensitive to the needs of children, using cautious language and love when dealing with children.

These interventions may allow for children who are difficult-to-manage to be assisted in the family environment rather than be mandated to alternative care.

### *3.3.2.1 The child displays behaviour which cannot be controlled by the parent or care-giver in terms of international law*

The CRC acknowledges the dangers of changes in the conduct of children consistent with age, maturity and other stages of development. Thus, the CRC obliges parents to provide

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<sup>315</sup> See the proposed provision in section 3 4.

direction and guidance to children “in a manner consistent with the evolving capacities of the child”.<sup>316</sup> The concept “evolving capacities” is also used to refer to a process of learning whereby children acquire knowledge, competencies and understanding, including understanding their rights and about how they can best be realised,<sup>317</sup> *heard and be understood*.<sup>318</sup>

In using the concept “evolving capacities”, the CRC has avoided setting age limits or definitions of maturity tied to particular issues.<sup>319</sup> Unlike the CRC, the Children’s Act is more specific in identifying children who are “uncontrollable” as children in need of care and protection. The obligation imposed by the CRC on parents, to provide direction and guidance to children “in a manner consistent with the evolving capacities of the child”, refers generally to the nurturance of all children, in the different stages of their growth and development. There was obviously some thinking in the context of the CRC that *all*<sup>320</sup> children need guidance in the course of their growth. However, the CRC failed to consider that some children may need special skill that supports positive behaviour in the course of their development.

The consideration for the “evolving capacities” of the child is important during early childhood because of the rapid transformation in children’s physical, cognitive, social and emotional

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<sup>316</sup> Art 5.

<sup>317</sup> Hodgkin & Newell (2007) 78.

<sup>318</sup> Own emphasis.

<sup>319</sup> Hodgkin & Newell (2007) 77.

<sup>320</sup> Own emphasis.

functioning from early infancy to the beginning of schooling.<sup>321</sup> Parents should be encouraged to offer direction and guidance in a child-centred way, that is, through dialogue or in ways which enhance the capacity of the child to exercise their rights, including their right to participation.<sup>322</sup> For instance, parents have an obligation to take into account the adolescents' views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop.<sup>323</sup> Unlike the CRC, the ACRWC does not cover children whose behaviour cannot be controlled by the parents or care-giver. Instead the ACRWC contains an Article which widely emphasises the responsibilities of parents towards their children.<sup>324</sup>

### 3.3.2.2 *The child displays behaviour which cannot be controlled by the parent or care-giver in terms of Kenyan law*

In this section, I use the Children's Act (Kenya) to find lessons for South Africa with regard to "a child who displays a behaviour which cannot be controllable by the parent or care-giver" as grounds for mandatory alternative care intervention. The discussion on Kenya is helpful in that South Africa may refer to it to amend the provision "child displays behaviour which cannot be controlled by the parent or care-giver" for a provision which promotes positive conduct and supports the development of the child.

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<sup>321</sup> Hodgkin & Newell (2007) 77-78.

<sup>322</sup> *Ibid.* See the discussion in ch 5.

<sup>323</sup> *Ibid.*

<sup>324</sup> S 20(1). See the discussion in section 2 4 3 2.

The Children’s Act (Kenya) has two provisions that are to some extent similar in meaning to the South African Children’s Act. The Children’s Act (Kenya) provides that a child who “is truant or is falling into bad associations”<sup>325</sup> and a child, “whose parents or guardian find difficulty in parenting”,<sup>326</sup> is a child in need of care and protection. The first provision does not refer to “uncontrollable” children *per se*, but children who are “truant” or in “bad associations”.<sup>327</sup> “Truant” means absent without leave or permission.<sup>328</sup> “Bad association” means a mischievous or disobedient group or society.<sup>329</sup> “Bad association” and “truant” have separate meanings from “uncontrollable”.

“Truant” relates to the absence of consent, where the parent cannot manage or control the conduct or the affairs of the child. This makes section 119(1)(f) of the Kenyan Act to some extent, similar in meaning to section 150(1)(b) of the South African Children’s Act. The second provision which speaks about a child “whose parents or guardian find difficulty in parenting” reflects on the capacity of the parent rather than control. It provides for the interests of the parent to take charge over the development of the child. Parenting reflects on, amongst others, the ability of parents to provide the child with emotional, psychological, cultural and environmental development<sup>330</sup> rather than control. Callan<sup>331</sup> argues that it is

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<sup>325</sup> S 119(1)(f).

<sup>326</sup> S 119(1)(d).

<sup>327</sup> *Ibid.*

<sup>328</sup> *Collins English Dictionary* 1556.

<sup>329</sup> *Collins English Dictionary* 107.

<sup>330</sup> See the discussion in *McCall v McCall* 205. See the discussion in section 2 4 1.

<sup>331</sup> *Creating Citizens: Political Education and Liberal Democracy* (1997) 145.

what parents give that establishes their right. South Africa may therefore learn from the Children's Act (Kenya) on the provision to promote the responsibilities of parents over their children, rather than promoting the ability of parents to manage children.

Section 150(1)(b) of the South African Children's Act is parent-centred rather than child-centred. The provision seeks for parents or care-givers to exercise ownership over their children. It caters for the rights of parents or care-givers who cannot manage their children. The provision also empowers parents or care-givers to rule their children. The exercise of control over a child who is difficult-to-manage rarely goes without abuse and the use of physical force. A parent or care-giver is therefore likely to physically discipline the child including, administering corporal punishment.<sup>332</sup>

Where the parent or care-giver has used the measures he or she has to control the child without success, he or she is further likely to recommend secure accommodation for the difficult-to-manage-child. Hence I opine that section 150(1)(b) of the Children's Act poses threats to violation of the rights of the child to, amongst other, human dignity,<sup>333</sup> freedom and security of the person,<sup>334</sup> the right to be protected from maltreatment, abuse and

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<sup>332</sup> See the discussion in section 3 3 9 12.

<sup>333</sup> S 10 of the Constitution provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected."

<sup>334</sup> S 12(1) of the Constitution provides that: Everyone has the right to freedom of security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause ...
- (b) to be free from all forms of violence from either public or private sources
- (c) not to be tortured in any way; and



degradation,<sup>335</sup> and any form of exploitation. In my recommendation for reform of this provision, as alluded to earlier,<sup>336</sup> I propose that a child-centred provision, which promotes positive conduct and supports the development of the child must be incorporated in the Children's Act rather than the right of the parent to have control over the child.<sup>337</sup>

### 3.3.3 *The child who lives or works on the streets or begs for a living*

This section discusses the circumstances that may lead children to live, work or beg on the streets. I also discuss possible intervention measures for such children. I also propose that a provision be enacted in the Children's Act for government to work collaboratively with the NGOs and the community to implement a programme that will reunite children who live, work or beg on the streets back into their families.<sup>338</sup>

The definition of the words "lives", "works" and "begs" used in section 150(1)(c) of the Children's Act are self-explanatory. Nevertheless, the Children's Act provides the definition of a "street child" as a child who has left the family home because of abuse, neglect, poverty or community upheaval to live, beg or work on the streets.<sup>339</sup> A child who works or begs on

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(d) not to be treated or punished in a cruel, inhuman or degrading way."

<sup>335</sup> S 28(1)(d) of the Constitution. See also the discussion in section 3 3 9 1.

<sup>336</sup> See the discussion in section 3 3 2.

<sup>337</sup> See the proposed provision in section 3 4.

<sup>338</sup> See the propose provision in section 3 4.

<sup>339</sup> S 1(1)(a).

the streets because of inadequate care, but returns home at night, is also a “street child”.<sup>340</sup> Street children are exposed to physical, mental or emotional abuse, negligent treatment, maltreatment, and exploitation, including sexual abuse. While on the streets,<sup>341</sup> street children are also exposed to health problems such as, scabies, fleas, lice, gonorrhoea, and HIV.<sup>342</sup> In some cases, street children become disabled through traffic accidents, violence and drug abuse.<sup>343</sup>

The large population of children on the streets is a clear indication that some children are not able to reside in the family home; either because of poverty, neglect, abuse, the death of a parent or care-giver, a parent that is hard to trace, or because the child has run away from the family home to avoid corporal punishment, or the child defied parental guidance and left the family environment to find refuge in the streets.<sup>344</sup> However, there are different reasons for children being on the streets. Ennew<sup>345</sup> is of the view that refugee children, particularly children who are unaccompanied by adults, often become street children.

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<sup>340</sup> S 1(1)(b) of the Children’s Act.

<sup>341</sup> *The Star* (2006-03-14): children on streets are more exposed to danger. *The Star* reported a 14 year-old boy who was found stabbed 21 times in his chest and died while asleep at a dumping site at Bronville, Welkom in the Northern Free State Province. Two 14 year-olds were arrested in connection with the incident.

<sup>342</sup> Ennew “Outside Childhood: Street Children’s Rights” in Franklin *The New Handbook of Children’s Rights* (2002) 392.

<sup>343</sup> *Ibid.*

<sup>344</sup> See *The Star* (2004-05-21). See also the discussion in section 3 3 2.

<sup>345</sup> In Franklin *The New Handbook of Children’s Rights* 392. See Art 22 of the CRC.

In other situations, children live and beg on the streets with assistance from their parents.<sup>346</sup> Thus a street child who cannot be returned to his or her family home is likely to live, work or beg for money on the streets for survival. If such a child cannot be reintegrated back into a family, he or she must be considered for alternative care.<sup>347</sup>

The Child Care Act became redundant because, amongst others, it failed to live up to the modern-day challenges confronted by children in the family environment. During the review of the Child Care Act, street children and other categories of vulnerable children were regarded as “children in especially difficult circumstances”.<sup>348</sup> Thus, the Children’s Act has a special provision that identifies a child who lives, works on the streets or begs for a living as a child in need of care and protection.<sup>349</sup> However, there are no other clauses that comprehensively speak to the circumstances of street children, except for the definition of “street child” provided in section 1 of the Act.<sup>350</sup> I hold the view in that it is not clear whether the Children’s Act’s provision for prevention and early intervention programmes aimed at

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<sup>346</sup> *Ibid.* Some parents were spotted by motorists sitting under trees while their children beg for money from motorists. This was gleaned from daily observation of children who stand at the corner of Republic Road and Malibongwe Drive (previously known as Hans Strijdom Road) in Randburg, Johannesburg, South Africa: *Kaya FM* (2005-02-25).

<sup>347</sup> Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 163.

<sup>348</sup> SALRC *The Review of the Child Care Act* (1998) par 5 12: other categories of vulnerable children identified by the SALRC report are children with disabilities and children of parents involved in divorce proceedings.

<sup>349</sup> S 150(1)(c).

<sup>350</sup> See the discussion in section 3 3 3.

preserving a child's family structure<sup>351</sup> speak to the situation of street children. It would serve a purpose if it was meant to address the situation of street children as it would ensure that children remain in the family environment as far as possible.

According to the SALRC report,<sup>352</sup> the Department of Welfare and Population Development<sup>353</sup> aims to ensure that there are uniform national standards for services rendered to street children. The Department of Welfare recognised the importance of erecting shelters and aimed to de-institutionalise children through community based programmes.<sup>354</sup> The Department set up "one stop services" within communities aimed at empowering and preserving families in the hope of reducing the number of children on the streets.<sup>355</sup>

### 3.3.3.1 *The child who lives or works on the streets or begs for a living in terms of international law*

In this section I discuss the extent to which the rights of children living on the streets are prioritised in international law. I also reflect on, amongst others, the rights which children who live on the streets are deprived; of such as the right to health, treatment, social security, adequate standard of living and education for the promotion of family life. Thus, I recommend that South Africa establish a prevention programme that would ensure healthy

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<sup>351</sup> S 144(1)(a). See the discussion in section 4 3.

<sup>352</sup> SALRC *The Review of the Child Care Act* (1998) par 5 12.

<sup>353</sup> Currently referred to as the Department of Social Development.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*

growth and creation of strategies that would reintegrate children who live on the streets back into families. South Africa's Initial Report for the CRC did not cover circumstances relating to street children. There is also no specific theme that a state party can use to report on street children for the CRC. State parties reporting to the CRC may consider reporting on children who live, work or beg for a living under the heading "Special Protection Measures"<sup>356</sup> as it was the case with Kenya when it reported on street children in its Second Report to the Committee.<sup>357</sup> Nevertheless, children who live, work or beg on the streets are covered by numerous Articles of the CRC because of the fact that they live without supervision, guidance, provision of any assistance whatsoever and that they are exposed to different dangers on the streets.

The ACRWC obliges state parties to take appropriate measures to prevent the use of children in all forms of begging.<sup>358</sup> Unlike the CRC, the ACRWC specifically prohibits the use of children in different forms of begging.<sup>359</sup> However, Article 29(b) of the ACRWC does not specifically provide for children who live, work or beg for a living on the streets, and instead it imposes an obligation on state parties to prevent persons from using children in begging.

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<sup>356</sup> According to Hodgkin & Newell (2007) 244, the Committee on the Rights of the Child recognises that young children are less able to resist harm particularly when they are orphaned, abandoned or deprived of family care. Thus, their development can be jeopardised. Children living and begging on the streets may be vulnerable in the same manner.

<sup>357</sup> See the discussion in section 3.3.3.4, Concluding Observation No 63, Kenya's Second Report.

<sup>358</sup> Art 29(b).

<sup>359</sup> *Ibid.*

I am of the view that when addressing issues relating to street children, South Africa must refer to, amongst others, Articles 24,<sup>360</sup> 26,<sup>361</sup> 27,<sup>362</sup> 28,<sup>363</sup> 29,<sup>364</sup> 31,<sup>365</sup> 32,<sup>366</sup> 33,<sup>367</sup> 34,<sup>368</sup> 36,<sup>369</sup> 37,<sup>370</sup> and 39<sup>371</sup> to establish programmatic intervention that will focus on these rights,

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<sup>360</sup> The Art obliges states to recognise the right of the child to enjoyment of the highest attainable standard of health and to facilitate the treatment of illness and rehabilitation for the health of children. See the discussion in section 4 2 2.

<sup>361</sup> The Art obliges states to recognise the right of the child to benefit from social security including social insurance.

<sup>362</sup> The Art obliges states to recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. See the discussion in section 4 2 2.

<sup>363</sup> The Art obliges states to recognise the right of the child to education.

<sup>364</sup> States are obliged to implement the right to education for all children.

<sup>365</sup> The Art obliges states to recognise the right of the child to rest, leisure and engaging in play and recreational activities appropriate to the age of the child.

<sup>366</sup> The CRC recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous to the education of the child or harmful to the child's health, physical, mental, spiritual, moral or social development. See the discussion in section 3 3 10.

<sup>367</sup> The Art recognises the right of the child to be protected from narcotic drugs and psychotropic substances. See the discussion in section 3 3 4.

<sup>368</sup> The Art recognises the right of the child to be protected from sexual exploitation and sexual abuse.

<sup>369</sup> The Art recognises the right of the child to be protected from all forms of exploitation prejudicial to any aspects of the child's welfare. See the discussion in section 3 3 5.

<sup>370</sup> The Art prohibits the subjection of any child to torture, cruel, inhuman, degrading treatment or punishment. See the discussion in section 3 3 9.

<sup>371</sup> The Art obliges states to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment or armed conflicts. See the discussion in section 3 3 9.

including family tracing, reunification<sup>372</sup> and strengthening of families to promote family life. From this study, I recommend that South Africa, the Department of Social Development in particular, conduct further research as part of its prevention programme strategy, to ensure that children have the primary socialisation and a modelling framework of the family to foster healthy growth and development.<sup>373</sup>

### 3.3.3.2 *The child who lives or works on the streets or begs for a living in terms of Kenyan law*

Since there is little research or legislative provisions governing situations of children who live, work or beg on the streets, I recommend that South Africa draw lessons from the observations made by the Committee on the Rights of the Child to Kenya and that South Africa must raise awareness on the issue of street children in order to change the stigma and negative public attitude, and must provide recovery and reintegration services for street children.

The Children's Act (Kenya) provides that a child "who is found begging or receiving alms" is a child in need of care and protection.<sup>374</sup> This provision is similar to the South African Children's Act with the use of the word "begging" only. The meaning of receiving "alms" is also similar to "begging" as it entails "charitable donation, money or good given to the poor or

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<sup>372</sup> Art 10(1) of the CRC and Art 25(2)(b) of the ACRWC, see the discussion in section 7 4 2.

<sup>373</sup> See the proposed recommendations in section 3 4.

<sup>374</sup> S 119(1)(b).

needy”.<sup>375</sup> It is estimated that Kenya has between 200 000 and 300 000 children who live on the streets.<sup>376</sup> The dangers faced by South African children who live, work or beg for a living on the streets, are similar to the experience of Kenyan children. In response to Kenya’s Initial and Second Country Report towards the CRC and Kenya’s non-governmental organisations’ report to the Committee on the Rights of the Child, the Committee was concerned about the high and increasing number of children on the streets due to, amongst other things, the increase of HIV/Aids and infections, the collapse of the family structure and poverty.<sup>377</sup> The Committee was also concerned about the limited access to health, education and other social services, and the sexual abuse and exploitation of street children.<sup>378</sup>

Although South Africa has not submitted its Second Country Report towards the CRC, it must learn from Kenya with regard to the responses provided by the Committee of the Rights of the Child to Kenya on children who live, work or beg for a living on the streets. The Committee was deeply concerned that street children are more often seen as offenders by law enforcement agents and are susceptible to different forms of violence and discrimination, including torture, beatings by police officers and killings.<sup>379</sup> Thus, South Africa must learn

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<sup>375</sup> *Collins English Dictionary* 40.

<sup>376</sup> According to the CIA July 2010: accessed from <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> 2011-04-28. See also the *National plan of action for orphans and vulnerable children, Kenya 2007-2010* (2008).

<sup>377</sup> See the discussion in section 3 2 3.

<sup>378</sup> *Ibid.*

<sup>379</sup> Concluding Observation No 64(d) of the Second Country Report; High Court, Criminal App. No 631/02: In this case, a 4 year-old in the Bahati estate of Nairobi was killed by a stray bullet when police were executing an arrest of a 19 year-old. An official statement by the police



from the recommendations of the Committee to Kenya that awareness must be raised on the issue of street children in order to change the stigma and negative public attitudes and to ensure that street children are given “recovery and reintegration services, including psychosocial assistance for physical, sexual and substance abuse, and where possible and when in the best interests of the child, services for reconciliation with a view to reintegration with their families”<sup>380</sup>.

### *3.3.4 The child is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency*

This section reflects on the extent to which children are addicted to dependence-producing substances. I reflect on the reasons why children engage drugs substances, and the extent to which legislation regulates drug and prevents addiction of children. In the discussion I make recommendations for South Africa to refer to the United Kingdom’s<sup>381</sup> experience of providing home care services to older persons, that same should be considered for provision of *home-based care*<sup>382</sup> for children addicted to dependence-producing substances<sup>383</sup>. I also

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indicated that the shot was fired in self-defence. Eye witness reports indicated that the police fired a shot into a crowd that was not violent, the majority of whom were children.

<sup>380</sup> Concluding Observation No 64(d) and (e) of the Second Country Report. See the proposed recommendations in section 3 4.

<sup>381</sup> See the discussion in section 3 3 4 2.

<sup>382</sup> Own emphasis.

<sup>383</sup> See the proposed provision in section 3 4.

recommend that South Africa learn from the framework used in the United Kingdom to capture information that is used to monitor positive change in the life of the service user who is on treatment.<sup>384</sup>

According to a study conducted by the Provincial Medical Research Council, drug and alcohol abuse is very prevalent in South Africa.<sup>385</sup> It is reported that children start drinking as young as 13 years of age.<sup>386</sup> Alcohol addiction is common amongst children because it is socially acceptable and because liquor is easily available in “shebeens”.<sup>387</sup> Liquor stores also sell liquor to under-age drinkers and families.<sup>388</sup> Hence there is a “massive growth” in alcohol abuse and drug addiction amongst teenagers and the middle aged.<sup>389</sup>

According to Roman,<sup>390</sup> binge drinking of alcohol undermines the family and the workplace. Goode’s<sup>391</sup> research on drug abuse revealed that the lives of addicts, most of who were

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384 *Ibid.*

385 See Provincial Medical Research Council *Substance Abuse Trends in the Western Cape* (2000-2005) Unpublished paper.

386 *Ibid.*

387 There is no dictionary meaning of “shebeen”. A “shebeen” is a community name used for houses within communities, where liquor is being sold.

388 *The Star* (2008-04-12).

389 Department of Social Development *National Drug Master Plan 2006-2011* (2009) 4-10, accessed from [http://www.dsd.gov.za/manuals/master\\_plan.pdf](http://www.dsd.gov.za/manuals/master_plan.pdf) on (2008-03-25).

390 “Alcohol Abuse and Alcoholism” in Bryant & Peck *21<sup>st</sup> Century Sociology A Reference Handbook* (2007) 407.

391 “The Sociology of Drug Abuse” in Bryant & Peck *21<sup>st</sup> Century Sociology A Reference Handbook* (2007) 416.

above 20 years of age, were marked by irregular employment, poverty, weak or non-existent family ties and high rates of property crime after addiction. The Department of Social Development confirms the fact that alcohol is a major contributor to crime, reduced productivity, poverty and unemployment in South Africa.<sup>392</sup> Binge drinking is said to be so out of control that schools are calling for breathalysers to test if children are drinking at school.<sup>393</sup> Many children put themselves in compromising and dangerous situations through the consumption of alcohol.<sup>394</sup> Many teenagers are said to have asked for advice regarding incidences they regret or that occurred whilst they were drunk; including murder, death, fights, and being robbed and raped at parties, clubs and schools.<sup>395</sup>

During the operation of the Child Care Act, there was no provision that protected children who were addicted to a dependence-producing substance and who need support to obtain treatment for such dependency. The Children's Act made improvements in this area by providing that a child who is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency is in need of care and protection.<sup>396</sup> The Children's Act provides for prevention and early intervention programmes, which include providing psychological, rehabilitation and therapeutic programmes.<sup>397</sup> On the other hand,

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<sup>392</sup> Department of Social Development *National Drug Master Plan 2006-2011* (2009) 4-10.

<sup>393</sup> *The Star* (2008-04-12).

<sup>394</sup> *Ibid.*

<sup>395</sup> *Ibid.* The newspaper reported an incident of a 14 year-old girl who passed out in the morning around 7am at school.

<sup>396</sup> S 150(1)(d).

<sup>397</sup> S 144(1)(e). See the discussion in section 4 3.

South Africa established the Prevention and Treatment of Drug Dependency Act aimed at establishing programmes for the prevention and treatment of drug dependency.<sup>398</sup> The South African Liquor Act prohibits the sale or supply of liquor or methylated spirits to any person below the age of 18.<sup>399</sup> Like the Constitution, the Liquor Act provides that a child is a person below the age of 18.<sup>400</sup>

The Department of Social Development recently developed the National Drug Master Plan with the aim of addressing issues relating to addiction to drug-dependence substances.<sup>401</sup> The Drug Master Plan is consistent with the recently enacted Prevention of and Treatment for Substance Abuse Act.<sup>402</sup> The Act provides options that may be considered to provide treatment to a person using dependence-producing substances. The Act acknowledges that a child who is addicted to dependence-producing substances can receive treatment in a child and youth care centre.<sup>403</sup> However, I am particularly in favour of the option which allows a person who is addicted to a dependence-producing substance to receive treatment services

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<sup>398</sup> 20 of 1992 (as amended in 1999), see s 6 of the Act.

<sup>399</sup> S 10(1) of Act 59 of 2003 prohibits the sale or supply of liquor or methylated spirits to a minor. S 10(3) and obligates a person to take reasonable measures to determine properly whether or not a person is a minor before selling or supplying liquor or methylated spirits to that person.

<sup>400</sup> S 1.

<sup>401</sup> DSD *National Drug Master Plan 2006-2011* (2009) 10-12.

<sup>402</sup> 70 of 2008.

<sup>403</sup> S 28 of the Prevention of and Treatment for Substance Abuse Act and s 191(3)(c) of the Children's Act.

from a community-based service centre.<sup>404</sup>

I opine that further improvements can be made in the Prevention of and Treatment for Substance Abuse Act. I propose that a provision be incorporated in the Act to allow, children in particular, who are suspected of using dependence-producing substances to be compelled by the head of the Department of Social Development or law<sup>405</sup> to mandatory assessment, mandatory treatment and monitoring which must take place at home as a priority. Where treatment cannot be administered at home, the child must receive treatment from a community-based service centre. Treatment can be received from a secure accommodation as a measure of last resort.

I am of the view that home-based treatment enables the child to receive treatment in his or

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<sup>404</sup> S 13(1) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008 provides that: “The MEC, after consultation with the departments referred to in section 12(4) and local municipalities, must facilitate the establishment of community-based services with special emphasis on under-serviced areas... 13(4) Community-based services must – (b) establish or utilise existing facilities and infrastructure, including primary health care centres to provide integrated community based treatment programmes . . . (d) provide professional and lay support within the home environment.”

<sup>405</sup> South Africa must refer to s 75 of the Children and Young Persons Act (Care and Protection) (New South Wales Alcohol) 1998 which provides that: “The children’s court may make an order ... (b) requiring the parent or anyone who has care of the child to take whatever steps are necessary to enable a child to participate in a treatment program in accordance with such terms as are specified in the order.” See the discussion in section 3 3 4 2 for this recommendation. See also the proposed provision in section 3 4.

her family and community.<sup>406</sup> This arrangement may speed rehabilitation of the child, particularly the fact that services will be administered in an environment that the child is familiar with, the child will be able to maintain constant contact with family members and that family members will be able to participate in the treatment of the child. This means that family members may not be able take part in the treatment or maintain proper contact with the child if treatment is administered in a care institution.

According to the geographical situation of crime in South Africa for the period 2010 and 2011, the Western Cape province has the highest crime rate and is most prevalent in drug related crimes.<sup>407</sup> South Africa is ill-equipped to deal with issues relating to drug addiction.<sup>408</sup> There are few services provided for, amongst others, therapeutic treatment, counselling and life skill programmes to deal with drug addiction in an efficient and appropriate way.<sup>409</sup> I therefore recommend that an operational framework be developed to monitor and assess

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<sup>406</sup> S 30(2) of the Prevention of and Treatment for Substance Abuse Act.

<sup>407</sup> South African Police Service *Crime Report (2010/2011)* 27.

<sup>408</sup> The National Institute for Crime Prevention and the Reintegration of Offenders, hereinafter referred to as "NICRO", is a non-governmental organisation providing comprehensive crime reduction and prevention services throughout South Africa. It builds and strengthens a democratic society, based on human rights principles, through crime prevention and people centered development. NICRO is acknowledged as a leader in the field of offender rehabilitation and re-integration of offender back into their communities. A large number of children of various ages who committed various crimes have been diverted into programmes at NICRO and have successfully attended programmes. See NICRO Report: *A Quantitative Statistical Presentation of Cases Diverted to NICRO programmes by Courts in South Africa from June 2009 – May 2010* (2010) 4-5.

<sup>409</sup> *Ibid.*

services that are provided to (young) drug addict users.<sup>410</sup> The South African government must, through the Department of Social Development, strengthen the capacity and skills of service providers (non-governmental organisations) in less resourced areas for exposure to treatment programmes nationwide for drug-producing substance users.

#### 3.3.4.1 *The child is addicted to a dependence-producing substance in terms of international law*

International treaties have identified different drugs that require control. The main international treaty, which stipulated the different types of drugs,<sup>411</sup> is the United Nations Treaty on Single Narcotic Drugs.<sup>412</sup> Hodgkin and Newell<sup>413</sup> acknowledge that there are drugs that are used by children that can alter their state of mind, be prejudicial to their health or can be addictive such as tobacco, alcohol and solvents but that the latter is not controlled by international treaties. The state needs to take legislative, administrative, social and educational measures to “protect” children from using drugs and “prevent” the use of children in drugs.<sup>414</sup>

The Committee on the Rights of the Child recommended that states provide children and

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<sup>410</sup> See the proposed framework in section 3 4.

<sup>411</sup> According to Hodgkin & Newell (2007) 503 drugs and substances which require control are: heroin, morphine, opium, cocaine, cannabis, ecstasy and other psychotropic drugs.

<sup>412</sup> 1961 hereinafter referred to as “UNSD”.

<sup>413</sup> (2007) 503.

<sup>414</sup> *Ibid.*

adolescents with accurate information about drugs and substance abuse through campaigns and public school programmes, develop free and easily accessible drug abuse treatment and social integration programmes and centres for street children, and co-operate with non-governmental organisations.<sup>415</sup> The Committee also noted the needs of children affected by HIV/Aids in respect of drugs. The use of alcohol may reduce the ability of children to exercise control over their sexual conduct and as a result may increase their vulnerability to HIV/Aids.<sup>416</sup>

The Committee on the Rights of the Child has, in respect to South Africa's Initial Report towards the CRC, recommended that South Africa take appropriate measures to curb the illicit use of narcotic drugs and psychotropic substances and prevent the use of children in the illicit production and trafficking in such substances.<sup>417</sup>

The Committee further recommended that programmes be introduced in schools to educate children about the harmful effects of the use of narcotic drugs and psychotropic substances and encouraged South Africa to support rehabilitation programmes dealing with child victims of drugs and substance abuse.<sup>418</sup> Thus, the National Drug Master Plan developed by South Africa reflects the country's response to the obligation by the CRC to state parties to:

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<sup>415</sup> Hodgkin & Newell (2007) 509; General Comment No. 3 on "HIV/Aids and the Rights of the Child" (2003) CRC/2003/3.

<sup>416</sup> *Ibid.*

<sup>417</sup> Concluding Observations No 38.

<sup>418</sup> *Ibid.*



“take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking in such substances”.<sup>419</sup>

The ACRWC obliges state parties “to take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as provided in relevant international treaties and to prevent the use of children in the production and trafficking in substances.”<sup>420</sup> Both the CRC and the ACRWC specifically provide for the protection and prevention of children in the use and production of drugs and trafficking in such circumstances.

South Africa has taken the problems regarding addiction to drug-dependence substances seriously and has signed the United Nations Treaty on Single Narcotic Drugs,<sup>421</sup> the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>422</sup> and the United Nations Convention on Psychotropic Substances.<sup>423</sup> However, South Africa has to date not, amongst other recommendations made by the Committee on the Rights of the Child, established programmes in schools to educate children about the harmful effects of drugs and psychotropic substances.

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<sup>419</sup> Art 33.

<sup>420</sup> Art 28.

<sup>421</sup> Entered into force on 08 August 1975 and ratified by South Africa on the 16 December 1975.

<sup>422</sup> 1988 hereinafter referred to as “UNITCD”, entered into force on 11 November 1990 and signed by South Africa on the 9 June 1989.

<sup>423</sup> 1971 hereinafter referred to as “UNCPS”, entered into force on 16 August 1976 and acceded to by South Africa on 27 January 1972.

### 3.3.4.2 *The child is addicted to a dependence-producing substance in terms of foreign jurisdictions*

According to the Children's Act (Kenya), a child is need of care and protection if he or she "is engaged in the use of or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health".<sup>424</sup> The difference between the Children's Act (Kenya) and the South African Children's Act is that, although the South African Children's Act, like Kenya, provides that a child who is addicted to a dependence-producing substance is in need of care and protection, South African law provides for the support and treatment that must be given to the child who is addicted to dependency-producing substances.<sup>425</sup>

As noted earlier, South Africa has not implemented programmes relating to drug-producing substances effectively. I am of the view that South Africa must learn from the response from the Committee on the Rights of the Child in Kenya's Second Report,<sup>426</sup> towards the CRC which raises concerns about drug usage, the rate of adolescent suicide, and the lack of mental health services in this regard. In addressing this concern, the Committee recommended that Kenya strengthen developmental and mental health counselling services and make same known and accessible to adolescents.<sup>427</sup> Thus, South Africa must learn from the response of the Committee to Kenya and develop a framework to facilitate and monitor

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<sup>424</sup> S 119(1)(s).

<sup>425</sup> *Ibid.*

<sup>426</sup> Concluding Observation No 49.

<sup>427</sup> Concluding Observation No 50.

the effective delivery of services provided to children who are addicted to dependence-producing substances.

I propose that South Africa must refer to the quality monitoring framework that is developed in the United Kingdom for home care management.<sup>428</sup> South Africa must establish a framework that informs how assessment and treatment services are to be provided to

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<sup>428</sup> Quality Monitoring Framework – Independent Sector Home Care Management Tool: accessed from [www.itsacr02a.nottscg.gov.uk](http://www.itsacr02a.nottscg.gov.uk) on the 2012-07-3. The tool is a framework used by some service providers or care-givers to monitor home care services for older persons. The framework simply regulates and monitors compliance by care-givers of the services to be provided, for older persons in particular. We can refer to the framework to establish a framework to monitor treatment that is provided to children who are addicted to dependence-producing substances. The framework allows service users to receive reliable information on home care services and the types of services they are going to receive. See the proposed provision and framework in section 3 4, “Recommendations and Conclusion”. See also information accessed from [www.docstoc.com/docs/...Quality-Monitoring-Framework---Home-](http://www.docstoc.com/docs/...Quality-Monitoring-Framework---Home-) on 2012-08-08, on the service providers who may provide home care services. Care-givers are contracted with government to provide home care. Government ensures that service providers who are contracted comply with the health, safety policies, laws and regulations. Services are identified by the service provider and are effectively consonant with the needs of the service user. The service staff’s rotas are required to inform service users of the services they are to receive prior to service. Services are always appropriate to meet the agreed care. Only staff that has received training that meets the National Minimum Care Standards of Care is permitted to provide services. Staff that provides care is matched according to the needs of the service user. The service user receives care from the regular care-giver. The care staff is sensitive to the changing needs of the service user. Care that is provided is person centred delivery. The service user is made aware of the procedure to be used to raise issues in relation to services. The service provider ensures that the service user is satisfied with the outcome of issues raised. See the proposed provision on home-based treatment and the service providers who may provide such services in section 3 4.

children who are addicted to dependence-producing substances. The framework can be used in community-based service centres and home-based treatment. It must incorporate information that identifies the standard and the type of assessment to be conducted, treatment to be administered, action taken by the service provider, and progress and recommendations.

The framework must include the following: access by the parent or family member to records pertaining to the treatment of the child; visits made by the service provider to the family home of the child who is receiving treatment; communication between the service provider and parents or family member; support and supervision provided by parents and service provider to the child; consideration of the lifestyle of the child during treatment; health and safety of the child; the views of the child regarding treatment; and informing the child about any information pertaining to treatment.<sup>429</sup>

### *3.3.5 The Child has been Exploited or Lives in Circumstances that Expose the Child to Exploitation*

This section discusses circumstances under which children may be exploited. I do so by discussing the following concepts provided in the Children's Act: children who are subjected to forced marriage in the form of "early marriage", "ukuthwala" and "ukungena". I also discuss exploitation in the form of female "genital mutilation" and "circumcision" and "sexual

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<sup>429</sup> See the proposed framework in section 3 4.

exploitation” in the form of “child prostitution” and “child trafficking”. I recommend that South Africa refer to the Prohibition of Child Marriages Act (India) and amend section 12 of the Children’s Act and incorporate a provision that prohibits early marriage, forced marriage including any form of exploitation, abuse or harmful cultural practises against children.<sup>430</sup> I also recommend that South Africa learn from the New South Wales<sup>431</sup> and develop a table of offences and penalties that would serve as a guide for the courts to impose punishment.<sup>432</sup>

The Constitution protects every child from “exploitative” labour practices.<sup>433</sup> According to the South African Children’s Act, “exploitation” in relation to a child includes all forms of slavery or practices that are similar to slavery, including debt bondage or “forced marriage”,<sup>434</sup> “sexual exploitation”,<sup>435</sup> servitude,<sup>436</sup> forced labour,<sup>437</sup> “child labour”<sup>438</sup> prohibited in terms of

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<sup>430</sup> See the proposed provision in section 3 4.

<sup>431</sup> See the discussion in section 3 3 5 5.

<sup>432</sup> See the proposed provision in section 3 4.

<sup>433</sup> S 28(1)(e).

<sup>434</sup> S 1(1)(a).

<sup>435</sup> See ss 1(1)(b) and 17 of the Children’s Act; ss 17(1)(a) and (b) of Sexual Offences and Related Matters Act for the definition of “sexual exploitation”. In terms of the definition of “child pornography”, the Films and Publications Act 18 of 2004, before its amendment in response to the *De Reuck v Director of Public Prosecutions Witwatersrand Local Division* 2003 (2) SACR 445 (CC) judgment, provided that any image, real or stimulated, depicting a person who is shown as being below the age of 18 years engaged in sexual conduct or a display of genitals which amounts to “sexual exploitation”, or participating in, or assisting another person to engage in sexual conduct which amounts to “sexual exploitation” or degradation of children. The amendment reads as follows, “child pornography” includes any image, however created, or any description of a person, real or stimulated, who is depicted as being, under the age of 18 years –

section 141<sup>439</sup> of the Children’s Act and “removal of body parts”.<sup>440</sup> Thus the Children’s Act regards a child that is exploited or lives in circumstances that expose him or her to exploitation as a child in need of care and protection.<sup>441</sup> The protection that the Children’s Act provides for a child who is or has been subjected to exploitation, neglect, abuse or inadequate supervision or any other failure to meet his or her needs, are prevention and early intervention programmes.<sup>442</sup>

Since there are different forms of “exploitation” that a child may be exposed to, the discussion in this section focuses on the forms of exploitation cited in the Children’s Act which tend to receive less attention due to, amongst others, insufficient research and

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- (i) Engaged in sexual conduct;
  - (ii) Participating in, or assisting another person to participate in, sexual conduct; or
  - (iii) Showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.

See also Minnie in Boezaart (ed.) *Child Law in South Africa* 537.

<sup>436</sup> S 1(1)(c) of the Children’s Act.

<sup>437</sup> S 1(1)(d) of the Children’s Act.

<sup>438</sup> S 1(1)(e) of the Children’s Act.

<sup>439</sup> Prohibits child labour and exploitation of children, see the discussion in section 3 3 9.

<sup>440</sup> S 1(1)(f) of the Children’s Act; *Northern Review* (2008-05-12): a 10 year-old was found badly mutilated, with private parts, ears and hands removed, which parts were used to perform “barbaric rituals”. The boy died 11 days later.

<sup>441</sup> S 150(1)(e).

<sup>442</sup> S 144(1)(f); see the discussion in section 4 3.

investigation. This section discusses “forced marriage”,<sup>443</sup> exploitation in the form of “early marriage”,<sup>444</sup> “ukuthwala” and “ukungena”. The section also discusses female “genital mutilation”<sup>445</sup> and “circumcision”<sup>446</sup> as forms of exploitation in the context of “removal of body parts”,<sup>447</sup> and lastly, “child prostitution”<sup>448</sup> and “child trafficking”<sup>449</sup> as forms of “sexual exploitation”.<sup>450</sup> “Child labour”<sup>451</sup> are discussed as another form of exploitation under the topic “a child who is a victim of child labour”<sup>452</sup> later in the study.

Generally, girl children are exposed to “sexual exploitation” and different harmful cultural practices, which are exploitive in nature. Female “genital mutilation” and “forced marriage” are examples of such practises.<sup>453</sup> On the other hand, a boy child may be exposed to life threatening experiences through cultural “circumcision”. The difference in the level of exposure to exploitive practises between girls and boys is that girls participate in these practices mainly to benefit their male counterparts, whereas boys participate to assert

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<sup>443</sup> S 1(1)(a).

<sup>444</sup> See the discussion in section 3 3 5 1 1.

<sup>445</sup> See the discussion in section 3 3 5 1 2.

<sup>446</sup> See the discussion in 3 3 5 1 3.

<sup>447</sup> S 1(1)(f) of the Children’s Act.

<sup>448</sup> See the discussion in 3 3 5 1 4.

<sup>449</sup> See the discussion in 3 3 5 1 5.

<sup>450</sup> S 1(1)(b) of the Children’s Act.

<sup>451</sup> S 1(1)(e) of the Children’s Act.

<sup>452</sup> See the discussion in 3 3 9.

<sup>453</sup> Viljoen in Boezart (ed.) *Child Law in South Africa* 337; Raj *Feminization of underdevelopment in Nigeria Some Theoretical Issues* (2007) 239. In Nigeria, gender norms for women include submissiveness, dependence and virginity until marriage.

themselves as men.

### 3.3.5.1 *Forced marriage: “early marriage”, “ukungena” and “ukuthwala”*

The age at which children are allowed to marry differs from one country to another.<sup>454</sup> However, most countries prohibit “early marriage”.<sup>455</sup> For instance, in terms of Ghana’s Children’s Act<sup>456</sup> no-one may enter into marriage if they are below the age of 18.<sup>457</sup>

The age at which a person can marry in terms of South African law varies between civil law marriage<sup>458</sup> and customary marriage.<sup>459</sup> Even though these laws prohibit marriage of children of certain age groupings, marriages of children are still allowed through, amongst others, “consent” that is required either from the parent or guardian of the child or in other circumstances, from the Minister of Home Affairs.<sup>460</sup>

Although there is no proper research regarding early marriages in South Africa, it is known in

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<sup>454</sup> Bowman & Kuenyehia (2003) 30, see n 275.

<sup>455</sup> Viljoen in Boezart (ed.) *Child Law in South Africa* 332 and 337.

<sup>456</sup> Act 560 of 1998. According to s 14(1) of the Act “No person shall force a child – (a) to be betrothed; (b) to be the subject of a dowry transaction; or (c) to be married”. See also Bowman & Kuenyehia (2003) 31.

<sup>457</sup> S 14(2) “The minimum age of marriage of whatever kind shall be eighteen years.”

<sup>458</sup> S 26(1) Marriages Act. See the discussion in sections 2 2 1 1, 2 2 2 7 and 3 4.

<sup>459</sup> S 3(1)(a) of the Recognition of Customary Marriages Act allows marriage of any person who is 18 years of age.

<sup>460</sup> See the discussion in sections 2 2 1 1 and 2 2 1 2.



other African countries that children, particularly those living in rural communities, are subjected to forced or early marriages by their parents.<sup>461</sup> These children are generally known as “child brides” or “young brides”. Newspapers report that South African parents allow the marriage of their girl children at puberty (or earlier) under the guise of culture or religious practice.<sup>462</sup> Children who participate in early marriages are forced in the sense that parents subject these children to marriage because, amongst other things, they associate marriage with success and are motivated by the benefits they are likely to receive from the marriage of their child.<sup>463</sup>

Men who marry young girls are adult males and benefit by marrying virgins who may not understand anything that concerns such marriages.<sup>464</sup> In some cases parents of the young bride would encourage the young girl to conceive in order to sustain her marriage or certify her fitness as a wife. The parents of the young bride may receive financial support from the husband of their daughter in the event they opt to provide care to their grandchildren.<sup>465</sup> Since customary tutelage would require the husband to support his family as the household head, the family of the new husband may include the parents of his young wife, particularly

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<sup>461</sup> Bowman & Kuenyehia (2003) 32.

<sup>462</sup> *Sowetan* (2004-09-06).

<sup>463</sup> Generally parents subject their children to early marriages due to the commercial gain guaranteed in *lobolo*. It is for this reason that *lobola* is losing its value in the modern day realities and changing lifestyle of South African people.

<sup>464</sup> Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) South Africa Programme 34.

<sup>465</sup> Lamanna & Riedmann (2003) 604-605, see n 275.

when there is no breadwinner in his wife's family.<sup>466</sup>

In other situations, young girls enter into early marriage due to societal attitudes and because they want to be accepted in their families and communities. Young girls are also known to get married to men who are employed or wealthy. This simply means that poverty is, among others, a motivation for early marriage.<sup>467</sup> This is evident in the well-known practice of King Mswati III of Swaziland who continuously marries young girls.

At the time of writing this section of the study,<sup>468</sup> he had his 12 prospective wives, one a 16 year old girl.<sup>469</sup> It is reported that the flashy cars, beautiful houses and other amenities enjoyed by the king's wives and the alleged good life in the royal family lure young girls to

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<sup>466</sup> Meer *Women in Tenure: Marginality and left hand power* (1997) 23-24: According to s 23(2) of the Black Administration Act (which is now repealed), an unmarried woman and widow had no independent land rights; there was a general acceptance that they would be taken care of within the ambit of a family by their father or husband. Also in the case of *Sonti v Sonti* 1929 NAC (C & O) 23 at 24, the court found that: "on the death of a native his estate devolves to his eldest son or his eldest son's male descendant inherits...the son cannot dispose the property to their parties whilst there are still daughters and wife of the family who needs support from the estate".

<sup>467</sup> Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 34.

<sup>468</sup> (2004-04-15): King Mswati III uses the annual Reed Dance, a ceremony where young girls dance bare breasted for the king and where they are chosen and later blessed by the Queen Mother before being revealed as the king's wife. Most of these young girls are known to be virgins and below 20 years of age. Young girls look forward to attending the dance, as they know the possibilities of being chosen as the king's wife.

<sup>469</sup> *Sowetan* (2004-09-06).

marriage with the king.<sup>470</sup> The response from parents has always been good, given the benefit they have of better livelihoods.<sup>471</sup>

Incidents of abuse in early marriage are rife but unreported.<sup>472</sup> Many girl children who enter into early marriage become more vulnerable as adult men use young girls' bodies to assert their self-esteem and confidence.<sup>473</sup> Young girls in early marriages become vulnerable to the "fistula"<sup>474</sup> condition, as they conceive at a very tender age.<sup>475</sup> Young brides' bodies are not sufficiently well-developed to conceive.<sup>476</sup>

Early marriage limits the right of a girl child to enjoy parental care and have access to

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<sup>470</sup> *Ibid.*

<sup>471</sup> Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 34.

<sup>472</sup> *Ibid.*

<sup>473</sup> Bowman & Kuenyehia (2003) 32.

<sup>474</sup> A congenital malformation or an abnormal opening. See Bowman & Kuenyehia (2003) 30.

<sup>475</sup> Bowman & Kuenyehia (2003) 32. See also *Sowetan* (2005-09-15).

<sup>476</sup> Bowman & Kuenyehia (2003) 32-33: An example of a reported case of the "fistula" condition is of a 15 year-old Nigerian bride, who towards the birth of her child endured pain for four days and four nights in a mud house before her family took her to hospital. The child bride gave birth to a stillborn baby. She (child bride) later started leaking urine. Apart from the "fistula" condition, a young girl in marriage makes a poor mother as she is constantly in bad health due to exposure to sexually transmitted diseases (STDs) and low educational achievement. *Sowetan* (2005-09-15): a woman in this situation alienates herself from society, like the 15 year-old bride who later lived in isolation for 10 years. Due to the high reportage of the "fistula" condition in Nigeria, the United Nations Population Fund lodged a campaign to raise awareness of available treatment for the condition.

education.<sup>477</sup> Instead a young girl is forced to withdraw from school, enter marriage ill-informed and assume a parental role at a very early age.<sup>478</sup> A young girl, who enters into a legally valid marriage, becomes an emancipated minor and attains the status of majority by virtue of marriage.<sup>479</sup>

Another form of forced marriage is the re-marrying of young widows by the brothers of their deceased husbands.<sup>480</sup> This practice is known as the levirate or *ukungena* in Zulu culture.<sup>481</sup> The brother of the deceased succeeds the deceased as the husband to raise the male heir or to increase the nominal offspring of the deceased<sup>482</sup> and assume all responsibilities including sexual relations with the young widow. This practice is normally encouraged by elderly family members with the view of keeping young widows in the family of the deceased husband.

The practice of *ukungena* has been found to be abusive and does not giving the young widow the right to make a decision regarding the new husband, including the right to re-

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<sup>477</sup> *Ibid.*

<sup>478</sup> Bowman & Kuenyehia (2003) 32; Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 34.

<sup>479</sup> S 1(b) of the Births and Deaths Registration Amendment Act 1 of 2002: The definition of a “major” or “person of age” is provided as “...any person who has attained the age of [21] 18 years”.

<sup>480</sup> S 1 of the KwaZulu Act on the Code of Zulu Law 16 of 1988; Natal Code of Zulu Law R151 of 1987; Kerr *The Customary Law Of Immovable Property* (1990) 144.

<sup>481</sup> Bennett *Customary Law in South Africa* (2004) 345.

<sup>482</sup> *Ibid.*

marry.<sup>483</sup> Marriage is valuable in South African culture and the practice of *ukungena* ensures that young girls remain in marriage by allowing the brother of the deceased to take over the deceased's wife.<sup>484</sup> There have been many unreported complaints regarding abusive experiences encountered by young girls in the practice of *ukungena*. However, there has not been any prosecution or concrete intervention, due to a lack of evidence.

The customary law practice of *ukuthwala* which involves the abduction of a girl by a suitor or the friends of the suitor to force her family to enter into marriage negotiations also fits the definition of forced marriage.<sup>485</sup> This practice is rife among the Xhosa, particularly in the Eastern Cape Province.<sup>486</sup> *Ukuthwala* can take place with the girl being aware of what is to be done to her.<sup>487</sup>

There is no definition of forced marriage in terms of South African law. What the Children's Act does is simply to prohibit conduct that is detrimental to the well-being of the child and is practised under guise of social, cultural and religious practices.<sup>488</sup> The Children's Act further provides that a child below the minimum age set by law for a valid marriage may not be given in marriage or engagement.<sup>489</sup> The Act provides that a child that is above the minimum age

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<sup>483</sup> Olivier *et al.* *Indigenous Law* (1995) 156 par 146.

<sup>484</sup> *Ibid.*

<sup>485</sup> Ngidi in Boezaart (ed.) *Child Law in South Africa* 238-239. Jansen "Family Law" in Bekker, Rautenbach & Goolam (eds.) *Introduction to Legal Pluralism in South Africa* (2006) 31.

<sup>486</sup> Ngidi in Boezaart (ed.) *Child Law in South Africa* 238-239.

<sup>487</sup> Ngidi in Boezaart (ed.) *Child Law in South Africa* 239.

<sup>488</sup> S 12(1).

<sup>489</sup> S 12(2)(a).

may not be given in marriage or engagement without his or her consent.<sup>490</sup> Section 12(2)(a) of the Children's Act is not stringent enough to curb early marriage in that it allows different marriages concluded in terms of *any*<sup>491</sup> law to be valid. Hence both civil law and customary law have their own minimum age at which a person may enter into marriage.

The Recognition of Customary Marriages Act provides that if the prospective spouse is a minor, the parents or legal guardian must give consent to marriage.<sup>492</sup> However, most South African customary marriages are not officially reported to marriage officers of the district where the marriage took place. Thus, many young girls, as in other countries, may marry as early as 13 or 16 years of age.<sup>493</sup>

South African laws create stringent rules in marriage.<sup>494</sup> For instance, the Marriage Act provides that a marriage of a minor that is concluded through the consent of parents may be annulled either by the parent or guardian of the minor within six weeks, by way of application,

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<sup>490</sup> S 12(2)(b).

<sup>491</sup> Own emphasis.

<sup>492</sup> S 3(3)(a).

<sup>493</sup> According to Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* 33-37, amongst other countries, Zambia, Namibia and Botswana prohibit anyone below the age of 21 from marrying without written consent. However, statistics reveal that a high percentage of girls were married below the age of 18 between the period 1999-2004, that is 42% in Zambia, 10% in Botswana, 10% in Namibia and 8% in South Africa.

<sup>494</sup> Ngidi in Boezaart (ed.) *Child Law in South Africa* 239.

after the parent or guardian has become aware of the marriage.<sup>495</sup> The application to annul such marriage may be lodged with the High Court before the minor attains majority.<sup>496</sup> The minor is also allowed to lodge an application within three months before he or she attains majority to annul an early marriage, which has been entered into without the necessary consent.<sup>497</sup> On the same note, the Recognition of Customary Marriages Act and the Children's Act prohibit child marriages and pronounce any marriage that is concluded without the consent of the parties as an invalid marriage. However, the two statutes are not sufficient to curb marriages of children below the age of 18.<sup>498</sup> This is so, in that the legislation contains different provisions which condone marriages of children such as, using the requirement of "consent", either from the parent or the Minister of Home Affairs.<sup>499</sup> I am of the view that, amongst others, the only way to curb marriages of children below the age of 18 is if South Africa could incorporate a provision which prohibits marriage of any person below the age of 18 without requiring the consent from parents, care-givers or the Minister of Home Affairs to solemnise the marriage.<sup>500</sup> Furthermore, I recommend that *all*<sup>501</sup> marriages

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<sup>495</sup> S 24A(1)(a) of the Marriage Act. See also Boezaart "Child Law, the Child and South African Private Law" (ed.) *Child Law in South Africa* (2009) 33.

<sup>496</sup> S 24A(1)(a) of the Marriage Act.

<sup>497</sup> S 24A(1)(b) of the Marriage Act.

<sup>498</sup> In 2005, South Africa had 3 264 girls and boys who were married at the age of 16: accessed from [www.statssa.gov.za/publications.html/P03072005/html/Po3072005.html](http://www.statssa.gov.za/publications.html/P03072005/html/Po3072005.html) on 2007-06-10. See also the proposed provision in section 3 4.

<sup>499</sup> See the discussion in sections 2 2 1 1 and 2 2 1 2; Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 37.

<sup>500</sup> See the proposed provision in section 3 4.

<sup>501</sup> Own emphasis.

be registered to monitor early marriages in South Africa.<sup>502</sup>

Thus, South Africa must refer to foreign jurisdiction which excludes marriage of children below the age of 18.<sup>503</sup> On the same note, parents should cease to consent to marriage of their young girls for financial gain.<sup>504</sup> Religious marriages should also be strictly monitored to regulate the trend of parents of getting children into early permanent relationships without calculating the consequences involved.

### 3.3.5.2 *Removal of body parts*

#### 3.3.5.2.1 Female genital mutilation

Studies refer to different forms of female “genital mutilation”<sup>505</sup>. Female “genital mutilation” is known as a traditional ritual that varies from culture to culture that involves the cutting of female genitals.<sup>506</sup> The practice is carried out in order to suppress female sexual desire and expression.<sup>507</sup> It was also used by modern physicians in England and the United States to

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<sup>502</sup> Art 21(2) of the ACRWC, see also the discussion in sections 2 2 2 7 and 3 3 5 4 1.

<sup>503</sup> See the discussion in sections 3 3 5 5.

<sup>504</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* (2004) 137, see n 275.

<sup>505</sup> Hereinafter referred to as “FGM” or Female Genital Cutting, hereinafter referred to as “FGC”, as known in other parts of Africa.

<sup>506</sup> Bowman & Kuenyehia (2003) 427.

<sup>507</sup> *Ibid.*



treat hysteria,<sup>508</sup> lesbianism,<sup>509</sup> masturbation<sup>510</sup> and other female “deviances”.<sup>511</sup>

The Children’s Act<sup>512</sup> defines “genital mutilation” and not “female genital mutilation”. According to the Children’s Act,<sup>513</sup> “genital mutilation” means the partial or total removal of any parts of the genitals and includes circumcision of a female child. The procedures involved in female “genital mutilation” are known as infibulations where some or all of the labia minora<sup>514</sup> are cut off and incisions are made in the labia majora<sup>515</sup> to create raw surfaces. The raw surfaces are later stitched together or kept together by pressure until they heal as a skin that covers the urethra and most of the vagina.<sup>516</sup> Young girls suffer serious harm as a result of such cultural practices.<sup>517</sup>

The age at which female “genital mutilation” is practiced, varies widely.<sup>518</sup> In some cultures,

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<sup>508</sup> A mental disorder characterised by emotional outburst, a frenzied emotional state, e.g., crying or laughter: *Collins English Dictionary* 724.

<sup>509</sup> Female homosexual: *Collins English Dictionary* 843.

<sup>510</sup> To stimulate sexual organs to achieve sexual pleasure: *Collins English Dictionary* 908.

<sup>511</sup> *Ibid.*

<sup>512</sup> S 1(1) of the Children’s Act.

<sup>513</sup> *Ibid.*

<sup>514</sup> The two small inner folds of skin in human females forming the margins of the vaginal orifice: *Collins English Dictionary* 819.

<sup>515</sup> The two elongated outer folds of skin in human females surrounding the vaginal orifice: *Collins English Dictionary* 819.

<sup>516</sup> Bowman & Kuenyehia (2003) 428.

<sup>517</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 332 and 337.

<sup>518</sup> Bowman & Kuenyehia (2003) 425.

girls are genitally mutilated as early as infancy, 14 or 16 years of age.<sup>519</sup> The most common age for “genital mutilation” of young girls in Africa is between four and eight years of age.<sup>520</sup> In South Africa and in other African countries, *inter alia* Ghana,<sup>521</sup> young girls as young as 10 are forced or in other instances coerced by their parents and relatives to attend *koma*<sup>522</sup> or “school mountain”,<sup>523</sup> an initiation rite that prepares young girls for marriage;<sup>524</sup> although there is no written research regarding activities in the “school mountain”. Those opposed to this practice hold the view that activities at the “school mountain” include genital mutilation with the aim of preparing young girls for womanhood.<sup>525</sup> The time spent by young girls at the “school mountain” may vary from one ethnic group to another. The school may be attended for approximately three weeks, three months<sup>526</sup> or even six months.

Female “genital mutilation” plays a social role in some societies in that it is difficult for young girls to marry if they are not circumcised.<sup>527</sup> Testimonies around female “genital mutilation” reveal that young girl suffer complications as a result of the practice such as the

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<sup>519</sup> Bowman & Kuenyehia (2003) 427.

<sup>520</sup> *Ibid.*

<sup>521</sup> *The Star* (2004-01-28).

<sup>522</sup> In Northern Sotho culture.

<sup>523</sup> The school is generally known as an initiation school for girls.

<sup>524</sup> Ford “Communication for Abandonment of Female Genital Cutting” in Freeman *Children’s Health and Children’s Rights* (2006) 185; Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 33.

<sup>525</sup> Bowman & Kuenyehia (2003) 427.

<sup>526</sup> *The Star* (2004-01-28).

<sup>527</sup> Van Bueren “Children’s Rights: Balancing Traditional Values and Cultural Plurality” in Douglas & Sebba (eds.) *Children’s Rights and Traditional Values* (1998) 17.

development of obstetric fistula.<sup>528</sup> The cutting of the clitoris may cause extensive bleeding which may lead to anaemia or death.<sup>529</sup> The cutting instruments are more often than not sterilised, the cut may get soaked in urine and be contaminated by faeces, causing infection.<sup>530</sup> The pain, swelling and inflammation of the front of the vulva often result in an inability to pass urine for hours or days.<sup>531</sup> Urine infection may also cause back pain from pressure on the kidneys.<sup>532</sup>

Infibulations is meant to prevent sexual intercourse with a clasp or by closing the genitals. If the false vaginal opening is too small, it may obstruct menstrual flow with constant menstrual pain.<sup>533</sup> The health problems caused by infibulations rarely disappear after the first bleeding.<sup>534</sup> A girl may suffer problems such as excessive growth of scar tissue, and development of cysts, which can be as big as a grapefruit and may be removed through surgery.<sup>535</sup> Despite this experience, health workers and traditional circumcisers continue with this practice.<sup>536</sup> Very little is said about female “genital mutilation” and the activities in the “school mountain”.

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<sup>528</sup> Bowman & Kuenyehia (2003) 428-430. Obstetrics is a branch of medicine concerned with child birth and the treatment of women before and after child birth.

<sup>529</sup> Bowman & Kuenyehia (2003) 429.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Ibid.*

<sup>532</sup> *Ibid.*

<sup>533</sup> Bowman & Kuenyehia (2003) 430.

<sup>534</sup> Bowman & Kuenyehia (2003) 429.

<sup>535</sup> *Ibid.*

<sup>536</sup> Bowman & Kuenyehia (2003) 429-430. Obstetrics is a branch of medicine concerned with child birth and the treatment of women before and after child birth.

Generally, girls who participate at the “school mountain” are sworn to secrecy regarding the activities of the school. More often than not the decision to genitally mutilate a young girl is imposed on her without any consent.<sup>537</sup> This means that exploitation that occurs at the “school mountain” or anywhere where female “genital mutilation” practice is carried out is easily concealed without intervention.

The Children’s Act<sup>538</sup> prohibits “genital mutilation” or “circumcision” of female children. The Children’s Act<sup>539</sup> defines “circumcision” as the removal of the clitoris by any means. There are no further provisions addressing female “genital mutilation” in the Children’s Act. On the other hand, the Equality Act<sup>540</sup> prohibits unfair discrimination against any person on the grounds of gender including any traditional, customary or religious practice which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.

In terms of the Constitution, every person, including a child, guaranteed the protection of her bodily and psychological integrity.<sup>541</sup> This includes the right to security in and control over their body.<sup>542</sup> Furthermore, every person including a child has the right to have their dignity

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<sup>537</sup> Ford in Freeman *Children’s Health and Children’s Rights* 185.

<sup>538</sup> S 12(3).

<sup>539</sup> S 1(1) of the Children’s Act.

<sup>540</sup> S 8(d).

<sup>541</sup> S 12(2).

<sup>542</sup> *Ibid.*

respected and protected.<sup>543</sup> Female “genital mutilation” invades the privacy of the girl child whose private parts are fiddled with by the mutilator.<sup>544</sup> Research has revealed that female “genital mutilation” and “early marriage” practices are harmful to the physical, psychological and social well-being of children<sup>545</sup> and little is published about them. This means that alternatives need to be developed in implementing children’s rights that would reflect local cultural beliefs.<sup>546</sup>

### 3.3.5.2.2 Circumcision

“Circumcision” performed in terms of culture, Muslim or Jewish religion, involves a surgical intervention that has no medical basis.<sup>547</sup> Fox and Thomson<sup>548</sup> explain the effects of “circumcision” and the reason it is opposed by relying on an opinion held by Thorpe LJ in the Court of Appeal case of *Re S*,<sup>549</sup> that “circumcision” is likely to be painful with definable physical and psychological risks and that for it to be ordered, there would have to be clear benefits to the boy child and his interests”.

The discussion on “circumcision” in this section reflects on the “circumcision” practice that is

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<sup>543</sup> S 10 of the Constitution.

<sup>544</sup> S 14 of the Constitution.

<sup>545</sup> See the discussion in sections 3 3 5 1 1 and 3 3 5 2 1.

<sup>546</sup> Van Bueren in Douglas & Sebba (eds.) *Children’s Rights and Traditional Values* (1998) 17.

<sup>547</sup> Fox & Thomson in Freeman *Children’s Health and Children’s Rights* 166.

<sup>548</sup> *Ibid.* See also *Re S* 574.

<sup>549</sup> (2005) 1 FLR 236.

carried out in South African “initiation schools”<sup>550</sup> and the extent to which it is exploitive of the boy child.<sup>551</sup> “Circumcision” is a form of exploitation which is not specifically referred to in the definition of “exploitation”. The definition of “exploitation” is, amongst others, “removal of body parts”.<sup>552</sup> The phrase “removal of body parts” is wide enough to cover “circumcision” of a boy child. A boy child who lives in a family with adult male members, who uphold “circumcision” of boy children as a cultural practice, may be viewed as disrespectful by his parents, community, tribe or traditional authority if he opposes or refuse to be circumcised.<sup>553</sup> In this regard, a boy child may not enjoy family life.<sup>554</sup>

In practice, the boy child or young “initiate”<sup>555</sup> is taken away from the family environment to the forest or mountain for a period of two, three<sup>556</sup> or six months for “circumcision” and other cultural practices. Many ethnic groups in South Africa circumcise in winter. This means that a young initiate who attends an “initiation school” for “circumcision” may stay in the forest or mountains for the entire winter period, and walk bare-foot in the middle of winter without a

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<sup>550</sup> Schools specifically established to initiate young boys to man-hood and circumcision.

<sup>551</sup> *Sunday Times* 2009-08-09, a child took his parents to court over circumcision. This case was seen as important as it would set a precedent for young men facing Xhosa initiation rites.

<sup>552</sup> S 1(1)(f) of the Children’s Act.

<sup>553</sup> Fox & Thomson in Freeman *Children’s Health and Children’s Rights* 175.

<sup>554</sup> *Ibid.* In the case of the complainant, he felt the pressure to participate in circumcision because his parents do everything for him including paying for his University education. In this situation, tension in the family environment is inevitable given the fact that the plaintiff was abducted by his father and 10 other men who subjected him to circumcision against his will and his Christian convictions.

<sup>555</sup> Refers to boys who are circumcised during the period of initiation at the forest or mountain.

<sup>556</sup> *Ibid.* See also *City Press* (2005-07-24).

nutritious diet or enough blankets. Young boys live in muddy huts or informal houses made of steel sheets without access to basic necessities such as health aids, education or proper shelter.

There is little written on “circumcision” in South Africa. Reports reveal that initiates of the Ndebele ethnic group in Moutse, Limpopo Province spend approximately two months away from their family home without access to health care facilities, school and other basic necessities.<sup>557</sup> The fact that a child may spend such an extended period of time away from his family means that the young initiate may find it difficult to re-integrate back into the family, community or adjust in his education and school upon return from the “initiation school”.<sup>558</sup> Many initiates drop out of the education system to work upon return from the “initiation school”.

The surgical operation performed on young boys as cultural “circumcision” in South Africa is similar to the practice in other African countries.<sup>559</sup> Boys are vulnerable to different kinds of sicknesses emanating from the use of unsterilized “circumcision” instruments, lack of anaesthesia, and infection, often leading to death.<sup>560</sup> Young boys who attend the “initiation school” may be between thirteen and twenty one years of age;<sup>561</sup> other countries initiate

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<sup>557</sup> *City Press* (2005-07-24).

<sup>558</sup> *Ibid.*

<sup>559</sup> Nyaundi “Circumcision and the Rights of the Kenyan Boy-child” (2005) *AHRJ* 174-177.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Mail & Guardian* (2009-12-17). South African officials are puzzled over how to regulate a centuries old tradition without destroying cultural beliefs.

children as young as nine years of age.<sup>562</sup> Young initiates are taught by older men whose teachings influence young boys to project themselves as adult males even when they may not be married or have children of their own.<sup>563</sup> Young initiates would therefore refuse instruction from females including their mothers. They are instead treated like family heads and assume a status that is superior to women in the community.<sup>564</sup>

Section 1(1) of the Children's Act defines "circumcision" in relation to female "genital mutilation"<sup>565</sup> and not the surgical removal of the foreskin (prepuce) from the male sexual organ.<sup>566</sup> On the other hand, section 12(8) of the Children's Act prohibits "circumcision" of a boy child who is below 16 years of age.<sup>567</sup> The Act allows "circumcision" of boy children if it is

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<sup>562</sup> Nyaundi (2005) *AHRJ* 179.

<sup>563</sup> *Ibid.* See also Bowman & Kuenyehia (2003) 471.

<sup>564</sup> Nyaundi (2005) *AHRJ* 179.

<sup>565</sup> See the discussion in section 3 3 5 2 2 1.

<sup>566</sup> *Collins English Dictionary* 276.

<sup>567</sup> S 12(8) "Circumcision of male children under the age of 16 is prohibited, except When -

- (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or
  - (b) circumcision is performed for medical reasons on the recommendations of a medical practitioner.
- (9) Circumcision of male children older than 16 may be performed –
- (a) if the child has given consent to the circumcision in the prescribed manner;
  - (b) after proper counselling of the child; and
  - (c) in the manner prescribed.
- (10) Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision."



performed for religious purposes and as prescribed by a particular religion.<sup>568</sup> “Circumcision” of a boy child is permitted if performed for medical reasons upon the recommendation of a medical practitioner.<sup>569</sup> “Circumcision” of boy children older than 16 years is allowed on condition that the boy child consents to “circumcision” in the prescribed manner<sup>570</sup> which is not identified in the Act. A boy child who is older than 16 who consents to “circumcision” must undergo counselling.<sup>571</sup> A boy child is allowed to refuse “circumcision” if he has the mind, age, maturity and is at the stage of development to do so.<sup>572</sup> Although section 12(8) of the Children’s Act applies to “circumcision” of boy children, the Act has still not taken all the measures necessary to protect boy children older than 16 from the practice of cultural “circumcision” without medical assistance.<sup>573</sup>

However, the Act expressly provides for medical assistance in “circumcision” that is performed on religious grounds.<sup>574</sup>

In March 2004, the Free State, Eastern Cape and Limpopo Province promulgated

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<sup>568</sup> S 12(8)(a).

<sup>569</sup> S 12(8)(b) of the Children’s Act.

<sup>570</sup> S 12(9)(a) of the Children’s Act.

<sup>571</sup> S 12(9)(b) of the Children’s Act.

<sup>572</sup> S 12(10) of the Children’s Act.

<sup>573</sup> Instead, reg 8 to the Children’s Act simply provides that a male child older than 16 years must provide his consent to circumcision in Form 3.

<sup>574</sup> S 12(8)(a). Reg 9(1) to the Act provides that “Circumcision performed for religious purposes on male children under the age of sixteen must be performed in accordance with the practices of the religion concerned and must be performed by a religious practitioner or by a medical practitioner concerned who has been properly trained to perform circumcisions.

“circumcision” laws.<sup>575</sup> The basis of these laws was to prevent injury or death arising from “circumcision”.<sup>576</sup> It is anticipated that regulations will be promulgated, including a minimum age requirement for participation in the “initiation school” or “circumcision”. A medical report (not less than a month old) indicating the health of the boy child is required, as well as the consent of the parent or guardian, and inspections of the “initiation school” should be carried out by health officials to establish that hygienic conditions and a proper water supply are present.<sup>577</sup> The Eastern Cape Health Department has been trying for years to enforce minimum standards for “circumcision” schools in the province. Since the introduction of the Traditional Circumcision Act<sup>578</sup> in the Eastern Cape Province, 40 traditional surgeons and nurses have been arrested.<sup>579</sup> Twenty “initiation schools” in Pondoland were closed down, 18 people were convicted and 150 initiates were rescued.<sup>580</sup> Nevertheless, these efforts may not achieve much given the fact that “initiation schools” operate in rural communities and most of them operate unlawfully without legal intervention.<sup>581</sup> It may therefore be difficult for the Eastern Cape Health Department to curb the health problems emanating from initiation or “circumcision”.<sup>582</sup> I am of the view that the only way to deal away with this harmful cultural practise against children is for South Africa to enact a provision in the Children’s Act

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<sup>575</sup> For instance, the Eastern Cape Province enacted the Traditional Circumcision Act 2001. See the discussion in *THISDAY* (2004-05-25).

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

<sup>578</sup> *THISDAY* (2004-05-25).

<sup>579</sup> *Ibid.*

<sup>580</sup> *Ibid.*

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.*

prohibiting circumcision of boys below the age of 18.<sup>583</sup>

In 2004, South African traditional leaders held a meeting to discuss the establishment of a national policy framework to combat botched “circumcisions”.<sup>584</sup> The national policy was to be formed upon receipt of discussion documents from the provincial branches of traditional leaders to inform the policy framework.<sup>585</sup> There had not been any progress in establishing the national policy framework on “circumcision” at the time of concluding this section of the study. The Chairperson of the SAHRC encouraged the participation of young people in the establishment of a policy framework to combat botched “circumcision” and found the ostracism of youth who refused “circumcision” significant.

The SAHRC noted that South Africa needs to ensure that “children’s voices are heard in matters affecting them”.<sup>586</sup> It is concerning that South Africa is 18 years into democracy, yet there is no universal outcry to the alarming statistics of boys dying at initiation schools.<sup>587</sup> I argue that any other traditional law must be subject to the Constitution as the supreme law. The constitutional protection of culture does not give communities *carte blanche* to engage in practices that are harmful to children.

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<sup>583</sup> See the proposed provision in section 3 4.

<sup>584</sup> *Ibid.*

<sup>585</sup> *Ibid.*

<sup>586</sup> *Sunday Times* 2009-08-09. See the discussion in Davel in Nagel *Gedenkbundel vir JMT Labuschagne* (2006) 28.

<sup>587</sup> *Sowetan* (2012) reports the death toll of young initiates at 43, as at the 27 July 2012, in the last 3 weeks.

Cultural and religious practices are protected to the extent that they are consistent with other rights in the Bill of Rights.<sup>588</sup> I propose that South Africa take a firm position and incorporate a provision that prohibits the removal of any body parts of any person below the age of 18 or subjecting a child to any form of exploitation, abuse or harmful cultural practises.<sup>589</sup>

### 3.3.5.3 *Sexual exploitation*

#### 3.3.5.3.1 Child prostitution

“Child prostitution” is defined in the context of “commercial sexual exploitation”.<sup>590</sup> According to the Children’s Act, “commercial sexual exploitation” with regard to a child means the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography irrespective of whether that reward is claimed by the child, payable to the child or shared with him or her, the parent or caregiver of the child or any person.<sup>591</sup> When analysing the definitions of “child sexual abuse”, the term is found to have a wide range of offences that can be committed against children.<sup>592</sup> “Child prostitution” which is

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<sup>588</sup> S 31(2) of the Constitution.

<sup>589</sup> See the proposed provision in section 3 4.

<sup>590</sup> S 1(1) of the Children’s Act; Matthias & Zaal in Davel & Skelton *Commentary on the Children’s Act* 9-6.

<sup>591</sup> *Ibid.*

<sup>592</sup> The Protocol Document developed by the Institute for Child and Family Development and the Western Cape Child Abuse and Neglect Forum *Protecting Our Children: A Protocol for the Multi- Disciplinary Management of Child Abuse and Neglect* (1996) provides the following definition of child sexual abuse: sexual abuse is any act or acts which result in the exploitation

also “sexual abuse” is under-reported, and sometimes denied or even buried by individuals in society.<sup>593</sup> Cases of parents renting out children for sexual labour are common.<sup>594</sup>

Parents expose their children in sexual trade due to, amongst others, the state of poverty in the family home and their dependence on the income derived from “prostitution”.<sup>595</sup> Thus economic dependence dampens parents’ vigour to seek remedies or curb the “sexual

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of a child or young person, whether with their consent or not, for the purposes of sexual or erotic gratification. This may be by adults or other children or young persons. Sexual abuse may include but is not restricted to the following behaviour:

- “(a) Non-contact abuse: exhibitionism (flashing), voyeurism (peeping), suggestive behaviours or comments. Exposure to pornographic materials or producing visual depictions of such conduct;
- (b) Contact abuse: genital, anal fondling, masturbation, oral sex, object or finger penetration of the anus/vagina, penile penetration of the anus/vagina and/or encouraging the child/young person to perform such acts on the perpetrator;
- (c) Involvement of the child/young person in exploitive activities for the purposes of pornography or prostitution; or
- (d) Rape, sodomy, indecent assault, molestation, prostitution and incest with children”.

See also Minnie in Boezaart (ed.) *Child Law in South Africa* 524.

<sup>593</sup> Minnie in Boezaart (ed.) *Child Law in South Africa* 523.

<sup>594</sup> *The Star* (2006-05-11): in South Africa, a 4 year-old girl was rented out to men for more than 9 months for R200 a session. Investigations revealed that the experience of the 4 year-old who was rented out as a sex slave is not the only case as there are hundreds of children in Johannesburg used as sex slaves by wealthy business men. Children as young as 8 years would be sold for sex for as little as R10. Some girls who are not in prostitution would be under the control of a hotel manager whom they say would allow them to work between 4pm and 8am the following day.

<sup>595</sup> *Ibid.*

exploitation” of their children.

“Child prostitution” is a form of labour that is more exploitive and dangerous than other forms of child labour. A young girl or boy may voluntarily or in other circumstances, under compulsion, participate in “prostitution”.<sup>596</sup> “Child prostitution”, like “child trafficking” is “deadly even on account of the fact that children are the most vulnerable to this hidden crime”.<sup>597</sup> “Child prostitution” often injures the child and demeans his or her self-worth. For this reason, the Children’s Act makes it an offence for any person who is the owner, lessor, manager, tenant or occupier of any premises where commercial sexual exploitation of a child has occurred or who has information in that regard, to fail to promptly take reasonable steps to report the matter to the police.<sup>598</sup>

There is currently no legislation that specifically addresses the needs of young girls who are in “prostitution” or who are victims of “trafficking”.<sup>599</sup> Instead, issues relating to “prostitution” and “trafficking” are dealt with, within the ambit of the Sexual Offences Act,<sup>600</sup> as sexual offences and the Children’s Act regards them as “exploitation”.<sup>601</sup> The Sexual Offences Act

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<sup>596</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* 143.

<sup>597</sup> Gallinetti & Kassan “Trafficking of Children in Africa: An Overview of Research, International Obligations and Existing Legal Provisions” in Sloth-Nielsen *Children’s Rights in Africa: A Legal Perspective* (2008) 239.

<sup>598</sup> S 305(5).

<sup>599</sup> At the time of writing this section of the study 2010-02-02.

<sup>600</sup> 23 of 1957, hereinafter referred to as the “Sexual Offences Act”. Other provisions of the Act have been repealed except for s 10.

<sup>601</sup> S 284 and 285.

contains prohibitions relating to brothels and “prostitution”.<sup>602</sup> These offences are not necessarily listed as sexual offences against children even though children may be victims of or be involved in these offences.<sup>603</sup> Although numerous provisions of the Sexual Offences Act have been repealed,<sup>604</sup> section 10 of the Act has not been repealed.

The Sexual Offences and Related Matters Amendment Act came into operation on 16 December 2007. The Act provides for, amongst others, a comprehensive and an expanded list of sexual offences against children and aims to address the vulnerability of children and persons who are mentally disabled to in respect of sexual abuse and exploitation.<sup>605</sup> However, a number of offences which are described in chapter 2 (sexual offences, including child sexual offences),<sup>606</sup> 3 (dealing with sexual offences against children)<sup>607</sup> and 4 (dealing

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<sup>602</sup> Minnie in Boezaart (ed.) *Child Law in South Africa* 535.

<sup>603</sup> *Ibid.*

<sup>604</sup> Amongst others, s 11 of the Sexual Offences Act.

<sup>605</sup> Preamble.

<sup>606</sup> Ss 3 (rape), 4 (compelled rape), 5 (sexual assault), 6 (compelled sexual assault), 7 (compelled self-sexual assault), 8 (compelling or causing persons who are 18 year or older to witness sexual offences, sexual acts or self-masturbation), 9 (exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older (“flashing”), 10 (exposure or display of child pornography to persons 18 years or older), 11 (engage sexual services of persons 18 years or older), 12 (incest), 13 (bestiality) and 14 (sexual acts with a corpse).

<sup>607</sup> Ss 15 (acts of consensual and sexual penetration with certain children (statutory rape), 16 (acts of consensual sexual violation with certain children (statutory sexual assault), 17 (sexual exploitation of children), 18 (sexual grooming of children), 19 (exposure or display or causing exposure or display of child pornography or pornography to children), 20 (using children for or benefiting from child pornography), 21 (compelling or causing children to witness sexual

with sexual offences against persons who are mentally disabled, including children)<sup>608</sup> of the Act do not have penalty provisions.

I am of the view that there is a serious impact on the vulnerability of victims (including children) of the decisions that are pending due to penalties not prescribed. This means that crimes that are set out in the act cannot be prosecuted. In the case of *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)*,<sup>609</sup> the Supreme Court of Appeal overturned the decision of the full bench of the Western Cape High Court of May 2012, wherein the court upheld a decision by the Riversdale magistrates court that a man who forcibly fondled a woman's breasts in 2009 could not be sentenced because the behaviour had no penalty under the Sexual Offences and Related Matters Amendment Act.

The magistrates court and High Court founded their judgments on the principle contained in the maxims *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law).<sup>610</sup> The implication of the ruling is that the court will not pass

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offences, acts or self-masturbation) and 22 (exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children).

<sup>608</sup> Ss 23 (sexual exploitation of persons who are mentally disabled), 24 (sexual grooming of persons who are mentally disabled), 25 (exposure or display of or causing exposure or display of children in pornography or pornography to persons who are mentally disabled) and 26 (using persons who are mentally disabled for pornographic purposes or benefiting therefrom).

<sup>609</sup> (369/12) [2012] 106 ZASCA (15 June 2012) Neutral citation.

<sup>610</sup> Par 7. The maxims can be traced back to Arts 7 and 8 of the Declaration of Rights of Man and of the Citizen of 26 August 1789 which in translation read: "7 No person shall be accused,



sentences for offences which do not have a penalty provision. The Sexual Offences and Related Matters Amendment Act was amended in June 2012 as a temporary measure to give courts the discretion to impose sentences on 29 offences described in chapter 2, 3 and 4 of the Act which had no penalties.<sup>611</sup> The Minister of the Department of Justice and Constitutional Development remarked on *DPP v Prins*' case that the courts have inherent discretion to impose an appropriate sentence in cases where no penalty provision is provided by legislation.

The aim of the law is to protect citizens. The gap that exists in the Sexual Offences and Related Matters Amendment Act depicts the inadequacies of our criminal justice system to deter sexual offences, and protect children in particular. South Africa must refer to foreign jurisdictions that have imposed penalties for similar offences to prescribe same in the Sexual Offences and Related Matters Amendment Act.<sup>612</sup>

Section 10 of the Sexual Offences and Related Matters Amendment Act creates an offence

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arrested, or imprisoned except in the cases and according to the forms prescribed by law ... 8  
The law must prescribe only the punishments that are strictly and evidently necessary, and no one may be punished except by virtue of a law drawn up and promulgated before the offence is committed, and legally applied."

<sup>611</sup> Select Committee on Security and Constitutional Development: Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B19-2012] 5 June 2012.

<sup>612</sup> See the discussion in section 3 3 5 5.

of procuration.<sup>613</sup> The provision contains various acts with specific forms of intent through which a person may be found guilty of a sexual offence.<sup>614</sup> Although section 11 of the Sexual Offences Act has been repealed, its implications were that a person who conspires with another person to induce a female by false pretences or other fraudulent means to allow any male person to have unlawful carnal intercourse with her, was guilty of an offence.<sup>615</sup>

### 3.3.5.3.2 Child trafficking

“Child trafficking” is generally known as a form of labour that either lures or forces young girls to labour by using their bodies.<sup>616</sup> “Trafficking” and “prostitution” are forms of labour that are

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<sup>613</sup> See the discussion by Minnie in Boezaart (ed.) *Child Law in South Africa* 535.

<sup>614</sup> Amongst others, s 10(a) of the Sexual Offences and Related Matters Amendment Act provides that a person who procures or attempts to procure any female to have unlawful carnal intercourse with any other person other than the procurer, or assists in any manner to bring about such intercourse, is guilty of an offence; a person who entices any female to a brothel for purposes of engaging in an unlawful canal intercourse or “prostitution”, or who conceals in any house or place, any female that he or she has enticed, is guilty of an offence, s 10(b); any person who procures or attempts to procure any female to become a common “prostitute”, s10(c); or to become an inmate in a brothel, s 10(d) is also guilty of an offence; a person who administers to or causes any female to be taken through use of any drug, or intoxicating liquor with intent to stupefy or overpower a female so as to enable another person other than the procurer to have unlawful sexual intercourse with such female is also guilty of an offence.

<sup>615</sup> Minnie in Boezaart (ed.) *Child Law in South Africa* 535-536.

<sup>616</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* 143. Trafficking may also be for purposes of commercial gain. See s 1(1)(a) and (b) of the Children’s Act which defines commercial sexual exploitation in relation to a child as the procurement of the child to perform sexual activities for financial or other reward, including

sexually abusive. Nevertheless there is an element of force in “trafficking” which distinguishes it from “prostitution”. In South Africa, “trafficking” is not recognised as a criminal offence separate from “sexual exploitation”.<sup>617</sup> The definition of “trafficking” in terms of the Children’s Act includes “exploitation”.<sup>618</sup> The trafficked child may feel powerless, worthless, and dehumanised and may experience rage, reproach and insecurity from being used.<sup>619</sup> There is also inadequate health care for trafficked children. Trafficked children are often humiliated due to the stigma attached to sex trafficking as “a whoring business”.<sup>620</sup> This means “child trafficking” is labour that physically and psychologically tortures and abuses children.<sup>621</sup>

Young girls are not likely to engage in criminal acts such as robbery because of the physical power that is used in robbery. Hence many girls are easily lured into sexual labour.<sup>622</sup> For

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acts of prostitution or pornography, irrespective of whether the reward or money is paid to the child, procurer, parent or caregiver of the child. Commercial sexual exploitation in relation to a child is also trafficking in a child for use in sexual activities including prostitution.

<sup>617</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* 144.

<sup>618</sup> S (1)(a)(ii).

<sup>619</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* 147-148.

<sup>620</sup> Asia Human Rights Report *Rape for Profit* (1993) 1-3.

<sup>621</sup> *Ibid.*

<sup>622</sup> A round table discussion at the Human Rights Institute for South Africa, hereinafter referred to as “HURISA” (1997-09-18) with Ms Siriporn Skrobaneck, International Coordinator of the Global Alliance Against Traffic in Women, hereinafter referred to as “GAATW”: The report was initiated by an incident where 10 South African girls were lured by an agent and promised jobs as administrative clerks in Israel with good pay, but ended up working as prostitutes: The latter

instance, girl children leave their home countries like Zimbabwe and enter South Africa illegally for employment. When there is no hope of employment they are easily lured to trade in sex.<sup>623</sup>

There is no published research on “trafficking” of children in South Africa to other countries.<sup>624</sup> However, information on “trafficking” reveals that “trafficking” is more prevalent than was previously assumed and that it takes a variety of forms, from individually perpetrated exploitation to illegal trade in human beings.<sup>625</sup> Newspaper reports reveal that some young children are lured by syndicates that trawl shopping malls looking for young girls with the “look of want”.<sup>626</sup> These young children are lured into the sex trade and denied their right to enjoy family care. Many do not make it to adulthood.<sup>627</sup> According to a Molo Songololo Report,<sup>628</sup> girl children are the primary targets of “trafficking” and local criminal gangs and parents are the primary traffickers. This makes “trafficking” in South Africa predominantly an in-country phenomenon.

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experience showed that in terms of South Africa’s experience, most young girls are victims of forced labour as they are lured from their homes under false pretence of economic benefits.

<sup>623</sup> *Ibid.*

<sup>624</sup> Kassan in Sloth-Nielsen *Children’s Rights in Africa-A South African Perspective* 240.

<sup>625</sup> Higson-Smith & Richter *et al. Sexual Abuse of Young Children in Southern Africa* 145.

<sup>626</sup> See the discussion in section 3 3 5 4 2.

<sup>627</sup> *Ibid.*

<sup>628</sup> Kassan in Sloth-Nielsen *Children’s Rights in Africa-A South African Perspective* 240.

The Children's Act<sup>629</sup> defines "trafficking" as the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children within or across the borders of the Republic, by means of, amongst others, threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child.<sup>630</sup> The recruitment of a vulnerable child for purposes of exploitation is also "trafficking".<sup>631</sup> The definition of "trafficking" includes the adoption of a child facilitated or secured through illegal means.<sup>632</sup>

The Children's Act prohibits any person from "trafficking" a child or allowing a child to be "trafficked".<sup>633</sup> The child or the person having control of the child may not use consent as a defence for a child participating in the act of "trafficking".<sup>634</sup> A person who has parental responsibility of the child is in terms of the Children's Act<sup>635</sup> prohibited from "trafficking" the child or allowing the child to be "trafficked".<sup>636</sup> The Children's Act prohibits conduct which facilitates trafficking in children. Thus, no natural or juristic person or a partnership may knowingly lease or sublease or allow any room, house, dwelling or establishment to be used

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<sup>629</sup> S 1(1)(a).

<sup>630</sup> S 1(1)(a)(i).

<sup>631</sup> S 1(1)(a)(ii) of the Children's Act. See also Minnie in Boezart (ed.) *Child Law in South Africa* 539.

<sup>632</sup> Ss 1(1)(b) and 284(2)(a)(ii) of the Children's Act.

<sup>633</sup> S 284(1).

<sup>634</sup> S 284(2)(a)(i)(ii) of the Children's Act.

<sup>635</sup> Ss 284 and 285.

<sup>636</sup> S 287.

for the purposes of harbouring a child who is a victim of trafficking.<sup>637</sup> Furthermore, the Act prohibits such a person or entity from advertising, publishing, printing, broadcasting or distributing information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.<sup>638</sup>

Human trafficking is a global phenomenon. It entails a violation of basic fundamental rights and affects large numbers of children.<sup>639</sup> Minnie<sup>640</sup> is of the view that the fact that South Africa is a source, transit and destination country for trafficked humans, resulting in the recruitment of children into this country for trafficking to other destinations which may be in South Africa and across national borders. The private nature of the “trafficking” business makes it difficult to monitor child “trafficking” or assess whether children are labouring under conditions that are prohibited by the Constitution<sup>641</sup> and the Children’s Act.<sup>642</sup> South Africa is currently embarking on various law reform processes to address the problem of “trafficking”.<sup>643</sup>

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<sup>637</sup> S 285(1)(a) of the Children’s Act.

<sup>638</sup> S 285(1)(b) of the Children’s Act.

<sup>639</sup> Minnie in Boezart (ed.) *Child Law in South Africa* 539.

<sup>640</sup> *Ibid.*

<sup>641</sup> S 28(1)(e).

<sup>642</sup> S 284(1).

<sup>643</sup> Kassan in Sloth-Nielsen *Children’s Rights in Africa-A South African Perspective* 248-249. The SALRC is investigating the possibility of drafting comprehensive legislation regarding trafficking in persons. The SALRC has released an Issue Paper and Discussion to serve as a

3.3.5.4 *The child has been exploited or lives in circumstances that expose the child to exploitation in terms of international law*

3.3.5.4.1 Forced marriage: “early marriage”, “ukungena” and “ukuthwala”

The CRC does not specifically address the issue of forced marriage. Instead, the CRC allows child marriages by stipulating that a child is any person below the age of 18, unless majority is acquired at an earlier age.<sup>644</sup> This means that the CRC recognises the fact that a child may acquire the age of majority earlier through marriage. Issues relating to child exploitation are explicitly covered under Article 24(3).<sup>645</sup> The Committee on the Rights of the Child expressed its dissatisfaction regarding the lack of support services to protect girl-children who refuse to undergo female genital mutilation and the lack of services to rehabilitate girls who are victims of the practice.<sup>646</sup>

The Committee recommended that state parties conduct rights awareness-raising campaigns to eradicate traditional practices that are harmful to the health, development and survival of

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basis for the Commission’s deliberations on the topic to elicit comments and suggestions from relevant stakeholders and to disseminate information of the issue of trafficking in persons.

<sup>644</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 341.

<sup>645</sup> It states that: “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

<sup>646</sup> Hodgkin & Newell (2007) 373.

girl-children in particular.<sup>647</sup> Furthermore, the Committee recommended that sensitisation programmes be conducted for health practitioners and the general public and that traditional leaders and religious leaders should be engaged around same.<sup>648</sup> The Committee also acknowledged that traditional practices such as virginity testing threaten the health, violates privacy, and affects the self- esteem of girls.<sup>649</sup> Article 24(3) may be read with Article 19.<sup>650</sup>

The CRC requires state parties to take all legislative, administrative, social and educational measures to protect the child from all physical or mental violence, injury, abuse, neglect, maltreatment or exploitation while in the care of parents and legal guardians or any other care-giver.<sup>651</sup> The CRC also requires that states establish social programmes to support the child and other forms of prevention, identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment and judicial involvement.<sup>652</sup> The Committee expressed its grave concern regarding female genital mutilation, feuds that emanate from dowries, initiation rites and forced or early marriages in most African states.<sup>653</sup>

In 2003, an independent expert<sup>654</sup> was appointed by the Secretary-General of the Committee

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<sup>647</sup> Hodgkin & Newell (2007) 374.

<sup>648</sup> *Ibid.*

<sup>649</sup> *Ibid.*

<sup>650</sup> Hodgkin & Newell (2007) 373; see the discussion in section 4 2 2.

<sup>651</sup> Art 19(1).

<sup>652</sup> Art 19(2).

<sup>653</sup> Hodgkin & Newell (2007) 373: in particular, the Committee on the Rights of the Child shared its concern regarding girls' participation and training in voodoo priesthood in Togo.

<sup>654</sup> Hodgkin & Newell (2007) 250.



on the Rights of the Child to lead research on violence against children. He submitted his report to the General Assembly in 2006 and recommended that states must prohibit all forms of violence against children in all settings; including corporal punishment; harmful traditional practices, such as early and forced marriages; female genital mutilation and so called honour crimes; sexual violence and torture; and other cruel and inhuman, degrading treatment or punishment.<sup>655</sup> The Committee was concerned that traditional practices and attitudes still limit the implementation of the CRC, particularly the provision which promotes respect for the views of the child.<sup>656</sup>

The Committee encouraged South Africa to continue promoting awareness of the participatory rights of children and encouraging respect for the views of the child within schools, families, social institutions and the care and judicial systems.<sup>657</sup> The Committee further encouraged South Africa to train teachers to enable students to express their views in provinces and at local level.<sup>658</sup>

South Africa must draw lessons from the ACRWC clearly prohibiting the cultural practice of marrying girls and boys at an early age.<sup>659</sup> The ACRWC adds that legislation must be

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<sup>655</sup> Hodgkin & Newell (2007) 251.

<sup>656</sup> Concluding Observation No 19; Art 12(1) of the CRC obligates state parties to ensure that the child who is capable of forming his or her own views is given an opportunity to express those views freely in all matters affecting him or her and that due weight be given to the views in accordance with the age and maturity of the child.

<sup>657</sup> Concluding Observation No 19.

<sup>658</sup> *Ibid.*

<sup>659</sup> Art 21(2).

adopted specifying a minimum marriage age of 18.<sup>660</sup> I also recommend that South Africa makes registration of all marriages in an official registry compulsory.<sup>661</sup> These are my recommendations even though there is no formal complaint lodged against statutory rape or the practice of “early marriages” invoking the protection of the ACRWC in South Africa yet.<sup>662</sup> Regarding early marriage, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa<sup>663</sup> also sets the minimum age for marriage as 18 years of age and ensures that marriage is entered into consensually by both parties.<sup>664</sup>

The CEDAW also obliges state parties to take all appropriate measures to modify the social and cultural routine of men and women in order to eliminate cultural and other practices that are prejudiced based on stereotypes, the inferiority and superiority of either of the sexes or on stereotyped roles of men and women.<sup>665</sup> Affirming the above positions, the international community recognises “child marriage” as a serious concern and recommends that state parties bring national legislation in line with international and regional standards to ensure a

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<sup>660</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 341.

<sup>661</sup> Art 21(2). See also the discussion in section 2 2 2 7.

<sup>662</sup> *Ibid.*

<sup>663</sup> Adopted on 11 July 2003: accessed from [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) on 2010-10-08.

<sup>664</sup> Art 6.

<sup>665</sup> Art 5(a), International Labour Organisation (ILO) & the African Commission on Human and People’s Rights (ACHPR) Report *The Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (2009) 129.

uniform approach to the age of majority and age of sexual consent for girls and boys.<sup>666</sup>

#### 3.3.5.4.2 Removal of body parts

##### 3 3 5 4 2 1 Female genital mutilation

The Committee on the Rights of the Child has in its remarks to South Africa's Initial Report towards the CRC, noted the practice of female "genital mutilation", including the negative impact it has on the health of young girls.<sup>667</sup> The Committee recommended that South Africa strengthen its efforts to eliminate the practice of female "genital mutilation" and implement programmes that would sensitise practitioners and the general public to change traditional attitudes and discourage traditional practices.<sup>668</sup>

The ACRWC protects the child's right to privacy, and such may include prohibition of interference with the child's physical being.<sup>669</sup> The ACRWC obliges state parties to take appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, development of the child, female "genital mutilation" and the effects it

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<sup>666</sup> Save the Children UK *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Southern Africa* (2006) 37.

<sup>667</sup> Concluding Observation No 33.

<sup>668</sup> *Ibid.*

<sup>669</sup> Art 10.

has on the child.<sup>670</sup>

### 3 3 5 4 2 2 Circumcision

The CRC does not have a provision that speaks to “circumcision”. Instead the CRC prohibits “exploitation”, “abuse”, torture and any other form of cruel, inhuman, degrading treatment, punishment or armed conflict. The CRC encourages social reintegration in the family by obliging state parties to put appropriate measures in place for such recovery and reintegration.<sup>671</sup>

The Committee of the Rights of the Child, in its concluding remarks towards South Africa’s Report to the CRC, was concerned about the “circumcision” of young boys which in some instances is carried out in unsafe medical conditions.<sup>672</sup> The Committee recommended that South Africa take effective measures, including training of medical practitioners and raising awareness, to protect boy children from unprotected and unsafe medical conditions during “circumcision”.<sup>673</sup>

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<sup>670</sup> Art 21.

<sup>671</sup> Art 39.

<sup>672</sup> Concluding Observation No 33.

<sup>673</sup> *Ibid.*

### 3.3.5.5 *Sexual exploitation*

The Committee on the Rights of the Child, in response to South Africa's report towards the CRC, raised concerns about the high incidence of "sexual exploitation".<sup>674</sup> The Committee recommended in the light of Article 34 and other articles of the CRC that South Africa undertake studies with a view to designing and implementing appropriate measures, including care and rehabilitation to prevent and combat the "sexual exploitation" of children.<sup>675</sup> Furthermore, the Committee, in its recommendations to states regarding sexual exploitation and sexual abuse of children refers to the First World Congress against Commercial Sexual Exploitation of Children Declaration,<sup>676</sup> which states that:

"The commercial exploitation of children is a fundamental violation of children's rights. It comprises sexual abuse by the adults. It comprises sexual abuse by the adult and remuneration in cash or in kind to the child or to a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery."

State parties are also obliged to take all appropriate national, bilateral and multilateral measures to prevent abduction, sales of or "traffic" in children for any purpose or in any

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<sup>674</sup> Concluding Observation No 39.

<sup>675</sup> *Ibid.*

<sup>676</sup> Held in August 1996, Stockholm, Sweden which included government representative of 122 government representatives, United Nations agencies and NGOs: see Hodgkin and Newell (2007) 516-517.

form.<sup>677</sup>

One of the objectives of the Children's Act<sup>678</sup> is to give effect to South Africa's obligations concerning the well-being of children in terms of the CRC.<sup>679</sup> The Children's Act<sup>680</sup> specifically provides that the purpose of the chapter on trafficking in children is to give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children<sup>681</sup> supplementing the United Nations Convention against Trans-national Organised Crime.<sup>682</sup> According to the Children's Act,<sup>683</sup> the latter instrument is in force in South Africa and its provisions are law, subject to the provisions of the Children's Act. The ACRWC also obliges state parties to take all appropriate measures to prevent the abduction, sale and "trafficking" in children for any purpose or in any form by any person, including the parents or legal guardians of children.<sup>684</sup>

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<sup>677</sup> Art 35 of the CRC.

<sup>678</sup> S 2(c).

<sup>679</sup> Art 34.

<sup>680</sup> S 281(a).

<sup>681</sup> Hereinafter referred to as the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children", entered into force on 25-12-2003 and ratified by South Africa on 2010-06-22.

<sup>682</sup> 2000.

<sup>683</sup> S 282.

<sup>684</sup> S 29(a).

### 3.3.5.6 *The child has been exploited, or lives in circumstances that expose the child to exploitation, in terms of foreign jurisdictions*

“Female genital mutilation”, also known as “female genital cutting”, is practised widely in other parts of Africa.<sup>685</sup> The circumstances facing female children who are subjected to “genital mutilation” and “early marriages” are treated seriously in Kenya. The Children’s Act (Kenya) expressly provides that a child who is subjected, or is likely to be subjected, to “female circumcision” or “early marriage” or to customs and practices prejudicial to the child’s life, education and health, is in need of care and protection.<sup>686</sup> However, both “female circumcision” and “early marriage” are still rife in Kenya.<sup>687</sup>

Section 119(1)(h) of the Children’s Act (Kenya) identifies the circumstances of children who are subjected to “female circumcision” and “early marriages” in a single clause. Unlike the Children’s Act (Kenya), South Africa has special provisions addressing “early marriages”,<sup>688</sup> female “genital mutilation”<sup>689</sup> and “circumcision”<sup>690</sup> separate from the grounds for removal identified in section 150(1) and (2) of the Children’s Act. This simply means that children in “early marriages” and children subjected to “genital mutilation” are, in terms of the South

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<sup>685</sup> Amongst others, Sudan, Egypt, Ethiopia, Oman, Eritrea and Kenya practice FGC. See Ford in Freeman *Children’s Health and Children’s Rights* 189. See also Bowman & Kuenyehia (2003) 428.

<sup>686</sup> S 119(1)(h).

<sup>687</sup> Bowman & Kuenyehia (2003) 428.

<sup>688</sup> S 12(2).

<sup>689</sup> S 12(3).

<sup>690</sup> S 12(8).

African Children's Act, not categorised as children in need of care and protection as stipulated in section 150(1). South Africa must draw lessons from Kenya and incorporate sections 12(2), (3), (8) as separate provisions for circumstances which identify a child as a child in need of care and protection in section 150(1) of the Children's Act. Such would give weight and seriousness to the fact that children who fall within the category of sections 12(2), (3), (8) are in need of care and protection, and thus deserve protection.

South Africa must also draw lessons from the Prohibition of Child Marriages Act (India) which took a daunting approach to end child marriages.<sup>691</sup> The Act provides for the prohibition of solemnisation of child marriages.<sup>692</sup> I recommend that South Africa incorporate an additional provision in the Children's Act that eliminates marriages of children below the age of 18, forced marriage and other marriage practices that are imposed on children. The proposed provision must also prescribe penalties for parents, care-givers or any other person who arrange for a child to be married.<sup>693</sup> Passing such a provision is an important step, even though it is not sufficient to foster behavioural change.

The Children's Act (Kenya) defines "female circumcision" as the cutting and removal of part or all of the female genitalia. The definition includes the practice of clitoridectomy, excision, infibulations and other practices involving the removal of part of or the entire clitoris or labia

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<sup>691</sup> See ch 1, n 32.

<sup>692</sup> Preamble.

<sup>693</sup> See the proposed provision in section 3 4.



minora of the female person.<sup>694</sup> “Circumcision” of boys is also widely practised in Kenya.<sup>695</sup> Most tribes in Kenya regard “circumcision” as a rite of passage from childhood to adulthood. The age of circumcision was previously between 14 and 16 years.<sup>696</sup> Recently, boys as young as eight and 12 years have been “circumcised”.<sup>697</sup> The cultural practice of “circumcision” is seen by the Kenyan community as a ceremony to prepare boy children for marriage.<sup>698</sup>

According to the Sexual Offences Act (Kenya),<sup>699</sup> if any person knowingly permits any child to remain on the premises for purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition;<sup>700</sup> act as a procurer of a child for purposes of sexual intercourse or any form of sexual abuse;<sup>701</sup> induces a person to be a client of a child for sexual intercourse or any form of sexual abuse;<sup>702</sup> takes advantage of his influence over or his relationship to a child to procure the child for sexual intercourse or any form of sexual abuse;<sup>703</sup> threatens or uses violence towards a child to

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<sup>694</sup> S 2 of Children's Act (Kenya).  
<sup>695</sup> Nyaundi (2005) *AHRJ* 171-181.  
<sup>696</sup> Nyaundi (2005) *AHRJ* 173.  
<sup>697</sup> Nyaundi (2005) *AHRJ* 174.  
<sup>698</sup> Nyaundi (2005) *AHRJ* 173-174.  
<sup>699</sup> 3 of 2006.  
<sup>700</sup> S 15(a).  
<sup>701</sup> S 15(b).  
<sup>702</sup> S 15(c).  
<sup>703</sup> S 15(d).

procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition;<sup>704</sup> intentionally or knowingly owns, leases, manages, occupies any movable or immovable property used for commission of any offences under this act; commits an offence of benefiting from “child prostitution”;<sup>705</sup> or gives monetary consideration, goods, other benefits of any form to induce the child or his parents for him or her to procure a child for sexual intercourse or any form of sexual abuse, is guilty of an offence.<sup>706</sup>

The Sexual Offences Act (Kenya) also prohibits “child trafficking” by sanctioning any person or juristic person who knowingly or intentionally makes or organises any travel arrangements for or on behalf of a child within or outside the borders of Kenya with the intention of facilitating the commission of any sexual offence against the child irrespective of whether the offence is committed or not.<sup>707</sup> Any person who receives a child within the borders of Kenya, or transfers, transports, harbours, supplies or recruits a child for the purposes of sexual offence, is guilty of an offence of “trafficking”.<sup>708</sup>

The Children’s Act (Kenya) provides that: “a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials”.<sup>709</sup> The Committee on the Rights of the Child made

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704 S 15(e).

705 S 15(f).

706 S 15(g).

707 S 13(a).

708 S 13(b).

709 S 15.

recommendations under the topic “sexual exploitation” and “trafficking”, addressing issues relating to “prostitution” and “trafficking” of children in Kenya.<sup>710</sup> The Committee is concerned about the rising number of children who are “trafficked” and engaging in “prostitution” as part of sex tourism.<sup>711</sup> The Committee is also concerned that the age of sexual consent for boys is not clearly established.<sup>712</sup> The fact that preventative measures, which include child pornography, are insufficient, remains of concern to the Committee.<sup>713</sup>

Kenya has drafted a Child Trafficking Bill which is, at the time of concluding this section of the study, not enacted.<sup>714</sup> The Committee raises concerns that the Children’s Act (Kenya) provides for the protection of children against, sale, “trafficking” and abduction, but its effective protection remains weak and rarely results in investigations and sanctions, even though the Act imposes sanctions for sexual offences.<sup>715</sup> Unlike South Africa, the challenge that Kenya has is to enforce the penalties stipulated in the Sexual Offences Act. I am of the view that the civil society in Kenya must put pressure on the judiciary to enforce the law for purposes of justice and fairness for the victims of sexual crimes. South Africa must refer to the Crimes Act’s (New South Wales)<sup>716</sup> table of offences that is used as a guide to impose

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<sup>710</sup> Concluding Observation No 65, the Second Country Report.

<sup>711</sup> *Ibid.*

<sup>712</sup> *Ibid.*

<sup>713</sup> *Ibid.*

<sup>714</sup> *Ibid.*

<sup>715</sup> *Ibid.*

<sup>716</sup> 1900.

maximum penalties.<sup>717</sup> South Africa must impose maximum penalties on crimes that are described by maximum levels and of the gravest forms in the Sexual Offences and Related Matters Amendment Act. For instance, the maximum penalty for, amongst others, aggravated sexual assault is 20 years imprisonment;<sup>718</sup> infliction or threat to bodily harm with intent to have sexual intercourse is 20 years;<sup>719</sup> indecent assault on persons under 10 is 10 years;<sup>720</sup> aggravated act of indecency on person under 16 years is five years;<sup>721</sup> sexual intercourse with a child under 10 years is 25 years;<sup>722</sup> attempts to have sexual intercourse with a child under 10 years is 25 years;<sup>723</sup> sexual intercourse with a child between 10 and 16 years is eight years;<sup>724</sup> and sexual intercourse with a child between 10 and 14 years is 16 years.<sup>725</sup>

However, the maximum penalties imposed on offences which do not prescribe sanctions in the Sexual Offences and Related Matters Amendment Act must be similar in all crime categories and must not discriminate against children in terms of age, as proposed in the

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<sup>717</sup> Accessed from: [www.lawlinks.nsw.gov.au/lawlink/pdo/11\\_pdo.nsf/pages/PDO\\_seoffences\\_penaltiestable](http://www.lawlinks.nsw.gov.au/lawlink/pdo/11_pdo.nsf/pages/PDO_seoffences_penaltiestable) on 2012-07-03.

<sup>718</sup> S 61J.

<sup>719</sup> S 61K.

<sup>720</sup> S 61M(2).

<sup>721</sup> S 61(O)(1).

<sup>722</sup> S 66A.

<sup>723</sup> S 66B.

<sup>724</sup> S 66C(2).

<sup>725</sup> S 66C(1).

recommendations section in this chapter.<sup>726</sup>

Like South Africa, there are inconsistencies in Kenyan law with regard to the age of restriction for sexual consent. For instance, the Criminal Law Amendment Act<sup>727</sup> of Kenya has increased the minimum age of sexual consent to 16.<sup>728</sup> On the other hand, the minimum age of consent to marriage is 18.<sup>729</sup> The inconsistencies in Kenyan law regarding the minimum age of sexual consent and consent to marriage encourages children to participate in sexual activities as early as 16.

Thus, I recommend that the minimum age of sexual consent and consent to marriage must be 18.

### *3.3.6 Child lives or is exposed in circumstances which may seriously harm his or her physical, mental or social well-being*

During the operation of the Child Care Amendment Act, the situation of a child who lived in or was exposed to circumstances that may seriously harm his or her physical, mental or social

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<sup>726</sup> See the proposed penalties in the discussion in section 3 4.

<sup>727</sup> 5 of 2003.

<sup>728</sup> S 19.

<sup>729</sup> S 14.

well-being was regarded as the ground for removal.<sup>730</sup> Instead of discussing this ground “a child exposed in circumstances which may seriously harm his or her physical, mental or social well-being”, Matthias<sup>731</sup> substitutes it with the topic “lifestyle of the parents”. Matthias avoided using the concept “dysfunctional families” and opted for “lifestyle of the parents”, motivated by the experience of social workers who investigated parents or guardians and found that the habits and behaviour displayed by parents which seriously injure the physical, mental or social well-being of the child are the result of alcohol abuse as a chosen lifestyle.<sup>732</sup>

I am of the view that the behaviour or conduct of parents which lead children to a situation of vulnerability is too serious to allow us conjure up words that do not describe the situation appropriately. Instead, I find the term “dysfunctional families” more appropriate to describe the dysfunctionality of families that exposes children to circumstances which may seriously harm their physical, mental or social well-being, rather than the term “lifestyle of parents”. The bad behaviour of parents is likely to make family life a hostile and unprotected environment for the upbringing of the child.<sup>733</sup> Thus, I propose that the term “dysfunctional families” be used in the Children’s Act, as it depicts the type of family which provides family life to a child.

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<sup>730</sup> S 14(4)(aB)(iv) of the Child Care Act provided that: “a child is in need of care if the child lives in or is exposed to circumstances of which may seriously harm the physical, mental or social well-being of the child”. See also Matthias (1997) 23-24.

<sup>731</sup> (1997) 23-24.

<sup>732</sup> Matthias (1997) 24.

<sup>733</sup> Matthias (1997) 23-24.

Matthias<sup>734</sup> notes the fact that the dysfunctionality of many families leaves children neglected, malnourished and with emotional and psychological trauma and instability. If a family is dysfunctional, for example as a result of alcohol abuse, there will be a tendency for family feuds due to the misbehaviour of parents. A child may, in situations where the family is dysfunctional, be exposed to situations that may seriously harm the child or expose him or her to dangers, including sexual abuse by either of their own parents, relatives or other adults in the company of their parents. A child may also be exposed to acts of sexual intercourse by parents who may, due to drunkenness, not acknowledge the presence of children.

According to Higson-Smith and Richter,<sup>735</sup> a child in the latter circumstances may grow up without morals and values or become an alcoholic. The child may also become uncontrollable due to lack of guidance. Thus children may be put in danger by the people who are supposed to protect them.

Newspaper reports have been published about parents who are not taking care of their children as a result of alcohol abuse.<sup>736</sup> A policeman reported that alcohol abuse leads to

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<sup>734</sup> (1997) 15.

<sup>735</sup> In Richter *et al.* *Sexual Abuse of Young children in Southern Africa* 145. Children from dysfunctional families generally have a background of family violence, incidents of alcohol abuse or have been physically or sexually abused.

<sup>736</sup> *The Star* (2005-10-17): the police reported that in two separate incidences two women reported their children missing. In one case, it was an 8 month old baby whose mother arrived drunk to report a missing child who was last seen playing outside. After two hours of searching, the child was found with the nanny. The mother of the child was detained and

parents trusting strangers with the care of their children.<sup>737</sup>

The Children's Act confirmed the ground previously entrenched in the Child Care Amendment Act that a child who lives in or is exposed to circumstances which may seriously harm his or her physical, mental or social well-being is a child in need of care and protection.<sup>738</sup> In this regard, the Children's Act made a provision similar to the Child Care Amendment Act.

### 3.3.6.1 *Child exposed in circumstances which may seriously harm his or her physical, mental or social well-being in terms of international law*

The CRC provides for situations where children may be exposed to circumstances that may harm their physical, mental or social well-being.<sup>739</sup>

Similar provisions are made in the ACRWC.<sup>740</sup> The CRC obliges state parties to take all

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charged with child neglect. In a similar incident, a mother reported her seven-year old daughter. After a search, the little girl was found with neighbours.

<sup>737</sup> *Ibid.*

<sup>738</sup> In terms of s 150(1)(f) a child is identified as a child in need of care and protection if "the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being".

<sup>739</sup> Arts 18, 27, 37 and 40.

<sup>740</sup> Arts 16(1) and 20(1).



measures to ensure that the child is protected against all forms of discrimination or punishment for, amongst others, expressed opinions or beliefs of the parents, legal guardians or family members of the child.<sup>741</sup> This provision is wide enough to protect children in dysfunctional families since belief includes behaviour and conduct that may be derived from non-religious values.<sup>742</sup>

When a family is dysfunctional or lives a particular life style, such behaviour is normally set by parents as they are the people who set family principles and values for their children. Hence the CRC charges parents and guardians with the responsibility to protect children against all forms of punishment and discrimination on the grounds of beliefs or expressed opinions.<sup>743</sup>

In terms of the European perspective,<sup>744</sup> where a child suffers neglect of or other ill-treatment as a result of a parent's alcohol or drug addiction, such is sufficient reason to warrant the removal of the child from family life.<sup>745</sup> This includes circumstances where there is no light or heat in the place where the child resides,<sup>746</sup> and such situations have been accepted as

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<sup>741</sup> Art 2(2).

<sup>742</sup> Gutto (2001) 77.

<sup>743</sup> *Ibid.*

<sup>744</sup> Art 8(2) of the ECHR.

<sup>745</sup> Kilkelly (1999) 264.

<sup>746</sup> Own emphasis.

compatible with Article 8(2) of the ECHR.<sup>747</sup>

3.3.6.2 *Child exposed to circumstances which may seriously harm his or her physical, mental or social well-being in terms of foreign jurisdictions*

Like the South African Children's Act, the Children's Act (Kenya) provides that a child who is exposed to any circumstances likely to interference with his physical, mental and social development is a child in need of care and protection.<sup>748</sup> I find the South African Children's Act and the Children's Act (Kenya) adequate in as it provides for foreseeable circumstances which may harm the child's physical, mental or social well-being compared to the Child Protection Act (Canada) which provides for a child who suffers harm.<sup>749</sup> The latter is reactive rather than preventative. I opine that it is better to keep a bad thing from happening than resolve it once it has occurred.

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<sup>747</sup> KilKelly (1999) 264.

<sup>748</sup> Art 119(q).

<sup>749</sup> S 9(p), that is, "... the child suffers from a mental, emotional, or developmental condition ...". See the discussion in section 3 3 6 2.

### 3.3.7 *Child may be at risk if returned to the custody of the parent, guardian or care-giver*

The Children's Act<sup>750</sup> provides that a child is in need of care and protection if:

“a child may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child”.

This is a new provision in the area of “children in need of care and protection”. Sections 150(1)(f)<sup>751</sup> and 150(1)(g) of the Children's Act appear similar to some extent, except that section 150(1)(g) is distinct; firstly, in protecting a child who is already removed from the family environment, whose safety has to be considered in the decision to return him or her to the family environment. Secondly, the provisions take precaution by protecting the child from any potential exposure to circumstances which may seriously harm his or her physical, mental or social well-being if returned.

The child who is protected by section 150(1)(g) is, amongst others, a child whose life may be at risk if the offender, because of whom the child was removed from the family home, is likely to live with the child once returned.

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<sup>750</sup> S 150(1)(g).

<sup>751</sup> “a child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being”. See the discussion in section 3 3 6.

There was no provision addressing the issue of children who “may be at risk if returned to the custody of the parent, guardian or care-giver ...” in the Child Care Act. The Children’s Act made improvements in this area by specifically providing for the circumstances of children who it is believed would be at risk if they are returned to their parents, guardian or care-giver; particularly where there is reason to believe that they may be exposed to circumstances which may seriously harm their physical, mental or social well-being.<sup>752</sup>

### 3.3.7.1 *Child may be at risk if returned to the custody of the parent, guardian or care-giver in terms of international law*

The Committee on the Rights of the Child noted the high incidence of domestic violence, ill-treatment and abuse of children in the family environment.<sup>753</sup> Generally, a child who is removed from the family home because of incidences of domestic violence and abuse is likely to be at risk if returned to the custody of the parent, guardian or care-giver that caused the problem if the problem is not addressed. Nevertheless, the Committee recommends that South Africa take measures to ensure that, amongst other services, support to children in legal proceedings, physical and psychological recovery and social reintegration are provided to the child.<sup>754</sup> This means that the Committee is focused on keeping the child in the family if

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<sup>752</sup> In terms of s 150(1)(g) the child identified to be in need of care and protection is the child that: “may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child”.

<sup>753</sup> Concluding Observation No 27.

<sup>754</sup> *Ibid.*

possible.

### 3.3.7.2 *Child may be at risk if returned to the custody of the parent, guardian or care-giver in terms of Kenyan law*

The Children's Act (Kenya) does not have a provision that speaks to the situation of a child who may be at risk if returned to the custody of the parent, guardian or care-giver where there is likelihood that the child may be exposed to circumstances which may seriously harm his or her physical, mental or social well-being if returned. Instead, the Children's Act (Kenya) simply identifies a child who is a victim of the offences mentioned in the Third Schedule of the Act<sup>755</sup> or if the offender is the member of the same household as the child against whom any such offence has been committed, or the child is a member of the same household as the person who has been convicted of any such offence against the child, as a child in need of care and protection.<sup>756</sup>

Unlike the South African Children's Act, the Children's Act (Kenya) does not specifically reflect on the situation of risk that the child may face if he or she is returned to the care of the person who may have offended him or her. This marks an improvement on the side of South Africa that it has, unlike Kenya, been vigilant about the risks the child may face if returned to the family environment where the offender resides. This provision is very important given the

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<sup>755</sup> Any person who has been convicted of an offence under the Children's Act or of a breach of any regulations to the Children's Act.

<sup>756</sup> S 119(1)(r).

fact that most incidences of child abuse occur in the family environment. Kenya should consider amending its child statute to cater for these grounds.

The Committee on the Rights of the Child noted the campaigns conducted by Kenya on issues relating to violence against and abuse of children.<sup>757</sup> However, the Committee was concerned that prevention measures and appropriate mechanisms for responding to the abuse of children remain inadequate.<sup>758</sup> The Committee regrets, amongst other things, a lack of available physical and psychological recovery and social reintegration measures.<sup>759</sup>

### *3.3.8 Child is in a state of mental or physical neglect*

A child is in a state of “neglect” if there is failure to provide for his or her parental responsibilities, such as basic “physical”, “intellectual”, “emotional” or “social” needs.<sup>760</sup> The Child Care Act also had a provision reflecting on “a child in a state of physical or mental neglect” as the ground for removal.<sup>761</sup> However, this section discusses this ground for removal of a “child in a state of mental or physical neglect” as incorporated in the Children’s Act.<sup>762</sup>

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<sup>757</sup> Concluding Observation No 42.

<sup>758</sup> *Ibid.*

<sup>759</sup> *Ibid.*

<sup>760</sup> S 1(1) of the Children’s Act.

<sup>761</sup> S 14(4)(Ab)(v). See also the discussion by Matthias (1997) 24.

<sup>762</sup> S 150(1)(h).

Zaal<sup>763</sup> opines that “neglect” is an act of omission. Other authors reflect on “neglect” as a liability that has arisen in circumstances where failure in parenting was associated with low standards of care, maintenance or safety due to, amongst other things, poverty, immaturity or parental incapacity resulting from illness, injury or a learning disability.<sup>764</sup> This means that there is to some extent agreement that poverty may be an element of “neglect” or, as other writers emphasise, that poverty is the root cause of “neglect”.<sup>765</sup> “Neglect” may be hard to prove as political and socio-economic factors can contribute to a child’s failure to thrive.<sup>766</sup> Child “neglect” becomes abuse in situations where parents or guardians who are responsible for the child fail to meet the essential needs of the child even when they have the means to do so.<sup>767</sup>

I am of the view that the provision “a child in a state of physical or mental neglect” is wide enough to accommodate the behaviour and habits of parents, which may put the child in a situation of “neglect”. This concept reflects on an act or omission to provide appropriate physical and emotional care to a child.<sup>768</sup> However, Zaal<sup>769</sup> finds the definition of, amongst other concepts, “neglect” as provided for in the Children’s Act too limiting and not linked to the grounds for mandatory alternative care interventions. Children are “physically” neglected

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<sup>763</sup> *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (PHD Thesis 2008 Wits) 330.

<sup>764</sup> O`Halloran (2003) 223.

<sup>765</sup> Sinclair in Davel (ed.) *Children’s Rights in a Transitional Society* 76.

<sup>766</sup> Bosman-Sadie & Corrie (2010) 168.

<sup>767</sup> Matthias (1997) 24.

<sup>768</sup> Lamanna & Riedmann (2003) 358.

<sup>769</sup> (2008) 328.

if they are malnourished, lack immunisation against childhood diseases, are without proper clothing, and attend school irregularly or not at all.<sup>770</sup> These circumstances may be depicted easily in the lives of, amongst other categories of children, “orphans”,<sup>771</sup> “abandoned children”,<sup>772</sup> “street children”<sup>773</sup> and “refugee children”. This section discusses the experiences of refugee children to demonstrate the state of “physical” and “mental” neglect since the other categories of children were discussed earlier in this study.

Refugee children were, during the review of the Child Care Act referred to as “children in especially difficult circumstances”.<sup>774</sup> The classification “children in especially difficult circumstances” also covers “street children” and “children with disabilities”. These three categories of children are more often found in a state of physical or mental neglect.<sup>775</sup>

Although there is no proper research in this area, reports reveal that South African refugee children come from neighbouring countries such as Zimbabwe, Mozambique, Lesotho, Malawi, Botswana and other African countries.<sup>776</sup> Most refugee children are found in either the company of other children or adults who may or may not necessarily be their own parents.<sup>777</sup> Most often, these children have a history of having left their family environment

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<sup>770</sup> *Ibid.*

<sup>771</sup> See the discussion in section 3 3 1.

<sup>772</sup> *Ibid.*

<sup>773</sup> See the discussion in section 3 3 3.

<sup>774</sup> SALRC *The Review of the Child Care Act* (1998) par 5 1 2.

<sup>775</sup> *Ibid.*

<sup>776</sup> *The Star* (2008-04-17).

<sup>777</sup> *Ibid.*



either as a result of poverty, war or other reasons.

The children may face further risks such as sexual violence, physical or mental abuse as a result of police harassment and other persons they meet across the borders and in the refugee country.<sup>778</sup> In South Africa, police arrest parents and children who are found entering the country illegally. Children are detained with their parents for long periods of time until the process for the preparation of their deportation is complete. The detention and waiting period is tormenting and may leave children in a state of neglect.<sup>779</sup>

An urgent application was lodged with the Pretoria High Court in the case of *Centre for Child Law v Minister of Home Affairs*,<sup>780</sup> which related to the rights and welfare of 13 unaccompanied foreign children who were detained at Lindela Centre with adults. The court reiterated the significance of the legal representation of children in terms of section 28(1)(h) of the Constitution.<sup>781</sup> The children were not accompanied by a parent. This arrangement poses a serious threat to the safety of children as they may be exposed to different forms of abuse.

Whilst in detention, refugee children do not have access to basic necessities. This is evident

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<sup>778</sup> *Ibid.*

<sup>779</sup> *Ibid.*

<sup>780</sup> 2005 (6) SA 50 (TPD).

<sup>781</sup> 59C-D; Du Toit “Legal Representation of Children” in Boezaart (ed.) *Child Law in South Africa* (2009) 102.

in the case of *Khosa and Mahaula v Minister of Social Development*,<sup>782</sup> in which the South African government was confused as to whether refugee children should receive the social grant the same way as children who are South African citizens. The applicants in the case challenged the constitutional validity of the provisions of the Social Assistance Act,<sup>783</sup> which disqualified persons who are permanent residents but not citizens of South Africa from accessing the grant.<sup>784</sup>

It is important to point out that refugee children are deprived of their right to family life and basic necessities as a result of their refugee status. It would serve the interests of refugee children if the Children's Act entrenched the provision identifying a child in a state of mental or physical neglect as a ground for removal.<sup>785</sup> Both the repealed Child Care Act<sup>786</sup> and the Children's Act provided for the removal of a child who is in a state of mental or physical

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<sup>782</sup> 2004 (6) BCLR 569 (CC). The applicants in the latter case challenged the constitutional validity of s 3(c) of the Social Assistance Act which disqualified children who were not permanent residents of South Africa from accessing the social grant. The latter practice contradicts the CRC, which affords every child the right to social security.

<sup>783</sup> S 4 provides that: "Any person is entitled to a child-support grant if that person satisfies the Director-General that –

- (i) are resident in the Republic at the time of the application for the grant;
- (ii) are a South African citizen. The amendment to s 4 by s 5(1)(c) provides for a person who is eligible to receive the grant as a South African citizen or a member of a group or category of persons proclaimed by the Minister with the concurrence of the Minister of Finance by notice in the gazette."

<sup>784</sup> 572I-J.

<sup>785</sup> S 150(1)(f) and (g).

<sup>786</sup> S 14(4)(Ab)(v).

neglect.<sup>787</sup> However, the two statutes failed to identify the category of children who may be classified as children in a state of mental or physical neglect.

The court in the case of *Khosa and Mahaule* adopted a purpose driven approach to the interpretation of rights. The court held the opinion that in the absence of any indication that the right to social security<sup>788</sup> is to be restricted to citizens, as in other provisions in the Bill of Rights, the word “everyone” cannot be construed to as referring to “citizens” only.<sup>789</sup> This position is taken on the basis that the Constitution, particularly the Bill of Rights, enshrines the rights of “all people in our country”<sup>790</sup> and that include refugee children.<sup>791</sup> Refugee children are also protected under the Refugees Act.<sup>792</sup> The Act provides that the detention of a refugee child must be used only as a measure of last resort and for the shortest possible period of time, taking into account the principle of family unity and the best interests of the child.<sup>793</sup>

### 3.3.8.1 *Child is in a state of mental or physical neglect in terms of international law*

The CRC regards children “who have experienced any personal, social and traumatic

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<sup>787</sup> S 150(1)(g).

<sup>788</sup> S 27(1) of the Constitution.

<sup>789</sup> 590C. S 28 of the Constitution protects “every” child.

<sup>790</sup> S 7(1) of the Constitution. See also *Khosa and Mahlaule* 590C.

<sup>791</sup> Own emphasis.

<sup>792</sup> 130 of 1998 as amended by the Refugees Amendment Act 33 of 2008, see s 29(2).

<sup>793</sup> S 289(3).

situations”, as children who require “special protection”.<sup>794</sup> The CRC does not specifically refer to this category of children as refugee children. However, the fact that refugee children often experience mental or physical neglect, similar to children who suffer personal, social and traumatic situations, makes the section 150(1)(h) of the Children’s Act<sup>795</sup> relevant to the CRC, particularly Article 19(1)(2) as discussed earlier.

According to Hodgkin and Newell, the protection that is envisaged in Article 19(1) is beyond the protection of children against torture, cruel, inhuman and degrading treatment discussed earlier in the chapter.<sup>796</sup> Instead, Article 19(1) requires that children be protected from “all forms of mental and physical violence”. The protective measures set out in Article 19 acknowledge that social and educational measures, particularly appropriate support to children and families, are appropriate to protection of the child from violence, abuse and exploitation.<sup>797</sup>

The provision made by the CRC for children “who have experienced any personal, social and traumatic situations” does not specifically refer to refugee children. Instead, the CRC has a

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<sup>794</sup> Van Loon & Vlaardingerbroek “Protecting the Human Rights of Refugee Children: Some Legal Institutional Possibilities” in *Children on the on the Move How to Implement their Right to Family Life* (1996) 101. The Preamble of the CRC acknowledges the fact that: “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”.

<sup>795</sup> See the description of refugee children in terms of the SALRC *The Review of the Child Care Act* (1998) par 5 1 2.

<sup>796</sup> Art 37; (2007) 249. See also the discussion in section 3 3 5 4.

<sup>797</sup> Hodgkin & Newell (2007) 249.

special provision for refugee children, which states that children whose parents cannot be traced or who are unaccompanied by parents or relatives must be given protection. State parties are obliged to maintain the information necessary to reunite these children with their families.<sup>798</sup> The CRC further requires that a child found in such circumstances be given temporary or permanent protection like any other child who has been deprived of his or her right to a family environment.<sup>799</sup> This means that, like other children, refugee children must receive both their physical and mental needs.

The Committee on the Rights of the Child was, in respect of South Africa's report towards the CRC, concerned about the absence of legislative and administrative measures addressing the issue of refugee and asylum-seeking children in South Africa.<sup>800</sup> The Committee was concerned about family reunification, and the right of access to education and health services for refugee children.<sup>801</sup> The Committee recommended that measures be put in place to ensure adequate access to all social services for refugee, asylum-seeking children.<sup>802</sup>

The ACRWC makes separate provision for "abused" children and children who are "neglected" by their parents or guardians.<sup>803</sup> Furthermore, the ACRWC provides for

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<sup>798</sup> Art 23(2).

<sup>799</sup> Art 23(3).

<sup>800</sup> Concluding Observation No 35.

<sup>801</sup> *Ibid.*

<sup>802</sup> *Ibid.*

<sup>803</sup> Art 16.

protective measures which include effective procedures for the establishment of special monitoring units to provide necessary support for the child and any person who has the care of the child, as well as other forms of prevention for identification, reporting, referral, investigation, treatment and follow-up of instances of child abuse and neglect.<sup>804</sup> Like the CRC, the ACRWC provides that if parents, legal guardians or close relatives of a refugee child cannot be found, the child must be given same protection as any other child who is permanently or temporarily deprived of his or her family.<sup>805</sup>

The ACRWC<sup>806</sup> operates like the CRC; it is a special provision that applies to children who are internally displaced through natural disaster, internal armed conflict, civil strife, or the breakdown of the economic or social order.<sup>807</sup>

### 3.3.8.2 *Child is in a state of mental or physical neglect in terms of Kenyan law*

According to the Children's Act (Kenya) a child who is displaced as a consequence of war, civil disturbances or natural disaster<sup>808</sup> is a child in need of care and protection. This provision specifically covers refugee children.<sup>809</sup> South Africa must draw lessons from the Children's Act (Kenya) and incorporate a similar provision that covers the situations of

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<sup>804</sup> Art 16(2).

<sup>805</sup> Art 23(3). See also Viljoen in Boezaart (ed.) *Child Law in South Africa* 339.

<sup>806</sup> Art 23(2) and (3).

<sup>807</sup> Art 23(4).

<sup>808</sup> S 119(1)(p).

<sup>809</sup> *Ibid.*

refugee children.<sup>810</sup>

The Committee on the Rights of the Child applauded the generous approach by Kenya to receiving refugees from neighbouring countries and the adoption of the Refugee Act.<sup>811</sup> However, the Committee was concerned about the lack of proper information on refugee, displaced and asylum-seeking children in Kenya.<sup>812</sup> The Committee was further concerned about reports of police brutality and harassment of refugee children<sup>813</sup> and the policy regarding the long-term encampment of refugee children which resulted in limited access to education and health services, and restrictions on freedom of movement, association and expression.<sup>814</sup>

The Committee recommended, amongst other things, that Kenya must take all necessary measures to fully implement the Refugees Act in line with international laws and refugee law;<sup>815</sup> collect comprehensive information and disaggregated information on refugee and asylum-seeking children; provide adequate resources to the Refugee Department to enable it to assume a greater role in the protection and assistance of refugee children;<sup>816</sup> and that Kenya must revise its policy on the long-term encampment of refugees to reside outside

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<sup>810</sup> S 150(1)(h). See the proposed provision in section 3 4.

<sup>811</sup> 2006. See also Concluding Observation No 59.

<sup>812</sup> Concluding Observation No 59(a).

<sup>813</sup> Concluding Observation No 59(c).

<sup>814</sup> Concluding Observation No 59(b).

<sup>815</sup> Concluding Observation No 60(a).

<sup>816</sup> Concluding Observation No 60(c).

designated areas; particularly to pursue medical treatment and education, to engage in self-employment, to reunite with other family members, and to secure physical and legal protection.<sup>817</sup>

*3.3.9 Child is being maltreated, abused, deliberately neglected or degraded by a parent, care-giver or person who has parental responsibilities and rights or a family member*

This section discusses, amongst others, “sexual abuse”, “domestic violence” and “corporal punishment” as forms of maltreatment, abuse, deliberate neglect or degrading treatment against children contained in the Children’s Act. Amongst others, I propose that “sexual abuse”, “domestic violence” and “corporal punishment” be provided in the Children’s Act as independent clauses so as to give each concept a priority with regards to meaning and information that applies to it. I also propose that South Africa must refer to California, United States of America’ s Title IX of the Education Amendments Act<sup>818</sup> to promulgate regulations to protect pregnant learners within schools and the family environment and to provide a range of services. I further propose that South Africa must refer to the Children First Report<sup>819</sup> and promulgate regulations to the Children’s Act for teachings and other assistance

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<sup>817</sup> Concluding Observation No 60(e).

<sup>818</sup> Wolf’s Report for Centre for Assessment and Development Policy *Using the Title IX of the Education Amendments Act to protect the rights of Pregnant and Parenting Teens* (1999) Attachment A-2. See the proposed provision in section 3 4.

<sup>819</sup> *National Guidelines for the Protection and Welfare of Children* (2004) 681-681. See the proposed provision in section 3 4.



to protect children who have been abused, maltreated and degraded.

*3.3.9.1 Maltreatment, abuse, deliberate neglect or degrading treatment in the following forms: “sexual abuse”, “domestic violence” and “corporal punishment”*

The Children’s Act provides that: “a child is in need of care and protection if, the child: is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is”.<sup>820</sup> On the other hand, the Constitution provides that: “Every child has the right to be protected from maltreatment, neglect, abuse or degradation”.<sup>821</sup> The concepts that are highlighted in the two provisions are “maltreatment”, “abuse”, “neglect” and “degradation” with the Children’s Act emphasising “neglect” as “deliberate neglect”. There is no definition of “maltreatment” in the Children’s Act. The dictionary meaning of “maltreatment” is to treat badly, cruelly or inconsiderately.<sup>822</sup> The most common form of “maltreatment” imposed particularly by mothers on their children is said to be neglect and medical neglect.<sup>823</sup>

The Children’s Act defines “abuse” as any form of harm or ill-treatment deliberately inflicted

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<sup>820</sup> S 150(1)(i).

<sup>821</sup> S 28(1)(d).

<sup>822</sup> *Collins English Dictionary* 893.

<sup>823</sup> Lamanna & Riedmann (2003) 359.

on a child and includes, assault or inflicting any other form of deliberate injury on a child (also known as physical abuse);<sup>824</sup> sexually abusing a child, or allowing a child to be sexually abused;<sup>825</sup> bullying by another child;<sup>826</sup> a labour practice that exploits a child;<sup>827</sup> or exposing a child to behaviour that may harm him or her psychologically or emotionally.<sup>828</sup> Zaal<sup>829</sup> opines that the wording in the definition “abuse” focuses on a perpetrator rather than merely the nature or consequences of harm.

According to Carstens and Du Plessis,<sup>830</sup> emotional and psychological abuse may be defined as a very subtle form of emotional ill-treatment, causing damage to the emotional and/or mental development of the child. Emotional abuse may manifest through verbal threats, constant belittling of the child, sarcasm and constant criticism or passive maltreatment.<sup>831</sup> Although both emotional and psychological abuse may be experienced in any environment, be it home, school or other spaces, children who are raised in any family, whether with loving

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<sup>824</sup> S 1(1)(a) of the Children’s Act. See also Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* 594; Matthias & Zaal in Davel & Skelton *Commentary on the Children’s Act* 9-6.

<sup>825</sup> S 1(1)(b) of the Children’s Act.

<sup>826</sup> S 1(1)(c) of the Children’s Act.

<sup>827</sup> S 1(1)(d) of the Children’s Act.

<sup>828</sup> S 1(1)(e) of the Children’s Act. See Carstens & Du Plessis in Boezaart (ed.) *Child Law in South Africa* 599.

<sup>829</sup> (2008) 338.

<sup>830</sup> In Boezaart (ed.) *Child Law in South Africa* 599.

<sup>831</sup> *Ibid.*

or brutal parents face “abuse”<sup>832</sup> when parents are overly harsh, critical or allow a child to witness violence between them.<sup>833</sup> Children may also face physical abuse by parents, guardians, relatives and educators under the guise of corporal punishment. On the other hand, children may be coerced or tricked to engage in sexual behaviour that may involve fondling of sexual organs, intercourse, rape or incest.<sup>834</sup> Thus a child may be abused in different forms, be it physically, psychologically or emotionally.<sup>835</sup> All forms of “abuse” are negative and traumatic and may affect a child’s personality development and self-image.<sup>836</sup>

As discussed earlier in this study, the Children’s Act, defines “neglect” as a decline in providing parental responsibilities to the child which includes physical, intellectual, emotional or social needs.<sup>837</sup> The word “deliberate”, in the concept “neglect”, acknowledges the fact that “neglect” of the child is intentional or carefully thought out.<sup>838</sup> The dictionary meaning of “degradation” is to cause humiliation or reduce in worth or character.<sup>839</sup>

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<sup>832</sup> Minnie in Boezaart (ed.) *Child Law in South Africa* 540-541; Van Bueren *Families Across Frontiers: Crossing the Frontier-The International Protection of Family Life in the 21<sup>st</sup> Century* 811.

<sup>833</sup> Lamanna & Riedmann (2003): 358.

<sup>834</sup> *Ibid.*

<sup>835</sup> Matthias (1997) 24-25; s 150(1)(i) of the Children Act. Also previously identified in s 14(4)(aB)(vi) of the Child Care Act.

<sup>836</sup> Ramasar in Glanz & Spiegel *Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* (1996) 142.

<sup>837</sup> S 1(1). See also the discussion in section 3 3 8.

<sup>838</sup> *Collins English Dictionary*: 392.

<sup>839</sup> *Collins English Dictionary*: 390.

The Constitutional Court has dealt with two cases which were brought on the grounds of the child's right to protection from "maltreatment", "neglect", "abuse" or "degradation".<sup>840</sup> Nevertheless, the court did not make any pronouncement on the meaning of section 28(1)(d) in either of the judgments. In the case of *S v Williams*<sup>841</sup> corporal punishment of children was found to be inconsistent with the child's constitutional right to protection from cruel, inhuman and degrading treatment, as well as the right of the child to dignity.

In the case of *Christian Education South Africa v Minister of Education*,<sup>842</sup> an application was made to challenge the South African Schools Act<sup>843</sup> which prohibits corporal punishment in schools. The court held that the prohibition of corporal punishment limits the rights of Christian individuals and community members to exercise a strongly-held religious belief and infringes on section 15<sup>844</sup> and section 31<sup>845</sup> of the Constitution.

The discussion in this section focuses on the following topics: "sexual abuse", "domestic violence" and "corporal punishment" as forms of abuse that comprise the elements of

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<sup>840</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 286-287.

<sup>841</sup> 1995 (3) SA 632 (CC).

<sup>842</sup> 1999 (2) SA 83 (CC); 2000 BCLR 1051 (CC); 2000 (4) SA 757 (CC). See the discussion in section 4.2.1: regarding the right of the child to be protected from maltreatment, neglect, abuse and degradation in terms of s 28(1)(d) of the Constitution.

<sup>843</sup> S 10.

<sup>844</sup> S 15(1) provides that: "everyone has the right to freedom of conscience, religion, thought, belief and opinion".

<sup>845</sup> S 31(1) provides that: "persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – to enjoy their culture, practice their religion and use their language".

“maltreatment”, “abuse” and “degradation” as key concepts highlighted in section 150(1)(i) of the Children’s Act. The concept “neglect” is discussed in the previous section of this study.<sup>846</sup> The Children’s Act provides for prevention and early intervention programmes for the purposes of developing the parenting skills of parents and care-givers to safeguard the well-being of the child. The programme includes the promotion of non-violent forms of discipline.<sup>847</sup> Furthermore, if a child has been maltreated, abused, or subjected to deliberate neglect or degrading treatment, the children’s court may make an order preventing the neglect, exploitation, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children’s needs.<sup>848</sup> The order may interdict a person from maltreating the child or from having contact with the child, if the court finds that the relationship between the child and the person who maltreated, abused or neglected the child is detrimental to the well-being or safety of the child<sup>849</sup> or that the child is exposed to a substantial risk of imminent harm.<sup>850</sup>

Thus, state intervention in the form of an interdict<sup>851</sup> may protect the child on any matter stipulated in the Children’s Act.<sup>852</sup> An interdict may take two broad forms, that is, a prohibitory interdict which may be issued to prohibit a person to whom it is directed from

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<sup>846</sup> See the discussion in section 3 3 8.

<sup>847</sup> S 144(1)(b). See the discussion in section 4 3.

<sup>848</sup> Ss 156(1)(i); 144(1)(f) of the Children’s Act. See the discussion in sections 4 2 and 4 2 1.

<sup>849</sup> S 156(1)(ii) of the Children’s Act.

<sup>850</sup> S156(k)(iii) of the Children’s Act.

<sup>851</sup> S 48(1)(a) of the Children’s Act. See Jones & Buckle (1988-1991) 87; Berry (2000) 12; Colin (2009) 60-85; Mbazira (2009) 166-167, see ch 1 n 100.

<sup>852</sup> S 45(1) of the Children’s Act.

doing something proclaimed as a violation<sup>853</sup> and in other cases a mandatory interdict may be issued requiring a person to whom it is directed, to do something or take steps to remedy a wrongful act for which he or she is responsible.<sup>854</sup> The criteria for granting an interdict have to be met were made clear in *Setlogelo v Setlogelo*<sup>855</sup> that there must be a clear right,<sup>856</sup> injury must have been committed, or there must be well-grounded apprehension that such will be committed to the applicant if the interim relief is not granted,<sup>857</sup> and there must be an absence of similar protection by any other ordinary remedy.<sup>858</sup>

#### 3.3.9.1.1 “Sexual abuse”

“Sexual abuse” is different from “sexual exploitation”. The Children’s Act defines “sexual abuse” in relation to a child as sexual molestation or assault, or allowing the child to be

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<sup>853</sup> See Jones & Buckle (1988-1991) 91. See also Gallinetti in *Commentary on the Children’s Act* 4-15.

<sup>854</sup> Jones & Buckle (1988-1991) 90.

<sup>855</sup> 1914 AD 221, 227; *Wezel v Kimberly Municipality* 1963 (1) SA 363 (GW) 370E-G: the applicant must establish a prima facie right or must have made out a prima facie case; Colin (2009) 51-75.

<sup>856</sup> See *Plettenberg Bay Entertainment (Pty) Ltd v Minister Van Wet en Orde* 1993 (2) SA 396 (C) 401B-D; *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 215 (N). In this case, the plaintiff must proof on a balance of probabilities that the right he or she seeks to protect exists.

<sup>857</sup> *Nestor v Minister of Police* 1984 (4) SA 230 (SWA) 244E-I.

<sup>858</sup> *SAPU v National Commissioner, SAPS* 2005 JOL 16030 (LC). An interdict is granted where there is no other relief because an interdict is a drastic remedy which ought to be granted only in deserving circumstances.

sexually molested or assaulted.<sup>859</sup> Any enticement, encouragement or forcing another person to use a child for sexual gratification is also “sexual abuse”.<sup>860</sup> A child that is exposed to sexual activities or pornography is also being sexually abused.<sup>861</sup> Procurement or allowing a child to be procured for commercial sexual exploitation or to participate in commercial sexual exploitation is regarded as sexual abuse.<sup>862</sup>

There are alarming reports of “sexual abuse” of South African children within families and the community.<sup>863</sup> The recent report about a two-year old who faced extensive surgery after being raped,<sup>864</sup> clearly confirms the traumatic experiences suffered by children in the family environment. “Sexual abuse” affects boy children<sup>865</sup> the same way it affects girl children.<sup>866</sup> Both children suffer abuse and go through traumatic experiences which may eventually affect

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<sup>859</sup> S 1(1)(a) of the Children’s Act.

<sup>860</sup> S 1(1)(b) of the Children’s Act.

<sup>861</sup> S 1(1)(c) of the Children’s Act.

<sup>862</sup> S 1(1)(d) of the Children’s Act.

<sup>863</sup> See the discussion in section 1 1 2.

<sup>864</sup> *The Star* (2006-02-22): a 2 year-old girl disappeared on 31 January 2006 whilst playing with a neighbour’s child (who was 3 years-old) outside her mother’s house in Tembisa, Ekurhuleni, Johannesburg. The child was discovered three kilometres away from her family home by two women, wandering the streets bleeding.

<sup>865</sup> *Sunday Times* (2008-06-08): several primary school boys in Thohoyandou, some as young as 10 have allegedly been sexually abused. The boys were allegedly paid between 50c and R5 to perform sexual acts. A sister of one boy, who is also a victim, testified about her brother that: “sometimes he is afraid, sometimes he dreams about what happed. He has changed; he is not the same boy he was before”.

<sup>866</sup> *The Star* (2008-06-18): a 10 year-old girl who was repeatedly raped by his father put messages on the walls of her foster home saying “I wish I was dead”. It is said that the girl often wets hers bed and has nightmares.

their behaviour.<sup>867</sup> The consequences of a long-standing record of sexual abuse in the family home, particularly where the perpetrators are relatives or neighbours in the community, are that the child may leave the family home in order to engage in prostitution as he or she loses his or her sense of worth.

Previously in South Africa, a male person committed a statutory offence if he had sexual intercourse with a girl below the age of 16 years or attempted to commit an immoral or indecent act with a girl below the age of 16 or a boy below the age of 19.<sup>868</sup> Statutory rape is also committed by a female who has or attempts to commit an immoral or indecent act with a boy below the age of 16 or a girl below the age of 19.<sup>869</sup> The SALRC<sup>870</sup> proposed that sexual relations with a young person should constitute a separate offence where the existence or absence of consent is not an element of the offence. The proposal made by the Commission was, amongst others, that any person who commits an act of sexual penetration with or an indecent act with a child that is below 18 years of age is guilty of an offence regardless of whether or not the child gave consent.<sup>871</sup>

The Sexual Offences and Related Matters Amendment Act made improvements with regard

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<sup>867</sup> *Ibid.*

<sup>868</sup> S 14(1)(a) of the Sexual Offences Act.

<sup>869</sup> S 14(1) and (3) of the Sexual Offences Act; See also Cronje & Heaton (2004) 244. The crime also applies to soliciting or enticing such a minor to commit an immoral or indecent act.

<sup>870</sup> Higson-Smith & Richter *et al.* *Sexual Abuse of Young Children in Southern Africa* 216.

<sup>871</sup> *Ibid.*



to enacting provisions that protect children against sexual crimes.<sup>872</sup> The Act provides that a person who commits consensual sexual penetration with a child<sup>873</sup> is guilty of an offence irrespective of whether the child consented to the sexual act or not.<sup>874</sup> According to the Act, any consensual sexual violation of a child with or without the consent of the child is an offence.<sup>875</sup> Any sexual exploitation of a child where the services of the child are engaged with or without the child's consent is punishable in terms of the law.<sup>876</sup> A sexual offence is also committed in situations where a reward or financial gain is made, whether to the child or the person who has control of the child.<sup>877</sup>

The Children's Act provides for the child in need of care and protection in the case where the child is maltreated, abused, intentionally neglected or degraded by his or her parents, care-giver or any person who has parental responsibilities, rights and control over the child.<sup>878</sup> Since abuse may be inflicted in different forms, amongst others, physically, emotionally, psychologically or sexually; this means that any form of abuse which harms the child shall find protection under the Children's Act and where relevant, the Sexual Offences and Related Matters Amendment Act.

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<sup>872</sup> See the discussion in section 3 3 5 3 1.

<sup>873</sup> A person below the age of 18 years.

<sup>874</sup> S 15(1).

<sup>875</sup> S 16(2).

<sup>876</sup> S 17(1) of the Sexual Offences and Related Amendment Act.

<sup>877</sup> S 17(2) of the Sexual Offences and Related Amendment Act.

<sup>878</sup> S 150(1)(i).

The Children's Act provides for possible interventions in situations of child abuse. They include making an order instructing a person to carry out an investigation.<sup>879</sup> The court may instruct that a protection order be made to remove a person from a child's home.<sup>880</sup> A child protection order may be made ordering that a child remain in, be released from, or be returned to the care of a person in terms of the conditions imposed by the court,<sup>881</sup> giving consent to medical treatment or for an operation to be performed on a child,<sup>882</sup> instructing a parent or care-giver of a child to undergo professional counselling, participate in a mediation, a family group conference, or other appropriate problem-solving forum,<sup>883</sup> instructing a child or other person involved in the matter concerning the child to participate in a professional assessment,<sup>884</sup> or instructing a hospital to retain a child who on reasonable grounds is suspected of being maltreated, abused or deliberately neglected pending further inquiry.<sup>885</sup>

The alarming reports on sexual abuse of children must motivate law enforcers to consider the spirit within which the Constitution,<sup>886</sup> the Equality Act<sup>887</sup> and other measures protect children's rights. This legislation is aimed at protecting victims of discrimination and includes any form of violence and abuse. The Constitution guarantees everyone equality and

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<sup>879</sup> In terms of s 50. See also s 49(1)(j).

<sup>880</sup> S 46(1)(ix) of the Children's Act.

<sup>881</sup> S 46(1)(h)(i) of the Children's Act.

<sup>882</sup> S 46(1)(h)(ii) of the Children's Act.

<sup>883</sup> S 46(1)(h)(iii) of the Children's Act

<sup>884</sup> S 46(1)(h)(vi) of the Children's Act.

<sup>885</sup> S 46(1)(h)(v) of the Children's Act.

<sup>886</sup> S 9(3).

<sup>887</sup> S 8(c).

prohibits unfair discrimination by the state or anyone on, amongst other grounds, age and gender.<sup>888</sup> The right to equality in terms of the Constitution includes protection from gender-related abuse such as rape.<sup>889</sup> The Equality Act also prohibits gender discrimination in as far as any person is subjected to any gender-based violence.<sup>890</sup>

### 3.3.9.1.2 “Corporal punishment”

Corporal punishment is prohibited in schools.<sup>891</sup> The National Education Policy Act also prohibits any person from administering corporal punishment or subjecting a student to psychological or physical abuse at any educational institution.<sup>892</sup> The Further Education and Training Colleges Act also prohibits corporal punishment.<sup>893</sup> The Children’s Amendment Bill prohibited all forms of corporal punishment in family homes, which raised a public outcry by proposing the repeal of any legislation, rule of common law, and customary law, including the court of a traditional leader, authorising corporal punishment.<sup>894</sup> The clause which could have prohibited corporal punishment in the home was removed from the Amendment Bill before the legislation was passed by Parliament. The enacted Children’s Act excluded the clause on corporal punishment due to parliamentary reluctance to agree on an outright

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<sup>888</sup> S 9(3).

<sup>889</sup> *Ibid.*

<sup>890</sup> S 8(c).

<sup>891</sup> South African Schools Act, s 10.

<sup>892</sup> 27 of 1996, s 3.

<sup>893</sup> 2006, s 16.

<sup>894</sup> [B19-2006], s 139(2) of the GG No 29150. See also the discussion in Fitzpatrick “Mom, Dad, you can’t hit me!” in *YOU Magazine* (2006-02-23) 170.

prohibition.<sup>895</sup>

The Children's Act prohibits corporal punishment in foster care;<sup>896</sup> cluster foster care schemes<sup>897</sup> and youth care centres.<sup>898</sup> The National Norms and Standards for Drop in Centres prohibit the use of corporal punishment.<sup>899</sup> The National Norms and Standards for Early Childhood Development Programme also prohibit corporal punishment.<sup>900</sup> Corporal punishment is a means to discipline children for misconduct.<sup>901</sup> The punishment may come in the form of spanking the child with a hand, an object such as a belt, cane or shoe<sup>902</sup> administered by either a parent,<sup>903</sup> or an educator<sup>904</sup> for the purposes of punishment, and

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<sup>895</sup> Kassan "The Protection of Children from all Forms of Violence-African Experiences" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 176.

<sup>896</sup> S 65.

<sup>897</sup> S 69.

<sup>898</sup> S 73 and 76.

<sup>899</sup> S 1.

<sup>900</sup> S 3.

<sup>901</sup> Henderson "Communication and Corporal Punishment: Beating as a Standard form of Admonishing Children in New Crossroads' Households" in Glanz & Spiegel *Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* (1996) 70 and 73.

<sup>902</sup> Henderson in Glanz & Spiegel *Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* 70. See also Save the Children Sweden Report *Ending Corporal Punishment of Children in South Africa* (2005) 6.

<sup>903</sup> Save the Children *Corporal Punishment of Children: A South African National Survey* (2005) 6; Fitzpatrick in *YOU Magazine* (2006-02-23) 170.

<sup>904</sup> *Sunday Times* (2008-04-06): Children may be abused at school by their own mates. A study conducted by the Centre for Justice and Crime Prevention revealed that more than one in 10 pupils is physically bullied: "A Johannesburg girl missed class for a week after her father was shot in a hijacking, she expected fellow pupils to comfort her. Instead, the traumatised 15

according to other beliefs, punishment is used for purposes of training and providing guidance to the child.<sup>905</sup>

Under common law, corporal punishment is lawful in the home given the “parental power”<sup>906</sup> and “parental authority” vested in parents, as alluded to in *R v Janke and Janke*<sup>907</sup> “to inflict moderate and reasonable chastisement on a child for misconduct provided that this was not done in a manner offensive to good morals or for objects other than correction and admonition”. The power imposed upon parents in common law to inflict moderate punishment may be delegated to a person acting in the parent’s place, although same was not extended to teachers. This position no longer applies in South African law given the move from parental power to parental responsibility.<sup>908</sup> The discipline that is administered by parents is expected to be moderate and consistent with the development of the child.<sup>909</sup>

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year-old was bombarded with more than 80 SMSs a day accusing her of bunking school to have an abortion.”

<sup>905</sup> *International Bible Society Proverbs 22: 6* (1984) 716.

<sup>906</sup> Van Heerden *et al.* in *Boberg’s Law of Persons and the Family* 313, defined “parental power” in terms of the common law 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 children and their property.

<sup>907</sup> 1913 TPD 382.

<sup>908</sup> Robinson (1998) *Obiter* 333; Sinclair in Davel (ed.) *Children’s Rights in a Transitional Society* 62.

<sup>909</sup> Lee *Child Abuse: A Reader and Sourcebook* (1986) 48: Corporal punishment in circumstances that are humiliating to a child, where the punishment is administered

Corporal punishment is abusive if it is physically or psychologically severe, degrading or humiliating.<sup>910</sup> These forms of disciplinary measures are abusive in the life of a child and may breach the fundamental right of the child to dignity and physical integrity where the child suffers continuous and unnecessary punishment.<sup>911</sup> Children who suffer this type of abuse are often reported to have left the family home to seek shelter in a place of safety<sup>912</sup> or on the streets.

Although disciplining the child by parents is not specifically prohibited in the Constitution, harsh discipline may be viewed as a practice that humiliates and degrades the child's self-worth.<sup>913</sup> Thus, corporal punishment was viewed as a form of violence against children.<sup>914</sup> Experts argue that corporal punishment teaches the child to resolve conflict by resorting to violence.

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intentionally, aimed at hurting the child, is referred to as physical abuse. See Art 5 of the CRC, see also the discussion in section 1 1.

<sup>910</sup> Save the Children Sweden *Ending Corporal Punishment of Children in South Africa* (2005) 6.

<sup>911</sup> Minnie in Boezaart (ed.) *Child Law in South Africa* 540-541: Corporal punishment can assume different forms, such as emotional, psychological, physical, sexual abuse and child neglect.

<sup>912</sup> *The Star* (2004-05-21): A 6 year-old boy who was abused by his father, was taken to a place of safety. The 44 year-old father was arrested at the Germiston hospital, East of Johannesburg upon bringing the child to remove a plaster from one of his arms. The doctors found that the boy's arm was broken and that the child had bruises on his back.

<sup>913</sup> S 28(d) of the Constitution protects every child from maltreatment, neglect, abuse or degradation.

<sup>914</sup> Save the Children Sweden Report *Ending Corporal Punishment of Children in South Africa* (2006) 6.

The argument has also been expressed that “in South Africa, it is illegal for a man to hit a woman and for a woman to hit a man, yet we may hit our kids”.<sup>915</sup> Parents may need to be taught how to discipline a child in an appropriate manner without resorting to abuse.

### 3.3.9.1.3 “Domestic violence”

Domestic violence between spouses is a form of abuse which can extend to children and other members living in the same household.<sup>916</sup> Children who live in families where there is constant violence are also affected by violence either physically or emotionally.<sup>917</sup> Children often become direct victims of violence when parents resort to violence to avenge themselves. There have been cases where a parent has burned his children and himself or herself;<sup>918</sup> a parent stabbed a child and hacked him with an axe; a child was mutilated;<sup>919</sup> and

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<sup>915</sup> Save the Children *Corporal Punishment of Children: A South African National Survey* (2005) 7 and 9; Fitzpatrick in *YOU Magazine* 170.

<sup>916</sup> Shroeder & Bosman *Violence in Family Life: A Legal Perspective in Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* (1996) 217.

<sup>917</sup> *Capricorn Voice* (2008-04-11): A family feud where a man suspected his wife was cheating on him at Makula village in Thohoyandou resulted in the man killing his wife and three children.

<sup>918</sup> *Sunday Times Metro* (2006-02-26): A husband who vowed to teach his wife whom he accused of having an affair, a lesson, burnt himself and their 2 children to death in the Winnie Mandela settlement in Tembisa, Ekurhuleni, East of Johannesburg. The husband who was unemployed and mainly dependent on his wife, bought petrol at a local garage, drank some and forced the children aged 6 and 8 years of age to do the same before locking the shack to set it alight.

<sup>919</sup> *Sowetan* (2004-08-30): 2 suspects, (a neighbour of a boy's family and a sangoma or a traditional healer) appeared in Seshego township, Limpopo Province Magistrates Court in

a father killed his children, wife and himself. Apart from being affected by domestic violence as demonstrated above, children may be abused by their own peers in the family environment and at school.<sup>920</sup>

Children may react with symptoms of psychological distress as a result of abusive and traumatic situations.<sup>921</sup> I agree with Black that children's reaction to traumatic incidents such as domestic violence have been understated.<sup>922</sup> The abuse that children suffer in family homes due to family violence clearly suggests that there is interference with the right of the child to enjoy family life. A child living in these circumstances becomes vulnerable as his or her security and bodily integrity is infringed upon.<sup>923</sup>

Some of the provisions of the Prevention of Family Violence Act were recently repealed by

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connection with the murder of a 10 year-old boy who was mutilated and his body parts removed.

<sup>920</sup> *The Star* (2008-05-5). A survey revealed that violence was increasing in schools, in 2007 a Grade 11 pupil at King Edward VII School, one of the Johannesburg top schools was killed in a vicious attack and in October 2006, a 19 year-old boy was murdered in a brutal stabbing by a fellow pupil at Forest High School; it was reported at the time as another incident of school violence.

<sup>921</sup> Black & Newman "Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment" in Van Bueren *The Effects on Children of Witnessing Violence Perpetrated against their Parents or Siblings* (1998) 206-207.

<sup>922</sup> *Ibid.*

<sup>923</sup> S 12(1)(c) of the Constitution guarantees everyone the right to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.



the Children's Act.<sup>924</sup> The Prevention of Family Violence Act compels anyone who examines, treats, attends to, advises, instructs or cares for a child in circumstances which ought to give rise to a suspicion that a child has been ill-treated or suffers from an injury which was probably deliberately inflicted, to report such circumstances to a police station, commissioner of child welfare or social worker.<sup>925</sup> The Act also provides that if the court is satisfied that it is in the best interests of any child, it may refuse a respondent contact with the child on such conditions as it may consider appropriate.<sup>926</sup> Despite these laws, our courts seem to be lenient in sentencing perpetrators of violent crimes against children.<sup>927</sup>

### 3.3.9.2 *Child is being maltreated, abused, deliberately neglected or degraded in terms of international law*

South Africa is obliged under the CRC to take measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. The protective measures that are anticipated by the CRC include effective procedures for the establishment of social programmes to provide

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<sup>924</sup> S 4, repealed by Schedule 4 of the Children's Act.

<sup>925</sup> S 1(viii); Cronjé & Heaton (2004) 250-251.

<sup>926</sup> S 7(6). See Sloth-Nielsen "Children" in Cheadle *et al. South African Constitutional Law – The Bill of Rights* (2010) 23-15. See the discussion in section 4 2 1.

<sup>927</sup> *The Star* (2008-06-18). A 10 year-old girl was repeatedly raped by her father. It was revealed that the father was a repeat offender in that in 1990 he was sentenced for sexually molesting another daughter from his first marriage and served less than five years in jail.

necessary support for the child.<sup>928</sup>

In another Article, the CRC obliges state parties to promote the physical and the psychological recovery of and social integration of a child victim of any form of neglect, exploitation, abuse, torture and any form of cruel and inhuman or degrading treatment or punishment or armed conflict. Such recovery shall take place in an environment that fosters the health, self-respect and dignity of the child.<sup>929</sup> The CRC prohibits unlawful interference with the privacy of the child, his or her family, home, and correspondence, and unlawful attacks on the honour and reputation of the child.<sup>930</sup> According to the CRC, the law protects the child against such interference or attacks.<sup>931</sup> The CRC also obliges state parties to take measures to protect the child from all forms of physical and mental violence, injury or abuse whilst the child is in the care of his/her parents or guardian.<sup>932</sup>

The right to protection from corporal punishment and other cruel, degrading forms of punishment is covered by Articles 19, 28(2) and 37 of the CRC.<sup>933</sup> The Committee on the Rights of the Child in its General Comment<sup>934</sup> on violence against children defines corporal or physical punishment as any punishment in which physical force is used and intended to

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<sup>928</sup> Art 19(1). See also the discussion in section 3 3 5 4, 4 2 1 and 4 2 2.

<sup>929</sup> Art 39.

<sup>930</sup> Art 16(1).

<sup>931</sup> Art 16(2).

<sup>932</sup> Art 19 of the CRC.

<sup>933</sup> Hodgkin & Newell (2007) 262.

<sup>934</sup> 8 of 2006.

cause some degree of pain or discomfort, mostly involving slapping and spanking of children.<sup>935</sup>

The foundations of the human rights obligation to prohibit and eliminate all corporal punishment and other degrading forms of treatment lie in the rights of persons to respect for their dignity and physical integrity and equal protection under the law.<sup>936</sup> Amongst other measures and mechanisms required to eliminate corporal punishment and other forms of punishment, is legal reform that eliminates all provisions which allow any degree of corporal punishment, that is “reasonable” or lawful correction etc.<sup>937</sup> The CRC obliges state parties to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity.<sup>938</sup>

The CRC also obliges state parties to protect the child from all forms of sexual exploitation and sexual abuse.<sup>939</sup> States are obliged to take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of the child to engage in any unlawful sexual activity;<sup>940</sup> the exploitative use of children in any unlawful sexual activity;<sup>941</sup> and the exploitative use of child pornographic performances and materials.<sup>942</sup> According to

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<sup>935</sup> Hodgkin & Newell (2007) 262.

<sup>936</sup> *Ibid.*

<sup>937</sup> Hodgkin & Newell (2007) 263.

<sup>938</sup> Art 28(2).

<sup>939</sup> Art 34(1). See the discussion in section 3 3 5 4.

<sup>940</sup> Art 34(1)(a).

<sup>941</sup> Art 34(1)(b).

<sup>942</sup> Art 34(1)(c).

Hodgkin and Newell, Article 34 covers both sexual abuse and sexual exploitation. However, the exploitative use of children in pornography and prostitution is linked to the sale of and traffic in children.<sup>943</sup> The CRC further requires that measures be put in place to assist child victims of any form of violence, neglect, sexual exploitation and sexual abuse.<sup>944</sup>

In the context of torture, cruel, inhuman, degrading treatment and punishment, the Committee has, in its observations towards South Africa's report towards the CRC, noted with concern the high incidence of police brutality and inadequate enforcement of existing legislation in handling child detainees.<sup>945</sup> The Committee recommended that South Africa make greater efforts to prevent police brutality and ensure that child victims are provided with adequate treatment to facilitate their physical and psychological recovery and social reintegration and ensure that perpetrators are sanctioned.<sup>946</sup>

The Committee was also concerned about South Africa's high incidence of domestic violence, and ill-treatment and sexual abuse of children in the family.<sup>947</sup> The Committee recommended, within the confines of the CRC,<sup>948</sup> that South Africa conduct research to establish the nature and scope of these practices.<sup>949</sup> The Committee recommended further

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<sup>943</sup> (2007) 513.

<sup>944</sup> Art 39; Hodgkin & Newell (2007) 589.

<sup>945</sup> Concluding Observation No 21.

<sup>946</sup> *Ibid.*

<sup>947</sup> Concluding Observation No 27.

<sup>948</sup> Art 19.

<sup>949</sup> Concluding Observation No 27.

that South Africa investigate cases of abuse, ill-treatment and domestic violence within “a child-friendly judicial procedure”<sup>950</sup> and establish adequate policies to contribute to the changing of attitudes. It also recommended that South Africa reinforce its efforts to formalise a comprehensive strategy to prevent and curb crimes that are committed against children.<sup>951</sup>

The Committee acknowledged the fact that corporal punishment is prohibited in South African schools, but remained concerned that it still persists in families and other institutions.<sup>952</sup> The Committee recommended that legal measures be established to prohibit corporal punishment in care institutions.<sup>953</sup> It was further recommended that South Africa reinforce measures to raise awareness on the negative effects of corporal punishment and change cultural attitudes to ensure that discipline is administered in a manner consistent with the dignity of the child.<sup>954</sup> The Committee acknowledged South Africa’s efforts in implementing legislation, policies and programmes to combat the sexual exploitation of children<sup>955</sup> in accordance with the CRC. However, the Committee recommended that South Africa implement the measures it has put in place to provide care and rehabilitation to curb the sexual exploitation of children.<sup>956</sup>

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<sup>950</sup> *Ibid.*

<sup>951</sup> *Ibid.*

<sup>952</sup> Concluding Observation No 2.

<sup>953</sup> *Ibid.*

<sup>954</sup> *Ibid.*

<sup>955</sup> Concluding Observation No 39.

<sup>956</sup> In accordance with Art 34 of the CRC.

The ACRWC obliges state parties to take specific legislative, administrative, social and educational measures to protect the child from all types of torture, and inhuman or degrading treatment particularly physical and mental injury, abuse, neglect or maltreatment, including the sexual abuse of children.<sup>957</sup> The ACRWC specifically obliges state parties to take measures to prevent the inducement, encouragement or coercion of the child to engage in any sexual activities or using the child in prostitution, sexual practices, pornographic activities, performances and material.<sup>958</sup>

In the case of corporal punishment, the ACRWC places on parents, and any other person responsible for the child, the duty to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.<sup>959</sup> South Africa is bound to establish measures and programmes to ensure that all forms of abuse of children in the family, school, care institutions and other systems are prohibited.<sup>960</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>961</sup> obliges state parties to ensure that legislation banning corporal punishment is strictly implemented, particularly in schools and other welfare institutions for children, and to establish a monitoring

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<sup>957</sup> Art 16(1).

<sup>958</sup> Art 27(a)(b) and (c).

<sup>959</sup> Art 20(1)(c).

<sup>960</sup> *Ibid.*

<sup>961</sup> Hereinafter referred to as “CAT” or “Convention against Torture”, entered into force in 1987-06-26 and signed by South Africa on 1993-01-10. South Africa submitted its of the Initial Report towards CAT on 7 December 2006: accessed from <http://www2.ohchr.org/english/bodies/cat/docs/CLC.doc> on 2010-10-08.

mechanism for such facilities.<sup>962</sup> The Committee on CAT noted South Africa's Initial Report towards the CAT and that it has legislation and jurisprudence of the Constitutional Court, referring to the judgment of *S v Williams* that prohibits corporal punishment.

However, the Committee remained concerned that there is infrequent use of corporal punishment in some schools and other public institutions and that there is no oversight mechanism to monitor these institutions.<sup>963</sup> Apart from the regulations I have proposed for teachings and other assistance to protect children who have been abused, maltreated and degraded, I propose that a forum be established at schools, represented by a teacher who is a member of the school governing body, two parents and a senior learner, to enable children lodge complaints regarding any form of abuse taking place in the school environment. Furthermore, information must be publicised to all learners concerning the existence of such forum.

The position of the ECHR with regard to a child who is maltreated, abused, deliberately neglected or degraded is discussed in Chapter 4 of this study under the topic "Prevention and early intervention measures".<sup>964</sup>

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<sup>962</sup> Art 16.

<sup>963</sup> Concluding Observation No 25.

<sup>964</sup> See the discussion in section 4 2 2.

### 3.3.9.3 *Child is being maltreated, abused, deliberately neglected or degraded in terms of foreign jurisdictions*

The Children's Act (Kenya) regards children who are sexually abused and exploited, including prostitution and pornography, as children in need of care and protection.<sup>965</sup> It is clearly spelt out in the Children's Act (Kenya) that a child that is exposed to domestic violence is in need of care and protection.<sup>966</sup> South Africa must refer to the Children's Act (Kenya) regarding the provision it incorporated for a child who is exposed to domestic violence as a child in need of care and protection. Thus, Kenya has been realistic that situations of abuse, maltreatment, and degradation that may be faced by children in the family environment include domestic violence.

The Children's Act (Kenya) prohibits corporal punishment.<sup>967</sup> In Kenya, corporal punishment was legally administered in schools<sup>968</sup> and later repealed by Kenya's Ministry of Education.<sup>969</sup> In its stead, the government of Kenya introduced alternative forms of punishment which were

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<sup>965</sup> S 119(1)(n).

<sup>966</sup> S 119(1)(j).

<sup>967</sup> S 13(1) provides that children are entitled to protection from "physical and psychological abuse, neglect and any other form of exploitation". Part III of the Kenyan Children Act regulates parental responsibility and does not specifically prohibit "reasonable chastisement"; instead s 241 of the Kenyan Penal Code protects children from the excessive use of force and s 234 protects children from grievous bodily harm.

<sup>968</sup> Legal Notice 40 of 1972.

<sup>969</sup> Legal Notice 56 of 2001; see also Legal Notice 5 of 2005.



launched in 2005.<sup>970</sup> The landmark case that demonstrates adherence to the repeal of corporal punishment is *Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)*<sup>971</sup> in which an appellant was charged and convicted in the lower court with an offence of subjecting a child to torture contrary to the Children's Act.<sup>972</sup> The position of the court confirmed the power of the courts to examine the status of corporal punishment in the family home.<sup>973</sup>

The Committee on the Rights of the Child noted the persistent reports regarding torture, cruel, inhuman and degrading treatment which occurs in Kenya despite the prohibition of same in legislation.<sup>974</sup> The Committee was further concerned about reports indicating that rape of girls by law enforcement agents have not been investigated. In its recommendations, the Committee on the Rights of the Child urged Kenya to review its legislation and ensure that the law is effectively implemented in order to provide children with better protection

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<sup>970</sup> Kenyan courts have introduced a variety of punishment options such as approving the reintegration of the child in the community as a more beneficial and economical form of punishment than imprisonment. In other instances, compensation may be ordered instead of imprisonment. The Kenyan courts are, by so doing, making attempts to integrate indigenous traditions of community-based dispute resolution into the statutory structure.

<sup>971</sup> Criminal Application No 185 of 2004.

<sup>972</sup> Ss 13(1), 18(1) and 20. See also the discussion by Kassan in Sloth-Nielsen *Children' Rights in Africa: A Legal Perspective* 177.

<sup>973</sup> In this case, a man was convicted of subjecting his 3 year-old daughter to torture under the Kenya's Children Act. The High Court in this case did not condemn corporal punishment but rejected the father's argument, which was used as a mitigating factor, that he was a parent disciplining his child.

<sup>974</sup> Concluding Observation No 32.

against torture and ill-treatment.<sup>975</sup> Kenya was urged by the Committee to investigate and prosecute all cases of torture and ill-treatment of children and ensure that an abused child is not victimised in legal proceedings and that his or her privacy is protected. Furthermore, the Committee urged Kenya to ensure that child victims are provided with services for care recovery and reintegration, including the provision of psycho-social support for children affected by torture and other cruel, inhuman and degrading experiences.<sup>976</sup>

In the context of corporal punishment, the Committee appreciated legislation enacted in Kenya prohibiting corporal punishment in schools. However, it raised concerns about corporal punishment taking place in the home environment, the criminal justice system, alternative care placements and employment.<sup>977</sup> Amongst other recommendations, the Committee urged Kenya, upon consideration of the child's right to protection from corporal punishment and other cruel or degrading forms of punishment, to introduce legislation that explicitly prohibits corporal punishment in the home, in all public and private alternative care, and in the employment environment.<sup>978</sup>

With regards to pregnant learners, the Californian Title IX of the Education Amendments

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<sup>975</sup> Concluding Observation No 33(a).

<sup>976</sup> Concluding Observation No 33(c).

<sup>977</sup> Concluding Observation No 34.

<sup>978</sup> Concluding Observation No 35(a).

Act,<sup>979</sup> prohibits unfair discrimination in educational institutions based on, amongst others, pregnancy and parenting status. It states that schools cannot require certain things of female teen parents when it does not require same from teen fathers. Also, the laws require that school must treat the absence due to childbirth, in the same way that it treats absences due to temporary disabilities.<sup>980</sup> Further, in the event a pregnant learner misses school, she is entitled to make up assignments, and same must be for pregnant and parenting students.

Pregnant and parenting learners cannot be penalised because of childbirth. Furthermore, legislation permits learners to choose their educational options, thus they are permitted to stay in their home school and be able to return to their home school any time.<sup>981</sup> Thus, I propose that South Africa must promulgate regulations to provide a range of services to pregnant learners within schools and the family environment.<sup>982</sup>

There are different ways in which situations of maltreatment, abuse and degradation of children can be avoided at school and family environment. The Children First Report<sup>983</sup> includes guidelines for protection of children. Amongst others, the guidelines provide: that children must be listened to and be respected; both the school and family environment must

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<sup>979</sup> Wolf's Report for Centre for Assessment and Development Policy *Using the Title IX of the Education Amendments Act to protect the rights of Pregnant and Parenting Teens* (1999) Attachment A-2. See the proposed provision in section 3 4.

<sup>980</sup> *Ibid.*

<sup>981</sup> *Ibid.*

<sup>982</sup> *Ibid.*

<sup>983</sup> *National Guidelines for the Protection and Welfare of Children* (2004) 681-681. See the proposed provision in section 3 4.

create an atmosphere of trust; children must be involved in decision-making matters that affects them; have emergency procedures in place and make children aware of these procedures; the school must have an anti-bullying policy; make children aware of bullying policy at school and encourage children to report any bullying; ensure that there is proper supervision of children based on adequate age, abilities and activities involved and observe appropriate gender balance; and make children aware of offensive and sexually suggestive physical and or verbal language.

Thus, I propose that South Africa must refer to the Children First Report and promulgate regulations to the Children's Act, as guidelines to prevent situations of maltreatment, abuse and degradation.<sup>984</sup>

### *3.3.10 Child who is a victim of child labour*

The discussion in this section notes the fact that child labour is prevalent mainly in highly unmonitored informal and rural sectors. The discussion acknowledges the provision incorporated in the Children's Act to curb child labour. However, I propose that South Africa must refer to international laws and the observations of the Committee on the Rights of the Child with regard to Kenya's second report towards the CRC and incorporate a provision in the Children's Act for: collaborative work of intersectoral government departments to conduct investigations in situations of child labour; awareness raising campaigns on child labour;

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<sup>984</sup> *Ibid.*

provide programmes aimed at ensuring that children go to school;<sup>985</sup> and provide basic services and adequate financial support for children prone to work to support their families.<sup>986</sup>

Child labour is rife in South Africa.<sup>987</sup> Due to poverty, many children are forced to leave their families to look for work.<sup>988</sup> According to Minnie,<sup>989</sup> children are trafficked for the purposes of commercial sexual exploitation, domestic servitude, working on farms and other forms of cheap labour. Hence children constitute the main body of farm workers in agricultural farming and the land sector in South Africa.<sup>990</sup> The same applies in places like West Africa,

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<sup>985</sup> *Ibid.*

<sup>986</sup> See the discussion in sections 3 3 1 2, 3 3 1 2 2 and the proposed provision in section 3 4.

<sup>987</sup> *Mail and Guardian* (1997-03-20).

<sup>988</sup> Kane-Berman (2009) 222. According to employment by age group, South African had 1 489 000 persons aged between 15 and 24 years in employment. It is important to point out that this age group includes children.

<sup>989</sup> Minnie in Boezart (ed.) *Child Law in South Africa* 539.

<sup>990</sup> *Streak Children Working in the Commercial and Subsistence Agriculture in South Africa: A Child Labour-related Rapid Assessment Study* (2008) Department of Labour: the study was conducted by the Human Sciences Research Council in KwaZulu-Natal, Mpumalanga and Western Cape Provinces and revealed that out of 100 children aged 12 years-old, 18 children worked in privately owned commercial agriculture, out of 289 children aged 13 years-old, 40 worked in commercial agriculture, out of 328 children aged 14 years-old, 49 were working in commercial agriculture, out of 204, children aged 15 years-old, 27 are working on commercial agriculture, out of 112 children who were 16 years-old, 16 children are working in commercial agricultural. This means that out of 1033 children in the above 3 provinces aged between 12 and 16 years-old, 150 are working in commercial agriculture: accessed from <http://www.child-labour.org.za/newsroom/media-releases/economic-need-drives-children-to-work-in-agriculture-12-june-2007/> on 2008-06-09.

where children work in markets and plantations.<sup>991</sup>

The Children's Act defines child labour as "work by a child which is exploitative, hazardous or otherwise inappropriate for a person of that age; and places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development".<sup>992</sup>

Children may serve in different forms of labour that may not be properly documented. The discussion in the previous section covered "child prostitution" as a form of child labour that is sexually exploitive. This section focuses on child farm workers.<sup>993</sup>

There is no accredited research on children who are employed on farms in South Africa. Nevertheless, the situation of children who are farm workers in this country is similar to those of child farm workers in Morocco, Jordan and Mauritania.<sup>994</sup> In these countries, children provide labour to supplement the family income but are unprotected by both the law and government.<sup>995</sup> In most cases where a child is employed as a farm labourer, there is no contract of employment between the child and the farm owner.<sup>996</sup> The contract is usually signed between the farm owner and the parents. This form of child labour denies the child

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<sup>991</sup> Gallinetti & Kassan in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* 242.

<sup>992</sup> S 1(1)(a)-(b).

<sup>993</sup> Bennett *African Customary Law* (1991) 186.

<sup>994</sup> Ali "A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Children's Rights in Muslim Jurisdiction" in *Protecting the Children's World* (2007) 142.

<sup>995</sup> Ali *Protecting the Children's World* 152.

<sup>996</sup> *Ibid.*

the right to education, health and protection.<sup>997</sup> The right of the child to be heard in terms of the conditions of employment contract are also easily compromised.

According to the Children's Act, a child who is a victim of labour is in need of care and protection.<sup>998</sup> Furthermore, the Children's Act provides other protective measures against child labour and the exploitation of children by prohibiting any person from using, procuring or offering a child for slavery or a practice similar to slavery, including, but not limited to debt bondage, servitude and serfdom, or forced or compulsory labour or provision of services.<sup>999</sup> The Act prohibits any person from using, procuring, offering or employing a child for the following purposes: commercial sexual labour;<sup>1000</sup> trafficking;<sup>1001</sup> or child labour;<sup>1002</sup> using, procuring, offering or employing a child for the commission<sup>1003</sup> of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure Act,<sup>1004</sup> or for any instance of child labour in contravention of the provisions of the Basic Conditions of Employment Act.<sup>1005</sup>

However, the prohibition by the Children's Act against child labour is not comprehensive enough to cover children in informal employment, and farm labour in particular. On the other

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<sup>997</sup> *Ibid.*

<sup>998</sup> S 150(2)(a).

<sup>999</sup> S 141(1)(a).

<sup>1000</sup> S 141(1)(b).

<sup>1001</sup> S 141(1)(c).

<sup>1002</sup> S 141(1)(e).

<sup>1003</sup> S 141(1)(d).

<sup>1004</sup> 51 of 1977.

<sup>1005</sup> 75 of 1997. According to s 141(1)(2)(b) of the Children's Act.

hand, the Constitution strictly prohibits every child from work or providing services that are not suitable for his or her age;<sup>1006</sup> or that place the well-being, education, physical, spiritual, mental health, moral or social development of the child at risk.<sup>1007</sup>

The challenge that exists in addressing child labour is that not all labour laws and related legislation are consonant with the Constitution and the Children's Act<sup>1008</sup> regarding the age at which a person ceases to be a child<sup>1009</sup> or may be employed. For instance, the South African Schools Act provides for compulsory education of children between the ages of seven and 15.<sup>1010</sup> The implication of this legislation is that education is not compulsory at any age above 15 years. The Schools Act indirectly strengthens the minimum age for employment provided in the Basic Conditions of Employment Act as 15 years or older.<sup>1011</sup> On the same note, the Basic Conditions of Employment Act restricts employment of a child who is under 15 years or below the minimum school-going age.<sup>1012</sup>

Apart from the legislation put in place, there is a need for a thorough investigation of children in labour. The investigation must give rise to public debate to inform the form of care and

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<sup>1006</sup> S 28(1)(f)(i).

<sup>1007</sup> S 28(1)(f)(ii).

<sup>1008</sup> S 1(1).

<sup>1009</sup> S 28(3) provides that every person below the age of 18 is a child.

<sup>1010</sup> Melchiorre *At What Age? ...are School-children Employed, Married and Taken to Court?* (2002) 98.

<sup>1011</sup> S 44(1). See also Melchiorre (2002) 98.

<sup>1012</sup> S 43(1)(a) prohibits employment of any person below the age of 15 or in terms of s 43(1)(b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.



protection needed where children are victims of child labour. Thus, I propose that provisions be enacted in the Children's Act to impose the responsibility of the Department of Social Development in collaboration with the Department of Labour, the South African Police Services, the Department of Education, the NGO sector and the assistance of the community, to conduct investigations on incidences of child labour, devise interventions that allow for the possibility of children being in school rather than work.

Furthermore, the Department of education must improve the quality of schooling by investing in education. The adequate financial support previously proposed with regard to children without visible means of support, will assist families prone to having working children.<sup>1013</sup>

The South African Schools Act provides education to children in farm schools, that is, children in public schools situated on the private property of the farm owner.<sup>1014</sup> The South African Schools Act<sup>1015</sup> provides for a public school on the private property of the farm owner on the conditions and terms agreed upon between the Member of the Executive Council<sup>1016</sup> and the owner of the private property. Although the Act is not expressive, the intention of providing education to children on farms is to ensure that every child who resides on the farm

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<sup>1013</sup> See the proposed provision in section 3 4.

<sup>1014</sup> S 14.

<sup>1015</sup> S 56 of the South African Schools Act provides that: "if an agreement contemplated in section 14 does not exist at the commencement of this Act in respect of a school, standing on private property which is deemed to be a public school in terms of section 52(1), the Member of the Executive Council must take reasonable measures to conclude such an agreement within six months of the commencement of this Act."

<sup>1016</sup> Hereinafter referred to as the "MEC".

receives education, rather than provide labour on the farm. However, there is no data verifying that there are no children providing labour in farm areas. Hence I recommend that investigations be conducted for appropriate intervention in this subject. However, the state can focus on immediately solving the remedial problems involving the reasons that make children leave school to become labourers.

Siddiqi<sup>1017</sup> is of the view that the immediate abolishing of child labour and requiring children to go to school will in essence not work. Instead, there must first be a change in the economic conditions of these children. Secondly, schools must make it worthwhile for children to attend school in order to make up for the lost earnings by making school and other excursions free, including the provision of food supplements. Parents may view the provision of food as valuable and may keep children in schools. The quality of education must also be improved so that school is viewed as an important factor and a successful future for the child.<sup>1018</sup>

### 3.3.10.1 *Child who is a victim of child labour in terms of international law*

This section discusses the extent to which international laws impose the responsibility on state parties to protect children in relation to labour. I also reflect on the observations of the

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<sup>1017</sup> Siddiqi *Child Labour: Issues, Causes and Interventions* (1999) Unpublished working paper 10-11; this is a working paper for the Human Capital Development and Operations Policy: accessed from [www.siteresources.worldbank.org/.../Resources/.../child\\_labour\\_issues.pdf](http://www.siteresources.worldbank.org/.../Resources/.../child_labour_issues.pdf) on 2012-11-08.

<sup>1018</sup> *Ibid.*

Committee on the Rights of the Child that South Africa has not put sufficient measures in place to ensure that all children have access to education, health and other social services. As per the recommendations in the previous chapter,<sup>1019</sup> a provision must be enacted in the Children's Act to ensure that children have access to basic services which would be a step towards curbing situations of children providing labour to afford basic services for their families.

The CRC,<sup>1020</sup> like the ACRWC,<sup>1021</sup> provides that state parties shall protect the child from economic exploitation and from performing work that is likely to be hazardous or interfere with the child's education, health, physical, mental, spiritual, moral and social development. Article 32 recognises the fact that the child must be free from economic exploitation, which often interferes with his or her education, health, spiritual, social, and moral development.<sup>1022</sup>

The Committee on the Rights of the Child acknowledged the fact that in other countries children are socialised to work at early age, including activities that are hazardous, exploitative, and damaging to their health, education and long-term prospects.<sup>1023</sup> For instance, young children get initiated into agricultural labour and domestic work or assist parents in hazardous activities. Children are also used or hired out for begging. Young

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<sup>1019</sup> See the discussion in section 3 3 10.

<sup>1020</sup> Arts 32 and 6(2).

<sup>1021</sup> Art 15(1).

<sup>1022</sup> Hodgkin & Newell (2007) 479.

<sup>1023</sup> Hodgkin & Newell (2007) 490.

people are used in the television, film, and advertising industry.<sup>1024</sup> Thus, states have the responsibility to protect the child in relation to extreme forms of labour.<sup>1025</sup>

The Committee has, in its observations towards South Africa's report to the CRC, noted that South Africa signed a Memorandum of Understanding with the International Programme for the Elimination of Child Labour of the International Labour Organization<sup>1026</sup> to conduct a national survey with the aim of compiling a report on national child labour statistics.<sup>1027</sup> Despite this Memorandum of Understanding, the Committee was still concerned that South Africa had 200 000 children between the age of 10 and 14 in labour.<sup>1028</sup>

The Committee noted the fact that South Africa has not ratified the ICESCR.<sup>1029</sup> The concern raised by the Committee relates to issues of poverty and unemployment, which are critical in promoting the rights of children. Furthermore, the Committee noted that South Africa has a Constitution and domestic legislation which reflect the principle of non-discrimination consistent with the CRC, yet there are no sufficient measures to ensure that all children have access to education, health and other social services.<sup>1030</sup> If South Africa takes careful consideration of these concerns, the country may well address situations of child labour.

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<sup>1024</sup> Hodgkin & Newell (2007) 491.

<sup>1025</sup> *Ibid.*

<sup>1026</sup> Hereinafter referred to as "ILO".

<sup>1027</sup> Concluding Observation No 37.

<sup>1028</sup> *Ibid.*

<sup>1029</sup> Concluding Observation No 11.

<sup>1030</sup> In terms of Art 2 of the CRC. See also Concluding Observation No 11.

The Committee noted with particular concern that insufficient measures have been adopted to ensure that all children are guaranteed access to education, health and other social services. The Committee was concerned with the following groups of vulnerable children: “Black children; girls; children with disabilities, especially those with learning disabilities; child labourers; children living in rural areas; children working and/or living on the streets; children in the juvenile justice system; and refugee children”.<sup>1031</sup> In its comments, the Committee called on the South African government to increase its efforts to implement the principle of non-discrimination and to ensure full compliance with Article 2 of the CRC, particularly on issues relating to vulnerable children.<sup>1032</sup>

A workshop was held in South Africa where different stakeholders discussed a Programme of Action which enunciated the promulgation of a provision in the Basic Conditions of Employment Act<sup>1033</sup> which prohibits the employment of children under 15 years of age.<sup>1034</sup> This process was guided by the Agenda for Action regarding Child Labour which was endorsed by the Child Labour International Conference.<sup>1035</sup> On 3 and 4 February 1998,

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<sup>1031</sup> Concluding Observation No 18.

<sup>1032</sup> Art 2(1) obliges state parties to respect the rights set forth in the CRC to each child, irrespective of the child’s or his or her parent or legal guardian’s race, colour, sex, language, religion, political or other ethnic opinion, national, ethnic or social origin, property, disability, birth or other status. Art 2(2) obliges state parties to take all measures to protect the child against all forms of discrimination or punishment on the basis of status, activities, expressed opinions or beliefs of the child’s parents, legal guardians or family members.

<sup>1033</sup> Chapter 6.

<sup>1034</sup> S 43, 44 and 48.

<sup>1035</sup> Oslo in 1997.

members of the Child Labour Intersectoral Group developed a South African programme of action to work towards the elimination of child labour.<sup>1036</sup>

The ACRWC obliges states parties to take all appropriate measures to ensure the full implementation of legislation and administration which includes the formal and informal sectors of employment and that focus is given to the ILO instruments relating to children.<sup>1037</sup> State parties are obliged in particular to provide, through legislation, the minimum age for admission to every kind of employment, appropriate regulation of hours and conditions of employment, and penalties or other sanctions for effective enforcement of this provision, and to promote the dissemination of information on the hazards of child labour to all sectors of the community.<sup>1038</sup>

However, culture in Africa is a major influence on a child's upbringing. Today, African children are still considered to have a responsibility to work for the cohesion and sustenance of their families. Thus, children put their physical and intellectual abilities at the service of

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<sup>1036</sup> The programme of action for the elimination of child labour is in terms of the Child Labour Inter- sectoral Group to: oversee and or to steer the process of eliminating child labour; coordinate policies and programmes in working towards eliminating child labour; create awareness campaigns with regard to child labour; facilitate debates on policy issues; monitor progress on the elimination of child labour; encourage and or facilitate the formation of provincial and sectoral structure. The programme of action was endorsed on the 12 March 1998, accessed from <http://www.search.gov.za/imfo/previewDocument.jsp?dk=%2Fstatic%2Finfo%2Fspeeches%2F1999%2F991215914al007> on 2008-07-07.

<sup>1037</sup> Art 15(2).

<sup>1038</sup> Art 15(2)(a)-(d).

their communities in order to preserve cultural values.<sup>1039</sup> Jobs that are performed by girls and boys are meant to groom them to play appropriate roles when they become adults.<sup>1040</sup> Although some of these traditional values may have changed, particularly in urban areas, the role of every child to contribute to the survival of the family and community remains.

I am of the view that for the ACRWC to yield impact in combating child labour, it is important to address child labour from the perspective of sectors that control child labour, that is, parents, extended families, community, employers and children themselves, to find common ground between all participants so that the purpose that needs to be achieved is reflected in the law and appropriate monitoring systems with absolute certainty.<sup>1041</sup>

### 3.3.10.2 *Child who is a victim of child labour in terms of Kenyan law*

The Children's Act (Kenya) provides that a child who is engaged in any work likely to harm his/her health, education, mental or moral development is in need of care and protection.<sup>1042</sup> However, as in other African countries, many families in Kenya rely on child labour for survival. The Committee on the Rights of the Child raised concerns in Kenya's Second Report towards the CRC about child labour in Kenya and the large number of children engaged in economic activities, compounded by high levels of poverty and the effects of

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<sup>1039</sup> Nhenga-Chakarisa, Who does the Law Seek to Protect and from What? The Application of International Law on Child Labour in an African Context (2010) *AHRJ* 161, 168-170.

<sup>1040</sup> *Ibid.*

<sup>1041</sup> Nhenga-Chakarisa (2010) *AHRJ* 194.

<sup>1042</sup> S 119(1)(o).

HIV/Aids.<sup>1043</sup> The Committee was also concerned about the economic exploitation of children and the number of children involved in work that is hazardous and that negatively impacts on their right to health, education and development.<sup>1044</sup> These concerns were raised by the Committee recently in 2007 during Kenya's second report to the CRC. This shows that child labour has persisted in Kenya, despite the enactment of the Children's Act (Kenya) in 2001. South Africa must refer to the response of the Committee which urged Kenya to develop legislation and policies to protect children from the worst forms of child labour, including putting mechanisms in place to address the root causes of child labour.<sup>1045</sup> South Africa must amend the provisions in the Children's Act regarding child labour and add provisions with intervention strategies that would work towards the prevention of child labour.<sup>1046</sup>

The Committee, in response to Kenya's second report to the CRC, urged state parties to seek support and provide technical assistance for the ILO, the United Nations Children's Fund,<sup>1047</sup> and national and international non-governmental organizations in order to develop a comprehensive programme to prevent child labour.<sup>1048</sup> The Committee also recommended that state parties strengthen the capacity of the institutions responsible for the control and

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1043 Concluding Observation No 61, Kenya's Second Report.

1044 *Ibid.*

1045 Concluding Observation No 62(a), Kenya's Second Report.

1046 See the discussion in section 3.3.10.

1047 Hereinafter referred to as "UNICEF".

1048 Concluding Observation No 62(c), Kenya's Second Report.



protection of child labour.<sup>1049</sup>

### 3.3.11 *Child in a child-headed household*

This section discusses circumstances surrounding a child in a child-headed household, the situation of vulnerability faced by the child in a child-headed household, and what makes such a child in need of care and protection. I also propose that a provision be enacted in the Children's Act for the state to assist children in child-headed households directly (through their supervisors or care-givers) and promote the right to family care by providing by material assistance and support programme to preserve and strengthen their families.<sup>1050</sup>

"A child in a child-headed household" is a new phenomenon in the area of law governing children and the innovative part of the Children's Act.<sup>1051</sup> The concept "a child in a child-headed household" is derived from experiences where children head households because parents who become ill with HIV/Aids are less able to work, resulting in the deterioration of the family home.

HIV/Aids seems to play a role in modern patterns of child abandonment.<sup>1052</sup> Fear and

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<sup>1049</sup> Concluding Observation No 62(b), Kenya's Second Report.

<sup>1050</sup> See the discussion in section 4 5 for the proposed provision.

<sup>1051</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 177. See also the discussion in section 2 2 1 8.

<sup>1052</sup> *Sunday Times Metro* (2001-08-22): an unknown mother dumped a baby with a Brakpan (Gauteng) couple, while the couple were holidaying in Ballito North, Durban on 29 Dec 2000.

ignorance about the disease result in the abandonment of children by their HIV positive mothers. This is the reason why many abandoned children grow up as orphans. Thus, the concept “a child in a child-headed household” is also applicable in situations where children become orphans and assume the roles of parents on behalf of their siblings.<sup>1053</sup> In these circumstances, a child who plays the role of a parent bears the burden of fending for and managing the ill-health of a parent or siblings who are infected by their HIV positive mother.

In other situations where the household head is a young girl who does not have any other means of support, there is great potential for her to engage in commercial sex work to make family life financially bearable.<sup>1054</sup> There was a rapid increase in “child-headed households” in South Africa between 2007 and 2009.<sup>1055</sup> These are some of the circumstances that may have led to the enactment of a “child in a child-headed household” provision in the Children’s Act.<sup>1056</sup>

The phenomenon a “child in a child-headed household” is more common in rural

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The baby was admitted to hospital a few days after abandonment and it was discovered that it had a serious internal infection as a natural consequence of HIV/Aids.

<sup>1053</sup> *Ibid*; see also Jewkes “Child Sexual Abuse and HIV Infection” in Ritchter *et al. Sexual Abuse of Young Children in Southern Africa* (2004) 135. See also information accessed from <http://www.unicef.org/southafrica/children.html> on 2008-04-9.

<sup>1054</sup> Jewkes in Ritchter *et al. Sexual Abuse of Young Children in Southern Africa* 135.

<sup>1055</sup> According to Kane-Berman (2009) 43, South Africa had 148 000 child-headed households.

<sup>1056</sup> S 150(2)(b).

communities affected by HIV and Aids.<sup>1057</sup> The fact that children who play the parental role on behalf of their siblings are themselves in need of care and protection, makes the “child in a child-headed household” phenomenon controversial in that<sup>1058</sup> orphaned children may not be taken care of by grandparents or relatives,<sup>1059</sup> grow up as children, or enjoy parental care or family care, but are deemed to undertake adult responsibilities and manage a family group which consists of other children.<sup>1060</sup> During the development of the Children’s Act, the SALRC debated the needs and well-being of children living in “child-headed households”.<sup>1061</sup> Given the increase in HIV and Aids infections in adults, and the fact that options available for formal placement of orphaned children are inadequate to cater for the number of children affected by the HIV/Aids pandemic, the SALRC motivated for the legal recognition of “child-headed households” as a placement option.<sup>1062</sup>

A report was recently released on research conducted in Uganda, Kenya and South Africa on “child-headed households”,<sup>1063</sup> which exposed some of the difficulties faced by orphaned children. The report was supported by testimonies of children who are orphans and victims of the scourge of HIV/Aids.<sup>1064</sup> On the side of South Africa, the report highlighted the

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<sup>1057</sup> Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 196.

<sup>1058</sup> Couzens & Zaal (2009) *Int Journal of Children’s Rights* 300-304.

<sup>1059</sup> *The Star* (2005-10-11).

<sup>1060</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 177.

<sup>1061</sup> Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 196.

<sup>1062</sup> SALRC *The Review of the Child Care Act* (1998) par 4 2 7; Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 196.

<sup>1063</sup> *The Star* (2005-10-11); SAHRC *Equality Update* (2005) 4-5.

<sup>1064</sup> *Ibid.*

government's failure to intervene and to keep children in schools.<sup>1065</sup> The Children's Act acknowledged that "child-headed households" reduce the incidence of removal of children from the family home and for this reason provided for the designation of an adult person to perform general supervisory functions in a child-headed household.<sup>1066</sup> The adult supervisor may be designated by the children's court,<sup>1067</sup> organ of the state<sup>1068</sup> or non-governmental organization<sup>1069</sup> determined by the provincial head of social development.

According to the Children's Act, the supervising adult must be a fit and proper person to supervise the household.<sup>1070</sup> This means that a person that is unsuitable to work with a child is not a fit and proper person.<sup>1071</sup> Before any adult person may be appointed to supervise a household, the adult must be screened and an enquiry be made to determine whether such

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<sup>1065</sup> Amongst others, the report revealed the situation of an orphan girl aged 14 years who said that she feared that her dream of becoming a scientist would not come true if there is no intervention on issues relating to HIV/Aids. The girl who is a South African citizen and a victim of HIV/Aids addressed the press conference and brought to the public attention the fact that there are other children in similar conditions. The girl resides with her grandmother who pays her school fees and the fees of her seven cousins from her pension money. The girl testified that she did not have text books. She also did not have a school uniform and had to rely on hand outs for her school uniform.

<sup>1066</sup> S 137(2); s 46(1)(b); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 177.

<sup>1067</sup> S 137(2)(1) of the Children's Act.

<sup>1068</sup> S 137(2)(2) of the Children's Act.

<sup>1069</sup> S 137(2)(3) of the Children's Act.

<sup>1070</sup> S 37(3)(b).

<sup>1071</sup> S 137(4) of the Children's Act.

adult appears on Part B of the National Child Protection Register.<sup>1072</sup> The Children's Act does not specifically provide that the supervising adult should reside with the children in the household, but the regulations to the Act provide that the supervising adult should at all times be accessible to the household and visit the household periodically (not less than once every two weeks) to support the children and to fulfil the duties prescribed in the regulations.<sup>1073</sup> This may be unrealistic given the fact that children want to explore different things as they develop in life, and may find them themselves in danger without daily supervision.

According to the Children's Act, the supervising adult must perform certain responsibilities on behalf of the child-headed household. According to the Act, the responsibilities include collecting (any social security grants or any grants in terms of the Social Assistance Act;<sup>1074</sup> or any assistance which the household is entitled to) and administering any duties (psychological, social and emotional support) on behalf of all members of the household;<sup>1075</sup> ensuring that members of the household attend school or an appropriate education programme;<sup>1076</sup> assisting with the supervision of homework;<sup>1077</sup> educating the members of the

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<sup>1072</sup> Part B affects professional, non-professionals, volunteers, members of management committees or boards or organizations, drivers, security personnel, librarians, traditional leaders, traditional healers. Basically, Part B register includes anyone who works or has access to children in the course of rendering services. See also the discussion in section 4 2 1.

<sup>1073</sup> National Norms and Standards (k)(vii)(2) of the reg to the Children's Act, Annexure L. See also Kassin & Mahery in Boezaart (ed.) *Child Law in South Africa* 199.

<sup>1074</sup> S 137(5)(a).

<sup>1075</sup> Reg 56(a).

<sup>1076</sup> Reg 56(b).

<sup>1077</sup> Reg 56(c).

household with regards to basic health, hygiene and sexually transmitted infections;<sup>1078</sup> assisting with health care requirements, including taking medicines and assisting members with disabilities;<sup>1079</sup> assisting members of the household with legal documentation;<sup>1080</sup> compiling a roster in consultation with members of the household and indicating the responsibility of various members in relation to domestic chores;<sup>1081</sup> in consultation with the social worker attempting to reconnect the members of such household with their parents or relatives;<sup>1082</sup> engaging members of the household regarding issues of the household;<sup>1083</sup> ensuring proper provision of resources for such household's basic needs;<sup>1084</sup> ensuring that the household budget is used properly and that the financial budget is adhered to;<sup>1085</sup> keeping a proper record of expenditure of the household; and<sup>1086</sup> using available and applicable child protection services to ensure the safety and well-being of the members of the household.<sup>1087</sup>

Where the supervising adult collects and administers money for a child-headed household, such adult is accountable to the organ of state or the NGO that designated him or her to

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1078 Reg 56(d).  
1079 Reg 56(e).  
1080 Reg 56(f).  
1081 Reg 56(g).  
1082 Reg 56(h).  
1083 Reg 56(i).  
1084 Reg 56(j).  
1085 Reg 56(k).  
1086 Reg 56(l).  
1087 Reg 56(m).

supervise the household. In terms of the regulation to the Children's Act,<sup>1088</sup> the supervising adult must:

- (1) In consultation with the members of the household, develop a monthly expenditure plan reflecting available financial resources and payments;
- (2) Ensure that the monthly expenditure plan is signed by the child as the head of the household; and
- (3) Submit the monthly expenditure plan, duly signed to the clerk of the children's court, the organ of the state or the NGO, as the case may be, together with such original documents, receipts, invoices and other documentation that may serve as proof of expenditure incurred.

The Children's Act requires that the supervising adult consults with the child-heading the household depending on the age, maturity and stage of development of the child, on any decision concerning the household and the members of the household.<sup>1089</sup> This provision enhances the principle of child participation in matters affecting the child as provided for in section 10 of the Children's Act.<sup>1090</sup>

Apart from the responsibilities performed by the supervising adult, the Children's Act stipulates certain responsibilities to the child-heading the household. These are to:

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<sup>1088</sup> Reg 57(1); see also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 199.

<sup>1089</sup> S 137(6); see also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 200.

<sup>1090</sup> See the discussion in section 5.5.

- (1) Collect and administer for the child-headed household any social security grants or grants in terms of the Social Assistance Act or any other assistance to which the household is entitled;<sup>1091</sup>
- (2) Make day-to-day decisions relating to the household and the children in the household;<sup>1092</sup>
- (3) In consultation with other members of the household, given their maturity, age and level of development, report the supervising adult to the organ of the state or NGO if the child or members of the household are not satisfied with the manner in which the supervising adult performs his or her duties.<sup>1093</sup>

The Children's Act provides for prevention and early intervention programmes which include developing appropriate parenting skills in parents and care-givers for the best interests of children with disabilities and chronic illness.<sup>1094</sup> Furthermore, the Act provides for early intervention programmes which include supporting and assisting families with a chronically ill or terminally ill family member.<sup>1095</sup> Such may be recommended in situations of child-headed households and children living with HIV/Aids. Furthermore, the Children's Act imposes on the child who is heading the household the duty to collect and administer any social security grants or grants in terms of the Social Assistance Act to which the household is entitled.<sup>1096</sup>

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<sup>1091</sup> S 137(5)(a); Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 200.

<sup>1092</sup> S 137(7). See also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 200.

<sup>1093</sup> S 137(8). See also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 200.

<sup>1094</sup> S 144(1)(c). See the discussion in section 4 3.

<sup>1095</sup> S 144(2)(d). See the discussion in sections 4 2 1 and 4 3.

<sup>1096</sup> S 137(5)(a).



Apart from the child-support grant, the disability grant is provided in terms of section 9 of the Social Assistance Act as follows:

“A person is, subject to section 5, eligible for a disability grant if he or she – is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession, the means needed to enable him or her to provide for his or her maintenance.”

Furthermore, Regulation 3(1) of the Social Assistance Act provides that:<sup>1097</sup>

“(b) the disability if confirmed by a valid medical report of a medical officer and the report specifies whether the disability is permanent or temporary provides that in the case of a temporary disability, the medical report issued by a medical officer must at the date of application not be older than 3 months”.

The disability grant is offered to persons living with HIV/Aids, who are 18 years or older, and in the advanced stages of the disease when their “T-helper cells”<sup>1098</sup> are 500 or below. The grant expires after six months and patients may not receive the grant if their T-helper cells

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<sup>1097</sup> GG 22 February 2005 No 27316.

<sup>1098</sup> Accessed from <http://the-aids-pandemic.blogspot.com/2006/11/hiv-aids-and-south-african-disability.html> on 2008-04-9: The “T-helper cells” are also called “CD4 Count” or “T lymphocytes”. They are white blood cells that play a role in the immune system.

are more than 500.<sup>1099</sup>

Although this may be a good source of support, particularly to a child-headed household who has a parent living with HIV/Aids whose body could have been weakened by the disease, I submit that when the body weakens, it is only appropriate that earlier intervention with regard to the grant be recommended, rather than using the reduction in “T-helper cells” as the only guide. While this may be good intervention for people living with HIV/Aids, the system has the potential to be abused by HIV/Aids infected persons. It is possible for an infected person to cease medication to keep his or her body weak in order to continue receiving the grant to support their families.<sup>1100</sup> This conduct is possible particularly in situations where the person living with HIV/Aids has lost hope of employment, where it is not possible to get employment, or the HIV/Aids infected person lacks confidence to face the public that may be aware of his or her illness, given the stigma attached to HIV/Aids.

Thus, I am of the view that for the disability grant to serve the purpose of assisting people

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<sup>1099</sup> Accessed from <http://www.aidsmap.com/en/docs/D2596cd3-B444-4F86-AE85-DDC5F048CEF3.asp> on 2008-04-09: there are two main types of T-helper cells. One T-helper cell orchestrates the body’s response to certain micro-organisms such as viruses. The other T-Cell destroys cells that are infected and produces antiretroviral substances. The latter cells have a molecule called CD8. HIV as a virus attached itself to the CD4 molecule allowing the virus to enter and infect these cells. Even while a person with HIV feels well and has no symptoms, billions of CD4 T cells are infected by HIV and are destroyed each day and billions more CD4 T-cells are produced to replace them.

<sup>1100</sup> Accessed from <http://the-aids-pandemic.blogspot.com/2006/11/hivaids-andsouth-african-disability.html> on 2008-04-9.

living with HIV/Aids, it must be made available until the person is fit to assume employment and the person must be employed when the grant is discontinued.

Other legislation that may contribute towards addressing situations of “child-headed households” is, amongst others, the Medical Schemes Act,<sup>1101</sup> Medicines and Related Substances and Control Amendment Act<sup>1102</sup> and the National Education Policy Act.<sup>1103</sup> The Employment Equity Act<sup>1104</sup> prohibits unfair discrimination on the grounds of HIV status.<sup>1105</sup> Although the Employment Equity Act does not apply to “child-headed households” *per se*, the Act may protect a parent of a child in a child-headed household who is discriminated against in his or her employment as a result of his or her ill-health relating to HIV and Aids.

Other measures taken before the enactment of the Children’s Act protect children from the transmission of HIV and Aids. This is evident in the case of *Minister of Health v Treatment*

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<sup>1101</sup> 131 of 1998, regulates medical aid schemes in South Africa and provides for the minimum benefits that the schemes offer to its members. The Act also ensures that medical schemes do not discriminate against people with HIV/Aids who cannot afford to pay their contributions in the scheme.

<sup>1102</sup> 90 of 1997; the Act allows government to use measures such as parallel importation and generic substitution to lower the costs of HIV/Aids medication.

<sup>1103</sup> 27 of 1996, s 3(4) provides for the drafting of a national policy on educators and learners and the HIV pandemic. It is for the latter reasons that the Minister of Education launched the “National Policy on HIV/Aids for Educators and Learners”. The policy contains guidelines on the management of HIV/Aids in schools and the support of educators and learners affected and infected by HIV/Aids.

<sup>1104</sup> 55 of 1998.

<sup>1105</sup> S 6(1).

*Action Campaign*<sup>1106</sup> which concerned the restrictions by the South African government on the availability of Nevirapine.<sup>1107</sup> The Constitutional Court ruled in favour of the High Court decision which found that government violated the constitutional provision which guarantees access to health care services and the right to reproductive health.<sup>1108</sup> The Constitutional Court held that the provision of a single dose of Nevirapine to mother and child for the purposes of protecting the child against the transmission of HIV was, as far as the children were concerned, essential.<sup>1109</sup> The children's ability to enjoy all other rights which they were entitled to was treated as urgent by the court. According to the court, the state is obliged to ensure the implementation of the child's right to family care and parental care where such is lacking.<sup>1110</sup>

Thus, I propose that a provision be enacted in the Children's Act which stipulates the responsibility of the state over children in the event parents fail to discharge their

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<sup>1106</sup> 2002 (2) SA 721 (CC). The case started in 2001 when the Treatment Action Campaign, hereinafter referred to as the "TAC", lodged an application in the High Court where it raised amongst other things, an issue as to whether government is constitutionally obliged to plan and implement an effective, comprehensive and progressive plan for the prevention of mother to child transmission of HIV throughout the country. On 21 December 2001, the Pretoria High Court found in favour of the TAC that government violated s 27 of the Constitution. The court ordered government to provide a national comprehensive rollout plan of mother to child transmission by 31 March 2002.

<sup>1107</sup> An anti-retroviral medication that reduces the risk of the mother passing HIV to her unborn child.

<sup>1108</sup> S 27(2) read with s 27(1)(a) of the Constitution. See 725E.

<sup>1109</sup> 725A.

<sup>1110</sup> 725A-B.

responsibilities, or where there are no parents at all to provide care to children for their development and well-being.<sup>1111</sup>

### 3.3.11.1 *Child in a child-headed household in terms of international law*

This section discusses the extent to which the CRC recognises child-headed families. Since there is no provision regarding child-headed households in the CRC, I reflect on the views of the Committee on the Rights of the Child regarding child-headed households with regard to South Africa's initial report towards the CRC and propose that a provision be enacted in the Children's Act that would provide for the responsibility of the state to assist child-headed households.<sup>1112</sup>

The CRC obliges state parties to recognise the right of the child to physical, mental, spiritual, moral and social development.<sup>1113</sup> The CRC also encourages regular attendance at school to reduce drop-out rates.<sup>1114</sup> Like other states, South Africa, as a signatory to the CRC, is under obligation to ensure that every child has access to education, attends school regularly, and does not drop out of school, as is the case with child-headed households.

The Committee on the Right of the Child devoted increased attention to HIV/Aids in its

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<sup>1111</sup> See the discussion in section 4 5 for the proposed provision.

<sup>1112</sup> *Ibid.*

<sup>1113</sup> Art 27(1).

<sup>1114</sup> Art 28(1)(e).

examination of reports in a separate section under “Basic Health and Welfare”.<sup>1115</sup> The Committee shared its serious concern regarding the high prevalence rate of HIV/Aids infections especially among women in their child-bearing years.<sup>1116</sup> The Committee was concerned about inappropriate traditional practices, stigma, and lack of knowledge of prevention methods.<sup>1117</sup> In its General Comment No 3,<sup>1118</sup> the Committee urged states to strengthen their efforts to combat the spread and effects of HIV/Aids by, amongst other things, conducting education campaigns, improving the prevention of mother-to-child transmission programme by providing free antiretroviral treatment and improving protection and support for Aids orphans.<sup>1119</sup>

The plight of child-headed households in South Africa has attracted international attention. Amongst other comments, the Committee remarked on South Africa’s initial report towards the CRC about the increase in child-headed families and the impact it has on children.<sup>1120</sup> The Committee noted the increase in single parenting, child-headed households, and polygamous marriages in South Africa as a concern in terms of honouring Article 18 of the CRC.<sup>1121</sup> The Committee urged South Africa to increase its efforts to increase family education and awareness through provision of training for parents, particularly regarding

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<sup>1115</sup> Hodgkin & Newell (2007) 362.

<sup>1116</sup> *Ibid.*

<sup>1117</sup> *Ibid.*

<sup>1118</sup> On HIV/Aids and the right of the child (CRC/GC/2003/3)

<sup>1119</sup> *Ibid.*

<sup>1120</sup> See the discussion in section 2.3.

<sup>1121</sup> Concluding Observation No 22.

parental guidance and joint parental responsibilities.<sup>1122</sup>

I am of the view that the Committee should have targeted issues relating to child-headed households separate from polygamous marriages to give child-headed household issues priority in order to effect more comprehensive input in that area.

In 2003 the Committee released General Comment No 3 on HIV and Aids and the rights of the child which addresses the issue of child headed-households and the kind of support that should be available to such households.<sup>1123</sup> The Comment noted that special attention must be given to children orphaned by Aids and those from affected families, including child-headed households as this category of children is most often affected by HIV infection.<sup>1124</sup>

The Comment supports the notion that orphans are best protected and cared for when efforts are made to keep siblings together and in the care of relatives and calls on state parties to provide support, financial or otherwise, to child-headed households.<sup>1125</sup> I propose that South incorporate a provision for financial and support programmes in the Children's Act for child-headed households.<sup>1126</sup> The ACRWC,<sup>1127</sup> the ACHPR<sup>1128</sup> and the CRC<sup>1129</sup> have clauses that

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<sup>1122</sup> *Ibid.*

<sup>1123</sup> CRC; GC/2003/3/17 March 2003.

<sup>1124</sup> Par 31.

<sup>1125</sup> Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 197.

<sup>1126</sup> See the discussion in section 4 5.

<sup>1127</sup> Art 11; Viljoen in Boezaart (ed.) *Child Law in South Africa* 339.

<sup>1128</sup> Art 17(1).

guarantee the child the right to education. The ACRWC has the most comprehensive clause and guarantees a child the right to education even after pregnancy.<sup>1130</sup> These international laws will only serve the needs of children if domestic legislation regarding education is aligned with them. For instance, the Children's Act must, consonant with the ACRWC, enact legislation that provides for amongst other things, education for pregnant children or any child who is not able to complete his or her education, either due to poverty or parental responsibilities as the head of the household. Education must be compulsory for all children below the age of 18.

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<sup>1129</sup> Art 28(1) provides that: "State Parties recognise the right of the child to education, and with a view to achieving this rights progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates."

<sup>1130</sup> Art 11(6).



### 3.3.11.2 *Child in a child-headed household in terms of Kenyan law*

There are 1.2 million people living with HIV/Aids in Kenya, and the disease continues to have an impact on children.<sup>1131</sup> Thus, approximately 15% of Kenyan children are one-parent orphans and 2.5% are double orphans.<sup>1132</sup> The alarming rate of HIV/Aids infection in Kenya prompted the publication of the HIV/Aids Prevention and Control Act.<sup>1133</sup> The Act provides for measures that seek to manage, prevent and control the HIV/Aids pandemic.<sup>1134</sup> The Kenyan non-governmental organisations acknowledged the efforts made in drafting the HIV/Aids Prevention and Control Act but argued that HIV/Aids is undermining Kenya's social institutions and economy and proposed that the Ministry of Gender, Children and Social Development establish synergies between treatment and prevention to enable the country to make HIV/Aids a manageable chronic illness, rather than a killer disease.<sup>1135</sup> Like South Africa, the Western Province of Kenya has targeted schools to promote community health interventions and to increase abstinence among adolescents.<sup>1136</sup>

The Committee on the Rights of the Child welcomed the "Kenyan National Strategic Plan on HIV/Aids (2005-2010)" and the guidelines on the feeding of infants and young children in the

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<sup>1131</sup> According to the CIA July 2010: accessed from <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> on 2011.04.28.

<sup>1132</sup> See the discussion in section 3 3 1 1 1.

<sup>1133</sup> 14 of 2006.

<sup>1134</sup> Njue *et al.* *Increasing Abstinence among Adolescents* (2004) 11<sup>th</sup> Reproductive Health Priorities Conference North West Province, South Africa. Unpublished conference paper 4.

<sup>1135</sup> Accessed from <http://www.savethechildren.org>WhereWeWork>Africa> on 2008-06-16.

<sup>1136</sup> Njue *et al.* (2004) Unpublished conference paper 4.

context of HIV/Aids.<sup>1137</sup> The Committee noted the decline in HIV/Aids infection rates in recent years, but was concerned about the high number of infections in children at the age of five, adolescent girls, and the high number of HIV/Aids orphans and child-headed households.<sup>1138</sup> The government of Kenya's funding towards antiretroviral medication was found to be insufficient. It was also found that insufficient resources had been allocated to sex education and prevention amongst adolescents.<sup>1139</sup> In its recommendations, the Committee on the Rights of the Child took into account its General Comment No 3 on HIV/Aids and the rights of children.<sup>1140</sup> It recommended that Kenya strengthen its efforts to combat the spread and effects of HIV/Aids by effectively implementing its National Strategic Plan, policies and guidelines on HIV/Aids, and infant and child feeding.<sup>1141</sup> The Committee recommended that the rights of children be integrated and that children must be involved in the development and implementation of HIV/Aids policies and strategies.<sup>1142</sup> There were no specific recommendations on child-headed households.

The Children's Act (Kenya) provides that a child who is terminally ill, or whose parent is terminally ill, is a child in need of care and protection.<sup>1143</sup> This provision is wide enough to include children of parents who are suffering from HIV/Aids-related illnesses. However, the

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<sup>1137</sup> Concluding Observation No 51, Second Country Report.

<sup>1138</sup> *Ibid.*

<sup>1139</sup> *Ibid.*

<sup>1140</sup> CRC/GC/2003/3.

<sup>1141</sup> Concluding Observation No 52 of the Second Country Report.

<sup>1142</sup> *Ibid.*

<sup>1143</sup> S 119(1)(l).

provision does not cover a “child in a child-headed household” as is the case with the South African Children’s Act. Issues relating to “child-headed households” have become part of a global agenda and Kenya must take steps to acknowledge “child-headed households” as new family arrangements and provide them with proper protection.

### 3.4 Recommendations and conclusion

The analysis of the grounds for mandatory alternative care interventions revealed the high incidence of vulnerability of children in the family environment, the status of children during the operation of the Child Care Act, and measures taken by other legislation to address vulnerability. The Children’s Act made improvements regarding these grounds. The grounds which were provided under the Child Care Act focused more on the fault of the parent, that is, parents who are “unfit or unable”.

Subsequently, the Children’s Act took an “unfit” and “child-centred” approach in terms of the Child Care Amendment Act. Hence, the Children’s Act has a combination of parents who are “unfit”, as expressed in section 150(1)(a), and children in need of care and protection, that is, a “child-centred” approach.<sup>1144</sup> The Children’s Act also introduced important circumstances that identify children as children in need of care and protection.<sup>1145</sup>

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<sup>1144</sup> See the discussion in section 3 2 1.

<sup>1145</sup> Such as, “child-headed households”; “child as a victim of child labour”; “child has been abandoned or orphaned and is without any visible means of support”; “a child who lives or

The discussion revealed that the ground “has been abandoned or is without visible means of support” in the Children’s Act has two meanings and that each ground must have a special provision. Thus, I propose that section 150(1)(a) be amended to read as follows:

“150 (1) A child is in need of care and protection if, the child –  
(a) has been abandoned;  
(b) is without visible means of support.”

The Children’s Act provides for “a child who is maltreated, abused, degraded and neglected” as a ground for mandatory care intervention.<sup>1146</sup> However, I am of the view that more specific and separate provisions should be established to remove any ambiguity and opportunity for misinterpretation with regards to this ground as follows:

“150 (1) A child is in need of care and protection if, the child –  
(a) is sexually abused;<sup>1147</sup>  
(b) had corporal punishment administered to him or her;<sup>1148</sup> and  
(c) is exposed to, or suffered domestic violence.”<sup>1149</sup>

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works on the streets or begs for a living”; and “a child who may be at risk if returned to the custody of the parent, guardian or care-giver”. These grounds should be considered for inclusion in the Kenyan Children’s Act.

<sup>1146</sup> S 150(1)(i).

<sup>1147</sup> This is based on the discussion in section 3 3 9 1 1.

<sup>1148</sup> This is based on the discussion in section 3 3 9 1 2.

What is most significant, is that these grounds targets both sexual and physical abuse of children. However, I agree with Zaal<sup>1150</sup> that the definitions of some of the concepts such as abandonment, abuse, commercial sexual exploitation, exploitation, neglect and sexual abuse are not linked to the grounds but apply to the grounds because they are incorporated in the provisions. He argues that where grounds are not limited by definition, they enable presiding officers the freedom to decide on one piece of data that is provided.

Zaal<sup>1151</sup> further argues that in view of the fact that the grounds will more often be affirmed by non-lawyers and social workers, cross referencing which informs the reader about the relevance of the definition should be included.<sup>1152</sup> He, amongst others, highlights that the definition of the concept “neglect” is too broad and may easily be interpreted in a manner

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<sup>1149</sup> This is based on the discussion in section 3 3 9 1 3.

<sup>1150</sup> (2008) 328, see the discussion in section 3 3 8.

<sup>1151</sup> *Ibid.*

<sup>1152</sup> Zaal (2008) 328, refers from s 49-6-1(a) of the West Virginia Code (1977) which shows how definitions should be referred to in alleging grounds. The code reads: “If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the fact to the circuit in the county in which the child resides, or if the petition is being brought by the department, in the county in which the custodial respondent or other named party abuser resides, or in which abuse or neglect occurred, or to the judge of the court in vacation. Under no circumstance may a party file a petition in more than one county based on the same set of facts. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with reference thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought ...”

which encourages removals based on the state of poverty in families.<sup>1153</sup>

I am of the view that grounds should not be limited by linking them to definitions of concepts. Otherwise, we are confining ourselves to the narrow definitions of concepts. The definitions of the concepts must be used as a guide for interpretation of grounds. Furthermore, I find it most significant that proof be provided to the grounds that are asserted.<sup>1154</sup>

I recommend that, amongst others, legislative intervention that is action oriented be taken with regard to the grounds “a child who is maltreated, abused, degraded and neglected”. I propose that South Africa refer to the National Guidelines for the Protection and Welfare of Children drawn by Children First organisation<sup>1155</sup> and promulgate regulations to the Children’s Act to provide for the duty of the Department of Social Development and the Department of Education to provide teachings and other assistance to protect children from situations of abuse, maltreatment and degradation to read as follows:

- “(1) The Department of Social Development shall, collaboratively with the Department of Education –
- (a) provide adequate training to learners to curb physical and sexual abuse, sexual harassment, common assault, bullying, threat to harm, maltreatment and degradation in schools and the family environment;

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<sup>1153</sup> (2008) 331.

<sup>1154</sup> (2008) 324.

<sup>1155</sup> *Children First National Guidelines for the Protection and Welfare of Children* (2004) par 681-682.

- (b) provide psychological help to learners on sexual abuse, sexual harassment common assault, bullying, threat to harm, maltreatment and degradation in schools and the family environment; and
  - (c) provide counselling to learners on sexual abuse, sexual harassment, common assault, bullying, threat to harm, maltreatment and degradation in schools and the family environment.
- (2) The Department of Education and the Department of Social Development shall collaboratively work towards teaching children about sexual and physical abuse by providing education that –
- (a) develops the child's self-esteem, assertiveness and self-protective skill;
  - (b) teaches the child to tell adult persons about any situation they find unsafe, upsetting, threatening, dangerous or abusive;
  - (c) gives the child skills necessary to enable them recognise and resist abuse, victimisation or bullying;
  - (d) teaches the child to say no or get away from an unfriendly person;
  - (e) teaches the child never to allow a stranger to swear them to keep a secret;
  - (f) informs the parents and ensures that any messages communicated to the child are also understood by parents;
  - (g) provides extra lessons to a child with special educational needs;
  - (h) provides teachings in a multi-class situation; and
  - (i) teaches the child about the safe use of technology, particularly with regard to telephone, mobile phone or internet as a protection measure.”

The discussion in the study revealed that the number of primary school girls falling pregnant has increased in the past few years.<sup>1156</sup> This means that the Sexual Offences and Related Matters Act which provides specifically for, amongst others, prosecution of consensual

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<sup>1156</sup> See the discussion in section 3 3 1 1.

sexual acts between children below the age of 16 is not doing much to curb sexual abuse.<sup>1157</sup>

For purposes of protecting pregnant learners and preventing the abandonment of newborns, I propose for South Africa to refer to Wolf's Report<sup>1158</sup> on the Title IX of the Education Amendments Act (California, United States of America) and promulgate regulations to the Children's Act to provide a list of reasonable provisions to protect pregnant learners within schools and the family environment and to provide a range of services to read as follows:

- "(1) The Department of Education shall provide assistance to pregnant learners to enable them complete their basic and high school of learning without interruption by –
- (a) ensuring that no restrictions are placed on learners because of pregnancy;
  - (b) ensuring that no restrictions are placed on participation in extra-curricular activities, the teacher can require notification of a physician to restrict participation of a learner;
  - (c) excuse the pregnant learner from physical education classes or other vigorous activity;
  - (d) allowing a pregnant learner flexibility to rest;
  - (e) making arrangement for a pregnant learner to leave school during school activity with minimal disruption; and
  - (f) making provisions for a pregnant learner to make up for missed work.
- (2) The Department of Education shall, collaboratively with the Department of Health provide –

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<sup>1157</sup> The Act failed to specify penalties for the 29 offences listed in the following sections: ch 2 on rape and compelled rape; ch 3 sexual offences against children; ch 3 on sexual offences against persons who are mentally disabled; s 55 conspiracy, incitement and inducing of another person to commit sexual offence; and s 71 on trafficking in persons.

<sup>1158</sup> Report for Centre for Assessment and Development Policy *Using the Title IX of the Education Amendments Act to protect the rights of Pregnant and Parenting Teens* (1999) Attachment A-2.



- (a) educational materials to male and female learners on gender inequities and traditional views on sex in order to reduce social pressures on unintended pregnancies;
- (b) comprehensive advice and information to pregnant learners, including –
  - (i) about giving birth and accommodation during the time of delivery in every public health institution with standard maternity services;
  - (ii) organising adoption services and temporary child care services;
  - (iii) establishing clear procedures to assist pregnant learners who became pregnant as a result of rape;
  - (iv) placing greater emphasis on the care of a pregnant learner and less on the reputation of the school; and
  - (v) assisting a pregnant learner to achieve good academic results.
- (c) services to pregnant learners in local maternity hospitals as a multidisciplinary team that provides medical attention, counselling and other support necessary for pregnant learners at risk of abandoning their newborns.”<sup>1159</sup>

I also propose that regulations be promulgated in the Children’s Act for the establishment of a forum to enable learners to lodge complaints as follows:

- “1 The Department of Education shall establish a forum to enable learners request for information and lodge complaints for the protection of children against any form of abuse taking place in the school, the forum shall consist of:
- (a) a teacher representing teachers, also a member of the school governing body;
  - (b) two parents whose children are learners in the same school; and
  - (c) a senior learner, representing the learners in the school.
- 2 The forum shall publicise information to all learners concerning how to lodge complaints and the type of complaints that may be lodged with the forum.”

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<sup>1159</sup> UNICEF Report *Gatekeeping Services for Vulnerable Children and Families* (2003) 19.

If the Children’s Act incorporated provisions for every form of sexual exploitation, this would firstly, show the priority and seriousness of the matter, and secondly, every form of exploitation will have an explicit provision with a clear definition, the nature and description of the act of sexual exploitation and the offence that accompanies the act. Research revealed that the grounds “a child has been exploited or lives in circumstances that expose the child to exploitation” is too wide and obviously needs further interpretation. These grounds<sup>1160</sup> were previously overlooked, and in instances where they were mentioned, they were not defined. A number of provisions are discussed within these somewhat broad grounds. I propose that the themes<sup>1161</sup> that are discussed in terms of the grounds “a child has been exploited or lives in circumstances that expose the child to exploitation” be incorporated in the Children’s Act as additional grounds as follows:

- “150 (1) A child is in need of care and protection if, the child –
- (a) is subjected to early marriage;
  - (b) is forced into marriage;
  - (c) has his or her body tampered with or body parts removed, including
    - (i) female genital mutilation;
    - (ii) circumcision;
  - (d) her body tampered with, such as being subjected to virginity testing and;
  - (e) is being sexually exploited, including being subjected to –
    - (i) prostitution; and
    - (ii) trafficking.”

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<sup>1160</sup> This ground was not provided for in the repealed Child Care Act.

<sup>1161</sup> See the discussion in sections 3 3 5 1 “early marriage”, “forced marriage”; 3 3 5 2 “removal of body parts”; 3 3 5 3 1 “child prostitution”; 3 3 5 3 2 “child trafficking”; 3 3 5 2 1 “female genital mutilation”; 3 3 5 2 2 “circumcision”.

I further propose for South Africa to draw lessons from the Prohibition of Child Marriages Act (India) which took a robust approach in curbing child marriages,<sup>1162</sup> to amend section 12 of the Children's Act and incorporate a provision that prohibits early marriage, forced marriage including any form of exploitation, abuse or harmful cultural practises as follows:

- "S 12 (1) No boy or girl under the age of 18 years shall be capable of contracting a valid marriage.
- (2) No one shall exploit the child or expose the child to exploitation in the form of subjecting the child into early marriage or forcing the child to enter into marriage.
  - (3) No person who has parental responsibilities and rights over a child, whether a parent or guardian is allowed to promote the marriage of a child or permit it to be solemnised or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage.<sup>1163</sup>
  - (4) No marriage officer is allowed to consummate a marriage of any male or female child below the age of eighteen.<sup>1164</sup>
  - (5) Any marriage of a male or female child who is below the age of eighteen, shall be null and void if the child is –<sup>1165</sup>
    - (i) taken or enticed to marry;
    - (ii) forcefully compelled or by any deceitful means induced to marry; and
    - (iii) sold or trafficked or used for purposes of getting him or her to marry.
  - (6) Any person who promotes or permit or consummates a marriage or negligently fails to prevent a marriage of a male or female child who is below the age of eighteen from being solemnised, including attending or participating in the marriage shall be-
    - (i) punishable with imprisonment which may extend to two years;
    - (ii) punishable with a fine which may extend to R5 000 or both the fine and imprisonment; or
    - (iii) unless he or she proves that he or she had reason to believe that the marriage was not a child marriage.

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<sup>1162</sup> See the discussion in section 3 3 5 5.

<sup>1163</sup> S 11(1) of the Prohibition of Child Marriages Act (India).

<sup>1164</sup> S 10 of the Prohibition of Child Marriages Act (India).

<sup>1165</sup> S 12(a)-(c) of the Prohibition of Child Marriages Act (India).

- (7) The marriage officer shall be responsible for the official registration of marriages<sup>1166</sup> consummated through traditional, religious or civil law of any person who is eighteen years of age.
- (8) The Department of Home Affairs shall facilitate for the registration of all<sup>1167</sup> marriages designating the days upon which registration may take place and by -
  - (a) providing mobile stations in communities;
  - (b) using markets and government buildings that are accessible by people in different geographical locations, including rural communities; and
  - (c) using faith-based and community based buildings for registration.
- (9) The High Court shall issue an interdict prohibiting any person responsible in subjecting a child to any form of exploitation, abuse or harmful cultural practise as follows: –
  - (a) subjecting a child to early marriage or forced marriage or where such marriage has been arranged or is about to be solemnised;
  - (b) subjecting a child to a procedure for the removal of his or her the body parts including, female genital mutilation;
  - (c) subjecting a child to virginity testing; or
  - (d) subjecting a child to circumcision in contravention of this Act.
- (9) The Department of Social Development shall, collaboratively with inter-sectoral government departments and stakeholders ensure –
  - (a) that incidences of exploitation, abuse, including early marriage, forced marriage, virginity testing, female genital mutilation or circumcision are recorded to allow for an informed and strategic response;
  - (b) that any child who is a victim of exploitation, abuse, including early marriage, forced marriage, female genital mutilation, virginity testing, circumcision is entitled to medical treatment, counselling and any other service that may foster the health, mental and dignity of the child;
  - (c) that communities, through multiple sectors and integration of different approaches, encourage children to go to school from school going-age to completion of tertiary education to acquire economic and livelihoods skills;

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<sup>1166</sup> Emphasis in the ACRWC, see the discussion in section 2 2 2 7.

<sup>1167</sup> Own emphasis.

- (d) the use multi-sectoral approaches such as training and advocacy for awareness-raising to curb the persuasiveness and far-reaching impact of child marriage, forced marriage, virginity testing, female genital mutilation and circumcision;
- (e) collaborative work with diverse community leaders and networks, such as, religious groups, law enforcement agents, health institutions, schools, local government and non-governmental organizations to influence people's attitudes and behaviours to curb exploitation and abuse of children including, early marriages, forced marriages, female genital mutilation and circumcision; and
- (f) that support is provided to the media to bring widespread attention to encourage open discussion about exploitation, abuse of children including, early marriage, virginity testing, female genital mutilation, forced marriage and circumcision.”

It became apparent that South African Children's Act omitted to recognise other grounds for mandatory care intervention that are recognised by the Children's Act (Kenya) as most significant for the development of the child.<sup>1168</sup> South Africa must learn from Kenya<sup>1169</sup> in this

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<sup>1168</sup> See the discussion in section 3 2 3.

<sup>1169</sup> The following grounds incorporated in Children's Act (Kenya) are omitted in the South African Children's Act:

- “(g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is kept in any premises which, in the opinion of a medical officer are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is unlawfully confined or is ill-treated; or

regard and include more grounds for mandatory alternative care interventions which are omitted South Africa's Children's Act. South Africa must incorporate the following provisions:

- “150 (1) A child is in need of care and protection if, the child –
- (a) is prevented from receiving education;<sup>1170</sup>
  - (b) is kept in any premises which in the opinion of a medical officer are overcrowded, unsanitary or dangerous;<sup>1171</sup>
  - (b) a pregnant child;<sup>1172</sup>
  - (c) is a terminally ill child;<sup>1173</sup>
  - (d) is disabled and is unlawfully confined or is ill-treated; and<sup>1174</sup>
  - (e) is displaced as a consequence of war, civil disturbances, or natural disaster.”<sup>1175</sup>

Children need care and protection in order to exercise the right to family life. Children also need capacity to exercise their fundamental rights for their development and well-being,

- 
- (n) who is displaced as a consequence of war, civil disturbances, natural disaster; or
  - (o) if any of the offences mentioned in the Third Schedule of this Act has been committed against him or if he is the member of the same household as a child against whom any such offence has been committed, or is a member of the same household as person who has been convicted of such an offence against a child; or
- (2) A child apprehended in this section shall be placed in separate facilities from a child offender's facilities”.

<sup>1170</sup> S 119(1)(g).

<sup>1171</sup> S 119(1)(i).

<sup>1172</sup> S 119(1)(k).

<sup>1173</sup> S 119(1)(l).

<sup>1174</sup> S 119(1)(m).

<sup>1175</sup> S 119(1)(p).

provision of basic necessities,<sup>1176</sup> and protection from neglect<sup>1177</sup> to enable them to participate in society freely and unhindered with a clear sense of security and self-worth for them to grow as a responsible citizen of the country. At this stage, my question is whether the grounds “a child who is without visible means of support” on its own, attracts a mandatory alternative care intervention. It clearly does not.<sup>1178</sup> A child who is without visible means of support is in need of financial assistance to enable him or her to live in the family for his or her development and well-being. Such a child is not in need of alternative care. Thus, the child would hardly reap any benefit if he or she were to be placed in alternative care for the simple reason that he or she lives in a destitute family.

I am of the view that parents, guardians or care-givers have the responsibility to ensure that family life is conducive to the development and well-being of the child. If parents are not able to provide for the family, I opine that the state<sup>1179</sup> must do all it can to support parents and guardians in their children-rearing responsibilities and ensure that mandatory alternative care intervention is a last option. Thus, the child must remain in the family environment wherever possible.

I therefore propose (for the purposes of addressing concerns raised in the discussion of this chapter)<sup>1180</sup> for South Africa to draw lessons from section 18(1) of the Northern Ireland Order,

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<sup>1176</sup> S 28(1)(c); s 144(2)(a) of the Children’s Act. See also the discussion in section 4 2 1.

<sup>1177</sup> S 28(1)(d); s 144(1)(f) of the Children’s Act. See also the discussion in section 4 2 1.

<sup>1178</sup> See the discussion in section 3 3 1 2.

<sup>1179</sup> See the discussion in section 4 2 1.

<sup>1180</sup> See the discussion in section 3 3 1 2, see also the discussion in section 4 2 1.

which provides for the duty of the state to assist children in need and their families. South Africa must either amend the regulations to the Social Assistance Act with regard to child-support grant or promulgate new regulations to section 150(1)(a) of the Children's Act in relation to "children without visible means of support" to read as follows:

- "1 It shall be the duty of the state to provide –
- (a) safeguards and promote the welfare and the needs of children who are 'without visible means of support';<sup>1181</sup>
  - (b) any service to any family member who has parental responsibility of the child, if the service is provided with a view to safeguarding and promoting the welfare of children; and<sup>1182</sup>
  - (c) so far as it is consistent with such duty, provide service that will promote the upbringing of children by their families, including a range of personal social services appropriate to the needs of children."<sup>1183</sup>

South Africa must also draw lessons from Children, Young Persons and their Families Act (New Zealand)<sup>1184</sup> and Children Act (United Kingdom)<sup>1185</sup> which provide services for children in need and their families and the Consolidated Act on Social Services (Denmark)<sup>1186</sup> which recognises the fact that children's needs are different according to age and stages of development.

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<sup>1181</sup> S 18(1)(a).

<sup>1182</sup> S 18(1)(c).

<sup>1183</sup> S 18(1)(b).

<sup>1184</sup> See the discussion in section 3 3 1 2 2.

<sup>1185</sup> *Ibid.*

<sup>1186</sup> *Ibid.*



Thus, I propose for South Africa to learn from these countries and amend the regulations to the Social Assistance Act to read as follows:

“1 A child whose parents are unemployed, or low income earners of less than R 2 500 per month, is eligible to receive a child-support grant in accordance with his or her age<sup>1187</sup> and approximated needs on a monthly basis as follows -<sup>1188</sup>

- (a). if a baby between age 0-2, an amount of R 1 100 per child;
- (b). if a toddler between age 3-6, an amount of R 750 per child; and
- (c). if older and between age 7-18, an amount of R 650 per child.”

I further propose that an additional provision for “special temporary family maintenance”<sup>1189</sup> to families without means of subsistence be entrenched in the Social Assistance Act or the South African Children’s Act in order to improve the conditions of children in families to read as follows:

“1 The Department of Social Development shall provide a family without means of subsistence or with an income of less than R 1 500 per month, a ‘special temporary family maintenance’.

- (a) Where parents –

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<sup>1187</sup> I have selected the three age groups and used interviews to get a sense regarding costs for basic necessities in families. See the discussion in section 3 3 1 2 2, see also Annexure “B” and “C” of interviews held with child-support grant recipients.

<sup>1188</sup> See Emerek Report *Fiscal System and Female Employment in Denmark* (2009) 20.

<sup>1189</sup> See the discussion in section 3 3 1 2.

- (i) are employed (as part time, temporary or casual workers) and both of them earning less than R 1 500 per month, shall receive a 'top up' cash benefit of R 1 000 as approximation for costs necessary for basic necessities of the family;
  - (ii) are unemployed, (including those who do not qualify for unemployment insurance fund (UIF) or who qualified for UIF but such fund had ceased) both parents shall receive a cash benefit of R 2 500 per month as approximation for costs necessary for basic necessities of the family; and
  - (iii) are employed (as part time, temporary or casual workers) and both of them earning more than R 2 500 per month, an amount approximated to cover costs necessary for basic necessities of the family, the cash benefit must cease to apply on the month when the parents earned the income which in terms of amount, is an approximation for costs necessary for basic necessities of the family.
- (b) Where a single parent –
- (i) is unemployed, (including a parent who do not qualify for unemployment insurance fund or who qualified for UIF but such fund had ceased) he or she shall receive a cash benefit of R 1 500 per month as approximation for costs necessary for basic necessities of the family;
  - (ii) is employed (as part time, temporary or casual worker) earning less than R 1 000 per month, a 'top up' cash benefit of R 500 shall be paid as approximation for costs necessary for basic necessities of the family; and
  - (iii) earns more than R 1 500 per month, an amount approximated to cover costs necessary for basic necessities of the family, the 'top up' cash benefit must cease to apply on the month when the parent earned an amount approximated for costs necessary for basic

necessities of the family.

- 2 A 'special temporary family maintenance' as mentioned in subsection (1), shall be -
- (a) adjusted consistently with the annual inflation rate;
  - (b) granted to a family 'without visible means of support' for a period not exceeding four months;
  - (c) granted to a family that produces proof that something is being done to address the situation of poverty in the family including, listing the names of the parents and family members with the Department of Labour (Unemployment Unit) for employment opportunities; and
  - (d) reviewed for further payment upon expiry of the four months in situations where there are no prospects of employment."

I recommend that the provision of a child who "displays behaviour which cannot be controlled by the parent or care giver",<sup>1190</sup> be amended.<sup>1191</sup> I am also concerned that, apart from the provision that regards a child who cannot be controlled by the parent or care-giver as a child in need of care, there is less emphasis on children who need guidance and support for their behaviour and development in the Children's Act. I therefore propose that South Africa refer

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<sup>1190</sup> S 150(1)(2) of the Children.

<sup>1191</sup> The following provision is recommended: "a child is in need of care and protection, if the child needs guidance and support that instils positive behaviour by parents or any person who has care of the child", see the discussion in section 3 3 2.

to the Child Protection Act (Queensland)<sup>1192</sup> regarding the provision for a statement of standards to promote good behaviour and promulgate regulations to the Children's Act to provide for skills to parents or anyone who has care of the child to promote positive behaviour in the child.

The proposed provision will ensure that the parent or care-giver provides special support and guidance for the behaviour of the child, rather than using physical force when dealing with the child. Such guidance and support will also be an early intervention or preventative measure<sup>1193</sup> for the child to be brought up in the family rather than secure care, to read as follows:

- "1 The Department of Social Development shall, collaboratively with the Department of Education, provide parents, or anyone who has care of the child, with skills to promote positive behaviour in the life of a child who needs guidance and support for his or her behaviour and development.
  
- 2 Parents or anyone who has care of the child shall receive teaching and other training methods, to -
  - (a) observe and analyse the situation of the child before intervention;
  - (b) inspect the environmental circumstances of the child, including the child's peer group and other social surrounding;
  - (c) portray good role models to show children what is expected of them;

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<sup>1192</sup> S 122. See the discussion in section 3 3 2 2.

<sup>1193</sup> See the discussion in sections 3 3 2 and 4 3.

- (d) listen and ask questions to children, to help parents understand the reasons for children's challenging behaviour;
- (e) use positive reinforcement and communicate with children when they are pleased with something they have done;
- (f) focus on a child's strengths, such as their personality and talents and not solely on the child's challenging behaviour;
- (g) reward good behaviour by offering an incentive for a child to behave positively and let the child know when there are improvement he or she has done;
- (h) establish and explain family routines to the child that assist the household run smoothly and make the child aware of how and what he or she may be expected to do;
- (i) encourage shared learning to a child by demonstrating a skill and letting the child take responsibility to reinforce the skill;
- (j) promote privileges and reward by asking the child to do something that the child would rather avoid in order to do something he or she likes;<sup>1194</sup>
- (k) acknowledge anger and allow time to listen to the child;
- (l) prepare for difficult situations to avoid conflicts with the child;
- (m) calmly and firmly explain his or her rules and boundaries to the child;
- (n) create a calm and safe environment to reduce anxiety and stress for himself or herself and the child; and
- (o) determine the need for professional assistance and other expertise where necessary.

3 In order to encourage the participation of children in working towards promoting positive behaviour, the parent or anyone who has care of the child must –

- (a) endeavour by care to alleviate feelings of insecurity and fear that may contribute towards uncontrollable behaviour when communicating with the child;

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<sup>1194</sup>

For example, let the child eat all his or her dinner so that he or she can watch TV rather than if he or she does not eat dinner, he or she cannot watch TV.

- (b) communicate with other significant people in the life of the child;
- (c) understand the reasons for, or the extent of, the uncontrollable behaviour and work together with the child to resolve it; and
- (d) listen to and communicate with the child to enable the child to express his or her needs and assist the child to understand the expectations of the parent.”

In addressing issues relating to children who live, work or beg for a living on the streets, I propose that the Department of Social Development implement a programme that will commence with an evidence-based study on children living on the streets, including the involvement of the community and the need for NGOs to play role in the reunification of children with their parents and families. I further recommend that funding be provided for such intervention programmes to ensure proper and successful coordination of services. Strategies for intervention programmes must consider the following:

- “1 The need to conduct an evidence-based study on issues relating to children who live, work or beg for a living on the streets, including;
  - (a) a best practice survey of responses to issues relating to street children; and
  - (b) recommendations for a process that would review legislation and policies to tackle issues relating to street children and how these issues could be addressed.
- 2 The need for coordination of responses to the rights of street children and solicit further input from non-governmental organisations.
- 3 The need for further research to fill information gap on the effect of street environments on the development of children.
- 4 Conduct capacity assessment of non-governmental organisations providing services to street children in order to intervene around capacity building.

- 5 Mobilise community members to allow street children access to their homes in order to hand them over to the Department of South African Police Services or the Department of Social Development for purposes of family reunification.
- 6 Provide financial and human resources to the responsible stakeholders in order to meet the challenge of providing for street children.

South Africa made improvements by enacting the Prevention of and Treatment for Substance Abuse Act for a child who “is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency” by providing, amongst others, committal of persons to treatment, rehabilitation and reduction of substance abuse.<sup>1195</sup> I find the establishment of community-based service centres which ensure that service users receive treatment in the community (which is also within the family environment), a great improvement for the promotion of family life.<sup>1196</sup> However, it would be more conducive also strength the family structure if assessment and treatment is undertaken at home.<sup>1197</sup> This means secure care must be considered when all else fails.

I therefore, recommend that South Africa refer to United Kingdom<sup>1198</sup> home care services provided to older persons and incorporate a provision for home-based care for children addicted to dependence-producing substances to read as follows:

“1 A child who is suspected of using dependence-producing substances must be compelled

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<sup>1195</sup> Preamble of the Act. See the discussion in section 3 3 4.

<sup>1196</sup> S 20.

<sup>1197</sup> See the discussion in section 3 3 4.

<sup>1198</sup> See the discussion in section 3 3 4 2.

by the head of the Department of Social Development or law<sup>1199</sup> to mandatory assessment, treatment and monitoring of services he or she receives in relation to dependence-producing substances.

- 2 A child who is suspected of using dependence-producing substances must receive services in relation to dependence-producing substances at home, before consideration is made to undertake assessment, administer treatment and other services in a community-based centre.
- 3 The Department of Social Development must ensure that the child who is suspected of using dependence-producing substances, is assessed and treated by –
  - (a) service providers or care-givers who are contracted with the Department of Social Development to provide home care;
  - (b) service providers who comply with the health, safety and security legislation and policies that apply in circumstances of treatment for dependence-producing substances;
  - (c) service provider who able to identify services that are effective and consonant with the needs of the service user;
  - (a) service providers who are able to provide service users with rotas that inform service users of the services they are to receive prior to service;
  - (b) service providers who are always appropriate to meet the agreed care;
  - (c) service providers who are permitted to provide services upon receipt of training that meets the National Minimum Care Standards and Norms (to be prepared by the Department of Social Development);
  - (d) service providers whose services are easily matched to the needs of the service user;

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<sup>1199</sup> S 75(b) of the Children and Young Persons Act (Care and Protection) (New South Wales). See the discussion in section 3 3 4 2.



- (e) services providers who are able to provide regular care-givers to enable the smooth implementation and progress monitoring of services;
- (f) service provider who is sensitive to the changing needs of the service user; and
- (g) service provider who makes the service user aware of the procedure to be used to raise issues of concern in relation to services and provide satisfactory response.”

The Prevention of and Treatment for Substance Abuse Act does not provide for a system to monitor services by service users. I therefore propose that the Department of Social Development establish a framework to be used by both community-based service centres and home-based carers to assess and monitor treatment by service users. The framework must capture information that can be used to demonstrate positive change in the life of a child service user. Apart from the information relating to personal identification, the framework must include appropriate, timeous and accurate information that dictates quality working practices and when a particular activity is most appropriately actioned to manage programme performance and progress as follows:

**Proposed Framework for Assessment and Monitoring of Treatment for a Child who is Addicted to Dependence-Producing Substance**

<b>12 Months of Receipt of Home-Based Treatment</b>				
<b>Record: 1<sup>st</sup> Quarter</b>				
<b>Information/Record</b>	<b>Date</b>	<b>Documented Proof</b>	<b>Action/Progress</b>	<b>Recommendations</b>
Evidence of meeting with the child and parent or family member before commencement of treatment				
Evidence of visits made by the service provider to the family home of the child for treatment				
Evidence of follow-up visits for treatment				
Evidence of communication between the service provider, the child and the parents or family of the child				
Evidence of up to date plan for treatment and communication of same with the child and parent or family member				
Evidence of regular support and supervision				
Evidence that the child's lifestyle is considered and not disrupted, for example meal times, school and other excursions				
Evidence of health and safety guidance provided to the child				
Evidence of any noticeable deterioration in the health of the child or mental or physical frailty				
Evidence of any medication that is provided or taken by the child				

Evidence that the child and parent or family is being informed before the child participates in the treatment and that the views of the child are taken into account				
Evidence that the child's privacy, dignity and cultural needs are taken care of				
Evidence that the child is informed about the gender of the staff that is attending to him or her				
Evidence that the child, parent or family member is informed in advance each time a service provider has to be changed				
Evidence that family members or relatives are involved in providing support to the child receiving treatment				
Evidence and record of time sheet that is signed by the child, parent or family member at each visit				

The discussion in this chapter revealed that the Sexual Offences and Related Matters Amendment Act does not disclose penalties for 29 offences.<sup>1200</sup> Thus, it may (as in the *Prins* case) take time for successful prosecution to follow. The Sexual Offences and Related Matter Amendment Act Amendment Bill<sup>1201</sup> was passed with the aim of amending the Act so as to expressly provide for the imposition of penalties in respect of certain offences.

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<sup>1200</sup> See the discussion in section 3 3 5 4 3.

<sup>1201</sup> [B 19 – 2012].

However, clause 5 of the Amendment Bill introduces a new section, 56A, that expressly clarifies the intention of the legislature that the imposition of penalties in respect of certain offences is left to the discretion of the courts within their penal jurisdictions. I am of the view that it would save costs if penalties are stipulated in the Act. Hence, I recommend for South Africa to learn from New South Wales<sup>1202</sup> and develop a table of offences and describe penalties that must be imposed on the offences stipulated in the Sexual Offences and Related Matters Amendment Act to guide the courts when imposing punishment.

Sexual offences are contact crimes.<sup>1203</sup> These crimes include physical contact between the victim and perpetrator, and will always have more serious psychological impact than cases in which property is stolen from the victim. Contact crime involves violence against the person, irrespective of the nature of such violence. The psychological impact of contact crime is very difficult to measure. Thus it is important to make efforts to satisfy the victim of these crimes by making sure the offender faces his or her wrong conduct also reduce the escalation of trends of sexual offences. I therefore further recommend that South Africa impose maximum penalties on sexual crimes as they are serious crimes which infringe on a child's right to equality,<sup>1204</sup> human dignity,<sup>1205</sup> privacy,<sup>1206</sup> freedom and security of the person<sup>1207</sup> and the right

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<sup>1202</sup> See the discussion in section 3 3 5 5.

<sup>1203</sup> These are crimes that involve physical contact between the victims and perpetrators.

<sup>1204</sup> S 9(3) of the Constitution.

<sup>1205</sup> S 10 of the Constitution.

<sup>1206</sup> S 14(a) of the Constitution.

<sup>1207</sup> S 12(1) of the Constitution.

to be protected from abuse<sup>1208</sup> as follows:

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<sup>1208</sup> S 28(1)(d) of the Constitution provides that: “Every child has the right to be protected from maltreatment, neglect, abuse or degradation.”

## Sexual Offences and Related Matters Amendment Act and Maximum Penalties

<b>Offence</b>	<b>Section</b>	<b>Maximum Penalty</b>
rape	Chapter 2 3	Life imprisonment
compelled rape	4	20 years
sexual assault	5	20 years
compelled sexual assault	6	15 years
compelled self-sexual assault	7	8 years
compelling or causing persons who are 18 year or older to witness sexual offences, sexual acts or self-masturbation	8	5 years
exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing")	9	7 years
exposure or display of child pornography to persons 18 years or older	10	15 years
engage sexual services of persons 18 years or older	11	15 years
incest	12	7 years
bestiality	13	14 years
sexual acts with corpse	14	8 years
acts of consensual and sexual penetration with certain children (statutory rape)	Chapter 3 15	14 years
acts of consensual sexual violation with certain children (statutory sexual assault)	16	14 years
sexual exploitation of children	17	Life imprisonment
sexual grooming of children	18	15 years
exposure or display or causing exposure or display of child pornography or pornography to children	19	15 years

using children for or benefiting from child pornography	20	15 years
compelling or causing children to witness sexual offences, acts or self-masturbation	21	7 years
exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children	22	5 years
sexual exploitation of persons who are mentally disabled	Chapter 4 23	Life imprisonment
sexual grooming of persons who are mentally disabled	24	14 years
exposure or display of or causing exposure or display of children in pornography or pornography to persons who are mentally disabled	25	14 years
using persons who are mentally disabled for pornographic purposes or benefiting there from	26	25 years

Children who are charged with and convicted of non-violent offences are now less likely to be imprisoned in South Africa.<sup>1209</sup> The South African Child Justice Act established a distinct procedure for children in conflict with the law by providing numerous safeguards to limit exposure of children to possible harmful effects of prosecution and detention. The Act also allows an inquiry magistrate to refer matters in respect of certain children who are in conflict with the law to be dealt with under the Children's Act as children in need of care and

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<sup>1209</sup> Imprisonment is to be used as a measure of last resort and only for the shortest appropriate period of time: s 69(1)(d) of the Child Justice Act.

protection.<sup>1210</sup>

However, these categories of children are not specifically acknowledged in the South African Children's Act as children in need of care and protection. I propose that South Africa draws lessons from the Child Protection Act (Canada) and include additional grounds that are omitted in section 150(1) South African Children's Act<sup>1211</sup> to ensure consistency with the

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<sup>1210</sup> For instance, s 50(a) of the Child Justice Act provides that if it appears to the inquiry magistrate during the course of a preliminary inquiry that (a) the child is in need of care and protection as referred to in s 150(1) and (2) of the Children's Act and that it is desirable to deal with the child in terms of s 155 and s 156 of the Children's Act; (b) the child does not live at his or her family home or in appropriate alternative care; or (c) the child is alleged to have committed a minor offence, or an offence aimed at meeting the child's basic need for food and warmth, the inquiry magistrate may stop the proceedings and order that the child be brought before the children's court referred to in s 42 of the Children's Act and that the child be dealt with under s 155 and 156.

<sup>1211</sup> The following grounds incorporated in the Child Protection Act (Canada) are omitted in South African Children's Act: "(i) the child has been harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;

- (j) the child is at substantial risk of being harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;
- (m) the child has suffered physical and emotional harm caused by being exposed to domestic violence by or towards a parent;
- (n) the child is at substantial risk of suffering physical and emotional harm caused by being exposed to domestic violence by or towards a parent;
- (o) the child requires a specific medical, psychological, psychiatric treatment to cure, prevent or ameliorate the effects of a physical or emotional condition or harm suffered, and the parent does not, or refuses to obtain treatment or is unavailable or unable to consent to treatment;



South African Child Justice Act as follows:

- “150 (1) a child is in need of care and protection if, the child –
- (a) requires specific medical attention, psychological and psychiatric treatment to cure, prevent, or ameliorate the effects of physical or emotional condition or harm suffered and the parent does not or refuses to obtain treatment;<sup>1212</sup>
  - (b) the child is in the care of a Child Protection Organisation or child and youth care centre or another person and the parent of the child refuses or is unable to care for the child;<sup>1213</sup>
  - (c) has been harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;<sup>1214</sup>

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- (p) suffers from a mental, emotional, or developmental condition that, if not addressed, could seriously harm the child and the parent does not or refuses to obtain treatment or is unavailable or unable to consent to services or treatment to remedy or ameliorate the effects of the condition;
  - (r) the child is in the custody of the Director or another person and the parent of the child refuses or is unable to resume custody of the child;
  - (s) the child is less than 12 years old, and the child, in the opinion of the Director, may have killed or seriously injured another person;
    - (i) poses a serious danger to another person; or
    - (ii) may have caused significant loss or damage to property, and the parent of the child does not obtain or is unwilling to consent to treatment for the child which may be necessary to prevent a recurrence of the incident or danger; or
    - (iii) the past parenting by the parent has put the child at significant risk of harm within the meaning of this section”.

<sup>1212</sup> S 9(p).

<sup>1213</sup> S 9(r).

<sup>1214</sup> S 9(i).

- (d) is at substantial risk of being harmed as a result of being exposed to or involved in the production of child pornography and the parent has failed or been unable to protect the child;<sup>1215</sup>
- (e) the past parenting by the parent has put the child at significant risk of harm;<sup>1216</sup>
- (f) is less than 18 years old, and the child, in the opinion of the head of the Department of Social Development is in conflict with the law in that, the child -<sup>1217</sup>
  - (i) had committed a minor offence;
  - (ii) poses a serious danger to another person; or
  - (iii) caused significant loss or damage to property and the parent of the child does not obtain, or is unwilling to consent to treatment for the child which may be necessary to prevent a recurrence of the incident or danger”.

I further propose that regulations be promulgated to the proposed section 150(1)(o) of the Children’s Act to facilitate for the diversion of criminal matters concerning children to alternative dispute resolution mechanisms for restorative justice services as, amongst others, restorative justice services proposed by the Department of Justice and Constitutional Development.<sup>1218</sup> These services may take the form of diverting the criminal matter from the punitive justice system to alternative means, which include, having the child offender apologise to victim/s, repairing what was damaged, and eventually keeping the child within

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<sup>1215</sup> S 9(j).

<sup>1216</sup> S 9(t).

<sup>1217</sup> S 9(s).

<sup>1218</sup> Department of Justice and Constitutional Development *Restorative Justice National Policy Framework Revision* (2012).

the community rather than imprisonment. I am of the view that any punishment that is imposed to a child offender must ensure that the child accounts for his or her wrong and is kept in the family as a priority rather than taking the child away from family life to a child and youth care centre<sup>1219</sup> or imprisonment.<sup>1220</sup> I therefore recommend that regulations that give effect to section 150(1)(o) be promulgated as follows:

- “1 The National Prosecuting Authority or the child justice court, must in a matter concerning a child who is in conflict with the law consider –
- (a) diverting the matter<sup>1221</sup> through prosecutorial diversion,<sup>1222</sup> from the punitive or formal criminal justice procedure to an alternative dispute resolution mechanism with diversion services;<sup>1223</sup>

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<sup>1219</sup> S 76 of the Child Justice Act.

<sup>1220</sup> S 77 of the Child Justice Act.

<sup>1221</sup> S 1 of the Child Justice Act; *Restorative Justice National Policy Framework Revision (2012)* 10.

<sup>1222</sup> S 52(2) of the Child Justice Act.

<sup>1223</sup> S 53(1) of the Child Justice Act with the aim to:

- “(a) deal with a child outside the formal criminal justice system;
- (b) encourage the child to be accountable for the harm caused by him or her;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into his or her family or community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation to the harm;
- (g) promote reconciliation between the child and the person and of community affected by the harm caused by the child;

- (b) diverting the matter at the preliminary inquiry or during trial where the child offender appears before the court within 48 hours of arrest;<sup>1224</sup> and
- (c) divert the matter at the child justice court before the finalisation of the case.

2 In circumstances where a child, as indicated in (the proposed) section 150(1)(o) of the Children's Act is convicted for a criminal matter, the child justice court must impose a sentence that ensures that the child remains in the family environment as possible and must enter the reasons of the imposition of such a sentence in the record of proceedings as stipulated in section 71(1) of the Child Justice Act.

- (a) The child justice court that convicts a child for a criminal offence may refer the matter –
  - (i) to non-custodial sentencing;
  - (ii) for restitution programmes in terms of section 74(2) of the Child Justice Act;<sup>1225</sup>
  - (iii) to home-based supervision;
  - (iv) to community-based sentencing in terms of section 72 of the Child Justice Act; and<sup>1226</sup>

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- (h) prevent stigmatising the child and the adverse consequences flowing from being subject to the criminal justice system;
  - (i) reduce the potential for re-offending;
  - (j) prevent the child from having a criminal record; and
  - (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society”.

<sup>1224</sup> S 52(1) of the Child Justice Act.

<sup>1225</sup> The provision allows the court to impose any of the following options as alternatives to the payment of a fine, (a) symbolic restitution to the victim/s; (b) payment of compensation to the victim/s; (c) an obligation on a child to provide some service of benefit to the victim/s; or (d) any other option that the child justice court considers as appropriate.

<sup>1226</sup> S 72(1) of the Child Justice Act, it allows a child to remain in the community for a sentence involving correctional supervision. The child justice court that has imposed a correctional

- (v) to a service provider for a restorative justice process.”<sup>1227</sup>

With regard to curbing child labour, I propose that South Africa must refer to international laws, recommendations from a working paper of the Human Capital Development and Operations Policy,<sup>1228</sup> and the observations of the Committee on the Rights of the Child with regard to Kenya’s second report towards the CRC and promulgate regulations to section 150(2)(a) of the Children’s Act as follows:

- “1 The Department of Social Development shall collaborate with the South African Police Services, the Department of Education, the Department of Labour, the NGO sector and the assistance of the community with the aim to curb child labour. These stakeholders shall engage in the following:
- (a) conduct investigations regarding situations of child labour in the Republic;
  - (b) raise awareness campaigns on child labour;
  - (c) provide programmes aimed at ensuring that children go to school;<sup>1229</sup>

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supervision must request a probation officer to monitor the child’s compliance with the order of imposed by the court, see s 72(2) of the Act.

<sup>1227</sup> United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* (2006) 7: “... any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”. In terms of s 73(1) of the Child Justice Act, the child justice court that convicts the child, may refer the matter to (a) a family group conference; (b) for victim-offender mediation; or any other restorative justice process that is in accordance with the definition of restorative justice.

<sup>1228</sup> Siddiqi *Child Labour: Issues, Causes and Interventions* (1999) Unpublished working paper 9-11, see the discussion in section 3 3 10.

<sup>1229</sup> See the proposed provision in section 3 4.

- (d) provide basic services and adequate financial support for children without visible means of support who are also prone to work to support their families;<sup>1230</sup>
- (e) conduct investigations in families with the assistance of parents and communities to track children who are doing domestic work rather going to school;
- (f) conduct investigations in private and public entities, including mining and farm areas to track children providing labour; and
- (g) improve the quality of schooling by investing in education. The adequate financial support previously proposed with, will assist families prone to having working children.<sup>1231</sup>

With regards to child-headed households, I am of the view that South Africa must refer to the practice of cluster foster care which provides stay-in care-givers for children in foster care.<sup>1232</sup>

Thus, a provision which obligates the Department of Social Development to provide a stay-in care-giver for child-headed households, as is the case with cluster foster care, must be incorporated in the Children's Act for child-headed households.

The provision can read as follows:

- “1 The Department of Social Development is under obligation to ensure the protection, strengthening and preservation of family life of child-headed. In fulfilling this obligation, the Department of Social Development shall -

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<sup>1230</sup> See the discussion in sections 3 3 1 2, 3 3 1 2 2 and the proposed provision in section 3 4.

<sup>1231</sup> See the proposed provision in section 3 4.

<sup>1232</sup> See the discussion in par 6 3 1.

- (i) put in place constant monitoring system and provision for assistance for children in child-headed households, from district social workers, child and youth care workers and trained community care worker;
- (ii) find care-givers who reside in the community where the child-headed household is located, who are willing to be stay-in care-givers to provide constant care and supervision to child-headed households;
- (iii) provide the different facilities and assistance in the child-headed household to enable the stay-in care-giver to discharge his or her responsibilities;
- (iv) provide specialised, enhanced and quality services for child-headed households by way of working collaboratively with intersectoral government departments and international agencies, and solicit financial and support services from private entities for the child-headed household; and<sup>1233</sup>
- (v) make a monthly contribution towards the services provided by the care-giver.”

South Africa can learn from the European jurisprudence with regard to the threshold criteria that are used to justify the removal of the child from family life. The threshold criteria ensure that the removal of the child from family life is not easily allowed. The interests of the child must be “necessary” and justifiable; “in accordance with the law”; and there must be a “legitimate aim” for the removal. Furthermore, the ECHR appreciates the fact that there is a “margin of appreciation” in the manner in which states may deal with a particular matter.<sup>1234</sup> The threshold criteria ensure that removal orders are only made when there is sufficient justification for ECHR purposes.

I propose that South Africa adopt an approach used by the ECHR of applying the threshold

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<sup>1233</sup> See also the proposed provision in section 6 5 regarding the collaborative work between the Department of Social Development, UNICEF and private entities.

<sup>1234</sup> See the discussion in sections 2 2 2 2 2 3 and 3 2 2.

criteria to determine whether the action taken by the public authorities to interfere with family life, is justifiable or not. South African Constitution has a limitation clause<sup>1235</sup> used to restrict the fundamental rights contained in the Bill of Rights, including the right to family care. However, the developed jurisprudence in the ECHR on the threshold criteria, its application on specifically on the right to family life and the grounds for mandatory alternative care interventions,<sup>1236</sup> justify the express inclusion of the threshold criteria in the South African Children's Act. The threshold criteria must be enforced by the South African courts consistently with section 36 of the Constitution in the decision whether to remove, or not remove the child from his or her family. The criteria can be used on listed, unlisted and any new grounds for mandatory care interventions. I propose that the following provision be incorporated in subsection 150(4) of the Children's Act:

- “(4) Having considered the grounds listed in section 150(1) and (2) and where, according to a designated social worker, there is no measure that may assist the child in terms of section 150(3) of the Act, the child may be removed from the family environment if the removal is –
- (i) in accordance with the law;<sup>1237</sup>
  - (ii) necessary in a democratic society; and<sup>1238</sup>
  - (iii) in pursuit of one or more legitimate aims.”<sup>1239</sup>

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<sup>1235</sup> S 36, see ch 1, n 162.

<sup>1236</sup> See the discussion in section 2 5.

<sup>1237</sup> See the discussion in section 2 2 2 2 4 1.

<sup>1238</sup> See the discussion in section 2 2 2 2 4 3.

<sup>1239</sup> See the discussion in section 2 2 2 2 4 2.



I am of the view that the Children's Act must incorporate provisions relating to both the mandatory list and the threshold criteria when dealing with situations of children in need of care and protection. My argument for the mandatory list is that it is easier to work with because it regulates situations that are listed by using a ground-matched approach. It covers grounds that are classified in the list with a focus on the obligation to be carried out by the state to act once a determination is made that a particular child is in need of care and protection. Thus, it is easy to fit grounds into a list that already exists. This approach may be easier to work with for less trained, less experienced professionals, and also for the purposes of curbing delay and reducing costs for hearings.

The discretionary approach lacks a clear direction from legislation. Thus, the discretionary approach can violate obligations under certain circumstances. The approach may also increase the risk where circumstances that need serious consideration may be ignored. However, my arguments for discretionary approach are that it provides a much more flexible approach to situations relating to the grounds for mandatory alternative care intervention. Social workers conducting investigations on circumstances of children in need of care and protection must provide accurate information and reflect on all facts in place to marginalise error. It is therefore important to have well trained professionals with capacity and extensive experience to tackle cases in which the discretionary approach is applied for justice to be done.

Circumstances which identify children as in need of care and protection are prevalent in communities and families, and thus far there has been little intervention on the side of government. The problem may also be linked to the absence of clearly identifiable social support structures in communities aimed at reducing the vulnerability of children in the family

environment.<sup>1240</sup> A cause for concern is the negative impact these experiences may have on the development and well-being of the child. The analysis of the grounds revealed that circumstances that identify children as children in need of care do not necessarily require that the child be removed from family life. Instead, an intervention may be sought for the protection of the child rather than removal.<sup>1241</sup>

Apart from the grounds that are discussed in this chapter, there are numerous unrecorded circumstances which make children vulnerable and in need of care and protection which may not be easily detected. Research and investigation into the merits of matters regarding children in need of care and protection may assist in finding more grounds. I opine that a national machinery consisting of an independent statutory body, well staffed, and specifically empowered to safeguard the interests of children, may assist in the investigations.<sup>1242</sup> Since there is no Ministry that specifically gathers information, receive complaints about children in need of care and protection, initiates mediation, and sees to public interest litigation and other responses on behalf of children,<sup>1243</sup> I see the need for South Africa to establish a Children's Advocate to undertake such role.

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<sup>1240</sup> Manaka-Mkwanazi *Perceptions of physical child abuse in the Zulu family* (PhD Thesis 1997) 8. See the discussion in section 2 2 1 10 on communal families.

<sup>1241</sup> Department of Health, Department of Education, Department of Justice and Constitutional Development etc.

<sup>1242</sup> Rwezaura "Competing Images of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa" (1998) *IJLP&F* 25.

<sup>1243</sup> *Ibid.*

An independent body must be built around such an advocate that could considerably promote, monitor and implement the CRC; facilitate the flow of information between the Committee on the Rights of the Child, concerned United Nations bodies and the non-governmental organisation community; work collaboratively with government to draft legislation, policies and strategies; support the work of non-governmental organisation networks that advance children's rights at national levels; and achieve compliance with both the Children's Act and related applicable constitutional and international law standards.

## **CHAPTER 4: PREVENTION AND EARLY INTERVENTION SERVICES AIMED AT KEEPING THE CHILD IN THE FAMILY – THE SOCIO-ECONOMIC AND PROTECTION ASPECT**

### **4.1 Introduction**

This chapter relates to the challenging issue of how to effectively channel supportive services to families in order to prevent the removal of children. The family must be capacitated to discharge its own responsibilities. This requires that the family be protected and have access to the basic necessities to create stability in the life of a child.<sup>1</sup>

This chapter seeks to explore the extent to which the state has to provide socio-economic and protection rights to children. These rights are recognised in section 144(1) and (2) of the Children's Act<sup>2</sup> as "prevention and early intervention programmes" that can be offered by the state in order to preserve and strengthen families. It is therefore important to explore the maximum extent to which the state makes financial resources available to cater for prevention and early intervention services for children in families. Also, this chapter discusses what placement procedures are available in the event it is not possible to keep

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<sup>1</sup> Amongst others, ss 24, 25, 26, 27, 28(1)(c), 28(1)(d) and 29 of the Constitution.

<sup>2</sup> See the discussion in sections 4 3 and 4 3 1.

children in families.<sup>3</sup> In the discussion, I reflect on what socio-economic and protection rights mean to children, including the responsibility imposed on the state to achieve this need.<sup>4</sup> Since there is no express provision in the Children's Act in this regard, I propose that a guiding principle be provided in the Children's Act that clearly articulates the primary role of parents in providing care and protection to children. Furthermore, I propose that an explicit provision be incorporated for the obligation on the state to assist parents and the family in their responsibilities.<sup>5</sup> I also propose that intersectoral government departments work collaboratively to provide social services to children according to their functions.<sup>6</sup> I propose that South Africa refer to the Child Family and Community Services Act (Canada) and Children, Young Persons, and their Families Act (New Zealand) and incorporate a provision to monitor the implementation of prevention and early intervention programmes.<sup>7</sup>

I examine the meaning and application of, amongst other objectives in the Children's Act,<sup>8</sup> the need to promote the preservation and strengthening of families.<sup>9</sup> This is the most significant objective for purposes of this study. Thus, I propose that regulations be promulgated to the Act for the promotion and support of the right of children to family care. I note in my discussion that the Department of Social Development *Norms, Standards and*

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<sup>3</sup> See the discussion in section 4 4.

<sup>4</sup> See the discussion in section 4 2 1.

<sup>5</sup> See the proposed provision in section 4 5.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> S 2 of the Children's Act.

<sup>9</sup> See s 144(1) of the Act; see the discussion in section 4 2.

*Practice Guidelines for the Children's Act*<sup>10</sup> failed to provide the basis of prevention and early intervention programmes. In this case I propose that regulations be promulgated to explain the types of services that will be provided as forms of prevention and early intervention programmes.<sup>11</sup>

Furthermore, I propose that South Africa must learn from the Child Family and Community Services Act (Canada) and promulgate regulations to the Children's Act to guide social workers who intervene in situations of children in need of care and protection, and consider less disruptive methods of intervention for preservation of family life.<sup>12</sup> I do so by proposing regulations that list different grounds for mandatory alternative care interventions and a list of interventions that are less disruptive to family life.<sup>13</sup>

The Children's Act has been costed,<sup>14</sup> thus it is crucial for this chapter to reflect on the extent to which the costing of the Act covers critical needs, such as welfare, protection, education and health of children. I also deal with the concern as to how we can monitor the effective implementation of prevention and early intervention services.<sup>15</sup> In this case, I propose that a provision be enacted in the Children's Act to impose an obligation on government and its officials to comply with legislation and spend money which is available and urgently needed

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<sup>10</sup> (2010). See the discussion in section 4 3 1 1 and the proposed provision in 4 5.

<sup>11</sup> See the proposed provision in section 4 5.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> See Annexure "K".

<sup>15</sup> See the proposed provision in section 4 5.

by children.<sup>16</sup>

In the discussion, I recommend in relation to protection rights of children that a provision be enacted in the Children's Act in consideration of section 28(1)(d) of the Constitution and Article 19 of the CRC.<sup>17</sup> The proposed provision is for the obligation on the state to protect children from maltreatment, neglect, abuse or degradation. I am also of the opinion that in the event the child cannot be kept in the family for his or her protection, he or she must be referred to a Child Protection Organisation.

However, I acknowledge the fact that the system of referral of children to Child Protection Organisations is not clear in the Children's Act. Thus, I propose that South Africa must refer to the Child Protection Act (Queensland) and amend section 110 of the Children's Act to provide a coherent referral process for children in need of protection to Child Protection Organisations. The provision that I propose for South Africa include the period at which a child may be kept in a Child Protection Organisation; the establishment of a "comprehensive case plan"<sup>18</sup> for the care of the child; the granting of a child protection order; the types of child protection order which can be made by the court; the period of monitoring the order and its effectiveness; funding for the establishment of Child Protection Organisations;<sup>19</sup> and how the

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<sup>16</sup> *Ibid.*

<sup>17</sup> See the discussion in sections 4 2 1 and 4 2 2 and the proposed provision in section 4 5.

<sup>18</sup> See the proposed provision for "comprehensive care plan" in section 5 6.

<sup>19</sup> See the proposed provision in section 4 5.

Child Protection Organisations may be used effectively.<sup>20</sup>

I also propose that South Africa must promulgate regulations to the Children's Act to guide the strategy for the geographical location of Child Protection Organisations and the collaborative work by intersectoral government departments and NGOs to provide child protection services and how these organisations can be monitored.<sup>21</sup>

## **4.2 State's obligation to provide socio-economic and protection rights of children**

The discussion in this section centres on the socio-economic and protection rights of children. These rights were initially entrenched in the CRC on account of the principle that a child must grow up in a family environment for the full and harmonious development of his or her personality.<sup>22</sup> The Children's Act embraces the same principle as the CRC, and states that it is necessary to effect changes to existing law to give children protection and assistance.<sup>23</sup>

The family has socio-economic needs which must be met in order for them to achieve quality livelihoods. This section therefore focuses on the "socio-economic rights" that are necessary

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> The Preamble of the CRC. See the discussion in sections 2 3 21.

<sup>23</sup> The Preamble. See the discussion in sections 2 1 and 2 2 1.



to keep the child in the family, rather than removing the child from the family environment. The *Government of the Republic of South Africa v Grootboom*<sup>24</sup> judgment refers to social welfare programmes.<sup>25</sup> This notion supports welfare as the right to social services rather than community development.<sup>26</sup> This is the assistance that is provided to families in order for them to obtain the basic necessities of life.<sup>27</sup> The assistance includes, but is not limited to, basic nutrition, shelter, basic health care, social services<sup>28</sup> and the responsibility of the state to provide financial assistance.<sup>29</sup> These are fundamental rights<sup>30</sup> that should contribute

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<sup>24</sup> 2001 (1) SA 46 (CC).

<sup>25</sup> Par 75 and 88.

<sup>26</sup> Sloth-Nielsen (2001) *SAJHR* 220.

<sup>27</sup> S 144(2)(a); Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 110.

<sup>28</sup> Ss 28(1)(c) of the Constitution. Ss 26 and 27 of the Constitution are also discussed as socio-economic rights that apply to everyone including children. See Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 41; see Liebenberg & Pillay (eds.) *Resource Book on Social and Economic Rights* (2000) 315, reflect on social security, social assistance and children's social services.

<sup>29</sup> S 4(a) of the Social Assistance Act provides that: "the Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for the purpose, make available a child support grant..."; s 6 provides that: "a person is, subject to section 5 eligible for a child support grant if he or she is the primary care-giver of that child". S 146 of the Children's Act provides that: "[t]he MEC for social development must, from money appropriated by the relevant provincial legislature, provide and fund prevention and early intervention programmes for that province". Thus, as from 1 April 2006, the Department of Social Development tasked the South African Social Security Agency, hereinafter referred to as "SASSA" with the responsibility for the management, administration and payment of social assistance grants. SASSA is a public entity established in terms of s 3A of the Company's Act 61 of 1973 (as amended), responsible to pay persons with disabilities, foster grant, care dependency, older persons, child support grant (hereinafter referred to as "CSG"), grant in aid,

towards the preservation and strengthening of families.<sup>31</sup> This means that children will no longer be removed from family life simply because they are in a state of material need.<sup>32</sup>

#### *4.2.1 State's obligation to provide socio-economic and protection rights of children - a South African perspective*

As discussed earlier in the previous chapter,<sup>33</sup> most children are vulnerable in the family environment due to, amongst others, socio-economic deprivation as a result of apartheid legacy, which was a major source of inequality in South Africa.<sup>34</sup> Many people have been, and still are, deprived of fundamental rights, such as land, housing, accommodation and property in South Africa.<sup>35</sup>

The Constitution guarantees children and their care-givers a range of socio-economic

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social relief and war veteran grant at an area which is convenient for the recipients of the grants. See Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 110.

<sup>30</sup> Particularly s 26, s 27 and 28(1)(c) of the Bill of Rights, the Constitution of the Republic Act 108 of 1996. See also the discussion in section 1 1 1 2.

<sup>31</sup> S 2 of the Children's Act. See also Lawrence-Karski (1996) *Int Journal of Children's Rights* 29.

<sup>32</sup> See Sloth-Nielsen (2001) *SAJHR* 231; Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175.

<sup>33</sup> See the discussion in section 3 3 1 2.

<sup>34</sup> Ntlama, *Jurisprudence on Equality in respect of Socio-economic Rights* (2006) *De Jure* 94. See also the discussion in sections 3 3 1 2 1 and 3 3 10.

<sup>35</sup> Gutto (2001) 111.

rights.<sup>36</sup> These include the right to basic education<sup>37</sup> and to further education, access to health care services,<sup>38</sup> social security,<sup>39</sup> sufficient food, and water<sup>40</sup> and adequate housing.<sup>41</sup> Furthermore, the Constitution specifically provides for children.<sup>42</sup>

Section 28 is a child-centred clause. It impacts on the rights and responsibilities of parents towards their children on one hand, and the responsibilities of the state to assist parents on the other.<sup>43</sup> Thus, section 28 has a specific budgetary advantage in that it provides the government with political justification for social programmes and resource allocation that prioritise children's rights.<sup>44</sup>

Section 28 lists specific rights which children have in addition to, and not in place of, those rights incorporated in the Bill of Rights. Children's rights provided for in section 28 are not

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<sup>36</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 291.

<sup>37</sup> S 29(1)(a).

<sup>38</sup> S 27(1)(a). See also the discussion by Veriava & Wilson, A Critique of the Proposed Amendments on School Funding and School Fees (2005) *ESR Review* 9.

<sup>39</sup> S 27(1)(c).

<sup>40</sup> S 27(1)(b).

<sup>41</sup> S 26(1).

<sup>42</sup> S 28. Skelton in Boezaart (ed.) *Child Law in South Africa* 265.

<sup>43</sup> Currie & De Waal *The Bill of Rights Handbook* (2005) 602; Skelton in Boezaart (ed.) *Child Law in South Africa* 285.

<sup>44</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 4.

subject to internal limitation, but are guaranteed and immediately enforceable.<sup>45</sup> Thus, children who live separately from their parents, that is, those living on the street, have a direct and immediate right to shelter. If the government is challenged, it cannot say it will realise this right sometime in future; it must provide shelter immediately.<sup>46</sup>

According to Skelton,<sup>47</sup> there is a dynamic interaction between section 28(1)(b) and section 28(1)(c), which deals with the socio-economic rights of children. In the *Government of the Republic of South Africa v Grootboom*,<sup>48</sup> the Constitutional Court held that section 28(1)(b) defines those who are responsible for giving care,<sup>49</sup> whereas 28(1)(c)<sup>50</sup> explains the scope of care. The court made it clear that the primary duty of caring for children remains with families.<sup>51</sup> The court found that the responsibility of the state in caring for the families was extensive in that it included providing the legal and administrative infrastructure to ensure the protection of children in section 28(1). The rights in section 28 enhance the rights contained

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<sup>45</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 5.

<sup>46</sup> *Ibid.*

<sup>47</sup> In Boezaart (ed.) *Child Law in South Africa* 286.

<sup>48</sup> The appellants in the Constitutional Court judgment of *Government of the Republic of South Africa v Grootboom*, see the discussion in sections 4 2 and 4 2 1, challenged the correctness of the lower court judgment in *Grootboom v Oosternberg Municipality*: where an urgent application to the High Court invoking their constitutional rights to adequate housing under s 26 and the children's rights to special protection under s 28 was made. See the discussion in section 1 1 1.

<sup>49</sup> The right to "family care" or "parental care" in the Constitution. See also the discussion in sections 2 3 and 2 4 2.

<sup>50</sup> The right of the child to basic health care services, social services, shelter and basic nutrition.

<sup>51</sup> Par 77. See also the discussion in section 2 4 2.

in the Bill of Rights,<sup>52</sup> which also apply to children.<sup>53</sup> The inclusion of the socio-economic rights clause for everyone was a contested debate during the drafting of the 1996 Bill of Rights.<sup>54</sup> When specifically asked about the difference between the socio-economic rights of children provided in section 28(1)(c) and the socio-economic rights of everyone in sections 25, 26, and 27 of the Constitution, the Panel of Constitutional Experts in their Memorandum replied as follows:

“The international instruments dealing with children’s rights do not limit the rights of children by requiring reasonable and progressive steps; this is because of the view that it is inappropriate for children’s rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also children cannot be expected to participate actively in human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do. The sub-clause will not permit children to make unreasonable demands on the state.”<sup>55</sup>

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<sup>52</sup> Chapter 2 of the Constitution.

<sup>53</sup> Currie & De Waal (2005) 603: Therefore, section 28 entrenches certain socio-economic rights for children, which supplement the general socio-economic rights for everyone as provided in sections 26 and 27 of the Bill of Rights.

<sup>54</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 293-294: the debate emanated from different opinions held by groups that participated in the drafting of the clause. Human rights activists and the African National Congress (ANC) advocated strongly for their inclusion of the socio-economic clause, while the private sector and the Freedom Front, a minority political party that represented the interests of a small group of white Afrikaans people advocated for their exclusion or dilution.

<sup>55</sup> Panel of Constitutional Experts *Memorandum on Children* (5 Feb 1996) 2: accessed from [www.pulp.up.ac/pdf/2009\\_13/2009\\_13.pdf](http://www.pulp.up.ac/pdf/2009_13/2009_13.pdf) on 2010-10-14, McLean *Constitutional Deference*,

The Bill of Rights applies to all organs of the state<sup>56</sup> and a provision of the Bill of Rights binds a natural or juristic person to the extent that it is applicable.<sup>57</sup> This means that the rights in the Bill of Rights have both a horizontal<sup>58</sup> and vertical<sup>59</sup> effect; that is, they place the duty on

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*Courts and Socio-economic Rights in South Africa* (2009); Proudlock in Boezaart (ed.) *Child Law in South Africa* 291.

<sup>56</sup> S 8(1) of the Constitution.

<sup>57</sup> S 8(2) of the Constitution.

<sup>58</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) par 40; Cheadle *et al.* "Application" *South African Constitutional Law – The Bill of Rights* (2010) 3-2: The term horizontally expresses the manner in which a Bill of Rights engages with natural and private persons, that is, where the state is not responsible but the exercise of a private power that poses a threat to the exercise of human rights. This means that the rights in the Bill bind the private person and accordingly apply to the conduct of such persons and form the basis of a cause of action or a defence in a law suit in the same manner as a statutory or common law right would may do; the rights bind the private person but must be given effect by the state, in the absence of the state, by common law: s 8(2) and (3) of the Constitution; the rights do not bind private persons but apply to all law governing private persons; the rights do not bind private persons but the values underlying the rights must be applied in the development of common law and customary law. Although a basic right does not override a conflicting rule of private law, the basic rights must be taken into account in the development of a constitutionally appropriate formulation of that private law rule; and the values underlying the rights may be applied in the development of the common law or customary law: the Constitution applies to the common law, only in so far as the common law is the basis of some governmental action which infringes a guaranteed right.

<sup>59</sup> *Du Plessis v De Klerk* par 33; see Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 3-3: The Constitution's primary function is to restrict and empower the state in respect of the laws it passes and the manner in which it conducts itself. Thus, a private person may challenge the law that is passed by the legislative body of state or challenge the conduct of the state on the grounds that the law or conduct of the state conflicts with the Bill of Rights.

the state and private persons to provide for the rights.<sup>60</sup>

The state has a fundamental obligation to respect, promote and protect the rights enshrined in the Bill of Rights.<sup>61</sup> Furthermore, “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”.<sup>62</sup> Kentridge AJ, in an early case of *S v Zuma*,<sup>63</sup> argued that “adequate housing” cannot mean whatever we might wish it to mean.<sup>64</sup> There are limits to what the state can reasonably afford.

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The purpose of entrenching fundamental rights is to protect the private sphere from interference from the state. Consequences that flow from a vertical Constitution are that: the Constitution binds the state only and accordingly the state’s conduct may be challenged for lack of constitutionality; the Constitution does not bind private persons and accordingly private conduct that is not regulated by the statute is not subject to constitutional scrutiny even if that conduct is regulated by the common law; once legislation is struck, the law reverts to status quo ante until new legislation is promulgated, that is, if the law that was previously used was a common law regime, the common law rule displaced by the impugned legislation resurrects itself; and if the legislature does not give legislative effect to a right contained in the Bill of Rights, that right may not be relied upon in private litigation.

<sup>60</sup> S 8(1) and (2) of the Constitution.

<sup>61</sup> S 7(2) of the Constitution. The Preamble of the Children’s Act also provides that the “state must respect, protect, promote and fulfil those rights”.

<sup>62</sup> S 27(2) of the Constitution. In relation to the realization of children’s rights, the s 4(2) of the Children’s Act requires the organs of the state to “... take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act”. See the discussion later in this section.

<sup>63</sup> 1995 (2) SA 642 (CC).

<sup>64</sup> 652-653.

In the case of *S v Makwanyana*<sup>65</sup> the Constitutional Court analysed the role of the constitutional state where Mahomed, then Deputy President of the Constitutional Court,<sup>66</sup> gave a detailed exposition, which requires that the Bill of Rights be entrenched.<sup>67</sup> Although the rights articulated by the judge were human rights principles in the Interim Constitution, they apply equally to the principles of the fundamental human rights and freedoms in the Constitution.<sup>68</sup> The Constitutional Court emphasised that South Africa's Constitution is committed to social transformation.<sup>69</sup> The Bill of Rights in the Constitution places an obligation on the state to give effect to the rights in the Bill of Rights.<sup>70</sup> According to Budlender and Proudlock,<sup>71</sup> the rights include children's right to family care or alternative care, social services<sup>72</sup> and protection from abuse and neglect.<sup>73</sup>

The responsibility imposed on both the state and parents to fulfil the socio-economic needs of children means that socio-economic rights have both vertical and horizontal application. In the case of *Du Plessis v De Klerk*,<sup>74</sup> the court argued that the view that the Bill of Rights applied only to vertical relations; that is, between the state and its subjects and not to

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<sup>65</sup> 1995 (6) BCLR 665 (CC).

<sup>66</sup> 758A-J.

<sup>67</sup> Chapter 2 of the Constitution.

<sup>68</sup> See the discussion in section 1.1.

<sup>69</sup> 262.

<sup>70</sup> S 7(2).

<sup>71</sup> *South African Child Gauge* (2007/2008) 41.

<sup>72</sup> S 28(1)(b).

<sup>73</sup> S 28(1)(c).

<sup>74</sup> 1995 (2) SA 40 (T).



horizontal relations; that is, between citizens, and was the pattern that was followed by the German Constitutional Court since 1958.

Instead, the court in *Du Plessis* concluded that the horizontal application of the Bill of Rights was not common, but that sometimes individual clauses regulating horizontal relationships have slipped in;<sup>75</sup> that is, socio-economic rights can be claimed from both the parents and the state.<sup>76</sup> In the case of *S v Manamela*<sup>77</sup> the court held that in considering less restrictive means, Parliament is entitled to have regard not only to constitutional rights but also considerations of cost, practical implementation and prioritisation of certain social means.<sup>78</sup>

The first case wherein the Constitutional Court had to consider socio-economic rights, which required positive obligation on the side of the state,<sup>79</sup> was the *Soobramoney v Minister of Health KwaZulu-Natal*.<sup>80</sup> The applicant sought an order in the High Court directing the state to provide him with continuing dialysis treatment.<sup>81</sup> The applicant's claim was made on the basis of section 11, the right to life and section 27(3), which prohibits refusal of emergency medical treatment.<sup>82</sup> The applicant's claim was determined in accordance with section 27(1) and (2) of the Constitution, entitling everyone to have access to health care services

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<sup>75</sup> Par 47.

<sup>76</sup> Van der Walt Law & Sacrifice *Towards a Post Apartheid Theory of Law* (2001) 118.

<sup>77</sup> 2000 (3) SA 1 (CC).

<sup>78</sup> Par 34.

<sup>79</sup> Liebenberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights* 65.

<sup>80</sup> 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

<sup>81</sup> 769E-F.

<sup>82</sup> 766G.

provided by the state within its available resources.<sup>83</sup>

The court found in the case of *Soobramoney*<sup>84</sup> that the guidelines drawn up by hospital authorities for determining which patients qualified for dialysis treatment was the responsibility of the provincial administration for health service in KwaZulu-Natal who had to make decisions about funding for health care and how such funds should be spend.<sup>85</sup> These choices involve difficult, which have to be taken at political level in fixing the health budget and fixing the priorities that need to be met at functional level.<sup>86</sup> The court alluded<sup>87</sup> to the fact that it would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities, who are mandated to deal with such matters.

The court found that *Soobramoney* could not rely on section 27(3) as his condition did not amount to any emergency requiring immediate remedial treatment.<sup>88</sup> However, the court found that the state had a constitutional obligation to comply with section 27 of the Constitution even though it was not shown that the state's failure to provide renal dialysis constituted a breach of those obligations.<sup>89</sup> Thus, the *Soobramoney* judgment set a precedent in situations where the state is not able to implement socio-economic rights due to

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<sup>83</sup> 774F. See also Liebenberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights* 65.

<sup>84</sup> 774H-775C-D.

<sup>85</sup> *Ibid.*

<sup>86</sup> 776B.

<sup>87</sup> 776B-D.

<sup>88</sup> 774E.

<sup>89</sup> 778B.

resource constraints.

The Constitutional Court has delivered remarkable judgments directly interpreting the socio-economic rights of everyone in sections 26 and 27.<sup>90</sup> Some of these judgments have interpreted section 28(1)(c) and its application to children.<sup>91</sup> The judgments developed a “reasonableness test” based on section 26(2) and section 27(2) for the adjudication of socio-economic rights cases involving adults and children living with their parents.<sup>92</sup> The “reasonableness test” was developed in the landmark case of *Grootboom* by the Constitutional Court, with the aim of assessing the constitutionality of the state’s housing policy.

The court justified the right to economic and social rights by enforcing section 26 of the Constitution to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.<sup>93</sup> The court found that although the right to housing as claimed by the respondents<sup>94</sup> was a socio-economic right, the Constitution<sup>95</sup> requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>96</sup> In terms of assessing the reasonableness of the housing policy in the *Grootboom* case, the court did not

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<sup>90</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 297-298.

<sup>91</sup> See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) sections 77 and 81 (in particular) as discussed later in this section.

<sup>92</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 298.

<sup>93</sup> 1171B.

<sup>94</sup> *Grootboom* 1169I-J: the respondents were parents and children.

<sup>95</sup> S 7(2).

<sup>96</sup> 1170I-J.

adopt a rigorous approach in scrutinising the infringement of a negative right.<sup>97</sup>

In its second stage of enquiry the court used the limitation test, which caused the state's policy to fail.<sup>98</sup> The court in *Grootboom* did not define the "reasonableness test"; instead it preferred to develop the test on the merits of each case.<sup>99</sup>

This "reasonableness test" was further developed in the case of *Minister of Health v Treatment Action Campaign*,<sup>100</sup> which concerned the constitutionality of the state's health care policy to prevent HIV transmission from HIV positive pregnant women to their babies.<sup>101</sup> One of the factors the court considered as contributing to a finding of unreasonableness in the *TAC* case was the negative impact of the state's restricted Prevention of Mother to Child Transmission<sup>102</sup> programme on children's rights to basic health care services.<sup>103</sup> When applying the "reasonableness test", the court will assess the state's policy, law or programme against the following criteria:<sup>104</sup>

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<sup>97</sup> De Vos, Pious Wishes or Directly Enforceable Human Right: Social and Economic Rights in South Africa's 1996 Constitution (1997) *SAJHR* 94.

<sup>98</sup> Liebenberg, The Interpretation of Socio-economic Rights in Woolman *et al.* (ed.) *Constitutional Law in South Africa* (2003) 33.

<sup>99</sup> Par 92.

<sup>100</sup> Hereinafter referred to as "TAC", 2002 (5) SA 703 (CC).

<sup>101</sup> *Ibid.*

<sup>102</sup> Hereinafter referred to as "PMTCT".

<sup>103</sup> Sections 77-80.

<sup>104</sup> See discussion by Proudlock in Boezaart (ed.) *Child Law in South Africa* 298.

- (a) The programme must be reasonably conceptualised (its design must be capable of facilitating the realisation of the right).<sup>105</sup>
- (b) The programme must be comprehensive, coherent and co-ordinated.<sup>106</sup>
- (c) There must be appropriate financial and human resources allocated for the implementation of the programme.<sup>107</sup>
- (d) The programme must be reasonably implemented.<sup>108</sup>
- (e) The programme must be transparent and its contents must be made known effectively to the public.<sup>109</sup>
- (f) The programme must be balanced and flexible and must make provision for short, medium and long-term needs. In particular, the programme should not exclude a significant segment of the population especially those whose needs are the most urgent and whose ability to enjoy all rights is most in peril.<sup>110</sup>

Regarding the provision of socio-economic needs of children in relation to section 28, Skweyiya found in *Du Toit v Minister for Welfare and Population Development*<sup>111</sup> that the institutions of marriage and the family are important social pillars that provide for security, support and companionship between members of society, and play an important role in

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<sup>105</sup> *Grootboom* 41.

<sup>106</sup> *Grootboom* 39 and 40.

<sup>107</sup> *Grootboom* 30.

<sup>108</sup> *Grootboom* 42.

<sup>109</sup> TAC 123.

<sup>110</sup> *Grootboom* 43 and 44.

<sup>111</sup> 2002 BCLR 1006 (CC) 1013I; 2003 (2) SA 198 (CC).

nurturing children. This means that children have the right to have their socio-economic needs met firstly by their families.<sup>112</sup>

According to Proudlock,<sup>113</sup> the last point of the “reasonableness test” is an area where children’s rights can be invoked. In the recent case of *Khosa and Mahlaule v Minister of Social Development*<sup>114</sup> the court developed the “reasonableness test” even further by including an “equality” and “dignity” analysis. The court’s argument on the basis of the principle of “equality”, found that the total exclusion of a vulnerable group (permanent residents including children) from a constitutionally protected socio-economic right, that is, section 27(1)(c), amounted to unfair discrimination on the basis of section 9(3) and also prevented the permanent residents (non-South African citizens) from enjoying other rights contained in the Bill of Rights.<sup>115</sup>

The right to social security as provided in the Constitution is viewed as a right that carries both the substantive right and the “equality” principle.<sup>116</sup> The court in *Khosa* found that the budgetary implications of extending social assistance to permanent residents were minimal, yet the exclusion had the effect of totally denying a vulnerable group access to a

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<sup>112</sup> Such as, the right to basic nutrition, shelter, basic health care services and social services, see s 28(1)(c) of the Constitution. In terms of *Grootboom* 1169, the primary duty for the care of children lies with their families. See also Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 110.

<sup>113</sup> In Boezaart (ed.) *Child Law in South Africa* 298.

<sup>114</sup> 2004 (6) BCLR 569 (CC). See also the discussion in section 3 3 8.

<sup>115</sup> Sections 77 and 81.

<sup>116</sup> Fredman *Human Rights Transformed – Positive Rights and Positive Duties* (2008) 239.

constitutionally guaranteed right.<sup>117</sup> The exclusion of permanent residents contravened the right of everyone to social security and was on this basis found unreasonable, as the state did not prove that the limitation was justifiable for purposes of the general limitation clause in section 36(1) of the Constitution.<sup>118</sup> This means that the right to social security applies to everyone, including children of non-citizens in the Republic.

In the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*,<sup>119</sup> the court had to adjudicate on the conflicting rights of a private landowner and the 400 squatters who had been evicted by the municipality from its land.<sup>120</sup> The court held that the state was in breach of its duty to provide adequate housing to the squatters. The state in this case had the duty to ensure that the applicants realised their right of access to housing and had failed to take any steps to enable the applicants who were in desperate need, to realise that right.<sup>121</sup> The court held that government had an obligation to ensure that at the very least evictions are carried out humanely unless the state provided alternative accommodation.<sup>122</sup>

The court in the case of *Centre for Child Law v Minister of Home Affairs*<sup>123</sup> held that the state

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<sup>117</sup> Par 62.

<sup>118</sup> 84; Fredman (2008) 239; Proudlock in Boezaart (ed.) *Child Law in South Africa* 299.

<sup>119</sup> 2004 (6) SA 40 (SCA).

<sup>120</sup> 47F-I.

<sup>121</sup> 54B-E.

<sup>122</sup> 55E-F.

<sup>123</sup> 2005 (6) SA 50 (T).

was:

“under a direct duty to ensure the basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. An active duty was found on the side of the state to provide those children with the rights and protection set out in section 28”.<sup>124</sup>

The court found that the state had infringed a number of children’s rights including section 28(1)(c)<sup>125</sup> and ordered the various respondents to accommodate the children in a place of safety, to bring each child to the children’s court to assess their individual needs and to provide them with social services under the Child Care Act.<sup>126</sup> The court in the *Grootboom* case found that:

“Through legislation and the common law, the obligation to provide shelter in ss (1)(c) was imposed primarily on the parents or family and only alternatively on the state. The subsection therefore did not create any primary State obligation to provide shelter on demand to parents and their children if children were being cared for by their parents or families.”<sup>127</sup>

Furthermore, where children are not living with their parents or families, the state has a direct responsibility for their socio-economic needs.<sup>128</sup> Thus, it was found that section 28(1)(c) did not create a direct and enforceable claim upon the state to provide shelter on demand to

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<sup>124</sup> Par 17. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 301.

<sup>125</sup> Par 22.

<sup>126</sup> Par 31. The Child Care Act has since been replaced by the Children’s Act.

<sup>127</sup> Par 51G-H. See the discussion in section 2 4 2.

<sup>128</sup> Par 17. See also Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 110. See the discussion in section 2 4 2.



parents and their children if children are being cared for by their parents.<sup>129</sup>

However, according to the *Grootboom case*,<sup>130</sup> the state has, in terms of section 26 of the Constitution, a positive and negative obligation to provide housing. There is a negative obligation imposed on the state and everyone to desist from preventing or impairing the right of access to housing.<sup>131</sup> The Constitution<sup>132</sup> also provides a further negative obligation, this being to prohibit arbitrary evictions.<sup>133</sup> In essence, the Constitution<sup>134</sup> requires access to available land,<sup>135</sup> appropriate services such as water and sewage, building of the houses and the financing of all these.<sup>136</sup> The right of the child to housing was also emphasised at an international level. Hodgkin and Newell<sup>137</sup> note the declaration made by the United Nations General Assembly's special session on children in 2002 that:

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<sup>129</sup> Par 77. See also Sloth-Nielsen (2001) *SAJHR* 224-225. See the discussion in section 2 4 2.

<sup>130</sup> 1188I.

<sup>131</sup> *Ibid.*

<sup>132</sup> S 26(3).

<sup>133</sup> 1189A: the fact that the municipality failed to prevent the growth of the "squatter camp", to provide effective mediation in advance of eviction and the inhumane way the eviction was carried out resulted in a breach of the negative obligation guaranteed in s 26(1).

<sup>134</sup> S 26(1).

<sup>135</sup> It was clear that no real policy existed which could be applied to people in need of housing in crisis situations. In the present case, whilst the local government had recognised this shortcoming and had considered a land programme in an effort to meet this, it had not been implemented.

<sup>136</sup> 1189B-F.

<sup>137</sup> *Implementation Handbook for the Rights of the Child* (2007) 398.

“Adequate housing fosters family integration, contributes to social equity and strengthens the feeling of belonging, security and human solidarity, which are essential for the well-being of children. Accordingly, we will attach a high priority to overcoming the housing shortage and other infrastructure needs, particularly for children in marginalised peri-urban and remote rural areas.”<sup>138</sup>

The *Grootboom* case provides that the extent of the state’s positive obligation in terms of the Constitution<sup>139</sup> is defined by three key elements. These are: (a) the obligation to “take reasonable legislative and other measures”; (b) to “achieve the progressive realisation of the right”; and (c), “within available resources”.<sup>140</sup> The state’s positive obligation is to devise a comprehensive and workable plan for ensuring the right to adequate housing.<sup>141</sup> This involves taking reasonable legislative and other measures to achieve the progressive realisation of the right within available resources.<sup>142</sup> The “measures” called for by section 26(2) involve more than legislation alone, and have to be supported by appropriate policies,<sup>143</sup> programmes<sup>144</sup> and budgetary support.<sup>145</sup>

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<sup>138</sup> A/S-27/19/Rev.1, par 27: in the same year the Commission on Human Rights appointed a Special Rapporteur on Adequate Housing, who works with government, and visits other countries on fact-finding missions and reports to the Commission on housing rights.

<sup>139</sup> S 26(2). See *Grootboom* 1189J and 1190A.

<sup>140</sup> 1190A.

<sup>141</sup> 1189J.

<sup>142</sup> 1184B, as referred from s 26(2) of the Constitution.

<sup>143</sup> 1190F. According to the *Grootboom* case, each sphere of government (national, provincial and local government) must ensure that laws policies, programmes and strategies are adequate to meet the state’s obligation in terms of s 26.

Given the above discussion, the state in the *Grootboom* case failed to meet its obligations in terms of section 26(2) of the Constitution.<sup>146</sup> The concept “progressive realisation of the right” indicates that “the right could not be realised immediately”.<sup>147</sup> According to the *Grootboom* case, this means that access to housing should be progressively facilitated.<sup>148</sup>

In *Mazibuko v City of Johannesburg*<sup>149</sup> O’ Regan J re-iterated the reasons given in the *Grootboom* and *TAC* cases as to why the court should not define and declare the content of socio-economic rights but should rather confine itself to establishing whether the state has “taken reasonable legislative and other measures progressively within its available resources” to achieve the realisation of the right to sufficient water.<sup>150</sup> The first reason is a rejection of the idea that a minimum core can be identified for each right that fits all

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<sup>144</sup> 1190C: the *Grootboom* case requires that a reasonable programme to carry out the constitutional task imposed on the state must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

<sup>145</sup> 1208I-J: a declaratory order was made which includes an obligation on the state to allocate funds to provide relief for people in desperate need. The latter includes people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations. See also 1209E-F.

<sup>146</sup> 1191A.

<sup>147</sup> *Ibid.*

<sup>148</sup> 1192B.

<sup>149</sup> Case CCT 39/09 2009 ZACC 28 (Unreported).

<sup>150</sup> Par 53-68. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 303.

situations.<sup>151</sup> Secondly, it is inappropriate for the court to determine specifically what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter that may be determined by the legislature and the executive. Government institutions are best placed to investigate social conditions in terms of achievable social and economic rights. It is desirable, in terms of democratic accountability, that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.<sup>152</sup>

Public institutions also play a role in ensuring the effective implementation of socio-economic rights at national level.<sup>153</sup> These institutions include commissions and other public interest groups.<sup>154</sup> For instance, in the case of *Grootboom*, the court accepted an offer by the SAHRC “to monitor and, if necessary, report in terms of [its] powers [on] the efforts made by the State to comply with its section 26 obligations in accordance with this judgment”.<sup>155</sup>

Apart from the provision made in the Constitution for the socio-economic rights of everyone, earlier, the Children’s Bill<sup>156</sup> had a provision for the socio-economic rights of children as follows:

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<sup>151</sup> Par 57-60. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 303.

<sup>152</sup> Par 61. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 303-304.

<sup>153</sup> Liebenberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights* 82.

<sup>154</sup> Liebenberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights* 83.

<sup>155</sup> Par 97.

<sup>156</sup> S 4(2).

“recognising that competing social and economic needs exists, the state must, in the implementation of this Act, take reasonable measures within its available resources to achieve the progressive realisation of the objects of this Act”.

It was argued that the wording in the Bill introduced a resource qualification on the implementation of the Act.<sup>157</sup> The Children’s Act took a different approach in providing for the responsibility of the state in implementing the objects of the Act in section 4 as follows:

“(1) This Act must be implemented by organs of state in the national, provincial and, where applicable, local sphere of government subject to any specific section of this Act and regulations allocating roles and responsibilities, in an integrated, co-ordinated and uniform manner. (2) Realising that competing social and economic needs exist, organs of the state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act.”<sup>158</sup>

The omission of the word “progressive” from the final version of the Children’s Act and the addition of the words “to the maximum extent of their available resources” is consistent with the CRC.<sup>159</sup> This means that apart from the parental responsibilities and rights discussed in

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<sup>157</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 13.

<sup>158</sup> S 4(1) and (2).

<sup>159</sup> Art 4. See also Arts 3, 6, 7, 19, 24, 26(1), 27(3), 28, and 39 discussed in section 4 1 2; UNICEF *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 13. Jamieson & Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” *Children’s Institute* (2005) 2: “The inclusion of the words ‘maximum extent’ before ‘available resources’ is a major victory for children. This

Chapter 2 of this study,<sup>160</sup> where parents lack capacity to meet the needs of their children, the state has the responsibility to make such provision.<sup>161</sup>

A children's budget is not necessarily a separate budget, but a pro-child budget for children.<sup>162</sup> It includes programmes aimed at realising children's rights within each departmental budget.<sup>163</sup> Departments that work for pro-child budgets ensure that the budget is reprioritised in ways that benefit children. This is achieved through a combination of expenditure that indirectly affects children, such as strategies to reduce unemployment.<sup>164</sup> Hence, I propose that a provision be enacted in the Children's Act for collaborative work between government departments for support and promotion of quality and sustainable livelihoods of children in families.<sup>165</sup> Any steps that are taken to cut back on spending for children are not acceptable. If the core minimum is not resourced, the government should demonstrate that this is due to a genuine lack of resources, and it must have a plan to show

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means that all departments need to prioritise children when they are making decisions about budgets and the allocation of resources. These words come from Article 4 of the UN Convention on the Rights of the Child and are aimed at ensuring that children's issues are prioritised in budget decisions."

<sup>160</sup> S 18(1) and (2) of the Children's Act. See the discussion in section 2 4 2.

<sup>161</sup> Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 110.

<sup>162</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 11.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> See the proposed provision in section 4 5.

how it will deliver on its obligations in the future.<sup>166</sup>

Parliament is responsible for approving the national budget, thereby allocating resources to government and monitoring government spending trends.<sup>167</sup> This clearly speaks to the intention of the legislature with regards to section 4 and in ensuring that government fulfils its obligations. Given the clarity created by section 4(1) of the Children's Act with regard to the responsibility of the state, I doubt if the argument in the *Grootboom* judgment that section 28(1)(c) "did not create any primary State obligation to provide shelter on demand to parents and their children if children were being cared for by their parents or families"<sup>168</sup> will survive. Section 4(2) of the Children's Act makes it clear that the state must "take ... measures to the maximum extent ... to achieve" the objectives of the Act. The operation of section 4(2) may be better understood through a discussion on Article 4 of the CRC, which provides reference to the application of law, policy and practice to promote the right.<sup>169</sup>

It could be argued that children who are not in parental care are guaranteed to receive primary support from the state. This category of children includes children in alternative care such as foster care, and children in child and youth care centres. Sloth-Nielsen<sup>170</sup> argues that what is left of children's socio-economic rights in the aftermath of the *Grootboom* case could be a fall back position, premised on the role of the state as the primary provider to

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<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> Par 51G-H. See the discussion in section 2 4 2.

<sup>169</sup> Section 4 1 2.

<sup>170</sup> (2001) SAJHR 230.

children without families. She argues that if the drafters of children's legislation want to put their money where their mouth is, child protection services should be weighed towards intervention and out-of-home care, because it is in these settings that neglected and deprived children's constitutional claims to state resources may be optimally realised.<sup>171</sup>

Taking the *Grootboom* case at face value, the fall-back position that is referred to would focus on the obligation of the state to children in foster care and children in institutional settings, abandoned and orphaned children and children living on the streets.<sup>172</sup> Providing support to these children may require human personnel in the form of social workers to provide state services to the ever-increasing number of children who do not have adult care-givers as well as appropriate increases in the subsidisation of state foster care and increases in institutional care where foster care is not available.<sup>173</sup> This option accords little or no priority to providing financial support to parents or families who are making efforts to support their own children. Instead, social workers will be compelled to remove children whose neglect or abuse is as a result of parental poverty.<sup>174</sup> Sloth-Nielsen<sup>175</sup> argues that the state seems to be responsible in fulfilling this right of the child to receive support, irrespective of whether children are in parental, family or alternative care.

Despite the constitutional obligation on the part of the state to fulfil the fundamental rights of

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<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*



individuals, the state's responsibility has in most cases been enforced to the extent of the availability of resources.<sup>176</sup> In the *Centre for Child Law v MEC for Education*,<sup>177</sup> the MEC objected to the request for sleeping bags for children in the Luckhoff School of Industry in order to protect children adequately from cold, and to provide the children with psychological services. The school was dilapidated and run down. The MEC alleged that it would be too expensive and that providing sleeping bags for a few children would result in discrimination against other children in similar conditions. The court rejected the MEC's arguments and ordered him to provide the children with sleeping bags. In response to the budget argument, Murphy J argued that:

"What is notable about the children's rights in comparison to other socio-economic rights is that s 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the right as unqualified and immediate."<sup>178</sup>

Murphy J argued further that the South African Constitution recognises that in relation to children's rights, budgetary implications ought not to compromise the justiciability of the rights

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<sup>176</sup> S 27(2) of the Constitution.

<sup>177</sup> 2008 (1) SA 223 (T): The applicant required the respondent to supply 111 sleeping bags in the School of Industry where there was no heating in the dormitories and no electricity in some spaces. Each child had either 1 or 2 thin blankets (as supplied to prisoners in prison) and some children had no warm clothes. The institution had no social worker or a psychologist to provide support to the children despite the fact that the children were identified as children in need of care and protection.

<sup>178</sup> 2271-J.

and that the minimal costs or budgetary allocation problems as discussed in the *Centre for Child Law* case above, were far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.<sup>179</sup>

The Constitution does not provide details of specific services, nor does it quantify in legislation the level of services that are to be granted to children.<sup>180</sup> Instead, the responsibility of the state to provide socio-economic rights of children is evident when the rights are enforced in case law. For instance, the justiciability of health care rights for children has been demonstrated in South Africa in, amongst other cases, *Treatment Action Campaign*<sup>181</sup> where the Constitutional Court stated that, although parents bear the primary duty to care for children, the state must provide adequate care when the parents are unable to do so.<sup>182</sup>

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<sup>179</sup> 228B. The state did not supply any quotation as evidence of how much the blankets would cost, to prove its allegation that it could not afford the blankets. The judge did his own calculations regarding the costs and found that about 150 blankets would cost approximately R30 000 and R70 000, an amount which is probably less than what the respondent was spending in defending the litigation: 227H.

<sup>180</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 6.

<sup>181</sup> 78-79.

<sup>182</sup> 749H-750B-C: the court was concerned with the plight of children born to indigent mothers who did not have access to antiretroviral medication. Nevirapine is the drug taken by pregnant women to prevent transmission of HIV to the foetus. The government was ordered to make it available at all state clinics and hospitals to ensure equal access. UNICEF in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 6.

On the other hand, the responsibility of the state is also evident in the implementation of, amongst others, the child-support grant. The child support grant is provided to eligible beneficiaries,<sup>183</sup> in the form of a transfer of income or financial assistance to poor households.<sup>184</sup> The child-support grant is viewed as having a positive impact on the lives of children in poor households in South Africa.<sup>185</sup> Amongst others, Matthias<sup>186</sup> argues that it would be “far better for the children’s court to have the power to order the state grant than ever to remove a child because of poverty”. Nevertheless, there is no financial safety net to support families who are committed to their responsibility of providing care to their children.<sup>187</sup>

The court in the *S S (A minor child) v The Presiding Officer of the Children’s Court, District Krugersdorp* case,<sup>188</sup> alluded to the fact that according to the Parliamentary monitoring group, the Children’s Act was intended to achieve the following:

“Overall, the Children’s Act extended the responsibility of the [state], and regulated a wider range of services than those covered by the Child Care Act. In practice, this created the need for greater [state] capacity for the registration and monitoring of a range of new

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<sup>183</sup> See also the discussion in sections 1 1 2, 3 3 1 2 1 and 4 1.

<sup>184</sup> See SAHRC Report *6<sup>th</sup> Economic and Social Rights Report (2003-2004)* (2006) 58. See also the discussion in sections 1 1 2 and 3 3 1 2.

<sup>185</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 1.

<sup>186</sup> (1997) 22; Kilkelly (1999) 174 also holds the view that it is better to take care of the needs of a child in a family home rather than in an institutional care.

<sup>187</sup> Matthias (1997) 21-22.

<sup>188</sup> 2011 (2) SACR 324; 2012 1 ALL SA 231 (GSJ). See the details of the case in the discussion in section 6 3.

services, as well as a responsibility on the state to create such new services where they did not exist ... Chapter 9 dealt with the child in need of care and protection, provided for the identification of such children and provided for action to be taken with regard to children.”<sup>189</sup>

Thus, I submit that parents must be supported in their child-rearing responsibilities, particularly where they lack the financial capacity to care for their families. This view must be clearly articulated in the Children’s Act.<sup>190</sup> Furthermore, it is important to note that poverty in South Africa has a major rural dimension. When the rural areas are targeted for the child-support grant, we have automatically targeted the poor.<sup>191</sup>

However, the unavailability of private payment systems in poorer areas makes the process of accessing the grant very slow and protracted.<sup>192</sup> Social welfare offices are located far from rural dwellings, which mean that a portion of the grant has to be used on transport rather than food.<sup>193</sup> The legislature would have treated children in urban and rural communities equally only if it provided social assistance to them according to their different needs.<sup>194</sup>

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<sup>189</sup> Par 10.

<sup>190</sup> See the proposed provision on the role of the state to assist parents in their responsibilities in section 4 5.

<sup>191</sup> Lund *Changing Social Policy the Child Support Grant in South Africa* (2008) 67; Sloth-Nielsen (2001) *SAJHR* 215.

<sup>192</sup> Lund (2008) 73.

<sup>193</sup> *Ibid.*

<sup>194</sup> Children who live on the margins of urban life are *de facto* if not *de jure* discriminated against in the enjoyment of many of their economic and social rights. See the discussion in section 3 3 1 2.

I submit that the grant, as currently provided to children, is not sufficient for their basic needs and welfare, if received at all. It is therefore important to determine whether children or their families need more. This determination may only be achieved by way of establishing what it takes to maintain a child for a month and costing this.<sup>195</sup> On the same note, it is important for the state to target specific families who are destitute for financial assistance. The state can use the administrative system used for implementing the child support grant to develop a special means test threshold to provide temporary special grants to specifically needy families, including orphans who are cared for by relatives or any suitable care-givers.<sup>196</sup>

If the temporary special grant is issued in the form of a voucher,<sup>197</sup> I submit that the value of the voucher must be consistent with what is needed to provide for the basic needs of particular family per month. Such will ensure that the special grant meets the needs of children and their families.

In other situations the state provides socio-economic assistance in the form of contributions towards nutrition programmes. In 1994, the Minister of Health developed an Integrated

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<sup>195</sup> Practically, the cost of groceries for two children aged 4 years and 7 years, including an ordinary (not extravagant) daily school lunch pack and toiletries, is approximately R 2000 per month. The cost is more for children who are younger (below 2 years of age) as their grocery list would normally include nappies and milk. The recent increase in the child support grant, that is, R260 per month with effect from April 2011 and a further rise to R270 in October 2011, simply scratches the surface of what the child needs. See also the discussion in section 3 3 1 2.

<sup>196</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 47.

<sup>197</sup> Jacobs *et al.* (2010) Unpublished conference paper 2-5. See the discussion in section 3 3 1 2.

Nutrition Programme designed to fulfil the goal of enabling all women to exclusively breastfeed their babies for the first four to six months.<sup>198</sup> From 2004 to 2005, 240 000 food insecure households received food parcels, although the beneficiaries of the programme were below the targeted output of 244 950.<sup>199</sup> A school nutrition scheme was also introduced for children between the age of seven and 13.<sup>200</sup> Although children received food, the quality of the food provided was not recorded.<sup>201</sup> High school children were excluded.<sup>202</sup>

Furthermore, the government has established an Integrated Food Security and Nutrition Programme<sup>203</sup> (IFSNP) with the aim of eradicating poverty by 2015. The programme distributes food parcels as a temporary measure to assist vulnerable and food-insecure households. Beneficiaries include children, child-headed households, orphaned children,

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<sup>198</sup> SAHRC Report 6<sup>th</sup> *Economic and Social Rights Report (2003-2004)* (2006) 46. Other goals of the Integrated Nutrition Programme, hereinafter referred to as the “INP” are as follows:

- (a) To prevent an increase in mortality due to diseases caused by the bad lifestyle choices;
- (b) To reduce the prevalence of malnutrition in children;
- (c) To ensure the optimal growth of infants and young children; and
- (d) To improve capacity at all level in order to solve the problems of malnutrition and hunger.

<sup>199</sup> SAHRC Report 6<sup>th</sup> *Economic and Social Rights Report (2003-2004)* (2006) 46-47.

<sup>200</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 40: The nutrition scheme is a national programme aimed at alleviating hunger, improving learner concentration and encouraging learner attendance.

<sup>201</sup> *Ibid.*

<sup>202</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 41.

<sup>203</sup> Hereinafter referred to as “IFSNP”.

HIV-affected households, and people with disabilities.<sup>204</sup> The agricultural initiatives that are the central and sustainable component of the IFSNP could also target families to contribute towards a reduction in malnutrition through increased food production for family consumption and household income.<sup>205</sup> Research has revealed that 50% of South Africa's hungry households do not receive the grants for which they are eligible. The IFSNP may be of great assistance in this regard.<sup>206</sup>

The state provides assistance towards access to education. According to the South African Schools Act,<sup>207</sup> it is unlawful to exclude learners from education because of the inability of their parents to pay fees. Schools are required to provide full or partial exemptions for learners whose families fall within the prescribed means test.<sup>208</sup> However, the state fails to provide a corresponding subsidy to schools to compensate for the lack of fee revenue.<sup>209</sup> In other instances, the state provides financial assistance in the form of a decrease in charges

Section 29(1)(a) of the Constitution specifically provides for the right of everyone to basic

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<sup>204</sup> Hendricks & Bourne "An Integrated Approach to Malnutrition in Childhood" *South African Child Gauge* (2009/2010) 49.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> S 5.

<sup>208</sup> Exemption of the Parents from the Payment of School Fees Regulations according to GG 12 October 1998 No 19347.

<sup>209</sup> Friedman (2008) 217.

education, which primarily applies to children.<sup>210</sup> However, the Constitution failed to specify whether basic education is free, and if free, whether that applies to all schools.<sup>211</sup> Section 29(1) of the Constitution lead government to lower school fees to afford every child an opportunity to receive education.<sup>212</sup> In other situations the state exempted parents from paying fees or related costs towards their children’s education.

The South African Schools Act allows a public school to exempt parents from paying school fees wholly, in part or conditionally by way of a resolution.<sup>213</sup> The state implemented a “school fee free” policy in 2007, which excludes pupils in the poorest communities from paying school fees.<sup>214</sup> Schools were ranked into five categories, with the poorest being placed in quintile one and the least poor in quintile five.<sup>215</sup> Gauteng province exempted pupils attending public schools in quintile one to three from paying school fees in 2008.<sup>216</sup>

The “school fee free” policy has come under scrutiny. There are debates around the classification of schools into different quintiles, emanating from research conducted in Lyndhurst Primary School, which is situated approximately two kilometres from Alexandra,

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<sup>210</sup> S 29(1) provides that: “Everyone has the right to basic education including adult basic education”.

<sup>211</sup> Friedman (2008) 217.

<sup>212</sup> *Ibid.*

<sup>213</sup> S 39(2)(b).

<sup>214</sup> *The Times* (2008-04-07).

<sup>215</sup> *Ibid.* According to this newspaper report, in the year 2007, only pupils in quintile one and two were declared no-fee paying learners.

<sup>216</sup> *Ibid.*



east of Johannesburg. The Lyndhurst school is regarded by the Department of Education as a wealthy school despite the fact that 325 of its 608 pupils live in the neighbouring township and informal settlements.<sup>217</sup> Another concern arising from this policy is that it discriminates against pupils on the grounds of class.<sup>218</sup> Currently, attention is given to quintiles one to three and the fourth and fifth quintiles are excluded.<sup>219</sup>

A consideration of international law follows hereafter<sup>220</sup> with regard to the protection aspect of “prevention and early intervention services”. In the latter section I reflect on Article 19 of the CRC<sup>221</sup> and the interpretation provided by, amongst other authors, Liebenberg and Pillay<sup>222</sup> who discuss protection as social service in the context of Article 19. Article 19 includes protection of children from physical or mental abuse, neglect, protection and assistance to children temporarily or permanently separated from their families, assistance to children with disabilities, protection of children from economic exploitation, drug abuse, sexual exploitation and abuse.

Thus, I agree with the views exchanged in *Grootboom*<sup>223</sup> above, that social welfare programmes are a group of services which include child support and child protection. This

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<sup>217</sup> *Ibid.*

<sup>218</sup> S 9(3) of the Constitution. See also *The Times* (2008-04-07).

<sup>219</sup> At the time of writing this section of the study (2008-03-31). See also *The Times* (2008-04-07).

<sup>220</sup> See the discussion in section 4 2 2.

<sup>221</sup> *Ibid.*

<sup>222</sup> (2000) 315.

<sup>223</sup> Par 75 and 88.

means that welfare programmes must ensure the safety and well-being of children. The family environment must be a safe and protective haven that provides security and stability for the proper physical, psychological and emotional well-being of the child. Sloth-Nielsen<sup>224</sup> is of the view that, in order to protect children against abuse, emphasis should be placed on preventative action. This led to social and educational measures being incorporated in Article 19 of the CRC, together with the need to provide support for the child and for those who care for the child. However, there is no express definition of “protection” rights and what they entail as provided in section 28(1)(d) of the Constitution. According to Freeman,<sup>225</sup> “protection” rights aim to ensure that minimum acceptable standards of treatment are ascertained for children. This category of rights consists of the right to freedom from abuse, inadequate care or neglect.<sup>226</sup> The rights are premised on the fact that children are not able to take care of themselves and need the protection, care and guidance of adults. A concern was raised as to the extent to which the state is liable for section 28(1)(d) right. The state is liable to the extent that it is responsible for such neglect or abuse. For instance, a child must be protected against neglect and abuse whilst in an orphanage or state institution.<sup>227</sup> The obligation on the state to protect the child is expressed in Article 19(1) of the CRC.<sup>228</sup> Thus, the right of the child to be protected against maltreatment, neglect, abuse or degradation

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<sup>224</sup> (2001) SAJHR 217.

<sup>225</sup> Freeman *The Rights and the Wrongs of Children* (1983) 43-45; Human “Theory of the Children’s Rights” in Boezaart (ed.) *Child Law in South Africa* (2009) 253; Bainham with Cretney *Children – The Modern Law* 89.

<sup>226</sup> Freeman (1983) 89.

<sup>227</sup> Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-12.

<sup>228</sup> See the discussion in section 4 2 2.

must also be guaranteed in state administrative action or legislation.<sup>229</sup>

Furthermore, Article 39 of the CRC requires the state to promote the physical and psychological recovery and social reintegration of the child victim.<sup>230</sup> Sloth-Nielsen<sup>231</sup> is of the view that questions may be raised regarding the treatment of children in families or the community. Practices which may be considered for section 28(1)(d) rights are traditional initiation schools as well as virginity testing. Domestic violence falls squarely within the purview of section 28(1)(d) and the Domestic Violence Act extends protection to children.<sup>232</sup> In the *Grootboom* case, Yacoob J<sup>233</sup> refers explicitly to the child's right to protection from maltreatment, abuse and degradation. His argument points to the fact that the state is directly responsible for ensuring the fulfilment of this right, whether children are in parental, familial or alternative care. This includes passing laws, creating enforcement mechanisms and providing for the prevention of such occurrences. I therefore propose, in support of Yacoob J's view,<sup>234</sup> that a provision be enacted for the obligation on the state to protect

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<sup>229</sup> Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-12; Sloth-Nielsen (2001) *SAJHR* 227.

<sup>230</sup> *Ibid*, see the discussion in section 4 2 2.

<sup>231</sup> *Ibid*.

<sup>232</sup> S 1(viii) and s 7(6).

<sup>233</sup> Par 78; Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-13.

<sup>234</sup> Par 78; S 28(1)(d) of the Constitution; see also Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-12; Budlender & Proudlock "Budget Allocations for Implementing the Children's Act" in Proudlock *et al. (eds.) South African Child Gauge* (2007/2008) 41; Sloth-Nielsen (2001) *SAJHR* 217: responsibilities of parents and families with regard to children's development are linked to their protection from abuse and neglect.

children from maltreatment, neglect, abuse or degradation.<sup>235</sup>

Section 28(1)(d) does not, on the face of it, create a right which is subject to progressive realisation.<sup>236</sup> As discussed in Chapter 3 of this study, the courts did not make any pronouncement on the right of the child to protection in terms of section 28(1)(d).<sup>237</sup> However, the court in the case of *Christian Education of South Africa v Minister of Education*,<sup>238</sup> instead of deciding the matter on the basis of whether the prohibition of corporal punishment was a practice that was in violation of the Bill of Rights, reflected on the limitation clause in section 36 of the Constitution. On the assumption that the blatant prohibition of corporal punishment violated the applicant's constitutional right to religious and cultural freedom, the central question raised by Sachs J was:

“whether the failure to accommodate the appellant's religious belief and practice by means of an exemption for which the appellant asked, can be accepted as reasonable and justifiable

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<sup>235</sup> See the proposed provision in section 4 5.

<sup>236</sup> Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-13.

<sup>237</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* (2009) 286-287. See the discussion in section 3 3 9 1.

<sup>238</sup> 2000 (1) BCLR 1051 (CC): the applicant in the case was an association of 196 independent schools which maintain a Christian conviction by providing an environment where their learner can learn in keeping with their Christian faith. It was argued that the abolition of corporal punishment in the school was a violation of the school's individual, parental and community rights to freely practice their religion on the basis that corporal punishment constituted a vital element of the Christian faith: par 2. In opposing the application, the Minister, amongst others, argued that the right to dignity of the child in terms of s 10, the right to security of the person in s 12 and the right of the children to be protected from neglect and abuse in s 28(1)(d) of the Constitution were violated. See the discussion in section 3 3 9 1.

in an open and democratic society based on human dignity, freedom and equality”.<sup>239</sup>

The Constitutional Court was of the view that the South African Schools Act did not deprive parents of their right to bring up their children according to Christian beliefs, but simply limited the capacity of the parents to empower or authorise teachers to administer corporal punishment in their name.<sup>240</sup> Thus, the limitation was found reasonable and justifiable under the limitation clause in section 36 of the Constitution and the appeal was not upheld.<sup>241</sup> Sloth-Nielsen<sup>242</sup> describes these findings of the court as a cry for uniform norms and standards in schools, international law’s recognition of the need to protect children from the potentially injurious consequences of their parents’ religious practices, and the constitutional duty on the part of the state to address the levels of domestic and public violence in our communities. Reference was also made to the duty incurred by the state upon ratifying the CRC; that is, it must take all measures to protect the child from violence, injury or abuse.<sup>243</sup>

An interview with an official of the Department of Social Development<sup>244</sup> regarding the commitment of government to protect children from maltreatment, abuse, neglect or

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<sup>239</sup> Par 32.

<sup>240</sup> Par 38.

<sup>241</sup> Par 40. The court referred to Arts 4, 19 and 34 of the CRC.

<sup>242</sup> In Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 23-15.

<sup>243</sup> Par 40. Sloth-Nielsen in Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 23-15.

<sup>244</sup> Held on the 2011-04-05 with Mqonci, deputy director of the Child Protection Unit of the national Department of Social Development, Tshwane. See attached Annexure “D”.

degradation, highlighted the successes revealed at the Medium Term Review<sup>245</sup> meeting of the Department of Social Development held on October 2010. The department has established standardised prevention programmes to address child abuse, neglect and exploitation. Furthermore, the department developed a framework for identification and assessment of good practice models for dealing with matters relating to child abuse, neglect and exploitation, including the establishment of Child Protection Organisations.

Government also committed itself to work in partnership with NGOs in providing child protection services.<sup>246</sup> However, it is not clear in the Act to what processes are used by Child Protection Organisations to refer cases for prevention and early intervention services or alternative care arrangements. Cases are rarely referred by the different government departments, the community, including traditional leaders to service providers. Also, the Medical Research Council Report<sup>247</sup> refers to the poor co-ordination between service providers and the government in child protection services. It alludes to the fact that critical service providers work in parallel, which in a way defeats the intention of child protection services. This also may stem from lack of proper referral processes for children in need of protection services.

The working partnership between the NGOs and government is not receiving proper financial

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<sup>245</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September* (2010) 6-9.

<sup>246</sup> See the discussion in section 4 2 1.

<sup>247</sup> *South Africa Failing its Children* (2012): accessed from [www.news24.com/SouthAfrica/.../SA-failing-its-children-study-2012](http://www.news24.com/SouthAfrica/.../SA-failing-its-children-study-2012) on 2012-09-07.

support.<sup>248</sup> This is evident from an interview with a social worker at a child and youth care centre,<sup>249</sup> who had experience in receiving children who suffered maltreatment and abuse, who affirmed that government contributes 75% towards its budget. However, given the fact that the needs of children are many, the child and youth care centre has to seek further funding from donors and charitable institutions.<sup>250</sup> Given the fact that the contribution made by the Department of Social Development meets only 75% of the NGOs needs, it is questionable whether government has taken “reasonable measures to the maximum extent”<sup>251</sup> of its available resources to assist the NGO in achieving the objectives of the Act. It was expected of the Department of Social Development *Norms, Standards and Practice Guidelines for the Children’s Act*,<sup>252</sup> to provide information as to what basic child protection services will be acceptable. Instead the guidelines document provides, amongst others, that the standard for child protection services is the “generic norms and standard for developmental welfare services ... applicable for case management”<sup>253</sup> and the national guidelines simply “prescribe the format for reporting cases of abuse, and deliberate neglect”.

In the absence of this information, I propose that a provision be incorporated in the Children’s Act for proper referral processes of cases to services providers and the implementation of

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<sup>248</sup> See also the discussion in section 4 4.

<sup>249</sup> An interview with Nompula, the head of the child and youth care centre called Thandanani in Honeydew, Roodepoort held on 2011-03-30. See attached Annexure “E”.

<sup>250</sup> *Ibid.*

<sup>251</sup> S 4(2).

<sup>252</sup> 2010.

<sup>253</sup> See Ref 16 of the DSD *Norms, Standards and Practice Guidelines for the Children’s Act* (2010).

child protection systems.<sup>254</sup> I am of the view that networking is a very important aspect of the delivery of child protection services. Networking facilitates referrals and ensures that the child who receives services, benefits from a wide range of support services available. I am of the view that NGOs, which operate as Child Protection Organisations, must facilitate the development of a child protection plan or a case plan for a child who receives child protection services; how referrals will be made; how confidential information will be shared; what type of matters will be referred; and when feedback on progress and results will be communicated.<sup>255</sup> Also, when child protection services work with service providers, it is important to have agreements reduced to writing.

#### *4.2.2 State's obligation to provide socio-economic and protection rights of children in terms of international law*

This section discusses the international obligations imposed on state parties to provide for the socio-economic and protection rights of children. The World Summit for Children, which was held in 1990 by world leaders, after the coming into force of the CRC, responds to the topic of this section in part.<sup>256</sup> A World Declaration in the Survival Protection and Development of Children and a Plan of Action, which established target areas that were to be reached by 2000, was signed. One of the aims of the Declaration was to ensure “pro child”

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<sup>254</sup> See the discussion in sections 4 2 1 and the proposed provision in section 4 5.

<sup>255</sup> See the proposed provision in section 4 5.

<sup>256</sup> See UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9. The summit was held in New York and had, amongst other aims, to promote the well-being of children.



spending through specific actions for child survival, protection and development.<sup>257</sup> The Committee on the Rights of the Child had from time to time questioned states about their spending on children. In some cases, countries were questioned about the amount spent on defence in comparison with child-related social services.<sup>258</sup>

Furthermore, the Articles that are incorporated in the CRC do not specifically provide for the socio-economic rights of children. However, there are numerous Articles which are interdependent and impose the direct responsibility on state parties to protect children's rights in a broad spectrum of circumstances as follows:<sup>259</sup> "States parties are obliged to ensure that there is necessary protection and care in their jurisdiction; they must take into account the rights and duties of parents and others who are legally responsible for the child."<sup>260</sup> Furthermore, the CRC provides that:

"States Parties shall undertake all appropriate all legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures

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<sup>257</sup> The CRC entered into force in 1990-09-02, one month after the 20<sup>th</sup> ratification. See UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9.

<sup>258</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9.

<sup>259</sup> Art 3(2); Art 4; Arts 28 and 24. See also Lawrence-Karski (1996) *Int Journal of Children's Rights* 138.

<sup>260</sup> Art 3(2). State parties are obliged to ensure that there is necessary protection and care in their jurisdiction, they must take into account the rights and duties of parents and others who are legally responsible for the child.

to the maximum extent of their available resources and, where needed within the framework of international cooperation.”<sup>261</sup>

In relation to economic, social and cultural rights, the CRC qualifies that the states must undertake measures that are “to the maximum extent of their available resources” to implement the rights of children.<sup>262</sup> However, the earlier draft of Article 4 qualified the obligation of the states “in accordance with their available resources”. Delegates who were opposed to this qualification argued that the provisions on state parties in the ICCPR<sup>263</sup> were not subject “to availability of resources” and that the ICCPR’s standards should not be limited in the CRC.<sup>264</sup> Hammerberg<sup>265</sup> argues that “the maximum extent of their available resources” does not imply that poorer countries can avoid their responsibilities. Instead “the maximum extent of their available resources” should be understood as a call for prioritisation of children within the state budget so as to ensure appropriate levels of service delivery.

The reference in Article 4 to “international cooperation” indicates that, where necessary,

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<sup>261</sup> Art 4.

<sup>262</sup> Hodgkin & Newell (2007) 50.

<sup>263</sup> According to the Preamble: “ ... the ideal of free human beings enjoying the civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights ... ”.

<sup>264</sup> Hodgkin & Newell (2007) 50.

<sup>265</sup> In Eide *et al.* (ed.) *Economic, Social and Economic, Social and Cultural Rights* 366; UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9.

other countries and bodies may need to assist in ensuring compliance with the CRC.<sup>266</sup> Hodgkin and Newell<sup>267</sup> find Article 4 realistic in accepting that lack of financial resources can hamper the implementation of economic, social and cultural rights in some states. This introduces the concept of “progressive realisation of such rights”. States must demonstrate *that they have gone to*<sup>268</sup> “the maximum extent of their available resources” and where possible, they have sought international cooperation to implement this right.<sup>269</sup>

Hodgkin and Newell<sup>270</sup> are of the view that the approach taken by the Committee on Economic, Social and Cultural Rights with regard to the concept “the maximum use of available resources” as provided in Article 2 of the International Covenant on Social Economic and Cultural Rights<sup>271</sup> is applicable in Article 4 of the CRC and must be seen as having a dynamic relationship with all other provisions in the ICSECR.

However, the Article that deals with education speaks of “achieving the right to education

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<sup>266</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9.

<sup>267</sup> *Ibid.*

<sup>268</sup> Own expression.

<sup>269</sup> Hodgkin & Newell (2007) 52.

<sup>270</sup> (2007) 56.

<sup>271</sup> Hereinafter referred to as “ICSECR”, states that: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

progressively”.<sup>272</sup> Thus, a remarkable feature of the CRC is the recognition of economic, social and cultural rights and the recognition that states that ratify the CRC are expected to match their words with action, even if this costs money.<sup>273</sup>

States are aware that: “(1) ... every child has the inherent right to life, and that (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>274</sup> The inherent right to life includes taking all measures to improve peri-natal care for mothers and babies, reduce infant and child mortality, and create conditions that promote the well-being of all young children during this phase of their lives.<sup>275</sup> Article 6 encompasses all aspects pertaining to the development of the child. Health and psychosocial well-being are interdependent.<sup>276</sup> According to the CRC, the extent to which state parties have an obligation towards the survival and development of children is to the “maximum extent as they may be capable”.<sup>277</sup> Thus the CRC creates a level at which state parties are to ensure that the rights of children are realised.<sup>278</sup>

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<sup>272</sup> Art 28(1): “States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity ... ”

<sup>273</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 9.

<sup>274</sup> Art 6 of the CRC.

<sup>275</sup> Hodgkin & Newell (2007) 84.

<sup>276</sup> *Ibid.*

<sup>277</sup> Art 6(2) of the CRC.

<sup>278</sup> Art 6. See also Hammerberg in Eide *et al.* (ed.) *Economic, Social and Economic, Social and Cultural Rights* 357.

According to Sloth-Nielsen and Mezmur,<sup>279</sup> survival rights are extremely important for acknowledging the rights guaranteed in Article 6 of the CRC. The term “survival rights” covers a child’s right to life, the basic needs for the existence and well-being of child, adequate living standards, shelter, nutrition and access to medical services.<sup>280</sup> The right to survival incorporates all steps taken to ensure the healthy development of children.<sup>281</sup>

However, state parties’ responsibility is to make certain that the child survives through all stages of development and not only in early childhood.<sup>282</sup> There is, however, confusion concerning the manner in which the CRC guarantees children’s rights. For instance, the words “as they may be capable”, clearly denotes that the rights that are guaranteed for children are subject to the capacity of the state has to provide for these rights.<sup>283</sup> The capacity that is referred to in the CRC relates to resources. The CRC acknowledges the fact that certain measures may not be possible for poorer countries. Although this may be the case, implementing this requirement should be given priority.<sup>284</sup>

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<sup>279</sup> “2 + 2 = 5? Exploring the domestication of the CRC in South African Jurisprudence 2002-2006” (2008) *Int Journal of Children’s Rights* 10. See also Mahery in Boezaart (ed.) *Child Law in South Africa* 320.

<sup>280</sup> Mahery in Boezaart (ed.) *Child Law in South Africa* 320.

<sup>281</sup> *Ibid.*

<sup>282</sup> Art 6(2).

<sup>283</sup> Hammerberg in Eide *et al.* (ed.) *Economic, Social and Economic, Social and Cultural Rights* 360.

<sup>284</sup> Hammerberg in Eide *et al.* (ed.) *Economic, Social and Economic, Social and Cultural Rights* 357.

The CRC requires the child to be “registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, so far as possible, the right to know and be cared for by his or her parents”. For the purposes this chapter, I shall reflect particularly on the right of the child to “as far as possible...be cared for by his or her parents” in order discuss the primary responsibility of parents with regards to their children and the assistance that may be provided by the state when parents fail. The right of the child to know and be cared for by his or her parents is qualified by the words “as far as possible”.<sup>285</sup>

Article 7 may be read in the context of Articles 5, 18 and 27. Article 18 endorses the principle that both parents have joint responsibility for caring for their children, appropriately supported by the state. On the other hand, Article 27 requires the state to assist parents in their material responsibilities in relation to caring for children.<sup>286</sup> Thus, care by parents may not be possible if the children are orphaned, or where the state authorities have judged that parental care is not in the best interests of the child because the parents are abusive or neglectful. However, the general principle of the CRC is that “in ordinary circumstances, children are best off with their parents”.<sup>287</sup> The CRC requires state parties to protect children from all forms of physical or mental violence while in the care of parents or other persons:

“(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation, including sexual abuse, while in the care of

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<sup>285</sup> Hodgkin & Newell (2007) 97.

<sup>286</sup> Hodgkin & Newell (2007) 108.

<sup>287</sup> Hodgkin & Newell (2007) 108-109.

parents(s), legal guardians(s) or any other person who has the care of the child. (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”<sup>288</sup>

With regard to Article 19, the CRC was deeply concerned about the persistent retention of the defence of “reasonable chastisement” where a state party has taken no significant action toward prohibiting all corporal punishment of children in the family.<sup>289</sup> The view of the Committee was that where government limits<sup>290</sup> rather than removes “reasonable chastisement”, it not only undermines educational measures to promote positive and non-violent discipline, but clearly does not comply with the principles and provisions of the CRC.<sup>291</sup> The Committee noted further that the action of such government constitutes a serious violation of the dignity of the child. Corporal punishment administered in schools, homes and in institutions, it is viewed by the Committee as contravening Articles 3,<sup>292</sup> 5,<sup>293</sup>

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<sup>288</sup> Art 19. See also the discussion in section 3 3 5 4.

<sup>289</sup> Hodgkin & Newell (2007) 261: the comments were made by the CRC Committee when it examined the Second Report of the United Kingdom.

<sup>290</sup> Where states suggest that some forms of corporal punishment are acceptable.

<sup>291</sup> Hodgkin & Newell (2007) 261.

<sup>292</sup> States have the duty to ensure that in all matters concerning the child, the best interests of the child are a primary consideration.

<sup>293</sup> States have the duty to respect the rights and responsibilities of parents over their children and the role of parents to provide direction and guidance to children consistently with the evolving capacities of their children. See the discussion in section 2 4 3 1.

6,<sup>294</sup> 19, 28(2),<sup>295</sup> 37(a), (c)<sup>296</sup> and 39.<sup>297</sup> The Committee,<sup>298</sup> through a General Comment, regarding the right to protection from corporal punishment and other cruel or degrading forms of punishment in *inter alia*, Articles 19, 28(2) and 37, commented that the purpose of the comment on violence against children is:

“to highlight the obligation of all States Parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take. Addressing the widespread acceptance to tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of states Parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies”.

The Committee raised concerns regarding bullying in schools and the rules which are supposed to be incorporated by states in the legislation governing education and the national school curriculum of rules.<sup>299</sup> The Committee recommends that state parties put effort into preventing and combating bullying, pay special attention to children with disabilities and foreign children, and ensure that the rules are fully implemented in schools and other care

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<sup>294</sup> See the discussion in section 4 2 2.

<sup>295</sup> See the discussion in section 3 3 3 1.

<sup>296</sup> See the discussion in section 3 3 3 1.

<sup>297</sup> Hodgkin & Newell (2007) 261: for Art 39 see the discussion in section 3 3 3 1.

<sup>298</sup> Hodgkin & Newell (2007) 262.

<sup>299</sup> Hodgkin & Newell (2007) 264.



institutions where children are involved.<sup>300</sup>

The Committee on the Rights of the Child's comments on child abuse and neglect clearly reflect the fact that Article 19(1) emphasised preventive action which eventually led to social and educational measures being incorporated in Article 19(2), which includes the need to establish social programmes to provide support for the child and for those who have care of the child.<sup>301</sup> Article 19(2)<sup>302</sup> emphasises the importance of social conditions for the protection of children from violence; that is protection from neglect and negligent treatment, which links Article 19 with Articles 4,<sup>303</sup> 18,<sup>304</sup> 26<sup>305</sup> and 27.<sup>306</sup>

Furthermore, it is important to encourage reporting of instances of abuse in home placement institutions, orphanages, psychiatric hospitals, schools and juvenile prisons.<sup>307</sup> Child-sensitive mechanisms need to be put in place where children can report incidents of sexual abuse. A large number of children do not have access to telephones and therefore cannot

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<sup>300</sup> *Ibid.*

<sup>301</sup> Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 322; Sloth-Nielsen (2001) *SAJHR* 217.

<sup>302</sup> Hodgkin & Newell (2007) 265.

<sup>303</sup> To implement measures "to the maximum extent of available resources".

<sup>304</sup> The duty of states to render appropriate assistance to parents in the performance of their child-rearing responsibilities and to ensure development of institutions, facilities and services for the care of children.

<sup>305</sup> The right of children to benefit from social security.

<sup>306</sup> The right of the child to adequate standard of living.

<sup>307</sup> Art 19(2); Hodgkin & Newell (2007) 266-267.

use the Help Lines set up to assist them.<sup>308</sup> When matters of violence are reported, the Committee requires that particular administrative procedures be followed, which include specifying an agency or inter-agency collaboration between social services, education, health, police and prosecution authorities and voluntary and private agencies, and that due regard must be given to the right of the child to be heard, as stipulated in Article 12 of the CRC.<sup>309</sup> States must have formal roles that are exercised through agencies to investigate reported instances or allegations of violence against children.<sup>310</sup>

The Committee calls for child sensitive investigation. Treatment, and any other follow-up, for reported matters require specialised, appropriate training and interdisciplinary corporation. The Committee<sup>311</sup> found Article 25 relevant in this case, particularly with regards to the periodic review of care treatment. Article 39 may apply with regards to physical recovery and social integration of a child victim of any form of neglect, exploitation, abuse, torture, cruel, inhuman or degrading treatment or punishment.

The duty to remove the child from a situation of abuse, or neglect, including trauma suffered by the child, is, according to the Committee, imposed on the police and not the social worker.<sup>312</sup> It is required that the necessary legal authority be given to social services to take

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<sup>308</sup> Hodgkin & Newell (2007) 266-267.

<sup>309</sup> Hodgkin & Newell (2007) 268.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> Hodgkin & Newell (2007) 269.

urgent action to protect children from abuse.<sup>313</sup> The Committee suggested appropriate support and assistance to both victims and perpetrators of family violence, rather than only punishment and intervention.<sup>314</sup>

Furthermore, the CRC requires:

“(1) States parties to acknowledge the right of the child to the enjoyment of the highest standard of health and to facilities for the treatment of illness and rehabilitation of health ... States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services ... (2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures ... (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care ... (c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution ... (e) to ensure that all segments of society, particular parents and children, are informed, and have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents ... (3) State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children...”<sup>315</sup>

According to Hodgkin and Newell, Article 24 enlarges on the right of children to physical

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<sup>313</sup> *Ibid.*

<sup>314</sup> Hodgkin & Newell (2007) 269: this recommendation was made directly to Poland.

<sup>315</sup> Art 24 of the CRC. See the discussion in section 3 3 3 1.

development such as nutrition, clothing and housing as provided in Article 27(3).<sup>316</sup> It does so by for example, emphasising the need for clean drinking water, health education, good hygiene and sanitation, breastfeeding and preventive action in relation to environmental pollution.

Article 24 is also viewed as the rights which build on the right to life and to survival and development as entrenched in Article 6 of the CRC.<sup>317</sup> Unlike Article 4 which provides that states must “to the maximum extent of their available resources” implement these rights, Article 24 provides that states shall promote and encourage international cooperation “with a view to achieving progressively” full realisation of this right.<sup>318</sup> According to Hodgkin and Newell,<sup>319</sup> the Committee of the Rights of the Child has not commented in detail on the interpretation of Article 24 and the obligation imposed by the Article on states.

However, Hodgkin and Newell<sup>320</sup> point to the General Comment of the Committee on ICSECR on the nature of the obligation imposed on states.<sup>321</sup> They note that the concept “progressive realisation” is a necessary flexibility device “reflecting the realities of the real world” but that the concept must be read within the objective of the Covenant, which is to establish clear obligations with regard to state parties in respect of the full realization of the

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<sup>316</sup> Art 27(3). See also Hammerberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights* 360.

<sup>317</sup> Hodgkin & Newell (2007) 344.

<sup>318</sup> Hodgkin & Newell (2007) 351.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

<sup>321</sup> No 14, 2000HRI/GEN/1/Rev.8. paras 43 to 45.

rights.

The CRC also obliges states to ensure, within their national laws, the right of the child to benefit from social security, which includes social assistance as follows:

“(1) States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national. (2) The benefit, should where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.”<sup>322</sup>

“Social security” is viewed as financial assistance that must be provided by the states.<sup>323</sup>

Since children are dependent on their parents and guardians, their parents or guardians must provide such assistance. Where parents are not able to provide such assistance, the state must ensure that some sort of financial assistance is paid directly to the child or is paid to the parent for the best interests of the child.<sup>324</sup> The Committee pointed out that because of the differences between municipalities and the widening of social strata, poor services are rendered to economically disadvantaged groups. The Committee recommends that states

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<sup>322</sup> Art 26(1).

<sup>323</sup> Hodgkin & Newell (2007) 385.

<sup>324</sup> *Ibid.*

take all appropriate measures in accordance with Articles 2,<sup>325</sup> 26,<sup>326</sup> 27<sup>327</sup> and 30<sup>328</sup> to ensure that social services are universally accessible, particularly by poor families.<sup>329</sup>

The Committee requires that the public be informed of their rights. Although this recommendation was directed to those Scandinavian countries with low levels of poverty among children, concern was raised particularly about the manner in which social benefits are decentralised in that this leads to inequitable distribution of welfare benefits.<sup>330</sup> The Committee<sup>331</sup> acknowledged that states<sup>332</sup> are employing:

“ ... the system of financial ‘allowances’ provided by the State to assist in the care of children under certain circumstances, such as low family income, are not provided to children themselves but rather to mothers, irrespective of whether they are caring for their children ...

The Committee recommended that Greece amend its procedure for the disbursement of family allowances to ensure that this financial assistance is provided to persons who are

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<sup>325</sup> Provides for the responsibility of the states to ensure respect for the rights of every child irrespective of, amongst others, their race, colour, language, religion, political or other opinion, ethnic or social origin, disability, birth or other status.

<sup>326</sup> See the discussion that follows.

<sup>327</sup> *Ibid.*

<sup>328</sup> Protects the right of a child from an indigenous group to enjoy his or her culture and to practice his or her religion and to use his or her language.

<sup>329</sup> Hodgkin & Newell (2007) 387.

<sup>330</sup> *Ibid.*

<sup>331</sup> Hodgkin & Newell (2007) 390.

<sup>332</sup> The concern was directed to Greece in particular.

caring for the children who are intended to benefit from the allowances.<sup>333</sup> The Committee<sup>334</sup> also raised concerns with regard to Nepal<sup>335</sup> and recommended that it abolish its legal provision which allows the poverty of parents as grounds for adoption, and further noted that a number of children are in state care because of the poverty of the family.

The CRC also provides that:

“(1) States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental spiritual, moral and social development ... (3) States Parties in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”<sup>336</sup>

The Committee notes with concern that even the most basic standards of living are not assured for millions of young children, despite widespread recognition of the adverse consequences of deprivation.<sup>337</sup> Growing up in relative poverty undermines children’s well-being, social inclusion and self-esteem, and reduces opportunities for learning and development. Growing up in conditions of absolute poverty has even more serious consequences, threatening children’s survival and their health as well as undermining the

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<sup>333</sup> Hodgkin & Newell (2007) 390.

<sup>334</sup> Hodgkin & Newell (2007) 123.

<sup>335</sup> Nepal CRC/C/15/Add.261, par 54.

<sup>336</sup> Art 27(3).

<sup>337</sup> Hodgkin & Newell (2007) 395.

basic quality of life.

States are urged by the Committee to implement systematic strategies to reduce poverty in early childhood, as well as combat its negative effects on children's well-being.<sup>338</sup> All possible means should be employed, including material assistance and support programmes for children and families.<sup>339</sup> According to the Committee,<sup>340</sup> this will assist young child to achieve a basic standard of living in accordance with their rights. Implementing children's rights to benefit from social security, including social insurance, is an important element of any strategy.<sup>341</sup> The provisions of the CRC, as discussed above,<sup>342</sup> cover situations of financial (monetary) assistance, "social security", "material assistance" and in other situations simply, "appropriate assistance".

The direct responsibility of states includes, amongst others, the duty to ensure that children have access to certain services such as free and compulsory education:

"(1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including vocational and general education, make them available and accessible to every child and take appropriate measures such as the

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<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> Arts 4, 18(2), 24, 26(1) and 27(3).



introduction of free education and offering financial assistance in case of need; (c) make higher education available to all on the basis of capacity by every appropriate means; (d) make educational and vocational information and guidance available and accessible to all children (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates ...<sup>343</sup>

Furthermore, the CRC also requires:

“States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts ...<sup>344</sup>

Article 39 requires states to provide measures to assist child victims who are covered under Articles 19,<sup>345</sup> 33,<sup>346</sup> 34,<sup>347</sup> 35,<sup>348</sup> 36,<sup>349</sup> 37.<sup>350</sup> The Committee on the Rights of the Child

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<sup>343</sup> Art 28 of the CRC.

<sup>344</sup> Art 39 of the CRC.

<sup>345</sup> As discussed in the previous paragraphs in this section.

<sup>346</sup> Provides for the protection of children from illicit use of narcotic drugs and psychotropic substances as defined in relevant international treaties.

<sup>347</sup> Provides for the protection of children who are subjected to all forms of sexual exploitation and sexual abuse, such as unlawful sexual activities, use of children in prostitution, pornographic performances and material.

<sup>348</sup> Provides for the protection of children who are subjected to abduction, sale or trafficking for any purpose or in any form.

<sup>349</sup> Provides for the protection of children against all forms of exploitation prejudicial to any aspects of the child welfare.

<sup>350</sup> Provides for the protection of children who are subjected to torture inhuman and degrading treatment or punishment.

recommends that states reinforce legal measures protecting child victims of pornography, prostitution, trafficking and sex tourism, prioritise recovery assistance, ensure that the victims are provided with education, training, psychological assistance, counselling and avoid institutionalising victims who cannot return to their families.<sup>351</sup> The Committee also acknowledged the difference between services that are provided for the rehabilitation of abused children in the urban and rural areas, and insisted that services be provided in accordance with Article 39 of the CRC.<sup>352</sup> The committee also requires that non-punitive approaches be taken for children who are victims of drug abuse.<sup>353</sup> The Committee pointed out its concern regarding the fact that children who are abusing drugs are imprisoned for a period of more than three years in some states.<sup>354</sup> Children who have been exposed to serious physical and moral danger must, as recommended by the Committee, receive rehabilitation, medical and social assistance. Social reintegration and compensation of the victims is also important.<sup>355</sup>

The ACRWC also requires state parties:

“ ... in accordance with their means and national conditions the all appropriate measures; (a) to assist parents and other persons responsible for the child and in the case of need provide material assistance and support programmes particularly with regard to nutrition, health,

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<sup>351</sup> Hodgkin & Newell (2007) 590-591.

<sup>352</sup> Hodgkin & Newell (2007) 591.

<sup>353</sup> *Ibid.*

<sup>354</sup> Hodgkin & Newell (2007) 591: the concern was directed at Bangladesh.

<sup>355</sup> Hodgkin & Newell (2007) 593-596.

education, clothing and housing; (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of child; and (c) ensure that children of working parents are provided with care services and facilities”.<sup>356</sup>

Furthermore, the ACRWC imposes a responsibility on state parties to provide support programmes with regards to nutrition, health, education, clothing and housing to assist parents and other persons responsible for the rearing of the child.<sup>357</sup> In 1963, African states formed the Organisation of the African Unity<sup>358</sup>, which later became African Union,<sup>359</sup> aimed at proclaiming the principle of respect for the sovereignty of the African states with a leadership committed to the transformation of Africa.<sup>360</sup> The objectives of the AU are to promote peace, security and stability; the promotion of human rights in accordance with the African Charter on Human and People’s Rights, the promotion of sustainable development at the economic, social and cultural level; and to work with relevant international partners in the eradication of diseases and promotion of good health.

The African leaders designed a programme and a plan of action called the New Partnership for Africa’s Development<sup>361</sup> to achieve these objectives.<sup>362</sup> NEPAD’s long term objectives are

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<sup>356</sup> Art 20(2): see the discussion in section 2 4 3 2.

<sup>357</sup> *Ibid.*

<sup>358</sup> Hereinafter referred to as the “OAU”. Art III Charter of the OAU.

<sup>359</sup> Hereinafter referred to as “AU”.

<sup>360</sup> Mbazira “A Path to Realising Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa Development” (2004) *AHRJ* 35.

<sup>361</sup> Hereinafter referred to as “NEPAD”.

<sup>362</sup> Mbazira (2004) *AHRJ* 35-36.

to eradicate poverty in Africa and place African countries, individually and collectively, on a path of sustainable development.<sup>363</sup> The goal includes, amongst others, the reduction of the proportion of people living in extreme poverty by half by 2015, enrolment of all children of school-going age in primary school by 2015, access to reproductive health care, increased employment and African reintegration.<sup>364</sup>

In his critique of NEPAD, Mbazira<sup>365</sup> maintains that economic, social and cultural rights are to be realised gradually and that they are thus not thought of as “real” rights. He adds that NEPAD failed to take a rights-based approach by vaguely referring to economic, social and cultural rights in terms of access to services.

Furthermore, there is no reference to the integration of human rights in the development process.<sup>366</sup> I submit that there has not been any remarkable contribution regarding the realisation of socio-economic rights through NEPAD yet. The problem could be the rapid increase in Africa’s population, which may outstrip economic growth.<sup>367</sup> This trend is likely to make the continent even poorer. Furthermore, Africa faces the reality of more people living

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<sup>363</sup> Mbazira (2004) *AHRJ* 43: this is part of the adoption of the Millennium Declaration’s International Development Goals, hereinafter referred to as “IDGs”.

<sup>364</sup> Mbazira (2004) *AHRJ* 43.

<sup>365</sup> Mbazira (2004) *AHRJ* 37-38.

<sup>366</sup> Mbazira (2004) *AHRJ* 50.

<sup>367</sup> In 2010 Sub-Saharan Africa had a population of approximately 1,013,779.050. This increases at the rate of 3% per annum: accessed from [www.internetworldstats.com/stats/.htm](http://www.internetworldstats.com/stats/.htm) on 2011-03-24.

with HIV/Aids than any other continent. These sufferers require treatment and care.<sup>368</sup>

Every year, the Committee on the African Children's Charter designates a theme for the "Day of the African Child".<sup>369</sup> The theme for 2010 was "Planning and Budgeting for the Well-being of the Child: A Collective Responsibility".<sup>370</sup> The words "collective responsibility" are consistent with the obligation imposed by the ACRWC on parents and guardians for the upbringing and development of the child.<sup>371</sup>

The ACRWC further provides that parents and guardians shall, within their financial capabilities, secure the conditions of living necessary for the development of the child.<sup>372</sup> This means that the ACRWC imposes the responsibility for the upbringing, development, and financial security for the development of the child primarily on parents and guardians and not

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<sup>368</sup> In 2009, 1.3 million people died of HIV/Aids in Africa, and 1.8 million people became infected: accessed from [www.avert.org/hiv-aids-africa.htm](http://www.avert.org/hiv-aids-africa.htm) on 2011-03-24.

<sup>369</sup> The Day has been commemorated since 1991, starting with the commemoration of the June youth anti-apartheid protests in Soweto in 1976. The theme for 2006 was "The Right to Protection: Stop Violence against Children"; 2007's theme was "Combat child trafficking"; for 2008 it was "Right to Participation: Let Children be Seen and Heard"; for 2009 it was "Africa Fit for Children: Call for Accelerated Action Towards their Survival": see Viljoen in Boezaart (ed.) *Child Law in South Africa* 344.

<sup>370</sup> Viljoen in Boezaart (ed.) *Child Law in South Africa* 344.

<sup>371</sup> Art 20(1) provides that: "Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and have the duty: (b) to secure within their abilities and financial capacities, conditions of living necessary to the child's development."

<sup>372</sup> Art 20(1)(b).

the state parties only.<sup>373</sup> The provision for financial assistance can only be made by state parties to assist parents and other persons responsible for the upbringing and development of the child.<sup>374</sup> The obligation imposed on state parties to provide support programmes and basic necessities for the development of the child may be regarded as financial assistance, given that it has financial implications.<sup>375</sup>

The ACRWC also provides for the protection of the child by requiring state parties to:

“(a) ... take specific legislative, administrative, social, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse while in the care of the child. (a) Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment and follow-up of instances of child abuse and neglect”.<sup>376</sup>

The ECHR does not specifically provide for the right of the child to socio-economic rights. However, the ECHR requires the state to take positive steps to promote respect for the right to family life.<sup>377</sup> This means that in terms of the ECHR the state has an obligation to ensure that the right to family life is enjoyed by everyone. The obligation includes the duty to

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<sup>373</sup> *Ibid.*

<sup>374</sup> Art 21(1)(b). See the discussion in 4 2 2.

<sup>375</sup> Art 20(2)(a).

<sup>376</sup> Art 16(a) and (b).

<sup>377</sup> Art 8(2). See also the discussion in section 2 2 2 2 1.

develop and maintain family ties, and act in a manner that enables these ties to develop naturally.<sup>378</sup>

There are contradicting opinions regarding the obligation of the state to provide assistance in terms of Article 8 of the ECHR. In the case of *Andersson and Kullman v Sweden*<sup>379</sup> the court found that Article 8 does not guarantee the family assistance from the state in the form of financial support or day care facilities for children. In *Marckx v Belgium* the ECtHR clearly states that family life is not restricted to social, moral or cultural relations, it also consists of interests of a material kind.<sup>380</sup> In the case of *Chapman v United Kingdom*,<sup>381</sup> the court found that:

“While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter for political not a judicial decision.”<sup>382</sup>

In the case of *Treharne v Secretary of State for Work and Pensions*,<sup>383</sup> the Child Support Agency failed to collect a maintenance assessment made against a father in respect of several of his children. The mother of the children requested enforcement of the support

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<sup>378</sup> *Rieme v Sweden* par 41. See also the discussion in section 2 2 2 2 1.

<sup>379</sup> 251. See also the discussion in section 2 2 2 2 1.

<sup>380</sup> 330 and 351 par 52. See the discussion in section 2 2 2 2 1 (own emphasis).

<sup>381</sup> (2001) 33 EHRR 399.

<sup>382</sup> 399 par 99.

<sup>383</sup> (2008) *EWHC* 3222.

through the agency, but the agency failed until it was too late to make any enforcement. When the children reached adulthood, they lodged a claim that the failure of the agency interfered with their right in terms of Article 8 to respect for their private and family life. They sought an award under the Human Rights Act<sup>384</sup> in vain. The Agency as a whole had satisfied the state's obligation in terms of Article 8.<sup>385</sup>

Of more importance, it was found that Article 8 only generated a claim against the state for a minimal level of financial support in relation to a child. Cranstone J explained that:

“As a matter of principle family life [in] Art 8 [is] constituted by the love, trust, confidence, mutual dependence and unconstrained social intercourse which exists within the family and private life by the sphere of personal and sexual autonomy. The same conclusion must surely apply in the converse situation where persons have less money as a result of the CSA failing to collect arrears of maintenance. That may make family life tougher and perhaps more stressful than it would be, but it cannot be said to affect the core values attached to these concepts.”<sup>386</sup>

With regard to the right of the child to be protected from abuse and neglect, the ECHR had an impact on the issue of corporal punishment, particularly where children's issues have been given explicit attention.<sup>387</sup> In the case of *Re, K A Local Authority v N*,<sup>388</sup> a local authority sought an emergency protection order to protect a young woman in a forced marriage. In

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<sup>384</sup> 1998.

<sup>385</sup> Choudhry & Herring (2010) 417.

<sup>386</sup> Par 31; Choudhry & Herring (2010) 417.

<sup>387</sup> Choudhry & Herring (2010) 237-239.

<sup>388</sup> (2007) 1 *FLR* 399.



this case the court declined to make the order on the basis of the fact that the young woman opposed the court intervention.

The ECtHR decision in *Tyrer v United Kingdom*<sup>389</sup> best illustrates the position in the European jurisprudence in this area. The matter concerned the corporal punishment of a 15 year-old boy at school on the 7 March 1972 who had three strokes administered to him with a birch cane.<sup>390</sup> The court decided that the punishment was degrading and declared that the nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being.<sup>391</sup> This violence is institutionalised, ordered by the judicial authorities of the state, and carried out by police authorities of the state.<sup>392</sup>

Although the applicant in the case did not suffer any severe or long-lasting physical effects, the punishment which he suffered under the power of the authorities constituted an assault, as covered in Article 3 of the ECHR regarding the protection of a person's dignity and physical integrity.<sup>393</sup>

According to Sloth-Nielsen,<sup>394</sup> there is no view offered by the ECtHR in the *Tyrer* case with regard to corporal punishment applied by parents and whether it amounts to a form of

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<sup>389</sup> (1978) 2 EHRR 1.

<sup>390</sup> Par 9.

<sup>391</sup> Par 30.

<sup>392</sup> Par 33.

<sup>393</sup> *Ibid.*

<sup>394</sup> In Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 23-16.

violence. However, the court in the case of *A v United Kingdom*<sup>395</sup> held that the repeated beating by the stepfather of a nine year old boy amounted to torture or inhumane and degrading treatment or punishment in contravention of Article 3 of the ECHR. The government of the United Kingdom was held liable for failing to take measures to protect the child in terms of the measures imposed by the ECHR on states to implement laws which protect children from serious breaches of personal integrity.<sup>396</sup> The English law seems to hold the same principles as South African common law with regard to moderate chastisement.<sup>397</sup> I am of the view that this area of law, in terms of South African jurisprudence, needs to be considered for amendment consistent with the Constitution.

Choudhry and Herring<sup>398</sup> argue that within the right of the child to respect for his or her family and private life is the right to bodily integrity. The right to a private life includes the right to psychological integrity, the right to personal development, and the right to establish and develop relationships with other human beings and the outside world.<sup>399</sup> Thus, Article 8 of the ECHR is seen not only as protecting individuals from physical violence, but also as protecting them from conduct which attacks their emotional well-being to such an extent that their personal development is hindered. This can include physical, psychological and emotional abuse or neglect. Thus, Article 8 will be relied upon in a case of child abuse

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<sup>395</sup> (1998) 2 *FLR* 952.

<sup>396</sup> Sloth-Nielsen in Cheadle *et al. South African Constitutional Law – The Bill of Rights* 23-16.

<sup>397</sup> Labuschagne “Case Discussion: *A v United Kingdom* 1998-09-23, ECHR (1998) VI 2692, NJ 1999, 532” (2000) *De Jure* 146.

<sup>398</sup> (2010) 297.

<sup>399</sup> *Pretty v UK* (2002) 2 FCR 149 par 61.

where the abuse is not severe enough to attract Article 3 protection. Unlike Article 3, the right in Article 8 is not absolute.<sup>400</sup>

The right to socio-economic rights is firmly entrenched in the UDHR for individuals and families.<sup>401</sup> The UDHR provides that everyone has the right to: "... a standard of living adequate for the health and well-being of himself and his family, including food ...". This clause covers every person including children. This means that children have the right to an appropriate standard of living, consistent with their development and well-being.<sup>402</sup>

#### *4.2.3 state's obligation to provide socio-economic and protection rights of children in terms of foreign jurisdictions*

This section reflects on foreign jurisdictions which directly impose an obligation on the state to provide socio-economic and protection rights. I compare the South African Children's Act with the Children's Act (Kenya). I select Kenya on the basis that it is one example of a sub-Saharan African country that has incorporated the general principles of the CRC.<sup>403</sup> The Constitution of Kenya<sup>404</sup> does not have a provision that specifically guarantees the socio-economic rights of children; neither does it recognise, amongst others, the right to social

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<sup>400</sup> (2010) 298.

<sup>401</sup> Art 25.

<sup>402</sup> *Ibid.*

<sup>403</sup> See the discussion in section 3 1. See UNICEF "Convention and Law Reform" in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 5.

<sup>404</sup> Act 2001: accessed from <http://kenya.rcbowen.com/constitution/chap5.html> on 2010-10-14.

security.<sup>405</sup> Instead the Kenyan Constitution acknowledges that everyone is entitled to fundamental rights and freedoms and guarantees every person protection for the privacy of his or her home and other property and from deprivation of property without any compensation.<sup>406</sup>

On the other hand, the Constitution of Kenya entrenches a right, which relates to the protection of any person who is deprived of property.<sup>407</sup> The Constitution prohibits any compulsory taking of, possession of, interest in, or right over any property.<sup>408</sup> However, the latter rights may be claimed by persons who have ownership or possession over the property and apply more to adults than children. Kenya has signed the ICSECR.<sup>409</sup> Article 9 of the Covenant requires that the state parties to the ICSECR recognise the right of everyone to social security, including insurance, while Article 10(2) requires that special protection be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be afforded paid leave or leave with adequate social security benefits.

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<sup>405</sup> Hakijamii Trust Report *The Right to Social Security in Kenya: The Gap between International Human Rights and Domestic Law and Policy A Parallel Report to Committee on Economic, Social and Cultural Rights Article 9 of the Covenant* (2007) 4: accessed from <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf> on 2010-10-14.

<sup>406</sup> Art 70(c).

<sup>407</sup> Art 75(1).

<sup>408</sup> *Ibid.*

<sup>409</sup> 3 January 1976. See the Office of the United Nations High Commissioner for Human Rights Report *Status of Ratifications of the Principal International Human Rights Treaties* (2004).

There is no definition of the right to social security in the ICSECR. However the Draft Comment on the Rights of Social Security indicates that it covers the right to access benefits through a social security system in order to secure adequate income, access to security, access to health care and family support.<sup>410</sup> According to the Committee on Economic, Social and Cultural Rights' revised guidelines for state reporting and general practice, the benefits should fall into the nine categories agreed by states in ILO Conventions; namely, medical care, sickness, unemployment, old-age, employment injury, family, maternity, disability and death of family members.<sup>411</sup> In order for the social policy to be realised, Langford<sup>412</sup> is of the view that the social security system must:

- (a) Be available and established under national law, which includes financial viability, sustainability and responsiveness to conditions.
- (b) Provide adequate benefits in amount and duration of payment.
- (c) Be accessible so as to extend social security provision to those lacking coverage, especially those with relevant information and ability to participate.
- (d) Be available to all persons equally and without discrimination on any grounds.
- (e) Pay special attention and afford special protection to vulnerable groups such as

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<sup>410</sup> *The Draft General Comment of the Right to Social Security* [E/C.12.GC/20/CRP.1.16 February 2006], Item 5 of the provisional agenda of the 36<sup>th</sup> Session of the Committee on Economic, Social and Cultural Rights Geneva, 1-19<sup>th</sup> May 2006, par 2: accessed from <http://www2.ohchr.org/English/bodies/hrcouncil/docs/10session/A.HRC.10.46.pdf> on 2010-11-10.

<sup>411</sup> *Official Records of the Economic and Social Council*, 1991, Supp. No.3 (E/1991/23 E/C.12/1990/8), Annexure IV: accessed from <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm> on 2010-11-10.

<sup>412</sup> "The Right to Social Security and Implications for Law, Policy and Practice" in Riedel (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2006) 29-53.

women, children, youth, and persons with disabilities, those in the informal sector, older persons, minority groups, non-nationals, prisoners and detainees.<sup>413</sup>

These provisions bestow on individuals the right to social security. On the other hand, they place the duty on the state to uphold these rights.<sup>414</sup> Social security is covered under a pension scheme limited to formal sector workers.<sup>415</sup> The government of Kenya has not established domestic legislation that adheres to international laws on social security or other forms of social protection.<sup>416</sup> Since this is a pre-requisite before the provisions can be invoked in domestic courts, it means that any legislative or institutional interventions that exist or are made from time to time are not derived from a clear, central and co-ordinated policy focus.<sup>417</sup> The social security system under Kenyan law is employment-centred.<sup>418</sup> This means that all the benefits that are derivable from the various social security schemes, that

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<sup>413</sup> Art 68 of the Convention 102 on “Equality of Treatment of Non-National Residents” provides that non-national residents shall have the same rights as national subject to certain exceptions.

<sup>414</sup> Hakijamii Trust Report *The Right to Social Security in Kenya* (2007) 4.

<sup>415</sup> Hakijamii Trust Report *The Right to Social Security in Kenya* (2007) 2.

<sup>416</sup> *Ibid.*

<sup>417</sup> Hakijamii Trust Report *The Right to Social Security in Kenya* (2007) 4.

<sup>418</sup> Amongst others, Kenya has the following legislation on social security: Retirement Benefits Act 1997 which supervises and regulates the establishment and management of retirement benefits schemes, protects the interest of members and sponsors of the scheme. The National Hospital Insurance Fund Act 1998, a benefit which covers medical conditions including maternity cases for the person contributing towards the fund and all his or her dependants. The National Social Security Fund Act 5 of 1977 and the Pensions Act 31 of 1965 provide the basic social security services and welfare support to certain category of workers, that is, in exclusion to casual workers and the unemployed. See Hakijamii Trust Report *The Right to Social Security in Kenya* (2007) 5-10.

is, health care, unemployment, sickness and other benefits, are accessible by persons or dependants only of persons who are in employment.

In its response to Kenya's report towards the CRC, the Committee expressed concern about the widespread poverty and the increasing number of children who do not have access to food, clean drinking water, adequate housing and latrines.<sup>419</sup> The Committee urged Kenya to reinforce its efforts to provide support and material assistance to marginalised and disadvantaged families and to guarantee the right of children to an adequate standard of living in accordance with Article 27 of the CRC.<sup>420</sup> What we are able to learn from Kenya is that countries may sign the CRC, but not live up to the obligations stipulated in the convention.

South Africa's socio-economic structure differs to a large extent from that of other African countries. Early industrialisation led to the formation of a sizable working class, which provided a financial foundation to build comprehensive social security systems.<sup>421</sup> Thus, South Africa has a competitive advantage over most African countries, including Kenya. However, the apartheid system provided a social security system which was based on employment-related protection.<sup>422</sup> Training, health care, and funded retirement was

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<sup>419</sup> Concluding Observation No 55.

<sup>420</sup> Concluding Observation No 56(a).

<sup>421</sup> Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 218 -264.

<sup>422</sup> Seekings & Class *Race and Inequality in South Africa* (2005) 128-165; Barchiesi (2006) Unpublished conference paper 4.

unequally distributed, with a focus on the white minority.<sup>423</sup> South African welfare policy and social security frameworks are thus characterised by unequal forms of social provision, and the absence of universal state-funded systems. Those who benefit are mainly working for the private sector, which provides health care and retirement benefits to its employees.<sup>424</sup>

The Children's Protection Act (South Australia) is quite specific about the role of the state in assisting parents in their responsibilities. The Act provides that in fulfilling the objectives of the Act, the Minister for Family and Community Services must endeavour to promote collaborative work between government, local government, non-governmental agencies and families in taking responsibilities for and dealing with problems of child abuse and neglect.<sup>425</sup> The Act also provides that the Minister for Family and Community Services must amongst others, provide preventative and support services;<sup>426</sup> assist the Aboriginal community to establish its own programmes for preventing or reducing incidents of abuse and neglect of children;<sup>427</sup> and provide information or education services for parents in relation to developmental, social and safety requirement of children.<sup>428</sup>

Child health nurses provide preventative and support services as, amongst others, part of

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<sup>423</sup> *Ibid.*

<sup>424</sup> Olivier *et al.* (eds.) *Social Security Law, General Principles* (1999) 249-279; Barchiesi (2006) Unpublished conference paper 8.

<sup>425</sup> S 8(a) of the Children's Protection Act (South Australia). See the proposed provision for South Africa inferred from the Children's Protection Act (South Australia) in par 4 5.

<sup>426</sup> S 8(d).

<sup>427</sup> S 8(e).

<sup>428</sup> S 8(f).



family home visits programmes. The visits are made to families, over the first two years of the child's life.<sup>429</sup> The family home visits are meant to enhance the development of the child and to support the parental attachment between the child and his or her parent. This is done by way of enabling health nurses to establish relationships with families and work closely with service providers and broker support for families which require additional help. The programme involves a health enrolment, health check, assessment of risk and the needs of the child. South Australia also has a parent helpline which provides telephonic services to parents 24-hours-a-day.<sup>430</sup> Services are rendered by health professionals and social practitioners with the assistance of volunteers. Support that is provided is on a wide variety of issues, including, toddler behaviour, bullying, sibling rivalry, drugs and alcohol, sexuality, safety, suicide and self-harm.<sup>431</sup>

Parenting programmes are provided using school facilities.<sup>432</sup> These are early intervention programmes for children up to five years old who have experienced issues of childhood abuse, domestic violence and so forth. The Department of Communities and Social Inclusions in South Australia also provides a range of concessions to help families on low or

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<sup>429</sup> South Australia Department of Health Report *Our Health and Health Services* (2008) 147 par 7.11.2. Accessed from [www.sahealth.sa.gov.au/...health...resources/resources/southaustralia-our-health](http://www.sahealth.sa.gov.au/...health...resources/resources/southaustralia-our-health) on 2012-09-05

<sup>430</sup> South Australia Department of Health Report *Our Health and Health Services* (2008) 147 par 7.11.3.

<sup>431</sup> *Ibid.*

<sup>432</sup> South Australia Department of Health Report *Our Health and Health Services* (2008) 147 par 7.11.4.

fixed incomes with the cost of household and other expenses.<sup>433</sup> This includes concessions on council rates, waste, sewerage, energy costs and public transport.

What we can learn from South Australia is that the responsibility that is imposed on the state is not only incorporated in legislation like Children's Act (Kenya), but is acted upon. I propose that South Africa develop a provision that unambiguously imposes an obligation on the state to assist parents in their roles.<sup>434</sup> Furthermore, South Africa must establish the types of programmes that must be implemented by the state with the support of other government departments and NGOs.<sup>435</sup>

### **4.3 Prevention and early intervention programmes**

#### *4.3.1 Introduction*

In this section I discuss the origins of "Prevention and early intervention programmes" in terms of South African law. I also reflect on circumstances wherein the programmes may be considered as intervention measures in the lives of children.

"Prevention and early intervention programmes" are a new phenomenon in South African child law. The Child Care Act did not have a specific clause covering "prevention and early

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<sup>433</sup> Accessed from [www.dcsi.sa.gov.au/pub/default.aspx?tabid=164](http://www.dcsi.sa.gov.au/pub/default.aspx?tabid=164) on 2012-06-05.

<sup>434</sup> See the proposed provisions in section 4 5.

<sup>435</sup> *Ibid.*

intervention programmes”, although Regulations 416 to the Child Care Act (as amended) stated that:

“(4) The report of a social worker contemplated in section 14(2) shall be concise and logically compiled, shall be based on a thorough assessment of the strengths of the child and the family and shall include the following basic components: (b) a summary of prevention and early intervention services rendered in respect of the child and his or her family and a brief background of previous statutory interventions in respect of the child.”

The Child Care Act did not define the concepts.<sup>436</sup> Matthias<sup>437</sup> holds the view that “prevention services” were applied in instances where social workers participated in working agreements with parents. However, social workers may not engage “preventative services” where a child is to be removed in emergency cases.<sup>438</sup> According to Matthias,<sup>439</sup> “prevention services” included therapeutic counselling, parental guidance referral for accommodation, financial or legal assistance, drug control services or community work. The programmes in “prevention and early intervention services” would basically include life skills programmes, and the development of pre-schools and recreational groups.<sup>440</sup>

A clause on “prevention and early intervention programmes” was first introduced explicitly in the Children’s Act when the legislature acknowledged the fact that a social worker may, after

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<sup>436</sup> GG 31 March 1998 No 18770.

<sup>437</sup> (1997) 29-30.

<sup>438</sup> Matthias (1997) 29.

<sup>439</sup> (1997) 33.

<sup>440</sup> Matthias (1997) 33.

investigation, find that the child, who was identified as a child in need of care and protection, is, in actual fact, not necessarily in need of alternative placement.<sup>441</sup> The intention of the legislature is to keep children in the family environment as much as possible and to make the removal of the child a measure of last resort.<sup>442</sup> The Children's Act is emphatic that the best interests of the child must be the paramount factor in deciding whether or not to remove a child.<sup>443</sup>

According to the Children's Act, "prevention and early intervention" measures may be considered in situations where the social worker has concluded his or her investigations concerning the status of the child, and has found that the child is not in need of care and protection.<sup>444</sup> In these circumstances, the social worker is expected to take the necessary measures to assist the child.<sup>445</sup> The assistance that may be provided by the social worker may include counselling, prevention, early intervention services, mediation, family reconstruction, rehabilitation, behaviour modification and other problem solving measures and referral to another suitably qualified person or organisation.<sup>446</sup> The Children's Act improved on the services that were previously provided by the Child Care Act and introduced prevention, mediation, family reconstruction, modification and other problem solving measures and referral to another suitably qualified person or organisation as new services.

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<sup>441</sup> S 150(3) of the Children's Act.

<sup>442</sup> S 148(1) of the Children's Act; Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 108.

<sup>443</sup> S 152(4).

<sup>444</sup> S 150(3).

<sup>445</sup> S 150(2).

<sup>446</sup> S 150(3).

Details regarding “prevention and early intervention programmes” and their application are provided in section 144(1) and (2) of the Children’s Act.<sup>447</sup>

#### 4.3.1.1 *The purpose and definition of prevention and early intervention services in terms of the Children’s Act*

This section discusses the definition of prevention and early programmes as provided in the Children’s Act and the manner in which they may be implemented. The discussion is complemented by data from an interview with a social worker who implemented the programmes.

According to the Children’s Act,<sup>448</sup> prevention and early intervention are based on:

- “(a) preserving a child’s family structure;
- (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and the best interests of their children, including the promotion of positive, non-violent forms of discipline;
- (c) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities and chronic illnesses;
- (d) promoting appropriate interpersonal relationships within the family;
- (e) providing psychological, rehabilitation and therapeutic programmes for children;
- (f) preventing the neglect, exploitation, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children’s needs;

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<sup>447</sup> S 144(1) and (2) of the Children’s Act.

<sup>448</sup> S 144(1)(a)-(i).

- (g) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;
- (h) diverting children away from the child and youth care system and criminal justice system; and
- (i) avoiding the removal of a child from the family environment”.

Furthermore, section 144(2) of the Children’s Act stipulates that prevention and early intervention programmes may include:

- “(a) assisting families to obtain the basic necessities of life;
- (b) empowering families to obtain such necessities for themselves;
- (c) providing families with information to enable them to access services;
- (d) supporting and assisting families with a chronically ill or terminally ill family member;
- (e) early childhood development; and
- (f) promoting the well-being of children and the realisation of their full potential”.

The “prevention and early intervention programmes” fall under the Child Protection Unit of the Department of Social Development and are kept broad to accommodate all directorates in the department.<sup>449</sup> “Prevention and early intervention programmes” are, for the purposes of implementing section 144 of the Children’s Act, defined with a focus on:

- (1)(a) preserving a child’s family structure: According to Mqonci,<sup>450</sup> this element talks to all programmes on social development; for example, preserving the family structure is a

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<sup>449</sup> Interview held on the 2011-04-05 with Mqonci, deputy director of the Child Protection Unit of the National Department of Social Development, Tshwane, see attached Annexure “D”.

<sup>450</sup> Deputy director of the Child Protection Unit of the National Department of Social Development, Tshwane, an interview held on the 2011-04-05.

goal that is adopted by all directorates, not to decentralise the family but promote nuclear families as a priority.<sup>451</sup> Thus, directorates have to develop strategies that would ensure that the family is not decentralised. The court in *Chirindza v Gauteng Department of Health and Social Welfare*,<sup>452</sup> found that even if the state cannot repair disruptive family life it can create positive conditions to avoid conduct by its agencies which may have the effect of placing children in peril. The court reflected on section 28 of the Constitution that requires the law to make the best effort to avoid any breakdown of family life or parental care. The Act complies with the obligation

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<sup>451</sup> *Ibid.*

<sup>452</sup> *Centre for Child Law v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC), the first applicant in this case trades as a shoe repairer in Sunnyside, Tshwane, at an intersection near a take-away restaurant. He (first applicant), on the day in question, had his 3 year-old daughter with him because his partner was in hospital giving birth. The second applicant in this case was at the same intersection with the first applicant as she begs money for a living and was accompanied on the same day in question by an assistant, her two children, a 1 year-old (whom she breast-feeds) and a 4 year-old because she was blind. The social workers of the Department of Social Development, Tshwane together with the officials of the City “raided” the people who had children with them or near then whilst begging. The social workers published a pamphlet warning mothers of this “raid” without a court order for the removal of these children. The social workers removed the children of the first and second applicants from the streets and placed the first applicant at a school for the blind. She was then unable to continue breast-feeding her 1 year-old. An application was brought on an urgent basis aimed at restoring the children to the parents. The child of the first applicant was immediately returned to his care. The children of the second applicant were ordered to remain in a place of safety for five weeks pending investigation of whether they were in need of care and protection. See also the discussion in sections 4 3 1, 5 2, 5 2 1 and 5 5.

imposed on the state to preserve the right of the child to family life.<sup>453</sup>

- (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and the best interests of the child, including the promotion of positive, non-violent forms of discipline. How this provision works in practice is that, in the event that a child is being neglected by parents and has committed crime repeatedly, instead of removing the child from the parent, the Department of Social Development will, after investigation, convert the case from a criminal inquiry and submit the case to the children's court for an inquiry with the aim of keeping the child in the family rather than removing the child.<sup>454</sup> The report of such inquiry will make recommendations; for example, that the child be put under the care of his or her parents for six months in order to assist the child through the programme that will be administered by the social worker.<sup>455</sup> A parent who is put under the parenting skills programme will report with the social worker to court for a review of work done and to assess if the programme is working for the parent and the child.<sup>456</sup>
- (c) developing appropriate parenting skills and the capacity of parents and care-givers to

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<sup>453</sup> S 145(1); Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 101.

<sup>454</sup> *Ibid.*

<sup>455</sup> The Department of Social Development has a module drafted on parenting. Every social worker is trained to assist parents with deficiencies in parenting skills to enable children to grow up under the care of parents rather than being removed.

<sup>456</sup> Interview held on the 2011-04-05 with Mqonci, deputy director of the Child Protection Unit of the National Department of Social Development, Tshwane. See attached Annexure "D".



safe-guard the well-being and best interests of children with disabilities and chronic illness. With regard to this element, a parent may be required to attend and complete a parenting skills programme designed to educate them in the parenting needs of children.<sup>457</sup>

- (d) promoting appropriate interpersonal relationships within the family. A member of the family who has a problem relating to family members, or who by his or her conduct commits an offence, may be put on a programme<sup>458</sup> to assist him or her to work against the negative behaviour for a positive behaviour which will enable him or her to understand the impact of his or her behaviour on self and other people, rebuild and restore damaged relationships, and to enable him or her to be accountable, communicate effectively and to value the philosophy of *ubuntu*.<sup>459</sup> This element is

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<sup>457</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 176.

<sup>458</sup> Restorative justice in “an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, taking measures to prevent a recurrence of the incident, this may be applied at any appropriate stage after the incident”: see s 1 of the Child Justice Act; see also Department of Justice and Constitutional Development *National Policy Framework on Restorative Justice* (2010) 3.

<sup>459</sup> These programmes are often provided by social workers working in NGOs with the aim of encouraging the offender to take responsibility, rehabilitate the victim, reintegrate the offender back into society and reducing recidivism and secondary victimisation: see s 51 of the Child Justice Act. In the case of *S v Maluleke* 2008 (1) SACR 49 (T) par 30: Bertelsmann J used the concept of *ubuntu*, literally translated as humanness to highlight the importance of restorative justice in South Africa. Bertelsmann J stated that the central features of African legal system that become evident are: “A concern to shame the offender and then to re-incorporate him or

used more often in cases that are diverted or had restorative approaches applied to them.<sup>460</sup>

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her back into the community once the initial expression of community repugnance has been demonstrated; avoiding as far as possible the segregation of the offender or his or her marginalisation into a sub-community of similar social rejects; a recognition that the supernatural plays a part in justice; a focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community; and ensuring that the families of the involved parties are always fully involved.” See also Batley & Maepa *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 16: accessed from [www.iss.co.za/pubs/Monographs/No111/contents.htm](http://www.iss.co.za/pubs/Monographs/No111/contents.htm) on 2011-06-07.

<sup>460</sup> See discussion on s 144(1)(h) of the Children’s Act later in this section. An NGO called Khulisa Crime Prevention Initiative, situated in Rosebank, Gauteng, developed different programmes on restorative justice, amongst others, “understanding the impact of behaviour on self and other people skills”. This programme is used to transfer relationship and self-management skills to offenders and was implemented in, amongst others, the following case studies: a case of a 15 year-old boy who comes from a very poor background, who stays with his mother and four siblings. The mother is not employed and lives on the children’s child support grant. The father of the boy passed away. The boy stole clothes from a washing line because he wanted a particular brand, which his mother could not afford. The parents found the restorative justice programme, which required the boy to tender a mediated apology helpful in that the boy now understands the wrong he has committed and is willing to take the responsibility for his action. Another case involved a 15 year-old male in a grade 7 class who was abandoned by his mother when he was a baby and was residing with his maternal grandmother when he committed the offence. The boy stole stationery from school. A mediated apology took place at the school where the child committed the crime. The child apologised to the principal of the school (victim). The principal understood the background of the child and accepted the child’s apology. The restorative justice practice as applied in this case brought closure between the child and the principal and the child took responsibility for his actions.

- (e) providing psychological, rehabilitation and therapeutic programmes for children. According to Bosman-Sadie and Corrie,<sup>461</sup> this element will enable organisations which provide counselling and treatment to child victims of abuse to access government funding for the services they provide.
- (f) preventing the neglect, exploitation, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children's needs: In this case, state intervention<sup>462</sup> may be used to prevent neglect, exploitation and abuse of the child.<sup>463</sup>
- (g) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development.<sup>464</sup>
- (h) diverting children<sup>465</sup> away from the child and youth care system and the criminal

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<sup>461</sup> (2010) 157.

<sup>462</sup> S 48(1)(a) of the Children's Act. See Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* (1988-1991) 87; Berry *The Law of Equitable Remedies* (2000) 12; Colin *The Law and Practice of Interdicts* (2009) 60-85; Mbazira *Litigating Socio Economic Rights in South Africa* (2009) 166-167.

<sup>463</sup> S 45(1) of the Children's Act. See the discussion in section 3 3 9 1.

<sup>464</sup> See the discussion in section 3 3 9 1.

<sup>465</sup> S 51 of the Child Justice Act provides that the objectives of diversion are (for purposes of this study), amongst others, to: "(a) deal with a child outside the formal criminal justice system in appropriate cases; (b) encourage the child be accountable for the harm caused by him or her; (c) meet the particular needs of the individual child; (d) promote the reintegration of the child into his or her family and community ...".

justice system:<sup>466</sup> If it appears during the course of an inquiry, amongst others, that the child is in need of care and protection,<sup>467</sup> the child does not live at his or her family,<sup>468</sup> or that the child committed a minor offence or offences aimed at meeting the child's basic need for food and warmth,<sup>469</sup> the inquiry magistrate may stop the proceedings and order that the child be brought before the children's court as referred to in terms of the Child Justice Act<sup>470</sup> or the Children's Act.<sup>471</sup> The child, his or her

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<sup>466</sup> Diversion can occur in three ways, first, through prosecutorial diversion, before a preliminary inquiry. This diversion is for children charged with schedule 1 offences (stipulated in the Criminal Procedure Act) and provided in s 41 of the Child Justice Act. After the preliminary investigations, the prosecutor will decide whether to prosecute in court or not. Secondly, a child may be diverted at the preliminary inquiry as provided in s 43(2)(b). In this case, a child appears before the court within 48 hours of arrest for an inquisitorial procedure where a child is given an opportunity to present his or her case. Finally, if not yet diverted, a child may still be diverted at the children's court before the finalisation of the case as provided in s 50(c).

<sup>467</sup> S 50(a) of the Child Justice Act. In need of care and protection in terms of s 150(1) and (2) of the Children's Act.

<sup>468</sup> S 50(b) of the Child Justice Act.

<sup>469</sup> S 50(c) of the Child Justice Act.

<sup>470</sup> S 42: A Report on a "10 Year on the Restorative Justice Celebration Seminar" organised by an NGO called the Restorative Justice Centre, situated in Tshwane, held at UNISA on 2010-11-09 revealed that children who are at risk because of having committed a crime or who are victims because of an act of an offender, are referred to NGOs by either the South African Police Services, Department of Social Development, Department of Justice and Constitutional Development, Department of Education, Legal Aid South Africa, parents and in other cases, children would approach the NGO for assistance. Children are singled out for special protection in terms of s 2 of the Child Justice Act. An NGO that receives a matter concerning a child victim or offender, would gather information as referred to it by the respective government, institution or parent, analyse it in order to reflect: the profile of the victim, the nature of the problem, including its severity on the victim, offender or significant others, an indication of further problems or themes, the impact of the problems, the behaviour patterns

parent or guardian may appear before the magistrate in order to have the diversion

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which emerge, during the consultation, the family environment of the child, personal feelings and relationships and interpersonal relationships and any opportunities for growth. Furthermore, the information will be analysed to find situations of trauma, abuse or treatment suffered by the victim, look into any temporary attention that may be provided with regard to, for example, stress and depression, motivate the child victim or offender to participate in the intervention, reflect on other relevant assistance that may benefit the intervention, for example, request assistance from the attorneys, lawyers, prosecutors other agencies, reflect on other available resources within the organisation that may be of assistance, for example, the Family Association Mediation of South Africa, hereinafter referred to as “FAMSA”, Youth Development Outreach, etcetera; or other resources that may assist the victim or offender’s difficulties. A person would be appointed to facilitate the intervention (more often, a restorative justice programmes are used) in order to assist the victim or offender to share his or her story. The facilitators would ensure that the best programme is considered to address the complaint. The facilitator would further ensure that the victim or complainant has sufficient time to relate his or her story, and express his or her feelings, concerns and expectations regarding the matter. The facilitator will further guide the conversation through probing questions and paraphrasing. The victim is always assured that the environment he or she is participating in with regard to tendering of evidence is safe and that he or she will receive the necessary protection. The facilitator would manage the process, be impartial and ensure that there is maximum participation from all those involved. He or she will set the tone for the process and negotiate, including the amount of time that will be spent on the session. The facilitator would keep a record regarding the proceedings for purposes of following-up on the matter. If the matter is to be resolved through the non-punitive or informal justice process with the facilitation of the NGO, the facilitator would encourage the offender to attend some of the meetings where the victim is present for the offender to take responsibility and express remorse. This informal process ensures that the wrong on the side of the offender is acknowledged and that justice takes its course by working towards either reconciliation or finding best solutions to satisfy the complaint.

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Ss 155 and 156.

option<sup>472</sup> that has been selected by the prosecutor to be made an order of the court.<sup>473</sup>

I am of the view that the prosecutor or presiding officer who is deciding on the diversion services for a child in need of care and protection, must opt for an arrangement which will keep the child in the family if possible. Thus, imprisonment must be a measure of last resort.

When a child is diverted, he or she may participate in a restorative justice programme which provides a wide range of services, such as family conferencing, restorative justice conferencing, life skills, including counselling, treatment, therapy or other approaches, involving the child offender, parent or guardian of the child, victim and the community. Restorative justice programmes are meant for purposes of reintegrating the child back into

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<sup>472</sup> Amongst others, we have the following diversion options: “compulsory school attendance” (requiring a child to attend school every day and be monitored by a specified person) in terms of s 53(1)(a); a “family time order” (requiring the child to spend a specified number of hours with his or her family) in terms of s 53(1)(b); “a good behaviour order” (requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour) in terms of s 53(1)(c); “a peer association order” (requiring a child to associate with persons or peers who can contribute to the child’s positive behaviour or to refrain from associating with certain specified persons or peers) in terms of s 53(1)(d).

<sup>473</sup> Interviews that were held with child offenders during the public participation and consultation process in the legislative drafting of the Child Justice Bill revealed that children awaiting trial in a welfare-run care facility, some of whom were below 12 years of age, opted to be with their parents and siblings on a “family time order” as a preferred diversion option. This option allows a child to be at home by for example 5 pm and stay at home for the evening on weekdays. The child is also expected to spend most of his or her time also helping around the house rather than be on the street with peers: accessed from [www.parliament.gov.za/live/contentpopup.php?Item\\_ID=302&Category\\_ID](http://www.parliament.gov.za/live/contentpopup.php?Item_ID=302&Category_ID) on 2012-09-04.

the community and reuniting him or her with his or her family members. The programmes are used in both civil and criminal matters.

According to Bosman-Sadie and Corrie,<sup>474</sup> diverting young people from the criminal justice system and/or the child and youth care system is a form of early intervention. Instead of serving a sentence for a crime that he/she has committed, the child may participate in a family group conference<sup>475</sup> and therapeutic services.<sup>476</sup> If the service is effective, the child will remain in the family and within the community. In other circumstances, the child may be given additional support. If the programme is not effective, the child will be referred to a criminal court or children's court for further decision in the matter.

I agree that diversion is good in keeping children away from state's care, and also that restorative justice services that are applied in diverted cases are child centred in that they enable a child to learn new life skills, attitudes, and behaviour and are likely to curb re-offence in criminal matters. However, I am of the view that diversion and restorative justice programmes would be more valuable if they are implemented as an early intervention measure; that is, as part of a school curriculum. South Africa is currently implementing restorative justice programmes as a proactive intervention, after a child has committed an offence or when a determination is made that the services are necessary for the circumstances of the child. Thus, South African must learn from foreign jurisdictions in this

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<sup>474</sup> (2010) 162.

<sup>475</sup> S 61 of the Child Justice Act.

<sup>476</sup> S 53(3)(k) of the Child Justice Act.

regard.<sup>477</sup>

- (1) avoiding the removal of a child from the family environment: Mqonci<sup>478</sup> notes that the aim of this provision is to ensure that the removal of the child from the family environment is a measure of last resort.
  
- (2) Prevention and early intervention programmes include:
  - (a) assisting families to obtain the basic necessities of life. This element needs to be discussed as it currently only covers social grants. In 2003, President Thabo Mbeki underlined the point that South Africa is characterised by two economies; one productive, skilled and competitive, and the other affected by unemployment, lack of skills, informality and dependence on welfare grants.<sup>479</sup> Critiques of state-funded social benefits argue that to make access to these benefits conditional on individual's ability to find waged employment means that they are only available to a small number of the economically active

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<sup>477</sup> See the discussion in section 4 3 3.

<sup>478</sup> The deputy director of the Child Protection Unit of the National Department of Social Development, Tshwane, an interview held on the 2011-04-05. See attached Annexure "D".

<sup>479</sup> Hart "Post Apartheid Developments in Historical and Comparative Perspective" in Padayachee (ed.) *The Developments Decade? Economic and Social Change in South Africa 1994-2004* (2006) 13-32.



population.<sup>480</sup>

The state's responsibility to provide social assistance is greatly reduced, in that then state does not contribute to the national Unemployment Insurance Fund financed by labour and business, and the country has no publicly financed retirement system or national health insurance. Retirement and healthcare provisions are linked to company-based schemes that prioritise employees who are long-term employees.<sup>481</sup> Concerns were raised that where poverty seems to be the only reason for the removal of the child, the state must adopt meaningful preventive measures, which must include a level of financial assistance for family preservation; such assistance may include a temporary financial assistance.<sup>482</sup> An interview with Mqonci<sup>483</sup> revealed that government does not provide temporary financial assistance. Instead, government gives food parcels to destitute families for three months only. The destitute family may have to make a further request when the three months lapse.

(b) empowering families to obtain such necessities for themselves: A family can

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<sup>480</sup> Barchiesi (2006) Unpublished conference paper 8. See the discussion in section 3 3 1 2.

<sup>481</sup> Barchiesi (2006) Unpublished conference paper 5.

<sup>482</sup> Matthias (1997) 31; Sloth-Nielsen (2001) *SAJHR* 231; Zaal & Matthias in Boezaart (ed.) *Child Law in South Africa* 175. See the discussion in section 3 3 1 2.

<sup>483</sup> The Deputy Director of the Child Protection Unit of the National Department of Social Development, Tshwane, and interview held on the 2011-04-05. See attached Annexure "D".

be empowered to access necessities by way of providing information, providing adequate training and creating an environment that will allow easy access.

- (c) providing families with information to enable them to access services. I am of the view that this element requires government to provide clear information as to what, how and where services are accessible. Information may be provided by way of awareness campaigns in public media to ensure that families have access to information and are able to use same.
  
- (d) supporting and assisting families with a chronically ill or terminally ill family member. These families may be supported by way of providing home-based care respite services through a public health nursing or a social service department or a volunteering community member. Respite care provides temporary relief for families or care-givers. It allows the family to engage in daily activities and thus decreases their feelings of isolation. It provides the family with rest and relaxation, and improves the family's ability to cope with daily responsibility. It makes it possible for the member with a chronic illness or disability to establish his or her identity and enrich his or her growth and

development.<sup>484</sup>

- (e) early childhood development. I find “early-childhood development the most significant of the “prevention and early intervention services”<sup>485</sup> as it contributes towards the growth and development in early childhood. It is fundamentally important for an infant to form deep attachments to care-givers, particularly parents during this period.<sup>486</sup> It is therefore important to promote the formation of attachments together with other developmental aspects of the child such as loving care, a sense of security, building of relationships and exploring the environment.<sup>487</sup> Thus the programme must provide appropriate development opportunities to the child,<sup>488</sup> and assist the child to reach his or her full potential, amongst others.<sup>489</sup> receiving care, support and security;<sup>490</sup> promote the rights to rest, leisure and play through provision of a stimulating environment;<sup>491</sup> the programme must be monitored;<sup>492</sup> promote self-control,

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<sup>484</sup> ARCH National Resource Centre Report *Respite Care for Children with Disabilities and Terminal Illness* (2009): accessed from <http://www.disabled-world.com/disability/caregivers/respite/respitefor—children.php> on 2011-06-07.

<sup>485</sup> Reg D(b)(2) to the Children’s Act.

<sup>486</sup> Bennett *Supporting Family Responsibility for the Rights of the Child: an Educational Viewpoint* (1996)

*Int Journal of Children’s Rights* 51.

<sup>487</sup> *Ibid.*

<sup>488</sup> Reg (a).

<sup>489</sup> Reg (b).

<sup>490</sup> Reg (b)(1).

<sup>491</sup> Reg (b)(2).

independence and developmentally appropriate;<sup>493</sup> its activities must promote free communication and interaction amongst children;<sup>494</sup> and respect and nurture the culture, spirit, dignity, individuality, language and development of each child.<sup>495</sup> The programme must care for children in a constructive manner, provide support and security;<sup>496</sup> and ensure development of positive social behaviour.<sup>497</sup> In 2007, 40% of children aged between three and five years, that is, 1.2 million children, were attending some form of education for “early childhood development”.<sup>498</sup> The department has<sup>499</sup> developed and approved a framework for monitoring and evaluation of the national integrated plans for early childhood development. It has ensured that the registration of early childhood development institutions is monitored.

Furthermore, the department conducted an audit of the partial care and early childhood development programme in the country. The provinces have reported an increase in the

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<sup>492</sup> Reg (b)(5).

<sup>493</sup> Reg (b)(6).

<sup>494</sup> Reg (b)(7).

<sup>495</sup> Reg (b)(8).

<sup>496</sup> Reg (c).

<sup>497</sup> Reg (d).

<sup>498</sup> De Lannoy & Lake in Pendlebury *et al.* (eds.) *South African Child Gauge* (2008/2009) 83, See also the discussion by Proudlock in Boezaart (ed.) *Child Law in South Africa* 307.

<sup>499</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September* (2010) 31-40.

number of crèches registered and the number of children reached.<sup>500</sup> What will be more encouraging will be the number of programmes that are funded by government and the number of children that are reached.<sup>501</sup> Government has shown its intention to provide capacity building for “Early Childhood Development” practitioners. The need for government to develop and invest in other social service practitioners especially child and youth care workers has been established.<sup>502</sup>

However, there is a lack of information in the Department of Social Development *Norms, Standards and Practice Guidelines for the Children’s Act* as to what type of assistance or services will be provided by the state for “Early Childhood Development”. Instead the guidelines document simply provides that “Early Childhood Development” must comply with norms and standards as determined by the national office of the Department of Social Development. The guidelines document also provides that the national office must develop a system of assessment to ensure that there is compliance with such standards and norms, without stating what such norms and standards entail.<sup>503</sup> I propose that an explanation be provided in the regulations to section 144(2) of the Children’s Act regarding the type of services which form part of “Early Childhood Development”.<sup>504</sup>

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<sup>500</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 45.

<sup>501</sup> *Ibid.*

<sup>502</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 46.

<sup>503</sup> See Ref 71 of the DSD *Norms, Standards and Practice Guidelines for the Children’s Act* (2010).

<sup>504</sup> See the proposed provision in section 4 5.

#### 4.3.1.2 *The participation of children, parents, family members and the community in the implementation of prevention and early intervention services*

This section discusses how prevention and early intervention services can be implemented. I do so by discussing persons who can be involved in implementing services and the significance of their participation. It is important to note that when a child is returned back into his or her family, he or she rejoins the community he once belonged to. Thus, it is important for the community to receive him or her back to enable the child to find some sense of belonging. When seeking solutions to the problems encountered by families, it is most significant to involve children, parents, family members and the community in order to promote their participation in the implementation of prevention and early intervention services. The Children's Act clearly provides that the prevention and early intervention programme is a method of intervention for reintegration of the child back into the family and the community.<sup>505</sup>

Lessons that can be learnt from our previous experience are that during the operation of the Child Care Act, prevention and early intervention services involved the participation of the social worker, the child, the parent and the community. However, the programme has not been properly implemented due to a shortage of social workers and scarcity of resources.<sup>506</sup>

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<sup>505</sup> S 144(3) of the Children's Act.

<sup>506</sup> Nompula of Thandanani Welfare, Honeydew, Roodepoort held on 2011-03-31. See attached Annexure "E". See UNICEF *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 30: There are currently 11 372 registered social workers.

For instance, community work is not carried out when a child is to be reintegrated back into his or her community; instead the social worker would liaise with the child and the parents only.<sup>507</sup> I submit that the child may not be able to find a sense of belonging in his or her community where, for example, he or she had committed an offence, or where he or she had been marginalised because of bad conduct, if reintegration is not performed. “Prevention programmes” are designed to strengthen and build the capacity of families and self-reliance in order to address problems that are likely to occur in the family environment.<sup>508</sup> If these problems are not attended to, such may lead to statutory intervention.<sup>509</sup> On the other hand, “early intervention programmes” are provided to families with children who may be vulnerable to, or at risk of harm or are likely to be removed from family life to alternative care.<sup>510</sup>

With regard to the right of the child to protection against maltreatment, abuse or neglect, if the children’s court finds that the child suffered maltreatment, abuse and neglect, the court may make an order which is in the best interests of the child, which may include receiving appropriate treatment or attendance, if needs be, at the expense of the state if the court finds

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According to the “IP Low” costing, 16 504 social workers are required to implement the Children’s Act in 2010 and 2011. According to the Full Cost (high scenario) 66 300 social workers are required in 2010 and 2011.

<sup>507</sup> *Ibid.*

<sup>508</sup> S 143(1)(b).

<sup>509</sup> *Ibid.* See also Matthias (1997) 33: the availability of prevention and early intervention measures means that the removal of the child is only contemplated in circumstances where preventative services do not work.

<sup>510</sup> S 143(2)(b).

that the child is in need of medical, psychological or other treatment.<sup>511</sup> In other cases, if the child has been subjected to maltreatment, neglect, abuse or degradation, the children's court may make an order interdicting a person from maltreating the child or from having contact with the child if the court finds that the relationship between the child and the person who maltreated the child is detrimental to the well-being or safety of the child<sup>512</sup> or that the child is exposed to a substantial risk of imminent harm.<sup>513</sup>

In other cases, supposing extreme circumstances, the child who has been subjected to maltreatment may be referred to temporary safe care in a child and youth care centre until such time as the order of the court is given effect.<sup>514</sup> If after an investigation the social worker decides that a section 150(1) grounds as discussed in Chapter three are not applicable, he or she must take appropriate measures to assist the child with, amongst others, counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.<sup>515</sup> The fact that the Children's Act considers a range of judicial remedies if a child is found to be in need of care and protection,<sup>516</sup> means that the court must explore those options before making any order concerning the removal of the

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<sup>511</sup> S 156(1)(i) of the Children's Act.

<sup>512</sup> S 156(1)(ii) of the Children's Act.

<sup>513</sup> S156(k)(iii) of the Children's Act.

<sup>514</sup> S156(2) of the Children's Act.

<sup>515</sup> S 150(3); see also ss 155(4)(a) and 155(4)(b) of the Children's Act. See Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* 9-7.

<sup>516</sup> S 156(1) of the Children's Act. See also Gallinetti in Davel & Skelton (eds.) (2007) *Commentary on the Children's Act* 4-13.



child.<sup>517</sup>

However, neither the Children’s Act nor the Department of Social Development *Norms, Standards and Practice Guidelines for the Children’s Act* define the types of programmes which are acceptable as “prevention programmes”. Instead the guidelines document provides that such standard of services must “... add value to the lives of families”.<sup>518</sup> Furthermore, the guidelines document refers to a “Family Preservation Services Manual” as a guideline to be used by all service providers. Nevertheless, the Manual has not been published yet.<sup>519</sup> Given this *lacuna* in the Children’s Act and guidelines to the Act, I propose that more detail be provided as to what forms of services meet the standard of services perceived as “prevention services”. I am of the view that the Child Care Act has set a trend by involving significant role players in the prevention and early intervention services for children, thus the trend set by the Child Care Act must be carried forward in the Children’s Act.

#### 4.3.1.3 Measures in place for securing prevention and early intervention services

It is important to note that the Executive, specifically, the Treasury, determines how national

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<sup>517</sup> S 148(1)(a) of the Children’s Act.

<sup>518</sup> See Ref 28 of the DSD *Norms, Standards and Practice Guidelines for the Children’s Act* (2010).

<sup>519</sup> At the time of writing this section of the study (2012-11-09), the guidelines document was released recently in 2012. See the discussion in section 2 1.

revenue is divided between the spheres of government.<sup>520</sup> The national government allocates money to provinces through the equitable share.<sup>521</sup> Provinces get 95% of their budget from the national government, which basically comes from the equitable share.<sup>522</sup> The equitable share is given as a lump sum by the National Treasury to each province to provide different services, including social services, healthcare, education and so on.<sup>523</sup> The equitable shares that are allotted by the National Treasury are monies received by the national government in the National Revenue Fund<sup>524</sup> and are drawn from the Fund as appropriated by Parliament annually.<sup>525</sup> Treasury does not have an equitable share formula to calculate the equitable share. Hence social services in the 2007/2008 budget were not included in the equitable share formula.<sup>526</sup>

The Constitution provides a list of factors that the Treasury must consider when working out the formula.<sup>527</sup> Thus, the equitable share allocation in a way stipulates to provinces what

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<sup>520</sup> S 216(2) of the Constitution. Budlender & Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 41: the equitable shares are passed annually by Parliament in the Division of Revenue Bill. S 75 of the Constitution requires Parliament to first work out the parliamentary rules for amending budgets before they can do so. They need to pass a law setting out this procedure but have not yet done so. The Treasury determines how the national revenue will be divided between the spheres of government.

<sup>521</sup> S 214(1)(c) of the Constitution.

<sup>522</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 41.  
<sup>523</sup> *Ibid.*

<sup>524</sup> S 213(1) of the Constitution.

<sup>525</sup> S 213(2)(a) of the Constitution.

<sup>526</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 42.

<sup>527</sup> S 214(1) provides that: "An Act of Parliament must provide for –

service areas are important and what money is available for these services. If a service area is not expressly costed into the equitable share it is likely that the service area will be less prioritised in the province's budget.<sup>528</sup> During the period of passing of the Children's Bill into legislation, concerns were raised that when government starts to implement the Act, Parliament and provincial legislation must be prepared to allocate funds appropriately.<sup>529</sup> The Bill had to be costed as that was a legal requirement.<sup>530</sup> The methods used in costing the Bill are, amongst others, an approach meant to ensure that government departments responsible for the implementation of different components of the Bill are involved in the costing process and were responsible for the costing outcomes.<sup>531</sup> In July 2006, the costing

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- (i) The equitable division of revenue raised nationally among the national, provincial and local spheres of government;
  - (ii) The determination of each province's equitable share of the provincial share of the provincial share of that revenue; and
  - (iii) Any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made."

<sup>528</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 42.

<sup>529</sup> See National Department of Social Development Report *The Cost of Children's Bill – Estimates of the Cost to Government of the Services Envisaged by the Comprehensive Children's Bill for the Period 2005 to 2010* (2006): accessed from <http://www.ci.org.za/depts/ci/plr/pdf/subs/CBFinalCostReport.pdf> on 2010-10-25.

<sup>530</sup> S 35 of the Public Finance Management Act 1 of 1999, hereinafter referred to as "PFMA".

<sup>531</sup> UNICEF Report "Budgeting for Child Right-The Role of Government" in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 27: the department was expected to gather information that would enable the team to cost the obligations using the models provided by the consulting team, develop the Medium Expenditure Framework,

of the Children's Bill was completed.<sup>532</sup> The costing included the calculation of the scope of costing in terms of the cost to the state (national, provincial and local government) of implementing the services envisaged by the Children's Bill for the period 2005/2006 to 2010/2011.<sup>533</sup>

An activity-based costing, focusing on the cost of services was performed which responds to questions. For instance, in the case of adoption questions such as, who is rendering the service? Is the state or an agent delivering the service? How many adoptions are likely to take place annually? Who carries tasks such as the screening of parents and children, placing children and follow-up work? What is the value of the person who undertakes such work? What are the fees? How long does each step take? What costs are associated with such service? Which department is responsible for such service?<sup>534</sup> Costs are calculated using a formula that incorporates quantity of services, necessary inputs and price inputs. This formula can be applied to the cost of residential care in a child and youth care centre as follows: Quantity, reflecting the number of children that will require residential care, maximum number of children per facility, input which consists of what is required to deliver the service;

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hereinafter referred to as "MTEF" and work out the phased implementation plan. The consulting team was expected to train groups of employees on costing, budgeting and implementation planning and give expert advice when required.

<sup>532</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 28.

<sup>533</sup> See Annexure "K": the table reflects the 2009/2010 and 2010/2011 budget.

<sup>534</sup> *Ibid.*

that is, the different categories of staff, the physical needs of children, including food, bedding and clothing (how much it costs to feed a child or clothe a child per month?), the price which is the payment made to the different categories of staff in terms of the number of shifts that will be needed from staff.<sup>535</sup> Calculating Norms and Standards were developed which considered the following questions: What activities will each activity involve? How long will each activity have to be delivered? What level of worker will carry out activities? What qualifications must that person have?<sup>536</sup>

Assumptions that are used in the costing process are described as “high”, “medium” and “low” density of services to estimate how much of a particular activity would be required.<sup>537</sup> For instance, the adoption of a child with special needs would require a high level intensity of services and service quantity norms would therefore be calculated at a higher rate. It would also be necessary to estimate how many children adopted each year would be children with special needs, known as the “demand variable”. It measures the number of units of the different services that would be supplied.<sup>538</sup>

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<sup>535</sup> *Ibid.*

<sup>536</sup> *Ibid.*

<sup>537</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 28.

<sup>538</sup> National Department of Social Development Report *The Cost of Children's Bill* (2006) 18: a large number of variables and assumptions are used in the Costing Model. The demand variables indicate the number of units of different services that are required or the number of facilities that are in place or are needed to meet the demand. These include staffing qualification norms, staffing norms for facilities and a range of other assumptions related to

The project team adopted two costing assumptions; the first being: norms and standards, divided into “high” and “low”; and the second being demand for services divided into “implementation plans” and “full cost”<sup>539</sup> option.<sup>540</sup> According to Budlender and Proudlock,<sup>541</sup> in using the “full cost” option, the team used the most reliable evidence to estimate how many children actually need services. The “full cost” scenarios are meant to provide for the equitable distribution of social services rather than continuing with existing inequitable patterns.<sup>542</sup> The “implementation plans”<sup>543</sup> are based on information provided by provincial departments which revealed provincial disparities in the funding of services for children.

I agree with Budlender and Proudlock<sup>544</sup> that the fact that the team asked each government department to describe current service delivery and their plans to increase it in line with the

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partial care or “early childhood development” subsidies, school fee subsidies, the cost of material assistance, the cost of food, clothing and recreation for children in facilities. For instance, the costing team looked at two tables reflecting demand variables for various services submitted by the social development department reflected as E1: “IP Low demand variables” which are estimates for the demand for services and Table E2: “FC High demand variables” based on uniform assumptions which take into account differing levels of poverty and the differing impact of the HIV/Aids pandemic. Amongst other demand variables mentioned for purposes of this section, see Annexure “K”.

<sup>539</sup> See Annexure “K”.

<sup>540</sup> *Ibid.* Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 43.

<sup>541</sup> In Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 43.

<sup>542</sup> *Ibid.* See also Annexure “K”.

<sup>543</sup> Hereinafter referred to as “IP”.

<sup>544</sup> In Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 43.

Bill, means that the scenarios do not measure the total demand or actual need for services, but specifically measure current service delivery. The provincial social development departments are known to be using the “IP low”<sup>545</sup> scenario and existing government budgets cover only 25% of the services that were set out in the Child Care Act (now replaced by the Children’s Act).<sup>546</sup>

An interview with an official of the Department of Social Development<sup>547</sup> revealed that the department is not using neither the “IP Low” or the “IP High”<sup>548</sup> scenario; the budget is still the same as it was during the operation of the Child Care Act and that the department has not commenced with implementing the new cost scenarios, i.e. the “IP Low” or the “IP High” scenarios as enunciated by the Children’s Act budget cost. Instead, the Department is currently trying to get more money from the national treasury for its annual spending. The challenge that is faced by the department is that there are not enough funds for the 2011 and 2012 financial year. The challenge came as a result of the monies, which were not spent in the previous financial year, having to be sent back to the national treasury. What is happening now is that the departments have developed an implementation plan for the 2011 and 2012 financial year with costing that is independent from the Children’s Act costing model. The independent implementation plan is still lower than the “IP Low” costing of the Children’s Act due to the fact that the department only receives a 10% increase in annual

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<sup>545</sup> See Annexure “K”.

<sup>546</sup> *Ibid.*

<sup>547</sup> Muller, the director in the Child Protection Unit of the National Department of Social Development, Tshwane, an interview held on 2011-04-06. See attached Annexure “J”.

<sup>548</sup> See Annexure “K”.

spending.<sup>549</sup> I am of the view that government should maximise its budget and spending “to the maximum extent” consistent with the needs of children.

Even before implementation of the Children’s Act could begin, government was not meeting its obligations under the Child Care Act.<sup>550</sup> Budlender and Proudlock<sup>551</sup> also point out the big differences between provinces with regards to delivering on current legislative obligations. For instance, 34% of the budget was to be used in the Western Cape province in the 2005/2006 financial year, whereas 10% of the budget was to be used to cover the Limpopo province. The low budgets are said to affect the ability to scale social services up rapidly. Scaling-up of services needs institutional capacity, which may take time to develop. Thus, in reality, the “IP low” scenario for one year with a total cost of R6 billion only meets 30% of the total need for services.<sup>552</sup>

If the “implementation plans” are used to formulate budgets, the inequalities within provinces are likely to persist.<sup>553</sup> The “full cost”<sup>554</sup> scenario is based on population figures and it is

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<sup>549</sup> *Ibid.*

<sup>550</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 43.

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid.*

<sup>553</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 30.

<sup>554</sup> Hereinafter referred to as “FC”. UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 30. Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 43: for the “full cost scenarios” the team used



more likely to address issues of inequalities. The costing exercise provides government with a clear indication of the budgets that need to be allocated.<sup>555</sup> In terms of what the provinces intend spending, concrete plans for implementing the Children's Act were made. The budget is for the MTEF.<sup>556</sup> The MTEF outlines the government's budget for the current year, as well as the predicted budget of the next two years. According to Schick,<sup>557</sup> the MTEF it is a "hard constraint" in that it bars government from taking actions that would cause estimated future spending rise above the pre-set limit. I am of the view that the MTEF is easy to work with if its projections are fully complied with.

The budgets for the provincial social development are divided into programmes, with the social welfare programme being the biggest, and the child care and protection services taking up the bulk of the Children's Act budget.<sup>558</sup> The budget has to cover laws and programmes providing services for vulnerable groups, including children, the elderly and

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the most reliable evidence to estimate how many children actually need services. See also Annexure "K".

<sup>555</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 31.

<sup>556</sup> Hereinafter referred to as the "MTEF".

<sup>557</sup> "Performance Budgeting and Accrual Budgeting: Decision Rules or Analytical Tools?" (2007) *OECD Journal on Budgeting* 111.

<sup>558</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 44: the social welfare programme is further divided into sub-programmes which include, amongst others: substance abuse, prevention and rehabilitation, crime prevention and support, child care and protection services, HIV/Aids and care and support services to families.

people with disabilities.<sup>559</sup> So far, the state budget does not reveal budget costs specifically allocated for programmes for children.<sup>560</sup> Education is easily identifiable as being directed at children and it might be difficult to identify social welfare or health spending as being specifically child-targeted.<sup>561</sup> The costing exercise revealed that the state needs to spend more on social services for children than it is currently spending.<sup>562</sup> The report stated that properly implemented intervention services provided earlier in the system are cost-effective, rather than drawing children deeper into the care and protection system, and that such system needs to be prioritised.<sup>563</sup>

The report also revealed the need for human personnel; that is, social workers to deliver the services.<sup>564</sup> The report acknowledged the workload of the Department of Justice and Constitutional Development in dealing with parenting agreements, custody and access issues, and raised concerns as to whether these issues should be prioritised since they deal

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<sup>559</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 44.

<sup>560</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 10.

<sup>561</sup> *Ibid*, government sets out its plans and indicates its policy priorities in annual estimates of expenditure, which enable the national, provincial and local government to create their own budgets.

<sup>562</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 41.

<sup>563</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 30.

<sup>564</sup> *Ibid*. Currently 11 372 registered social workers and according to the IP Low scenario 8 662 social workers were required to implement the Children's Bill in 2005/2006. According to the FC High scenario 47000 social workers were required in 2005/2006 and 66 300 in 2010/2011. Thus, the country is facing a critical shortage.

with children who are still living with their parents.<sup>565</sup> The scope of costing was limited to the state cost of meeting the obligation, whereas private partners operate some of the services. Thus the obligation of the state was seen as primary, even when the state relies on private entities for services. It is the state's budget that gives a clear indication of what the government's real priorities are.<sup>566</sup> The Budget Review, particularly over the past three years, shows that South Africa spends its highest budget on education, health and social security in that order.

It is questionable whether the budget on education, health and social services is practically drafted in terms of the actual spending and trends, or is properly spent. My argument is based on the recent case of *Section 27 v Minister of Education*,<sup>567</sup> in which the Department of Education delayed to supply textbooks to learners in the Limpopo province.<sup>568</sup> The Department of Education failed to supply the textbooks despite the ruling of the North Gauteng High Court, held in Pretoria in May 2012, that the department action constituted a violation of the right to basic education.<sup>569</sup> The department also failed to obey the order issued for the department to devise a "catch-up plan" to remedy the consequences of the delay and supply the affected children with text books by the 15 June 2012.<sup>570</sup> The Minister

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<sup>565</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 30.

<sup>566</sup> UNICEF Report *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 10.

<sup>567</sup> (2012) 3 ALL SA 379 (GNP).

<sup>568</sup> *Mail & Guardian* (2012-06-22).

<sup>569</sup> Par 32.

<sup>570</sup> Paras 38 and 43.

of Education argued that the delay was due to cash flow and administration problems.<sup>571</sup> The department has not supplied the textbooks yet.<sup>572</sup>

Even though the Minister of Education in the *Section 27* case points at cash flow and administration problems as reasons for non-delivery of services, it may not be a surprise to learn by the end of fiscal year that the same ministry intends to roll-over funds to the next fiscal year. Research conducted by Institute for Democracy in South Africa<sup>573</sup> on government's 2000 and 2001 un-audited reports, revealed that there is great under-spending in provincial government budget.<sup>574</sup>

Even though it is acknowledged that the reasons for under-expenditure are difficult to discern, the IDASA research associates note that under-spending correlates with the size of the capital budgets, and that a main reason could be lack of managerial capacity.<sup>575</sup> I am of the view that where work is contracted to NGOs, the slow and protracted process of payment made by government to contracted NGOs brings the work of many service providers to a halt. Under-spending is a problem that remains and Treasury is still<sup>576</sup> not providing proper

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<sup>571</sup> *Mail & Guardian* ( 2012-06-22).

<sup>572</sup> On the 2012-08-03, at the time of writing this section of the study.

<sup>573</sup> Hereinafter referred to as "IDASA".

<sup>574</sup> Claassens & Whelan *Government Underspending remains a Problem* (2002) 1: accessed from [www.idasa.org/media/uploads/outputs/.../Budget%20Brief%2091.pdf](http://www.idasa.org/media/uploads/outputs/.../Budget%20Brief%2091.pdf) on 2012-09-19.

<sup>575</sup> Claassens & Whelan *Government Underspending remains a Problem* (2002) 9.

<sup>576</sup> At the time of writing this part of the discussion. What is currently happening is that, after spending, the government supplies (in terms of the Public Finance Management Act) spending performance information to finance officials, the executive and the public. The

solutions on how to tackle it.

Another reason that makes NGOs inefficient in the delivery of services is revealed by a multi-country research study, conducted by the African Democracy Institute and civil society organisations on HIV and Aids financing and spending in the Eastern and Southern Africa, which revealed that there are low spending rates of funds earmarked for HIV and Aids.<sup>577</sup> This is said to weaken Africa's argument for increased funding from developed countries.<sup>578</sup> Research revealed that the reasons for HIV and Aids resource under-spending, where donor funding is given to NGOs, is due to, amongst others, strict donor (I add, also strict government) reporting requirements, lots of paperwork to be completed, site visits and constant reporting, (that is, quarterly, biannual and annual narrative) and financial

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information provides the basis which enables the various stakeholders to apply pressure on spending agents. According to the Claassens & Whelan's *Government Underspensing remains a Problem* (2002) 11-13, this level of disclosure increases financial accountability. The extent to which government and officials are made to account on monies not spent, remains questionable as under expenditure is still the game of the day.

<sup>577</sup> Mukotsanjera & Giya *Determinants of Under-spending of HIV and Aids Funds: Practical Considerations* (2008). Under-spending of funds made available by government and donor partners is viewed by the writers as tragic, considering the fact that Africa is a poor continent and that, almost half of the population in the Saharan Africa live below the poverty line: accessed from [www.idasa.org/.../determinants%20of%20underspending%20in%20](http://www.idasa.org/.../determinants%20of%20underspending%20in%20) on 2012-09-19.

<sup>578</sup> *Ibid*, 3.

reporting).<sup>579</sup>

According to some CSOs, the contractual requirements are time consuming, particularly when working with different donors who have their own compliance requirements. Also, bigger organisations are viewed as able to comply with reporting requirements as they would employ professional staff for project management.<sup>580</sup> I am of the view that this challenge may be addressed if organisations are permitted to create their own programme objectives, activities, costing for activities, monitoring and evaluation strategies, including the methodology as how the objectives will be achieved.<sup>581</sup> This arrangement will enable NGOs to report according to their own reporting requirements which fit into the donor or the government's broader objective and can thus make more time available for actual implementation of services. We should frown at instances where government departments return money to the national treasury when not spent. This is not solving the problems of the poor, but infringes on the fundamental rights of children even further.

Also, government must be informed where the MTEF projections tend to be ignored by politicians who are pressured by the exigencies of budgeting to focus on the year ahead. This is so, even when politicians are aware that their decisions adversely affect future

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<sup>579</sup> *Ibid*, 3-4.

<sup>580</sup> *Ibid*, 4-6.

<sup>581</sup> See the proposed provision in section 4 5.

budgets.<sup>582</sup>

Since government spending units are the central decision structures, I opine that the MTEF arrangement should be used to compel government to take account of future impacts before they decide on spending trends. This can limit the freedom of pressured politicians. Furthermore, we need to ensure that the MTEF arrangement is adhered to by government officials as a framework that works hand in glove with the annual budget process. Government can take advantage of this arrangement to hold its officials who contravene the MTEF liable, and also use the MTEF for annual performance appraisals.<sup>583</sup> Thus, I recommend that provisions must be incorporated in the Children's Act to hold government departments and officials accountable for the delivery of services, as well as to account for money that is not spent.<sup>584</sup>

The budget that provides for the basic nutrition, shelter, basic health care services, social services and protection of the child from maltreatment, neglect, abuse or degradation of children, is not necessarily prioritised. The MEC for Social Development, who is mainly responsible for the implementation of the Children's Act, may, in terms of the Constitution,

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<sup>582</sup> Schick *Organisation for Economic Co-operation and Development Journal on Budgeting* (2007) 114.

<sup>583</sup> See the proposed provision in section 4 5.

<sup>584</sup> *Ibid.*

bargain to get more funding for the provincial budget in order to provide social services.<sup>585</sup>

The Children's Act has put measures in place to secure the implementation of the Act with regard to "prevention and early intervention services". The obligation is imposed on the Ministry of Social Development,<sup>586</sup> after consultation with other Ministries, such as Education, Finance, Health, Provincial and Local Government and Transport, to include a comprehensive national strategy in its department to secure the provision of "prevention and early intervention programmes" to families, parents, care-givers and children of the Republic.<sup>587</sup> This provision is consistent with the Public Finance Management Act<sup>588</sup> in that it requires government to submit a memorandum to Parliament giving a projection of cost implications of an additional function that is imposed on the province in terms of the draft national legislation. The projection of cost implications of the Children's Act was done in 2006 by a consulting team.<sup>589</sup>

The MEC for Social Development has the responsibility within the national strategy, to provide a provincial strategy, which includes properly co-ordinated and managed "prevention

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<sup>585</sup> S 214(2)(h): requires the national government to take into account the obligation of the provinces and municipalities in terms of the national legislation.

<sup>586</sup> S 1(1) of the Children's Act defines the Minister of Social Development as the Cabinet member responsible for it.

<sup>587</sup> S 145(1).

<sup>588</sup> S 35.

<sup>589</sup> A team appointed by the National Department of Social Development. See Report *The Cost of Children's Bill* (2006). Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 106.



and early intervention programmes”.<sup>590</sup> The MEC must also, in terms of the Children’s Act, compile a provincial profile in terms of prescribed intervals that would make necessary information available to the development and review strategies incorporated in both the national and provincial strategy.<sup>591</sup> Furthermore, the MEC has the responsibility in terms of the Children’s Act to use money appropriated to it by the provincial legislature to provide and fund the “prevention and early intervention programmes” for that particular province.<sup>592</sup>

The provision of “prevention and early intervention programmes” qualifies for funding if it is consistent with the national norms and standards identified in the Children’s Act. The national norms and standards for “prevention and early intervention programmes” are established by regulations.<sup>593</sup> The process for the development of the regulations is, like the process of the drafting of the comprehensive national strategy, a collaborative input with consultation with other Ministries.<sup>594</sup> In terms of the Children’s Act, the national norms and standards for “prevention and early intervention programmes” relate to “outreach services;”<sup>595</sup>

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<sup>590</sup> S 145(2).

<sup>591</sup> S 145(3).

<sup>592</sup> S 146(1); Proudlock in Boezaart (ed.) *Child Law in South Africa* 297.

<sup>593</sup> S 147(2); Regulations to the Children’s Act GG 27 June 2008 No 31165; Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 104.

<sup>594</sup> S 147(1) of the Children’s Act.

<sup>595</sup> S 147(2)(a); Reg D (a) to the Children’s Act: Amongst others, this services must - (1) be aimed at reaching out to especially vulnerable children and families in order to meet the needs of the children; (2) be aimed at reaching the needs of children in the context of family and community; (4) ensure that children and families are able to access documents, including birth certificates, to facilitate access to social security and other social services; (9) give effect to the promotion and identification of children at high risk of getting into the child care or criminal

education, information and promotion;<sup>596</sup> therapeutic programmes;<sup>597</sup> family preservation;<sup>598</sup> skills development programmes;<sup>599</sup> diversion programmes;<sup>600</sup> temporary safe care;<sup>601</sup> and

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justice system; (10) include home based, home visitation and community outreach support to particularly vulnerable children and families, including children infected and affected by HIV/Aids and other chronic illnesses, children with disabilities as well as orphans; and (12) recognise community's strengths and resources to promote safe neighbourhood for children.

<sup>596</sup> S 147(2)(b); Reg D (b) to the Children's Act: Amongst others, this services must - (1) promote education and awareness of children's rights and responsibilities; (2) promote the importance of the early years, especially early childhood development; (4) provide children and families with information on how to access health and appropriate social services; (6) provide information and support to families affected by HIV/Aids and other chronic illnesses; (7) provide information on early identification of risk factors in children and families; and (13) provide opportunities for dialogue in communities on matters that affect children.

<sup>597</sup> S 147(2)(c); Reg D (c) to the Children's Act: Amongst others, this services must - (2) promote emotional well-being and growth of the child; (3) be appropriate with the developmental needs and the developmental stage of the child; (9) involve the child, his or her family and significant persons; and (12) ensure that proper records are kept and data is captured.

<sup>598</sup> S 147(2)(d); Reg D (d) to the Children's Act: Amongst others, this services must - (2) be aimed at preventing the recurrence of problems in the family environment that may harm children or adversely affect their development; (3) address factors that put children at risk of imminent removal from their environment; (4) address the particular needs of families in their diverse forms; (16) promote the reunification of children with their families.

<sup>599</sup> S 147(2)(e); Reg D (e) to the Children's Act: Amongst others, this services must be - (2) aimed at alleviating poverty and its adverse effects on children; (3) aimed at creating employment and improving family income; and (4) aimed at proving skills for the care of sick, disabled and chronically ill children.

<sup>600</sup> S 147(2)(f); Reg D (f) to the Children's Act: Amongst others, this services must - (1) promote the dignity and well-being of the child and the development of his and her sense of worth and ability to contribute to society; (2) be appropriate to the age and maturity of the child; (3) be based on an assessment framework which covers: (a) Details of risk factors associated with

assessment of programmes”.<sup>602</sup> The Children’s Act is emphatic that funding for “prevention

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offending that are present in the child’s life, including – social, family and peer relationships; education, including school grade, attendance and performance; history of antisocial behaviour; medical or psychiatric history; whether the child has been found in need of care and the developmental areas that the programme is designed to address; (b) strength assessment; (5) impart useful skills; (6) not be exploitative, harmful or hazardous to a child’s physical or mental health; (7) include a restorative justice element which aims at healing relationships including relationships of the victim; (9) involve parents and care-givers where available; (12) promote the participation of children in decision-making; and (17) be sensitive to the linguistic needs and religious and cultural norms and values of children and their families.

<sup>601</sup> S 147(2)(g); Reg D (g) to the Children’s Act: Amongst others, - (1) placement of a child in such care must be based on the assessment of the needs of the child; (5) temporary safe care must not be disruptive to the child’s life and regular routine; (6) temporary safe care must allow access to the child by relevant persons, including his or her parent, guardian, care-giver, next of kin or other professional if it is necessary and in the best interests of the child; and (8) be sensitive to the linguistic needs and religious and cultural norms and values of children and their families.

<sup>602</sup> S 147(2)(h); Reg D (h) to the Children’s Act: Amongst others, this services must – (1) be conducted by service providers who have appropriate training, support and competencies to undertake such; (2) be conducted annually; (6) aimed at promoting decision-making about future programmes; (9) monitor adherence to the minimum norms and standards prescribed in this Act and to take decisive and appropriate action where departures from the norms and violations occur; (10) be done with the participation of children ad programme staff; (11) consider: the degree to which the programme reached the intended target; demographic profile of the target group; whether recipients are receiving quality servicers; the availability and efficient utilisation of programmes resources; sustainability of programme efforts; ability of staff to implement the programme; management function, ability and competency; (12) ensure the participation of families and communities; and (14) aimed at addressing and meeting the developmental needs of children.

and early intervention programmes” be prioritised in communities with families that lack proper shelter, food and other basic necessities of life for their children.<sup>603</sup> The Act also emphasises the need to make “prevention and early intervention programmes” available for children with disabilities.<sup>604</sup>

According to Van der Linde,<sup>605</sup> “prevention and early intervention programmes” express the importance of the basic family structure and the responsibility of the state to intervene *in time* to prevent the removal of the child from family life. Thus, I submit that the Children’s Act made major improvements by creating a provision for “prevention and early intervention services” which was not provided in the Child Care Act.

I envisage that if the children’s court is faced with circumstances that leads it to make a decision to remove the child from family life, it would make an order that “early intervention services” be provided to the child, the family of the child, or parent or care-giver if the court considers the provision of such programmes appropriate.<sup>606</sup> The court may alternatively order that the child and his or her family participate in a prescribed family preservation programme.<sup>607</sup>

The order that is made concerning “early intervention services” must be for any specified

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<sup>603</sup> S 146(4)(a).

<sup>604</sup> S 146(4)(b).

<sup>605</sup> In Verschraegen (ed.) *International Family Law: Family Finances* 103.

<sup>606</sup> Ss 148(1), 148(1)(a).

<sup>607</sup> S 148(1)(b).

period not exceeding six months.<sup>608</sup> Upon expiry of the set period, the designated social worker must submit a report stating progress regarding “early intervention services” provided to the child, the family or the care-giver to the child.<sup>609</sup> The court may, upon considering the report, decide whether to remove or not remove the child.<sup>610</sup> The court may also order that the “early intervention programmes” continue for another period not exceeding six months.<sup>611</sup> The court may at its discretion also order that the child be removed temporarily or permanently in circumstances where the child may be at serious or imminent risk.<sup>612</sup> This means that the order for “early intervention programmes” is not made randomly. Instead the court considers other factors.

The Children’s Act also provides for other intervention measures, which need to be considered before the decision to remove the child from the family environment is explored.<sup>613</sup> According to the Children’s Act.<sup>614</sup>

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<sup>608</sup> S 148(2).

<sup>609</sup> S 148(3).

<sup>610</sup> S 148(4)(a).

<sup>611</sup> S 148(4)(b).

<sup>612</sup> S 148(5).

<sup>613</sup> S 156(1)(k).

<sup>614</sup> An interdict may be made in terms of s 156(1)(k): “if the court finds that –

- (a) the child has been or is being maltreated, abused, neglected or degraded by that person;
- (b) the relationship between the child and that person is detrimental to the well-being or safety of the child; or
- (c) the child is exposed to a substantial risk of imminent harm”.

“[i]f the [c]hildren’s [c]ourt finds that a child is in need of care and protection the court may make any order which is in the best interests of the child, which may be or include [an] order interdicting a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child”.

Thus, the intention of the Children’s Act is understood to be to keep every child in the family environment rather than removal.<sup>615</sup> However, children will continue to be removed under the guise of poverty until the state provides proper assistance for sustenance and quality livelihoods in families to enable children to grow up in the family environment.<sup>616</sup> This is evident in situations where poverty results in child neglect and abuse.<sup>617</sup> Sloth-Nielsen<sup>618</sup> is of the view that, since there is a close link between parental poverty and child abuse in South Africa, it is arguable that where children’s neglect stems from poverty alone, the state should be required to adopt meaningful preventative measures which should include some level of financial allocation for family preservation.<sup>619</sup>

The *Grootboom* judgment argues for the possible establishment of social welfare programmes providing maintenance and other material assistance to families in need in defined circumstances. I agree that the establishment of social welfare programmes is the

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<sup>615</sup> S 156.

<sup>616</sup> Matthias (1997) 23-57; Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 109.

<sup>617</sup> Matthias (1997) 23-57; Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 101.

<sup>618</sup> In Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 23-13.

<sup>619</sup> Sloth-Nielsen in Cheadle *et al.* *South African Constitutional Law – The Bill of Rights* 23-13.

way to go. I further agree with Sloth-Nielsen<sup>620</sup> that social welfare programmes should be implemented even if the programmes find their legal recourse in section 27 of the Constitution, where it is stated that the state needs to implement the rights progressively and within their available resources.

As at the moment, prevention services do not include “special temporary maintenance” or an income assistance grant over and above the social grant.<sup>621</sup> The study conducted by UNICEF<sup>622</sup> states that “the allocation of resources to children” to “the maximum extent” of their availability is key to a state’s effort to ensure the implementation of the CRC. Thus, I submit that the implementation of legislation through programmes and institutions requires adequate and substantial allocation of finances from governments to ensure that children’s rights become a reality.

The state must provide “special temporary maintenance” to destitute families, irrespective of whether a particular family receives a child-support grant for a particular child.<sup>623</sup> The responsibility of the state to provide social assistance must not end with the grants that are administered and implemented by SASSA. The Children’s Act provides that in the event that a child is without support or in a poverty stricken situation, the state may be ordered to provide the basic necessities as a fundamental right or assist a child in obtaining access to a

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<sup>620</sup> *Ibid.* See also Sloth-Nielsen (2001) *SAJHR* 227.

<sup>621</sup> See the discussion in sections 3 3 1 2.

<sup>622</sup> *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 4.

<sup>623</sup> See the discussion in section 3 3 1 2 and the proposed provision in section 3 4.

public service to which the child is entitled.<sup>624</sup> I am of the view that the right to family care or parental care supersedes even situations where the family of the child is too poor to take care of the child. Hence, the state must provide maximum assistance to parents to enable them to preserve the right of the child to family life.

The Children's Act<sup>625</sup> recognises Child Protection Organisations as organisations which have been given written approval by the Director-General or the provincial head of Social Development to perform child protection services. A Child Protection Organisation is recognised as such only if it complies with the prescribed criteria to perform all or any specific child protection services in the relevant province.<sup>626</sup> Services that are performed by Child Protection Organisations include those aimed at supporting children's court proceedings<sup>627</sup> and the implementation of court orders,<sup>628</sup> for example, assessment services used to determine if a child is in need of care and protection.

Other services relate to prevention and early intervention,<sup>629</sup> reunification of children in

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<sup>624</sup> S 46(1)(h)(viii) of the Children's Act.

<sup>625</sup> S 107(1).

<sup>626</sup> S 107(2)(b) of the Children's Act. According to s 108(1) and (2) of the Children's Act, current child welfare organisation that were registered under the Child Care Act such as the child welfare, are registered as designated Child Protection Organisation for purposes of the Children's Act. See also Mahery *et al.* (2011) 10.

<sup>627</sup> S 105(a)(i) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>628</sup> S 105(a)(ii) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>629</sup> S 105(5)(b)(i) and (ii) of the Children's Act. See also Mahery *et al.* (2011) 11.



alternative care with their families,<sup>630</sup> integration of children into alternative care arrangements,<sup>631</sup> placement of children in alternative care, adoption of children including inter-country adoptions,<sup>632</sup> carrying out of investigations and the making of assessments in cases of suspected abuse, neglect<sup>633</sup> or abandonment of children, intervention and removal of children in appropriate cases and drawing up of individual development plans and permanency plans<sup>634</sup> for children who are removed from family life, or at risk of being removed from their families.<sup>635</sup> However, it is questionable as to what infrastructure and human resource capacity is available to implement child protection systems. The concern is raised on the basis of the fact that matters relating to child abuse, exploitation and domestic violence which take place in rural communities under guise of amongst other, FGM, forced marriages and circumcision are currently not recorded and dealt with in terms of the systems put in place at the South African Police Services to protect children.

A Child Protection Register may be used by social workers to monitor patterns of threat of harm or abuse suffered by children.<sup>636</sup> A National Child Protection Register records situations of child abuse and neglect, including personal information and information relating to a conviction or court order.<sup>637</sup> Thus, if a child is abused, his or her name can be recorded

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<sup>630</sup> S 105(5)(b)(iii) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>631</sup> S 105(b)(iv) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>632</sup> S 105(b)(vi) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>633</sup> S 105(c) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>634</sup> S 106(2)(i) of the Children's Act.

<sup>635</sup> S 105(e) of the Children's Act. See also Mahery *et al.* (2011) 11.

<sup>636</sup> S 113(f) of the Children's Act.

<sup>637</sup> S 111(1) of the Children's Act. See also UNICEF (2008) 11.

in the Register so that the child is known about and not forgotten. The information in the Register cannot be shared with other people except for professional people who are working with children.<sup>638</sup>

The Register also records information regarding people who are unsuitable to work with children.<sup>639</sup> An unsuitable person is someone who has committed a crime like murder, rape or indecent assault against the child, or has been accused of these crimes but not convicted because of mental illness,<sup>640</sup> or a person who is not found guilty of a crime but the court or official forum made a decision saying that the person is not suitable.<sup>641</sup>

#### *4.3.2 Prevention and early intervention services in terms of international law*

This section discusses what prevention and early intervention services may mean in the context of international law and the extent to which they must be recognised by state parties. The CRC does not have a provision on prevention and early intervention services. Instead, the CRC has Articles that provide for prevention measures.

Thus, I use the standard set by the CRC regarding what prevention should be to propose for the establishment of provisions for prevention measures in the Children's Act. For instance,

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<sup>638</sup> Ss 113(e) and 114 of the Children's Act. See also UNICEF (2008) 10.

<sup>639</sup> S 120(1) of the Children's Act. See also the discussion in section 3.3.11 where s 137(4) of the Children's Act is discussed.

<sup>640</sup> Ss 120(4)(b) and 120(5) of the Children's Act.

<sup>641</sup> S 120(6) of the Children's Act. See also UNICEF (2008) 12.

it prohibits separation of the child and his or her parents except where such separation is necessary for the best interests of the child.<sup>642</sup> Thus, the CRC obliges state parties to respect the right of the child to his or her identity, including nationality, name and family relations.<sup>643</sup> This means that state parties have the duty to respect the right of the child to grow up in a family and preserve his or her identity.<sup>644</sup> Furthermore the CRC imposes an obligation on state parties to take necessary measures to protect the child in the event that the right to identity and family relations of the child is infringed.<sup>645</sup>

In other cases, the CRC provides for early intervention measures in the form of requiring state parties to provide assistance to parents. For example, the CRC binds state parties to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The assistance expected from state parties includes the development of institutions, care and services to children, which may be recognised as services aimed at preventing the removal of the child from the family environment.<sup>646</sup>

Nevertheless, the CRC has a special clause guaranteeing protection services to a child living, begging or working on the street. Protection services that are anticipated for such a child include social programmes to provide the child and his or her parent or care-giver with

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<sup>642</sup> Art 9(1). See the discussion in section 5.3.

<sup>643</sup> Art 8(1).

<sup>644</sup> *Ibid.*

<sup>645</sup> Art 8(2).

<sup>646</sup> Art 18(2).

support.<sup>647</sup> The CRC also allows that other forms of services, treatment and follow-up of instances of child maltreatment and judicial involvement, be made by state parties to street children.<sup>648</sup>

The growth in restorative justice in South Africa is internationally steered by, amongst others, the Vienna Declaration on Crime and Justice.<sup>649</sup> The Vienna Declaration encouraged the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties.<sup>650</sup> Taking this further, the United Nations Economic and Social Council adopted a resolution containing a set of Basic Principles for the Use of Restorative Justice Programmes in Criminal Matters.<sup>651</sup> The Basic Principles for Use in Restorative Justice gives useful definitions of restorative justice programmes, processes and outcomes. They also outline how restorative justice programmes should be used.

The Basic Principles for Use in Restorative Justice calls on states parties to establish guidelines and standards to govern restorative justice programmes and encourages states to

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<sup>647</sup> Art 19(2). See also Ennew “Outside Childhood: Street Children’s Rights” in Franklin (ed.) *The New Handbook of Children’s Rights* (2002) 390.

<sup>648</sup> *Ibid.*

<sup>649</sup> 2000.

<sup>650</sup> The Vienna Declaration on Crime and Justice: *Meeting the Challenges of the Twenty-First Century*, 10<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/RES/55/59, par 28.

<sup>651</sup> ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2.

develop national strategies through a process of consultation.<sup>652</sup>

The CRC obliges state parties to take measures to the maximum extent possible to ensure the survival and development of the child.<sup>653</sup> Furthermore, the CRC obliges state parties to recognise the right of the child to physical, mental, spiritual, moral and social development.<sup>654</sup>

The CRC also provides that state parties must recognise the right of the child to education and that measures need to be taken to encourage regular attendance at school to reduce drop-out rates.<sup>655</sup>

These Articles of the CRC provide for children below the age of eighteen including “early childhood development”. The UNICEF Report on the review of child-support grants in South Africa revealed high attendance at crèche, particularly of children receiving the child-support grant.<sup>656</sup> This means the child support grant complemented “early childhood development”.

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<sup>652</sup> Furthermore, the United Nations developed the *Handbook on Restorative Justice Programmes*. The handbook sets out guidelines for practice. The handbook is also an important source of reference in facilitating restorative justice.

<sup>653</sup> Art 6(2). See also the connection between Art 6(2) and Art 4(2). See the discussion in section 4 2 2.

<sup>654</sup> Art 27(1). See the discussion in section 4 2 2.

<sup>655</sup> Art 28(1) provides that: “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(e) take measures to encourage regular attendance at school and the reduction of drop-out rates.”

<sup>656</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 40.

On the same note, attendance of children at crèche was found to be lower in rural and informal urban areas where children are most likely to live in resource constrained settings.<sup>657</sup> The programme provided by “early childhood development” centres was seen as a necessity in these areas.<sup>658</sup> However, other provinces experienced challenges in implementing the programme due to a lack of resources, which raises concerns in terms of the sustainability of the programme.<sup>659</sup>

The CRC clearly makes the point that development should be viewed in its broadest sense “embracing the child’s physical, mental, spiritual, moral psychological and social development”.<sup>660</sup> What South Africa can learn from this comment is that intervention services provided to children under the age of two in the form of preventative health care at public health facilities, growth monitoring through regular weighing, immunisation and access to vitamin supplements,<sup>661</sup> form part of an “early childhood development” programme. Thus, same must be provided for in the provision relating to early intervention services.<sup>662</sup>

There is no provision for “prevention and early intervention services” in the ACRWC. The obligation imposed by the ACRWC on state parties to assist parents in providing assistance

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<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid.*

<sup>659</sup> SAHRC 6<sup>th</sup> *Economic and Social Rights Report (2003-2004)* (2006) 76.

<sup>660</sup> General Comment 5 par 12.

<sup>661</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 43.

<sup>662</sup> See the proposed provision in section 4 5.

and support programmes on basic necessities for children may be interpreted as “prevention and early intervention” measures aimed at preserving family life rather than removing the child from the family because of the lack of such assistance.<sup>663</sup> Thus the assistance provided by state parties to parents is for the upbringing, development, security and financial needs regarding the conditions of living that are consonant with the development of the child.<sup>664</sup>

The ACRWC, like the CRC,<sup>665</sup> provides that state parties shall guarantee the survival, protection and development of the child.<sup>666</sup> The ACRWC also obliges state parties to provide for the education of the child. This obligation requires states to take measures to ensure that the child is educated about primary health care issues that relates to him or her.<sup>667</sup> On the same note, the ACHPR guarantees every individual the right to education.<sup>668</sup> This provision is to some extent similar to the ACRWC<sup>669</sup> and the CRC.<sup>670</sup> The difference between the three

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<sup>663</sup> See the discussion in section 4 3 1 3.

<sup>664</sup> Art 20(1)(a).

<sup>665</sup> Art 6(2).

<sup>666</sup> Art 5(2).

<sup>667</sup> Art 11(2)(g).

<sup>668</sup> Art 17(1) provides that: “Every individual shall have the right to education.”

<sup>669</sup> Art 11(1) provides that: “Every child shall have the right to an education.”

<sup>670</sup> Art 28(1) provides that: “State Parties recognise the right of the child to education, and with a view to achieving this rights progressively and on the basis of equal opportunity, they shall, in particular:

- (i) Make primary education compulsory and available free to all;
- (ii) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

international laws is that the ACHPR covers everyone, whereas the ACRWC and the CRC cover children only. Furthermore, the ACHPR obliges state parties to ensure that every person exercises the right to development.<sup>671</sup> This provision is wide enough to cover “early childhood development”. In this regard, state parties have the responsibility to put measures in place to ensure that every child receives proper provision for his or her development.<sup>672</sup>

The ECHR does not specifically provide for “prevention and early intervention services” but provides for the positive obligation to respect family life.<sup>673</sup> The ECHR in certain circumstances requires the state to adopt measures in order to prevent the separation of the child from family members.<sup>674</sup> In other situations, it may be that support and assistance need to be provided to a family prior to the removal of the children on the grounds of neglect.<sup>675</sup> In yet other circumstances, it is consistent with Article 8 to take the children into care if they are

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- (iii) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (iv) Make educational and vocational information and guidance available and accessible to all children;
  - (v) Take measure to encourage regular attendance at schools and the reduction of drop-out rates.”

<sup>671</sup> Art 22(2) provides that: “State shall have the duty, individually or collectively to ensure the exercise of the right to development.”

<sup>672</sup> *Ibid.*

<sup>673</sup> Art 8.

<sup>674</sup> KilKelly (1999) 174.

<sup>675</sup> *Ibid.*



living in unsanitary and impoverished conditions.<sup>676</sup>

According to Kilkelly,<sup>677</sup> the consequences of “interference” with family life are huge in that, in assessing consistency with Article 8, it may be crucial to assess whether the authorities provided assistance to parents or considered other *measures in maintaining family ties*<sup>678</sup> or other preventative measures before removing the child from family life.

The ECHR explicitly prohibits interference by a public authority in a person’s right to private and family life.<sup>679</sup> According to the ECHR, interference in a person’s right to family life may be justifiable in situations where the situation of the child in need of care and protection warrants removal. The ECHR considers in each case whether the reasons in favour of a care order are relevant and sufficient.<sup>680</sup> The interference by the state should be for the purposes of, amongst others, the promotion of security, public safety, protection of health, morals,<sup>681</sup> or the rights and freedoms of others.<sup>682</sup> This means that where a child is known to

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<sup>676</sup> Kilkelly (1999) 173.

<sup>677</sup> (1999) 265.

<sup>678</sup> Own emphasis.

<sup>679</sup> Art 8(1) and (2).

<sup>680</sup> Art 8(1) and (2) of the ECHR, Kilkelly (1999) 264.

<sup>681</sup> As established in the case of *Rieme v Sweden* 183 paras 61 and 13. It was found that the safeguards against arbitrary interferences conferred to authorities by s 28 of the Social Services Act 1980 to prohibit the applicant from removing his child from foster home on the ground that there was “a risk which was not of a minor nature” were found reasonable and acceptable for purposes of Art 8 of the ECHR. See the discussion in section 2 2 3.

<sup>682</sup> This means the authorities may remove the child and also interfere with the parent’s right to family life for purposes of protecting the child. The authorities may, like in the case of *Rieme v*

have been abused by a parent, the removal of the child from family life into care may be justifiable if it is compatible with the ECHR.<sup>683</sup>

The European Commission in *X and Y v Germany*<sup>684</sup> found “that only the most pressing grounds can justify the disruption of existing family ties, even where the material conditions of a family are poor”.<sup>685</sup> In *Olsson v Sweden*<sup>686</sup> the court held that the removal of children under the care of their parents “must be supported by sufficiently sound and weighty considerations in the interests of the child; it is not enough that the child would be better off if placed in care”.

The European Commission has assessed the consequences of interference with family life.<sup>687</sup> The Commission has<sup>688</sup> taken into account issues such as whether the social authorities provided assistance to the parents or took other preventative measures before

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*Sweden* par 23, where the parent was prohibited from removing the child, lift the prohibition of removal. In this case, the welfare report of the child indicated the adjustment made by the child in her relationship with the applicant and foster family who were also cooperative. The child maintained contacts with the applicant and had been close to him and his wife.

<sup>683</sup> Art 8(2); Kil Kelly (1999) 264.

<sup>684</sup> (1978) 15 DR 208.

<sup>685</sup> See further discussion in Van der Linde (2001) 185.

<sup>686</sup> 287 par 72; see also Van der Linde (2001) 185.

<sup>687</sup> Kil Kelly (1999) 265.

<sup>688</sup> Art 8(1).

considering the removal of the child from family life.<sup>689</sup> Kil Kelly<sup>690</sup> seems uncertain whether an obligation of financial assistance should be disregarded and points to a situation where a parent seeks to enforce a decision to provide for a child with special needs. Forder<sup>691</sup> is of the view that the state must enable parents to carry their parental role and intervene in situations where there is interference on the part of children or parents in exercising their right to family life. Whether or not the state should provide financial assistance was clarified in *Marckx v Belgium* as discussed previously in this chapter. Family life also includes interests of a material kind,<sup>692</sup> even though the case of *Andersson and Kullman v Sweden*<sup>693</sup> the judge held the view that Article 8 of the ECHR does not guarantee state assistance for the family.

With regards to the responsibility which the state has towards children, we can further refer to the case of *Z and Ors v UK*,<sup>694</sup> particularly the position taken by the ECtHR in questioning the approach by the English court with regard to the liability of public authorities. The court held that a local authority has the duty to ensure that measures are taken to protect a child at risk. In this case, the ECtHR noted a failure by the local authority to assign a senior social worker or a guardian *ad litem* to a child. *R v Barnet London Borough Council, R v Lambeth*

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<sup>689</sup> Kil Kelly (1999) 265.

<sup>690</sup> (1999) 210.

<sup>691</sup> Forder (1996-1997) *MJECL* 128-129.

<sup>692</sup> See the discussion in sections 2 2 2 2 1 and 4 2 2.

<sup>693</sup> See the discussion in section 4 2 2.

<sup>694</sup> (2001) 2 *FLR* 612.

*London Borough Council and R v Lambeth London Borough Council*<sup>695</sup> concerned the duty of every local authority to (a) safeguard and promote the welfare of children within their area of jurisdiction who are in need, and (b), consistent with that duty, to promote the upbringing of such children by their families, by providing a range of services appropriate to those children in need in terms of the Children Act.<sup>696</sup>

The cases involved children in need who claimed that they were entitled to particular resources. In the one case siblings who suffered from autism were assessed and it was found that they required re-housing, which was offered by the local authority. The obligation under Article 8 led to the interpretation of section 17 of the Children Act. Lord Scott<sup>697</sup> explained that:

“If a parent or parents have become intentionally homeless or for any other reason are not entitled to look to the local authority for housing accommodation, the local authority is entitled, in my opinion, to adopt a general policy under which it is made clear that it will make accommodation available to the children in the family in order to prevent children becoming homeless, but will not permit the parents to use the children as stepping stones by means of which to obtain a greater priority to be re-housed than that to which they would otherwise be entitled.”

The ECHR also recognises that the child has the right to be protected from abuse. This right depends on how severe the abuse is, as more often than not, the right that may be infringed

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<sup>695</sup> (2004) 1 All ER 97; see Choudhry & Herring (2010) 298.

<sup>696</sup> S 17.

<sup>697</sup> Par 141; Choudhry & Herring (2010) 298-299.

could be covered by Article 3 and 8 of the ECHR. Article 3 covers most forms of child abuse and is not limited to physical injuries but includes sexual abuse and mental suffering. The Article covers situations where the child is neglected to a point where the child is suffering mental abuse.<sup>698</sup> The fact that the child is an illegal immigrant, or that he or she has committed an offence, does not diminish the child's entitlement to Article 3.<sup>699</sup> The child's claim may be covered by Article 3, if for instance, the state places the child in a position where the child is at risk of torture or inhumane or degrading treatment at the hands of another.

The court of appeal in *Gezer v Secretary of State for the Home Department*<sup>700</sup> held that:

“The State's duty to protect individuals from Article 3 ill-treatment will, depending on the circumstances, sometimes involve refraining from action, and sometimes involve taking action. In the context of the duty to protect, the difference is serendipitous.”

#### 4.3.3 *Prevention and early intervention services in terms of foreign jurisdictions*

There is no legislation that provides for “prevention and early intervention services” for

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<sup>698</sup> Choudhry & Herring (2010) 288.

<sup>699</sup> *Ibid.*

<sup>700</sup> (2004) EWCA Civ 1730 par 28: a family of homeless asylum seekers was housed on the Toryglen estate in Glasgow. It was claimed that the estate was infamous for its racist attacks and intimidation. Soon after, the family arrived they were assaulted, abused and harassed. The court agreed that the family suffered conduct which interfered with the rights in Article 3. There was no dispute that the state owed an obligation to protect people from abuse and that included protection by putting them in a place where they would not be abused. See also Choudhry & Herring (2010) 289.

children in Kenya. Thus, the CRC recommended that Kenya take into account the General Comments No 7<sup>701</sup> on implementing child rights in “early childhood”. Furthermore, the Committee recommended that Kenya urgently develop a comprehensive social protection framework with the highest priority given to the most vulnerable children; particularly children belonging to disadvantaged families, rural communities, orphans, children infected with or affected by HIV/Aids and street children.<sup>702</sup>

Since restorative justice programmes involve a wide range of prevention and early intervention services, and that they are most significant in keeping children in families, I am of the view that South Africa must learn from other jurisdictions on how they are applied for improvements in the implementation of the Children’s Act. Canada, New Zealand and the United States of America are using restorative justice programmes in school curricula as an early intervention measure to reduce the exclusion of children from school bullying, to raise standards of conduct, combat truancy and disciplinary issues arising from defiant and disrespectful behaviour, everyday conflicts, disputes, and petty crimes.<sup>703</sup> The restorative justice practices are delivered to staff, pupils, parents or school governing bodies.<sup>704</sup> The practices reflect on how a school can begin the process of becoming restorative and why restorative approaches are effective.

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<sup>701</sup> CRC/C/GC/7/Rev.1 par 26.

<sup>702</sup> Concluding Observation 56(c).

<sup>703</sup> Information accessed from: <http://www.restorativejustice4schools.co.uk/aboutapproach.htm> on 2012-03-13.

<sup>704</sup> Report Sherman & Strang *Restorative Justice: the Evidence* (2007) Smith Institute 33-52.

Other developments in restorative justice practices manifest in individual states in the Eastern Europe region, even though there is no legislation that regulates the practice.<sup>705</sup> Estonia used victim offender mediation practice as a restorative justice measure to resolve disputes. In this case, government would fund non-governmental organisations to implement restorative justice practices.<sup>706</sup> South East Europe used restorative justice practice as a conflict resolution technique that is not limited to minor offences but to a wide range of offences, including serious violence, domestic violence, and incidents not defined by law.<sup>707</sup> The United Kingdom and United States of America introduced a *whole-school restorative justice approach*<sup>708</sup> programmes to schools. The programmes taught restorative justice principles for managing relationships within schools. These can be described as primary-level interventions, aiming to prevent harm in as-yet unharmed populations. However, the programme has been discontinued in the United Kingdom due to lack of funding.

The United States of America acknowledges the significant work that is done by the NGO

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<sup>705</sup> Hansen: College of Human Ecology *Restorative Justice in Eastern Europe* (2006) School of Social Work 1.

<sup>706</sup> Vos & Hansen *Introduction of Restorative Justice in the Ukrainian Legal System* (2006) Ukrainian Centre for Common Ground 2-4.

<sup>707</sup> Report Sherman & Strang *Restorative Justice: the Evidence* (2007) Smith Institute 33. This practice allowed for children to be taught in advance on how to deal with conflicts. Students are taken through a series of workshops designed to develop mutual respect and understanding. The evaluation results revealed that students who participated in the workshops dealt more constructively with conflict.

<sup>708</sup> Report Sherman & Strang *Restorative Justice: the Evidence* (2007) Smith Institute 52.

sector.<sup>709</sup> Thus, most government grants in the states are awarded to, amongst others, organisations and institutions for the benefit of the population or community. This information can be found in government policies and is not explicitly provided for in, amongst other South African legislation, the Children's Act.<sup>710</sup> This could have created a positive impact if legislation made provisions for the work of NGOs. This would have made legislation implementers and enforcers value the role played by NGOs of providing a quick response to needs of communities. Hence I propose that a clear provision be enacted in the Children's Act on the collaboratively and partnership work of the NGOs with government in providing child protection services.<sup>711</sup>

However, unlike the policy,<sup>712</sup> the Children's Act must provide that social welfare services are a responsibility of government, and that when civil societies work collaboratively with government, it must be with government providing financial support to organisations. Thus, I

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<sup>709</sup> Robert *Federal Government Grants: No Free Lunch* (2011): accessed from [www.usgovinfo.about.com/od/moneymatters/a/granttruth.htm](http://www.usgovinfo.about.com/od/moneymatters/a/granttruth.htm) on 2012-09-18.

<sup>710</sup> Amongst others, these are "Policy on Financial Awards to Service Providers" 2004; "Procedure Guidelines for the Implementation of the Policy on Financial Awards to Service Providers" 2005; and a "Policy on Financial Awards to the Non-profit Organisations in the Social Development Sector" 2003, see *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development*, Free State Case No: 1719/2010, par 19 (Unreported).

<sup>711</sup> See the proposed provision in section 4 4.

<sup>712</sup> The "Policy on Financial Awards to the Non-profit Organisations in the Social Development Sector" of 2003, provides that social welfare services have been a joint responsibility of government and civil society, see *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development*, Free State Case No: 1719/2010, paras 18-22 (Unreported).



am not appeased by the fact that government seems comfortable with the fact that NGOs have some responsibility to provide services, given that NGOs operate through funding, including donations from the private entities as a corporate social responsibility provided to communities.<sup>713</sup>

In the case of *Salazar, Secretary of the Interior, et al. v Ramah Navajo Chapter et al*,<sup>714</sup> the government was sued by the tribes for services provided, such as education, environmental protection, agricultural assistance and law enforcement to communities. Government contended that Congress appropriated inadequate funds to fulfil its contractual obligations to the Tribes. The United States Court of Appeals for the 10<sup>th</sup> Circuit held that government must pay the Tribe's contract support costs that the Federal Government would have otherwise provided.<sup>715</sup> The latter followed from, amongst others, a well-established principle that, "When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the

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<sup>713</sup> *Policy on Financial Awards to the Non-profit Organisations in the Social Development Sector* (2000).

<sup>714</sup> (2012) U.S 567. Briefly, the facts of the case are that the responded Tribes contracted with the Secretary of the Interior to provide services. The contracts were entered into under ss 450 of the Indian Self-Determination and Education Assistance Act (ISDA) 1975, which directs the Secretary of the Interior to enter into contracts with willing tribes under which they will provide services. During each financial years, the Congress appropriated sufficient funds to pay any individual tribal contractor in full, the Secretary of the Interior paid the Tribe contractors on a uniform *pro rata* basis.

<sup>715</sup> *Ibid*, 5-18.

appropriation in service of other permissible ends.”<sup>716</sup>

I am of the view that services that are provided to NGOs, should not be construed to mean that they bear the primary responsibility to provide services to vulnerable communities, lest we burden NGOs with a responsibility which is originally not of its own making. This view is clearly argued in *Salazar*,<sup>717</sup> that the principle applies even if an agency’s total lump-sum appropriation is insufficient to pay all of its contracts, government remains responsible for monies spent by NGOs under contracts which serve the purpose that government has identified.

In the United States of America, organisations that get government grants are subject to strict government oversight and must comply in terms of the contract and stipulated standards provided by government.<sup>718</sup> Granted funds must be spent. Thus, any money not spent goes back to the Treasury. If an organisation fails to perform in terms of the contract, such may result in different penalties, such as economic sanctions, and imprisonment in cases of improper use or theft of public funds.<sup>719</sup> South Africa must refer to the United States of America and incorporate a provision for eventualities, such as when an NGO fails to fulfil the conditions of the contract between itself and government. I further propose that such an organisation must be blacklisted, have its name removed from the government’s data-base

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<sup>716</sup> *Ibid*, 2.

<sup>717</sup> 6-8.

<sup>718</sup> Robert *Federal Government Grants: No Free Lunch* (2011): accessed from [www.usgovinfo.about.com/od/moneymatters/a/grantruth.htm](http://www.usgovinfo.about.com/od/moneymatters/a/grantruth.htm) on 2012-09-18.

<sup>719</sup> *Ibid*.

of the list of service providers, be excluded from the lists of donor funding organisations, and the list by the private entity for the corporate social funding.<sup>720</sup>

I am of the view that South Africa must promulgate regulations to the Children's Act to guide social workers to work in partnership with teachers and NGOs to implement restorative justice programmes as part of the school curricula.<sup>721</sup> Restorative justice programmes, implemented in schools, manifest as the best example of early intervention practice as they have the potential to make schools become safer and happier environments. Also, they allow parents understand the behaviour of children and support the development and well-being of children.

With regard to government budget and spending levels, the United States uses programme budgeting. The core idea of this structure is that expenditures should be grouped and decided in terms of governmental objectives, not according to how the organisations spends the money.<sup>722</sup> All the activities that contribute to the same objective are placed in the same programme, irrespective of the organisational entity to which they are assigned.<sup>723</sup> However,

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<sup>720</sup> See the proposed provision in section 4 5.

<sup>721</sup> *Ibid.*

<sup>722</sup> Schick (2007) *OECD Journal on Budgeting* 115.

<sup>723</sup> *Ibid.* Governments that budget by objectives, construct a programme structure which is supposed to serve as the basis for formulating the budget. For instance, when government seeks to safeguard citizens against crime, they more often maintain a police force, prosecutor's office, a court system, a parole or probation agency and prisons. Even though each of these units are managed by different entities, they would be grouped in the same programme as they share the same objective. This means that similar activities would be

Schick<sup>724</sup> argues that programme budgeting stirs up disputes over government objectives. Schick uses the example of a school with nurses on duty to deal with routine medical problems and to teach students proper hygiene. The objective may be viewed as serving both the Department of Education and Health. Thus, there may be conflict over the issue of control over activities and the resources to be used to implement programmes. I am of the view that conflict can be mitigated if the department whose services are core in the programme takes the initiative and provide services by working collaboratively with other departments to enable them discharge their responsibilities through the use of their own resources.

Programme budgeting is also used more by NGOs and seems to be a sensible means of implementing programmes. A number of jurisdictions, including South Africa, use NGOs as a means of accounting for public funds.<sup>725</sup> However, NGOs are not given the absolute discretion in classifying programme budgets. Instead, government decides which programmes should be channelled within which organisation. Also, programmes and budgeting may be impeded by reforms. Programmes require that policy makers agree on objectives and decide on amounts to be spent. They also ensure that a broader range of

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grouped together the same way as the budget. Thus, government may decide that when more funds are allocated for police patrols, such may reduce the incidence of crime and enable less spending on prisons.

<sup>724</sup> (2007) *OECD Journal on Budgeting* 116.

<sup>725</sup> *Ibid.*

options be reviewed than it is considered in formulating budgets.<sup>726</sup>

I am of the view that since NGOs have proven to be good in implementing programmes, programme budgeting should be left to them. Since programme budgeting provides more information on objectives and policies, any information that relates to the outcomes can assist in assessing the effectiveness of the programme.<sup>727</sup> This practice may, in many ways, make NGOs accountable in the implementation of programmes. The programme must be monitored and evaluated to ensure that financial assistance is expended for the given purpose. Thus NGOs must be encouraged to build their own monitoring and evaluation systems for completion of their projects.<sup>728</sup>

Furthermore, NGOs must submit progress reports of their projects. Government must carry out the physical and financial verification of the projects, and also assess the pace at which services are provided, the completion of projects, and whether services are provided in a satisfactory manner. I therefore recommend that a provision be enacted in the Children's Act to enable NGOs to implement programmes on behalf of government.<sup>729</sup> The question that follows is, how should the Department of Social Development and other institutions work collaboratively with NGOs in the delivery of services? I am of the view that since NGO may not be in a position deliver service on time, NGOs must work with private entities that have a

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<sup>726</sup> Schick (2007) *OECD Journal on Budgeting* 118.

<sup>727</sup> *Ibid.*

<sup>728</sup> Government of Pakistan *Guidelines for Financial Assistance to NGOs* (2000) par III: accessed from [www.environment.gov.pk/NGO%20Guidelines/](http://www.environment.gov.pk/NGO%20Guidelines/) on 2012-09-20.

<sup>729</sup> See the proposed provision in section 4 5.

competitive advantage in the delivery of specific services. I briefly reflect on this question in the next section and chapter 6 of the study.<sup>730</sup>

#### **4.4 Positive duty on the state to protect a child in need of care through placement procedures**

This section discusses the duty which the state has to provide care placement for a child who cannot be kept in the family. I opine that a child who needs care placement is one who has experienced multiple breaches of rights including, abuse, lack of appropriate care, or whose development and well-being is under threat of harm if he or she remains in the family. In order to place the child in care that is at most, as similar to family life as possible, we need financial and moral support for the provision of services that would contribute towards the development and well-being of the child.

I am of the view that services must be provided collaboratively by government and NGOs. However, the discussion in this section revealed that NGOs are not properly supported financially to enable them to work in partnership with government and private entities in the delivery of services.<sup>731</sup> Thus, I recommend that a provision be enacted in the Children's Act

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<sup>730</sup> See the discussion in section 6 3 3 and the proposed provision in section 6 5.

<sup>731</sup> *Ibid.*

to provide for the support of NGOs by government.<sup>732</sup>

According to the SALRC Report,<sup>733</sup> measures that need to be implemented for children are those aimed at maintaining the family unit, and supporting children within the family. This means that placement procedures should only happen in the event that it is not possible to keep the child within the family environment.<sup>734</sup> Robinson<sup>735</sup> also affirms the position in the SALRC Report with regard to the right to family care or parental care in that these rights mean that only “the most pressing grounds” can justify the disruption of “family ties”.<sup>736</sup>

Placement of a child in need of care and protection does not simply entail removing the child from the family environment to alternative care. The Children’s Act identifies processes that need to be adhered to. When the children’s court pronounces by way of a decision that a child is a child in need of care and protection, and orders that such child be placed in alternative care, the child becomes a ward of the state.<sup>737</sup>

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<sup>732</sup> See the proposed provision in section 4 5.

<sup>733</sup> SALRC *The Review of the Child Care Act* (1998) 117.

<sup>734</sup> S 156(1) of the Children’s Act. See Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 109.

<sup>735</sup> (1998) *Obiter* 338.

<sup>736</sup> *Rieme v Sweden* paras 54 and 56: The mutual enjoyment of each other’s company entails maintaining contact and keeping “family ties”. See also, in the case of *X and Y v Germany* (1978) 5 DR 208, it was declared: “that only the pressing grounds can justify the disruption of existing family ties, even where the material conditions of a family are poor”.

<sup>737</sup> National Department of Social Development Report *The Cost of Children’s Bill* (2006) III.

Although the Children's Act does not provide specific guidance, the state has a duty to provide the child that is declared as a child in need of care and protection with at least adequate accommodation, nutrition, clothing, education, medical treatment and recreational facilities.<sup>738</sup> The Children's Act provides for guidelines to placement procedures in different forms of alternative care.<sup>739</sup> Thus children who are found by the children's court as children in need of care and protection are wards.<sup>740</sup> The state bears the costs of running the different forms of alternative care,<sup>741</sup> including foster care and kinship care.<sup>742</sup> Furthermore, the state is responsible for the provision of a care-dependency grant to children with disabilities.<sup>743</sup>

The placement procedure in the Children's Act provides that the court may order that a child in need of care<sup>744</sup> be placed in temporary safe care until such time as the court order is

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<sup>738</sup> *Ibid.*

<sup>739</sup> S 167 (1)(a)-(c). This includes, foster care in terms of ss 156(1)(e)(i), 167(1)(a), temporary safe care in terms of ss 156(1)(e)(iii), 167(1)(c) and shared care or child and youth care centre in terms of ss 156(1)(e)(i)-(v), 167(1)(b), 167(2). See the discussed in ch 6.

<sup>740</sup> National Department of Social Development Report *The Cost of Children's Bill* (2006) III.

<sup>741</sup> National Department of Social Development Report *The Cost of Children's Bill* (2006) 68.

<sup>742</sup> *Ibid.* See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 305.

<sup>743</sup> According s 9(b) of the Social Assistance Act 13 of 2004, a person is eligible for a disability grant if he or she is, subject to a situation of physical or mental disability, unfit to obtain any employment or profession as a means to provide for his or her maintenance. Regulation 3(1)(a)(i) of GG 22 February 2005 No 27316 states that the disability must be confirmed by a valid medical report of a medical officer specifying whether the disability is permanent or temporary. In the case the disability is temporary disability, the medical report issued by a medical practitioner stating such, must not be older than 3 months at the time the application of the grant is made.

<sup>744</sup> S 156(1)(e).



implemented.<sup>745</sup> According to the Children’s Act, an order made by the court as indicated above is subject to the condition that the court determines a placement,<sup>746</sup> which may include:

- “(i) rendering the placement of the child subject to supervision services by a designated social worker or authorised officer;
- (ii) rendering the placement of the child subject to reunification services being rendered to the child and the child’s parents, care-giver or guardian, as the case may be, by a
- (iii) designated social worker or authorised officer; or  
requiring the person in whose care the child has been placed, to co-operate with the supervising designated social worker or authorised officer or to comply with any requirements laid down by the court, failing which the court may reconsider the placement”<sup>747</sup>.

The Children’s Act provides that the court must, in its order regarding the removal of the child, consider the best way of securing stability in the child’s life.<sup>748</sup> The options that may be explored by the court in securing stability of the child in alternative placement may include; leaving the child in the care of the parent or care-giver under supervision of a social worker,<sup>749</sup> placing the child in an alternative care for a limited period to enable the possibility of reunification of the child with the parent,<sup>750</sup> placing the child in alternative care with or

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<sup>745</sup> S 156(2) of the Children’s Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 181.

<sup>746</sup> S 156(3).

<sup>747</sup> *Ibid.*

<sup>748</sup> S 157(1)(b). See the discussion in sections 6 4 1 and 8 3 1.

<sup>749</sup> S 157(1)(b)(i). See the discussion in section 8 3 1.

<sup>750</sup> S 157(1)(b)(ii). See the discussion in sections 7 3 1 and 8 3 1.

without terminating parental responsibilities and rights of the parent or care-giver,<sup>751</sup> making the child available for adoption,<sup>752</sup> and issuing instructions regarding progress made with the implementation of the permanency plan.<sup>753</sup>

The provincial head of Social Development is also tasked with the responsibility of approving the person, facility, place or premises to provide temporary safe care to children.<sup>754</sup> Furthermore, the provincial Department of Social Development has the duty to terminate the monthly fees payable at the alternative care in that province for the child upon transfer of that child to a child and youth care centre or to a person in another province. New fees will be charged in terms of the rates of the new place of transfer until the child is transferred, removed or discharged from the child and youth care centre, or from the care of a person in such province.<sup>755</sup>

The provincial head of Social Development who places a child in a child youth care centre, must provide a residential care programme which the court has determined for the child with due consideration of the development, therapeutic, and educational needs of the child, the distance of the centre from the child's family or community, the safety of the community and other children in the centre; and in the case of a child in need of secure care, a permanency plan for the child and any instructions issued by the court with regard to the implementation

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<sup>751</sup> S 157(1)(b)(iii). See the discussion in section 8 3 1.

<sup>752</sup> S 157(1)(b)(iv). See the discussion in section 8 3 1.

<sup>753</sup> S 157(1)(b)(v). See the discussion in section 8 3 1.

<sup>754</sup> Reg 63(1) to the Children's Act.

<sup>755</sup> Reg 65 to the Children's Act.

of the permanency plan.<sup>756</sup> Upon placement of the child in alternative care, the provincial head of Social Development is, in terms of the Children's Act, obliged to select a centre offering the development programme ordered by the court which is located as close as possible to the child's family or community.<sup>757</sup>

When placing the child in temporary care the court may obtain a report by a designated social worker regarding the condition of the child's life in terms of his or her developmental and therapeutic needs, family preservation services that have been considered or attempted and a documented permanency plan consistent with the age and development of the child for the purposes of achieving stability in the child's life.<sup>758</sup>

The Children's Act requires that a procedure be followed before the child is transferred from alternative care; such procedure being to assess the best interests of the child before the issuing of the notice of provisional transfer of the child from alternative care.<sup>759</sup> The assessment must be conducted by a designated social worker in consultation with the parent, guardian or care-giver of the child or the person in whose custody that child had been prior to placement in alternative care, on condition that their responsibilities and rights have not been terminated.<sup>760</sup> The designated social worker must also assess the foster parent, the head of the child and youth care centre or the head of the facility, place or premises where

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<sup>756</sup> S 158(3).

<sup>757</sup> S 158(4) of the Children's Act.

<sup>758</sup> S 157(1)(a) of the Children's Act. See the discussion in sections 6 4 1 and 8 3 1.

<sup>759</sup> Reg 66(1) to the Children's Act.

<sup>760</sup> Reg 66(1)(a)(i).

the child is placed<sup>761</sup> and the child himself or herself.<sup>762</sup>

The positive duty that is imposed on the state is to ensure that care placement procedure is available at the expense of the state. This must be done by way of providing a process and care placement that is as similar to family life as possible for a child in need of care and protection. Such care must be a protected and habitable environment for the development and well-being of the child. Thus, the state must provide training, professional development, and ongoing financial and moral support for services provided by temporary safe care, foster parents and child and youth care centres.<sup>763</sup> Also, children in care placements must receive proper education and professional services for their treatment and rehabilitation. Unfortunately, these commitments can only be realised with availability of resources.

Care placement may also be used by children for protection services. The placement can be shared by both NGOs and the public sector.<sup>764</sup> NGOs have recently been experiencing issues of funding because of the down turn of the economy.<sup>765</sup> Also, when donor institutions provide funding, they should not only dictate where funding should go but also be interested in the number of areas in which service providers have intervened, rather than quality of

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<sup>761</sup> Reg 66(1)(a)(ii).

<sup>762</sup> Reg 66(1)(a)(iii).

<sup>763</sup> I discuss the concern as to what “appropriate alternative care” should mean for a child who is removed from family life in ch 6 of the study.

<sup>764</sup> Medical Research Council Report *South Africa Failing its Children* (2012): accessed from [www.ngopulse.org/Group/Civilsociety](http://www.ngopulse.org/Group/Civilsociety) on 2012-09-06.

<sup>765</sup> *Ibid.*

services.<sup>766</sup> This means that NGOs are left to the mercy of donors. This makes many NGOs focus on their survival rather than services. Thus I find the NGO sector under-resourced and under-supported to deal with a wide range of needs relating to child protection. I therefore propose that a provision be enacted in the Children's Act for situations where government may contact NGOs to implement services. I further propose that funding must be clearly allocated for the work done by NGOs.<sup>767</sup>

#### *4.4.1 Positive duty on the state to protect a child in need of care through placement procedures in terms of international law*

In this section I discuss the duty that is imposed on state parties to provide placement procedures, and what it entails in the context of international standards. I also propose that a provision be enacted in the Children's Act as a guide for how the implementers of the Children's Act may respond to the different grounds for alternative care interventions before considering removing the child from family life.

There is no provision that specifically provides for placement procedures for children who are removed from family life in the CRC. Instead, the CRC leaves such responsibility to state parties to ensure that procedural measures are put in place. The CRC simply obliges state parties to ensure that a child is not separated from his or her parents against their will, except in situations where competent authorities determine, subject to judicial review, in terms of

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<sup>766</sup> *Ibid.*

<sup>767</sup> See the discussion in section 6.5.

applicable laws and procedures, that the separation between the child and his or her parents shall be in the best interests of the child.<sup>768</sup> The CRC expressly provides that state parties that are interested in the issue pertaining to the separation of the child and parents shall be given an opportunity to express their views in these proceedings.<sup>769</sup>

A provision for adoption placement in the CRC states that, for the purposes of permanent placement, state parties that permit a system of adoption shall make certain that the best interests of the child shall be the paramount consideration and ensure that the child in inter-country adoption enjoys the safeguards and standards similar to the standards available in national adoption.<sup>770</sup> The CRC further provides that where a child is placed in another country, the placement must be carried out by competent authorities, who should sign multilateral and bilateral agreements.<sup>771</sup> The CRC gives all persons, including children, an opportunity to express their views regarding the separation between the child and parents.<sup>772</sup> This part of the CRC is consistent with the right of the child to express his or her views in matters that affect him or her.<sup>773</sup>

With regard to the duty of state parties to provide financial assistance to children in need of care, the CRC emphasises that:

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<sup>768</sup> Art 9(1).

<sup>769</sup> Art 9(2).

<sup>770</sup> Art 21(c).

<sup>771</sup> Art 21(e).

<sup>772</sup> Art 9(2).

<sup>773</sup> Art 12(1) and (2) of the CRC. See also the discussion in section 5.5.1.

“(2) The parents(s) 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 ... (4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the agreements of the conclusion of such agreement, as well as the making of other appropriate arrangements.”<sup>774</sup>

The Committee acknowledges that states seem to shift their duties and responsibilities onto parents and the persons effectively or legally responsible for a child’s upbringing.<sup>775</sup> According to Hodgkin and Newell,<sup>776</sup> Article 27(4) is precisely about what is expected from parents by way of legally defining parental responsibilities in relation to meeting the child’s material, emotional, developmental and intellectual needs. Furthermore, Article 27(4) requires that when parents are not able to provide an adequate standard of living for their children, the state should step in. Article 27 puts clear conditions with regards to the responsibility of states “in accordance with national conditions and within their means”.

According to Hodgkin and Newell, the latter phrase reflects some nervousness about financial commitments and control over government expenditure. Detrick<sup>777</sup> found that it is doubtful whether these qualifications dilute the overarching obligation to meet the economic

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<sup>774</sup> Art 27(2) and (4).

<sup>775</sup> Hodgkin & Newell (2007) 395: the concern was raised particularly with regard to the Democratic Republic of the Congo.

<sup>776</sup> (2007) 395.

<sup>777</sup> 374 and 375.

rights of the child “to the maximum extent of ... available resources”. There has not been any argument regarding the application of Article 4 to the rights expressed in Article 27.<sup>778</sup>

The question as to whether the state has the duty to provide children in need of care with placement procedures and financial assistance is not answered with certainty in terms of the European jurisprudence. Bainham and Cretney<sup>779</sup> are of the view that what is required from parents and the state is neither absolute nor maximum care but normal provision. Choudhry and Herring<sup>780</sup> argue in terms of the case of *Re B (Children)*<sup>781</sup> in relation to the Children’s Act,<sup>782</sup> that the law’s approach to child protection is based on an explicit assumption that children are best looked after within the family, with their parents playing a full role in their lives and with the least recourse to legal proceedings. Hale<sup>783</sup> notes that:

“Taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority which does so. In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments including the European Convention on Human Rights (Art 8), the International Covenant on Civil and Political Rights (Art 23) and throughout the United Nations Convention

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<sup>778</sup> Hodgkin & Newell (2007) 395.

<sup>779</sup> *Children – The Modern Law* (1993) 95.

<sup>780</sup> (2010) 287; Department for Children, Schools and Families, *The Children Act 1989 Guidance and Regulations* (2008) par 1 8.

<sup>781</sup> (2008) UKHL 35 par 20.

<sup>782</sup> 1989 of England.

<sup>783</sup> Choudhry & Herring (2010) 287.



on the Rights of the Child. As Justice McReynolds famously said in *Pierce v Society Sisters* 268 US 510 (1925) at 535, ‘The child is not the mere creature of the State’.”

I submit that in terms of the European jurisprudence, the issue of placement procedures for children in need of care is not widely entertained. The view shared by Choudhry and Herring above simply depicts the strictest approach adopted by the European law of keeping children in families. I applaud the above position but submit further that it is still of the utmost significance to develop jurisprudence to address extenuating circumstances, which may make it difficult for a child in need of care and protection to remain in the family environment. Thus, I propose that a provision be enacted in the Children’s Act which must stipulate how the state must address the different grounds for mandatory alternative care interventions without removing children from their families.<sup>784</sup>

Like the CRC, the ACRWC does not specifically have a provision addressing issues regarding placement procedures for children in need of care. The Charter simply provides that no child shall be separated from his or her parents except as a result of judicial authority.<sup>785</sup> The ACRWC provides that if separation occurs as a result of an action of the state, it should be carried out in accordance with appropriate law and that the separation must be in the best interests of the child.<sup>786</sup>

#### 4.4.2 *Positive duty on the state to protect a child in need of care through placement*

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<sup>784</sup> See the proposed provision in section 4 5.

<sup>785</sup> Art 19(1).

<sup>786</sup> *Ibid.*

*procedures in terms of foreign jurisdictions*

This section will enable South Africa to learn from other jurisdictions as to what mechanisms must be put in place to facilitate for placement procedures. I discuss two jurisdictions, namely, Kenya and Ireland. I chose Ireland in particular, in wanting to take advantage of its baseline research which identifies the obstacles faced by children with regard to the realisation of rights including, care systems.<sup>787</sup> With regards to the gaps that exist in our law, I propose that a provision be enacted in the Children’s Act for strict regulations for the monitoring of foster care and residential care facilities.<sup>788</sup> The Irish experience of residential care is similar to South Africa.<sup>789</sup> The Child Care Amendment Act (Ireland)<sup>790</sup> provides that the Health Service Executive shall provide “special care”<sup>791</sup> to a child in respect of whom a special care order is made.<sup>792</sup> Special care is care which addresses the behaviour and the risk of harm that is posed to the child’s life, health, safety, development and welfare.<sup>793</sup> This type of care addresses the requirements of the child which may include medical, psychiatric

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<sup>787</sup> Kilkelly *Obstacles to the Realisation of Children’s Rights in Ireland* (2007) Ombudsman for Children Report 16-17.

<sup>788</sup> See the proposed provision in section 6 5.

<sup>789</sup> See the discussion in sections 6 2 1 and 6 3 1.

<sup>790</sup> 19 of 2011.

<sup>791</sup> Is a secure environment for a child who require protection because of a real and substantial risk to their health, safety, development or welfare, which the child is unlikely to receive unless the High Court make an order in respect of him under Part IVA of the Child Care Amendment Act.

<sup>792</sup> S 23B(1).

<sup>793</sup> S 23C(a)(i).

assessment, examination, treatment<sup>794</sup> and educational supervision.<sup>795</sup> An individual education plan is developed for the child, consistent with the school where the child is enrolled.

The Health Service Executive applies for a special care order for a child if he or she is satisfied that the child has attained 11 years of age and has made a determination that the child needs special care.<sup>796</sup> A consultation shall be arranged with the child,<sup>797</sup> the parent who has custody of the child,<sup>798</sup> a guardian,<sup>799</sup> relative of the child<sup>800</sup> or any person that the Health Service Executive thinks has knowledge of the child and his or her family and whereabouts.<sup>801</sup> The Health Service Executive conducts a family welfare conference which is to determine whether the child requires special care.<sup>802</sup> Where there is cause to believe that the child requires care, the Health Service Executive applies to the High Court for a special care order.<sup>803</sup> The High Court grants the order if it is satisfied that the child requires the special care order to adequately address the behaviour and risk of harm that is faced by the child.

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<sup>794</sup> S 23(C)(a)(ii).

<sup>795</sup> S 23(C)(b).

<sup>796</sup> S 23(F)(1).

<sup>797</sup> S 23(F)(3)(a)(i).

<sup>798</sup> S 23(F)(3)(a)(ii).

<sup>799</sup> S 23(F)(3)(a)(iii).

<sup>800</sup> S 23(F)(3)(b)(i).

<sup>801</sup> S 23(F)(3)(b)(ii).

<sup>802</sup> S 23(F)(7).

<sup>803</sup> S 23(F)(8).

Research revealed that amongst other challenges in care systems in Ireland. The social workers who are tasked with the duty to establish and implement care plans, do not provide proper planning.<sup>804</sup> Care plans would be poorly drafted and children would receive limited access to social workers and psychiatric support.<sup>805</sup> There is also failure to screen staff. This means that residential care in Ireland entail staff that are unqualified. Foster parents find it difficult to get immediate psychiatric support and counselling for children in their care.<sup>806</sup>

Kilkelly<sup>807</sup> argues that, because children in alternative care face multiple challenges, greater effort is required to prevent children from being placed in care. What South Africa must learn from Ireland is that placement must be minimised and must be used as a measure of last resort. Furthermore, South Africa should learn from Kilkelly's<sup>808</sup> argument that there is a need for strict regulations and monitoring of foster care and residential care facilities.<sup>809</sup>

The Children's Act (Kenya) provides that a child who is in need of care and protection must take refuge in a place of safety.<sup>810</sup> Such child can be accommodated in a place of safety until

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<sup>804</sup> Irish Social Services Inspectorate Annual Report 2004/2005. See also Kilkelly *Obstacles to the Realisation of Children's Rights in Ireland* (2007) Ombudsman for Children Report 14.

<sup>805</sup> *Irish Social Services Inspectorate Annual Report 2004/2005*.

<sup>806</sup> Kilkelly *Obstacles to the Realisation of Children's Rights in Ireland* (2007) Ombudsman for Children Report 14.

<sup>807</sup> Kilkelly *Obstacles to the Realisation of Children's Rights in Ireland* (2007) Ombudsman for Children Report 16-17.

<sup>808</sup> *Ibid.*

<sup>809</sup> See the discussion in sections 6 2, 6 3, 6 4 and 6 5.

<sup>810</sup> S 120(2) of the Kenyan Children's Act.

he or she is brought before the court.<sup>811</sup> A child who is believed to be in need of care and protection can be apprehended without a warrant and be brought immediately before the children's court.<sup>812</sup> An application can be made to a court for an order to place a child in need of care and protection in a place of safety.<sup>813</sup> An interim order can be made for the temporary accommodation of the child in a place of safety.<sup>814</sup>

The person who brings a child who is accommodated in a place of safety before the court, is required to send the particulars of the child to the child's parent or guardian or any person with parental responsibility over the child, requiring the person to appear at the court before which the child will appear.<sup>815</sup> Same person is required to notify the director or his representative of the nature of the grounds on which the child is to appear before the court, the child's name, address, the day and hour.<sup>816</sup>

In other instances, the child who is in need of care and protection may be placed in care with an appointed local authority or a charitable children's institution. Such child may be brought before the court within three months.<sup>817</sup> However, the local authority or the charitable children's institution must notify the director within seven days of receiving the child.<sup>818</sup> The

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<sup>811</sup> S 120(3) of the Kenyan Children's Act.

<sup>812</sup> S 120(4) of the Kenyan Children's Act.

<sup>813</sup> S 125 of the Children's Act.

<sup>814</sup> S 120(5) of the Kenyan Children's Act.

<sup>815</sup> S 120(9) of the Kenyan Children's Act.

<sup>816</sup> S 120(11) of the Kenyan Children's Act.

<sup>817</sup> S 120(12)(b) of the Kenyan Children's Act.

<sup>818</sup> S 120(12)(a) of the Kenyan Children's Act.

local authority or the charitable children's institution is entitled to receive the cost of maintenance of such child from the child's parent, guardian or any person who has parental responsibility of the child.<sup>819</sup> If the child needs treatment or medical care, the authorised officer must take the child to a registered health institution.<sup>820</sup> The medical practitioner at the health institution has the responsibility to record and preserve any information with regard to the condition of the child.<sup>821</sup> Any expenses incurred in connection with medical treatment shall be paid out of public funds.<sup>822</sup>

The court that adjudicates over the matter concerning a child in need of care and protection may, for the purposes of placement order that<sup>823</sup> the child be placed in a rehabilitation school suitable for the needs and attainments of the child;<sup>824</sup> the director provide care to a child who is a victim of armed conflict, civil disturbance or natural disaster,<sup>825</sup> a child who is disabled;<sup>826</sup> a child who is subject to early marriage; or<sup>827</sup> a child who is involved in drug abuse.<sup>828</sup> The Act provides that a child who is hosted in a state institution must receive holistic care and

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<sup>819</sup> S 120(13) of the Kenyan Children's Act.

<sup>820</sup> S 121(1) of the Kenyan Children's Act.

<sup>821</sup> S 121(3) of the Kenyan Children's Act.

<sup>822</sup> S 121(4) of the Kenyan Children's Act.

<sup>823</sup> S 125(2) of the Kenyan Children's Act.

<sup>824</sup> S 125(c) of the Kenyan Children's Act.

<sup>825</sup> S 125(e) of the Kenyan Children's Act.

<sup>826</sup> S 125(f) of the Kenyan Children's Act.

<sup>827</sup> S 125(g) of the Kenyan Children's Act.

<sup>828</sup> S 125(h) of the Kenyan Children's Act.

education,<sup>829</sup> including private study,<sup>830</sup> be provided with food at appropriate intervals,<sup>831</sup> have fresh and clean drinking water,<sup>832</sup> and be appropriately clothed.<sup>833</sup> The administering authority is encouraged to develop leisure activities,<sup>834</sup> ensure that the child observes any requirement of the religious persuasion to which the child belongs,<sup>835</sup> and protect the health of the child by ensuring that child has access to medical, dental, nursing, psychological and psychiatric advice, treatment and other services.<sup>836</sup>

According to the Kenyan Children's Act,<sup>837</sup> the role of the local authority shall be to safeguard and promote the rights and welfare of children. The local authority must establish family-oriented programmes and support initiatives from different social clubs.<sup>838</sup> A director is appointed in terms of the Act to make welfare schemes available to children.<sup>839</sup> Institutions for care placements must respect the privacy, dignity gender, religious beliefs, and racial origin, tribal, cultural and other special needs of children in care, including disability.<sup>840</sup> Facilities and resources must be provided consistent with age, gender and other special

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829 S 7(1)(b).  
830 S 12(1)(b).  
831 S 9(1)(a)(i).  
832 S 9(1)(b).  
833 S 10(1).  
834 S 12(2)(a).  
835 S 13.  
836 S 14(2)(a).  
837 S 40(a).  
838 S 40(b).  
839 S 41.  
840 S 7(2)(b).

needs of the child.<sup>841</sup>

Amongst others, the Children’s Act (Kenya) explicitly imposes the responsibility on the state to provide financial assistance for state institutions.<sup>842</sup> The assistance is for the expenses of maintenance, education, training of children in the care<sup>843</sup> and for the running of voluntary children’s institutions.<sup>844</sup> I am not certain whether the great investment that is made by Kenya in state institutions is for purposes of encouraging placement of children in state care.<sup>845</sup> Does it also mean that Kenya would remove children from family life to care without making any attempt to keep children with their parents? This is certainly confusing in that there is no provision in the Children’s Act (Kenya) for the support for family life and preservation of families. Also, Kenya regards the removal of children from family life as a decision of last resort.

## 4.5 Recommendations and conclusion

The discussion in this chapter revealed the improvements made in the Children’s Act of incorporating a provision for “prevention or early intervention services”. The provision prioritises keeping children in the family rather than removing them into alternative care. The Act also grants increased jurisdiction to the children’s court to adjudicate, amongst others,

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<sup>841</sup> S 10(2).

<sup>842</sup> S 7(1)(a).

<sup>843</sup> Second Schedule Part II par 6.

<sup>844</sup> Second Schedule Part VI par 3-4.

<sup>845</sup> See the discussion in section 4 4 2.



matters that concern the provision of “prevention and early intervention services” for children.<sup>846</sup> The discussion is clear in the fact that the state has the responsibility to ensure that there is legal, social and economic provision in the family environment for the growth, development and well-being of children for their enjoyment of family life.<sup>847</sup> The duty to provide children with the necessary services is placed on the state with the aim of serving as a safety net in cases of “extreme deprivation”.<sup>848</sup> However, the duty to provide for the child is primarily placed on parents as a common law duty of support,<sup>849</sup> by virtue of the fact that as parents, they have responsibilities and rights in terms of the Children’s Act.<sup>850</sup> However, there is no provision in the Children’s Act that clearly stipulates where the primary responsibilities of parents in providing care ends and where the role of the state to assist parents in their responsibilities begins.<sup>851</sup> The Children’s Act<sup>852</sup> simply imposes an obligation on the state (in a separate provision) to allocate resources to children to the maximum extent of their availability.

I recommend that South Africa must refer to the critical arguments raised in *Grootboom*<sup>853</sup>

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<sup>846</sup> S 45(1)(e); Skelton in Boezaart (ed.) *Child Law in South Africa* 81.

<sup>847</sup> *Grootboom* 1170I-J.

<sup>848</sup> Sloth-Nielsen (2001) *SAJHR* 220.

<sup>849</sup> *Ibid.*

<sup>850</sup> S 18.

<sup>851</sup> S 18; *Grootboom* par 77. See also the discussion in section 2 4 2.

<sup>852</sup> S 4(2); Art 4 of the CRC. See the discussion in sections 4 1 2 and 4 2 2.

<sup>853</sup> See the discussion in sections 2 4 2, 4 2 and 4 2 1.

judgment and opinions by some authors<sup>854</sup> to establish a provision for the assistance that must be provided by the state to enable parents to fulfil their responsibilities. I further propose that an opening provision be incorporated in the Children's Act under section 144 to read as follows:

“1 Section 144 shall be guided by the following principle:

- (a) The primary role in caring for and protecting the child lies with the parents and the family. The state shall take all measures to assist parents and the family in –
  - (i) promoting and supporting their responsibilities and rights;
  - (ii) preserving and strengthening the family;
  - (iii) providing assistance and protection to parents and the family;
  - (iv) providing resources and capacity for the implementation of prevention and early intervention programmes; and
  - (v) ensuring that intervention into family life is the minimum necessary to ensure the child's safety and protection from maltreatment, neglect, abuse or degradation.”<sup>855</sup>

The international instruments brought to light the fact that the responsibility of the state to provide the child with socio-economic needs as entrenched in sections 26, 27 and 28(1)(c) of the Constitution and section 4 of the Children's Act must comply with Article 4 of the CRC. The Committee on the Rights of the Child has also been sensitive to the impact the world

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<sup>854</sup> Amongst others, Van der Linde in Verschraegen (ed.) *International Family Law: Family Finances* 103; Sloth-Nielsen (2001) *SAJHR* 217; Cronjé and Heaton *The South African Family Law* (2010) 273. See the discussion in sections 2 4 2, 4 2 1 and 4 2 2.

<sup>855</sup> Part 2, s 13(b)(i),(ii) of the Children, Young Persons and their Families Act (New Zealand).

recession, economic adjustments and cutbacks may have on children.<sup>856</sup> Despite the negative effects of the market economy, the Committee emphasised in terms of Article 4 of the CRC that:

“Budgetary allocations for the implementation of economic, social and cultural rights should be ensured during the period of transition to the market economy to the maximum extent of available resources and in the light of the best interests of the child.”<sup>857</sup>

According to Hodgkin and Newell,<sup>858</sup> states are required to increase their budgetary allocations for the implementation of the rights recognised in the CRC. South Africa must ensure that there is a more balanced distribution of resources that would ensure that the economic, social and cultural rights of all children, including those in financially disadvantaged families are met.

What South Africa can learn from the ECHR is that it has not defined what “interests of a material kind” mean for families.<sup>859</sup> The ECtHR has not ruled out the fact that social demands in the form of cash may be of relevance in the interpretation of Article 8. This

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<sup>856</sup> (2007) 63.

<sup>857</sup> *Ibid.*

<sup>858</sup> (2007) 67: The recommendation was specifically for Columbia but applies equally to South Africa, given the fact that the state has not prioritised the rights of children by way of channelling more money to the budget that covers children and their families.

<sup>859</sup> See the discussion of amongst others, *Marckx v Belgium*; *R v Barnet London Borough Council*; *R v Lambeth London Borough Council*; *R v Lambeth London Borough Council*; *Treharne v Secretary of State for Work and Pensions*, in sections 4 2 2, 4 3 2 and 4 4 2.

development in the area of providing social assistance to families in European jurisprudence became evident in *Petrovic v Austria*,<sup>860</sup> where a father alleged that the refusal by government to grant him a parental leave allowance made him a victim of discrimination on the grounds of sex in breach of Article 8 and 14 of the ECHR. The court argued that the state, by granting a parental leave allowance demonstrates its respect for family life, falling within the scope of Article 8. The allowance is viewed as intending to promote family life as it enables one parent to remain at home and look after the children.

The Children's Act lacks an express provision on the collaborative work between NGOs and intersectoral government departments in implementing prevention and early intervention programmes. South Africa must learn from the Children's Protection Act (South Australia) and provide for the duty of the Minister of Social Development to promote partnership and collaborative work between national government, provincial government, local government and NGOs. These stakeholders are appointed to assist children and their families, where there are no parents,<sup>861</sup> in assisting children directly by providing material assistance and support programmes to children and families to read as follows:

- (a) The Department of Social Development, non-governmental organisations and intersectoral government departments must assist parents in their role, where there are no parents, it must assist children directly by performing the following functions
  - 
  - (i) respect parents' responsibilities and rights to provide direction to the child;
  - (ii) provide assistance to parents in the exercise of their child-rearing

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<sup>860</sup> 27 March 1998 (Appl No 20458/92) par 27.

<sup>861</sup> See the discussion in section 3 3 11, in the case of a child in a child-headed household.

- responsibilities,<sup>862</sup>
- (iii) provide assistance to child-headed households to ensure that there are quality livelihoods for the development and well-being of children in these families;
  - (ii) provide, or assist in the provision of early intervention, preventative and support services directed towards strengthening and supporting families, reducing the incidence of child abuse and neglect and maximising the well-being of children;<sup>863</sup>
  - (iii) in the case of need, to provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;<sup>864</sup>
  - (vi) development of institutions, facilities and services for the care of children;<sup>865</sup>
  - (vii) provide, or assist in the provision of services for dealing with the problem of child abuse and neglect to promote the well-being, care and protection of the child;<sup>866</sup>
  - (viii) support parents by developing coordinated strategies for dealing with in preventing and reducing abuse and neglect of children; and<sup>867</sup>
  - (ix) provide, or assist in the provision of care placement procedure when it is not possible to keep children in families.
- (b) In carrying out its duty, the Department of Social Development must ensure:
- (i) coordination between the work of non-governmental organisations (as they are attuned to social shifts and the needs of children in need of care and protection) and intersectoral government departments;

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<sup>862</sup> Art 18(2) of the CRC.

<sup>863</sup> S 8 of Children's Protection Act (South Australia).

<sup>864</sup> Art 20(2)(a) of the ACRWC.

<sup>865</sup> Art 18(2) of the CRC.

<sup>866</sup> S 8(c) Children's Protection Act (South Australia).

<sup>867</sup> S 8(b) Children's Protection Act (South Australia).

- (ii) that it collaborates with non-governmental organisations and private entities that have competitive advantage in providing specific goods, to provide prevention and early intervention services; and
- (iii) non-governmental organisations and any persons providing services under this Act have received adequate training that complies with appropriate standards.”<sup>868</sup>

This chapter made attempts to respond to the sub-question: What laws protect, strengthen and preserve the right of the child to grow in a family.<sup>869</sup> The discussion revealed that prevention and early intervention programmes are, amongst others, the most possible way to addressing the grounds for mandatory alternative care interventions. Thus, the programmes are most significant in keeping children in families, promoting interpersonal relationships within the family and providing psychological, rehabilitation and therapeutic services to children in families.

However, these programmes, as discussed, may not meet the needs of children in families if the root cause of the problems are not addressed. For instance, if a child has committed an offence where he or she stole clothes, food, or stationery, it is important to find out what has motivated a child to steal. If the child committed an offence because of the situation of poverty in his or her family, it will be more appropriate to provide financial assistance to the family as a priority. Furthermore, therapeutic and life skills services must be provided in order to prevent the recurrence of the problem.

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<sup>868</sup> S 7(2)(d) and (f) of the Children, Young Persons and their Families Act (New Zealand).

<sup>869</sup> See the discussion in section 1 2 2.

South Africa has implemented the child-support grant which is currently viewed as a huge success.<sup>870</sup> However, there is dissatisfaction with the roll-out of the grant, particularly, the alarming rate of teenagers falling pregnant.<sup>871</sup> The most common challenges that are encountered by parents in accessing the child-support grant are that they fail the means test used as the criteria to qualify parents for the grant.<sup>872</sup>

It must be noted that when the means test is applied, it does not take into account the level of poverty in the household. For instance, the fact that there are a number of children in the household who may be dependent on a single grant is not considered in the application of the means test. I reiterate my recommendation that the child-support grant must be provided in accordance with the age of the child,<sup>873</sup> the amount must be adequate to meet the needs of the child, and it must be in line with inflation.

Another challenge with accessing the child-support grant is that some beneficiaries cannot receive the grant because they lack the correct documentation. In other instances, identity documents, birth certificates or clinic cards are not accurate. There is an inability to deal with existing documentation or there is no documentation at all.<sup>874</sup> Twelve percent of primary

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<sup>870</sup> See the discussion in sections 1 1 2 and 3 3 1 2.

<sup>871</sup> *Ibid.*

<sup>872</sup> *Ibid.*

<sup>873</sup> See the discussion in sections 3 3 1 2 2 and 3 4.

<sup>874</sup> Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 58: a mother of an 11 year-old son who resides in Orange Farm, Gauteng Province could not access the grant. She said that she could not receive the grant for her child because she did not have an identity document and that the child does not have a birth certificate because she

care-givers of children who do not receive the grant have previously tried to apply for the grant. Other reasons why care-givers could not receive the grant are that they are receiving the grant on behalf of their siblings; for example, in a child-headed a household. There are further complaints regarding travel times and locations where the grant is accessed.<sup>875</sup> Other challenges which are anticipated if the grant has to be paid into bank accounts are that bank charges will take too much out of what is an already small grant.<sup>876</sup>

I am of the view that the currently low child-support grant may only be successful in meeting the needs of the child if it is complemented by an additional provision of food parcels.<sup>877</sup> The cash may be used for transport and other cash transactions, which are not related to food.

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cannot apply for the birth certificate for the child without an identity document. Another example of a care-giver who could not receive the grant for children is of a care-giver who has taken in children belonging to relatives. The care-giver could not access the birth certificates for the children; she was still awaiting the death certificate of the parent who looked after the children. The care-giver could also not access a letter from the funeral undertaker to prove that the parent had died. One non-governmental organisation commented that the requirement of a death certificate is a problem in rural areas where most people are buried traditionally and the death is not registered. One care-giver said that she has seven children and can only receive the grant for four children; the last born child cannot receive the grant because his identity document had the name of the care-giver erroneously written on it. She has been given different advice such as, to get an affidavit from the police station, to reapply for a new birth certificate for the child which is all a problem for her as it means she now has to start a process of finding money to travel to the Department of Home Affairs in town to rectify the error made.

<sup>875</sup> Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 56.

<sup>876</sup> *Ibid.*

<sup>877</sup> See the discussion in section 3 3 1 2.



Alternatively, also as alluded to earlier,<sup>878</sup> the child-support grant must be raised to meet the costs of what is needed to maintain a child per month. Furthermore, there is a need to improve on how and where the child-support grant is accessible. Multipurpose mobile stations may be provided in rural communities and other communities that are too far to reach for the disbursement of the grant.<sup>879</sup> The mobile stations may also be used as a registration services for identity documentation.

The Committee on the Rights of the Child<sup>880</sup> is concerned about insufficient support to disadvantaged families and that, as a result, children are unnecessarily separated from their parents.<sup>881</sup> The Committee recommends that the states should provide adequate support to disadvantaged families, including counselling and education services and ensure that separation of children from their parents only occurs where necessary.<sup>882</sup>

I submit that adequate financial assistance or “special temporary maintenance” must be provided to disadvantaged families.<sup>883</sup> Since the aspect of financial support to families is currently not included in the costing in the Children’s Act, it is important for the state to

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<sup>878</sup> *Ibid.*

<sup>879</sup> Kibel *et al.* *South African Child Gauge 2009/2010* (2010) 84.

<sup>880</sup> Hodgkin & Newell (2007) 123. See the discussion in section 4 2 2.

<sup>881</sup> Hodgkin & Newell (2007) 67: the recommendation was specifically for Columbia but applies equally to South Africa given the fact that the state has not prioritised the rights of children by way of channelling more money into the budget that covers children and their families.

<sup>882</sup> Hodgkin & Newell (2007) 123.

<sup>883</sup> See the discussion in sections 3 3 1 2 and 4 3 1 2.

consider it in order to improve the livelihoods of destitute families. I reiterate<sup>884</sup> that adequate financial assistance must be provided to a destitute family to cover their needs and the costs of maintaining the whole family, including parents and other members every month until such time as the family is self-sustaining. There will be no need for the same family to receive a child-support grant for its children; that will be double subsidisation. This intervention would mean that the cost for curative services, such as residential care will be reduced, because the number of children who will need such services will be smaller. This will save state resources and the removal of children from family life will be a matter of last resort.<sup>885</sup>

Access to public health facilities is relatively high.<sup>886</sup> However, there are concerns that caregivers in rural communities, who live far from clinics, have to travel on foot to access health care.<sup>887</sup> There are also complaints regarding long hours spent in queues without food, and that recipients of services are told to return the following day due to the shortage of medicines.<sup>888</sup> The challenges which were previously experienced in implementing an “early childhood development” programme regarding the unavailability of guidelines for the conditions of service for practitioners and lack of human personnel to carry out early childhood services have been addressed as revealed by the Mid Term Review meeting of the Department of Social Development. However, it is important for the department to use

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<sup>884</sup> See the discussion section 3.3.1.2 and 3.4.

<sup>885</sup> Bosman-Sadie & Corrie (2010) 156.

<sup>886</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 41.

<sup>887</sup> *Ibid.*

<sup>888</sup> *Ibid.*

the full cost scenario<sup>889</sup> method of early childhood development when it rolls out the programme. This will ensure the registration of more programmes and the employment of professional staff that is highly skilled in dealing with children at that level.

Poverty alleviation programmes such as providing food parcels<sup>890</sup> strengthen the family and ensure that children have access to food, housing, water, electricity, sanitation and municipal assistance for families that are registered as indigent.<sup>891</sup> There is a need to make services available to all children to enable them to be cared for in a family environment.<sup>892</sup> Children who grow up in a family environment are often protected from communicable diseases and are guaranteed proper social, emotional and spiritual development. The developments brought about by the Children's Act in allocating resources to "prevention and early intervention services" in order to keep children out of institutions<sup>893</sup> are bound to provide families with a quality and sustainable livelihood.

There is very little to learn from Kenya with regards to the provision of "prevention and early intervention services". The Children's Act (Kenya) failed to put mechanisms in place to ensure that as far as possible, the child remains in the family environment. Another reason why Kenya may have intentionally omitted the inclusion of a provision aimed at keeping

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<sup>889</sup> See Annexure "K".

<sup>890</sup> See the discussion in section 4 3 1 1.

<sup>891</sup> UNICEF Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 42.

<sup>892</sup> See the discussion in section 4 3 1 1.

<sup>893</sup> Matthias and Zaal in Boezaart (ed.) *Child Law in South Africa* 183.

children in families could be the issue of scarcity of resources as that could have meant that Kenya must, like South Africa, provide support grants to children in need or in poverty stricken families for the preservation and strengthening of families.

South Africa can draw lessons from the Child Protection Act (Canada)<sup>894</sup> which provides for measures that must be implemented to ensure that the state assist parents in their child rearing responsibilities in order to preserve families. Thus, regulations must be promulgated to the Children's Act to provide information as to what prevention and early intervention services in the context of section 144(2) would mean in order to ensure quality and sustainable livelihoods in families. It could read as follows:

“144(2) The state must assist parents, where there are no parents, it must assist children directly (through their care-givers)<sup>895</sup> and promote the right to family care by putting in place measures for the preservation and strengthening of families. This must be achieved by-

- (a) assisting families to obtain the basic necessities of life by –
  - (i) providing information to enable families to access basic necessities provided by government;
  - (ii) providing child-support grant in accordance with the age of the child and “special temporary maintenance” to destitute families; and<sup>896</sup>
  - (iii) collaborating with NGOs and private entities for support and promotion of quality and sustainable livelihoods of children in families.
- (b) empowering families to obtain such necessities for themselves by-

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<sup>894</sup> Par 2 of the Preamble.

<sup>895</sup> See the discussion in section 3 3 11, in the case of a child in a child-headed household.

<sup>896</sup> See the discussions in sections 3 3 1 2 and 3 4.

- (i) providing support to parents in their child-rearing responsibilities, particularly where they lack the capacity to care for their families;
  - (ii) diversifying livelihoods options through skills training;<sup>897</sup>
  - (iii) provide training on income generating activities such as, agricultural production, to increase food security and incomes for destitute families;
  - (iv) use incomes to keep children in school and out of child labour;
  - (v) increasing micro-financing access for destitute families for income generating activities; and
  - (vi) promoting self-employment.
- (c) providing families with information to enable them to access services by way of –
- (i) conducting awareness campaigns;
  - (ii) making information available at government service points;
  - (iii) spreading information through newspaper, television, radio and other forms of mass media; and
  - (iv) NGOs, churches and religious groups.
- (d) supporting and assisting families with a chronically ill or terminally ill family member by providing –
- (i) home-based care and support for the chronically ill or terminally ill family member;
  - (ii) regular visitations and care for the patients at their homes;
  - (iii) counselling to family members in coping with or caring for their members;
  - (iv) referral system for advisory and rehabilitative services, including medical, psychosocial services, peer support groups, religious groups, community care workers and rehabilitation workers;
  - (v) supply of food parcels for those in dire need; and
  - (vi) assistance with the establishment of palliative care support groups within communities.

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<sup>897</sup> Inferred from Child Labour Report *Improved Family Livelihoods to Address Child Labour in Nepal* (2009): accessed from [www.worlded.org/.../ChildLabour/bfp-improved-family-livelihoods-re](http://www.worlded.org/.../ChildLabour/bfp-improved-family-livelihoods-re) on 2012-08-29.

- (e) providing early childhood development of the child by way of –<sup>898</sup>
- (i) assessing the status of children in their area of jurisdiction and gather information to determine their needs;
  - (ii) provide for the needs of children in accordance with the different age grouping and development;
  - (iii) provide primary health care services;
  - (iv) provide mother-child and nutrition services;
  - (v) provide clean water and a hygienic environment for an integrated early childhood development response;
  - (vi) reaching parents and care-givers and working with them to ensure stability in children;
  - (vii) create child friendly spaces;
  - (viii) provide psychosocial support and play with other children;
  - (ix) provide informal learning counselling to parents and care-givers;
  - (x) sensitise care-givers and parents on good caring and rearing practices; and
- (f) promoting the health, well-being of children and the realisation of their full potential by way of –
- (i) providing parenting information covering children between 0-3 months (newborns), 3-12 months (babies), 1-3 years (toddlers), 3-5 years (pre-schoolers), 6-8 years, 8-10 years, 10-13 years (teenagers), 14-16 years and 16-18 years;
  - (ii) providing health checks for children for early detection of lifestyle risk factors, delayed development and illness, introduce guidance for healthy lifestyles and early intervention strategies;
  - (iii) raising awareness on factors that are harmful to the development and well-being of the child, including, early marriage, female genital mutilation, circumcision, virginity testing, sexual exploitation in the form of child prostitution, child trafficking and other practices;
  - (iv) providing affordable, accessible high quality health care for children;

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Refer to the UNICEF Report *Early Childhood Development in Emergencies* (2012): accessed from [www.unicef.org/earlychildhood/index\\_40745.html](http://www.unicef.org/earlychildhood/index_40745.html) on 2012-09-10.

- (v) providing free treatment for children by health practitioners such as, optometrists, dentists and physicians;
- (vi) providing free treatment and accommodation in public hospital;
- (vii) providing childhood and adolescent immunisation; and
- (viii) providing child support and family benefits.”

In situations where the grounds for mandatory alternative care can be addressed by means that do not necessitate the removal of the child from the family, the state must take appropriate measures to provide means that would enable the child to remain in the family.<sup>899</sup>

Hence, I propose that the designated social worker who investigates the grounds for mandatory alternative care interventions must opt for an intervention that is less disruptive to family life. South Africa must refer to, amongst others, the Child Family and Community Services Act (Canada) and incorporate regulations to section 144(1)(a) of the Children’s Act that could read as follows:

“1 In the event the ground for mandatory alternative care intervention is as a result of, amongst others, that the –

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<sup>899</sup> S 7(2) of the Constitution provides that the “state must respect, protect, promote and fulfil those rights”. The Preamble of the Children’s Act also provides that the “state must respect, protect, promote and fulfil those rights”. S 4(2) of the Children’s Act requires state organs to take reasonable measures to the maximum extent of their available resources to achieve the objectives of the Act. S 28(1)(c) realizes the socio-economic rights of children. See Sloth-Nielsen (2001) *SAJHR* 210, 220; SAHRC *6<sup>th</sup> Economic and Social Rights Report(2003-2004)* (2006) 113. According to the latter report, these rights include the implementation of legislation, the adoption of a national strategy, and the development of plans directed towards the full realisation of the rights. See the discussion in sections 4 3 1 1 and 4 3 1 3.

- (a) child has been abandoned or orphaned;<sup>900</sup>
- (b) child is without any visible means of support;<sup>901</sup>
- (c) child lives or works on the streets or begs for a living;<sup>902</sup>
- (d) child is addicted to dependence-producing substances;<sup>903</sup>
- (e) child is displaying behaviour which cannot be controlled by the parent or care-giver;<sup>904</sup>
- (f) child may be at risk if returned to the custody of the parent, guardian or care-giver;<sup>905</sup>
- (g) child is in a state of mental or physical neglect;<sup>906</sup>
- (h) child is being maltreated, abused, neglected or degraded by a parent, care-giver or person who has parental responsibilities and rights or a family member, including -
  - (i) sexual abuse;
  - (ii) corporal punishment; and
  - (iii) domestic violence.
- (i) child has been exploited or lives in circumstances that expose the child to exploitation;<sup>907</sup>
- (j) child has been exposed in circumstances which may seriously harm his or her physical, mental or social well-being, such as;<sup>908</sup>
  - (i) force marriage or early marriage;

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<sup>900</sup> See the discussion in section 3 3 1 1.

<sup>901</sup> See the discussion in section 3 3 1 2.

<sup>902</sup> See the discussion in section 3 3 3.

<sup>903</sup> See the discussion in section 3 3 4.

<sup>904</sup> See the discussion in section 3 3 2.

<sup>905</sup> See the discussion in section 3 3 7.

<sup>906</sup> See the discussion in section 3 3 8.

<sup>907</sup> See the discussion in section 3 3 5.

<sup>908</sup> See the discussion in section 3 3 6.



- (ii) removal of the child's body parts; and
  - (iii) sexual exploitation,<sup>909</sup> prostitution<sup>910</sup> or trafficking.<sup>911</sup>
- (k) child who is a victim of child labour;<sup>912</sup>
- (l) child in a child-headed household; and<sup>913</sup>
- (m) child who is in trouble with the law.<sup>914</sup>
- 2 When implementing a prevention and early intervention programme, a designated social worker must consider intervention that is less disruptive to family life as possible, such as:
- (a) providing financial means, including special temporary maintenance to the family of the child without visible means of support;<sup>915</sup>
  - (b) providing parenting skills that would assist the parent and the family to care for the child who is difficult to manage rather than removing the child;<sup>916</sup>
  - (c) work in partnership with teachers and non-governmental organisations to implement restorative justice programmes as part of school curriculum to curb exclusion of children from school, bullying, truancy, disciplinary issues arising from defiant and disrespectful behaviour, conflicts, and petty crimes;<sup>917</sup>
  - (d) referring the matter concerning the child to an alternative dispute resolution forum;<sup>918</sup>
  - (e) facilitate litigation and medical support for a child who suffered, amongst others, sexual exploitation; harmful cultural practices; maltreatment and abuse;
  - (f) removing the perpetrator who is abusing the child from the family environment rather than removing the child;

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<sup>909</sup> See the discussion in section 3 3 5 3.

<sup>910</sup> See the discussion in section 3 3 5 3 1.

<sup>911</sup> See the discussion in section 3 3 5 3 2.

<sup>912</sup> See the discussion in section 3 3 10.

<sup>913</sup> See the discussion in section 3 3 11.

<sup>914</sup> See the proposed provision in section 3 4.

<sup>915</sup> See the discussion in section 3 3 1 2.

<sup>916</sup> See the discussion in section 3 3 2.

<sup>917</sup> See the discussion in section 4 3 3.

<sup>918</sup> See the proposed provision in section 5 6.

- (g) provide education to learners to protect them in situations of pregnancy and prevent the abandonment of newborns;<sup>919</sup>
- (h) facilitate proceedings with the prosecutor or the Director of Public Prosecutions and indicate to the presiding officer at a preliminary inquiry or child justice court<sup>920</sup> that a matter concerning a child who is in trouble with the law be diverted from the formal criminal justice process, for a family time order where the child can be supervised at home by his or her parents; and<sup>921</sup>
- (i) providing home-based services, including treatment and rehabilitation services to a child who is addicted to dependence-producing substances.<sup>922</sup>

The fact that the Department of Social Development returned monies to the national treasury which were not spent in the 2010 and 2011 financial year is concerning. Many children live in families that are destitute and receive a grant that does not even meet their basic needs. Other children live with parents who do not even qualify to receive the grant yet need financial assistance to survive. Yet the state can afford to send money back to treasury because the money is not spent. The problem is that the state has not prioritised the needs of children and families. If it had, it would have channelled the monies where they are needed most, rather than returning it to the treasury. It is understandable that as the assistance provided by the state increases, so will the recipients of the assistance increase. Society will eventually have confidence in the assistance provided by government and such assistance must be provided in accordance with the needs of society.

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<sup>919</sup> See the proposed provisions in section 3 4.

<sup>920</sup> As provided in s 1(1) of the Child Justice Act.

<sup>921</sup> See the discussion in section 4 3 1 1.

<sup>922</sup> S 4(a) of the Child Family and Community Services Act (Canada).

UNICEF<sup>923</sup> has recommended that one way to ensure that adequate resources are dedicated to children is to establish an office with the responsibility for analysing budgets with regard to their responsiveness to children's issues. In South Africa, the Institute for Democracy in South Africa was established,<sup>924</sup> and the Children's Budget Unit was set up in 1995. The Institute provides research and training and disseminates information to make government budgets more responsive to children's rights.<sup>925</sup> The mandate of the Unit is to report on child poverty and the obligation of the state to realise child rights, focusing on budget obligations and socio-economic rights. The Budget Project of IDASA builds capacity in civil society organisations to participate effectively in budget processes in support of poverty reduction in Africa. NGOs are involved in order to ensure transparency in the processes of the work of governments. They scrutinise the budgets to establish whether or not they benefit the targeted sectors and may lobby for changes. These activities are part of the democratic transition in South Africa.<sup>926</sup> The state also has the duty to provide finance to employ the personnel to render services to the public. Amongst other departments, Social Development requires personnel, such as, social workers, child care workers and support staff.<sup>927</sup>

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<sup>923</sup> Report *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 3.

<sup>924</sup> Hereinafter referred to as "IDASA".

<sup>925</sup> UNICEF "Budget Projects - A Role for Non-Governmental Organisations" in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 16.

<sup>926</sup> UNICEF in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 17.

<sup>927</sup> National Department of Social Development Report *The Cost of Children's Bill* (2006) 69.

I concur with other writers<sup>928</sup> who argue that when Parliament passed the Children’s Bill it ought to have geared itself and the provincial legislatures up to allocate funds appropriately in order to implement the Act. The costing report revealed that social services need to be prioritised.<sup>929</sup> This clearly focused on the obligation imposed on the state to provide a wide range of social welfare services to children including home and community-based care services, foster care placements and financial assistance in the form of grants or placement in child and youth care centres.<sup>930</sup> The state is supposed to be implementing the costing model in its budget rather than using the previous method of the Child Care Act.<sup>931</sup> I further recommend that government plan and cost its activities consistent with the responsibilities imposed on it in the Children’s Act. Failure to establish proper frameworks for the implementation of “prevention and early intervention services” would certainly result in the objectives of the Children’s Act not being achieved.

I am of the view that regulations must be promulgated to the Children’s Act to enable the designated social workers to monitor the implementation of prevention and early intervention programmes, to compel performance of government officials, and to ensure

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<sup>928</sup> Proudlock in Boezaart (ed.) *Child Law in South Africa* 307; see National Department of Social Development Report *The Cost of Children’s Bill* (2006) 1.

<sup>929</sup> See the discussion in section 4 3 1 3.

<sup>930</sup> National Department of Social Development Report *The Cost of Children’s Bill* (2006) 1. See also Proudlock in Boezaart (ed.) *Child Law in South Africa* 307.

<sup>931</sup> See the discussion in section 4 3 1 3.

accountability for money that is not spent.<sup>932</sup> It could stipulate as follows:

- “1 Where prevention and early intervention services are provided to families, the designated social worker must monitor the following -
  - (a) the implementation of services or support that are provided;<sup>933</sup>
  - (b) the standard of services that are provided to children and their families; and<sup>934</sup>
  - (c) the practice and procedure applying in respect of the delivery of services.<sup>935</sup>
- 2 The designated social worker monitoring the implementation of prevention and early intervention service must prepare a report for the assessment of services and submit it to the head of the Department of Social Development.<sup>936</sup>
- 3 The Department of Social Development shall assess service delivery and get the officials in the business units that implement prevention and early intervention programmes to account for their performance and money not spent. This will be effected by requiring -
  - (a) the respective business units of the Department of Social Development to develop a budget to implement programmes in accordance with the annual plan and the budget allocated by the National Treasury;
  - (b) the respective business units to establish an implementation plan which must include, activities, outputs and activity time lines for services to be implemented;
  - (c) the respective business units to establish activities to be implemented to identify areas where challenges may be encountered to implement plans to curb such challenges;
  - (d) the respective business units to cost the activities in the implementation plan in accordance with the annual plan and the budget allocated by the National

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<sup>932</sup> *Ibid.*

<sup>933</sup> S 400(a) of the Children, Young Persons, and their Families Act (New Zealand).

<sup>934</sup> S 400(b) of the New Zealand's Children, Young Persons, and their Families Act.

<sup>935</sup> S 400(c) of the New Zealand's Children, Young Persons, and their Families Act.

<sup>936</sup> S 400(2) of the New Zealand's Children, Young Persons, and their Families Act.

Treasury; and

- (e) individual officials of the respective business unit to draft performance plans to be used to monitor performance of officials in the delivery of programmes in accordance with the annual plan and the unit's implementation plan.
- 4 In the event money is appropriately spent and services are delivered, the Director of the respective business unit of the Department of Social Development must recommend for an award of recognition, promotion, performance bonus or whatever gesture appropriate to acknowledge the performance of officials responsible in such portfolio.
- 5 In the event money is **not** appropriately spent and services are not delivered, the Director of the respective business unit of the Department of Social Development, must request the following:
- (a) a report detailing reasons for money not spent and services not delivered; and
  - (b) the names of officials involved in the delivery of services in that portfolio.
- 6 If the reasons for non-performance are satisfactory, the Director of the respective business unit of the Department of Social Development must –
- (a) arrange a one on one meeting with the officials of the business unit involved;
  - (b) arrange a meeting with the team leader of the business unit involved.
  - (c) meet with the Chief Director responsible for the business unit and the human resources of the Department of Social Development to decide on the following:
    - (ii) provide training and skill to government officials of the respective business unit in order to improve on their work;
    - (iii) demote the officials of the business unit that failed to spend money and deliver services, to a unit -
      - (aa) that is of a rank lower than the business unit in which the officials failed to spend money or deliver services;
      - (bb) that meets the level of professional skills of the officials who are subject to demotion; or
      - (cc) where government officials will be more effective.
- 7 If the reasons for non-performance are not satisfactory, the Chief Director, the Director of the respective business unit and the Director of human resources of the Department of Social Development must decide on the dismissal of the employee/s involved on

accounts of non-performance as provided in section 17(2) of the Public Service Act,<sup>937</sup> consistently with the Labour Relations Act 66 of 1995.

- 8 The Director of the Department of Social Development of the respective business unit that is affected by non-performance must employ human personnel or hire consultants with appropriate expertise and knowledge to use the budget allocated to the respective business unit to deliver services.”

The Children’s Act does not provide information regarding the following: the referral process of children in need of protection by Child Protection Organisations; the period of stay in a Child Protection Organisation; the need for a case plan for the care of the child; when a child protection order can be granted; the types of child protection order which can be made by the court; the period of effectiveness and monitoring of the order; and who should fund the establishment of Child Protection Organisations. South Africa must learn from the Child Protection Act (Queensland)<sup>938</sup> which entrenched similar provisions and amend section 110 of the Children’s Act accordingly. It should read as follows:

- “110(8) The Department of Education, the National Prosecuting Authority, South African Police Services, the Department of Justice and Constitutional Development, the Department of Health, the South African Human Rights Commission, the community, traditional leader, any interested person or institution, must refer any matter concerning a child in need of care and protection to the Department of Social Development.

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<sup>937</sup> Provides that: “an employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of –

- (i) incapacity due to ill health or injury;
- (ii) operational requirements of the department as provided for in the Labour Relations Act;
- (iii) incapacity due to poor work performance; or
- (iv) misconduct”.

<sup>938</sup> See ss 54(1) and (2), 56 and 59.

- (9) The Department of Social Development shall register the matter concerning the child for child protection services.
- (10) If the matter does not require a child protection order, the Department of Social Development shall upon registration and for the requirement of child protection services, refer the matter concerning a child in need of care and protection to a Child Protection Organisation for determination.
- (11) A Child Protection Organisation shall –
- (a) establish a reference committee consisting of relevant intersectoral government departments and stakeholders for purposes of networking and referral of cases concerning children in need of care and protection;
  - (b) before referring any matter concerning a child in need of care and protection, establish its appropriateness and the service provider who is relevant and accredited to deal with the matter concerning the child; and
  - (c) have a written agreement with a service provider who has expertise in services that are needed for the child.
- (12) The service provider shall –
- (a) open a file concerning the child, contact the child, parent, care-giver or anyone who has responsibilities and rights over the child and facilitate the implementation of programmes;
  - (b) advise a Child Protection Organisation in the event the matter concerning the child is assigned to a mediator or facilitator;
  - (c) ensure that feedback on progress and any results regarding the development and well-being of the child is communicated;
  - (d) where possible, maintain confidentiality concerning the matter relating to the child; and
  - (e) upon completion of the process send a report to a Child Protection Organisation as the referral source.



(13) A Child Protection Organisation, a designated social worker, the provincial Department of Social Development, or a police official who receives a report that a child has been abused in a manner causing physical injury, sexually abused, maltreated or deliberately neglected, must make an application for a child protection order.

(a) The application must –

- (i) state the grounds on which the order is made;
- (ii) state the nature of the order sought;
- (iii) comply with the applicable rules of the court;
- (iv) be filed in the court;
- (v) where the order is sought against the parents of the child, the order must be served on both parents personally or by posting it at the residential address last known to the parents; and
- (vi) be indicated to the child.

(14) The children's court may make a child protection order if it is satisfied that -

(a) the child is in need of protection and that the order is appropriate and desirable for the child's protection; and

(b) the making of a child protection order is contested and a meeting shall be held or attempts shall be made to hold one between the parties involved for an agreement.

(15) The application may be heard in the absence of the parents if –<sup>939</sup>

(a) the parents have been given reasonable notice of the hearing and failed to attend; and

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<sup>939</sup> S 58(1)(a) and (b) of Child Protection Act (Queensland).

- (b) it is satisfied that practicable steps were taken to give parents notice of the hearing.
- (16) The children's court may make a child protection order if it is satisfied that -
- (a) the child is a child in need of protection and the order is appropriate and desirable for a child in need of protection;
  - (b) *comprehensive case plan* is established regarding the care of the child;
  - (c) the order is appropriate for meeting the child's protection and care needs;
  - (d) if the making of the court order has been contested, a meeting between the parties involved must have been held or attempts have been made to hold a meeting; and
  - (e) the child has expressed his or her wishes which are made known to the court.
- (17) The court must not issue a child protection order unless a copy of a case plan has been filed in court.
- (18) Where the court makes a long-term child protection order, the court must be satisfied that –
- (a) there is no parent willing and able to protect the child in the foreseeable future; and
  - (b) the child's need for emotional security will be met in the long-term by making the order.
- (19) The court must not grant long-term guardianship –
- (a) to a person who is not a member of the child's family, unless the child is already under care and guardianship under a child protection order; and

- (b) if the court can grant guardianship to another suitable person.
- (20) Before the court extends the child protection order upon granting a short-term guardianship of the child, the court must have regard to the child's need for emotional security and stability.
- (21) The children's court can make the following child protection orders which the court considers to be appropriate in the circumstances –
- (a) an order directing a parent of the child to do or refrain from doing something directly related to the child's protection;
  - (b) an order directing a parent not to have direct or indirect contact with a child; or not to have an unsupervised contact with a child.
  - (c) an order requiring a designated social worker to supervise the child's protection in relation to matters stated in the order;
  - (d) an order granting care and guardianship of the child to a suitable person who is a member of the family other than the parent of the child; and
  - (e) an order granting care and guardianship of a child to a Child Protection Organisation.<sup>940</sup>
- (22) A child protection order shall state the time when it starts and ends -
- (a) where no care and guardianship of the child is granted, the order must not be for

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<sup>940</sup> S 61 of Child Protection Act (Queensland).

more than 1 year after the day it is issued;

- (b) where a short-term care and guardianship is granted, the order cannot be for more than 2 years; and
- (c) where a long-term care and guardianship is granted, the order lapses on the day before the child turns 18 years.<sup>941</sup>

Given the dire need for child protection services in South Africa, I propose with reference to the Child Protection Act (Queensland) that a provision be established in the South African Children's Act to ensure the effective use of the Child Protection Organisations. South Africa must promulgate regulations to section 105 of the Act as a guide to the strategy required from the Minister of Social Development regarding the geographical location of Child Protection Organisations, the collaborative work of intersectoral government departments and civil society providing child protection services, and the monitoring of services provided by Child Protection Organisations. The proposed regulations could read as follows:

- “1 The Minister of Social Development shall be responsible for the administration of this Act, and must –
- (a) ensure the establishment of Child Protection Organisations from monies allocated to it by Parliament;
  - (b) ensure equal access to Child Protection Organisations by all provinces in the Republic, including urban and rural communities;
  - (c) provide direction and ensure coordination and collaborative work of child protection services by Ministers of Education, Health, Finance and Justice and

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<sup>941</sup> S 62 of Child Protection Act (Queensland).

Constitutional Development, South African Police Services and the non-governmental organisations;<sup>942</sup>

- (d) enter into agreements with non-governmental organisations and other institutions respecting the provision of child protection services;<sup>943</sup>
- (e) monitor the care of the child and services delivered by Child Protection Organisations under this Act.”<sup>944</sup>

Given my recommendation for the Department of Social Development to work collaboratively with NGOs, I am of the view that a provision must be incorporated in the Children’s Act for the Department of Social Development to contract services relating to prevention and early intervention to NGOs. The provision could read as follows:

- “1 The Department of Social Development shall require NGOs to provide specific prevention and early intervention services. The Department of Social Development shall require the NGO to provide information regarding –
- (a) the objectives of the programme;
  - (b) the activities that are to be used in the programme;
  - (c) measures used to ensure that the standards of government in providing for children are upheld;
  - (d) the type of assessment and progress tool that are to be developed to monitor the effectiveness of the programme;
  - (e) the outcomes of the programme;
  - (f) the frequency in monitoring the programme; and
  - (g) its own monitoring and evaluation system.
- 2 The NGO must, upon completion of its project, account for the services it delivered by–

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<sup>942</sup> S 3(2)(c) of the Child Protection Act (Canada).

<sup>943</sup> S 3(3)(b) of the Child Protection Act (Canada).

<sup>944</sup> S 3(3)(d) of the Child Protection Act (Canada).

- (a) submitting a narrative report which clearly identifies:
    - (i) further services that are needed and the extent to which the programmes are specialised to meet the needs of children; and
    - (ii) what follow-up programmes are needed.
  - (b) financial statement regarding its project.
- 3 The Department of Social Development must undertake a task to verify the delivery of services and monies spent. In the event the NGO has failed to deliver services as contracted, the department shall -
- (a) give the NGO two weeks to provide an explanation for non-performance;
  - (b) if the NGO fails to respond after two weeks, the department must request the NGO to hand back the funds;
  - (c) if the NGO fails to bring back the funds after two weeks, the department must conduct an investigation into the contract between itself and the NGO which must not last more than two months; and
  - (d) if it is discovered that the NGO has used the funds but failed to perform, the department must remove the name of the NGO from its service provider database and blacklist the NGO describe the process flow, starting from when cases are referred to them to the execution of programmes.”

# CHAPTER 5: PREPARATION FOR THE REMOVAL OF THE CHILD FROM FAMILY LIFE AND THE DECISION-MAKING PROCESS

## 5.1 Introduction

The child's fundamental right to remain in his or her family may be affected by state-imposed care and protection measures which warrant that the child be removed from family life. This may be the end of a significant parent-child relationship and the beginning of an uncertain future. Because of this, it is important to investigate the process in terms of which children are brought into care. Thus, I discuss the preparations made by social workers to remove children from family life to alternative care.<sup>1</sup>

In the discussion, I reflect on situations where children are removed with or without a warrant; assess when social workers misuse emergency removals; instances where a medical practitioner may compel a child to undergo medical examination for removal; keeping certain information that concerns the child confidential; the importance of prioritising mediation in child care proceedings; and considering court proceedings as the last option.

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<sup>1</sup> Matthias (1997) 27-44. Issues around early childhood intervention; grounds for mandatory alternative care interventions; preventative measures by government; foster care; institutional care; day care; preparing the family for the removal of the child; permanency planning; adoption and reunification of families.

Furthermore, I discuss, amongst others, the right of the parent and the child to be involved in the decision-making process concerning the removal of the child from family life. In this section, I reflect on the following issues: when the parent must be involved in the decision-making process concerning the removal of the child including, the right of the parent to challenge the removal of the child; when the child must be directly involved;<sup>2</sup> when a legal representative must be appointed for the child; and measures that must be put in place to enable the child to participate in matters affecting him or her.

The Constitutional Court judgment of *Centre for Child Law v Department of Health and Social Development Gauteng*,<sup>3</sup> and evidence in foreign jurisdictions<sup>4</sup> show that far too many children are being removed from their parents unnecessarily, often for inadequate, even absurd, reasons. A similar incident took place in the *Centre for Child Law* case<sup>5</sup> in which the court found that sections 152(5), (6) and (7) impose serious penalties for misuse of the power to

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<sup>2</sup> S 10 of the Children's Act; Van der Linde in Nagel *Gedenkbundel vir JMT Labuschagne* 103 with reference to case law by the ECtHR on the content of the right to family life.

<sup>3</sup> The children of the applicants were removed from the streets by the social workers of the Department of Social Development without a court order. The case was decided by the Constitutional Court, see the discussion in sections 4 3 1 1, 5 2 1 and 5 5.

<sup>4</sup> Booker *Children Stolen by the State Needlessly, Causing Utter Misery in One of Britain's Most Disturbing Scandals* (2012) 1-2: accessed from [www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html](http://www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html) on 2012-10-06, reported that applications to take children into care have soared in England. The official reason given for the alarming report in the number of children being removed from their families to care is that in 2008, a 17 months old "Baby P", later named as "Peter Connelly" died at the hands of his mother and her violent partner. This incident increased the determination of social workers to intervene in situations that have potential to lead to "Baby P" case; see the discussion in section 5 4.

<sup>5</sup> Par 4.



remove a child without a court order. However, these provisions do not specifically stipulate penalties against social workers who misuse their powers. Instead, they refer further to section 27(1)(b) of the Social Services Professions Act.<sup>6</sup>

The Social Services Professions Act is out-dated and does not contain adequate penalties for the unprofessional conduct by social workers in the *Centre for Child Law* case.<sup>7</sup> There is also no provision that impose penalties against social worker who misuse their powers in the Children's Act. Instead, section 305 of the Children's Act provides for a list of offences committed by, amongst other persons, care-givers against children.<sup>8</sup> I am of the view that South Africa must refer to foreign jurisdiction and provide stringent provisions that must be enacted in section 305(8) of the Children's Act, listing conduct that constitutes unprofessional conduct and penalties against social workers who misuse their authority by taking children from their families without due cause.<sup>9</sup>

The Constitutional Court judgment of *Centre for Child Law*,<sup>10</sup> revealed that there is no provision for automatic review by the court of decisions for removal of children from family life by social workers and the police. The Constitutional Court read-in words in the Children's

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<sup>6</sup> 110 of 1978.

<sup>7</sup> Thus, the Social Service Professions Bill [B-2008] GG 25 January 2008 No 30688 was published by the South African Council for Social Services Professions to regulate the professional conduct of social service. See the discussion in section 5 2 2.

<sup>8</sup> See the discussion in section 5 2 2.

<sup>9</sup> See the discussion in section 5 2 1. See also section 5 6 for the proposed provision.

<sup>10</sup> Par 83. See the discussion in sections 4 3 1 1, 5 2 1 and 5 5.

Act to remedy such defect. I propose that the words “read-in” by the court for the judicial review of decisions taken by social workers be incorporated in the Children’s Act as an amendment to section 152 and 155.<sup>11</sup>

When investigating the circumstances of the child, the designated social workers would, amongst others, gather information from experts such as, medical practitioners and psychologists for the investigation report.<sup>12</sup> The Children’s Act allows the presiding officer to give special attention to any rights of a person that may be prejudiced by the information appearing in the report of the social worker.<sup>13</sup> However, the Act does not expressly provide parents with the opportunity to be involved in the investigation conducted by the social worker including, questioning the information that is incorporated in the report.<sup>14</sup> I opine that South Africa must incorporate a provision that expressly gives parents the opportunity to be interviewed during the investigation concerning the child in order to enable them to participate in the decision-making process concerning the removal of the child. This would give parents an opportunity to challenge the information contained in the investigation report of the designated social worker for the release of their children from care.<sup>15</sup>

The Children’s Act does not have a provision that requires a child to undergo medical

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<sup>11</sup> See the discussion in section 5 2 1 and section 5 6 for the proposed provision.

<sup>12</sup> See the discussion in section 5 2 3.

<sup>13</sup> S 155(4)(b), see the discussion in section 5 2 3.

<sup>14</sup> See the discussion in section 5 2 3.

<sup>15</sup> See the discussion in section 5 5 2. See also the discussion in section 5 6 for the proposed provision.

assessment or examination for health condition or assess situations of abuse on the child before placement into care. Instead, the Children's Act<sup>16</sup> provides for the superintendent, or person in charge of a hospital, to give consent for treatment or surgery concerning the child in emergency situations. Thus, it is also questionable whether the medical practitioner is allowed to compel the child in need of care to undergo compulsory assessment for purposes of the removal of the child from family life.<sup>17</sup> I am of the view that South Africa must incorporate a provision in the Children's Act that would require the child to undergo an assessment or examination if the examination is meant to guide the medical examiner about the condition of the child, whether the child has been abused or suffered maltreatment, neglect, or the type of medical treatment that may be given to the child.<sup>18</sup> South Africa must refer to New Zealand child legislation, which contains a standard of practice and obligations which doctors must abide by.<sup>19</sup>

The Children's Act<sup>20</sup> also imposes a compulsory obligation on, amongst others, the medical practitioner, who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexual abuse, or deliberate neglect, to report such information. The obligation to report situations of abuse as provided in the Act excludes parents or care-givers of the child. I am of the view that this provision must be amended to

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<sup>16</sup> S 129(6); see also the discussion in sections 5 2 3 and 5 6.

<sup>17</sup> See the discussion in section 5 2 3.

<sup>18</sup> Protection from maltreatment, neglect, abuse or degradation is incorporated in section 28(1)(d) of the Constitution; see also the discussion in section 5 2 3.

<sup>19</sup> See the discussion in section 5 4.

<sup>20</sup> S 110. See also *Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W). See the discussion in section 5 2 3.

include parents and care-givers as they are more often the first recipients of information of child abuse. Furthermore the Act must require the child to undergo assessment and medical examination, not only if the child is suspected to have been abused, but purely for purposes of ascertaining the health and well-being of the child. Furthermore, the Act must be amended to specify the conditions under which the medical practitioner may be required to disclose medical information.<sup>21</sup>

The Children's Act has no provision for mediation in child related matters. Thus, I propose that South Africa refer to the Children's Protection Act (South Australia)<sup>22</sup> and incorporate a provision in the Children's Act that would facilitate the option of resolving issues relating to care of children in mediation proceedings as a priority.<sup>23</sup> I also recommend that South Africa refer to the Children's Act (Scotland),<sup>24</sup> and amend section 6(5) of the Children's Act to incorporate a provision that prioritises mediation in matters where a child is involved.<sup>25</sup>

Furthermore, I propose that South Africa must refer to the Young Persons and Families Act

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<sup>21</sup> This information is provided in situations pertaining to the disclosure of the child's HIV status, see s 133(1)(a)(b)(c) and (d). See also *NM v Smith* 2007 (7) SA 250 (CC); See the discussion in section 5 2 3. See also the discussion in section 5 6 for the proposed provision.

<sup>22</sup> Ss 27; 28; 32; 33; 34.

<sup>23</sup> See the discussion in section 5 6 for the proposed provision.

<sup>24</sup> See Schedule 4 par 59(a) and (b); Adoption and Children Act 2007 (Scotland), Schedule 2 par 8 and Schedule 3 par 1; see also College of Mediators in Scotland *Code of Practice for Mediators* (2008) par 4 7.

<sup>25</sup> *Ibid.*

(New Zealand)<sup>26</sup> and the Children and Young Persons Act (New South Wales)<sup>27</sup> and amend section 6(4) of the Children's Act by enacting provisions regarding the general principles that guide mediation proceedings.<sup>28</sup> The proposed provisions must also contain details such as what family care mediation is, who qualifies as a mediator, what training does a mediator need to undergo, and regulations that guide the mediator on how to work with information including information that must be kept confidential.<sup>29</sup> I am of the view that the appointment of mediators and legal representatives in child care matters must be made from the ranks of attorneys and advocates. South Africa must refer to the guidelines used in some of the states in the United States of America,<sup>30</sup> and promulgate regulations to the Children's Act which will guide the interests and the responsibilities of attorneys and advocates appointed as mediators and legal representatives for children.<sup>31</sup>

With regard to the participation of the child in matters affecting him or her, I propose that South Africa must refer to Article 12(1) and (2) of the CRC<sup>32</sup> and the Children and Young People Act (Australia)<sup>33</sup> and amend section 10 of the Children's Act to provide for the right of

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<sup>26</sup> See s (c) of the Preamble and s 20 of the Act.

<sup>27</sup> S 37(2) of the Children and Young Persons Act (New South Wales) 157 of 1998.

<sup>28</sup> *Ibid.*

<sup>29</sup> See the discussion in section 5 6 for the proposed provisions.

<sup>30</sup> See Shotton *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 38.

<sup>31</sup> See the discussion in section 5 6 for the proposed regulations.

<sup>32</sup> Art 12(1) CRC. Qvortrup "Monitoring Childhood: Its Social, Economic and Political Features" in Verhellen (ed.) *Monitoring Children's Rights* (1996) 37. See the discussion in section 5 5 1 and 5 6.

<sup>33</sup> Ss 17; 18 of Division 1.3.2.

the parent and the child to participate in different forums concerning the child and to have their views heard and taken into consideration.<sup>34</sup> With regard to when a child can participate directly in court, I propose that South Africa must refer to “Roger Hart’s Participation Ladder” and promulgate regulations to section 10 the Children’s Act.<sup>35</sup> The “Roger Hart’s Participation Ladder” provides a guide that identifies the different stages at which a child may participate and present his or her wishes and the type of support that can be provided to the child during his or her participation.

The court currently refers cases concerning children to the Legal Aid for legal assistance.<sup>36</sup> I propose that South Africa must refer to the Children, Young Persons, and their Families Act (New Zealand)<sup>37</sup> and incorporate a provision in the Children’s Act for a legal representative with expertise to work collaboratively with other professionals and provide assistance in matters concerning children.<sup>38</sup>

South Africa must also refer to the Children, Young Persons and Families Act (New Zealand)<sup>39</sup> and Care of Children’s Act (New Zealand)<sup>40</sup> and incorporate a provision that will fill

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<sup>34</sup> See the discussion in section 5 6 for the proposed amendment.

<sup>35</sup> Franklin in Verhellen (ed.) *Monitoring Children’s Rights* 324. See the discussion in sections 5 5 1 and 5 6.

<sup>36</sup> S 55(1) of the Children’s Act. See also the discussion in section 5 6 for the proposed regulations.

<sup>37</sup> S 7 of the Children, Young Persons, and their Families Act (New Zealand).

<sup>38</sup> See the discussion in section 5 6 for the proposed provision.

<sup>39</sup> S 159(1).

<sup>40</sup> S 7(2)(a).

the *lacuna* in section 55 of the Children’s Act regarding who bears the responsibility to appoint a legal representative for the child. Furthermore, we can refer to the Care of Children’s Act (New Zealand)<sup>41</sup> and enact a provision in the Children’s Act which identifies the functions of the legal representative that is appointed in the proceedings concerning children.<sup>42</sup>

We should also learn from the Children, Young Persons and Families Act (New Zealand)<sup>43</sup> and incorporate a provision for the payment of fees for legal representation.<sup>44</sup> I also recommend that when preparing the child for removal, the designated social worker must prepare a “comprehensive care plan” to guide the care arrangements of the child after the removal from family life.<sup>45</sup> The arrangements must include, the contact between the child and his or her family, reunification of the child back into his or her family, and permanency planning upon failure to reunite the family.

## 5.2 Preparation for removal from family life to alternative care

This section is most significant in that more often than not, the public is unaware of how the decision to remove a child is taken. Thus, I will use this section to briefly discuss how social workers and police remove children from family life into care, with or without a court order. I

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<sup>41</sup> 2004, s 7(3) and (4).

<sup>42</sup> See the discussion in section 5 6 for the proposed provision.

<sup>43</sup> S 161.

<sup>44</sup> See the discussion in section 5 6 for the proposed provision.

<sup>45</sup> *Ibid*, see also the proposed provision in section 6 5.

do so by discussing the *Centre for Child Law* case.<sup>46</sup> In my analysis of this case, I discuss the gap in the Children's Act to provide for the judicial review of the decisions to remove children from family life that are made by social workers or police.<sup>47</sup> I also reflect on the interventions by social workers and the instances where they misuse emergency removals.<sup>48</sup>

I discuss additional responsibilities of social workers who remove the child as well as sanctions that accompany such responsibilities in order to make social workers accountable for their actions.<sup>49</sup> I discuss the circumstances under which a child must undergo medical assessment or examination, instances where the medical practitioner may compel the child to undergo examination, and the obligation of the medical practitioner to disclose medical information.

I also reflect on the right of the parents to be involved in the investigation conducted by the designated social worker, including questioning the information that is incorporated in the investigation report. I conclude the discussion by reflecting on the improvements made in

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<sup>46</sup> *Centre for Child Law v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC). See s 155(2) of the Children's Act. See also the discussion in section 4 3 1 1 for the facts in the case: the application in this case was brought in two parts, the first part on an urgent basis with the aim to restore the children to their parents. The second part of the application included (a) a declaratory order pertaining to the wrongful conduct of the social workers and (b) a declaration of constitutional invalidity relating to ss 151 and 152 of the Children's Act. See further the discussion in sections 5 2 1, 5 2 2 and 5 6.

<sup>47</sup> See the discussion in section 5 2 1.

<sup>48</sup> See the discussion in section 5 2 2.

<sup>49</sup> *Ibid.*



the Children's Act in introducing ADR<sup>50</sup> measures. I also discuss the amendments that can be made to improve on the ADR provisions in the Act.<sup>51</sup>

### *5.2.1 Removal of the child from family life to care, with or without a court order*

This section discusses the removal of the child from the family environment to care with or without a court order. In the discussion, I assess whether the Children's Act has a provision for judicial review of the decision made by social workers or the police to remove a child from family life. In particular, I discuss whether section 152 and 155 of the Children's Act contain ways that restrict removal of children from family life. I also discuss the extent to which the Children's Act provides sanctions for wrongful removals carried out by social workers and assess if the sanctions are stringent enough to prevent unlawful removals. Social work practice is well established with regards to measures put in place for the removal of the child from family life. For instance, where children in need of care are placed with relatives, there is not necessarily a dire need to prepare the child for removal.<sup>52</sup> In other cases, social workers would prepare the family by talking to both the parents and the child prior to removal.<sup>53</sup> Only a few social workers said that they had taken the child to the new place of

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<sup>50</sup> See the discussion in section 1 6 4.

<sup>51</sup> See the discussion in section 5 2 3.

<sup>52</sup> Matthias (1997) 33.

<sup>53</sup> *Ibid.*

safety to show them where they would be placed by the children's court.<sup>54</sup>

I acknowledge that social workers are doing their best to ensure that prior arrangements are made to ensure smooth transition for the child, that is, from family life to care. However, I further recommend that social workers must be sensible to ensure that the child is provided with counselling by engaging the child directly, keeping him or her at ease, and enabling him or her to understand the reasons why he or she is being removed.

An interview with Nompula<sup>55</sup> revealed that in practice, children who have suffered abuse are taken away in the presence of their parents and community or peers without proper preparation. This is due to the level of trauma the child may have suffered, which often requires that the child be removed with immediate effect. This does not prepare the child for the period of transition from family life to alternative care.<sup>56</sup> Many children suffer major psychological and emotional dislocation due to the loss of their daily routine.

It may not be easy to provide actual counselling to a child in emergency removals.<sup>57</sup> However, it may serve the purpose if the designated social worker could provide counselling

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<sup>54</sup> *Ibid.*

<sup>55</sup> The head of the Child and Youth Care Centre called Thandanani in Honeydew, Roodepoort, Gauteng province, interview held on 2011-03-30, see Annexure "E".

<sup>56</sup> *Ibid.*

<sup>57</sup> The incident that took place in *Centre for Child Law v Department of Health and Social Development Gauteng* case, where social workers planned a "raid" to remove children found begging with parents on the streets without a court order for removal, such is an example of an emergency removal.

to the child immediately after the removal for the child to be kept at ease regarding the process for his or her removal to the new care arrangement.

According to the Children's Act, a child may be removed by way of a court order if the child is exposed to harm.<sup>58</sup> The court order may designate a person to execute the order.<sup>59</sup> This person may be a police officer who is given powers<sup>60</sup> to remove the child if he or she is accompanied by a social worker.<sup>61</sup> Also, if any person adduces evidence under oath before the presiding officer in the children's court that a child who resides within the jurisdiction of the court is in need of care and protection, the presiding officer must order that the child who is alleged to be in need of care and protection be referred to a designated social worker for investigation.<sup>62</sup> If the presiding officer issues an order with regard to the evidence tendered in court regarding a child who is in need of care and protection, the presiding officer may, based on the report of the investigating social worker, order that the child be placed in

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<sup>58</sup> S 50(1) of the Children's Act.

<sup>59</sup> S 50(1)(a) and (b) of the Children's Act.

<sup>60</sup> The additional powers of the police official are stipulated in ss 26-31 of the Child Justice Act.

<sup>61</sup> According to s 50(4)(a)-(d) of the Children's Act.

<sup>62</sup> S 151(1) of the Children's Act. S 1 of the Children's Act defines a "designated social worker" as (a) a social worker in the service of the Department or provincial Department of Social Development; (b) designated Child Protection Organisation; or (c) a municipality. A "social worker" is defined as a person registered or deemed to be registered in terms of the Social Service Professions Act. "Social service professional" includes a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker who are registered as such in terms of the Social Service Professions Act.

temporary safe care if it is necessary for the safety and well-being of the child.<sup>63</sup>

In other circumstances, a person authorised by a court order to remove the child may, alone, or in the company of a police official, enter the premises specified in the order,<sup>64</sup> exercise any power given to him or her,<sup>65</sup> and remove the child that is in need of care and protection.<sup>66</sup>

The police official is allowed to use such force as may be reasonably necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of such premises, provided that he or she shall audibly demand admission to the premises and announce the purpose for which he or she seeks entry.<sup>67</sup>

A person who has removed a child using a court order must, without delay, inform the parent, guardian or care-giver of the child within 24 hours if such person can be traced;<sup>68</sup> refer the matter within 24 hours to a designated social worker for investigation;<sup>69</sup> and report the matter to the relevant provincial Department of Social Development.<sup>70</sup> The improvement made by the Children's Act, is that unlike the repealed Child Care Act,<sup>71</sup> the Children's Act no longer allows police officials and social workers to authorise ordinary members of the public to

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<sup>63</sup> S 151(2) of the Children's Act.

<sup>64</sup> S 151(5)(a) of the Children's Act. See also s 50(3) of the Children's Act.

<sup>65</sup> S 151 (5)(c) of the Children's Act.

<sup>66</sup> S 151(5)(b) of the Children's Act.

<sup>67</sup> S 151(6) of the Children's Act.

<sup>68</sup> S 151(7)(a) of the Children's Act.

<sup>69</sup> S 151(7)(b) of the Children's Act.

<sup>70</sup> S 151(7)(c) of the Children's Act.

<sup>71</sup> S 12; Matthias & Zaal in Boezaart (ed.) *Child Law in South African Law* 168.

undertake removals on their behalf. If we already have problems with social workers misusing powers, how many more would we have if ordinary members of the public were allowed to undertake removals?

In other situations a child may be removed by the designated social worker or a police official from family life without a court order.<sup>72</sup> The latter can only be carried out if there is a reasonable belief that the child is in need of care and protection<sup>73</sup> and is in need of immediate urgent protection.<sup>74</sup> A child may also be removed without a court order if obtaining a court order may cause delay that may compromise the safety and well-being of the child.<sup>75</sup> In other situations, if a person with parental responsibility traffics or allows the child to be trafficked, the court may suspend such person's parental responsibilities<sup>76</sup> and place the child in temporary safe care pending an inquiry by the children's court.<sup>77</sup>

Where a child is removed without a court order and placed in temporary safe care, the social worker or police official must inform the parent, guardian or care-giver about the removal

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<sup>72</sup> S 152(1) of the Children's Act.

<sup>73</sup> S 152(1)(a)(i) of the Children's Act.

<sup>74</sup> S 152(1)(a)(ii) of the Children's Act.

<sup>75</sup> S 152(1)(b) of the Children's Act. See also Zaal (2008) 285: The position in South Africa is that certain categories of persons are permitted to undertake urgently needed removal of children without obtaining a court authorization.

<sup>76</sup> S 287(a) of the Children's Act.

<sup>77</sup> S 287(b) of Children's Act.

within 24 hours.<sup>78</sup> The designated social worker is also expected to inform the clerk of the children's court about the removal not later than the next court day.<sup>79</sup> Furthermore, the removal of the child must be reported to the provincial Department of Social Development.<sup>80</sup> The police official<sup>81</sup> who is removing the child without a court order must refer the matter to a designated social worker for investigation<sup>82</sup> without delay, notify the provincial Department of Social Development within 24 hours about the removal and the place where the child has been placed,<sup>83</sup> and inform the clerk of the court about the removal not later than the next court day.<sup>84</sup>

According to the Constitutional Court in *Centre for Child Law*,<sup>85</sup> the Child Care Act<sup>86</sup> ensured the judicial review of the decision taken to remove a child with or without a court order. Thus, the Child Care Act provided the parent of the child with an opportunity to contest the removal,

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<sup>78</sup> Ss 152(1); 152(2)(a); 152(3)(a) of the Children's Act, that is, by a designated social worker or police official.

<sup>79</sup> S 152(2)(b) of the Children's Act.

<sup>80</sup> S 152(2)(c) of the Children's Act.

<sup>81</sup> S 152(3)(a) of the Children's Act.

<sup>82</sup> S 152(3)(b) of the Children's Act.

<sup>83</sup> S 152(3)(c) of the Children's Act.

<sup>84</sup> S 152(3)(d) of the Children's Act.

<sup>85</sup> Par 13.

<sup>86</sup> S 12 required that a child who is removed from family life without a warrant be brought before a court within 48 hours for a formal determination of whether the removal was justified, which would also allow a parent to appear before the court and challenge the removal. See also reg 9 to the Child Care Act.

which is not the case with the Children's Act.<sup>87</sup> The Constitutional Court found that the violation of the rights of parents and children was exacerbated by the lack of judicial review of the decision to remove children from their parents.<sup>88</sup> It is this *lacuna* that renders section 151 and 152 of the Children's Act unconstitutional.<sup>89</sup> The Constitutional Court<sup>90</sup> read-in what was lacking and required in the Children's Act for it to comply with the Constitution.<sup>91</sup>

The Act provides that if a child is on reasonable grounds suspected to have been abused in a manner which led to physical injury, sexual abuse or is deliberately neglected, any person who has made such conclusion must report the situation to the designated Child Protection Organisation, the provincial Department of Social Development, or a police official.<sup>92</sup> The

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<sup>87</sup> See discussion on the Children's Act later in this section.

<sup>88</sup> Par 12.

<sup>89</sup> The application in this case was brought in two parts, the first part on an urgent basis with the aim to restore the children to their parents. The second part of the application included (a) a declaratory order pertaining to the wrongful conduct of the social workers, and (b) a declaration of constitutional invalidity relating to ss 151 and 152 of the Children's Act.

<sup>90</sup> *Ibid.*

<sup>91</sup> The Constitutional Court confirmed the decision in *Centre for Child Law*: The court made amongst other submissions, that S 151(7) and s 152(7) is to read as though the following appears as: "(d) within 48 hours, place the matter before the [c]hildren's [c]ourt having jurisdiction for review of the removal and continued placement of the child, give notice of the date and time of the review to the child's parent, guardian or care[-]giver, and cause the child to be present at the review proceedings where practicable". I used the remedy that is proposed by the court to propose a provision for judicial review of decisions in the Children's Act.

<sup>92</sup> S 110(1) of the Children's Act. The provision identifies persons who may make the conclusion regarding the status of the child as "any" correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion,

police official who receives a report regarding the child in need of care and protection must provide for the safety and well-being of the child at risk.<sup>93</sup>

There is no specific provision in the Children's Act which requires the child to undergo medical *assessment*,<sup>94</sup> or *examination* for his or her health condition or medical treatment for purposes of providing alternative care to the child. However, the Act determines the age at which a child may undergo medical *treatment* or *surgery*.<sup>95</sup> It provides that a child may only access medical *surgery* if he or she is 12 years of age and must be assisted by parent or guardian who must assent to the operation in writing.<sup>96</sup>

It is important to distinguish between *treatment* or *surgery* or *assessment* or *examination* that

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nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre. See also s 110(2) of the Children's Act.

<sup>93</sup> S 110(4)(a) of the Children's Act.

<sup>94</sup> Own emphasis. Assessment is an evaluation or appraisal of a condition. It may be carried out to ensure that an individual is fit in a specific environment. An assessment may begin from the moment a person is identified, when questions are asked. The medical practitioner will be noticing the clothes, whether the person looks clear and tidy, eye contact, body language, whether the person is sweating, shaking, breaking rapidly, speaking hesitantly, tearfully and other signs: accessed from: accessed from [www.mind.org.uk/assets/0001/3733/Mind\\_ESA\\_factsheet-4.pdf](http://www.mind.org.uk/assets/0001/3733/Mind_ESA_factsheet-4.pdf) on 2012-10-12.

<sup>95</sup> Own emphasis. Surgery is an operative manual and instrumental technique on a patient to investigate and or treat a pathological condition.

<sup>96</sup> S 129(3)(c).



a child may be required to undergo. The relevance of the distinction is that medical *assessment* or *surgery* has different meanings. The former may not be as intrusive as the latter. However, I am of the view that South Africa must refer to foreign jurisdictions and incorporate a provision in the Children's Act for the age at which a child may consent to medical *assessment* or *surgery*.<sup>97</sup> Also, the Act must determine the age at which the child must be assisted when accessing medical *assessment* or *examination*.<sup>98</sup> I further emphasise the fact that the child who is assisted by parents in accessing medical *assessment* or *examination* must give an *informed consent*.<sup>99</sup>

The notion of *informed consent* enables any person who undertakes medical *treatment* or *surgery* to participate, based on the information given to him or her concerning the participation. Furthermore, South Africa must refer to foreign jurisdictions, such as New Zealand,<sup>100</sup> and incorporate a provision in the Children's Act<sup>101</sup> which requires that *informed consent* must be given by a child of the level of maturity and mental capacity to consent.

The Children's Act<sup>102</sup> also allows the superintendent or person in charge of a hospital to give

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<sup>97</sup> See the proposed provision in section 5 6.

<sup>98</sup> *Ibid.*

<sup>99</sup> Own emphasis. See the discussion in section 5 4.

<sup>100</sup> *Ibid.*

<sup>101</sup> S 129 of the Children's Act requires that the child must be of the level of maturity and mental capacity to understand the benefits, risks, social and other implications of the medical treatment. However, the Act does not tie the latter with the requirement that the person who participates must be able to give *informed consent*.

<sup>102</sup> S 129(6); see also the discussion in sections 5 2 3 and 5 6.

consent in emergency *treatment* or *surgery* concerning the child, even when the child has refused consent. This means that, if the situation is not urgent, the medical practitioner may not compel the child to undergo *treatment* or *surgery*. Contrary to the Children's Act, the National Health Act<sup>103</sup> provides that a health service may not be provided to a health user unless it is an emergency; that is, where a delay in the provision of a health service to the user might result in his or her death or irreversible damage to his or her health.<sup>104</sup> Nothing is mentioned regarding compulsory *assessment* or *examination* in the Act.

Also, the Children's Act does not provide for the right of the child to refuse to give consent to medical *assessment* or *examination*. Instead, there is an implied provision on the right of the child to give consent to medical *treatment* or *surgery*. The right is implied in section 129(1) which provides that the child may be subjected to medical *treatment* and *surgery* if medical consent is obtained from those authorised. Thus, where the child refuses to give consent or is unable to give consent, a High Court or children's court can be approached for consent.<sup>105</sup>

The Children's Act addresses situations where parents may use their parental responsibilities and rights to refuse consent to the medical *treatment* or *surgery* of the child.<sup>106</sup> This provision

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<sup>103</sup> 61 of 2003.

<sup>104</sup> S 7(1)(e).

<sup>105</sup> See 129(2) and (3) of the Children's Act.

<sup>106</sup> S 129(10) provides that "no parent, guardian or care-giver may refuse to assist the child when consenting to surgery or withhold consent where the child lacks capacity to consent by reason only of religious or other beliefs, unless they can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned".

is inferred from the CRC.<sup>107</sup> Some parents would refuse to give consent to medical *treatment* or *surgery* of the child based on religious or cultural beliefs. In many cases the High Court has overruled such parental refusal.<sup>108</sup>

The Children's Act<sup>109</sup> also imposes an obligation on, amongst others, a medical practitioner, who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexual abuse or deliberate neglect, to report such information.<sup>110</sup> This is evident from the case of *Tshabalala-Msimang v Makhanya*,<sup>111</sup> in which the court held that in

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<sup>107</sup> See the discussion in section 5 3.

<sup>108</sup> In the case of *Hay v B* 2003 (3) SA 492 (W), the court held that the child's right to religion outweighs a parent's right to religion. In another case, a child who refused to consent to surgery is evidenced in the case of a 12-year old girl who suffered from leukaemia who refused to consent to a life-saving blood transfusion because she was a Jehovah's Witness, this forced doctors to make an urgent application to the High Court to overrule her refusal. The court order was issued the same day. *The Star* 2009-03-12.

<sup>109</sup> S 110(1) provides that: "Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official." See also the discussion in section 5 2 3.

<sup>110</sup> Protection from maltreatment, neglect, abuse or degradation are addressed in section 28(1)(d) of the Constitution; see also the discussion in section 5 2 3.

<sup>111</sup> 2008 (6) SA 102 (W).

terms of the Constitution and the National Health Act,<sup>112</sup> private information that is contained in the health records of a user relating to the health status, *treatment* or stay in a health establishment of that use, is worth protecting as an aspect of human autonomy and dignity.<sup>113</sup> However, the Children’s Act limits the right to keep information concerning the health status of the child confidential, subject to the “best interests of the child”.<sup>114</sup> Thus, this provision cannot operate to conceal situations where a child has been abused in a manner causing physical injury, sexual abuse or deliberate neglect.

According to Nompula,<sup>115</sup> measures that are put in place for the removal of the child are the referral process of the child by the Department of Social Development or the South African Police Services to child welfare organisations.<sup>116</sup> A child welfare organisation would before receive a child into its care, and request the social worker from either the Department of Social Development or the South African Police Services who is referring a child into care to provide the background information on the child, the child’s documentation and screen the child.<sup>117</sup>

I am concerned though, that in practice, there is no referral that is made at this stage of the

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<sup>112</sup> 61 of 2003.

<sup>113</sup> Section 27.

<sup>114</sup> S 13(1)(d).

<sup>115</sup> The head of the child and youth care centre called Thandanani in Honeydew, Roodepoort, Gauteng province, interview held on 2011-03-30. See Annexure “E”.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

child to a psychologist or medical practitioner for *assessment* or *examination* for the physical and emotional well-being of the child. I propose that a provision must be incorporated in the Children's Act for appropriate *assessment* or *examination* of the child for purposes of ascertaining the physical and emotional well-being of the child for purposes of removal. The latter may assist in, amongst others, preparing care arrangement that would accommodate a child who is likely to cause a spread of infectious disease. Thus, the child must not only be assessed or examined if he or she has been physically abused, maltreated, neglected, or degraded.

The exclusion of parents or care-givers from the list of persons who are tasked with the responsibility to report abuse<sup>118</sup> in a way suggests that the parents and care-givers may be the perpetrator of abuse. Thus, I am of the view that, since parents and care-givers are more often the first recipients of information concerning child abuse, they must be included in the list of persons who are tasked with the compulsory obligation to report situations of abuse in terms of section 110(1). I am also of the view that if the medical information concerning the child is important as an evidential aspect concerning the circumstances of the child, the "best interests of the child"<sup>119</sup> standard must be used to justify the disclosure of such information.

The Children's Act also limits the circumstances under which medical information concerning the child may be disclosed.<sup>120</sup> The Act protects the right to privacy and physical integrity of

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<sup>118</sup> S 110(1) of the Children's Act.

<sup>119</sup> See the discussion in section 5 2 3.

<sup>120</sup> S 133(1).

the child by requiring consent for the disclosure of the HIV status of the child. Disclosure of such information has serious personal and social consequences for the sufferer, especially for children who are the most vulnerable group in society.<sup>121</sup> I propose that South Africa refer to foreign jurisdictions and amend the Children's Act to incorporate provisions that stipulate the standards of practice that are expected from medical practitioners in matters relating to medical information relating to children.<sup>122</sup>

### *5.2.2 Investigating whether the child is in need of care and protection*

In the discussion of this section, I will reflect on instances where social workers misuse child removal provisions. I point out that there is no adequate provision for a list of conducts that are unprofessional and sanctions against social workers who misuse their powers. Thus, I propose that such be incorporated in the Children's Act.<sup>123</sup>

The Children's Act uses an approach which is similar to the Child Care Act in providing that a child who is identified as a child in need of care and protection in terms of section 150(1) and

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<sup>121</sup> S 133(1)(a)(b)(c) and (d). See also *NM v Smith* 2007 (7) SA 250 (CC) par 63. In this case, the court held that the disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. Keeping information confidential, may encourage individuals to seek treatment and disclose their HIV status which they previously could not disclose by fear of stigmatisation, see par 42.

<sup>122</sup> See the discussion in section 5.4, see also the proposed provision in section 5.6.

<sup>123</sup> See the proposed provision in section 5.6.

(2) of the Act must be referred to a designated social worker for investigation.<sup>124</sup> The Children's Act gives the children's court the power to decide whether the child that is subject to the court proceedings in terms of sections 47, 151, 152 or 154 of the Children's Act is in need of care and protection or not.<sup>125</sup> Thus, the children's court would authorise a designated social worker to conduct an investigation into whether a particular child is in need of care within 90 days, compile such report and furnish it to the court.<sup>126</sup> The designated social worker must report his or her investigation of the child who is identified to be in need of care to the relevant provincial Department of Social Development.<sup>127</sup>

If after the investigation, the social worker discovers that the child that is subject to investigation is not in need of care and protection, the social worker must submit a report with the findings and reasons for the findings to the children's court for a review.<sup>128</sup> The social worker must, where appropriate, indicate in the report, any measures that are recommended to assist the family of the child that was investigated.<sup>129</sup>

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<sup>124</sup> S 150(2) of the Children's Act.

<sup>125</sup> S 155(1) of the Children's Act.

<sup>126</sup> *Centre for Child Law* par 13. See 155(1) and 155(2) of the Children's Act; Gallinetti "The Children's Court" in Davel & Skelton (eds.) *Commentary on the Children's Act (2007)* 4-13.

<sup>127</sup> S 155(3) of the Children's Act.

<sup>128</sup> S 155(4)(a).

<sup>129</sup> S 155(4)(b). Measures that may be taken by the designated social worker include assisting the child with counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.

In the *Centre for Child Law* case,<sup>130</sup> it was revealed that social workers misused the child removal provisions. The incident in the case is not different from research in developed legal systems.<sup>131</sup> The research revealed unpleasant reports about social workers taking children from family life without due cause.<sup>132</sup> These incidents include, amongst others, the involvement of psychologists who would write information in the reports prepared by social workers for the removal of children, which appear to confirm the case planned for the courts.<sup>133</sup> In many cases, parents are not permitted to question the claims that are incorporated in the social worker's report.<sup>134</sup> I am of the view that we should be extremely critical when children are too easily taken into care, and also when children who are in destitute families are not provided services for quality livelihoods, but are rather removed from family life. According to research conducted by Partners for Health Reform Plus Project, sanctions may assist in improving accountability in developing and transitional countries.<sup>135</sup> Thus, sanctions may work for situations where children are removed from family life without due course.

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<sup>130</sup> Centre for Child Law.

<sup>131</sup> Weetam *Child Protection Services—Hold them Accountable for their Mistakes* (2012): accessed from [www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo](http://www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo) on 2012-09-14.

<sup>132</sup> *Ibid.*

<sup>133</sup> Booker *Children Stolen by the State Needlessly, Causing Utter Misery in One of Britain's Most Disturbing Scandals* (2012) 5: accessed from [www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html](http://www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html) on 2012-10-06.

<sup>134</sup> See the discussion in section 5 5.

<sup>135</sup> Brinkerhoff *Accountability and Health Systems: Overview, Framework and Strategies* (2003), The Partners for Health Reform Plus Project: accessed from [www.PHRplus.org](http://www.PHRplus.org) on 2012-09-04.



The court in *Centre for Child Law* case<sup>136</sup> did not impose sanctions against the social workers involved. Instead, it noted the fact that section 152(5),(6) and (7) of the Children’s Act imposes serious penalties for misuse of the powers to remove a child without a court order.<sup>137</sup> Since these provisions do not impose any sanctions, the court further referred to section 27(1)(b) of the Social Services Professions Act as a provision which contains sanctions but omitted to impose specific penalties against the social workers who misused their powers in the case.

The Social Services Professions Act is out-dated and currently under review.<sup>138</sup> It is

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<sup>136</sup> Par 4.

<sup>137</sup> S 152 provides that:

- “(5) Misuse of a power referred to in subsection (1) by a designated social worker in the service of a designated child protection organisation –
- (i) constitutes unprofessional or improper conduct as contemplated in section 27(1)(b) of the Social Service Professions Act, 1978 (Act. 110 of 1978) by that social worker; and
  - (ii) is a ground for an investigation into the possible withdrawal of that organisation’s designation.
- (6) Misuse of a power referred to in subsection (1) by a designated social worker employed in terms of the Public Service Act or the Municipal Systems Act constitutes unprofessional or improper conduct as is contemplated in section 27(1)(b) of the Social Services Professions Act, 1978 (Act No. 110 of 1978) by that social worker.
- (7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the of the South African Police Service Act, 1995 (Act No. 68 of 1995).”

<sup>138</sup> With regards to the disciplinary sanctions that may be imposed on social workers, section 47 of the Social Service Professions Bill 2007 provides that:

therefore questionable as to whether the court in *Centre for Child Law* would have found an appropriate offence that is committed by the social workers and a penalty that accompanies same.

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- “(1) A social service practitioner who has been found guilty of unprofessional conduct in terms of this Act, is liable to one or more of the following disciplinary sanctions –
- (i) a reprimand or a caution;
  - (ii) suspension of his or her registration for a period and on the conditions determined by the disciplinary committee;
  - (iii) the cancellation of his or her registration;
  - (iv) a fine not exceeding R 10 000;
  - (v) a compulsory period of supervised professional service determined by the disciplinary committee;
  - (vi) the payment of costs in respect of the disciplinary proceedings as determined by the disciplinary committee;
  - (vii) the payment of restitution to the complainant as determined by the disciplinary committee.
- (2) The disciplinary committee may –
- (a) postpone the imposition of a penalty for a period and on conditions as it may determine;
  - (b) order that the execution of any disciplinary sanction referred to in subsections (1)(c) or (d) be suspended for a period and on conditions as it may determine;
  - (c) impose the disciplinary sanction it considers appropriate, taking into account considerations of progressive and restorative discipline and the protection of the interests of the public.
- (3) If any social service practitioner fails to comply with any of the conditions imposed upon him or her in terms of subsection (2)(a) and the disciplinary committee is satisfied that the non-compliance was not due to circumstances beyond that person’s control, the disciplinary committee may impose any of the penalties referred to in subsection (1) as if the imposition of the penalty had never been postponed ...”

The South African Council for Social Services Professions passed a Bill with the aim to replace the out-dated Social Services Professions Act. The Bill contains penalties that are imposed on social workers who conduct themselves improperly. Like the Social Services Professions Act, the Bill will apply to registered social workers only. Amongst others, section 47 of the Bill provides for “unprofessional conduct”. However, the provision does not define what “unprofessional conduct” is, neither does it stipulate the types of conduct which may be regarded as “unprofessional conduct”. It simply highlights the disciplinary powers and procedure regarding unprofessional conduct, how the professional board will attend to, amongst others, complaints relating to unprofessional or improper conduct,<sup>139</sup> investigate unprofessional conduct,<sup>140</sup> and charge unprofessional conduct.<sup>141</sup>

I am of the view that the court could have found difficulty in imposing sanctions against the responsible social workers for the reason that, amongst others, section 27(1)(b) of the Social Services Professions Act covers social workers who are registered with the South African Council for Social Services Professions. Even though it is not indicated in the *Centre for Child Law* case, it is important to point out that not all social workers who are employed by the Department of Social Development are registered with the council.<sup>142</sup> Thus, it would have been interesting to see the steps that would have been taken by the court if such social

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<sup>139</sup> S 40.

<sup>140</sup> S 41.

<sup>141</sup> S 42.

<sup>142</sup> Interview with “Molebatsi”, not her real name, supervisor in the Professional Services Registration Division, the South African Council for Social Services Professions in Pretoria, in the Gauteng province, held on the 2012-10-12, See attached Annexure “I”.

workers were registered with the council.

It would also have not been possible for the court in the *Centre for Child Law* to impose sanctions directly from the Children's Act<sup>143</sup> because there is no specific provision for sanctions against social workers who misuse their powers in the Act. It would have been more valuable if the Children's Act provided for a list of offences or unprofessional conduct by social workers and included sanctions that accompany the offences. Social workers who are registered with the South African Council for Social Services Professions have different expertise, including expertise in child related matters. Thus, I propose that South Africa refer to foreign jurisdictions<sup>144</sup> and provide for a list of offences or unprofessional conducts and sanctions against social workers who work in child related matters in the Children's Act.<sup>145</sup>

I also recommend that such provisions be enacted in the Children's Act as section 305(8). Furthermore, I propose that such provisions must be consistent with section 47 of the Social Service Professions Bill (once enacted into legislation).<sup>146</sup> This provision must apply to all social service professionals who are implementing the Children's Act, irrespective of whether or not they are registered with the South African Council for Social Services Professions.

I am of the view that when the provision for sanctions is enacted in the Children's Act, it has the potential to encourage social workers to act in the broader public interests and be

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<sup>143</sup> S 305.

<sup>144</sup> See the proposed provision in section 5 6.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

accountable for their actions. Since there are not enough social work personnel that provide services in South Africa,<sup>147</sup> the sanctions that I propose against social workers should be constructive rather than retributive; the latter includes dismissal.<sup>148</sup> Thus, I rely on the interview with the supervisor in the professional services registration division of the South African Council for Social Services Professions,<sup>149</sup> that sanctions must enhance the accountability in the social sector operations and reform efforts.

The interview with the supervisor at the South African Council for Social Services Professions revealed challenges that exist in monitoring the work of social workers and imposing punishment on unprofessional conduct. The interview noted, amongst others, the following: that the public is not aware of the body to which social practitioners account to; the public does not regard social work as a professional service; and not every social worker is registered with the South African Council for Social Services Professions.

The Children's Act has developed other ways in which a child may be investigated for the purposes of removal. If the children's court forms an opinion that the child who is involved in or affected by court proceedings is in need of care and protection, the court can make an

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<sup>147</sup> UNICEF *Convention and Law Reform Reforming Child Law in South Africa: Budgeting and implementation Planning* (2007) 30.

<sup>148</sup> Interview with "Molebatsi" (not her real name), supervisor in the Professional Services Registration Division, the South African Council for Social Services Professions in Pretoria, in the Gauteng province, held on the 2012-10-12, See attached Annexure "1".

<sup>149</sup> *Ibid.*

order referring such child to a designated social worker for investigation.<sup>150</sup> The course of proceedings referred to by the Children's Act are those related to the Administration Amendment Act,<sup>151</sup> Matrimonial Affairs Act,<sup>152</sup> Divorce Act,<sup>153</sup> Maintenance Act,<sup>154</sup> Domestic Violence Act<sup>155</sup> or the Recognition of Customary Marriages Act.<sup>156</sup> If the court forms an opinion that the child of any of the parties to the proceedings that relate to any of the above legislation has been abused or neglected, the court may suspend the proceedings and request the Director for Public Prosecutions to attend to the allegations of abuse or neglect.<sup>157</sup>

In other circumstances, the children's court may order "any" person to carry out an investigation that may assist the court in deciding a matter concerning a child.<sup>158</sup> This investigation includes persons who may assist the court in deciding whether a child is in need of care and protection.<sup>159</sup> The improvement made by the Children's Act in this area is that "any" person may be asked to carry out an investigation concerning a child, not only a designated social worker. "Any" person includes the police official accompanying the

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<sup>150</sup> S 47(1).

<sup>151</sup> 9 of 1929, hereinafter referred to as the "Administration Amendment Act".

<sup>152</sup> 37 of 1953, hereinafter referred to as the "Matrimonial Affairs Act".

<sup>153</sup> See the discussion in section 2.2.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> S 47(2)(a)-(b) of the Children's Act.

<sup>158</sup> S 50(1)(a) of the Children's Act.

<sup>159</sup> S 155(9) of the Children's Act.

designated social worker or any other person authorised to conduct the investigation.<sup>160</sup> The legislature appears to have acknowledged the dire need of investigation services in situations concerning children in need of care and protection and has, by imposing the responsibility of investigating the circumstances of the child on “any” person, made investigation services easily accessible for the benefit of children.<sup>161</sup> In terms of the Children’s Act, the police official who receives a report regarding a child in need of care and protection,<sup>162</sup> has the duty to notify a Child Protection Organisation or the provincial Department of Social Development of the report and any steps that have been taken in terms of the matter.<sup>163</sup> The Child Protection Organisation that is designated for such purpose or the provincial Department of Social Development that receives the report from the police official must ensure the safety and well-being of the child by making an initial assessment of the report.<sup>164</sup>

If substantial evidence emerges from the investigation, proceedings may be initiated for the protection of the child.<sup>165</sup> The Child Protection Organisation or the provincial Department of Social Development, which has conducted an investigation,<sup>166</sup> may take measures to assist the child. The assistance may, amongst others include counselling, mediation, prevention or

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<sup>160</sup> S 50(4) of the Children’s Act.

<sup>161</sup> S 50(1)-(5) of the Children’s Act.

<sup>162</sup> S 110(4)(a) of the Children’s Act.

<sup>163</sup> S 110(4)(b) of the Children’s Act.

<sup>164</sup> S 110(5)(b) of the Children’s Act

<sup>165</sup> S 110(5)(d) of the Children’s Act.

<sup>166</sup> S 110(5) of the Children’s Act.

early intervention services, family reconstruction, rehabilitation or problem solving.<sup>167</sup>

In situations where the child who suffered abuse lives in the family environment where the offender lives, the Child Protection Organisation or the provincial Department of Social Development must, if they are satisfied that it is in the best interests of the child, remove the alleged offender from the family environment for the safety and well-being of the child rather than removing the child.<sup>168</sup> The designated Child Protection Organisation or the provincial Department of Social Development, which has conducted investigation regarding the child, has the duty to report the possible commission of an offence to a police official.<sup>169</sup>

In practice, the investigations carried out by the social worker revolve around establishing if indeed the child is a child in need of care and protection.<sup>170</sup> I am of the view that the determination of whether the child is in need of care and protection is tentatively reached after the investigation process, as the children's court will rely on the investigation when it takes a formal decision whether or not to remove the child. Tshikalange<sup>171</sup> argues that in practice, a child who has suffered abuse, is asked fewer questions regarding the incident of the abuse for fear of intimidating the child, or making him or her feel that he or she is being re-victimised through the investigation. This means that the investigation may not be

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<sup>167</sup> S 110(7)(a) of the Children's Act.

<sup>168</sup> S 110(7)(b) of the Children's Act.

<sup>169</sup> S 110(8) of the Children's Act.

<sup>170</sup> An interview with Tshikalange, a social worker for the Johannesburg Child Welfare Society, held on 2011-03-31, see Annexure "F".

<sup>171</sup> *Ibid.*



thorough and that the recommendations made by the social worker may not include the explicit views of the child.

In comparison with the Children's Act (Kenya), the (South African) Children's Act provides for a strict approach when selecting a person who can provide care and protection to a child who is removed from family life. Unlike the Kenyan Children's Act,<sup>172</sup> the South African Children's Act does not allow the child to be kept in the care of a friend. Instead, the South African Children's Act allows a child who is kept in temporary care pending a court inquiry, in a place of safety or be returned to the parent, care-giver or any person who had parental responsibility of the child before removal. The South African approach is safer in that it can easily be monitored to prevent situations where the child may be abused by outsiders.

According to Matthias's<sup>173</sup> research, parents of children in need of care would enter into working agreements with social workers to assist the social workers to decide whether to remove or not to remove the child. In other jurisdictions,<sup>174</sup> the conduct of parents is always suspect if a child has to be removed from family life. Thus, parents would be less consulted in the process concerning the removal of the child.<sup>175</sup> Nevertheless, what often happens is that when the designated social worker investigates the circumstances of the child, he or she

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<sup>172</sup> See the discussion in section 5 3.

<sup>173</sup> (1997) 33.

<sup>174</sup> See the discussion in section 5 4.

<sup>175</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14.

would, amongst others, interview the police, teachers and other interested persons who have no expertise in ascertaining the circumstances of the child. Thus, if most of the people who are interviewed recommend that the child be removed from his or her family, such is sufficient enough to influence the social worker to remove the child.

### 5.2.3 *Children's Court Inquiry - establishing whether or not the child is in need of care*

Before a child is formally found to be in need of care and protection, the children's court must hold a care and protection hearing to inquire whether the child is indeed in need of care and protection.<sup>176</sup> The child may, upon such determination, be placed in temporary care,<sup>177</sup> be transferred to other temporary care,<sup>178</sup> remain in the care of the person who had his or her care,<sup>179</sup> or be put under the control of a family member.<sup>180</sup> If the child has already been removed from family life to temporary safe care, the children's court is generally expected (without obligation) to hold a preliminary inquiry to decide, amongst others, whether the child should be placed in temporary safe care and whether such care arrangement will enable the

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<sup>176</sup> S 155(5) of the Children's Act; see also Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 168 and 170.

<sup>177</sup> S 155(6)(i). See the discussion in section 6 1.

<sup>178</sup> S 155(6)(ii). See the discussion in section 6 1.

<sup>179</sup> S 155(6)(iii).

<sup>180</sup> S 155(6)(iv). See the discussion in sections 6 1 and 6 4 1.

child to have contact with his or her family members pending the main hearing.<sup>181</sup>

After hearing the reasons for a preliminary removal of the child, the magistrate would either confirm the hearing or set it aside. The preliminary inquiry would also consider whether it will be in the best interests of a lost or abandoned child to have information such as, the child's photograph published in the media in an attempt to trace the parents or relatives of the child.<sup>182</sup>

If, at a preliminary inquiry, the children's court confirms the placement of the child in temporary safe care, the magistrate of the children's court must consider whether a contribution order must be made.<sup>183</sup> The order is about considering whether a person legally responsible for maintaining the child can afford to contribute towards the expense of accommodating the child in the alternative care situation that has been ordered by the court.<sup>184</sup> The magistrate may, upon a positive response, order payment of a contribution order in terms of chapter 10 of the Children's Act.<sup>185</sup>

Before the main hearing regarding the issue whether the child is in need of care and

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<sup>181</sup> S 155(6)(i) of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 170. See the discussion in section 7 3 1.

<sup>182</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 170.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 180; Matthias & Zaal in Davel & Skelton (eds.) *Commentary on the Children's Act* 10-4 and 10-12.

protection, the designated social worker must conduct an investigation into the living circumstances and familial environment of the child.<sup>186</sup> The main evidence will be presented in the form of an investigative report drawn up by a social worker, as the Children's Act mandates the children's court to "have regard to" a designated social worker's report.<sup>187</sup> The social worker's report becomes an overriding document that will be referred to by the court before reaching a formal finding that the child is in need of care and protection.<sup>188</sup> The weight attached to the report of the designated social worker is such that the presiding officer shall, upon production of the report at the hearing, admit evidence of the facts stated in it and take a decision subject to the report.<sup>189</sup> However, the Children's Act allows the presiding officer to have special regard to any rights of a person who is prejudiced by the information appearing in the report.<sup>190</sup>

The report of the social worker is expected to indicate measures recommended by the social

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<sup>186</sup> S 155(2) of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 170.

<sup>187</sup> S 155(9) read with s 155(2); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 170-171.

<sup>188</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 171; Matthias & Zaal in Davel & Skelton in *Commentary on the Children's Act* 9-18 and 9-19.

<sup>189</sup> S 63(1).

<sup>190</sup> S 63(3). The right involves access by a parent to the information in the reports about his or her child in proceedings which potentially could lead to the child being freed from alternative care or where the child is placed in care on grounds which are not well-founded or erroneous. This is, amongst others, the opportunity which the parent can use to challenge the allegation in the report of the social worker. See also the discussion in section 7 1 2.

worker to assist the family,<sup>191</sup> including counselling, mediation, prevention and early intervention services,<sup>192</sup> family reconstruction and rehabilitation, behaviour modification, problem-solving and referral to another suitably qualified person or organisation.<sup>193</sup> The report is expected to cover the history of the case, identify the developmental and therapeutic needs of the child, and any family preservation services<sup>194</sup> considered or attempted and present a permanency plan,<sup>195</sup> which includes the future care situation of the child.<sup>196</sup> The report must also indicate what the post-court-order phase would be after the main hearing. The Children's Act<sup>197</sup> prevents the children's courts from taking the drastic step of ordering that children be removed into alternative care unless they have had the benefit of a detailed social worker's report.

Matthias,<sup>198</sup> who conducted research during the operation of the Child Care Act, and whose research is still relevant for discussions on the Children's Act, relied on two positions shared by international child care law and practice. Firstly, the work of Harding focused on keeping families, particularly poor families, whose family ties are threatened by the powers of the courts and social workers to remove children from their parents to alternative placement,

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<sup>191</sup> See the discussion in sections 3 3 1 2 and 4 5.

<sup>192</sup> See the discussion in section 4 3 1 1.

<sup>193</sup> S 155(4)(b) of the Children's Act.

<sup>194</sup> See the discussion in section 4 3 1 1.

<sup>195</sup> See the discussion in section 8 3 1.

<sup>196</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 172.

<sup>197</sup> S 157(1) as supplemented by reg 53 to the Children's Act.

<sup>198</sup> Matthias (1997) 29.

together.<sup>199</sup> Harding held the view that children should only be removed in extreme circumstances and that parents should be provided with resources to give them the opportunity to raise their children in their own homes.<sup>200</sup>

Matthias<sup>201</sup> holds the view that the removal of an uncontrollable child from family life to alternative care could be considered only when preventative services such as therapeutic counselling or group work where parents are provided with parenting skills do not work. Thus, social workers could find ways to address the problems that make a child uncontrollable, rather than opting for the removal of the child.<sup>202</sup>

Apart from the report of the investigative social worker that is used as a guiding document at the main hearing, other evidence from professionals, such as a legal representative who is appointed either privately or through the Legal Aid, witnesses, and the report by the investigative social worker are used during the hearing.<sup>203</sup> Information from a medical professional or psychologist may also be required to establish the circumstances of the child that is subject to care and protection proceedings.<sup>204</sup> An examination of the child or any other person, such as siblings, may also be conducted during this phase.<sup>205</sup> The Children's Act

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<sup>199</sup> Matthias (1997) 31. See the discussion in sections 4 3 1 1 and 4 5.

<sup>200</sup> *Ibid.* See also Adamec & Pierce (2000) AJO 4.

<sup>201</sup> (1997) 20. See also the discussion in section 3 3 2.

<sup>202</sup> *Ibid.*

<sup>203</sup> Zaal & Skelton "Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts" (1998) SAJHR 545-546 and 552-559.

<sup>204</sup> S 62(1) of the Children's Act.

<sup>205</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 173.

requires that once the children's court magistrate decides that a matter is ready for court, he or she must set the matter down for hearing within 30 days to avoid situations where undue delays may prejudice the child.<sup>206</sup> However, I am of the view that where there is a need to set the matter down for a hearing sooner than 30 days, a hearing must be held if it is in the best interests of the child to do so. In terms of the Children's Act, the children's courts are given an important new option of referring the matter regarding the child in need of care and protection to ADR before the main care and protection hearing.<sup>207</sup>

The ADR mechanisms include mediation, family group conferences, prehearing conferences and "lay forum hearings".<sup>208</sup> Matthias and Zaal<sup>209</sup> maintain that the primary aim of ADR is to reduce points of dispute so that child-care-giver relations can be healed. They add that interactions between parties that are guided and assisted by a skilled ADR facilitator may sometimes be more appropriate for healing relationships rather than the more formal, adversarial children's court proceedings.<sup>210</sup> Thus, ADR may be more constructive for the child and the family.<sup>211</sup> It is suggested that for the presiding magistrate to order ADR

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<sup>206</sup> Reg 6(2)(c) read with reg 7(1) to the Children's Act.

<sup>207</sup> S 155(4)(b).

<sup>208</sup> Ss 46(1)(h)(iii), 70, 71 of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 174.

<sup>209</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 174.

<sup>210</sup> Zaal (2008) 305-306 argues that given the new ADR responsibilities that are given to the children's courts, whenever a presiding officer contemplates that a case be referred for any ADR, such should be communicated between the parties, including the method how the ADR is to take place, how the results will be utilized by the court, and what the payment and timelines are going to be.

<sup>211</sup> *Ibid.*

procedures to take place before the hearing, he or she ought to consider whether appropriate resources for this process are locally available.<sup>212</sup> Any results from the ADR need to be scrutinised to establish if indeed that was the agreement reached by the parties to the ADR rather than simply endorsing them.<sup>213</sup> Furthermore, the presiding officer must consider if the ADR results are in the best interests of the child for them to be given the force of law by incorporating them in the care and protection order.<sup>214</sup> I highly recommend mediation for its flexible process that can be used in a diverse range of issues, and that it can promote and strengthen family communication and relationships. I am of the view that mediation can expedite proceedings, compared with court proceedings that often take time because of court adjournments. I further opine that mediation should be considered in child-related matters as it is likely to cause less interruption in the life of a child as a case will be finalised timeously.<sup>215</sup> Dore<sup>216</sup> revealed that Scotland has considered mediation as one of the measures that can be used to prevent homelessness. The use of mediation in child care proceedings is viewed as a service that saves government costs for care placement.<sup>217</sup>

The Children's Act made improvements by introducing ADR. However, the provision in the Act lacks information as to the type of mediation that may be conducted in family care

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<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> See also the discussion in section 5 4.

<sup>216</sup> Dore *Mediation and Homelessness Prevention in Scotland Report: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 5. See the discussion in section 5 4.

<sup>217</sup> *Ibid*, 15.



proceedings, who qualifies as a mediator, what training a mediator need, the type of information that may be exchanged including, keeping certain information confidential, and when children should be directly involved. It will be useful if South Africa could learn from Scotland and New Zealand which have well developed jurisprudence to weigh up appropriate wording for regulations that must be promulgated to the Children Act.<sup>218</sup>

I recommend that amendments be made to the Children's Act for a detailed provision for mediation procedures to be used before the main care and protection hearing. Thus, mediation has the potential to recommend proactive measures that can be taken to keep the child in the family and avoid the drastic steps of removal.

If after the 90-day investigation the social worker finds the child to be in need of care and protection, the social worker must bring the child before the children's court for a hearing.<sup>219</sup> The court hearing the matter may adjourn the matter for a period not exceeding 14 days<sup>220</sup> and order that while the decision is pending on the matter: the child remain in temporary safe care where the child is kept,<sup>221</sup> be transferred to another place in temporary safe care,<sup>222</sup> remain with the person under whose control the child is,<sup>223</sup> be put under the control of a

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<sup>218</sup> See the discussion in section 5 4 and 5 6.

<sup>219</sup> S 155(5) of the Children's Act.

<sup>220</sup> S 155(6)(a) of the Children's Act.

<sup>221</sup> S 155(6)(b)(i) of the Children's Act.

<sup>222</sup> S 155(6)(b)(ii) of the Children's Act.

<sup>223</sup> S 155(6)(b)(iii) of the Children's Act.

family member or other relatives of the child,<sup>224</sup> or be placed in temporary safe care.<sup>225</sup>

If the court finds that the child is not in need of care and protection, the court must order that the child who was placed in temporary safe care: be returned to the person in whose control the child was before the child was put in temporary safe care;<sup>226</sup> order that the child be subjected to early intervention services;<sup>227</sup> or decline to make an order if the child is not in temporary safe care.<sup>228</sup> The Children's Act provides for a wide range of care and protection orders, which the children's court may select from if it finds this to be in the "best interests of the child".<sup>229</sup> An order, which can be made by the children's court, includes an order:<sup>230</sup>

- “(a) [R]eferred to in section 46;
- (b) confirming that the person under whose control the child is may retain control of the child, if the court finds that the person is a suitable person to provide for the safety and well-being of the child;
- (c) that the child be returned to the person under whose care the child was before the child was placed in temporary safe care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child;
- (d) that the person under whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court

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<sup>224</sup> S 155(6)(b)(iv) of the Children's Act.

<sup>225</sup> S 155(6)(b)(v) of the Children's Act.

<sup>226</sup> S 155(8)(a) of the Children's Act.

<sup>227</sup> S 155(8)(b) of the Children's Act.

<sup>228</sup> S 155(8)(c) of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 175.

<sup>229</sup> See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 175-176; Bosman-Sadie & Corrie (2010) 181. See the discussion in ch 6 for a discussion on alternative care options.

<sup>230</sup> S 156(1) of the Children's Act.

- finds that the child became in need of care and protection because the person under whose care the child was lacked the time to care for the child;
- (e) if the child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in –
- (i) foster care with a suitable parent;
  - (ii) foster care with a group of persons or an organisation operating a cluster foster care scheme;
  - (iii) temporary safe care, pending an application for, and finalisation of, the adoption of the child;
  - (iv) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
  - (v) a child and youth care centre designated in terms of section 158 that provides residential care programme suited to the child's needs.”

However, a child who is kept in a place of temporary safe care may, if circumstances permit, remain there for a period of not more than two years pending his or her removal to the placement that has been directed by the court.<sup>231</sup> An appropriate placement order, which has been directed by the court, may also only last for two years.<sup>232</sup> According to the Children's Act, the “best interests of the child” standard is the determining factor in any decision on whether to remove or not to remove the child from family life to temporary safe care.<sup>233</sup>

This standard applies to all the relevant factors including the safety and well-being of the

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<sup>231</sup> S 156(2) of the Children's Act.

<sup>232</sup> S 26(2) of the Children's Act.

<sup>233</sup> S 152(4).

child. In terms of the “best interests of child”, the Act considers:<sup>234</sup>

- “(a) the nature of the personal relationship between -
  - (i) the child and the parents, or any specific parent; and
  - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parent, or any specific parent, towards -
  - (i) the child; and
  - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent or of any other care-giver or person to provide for the needs of the child including emotional and intellectual needs;
- (d) the like effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from -
  - (i) both or either of the parents; or
  - (ii) any brother or sister or other child, or any other care-giver or person with whom the child has been;
- (e) the practical difficulty and expense of the child being with the parent, and any specific parents and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child -
  - (i) to remain in the care of his or her parent, family and extended family; and
  - (ii) to maintain a connection with his or her family, extended, culture or tradition;
- (g) the child’s -
  - (i) age, maturity and stage of development;
  - (ii) gender;
  - (iii) background; and
  - (iv) any other relevant characteristics of the child;
- (h) the child’s physical and emotional security and his or her intellectual emotional, social and cultural development;
  - (i) any disability that a child may have;

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<sup>234</sup> S 7(1) of the Children’s Act.

- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up in a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect a child from any physical or psychological harm caused by -
  - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour;
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.
- (2) In this section 'parent' includes any person with parental responsibilities and rights in respect of the child."

The "best interests of the child" concept is derived from a particular view regarding a family and family relations.<sup>235</sup> The concept has been limited to private law matters of custody, guardianship, and access, including adoption cases. As family patterns change,<sup>236</sup> so do the views on the best interests of the child concept. However, the courts have provided some guidelines on what the best interests of the child should be, even though they could not provide a basis to work out what outlines the best interests of the child.<sup>237</sup> The "best interests

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<sup>235</sup> Heaton "Some General Remarks on the Concept 'Best Interests of the Child'" (1990) *THRHR* 95; Heaton *The Meaning of the Concept the Best Interests of the Child as Applied in Adoption Applications in South African Law* (LLM Dissertation 1988 UNISA) 4.

<sup>236</sup> See the discussion in section 2 2 1.

<sup>237</sup> Currie "*Human Rights Practice*" *Practical Legal Training Manual Lawyers for Human Rights* (1996) 171.

of the child” standard is entrenched in international law<sup>238</sup> and the South African Constitution raised this principle to that of a constitutional imperative by explicitly providing that: “[a] child’s best interests are of paramount importance in every matter concerning the child”.<sup>239</sup> The fact that children possess rights<sup>240</sup> makes the application of the best interests standard wider, which implies the existence of legal or moral duties in someone or everyone in implementing those rights.

In the case of *McCall v McCall*<sup>241</sup> an attempt was made to list some of the most important factors which are to be taken into account in assessing where the best interests of the child should lie. A checklist<sup>242</sup> was created which would provide clarity and consistency

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<sup>238</sup> For example, Art 3 of the CRC.

<sup>239</sup> Davel & De Kock “In a Child’s Best Interests” (2001) *De Jure* 272.

<sup>240</sup> S 28 of the Constitution. See also the discussion in sections 2 3 and 2 4.

<sup>241</sup> 1994 3 SA 201 (K): the custody of the boy (Rowan) was given to his father as he had reached the stage of development, that is, almost puberty where would need the discipline of a father more than the protectiveness of his mother: 206J; see also *French v French* 1971 4 SA 298 (W).

<sup>242</sup> (a) [T]he love and affection which exists between parent and child;  
(b) the parent’s compatibility with the child;  
(c) the parent’s abilities, character and temperament and the impact thereof on the child’s needs and desires;  
(d) the parent’s ability to communicate with the child;  
(e) the parent’s insight, understanding and sensitivity to the child’s feelings;  
(f) the parent’s capacity and character to give the child guidance which he or she requires;  
(g) parent’s ability to provide the child with economic security such as food, clothing and housing;

concerning the contents of the best interests measure.<sup>243</sup> The judge specified that if the child had the intellectual and emotional maturity to express his or her true feelings, weight must be given to the preference of the child.<sup>244</sup> Thus, the wishes of the child can be decisive for the court.<sup>245</sup> Where the child is able to express himself or herself in all matters affecting him or her, he or she must be given ample opportunity to participate meaningfully if such matters affect him or her.<sup>246</sup> Heaton<sup>247</sup> is of the opinion that the best interests of the child cannot be predicted with absolute certainty. I agree with Heaton in that it is difficult to know whether the outcome of each option would be in the best interests of the child concerned. A guide as to what the best interests of the child are, is significant as it could be used by the court as a

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- (h) parent's ability to provide for the child's religious and secular educational well-being and security;
- (i) parent's ability to provide for the child's emotional, psychological, cultural and environmental development;
- (j) the parent's mental and psychological health and moral fitness;
- (k) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (l) the desirability or otherwise of keeping siblings together;  
the child's preference if the Court is satisfied that in the particular case the child's preference should be taken into account;
- (m) the desirability or otherwise of applying the doctrine of same sex matching, for instance placing sons with fathers and daughters with mothers;
- (n) any other relevant factor: 205B-G. See Davel & De Kock (2001) *De Jure* 276.

<sup>243</sup> Davel & De Kock (2001) *De Jure* 2001 272.

<sup>244</sup> 207H-I.

<sup>245</sup> *Meyer v Gerber* 1999 (3) SA 650 (O).

<sup>246</sup> Franklin (ed.) *The Handbook of Children's Rights* (1995) 14.

<sup>247</sup> (1988) 12.

reference when considering the relevant facts in a case affecting a child.

It is not clear to what extent the courts would take the views of the community into account when determining what would be in the best interests of the child who cannot express his or her own opinion. On the other hand, the best interests of the child may depend largely on the present day challenges every child might face. Currently, the best interests of the child would be to provide the child with a family, which will have discretion to determine all issues related to his or her upbringing. It is questionable though, whether all family types can fulfil the developmental role and the best interests of the child. This is of particular concern where a child lives in, amongst others, a child-headed household where there is more often, deprivation of socio-economic needs.<sup>248</sup>

I am of the view that the “best interests of the child” standard is the appropriate guide to assess whether the child must be given an opportunity to participate in a particular matter. However, the best interests of the child cannot be used against the child’s expressed wish. I argue that what may appear to be in the best interests of the child must be looked at in conjunction with the child’s wishes. Cultural values must be recognised when interpreting what would be in the best interests of the child. Bennett<sup>249</sup> notes that in the past our courts have reached a compromise between customary law and what would be in the best interests of the child. He states that it would be misleading to say that customary law ignored the interests of the children. In customary law, the fate of the child was linked to the well-being

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<sup>248</sup> See the discussion in section 2 2 1 8.

<sup>249</sup> (1999) *Obiter* 147-148.



of the child's family.<sup>250</sup>

As a constitutional standard, the best interests of the child concept remains a primary consideration<sup>251</sup> in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.<sup>252</sup> I submit that the application of this standard may vary from case to case, country to country, or culture to culture. Any person who determines what is in the child's best interests should

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<sup>250</sup> Bennett (1999) *Obiter* 151.

<sup>251</sup> S 28(2) of the Constitution. The case of *Jackson v Jackson* 2002 (2) SA 303 (SCA), concerned the custody of two girls who were awarded to the father with the mother having unlimited access: 307F and 313B. During the marriage, the father and the mother wanted to emigrate with their two children to Australia. Six months after the parties were divorced, the mother still wished to emigrate but later reconsidered her decision: 308E. The father of the children applied for a variation of the custody order in order to relocate with the children. The court had to decide whether it was in the best interests of the children that their custody order be varied: 320C. The court decided that it was not in the children's interests to do so because there was no clear separation between the mother and the children and that the parents had equal parental responsibilities: 321C. Scott JA expressed the point that the interests of the children are the first and paramount consideration: 318E. In *I v S* 2000 (2) SA 993 (C): the parties to the marriage were married in terms of Islamic law. The marriage disintegrated with the parties having concluded a settlement agreement with regard to access of the child. The father, who was the applicant in this case had irregular access to the children which was then terminated. He then applied in terms of s 2 of the Natural Fathers of Children Born Out of Wedlock Act 1998 to have access in terms of their agreement made an order of the court. The court held that the applicant had access to the children if it was in the best interests of the child and that due weight had to be given to the wishes of the children. The children refused to have contact with the applicant and the court held that the children were old and mature enough to give an opinion and that their wishes must be respected.

<sup>252</sup> SALRC *Review of the Child Care Act* (1998) 20.

exercise wide discretion based on the facts of the matter. Before removing the child from family life, the court may have to consider removing the child from the family or removing the offender from the place where the child resides if the best interests of the child so dictate.

An interview with a social worker<sup>253</sup> revealed that in practice, when the social worker makes recommendations in the investigation report regarding the child in need of care and protection, such recommendations are usually the views of the social workers, which are often assumed to be in the best interests of the child. The views that are captured by the social worker in the report would normally be consistent with the circumstances, which the child would have faced in the family environment. The social worker often takes it for granted that his or her views regarding the proper development and well-being of the child are the same that the child is likely to adopt, since such views are in the best interests of the child. More often than not, social workers take decisions on behalf of children and not with the participation of children.<sup>254</sup> The reason social workers do not involve children in the decision-making processes is that children who are in need of care and protection would normally have undergone trauma and stress and this could hamper their effective participation.<sup>255</sup>

I submit that this process is flawed, as we can never assume that a child who went through stress would not be able to participate in any decision regarding his or her best interests.

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<sup>253</sup> An interview with Tshikalange, a social worker for the Johannesburg Child Welfare Society, held on 2011-03-31. See attached Annexure “F”.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

Furthermore, the fact that the child commissioner would base his/her decision on the recommendations of the social worker in arriving at the decision to remove the child makes the entire decision-making process even more biased towards the views of the social workers without focusing on the best interests of the child. Nompula<sup>256</sup> holds the view that if a child has suffered stress, the social worker who manages the case of the child should build a relationship with the child to enable the child to open up and share his or her views with confidence. The social worker should use different strategies to get the child to talk, such as engaging the child using a child-like language.

### **5.3 Preparation for removal from family life to alternative care in terms of international law**

International instruments that apply to this topic do not reflect on the ways in which the child is removed from family and brought to alternative care. Instead, they simply reflect on the obligation of state parties to provide, amongst others, “special protection and assistance” to any child who is removed from the family environment. The “special protection and assistance” referred to, particularly in the CRC<sup>257</sup> and the ACRWC,<sup>258</sup> relate to specific safeguards and support measures that may be necessary for the smooth transition in the life of a child who is temporarily or permanently deprived of his or her family environment, or in

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<sup>256</sup> The head of the child and youth care centre called Thandanani in Honeydew, Roodepoort. Interview held on 2011-03-31, see attached Annexure “E”.

<sup>257</sup> According to Art 20(1).

<sup>258</sup> Arts 25(1), 25(2)(a).

whose best interests cannot be allowed to remain in that environment. Since there is no clarity as to the type of “special protection and assistance” that is expected from state parties who are removing children from family life, the concept “special protection and assistance” may also mean psychological and emotional preparation of the child for his or her removal from family life. “Special protection and assistance” may be provided by a state party to a child during the preparatory stage by way of ensuring that every process that is undertaken for purposes of removal, promotes the best interests of the child and his or her well-being. Article 9(1) of the CRC states that:

“[s]tates [p]arties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place or residence”.

According to Hodgkin and Newell,<sup>259</sup> Article 9(1) enshrines two important principles, firstly, that children should not be separated from their parents, unless it is necessary for their best interests; and secondly, that all procedures used to separate children from their parents must be fair. The need to expedite the judicial process so that the separation between the child and his or her parents should be short was emphasised in the context of Article 9(1).<sup>260</sup>

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<sup>259</sup> (2007) 123.

<sup>260</sup> Hodgkin & Newell (2007) 128.

Hodgkin and Newell<sup>261</sup> argue that the inclusion of the Beijing rules in care and welfare proceedings emphasises the point that removing children from their parents is as serious as depriving them of their liberty, and requires that a fair hearing be conducted.

The right of the parent to refuse medical treatment on behalf of the child has its origins in the CRC. This is relevant in this chapter in that children who are not of a level of maturity to give consent require the consent of the parent to undergo treatment. Also, the parent may consent to medical treatment if he or she is provided with information pertaining to the treatment. The CRC addresses the issues of parental responsibility and the right to refuse medical treatment and surgery on behalf of the child. It provides that if the child lacks the capacity to consent, the parents, guardians or care-giver has the right to provide consent in the best interests of the child.<sup>262</sup>

South Africa inferred from the CRC when drafting the provision with regard to medical treatment and surgery. This means that it was not anticipated in the CRC, nor the Children's Act, that a child may be required to undergo medical assessment or examination, which is a less intrusive procedure compared with surgery. Also, the consent that is expected from the parent to subject his or her child to medical treatment is not *informed consent*. Thus, I am of the view that South Africa must refer to other jurisdictions with developed jurisprudence to fill

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<sup>261</sup> (2007) 129.

<sup>262</sup> Art 18(1).

the gaps that exist in the Children's Act.<sup>263</sup>

According to the CRC, if the best interests of the child mean that the child cannot be allowed to remain in the family environment, the child shall be guaranteed special protection and assistance by the state.<sup>264</sup> This means that the "best interests of the child"<sup>265</sup> is the determining factor on whether the state should provide the child who cannot remain in the family environment with protection and assistance, which in this case includes alternative care arrangements. The ACRWC states that:

"[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his or her parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child."<sup>266</sup>

The right of the child to receive parental care and protection is emphasised in Article 19(1). However, Article 19(1) does not subject the decision that may be taken by judicial authorities to separate the child from his parents to judicial review. Furthermore, like the CRC, the ACRWC states that in all actions that are undertaken by any person or authority concerning the child, the best interests of the child shall be the primary consideration.<sup>267</sup> This means that

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<sup>263</sup> See the discussion in section 5.2.3 and 5.6.

<sup>264</sup> Art 20(1).

<sup>265</sup> Art 3.

<sup>266</sup> Art 19(1).

<sup>267</sup> Art 4(1).

the only consideration that should prompt state parties to decide to remove or not remove a child from family life is the “best interests of the child” standard.

The Children’s Act<sup>268</sup> sets the criteria, which must be satisfied before the children’s court can grant supervision or care order. The court must further be satisfied that the order that it is about to make will promote the welfare of the child and that it is better to make that order rather than not make it.<sup>269</sup> From the point of view of the ECHR, any intervention by means of a care or supervision order will amount to interference with a family’s right under Article 8(1). Such interference can only be justified if it can be shown that making the order was necessary in the interests of the child under Article 8(2).

Clearly, the child may not be removed from family life under either the Children’s Act or the ECHR arising from the mere fact that it is in the best interests of the child to be removed. This is explicit under Article 8 and reflected in section 31 of the Children’s Act. The threshold criteria will only be met if the child or his or her interests has faced or is facing significant harm. The interests of the child will then also be sufficient to justify interference in family life. Thus, an interventionist order may only be granted if there is sufficient justification for ECHR.

With regard to when a child can be removed from family life to care, the ECtHR accepted that whether the intervention in family life involved in removing a child from the care of his or her parents is justified or not, is a matter over which contracting states may differ and so

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<sup>268</sup> S 31, Act 1989.

<sup>269</sup> S 1(1) and (5) of the Children’s Act; Choudhry & Herring (2010) 299.

there is a margin of appreciation.<sup>270</sup>

It is very rare for the ECtHR to find a removal itself that infringes the ECHR. The ECtHR has explained that:

“a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life”.<sup>271</sup>

Thus, guidance has been offered on when intervention is justifiable.<sup>272</sup> When a local authority applies for a care order, it must prepare a care plan<sup>273</sup> stating what it would do with the child during the care order. The court will consider the care plan carefully before determining whether to make the order or not. The care plan becomes important when the court is considering whether making a care order is proportionate interference under Article 8. The care order has serious implications in that it can, at one extreme, remove the child from the parents, and at the other, it can allow the child to remain in the family under the

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<sup>270</sup> See the discussion in sections 1 1 1 2 2 and 2 2 2 2 2 3.

<sup>271</sup> *Johansen v Norway* par 64.

<sup>272</sup> Choudhry & Herring (2010) 300-301: first, the intervention must be in accordance with the law; the intervention must have a legitimate aim; the intervention must be necessary in a democratic society. See the discussion in section 2 2 2 2 4. See also amongst others, the following cases discussed in section 5 4 1, *H and W v United Kingdom*, *Sahin v Germany*, *Sommerfeld v Germany*, *Hoffman v Germany* and *Re C* with regard to the right of the parent and child to be involved in the decision-making resulting in the removal of the child.

<sup>273</sup> See the discussion in section 8 3 2.



close watch of the local authority.<sup>274</sup>

If the court forms the view that the care order is appropriate but believes that the plans of the local authority are unduly interventionist, the court can refuse to make an order.<sup>275</sup> In reflecting on the question of how the care plan is implemented, the ECHR looks into procedural fairness on whether the family has been adequately involved in the decision on how the care plan will operate. Choudhry and Herring<sup>276</sup> argue that there need to be secure mechanisms in place to ensure that the intervention is compatible with human rights.

#### **5.4 Preparation for removal from family life to alternative care in terms of foreign jurisdictions**

This section discuss how social workers remove children from family life into care in terms of foreign jurisdictions. In the discussion I reflect on instances where social workers misuse their powers when removing children from family life. I also discuss the circumstances under which a child must undergo medical assessment or examination; instances where the child may be compelled to undergo examination, and the obligation for the medical practitioner to disclose medical information. I also reflect on the right of the parent to be involved in the preparations done by the social worker when removing the child.

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<sup>274</sup> S 31 of the Children Act; Choudhry & Herring (2010) 306.

<sup>275</sup> *Re S, Re W* 2000 UKHL 10: the court has the right to invite the local authority to reconsider the care plan if the court believes it is contrary to the interests of the child.

<sup>276</sup> (2010) 308.

In the discussion I recommend that, amongst others, the following provisions be incorporated in the Children's Act: a list of unprofessional conduct; involvement of the parent in the preparations for the removal of the child; ensuring that a child provides an informed consent when undertaking medical assessment.

The Children's Act (Kenya) allows the authorised officer to apprehend a child who is on reasonable grounds believed to be in need of care and protection without a warrant. The authorised officer must without delay bring the child so apprehended before the children's court.<sup>277</sup> This provision may result into what transpired in the South African case of *Centre for Child Law*.<sup>278</sup> Kenya should provide for circumstances under which a child may be apprehended without a warrant and the period within which the child may be brought before the court. Kenya must learn from the South African Children's Act and provide for the removal of a child without a warrant only in emergency situations. Like South Africa, Kenya must also incorporate a provision for judicial review of cases concerning the removal of children from family life.<sup>279</sup>

The Children's Act (Kenya) allows a child who is in need of care and protection to take refuge in a place of safety until he or she appears before the court.<sup>280</sup> Furthermore, any authorised officer may take any child who is in need of care and protection to a place of safety or may keep any child who has taken refuge in a place of safety until the child is brought before the

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<sup>277</sup> S 120(4).

<sup>278</sup> Par 4.

<sup>279</sup> See the proposed provision in section 5 6.

<sup>280</sup> S 120(2).

court.<sup>281</sup> The challenges of easily allowing children to take refuge in a place of safety are enormous compared with providing security to enable them to remain in their families. For instance, a new care placement may, amongst others, stifle family ties.<sup>282</sup> The new arrangement may also interrupt a learner's studies and study pattern when the learner is introduced to a new residence, school arrangement, study routine and friends.<sup>283</sup>

The Children's Act (Kenya) allows that where an application is made in court for a child who is in need of care and protection and the child is not in a place of safety, the court may issue summons requiring the child to be brought before the court. This opportunity allows the court to make an interim order for the temporary accommodation of the child in a place of safety or for his or her temporary committal to the care of a fit person.<sup>284</sup> Where an authorised officer has taken a child to a place of safety without reference to a court order, the parent or guardian or any person who has parental responsibility for the child, may apply to the court for the release of the child from a place of safety.<sup>285</sup> There is no provision for parents or any person to apply to court for the release of a child from a place of safety in the South African Children's Act. Thus, South Africa must learn from Kenya in this regard.

On the other hand, Kenya and South Africa must learn from other jurisdictions with regard to the involvement of parents in the investigation process and the need for parents to compile

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<sup>281</sup> S 120(3).

<sup>282</sup> See the discussion in section 2 2 2 2 1 and 2 2 2 2 3.

<sup>283</sup> See the discussion in section 6 2.

<sup>284</sup> S 120(5) of the Children's Act (Kenya).

<sup>285</sup> S 120(7) of the Children's Act (Kenya).

their own information when the social worker conducts an investigation into the circumstances of the child.<sup>286</sup> I am of the view that policy drafters must simplify the assessment procedures to make the professional tasks undertaken by social workers who remove children clearer and more realistic; particularly for parents and children who are participating in the process of removing the child from the family.<sup>287</sup>

According to the Children's Act (Kenya), where a child is taken to a place of safety, the person who took the child may bring such child before the court by sending a notice to the court specifying the grounds on which the child is to be brought before the court and shall send particulars of the child to the parent or guardian or such other person who has parental responsibility over the child requiring them to attend at the court where the child is to appear.<sup>288</sup> The Director of Welfare, who receives a notice regarding the appearance of the child before the court, shall conduct investigations and provide information regarding the home, age, health, character and general antecedents of the child or any information that may be necessary to assist the court.<sup>289</sup>

The Children's Act (Kenya) also allows an appointed local authority or a charitable children's institution that believes that a child is in need of care and protection to take the child into care

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<sup>286</sup> See the discussion later in this section.

<sup>287</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14.

<sup>288</sup> S 120(9) of the Children's Act (Kenya)..

<sup>289</sup> S 120(11) of the Children's Act (Kenya).

without bringing him or her to court immediately.<sup>290</sup> The local authority or the children's institution shall: notify the Director of Welfare within seven days of receipt of the child into care;<sup>291</sup> bring the child to court for appearance within three months;<sup>292</sup> submit a monthly report regarding children in care;<sup>293</sup> and investigate all cases of children in need of care in the institution.<sup>294</sup> The fact that the Children's Act (Kenya) provides that the child must be brought to court for appearance within three months implies that Kenya does not show any urgency in dealing with situations of children in need of care. It would have been appropriate if the child is brought to court immediately; particularly in emergency removals.

The authorised officer may take the child who appears to be in need of medical attention to a registered health institution for medical treatment, care and hospital accommodation.<sup>295</sup> The health institution that accommodates the child shall notify the parent, guardian or any person who has parental responsibility for the child.<sup>296</sup> If it appears to a medical practitioner that an offence has been committed against the child, the medical practitioner shall record and preserve any information with regard to the condition of the child.<sup>297</sup>

The South African Children's Act does not contain this provision. Instead, it provides for a

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<sup>290</sup> S 120(12).

<sup>291</sup> S 120(12)(a) of the Children's Act (Kenya).

<sup>292</sup> S 120(12)(b) of the Children's Act (Kenya).

<sup>293</sup> S 120(12)(c) of the Children's Act (Kenya).

<sup>294</sup> S 120(12)(d) of the Children's Act (Kenya).

<sup>295</sup> S 121(1).

<sup>296</sup> S 121(2).

<sup>297</sup> S 121(3).

report from the medical expert without mentioning the fact that the child must undergo medical examination.<sup>298</sup> South Africa must learn from Kenya and provide for a medical assessment or examination that must be carried out on a child for purposes of assessing the status of health and well-being of the child before placing the child in care.<sup>299</sup> Thus, medical assessment must not be carried out for purposes of assessing situations of abuse only, neither must it be used to motivate the decision to remove the child from family life. South Africa must learn from Kenya and incorporate a provision for the child to be examined by an experienced medical practitioner. This provision will evade situations of poor or wrong medical diagnosis which may result into parents losing their children to a permanent non-reversible adoption placement.<sup>300</sup>

I am of the view that Kenya must, apart from hearing the views of the child, use the best interests of the child to determine whether a child must or must not undergo medical assessment or examination. I propose further that both Kenya and South Africa enact

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<sup>298</sup> S 62(1) of the Children's Act.

<sup>299</sup> In other jurisdictions, such as, Uganda, the information that is required for purposes of proceedings it is not only the status of health of the child. S 37 of Children's Statute 6 of 1996 (Uganda) allows that a child who is removed from family life, be removed with any other relevant material necessary for the proceedings regarding the removal. The Uganda Children's Act gives police and social workers who remove a child from family life, the power to remove any documents that may be needed for the protection of the child during proceedings in terms of s 37(1).

<sup>300</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14. See the discussion later in this study regarding the removal of children from family life in the United Kingdom.

provisions in their child legislation for the right of the medical practitioner to keep medical information confidential and state the circumstances in which such information may be disclosed.<sup>301</sup>

Another way to curb the situation where social workers may misuse their powers by removing children from family life without due course, would be by involving parents in the preparation of the child for removal. I am of the view that South Africa must refer to a guide written by the Colorado Department of Education<sup>302</sup> which clearly spells out that connections between parents and state officials, including constant communication, would ensure that parents are fully involved in the matters concerning their children. I opine that by inferring from Colorado we can incorporate provisions in the Children's Act which may give parents an opportunity to be directly involved during the social worker's initial involvement with the family, and during the investigations that are conducted by the social worker. The involvement by parents would also ensure that the parent keep constant contact with the social worker who is involved in the case.<sup>303</sup>

Parents must also be given an opportunity to challenge the information that is incorporated in the report by the designated social workers. It will avoid situations where we have information that is damaging against parents, and also enable judges to rule any allegations

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<sup>301</sup> See the proposed provision in section 5 6.

<sup>302</sup> Colorado Department of Education *Strengthening Parent Involvement: A Toolkit* (2003) 14 and 17.

<sup>303</sup> See the proposed provision in section 5 6.

against parents inadmissible.<sup>304</sup> Furthermore, the Children's Act must provide for the right of parents to apply to the court for the release of their children from care placement.<sup>305</sup>

South Africa must also refer to the professional regulations provided by Vermont<sup>306</sup> and enact a provision for a list of unprofessional conduct by social workers.<sup>307</sup> The list will assist in determining what type of conduct should be regarded as unprofessional conduct. This provision is valuable for the Social Service Professions Bill (once enacted into legislation), and the Children's Act, as there is currently no definition of "unprofessional conduct" by social workers in the legislation.

It is important to point out that there are well developed legal systems that South Africa may learn from. Amongst others, New Zealand child legislation<sup>308</sup> responds well to aspects such as, the child's right to privacy with regards to his or her health status; whether the medical practitioner may be compelled to assess the child; situations when the medical practitioner may be compelled to disclose the medical status of the child; and whether the child must be compelled to undergo medical assessment.

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<sup>304</sup> See the discussion in section 5 4.

<sup>305</sup> See the proposed provision in section 5 6.

<sup>306</sup> S 129a of Title 3, *Professional Regulations for Licenced Clinical Social Worker* 253 of 1985: accessed from [www.leg.state.vt.us/statutes/fullchapter.cfm?Title=26&Chapter=055](http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=26&Chapter=055) on 2012-11-12.

<sup>307</sup> See the proposed provision in section 5 6.

<sup>308</sup> Care of Children Act (New Zealand) and Children, Young Persons and Families Act (New Zealand).



Research has revealed the increase in the United Kingdom of instances where children are removed from family life because of trivial also fabricated evidence by social workers or poor or wrong medical diagnosis.<sup>309</sup> These include, circumstances in which children may be examined and verified by non-specialist doctors who may not be able to confirm the health or medical condition of the child.<sup>310</sup> In practice, social workers' opinions are captured in the investigation report (which are obviously not expert opinions) and are relied upon by judicial officers.<sup>311</sup> Thus, the information by social workers become easier ways in which a family can be torn apart rather than ways to put proper support networks in place to assist the parents to care for their children.<sup>312</sup> I am of the opinion that a medical examination must be

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<sup>309</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14.

<sup>310</sup> Weetam *Child Protection Services—Hold them Accountable for their Mistakes* (2012): accessed from [www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo](http://www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo) 2012-09-14. For instance in the United Kingdom, the Child Protection Services required Mrs A to subject her child to medical examination after her eldest autistic child was reported by the school to have a 4mm bruise on his ear to the social services disability team. The doctors who examined the child could not confirm the injuries whether they were accidental or non-accidental. Mrs A later took the child to a consultant paediatrician who specialised in children with learning difficulties. The doctor diagnosed that the child and his brother had autism and that the injury of the child are non-accidental and that it was hard to attain a bruise on that part of the ear.

<sup>311</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14.

<sup>312</sup> Weetam *Child Protection Services—Hold them Accountable for their Mistakes* (2012): accessed from [www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo](http://www.voiceinthecrowd.org/2012/06/19/child-protection-protective-services-hold-them-accountable-fo) 2012-09-14.

performed by a specialist doctor to avoid cases where parents and care-givers are prosecuted for a false cause of action. This will also avoid instances where the opinions and judgment of social workers and general medical practitioners are allowed free reign. Also, before a child can consent to medical assessment or examination, even in circumstances where the child is assisted by a parent, he or she must be able to give *informed consent* to undergo medical assessment or examination.

The case of *The Proceedings Commissioner Fiji Human Rights Commission v State*,<sup>313</sup> concerns the powers which police have in investigating and detecting crime, including subjecting the complainant to medical examination.<sup>314</sup> The complainant knew why she was being examined. However, her consent, which was given to the police, was viewed in the context of police detention given the fact that there was a police presence in the background. The concern in this case was not so much about informing the complainant to undergo medical examination, but the nature of consent that is obtained to undergo medical examination. The principle of *informed consent*<sup>315</sup> was applicable in the case of *Chester v*

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<sup>313</sup> 24 Nov 2006 (Unreported). The complainant alleges that on the 11 July 1999 she found a new born baby in a toilet cubicle. The police were called. A few days later, she was taken to Central Police Station and escorted to the hospital where she was made to undergo medical examination to find if she had given birth recently. The complainant was made to make submissions together with relevant authorities: accessed from [www.cla.asn.au/Article/0903CivilLibertiesFiji.pdf?phpMyAdmin](http://www.cla.asn.au/Article/0903CivilLibertiesFiji.pdf?phpMyAdmin) on 2012-10-04.

<sup>314</sup> 10. In the case of *Brooks v Metropolitan Police Commissioner* (2005) 2 ALL ER 489, the House of Lords found that the powers of the police in carrying out their duties are not limitless. There are parameters within which the powers are to be exercised in carrying out their duties and such powers must be balanced with the right to privacy.

<sup>315</sup> Own emphasis.

*Afshar*,<sup>316</sup> wherein Lord Steyn decided along the line that anything that is done to the body of a person without his or her *informed consent* is unlawful.<sup>317</sup>

In *The Proceedings Commissioner Fiji Human Rights Commission*, the court argued on, amongst others, the basis of section 25(2) of the Constitution of Fiji that *informed consent* means consent obtained after the person has been told what the risks of medical examination are, even though they have minimal risks or side effects.<sup>318</sup> Consent must be willingly and voluntarily made. The court found that there was a breach of the plaintiff's constitutional right to be treated with dignity, along with her right to be medically examined without *informed consent*.<sup>319</sup> The complainant was accordingly awarded compensation.

Although informed consent may be required from the child who is undergoing medical examination, the consent of the parent is also respected in certain cases. I am of the view that the *Northwestern Health Board v HW and CW*,<sup>320</sup> took a different turn from the decision

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<sup>316</sup> (2004) 4 ALL ER 587.

<sup>317</sup> 593.

<sup>318</sup> *Rogers v Whitaker* (1992) 175 CLR 479. In this case, the High Court in Australia affirmed the fact that the doctor has the duty to warn a patient of any material risk involved in a proposed treatment. A risk is considered material if a person who is in similar circumstances as the doctor can attach significance to the risk.

<sup>319</sup> *Informed consent* used to be an ethical obligation. It is now made a legal requirement in, amongst other countries, New Zealand, see ss 178 and 333 of Children, Young Persons and Families Act. See also the proposed provisions to the South African Children's Act in section 5 6.

<sup>320</sup> (2001) 3 IR 622.

of *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>321</sup> The Supreme Court in *Northwestern Health Board* upheld a High Court<sup>322</sup> decision not to allow the Health Board to carry out a medical test on an infant boy in opposition of the parent's wishes. This position was taken by the court despite the fact that the Health Board advised that the child undergo such tests.

In *Gillick v West Norfolk and Wisbech Area Health Authority*, the Department of Health and Security in England published a circular to reassure doctors that they would not be acting unlawfully in prescribing contraceptives to girls under 16 years of age. This position was supported under the guise that the doctors were acting in good faith to protect girls against the harmful effects of sexual intercourse.

When Mrs Gillick sought an assurance from her local health authority that her daughter would not be given contraception without her consent, she was refused. Mrs Gillick challenged the legality of the guidance. The case went to the House of Lords for a final decision where it was decided that the "best interests of the child" had overridden parental rights. The court established that the parents' right to consent on behalf of their children

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<sup>321</sup> (1985) 3 ALL ER 402 (HL).

<sup>322</sup> The High Court set out that, there is no doubt that medical opinion would emphasise that it is in the child's best interests to have him do the tests. The court considered the views of the parents that they did not want their child to have the discomfort of a pinprick in his heel. The court concluded that is the state is entitled to intervene in every case where a professional opinion differed from that of a parent, where the opinion of the parent is considered wrong, such would in a way mean that the state always knows best.

ends when the child is fully able to comprehend the proposed treatment.<sup>323</sup> The Gillick judgment is dangerous in that it portrays a message which says that parental responsibilities and rights concerning the medical status of their children cease when children are able to take their own decisions.

With regards to situations wherein medical practitioners would compel patients to undergo treatment, I refer to, amongst others, the judgment of *Fitzpatrick & Anor v K*.<sup>324</sup> I argue that although the judgement concerns an incident wherein an adult was compelled by court order to undergo medical treatment, similar facts may apply in cases relating to children. In the case of children, the court is likely to look at the “best interests of the child” standard in ascertaining whether the child must be compelled to undergo medical examination. I am of the view that South Africa must refer to case law, legislation and experience from the

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<sup>323</sup> The court also argued that in some cases, a minor can consent to treatment if he or she can understand the treatment. This is referred to as “Gillick competency”. A child who is “Gillick competent” is able to prevent parents viewing their medical records.

<sup>324</sup> (2008) IEHC 104, the case concerned Ms K, a young woman who recently arrived in Ireland from the Democratic Republic of Congo. Ms K suffered postpartum haemorrhage shortly after giving birth in the Combe Women’s Hospital. When the hospital had to prepare to give her an emergency blood transfusion, she told them via a friend who was acting as an interpreter that she was a Jehovah’s Witness and did not want to be transfused. Due to communication difficulties, her exhausted state, her care team had doubts about the validity of her refusal to consent to the blood transfusion. The hospital applied for an emergency court order allowing them to transfuse the patient despite her refusal. The court granted the order and Ms K survived. In her claim, Ms K alleged, amongst others, that by overriding her refusal to consent to the blood transfusion, the hospital had committed an assault. The judge found in favour of the hospital.

jurisdictions discussed above and incorporate provisions in the Children’s Act to fill gaps.<sup>325</sup>

Research conducted in Scotland regarding mediation revealed the significance of mediators receiving training on mediation skills and aspects of confidentiality.<sup>326</sup> Arguments expressed against keeping information that relates to a child in mediation confidential are, amongst others, that withholding information does not effectively protect the child, and also that the protection of the child depends on the willingness of the social practitioner and anyone who is involved in the case of the child to share and exchange relevant information.<sup>327</sup>

I am of the view that the sharing of information often overcomes the reluctance to take action. On the other hand, I agree that the principle of confidentiality must be adhered to with caution. My argument is that the principle of confidentiality does not always promote relations between the mediation team, and also that it limits the success of the service. I am also of the view that there is a need to keep certain information confidential if it is in “the best interests of the child”. This contention must be clearly articulated in legislation. In this case, South Africa must learn from Scotland and provide a clause in the Children’s Act for the terms and conditions regarding information sharing between mediators.<sup>328</sup>

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<sup>325</sup> See the discussion in sections 5 2 1 and 5 6.

<sup>326</sup> Dore *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 13 and 26.

<sup>327</sup> Office of the Minister for Children and Youth Affairs Report *Children First: National Guidelines for the Protection of Welfare of the Child* (2009) 21.

<sup>328</sup> See the discussion in section 5 6.

Another provision that must be incorporated in the Children's Act relates to mediation skills that a mediation facilitator must have. The skills include understanding the important dynamics of conflict,<sup>329</sup> to be impartial, to have proper listening skills, and some negotiation and analytical skills. Furthermore, a mediator in Scotland must be registered with the Scottish Mediation Register which is administered by the Scottish Mediation Network.<sup>330</sup> The professional body of mediators must adhere to Practice Standards which also set out standards for training (including family mediation for mediators working with young children), experience and ongoing practice.<sup>331</sup> I opine that a mediator in care proceedings must be drawn from, amongst others, legal practitioners; that is, either advocates or attorneys and psychologists, as not any person can mediate. Otherwise, children in need of care and protection, who are already vulnerable, may be further damaged by poor mediation being delivered by inexperienced lawyers.

Another concern that needs to be addressed is when a child can be directly involved in mediation proceedings. This question also applies for court proceedings.<sup>332</sup> If the child is involved, how must he or she be assisted to enable him or her to participate, and to share his

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<sup>329</sup> Dore *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 12-13.

<sup>330</sup> College of Mediators in Scotland *Code of Practice for Mediators* (2008) section 4 7.

<sup>331</sup> Dore *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 13.

<sup>332</sup> See the discussion in section 5 5 regarding the participation of the child in court proceedings.

or her views with confidence?<sup>333</sup> I am of the view that this depends on whether the proceedings have reached the stage where it is crucial to hear the views of the child. Also, that the views of the child must be solicited if such would be in the best interests of the child.<sup>334</sup>

Dore<sup>335</sup> is of the view that this type of decision would depend on the willing participation and co-operation of the parties. I recommend that South Africa establish a provision that recommends mediation as a priority in care proceedings concerning the child.<sup>336</sup> My recommendation is based on the argument that mediation has often proven to result in quality changes in the relationship of the parties involved, resolves conflict, and improves communication and support.<sup>337</sup> Thus, my aim is to have care matters resolved in mediation, with the result of returning the child back to his or her family rather than placement in alternative care.

## **5.5 The decision-making process resulting in the removal of the child - the right of parent and child to be involved in the**

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<sup>333</sup> See the discussion in section 5 5 2 regarding the different level at which a child may participate. See also the discussion in section 5 6 for the proposed regulations on the different levels at which a child may participate and be assisted.

<sup>334</sup> See the discussion in section 5 2 on the “best interests of the child”.

<sup>335</sup> *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 16.

<sup>336</sup> See the proposed provision in section 5 6.

<sup>337</sup> *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 23.



## decision-making process

The right to participate in the decision-making process concerning the removal of child applies to both the child and the parent. I have discussed the involvement of parents in matters concerning their children in the previous sections.<sup>338</sup> Thus, in this section, I will focus on the right of the child to participate in the decision-making process concerning his or her removal; the appointment of a *curator ad litem* and legal representative for the child; the right of the child to participate directly in matters affecting him or her including the type of assistance which may be provided to enable the child to express his or her views; and provision for legal assistance for the child at the expense of the state.

The Children's Act allows "any person" (including the parent of the child), who may be affected by the information contained in the report of the social worker, to participate in the proceedings by tendering evidence under oath regarding the information that is disputed in the report.<sup>339</sup> The presiding officer is required to give any person whose rights may be prejudiced by the information in the report an opportunity to "question or cross-examine" the social worker who compiled the report.<sup>340</sup> Where the social worker gives oral evidence, the prejudiced person will also present information before the court if the point at issue is

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<sup>338</sup> See the discussion in section 5 4.

<sup>339</sup> *Ibid.* See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 171.

<sup>340</sup> S 63(3). The report compiled by the social worker in terms of s 155(2) of the Children's Act.

important for the resolution of the case.<sup>341</sup>

The participation of both the child and the parent in the decision-making proceedings, including cross-examination, may assist the children's court to establish the truth regarding the child in need of care.<sup>342</sup> In establishing the truth, the court has to decide on, for example, whether the parent has sexually abused the child or if the parent denies committing such abuse. It must be acknowledged that cross-examination may be ineffective if the parent does not have access to information concerning the removal of the child.<sup>343</sup> Also, if the parent is given an opportunity to express his or her views without access to information; such may make the proceedings disproportionately unfair and are likely to generate unnecessary hostility on the part of a parent who is under cross-examination.<sup>344</sup>

I propose that parents be given an opportunity to share their views when the social worker investigates the circumstances of the child and in court proceedings.<sup>345</sup> It must also be acknowledged that parents must be assisted in proceedings affecting their children. This includes enabling parents to receive legal representation, where necessary, by state funded Legal Aid.<sup>346</sup> Court hearings can be intimidating even for experienced social workers, thus

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<sup>341</sup> S 155(9); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 171.

<sup>342</sup> Ss 60(1)(b), 60(1)(c) and 63(3)(b)(i); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 167.

<sup>343</sup> See the discussion in section 7 2 1.

<sup>344</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 166.

<sup>345</sup> See the discussion in sections 5 2 2, 5 4, 5 6.

<sup>346</sup> However, the parent must meet the main factor in the "means test" that is used by Legal Aid to qualify parents for legal assistance. Thus, the Legal Aid looks at whether the income of the

parents would need guidance about court processes and what to expect in court. The legal representative must, amongst others, advise the parent to attend every court hearing about the child,<sup>347</sup> and encourage the parent to be proactive by requesting visitation rights even before the hearing.

In terms of South African law, the right of the child to be involved in the decision-making process is best understood through the practice of assigning a legal representative to him or her. However, curators are more often appointed for children in divorce proceedings, rather than separate legal representatives.<sup>348</sup> The Constitutional Court developed a trend of appointing a curator *ad litem* and not a “legal practitioner” for children involved in cases before the court to ensure that the rights of children are protected as the child is likely to be affected by the decision of the court.<sup>349</sup> The parents of the child are the ones who normally

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person who seeks legal assistance will not afford the costs of her own legal representation: accessed from [www.legalaid.co.za](http://www.legalaid.co.za) on 2012-10-06.

<sup>347</sup> Court hearing may be an opportunity for the parent to show the judicial officer that he or she cares and that he or she is doing everything to parent his or her child.

<sup>348</sup> Du Toit “Legal Representation of Children” in Boezaart (ed.) *Child Law in South Africa* (2009) 93; Kassan “Children’s Right to Legal Representation in Divorce Proceedings” in Sloth-Nielsen & Du Toit (eds.) *Trials and Tribulations, Trends and Triumphs: Development in International, African and South African Child and Family Law* (2008) 227.

<sup>349</sup> In *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par 3, the Acting Judge stated that where there is a risk of substantial injustice, the court is obliged to appoint a curator *ad litem* for the child and that such duty is imposed by section 28(1)(h) of the Constitution. The right of children to participate in proceedings that affect them was recognised in the Constitutional Court judgment of *Christian Education South Africa v Minister*

decide whether a curator *ad litem* should be appointed. A curator *ad litem* fulfils a critical role in that he or she ensures that the voice of the child is heard. A curator *ad litem* is appointed in the following circumstances: (1) if the minor does not have a parent or guardian;<sup>350</sup> (2) if the parent or guardian cannot be found;<sup>351</sup> (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,<sup>352</sup> or (4) if

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*of Education* 2000 (4) SA 757 (CC), where the court, amongst other arguments, stated that although the state and parents of the children were in a position to speak on behalf of the children, neither of them was able to speak in their name. See Du Toit in Boezaart (ed.) *Child Law in South Africa* 96. The court stated that a curator could have made sensitive enquiries to enable the voice or voices of the children to be heard, see 787. In the case of *Minister for Education v Pillay* 2008 (1) SA 474 (CC); (Du Toit in Boezaart (ed.) *Child Law in South Africa* 97) the court stated that legal matters that involve children have the tendency to exclude children, leaving the matter to adults to argue and decide on their behalf. The court stated that the need for the child's voice to be heard is even more acute when it concerns children of Sunali's age (who was 15 years old when the case was brought to court), who should be taking responsibility for their own action and beliefs, 494 E-G. In the case of *S v M* 2008 (2) SA 232 (CC), the Constitutional Court appointed a curator *ad litem* in dealing with an appeal matter against a sentence of periodical imprisonment of a single mother of three minor children to investigate the circumstances of the children. In all the cases that came before the Constitutional Court, a curator *ad litem* was appointed rather than a "legal representative".

<sup>350</sup> *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T). The court in the case of *Yu Kwam* appointed the father of the minor as a curator *ad litem* to continue with the action on behalf of the child to claim compensation for injuries, which the child sustained in a motor vehicle accident. See also the discussion in Boezaart *Law of Persons* (2010) 89.

<sup>351</sup> *Ex parte Bloy* 1984 (2) SA 410 (D); see the discussion in Boezaart (2010) 89.

<sup>352</sup> *Wolman v Wolman* 1963 (2) SA 452 (A) 459; *B v E* 1992 (3) SA 438 (T); In *Ex parte Oppel* 2002 (5) SA 125 (C) 31D-E, the courts stated that if the guardian of the minor is alive, the guardian *ad litem* will only be appointed in exceptional circumstances and these are: "where

the parent or guardian unreasonably refuses to assist the minor or is not readily available to assist the minor.<sup>353</sup>

Our Constitution recognises the need for a child to have a legal representation in matters affecting him or her.<sup>354</sup> The Constitution does not provide for the right of the child to be involved in all decision-making affecting him or her. Instead, it guarantees the child the right to have a “legal practitioner” assigned to him or her by the state and at the expense of the state in civil matters affecting him or her if substantial injustice would otherwise result if such “legal practitioner” is not assigned.<sup>355</sup> The Constitution uses the term “legal practitioner” rather than “legal representative” as used in the CRC<sup>356</sup> and the ACRWC.<sup>357</sup> The right of the child to have a “legal practitioner” assigned to him or her is restricted to civil proceedings which affect the child and the right is only guaranteed to the child if substantial injustice would result if the “legal practitioner” is not assigned.<sup>358</sup>

Secondly, the Constitution allows anyone to approach a competent court alleging that a right

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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”.

<sup>353</sup> See the discussion in Boezaart (2010) 89.

<sup>354</sup> S 28(1)(h); see also discussion in SALRC *The Review of the Child Care Act* (1998) section 7 2 3.

<sup>355</sup> S 28(1)(h).

<sup>356</sup> Art 12.

<sup>357</sup> Art 4(2). See also the discussion in section 5 5 1.

<sup>358</sup> S 28(1)(h) of the Constitution; Du Toit in Boezaart (ed.) *Child Law in South Africa* 96.

in the Bill of Rights has been infringed or threatened.<sup>359</sup> The following persons may approach a competent court:

- “(a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members”.<sup>360</sup>

Section 38(b) also applies to children. However, it is silent as to who bears the costs for the person “acting on behalf of another person who cannot act in their own name”.

The case of *Soller v G*<sup>361</sup> was the first to interpret section 28(1)(h) of the Constitution.<sup>362</sup> In this case, the court addressed the question of why a child needed “separate legal

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<sup>359</sup> S 38; UNICEF “Convention and Law Reform” in *Reforming Child Law in South Africa: Budgeting and Implementation Planning* (2007) 5.

<sup>360</sup> S 38 of the Constitution.

<sup>361</sup> 2003 (5) SA 430 (W). The case involved the custody of a 15 year-old boy who sought variation of his custody order on the basis that he wanted custody to be granted to his father. The application was initially brought by S (attorney) on behalf of the boy (K). S was struck from the roll. Satchwell J decided that the matter required assignment of an attorney. An extremely well-reputed attorney was assigned in this matter.

<sup>362</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 102.

representation” by stating that: the significance of section 28(1)(h) lies in the recognition, also found in the CRC, that the child’s interests and adult’s interests may not always intersect and that a need exists for “separate legal representation” of the child’s views.<sup>363</sup> The case of *Ex Parte van Niekerk v Van Niekerk*<sup>364</sup> was the first matter in which a “legal representative” was appointed for children as joint parties in a matter between their parents.<sup>365</sup> There was uncertainty as to who should provide the “legal representation” and the court referred the matter to the State Attorney’s Office and ordered that a state attorney be appointed as a “legal representative” for the children.<sup>366</sup> This approach was flawed in that the State Attorney’s Office does not have the capacity to provide “legal representation” in family law matters.<sup>367</sup> Instead, they function to defend actions and applications against any of the branches of government.<sup>368</sup>

It has always been understood that the assignment of a “legal representative” by the state means the provision of a “legal representative” by Legal Aid South Africa.<sup>369</sup> In the case of *Legal Aid Board v R*<sup>370</sup> the court decided that Legal Aid South Africa was the correct

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<sup>363</sup> 434-435 paras 7-8. See also the discussion in sections 5 5 and 5 5 1.

<sup>364</sup> 2005 JOL 14218 (T) par 7.

<sup>365</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 103.

<sup>366</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 104.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> 2009 (2) SA 262 (D): The case concerned a 12 year-old girl who had been the subject of an acrimonious battle between her parents since she was 5 years-old. At a previous hearing the presiding judge directed the Minister for Justice and Constitutional Development to make

institution to be approached for requests for “legal representation”. Section 55 of the Children’s Act also allows for the appointment of “legal representation” for children. This provision is weaker in that it lacks detailed information regarding the circumstances under which “legal representation” should be funded and that the court cannot order that “legal representation” be provided but can only refer the matter to the Legal Aid Board.<sup>371</sup>

In terms of the scope and function of the legal representative, Judge Satchwell in *Soller v G* stated that a “separate legal representative” for the child must have a different role and responsibility.<sup>372</sup> Judge Satchwell clearly differentiates between the roles of the family advocate, curator *ad litem* and a “separate legal representative” for the child.<sup>373</sup> The Judge

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arrangements for legal representative to be appointed for the child. This order was for some reason not carried out. Instead, a legal representative was appointed for her by the Legal Aid Board in Durban.

<sup>371</sup> Gallinetti in Davel & Skelton (eds.) *Commentary on the Children’s Act* 4-21 - 4-22; Du Toit in Boezaart (ed.) *Child Law in South Africa* 94.

<sup>372</sup> Par 25.

<sup>373</sup> Par 22-24. The office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act. The Family Advocate appointed in terms of this Act, acts as an advisor to the court and as a mediator between the family and the court. The Family Advocate does not represent any of the parties and is required to be neutral in order to investigate the dispute and report to the court. During the investigation, the Family Advocate will engage with the children to ascertain their views on their future after the divorce. The Family Advocate will simply record the views of the children in the report and will consider them in order to make a recommendation but will not represent or advocate for the wishes of the children. The role of the Family Advocate is to make a recommendation on the overall best interests of the child, which may in some cases be in conflict with the wishes of the child. See also Kassan in Sloth-Nielsen & Du Toit (eds.) *Trials and Tribulations, Trends and Triumphs: Development in International, African and South African Child and Family Law* 233.



stated that in relation to a separate legal representative for the child, “neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador”.<sup>374</sup> It follows therefore that children who are older will need the assistance of a “separate legal representative” who will act on their instructions and follow these instructions during litigation.<sup>375</sup> What we are able to learn from both the cases of *Soller v G* and *R v H*,<sup>376</sup> is that the courts have the power to appoint “legal representatives” in terms of section 28(1)(h) over and above the common law power to appoint a curator *ad litem*.

The right of children to “legal representation” is also affirmed by the contention of Davel<sup>377</sup> who affirms the view of the SALRC that:

“Without someone to help give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations are allowed to continue, and children are put at risk.”<sup>378</sup>

However, there are gaps in section 28(1)(h) of the Constitution regarding the legal representation for children. Thus, it will be more meaningful if a provision is enacted in the Children’s Act to provide the following detailed information: who may appoint a *legal* representative for a child; what type of legal representative may be appointed (since not

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<sup>374</sup> Par 26.

<sup>375</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 109.

<sup>376</sup> 2005 (6) SA 535 (C).

<sup>377</sup> Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 28.

<sup>378</sup> SALRC *The Review of the Child Care Act* (1998) par 13 2 1.

every legal practitioner has expertise in matters relating to children)<sup>379</sup> what views the legal representative is required to represent on behalf of the child; and who bears legal costs for legal representation.<sup>380</sup>

The growing need in South Africa to recognise the involvement of children in disputes that affect them caused the legislature to recognise the fact a child has the necessary intellectual and emotional maturity to express his or her preferences; i.e. a genuine and accurate reflection of his or her feelings towards his parents.<sup>381</sup> The right of the child to be involved in decision-making process is articulated in section 10 of the Children's Act:

“Every child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”<sup>382</sup>

The right of the child to participate in matters that affect him or her<sup>383</sup> requires that weight

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<sup>379</sup> The court in *Soller v G* held that although the attorney assigned to the case was unsuitable to represent the child, the matter required the assignment of a “legal representative” in terms of section 28(1)(h), see par 1-17.

<sup>380</sup> See the proposed provisions in section 5 6.

<sup>381</sup> *French v French* 1971 (4) SA 298 (W).

<sup>382</sup> S 10 of the Children's Act.

<sup>383</sup> Good examples of situations where the views of the child are needed are in relation to amongst others, the right of the parent and the child to contact each other after the removal of the child from family life, see s 31(1); deciding on an extension of the period of a court order, see s 159(2)(a)-(b); and the development of a parenting plan.

should be given to the preference expressed by the child.<sup>384</sup> In *Lubbe v Du Plessis*,<sup>385</sup> Judge Van Heerden stated that if the court is convinced that a child has the required maturity to express his or her preference, then the court is obliged to give serious consideration to the child's views and wishes.<sup>386</sup> However, the Children's Act establishes cautionary measures by empowering magistrates to intervene in situations where cross-examination or questioning of the child in such proceedings would not be in the best interests of the child.<sup>387</sup> Thus cautionary measures are necessary for children who participate directly, who, amongst others, are likely to be cross-examined by a lawyer of an abusive parent. Such a child may be affected, particularly if the child has already been damaged psychologically by the abuse.

I am of the view that the legal representative must be appointed even in circumstances

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<sup>384</sup> *Manning v Manning* 1975 (4) SA 659 (T); *McCall v McCall* 207H-I. In the case of *F v F* 2006 (3) SA 42 (SCA) par 10, the court rejected the mother's application to relocate with her daughter despite finding that the decision to leave with the child was in good faith.<sup>384</sup> The court found that the practicalities of the decision of the mother to relocate had been ill-researched and were outweighed by the need of the child not to be separated from both parents. The court referred to section 10 of the Children's Act that states that children have the right to participate in decisions that affect them. The court in this case considered the wishes of the child when it had to evaluate, weigh, and to balance innumerable competing circumstances. See also Skelton in Boezaart (ed.) *Child Law in South Africa* 86-90.

<sup>385</sup> 2001 (4) SA 57 (C).

<sup>386</sup> 73E-74B. In the case of *J v J* 2008 (6) SA 30 (C), the presiding officer attached significant weight to the wishes of the child with respect to the child's education. The child was interviewed by a psychologist and he complained that he was not a "lab rat" to be subjected to continuous testing, see par 40. The child also had to attend endless litigation. The judge considered the wishes of the child and ordered that the child be allowed to settle down without further litigation, assessment or investigation, see the discussion in par 43.

<sup>387</sup> S 61(1)(c); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 166.

where the child wishes to express his or her own views. I agree with Haarsma<sup>388</sup> that a professional, who is appointed for the child, has the duty to make the child aware of his or her rights and to indicate what these rights mean in practical terms. Thus, the duty of the legal representative must, in circumstances where he or she is not representing the child, guide the child about his or her rights, the rights of others, and their limitations.<sup>389</sup> I am of the view that children may not be able to participate in matters affecting them if they are not aware of, or informed about, their rights.

I agree with Bosman-Sadie and Corrie<sup>390</sup> that section 10 of the Children's Act has neither age limits nor boundaries set for the participation of the child. Instead, it refers to "any matter". This is, amongst others, what makes section 10 of the Children's Act different from section 28(1)(h) of the Constitution, in that the Constitution allows the child to have legal representation only in "civil proceedings". I opine that the scope of section 10 is wider than the Constitution.

The court may entertain a course of action by "any" child or a legal representative of the child relying on the provision that: "[e]very child has the right to bring, and be assisted in bringing a matter to the court, provided that matter falls within the jurisdiction of that court".<sup>391</sup> The intention of the legislature with section 14 was to ensure that every child could access the

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<sup>388</sup> Haarsma in Verhellen (ed.) "Children's Participation in Residential Care" *Monitoring Children's Rights* (1996) 283.

<sup>389</sup> See the proposed provision in section 5 6.

<sup>390</sup> (2010) 25.

<sup>391</sup> S 14 of the Children's Act.

courts. According to Boezaart,<sup>392</sup> we cannot be certain that the intention of the legislature included supplementing the child's capacity to initiate or defend an action. She argues that section 14 of the Children's Act<sup>393</sup> has a connection with section 28(1)(h) of the Constitution.<sup>394</sup>

Davel<sup>395</sup> suggests that:

"The wording in 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."

I submit that Davel's suggestion must be considered. I support Davel's statement that it would "be proper in making the decision to find that in the absence of legal representation, substantial injustice would probably result" when assigning a legal representative for the child. I further submit that a legal practitioner must be assigned to the child by the state at the state's expense, in all matters affecting the child. I also argue with regard to section 14 of the Children's Act that the system of assigning "legal representation" for children cannot

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<sup>392</sup> "Child Law, the Child and South Africa Private Law" in *Child Law in South Africa* (2009) 22.

<sup>393</sup> The clause provides that: "Every child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court."

<sup>394</sup> *Ibid.*

<sup>395</sup> In Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 27.

depend solely on the powers of the court to make such appointments.<sup>396</sup>

The Children's Act has been generous in ensuring that the right of the child to participate in matters that concerns him or her is protected.<sup>397</sup> However, a pilot study which evaluated the quality of services which a child witness receives when he or she works with interpreters in court,<sup>398</sup> revealed the vulnerability of children who appear in court and that the consequences may be more serious than is the case of older persons. In comparing children with older persons, children are found to communicate less and are also not able to assert themselves.<sup>399</sup> Persons who had a minimum experience of three years working in court, observing and listening to children in court, were interviewed.<sup>400</sup> The study revealed that there was inaccuracy of translation; problems in relating appropriately to children; providing effective services for children involved in sexual abuse cases; and serving the needs of bilingual or multilingual children.<sup>401</sup> Inaccurate and incomplete translations were seen as a serious problem. Matthias and Zaal<sup>402</sup> acknowledged the recommendation made by one Zulu-speaking attorney that there is a need to encourage more accurate interpretation of

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<sup>396</sup> See the proposed provision in section 5 6.

<sup>397</sup> S 18(3)(c)(ii), a child has the right to participate in an adoption placement that concerns him or her.

<sup>398</sup> Matthias & Zaal "Hearing only a Faint Echo? Interpreters and Children in Court" (2002) *SAJHR* 350.

<sup>399</sup> Matthias & Zaal (2002) *SAJHR* 352; an interview with Tshikalange, a social worker for the Johannesburg Child Welfare Society, held on the 2011-03-31. See also the discussion section 5 1 3.

<sup>400</sup> Matthias & Zaal (2002) *SAJHR* 353.

<sup>401</sup> Matthias & Zaal (2002) *SAJHR* 354.

<sup>402</sup> Matthias & Zaal (2002) *SAJHR* 355.

children's evidence in the courts. The attorney cited one of his cases in which he had a child witness who said in Zulu: "he hit me, kicked me with his boot and then raped me". The interpreter simply translated this as "he raped me". Children are also described as vulnerable to pressure from the interpreters.<sup>403</sup> Chirwa<sup>404</sup> maintains that children who have had a traditional African upbringing are at a particular disadvantage because they are unlikely to be comfortable with asserting their views in formal proceedings involving adults.

Interpreters should be supportive and patient when working with children. Interpreters are also known to have behaved rudely and in an intimidating manner when they relate to children.<sup>405</sup> One respondent said that he had observed such intimidation in a criminal court where, when the accused attempted to answer, the interpreter would, with great mimicry, hold his hand to his ear, and then smile broadly; amused by the stupidity of the answer and translate it in a belittling fashion. On other occasion, the interpreter would burst into laughter at the answers of the accused. Both the prosecutor and the regional magistrate enjoyed the interpreter's antics and seemed to accept his assessment of the credibility of the witness.<sup>406</sup> What we are able to learn from this research is that children are likely to be intimidated in formal proceedings. When children are vulnerable, they communicate less and also lose confidence in themselves. It is also critical for the translator to be accurate in translation, relate appropriately to children including, using a language that is best understood by a child.

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<sup>403</sup> Matthias & Zaal (2002) *SAJHR* 358.

<sup>404</sup> "Participation Rights: Challenging African Legislation" (2002) *Children First* 32.

<sup>405</sup> Matthias & Zaal (2002) *SAJHR* 358.

<sup>406</sup> Matthias & Zaal (2002) *SAJHR* 359.

I am of the view that less formal court proceedings, such as mediation,<sup>407</sup> may minimise intimidation of children in proceedings. I propose that South Africa learn from foreign jurisdictions, such as “Roger Hart’s Participation Ladder”,<sup>408</sup> which is used in situations where a child participates. South Africa must promulgate regulations to the Children’s Act using the “Roger Hart’s Participation Ladder” as a guide to how the child must be assisted when he or she participate directly in matters affecting him or her. “Roger Hart’s Participation Ladder” identifies the different stages at which a child may participate and encourages co-operation of participants involved in the proceedings.<sup>409</sup>

*5.5.1 The decision-making process resulting in the removal of the child - the right of parent and child to be involved in the decision-making process in terms of international law*

The right of the child to participate in matters that affects him or her is spelled out in Article 12(1) of the CRC, which obliges state parties to:

“(1) ... assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child

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<sup>407</sup> S 60(3); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 166. See also the discussion in sections 5 2 3.

<sup>408</sup> Franklin in Verhellen (ed.) *Monitoring Children’s Rights* 324. See the discussion in section 5 5 1.

<sup>409</sup> See also the discussion in sections 5 4 and 5 6.



shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

The CRC requires that the views of the child be heard and taken into account in arriving at a decision on any matter that concerns the child.<sup>410</sup> Furthermore, the CRC is specific that the views of the child be heard in judicial and administrative proceedings affecting the child.<sup>411</sup> The views that are referred to in the CRC are of the child who is capable of expressing an opinion. These views must, according to the CRC, be given due weight consistent with the age and maturity of the child.<sup>412</sup>

The right of the parent to participate in decision-making concerning the child is coherently expressed in situations where the child is separated from the parent against the child’s will.<sup>413</sup> The CRC provides that in any proceedings which concern the separation of the child from his or her parents against their will, “all interested parties shall be given an opportunity to participate in the proceedings and make their views known”.<sup>414</sup> This provision protects both the rights of the parent and the child to make their views known. However, the right of the child to participate is made subject to the level of maturity and age of the child.<sup>415</sup> I agree

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<sup>410</sup> Art 12(1).

<sup>411</sup> Art 12(2).

<sup>412</sup> Art 12(1).

<sup>413</sup> Art 9(1) of the CRC. See the discussion in sections 5 3 and 5 5 1.

<sup>414</sup> Art 9(2).

<sup>415</sup> Art 12(2) of the CRC.

with Davel<sup>416</sup> that the interests of the parent and the child may not always be the same, thus it is important for the child to have separate representation so that his or her views may be expressed. Davel<sup>417</sup> further argues that children should be allowed to “express their views freely” in matters affecting them; that is, by means of participation<sup>418</sup> and representation.<sup>419</sup> This clarity was not created in the Children’s Act. It is therefore important for the legislature to amend the Children’s Act and align it with the CRC.

Article 12 is seen as a principle of fundamental importance relevant for the implementation of the CRC and the interpretation of other rights in the CRC.<sup>420</sup> The child is afforded the right to express his or her views freely in all matters that affect him or her, and such views are to be given weight in accordance with the age and maturity of the child.<sup>421</sup> The objective of this right is to have the views of the child heard and taken seriously in all proceedings.<sup>422</sup> Article 12(2) requires that weight be given to views of the child in any judicial or administrative

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<sup>416</sup> Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 16.

<sup>417</sup> In Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 20; Art 12 of the CRC. See also the discussion in section 5 2.

<sup>418</sup> Participation allows the child to be heard directly without a mediator or representative. In participating, a child may make his or her views known directly and become a party to the legal action that affects him or her. This type of participation enables the child to interact with the proceedings.

<sup>419</sup> Representation allows the child to have an attorney or an adult representative in legal proceedings: Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 18.

<sup>420</sup> Hodgkin and Newell (2007) 149: it is good to provide further guidance on the implementation of the CRC.

<sup>421</sup> Art 12(1); Haarsma in Verhellen (ed.) *Monitoring Children’s Rights* 281.

<sup>422</sup> Haarsma in Verhellen (ed.) *Monitoring Children’s Rights* 281.

proceedings that affect the child. Thus, Article 12(2) covers different court hearings and decision-making forums affecting the child, such as education, health, planning and environment.<sup>423</sup>

Article 12 highlights the child as an active participant in the promotion, protection, and monitoring of his or her rights. Article 12 is not seen as advancing the child's participation, but it is recognised as comprising a cluster of rights, which comprise of Article 12, 13<sup>424</sup> and 14<sup>425</sup> of the CRC. According to Davel,<sup>426</sup> Article 12(1) affords the child an overarching right to participate in matters that affect the child. The right of the child to be involved in matters that affects him or her is provided in the four key principles of the CRC, identified as protection, prevention, provision and participation.<sup>427</sup> The right of the child to have his or her views heard, as stated in the CRC, is termed by Hammerberg<sup>428</sup> as the "participation element".

The Committee on the Rights of the Child produced a General Comment on Article 12 of the CRC to enable state parties to understand the implementation of this principle.<sup>429</sup> According to the Committee on the Rights of the Child, when the right of the child to express his or her

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<sup>423</sup> Hodgkin & Newell (2007) 149.

<sup>424</sup> The child's right to freedom of expression.

<sup>425</sup> The child's right to freedom of thought, conscience and religion.

<sup>426</sup> Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 20.

<sup>427</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 94.

<sup>428</sup> In Eide *et al.* (ed.) *Economic, Social and Cultural Rights Cultural Rights* 358.

<sup>429</sup> *The Right of the Child to be Heard* Committee on the Rights of the Child General Comment No 12 CRC/C/GC/12 20 July 2009. See also Mahery in Boezaart (ed.) *Child Law in South Africa* 321.

opinion and to participate in various activities is recognised according to the evolving capacities of the child, it will be beneficial for the child, the family, the community, the school and the state.<sup>430</sup> Children will be recognised as rights-holders who are not only entitled to receive protection but to participate in all matters affecting them.<sup>431</sup> However, the Committee notes that due to traditional and paternalistic attitudes that exist, children are not encouraged to make their views known; neither are their views heard nor given due weight in decisions affecting them in the family, community, school and in their social life.<sup>432</sup> Traditional practices, such as forced marriages<sup>433</sup> and removal of body parts,<sup>434</sup> are not conducive to the realisation of the general principles in the CRC.

Children are autonomous individuals with fundamental rights, views, and feelings of their own. This means that they should be listened to as they are likely to communicate their emotions in matters concerning them. Qvortrup<sup>435</sup> holds the view that the participation of the child, as provided in the CRC, may be realised in the courtroom, in medical consultation, in schools and other institutions.<sup>436</sup> It is logical to listen to the child in order to know what is in

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<sup>430</sup> Hodgkin & Newell (2007) 149.

<sup>431</sup> Hodgkin & Newell (2007) 150-153.

<sup>432</sup> *Ibid.*

<sup>433</sup> See the discussion in section 3 3 5 1.

<sup>434</sup> See the discussion in section 3 3 5 2.

<sup>435</sup> In Verhellen (ed.) *Monitoring Children's Rights* 37.

<sup>436</sup> The right of the child to participate in decision-making processes that concern the child is also expressed in the Hague Convention on Inter-country Adoptions. Art 4(2) of the Hague Convention states that state parties are encouraged to consider the wishes and opinion of the child when a decision that concerns placing the child on inter-country adoption is to be considered. On the other hand, Art 4(4)(d) of the Hague Convention states that the consent of

his or her best interests.<sup>437</sup> When the views of the child are respected, it means the best interests of the child are respected too. The right of the child to have his or her views heard also includes his or her right to have legal representation by either an adult or a legal practitioner in legal proceedings.<sup>438</sup> In this regard, Article 12(2) of the CRC provides that the child “shall in particular be provided” the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.<sup>439</sup>

Du Toit<sup>440</sup> is of the view that the words “shall in particular be provided” in Article 12(2) indicate the obligation on state parties to give the child an opportunity to participate in proceedings to enable the child to form his or her views should the child want to participate. States need to ensure that child-sensitive procedures are available to children and their representatives. This includes the provision of friendly information, advice, advocacy and access to independent complaints procedures and to the courts with necessary legal and other assistance.<sup>441</sup> The participation of the child in proceedings includes all the rules that allow

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the child to inter-country adoption may be dispensed with in situations where the child cannot form his or her own opinion due to immaturity and age.

<sup>437</sup> Hammerberg in Eide *et al.* (ed.) *Economic, Social and Cultural Rights Cultural Rights* 358.

<sup>438</sup> Art 12(2); Davel in Nagel (ed.) *Gedenkbundel Vir JMT Labuschagne* 18-19; Kassan “The voice of the child in family law proceeding” (2003) *De Jure* 164-167.

<sup>439</sup> Art 12(2); Kilkelly (1999) 120.

<sup>440</sup> In Boezaart (ed.) *Child Law in South Africa* 94-95.

<sup>441</sup> Hodgkin & Newell (2007) 156.

the child to be heard directly without an intermediary.<sup>442</sup> These are rules that allow children to participate in legal proceedings that allow that children to be consulted for an opinion regarding matters affecting them.<sup>443</sup> The Committee also expresses concern about the absence of independent mechanisms to register and address complaints regarding the violation of the rights of children.<sup>444</sup> The Committee recommends that an independent child-friendly mechanism be made accessible to children. Furthermore, the Committee suggests that states should introduce an awareness raising campaign to facilitate the effective use by children of such a mechanism.<sup>445</sup> The Committee is concerned that children are able to lodge complaints only when assisted by their parents or legal guardians. Thus, the Committee suggests that states establish a system, such as Childline South Africa, where complaints relating to sexual exploitation, sexual abuse, neglect, ill-treatment or any form of violence may be lodged to ensure protection and respect for the rights of children.<sup>446</sup>

The right of the child to legal representation affirms the fact that the child may in other circumstances not be in a position to participate in matters that affect him or her. Barn and Franklin<sup>447</sup> argues that to achieve the intentions of the right of the child to have his or her views heard in terms of the CRC, work must be done at numerous levels. Firstly, the child's

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<sup>442</sup> Davel in Nagel (ed.) *Gedenkbundel Vir JMT Labuschagne* 18.

<sup>443</sup> *Ibid.*

<sup>444</sup> Hodgkin & Newell (2007) 158.

<sup>445</sup> *Ibid.*

<sup>446</sup> Hodgkin & Newell (2007) 157-158.

<sup>447</sup> "Article 12 – Issues Developing Children's Rights Participation Rights" in Verhellen (ed.) *Monitoring Children's Rights* (1996) 306.

status must be raised in order to get their opinion listened to.<sup>448</sup> Secondly, legislation must be amended to implement this right in key areas of children's lives.<sup>449</sup> Thirdly, children must receive support to enable them to understand their rights, express their opinion, and use a legal representative.<sup>450</sup> Fourthly, institutions must consider how best to improve children's rights to participate, and change their own practice to enable children to exercise the right to freedom of expression.<sup>451</sup>

The ACRWC requires state parties in all judicial and administrative proceedings affecting a child who is capable of communicating his or her own views, to give the child an opportunity to express his or her views and to be heard either directly or through an impartial representative as a party to the proceedings.<sup>452</sup> Furthermore, the ACRWC requires the relevant authority to take those views into consideration in accordance with the provisions of appropriate law.<sup>453</sup>

The ACRWC directly echoes the language used in the CRC.<sup>454</sup> The ACRWC provides that:

"In all judicial or 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

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448 *Ibid.*

449 *Ibid.*

450 *Ibid.*

451 *Ibid.*

452 Art 4(1) and Art 4(2).

453 *Ibid.*

454 Art 12.

to be heard either directly or through an impartial representative as a party to the proceedings, and the views shall be taken into consideration by the relevant authority in accordance with the provision of appropriate law.”<sup>455</sup>

The ACRWC further provides that:

“Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.”<sup>456</sup>

Thus, the ACRWC obliges state parties to provide the child who is capable of communicating his or her own views, with an opportunity to have those views heard. The ACRWC further provides for different ways in which the child may express his or her views, amongst others, either directly or through an impartial representative as a party to the proceedings. Like the CRC,<sup>457</sup> the ACRWC<sup>458</sup> provides that these views must be taken into account by the relevant authority in accordance with the provisions of appropriate law.

The ACRWC has been described as weaker than the CRC in that it only requires that the child be “capable of communicating his or her views” and does not attach any weight to the views of the child in accordance with the age, maturity and stage of development of the

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<sup>455</sup> Art 4(2).

<sup>456</sup> Art 7.

<sup>457</sup> Art 12(2).

<sup>458</sup> Art 4(2).



child.<sup>459</sup> Davel<sup>460</sup> also finds the right to be heard, as stated in ACRWC, quite restrictive as compared with the right in the CRC. It is important to note that it may be difficult to assess the stage at which the child is capable of communicating his or her views without stating the age, level of maturity and stage of development of the child in determining the capacity of the child. Very little has been said about children's access to court, including their rights to legal representation in court hearings under Article 6(1) of the ECHR.<sup>461</sup> The representation of children in court proceedings was seen as part of the procedural protection of rights covered under Article 8 of the ECHR. However, the ECHR guarantees everyone the right to effective access to a court to have their civil rights, obligations and any charge against them

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<sup>459</sup> Art 4(2) of the ACRWC; Du Toit in Boezaart (ed.) *Child Law in South Africa* 95.

<sup>460</sup> In Nagel (ed.) *Gedenkbundel Vir JMT Labuschagne* 20.

<sup>461</sup> Art 6(1) provides that: "[i]n the determination of civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Furthermore Art 6(3) states that: "Everyone charged with a criminal offence has the following minimum rights:

- (i) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (ii) to have adequate time and facilities for the preparation of his defence;
- (iii) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...
- (iv) to have the free assistance of an interpreter if he cannot understand or speak the language used in court." Kilkelly (1999) 117; Choudhry & Herring (2010) 239.

established.<sup>462</sup> The legal implication of the ECHR is that the state may be required to appoint a legal advisor if circumstances so deserve.<sup>463</sup>

The case of *H and W v United Kingdom*, the court had to decide whether the parents were properly informed about the different processes that lead to the adoption of their children.<sup>464</sup>

The court found that the proceedings, which involved the decision-making process on the removal of children from natural parents in view of adoption, related to a fundamental element of “family life”.<sup>465</sup> In this case, the objective of the court was viewed as a way to establish the right of the parents to be heard regarding important decisions that concern their children.<sup>466</sup>

In situations where parents participate in the decision-making process regarding their children, it is argued that their participation must be of a sufficient degree to ascertain protection of their interests.<sup>467</sup> The rights of other family members to participate in the decision-making process may depend on the nature of the relationship between the family member and the child in care when the participatory approach is being used.<sup>468</sup> However, it is important to acknowledge the fact that, like parents, children have views that need to be

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<sup>462</sup> Art 6; Kil Kelly (1999) 120-121.

<sup>463</sup> Kil Kelly (1999) 121.

<sup>464</sup> Van der Linde in Nagel (ed.) *Gedenkbundel Vir JMT Labuschagne* 104.

<sup>465</sup> (1987) 10 EHRR 112 par 80.

<sup>466</sup> Kil Kelly (1999) 286.

<sup>467</sup> Kil Kelly (1999) 120.

<sup>468</sup> Kil Kelly (1999) 287; Van der Linde in Nagel (ed.) *Gedenkbundel Vir JMT Labuschagne* 105.

heard; particularly if such views affect the decision-making process that involves matters affecting them.<sup>469</sup>

In the case of *T P and K M v United Kingdom*<sup>470</sup> concerning the taking of a 17 year-old girl into care upon suspicion that the girl was being sexually abused by her boyfriend, the court arrived at the conclusion that the refusal by the local authority to disclose to the mother a video of the girl's interview with a psychologist, deprived the mother of adequate involvement in the decision-making process concerning her daughter.<sup>471</sup> It is important to point out that written and video material contains more specific information, compared with what can be communicated. If the mother of the child had access to the video, such may have assisted her in, amongst others, providing the necessary support to the child. Disclosure of information to the mother may have enabled her to understand most, if not all, the circumstances of the child, assisted her in providing full support to the child, and participating fully in the matter affecting the child. Also, disclosure of abuse may assist to prevent further abuse. If the principle of prevention of harm is in conflict with the principle of confidentiality, I submit that prevention of harm should prevail.

In *Sahin v Germany*<sup>472</sup> and *Sommerfeld v Germany*,<sup>473</sup> the court stressed the importance of

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<sup>469</sup> Children need to be heard in matters affecting them: See SALRC *The Review of the Child Care Act* (1998) par 13 2 1; See also Davel in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* (2006) 18. This sub-topic is discussed fully in section 5 2.

<sup>470</sup> (2001) 2 *FLR* 549.

<sup>471</sup> Par 78-83.

<sup>472</sup> (2002) 2 *FLR* 486.

expert psychological evidence to affirm that the applicant father was sufficiently involved in the decision-making process.<sup>474</sup> In *Sahin's case*,<sup>475</sup> the Regional Court noted the fact that the District Court omitted to hear the evidence of the child regarding her relationship with her father.<sup>476</sup> Instead the court relied on the reasoning by a psychologist that hearing from the five year-old regarding her relations with her father would have put psychological stress on the child.<sup>477</sup> The psychologist should have asked the child directly about the father. The court concluded that there was a violation of the applicant's rights under Article 8 of the ECHR.

Van der Linde<sup>478</sup> raises concerns regarding *Sahin's case* and notes that it was interesting that the ECtHR did not at any stage address the child's own independent right to respect for

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<sup>473</sup> (2003) 2 *FLR* 671.

<sup>474</sup> See Choudhry & Henning (2010) 240; Van der Linde (2003) *Obiter* 173.

<sup>475</sup> The applicant S and the mother D of the child G lived together until July 1989. S visited D until February 1990. He regularly fetched G for visits until November 1990. Later on, D prohibited further contact between S and G. In his application for the right to access, the request was dismissed by the District Court because it was not in the best interests of the child in that G greatly disliked S. S appealed to the Regional Court and the court ordered an expert psychological opinion on whether contacts between S and G were in the interests of G. The expert related her visit to the applicant's family in November 1992 and February 1993 and reached the conclusion that a right of access without prior communication to overcome the conflicts between the parents was not in the best interests of the child's well-being. See Van der Linde (2003) *Obiter* 163.

<sup>476</sup> Par 18-19.

<sup>477</sup> Van der Linde (2003) *Obiter* 164.

<sup>478</sup> (2003) *Obiter* 168.

family life under Article 8, but focused on the right of the father.<sup>479</sup> In the *Sommerfeld's* case<sup>480</sup> the psychologist considered that the child did not wish to have any personal contact with the father because the relationship between the father and child was disrupted for six years and no diagnosis of the relationship appeared possible.<sup>481</sup> Upon hearing the evidence of the child who reiterated that she did not want to see or talk to X, the court simply noted the report submitted by the psychologist. Van der Linde<sup>482</sup> finds that the court's failure to order a new psychological report on the possibilities of the father establishing contact with his daughter clearly revealed the insufficient involvement of the father in the decision-making process and violated his right for respect for family life.

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<sup>479</sup> Both the District Court and the Regional Court focused on the right of the father. For instance, the District Court omitted to hear the evidence of the child and instead inquired from the expert whether hearing the child in court would not cause psychological stress for her. The expert indicated that she had not directly asked the child about her father. Furthermore, the Regional Court referred to the fact that section 1711 of the Civil Code which dealt with the position of fathers of children born out of wedlock places such father in a weaker legal position compared to fathers of children born in marriages: see Van der Linde (2003) *Obiter* 164.

<sup>480</sup> In 1981 after the birth of his daughter M, the applicant X lived together with the mother of M for five years and separated thereafter. X was prohibited to have contact with M. In 1990 X applied to the District Court for a right of access to M. On 27 June 1991 when M was 10 years-old, the court heard M who stated that X disturbed her by always standing at the fence of the school yard and that she did not wish to visit X. In September 1993 X applied again for a right of access. In February 1994 the court heard the 13 year-old who was still not interested in contacting X.

<sup>481</sup> Par 13.

<sup>482</sup> (2003) *Obiter* 170.

In both the cases of *Sahin v Germany*<sup>483</sup> and *Sommerfeld v Germany*<sup>484</sup> the court held that earlier decisions had gone too far in saying that hearing the child or receiving an expert record was an essential requirement for Article 8. The court must ensure that proceedings are fair. How the child's views would be considered would depend on the age, level of maturity and development of the child, and an assessment of specific circumstances relating to each case.<sup>485</sup> What we are able to learn from this discussion is the fact that the courts were, in each case, keen to hear the child's perspective. I am of the view that in hearing children, we are able to establish many aspects about them which may not be presented clearly by an adult. When children are allowed to present their views and are supported when doing so, decisions that are made for them are likely to have positive consequences, rather than negative. In the case of *Hoffman v Germany*,<sup>486</sup> the German court's refusal to grant the applicant father access was regarded as justified interference with his right for respect for his family life since it was regarded as necessary in a democratic society in terms of Article 8(2) of the ECHR. The District Court heard the evidence of the then seven year-old J, who stated that she had not recognised her natural father and expressed her wish not to see him. The court noted that it was not in the interests of the child to act contrary to her

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<sup>483</sup> Par 54: the court found that failure to hear the child in court meant that the applicant had insufficient protection. The court found that the authorities had overstepped their margin of appreciation and violated the applicant's right under Art 8.

<sup>484</sup> The court found that the 13 year old who expressly wished not to see her biological father may be interrupted emotionally if she is forced to do. The latter reasoning was found sufficient by the court.

<sup>485</sup> Choudhry & Herring (2010) 240.

<sup>486</sup> (2003) 2 *FLR* 671.

wishes.<sup>487</sup>

Furthermore, the District Court based its decision on several reports, including reports by the child and expert evidence; one of them being the experience of the meetings between H and J held at the Mülheim Child Guidance Centre. All this led the ECtHR to conclude that H was in fact sufficiently involved in the decision-making process.<sup>488</sup>

It was held that in private law cases concerning children, the failure to either hear the child directly in an open court or obtain an expert's psychological assessment of the views of the child would infringe on the right in Article 8. Barratt<sup>489</sup> maintains that for purposes of asserting the views of the child, it is important to ascertain why the child refuses contact with his or her father, which reflects on the ability of the child to form his or her own independent views, and adds that the appointment of an expert psychologist may be appropriate in this regard. The psychologist will then assess the wishes of the child over and above the assessment of the family advocate. Children are allowed to bring proceedings either through a solicitor or through a friend who may be a friend of their parents. When a suit is brought through a solicitor, the child must be granted leave to do so.<sup>490</sup> However, the court has rarely granted children leave to use a solicitor to bring a law suit. In the case of *Re C*<sup>491</sup> the court

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<sup>487</sup> Par 16.

<sup>488</sup> Van der Linde (2003) *Obiter* 171.

<sup>489</sup> (2002) *THRHR* 570-572.

<sup>490</sup> Family Proceedings Rules 1999, SI 1999/3491 Rule 9.2A. S 8 of the Children's Act, England is most likely to be used.

<sup>491</sup> (1996) 1 FCR 461.

refused a section 8 order to a 14-year old who wanted to go on holiday with her friend's family to Bulgaria against her parents' wishes. The issue was regarded as too trivial by the court.

The court also held that if the proceedings are to become too complex or are likely to cause emotional harm to the child, it would be better for the child not to be involved. However, the court seems to be more flexible to allow children to express their opinions when they wish to be involved in matters between them and their parents. In the *Re A*<sup>492</sup> case the child was allowed to have separate representation in court, and Sloss P stated that the Human Rights Act<sup>493</sup> has strengthened the claim of children seeking separate representation:

“There are cases where they do need to be separately represented and I suspect as a result of the European Convention ... becoming part of domestic law, and the increased view of the English court, in any event, that the children should be seen and heard in child cases and not always sufficiently seen and heard by the use of a court welfare officer's report, there will be an increased use of guardians in private law cases. Indeed, in the right case I would welcome it. I hope with the introduction of CAF/CASS<sup>494</sup> in April of the next year ... it will be easier for children

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<sup>492</sup> (2001) 1 *FLR* 715.

<sup>493</sup> 1998.

<sup>494</sup> Hereinafter referred to as “Children and Family Court Advisory Support Service”. According to Choudhry & Herring (2010) 240, CAF/CASS lacks resources to represent children and its incapacity was seen in many cases where children required representation. Thus, the rights of children are seen to be downgraded for reasons of financial resources.



to be represented in suitable cases.”<sup>495</sup>

In terms of the European jurisprudence, the general principles concerning the protection of the participation of parents of children in care with regard to decisions concerning their children were flagged in *Re G*.<sup>496</sup>

“The fact that a local authority for children has parental responsibility pursuant to s 33(3) (a) of the Children’s Act does not entitle it to take decisions about those children without reference to, or over the heads of, the children’s parents ...”<sup>497</sup>

And that:

“A local authority can lawfully exercise parental responsibility for a child only in a manner consistent with the substantive and procedural requirements of Art 8. There is nothing in s 33(3) (b) of the Children’s Act 1989 that entitles a local authority to act in breach of Art 8 ...”<sup>498</sup>

Further that:

“... [A] local authority, before it can properly arrive at a decision to remove children from their parents, must tell the parents (preferably in writing) precisely what it is proposing to do. It must

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<sup>495</sup> Paras 21-22.

<sup>496</sup> (2003) *EWCH* 551.

<sup>497</sup> Par 43.

<sup>498</sup> Par 44.

spell out (again in writing) the reasons why it is proposing to do so. It must spell out precisely in writing the factual matters it is relying on. It must give the parents a proper opportunity to answer (either orally and/or in writing as the parents wish) the allegations being made against them. And it must give parents a proper opportunity to (orally and/or in writing as they wish) to make representations as to why the local authority should not take the threatened steps...<sup>499</sup>

In *Mabon v Mabon*,<sup>500</sup> the Court of Appeal overturned the decision of a judge that three educated, articulate and reasonably mature boys aged 17, 15 and 13 should not be represented separately in a seriously contested residence and contact dispute. Thorpe LJ held that it was not thinkable to exclude the three boys from knowledge of and participation in legal proceedings that fundamentally affected them.<sup>501</sup> The judge was of the view that children should be allowed to participate in litigation, even if participation might cause harm to them. The judge further explained that the rights to freedom of expression and participation outweigh the paternalistic judgment of welfare.<sup>502</sup> He referred to Article 8<sup>503</sup> of the ECHR and Article 12<sup>504</sup> of the CRC.<sup>505</sup>

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<sup>499</sup> Par 45, 310.

<sup>500</sup> (2005) 2 FCR 354.

<sup>501</sup> Par 52.

<sup>502</sup> Par 53.

<sup>503</sup> Right to respect for family life.

<sup>504</sup> “States Parties shall assure to the child who is capable of forming his or her own views the right to express these views freely in all matters affecting them.”

<sup>505</sup> Choudhry & Herring (2010) 240.

An interview with Tshikalange<sup>506</sup> revealed that where meetings are held in the absence of the child, or where there are no refreshments, toys or instruments put in place to keep the child busy, where there is no allowance for costs to ensure that the child attends a decision-making meeting, or lack of preparation for the child to meaningfully participate in meetings, or if the meeting is chaired in a language which the child does not understand, such can incapacitate the child from participating. Lessons imparted by this interview are that we can only know the views of the child if he or she is heard. Thus, it does not serve the purpose if we excuse a child from participating in a meeting. In order to drive meaningful and quality participation of children, we need to provide for their participation, and enable, encourage and involve children to participate.<sup>507</sup> Too many factors affect and influence an individual, and children are no different in this regard. Participation for a child is about creating space and providing capacity for a child to share the views he or she has in a matter.

Hart<sup>508</sup> suggests that participation may be facilitated by way of: treating the views of the child as important; recognising the difference between the child and an adult's way of expressing views; and encouraging the involvement of children in decision-making processes by providing tools which will enable the child to participate in the decision-making forum. Support can be given to children by way of guidance; giving them feedback on every matter that is discussed; listening to the feedback of the child regarding the meeting; and allowing

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<sup>506</sup> Interview with a social worker for the Johannesburg Child Welfare Society, held on 2011-03-31. See Annexure "F", see also the discussion in section 5 1 3.

<sup>507</sup> This input is clearly provided in "*Roger Hart's Participation Ladder*", see the discussion later in this section.

<sup>508</sup> Hart *Children's Participation from Tokenism to Citizenship* (1992) 2.

the child to contact the facilitator later to discuss the meeting and other issues; and allowing the child to participate voluntarily.<sup>509</sup>

Hart<sup>510</sup> argues that participation is a process of sharing decisions, which affect one's life and the life of the community in which one lives. It is a means by which democracy is built and a standard against which democracies should be measured. According to Pierce,<sup>511</sup> the participation of the child must be supported. Pierce<sup>512</sup> provides an example of one project participation session where a girl-child became pregnant during the work of the project, resulting in the need for child care provision to support her attendance. A child needs support to speak to large audiences and advice about managing inappropriate questions about their experiences.<sup>513</sup> Pierce<sup>514</sup> further sees the need for the participation of children in situations of where policy is established, in accordance with the evolving capacities of children. Children welcome the opportunity to participate in the development of services. Pierce<sup>515</sup> finds it helpful to carry out a risk assessment process on children to ensure that they are ready and able to participate, and to determine the appropriate level of their

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<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.*

<sup>511</sup> Pierce "Children's Participation in Policy and Practice to Prevent Child Sexual Abuse-Developing Empowering Interventions" 78: accessed from [www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf](http://www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf) on 2011-03-10.

<sup>512</sup> Pierce 81: accessed from [www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf](http://www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf) on 2011-03-10.

<sup>513</sup> Pierce 83: accessed from [www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf](http://www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf) on 2011-03-10.

<sup>514</sup> Pierce 78: accessed from [www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf](http://www.coe.int/t/dg3/children/1in5/Source/...Pierce.pdf) on 2011-03-10.

<sup>515</sup> *Ibid.*

participation by using “Hart’s Participation Ladder” principle.<sup>516</sup>

Hart’s participation principle contains eight steps. The three lowest steps of the ladder are seen to express children’s involvement in matters affecting them. These steps are “non-participation”; this means, a form of participation where the child who had the opportunity to participate made the decision not to participate rather than participate. It is important for the legal representative or mediator to find ways to encourage the child to participate. The steps are identified in this order: “manipulation”, which reflects the involvement of children as consultants in a project, where children are not given any feedback; “decoration” may involve for example, the parading of children in T-shirts bearing slogans which the children may not have chosen; “tokenism” which involves children’s notional involvement in events.

The next steps are regarded as genuine, but graded participation. The form of activity that is involved in the remaining five steps is defined in this particular order: children may be “assigned but informed”. In this participation, a project is chosen and planned by adults but the participating children understand and fulfil a meaningful role in achieving the objective of the project; “consulted and informed”, in this case adults would design and share decisions with children; “adult-designed or initiated, shared decisions with children”; “child designed or initiated and directed”, this step of participation suggests that although children may design and direct, they will always require adults’ approval; and “child designed or initiated shared decisions with adults”. These are the higher steps on the ladder and Hart calls them “real participation”, as these steps express the increasing possibility of children’s participation.

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<sup>516</sup> Franklin in Verhellen (ed.) *Monitoring Children’s Rights* 324.

The eight steps suggest that children can participate in different forms and that there are diverse possible degrees of involving the child's participation, initiative and influence. I am of the view that South Africa must refer to "Roger Hart's Participation Ladder"<sup>517</sup> principle and promulgate regulations to the Children's Act that identify the various steps regarding the way in which a child must be assisted to enable him or her to participate, and the level of progress in participation in order to adopt a yardstick to measure the extent and quality of child's participation. Where decisions are to be made about interference in family relationships, such as placing the child up for adoption or taking children into care, the obligation of respect for family life imposes procedural obligations on the state.<sup>518</sup> In Keegan's case<sup>519</sup> the court concluded that failure by the mother to consult the natural father before the mother gave the child up for adoption did not respect the natural father's right to family life.<sup>520</sup> In *W V v UK*<sup>521</sup> the court said that Article 8(1) requires that the procedure by the state must be sufficient to protect the interests of the family members and that parents should be involved in proceedings about their children.

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<sup>517</sup> (1992) 2.

<sup>518</sup> *Ibid.*

<sup>519</sup> 342 paras 49-51.

<sup>520</sup> Harris *et al.* (2009) 394.

<sup>521</sup> (1987) 10 EHRR 29 paras 64, 77-79.

*5.5.2 The decision-making process resulting in the removal of the child - the right of the parent and the child to be involved in the decision-making process in terms of foreign jurisdictions*

The right of the child to participate or to be involved in decision-making processes concerning his or her removal is articulated in the Children's Act (Kenya).<sup>522</sup> There is no mention of parental involvement in the decision-making process concerning the child in the content of section 8. However, Kenya's provision on the right of the child to participate is not as detailed as the South African Children's Act. Kenya's provision lacks information as to who is responsible for the expenses of legal representation and the type of matters in which the parent may require legal presentation.<sup>523</sup>

Furthermore, the Children's Act (Kenya) requires the administrative authority to take into account the views of the child when preparing the placement plan for the child. The plan is reviewed annually, consistent with the child's age and understanding.<sup>524</sup> The Act requires that the placement plan be consistent with any other plan prepared by the placing authority, and that it must comply with requests made by the child's placing authority to provide it with information concerning the child,<sup>525</sup> and that a suitable representative must attend any

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<sup>522</sup> S 8.

<sup>523</sup> See the discussion in section 5.5.

<sup>524</sup> S 8(3) of the Children's Act (Kenya).

<sup>525</sup> S 8(4)(b)(i).

meetings the placing authority may hold concerning the child.<sup>526</sup>

There are gaps in this provision; amongst others, the provision does not indicate which client would be the suitable representative. There is lack of information as to what proceedings the suitable representative is allowed to represent the child; civil, criminal or *in all matters*? There is also no provision as to who bears the financial costs for legal assistance. I find South Africa has established better provisions with regard to the rights of the parent and the child to participate, compared with Kenya.<sup>527</sup> However, South Africa still needs to entrench provisions which guarantee the right of the parent to participate in matters concerning their children at the expense of the state.

## 5.6 Recommendations and conclusion

This study stresses the importance of the right of the child to family life. I agree with the general rule that is expressed in the *Centre for Child Law* case,<sup>528</sup> that children must remain in the care of their care-givers even when there is an investigation as to whether they are in need of care, unless this is not appropriate with regard to their safety. What we learn from this chapter is that the removal of the child by the social worker or police officer without a court order is a drastic measure. The discussion revealed that there are measures for the application, which include issues of the child and the parent participating in the preparation

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<sup>526</sup> S 8(4)(b)(ii).

<sup>527</sup> See the discussion in sections 5 2 2 and 5 5.

<sup>528</sup> See the discussion in sections 4 3 1 1 and 5 2 2.



for the removal and the decision-making process regarding the removal of the child. Some of these measures are incorporated in the Children's Act, such as the best interests of the child standard which is used as a determining factor.<sup>529</sup> However, the discussion also revealed gaps which exist in our law which need to be filled.

The court in *Chirindza* pointed out that the silence in section 151 and 152 in the Children's Act may cause a person to interpret the law that there is no right to judicial review of the decision to remove the child, and that in the light of the above, these provisions are unconstitutional in that they fail to provide a way to review a judicial decisions which separate children from their parents. When the court held the latter view, it referred to the rights that are infringed or placed at risk by sections 151 and 152 as the following; section 28(1)(b) of the Constitution to family care and parental care, the best interests of the child as a paramount consideration in section 28(2) of the Constitution, and Article 9(1) of the CRC which obliges state parties to ensure that the child is not separated from his or her parents unless necessary, in the best interests of the child and subject to a judicial review with an opportunity to participate in the proceedings.<sup>530</sup> A somewhat similar right is captured in Article 19 of the ACRWC, even though it omitted the element of judicial review.<sup>531</sup>

I have concerns regarding the fact that the Children's Act (Kenya) allows an appointed local authority or a charitable children's institution who believes that a child is in need of care and

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<sup>529</sup> S 152(4) of the Children's Act.

<sup>530</sup> See the discussion in section 5.3.

<sup>531</sup> *Ibid.*

protection to take the child into care without bringing the child to court immediately.<sup>532</sup> Furthermore, the Act allows the local authority or the children's institution to notify the Director of Welfare about the removal of the child within seven days of receipt of the child into care, and provides that the child can be brought to court for appearance within three months. Kenya should, in this case, learn from the comments made by the Committee on the Rights of the Child that the judicial process regarding the separation of the child and his or her parents should be kept as short as possible.<sup>533</sup>

Furthermore, Kenya must learn from the South African experience, particularly from the *Centre for Child Law* case, in which the court read-in words in the Children's Act to provide for judicial review of decisions regarding the removal of child. Thus I propose that a provision be enacted in the Children's Act, for purposes of judicial review, of decisions of removal of children from family life by social workers and police. I refer to the *Centre for Child Law*,<sup>534</sup> and propose that the words "read in" by the Constitutional Court to remedy the defect in the Children's Act, be incorporated in section 152 of the Act in the following way:<sup>535</sup>

"(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

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<sup>532</sup> See the discussion in section 5 4.

<sup>533</sup> See the discussion in section 5 3.

<sup>534</sup> The children of the applicants were removed from the streets by the social workers of the Department of Social Development without a court order: see discussion in sections 4 3 1 1, 5 2 and 5 5.

<sup>535</sup> Par 96.

- (i) the removal is placed before the [children's court] for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian and care-giver as the case may be are, unless this is impracticable, present in court."

An additional paragraph numbered (d), be read-in to section 152(2) of the Act as follows:

"(d) ensure that:

- (i) the removal is placed before the [children's court] for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian and care-giver as the case may be are, unless this is impracticable, present in court".

Section 152(3)(b) must be severed and replaced by a section reading:

"(b) refer the matter of the removal before the end of the first day after the day of the removal to a designated special worker who must ensure that:

- (i) the removal is placed before the [children's court] for review before the expiry of the next court day after the referral;
- (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and
- (iii) the investigation contemplated in section 155(2) [of the Act] is conducted".

South Africa must, amongst others, refer to the professional regulations provided by Vermont<sup>536</sup> for unprofessional conduct, and incorporate a provision in section 305(8) of the Children's Act for a list of conduct which constitutes unprofessional conduct to read as follows:

- “1 The following conduct by a social worker shall constitute unprofessional conduct and may constitute grounds for imposing sanctions against the social worker if the social worker -
- (a) engages in a conduct which evidence unfitness to practice as a social worker;
  - (b) engages in any sexual conduct with the child; or with immediate family member of a the child with whom the
  - (c) harasses, intimidates or abuses a child;
  - (d) practices outside a social worker's area of training, experience or competence without appropriate supervision;
  - (e) misuses his or her powers when he or she –
    - (i) removes a child from family life without due course;
    - (ii) conducts himself or herself in a manner which contravenes the Children's Act; or
    - (iii) fails to comply with the provisions of the Children's Act;
  - (f) engages in conflicts of interest that interfere with the exercise of the social worker's professional discretion and impartial judgment;
  - (g) intentionally cause physical or emotional harm to the child or any person he or she provides services to;
  - (h) fails to inform the child, the parent or the care-giver when a real or potential conflict of interests arises and to take reasonable steps to resolve the issue in

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<sup>536</sup> S 129a of Title 3, *Professional Regulations for Licenced Clinical Social Worker* 253 of 1985: accessed from [www.leg.state.vt.us/statutes/fullchapter.cfm?Title=26&Chapter](http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=26&Chapter). On 2012-11-12.

- a manner that makes the client's interest primary and protects the clients' interest to the greater extent possible;
- (i) takes unfair advantage of any professional relationship;
  - (j) exploits others to further his or her personal, religious, political or business interests;
  - (k) fails to take steps to protect the child and to set clear, appropriate and culturally sensitive boundaries in instances where dual or multiple relationships are unavoidable;
  - (l) participates in bartering, unless bartering is considered to be essential for the provision of services, negotiated without coercion, such as, payment of adoption fees to adoption agencies;
  - (m) fails to clarify with all parties regarding the services he or she provides and his or her obligations to various individuals who are receiving services; and
  - (n) fails to clarify his or her social worker role with the parties involved and to take appropriate action to minimise any conflicts of interest when he or she anticipates a conflict of interest amongst individuals receiving services or anticipates to perform in conflicting roles such as testifying in a child's custody dispute or any matter concerning the child.

I am of the view that social workers who misuse removals or conduct themselves unprofessionally must account for their actions. I propose, with regard to the sanctions that must be imposed on social workers, that South Africa must refer to the report of the Partners for Health Reform Plus Project, the United Nations Development Programme Report,<sup>537</sup> the interview held with the Supervisor of Professional Services Registration Division at the South

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<sup>537</sup> *Fostering Social Accountability: from Principle to Practice – Guidance Note (2010) 23:* accessed from [www.PHRplus.org](http://www.PHRplus.org) on 2012-11-16.

African Council for Social Services Professions,<sup>538</sup> and the South African Social Service Professions Bill,<sup>539</sup> and incorporate a provision in section 305(9) of the Children’s Act to read as follows:

“1 The South African Council for Social Services is responsibilities to monitor the functions of designated social workers who are registered with the council. The South African Council for Social Services must –

- (a) develop and enhance information systems which are important in ascertaining accountability and enhancing interventions on the side of designated social workers for the benefit of the public by way of <sup>-540</sup>
  - (i) conducting information and public awareness campaigns on the functions of social workers and the statutory body for the accountability of social workers;
  - (ii) ensuring that every social worker who is operating as such, whether in government, a non-governmental organisation or private entity, is registered with the South African Council for Social Services Professions that is constituted as a statutory body for the accountability of social workers;

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<sup>538</sup> Interview with “Molebatsi” (not her real name), supervisor in the Professional Services Registration Division, the South African Council for Social Services Professions in Pretoria, in the Gauteng province, held on the 2012-10-12. See attached Annexure “1”.

<sup>539</sup> See the discussion on s 47 of the Social Service Professions Bill 2007 in section 5 2 2.

<sup>540</sup> Brinkerhoff *Accountability and Health Systems: Overview, Framework and Strategies* (2003) 24. The Partners for Health Reform Plus Project: accessed from [www.PHRplus.org](http://www.PHRplus.org) on 2012-09-04.

- (iii) ensuring that any institution that employs social workers, monitors their work and implements internal disciplinary procedures for any wrong-doing; and
  - (iv) ensuring that any institution that employs social workers, if wrong-doing is established on the side of the designated social worker, after every disciplinary procedures, ensure that a report is send to the South African Council for Social Services Professions which must include the nature of the wrongful conduct and the type of punishment that accompanies such wrong-doing.
- (b) ensure that information needed by social workers is available, accessible and transparent;
  - (c) clarify the chains of accountability to determine more precisely the role of social workers working in different settings;<sup>541</sup>
  - (d) shorten the process to provide feedback or reports on the performance of social workers by putting in place mechanisms that ensure more direct and timely feedback;
  - (e) make the reporting processes and aspect more powerful to include incentives for responsive and good performance; and
  - (f) create systems that would ensure that social workers adhere to standards that would improve performance.<sup>542</sup>

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<sup>541</sup> *Ibid*, Brinkerhoff *Accountability and Health Systems: Overview, Framework and Strategies* (2003) 22.

<sup>542</sup> *Ibid*, Brinkerhoff *Accountability and Health Systems: Overview, Framework and Strategies* (2003) 25.

2 The designated social worker who conducts himself or herself unlawfully shall be sanctioned in terms of the disciplinary powers of the institution that employs him or her, consistently with sanctions provided in section 17(2) of the Public Service Act,<sup>543</sup> section 22 of the South African Social Services Act and the Labour Relations Act 66 of 1995 as follows:

- (a) prior to the unlawful matter being reported to the South African Council for Social Services Professions and any disciplinary steps being imposed –
  - (i) the designated social worker shall have a right to be heard;
  - (ii) the designated social worker shall be subpoenaed by the institution that employs him or her to appear before a forum that is established for purposes of enabling the public voice their concerns;
  - (iii) if the designated social worker is found to have conducted himself or herself unlawfully, he or she shall be sanctioned through the following constructive measures -
    - (aa) given the first warning though which, he or she shall be required to rectify his or her unlawful conduct by –
    - (bb) tendering an apology to the complainant;
    - (cc) restoring a property or any material element to its original state; and

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<sup>543</sup> Provides that: “an employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of –

- (i) incapacity due to ill health or injury;
- (ii) operational requirements of the department as provided for in the Labour Relations Act;
- (iii) incapacity due to poor work performance; or
- (iv) misconduct”.



- (dd) pay damages or a fine of not less than R 10 000, whichever is greater.
- 3 In the event the designated social worker is a second time defaulter, the institution that employs the designated social worker shall report the unlawful conduct of the designated social worker to the South African Council for Social Services Professions and have his or her impact on his or her accountability as follows: <sup>-544</sup>
- (a) if the council decides on publishing the name of the designated social worker in a journal for social workers as the appropriate disciplinary step, the decision must be ratified by a general meeting;
  - (b) if the designated social worker has failed to comply with the code of social services professions including, the commission of acts of corruption, the council shall give the designated social worker six months to show compliance and to show remorse to the council for his or her conduct; and
  - (c) the designated social worker fails to remedy the default as required by council, the council shall make a recommendation to a general meeting and the general meeting shall decide on the council's recommendation.
- 4 The council or a general meeting may recommend, amongst others, the following sanctions:
- (a) give the designated social worker a written warning; or
  - (b) to suspend the registration of the designated social worker;
- 5 If the designated social worker fails to comply with the recommendations of the council or a general meeting with regard to issues relating to his or her non-compliance with the relevant laws, non-performance, incapacity, misconduct or wrong-doing, the council

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<sup>544</sup> Brinkerhoff *Accountability and Health Systems: Overview, Framework and Strategies* (2003) 16, The Partners for Health Reform Plus Project: accessed from [www.PHRplus.org](http://www.PHRplus.org) on 2012-09-04.

shall, as a matter of last resort, issue the following sanctions:

- (a) give the designated social worker a final warning;
- (b) publish his or her name in a journal for social workers to name and shame the wrong-doing;
- (c) publish the name of the designated social worker in a journal for social workers;  
or
- (d) impose the disciplinary sanction it considers appropriate, taking into account considerations of progressive and restorative discipline and the protection of the interests of the public.”

With regard to the provision for the child to undergo medical assessment or examination to assess the health condition or possible abuse, I am of the view that the Children’s Act must provide the age at which the child must consent to medical assessment or examination. The Act must also provide for situations in which the medical practitioner may compel a child to undergo an assessment or examination and disclose information concerning the medical status of the child. Furthermore, the Act must be clear on the fact that the child must give *informed consent* for him or her to undertake medical examination. Thus, the Children’s Act must read as follows:

“1 A child may undergo medical assessment or examination in the following circumstances -

- (a) if the child is 16 years of age,<sup>545</sup> he or she may consent to medical assessment or examination unassisted if –

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<sup>545</sup> Consistently with the age at which a child may consent to medical treatment or surgery, as proposed in the Children’s Act, see the discussion in section 5 2 1.

- (i) he or she has given *consent* upon receiving information regarding the assessment or examination from the specialist medical practitioner; and
  - (ii) he or she is of the level of maturity and mental capacity to understand the benefits, risks, social and other implications of the medical assessment or examination, unless there are reasonable grounds for believing that the child is not competent.<sup>546</sup>
- (b) if the child is below 16 years of age, where he or she gives an *informed consent* to medical assessment or examination assisted by parent or guardian;
  - (c) if the child is required to undergo psychiatric assessment, he or she, depending on his or her condition, may undergo compulsory medical assessment and forfeit his or her right to give an *informed consent*;<sup>547</sup> or
  - (d) if the child is assessed or examined by a professionally qualified medical practitioner for the benefit of the child.
- 2 Where consent by another person is necessary on behalf of the child, consent must be given by –
- (a) a person who has been acting in the place of a parent;<sup>548</sup>
  - (b) a person who has been appointed as a guardian and has been given powers to

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<sup>546</sup> S 36 of the Care of Children Act (New Zealand).

<sup>547</sup> S 178 and 333 of Children, Young Persons and Families Act (New Zealand).

<sup>548</sup> S 36(b) of the Care of Children Act (New Zealand).

consent on behalf of the child,<sup>549</sup>

- (c) if there is no person who has been so acting on behalf of the child, consent must be granted by the Ministry of Social Development; or<sup>550</sup>
  - (d) a legal representative who is acting on behalf of the child for the doctor to disclose any protected information obtained in a doctor-patient relationship.<sup>551</sup>
  - (d) by leave of a High Court judge who may also bring a civil, criminal and disciplinary proceedings against a person in respect of administration by health practitioner of any blood transfusion of a child below the age of 18, by reason of the lack of consent of the person whose consent is required by law.<sup>552</sup>
- 3 The High Court, children's court or any proceedings concerning the child, may require a child to undergo medical examination or assessment by a registered specialist medical practitioner -
- (a) if there are reasonable grounds for suspecting that the child is suffering from ill-treatment, has been abused, neglected, deprived, seriously harmed or for reasons of ascertaining the development or well-being of the child as required in the

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<sup>549</sup> S 139-142 of Children, Young Persons and Families Act (New Zealand).

<sup>550</sup> S 36(b) of the Care of Children Act (New Zealand).

<sup>551</sup> S 196 of the Children, Young Persons and Families Act (New Zealand).

<sup>552</sup> Ss 36(c) and 37 of the Care of Children Act (New Zealand).

proceedings;<sup>553</sup>

- (b) if the court may restrict the nature of the examination that may be carried out and the procedures used to carry out the examination;
- (c) if the designated social worker may, with an *informed consent* from the parent or guardian of the child arrange for any child for which this section applies to be medically examined by a registered specialist medical doctor;<sup>554</sup>
- (d) if the designated social worker who has not received an *informed consent* from the parents or guardian of the child, can require the child to be medically examined if he or she has made reasonable efforts to acquire an *informed consent* from the parents;<sup>555</sup>
- (e) if the designated social worker who has received an *informed consent* from the parents or guardian of the child, can make arrangements to have the medical examination taking place at a place that is convenient for the child and the parent including, a home assessment; and
- (f) if the designated social worker may, on the instruction of a specialist medical practitioner, submit the child at a place and at a specified time to prevent the outbreak or spread of any infectious diseases.”

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<sup>553</sup> S 49-52 of the Children, Young Persons and Families Act (New Zealand).

<sup>554</sup> S 53(2) of the Children, Young Persons and Families Act (New Zealand).

<sup>555</sup> S 53(3) of the Children, Young Persons and Families Act (New Zealand).

Reports revealed that when the social workers conduct investigations regarding the circumstances of the child,<sup>556</sup> they would more often not solicit the views of the parents. Thus, the presiding officers may be presented with allegations made against the parents without their input.<sup>557</sup> In order to avoid situations where children are removed from family life without just cause, I proposed that provisions be incorporated in the Children's Act for the right of the parent to participate in the investigations by the social worker concerning the removal of the child, the decision-making process<sup>558</sup> regarding the removal of the child, and to have access to information concerning the circumstances of the child and removal.

South Africa must refer to the research by Booker,<sup>559</sup> Akister<sup>560</sup> and the Colorado Department of Education's *Strengthening Parent Involvement: A Toolkit*,<sup>561</sup> and incorporate provisions in section 155(10) of the Children's Act for the right of the parents to participate in the decision-making process concerning their children, to read as follows:

"1 The designated social worker has the responsibility to ensure that parents participate in

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<sup>556</sup> See the discussion in section 5 2 2.

<sup>557</sup> Booker *Children Stolen by the State Needlessly, Causing Utter Misery in One of Britain's Most Disturbing Scandals* (2012) 5: accessed from [www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html](http://www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html) on 2012-10-06.

<sup>558</sup> See the discussion in section 5 5 2.

<sup>559</sup> *Children Stolen by the State Needlessly, Causing Utter Misery in One of Britain's Most Disturbing Scandals* (2012) 5: accessed from [www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html](http://www.dailymail.co.uk/debate/article-2128987/Children-stolen-state.html) accessed on 2012-10-06.

<sup>560</sup> Akister *Protecting Children: The Central Role of Knowledge* (2010) 15: accessed from [www.angliaruskim.openrepository.com](http://www.angliaruskim.openrepository.com) on 2012-10-04.

<sup>561</sup> See the discussion in section 5 5 2.

the decision-making process concerning the child by way of -

- (a) ensuring that parents have their say during the investigation into the circumstances of the child;
- (b) enabling parents to complete a “parents concern form”,<sup>562</sup> which must be used as a reliable and valid instrument to understand the views of the parents concerning the child;
- (c) informing parents as to why their input is critical in order to enable parents make an informed decision;<sup>563</sup>
- (d) working with parents to ensure that children are not taken into care for no good reasons by way of –
  - (i) helping parents understand the process involved concerning the investigation including, the possible or ultimate removal of the child from family life;<sup>564</sup>
  - (ii) scheduling meetings at a time when a working parent can attend;
  - (iii) providing transportation and child care if necessary;<sup>565</sup>
- (e) working with parents to gather information that would ensure that the family of the child is preserved rather than gathering information against the family in court;
- (f) conducting investigation in the circumstances of the child for purposes of presenting the true nature of facts rather than allegations, deceitful or information

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<sup>562</sup> I envisage a form that provides parents’ own concerns and opinions about the type of assistance and support that might be offered in order to keep the child in the family.

<sup>563</sup> Colorado Department of Education *Strengthening Parent Involvement: A Toolkit* (2003) 22.

<sup>564</sup> Colorado Department of Education *Strengthening Parent Involvement: A Toolkit* (2003) 18.

<sup>565</sup> *Ibid.*

colluded with other experts to get the results desired by them rather than the 'best interests of the child';

- (g) ensuring that no evidence is fabricated for purposes of demeaning parents' worth and their role in the life of a child;
- (h) ensuring that parents are not influenced by their conduct into signing documents that may bar them from gaining access to their children;
- (i) building connections between experts, relevant stakeholders and the parents in order to understand what is going on at home;
- (j) enabling parents to communicate what may impact negatively on their participation in the matter concerning the child, such as, ageing, dealing with a family illness or financial stress;<sup>566</sup>
- (k) ensuring that there is regular communication between themselves and parents regarding the matter concerning the child;<sup>567</sup>
- (l) contributing towards a process that would ensure that –
  - (i) parents have access to information including, the investigation report, to enable them to apply to court for the release of the child;
  - (ii) parents are allowed to defend themselves in proceedings where the investigation report prepared by the designated social worker is relied upon by the court;
  - (iii) family courts are held openly to enable parents gain access to information that is shared in court; and
  - (iv) family courts are only held in secrecy if such arrangement is meant to protect the 'best interests of the child'."

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<sup>566</sup> Colorado Department of Education *Strengthening Parent Involvement: A Toolkit* (2003) 14.

<sup>567</sup> Colorado Department of Education *Strengthening Parent Involvement: A Toolkit* (2003) 17.



It is also crucial that the wishes of the child be heard and taken into account before the child can be removed from the family environment. It is further recommended that the right of the child to be heard and to be respected in the same way as the parent, or any adult person, who is participating in any proceedings that concern the child be enforced. Obviously, not every child is capable of expressing himself or herself in matters affecting them. However, the child who is able to express his or her wishes must be given an opportunity to participate meaningfully in matters affecting him or her. The Constitution,<sup>568</sup> the CRC,<sup>569</sup> and the South African Children's Act<sup>570</sup> made improvements in the area of the participation of the child in decision-making processes that concern the child. These prescripts have endorsed the fact that a mature child, of an appropriate age and level of development, must be given an opportunity to participate in matters concerning him or her, in the same way as his or her parents or any adult members participate in proceedings that affect them.<sup>571</sup>

The Constitution, in particular, guarantees the child legal representation assigned to him or her by the state and at the expense of the state in civil matters affecting the child if substantial injustice would otherwise result if the legal representative were not assigned.<sup>572</sup> These details are lacking in the Kenyan Children's Act. However, a shortcoming was highlighted regarding the South African Children's Act in that the right of the child to have legal representation is restricted to civil matters affecting the child only.

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<sup>568</sup> See the discussion in section 5 5.

<sup>569</sup> See the discussion in section 5 5 1.

<sup>570</sup> See the discussion in section 5 5.

<sup>571</sup> Du Toit in Boezaart (ed.) *Child Law in South Africa* 111. See the discussion in section 5 5.

<sup>572</sup> See the discussion in section 5 5.

My conceptual view of the right of the child to participate in the decision-making process that affects him or her is that the child must participate in all matters affecting him or her. Since it is difficult to predict whether substantial injustice would result from a lack of legal representation for the child, it is important to always have a legal representative assigned in advance for the child in an eventuality substantial injustice could result. If the child will benefit from legal representation, arrangements must be made for legal representation to be appointed for the child. Legal representation should not be from the rank of social workers as they may have conflicting interests given their task to conduct investigations regarding the child.<sup>573</sup> I am of the view that legal representatives in cases involving children in need of care and protection must be attorneys and advocates with expertise in children's rights. This expertise is not usually acquired from the general practice of law, since most law schools offer little, if any, course work on child litigation. I opine that attorneys and advocates who are appointed as legal representatives for children must be aware of children's special needs and techniques for communicating with them.

When representing children in need of care and protection, legal representatives must, over and above their knowledge in children's rights, know about services available in the community, and be familiar with service providers and services that address the most common problems faced by families who need assistance and services not routinely available in the community.<sup>574</sup> Since we have few legal representatives that work on general child-related matters, it is important that we motivate advocates and attorneys to develop an

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<sup>573</sup> SALRC *The Review of the Child Care Act (1998)* par 7 2 3.

<sup>574</sup> Shotton (2000) 38.

interest to work with children. We can do so by assisting advocates and attorneys to become acquainted with information concerning children by providing them with suitable training,<sup>575</sup> qualifications, experience and orientation for such work.

Research reveals that advocates, attorneys, judges, and social services personnel including lay investigators, court appointed special advocates, in the United States of America, use, amongst others, guidelines to the Adoption and Safe Families Act to provide for reasonable efforts to enable children to remain safely in the family or to reunite with their families.<sup>576</sup> I am of the view that South Africa must refer to the guidelines and promulgate regulations to the Children's Act which will guide the interests of attorneys and advocates appointed as legal representatives for children.<sup>577</sup> The regulation must read as follows:

- “(1) After accepting a case involving a child in need of care and protection, the attorney or advocate who is representing the child must –<sup>578</sup>
- (a) communicate with the designated social worker and the agency that is providing services to the child and request access to records held by them in order to obtain

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<sup>575</sup> *Ibid*, provides for the establishment of a mandatory training program for attorneys representing parents and children. The reason why the training is important is that, attorneys practising in dependency cases and in juvenile court cases have no prior experience and may not be aware of the standard of practise either in juvenile court personnel or for child welfare agency. Also, these attorneys may not be familiar with child development issues or with the importance of statutory requirements designed to protect children.

<sup>576</sup> Shotton (2000) 7-9.

<sup>577</sup> See the discussion in section 5 5 2.

<sup>578</sup> Shotton (2000) 10.

more information about the case, services provided, plan for reunification, contact arrangements and projected date of the return of the child to his or her family,<sup>579</sup>

- (b) interview the social worker to determine what involvement, if any, he or she had with the parent or the child prior to the child's removal from home;
- (c) establish what services the social worker believes would have been helpful in avoiding placement;
- (d) investigate the child's removal from family life;
- (e) familiarise himself or herself with the circumstances under which the child was taken from home;
- (f) familiarise himself or herself with the history of the family of the child and the basis for removal including-<sup>580</sup>
  - (i) the grounds that mandated and justified the removal of the child;
  - (ii) how family problems are contributing to the situation of the child in need of care and protection;
  - (iii) services that are provided by the social worker to the family of the child to alleviate the risk or harm that may be suffered by the child;
  - (iv) provision of home-based services; and
  - (v) consideration of placing the child with relatives before removal.

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<sup>579</sup> *Ibid.*

<sup>580</sup> Shotton (2000) 7-8.

- (g) consult national resources centres or organisations dealing with children’s issues (with their addresses and telephone numbers listed in the guidelines document) for advice on how to proceed in litigation concerning the child,<sup>581</sup>
- (h) consult with experts in the Department of Social Development who can help obtain additional expert advice when necessary; and<sup>582</sup>
- (i) meet with the Department of Social Development representatives and participants during care proceedings.”

Furthermore, South Africa must learn from the United States and provide guidelines for the responsibilities of the attorneys and advocates as legal representatives on behalf of parents in matters involving their children.<sup>583</sup> The guidelines must focus on the reasonable efforts that must be exercised by advocates and attorneys in the different phases concerning the removal of the child, such as the prevention of the actual removal, contact, reunification of the child back into his or her family, and permanency planning upon failure of reunification attempts.<sup>584</sup>

Thus, the guidelines must read as follows:

- “(1) The advocate or attorney who is representing the child who is being prepared for removal or who is removed from family life pending a review or final determination of care

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581 Shotton (2000) 11-12.

582 Shotton (2000) 36.

583 Shotton (2000) 8.

584 *Ibid.*

proceedings, must investigate reunification efforts of the child and his or her family as follows -

- (a) investigate the involvement of outside agencies and interview their representatives.
  - (b) interview the designated social worker and review his or her file in order to –
    - (i) determine what contacts has been established by the social worker with the parents of the child since removal;
    - (ii) determine the efforts that the social worker made to reunify the child with the family.
  - (c) interview the agency and review its file and ensure that it has complied with its own procedures and regulations;
  - (d) work collaboratively with the designated social worker and the agency that provides services to the child and his or her family to make good faith efforts to prevent the removal.<sup>585</sup>
- (2) The attorney or advocate who is representing the child who is removed from family life, whose prospects of re-joining the family are limited, must work together with the designated social worker in accordance with the *comprehensive care plan* and to investigate the efforts to achieve permanency for the child as follows -
- (a) ensure that every reasonable effort is made to timely place the child in permanent placement;
  - (b) ensure that permanency hearings are timeously held;
  - (c) identify appropriate cases for concurrent planning;

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Shotton (2000) 66.

- (d) fill petitions to terminate parental right timeously;
- (e) make specific recruitment efforts to find adoptive homes for children;
- (f) make specific efforts to provide timely adoption studies of both the child and potential adoptive family; and
- (g) make specific efforts for the prompt pursuit of adoption assistance allowance and funds for children with special needs.”

With regard to the participation of children in court proceedings, Matthias and Zaal<sup>586</sup> proposed, amongst other recommendations, that because South Africa has 11 official languages, there is in no way that the courts can do without translation by an interpreter. It is important to find interpreters who work well with children, are appropriately skilled, and are well trained.<sup>587</sup> Other suggestions are that interpreters must be allowed to engage with children in a less formal manner; this should apply particularly in cases where children are traumatised, immature and mentally challenged.<sup>588</sup>

I further recommend that the interaction between the court interpreters and children who participate in court be assessed by the social worker who is managing the case involving the child, and that unwarranted practices must be brought to the attention of the interpreters. The Children’s Act<sup>589</sup> also requires families, parents, care-givers and children, identifying and

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<sup>586</sup> (2002) SAJHR 363.

<sup>587</sup> *Ibid.*

<sup>588</sup> *Ibid.*

<sup>589</sup> S 144(3).

seeking solutions to their problems, to participate in prevention and early intervention programmes.

However, I am of the view that the child must receive support to enable him or her to participate. For example, in a case where the child has been abused by a perpetrator who is his or her father or relative, the child must be asked if he or she is able to speak in the presence of the perpetrator or other witnesses who may be related to the child, such as his or her mother, siblings or peers in the community, in order to exclude any circumstances which may jeopardise the ability of the child to assert himself or herself.

With regard to supporting the child in making his or her views heard, Hodgkin and Newell<sup>590</sup> maintain that institutions must ensure that they have direct contact with children and that children are appropriately consulted. The institutions should devise specially tailored consultation programmes and imaginative communication strategies to ensure full compliance with Article 12 of the CRC.<sup>591</sup> I maintain that a range of suitable ways in which children can be supported when they make their views known must be established, such as using a child-like language and child cartoons and dolls, consistent with the age of the child.

I maintain further that South Africa must refer to “Roger Hart’s Participation Ladder”<sup>592</sup> which describes the different levels at which the child may participate, and the impact thereof. In

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<sup>590</sup> (2007) 68. See the discussion in section 5 5 1.

<sup>591</sup> *Ibid.*

<sup>592</sup> See the discussion in section 5 5 1.



using “Roger Hart’s Participation Ladder”, we will be able to know the level at which a child participates and the impact such participation may have on the child, and the type of support that can be given to the child to ensure meaningful participation. A concern may be raised as to the age at which a child can participate. Some authors argue that the views of the child can be sought directly from the child if he or she is four years-old and upwards when some positive or negative bond could have taken place for a child to give some perspective.<sup>593</sup> I am of the view that a child of seven years of age can participate directly and more sense can be made from his or her participation. Psychological input avers that children who are seven years of age are known to have the ability to use tools for purposes of awareness, have developed a sense of self-worth, and hold views of their own competencies.<sup>594</sup>

ADR is also more accessible than litigation. The Young Persons and Families Act (New Zealand)<sup>595</sup> prioritises mediation in matters where the child is involved, and considers a court hearing only where there are no prospects of success in mediation. Like New Zealand, the Children and Young Persons Act (New South Wales) provides that in responding to a report concerning a child, the Director-General is to consider the appropriateness of using ADR services in order to resolve problems at an early stage.<sup>596</sup> Thus, I recommend that section 6(4) of the Children’s Act be amended by inserting a provision that will give effect to

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<sup>593</sup> Douglas *Why Taking More Children into Care can be Beneficial* (2012): accessed from [www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be](http://www.guardian.co.uk/social-care-network/2012/apr/16/taking-more-children-care-be) on 2012-09-14.

<sup>594</sup> Accessed from [www.cache.lego.com/.../uploadDF1454F4-DED5-4B71-AAF205557D8](http://www.cache.lego.com/.../uploadDF1454F4-DED5-4B71-AAF205557D8) on 2012-10-15.

<sup>595</sup> See s (c) of the Preamble and s 20 of the Act.

<sup>596</sup> S 37(2) of the Children and Young Persons Act (New South Wales).

mediation to read as follows:

“6(4)(c) In any matter concerning the child in need of care or protection or who has offended against the law, an approach to solving the matter in a conducive and conciliatory manner must be sought as follows–

- (i) attendance at a preliminary dispute resolution forum must be mandatory; and
- (ii) a court hearing must be used as a measure of last resort.”

I am of the view that a mediator must have skills to mediate proceedings, which include understanding the important dynamics of conflict, ability to be impartial, proper listening skills, and some analytical skills. Furthermore, South Africa must refer to foreign jurisdiction and ensure that mediators are registered with an institution for such special practice.<sup>597</sup>

I opine that a mediator in care proceedings must be drawn from the legal field; that is, either advocates or attorneys as not any person can mediate. Otherwise, children in need of care and protection, who are already vulnerable, may be further damaged in poor mediation by inexperienced people. Thus, South Africa must promulgate regulations to section 6(4) of the Children’s Act to read as follows:

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<sup>597</sup> See the discussion in section 5.4. In Scotland mediators are registered with the Scottish Mediation Register which is administered by the Scottish Mediation Network. This professional body of mediators adheres to practice standards, which also set out standards for training (including family mediation for mediators working with young children), experience and ongoing practice.

“1 A mediator shall be drawn from the rank of legal practitioners, that is, either advocates or attorneys with, amongst others, the following interests, qualities and skills:

- (a) knowledge of services available in the community;
- (b) be familiar with service providers in child care services;
- (c) knowledge of services that address the most common problems faced by families who need assistance;
- (d) an understanding of the dynamics of conflict;<sup>598</sup>
- (e) capacity to adhere to law, guidelines and practice to keep certain information confidential, consonant with the general provision in the Children’s Act;
- (f) be impartial;
- (g) proper listening skills;
- (h) analytical skills; and
- (i) be registered with a network of mediators established for purposes of mediation in child related matters, and such network of mediators –
  - (i) must be a professional body of mediators which adheres to practice standards set out for training of mediators working with children, and
  - (ii) must have experience and ongoing practice.”<sup>599</sup>

I propose that regulations be promulgated to section 6(5) of the Children’s Act to provide for the professional and legal responsibility, which a mediator who participates in family care mediation has, of handling information concerning the child and to keep certain information confidential.

“1 A mediator must adhere to the following terms and conditions regarding information concerning the child:

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<sup>598</sup> Dore *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 12-13.

<sup>599</sup> Dore *Mediation and Homelessness Prevention in Scotland: A Decade of Mediation Between Young People and Their Families Extract for Local Authorities* (2012) 13.

- (1) share information that is relevant to the case concerning the child at the beginning of any mediation service by –
  - (a) avoiding to limit or prevent the exchange of information between different professional staff who have a responsibility for ensuring the protection of children;<sup>600</sup>
  - (b) sharing all information regarding concern, assessment or mediation proceedings in general on ‘a need to know’ basis;
  - (c) sharing any other information if it is in the best interests of the child; and
  - (d) making no undertakings concerning secrecy on information that protects or has potential to protect the child from harm or imminent danger.
- (2) keep information that is not intended to form part of the proceedings concerning the child confidential by -
  - (a) complying with the guidelines to keep certain information confidential shall apply consonant with the general provision in the Children’s Act and relevant laws;
  - (b) ensuring that confidential information that is gathered for one purpose is not used for another without consulting the person who provided that information; and
  - (c) participate in training that is provided on confidentiality.”

Given the gap in the South African Children’s Act regarding provision for mediation, I further

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<sup>600</sup> Office of the Minister for Children and Youth Affairs Report *Children First: National Guidelines for the Protection of Welfare of the Child* (2009) 21.

propose that South Africa refer to the Children’s Act (Scotland)<sup>601</sup> to provide general principles to guide mediation proceedings by inserting subsection 6(5) of the Children’s Act to read as follows:

“6(5) When deciding a care option for the child, the mediator must –

- (a) use the best interests of the child standard to decide between keeping the child in the family and placement of the child in alternative care. It must do so by setting out a definitive state of what constitutes;
- (b) consider the wishes and the views of the child and take them into account when promoting the best interests of the child;
- (c) where it appears that the child who is part of mediation proceedings is suffering or likely to suffer harm, advise participants to find assistance;
- (d) report such matter to a designated social worker who is responsible for the child;
- (e) withdraw mediation if it appears to the mediator that the participants to mediation are acting in a manner that may be seriously detrimental to the best interests of the child;
- (f) agree to consult a child directly in matters affecting the child and encourage participants to give due consideration for the views and wishes of the child, bearing in mind the child’s age, maturity, stage of development the wishes and views of the child; and

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<sup>601</sup> See Schedule 4 par 59(a) and (b); Adoption and Children Scotland Act 2007, Schedule 2 par 8 and Schedule 3 par 1. See also College of Mediators in Scotland *Code of Practice for Mediators* (2008) par 4 7.

- (g) focus on the best interests of the child and explore situations from a child's point of view.”

I further propose that mediation must be used to facilitate the decision-making process regarding the removal of the child. Thus, the child, parent or guardian of the child, and where necessary the extended family, family members or a community representative as recognised by the community under any tradition, a system of religious, personal or family law or practice to which the child belongs, must participate in the family care mediation of the child. I propose that South Africa must refer to South Australia's laws and incorporate a provision in the Children's Act to facilitate family care mediation. The provision must provide information as to what family care mediation is, who qualifies as a mediator, and what training a mediator needs. I therefore recommend the proposed provision reads as follows:

- “1 Before care proceedings regarding a child who is identified as a child in need of care and protection are adjudicated by the children's court, a designated social worker must hold a family care mediation meeting that must decide on care issues including, an appropriate alternative care for the child. The designated social worker must –
- (a) involve the child, the parent, members of the family, extended family members or a community representative as recognised under any tradition, a system of religious, personal or 'family' law or practice to which the child belongs;<sup>602</sup>
  - (b) ensure that sufficient information regarding the grounds<sup>603</sup> under which the mandatory alternative care intervention is considered, are presented at the family care mediation; and

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<sup>602</sup> S 28.

<sup>603</sup> S 32(2).

- (c) provide information that will enable family care mediation participants make informed decision as to the appropriate alternative care that is best for securing the care and protection of the child.
- 2(1) A designated social worker shall be responsible for convening family care mediation in respect of the child in need of care and protection. A designated social worker must -
- (a) arrange for a mediator to facilitate the family care mediation;
  - (b) arrange for a legal representative to be present, unless satisfied that the child is of an age, maturity and stage of development, has made an independent decision to waive his or her right to be so represented;
  - (c) arrange for persons to be invited to attend the family care mediation at the time and place to be fixed for the meeting; and
  - (d) arrange for the payment of fees of a mediator and the legal representative of the child with the Department of Social Development.
- 3 The mediator shall take reasonable steps to ascertain the views as to the care and protection of the child from –
- (a) the child of an age, maturity and stage of development (so far as his or her views are ascertainable) if he or she has not been invited, refuses to be invited or to attend;
  - (b) the parent who is invited to the family care mediation who is unable to attend; and
  - (c) family members, extended family members or a community representative as recognised under any tradition, a system of religious, personal or ‘family’ law or practice to which the child belongs, who have been invited to attend the mediation if the mediator thinks it appropriate to do so.
- 4 If the mediator thinks appropriate, he or she will allow the child, the parent, members of the family, extended family members or a community representative as recognised under any tradition, a system of religious, personal or ‘family’ law or practice to which the child

belongs, an opportunity to hold a mediation in private for purposes of formulating the family's recommendations as to the arrangements for securing the care and protection of the child.<sup>604</sup>

5 The mediator must –

(a) ensure that the decision regarding appropriate alternative care is made with the consent of the child, the parent or care-giver, if the latter is not available, consent of members of the family, extended family members or a community representative as recognised under any tradition, a system of religious, personal or 'family' law or practice to which the child belongs.<sup>605</sup>

(b) ensure that the family care mediation outcomes are –

(i) recorded and acknowledged by a designated social worker in a written report and persons who attended mediation concur in the report and the decision taken at mediation;<sup>606</sup>

(ii) admissible by the children's court;<sup>607</sup> and

(iii) subject to judicial review.<sup>608</sup>

6 The children's court granting an order for appropriate alternative care for the child, may not do so before a family care mediation has been held in respect of the child. Unless it is

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<sup>604</sup> S 32(3).

<sup>605</sup> S 32(5).

<sup>606</sup> S 32(7).

<sup>607</sup> S 34.

<sup>608</sup> S 33.



satisfied that –<sup>609</sup>

- (a) it has not been possible to conduct mediation despite reasonable endeavours to do so;
- (b) an order should be made without delay;
- (c) the guardians of the child consent to the making of the application; and
- (d) that there is no good reason to do so.

7 Any agreement that is reached at the family care mediation must be –

- (a) submitted to the children’s court for confirmation or rejection;
- (b) made an order of the court, if the court find it to be in the best interests of the child; and
- (c) referred back to the family care mediation for reconsideration of specific issues or rejected if it is not in the best interests of the child.”

I propose that South Africa use the “Roger Hart’s Participation Ladder”<sup>610</sup> to identify the type of assistance that may be provided to a child through the different stages at which a child may participate directly in matters affecting him or her. Apart from the training that I propose

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<sup>609</sup> S 27(2) of the Children’s Protection Act (South Australia).

<sup>610</sup> Hart (1992) 2; Franklin in Verhellen (ed.) *Monitoring Children’s Rights* 324. See the discussion in par 5 5 1.

be undertaken by mediators, “Roger Hart’s Participation Ladder” will guide mediators as to the type of support that they must provide to children in order to enable them to participate. I propose that regulations be promulgated to section 10 of Children’s Act to ensure that the child participates “in an appropriate way”<sup>611</sup> as follows:

- “1 The child must be assisted to participate according to his or her age, level of maturity and stage of development through -
  - (a) methods that are ‘empowering’<sup>612</sup> to get him or her participate in matters affecting him or her by expressing his or her views freely;
  - (b) methods that are ‘decorative and attractive’<sup>613</sup> to invoke the participation of the child, such as –
    - (i) providing a ‘token’<sup>614</sup> to involve a child’s notional participation
    - (ii) presenting practical and real scenarios to the child to enable the child to participate with openness and truthfulness.
- 2 The child of a higher age, maturity and stage of development must participate at that level, be assisted to participate in a particular order, by -
  - (a) ‘assigning, stipulating and informing’ the child about -
    - (i) What is required from him or her with regards to his or her participation and what has been decided and planned regarding the participation;
    - (ii) The role he or she is expected to play during and ensure that the child understands what is required of him or her to enable him or her to fulfil a meaningful role in participating;

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<sup>611</sup> See the proposed provision in section 5 4.

<sup>612</sup> Methods that may be used to “manipulate” the child to participate may be by e.g., use of a language, tools and equipments relevant to the age, maturity and stage of development of the child must be used to skilfully cause the child to participate.

<sup>613</sup> A “decorative” method may be, e.g., a message on a picketing card bearing slogans may be used.

<sup>614</sup> A “token” is any composition that is used to represent something.

- (b) 'consulting and informing' the child -
  - (i) adults must design decisions with the children, the child must form part of the decision-making in matters concerning him or her.
- (c) 'adult-designing or initiating, sharing decisions with the children' -
  - (i) adults must design or initiate, any decision that is taken by an adult, must be shared with the children;
- (d) 'child designed or initiated and directed' -
  - (i) the child must design, initiate and direct with the approval of the adults;
- (d) 'child designed or initiated shared decision with an adult' -
  - (i) the child must design or initiate a decision that is to be shared with an adult and such participation must be real."

South African must also learn from the European experience with regard to the support that is given to the child to ensure that his or her views are heard. The ECtHR acknowledged the fact that the views of the child will seldom be the deciding factor. Hence, the courts ensure that the views of the child are always elicited and respected.<sup>615</sup> Due weight is given to the views of the child depending on the age and understanding of the child regarding the matters involved. Legal aid, advice and assistance are made available where required.<sup>616</sup> Over and above these arrangements, an official solicitor can also be appointed in circumstances where the child does not have a guardian *ad litem*, and where the court considers that the circumstances are exceptional and require such an appointment to be made in the interests of the child.

I am of the view that the trend by the Constitutional Court of appointing a curator *ad litem* for

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<sup>615</sup> See the discussion in section 5 5 1.

<sup>616</sup> *Ibid.*

a child, where necessary, must be practised in other forums adjudicating matters concerning children. Furthermore I propose that a child of such maturity and level of development to understand the proceedings concerning him or her, also be given an opportunity to request a curator, rather than leaving such responsibility to the court. Thus, the proposed provision must be incorporated in section 10 of the Children's Act to read as follows:

- “1 The High Court, children's court, mediation forum or any institution with interests in a matter concerning a child, must appoint or request the appointment of a curator *ad litem* –
- (a) if the child that is of such age, maturity and stage of development requires the appointment of such curator;
  - (b) if the minor does not have a parent or guardian;
  - (c) if the parent or guardian cannot be found;
  - (d) 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
  - (e) if the parent or guardian unreasonably refuses to assist the minor or is not readily available to assist the minor.”

I am of the view that when legislation provides for the participation of children in proceedings concerning them, including situations of removal of children from family life, it must provide for an appropriate degree of legal representation which provides for, amongst others, the functions of the legal representative in the matter concerning the children, who bears the costs for legal representative and stakeholders that may provide assistance to the legal representative. I therefore propose with reference to the Children, Young Persons, and their Families Act (New Zealand), that section 55 of the Children's Act be amended with subsections that read as follows:

“55(1) The High Court, children's court, family care mediation forum or any institution

adjudicating or facilitating a matter relating to a child must, *in all matters affecting the child* -<sup>617</sup>

- (a) direct the registrar or the clerk of the court to request Legal Aid to appoint a legal representative to act on behalf of the child who is the subject of, or who is party to proceedings under the Children's Act,<sup>618</sup>
- (b) request the Legal Aid to appoint the legal representative for the child, who has expertise and the ability to take the side of the child and act as his or her agent in matters relating to the child;
- (c) request the Legal Aid to appoint the legal representative who must, provide guidance to the child about his or her rights, the rights of others and their limitations in situations when the child participates directly in the proceedings affecting him or her;
- (d) request the Legal Aid to provide information to the legal representative which stipulate the duties of the legal representative, the requirements with regards to his or her performance and information regarding stakeholders who may assist with research or information relating to children's issues; and
- (e) direct the clerk of the court or Registrar to ensure that a more accurate interpreter of children's evidence is provided in proceedings relating to the child.

(2) The Legal Aid must –

- (a) ensure that the legal representative meets with the child to establish the views of the child before hearing;<sup>619</sup>
- (b) ensure that the legal representative represent the wishes of the child as opposed to the best interests of the child;

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<sup>617</sup> Own emphasis.

<sup>618</sup> S 7 of the Children, Young Persons, and their Families Act (New Zealand).

<sup>619</sup> S7(3) of the Children, Young Persons, and their Families Act (New Zealand).

- (c) ensure that the best interests of the child override any matter involving the child where the views of the child are not possible to establish; and
- (d) ensure that the legal representative work collaboratively with the child, the designated social workers, specialist medical practitioner or psychologist who attended to the child concerning the matter relating to the child.”

There is a need to emphasise as to who bears the responsibility to appoint a legal representative for the child in the Children’s Act. I propose that South Africa learn from Children, Young Persons and Families Act (New Zealand)<sup>620</sup> and amend section 55 of the Children’s Act by inserting clauses which must read as follows:

“55(3) The clerk of the children’s court, the registrar of the High Court or the managing director of an institution participating in the matter concerning the child, apply to Legal Aid to request for an appointment of the legal representative to represent the child in court, if the child is -

- (a) a party to the proceedings; or
- (b) any other proceedings considered necessary and desirable.

55(4) Where the Legal Aid clerk appoints the legal representative for the child, such person must by reason of personality, cultural background, training and experience be suitably qualified to represent the child.

55(5) When the proceedings in respect of which the legal representative have been disposed of or where the appointment of the legal representative is no longer

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<sup>620</sup> S 159(1).

required for purposes of representing the child, the court may –

- (a) if it is necessary and desirable in the interests of the child, extend the appointment of the legal representative for other specified purpose; or
- (b) involve the services of the legal representative in the day to day care for the child, including contact with the child.”<sup>621</sup>

South Africa must further refer to the Care of Children’s Act (New Zealand)<sup>622</sup> and amend the Children’s Act to provide for a provision which stipulates the duties of a legal representative as follows:

“55(6) The legal representative must –

- (a) where he or she considers it appropriate to do so, meet with the child to enable the child to express his or her views;
- (b) call any person as a witness in the proceedings; and
- (c) where necessary, cross-examine witnesses called by a party or court to the proceedings.”

South Africa must also learn from the New Zealand Children, Young Persons and Families Act<sup>623</sup> and incorporate a provision for payment of fees for legal representation for the child as follows:

“55(7) The legal representative who is appointed by Legal Aid to represent the child in respect of any proceedings shall be served with all documents required to

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<sup>621</sup> S 7(2)(a) of the Care of Children’s Act (New Zealand).

<sup>622</sup> S 7(3) and (4).

<sup>623</sup> S 161.

be served to the parties in the proceedings.

- 55(8) The legal representative who is appointed to represent the child shall be –
- (a) paid out of funds appropriated to the Legal Aid by the Minister of Social Development for such purpose,<sup>624</sup> and
  - (b) have his or her bill of costs for services given to the clerk or registrar of the court who appointed him or her for payment.<sup>625</sup>

I further propose that South Africa refer to the CRC and amend section 10 of the Children's Act and incorporate a provision for the right of the parent and child to have their views heard and taken into consideration. Furthermore, they must refer to the Children and Young People Act (Australia) and identify the different forums in which the parent and the child be given an opportunity to express their views. The proposed amendment must read as follows:

“10(1) the views of the child and parent must be -

- (a) heard and taken into account in any decision concerning the child;<sup>626</sup>
- (b) heard in judicial and administrative proceedings affecting the child;<sup>627</sup>
- (c) heard in –<sup>628</sup>

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<sup>624</sup> S162(1) of the Children, Young Persons and Families Act.

<sup>625</sup> S 162(2) of the Children, Young Persons and Families Act.

<sup>626</sup> Art 12(1) CRC. Qvortrup “Monitoring Childhood: Its Social, Economic and Political Features” in Verhellen (ed.) *Monitoring Children's Rights* (1996) 37. See the discussion in section 5 5 1.

<sup>627</sup> Art 12(2) CRC.



- (i) 'family care' mediations;
- (ii) emergency actions;
- (i) care and protection orders; or
- (ii) court orders".

I am of the view that the state must urgently remove children from proven and properly evidenced abusive family life, circumstances of potential harm, or where harm occurs. I recommend that a designated social worker must draft a *comprehensive care plan* which must be presented to the children's court before the final order is made.<sup>629</sup> The *comprehensive care plan* must guide social workers as to the arrangements in place after the removal of the child, such as the contact between the child and his or her family after the removal or reunification of the child back into his or her family. Thus, the plan must be used in urgent and less urgent situations for the removal of children

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<sup>628</sup> Ss 17; 18 of Division 1.3.2 of the Children and Young People Act (Australia).

<sup>629</sup> See the discussion in section 6 5 on what must be contained in the "comprehensive care plan".

# CHAPTER 6: ALTERNATIVE CARE OPTIONS UPON THE REMOVAL OF THE CHILD FROM HIS OR HER PARENTS OF FAMILY

## 6.1 Introduction

In this chapter, I discuss alternative care options which can be ordered by the children's court when a child has to be removed from family life. Given the wide scope of alternative care, I primarily focus on the improvements made in the Children's Act in alternative care such as, the introduction of foster care,<sup>1</sup> child and youth care centres<sup>2</sup> and temporary safe care.<sup>3</sup> I also indicate the omission in the Children's Act in not recognising kinship care and communal families. I furthermore note the fact that the Act has excluded adoption as an alternative care option.<sup>4</sup> Thus, in general, alternative care is meant to be a temporary arrangement for a child who is in need of care and protection for a specific time.

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<sup>1</sup> Ss 46(1)(a) and 167(1)(a) of the Children's Act; Bosman-Sadie & Corrie (2010) 190.

<sup>2</sup> S 167(1)(b). S 29 of the Child Justice Act 75 of 2008 amends s 167(1)(b) and 191(2)(j) of the Children's Act to such an extent that a presiding officer may order the detention of the a child who is alleged to have committed any offence in a specified child and youth care centre. See Currie & De Waal *The Bill of Rights Handbook* (2005) 608; Bosman-Sadie & Corrie (2010) 189. See the discussion in sections 6 3 and 6 4.

<sup>3</sup> S 167(1)(c). An interview with Khoza, a social worker and also the director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, confirmed that temporary safe care could be provided by a government institution, a private institution or a Child Protection Organization.

<sup>4</sup> S 167(1); Louw in Boezaart (ed.) *Child Law in South Africa* 143. See ch 8 for the discussion on adoption.

In my discussion I make specific recommendations based on the omissions that I find exist in the Children's Act. Thus, I propose, amongst others, the following provisions in the Children's Act: With regard to the omission in the Act to recognise kinship care and communal families,<sup>5</sup> I firstly, propose that South Africa refer to foreign jurisdictions and provide for the definition of "communal care" and kinship care.<sup>6</sup> Secondly, I propose for an enactment of a provision for the placement of children in alternative care in the following order of priority: kinship care, foster care with non-relatives, placement in a communal family and placement in a child and youth care centre, as the last option.<sup>7</sup>

I also propose that a provision be enacted in the Children's Act, that would, *where possible*,<sup>8</sup> prioritise placement of children with foster parents or adoptive parents with a religious, cultural or language background that is similar to the child's, and that a foster grant be provided to all foster children, including children living with grandparents, to adequately meet the needs of such children.<sup>9</sup>

I propose, in relation to foster care plans, that South Africa must learn from foreign jurisdictions, such as the Children and Young Persons Act (New South Wales)<sup>10</sup> and the

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<sup>5</sup> See the discussion in section 6 3 1

<sup>6</sup> See the discussion in sections 6 3 1 and 6 3 3; see also the proposed provision in section 6 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> Own emphasis.

<sup>9</sup> See the discussion in section 6 3 1 and the proposed provision in section 6 5.

<sup>10</sup> See the proposed provision in section 6 5.

position in the Ireland,<sup>11</sup> to make a care plan a standard requirement for all alternative care arrangements. I am of the view that the provision must be for a *comprehensive care plan*,<sup>12</sup> as used in California, United States of America, inferred from the Adoption and Safe Families Act.<sup>13</sup> The Act requires social workers to use reasonable efforts to find permanent placement for a child. The “comprehensive plan” includes well co-ordinated services which promote the health, development and the well-being of children.<sup>14</sup>

I acknowledge the improvements made in the Children’s Act for the provision of training programmes to foster parents. I also note with favour, the fact that foster care agreements may stipulate the terms and conditions of foster care. However, I propose that regulations be promulgated to the Children’s Act for explicit responsibilities of foster parents, the training that must be provided to foster parents on life skills to enhance their capacity to provide care to children, and cooperation between the social worker and foster parents in promoting the development and well-being of the child.<sup>15</sup> I also propose for a provision for the strict monitoring of foster care placements by the designated social workers in order to marginalise

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<sup>11</sup> See the discussion in section 6 3 3 and the proposed provision in section 6 5.

<sup>12</sup> Own emphasis. The term “comprehensive plan” is used in the California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 49: accessed from [www.nc.casaforchildren.org/files/.../Reasonable\\_Efforts\\_2.pdf](http://www.nc.casaforchildren.org/files/.../Reasonable_Efforts_2.pdf)-United States on 2012-11-16.

<sup>13</sup> *Public Law* 105-89.

<sup>14</sup> See the discussion in section 6 3 3.

<sup>15</sup> See the proposed provision in section 6 5.

situations of potential risk that come with incapacities of foster parents.<sup>16</sup>

In my discussion on the backlog in foster care extensions, I propose for, amongst others the following: The enactment of a provision that will ensure that social workers comply with the Children's Act by reviewing care plans, and a provision for the obligation on the designated social worker to communicate the results of the review of foster care plans in a family care mediation forum in order to bind the social worker to act on the recommendations of the mediation.<sup>17</sup> I also propose for a provision for a penalty in the event the designated social worker does not review care plans or omits to communicate the results of the review of the care plan to a family care mediation.<sup>18</sup> Thus, I am of the view that this strategy may work to lessen the role given to courts to extend care orders.<sup>19</sup>

I also propose that South Africa must refer to foreign jurisdictions and enact a provision in the Children's Act which will ensure that clear funding is directed to collaborative work by intersectoral government departments, private entities and NGOs, for implementation of services and provision of special care services necessary for children in alternative care.<sup>20</sup>

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<sup>16</sup> See the discussion in section 6 3 3 and the proposed provision in section 6 5.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, see the discussion in section 6 3 1.

<sup>20</sup> *Ibid.*

## 6.2 Appropriate alternative care options

This section discusses the concept “appropriate alternative care” and its meaning in the context of a child who is removed from family life. In the discussion, I propose that a provision be enacted in the Children’s Act, that must, *where possible*,<sup>21</sup> prioritise placement of children with foster parents or adoptive parents with a religious, cultural or language background that is similar to the child’s.<sup>22</sup> According to the Constitution, every child has the right to family care, or parental care, or to *appropriate*<sup>23</sup> alternative care when removed from the family environment.<sup>24</sup> The interpretation of this provision is that the child may only be placed in alternative care when he or she is removed from the family environment. The Constitution is emphatic that the form of alternative care selected for a specific child when he or she is removed from family life must be *appropriate*<sup>25</sup> alternative care.<sup>26</sup>

According to Zaal and Matthias,<sup>27</sup> in order for alternative care to remain appropriate, it must be enhanced. This may be done by way of developing decision-making responsibilities and processes, sufficient management and suitable changes to ensure that children are appropriately protected. Many of the decisions pertaining to management in the alternative

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<sup>21</sup> Own emphasis.

<sup>22</sup> See the proposed provision in section 6 5.

<sup>23</sup> Own emphasis.

<sup>24</sup> S 28(1)(b).

<sup>25</sup> Own emphasis.

<sup>26</sup> Zaal & Matthias “Alternative Care” in Davel & Skelton (eds.) *Commentary on the Children’s Act* (2010) 11-12.

<sup>27</sup> *Ibid.*

care system are to be made by the provincial heads of Social Development consistent with their powers as provided in the Children's Act.<sup>28</sup>

The Constitution does not ascribe a specific meaning to “appropriate alternative care”. It may mean that the alternative care for the child who is removed from family life must be similar to his or her previous family environment. Appropriate alternative care may also mean a placement that is appropriate to address the factors that influenced the decision to remove the child from family life. For instance, if the child is removed from family life for reasons of sexual abuse, appropriate alternative care may be provided in a safe environment where the child receives treatment and counselling without contact with the alleged perpetrator.

Section 28(1)(b) of the Constitution expresses the right of the child to *appropriate*<sup>29</sup> alternative care when removed from the family environment.<sup>30</sup> It is the duty of the state to intervene and protect the child when he or she is removed from family life. Thus, the state must provide care of such a nature and quality that it is close to family or parental care. Thus, I hold the view that “appropriate alternative care” must provide for the protection, development and well-being of the child when family care or parental care is not available.

This also means that when the state assumes responsibility for the upbringing of the child by

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<sup>28</sup> Ss 107 and 311(1). See also the discussion in Zaal & Matthias in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 11-2.

<sup>29</sup> Own emphasis.

<sup>30</sup> Skelton in Boezaart (ed.) *Child Law in South Africa* 285-286.

placing him or her into care, the care order must be conducted in a manner that respects the religious and philosophical convictions of the child's parents. The CRC states that:

“... when considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.<sup>31</sup>

The SALRC<sup>32</sup> noted that children placed with foster parents of different background from their own, might indirectly be denied the right to enjoy their culture, to practice their religion, or use their own language.<sup>33</sup> The SALRC also acknowledged the fact that the Constitution<sup>34</sup> gives effect to the right of every person to culture, language and religion and emphasises the child's right to family life in terms of the dignity that a family unit has.<sup>35</sup> However, this should not be the only concern. The SALRC noted that:

“Where most practitioners agree that, *where possible*,<sup>36</sup> the racial and cultural matching of children and prospective adoptive or foster parents is desirable, many express concern about the damaging effects of institutionalisation, especially in the case of infants and very young children. They emphasise the urgency of the need to settle such a child into a

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<sup>31</sup> Art 20(3). See Art 25(3) of the ACRWC; Kilkelly (1999) 273. See the discussion in section 8 2 3.

<sup>32</sup> Discussion Paper on the *Review of the Child Care Act and the Children's Bill Project* 110 (2002) 22-23.

<sup>33</sup> See Gallinetti & Loffell “Foster Care” in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 12-11.

<sup>34</sup> S 181(c).

<sup>35</sup> Discussion Paper on the *Review of the Child Care Act and the Children's Bill Project* 110 (2002) 220-221 par 17 5 2.

<sup>36</sup> Own emphasis.



permanent family environment...and they hold that if considerations of *culture and ethnicity become the overriding factor, irreparable damage may be done to children who could have the benefit of care in a family environment.*<sup>37</sup>

Thus, I propose that a provision which considers the standard expressed in the CRC above, regarding placement of children, must be incorporated in the Children's Act, consistent with the views expressed by the SALRC with regards to placement of children with adoptive parents or foster parents.<sup>38</sup>

Gallinetti and Loffell<sup>39</sup> acknowledge the fact that the Constitution<sup>40</sup> guarantees every person the right to a culture, religious and linguistic community to enjoy their culture. Bosman-Sadie and Corrie<sup>41</sup> argue that culture is a largely learned behaviour and not genetically inherited. They add that respect for the culture of the family of origin is not negotiable and should be taught to a child from his or her earliest years of development.

The case of *C v Commissioner of Child Welfare, Wynberg*<sup>42</sup> demonstrated the fact that the matching of children and would-be guardians on the basis of religion, language and culture made more sense when done in foster care where children are older. The court observed that the identification of an adopted child with his parents, their culture, way of life and

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<sup>37</sup> *Ibid.*

<sup>38</sup> See the proposed provision in section 6 5.

<sup>39</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 12-9.

<sup>40</sup> S 31(1).

<sup>41</sup> (2010) 251.

<sup>42</sup> 1970 (2) SA 76 (C).

background is vital to the maintenance of a happy and stable home.<sup>43</sup> The person who is providing care for the child must share the same background.<sup>44</sup> The Children's Act provides that when the children's court decides on whether to place the child into foster care, it is required to consider the report submitted by the social worker regarding the cultural, religious and linguistic background of the child<sup>45</sup> and the availability of a foster parent with a similar background.<sup>46</sup>

The Children's Act also finds it essential that the religious, cultural and language background be assessed when a child is adopted.<sup>47</sup> The court in *C v Commissioner of Child Welfare, Wynberg*, found that it was too rigid to apply religious, culture and language matching principles for adoptions where the majority of children affected would be young infants. In this case, the religious background would carry less weight. The court may have arrived at such reasoning because of the fact that foster care is generally a temporary option, whereas adoption is permanent.<sup>48</sup>

Zaal<sup>49</sup> maintains that culture and language should not be used to deny a child an opportunity to grow up in a family full of love and support for his or her proper development and well-

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<sup>43</sup> Par 88C.

<sup>44</sup> Par 87E.

<sup>45</sup> Ss 184(1)(a) and 184(2)(a) and (b) of the Children's Act.

<sup>46</sup> S 184(1)(b) of the Children's Act. See discussion in section 6 5 1.

<sup>47</sup> Ss 240(1)(a) and 231(3) of the Children's Act. Reg 98(1) and (3) to the Children's Act.

<sup>48</sup> Skelton *et al. Family Law in South Africa* (2010) 321.

<sup>49</sup> "Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983" (1994) *SAJHR* 372.

being. This supports the view expressed by the SALRC. Also, foreign jurisprudence seems to support Zaal's argument.<sup>50</sup> I agree with the discussed legal prescripts and Zaal's argument that the background of the child in relation to religion, culture and language is an important consideration when placing the child in care. However, I emphasise the fact that these attributes must be considered *where possible*.<sup>51</sup>

### 6.2.1 *Alternative care options in terms of South African law*

In this section I describe the different types of alternative care as provided by the Children's Act, the experience of children in care, and how it impacts on their lives. I also discuss the types of alternative care orders that may be issued by the court. I propose that, amongst others, the following: that a provision be enacted in the Children's Act to use the process for the review of care plans to regulate the period of stay in care; a provision be incorporated in the Children's Act for the child to be subjected to medical assessment for purposes of

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<sup>50</sup> According to the English family law, the right of the parent to determine the child's religious upbringing is an aspect of parental responsibility: *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* (1999) UKHL 15. See also the case of *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* (1991) 2 FLR 573: the 8 year-old child of Orthodox Jewish parents who suffered from a Down Syndrome was placed with Catholic foster carers at the age of 18 months. Attempts to find adoptive placement consistent with the child's religious background failed. The parents objected to the child being placed with Catholic foster parents and sought her return. Initially, the Court of Appeal accepted that a child's religious heritage carried some weight. However, this did not justify the removal of the child from the foster parents since that was an arrangement which was working well for the child.

<sup>51</sup> See the proposed provision in section 6 5.

examining his or her medical needs and for purposes of ascertaining his or her health condition and well-being; and a provision that allows a child who cannot be reunited with his or her family to remain in care until such time the child is self-sufficient.<sup>52</sup>

When a child is placed in care, the designated social worker is required to draft a plan, which must contain the terms of the contact between the child and his or her parents or family members while the child remains in alternative care.<sup>53</sup> In addition to care, alternative care must offer amongst other services, counselling and rehabilitation, which must last for a specified time when the child is kept in care. The child may remain in alternative care and participate in further programmes until his or her situation is addressed and he or she is ready to be released from care. When the child is placed in temporary safe care, such care must be approved by the provincial head of Social Development<sup>54</sup> and must comply with the prescribed criteria in the Regulations.<sup>55</sup>

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<sup>52</sup> See the proposed provisions in section 6 5.

<sup>53</sup> Reg, see also an interview with Khoza, the Director of the Department of Social Development: Child Protection Unit: Alternative Care, held on 2011-04-14, see Annexure “G”.

<sup>54</sup> S 167(3)(a) of the Children’s Act.

<sup>55</sup> S 167(3)(b) of the Children’s Act; according to reg 63(3): “[a]pproval to provide temporary safe care to a child may not be granted to a person, facility, place or premises unless the relevant provincial head of social development or the person authorised to grant approval is satisfied that –

- (a) the child will be cared for in a healthy, hygienic and safe environment in line with the reasonable standards of the community where the temporary safe care is to be provided;
- (b) the child will be provided with adequate nutrition and sleeping facilities;

Apart from the alternative care placements orders that can be made for a child in need of care,<sup>56</sup> the children's court can issue the different types of placement orders, amongst others, the following:<sup>57</sup> that a child in a child-headed household be placed under the supervision of an adult person designated by the court.<sup>58</sup> This order may be made with the aim of keeping the child in the family. According to Khoza,<sup>59</sup> many children who become orphans at a young age can use possessions such as their residential homes or farm land to find their sense of belonging and identity in their family environment and community. The children's court hardly ever takes a decision to remove a child living in a rural community, in a child-headed household to alternative care.<sup>60</sup> Khoza feels that the disadvantage of placing a child in a

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- (c) the person responsible for providing the child with temporary safe care is suitable and willing to provide such care;
  - (d) the area in which the child is to be placed in temporary safe care will not be severely disruptive to the child's daily routine; and
  - (e) care will be provided in accordance with the definition of care as set out in section 1 of the Act".

<sup>56</sup> S 156 of the Children's Act.

<sup>57</sup> S 167.

<sup>58</sup> S 46(1)(b): According to an interview with Khoza, a social worker and also the director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, see Annexure "G". See also s 156(1)(f).

<sup>59</sup> An interview with a social worker and also the director of the Child Protection Unit of the National Department of Social Development, Tshwane, held on 2011-04-14.

<sup>60</sup> S 46(1)(a) of the Children's Act. According to an interview with Khoza, a social worker and also the director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14 and a follow-up interview held on 2011-07-12, an order to remove the child from his or her family environment may only be made if the order will promote the development, well-being and the best interests of the child. The child may be

child-headed household in alternative care is that the child is likely to suffer emotionally and psychologically in the event he or she finds changes in his or her family environment which occurred during his or her absence.

The children's court can also issue a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child at different times or within specified hours of the day or night for a specific period.<sup>61</sup> This form of care is used in situations where the child is placed in a facility for psychological services, treatment or counselling for a specific period. A supervision order<sup>62</sup> may also be issued where the child is placed with the parent or care-giver but the social worker supervises the person who is caring for the child. A shared care order may be issued to care-givers in a child and youth care centre to take the responsibility for the care of the child at different times or periods.<sup>63</sup>

Other orders include subjecting the child, the parent or any person with parental responsibilities and rights in respect of the child to early intervention services, family preservation programmes,<sup>64</sup> or a child protection order which includes an order that a child remains in, be released from, or be returned to, the care of a person subject to conditions

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removed if he or she is likely to suffer abuse in the family environment and where according to the views of the child, he or she may not be able to live in such a family environment. See also s 156(1)(g).

<sup>61</sup> S 46(1)(d) of the Children's Act.

<sup>62</sup> S 46(1)(f).

<sup>63</sup> S 46(1)(e).

<sup>64</sup> S 46(1)(g). See the discussion in section 4 2.

imposed by the court.<sup>65</sup> These orders can be made to stabilise the lifestyle of the child in the family environment. The orders can also be made as additional court orders where the child is found to be in need of care and protection.<sup>66</sup> There are no formal forms that are created in the Regulations for these court orders. Instead, matters that require these orders such as, a child who has been subjected to abuse or deliberate neglect,<sup>67</sup> are dealt with administratively within the Department of Social Development.<sup>68</sup>

The Child Care Act defined alternative care as the placement of a child outside his or her family with a suitable foster parent as designated by the court,<sup>69</sup> placing a child in a children's home,<sup>70</sup> or a school of industry<sup>71</sup> as well as placement in adoption by means of an adoption order.<sup>72</sup> The Children's Act did away with children's homes and schools of industry. These facilities are now classified as child and youth care centres. The centres operate as multi-use facilities.

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<sup>65</sup> S 46(1)(h)(i).

<sup>66</sup> Bosman-Sadie & Corrie (2010) 70-71.

<sup>67</sup> S 46(1)(h)(v) of the Children's Act.

<sup>68</sup> *Ibid.*

<sup>69</sup> S 15(1)(b) of the Child Care Act.

<sup>70</sup> S 15(1)(c) of the Child Care Act.

<sup>71</sup> S 15(1)(d) of the Child Care Act.

<sup>72</sup> Reg in terms of s 60 to the Child Care Act, GG 12 December 1986 No 10546. See also Bosman-Sadie & Corrie (2010) 190. I am of the opinion that previously, during the operation of the Child Care Act, alternative care was not only meant to be temporary safe care for the child whilst he or she awaited an opportunity to be returned home after observation or treatment. Instead, alternative care was also meant to be a permanent arrangement for children who cannot be reunited with their parents.

The advantage of establishing multi-use facilities<sup>73</sup> is that they are cost effective in that a single infrastructure can support one multi-purpose facility and that fewer costs are incurred for operations and human personnel. However, these facilities may pose challenges such as lack of parking lots, as one multi-purpose facility might be accessed by many children, including those who are referred to the multi-purpose centre by order of the court for access to therapeutic services only. Furthermore, a multi-purpose facility poses the challenge of having competing objectives and programmes in the absence of inappropriate planning.

If the children's court was satisfied (after the inquiry) that the child was in need of care, it could order that the child be returned to a place of safety or remain in the custody of his or her parents.<sup>74</sup> A child who is placed in care, could remain there for a maximum period of two years<sup>75</sup> and the order of the children's court could be renewed for a further two years.<sup>76</sup> The Minister of Welfare and Population Development was vested with the power to renew placement orders, and also to ensure that renewals were heard in the children's court.<sup>77</sup> However, the Child Care Act had no guidelines to determine the termination of alternative

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<sup>73</sup> See Skelton "Child and Youth Care Centres" in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 13-9. See the discussion in section 6 5 1 1.

<sup>74</sup> S 15(1)(a) of the Child Care Act.

<sup>75</sup> S 16 of the Child Care Act.

<sup>76</sup> Reg 15 to the Child Care Act as substituted by the 1998 Amendments contained provisions designed to ameliorate the problems caused by the Ministerial renewals of the children's court placement orders. See Reg 416 in GG 18770 of 31 March 1998 hereinafter referred to as the "1998 Amendments".

<sup>77</sup> Zaal "Children's Courts: An Underrated Resource in the New Constitutional Era" in Robinson (ed.) *The Law of Children and Young Persons in South Africa* (1997) 113-114.



care for adoption as a means for permanency planning<sup>78</sup> when reunification is unsuccessful.<sup>79</sup>

The improvement made by the Children's Act is that a child cannot be kept in a temporary safe care or child and youth care centre for a period of more than six months without a court order placing the child in alternative care.<sup>80</sup> Even though this clearly shows that temporary safe care is meant solely to provide services and is never intended as a permanent solution, there are no strategies put in place to curb the lengthy periods of stay in temporary care. Hence, I recommend that a provision be enacted in the Children's Act to use the process for the review of care plans to regulate the period of stay in care.<sup>81</sup>

A child in alternative care may be granted leave of absence subject to limitations and conditions that may be prescribed.<sup>82</sup> This may apply in cases where a child in foster care or a child in a child and youth care centre is permitted to spend a weekend with parents who have improved their capacity to care for the child.<sup>83</sup> The leave of absence may also be requested for the child in, amongst other situations, where the child has to undertake an international visit.<sup>84</sup> Before the children's court can grant the leave of absence, the court

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<sup>78</sup> Permanency planning is defined as giving a child an opportunity to grow up in his or her own family and where this is not possible or not in his or her best interests, to have a time-limited plan which works towards life-long relationships in a family or community setting.

<sup>79</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 142.

<sup>80</sup> S 167(2), must be read with s 305(1)(c).

<sup>81</sup> See the proposed provision in section 6 5.

<sup>82</sup> S 168(1).

<sup>83</sup> Zaal & Matthias in Davel & Skelton (eds.) *Commentary on the Children's Act* 11-6.

<sup>84</sup> Bosman-Sadie & Corrie (2010) 192.

must be provided with the reasons why the child is undertaking the visit, including the date on which the child can be expected back in South Africa.<sup>85</sup> However, Zaal and Matthias<sup>86</sup> note that some alternative carers may be tempted to gain respite care by granting periods of leave to children who are proving difficult to manage. Thus, it is important to stipulate conditions and limit the period.<sup>87</sup>

The leave period in terms of the Children's Act<sup>88</sup> is limited to not more than six weeks. The leave of absence may also be granted by either the management of a child and youth care centre,<sup>89</sup> the person in whose care the child has been kept,<sup>90</sup> or the provincial head of Social Development in the relevant province as recommended by a report of the social worker.<sup>91</sup> When the leave of absence is granted by the management of the child and youth care centre, the provincial head of Social Development must immediately inform the children's court which ordered the placement of the child in the centre about the granting of the leave and the terms and times stipulated in the leave.<sup>92</sup> If the child is placed under supervision of a social worker, leave of absence may only be granted with the approval of a social worker.<sup>93</sup> The provincial head of Social Development, the social worker supervising the child in

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<sup>85</sup> *Ibid.*

<sup>86</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 11-6.

<sup>87</sup> *Ibid.*

<sup>88</sup> Reg 58(1) to the Children's Act.

<sup>89</sup> S 168(1)(a) of the Children's Act.

<sup>90</sup> S 168(1)(b) of the Children's Act.

<sup>91</sup> S 168(1)(c) of the Children's Act.

<sup>92</sup> Reg 64(3) to the Children's Act.

<sup>93</sup> S 168(2) of the Children's Act.

alternative care, and the management of a child and youth care centre may cancel the leave of absence at any time.<sup>94</sup> Once the leave of absence has been cancelled, the provincial head of Social Development, the social worker supervising the child in alternative care and the management of a child and youth care centre must request that the child be returned to the person, the child and youth care centre or place where the child is in temporary safe care.<sup>95</sup>

When children are in alternative care the state is responsible for their care.<sup>96</sup> Permission must be obtained for any child who leaves South Africa during this period. The Children's Act prohibits any child in alternative care from leaving the Republic without the written approval of the provincial head of Social Development.<sup>97</sup> When the provincial head of Social Development grants such approval, he or she will consider what is in the best interests of the child.<sup>98</sup> The provincial head of Social Development may set terms and conditions when granting permission for a child to leave the Republic.<sup>99</sup> For instance, the provincial head of Social Development may require that the child be brought back by a specific date.<sup>100</sup>

I am of the view that regulations must be promulgated to section 169(1) of the Act to address

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<sup>94</sup> S 168(3) of the Children's Act.

<sup>95</sup> S 168(5) of the Children's Act.

<sup>96</sup> See also the discussion in Zaal & Matthias in Davel & Skelton (eds.) *Commentary on the Children's Act* 11-7.

<sup>97</sup> S 169(1).

<sup>98</sup> S 169(2).

<sup>99</sup> Zaal & Matthias in Davel & Skelton (eds.) *Commentary on the Children's Act* 11-7.

<sup>100</sup> *Ibid.*

issues of contact between the child and birth parents, or anyone with whom the child had a relationship that constituted family life.<sup>101</sup>

I am of the view that the child and the birth parent must be able to communicate<sup>102</sup> with each other, even when the child has left South Africa. Any child who absconds from alternative care, or a child who fails to return to alternative care upon cancellation,<sup>103</sup> or expiration of leave of absence, shall be apprehended by a police official or designated social worker.<sup>104</sup>

The Children's Act permits a police official or designated social worker, who on reasonable grounds, believes that the child who is in alternative care is accommodated on certain premises, to enter the premises without a warrant and to search the premises for the purposes of apprehending the child.<sup>105</sup> The police official who apprehends the child who absconded, must ensure that the child is safe and that the child's well-being is taken care of. If the safety and well-being of the child is at risk, the police official must notify the provincial Department of Social Development or a designated Child Protection Organisation of the fact that the child has been apprehended and any steps that have been taken regarding the

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<sup>101</sup> See the discussion in section 7.5 for the proposed provision.

<sup>102</sup> See the wide definition of "contact" in s 1 of the Children's Act.

<sup>103</sup> S 170(1)(a).

<sup>104</sup> S 170(1)(b).

<sup>105</sup> S 170(2). S 27 of the Criminal Procedure Act allows police officer to use force, such as breaking down a door, to get into premises. The police officials do this when they have good reason to believe that valuable evidence could be destroyed. A forced entry would also be justified if someone's life was in danger. See Meintjies-Van der Walt *et al. Introduction to South African Law: Fresh Perspectives* (2008) 467; Bosman-Sadie & Corrie (2010) 192.

child.<sup>106</sup>

There is once more, a *lacuna* in this provision. Thus, I propose that a provision be incorporated in the Children's Act for the child to be subjected to medical assessment for purposes of examining his or her medical needs and for purposes of ascertaining his or her health condition and well-being.<sup>107</sup>

If the child is apprehended, or he or she returns on his or her own, the person who cared for the child in alternative care must without delay bring the child before the presiding officer of a children's court,<sup>108</sup> and keep the child in temporary safe care until the child appears before the presiding officer.<sup>109</sup> The child is brought before the presiding officer who must order that the child be put in temporary safe care, a child and youth care centre or appropriate facility.<sup>110</sup> The presiding officer must inquire into the reasons why the child absconded from alternative care or failed to return<sup>111</sup> and must order that the child be returned to that centre or person who had the care of the child.<sup>112</sup>

The presiding officer must order the clerk of the children's court to report the results of the

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<sup>106</sup> S 170(4).

<sup>107</sup> See the proposed provision in section 6 5.

<sup>108</sup> S 170(5)(a).

<sup>109</sup> S 170(5)(b).

<sup>110</sup> S 170(6)(a).

<sup>111</sup> S 170(6)(b).

<sup>112</sup> S 170(6)(c)(i).

inquiry to the provincial head of Social Development in the relevant province<sup>113</sup> and notify the provincial head of Social Development of any order that has been made in this regard.<sup>114</sup> Where the child could not be returned to the centre as noted in the above provisions,<sup>115</sup> the provincial head of Social Development may, after consideration of the report and enquiry of the children's court, consider the transfer of the child, or, where necessary,<sup>116</sup> remove the child from alternative care,<sup>117</sup> discharge the child from alternative care,<sup>118</sup> or order that the child be returned to the child and youth care centre or person in whose care or temporary safe care the child was in before placement.<sup>119</sup>

If the provincial head of Social Development transfers the child to the care of the child's parent, guardian or former care-giver under the supervision of a designated social worker, he or she must specify in an order that is issued in this regard any requirements that must be complied with.<sup>120</sup> In the event of breach or non-compliance with the order, the designated social worker may bring the child before a children's court, which may vary the order issued by the provincial head of Social Development after the inquiry or make a new order.<sup>121</sup>

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<sup>113</sup> S 170(7)(a).

<sup>114</sup> S 170(7)(b).

<sup>115</sup> S 170(6)(c)(ii).

<sup>116</sup> S 170(8)(a).

<sup>117</sup> S 170(8)(b).

<sup>118</sup> S 170(8)(c).

<sup>119</sup> S 170(8)(d).

<sup>120</sup> S 171(3)(a) of the Children's Act.

<sup>121</sup> S 171(3)(b) of the Children's Act.

Before the provincial head of Social Development may issue an order in writing for the transfer of a child in alternative care,<sup>122</sup> a designated social worker must consult the child, taking into account the age, maturity and stage of development of the child,<sup>123</sup> the parent, guardian or care-giver of the child if available,<sup>124</sup> the child and youth care centre,<sup>125</sup> or the person to whom the child is to be transferred.<sup>126</sup> If the child is transferred from a secure child and youth care centre to a less restrictive child and youth care centre or another person, the provincial head of Social Development must be satisfied that the transfer will not prejudice other children.<sup>127</sup>

I am of the view that the Children's Act failed to address the critical fact that the transfer of the child must not stifle the right of the child and the parent to contact each other. Thus, I recommend that the child must be transferred to a place that is accessible by the birth parent or other persons who have family relations with the child for purposes of contact.<sup>128</sup>

The Children's Act prohibits any transfer of a child from alternative care without ratification by the children's court in circumstances where the child is transferred from the care of a person to a child and youth care centre,<sup>129</sup> or from the care of a child and youth care centre to secure

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<sup>122</sup> S 171(1) of the Children's Act.

<sup>123</sup> S 171(4)(a) of the Children's Act.

<sup>124</sup> S 171(4)(b) of the Children's Act.

<sup>125</sup> S 171(4)(c) of the Children's Act; reg 60(2).

<sup>126</sup> S 171(4)(d) of the Children's Act.

<sup>127</sup> S 171(5) of the Children's Act.

<sup>128</sup> See the proposed provisions with regard to "contact" in section 7 5.

<sup>129</sup> S 171(6)(a) of the Children's Act.

care or a more restrictive child and youth care centre.<sup>130</sup> Thus, the ordinary transfer powers which the heads of the Department of Social Development have in terms of section 171(1) are restricted. The head of Social Development who transfers a child from alternative care to a child and youth care centre must have such decision ratified by the children's court.<sup>131</sup>

The children's court will only act once the decision to transfer the child is communicated to it.<sup>132</sup> However, the Children's Act does not indicate whether the children's court's decision to ratify entails some kind of enquiry proceedings or not. Since this is not made clear, the children's court has an unfettered discretion to decide what process is followed.<sup>133</sup> Zaal and Matthias<sup>134</sup> maintain that if the children's court merely has the power to endorse the transfer of the child, such will be meaningless.<sup>135</sup> I agree with Zaal and Matthias that some issues for consideration regarding the transfer of the child would be that appropriate transport be used and that the child be accompanied by a social worker, social service professional or escort employed by the Department of Social Development.

A child that is already in a child and youth care centre, or placed in the care of a person or

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<sup>130</sup> S 171(6)(b) of the Children's Act. See also Bosman-Sadie & Corrie (2010) 195.

<sup>131</sup> Zaal & Matthias "Alternative Care" in Davel & Skelton (eds.) *Commentary on the Children's Act* (2010) 11-16.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Regs 62, 62(1), 62(3) to the Children's Act; Zaal & Matthias in Davel & Skelton (eds.) *Commentary on the Children's Act* 11-16 - 11-17.

<sup>135</sup> *Ibid.*



temporary safe care, may be transferred from his or her current placement to another,<sup>136</sup> discharged from the alternative care,<sup>137</sup> or be returned once a notice is issued by the provincial head of Social Development to that effect.<sup>138</sup> On the other hand, the provincial head of Social Development may issue a notice requiring that a child be provisionally transferred from alternative care to another form of care that is not restrictive for a trial period of not more than six months.<sup>139</sup> The provincial head of Social Development may discharge a child from alternative care at any time by way of notice if it is in the best interests of the child to do so.<sup>140</sup> The notice to discharge the child from alternative care may be issued if procedures such as regulations 66(1)<sup>141</sup> to the Children's Act have been followed.<sup>142</sup> The

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<sup>136</sup> S 173(2)(a); reg 68(1)(a) to the Children's Act.

<sup>137</sup> S 173(2)(b); reg 68(1)(e) to the Children's Act. The child must be accompanied by a designated social worker or escort who must be suitably qualified, experienced person or employed by the provincial of the Department of Social Development or by an accredited Child Protection Organisation.

<sup>138</sup> S 173(2)(c) of the Children's Act.

<sup>139</sup> S 174(1) of the Children's Act.

<sup>140</sup> S 175(1) of the Children's Act.

<sup>141</sup> The procedures entail firstly, the assessment of the best interest of the child before issuing a notice to discharge the child which comprise of the following: (a) an assessment that must be conducted by a designated social worker in consultation with (i) the parent, guardian or care-giver of the child or the person in whose custody the child had been before the placement of the child in alternative care, (ii) the foster parent, the head of the child and youth care centre or the head of the care facility and (iii) the child himself or herself. Secondly, the assessment must in terms of reg 66(1)(b) take into account, amongst others, (i) the child's basic need for love, parental care and permanent family life; (ii) the child's need for protection and security, (iii) the physical and psychological being of the child, (iv) ascertain the wishes and feeling of the child in accordance with the age and the level of maturity of the child and (v) any effect the changes may have on the child. Thirdly, a procedure for the reunification of the child with his or her family in terms of reg 66(2)(a) must be complied with. The procedure requires that a

child must be discharged in accordance with his or her developmental plan on condition that the goals, which put him or her in care, have been achieved.<sup>143</sup> The discharge of the child from alternative care will reunite the child with his or her immediate family or other family members.<sup>144</sup> After-care<sup>145</sup> can be provided as a supportive service to monitor the child's developmental adjustment after his or her discharge.<sup>146</sup>

A child that is placed in alternative care shall remain there until he or she reaches the age of 18. However, the provincial head of Social Development may consider an application to extend the placement of the child in alternative care until the child reaches 21 if such application is made by the child.<sup>147</sup> The application will be granted if the alternative care-giver will be able to care for the child<sup>148</sup> and if the continued stay of the child in the alternative

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designated social worker who is rendering family reunification services compile a report regarding the developmental assessment of the child. The report must be compiled in consultation with the parent, guardian, care-giver or the person who had custody of the child before the removal of the child to alternative care, the foster parent, the head of the child and youth care centre and the head of a care facility and the child himself or herself.

<sup>142</sup> S 175(2)(a)(i); reg 67 to the Children's Act.

<sup>143</sup> Bosman-Sadie & Corrie (2010) 196.

<sup>144</sup> S 175(2)(a)(ii).

<sup>145</sup> S 1(1) of the Children's Act defines after-care as: a means of the supportive service provided by a social worker or a social service professional to monitor progress with regard to the child's developmental adjustment as part of (a) family preservation or reunification services, (b) adoption or placement in alternative care or (c) discharge from alternative care.

<sup>146</sup> Bosman-Sadie & Corrie (2010) 198.

<sup>147</sup> S 176(2).

<sup>148</sup> S 176(2)(a); reg 69(1)(a) to the Children's Act.

care is necessary to enable the child to complete his or her education and training.<sup>149</sup> I am of the view that the Act must be amended to allow for the child to remain in care until such time the child is self-sufficient.<sup>150</sup> Thus, the provision which allows the child or anyone on his or her behalf, to lodge an application to continue residing in alternative care, must be amended.

The Children's Act allows a child and any person who is aggrieved by any decision regarding the placement of a child in alternative care to lodge an appeal against such decision with the MEC for Social Development within ninety days. The MEC must decide on the appeal within ninety days of receipt of the application to appeal.<sup>151</sup> I am concerned about the time given to the MEC to decide on the complaints regarding placement. The fact is that government is known for its delay in responding to complaints and matters in general, and it is highly likely that complaints that are lodged with government can last for protracted periods. I am of the view that matters concerning children in care are very sensitive and must be attended to timeously and with respect. I argue further that complaints must be dealt with speedily if they are sent to mediation.<sup>152</sup> The child or any person who is not satisfied with the outcome of the lodged appeal may apply to the competent High Court to review that decision.<sup>153</sup>

The management of the child and youth care centre or person or organisation in whose care

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<sup>149</sup> S 176(2)(b); reg 69(1)(b) to the Children's Act.

<sup>150</sup> See the proposed provision in section 6 5.

<sup>151</sup> S 177(1); reg 90 to the Children's Act.

<sup>152</sup> In line with s 6 of the Children's Act, see the discussion in section 5 6, regarding the proposed provisions on mediation.

<sup>153</sup> S 177(2).

or temporary safe care the child has been placed has an obligation to report any matter to the provincial head of Social Development concerning a child who is seriously injured or abused in alternative care with immediate effect.<sup>154</sup> In the event of the death of the child who is in alternative care, the management of the child and youth care centre, a person, an organisation, or a temporary safe care in whose care the child has been placed, is required to report such death to the parent or guardian of the child if he or she can be found.<sup>155</sup> The death of a child must be reported to the police,<sup>156</sup> the provincial head of Social Development,<sup>157</sup> and the social worker dealing with the matter.<sup>158</sup> The police official must investigate the circumstances surrounding the death of the child, except where the police official is satisfied that the child died of natural causes.<sup>159</sup>

### 6.2.2 *Alternative care in terms of international law*

In this section, I discuss the extent to which international law recognises alternative care, the types of alternative care that may be considered for a child in need of care, and services that may be provided in care. In the discussion I propose, amongst others, the following recommendations: that a provision be enacted to prioritise “kinship care”; provisions be enacted that spell out the responsibilities of the foster parent and the training that must be

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<sup>154</sup> S 178(1).

<sup>155</sup> S 178(2)(a).

<sup>156</sup> S 178(2)(b).

<sup>157</sup> S 178(2)(c).

<sup>158</sup> S 178(2)(d).

<sup>159</sup> S 178(3).

provided to them; and that regulations be promulgated for collaborative work of agencies such as, UNICEF, the Department of Social Development and local NGOs.<sup>160</sup>

According to the CRC<sup>161</sup> the child who is temporarily or permanently deprived of his or her family environment is entitled to special protection and assistance provided by the state. This means that a child who is deprived of a family environment must be placed in alternative care.<sup>162</sup> The type of care which may be received by a child who is so deprived includes, amongst others, foster care, *kafala*<sup>163</sup> of Islamic law, adoption, or if possible, placement in a

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<sup>160</sup> See the proposed provision in section 6 5.

<sup>161</sup> Art 20(1).

<sup>162</sup> Art 20(2) provides that: "States Parties shall in accordance with their national laws ensure alternative care for such a child."

<sup>163</sup> Adoption is not recognised in terms of Islamic law. Islamic law has developed *kafala* instead of adoption. The concept *kafala* is a permanent form of foster care which excludes the child from taking a family name of the foster parents or having inheritance rights: Hodgkin & Newell (2007) 280-281. The Committee on the Rights of the Child queried the fact that girl and boy children are not treated the same in terms of *kafala*. Recommendations were made by the Committee that *kafala* must fully respect the provisions of the Convention, Art 20 and 21 in particular. In its Concluding Observation to the report of Morocco towards the CRC with regard to *kafala*, the Committee recommended that Morocco take all necessary measures to implement the *kafala* legislation in order to ensure that: (a) a judicial decision is at the origin of the placement of the child; (b) all social benefits are attributed to children equally and as it is done with other children; (c) ensure that effective mechanisms are established that would enable the child to address and receive complaints and that standards of care are monitored and that care is reviewed periodically; and (d) that boys and girls are given the same opportunities under *kafala*: Hodgkin & Newell 281.

suitable institution.<sup>164</sup>

Hodgkin and Newell<sup>165</sup> argue that while it may be best to remove the child from his or her parents, the state should first seek placement of the child in his or her broader family before looking for alternatives.<sup>166</sup> The Committee on the Rights of the Child<sup>167</sup> requires state parties to:

“... Ensure that the institutionalisation of a child is a measure of last resort and only occurs when family-type measures are considered for a specific child, and that institutionalisation is subject to regular review with a view to reassessing the possibility for reunification.”<sup>168</sup>

Thus, I recommend that a provision be enacted in the Children’s Act for the placement of children in need of care in “kinship care”, before exploring other care options.<sup>169</sup> This recommendation conforms to the priority alluded to by the Committee on the Rights of the child and endorses the principles of the CRC.

Hodgkin and Newell<sup>170</sup> refer to Article 4 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with special Reference to Foster Placement

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<sup>164</sup> Art 20(3).

<sup>165</sup> (2007) 278.

<sup>166</sup> Arts 20 and 20(3) must be read with Arts 9 and 5 of the CRC.

<sup>167</sup> Latvia’s Initial Report towards the CRC par 33, see Hodgkin & Newell (2007) 282.

<sup>168</sup> Hodgkin & Newell (2007) 282.

<sup>169</sup> See the discussion in section 6 3 1 and the proposed provision in section 6 5.

<sup>170</sup> (2007) 278.

and Adoption Nationally and Internationally,<sup>171</sup> which states that:

“When care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by substitute – foster or adoptive – family, or if necessary, by an appropriate institution should be considered.”

This suggests a hierarchy of options for the placement of the child; firstly, by family relatives including older children by relatives of the child’s parents, that is uncle, aunts, grandparents. Secondly, a substitute family through fostering or adoption; and thirdly, an appropriate institution.<sup>172</sup> The qualifying words “if necessary” as used in Article 4 reflect that alternative care may sometimes be the best care for the child. According to Hodgkin and Newell,<sup>173</sup> it may be “necessary” to place the child in alternative care, if, for example, the child has suffered multiple foster care breakdowns.

Like the Child Care Act, the CRC does not identify adoption as a placement that is separate from state care and foster care. Instead adoption is categorised as a form of alternative care.<sup>174</sup> I am of the view that adoption should by definition not be classified as an alternative care option. I am in favour of the approach adopted by the South African Children’s Act of defining adoption as a permanent placement option. Adoption should be recognised as an

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<sup>171</sup> 1986.

<sup>172</sup> Hodgkin & Newell (2007) 278.

<sup>173</sup> (2007) 282.

<sup>174</sup> Hodgkin & Newell (2007) 280.

*appropriate*<sup>175</sup> permanent placement,<sup>176</sup> given the fact that it is a care arrangement that gives the adopted child a definite sense of belonging in a particular family for a lifetime.

The CRC recognises the role played by parents and the state in caring for children by making use of kinship<sup>177</sup> and foster care.<sup>178</sup> Kinship and foster care are effective in providing care and protection to children in that they give the child options; that is, to remain in alternative care whilst such care is needed or to be reunited with his or her family.<sup>179</sup> The CRC encourages state parties, families and the communities to support children in need of care through kinship and foster care.<sup>180</sup> Amongst others, states are encouraged to develop comprehensive support and education programmes for parenting and preparation for parenthood.<sup>181</sup> The United Nations Guidelines for the prevention of Juvenile Delinquency (the Riyadh Guidelines) propose that:

“Measures should be taken and programmes developed to provide families with the opportunity to learn about parental roles and obligations as regards child development and child care, promoting positive parent-child relationships, sensitising parents to the problems of children and young persons and encouraging their involvement in family and community-

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<sup>175</sup> Own emphasis.

<sup>176</sup> See the discussion in section 8 1.

<sup>177</sup> See the discussion in section 6 4 1 for the definition.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> Art 5.

<sup>181</sup> Art 5 of the CRC, see Hodgkin & Newell (2007) 80.



based activities.”<sup>182</sup>

It is envisaged that this will encourage responsible parenthood.<sup>183</sup> States are also urged to establish standards and procedures guaranteed in legislation for alternative care in the areas of health, education, and safety in accordance with the principles and provisions of the CRC.<sup>184</sup> Furthermore, states are urged to assist families that are identified to be at risk of breaking down with practical measures such as financial benefits, housing, equipment, and psychological and professional support.<sup>185</sup>

The Committee on the Rights of the Child, in its Concluding Observation in respect of South Africa’s initial report towards the CRC, expressed its concerns about the lack of alternative care facilities in communities.<sup>186</sup> The Committee also recommended that training be provided to social welfare officials and that additional programmes be developed to facilitate alternative care.<sup>187</sup>

According to Hodgkin and Newell,<sup>188</sup> the training that is referred to is for professionals

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<sup>182</sup> Hodgkin & Newell (2007) 80.

<sup>183</sup> Hodgkin & Newell (2007) 240.

<sup>184</sup> Art 18 of the CRC, see Hodgkin & Newell (2007) 240.

<sup>185</sup> Hodgkin & Newell (2007) 237.

<sup>186</sup> Concluding Observation No 25 was concerned about South Africa’s obligation towards Art 20 of the CRC: accessed from <http://www1.unm.edu/humanrts/crc/southafrica2000.html> on 2008-06-17.

<sup>187</sup> *Ibid.*

<sup>188</sup> (2007) 240. This comment was made with regard to Nigeria’s Initial Report towards the CRC, par 40 and 41.

working with children. Article 9(4) of the CRC<sup>189</sup> refers to the “competent” authority, which according to Hodgkin and Newell,<sup>190</sup> relates to an authorised person with skills to determine on the basis of evidence what is in the best interests of the child. The skills may be acquired through formal training such as child psychology, legal casework and social work or experience such as community or religious arbitration.<sup>191</sup> Thus, I propose that provisions be enacted that clearly stipulate the responsibilities of the foster parent and the training that must be provided to them to impart parenting skills, including life skills, on how to deal with foster children based on the circumstance that brought the child into foster care.<sup>192</sup>

The scope of measures to be taken by state parties in assisting families is also stipulated in Article 19 of the CRC.<sup>193</sup> These measures are intended to protect children from all forms of violence, abuse, neglect and negligent treatment, including children in institutions such as foster care and other institutional settings.<sup>194</sup> Hodgkin and Newell<sup>195</sup> are of the view that the requirements in Article 3(3) of the CRC regarding the provision of consistent standards and supervision for all institutions, services and facilities are relevant to the prevention of violence against children. Furthermore, states are required to allocate sufficient resources to public

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<sup>189</sup> States that the child has the right to have the decision regarding his or her separation from his or her parents argued in his or her best interest.

<sup>190</sup> (2007) 127.

<sup>191</sup> Hodgkin & Newell (2007) 128.

<sup>192</sup> See the proposed provision in section 6 5.

<sup>193</sup> See the discussion in section 4 1 2.

<sup>194</sup> Hodgkin & Newell (2007) 258.

<sup>195</sup> (2007) 258 and 264. See also the discussion in section 6 5 1.

child care facilities.<sup>196</sup> The Committee on the Rights of the Child recommends that state parties seek technical assistance from, amongst others, UNICEF in this regard.<sup>197</sup>

I propose that regulations be promulgated to enable agencies such as UNICEF to work in partnership with the Department of Social Development and local NGOs in fulfilling the mandates of the Children's Act.<sup>198</sup>

The CRC acknowledges the fact that children suffer a wide variety of abuse and maltreatment whilst in residential care, despite the sincere belief that the state cares.<sup>199</sup> Thus, the CRC requires state parties to conduct a periodic review of the circumstances and treatment of children who are placed in care by authorities, including placement in foster care, adoption families, immigration and refugee detention centres, prisons, children's homes and state institutions for children deprived of their family environment.<sup>200</sup> States are required to establish regulations that govern the periodic review of treatment. The regulations must establish high standards and best practice for all professionals working with children in placement in order to secure the rights of the child to be heard, to be informed of events in the outside world, and to have access to a complaints procedure.<sup>201</sup>

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<sup>196</sup> Hodgkin & Newell (2007) 240.

<sup>197</sup> Hodgkin & Newell (2007) 267.

<sup>198</sup> See the proposed provision in section 6 5.

<sup>199</sup> Art 25.

<sup>200</sup> Art 25; see Hodgkin & Newell (2007) 379 and 380.

<sup>201</sup> *Ibid.*

With regard to alternative care options, the CRC provides that in the case of foster placement or adoption,

“...when considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”.<sup>202</sup>

The ACRWC has a similar provision.<sup>203</sup> The difference between the ACRWC and the CRC is that the ACRWC states: “when considering alternative family care” rather than “when considering solutions”, as stated in the CRC. The statement in the CRC is wide enough to consider *any*<sup>204</sup> solution, while the ACRWC strictly states “alternative family care”.<sup>205</sup> The ACRWC is clear about the fact that the type of “alternative family care” that it is referring to is foster care or suitable institutions. The ACRWC does not include adoption as an alternative family care.<sup>206</sup> Furthermore, the phrase “when considering solutions” presupposes that there are various solutions or plans, which may be explored for the child.

According to the ACRWC,<sup>207</sup> state parties are obliged to ensure that a child who is parentless or who is deprived of his or her family environment temporarily or permanently, or who, in his or her best interests, cannot be brought up or allowed to live in that environment, be provided with alternative family care which could include, amongst others, placement in foster care or

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<sup>202</sup> Art 20(3). See also the discussion in section 6 4 2.

<sup>203</sup> Art 25(3). See also the discussion in section 6 4 2.

<sup>204</sup> Own emphasis.

<sup>205</sup> Own emphasis.

<sup>206</sup> Art 25(2)(a) of the ACRWC. See also the discussion in section 6 2.

<sup>207</sup> *Ibid.*

suitable institutions for the care of children.<sup>208</sup> Unlike the CRC, the ACRWC does not include adoption as an alternative care option. This is similar to the South African Children's Act. However, the ACRWC is open to other alternative care options as it considers other "suitable institutions" which may provide care to children.<sup>209</sup> Wanitzek<sup>210</sup> argues that:

"[in] traditional society, it was considered basic and best for anybody to be clearly affiliated to a certain kinship group because an individual could survive physically and psychologically only with the group's support. Basic material and immaterial needs could be met only through the community".

Once more, community work that is done by community members, reciprocal help by community members to each other and the general support of providing the physical and emotional needs is highlighted.<sup>211</sup> In terms of the European jurisdiction, an examination of decisions by a public authority which resulted in the removal of the child from the family and placing the child in alternative care, revealed that the European courts have considered the best interests of the child principle<sup>212</sup> as a relevant consideration, which enabled the courts to avoid placing children in alternative care. In the *Re S (children: care plan)*, *Re W (children:*

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<sup>208</sup> *Ibid.*

<sup>209</sup> Art 25(2)(b).

<sup>210</sup> *The Legal Position of Children in Tanzania: Patrilineal or Welfare Principle* (1995) 19; Himonga "African Customary Law and Children's Rights Intersections and Domains in a New Era" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 87.

<sup>211</sup> See the discussion in section 2 2 1 10.

<sup>212</sup> *Berrehab v Netherlands* 322: see the discussion of the case in section 2 2 2 2 4 3; *Bronda v Italy* par 62: in determining whether an interference with family life is justified, the ECtHR attaches special weight to the overriding interests of the child. See also the discussion of the case in section 2 2 2 2.

*care plan*) case,<sup>213</sup> Lord Nicholls of Birkenhead referred to the following “cardinal principles”:

“The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. Thereafter the court has no continuing role in relation to the care order. Then it is the responsibility of the local authority to decide how the child should be cared for.”<sup>214</sup>

Apart from the responsibility given to the local authority to decide on how the child is to be cared for once a care order is issued, the European courts use the threshold criteria to restrict the removal of children from family life into care.<sup>215</sup> The European courts are reluctant to place children in care. This could be due to the emphasis placed on the promotion of family life, making alternative care a measure of last resort. The purpose of the removal of a child in need of care and protection from his or her family to alternative care is to enable the child to have an alternative care arrangement which will provide him or her with appropriate care as his or her original family environment fails to do so. Also, emphasis is made that placement in alternative care is intended to be a temporary measure, aimed at achieving family reunification.<sup>216</sup>

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<sup>213</sup> (2000) UKHL 10.

<sup>214</sup> Par 28.

<sup>215</sup> See the discussion in sections 2 2 2 2 and 3 2 2.

<sup>216</sup> According to *Johansen v Norway* 3, the taking of the child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit. In *Rieme v Sweden* par 54-56: the ECtHR found that the mutual enjoyment of each other’s company entails maintaining contact and keeping family ties. Thus, the mutual enjoyment by

The following judgments of the ECtHR reveal the significance placed on the right to respect for family life rather than placing children in care. In *Olsson v Sweden*,<sup>217</sup> the foster families with whom the children were placed lived a significant distance from their parents and from each other which made it difficult for the parents and children to maintain meaningful contact.<sup>218</sup> The European Commission's report expressed the view that parents have the right in terms of Article 8 of the ECHR to take care of their children and educate them. The Commission argued that this right must be exercised in the interests of the children and can only be limited by the state in conditions where it is proven that the parents' conduct is contrary to the interests of children.<sup>219</sup>

Both the Commission and the ECtHR decided that the removal of children from the care of their parents "must be supported by sufficiently sound and weighty considerations in the

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parents and the child of each other's company constitutes the fundamental element of family life. Louw in Boezaart (ed.) *Child Law in South Africa* 142; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102-103. See the discussion in par 7 2 2.

<sup>217</sup> See the discussion in sections 2 2 2 4 2 and 3 2 2 children were taken into care because the social authorities considered that their development was in danger for a variety of reasons, including the parents' inability to satisfy their emotional and intellectual needs. These reasons were found to be relevant as for example, the children were retarded in their development and other measures had been tried without success. The court was satisfied that the care order was compatible with Art 8.

<sup>218</sup> 259.

<sup>219</sup> KilKelly (1999) 269.

interests of the child; it is not enough that the child would be better off if placed in care.”<sup>220</sup>

The applicants in *Andersson v Sweden* were a mother and son. The son was taken into public care and later placed in a foster home. The social welfare authorities prohibited any contact between the mother and son, including telephone conversations, and meetings for one and a half years to avoid harm to the child, using domestic legislation. In responding to the question of whether there was infringement of their right to family life, the ECtHR held:

“The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Moreover, telephone conversations between family members are covered by the notions of ‘family life’ and ‘correspondence’ within the meaning of Article 8. It follows and this was contested by the Government – that the measures at issue amounted to interferences with the applicant’s right to respect for family life and correspondence.”<sup>221</sup>

In the case of *Hokkanen v Finland*, the applicant agreed that his daughter should be looked after by the maternal grandparents following the death of his wife. Later on, the grandparents refused to return his daughter. The grandparents failed to comply with the court orders, which granted the father access and custody of the child and the police refused to execute the custody order. The Appeal Court transferred custody to the grandparents and declined to enforce access against the child’s wishes. The court found that it is up to the

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<sup>220</sup> 287 par 72. See also *Kilkelly* (1999) 269.

<sup>221</sup> See *Andersson v Sweden* 643 par 72. See also *Rieme v Sweden* paras 54-56; see the discussion in sections 7 2 2 and 7 4.



national authorities to strike a fair balance where contact with the parent might appear to threaten the best interests of the child and his or her rights under Article 8.

With regard to enforcing custody orders, the court noted that domestic authorities must do their utmost to facilitate co-operation between the parties involved. On applying coercion, the authorities must limit their actions as all interests and rights, such as that of the child must be taken into account.<sup>222</sup> The court declared that the difficulty in arranging access was in the main due to the animosity between the grandparents and the applicant.<sup>223</sup> Both the district court and the Appeal Court's decision regarding access had recognised the need to arrange meetings at neutral places outside the grandparent's home. The court found that the competent authorities, prior to the court of appeal judgment, had made reasonable efforts to facilitate a reunion.

In *Johansen v Norway* the ECtHR considered a case where a child had been placed in public care from the age of two weeks. The court concluded that the infringement of Article 8 was based on the authority's further actions to terminate parental rights permanently and place the child in a foster home with the intention of having the child adopted. These actions were viewed as depriving the applicant of her family life with the child and they were inconsistent with the aim of reuniting the parent and the child.<sup>224</sup> According to the court, the placing of a child in foster care with the aim of having the child adopted should only be applied in

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<sup>222</sup> Par 58.

<sup>223</sup> 173 par 60 and 61.

<sup>224</sup> 72 par 78.

exceptional circumstances, and could only be justified if they were motivated by an overriding requirement relating to the best interests of the child.<sup>225</sup> In *K & T v Finland*<sup>226</sup> the court found that the care order was not the only option for securing a child's protection. In particular, the court found that the reasons used to justify the care order were insufficient and that the methods used in implementing those decisions were excessive, leading to a violation of Article 8.

### 6.2.3 *Alternative care in terms of foreign jurisdictions*

In this section I discuss the foreign jurisdiction, and African jurisprudence in particular, in relation to care by grandparents and communal families as forms of alternative care. I am of the view that the discussion on the African experience will serve as a good motivation for South Africa to enact a provision that recognises care by grandparents as a form of kinship care and communal care in the form of care that is provided by communal structures and groups in the Children's Act.<sup>227</sup>

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<sup>225</sup> The court noted the fact that the mother's access to her daughter in care was going well and that there were no signs of improvement in her life. The authority's view that the applicant was unlikely to cooperate and that there was a risk of her disturbing the daughter's care if given access to the foster home was based on the difficulties experienced in the implementation of the care decision concerning her son. The court concluded that these difficulties and risks were not of such a nature and degree as to free the authorities altogether from their normal obligation under Article 8 to take measures with a view to reuniting them.

<sup>226</sup> 707. See further the discussion in section 6 4 2.

<sup>227</sup> See the discussion in sections 2 2 1 10 and 8 4 2 2 1 4.

Research revealed that China uses care by “paternal kin” as informal care for children whose fathers had died and their mothers had remarried and left them.<sup>228</sup> These children are taken care of by their “paternal kin” namely, grandmothers, grandfathers, aunts and uncles on the father’s side. Only a few children are cared for by their “maternal kin”. Jini and Roby<sup>229</sup> are of the view that due to cultural expectations, the “paternal kin” is likely to continue as the presumed care-giver for orphaned children.

In the east of Zimbabwe, the degree of relatedness and financial ability are the determining factors when care-givers are willing to accept children into their care for fostering.<sup>230</sup> Even though grandparents and communal families are taking on the responsibilities to provide care to children, the financial, psychological and the physical burden are heavy on them.<sup>231</sup> Thus, the level of poverty and lack of access to health care services for grandparents would put children at risk.<sup>232</sup> Children in foster care of grandparents who are poor do more work and are served less food.<sup>233</sup> These children are more vulnerable in that they are still required to work even when they are ill.<sup>234</sup>

I agree with the Jini and Roby that incidents of “communal families” or “community-based

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<sup>228</sup> Jini & Roby *Children in Informal Alternative Care* (2011) 16.

<sup>229</sup> *Ibid.*

<sup>230</sup> Jini & Roby (2011) 20.

<sup>231</sup> Jini & Roby (2011) 33.

<sup>232</sup> Jini & Roby (2011) 20.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

informal care” as they call it, are rarely reported in the literature.<sup>235</sup> They note the fact that countries such as Malawi, South-East Asia and Cambodia have, and still are, practising “community-based informal care”. This type of care provides direct, continuous care and support to orphaned children.<sup>236</sup> “Community-based informal care” is readily available, and is more convenient during times of crisis and distress, because of the African belief that when a child is born, he or she belongs to the community.<sup>237</sup>

There are also situations where children in communities are cared for by faith-based organisations and traditional authority’s council.<sup>238</sup> This form of care seems to be growing, given the prevalence of HIV/Aids which orphans many children.

What we can learn from the discussion in this section is that “kinship” and “communal care” preserve continuing contact between family members, relatives and the child. It also assists siblings and extended family networks to maintain their identity, decrease the distress of relocation, and decrease the grief of separation of children from their parents. I am of the view that care that is informally provided by grandparents and communal families must be recognised in the Children’s Act. This will enable child have full protection of the law, like children in parental care and formal care.<sup>239</sup> This will further ensure that an environment of support and protection is created, in a more concerted effort, at all levels and for all needs of

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<sup>235</sup> Jini & Roby (2011) 22.

<sup>236</sup> Jini & Roby (2011) 21.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> See the proposed provision in section 6 5.

children.

Ireland also has a long standing tradition of relying on community groups to provide support and services to families.<sup>240</sup> New South Wales<sup>241</sup> and Ireland regard care plans as the significant part of a successful foster placement and are recognised as a matter of best practice.<sup>242</sup> Thus, a care plan must outline the intentions for the placement and must be prepared in advance of placement. In other cases, particularly where the child is placed in a situation of emergency, a care plan would be required as soon as possible thereafter.<sup>243</sup>

In the case of *The Eastern Health Board-v-District James Paul McDonnell*,<sup>244</sup> the High Court upheld the right of the District Court to impose conditions on making a care order which obliged that a “comprehensive care plan” be completed within three months. The court acknowledged the fact that parents, children and foster parents rely on the plan as a framework to ensure that their legal rights are protected and that “best practice” is in fact applied.<sup>245</sup> What South Africa can learn from this judgment is that a care plan is important in directing the type of care and other arrangements that must be included in the care of the child. Thus, I am of the view that a care plan is an important guideline document which the

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<sup>240</sup> Kilkelly *Obstacles to the Realisation of Children's Rights in Ireland* (2007) Ombudsman for Children Report 123.

<sup>241</sup> S 78 of the Children and Young Persons (Care and Protection) Act; see also the discussion in section 6 5.

<sup>242</sup> Horgan “Foster Care in Ireland” (1998) *Irish Journal of Applied Social Studies* 38.

<sup>243</sup> See the proposed provision for a comprehensive care plan.

<sup>244</sup> (1999) 2 1 *JFL* 26.

<sup>245</sup> Horgan (1998) *Irish Journal of Applied Social Studies* 39.

designated social worker may use to manage, monitor and review the care of the child in order to release the child from care timeously.

In terms of the Ireland jurisdiction, when children are placed in care they must be assessed. Children are also assessed when they are placed with relatives, in accordance with the Placement of Children with Relatives Regulations to the Child Care Act.<sup>246</sup> The regulations also provide for the assessment of relatives as carers for children in need of care. However, the Child Care Act does not define them as “foster parents” or “foster care”. Also, relatives and non-relatives are screened for purposes of safe placement for children in need of care. This means that a child who is injured in a foster care that was screened, would have the right of action against the national authorities responsible for placement.

Foster parents have the right to receive support from the national authorities concerning the role they play in providing care to foster children. In the case of *W v Essex County Council*,<sup>247</sup> the court determined the fact that a social worker who places a child with foster

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<sup>246</sup> S 261 of Act 1996; Horgan (1998) *Irish Journal of Applied Social Studies* 42.

<sup>247</sup> (1997) 2 *FLR* 535. The case involved proceedings taken by foster parents whose children were abused by an abusive child placed in their care by the local authority. The foster parents were concerned about fostering any other child as they had their own 4 children for whom to provide care. When the foster parents inquired about the abusive foster child, they were given oral assurance by the representatives of the local council that they will not be given a foster child who was known or suspected to be sexually abusive. Art 19 of the regulations to the Child Care Act provide that before a child is placed with foster parents, the prospective foster parents must be furnished with basic information regarding the child and his or her family background and previous care admissions, including the reason why the child was admitted to the care of the Health Board.

parents has a duty to support the foster parents with information as a reasonable social worker would provide. The court held that the local authority is also vicariously liable for the conduct of the social worker in that respect.

Given this discussion, it is important for South Africa to enact a provision which lists the obligations of the social worker towards foster parents. Also, there is a need for an enactment of a provision for the responsibilities of foster parents. Although some of these responsibilities may be incorporated in the foster care contract, I propose that a provision be enacted in the Children's Act that sets out the responsibilities of foster parents for the legal recognition for their role and to regulate their functions. A child who is in foster care must be provided with quality services that meet his or her needs. In the case of *FN v Minister for Education*,<sup>248</sup> a foster child, who suffered hyperkinetic conduct disorder, needed treatment. The Ireland Health Board and the Department of Health and Children could not offer services that could meet the needs of the child. The High Court found that where a child has special needs which cannot be provided for by his parents, or guardian, the state has a constitutional obligation under Article 41.2.5 of the Constitution<sup>249</sup> to provide for that need. The court ordered that FN had a constitutional right to secure accommodation with treatment designed to meet his needs and vindicate his constitutional right. The Ireland experience poses a challenge to South Africa, namely, to establish a provision in the Children's Act that imposes a duty on the Department of Social Development to provide quality and secure care,

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<sup>248</sup> (1995) 1 *IR* 409; (1995) *ILRM* 297. In the case of *T D v Minister of Education* (2000) 2 *ILRM* 321, the High Court ordered the state to complete the secure facilities within a specified time frame.

<sup>249</sup> *Ireland Social Services Inspectorate Annual Report* (2005) 3.

including timeous response to the needs of children in care.

### 6.3 Foster care as an alternative care option

This section introduces foster care and its significance in the lives of children in need of care and protection. In my introduction regarding the important role played by foster care in the lives of many children in need of care and protection, I recommend that foster care be supported to enable foster parents to provide services that are essential for the development and well-being of children.

The court's ruling in *SW v F*<sup>250</sup> recognises the significance of foster care. The court held that the child's right to parental care does not only refer to parental care on the part of natural parents, but such right includes an adoption order<sup>251</sup> and is open to foster care in cases where the care of a natural parent is lacking and inadequate.<sup>252</sup> There are few foster families in South Africa.<sup>253</sup> The number of foster care orders far outweighs social workers' capacity to

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<sup>250</sup> 1997 (1) SA 796 (O).

<sup>251</sup> In terms of the Interim Constitution which applies equal force like s 28(1)(b) of the Constitution. See also the discussion by Louw in Boezaart (ed.) *Child Law in South Africa* 134.  
<sup>252</sup> 799B.

<sup>253</sup> By the 20 March 2011, 305 000 foster care orders were made by the children's court in South Africa and 361 000 children were receiving foster care grants. Information accessed from: Social Security Pension System, hereinafter referred to as "SOCPEN" (an administrative data system of South African Social Security Agency) managed by SASSA, accessed from [www.sassa.gov.za](http://www.sassa.gov.za) on 2011-04-29. Information also obtained from an interview with Khoza, a



process, monitor and support foster care.<sup>254</sup> South Africa has 701 000 orphaned children.<sup>255</sup>

This clearly shows that social welfare resources are inadequate to support foster care to all orphans.<sup>256</sup> I am of the view the different types of foster care that exist in South Africa must be given legal recognition. Children in foster care are vulnerable in many ways, depending on the type of the foster placement they are in. Thus, such children should be considered at a higher risk with potential to develop social and behavioural difficulties, in part due to the lasting effects of stress when removed from familiar persons. Thus, there is a need to examine their health and well-being and make provision for intensive care and specialised health care services. The situation will be different for children in foster care who are diagnosed with a disability. The placement of such children with specific needs must be met.

### 6.3.1 *Foster care in terms of South African law*

In this section I describe the foster care options that are recognised in the Children's Act. I explain the foster care system and how it impacts on the lives of children. I also reflect on

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social worker and the director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, see Annexure "G".

<sup>254</sup> Meintjies *Child Protection and Social Security in the Face of Poverty and the Aids Pandemic: Issues Pertaining to the Children's Bill* [B70-2003] (2005): accessed from <http://www.ci.org.za/depts/ci/pubs/pdf/rights/bills/Childprotection-socialsecurity.pdf> on 2009-03-18.

<sup>255</sup> Kane-Berman (2008) 44. See the discussion in section 3 3 1 1.

<sup>256</sup> *Ibid.*

the role played by foster parents in providing care and the training that is required to empower foster parents to provide care to children. I also reflect on the omission in the Act to recognise the role played by grandparents in providing “kinship care” and “communal families” in providing care to orphaned children. I propose that South Africa must refer to foreign jurisdictions and enact a provision in the Children’s Act for the recognition of “kinship care” and “communal care” in this regard.

Furthermore, I discuss the backlog in foster care extensions and propose possible solutions. I also discuss the need for a provision on “special care services” in the Children’s Act. I propose that South Africa must incorporate a provision in the Children’s Act to sanction social workers who do not fully implement *comprehensive care plans*. I furthermore propose for the enactment of the following provisions: for the review of extension orders rather than shifting the role to the courts; that South Africa must refer to foreign jurisdictions to include a provision in the Children’s Act for a foster care grant that will meet the needs of the foster child; and for collaborative work between government, private entities and NGOs for the implementation of services.

The Children’s Act defines foster care in section 180 of the Act as follows:

- “(1) A child is in foster care if the child has been placed in the care of a person who is not
  - (a) the parent or guardian of the child as a result of –
  - (b) an order on a children’s court; or
  - (c) a transfer in terms of section 171.
- (2) Foster care excludes the placement of a child –
  - (a) in temporary safe care; or
  - (b) in the care of a child and youth care centre.
- (3) A children’s court may place a child in foster care –
  - (a) with a person who is not a family member of the child;

- (b) with a family member who is not the parent or guardian of the child; or
- (c) in a registered cluster foster care scheme.”

The Children’s Act expressly excludes the placement of a child in temporary safe care<sup>257</sup> or in the care of a child and youth care centre,<sup>258</sup> from the definition of foster care.<sup>259</sup> The Act provides clarity on the definition of the concept of foster care, and when such placement should be considered. The Children’s Act provides for other ways in which a child may be brought to foster care;<sup>260</sup> i.e. if the child has no parent or care-giver, or has a parent or care-giver but that person is unable or unsuitable to care for the child. That child may be placed in foster care with a suitable parent,<sup>261</sup> or foster care with a group of persons, or an organisation operating a cluster foster care scheme.<sup>262</sup> A child may also be brought into foster care as a result of a transfer from alternative care to any other person in terms of section 171 of the Children’s Act.<sup>263</sup> The term “foster care” was not defined in the Child Care Act.<sup>264</sup> During the review of the Child Care Act, the SALRC<sup>265</sup> recommended that provision be made for various forms of substitute family care, which should include short-term and long-term care by relatives and non-relatives. The SALRC proposed that a further distinction be made between

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<sup>257</sup> S 180(2)(a).

<sup>258</sup> S 180(2)(b).

<sup>259</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children’s Act* 12-8.

<sup>260</sup> S 156(1)(e).

<sup>261</sup> S 156(1)(e)(i).

<sup>262</sup> S 156(1)(e)(ii).

<sup>263</sup> S 180(1)(b).

<sup>264</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children’s Act* 12-9.

<sup>265</sup> *Report on the Review of the Child Care Act and Children’s Bill (2002)* 217-218; Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children’s Act* 12-14.

“court-ordered kinship care”, which arises as a result of court proceedings in cases of abuse and severe neglect, and “informal kinship care” by relatives. This care may be undertaken through informal engagement on an indefinite basis due to the death, absence or incapacity of the parents.

Nevertheless, this proposal was not addressed in the Children’s Act. The omission on the side of the legislature to provide for “court ordered kinship care” and “informal kinship care” by relatives in legislation resulted in the recent case *S S (A minor child) v The Presiding Officer of the Children’s Court, District Krugersdorp*.<sup>266</sup> The *S S (A minor child)* case is an

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<sup>266</sup> See the discussion in section 4 2 1. See the discussion in par 4 2 1. The case arose from an application for foster care to the Krugersdorp children’s court. In this case, the presiding officer declined to order foster care for the 12 year old boy because he had been living for some time with his great aunt and uncle. The law requires that, in order to be found in need of care and protection, and therefore eligible for foster care, a child must be orphaned or abandoned and without visible means of support. The boy was an orphan but, the court held that he had visible means of support because his aunt and uncle were already caring for him. The Centre for Child Law acting on behalf of the child took this on appeal to the High Court. The judge upheld the appeal and placed the boy in foster care with his great aunt and uncle until he turns 18. The judge found that visible means of support includes a consideration whether someone has a legal duty to support the child. Grandparents do have a legal duty of support towards their grandchildren, and adult siblings also have such a legal duty towards their younger siblings. However, uncle and aunts do not have such a legal duty. Thus the appeal is against the finding of the magistrate that a minor child is not in need of care and protection as envisaged in s 150(1)(a) of the Children’s Act and a consequent refusal to place the child in foster care. Child law experts who entered the case as *amicus curiae*, see par 7, expressed the concern that this judgment will mean that the many grandmothers caring for children will no longer be eligible for the foster child grant. They expressed the fact that the majority of children who are orphaned are living with relatives who are grandparents who will have to rely on the lower child-support grant for the care of their grandchildren.

appeal against the finding by the commissioner that the minor child is not in need of care and protection as envisaged in section 150(1)(a) of the Children’s Act and the consequent refusal to place the child in foster care.<sup>267</sup> Thus, the appeal centres on the interpretation of section 150(1)(a) of the Children’s Act.<sup>268</sup> The parties in the case had common views regarding the interpretation of section 150(1)(a) and the fact that the appeal must be upheld that the minor child be recognised as a child in need of care and protection in terms of the Children’s Act, that the Lamanis be admitted as his foster parents, and that the minor child be granted a foster care grant.<sup>269</sup> The parties agreed that the minor child can receive a foster grant within the meaning of section 150(1)(a) of the Children’s Act which provides that “a child is in need of care and protection if, the child has been abandoned or orphaned and is without any visible means of support”.<sup>270</sup> The court argued that the focus in the case should be on the words “without visible means of support” and whether the words pertained solely to the child and not the care-giver.<sup>271</sup> This is a legal question. The court agreed that the word “and” should remain as “and”<sup>272</sup> The court argued that section 150(1)(a) must be in accordance

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<sup>267</sup> Par 3.

<sup>268</sup> Par 10.

<sup>269</sup> Par 4.

<sup>270</sup> Par 5.

<sup>271</sup> Par 7.

<sup>272</sup> Investigating Directorate: *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*; *In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) par 24; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC) par 41; *Preddy v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA) par 12; *Ngcobo v Salimba* CC; *Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) par 11: “it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; In casu why ‘and’ should be read to mean ‘or’ or vice versa. The words

with section 39(2) of the Constitution,<sup>273</sup> in keeping with the Bill of Rights, and in the best interests of the child.<sup>274</sup> It is settled in law that in the interpretation of statutes a purposive approach must be adopted, enquiring into the purpose for which the provision was enacted, and interpret the provisions in cases of doubt in such a manner as to advance and give effect to the purpose of the legislation.

According to section 181 of the Children's Act, the purpose of foster care is to<sup>275</sup>

- (a) protect and nurture children by providing a safe, healthy environment with positive support;
- (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and
- (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.

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should be given their ordinary meaning '... unless the context shows or furnishes very strong grounds for presuming that the legislature really intended that the word not used is the correct one ...' Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be unreasonable, inconsistent or unjust ...or that the result will be absurd ... or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights (s 39(2) of the 1996 Constitution)".

<sup>273</sup> Which provides that "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."

<sup>274</sup> Par 7.

<sup>275</sup> Par 18.

According to section 181(1) of the Children's Act,

“Before a children's court places a child in foster care, the court must follow the children's court processes stipulated in Part 2 of Chapter 9 to the extent that the provisions of that Part are applicable to the particular case.”<sup>276</sup>

The children's court processes stipulated in Part 2 of Chapter 9 are comprised of section 155 to 160 which consist of the following:

- (a) section 155, a decision of question whether the child is in need of care and protection;
- (b) section 156, order when a child is found to be in need of care and protection;
- (c) section 157, court order to be aimed at securing stability in child's life'
- (d) section 158, placement of child in child and youth care centre;
- (e) section 159, duration and extension of orders; and
- (f) section 160, regulations.

In terms of section 180(3) of the Children's Act, a child may be placed in foster care with a person who is not a family member of the child or with a family member who is not a parent or guardian of the child. Therefore, to exclude children who are in placement with families who are related to them from receiving foster grants if circumstances permit, would be

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<sup>276</sup> Par 19.

contradictory to the terms of the Children's Act.<sup>277</sup>

I am of the view that this is the position that other foreign jurisdictions expressed, particularly with regards to kinship foster care, that a child can be placed with grandparents, aunts and other relatives in kinship care. It is important for South Africa to enact a provision for kinship care in the Children's Act, and also, a provision which would identify a person or persons who can be classified as kin parents.

The court found that for purposes of the Children's Act, clearly relatives may be eligible foster parents for abandoned or orphaned children as "every child has the right to family care or parental care".<sup>278</sup> Thus, to include the possibility of family members or other care-givers who have taken on the task of caring for a child being considered as foster parents of abandoned or orphaned children would be consistent with the tenor of the Children's Act, taking into account its emphasis on permanency, the preservation and the strengthening of family ties.<sup>279</sup>

Further, section 8 of the Social Assistance Act provides that a foster parent is subject to section 5 of the Act, eligible for a foster grant for as long as the child is in need of care, (b) he or she satisfies the requirements of the Children's Act. Section 5(2) provides that the Minister may prescribe income threshold, and means testing. The latter is in practice used

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<sup>277</sup> Par 23.

<sup>278</sup> Par 23.

<sup>279</sup> Par 23.



with regards to eligibility for the child-support grant. However section 18 of the Social Assistance Act indicates that the financial criteria in terms of which applicants for a grant qualify, are set out in the regulations.<sup>280</sup>

With regard to foster care, the regulations provide that, “a foster parent qualifies for a foster child grant regardless of such foster parent’s income”.<sup>281</sup> The Children’s Act does not set out a means test to be applied, nor does it provide for an investigation into the earnings of foster parents; neither the Children’s Act, nor the Social Assistance Act, nor the Regulations.<sup>282</sup> This clearly says that these legal prescripts do not require an examination of the foster parent’s income for the simple reasons that the foster grant is meant for the benefit of the foster child and not the foster parent.<sup>283</sup>

Regarding another phase of enquiry, as to whether the minor child is “without visible means of support”, the enquiry includes the consideration as to whether the legal duty of support rests on someone in respect of the child, including the current care-giver, and whether in addition to the status of being orphaned or abandoned, the child has the means currently, or whether the child has an enforceable claim for support.<sup>284</sup> The court found that if the minor is not able to access any means of support, then section 150(1)(a) of the Children’s Act will

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<sup>280</sup> Annexure A-D to the reg of the Social Assistance Act; see also par 24 of the *S S (A minor child)* case.

<sup>281</sup> See Annexure C.

<sup>282</sup> Sections 24 and 31.

<sup>283</sup> Par 31.

<sup>284</sup> Par 30.

apply in that the child is in need of care and protection. However, the court highlighted the fact that the phrase “without visible means of support” as it relates to the means of the care-giver rather than the needs of the child, is contrary to the best interests of the child.<sup>285</sup>

With regard to the law relating to the duty of support, the court alluded to the fact that biological parents of children, whether married or unmarried, have the duty of support.<sup>286</sup> The general principle is that both maternal and paternal grandparents, regardless of whether the mother and father were married, have a duty of support.<sup>287</sup> Siblings also have a duty of support. Thus, a hierarchy is set for a duty of support which requires grandparents, failing them, great grandparents in the direct line, to support a child, before those in the collateral line, for example, brothers and sister.<sup>288</sup> Step-parents have been found to have a limited duty of support in narrowly defined circumstances.<sup>289</sup> What is good in this case is that, although the court found that the grandparent, aunt and other relatives have the duty to support the child, if they are excluded from being eligible for the foster grant, such may dissuade them

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<sup>285</sup> Par 40.

<sup>286</sup> Par 33.

<sup>287</sup> Van Schalkwyk “Maintenance for Children” in Boezaart (ed.) *Child Law in South Africa* (2009) 44-45; *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E), held that there is an order of priority, and if parents are not able to support their children, the duty falls first on paternal and maternal grandparents; *Petersen v Maintenance Office, Simon’s Town Maintenance Court*, the court recognised that paternal grandparents also have a duty of maintenance towards a child whose parents were not married.

<sup>288</sup> Van Schalkwyk in Boezaart (ed.) *Child Law in South Africa* 44.

<sup>289</sup> See the discussion in par 2, Heystek.

from stepping in to help to support the minor child early in the orphanage of that child.<sup>290</sup>

The court found that the child commissioner in the *S S (A minor child)* case should have found the interpretation of “without visible means of support” to mean that “a child is in need of care and protection if the child has been abandoned or orphaned and has no care-giver who is willing to support the child”.

In the manner set out above, the court found that the child commissioner should accordingly have found the minor child to be in need of care protection and placed him in foster care of the Lamanis’ (aunt and uncle).<sup>291</sup> The court found that the minor child is related to his foster parents and that he should be placed in their foster care until he turns 18 years. This is so because he qualifies in terms of s 186(2) of the Children’s Act for foster care of extended duration, due to the fact that he is an orphan as defined by the Children’s Act, and there is no possibility of reunifying him with either of his biological parents.<sup>292</sup>

I am of the view that the major crisis caused by the wording in section 150(1)(a) with regard to care by grandparents is that it excludes grandparents on the basis of the legal duty they have to support their grandchildren, also on the basis that they have visible means of support. Even though this is not clearly spelled out in the judgment, I am of the view that, to some extent, focus is laid on the pension fund of the grandparent which creates the view that

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<sup>290</sup> Par 40.

<sup>291</sup> Par 41.

<sup>292</sup> Par 42.

grandparents have a visible means of support. Thus, I am concerned in that the pension received by a grandparent may not be adequate to provide for the household needs and survival of all family members.<sup>293</sup>

An interview held with Dube revealed that many grandparents are not applying for the foster grants, because they lack knowledge about the grant.<sup>294</sup> I opine that some grandparents are not applying for the foster grant as they may be doubtful if they will be given the foster grant as they are already receiving the old age grant; both of which are little to maintain two people on a monthly basis. Obviously, like Dube says, many grandparents may view the kinship care as their direct responsibility in the absence of the parents.<sup>295</sup> I agree with Dube that section 150(1)(a) covers all children who are without visible means of support, including grandchildren who are taken care of by grandparents.

It is important to point out that the needs of an orphaned child who is without visible means of support do not cease, even when the child lives with his or her relatives. The situation will be worse if the relatives, that is, the grandparent, aunt or uncle, are themselves too poor to provide for the needs of the child. Thus I do not agree with Dube that when a child under care of a grandparent must not receive a foster grant for reasons that such will create a

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<sup>293</sup> “The child has been abandoned or orphaned and is without any visible means of support”; see the discussion in section 3 3 1 2.

<sup>294</sup> Interview with Dube, a registered social worker and a registered counsellor in Pretoria, Gauteng province, held on the 2012-10-25. He worked for Child Welfare South Africa in the area of temporary safe care, foster care and adoption, see Annexure “H”.

<sup>295</sup> *Ibid.*

“dependency syndrome”. I am of the view that a “dependency syndrome” could still be created in situations of children who are not orphaned who are receiving the child-support grant. Thus, the question to be asked is whether the child-support grant is meant for the parent or the child.

Although the court in *S S (A minor child)* case gave judgment in favour of the minor child, I am of the view that the court lacked a provision to work on its argument to support the foster care of the minor child. I am of the view that South Africa must incorporate a provision in the Children’s Act which identifies persons who can provide kinship care to a child. This provision is critical as it will provide information as to the fact that, amongst other persons, a grandparent can provide kinship care to the grandchild, over and above the legal duty the grandparent has by common law to provide for the maintenance of the child. Furthermore, I argue that if the grandparent is recognised as a kinship carer, the benefits that accrue to a child who is in under his or her kinship care must apply. Thus, I propose that regulations be promulgated to the Children’s Act which provide for a foster grant of an amount that is adequate to meet the needs of the child.<sup>296</sup> Also, “court-ordered kinship care” did not find recognition in the Children’s Act.<sup>297</sup>

I am of the view that “kinship care”, both “court-ordered” and “informal kinship” care, are important for a child in need of care and protection in that they ensure continuity in the life of the child, given the blood ties which assist in bonding. Thus, kinship care is an appropriate

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<sup>296</sup> See the proposed provision in section 6 5.

<sup>297</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children’s Act* 12-14.

alternative care, particularly if the child is placed with a suitable relative. I am of the view that kinship care should find a special provision in the Children's Act. I propose that South Africa refer to foreign jurisdictions and enact a provision for the definition of kinship care, and another provision which prioritises kinship care over other alternative care options.<sup>298</sup>

According to the Children's Act, a child is placed in cluster foster care if he or she is in the care of a person who is not the parent or guardian of the child as a result of an order of the children's court.<sup>299</sup> In the event that a suitable relative or foster parent cannot be found for a child, the children's court may consider placing the child in cluster foster care.<sup>300</sup> The concept "cluster foster care" was formally introduced by the SALRC in its Review of the Child Care Act,<sup>301</sup> wherein a child would be placed in the care of a care-giver, and such care-giver is paid by an NGO. The Children's Act provides that the children's court may place a child in foster care with a person who is not a family member,<sup>302</sup> or a person who is a family member but who is not a parent or guardian of the child,<sup>303</sup> or in a registered cluster foster care scheme.<sup>304</sup> Cluster foster care is a new care arrangement introduced by the Children's Act. It is defined as the reception of children in foster care in terms of a cluster foster care scheme managed by an NPO and registered by the provincial head of Social

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<sup>298</sup> See the proposed provision in section 6 5.

<sup>299</sup> S 180(1)(a).

<sup>300</sup> S 183. See Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-15.

<sup>301</sup> *Report on the Review of the Child Care Act and Children's Bill Project* 110 (2002) 215.

<sup>302</sup> S 180(3)(a).

<sup>303</sup> S 180(3)(b).

<sup>304</sup> S 180(3)(c).

Development.<sup>305</sup>

A group of care-givers may register to provide “cluster foster care” to a group of foster children.<sup>306</sup> The aim is to ensure an economically able care model for children receiving care in groups. Government can authorise religious organisations to provide cluster foster care.<sup>307</sup>

The Children’s Act provides that an organisation that manages and operates a cluster foster care scheme must be an NPO operating in terms of the Non-profit Organisation Act.<sup>308</sup> The NPO must comply with the requirements of the Non-profit Organisation Act<sup>309</sup> and be approved for providing cluster foster care by the provincial head of Social Development.<sup>310</sup>

The scheme that provides cluster foster care must comply with the prescribed requirements<sup>311</sup> and be registered with the provincial head of Social Development.<sup>312</sup>

The Children’s Act requires that the management of a cluster foster care scheme be monitored by the provincial head of Social Development.<sup>313</sup> According to Khoza,<sup>314</sup> cluster

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<sup>305</sup> S 1(e) of the Children’s Act; see Mahery *et al.* (2011) 10.

<sup>306</sup> S 1(e); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 178.

<sup>307</sup> *Ibid.*

<sup>308</sup> 71 of 1997, see s 183(1)(a) of the Children’s Act.

<sup>309</sup> S 183(1)(b)(i).

<sup>310</sup> S 183(1)(b)(ii); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children’s Act* 12-16.

<sup>311</sup> S 183(1)(c)(i).

<sup>312</sup> S 183(1)(c)(ii).

<sup>313</sup> S 183(2).

<sup>314</sup> Interview with a social worker and director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, Annexure “G”.

foster care systems existed even before the Children's Act, but they were not regulated. In practice, an NPO would establish a scheme and the scheme would have a number of homes affiliated to it. Each home would keep no more than six children. The NPO would cluster resources they received from donor funding to the homes to address the needs of children who were kept in those homes. Gallinetti and Loffell<sup>315</sup> argue that the reluctance on the part of some provincial authorities to register new care facilities is due to budgetary considerations or a desire to reduce what has been an excessive reliance on institutional rather than community-based care.

According to Khoza, the Department of Social Development is currently introducing draft norms and standards in its provincial offices. These norms and standards stipulate how cluster foster care should function to ensure the best possible care for children. However, government is not funding the cluster foster care systems yet. Mahery *et al.*<sup>316</sup> note that, in theory, grants should be paid to the scheme, which then pays foster parents.

Khoza is of the view that cluster foster care should not depend solely on government. She adds that if government provides funding, its focus will be on the services that a child receives from the cluster foster care and not operational costs. A cluster foster scheme must provide programmes and support not only for the children placed in its care but also for the members of the organisation who are responsible for the scheme.<sup>317</sup> The only support

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<sup>315</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 12-16.

<sup>316</sup> (2011) 10.

<sup>317</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-16.



received by the cluster foster care systems from the Department of Social Development thus far, is the development of draft operational norms and standards and guidelines for cluster foster care systems, the piloting of these care systems, and consultation around same on the draft documents with other national stakeholders.<sup>318</sup>

The challenge that is currently faced by the Department of Social Development is that it has not consulted with all the provinces.<sup>319</sup> The reason for placing children in foster care is to protect and nurture children in an environment which would provide safety, health-care, and positive support,<sup>320</sup> promote the goals of permanency planning,<sup>321</sup> prioritise reunification<sup>322</sup> and connect the child to other safe and nurturing family relationships intended to last a lifetime.<sup>323</sup> This type of foster care respects an individual and his or her right to culture, ethnic and community diversity.<sup>324</sup>

It is important to find the best way to secure stability in the life of the child before the

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<sup>318</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September* (2010) 16-18.

<sup>319</sup> *Ibid.*

<sup>320</sup> S 181(a).

<sup>321</sup> It is a systematic process of carrying out within a brief, limited time period, a set of goal-oriented activities designed to help children live in families that offer continuity of relationships with nurturing parents or care-givers and the opportunity to establish life-time relationships: Bosman-Sadie & Corrie (2010) 203. See the discussion in section 8 1.

<sup>322</sup> See discussion on reunification later in this section. See also the discussion in section 7 3 1.

<sup>323</sup> S 181(b) of the Children's Act.

<sup>324</sup> S 181(c) of the Children's Act.

children's court makes an order<sup>325</sup> to remove the child from his or her parents or care-giver.<sup>326</sup> Stability in the life of the child, as referred to in the Act, is the type of family life which the child had before his or her removal from the family environment.<sup>327</sup> Stability may be secured by way of, amongst others, placing the child in alternative care for a limited period to allow for the reunification of the child with his or her parents or care-giver under the supervision and assistance of a designated social worker,<sup>328</sup> or placing the child in alternative care with or without terminating the parental rights of parents or care-giver.<sup>329</sup>

The children's court most often considers the latter option where the parents can contact the child in alternative care and work towards reuniting the child with his or her parents. The Children's Act made improvements to alternative care by introducing cluster foster care.<sup>330</sup> However, it would add more value to also create stability in the life of a child if it recognised the fact that children in need of care can be taken care of within the ambit of communal families.<sup>331</sup> I therefore propose that South Africa incorporate a provision in the Children's Act for the recognition of "communal families" as an alternative care.<sup>332</sup>

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<sup>325</sup> S 156 of the Children's Act.

<sup>326</sup> S 157(1)(b); Louw in Boezaart (ed.) *Child Law in South Africa* 152.

<sup>327</sup> *Ibid.*

<sup>328</sup> Meintjies *Child Protection and Social Security in the Face of Poverty and the Aids Pandemic: Issues Pertaining to the Children's Bill* [B70-2003] (2005).

<sup>329</sup> S 157(b)(iii).

<sup>330</sup> S 1(e).

<sup>331</sup> See the discussion in section 2 2 1 10.

<sup>332</sup> See the proposed provision in section 6 5.

According to Khoza,<sup>333</sup> in practice, the procedure that is followed when placing a child in foster care is that the head of the Department of Social Development would refer the child to a NGO that is accredited<sup>334</sup> by the department and has entered into a service level agreement with the department to provide care and protection services to children. The accredited NGOs must also be registered on the Department of Social Development's database as service providers, and must submit a report to the department on services they render for children.

The provincial Department of Social Development provides training and support services to social workers in NGOs and also monitors the implementation of the Children's Act by NGOs. However, there is no clear funding that is explicitly directed to services that are provided by NGOs. I am of the view that South Africa must refer to the experience in foreign jurisdiction, regarding the work that government contracts to NGOs, the types of contracts entered into with NGOs and the types of services rendered for children in alternative care and financing.<sup>335</sup>

A prospective foster parent must be a fit and proper person to be entrusted with the foster

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<sup>333</sup> Interview with a social worker and the director of the Child Protection Unit of the National Department of Social Development, Tshwane, held on 2011-04-14.

<sup>334</sup> When the Department accredits a non-governmental organisation it looks at the capacity the non-government organisation has to provide the required services before it gives the organisation the power to act as a Child Protection Organisation and to provide statutory services to children.

<sup>335</sup> See the discussion in section 6 3 3.

care of the child.<sup>336</sup> Such parent must be willing and able to undertake, exercise and maintain the responsibilities of care,<sup>337</sup> and must have the capacity to provide an environment that is conducive to the development and well-being of the child.<sup>338</sup> The prospective foster parent must be properly assessed by a designated social worker for his or her fitness as a foster parent, and have the willingness and capacity to provide for the growth and development of the child.<sup>339</sup>

A person who is not fit and proper to work with children may not be entrusted with the foster care of a child.<sup>340</sup> The provisions regarding the requirements of a prospective foster parent<sup>341</sup> and a person who is unsuitable to work with children<sup>342</sup> apply to any person who is employed in a non-profit organisation managing cluster foster care.<sup>343</sup>

A foster parent has the responsibility to provide day-to-day care for the foster child and to ensure that where the foster child is from a different cultural, linguistic or religious

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<sup>336</sup> S 182(2)(a).

<sup>337</sup> S 182(2)(b); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>338</sup> S 182(2)(c); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>339</sup> S 182(2)(d); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>340</sup> S 182(3); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>341</sup> S 182(2).

<sup>342</sup> S 182(3); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>343</sup> S 182(4).

background, the child is assisted to have some connection with the culture, language or religion of his or her origin.<sup>344</sup> On the other hand, a child may be placed with a foster parent who has a different cultural, linguistic and religious background to his or her own. This decision may be taken in situations where there is an existing bond between the foster parent and the child,<sup>345</sup> or where a suitable and willing foster parent with a background similar to that of the child cannot be found.<sup>346</sup> The Children's Act prohibits the placement of more than six children with a single person or two people sharing a common household.<sup>347</sup> This type of foster care arrangement may only be allowed for the placement of siblings,<sup>348</sup> or where the court considers that it will be in the best interests of all the children to be placed with a single person.<sup>349</sup> The Act only allows the placement of more than six children with one foster parent if the children are to be cared for in a registered cluster foster scheme.<sup>350</sup> Every foster parent is entitled to a foster grant, irrespective of whether he or she is working or not.<sup>351</sup> The foster grant now stands at R740-00 per child per month.<sup>352</sup> The grant is solely for

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<sup>344</sup> Reg 70 (1)(j) to the Children's Act.

<sup>345</sup> S 184(2)(a) of the Children's Act.

<sup>346</sup> S 184(2)(b) of the Children's Act.

<sup>347</sup> S 185(1); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-19.

<sup>348</sup> S 185(1)(a); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-19.

<sup>349</sup> S 185(1)(b); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-19.

<sup>350</sup> S 185(2); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-19 – 12-20.

<sup>351</sup> Reg 71(6) to the Children's Act; Matthias & Zaal in Boezaart *Child Law in South Africa* 181; Kruuse & Kruuse "Social Services and Benefits" in Clark (ed.) *Family Law Service* (2008) K8.

the care of the child in foster care and is received by the foster parent from the SASSA.<sup>353</sup>

The foster grant ceases when the child is reunited with his or her family or when he or she is adopted.<sup>354</sup> The problems that are encountered in administering the grant are discussed later in this section. The foster grant applies to foster parents and not adoptive parents. Sloth-Nielsen and Van Heerden<sup>355</sup> argue that the state should provide financial assistance to suitable adoptive parents as well.

I am of the view that the Children's Act made attempts to prevent poverty in families through the provision of grants to "children without invisible means of support".<sup>356</sup> However, the step taken in the Children's Act does not go far enough to include destitute families. The Act also excludes adoptive parents who require financial assistance.<sup>357</sup> Thus, I propose that an adoption grant must be provided to adoptive parents with insufficient means to support their adoptive children. With regards to the foster grant, I am of the view that the state must increase the foster grant to an amount that is adequate to provide for the needs of the child

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<sup>352</sup> At the time of writing this section (12 April 2011). In 2010 the foster grant was a cash grant valued at R710 per month. See Kibel *et al.* (eds.) (2010) 108. See also s 8 of the Social Assistance Act.

<sup>353</sup> See the discussion in section 4 1.

<sup>354</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 152-153.

<sup>355</sup> "Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa" (1996) *SAJHR* 255.

<sup>356</sup> See the discussion in section 3 3 1 2.

<sup>357</sup> See the discussion in section 8 4 5.

like I proposed for children without visible means of support.<sup>358</sup> I recommend that South Africa refer to foreign jurisdiction and incorporate a provision for an adoption allowance in the Children's Act to cater for this.<sup>359</sup>

The Children's Act made improvements in this respect where willing parents were excluded from adopting a child due to their financial incapacity to care for the child. The Act provides that no person may be disqualified from adopting a child by reason of his or her financial status.<sup>360</sup> Furthermore, the Act provides that any person who adopts a child must apply for "means-tested social assistance" where relevant.<sup>361</sup>

It is clear that the objective of the Children's Act is to ensure that an adopted child has social security that fulfils his or her family life, rather than keeping the child in temporary care without stability and a sustainable livelihood. An interview with Khoza reveals that there have not been any practical cases where financial support was granted to adoptive parents who were willing to adopt, but could not do so because of financial instability. I am of the view that if a parent has good parenting skills, and is willing to adopt a child but lacks the means to do so, he or she must be assisted financially to enable him or her to adopt a child. I furthermore feel that the financial support that is envisaged for adoptive parents must be

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<sup>358</sup> See the discussion in sections 3 3 1 2 and the proposed provision in section 3 4.

<sup>359</sup> See the proposed provision in section 8 5.

<sup>360</sup> S 231(4); see the discussion in section 8 3 2 2 2 3.

<sup>361</sup> S 231(5).

sufficient to meet the costs of maintaining the child every month.<sup>362</sup>

Foster care may lapse on expiry of two years from the date the order was made,<sup>363</sup> or any shorter period for which the order was made.<sup>364</sup> The order may also be extended for a period of not more than two years at a time.<sup>365</sup> The Children's Act prohibits extension of foster care orders beyond the date at which a child reaches 18 years of age.<sup>366</sup> The Children's Act allows the children's court to order the cessation of further social worker supervision in situations where a foster child remains in foster care for more than two years.<sup>367</sup>

However, the Act creates an exception in the case of a child who has been abandoned, whose parents are deceased, or where there is no purpose in attempting reunification between the child and the biological parents. In these cases a child may be in foster care for more than two years.<sup>368</sup> In all these circumstances, the court must be satisfied that the order is in the best interests of the child.<sup>369</sup> The order to cease further supervision will occur after the need for creating stability in the life of the child has been considered. No social worker's

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<sup>362</sup> See the discussion in section 3 3 1 2.

<sup>363</sup> S 159(1)(a)(i).

<sup>364</sup> S 159(1)(a)(ii).

<sup>365</sup> S 159(1)(b).

<sup>366</sup> S 159(3).

<sup>367</sup> S 186(1)(a).

<sup>368</sup> SALRC *Report on the Review of the Child Care Act and Children's Bill* (2002) 227-228; Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-21.

<sup>369</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-21.



report will be required for the placement.<sup>370</sup> Instead, the foster care will subsist until the child turns 18 or unless otherwise directed.<sup>371</sup>

On the other hand, the children's court may, after considering the need to create stability in the life of a child who has been in foster care for more than two years with a person other than a family member, extend such order for more than two years at a time, or order that no foster care supervision or report is required and that the foster care placement subsist until the child turns eighteen.<sup>372</sup> Or, after considering the need to create stability in the life of a child who has been in foster care with a family member for more than two years, extend such order for more than two years at a time, or order that the foster care order subsist until the child turns 18 if the child has been abandoned by the biological parents,<sup>373</sup> the child's biological parents are deceased,<sup>374</sup> or if there is no purpose in attempting reunification between the child and his or her biological parent<sup>375</sup> and if it is in the best interests of the child.<sup>376</sup>

I am not in favour of a constant renewal of a foster care order, particularly when it is clear

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<sup>370</sup> S 186(1)(b); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-20.

<sup>371</sup> S 186(1)(c); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-20.

<sup>372</sup> S 186(2); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-21; see also Louw in Boezaart (ed.) *Child Law in South Africa* 152.

<sup>373</sup> S 186(2)(a).

<sup>374</sup> S 186(2)(b).

<sup>375</sup> S 186(2)(c).

<sup>376</sup> S 186(2)(d).

that reunification of the child with his or her family is not possible. The practice of constant renewal may be viewed as another way of ensuring that foster care is indefinite, or to prevent foster parents who are willing to adopt their foster children from adopting. This impacts negatively on permanency planning for the child.<sup>377</sup> Long term foster care is inappropriate as it creates insecurity in the life of a child.

The interview with Dube reveals that social workers who manage cases are overly burdened by workload.<sup>378</sup> Dube also alludes to the shortage of social work personnel as, amongst others, reason for the backlog in foster care placements.<sup>379</sup> He also points out that the process of monitoring a child in foster care is protracted and requires follow-up.<sup>380</sup> I agree with Dube that more social work personnel will solve the problem of the backlog in cases. I further argue that the additional staff must strictly monitor foster care plans and review them in accordance with the provisions that I have proposed in this chapter.<sup>381</sup>

I am of the view that a provision must be incorporated in the Children's Act to impose disciplinary measures on designated social workers who omit to review the care plans rather than overburdening the courts with the function of renewing care orders.<sup>382</sup> Thus, the strict

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<sup>377</sup> SALRC *The Review of the Child Care Act* (1998) section 7 2 9. See the discussion in section 8 1.

<sup>378</sup> Interview with Dube, a registered social worker and a registered counsellor in Pretoria, Gauteng province, held on the 2012-10-25, see Annexure "H".

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

<sup>381</sup> See the proposed provision in section 6 5.

<sup>382</sup> *Ibid.*, see also the discussion later in this section.

monitoring of care plans and the proposed sanctions are likely to avoid long-term foster care.

A social service professional is required to visit a child in foster care at least every two years to monitor and evaluate the placement.<sup>383</sup> Gallinetti and Loffel<sup>384</sup> note that the Act indicates what this visit must entail, and what and where it must be recorded. Matthias<sup>385</sup> argues that the maximum period of two years given by the children's court to placement orders, *which has not changed in terms of the Children's Act*,<sup>386</sup> including a foster care order, is appropriate, in that it puts pressure on the social worker and biological parents to engage in reconstruction services.<sup>387</sup> It was expected of the Department of Social Development's *Norms, Standards and Practice Guidelines for the Children's Act*,<sup>388</sup> to provide for stringent measures to ensure the full implementation of foster care plans to curb the backlog of children remaining in foster care indefinitely. Instead, in terms of the standard that is required, the guide states that a foster care plan must be developed according to the prescribed format stipulating what the format has to contain. The plan is to be developed by the relevant professional and includes the child, his or her parents, or guardian.

The care plan must include the proposed intervention and the roles and responsibilities of all

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<sup>383</sup> S 186(3); reg 75(4)(viii) to the Children's Act.

<sup>384</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 12-22.

<sup>385</sup> (1997) 43.

<sup>386</sup> Own emphasis.

<sup>387</sup> S 156 of the Children's Act; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 180; see the discussion later in this section.

<sup>388</sup> Reference No 152 of the Department of Social Development *Norms, Standards and Practice Guidelines for the Children's Act* 251.

the relevant parties. It also guides that the supervision process of drafting the care plans must be defined and communicated in the provinces. The guide also states that the plan must be discussed with the child, parent, guardian or care-giver, before it is included in the contract. It further states that the plan must be reviewed every six months and that the process of supervision of the care plan must be included in the care plan.<sup>389</sup>

I am of the view that if the implementation of a care plan is properly monitored and managed, it would be an essential tool that ensures that a child is strictly kept in care for a specific time as entrenched in the plan. This is so, as the plan would state the objectives of placement, measures that need to be put in place to achieve them, and the release of the child from care.<sup>390</sup> I am of the view that the authority that is given to the children's courts to extend foster care orders is not a bad thing. However, it would lessen the burden on the courts if legislation would require the courts to step in as the last option.

I am of the view that the Children's Act should have left the responsibility to extend foster care placements to social workers who are assigned to manage the cases of children in foster care. Thus, I propose that a provision be enacted in the Children's Act to ensure that the *comprehensive care plan* that is prepared by the designated social worker contains a clause that imposes a penalty against the social worker in the event he or she omits to

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<sup>389</sup> *Op cit* 252.

<sup>390</sup> SOS Children's Villages International *Guidelines for the Alternative Care of Children: A United Nations Framework* (2009) 17.

review the care plan at the times that are stipulated in the plan.<sup>391</sup>

In practice, when the two year period lapses, it gets renewed and the social worker would provide the “reconstruction services” for as long as the child remains in substitute care. The consequence of the renewal of the “reconstruction services” may be that the parent or the child may take a long time to be restored to a state of effectiveness.<sup>392</sup> At the same time, the parent may at any time lodge an application to return the child from foster care, even if returning the child to the parent may create instability in the life of the child.<sup>393</sup> Matthias<sup>394</sup> does not provide details of what “reconstruction” work consists of.

According to Khoza,<sup>395</sup> “reconstruction” work is a framework or a model, which plans the work that needs to be done regarding a child who is in care. The child that receives the “reconstruction services” must be part of the process or reconstruction. “Reconstruction work” builds up towards reunification. Khoza supports reconstruction work on the basis that at the end of the two year period, the social worker and the biological parents would be in a position to evaluate the permanency plan options for the child; that is, return the child to their home or consider permanent placement with a new family.<sup>396</sup> “Reconstruction services” aim to meet the basic necessities of the child.

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<sup>391</sup> See the proposed provision in section 6 5.

<sup>392</sup> Matthias (1997) 43.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*

<sup>395</sup> Interview with a social worker and director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, see Annexure “G”.

<sup>396</sup> *Ibid.*

“Reconstruction services”, which were provided during the operation of the Child Care Act, focused on a “residual based approach”; that is, the services were restrictive and focused on individual case work addressing a particular need of a child.

According to Khoza, in terms of the Children’s Act, the Department of Social Development uses a developmental approach when it administers reconstruction services. Reconstruction services are provided to parents and children to enable them to have a harmonious and sustainable family life. This means that the services that are provided are less restrictive. Thus, there is a shift in the manner in which welfare services are now provided by government. For instance, when a foster plan<sup>397</sup> is established, it stipulates the activities that need to be carried out and the time frame for the review of progress. Frameworks that are put in place for reconstruction services are, amongst others, a foster care plan,<sup>398</sup> which stipulates the activities that will be conducted.

A “permanency plan”<sup>399</sup> is another reconstruction tool which is used to provide guidance on the type of care and protection programme that needs to be administered for a child and the time frame within such programme will be completed. If the children’s court is of the view that reunification between the child and the biological parents is possible, and that it is in the best interests of the child to reunite the child with the parent, the court will issue an order to reunite the child with the parents in accordance with the conditions set by the designated

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<sup>397</sup> Reg 75 to the Children’s Act.

<sup>398</sup> Reg 75(4) to the Children’s Act.

<sup>399</sup> Reg 75(4)(b)(vii) to the Children’s Act, see the discussion on reunification later in this section.

social worker in a foster care plan relating to the proposed reunification.<sup>400</sup> If the child has not been reunited with his or her biological parents within two months of the initial court order, or at any time during the extension of the order, the designated social worker appointed to facilitate the reunification must submit a report to the children's court explaining the reasons why the child was not reunited with the biological parents,<sup>401</sup> and recommend

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<sup>400</sup> S 187(1); reg 75(4)(b)(vi) to the Children's Act. A foster care plan may contain the following details in terms of reg 75(4):

- “(a) the personal identification particulars of the parent or parents or guardian or guardians, the foster parent or parents, the foster child or children and the designated social worker or designated child protection organisation; and
- (b) the respective responsibilities and rights of the parent and parents or guardian or guardians and foster parent or parents with respect to the foster child, including but not limited to –
- (i) contact with the foster child by the parent or parents or guardian or guardians;
  - (ii) financial contributions to the child's maintenance and upbringing by the child's parent or parents or guardians;
  - (iii) details concerning consent to medical treatment, surgical operations, removal of a child from the Republic or decisions concerning the child's education and participation in cultural or religious activities;
  - (vi) contact with the foster child by other family members or the extended family;
  - (v) any steps required to stabilise a child's life;
  - (vi) proposed reunification services;
  - (vii) the details of any proposed permanency plan; and
  - [(viii)] the proposed supervision services and monitoring of the foster care placement to be undertaken by the designated social worker or designated child protection organisation”;

Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-23 – 12-24; see also the discussion in section 7 3 1.

<sup>401</sup> S 187(2)(a).

steps that may be taken to stabilise the child's life.<sup>402</sup> Upon considering the report of the designated social worker, the children's court may order the designated social worker to continue facilitating the reunification.<sup>403</sup> According to Khoza,<sup>404</sup> reunification is a continuous process that depends on the merits of each case. A permanency plan may be established for a child who is in foster care because of neglect. The social worker would firstly provide services to the child who is traumatised, and secondly, provide appropriate services to the parents to enable them to deal with the problem. While the child remains in care, the social worker will enable the child and the parent to establish contact with each other. The social worker will later conduct an assessment to establish if the child or the parent needs further services. Lastly, the social worker will establish if the child may be reunited with his or her parents, or if placement in care has to be extended. The children's court may order the termination of the reunification plan if there are no prospects for reunification.<sup>405</sup>

When the court orders that a child is placed with foster care parents, it sets out the responsibilities and rights of the foster parent over the child in the order.<sup>406</sup> The order is normally accompanied by a foster care plan, which would contain the respective rights and responsibilities of the biological parent or guardian of the child,<sup>407</sup> the rights and

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<sup>402</sup> S 187(2)(b).

<sup>403</sup> S 187(3)(a).

<sup>404</sup> Interview with a social worker and director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14, see Annexure "G".

<sup>405</sup> S 187(3)(b).

<sup>406</sup> S 188(1)(a); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-27.

<sup>407</sup> S 188(1)(e).



responsibilities of the foster parents, family members, other persons having an interest in the well-being of the foster child, and the role of the designated social worker or designated Child Protection Organisation or management of a cluster foster care scheme.<sup>408</sup> A foster parent is prohibited from taking any decision that is contemplated in the Children's Act,<sup>409</sup> namely, any decision:

- “(i) in connection with a matter listed in section 18(3)(c);<sup>410</sup>
- (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
- (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, and health, personal relations with a parent or family member or, generally, the child's well-being”.

The views and wishes of the child will be considered with due regard to the age, maturity and the development of the child<sup>411</sup> and any views and wishes expressed by the parent or

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<sup>408</sup> S 188(1)(c); reg 75(2) to the Children's Act.

<sup>409</sup> S 31(1)(b).

<sup>410</sup> “Give or refuse any consent required by law in respect of the child, including-

- (i) Consent to the child's marriage;
- (ii) Consent to the child's adoption; consent to the child's departure or removal from the Republic;
- (iii) Consent to the child's application for a passport; and
- (iv) Consent to the alienation or encumbrance of any immovable property of the child.”

<sup>411</sup> S 188(2)(a).

guardian of the child.<sup>412</sup>

A foster parent may have additional responsibilities and rights over the child in addition to the responsibilities and rights normally given to a foster parent if the child has been abandoned,<sup>413</sup> the child is an orphan,<sup>414</sup> or if family reunification is not in the best interests of the child.<sup>415</sup> The additional rights include, the right to consent to surgical operations in relation to a foster child in his or her care,<sup>416</sup> the right to apply for a passport of the child and to remove the child from the Republic<sup>417</sup> if the right has been provided in a foster care plan,<sup>418</sup> or has been designated by the order of the court,<sup>419</sup> or if the foster parent has permission from the provincial head of Social Development to remove the child from the Republic.<sup>420</sup> The Act also provides guidance as to the nature of the relationship between the child, the parent or guardian, the foster parent and the designated social worker dealing with the matter concerning the child who is in foster care.<sup>421</sup>

Foster care may be terminated by the children's court if good cause is shown or if it is in the

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<sup>412</sup> S 188(2)(b).

<sup>413</sup> S 188(3)(a).

<sup>414</sup> S 188(3)(b).

<sup>415</sup> S 188(3)(c).

<sup>416</sup> Reg 71(3)(b) to the Children's Act.

<sup>417</sup> Reg 71(4) to the Children's Act.

<sup>418</sup> Reg 71(4)(a) to the Children's Act, see s 188(1)(e) of the Children's Act.

<sup>419</sup> *Ibid.*

<sup>420</sup> Reg 71(4)(b) to the Children's Act.

<sup>421</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-10.

best interests of the child to do so.<sup>422</sup> On the same note, the children's court must, before terminating foster care, take into account all relevant factors that relate to the bond that exists between the child and his or her biological parent,<sup>423</sup> the relationship between the child and his or her biological parent if the biological parent reclaims care of the child,<sup>424</sup> the bond that developed between the child and the foster parent,<sup>425</sup> and the child and the family of the foster parent,<sup>426</sup> and the prospects of achieving permanency in the child's life by returning the child to the biological parent,<sup>427</sup> allowing the child to remain permanently in foster care with the foster parent,<sup>428</sup> placing the child in any other alternative care<sup>429</sup> or putting the child up for adoption.<sup>430</sup>

Foster care that takes place in terms of customary law is an informal arrangement where orphaned or abandoned children live with, for example, grandparents, relatives, neighbours who do not have children.<sup>431</sup> Also, a child may be in foster care, where he or she is taken care of within the ambit of a communal association, or where he or she receives community

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<sup>422</sup> S 189(1); reg 75(6) to the Children's Act; Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-30.

<sup>423</sup> S 189(2)(a).

<sup>424</sup> S 189(2)(b).

<sup>425</sup> S 189(2)(b)(i).

<sup>426</sup> S 189(2)(b)(ii).

<sup>427</sup> S 189(2)(c)(i).

<sup>428</sup> S 189(2)(c)(ii).

<sup>429</sup> S 189(2)(c)(iii).

<sup>430</sup> S 189(2)(c)(iv).

<sup>431</sup> Bennett *A Sourcebook of African Customary Law in Southern Africa* (1991) 377-378.

based care, that is, care which is provided by the members of the community.<sup>432</sup> Grand parenting is the well-known informal care arrangement often available for grandchildren.

Foster care in terms of grand parenting may have potential benefits for the child. However, under certain circumstances children under the foster care of aged grandparents may become ill due to the inability of the grandparents to observe the basic rules of hygiene or as a result of a poor diet with less access to medical care than children living with younger parents.<sup>433</sup> I am of the opinion that this situation is exacerbated by the fact that most grandparents do not apply for a foster grant. However, the *S S (A minor child)* judgment brought improvements in our law in that grandparents would now, like aunts and uncles who have the legal duty to support a child, challenge section 150(1)(a) of the Children's Act for the benefit of "a child [who] has been abandoned or orphaned [and has no visible means of support]"<sup>434</sup> Where grandparents provide care for children who are not related to them, they would sometimes not apply for a foster grant even when they are financially needy because they are ignored or uninformed about the availability of the grant. Instead, most grandparents use the old age pension or the child-support grant to fend for their grandchildren.

It is clear that neither of these grants are sufficient to meet the basic needs of both the child

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<sup>432</sup> See the discussion in section 2 2 1 10.

<sup>433</sup> Ledderbogge *Transracial Placements of Children in the Durban Metropolitan Area* (Masters Dissertation 1996 UND) 22.

<sup>434</sup> Par 41.

and grandparent every month.<sup>435</sup> If the grandparent were to access both the old age pension and the foster grant, the needs of the grandchildren in his or her foster care might be better met. I propose that the Children's Act must refer to foreign jurisdictions and incorporate a clause on kinship care and communal foster care for legal recognition.<sup>436</sup> My view is based on the fact that South Africa already recognises care provided by grandparents and communal structures that take care of children in need of care and protection.<sup>437</sup>

The Committee on the Rights of the Child<sup>438</sup> appreciated the placement of children in informal foster care, particularly in rural areas. Nevertheless, the Committee raised concerns regarding the lack of adequate monitoring to prevent the abuse of children, such as their use as domestic workers. The Committee<sup>439</sup> recommended that measures be taken to establish outside supervision of these placements in order to avoid situations where a child is abused by his or her foster family.

While foster care makes a positive contribution to children who are removed from family life, it is important to point out that foster care has its own risks. Social workers do not know the

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<sup>435</sup> See the discussion in section 3 3 1 2 regarding estimations on what it costs to maintain a family of 4 members.

<sup>436</sup> See the proposed provision in section 6 5.

<sup>437</sup> See the discussion in sections 2 2 1 9 and 2 2 1 10.

<sup>438</sup> This concern was raised in the *Concluding Observation to Comoros*, Hodgkin & Newell (2007) 281.

<sup>439</sup> *Ibid.*

conditions that foster children live in.<sup>440</sup> In some cases, social workers place the child in foster care and thereafter, disappear from the scene.<sup>441</sup> The screening of foster parents, a process which may reveal their strengths and weaknesses, is often rushed. This makes it difficult to trace past situations of abuse by the foster parent or to have clear knowledge of the ability of the foster parent to provide care to children.<sup>442</sup> Unfortunately, there is no reported case law pertaining to typical incidents. Even with the reports made in the newspapers regarding incidents of abuse of foster children by foster parents, there are no formal complaints lodged concerning such matters that I know of.

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<sup>440</sup> *The Star* (2005-08-15): this incident was reported on page 3 with the title “Pastel House of God has become Symbol of Cruelty” and page 9 with the title “Suffer Little Children”. Pastor (Cornelius Ngwenya), 67, and his wife, 46, of Benoni, East Rand, Gauteng province were arrested for allegedly inflicting “unspeakable cruelty” on their three foster children, a 5 year-old boy and two toddler girls who were 2 and 3 years-old. One of the children lived in a pigeon coop without food. The child was found malnourished with a liver infection. The 5 year-old could not talk, was not toilet trained and could not move properly. The child was found sitting on a cold cement floor in the dark in a 2m by 4m room in his own faeces and urine. A blanket was found lying on the floor covered in faeces and urine. According to residents of Benoni, there could be many children who are subjected to this kind of abuse because of the greed of foster parents and negligent social workers. The spokesperson for the Democratic Alliance, hereinafter referred to as “DA” for Gauteng welfare blamed this incident on the screening of prospective foster parents that is often rushed by social workers. This raised questions around the periodic checks that are supposed to be conducted by social workers on foster parents’ homes.

<sup>441</sup> *Ibid.*

<sup>442</sup> Regs 71(7), 72(1) and (2) to the Children’s Act require a foster parent to participate in a training programme aimed at enhancing the capacity of the foster parent to provide care to children who might in future be placed in his or her care.

Khoza<sup>443</sup> affirms that while foster parents are screened, the focus is often on the residential home where the child will be kept and what may appear to be the behaviour of the foster carer, with little focus being placed on the foster carer's emotional and physical capacity. The religious background of the foster parent is in practice not subject to assessment, given the fact that there are so few foster parents who make their homes available to children in need of care.

In such circumstances, foster parents may end up with responsibilities beyond their capacity. In other situations foster parents would foster children for purposes of accessing the foster grant for their own good.<sup>444</sup> Some parents turn fostering into a business, taking children even when they cannot afford to care them.<sup>445</sup> The Committee on the Rights of the Child also noted that, "Even though children are more exposed to violence or neglect in institutions, the vulnerability of children in foster care should not be underestimated".<sup>446</sup> The Committee<sup>447</sup> further noted with concern that foster care has not been institutionalised or standardised, and that the organisations involved are generally left to develop their own systems of monitoring and recruitment.<sup>448</sup> In South Africa, children in foster care may be moved from one foster family to another, thereby remaining in foster care for years. This creates instability in the

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<sup>443</sup> Interview with a social worker and director of the Child Protection Unit of the National Department of Social Development, Tshwane, held on 2011-04-14, see Annexure "G".

<sup>444</sup> *Ibid.*

<sup>445</sup> *The Star* (2005-08-15).

<sup>446</sup> Hodgkin & Newell (2007) 281.

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

lives of children.<sup>449</sup> The foster care system must be assessed and better regulated if it is to contribute towards the child's right to family life.<sup>450</sup>

The Department of Social Development requires provinces to implement the foster care guidelines stipulated in the Children's Act and submit reports regarding their implementation to the national office.<sup>451</sup> Challenges encountered by the Department of Social Development in the implementation of the foster care guidelines in the provinces include the lack of co-operation regarding the submission of information by provinces.<sup>452</sup> I am of the view that the Department of Social Development should use stringent measures<sup>453</sup> to get the provinces to submit the required information. Inputs by provinces are crucial to assist the national department to adjust standard foster care guidelines according to experiences in different provinces.

According to Matthias and Zaal,<sup>454</sup> a foster parent serves as a temporary, substitute parent. This type of a substitute nuclear family environment is generally regarded as better for most

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<sup>449</sup> Louw in Boezaart (ed.) *Child Law South Africa* 142; interview with Khoza a social worker and director of the Child Protection Unit of the National Department of Social Development, Tshwane, held on 2011-04-14, see Annexure "G".

<sup>450</sup> *Ibid.* See also the discussion in section 6 4 2.

<sup>451</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September (2010)* 16-18.

<sup>452</sup> *Ibid.*

<sup>453</sup> Measures such as having a senior member such as the head of the Department of Social Development visit the provinces to collect such information would have worked, given the respect for seniority.

<sup>454</sup> In Boezaart (ed.) *Child Law in South Africa* 178.



children in need of care rather than placement in a residential care. Foster care is representative of a family in terms of its size as compared with a child and youth care centre.

Furthermore, a child in foster care is likely to receive more individual attention and emotional and psychological comfort compared with a child in a child and youth care centre. A child in foster care normally lives with family members and is likely to bond with them and live in what is likely to be a nuclear family and establish relationships much easier with the foster family. However, only long-term foster care can create a degree of stability in a child's life even though it does not solve the problem of who should exercise guardianship in respect of the child.<sup>455</sup> Furthermore, the fact that a child who is in long-term foster care is not necessarily in a permanent placement means that foster care may not provide a family life with a sustainable livelihood for the child.

I am of the view that the South African foster care system had to some extent improved. The Children's Act<sup>456</sup> has established stringent provisions to regulate the foster care system and contact issues.<sup>457</sup> For example, a child who is placed in foster care because of an abusive biological parent may not be barred from contact with the abusive parent, except where

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<sup>455</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 152.

<sup>456</sup> S 45(1)(b) states that the children's courts may adjudicate any matter involving contact with the child. S 28(1)(a) of the Children's Act provides that the rights of contact may be suspended or terminated temporarily or permanently.

<sup>457</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 181. In terms of Art 4(2) of the ECHR contact may be restricted when it is necessary and in the best interests of the child to do: see Van der Linde in Nagel *Gedenkbundel vir JMT Labuschagne* 115-116 and the discussion in section 7 2 1.

contact is not in the best interests of the child.<sup>458</sup>

### 6.3.2 Foster care in terms of international law

According to the CRC,<sup>459</sup> the care that is considered for the child who is deprived of family life should include, amongst others, foster care which considers continuity in the child's upbringing. The CRC encourages states to place children in family-based or family-like care early, as it is best to invest in care that secures opportunities for young children.<sup>460</sup> According to Hodgkin and Newell<sup>461</sup> this will enable the child to form long-term attachments; for example, through fostering or supported placements within the extended family. However, Hodgkin and Newell<sup>462</sup> maintain that if a child is placed in foster care, the foster care should not preclude the return of the child to his or her own family.

Hodgkin and Newell<sup>463</sup> point out that in some situations foster care can also be used to disguise hidden aspects of child abuse where children are kept as domestic workers in conditions that are similar to slavery. In Burkina Faso, children are routinely sent to live with wealthier families as servants. The state is not absolved of the responsibility to secure the safety and well-being of the child simply because the use of the child as domestic labour is

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<sup>458</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 182.

<sup>459</sup> Art 20(3).

<sup>460</sup> Hodgkin & Newell (2007) 244.

<sup>461</sup> *Ibid.*

<sup>462</sup> (2007) 281.

<sup>463</sup> *Ibid.*

arranged by parents.<sup>464</sup> The Committee on the Rights of the Child acknowledges the placement of children in informal foster care in rural areas.<sup>465</sup> However, the Committee is concerned that there are inadequate mechanisms to monitor abuse in informal foster care placements. The Committee recommends that states take measures to engage outside supervision of these placements in order to prevent the child from being abused by his or her foster family. The officers who train foster care-givers and supervise foster care facilities are expected to ensure that children in foster care are not treated as inferior to other children within the family or exploited as domestic workers.<sup>466</sup>

The Committee on the Rights of the Child noted with respect to South Africa's initial report towards the CRC, that the existing South African foster care system is not properly monitored and evaluated, and recommended that the system be reviewed periodically.<sup>467</sup> The Committee was in the case of Costa Rica concerned about the duration of interim placement, which would last for more than three years before the matter was brought before the judicial officer for final decision on the placement of the child.<sup>468</sup> The Committee requires state parties to keep interim placement short, that such placement must be reviewed regularly, and that the child be brought before the judge in the initial phase of separation between the child and the parents.

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<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.*

<sup>467</sup> Concluding Observation No 25.

<sup>468</sup> Hodgkin & Newell (2007) 382.

The Committee emphasised<sup>469</sup> the fact that states should provide counselling and community-based programmes to assist children at home and increase financial support and other benefits for families with children living in poverty<sup>470</sup> *rather than prioritising the placement of children outside their own families.*<sup>471</sup> The Committee has, its Concluding Observations<sup>472</sup> towards Luxembourg, expressed its concern about the fact that parents automatically lose parental authority over their children when they are placed in foster care or in institutions by courts; apparently without determining whether such placement is in the best interests of the child.<sup>473</sup> I am of the view that assistance should be provided to families living in poverty to enable them to raise their own children. This may be in the form of training in parenting skills<sup>474</sup> and financial support<sup>475</sup> that is sufficient to maintain each child in the household, rather than placing the child in care.

According to the ACRWC,<sup>476</sup> a child who is deprived of his or her family environment and cannot be allowed to remain in that environment must be provided with alternative family care, which includes, amongst others, placement in foster care or placement in a suitable institution. Unlike the CRC, the ACRWC has limited its options for placement to foster care and suitable care. The African culture values continuity and cohesion of the family unit and

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<sup>469</sup> In its Concluding Observations to Kazakhstan No 40 and 41.

<sup>470</sup> Hodgkin & Newell (2007) 241.

<sup>471</sup> Own emphasis.

<sup>472</sup> No 34 and 35 of the Luxembourg's Initial Country Report.

<sup>473</sup> Hodgkin & Newell (2007) 237.

<sup>474</sup> See the discussion in section 4 1.

<sup>475</sup> See the discussion in sections 4 1, 3 3 1 2 and 4 5.

<sup>476</sup> Art 25(2)(a).

belonging in a community.<sup>477</sup>

I am of the view that the ACRWC should have included extended family care and communal care, as the two care systems are widely practised in Africa. Like the CRC, the ACRWC is concerned about continuous development in the life of the child when the child is placed in alternative care by stating that state parties to ACRWC:

“when 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”.<sup>478</sup>

Furthermore, the ACRWC requires states to take measures to trace and reunite children with parents or relatives.<sup>479</sup>

In terms of the European jurisdiction, the ECtHR found in *X v Switzerland*,<sup>480</sup> that whether the ties between a child and his or her foster parents amount to family life will depend on the facts of the case. The question to be asked is whether the child has close personal ties with his or her natural parents and the length of time the child has spent in the care of the foster family. The relationship between the foster parents and foster child is viewed as a relationship which may fall within the ambit of family life depending upon the strength of the

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<sup>477</sup> Omotola “Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture” (2004-2005) *II&CLR*, 126.

<sup>478</sup> Art 25(3).

<sup>479</sup> Art 25(2)(b). See the discussion in section 7 2 2.

<sup>480</sup> (1978) 13 DR 248.

emotional ties.

*Beoku v Betts*<sup>481</sup> involved an applicant who was Jamaican-born and who had a relationship with a British citizen where a daughter was born from the relationship. The applicant had another relationship with a British citizen where a daughter and son were born. The House of Lords found that the Article 8 rights of family members who are not party to proceedings should be considered.<sup>482</sup> The court decided that the effect on the other family members' right to respect for family life with the applicant must be taken into account in the hearing concerning the deportation of the applicant back to Jamaica. Having regard in particular to the evidence of the relationship between the applicant and his son and daughter, that is, sharing the responsibility for his daughter two days a week despite the breakdown of his relationship with the mother, caused the invoking of Article 8. The threshold of successful reliance on Article 8 was high.<sup>483</sup> Thus, a decision which affects a person's family life also affects those with whom he enjoys family life.

Foster care should be conceived of as a temporary measure which should be ended as soon as the circumstances allow.<sup>484</sup> Every foster care placement should be compatible with the goal of the subsequent reunification of the child with the parents. A child in foster care will have family life and attract the protection of Article 8 if the foster child has developed strong

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<sup>481</sup> (2008) UKHL 39.

<sup>482</sup> Par 42.

<sup>483</sup> *Ibid.*

<sup>484</sup> *Johansen v Norway* (1997) 23 EHRR 33. See the discussion in section 7 2 2; Kilkelly (1999) 197.

ties with the foster parents.<sup>485</sup> It is important for a child who is removed from family life to develop personal ties with the foster family since this relationship is protected by legislation.<sup>486</sup>

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<sup>485</sup> Kilkelly (1999) 197.

<sup>486</sup> Art 8(2) of the ECHR. See *Hoge Raad 17*; *Bronda v Italy* 81 and the discussion in section 2 2 2.

A long-term attachment to the foster family can bar the return of the child to his biological parents, or to one of them based on the criterion of the best interests of the child.<sup>487</sup> However, if foster upbringing is ordered for a child, the family relationship is not terminated in principle.<sup>488</sup> Article 8 of the ECHR requires that there must be a fair and comprehensive balancing of a child's interest in remaining in foster care and the parent's interests in family reunification. This also applies to the taking of the child into public care.<sup>489</sup> According to the court's jurisprudence, as alluded to in a number of cases,<sup>490</sup> foster placement should basically be conceived as a temporary measure, which should be ended as soon as circumstances allow. Thus, the court in *Johansen v Norway* stated that:

“[T]aking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In this regard a fair balance has to be struck between the interest of the child in remaining in public care and those of the parents in being reunited with the child. In carrying out this balancing exercise, the Court will attach particular importance to the best interest of the child, which depending upon their nature and seriousness may override those of the parent. In particular ... the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.”<sup>491</sup>

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<sup>487</sup> *Olsson v Sweden* 33; *Rieme v Sweden* 70.

<sup>488</sup> *W v United Kingdom* 59; *Andersson v Sweden* 72; *Eriksson v Sweden* 58.

<sup>489</sup> *Hokannen v Finland* 299; *K and T v Finland* 1354.

<sup>490</sup> Par 33; *Olsson v Sweden* par 81; *Couillard Maugery v France* 1 July 2004 (Applic no 64796/01). See also Choudhry & Herring (2010) 316.

<sup>491</sup> Par 64. In the case of *Johansen* a 2 weeks-old child was placed in public care. The court held that the applicant in the case had been deprived of his parental rights and access in the



### 6.3.3 Foster care in terms of foreign jurisdictions

This section will assist with information as to whether a grandparent must be regarded as a kinship carer, as is the case in other foreign jurisdictions. Furthermore, the discussion will provide information as to whether a foster child who is under kinship care of a grandparent must qualify for a foster care grant. These concerns must be addressed to confirm, amongst others, the finding of the court in *S S (A minor child)* judgment that the minor child is in need of care and protection and must be placed in foster care of his aunt and uncle.<sup>492</sup>

Thus, South Africa must learn from the foreign jurisdictions discussed in this section and enact a provision in the Children's Act which recognises kinship care, identify persons who qualify as kinship carers, including the right of the child who is without visible means of support, who is under kinship care, to receive a foster grant.<sup>493</sup>

Connolly<sup>494</sup> argues that there is a great deal of variability with respect of how kinship care is defined. For example, states in the United States of America define kinship in relation to

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context of a permanent placement of the child in a foster home with a view to adoption by the foster parents. The court held that the measures taken by the court were overridden by requirements pertaining to the best interests of the child. See Van der Linde (2003) *Obiter* 166 for further discussion on this topic. See also the discussion in section 6 8.

<sup>492</sup> Par 41.

<sup>493</sup> See the proposed provision in section 6 5.

<sup>494</sup> *Kinship Care* (2003) Department of Child, Youth and Family 5: accessed from [www.cyf.govt.nz/documents/about-us/.../social.../kinship-care.pdf](http://www.cyf.govt.nz/documents/about-us/.../social.../kinship-care.pdf) on 2012-10-02.

blood, marriage or adoption, while other jurisdictions such as the United Kingdom define kinship in relation to care by family friends, neighbours and godparents.<sup>495</sup> In the United States of America, 41 states give preference to placements with relatives when a child is found to be in need of care.<sup>496</sup> This indicates that there is a broader interpretation of who constitutes kin. Legislation in the United States requires that state agencies must make reasonable efforts to identify and locate a child's relatives when an out-of-home placement is needed.<sup>497</sup> California defines a relative as an adult who is related to the child by blood, adoption or affinity within the fifth degree of kinship, including, stepparents, step siblings, great grandparents or spouse of any of these persons even if the marriage was terminated by death or divorce.<sup>498</sup>

However, preference is given to adult grandparent, aunt, uncle or sibling. Thus, preference is given to the child's grandparents, aunts, uncles, adult siblings and cousins. The social worker who is responsible in placing the child must conduct an assessment to determine whether the relative is "fit and willing" to provide a suitable placement for the child, able to ensure the child's safety, and able to meet the needs of the child.<sup>499</sup> If a relative meets the qualification for being a foster parent, he or she may receive payments at the full foster care

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<sup>495</sup> *Ibid.*

<sup>496</sup> Child Welfare Information Gateway *Placement of Children with Relatives* (2010) 2: accessed from [www.childwelfare.gov/systemwide/laws\\_policies/.../placement.pdf](http://www.childwelfare.gov/systemwide/laws_policies/.../placement.pdf) on 2012-11-19.

<sup>497</sup> *Ibid.*

<sup>498</sup> See *California Welfare & Institutions Code 361.3* (West 2006).

<sup>499</sup> *Ibid.*

rate and any other benefits available to foster parents, whether in money or services.<sup>500</sup> This principle also applies in Louisiana, which emphasises on the right of the foster child to receive a foster allowance “as appropriate to the age of the child”, rather than emphasising the right of the foster parent to have access to the foster grant.<sup>501</sup> Research<sup>502</sup> reveals that the welfare of some children can be seriously damaged by residential care or continuous foster care. Thus, in most cases,<sup>503</sup> it is more conducive for the development and the best interests of the child if the child is nurtured by his or her biological parents rather than placement in foster care.

Amongst other types of foster care that are provided in the United States of America which are not formally recognised in the South African Children’s Act, are “treatment foster care”,<sup>504</sup>

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<sup>500</sup> Child Welfare Information Gateway *Placement of Children with Relatives* (2010) 3. In California, the State Licensing Regulations require the prospective foster parent to be at least 18 years of age, have a solid ground in child parenting and must have attained 10 years of adulthood. See California Code of Regulations Title 22 Division 6, Chap 9.5, Art 4-5 (2007).

<sup>501</sup> Louisiana Office of Community Services’ Guidelines *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 64: accessed from [www.dss.state.la.us](http://www.dss.state.la.us) on 2012-10-25.

<sup>502</sup> O`Halloran (2003) 195-196.

<sup>503</sup> Such as *R (M) (An infant)* 1966 3 All ER 58 (CH): there are various cases in which children were removed from the care of their parent for some time but later restored to their parents’ care.

<sup>504</sup> This is foster care for the provision of therapeutic, specialised, intensive or enhanced foster care, see Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 8: accessed from [www.hdwg.org/sites/default/files/Foster-Care-Primer.pdf](http://www.hdwg.org/sites/default/files/Foster-Care-Primer.pdf) on 2012-10-19.

“group home”<sup>505</sup> and “inter-jurisdictional placement”.<sup>506</sup> Children in foster care receive services from the child welfare system which is an arrangement of federal, state and private partnerships with multiple stakeholders. Thus, children who are placed in alternative care, are safe, secured and supported for their development and well-being.<sup>507</sup> Health care and financing needs of children in foster care reveals that children in foster care are vulnerable due to, amongst others, the fact that their removal from the care of parents often makes tracking children’s health history difficult.<sup>508</sup> Furthermore, when in foster care, they may be moved from one foster home to another, or are subject to various treatment arrangements and thus receive care from different service providers. These circumstances may complicate the recording of health care information in attempting to ensure that children receive the health care services they need.

Research recommends that children in foster care must have necessary services and that services must be subsidised or free of charge.<sup>509</sup> The following health care services are

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<sup>505</sup> *Ibid.* Children in group home are those who require a more structured environment than can be provided in a private home. Thus, such children are placed in an institutional setting.

<sup>506</sup> Where a child is placed outside their own community, other than the state that is responsible for their care. This may be because, amongst other reasons, the child has relatives that can care for him or her in another state or if the child has special needs that cannot be met with the treatment resources available with the state, see Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 8.

<sup>507</sup> *Ibid.*

<sup>508</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 2.

<sup>509</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 2.

recognised as necessary when caring for children in foster care: initial health assessment; comprehensive medical or dental assessment; developmental and mental health evaluation; and ongoing care and monitoring of health status.

Children in foster care are viewed as poorer in overall health and have a higher rate of serious emotional and behavioural problems, chronic medical conditions and developmental delays.<sup>510</sup> Phicil is of the view that children in foster care may be diagnosed with intellectual disability, visual or hearing impairment and physical disability.<sup>511</sup> Thus, I argue that the health status of children in foster care with disabilities may be at a high risk of deteriorating if their placements do not meet their specific needs. For children who suffered severe neglect and abuse in the family environment, placement in foster care can be an important opportunity to provide prevention and rehabilitation services. I am of the view that South Africa must refer to Phicil's research and enact a provision for the different services that are necessary for children in foster care and the financing of same.<sup>512</sup>

In the United States of America, health care services for children in foster care are financed by government, using Medicaid, a private medical aid programme.<sup>513</sup> Medicaid covers foster

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<sup>510</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 5.

<sup>511</sup> *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 6.

<sup>512</sup> See the discussion in section 6 5.

<sup>513</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 10: The United States of America's public health insurance program under Title XIX of the Social Security Act 1965 and works as an entitlement program. The program in

care children, including youth previously in foster care up until the age of 26.<sup>514</sup> Thus, medical care would be received under comprehensive care provided by Medicaid.<sup>515</sup> More often, public-private partnership agreements are used to facilitate the provision of services such as medical care.<sup>516</sup> This arrangement enables government to leave the work in the

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jointly financed by both state and federal funds. Almost all children in foster care are eligible to receive Medicaid benefits.

<sup>514</sup> *Ibid.*

<sup>515</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 19.

<sup>516</sup> Saadé *et al. The Story of a Successful Public-Private Partnership in Central America: Hand washing for Diarrheal Disease Prevention* (2001) xi. The public private partnership was initiated by the United States Agency for International Development (hereinafter referred to as “USAID”), who contacted soap producers from 5 countries in the United states, Central America such as, Colgate-Palmolive and Unilever. The companies launched a hand washing campaign. Ministries of Health, Education, media companies, UNICEF and NGOs joined the partnership. The campaign involved radio and television advertisements, posters and flyers distributed by sales personnel and through mobile units to communities, schools, municipal and health centres. According to a follow-up assessment, ten percent of women surveyed improved their handwashing behaviour and diarrhoea. It was also estimated that over the course of the intervention, there was an overall reduction in diarrheal prevalence of about 4.5 percent among children under 5 years of age: : accessed from [www.ehproject.org/PDF/...Publications/JP001CentAmHandwash.PDF](http://www.ehproject.org/PDF/...Publications/JP001CentAmHandwash.PDF) on 2012-10-29. See also UNICEF *Non-State Providers and Public Private Partnership in Education for the Poor* (2011) v: accessed from [www.unicef.org/eapro/Final\\_NSP\\_lowres.pdf](http://www.unicef.org/eapro/Final_NSP_lowres.pdf) on 2012-10-29. This research revealed that although the states are committed to fulfilling the rights of children to access basic services, many developing countries in East Asia and Pacific face daunting challenging service delivery. Public spending on services too often does not reach poor and marginalised children. Thus, UNICEF East Asia, the Pacific Regional Office, the Asian Development Bank and the Ministry of Education, Health and Finance engaged in a workshop

hands of service providers.

The agreement between government, the private sector and the beneficiaries (residential care) enables the parties to establish performance conditions and ensures coordination between the parties. I am of the view that South Africa can learn from the United States in this regard. Thus, South Africa must refer to the United States' experience and enact a provision that facilitates the financing of services for children in care through public-private partnerships. I further propose that South Africa use local NGOs for the distribution of medical care as part of its work in communities. Local NGOs can also be used to solicit funding from international agencies, such as UNICEF, for purposes of ensuring that children receive enhanced and sustainable care.<sup>517</sup>

In terms of the Adoption Assistance Act (United States of America), each state is required to develop and submit a child welfare plan under Title IV-B of the Social Security Act.<sup>518</sup> AFSA uses the term "time-limited reunification services".<sup>519</sup> Thus, social workers are required to develop a "comprehensive plan" that specifies how the services identified in the needs assessment or otherwise identified in individual cases, will be funded and delivered. The

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to develop public private partnerships to improve state and non-state engagement in basic service delivery.

<sup>517</sup> See the proposed provision in section 6 5.

<sup>518</sup> 42 U.S.C; s 622.

<sup>519</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 56.

plan must emphasise the provision of early intervention or highly intensive services as the method most likely to promote family maintenance.<sup>520</sup>

The plan must also stipulate the criteria for determining an appropriate visitation schedule.<sup>521</sup>

Social workers are required to make reasonable efforts to find permanent homes for children for whom reunification is either being pursued at the same time as adoption planning (concurrent planning).<sup>522</sup> This requirement is meant to ensure that social workers achieve a permanent living situation in a timely manner. I am of the view that South Africa must also refer to the “comprehensive plan” as implemented in the United States and incorporate a provision for *comprehensive care plan*<sup>523</sup> with quality services for children in care in the Children’s Act. The plan must include arrangements for the provision of, amongst others, early and periodic screening, diagnostic and treatment programme,<sup>524</sup> Thus, the United States of America’s experience of health care system highlights innovative work that may improve the *comprehensive care plan* that I propose for South Africa.<sup>525</sup>

I am of the view that the proposed *comprehensive care plan* for children in alternative care must be a well co-ordinated plan that includes services which are vital in promoting the

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<sup>520</sup> *Ibid.*

<sup>521</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 64.

<sup>522</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 62 and 64.

<sup>523</sup> Own emphasis.

<sup>524</sup> *Ibid.*

<sup>525</sup> *Ibid.*



health, education, development and the well-being of the child. I further propose that a clause be enacted in the Children's Act for collaborative work of intersectoral government departments to provide specialised services to children in care consistently with their different age, culture and needs.<sup>526</sup>

Amongst others, recommendations in the research conducted in Ireland concerning children in foster care, are that foster children, and children with disabilities in particular, must be given access to therapy and support in school.<sup>527</sup> A concern that was raised is that the equipment needed by children with disabilities belongs to the school and when children are moved from primary to high school they are required to re-apply for such support. I am of the view that children with disabilities must be given equipment which they must be able to use at the different schools which they attend, and also at home. This recommendation enables the child to have an enabling environment at school and at home.<sup>528</sup>

Thus, in the case of South Africa, I recommend that the Department of Social Development work collaboratively with the Department of Education and ensure that there is adequate provision for children with special educational needs. These departments must work together with the Department of Health to provide for the healthcare of children. It is also important for government to outsource the delivery of equipment and other services to

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<sup>526</sup> *Ibid.*

<sup>527</sup> Kilkelly Ombudsman for Children Report *Obstacles to the Realisation of Children's Rights in Ireland* (2007) 17.

<sup>528</sup> *Ibid.*

private entities with a good reputation<sup>529</sup> to ensure timeous delivery of such.

The Kenyan Children's Act imposes the duty to facilitate foster care placement procedures and the termination of foster care on the Director of the Department of Children's Affairs, the manager of the institution, and the court. The Director has in most cases performed the role which in terms of the South African Children's Act is undertaken by the children's court. Unlike the South African Children's Act, the Kenyan Children's Act neither stipulates a clear procedure nor elaborates on the roles of the professionals involved in the placement of the child in foster care. For instance, the role of the social workers is not clearly articulated from the onset but highlighted when a foster care provider has to be screened for eligibility to provide foster care.

In terms of the Kenyan Children's Act, a child who is placed by a care order in a rehabilitation school or a charitable children's institution,<sup>530</sup> may be placed with a foster parent for a period that may be authorised by the Director with the manager of the institution.<sup>531</sup> This provision does not apply to a child who is placed in care as a result of a criminal offence. The manager of the institution supervises and assesses the condition of the child in foster care and takes steps to safeguard the welfare of the child.<sup>532</sup>

The foster parent of a child has the responsibility to maintain the child as if he or she is his or

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<sup>529</sup> Such as big retailers who can collaborate with NGOs in the delivery of services.

<sup>530</sup> See the discussion on the definition of "charitable childrens' institutions" in section 6 5 3.

<sup>531</sup> S 147(1).

<sup>532</sup> S 147(2).

her own.<sup>533</sup> The Director may arrange for a contract to be signed by the foster parent and the parent or guardian of the child in foster care, stating the maintenance that is payable for the child in care.<sup>534</sup> The maintenance agreement is enforceable like any maintenance order issued in terms of section 101 of the Kenyan Children's Act.<sup>535</sup> The foster parent is discharged of his or her responsibilities upon the discharge of the care order by the manager or court,<sup>536</sup> upon the expiry of the period specified by the director,<sup>537</sup> or upon the child attaining the age of 18.<sup>538</sup>

According to the Kenyan Children's Act, persons who qualify as foster parents include spouses of a marriage<sup>539</sup> and a single woman not below the age of 25.<sup>540</sup> The Act prohibits any single male from fostering a female child and any single female from fostering a male child.<sup>541</sup> Furthermore, the Act prohibits any person who is not resident within the Republic of Kenya or who has been resident in the Republic for a period of at least 12 months from fostering a child.<sup>542</sup>

The criteria to qualify as a prospective foster parent, as mentioned in sections 147(1)(a),

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<sup>533</sup> S 147(3).

<sup>534</sup> S 150(1).

<sup>535</sup> S 150(2).

<sup>536</sup> S 147(4)(a).

<sup>537</sup> S 147(4)(b).

<sup>538</sup> S 147(4)(c).

<sup>539</sup> S 147(1)(a).

<sup>540</sup> S 147(1)(b).

<sup>541</sup> S 148(2).

<sup>542</sup> S 148(3).

147(1)(b), 147(2) above, differs from the criteria stipulated in the South African Children's Act in that South Africa uses the fitness of the foster parent for the foster care offering,<sup>543</sup> willingness to undertake the role,<sup>544</sup> and the capacity to provide an environment that is conducive to the child's growth and development.<sup>545</sup> The South African legislature may have intentionally omitted using age and marital status as a requirement as stipulated in the Kenyan Children's Act to avoid discriminating against persons on those grounds.<sup>546</sup>

Like the South African Children's Act, the Kenyan Children's Act prohibits the foster parent from removing the foster child from the Republic of Kenya without the leave of the court.<sup>547</sup> If leave is granted, the Act allows the court to impose conditions and restrictions that may be appropriate and consistent with the best interests of the child.<sup>548</sup> The Kenyan Children's Act prohibits any person from retaining a child in his or her care without notifying the Director if the parents of the child cannot be traced.<sup>549</sup>

In terms of the Fourth Schedule to the Kenyan Children's Act, the ways in which foster care placements are made include<sup>550</sup> the foster parent registering as such with the Director of

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<sup>543</sup> S 182(2)(a).

<sup>544</sup> S 182(2)(b); Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-13.

<sup>545</sup> S 182(2)(c).

<sup>546</sup> S 9(3) of the Constitution.

<sup>547</sup> S 148(4).

<sup>548</sup> S 148(5).

<sup>549</sup> S 149.

<sup>550</sup> S 152.

Children's Services, or through the manager of a rehabilitation school, or a voluntary children's institution who will forward the application to the Director.<sup>551</sup> The prospective foster parent will be interviewed and assessed to ascertain his or her suitability to foster a child before the child is placed in foster care.<sup>552</sup> In practice, the children's officer would visit the home of the prospective foster parent to confirm in writing that the home is likely to meet the requirements and that the living conditions are satisfactory.<sup>553</sup>

The children's officer acts in the same way as the designated social worker in the context of the South African Children's Act. The Kenyan Children's Act requires that two persons who know the prospective foster parent must testify to the foster parents' good character and suitability to care for the child.<sup>554</sup> Furthermore, the children's officer of the district where the prospective foster parent resides must establish whether the prospective foster parent has a criminal record that renders him or her unsuitable to care for the child.<sup>555</sup>

Most foster care providers live below the poverty line.<sup>556</sup> Kenya has 2.4 million orphaned

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<sup>551</sup> Fourth Schedule par 3.

<sup>552</sup> Fourth Schedule par 4(1)(a).

<sup>553</sup> Fourth Schedule par 4(1)(b); Sala "The Quality of Food, Clothing and Shelter Provided to Orphaned Children under Foster Care in Kibera Slums in Kenya" 2009 *East African Journal of Public Health* 312-316.

<sup>554</sup> Fourth Schedule par 4(1)(c).

<sup>555</sup> Fourth Schedule par 4(1)(d).

<sup>556</sup> The Sala study was an interview conducted with 18 key informants. A questionnaire was used to collect the quantitative data from foster care providers. Qualitative data was obtained by using focus group discussions: (2009) *EAJPH* 312-316.

children.<sup>557</sup> Since there are many children in need of care in Kenya, the state provides the following forms of foster care: “state-sponsored” foster care,<sup>558</sup> “nuclear foster care” which is unrealistic, and “extended family communal foster care”.<sup>559</sup> Umbima<sup>560</sup> maintains that the traditional foster care of extended families is better equipped to deal with the social problems that are encountered by children in Kenya. This argument relies on the fact that, according to African culture, a child belongs to a large family, i.e. a clan, and the fact that the care and the discipline of children are communal responsibilities.

In a traditional foster care situation, the clan would take on the care and responsibility of children without any set of rules. On the other hand, the state sponsored foster care takes the form of providing care and protection to children who are abused, neglected or who are denied basic necessities. The foster parents who are permitted to provide “state sponsored” foster care are chosen by the courts. According to Umbima,<sup>561</sup> “state sponsored” foster care requires substantial resources, which the state of Kenya does not have. Most people would volunteer to adopt children rather than provide foster care. In assessing the quality of foster care that is provided by many parents in Kenya in December 2009, Sala<sup>562</sup> reveals that the majority of children in foster care had only one meal per day, whereas other children

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<sup>557</sup> Joint Council on International Children’s Services Report *Child Welfare in Kenya* (2009) 1: accessed from [www.jcics.itsac.com/old-files/Summary%20Report%20-%20Kenya.pdf](http://www.jcics.itsac.com/old-files/Summary%20Report%20-%20Kenya.pdf) on 2011-04-21.

<sup>558</sup> It is a more recent type of care.

<sup>559</sup> Umbima *Regulating Foster Care Services: the Kenyan Situation* (1991) 169-174.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Ibid.*

<sup>562</sup> Sala (2009) *EAJPH* 312-316.

complained about inadequate good quality food and exposure to the risks of malnutrition, low self-esteem, and respiratory tract infections.

Foster care parents reported that children's clothing is inadequate, and the majority of families who are providing foster care, complained of the lack of adequate shelter and overcrowding in homes, which makes children susceptible to pneumonia, coughs and colds.

## 6.4 Child and youth care centres

### 6.4.1 *Child and youth care centres in terms of South African law*

The South African Children's Act introduces a new concept of residential care for children.<sup>563</sup> The Act provides for a child and youth care centre; a facility that provides residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the children in the facility.<sup>564</sup> Matthias and Zaal<sup>565</sup> note that a child and youth care centre may be considered where the child could not be placed with an adoptive or foster family. South Africa has 305 child and youth care centres.<sup>566</sup> This type of

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<sup>563</sup> Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-7.

<sup>564</sup> S 191(1); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>565</sup> In Boezaart (ed.) *Child Law in South Africa* 179.

<sup>566</sup> As at 20 March 2011. Information gathered from an interview with Khoza, a social worker and director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-14.

care excludes partial care,<sup>567</sup> drop-in centres,<sup>568</sup> boarding schools,<sup>569</sup> school hostels, or any other residential facility that is attached to a school,<sup>570</sup> prison,<sup>571</sup> or any other establishment which is maintained for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training.<sup>572</sup> Mahery *et al.*<sup>573</sup> note that according to the norms and standards of a child and youth care centre, every centre must provide temporary safe care to children if appropriate and if the centre allows it.

Child and youth care centres offer therapeutic programmes designed for children in residential care. Skelton<sup>574</sup> argues that the new vision for the child and youth care centre is more holistic. The child and youth care centre is a multi-purpose centre, which can offer a range of programmes for children with behavioural, psychological and emotional difficulties or for children who have been abused.<sup>575</sup> The programmes provide care that is consistent

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<sup>567</sup> S 191(1)(a) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>568</sup> S 191(1)(b) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>569</sup> S 191(1)(c) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>570</sup> S 191(1)(d) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>571</sup> S 191(1)(e) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>572</sup> S 191(1)(f) of the Children's Act; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-6; Mahery (2011) 31.

<sup>573</sup> (2011) 12.

<sup>574</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 13-8.

<sup>575</sup> S 191(2) of the Children's Act; see Mahery *et al.* (2011) 9.



with the developmental needs appropriate to the age of the child, his or her developmental stages, and emotional, physical, spiritual, intellectual and social needs.<sup>576</sup>

The therapeutic programmes provided by the child and youth care centre are designed for the reception, care and development of children in care,<sup>577</sup> children with a parent or other person having parental responsibilities,<sup>578</sup> in temporary safe care,<sup>579</sup> early childhood development,<sup>580</sup> in temporary safe care for protection against abuse or neglect,<sup>581</sup> in temporary safe care for protection against trafficking or commercially sexually exploited children,<sup>582</sup> on in temporary safe care for observation and assessment.<sup>583</sup> The child receives a secure care programme and may be kept in care for a very short time. A longer period may be considered as a measure of last resort.

The child may receive counselling, treatment,<sup>584</sup> assistance to reintegrate with his or her family and community,<sup>585</sup> secure care as a child awaiting trial or sentence,<sup>586</sup> secure care for

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<sup>576</sup> *Ibid.*

<sup>577</sup> S 191(2)(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*; Mahery (2011) 31.

<sup>578</sup> S 191(2)(b); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>579</sup> S 191(2)(c); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>580</sup> S 191(2)(d); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>581</sup> S 191(2)(e); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>582</sup> S 191(2)(f); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>583</sup> S 191(2)(g)(i); reg 83(1)(c).

<sup>584</sup> S 191(2)(g)(ii); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>585</sup> S 191(2)(g)(iii); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act 13-8*.

<sup>586</sup> S 191(2)(h).

the purposes of monitoring behavioural, psychological and emotional difficulties,<sup>587</sup> secure care in terms of an order issued under the Criminal Procedure Act,<sup>588</sup> or an order issued in terms of section 156(1)(i) of the Children’s Act for the placement,<sup>589</sup> or transferring the child to alternative care.<sup>590</sup> A child and youth care centre may also include a programme designed for the reception and care of street children,<sup>591</sup> or any child for any purpose that may be prescribed by regulation.<sup>592</sup> Furthermore, a child and youth care programme may offer<sup>593</sup> appropriate care and development for children with disabilities<sup>594</sup> or chronic illnesses.<sup>595</sup> Skelton<sup>596</sup> finds this to be an empowering provision, which requires the Department of Social Development, and arguably the Department of Health, to plan and budget for it. The above placement is only allowed if the child has a need, which the parent or the family of the child

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<sup>587</sup> S 191(2)(i).

<sup>588</sup> S 191(2)(j)(i) and s 191(2)(g)(iii). In terms of s 76 of the Child Justice Act 75 of 2008, a child may be sentenced to compulsory residence in a child and youth care centre which provides a programme referred to in s 191(2)(j) of the Children’s Act. See also Gallinetti “Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime” in Boezaart (ed.) *Child Law in South Africa* (2009) 661.

<sup>589</sup> S 191(2)(j)(ii).

<sup>590</sup> In terms of ss 171 and 191(2)(j)(iii) of the Children’s Act.

<sup>591</sup> S 191(2)(k).

<sup>592</sup> S 191(2)(l).

<sup>593</sup> S 191(3); Skelton in Davel & Skelton (eds.) *Commentary on the Children’s Act* 13-8.

<sup>594</sup> S 156(1)(g) of the Children’s Act allows certain child and youth care centres to provide specialised programmes for children with specific types of physical or mental disabilities or a particular chronic illness with the aim of supplying the most appropriate program for the child. See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 179.

<sup>595</sup> S 191(3)(a).

<sup>596</sup> Skelton in Davel & Skelton (eds.) *Commentary on the Children’s Act* 13-8.

does not have the capacity to make appropriate provision for.<sup>597</sup>

In other situations, the need may be addressed through a programme provided by a centre, which is registered to provide care for children with disabilities and chronic illness.<sup>598</sup> A child and youth care centre programme can also offer treatment for children addicted to dependence-producing substances,<sup>599</sup> children with a psychiatric condition,<sup>600</sup> assistance to a person for the purposes of transition from a child and youth care centre to a new care after reaching the age of 18,<sup>601</sup> or any other service that may be prescribed.<sup>602</sup> The content of the programme offered by the child and youth care centre is assessed and approved by a suitably qualified person<sup>603</sup> and must receive final approval from the provincial head of Social Development.<sup>604</sup>

The children's court that takes the decision to place the child in need of care in a child and youth care centre must find the residential programme that is appropriate for the child<sup>605</sup> and order that the child be placed in a child and youth care centre.<sup>606</sup> The children's court may

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<sup>597</sup> The head of the child and youth care centre called Thandanani in Honeydew, Roodepoort, Gauteng province held on 2011-03-30, see Annexure "D".

<sup>598</sup> Reg 84(1)(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-8.

<sup>599</sup> S 191(3)(c); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-8.

<sup>600</sup> S 191(3)(d); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-8.

<sup>601</sup> S 191(3)(e).

<sup>602</sup> S 191(3)(f).

<sup>603</sup> S 191(4)(b).

<sup>604</sup> S 191(4)(a).

<sup>605</sup> S 158(2)(a) of the Children's Act.3

<sup>606</sup> S 158(2)(b) of the Children's Act.

determine the type of residential programme that is required by a child through the assistance of the relevant provincial head of Social Development.<sup>607</sup> The aim of selecting a specific facility for the child is to allow contact between the child, family and friends as the residential care may be located close to the place where the child lives.<sup>608</sup>

Furthermore, a specific child and youth care centre may be selected on the basis of the best interests of the child principle, in that the child be placed in a child and youth care centre which provides a secure care programme that is appropriate to the needs of the child.<sup>609</sup> If the court finds that the parent or care-giver cannot control the child or if the child displays criminal behaviour,<sup>610</sup> it can place the child in a child and youth care centre if such placement is in the best interests of the child.<sup>611</sup> Residential care facilities are few, and children sometimes wait in temporary safe care for long periods before their placement in residential care.<sup>612</sup> On the same note, children at residential care facilities are treated with more restrictive means.<sup>613</sup>

The Children's Act requires the Minister of Social Development to draw up a comprehensive national strategy aimed at ensuring an appropriate spread of child and youth care centres

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<sup>607</sup> S 158(3); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 179.

<sup>608</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 179.

<sup>609</sup> S 156(1)(h).

<sup>610</sup> S 156(1)(h)(ii).

<sup>611</sup> S 156(1)(h)(i).

<sup>612</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 182.

<sup>613</sup> *Ibid.*

throughout the Republic.<sup>614</sup> According to Skelton,<sup>615</sup> this section is designed to ensure that there is effective planning for residential care, and an appropriate spread of facilities that provide a selection of programmes across all provinces, which were not provided for in the past. For instance, reform schools are residential facilities to which children can be sentenced by a criminal court in suitable cases.<sup>616</sup>

The case of *S v Z and 23 similar*<sup>617</sup> illustrated the fact that such facilities were and still are scarce. These cases were referred to the court by a concerned magistrate in terms of section 304(2)(a) of the Criminal Procedure Act.<sup>618</sup> In all these cases child offenders were sentenced to a reform school in terms of section 290 of the Criminal Procedure Act, but had been in prison for long periods of time waiting to be transferred to a reform school. The two-year order of these children had either lapsed or was about to lapse. The court directed the government to report on a range of matters and ordered that the 20 child offenders be released immediately.

The Minister of Social Development must, upon consultation with the Ministers of Education, Health, Home Affairs and Justice and Constitutional Development, draw a comprehensive national strategy to ensure that a variety of residential care programmes in various regions,

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<sup>614</sup> S 192(1).

<sup>615</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 13-9.

<sup>616</sup> S 290 of the Criminal Procedure Act; s 76 of the Child Justice Act.

<sup>617</sup> 2004 (1) SACR 400 (E).

<sup>618</sup> 1977.

particularly for children with disability and chronic illnesses, is provided.<sup>619</sup> The MEC for Social Development is expected to provide a provincial strategy consistent with the national strategy aimed at the establishment of an appropriate spread of properly resourced, co-ordinated and managed child and youth care centres in the province providing the required range of residential care programmes.<sup>620</sup>

Furthermore, the MEC is expected to compile a provincial profile at the prescribed time in order to make the information that is necessary for the development and review of the strategies identified above available.<sup>621</sup> The provincial head of Social Development is under obligation to maintain records of all available child and youth care centres in the province and the programmes contemplated by section 191 in this regard.<sup>622</sup> The MEC for Social Development is expected to fund the child and youth care centres from the funds appropriated to it by the provincial legislature.<sup>623</sup> The child and youth care centres are therefore managed and maintained as prescribed in the Children's Act<sup>624</sup> and are expected to comply with the national norms and standards stipulated in section 194 of the Children's Act

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<sup>619</sup> *Ibid.*

<sup>620</sup> S 192(2); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-9; Mahery (2011) 33.

<sup>621</sup> S 192(3); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-9; Mahery (2011) 33.

<sup>622</sup> S 192(4); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-9; Mahery (2011) 33.

<sup>623</sup> S 193(1); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-10; Mahery (2011) 33.

<sup>624</sup> S 193(2)(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-10.

and other prescripts.<sup>625</sup> The child and youth care centre must also comply with the structural, safety, health and other requirements of the municipality of the area in which the centre is situated.<sup>626</sup>

According to Skelton,<sup>627</sup> section 193 of the Children's Act is significant in that it places the responsibility of funding all registered child and youth care centres directly on the provincial Department of Social Development.<sup>628</sup> This is a new provision in our law in that the legislation was in the past silent on the financial responsibility for residential care facilities. Residential facilities were operated by non-governmental service providers and were, and still, are partially funded by the state with the non-governmental organisation required to provide for the balance of the annual budget.<sup>629</sup>

An interview with the director of Child Welfare South Africa<sup>630</sup> revealed that the Department of Social Development only provides 18% of the funding of its annual budget and that the non-governmental organisation has to find a substantial amount of the costs of running the

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<sup>625</sup> S 193(2)(b)(i); reg 82-92; Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-10.

<sup>626</sup> S 193(2)(b)(ii); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-10.

<sup>627</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 13-10.

<sup>628</sup> See Annexure "A" with regard to costing of services rendered by the provincial Social Department with regard to child and youth care centres.

<sup>629</sup> *Ibid.*

<sup>630</sup> Theron, the head of the child and youth care centre, (hereinafter referred to as "CWSA", registered to render services to vulnerable groups), Edenvale, Johannesburg, interview held on 2011-04-11, see Annexure "L".

organisation.<sup>631</sup>

An accredited organisation operating as a child and youth care centre may only qualify for funding from the provincial Department of Social Development if it complies with the national norms and standards stipulated in the Children's Act.<sup>632</sup> The Children's Act imposes on the Minister for Social Development an obligation to determine national norms and standards for child and youth care centres after consultation with other ministries. The norms and standards must focus on the residential programme,<sup>633</sup> therapeutic programme,<sup>634</sup> developmental programmes,<sup>635</sup> permanency plans for children,<sup>636</sup> individual developmental plans,<sup>637</sup> temporary safe care,<sup>638</sup> protection from abuse and neglect,<sup>639</sup> assessment of children,<sup>640</sup> family reunification and reintegration,<sup>641</sup> after-care,<sup>642</sup> access to and provision of adequate health care,<sup>643</sup> access to schooling, education and early childhood development,<sup>644</sup>

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<sup>631</sup> Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-11.

<sup>632</sup> See also ss 193(3) and 194.

<sup>633</sup> S 194(2)(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>634</sup> S 194(2)(b); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>635</sup> S 194(2)(c); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>636</sup> S 194(2)(d); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>637</sup> S 194(2)(e); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>638</sup> S 194(2)(f); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>639</sup> S 194(2)(g); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>640</sup> S 194(2)(h); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>641</sup> S 194(2)(i); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>642</sup> S 194(2)(j); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>643</sup> S 194(2)(k); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>644</sup> S 194(2)(l); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.



security measures for child and youth care centres,<sup>645</sup> and measures for the separation of children in secure care programmes from children in other programmes.<sup>646</sup> The Children's Act has in this regard provided more effective protection for children in child and youth care centres.<sup>647</sup>

The MEC for Social Development is also tasked with the responsibility to establish child and youth care centres.<sup>648</sup> The Children's Act regards existing children's homes, places of safety, secure care facilities, schools of industry<sup>649</sup> and reform schools<sup>650</sup> operated by the state and established in terms of the Child Care Act, as child and youth care centres in the Children's Act.<sup>651</sup> These state institutions are deemed to provide the residential care programmes referred to in the Children's Act.<sup>652</sup>

The Children's Act imposes an obligation on the provincial Department of Education to provide education to children living in state operated facilities.<sup>653</sup> According to the Children's Act, the state operated facilities must be registered as child and youth care centres within

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<sup>645</sup> S 194(2)(m); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>646</sup> S 194(2)(n); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-13.

<sup>647</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 182.

<sup>648</sup> S 195 of the Children's Act.

<sup>649</sup> Established in terms of s 33 of the Children's Protection Act 25 of 1913.

<sup>650</sup> Established in terms of s 52 of the Prisons and Reformatories Act 13 of 1911.

<sup>651</sup> See ss 196(1)(a), 195.

<sup>652</sup> Ss 196(1)(b), 191(2)(c) and (e).

<sup>653</sup> S 196(1)(e).

two years of the operation of the chapter dealing with child and youth care centre.<sup>654</sup> Apart from the child and youth care centres that were previously established in terms of the Child Care Act, the Children's Act stipulates that any national or provincial Department of Social Development, municipality or accredited organisation, may establish and operate a child and youth care centre on condition that the centre is registered with the relevant provincial Department of Social Development,<sup>655</sup> managed and maintained in terms of the Children's Act,<sup>656</sup> and complies with the stipulated standard and norms set out in section 194 of the Act.<sup>657</sup>

A privately owned child home that was registered in terms of the Child Care Act, is for the purposes of section 197 of the Children's Act, regarded as a child and youth care centre registered in terms of section 191(2)(a) of the Children's Act.<sup>658</sup> The child and youth care centre is regarded as being registered for a period of five years from the 1 April 2010.<sup>659</sup> Any existing shelter registered in terms of the Child Care Act must register as a child and youth care centre within a period of five years from the date of the operation of section 198 of the

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<sup>654</sup> S 196(4); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-14 and 13-15.

<sup>655</sup> S 197(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-16 – 13-17; Mahery (2011) 33.

<sup>656</sup> S 197(b); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-16 – 13-17; Mahery (2011) 33.

<sup>657</sup> S 197(c) and (d).

<sup>658</sup> S 198(1); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-17.

<sup>659</sup> S 198(2); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-17.

Children's Act.<sup>660</sup> If the child and youth care centre is registered conditionally, the registration must specify the type of residential care programme that is to be provided<sup>661</sup> and the period for which the conditional registration will be valid. This must not exceed one year.<sup>662</sup> An application for new or conditional registration of a child and youth care centre must be lodged with the provincial head of Social Development in the relevant province in terms of the relevant procedures.<sup>663</sup> A child and youth care centre may be closed voluntarily by the person holding registration of the centre by way of written notice to the provincial head of Social Development.<sup>664</sup> A child and youth care centre must have a management board appointed by the MEC for Social Development of the relevant province.<sup>665</sup>

In the case of a privately owned centre, the registration holder of the child and youth care centre shall be the management board.<sup>666</sup> Quality assurance of the child and youth care centres is to be conducted in respect of each centre by a team that is connected to the centre and another outside team.<sup>667</sup> An organisational development plan for the centre must

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<sup>660</sup> S 198(3); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-17.

<sup>661</sup> S 201(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-20; Mahery (2011) 35.

<sup>662</sup> S 201(b); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-20; Mahery (2011) 35.

<sup>663</sup> Ss 201(a) and 201(b) of the Children's Act. See also s 199(1)(a) of the Children's Act.

<sup>664</sup> S 205(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-24.

<sup>665</sup> S 208(2)(a); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-25; Mahery (2011) 36.

<sup>666</sup> S 208(2)(b).

<sup>667</sup> See ss 211(1), 211(2), 211(2)(a) and 211(2)(b); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-27 – 13-28.

also be provided in terms of the quality assurance to the MEC for Social Development.<sup>668</sup> In its report on the care of orphans and vulnerable children, UNICEF<sup>669</sup> notes that services provided to community child care forums are inconsistent and that there is no consensus on the minimum assistance that needs to be provided. Furthermore, the UNICEF report reveals that the burden of caring for orphans and vulnerable children has created a crisis in the alternative care system as the number of unregistered child care institutions has mushroomed. Social workers, on the other hand, are not able to meet the demand for foster care placement.<sup>670</sup>

In its annual plan<sup>671</sup> for investing and ensuring the provision of quality social welfare services to children, the Department of Social Development has developed a strategy to transform the child and youth care centres in the Republic.<sup>672</sup> The Department initiated the development of a national database for child and youth care centres. Information on the conditions and state of maintenance of the buildings of schools of industry and reform schools was gathered and an infrastructure plan and minimum norms and standards for the transformation of residential care facilities<sup>673</sup> and new programmes for the child and youth care centres were

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<sup>668</sup> S 211(3); Skelton in Davel & Skelton (eds.) *Commentary on the Children's Act* 13-28; Mahery 37-38.

<sup>669</sup> *Protection for Orphans and Vulnerable Children* (2008) 2.

<sup>670</sup> *Ibid.*

<sup>671</sup> Financial year 2010 and 2011.

<sup>672</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September* (2010) 15.

<sup>673</sup> The transformation of the residential care facilities included an audit of infrastructure for children's homes and temporary places of safe care and programmes.

developed.<sup>674</sup> However, the Department of Social Development encountered challenges in implementing its strategy. The newly registered child and youth care centres were not included in the database. There was a delay in the commencement of capacity building sessions in the provinces, and four provinces were not able to provide inputs on the strategy document.<sup>675</sup>

#### 6.4.2 *Child and youth care centres in terms of international law*

The CRC states that:

“States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and sustainability of their staff, as well as competent supervision.”<sup>676</sup>

According to Hodgkin and Newell,<sup>677</sup> care institutions must be assessed through appropriate inspection to establish whether they comply with appropriate standards regarding the safety, health and personnel that render care services to children as set out in the CRC. The CRC promotes institutional care that provides protection for children in accordance with the standards articulated in domestic legislation, such as, prohibiting corporal punishment and

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<sup>674</sup> Department of Social Development *Mid-Term Review of the Strategic Plan for the Chief Directorate Children April - September (2010)* 15.

<sup>675</sup> *Ibid.*

<sup>676</sup> Art 3(1).

<sup>677</sup> (2007) 41. See Art 20 of the CRC.

any other inhumane or degrading treatment or punishment. The CRC requires clear policies for the prevention of any form of violence against children in institutions, and that there are clear, well-publicised procedures to enable children to seek confidential advice and to make representations and complaints about their treatment to an independent body with appropriate powers to investigate and implement its recommendations.<sup>678</sup>

These procedures are intended to ensure that where necessary, children have access to independent advocates and representatives who can provide advice to them and act on their behalf.<sup>679</sup> In prioritising the need to bring children up in families rather than in state care, the Committee on the Rights of the Child in its Concluding Observations to Nigeria pointed out that<sup>680</sup> the state should adopt a programme to strengthen and increase capacities of families by way of strengthening existing family structures, including extended families and child care centres.

It is important to note that if a child has a disability, he or she may not necessarily be removed from family life because of his or her disability. The CRC distinguishes between care that is provided for children who are deprived of family life and the care that is provided to children with disabilities.<sup>681</sup> I am of the view that care and protection for a child with a disability will not be the same as care that is provided to a child in need of care and protection in terms of section 150(1) and (2) of the Children's Act. The decision that

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<sup>678</sup> Hodgkin & Newell (2007) 264.

<sup>679</sup> *Ibid.*

<sup>680</sup> No 40 and 41 of Nigeria's Initial Country Report; see Hodgkin & Newell (2007) 240.

<sup>681</sup> *Ibid.* See Art 23 of the CRC.

influences the court to remove a child in need of care and protection from family life is taken for the purposes placing the child in alternative care for his or her care and protection, which his or her family life could no longer give, and to get the child to participate in a programme that will address the cause of his or her removal. On the other hand, a child with a disability might need care, treatment, training and other forms of support if he or she is placed in the state's care.

The CRC provides that a child who is deprived of his or her family environment is entitled to special protection and assistance provided by the state. The ACRWC<sup>682</sup> does not impose an obligation on state parties to provide assistance to children who are deprived of a family environment. On the same note, the ACRWC does not guarantee children special protection when they are deprived of family life. The special protection that is referred to in the CRC<sup>683</sup> is a programme measure which acknowledges the fact that children who are deprived of family life have greater needs than simply the provision of alternative care.<sup>684</sup>

The loss of family attachment and identity together with the instabilities and disruptions of a new placement can impede a child's psychological, intellectual and emotional make-up and development.<sup>685</sup> I am of the view that providing the child with appropriate alternative care and special treatment, which addresses the circumstances that caused the removal of the child from the family, may be considered special protection. Since special protection comes

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<sup>682</sup> Art 25(2)(a).

<sup>683</sup> Art 20(1).

<sup>684</sup> Hodgkin & Newell (2007) 280.

<sup>685</sup> *Ibid.*

at a cost, such may have deterred the ACRWC from entrenching the provision in its law given the fact that the African continent has some of the poorest countries in the world that may not be able to meet this obligation.

According to ECtHR's jurisdiction, the margin of appreciation enjoyed by state authorities means that only in exceptional circumstances will the court find that a care order does not meet the threshold criteria. The state must provide proof to justify its action in removing the child.<sup>686</sup> In the case of *K and T v Finland*,<sup>687</sup> a new-born was removed at the moment of birth into care. The court found this measure very harsh and not justified by any extraordinarily compelling reasons in the case. The decision to take the new-born into care was based on, amongst others, the fact that there was a clear need to protect the child from harm. But such need was not sufficient as it eventually had an effect on the parents' potential to enjoy family life with their new-born child, giving rise to a violation of Article 8 of the ECHR.

The ECtHR accepts that parents' violence against or neglect of children may justify placement of children into public care, including suspension of parental rights to custody and contact. This was evident in the case of *Covezzi and Morselli v Italy*<sup>688</sup> where the children of the applicant were taken into public care after a family member had revealed repeated incidences of sexual abuse by several adult family members against the children of the

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<sup>686</sup> That its interference is "in accordance with the rule of law", pursues one of "the legitimate purposes or aims" listed in Article 8(2) of the ECHR and that it is "necessary in a democratic society" or proportionate to the pursuit of that aim. See the discussion in section 2 2 2 2 4.

<sup>687</sup> 707.

<sup>688</sup> (2003) 38 EHRR 28 par 48-49.



applicant and their cousins. The adults and applicants were later convicted for sexual abuse of minors and lost their parental rights. The court found that the urgent placement of the children into public care and the restrictions on contact between the mother and the children was appropriate given the lack of cooperation received from the mother.

The European jurisprudence recognises the large margin of appreciation which states have with regard to the interpretation of Article 8. I am of the view that this position could be the reason why domestic authorities are better placed to assess what is in the best interests of the child, and the family rights of parents and family members. With some exceptions, the ECtHR enforces these measures if they are necessary, proportionate with the legitimate aim, and in the best interests of the child. Thus, Thorpe LJ in *Re B (Care: Interference with Family life)*<sup>689</sup> stated that:

“where the application is for a care order empowering the local authority to remove a child or children from family, the judge in modern times may not make such an order without considering the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, Article 8 rights of the adult members of the family and of the children of the family. Accordingly he must not sanction such an interference with family life unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children”.

#### 6.4.3 *State’s residential care in terms of foreign jurisdictions*

In this section I discuss the definition of residential care. The definition will assist the study in

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<sup>689</sup> (2003) EWCA 2 FLR 813.

determining whether foreign jurisdictions are living up to that purpose and if there are lessons to be learnt for the South African state care system. I discuss the Irish and Kenyan experience for informed input for the recommendations in this topic. Research in Ireland reveals that when children are in residential care, they suffer further problems such as the inability to maintain contact with siblings, parents and friends.<sup>690</sup> They also face obstacles in their education and access to specialised services. Thus, children who have been through this level of experience are said to need a higher level of social work, and emotional and psychiatric support than what is generally available.<sup>691</sup> The discussion in this section will enable us to realise particularly, the disadvantage of placing a child in state care where other placement options, such as kinship and foster care with non-relatives, are available options. Thus, I recommend that emphasis be made in legislation that the removal of the child from family life be made a matter of last resort.<sup>692</sup>

Residential care, in relation to children, refers to care-giver to a child who has significant physical, disabilities, learning disabilities, mental ill-health, alcohol or drug dependency or who are at risk of injury or abuse.<sup>693</sup> This type of care is given to a child when the original

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<sup>690</sup> Kilkelly Ombudsman for Children Report *Obstacles to the Realisation of Children's Rights in Ireland* (2007) 15.

<sup>691</sup> *Ibid.*

<sup>692</sup> See the proposed provisions in section 6 5.

<sup>693</sup> Meintjies *et al.* Home Truths: The Phenomenon of Residential Care for Children in a Time of Aids (2007) 16-18: accessed from [www.ansa-africa.net/uploads/.../Residential\\_Care\\_children\\_AIDS.pdf](http://www.ansa-africa.net/uploads/.../Residential_Care_children_AIDS.pdf); see also [www.definitions.uslegal.com/r/resid](http://www.definitions.uslegal.com/r/resid) on 2012-11-16.

family care and the support of home care breaks down.<sup>694</sup> Residential care can be given for a short time or long periods, or permanently. It is given outside a person's house.

The annual reports of the Irish Social Service Inspectorate reveal that Ireland has serious shortcoming in the treatment of children in some residential placements, with concerns about child protection, lack of dedicated social work support, lack of proper planning, treatment of complaints, failure to vet or check all the staff, and the use of monitoring and physical restraint. The Child Care Placement of Children in Residential Care Regulations<sup>695</sup> provide that children in care have the right to a review of their placement within two months and then every six months for the first two years of placement, and after two years, their placement must be reviewed annually.

However, this minimum requirement was not complied with. Research recommends that restrictions be applied to the removal of children from family life.<sup>696</sup> Furthermore, it is recommended that siblings be placed together and that contact between children and their parents must be supported when children are placed in care. Also, residential care must be a short-term arrangement to enable the child to reunite with his or her family.<sup>697</sup> While in residential care, the educational plan and any services that are meant for the development

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<sup>694</sup> *Ibid.*

<sup>695</sup> 1995.

<sup>696</sup> Kilkelly Ombudsman for Children Report *Obstacles to the Realisation of Children's Rights in Ireland* (2007) 16-17.

<sup>697</sup> *Ibid.*

and well-being of children, must be implemented by intensive social work support.<sup>698</sup>

The Children's Act (Kenya) provides for the establishment of rehabilitation schools,<sup>699</sup> remand homes,<sup>700</sup> and charitable children's institutions<sup>701</sup> for children in need of care and protection. According to the Act, the Minister of Gender, Children and Social Development<sup>702</sup> may establish schools as he or she may consider necessary to provide accommodation and facilities for the care and protection of children. According to the Children's Act (Kenya), a charitable children's institution is a home or institution which is established by a person, corporate or un-incorporate, a religious organisation or non-governmental organisation, which has been granted approval by the council<sup>703</sup> to manage a programme for the care, protection, rehabilitation or control of children.<sup>704</sup> This definition does not cover the definition of amongst others, a rehabilitation school,<sup>705</sup> a school within the meaning of an Education Act,<sup>706</sup> a borstal institution,<sup>707</sup> any health institution,<sup>708</sup> or other similar establishment.<sup>709</sup> A

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<sup>698</sup> Kilkelly Ombudsman for Children Report *Obstacles to the Realisation of Children's Rights in Ireland* (2007) 17.

<sup>699</sup> These are schools established under s 47(1) of the Children's Act (Kenya).

<sup>700</sup> Children's remand homes are established under s 50 for the detention of children.

<sup>701</sup> S 58. These institutions are established by a person, corporate or non-corporate, non-governmental organisation, religious institution and has been granted approval by the National Council for Children Services to manage a program for care, protection, rehabilitation or control of children.

<sup>702</sup> Minister means the Minister charged with the administration of the Children's Act.

<sup>703</sup> S 58. According s 2 of the Children's Act (Kenya), council means the National Council for Children's Services established in terms of s 30 of the Act.

<sup>704</sup> S 58.

<sup>705</sup> Ss 59(a) and 47 of the Children's Act (Kenya).

<sup>706</sup> S 59(b), 1995.

charitable children's institution is not prohibited from providing medical care, education or training for children accommodated at the institution.<sup>710</sup>

A religious organisation or non-governmental organisation which establishes a charitable institution for the care, protection or control of children is required to show proof of its registration before applying for approval to implement a child welfare programme.<sup>711</sup> In a similar vein, a person or unincorporated body, which establishes a charitable institution, is required to furnish to the Director of the Department of Children's Affairs a list of trustees of the institution before applying for approval to implement a child welfare programme.<sup>712</sup> Thus, a charitable children's institution must be approved by government before it can operate.<sup>713</sup>

A charitable institution may appoint officers to provide care and protection services.<sup>714</sup> The officers are authorised to inspect a charitable children's institution or any premises which are used to accommodate children who are in need of care and protection.<sup>715</sup> The officers are

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<sup>707</sup> S 59(c) of the Children's Act (Kenya). This is an institution established in terms of s 3 of the Borstal Institutions Act 1971.

<sup>708</sup> S 59(d).

<sup>709</sup> S 59(e).

<sup>710</sup> S 59.

<sup>711</sup> S 60. See also JCICS Report *Child Welfare in Kenya* 1.

<sup>712</sup> S 61.

<sup>713</sup> S 58. See also JCICS Report *Child Welfare in Kenya* 1.

<sup>714</sup> S 66(1).

<sup>715</sup> S 67(1).

also allowed to interview any child in charitable institutions,<sup>716</sup> require production of annual reports or any records kept in accordance with the Children's Act,<sup>717</sup> inspect the conditions of the premises provided, and prepare and submit a report to the Director of Children's Affairs outlining the findings and recommendations.<sup>718</sup> The Director may, upon receipt of the inspection report, take remedial measures where necessary, which may include inspecting the remand school or charitable children's institution.<sup>719</sup>

A charitable children's institution that intends to implement a child welfare programme shall notify the Area Advisory Council and provide full information on the mode of operation and the specific objects of the programme.<sup>720</sup> The Area Advisory Council is expected to submit the proposed child welfare programme to the Director with recommendations. If the Council approves the programme, the programme shall be reviewed annually in order to advise the Council on whether to continue or cancel the programme.<sup>721</sup> The Council may cancel the welfare programme if the institution is unfit to provide care, protection and control of children,<sup>722</sup> if children admitted into the institution are suffering or are likely to suffer harm,<sup>723</sup> or if the manager of the institution has contravened any of the regulations under the

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<sup>716</sup> S 67(2)(a).

<sup>717</sup> S 67(2)(b).

<sup>718</sup> S 67(2)(d).

<sup>719</sup> S 68(1).

<sup>720</sup> S 69(1).

<sup>721</sup> S 70.

<sup>722</sup> S 71(1)(a).

<sup>723</sup> S 71(1)(b).

Children's Act.<sup>724</sup> Parry-Williams and Njoka<sup>725</sup> are of the view that many charitable children's institutions in Kenya operate illegally and are not recognised by government.

They further argue that some organisations recruit children to enter orphanages.<sup>726</sup> This is contrary to the principle of reunification provided for in the Children's Act (Kenya).<sup>727</sup>

Parents who are poor see placing their children with other parents who are more affluent or with a charitable children's institution as a sensible option.<sup>728</sup> Many parents who place their children with a charitable children's institution argue that an institution may be able to clothe, feed and take the child to school.<sup>729</sup> However, I submit that a charitable children's institution may not be able to provide the child with the love and attention that a child may only receive from a family and family members.

If the Minister is not satisfied with the conditions or management of a rehabilitation school he may subject the manager to disciplinary proceedings,<sup>730</sup> or request the manager to show reasons why his or her certificate of approval should not be withdrawn. If the manager does

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<sup>724</sup> S 71(1)(c).

<sup>725</sup> *A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya* (2008) 24: accessed from [www.jcics.itsac.com/old-files/Summary%20Report%20-%20Kenya.pdf](http://www.jcics.itsac.com/old-files/Summary%20Report%20-%20Kenya.pdf) on 2011-04-21.

<sup>726</sup> *Ibid.*

<sup>727</sup> Ss 3 and 6. See also the discussion in section 7 3 3.

<sup>728</sup> Parry-Williams & Njoka (2008) 6.

<sup>729</sup> *Ibid.*

<sup>730</sup> S 47(3)(i).

not respond to the Minister's request, the Minister may withdraw the certificate and close the school.<sup>731</sup> Before withdrawing the certificate, the Minister may prohibit further admission of children in need of care and protection to the school by way of a written notice served to the manager. If the Minister is not happy to allow the school to continue to operate, he or she may give the manager not less than six months' notice to withdraw the certificate and cease the operation of the school.<sup>732</sup> The Kenyan rehabilitation schools have separate sections for children of different gender, age groups and separate sections for child offenders and children in need of care and protection.<sup>733</sup>

The Director of Children's Affairs has the responsibility to supervise all rehabilitation and remand schools and to ensure that the schools are visited periodically.<sup>734</sup> If the Director is satisfied that a child who is at the school should not remain at the school subject to a committal order of the children's court, he or she may refer the matter to the children's court for revocation of the committal order.<sup>735</sup> The children's court may revoke the order on its own motion or on the application of any person upon reflecting on all the relevant records of any court, which may previously have considered a similar application.<sup>736</sup> The only time the Children's Act (Kenya) mentions the involvement of the court in placement in alternative care is when the Director of Children's Affairs applies to court to have the period of his or her

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<sup>731</sup> S 47(3)(ii).

<sup>732</sup> S 47(4).

<sup>733</sup> S 48.

<sup>734</sup> S 51.

<sup>735</sup> S 53(1).

<sup>736</sup> S 53(2).



committal of the child to the rehabilitation school increased by a period not exceeding six months.<sup>737</sup>

The Children's Act (Kenya) further provides that a child who is committed to a rehabilitation school shall be under the supervision of the Director after the expiration of the prescribed period of his stay until he or she attains the age of 21 or for a period of 21 years, or whichever shall be the shorter period.<sup>738</sup> The period of stay at the rehabilitation school must be consistent with the age at which a person ceases to be a child. Furthermore, the Act must provide for situations where the child may not have a place of care once the period of stay has expired, that is, after the age of 21.

The similarities between the Children's Act (Kenya) and the South African Children's Act with regard to care institutions is the fact that the child in care may only be removed from care by way of leave of absence that may be granted by the manager of the institution with the authority of the Director for the period or on such conditions the Director may deem fit and may at any time terminate such leave to return the child to school.<sup>739</sup> This is how the Children's Act (Kenya) regulates the leave of children from care.

Furthermore, like the South African Children's Act,<sup>740</sup> Kenya has a special provision for children who are absconders and children of difficult character. If the Director of Children's

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<sup>737</sup> See later in the discussion of this section.

<sup>738</sup> S 54(2).

<sup>739</sup> S 52.

<sup>740</sup> See the discussion in section 6 2 1.

Affairs is of the opinion that a child who is at a rehabilitation school is a persistent absconder, difficult to manage, or has an inappropriate influence on other children, he or she may apply to the children's court to have the period of committal of the child to the rehabilitation school increased by a period not exceeding six months. If the child who is a persistent absconder is below the age of 16,<sup>741</sup> the child may be sent to a borstal institution.

Another category of children that may be sent to a borstal institution is a child who is above 16 years of age<sup>742</sup> or is provided with appropriate medical treatment or professional counselling, a child whose conduct is influenced by drug abuse, or is of unsound mind, or is suffering from a medical illness.<sup>743</sup> I am of the view that children who are placed in a borstal institution for any reason, are likely to exacerbate in their condition rather than rehabilitate. For instance, a child who is placed in a borstal institution as a first time offender is likely to become a hardened criminal. On the other hand, a child who is placed at home under supervision of parents or a care-giver, is likely to look up to the adult members as role models.

If the child who is in a rehabilitation school is found to have a serious illness, the manager may, on the advice of a medical officer or practitioner, make an order to remove the child to a health institution.<sup>744</sup> However, the government of Kenya "recommends that children should

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<sup>741</sup> S 55(1)(a).

<sup>742</sup> S 55(1)(b).

<sup>743</sup> S 55(1)(c).

<sup>744</sup> S 56(1).

only be placed in institutional care as a last resort”.<sup>745</sup> Although children may be in need of care, they have different circumstances, which call for their placement into care. South Africa may in this regard learn from Kenya by, for example, placing girl children who have been sexually abused by boys separate from boys. The South African Children’s Act and regulations are silent on this matter. My preference for separating boys from girls is based on merited cases where if a girl who suffered sexual abuse by boys is placed in the vicinity of boys immediately after the abuse, such has the tendency to prolong healing as it is easy to remember the incident of abuse when one interacts with a group of people who are similar to your offenders. On the same note, if girls and boys are placed in the same institution, it is not easy to avoid situations of further abuse since it is not easy to monitor children constantly. I further recommend that children of the same age group be placed in the same unit or section, as older children are likely to dominate and physically abuse younger children when they assert themselves as seniors.

## 6.5 Recommendations and conclusion

What we are able to learn from the discussion in this chapter is that the decision to place a child in alternative care must be taken by a judicial, administrative, or other adequate and recognised procedure, including appropriate legal representation on behalf of the child. The decision should be based on rigorous assessment, treatment, counselling, planning, and

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<sup>745</sup> Ministry of Gender, Children and Social Development *The National Plan of Action for Orphans and Vulnerable Children, Kenya 2007-2010* (2008): accessed from <http://www.ovcsupport.net/libsys/Admin/d/DocumentHandler.ashx?id=942> on 2011-04-28.

review of established structures and mechanisms. This work must be carried out on a case by case basis by suitably qualified professionals in a multidisciplinary team.

The discussion in this chapter revealed the importance of placing children with foster parents or adoptive parent with a religious, cultural or language background of the child.<sup>746</sup> I propose that sections 184(1)(b), 240(1)(a) and 231(3) of the Children’s Act and regulations 98(1) and (3) to the Children's Act be amended to read as follows:

“when considering solutions for the placement of the child with foster parents or adoptive parent, *where possible*,<sup>747</sup> due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”.

I am of the view that section 176(2)(a) and regulation 69(1)(a) of the Children’s Act must be amended to allow for the child who cannot be reunited with his or her family to remain in care until such time the child is self-sufficient. The amendment can read as follows:

“176(2)(a) a child who cannot be reunited with his or her family shall continue to reside in alternative care until such time the child is self-sufficient.”

The discussion on foster care revealed the need to provide for the legal recognition of kinship care and communal care.<sup>748</sup> Research also reveals that kinship care is defined differently in

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<sup>746</sup> See the discussion.

<sup>747</sup> Own emphasis.

<sup>748</sup> See the discussion in sections 6 2 2, 6 2 3, 6 3 1.

different jurisdictions.<sup>749</sup> However, I propose that South Africa must refer to the definition of kinship provided by California in particular, because it is similar to the South African practise of kinship care (even though there is no legal recognition).<sup>750</sup> Thus, South Africa must draw reference from California and amend section 180(3)(b) of the Children’s Act with a provision that reads as follows:

“A child can be placed with a family member who is not the parent or guardian of the child in kinship care. Such care includes a formal (court-ordered) or informal care by –

- (a) a grandparent;
- (b) an aunt or uncle;
- (c) an adult sibling;
- (d) a cousin; or
- (e) any person who is related to the child for a child who is orphaned or with parents who are incapable to provide care to a child.”

Furthermore, a clause must be added to section 180(3) of the Children’s Act, as 180(3)(d) for the recognition of communal care as another form of foster care. The provision can read as follows:

“A child can be placed in a formal (court-ordered) or informal communal care which is provided by persons, a group of persons, structure made of members of a particular community, clan or tribal authority’s council which provides care to a child who is orphaned or whose parents or relatives are incapable to provide care to a child.”

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<sup>749</sup> See the discussion in section 6 3 3.

<sup>750</sup> See the discussion in section 6 3 3.

Research reveals that children who are in multiple foster homes for 12 months, that is, placed for a period of six months in one home and six months in another home, had some sense of belonging to a family and functioned similar to a child who had been in one foster care for 12.<sup>751</sup> Even though foster care is not the same as being raised by one's own parents, foster care is still a better option than residential care. This is the case in that foster care is to a great extent similar to being raised in a family, given the one-on-one attention which a child receives in an arrangement that is symbolic of his or her original family.<sup>752</sup>

The discussion on alternative care in terms of international law<sup>753</sup> clearly pointed out the value of the communal group to its members. Communal groups are acknowledged for providing security and taking care of the needs of community members.<sup>754</sup> Research by Umbima<sup>755</sup> reveals that Kenya permits foster care within extended families where children are taken care of within the ambit of a clan<sup>756</sup> or community. To some extent, this form of care seems to be similar to care that is provided to children living on communal properties in South Africa.<sup>757</sup> The care of children by extended families within the ambit of a clan is valuable for a child compared with care that is provided by a state institution. This form of

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<sup>751</sup> McCue & Balestracci (2001) 1258.

<sup>752</sup> *Ibid.*

<sup>753</sup> See the discussion in section 6 2.

<sup>754</sup> See also the discussion in section 2 2 1 10 on communal families.

<sup>755</sup> See the discussion in section 6 4 3.

<sup>756</sup> Clan is defined as a large close-knit group of interrelated families or sub-groups of a tribe: *Case-study on: Traditional Multi-stakeholder Dialogue on Structures in Local Governance for Local Development* (2005) 3-4: accessed from [www.info.worldbank.org/etools/docs/library/153066/somaliaputland.pdf](http://www.info.worldbank.org/etools/docs/library/153066/somaliaputland.pdf) from 2012-11-16.

<sup>757</sup> See the discussion in section 2 2 1 10.

care is significant for the child in that the child knows the people who are providing him or her with care and such placement is not likely to disrupt the life of child.<sup>758</sup> South Africa should be encouraged to legally recognise the care that is provided to children living in communal property associations, as care that contributes positively to the needs of the child in need of care.<sup>759</sup> This will enable South Africa to prioritise placing children with people they know in an arrangement which reflects a familiar environment.

I propose that South Africa must amend section 180 of the Children’s Act and incorporate a provision that recognises kinship care<sup>760</sup> and care provided by communal families<sup>761</sup> as legitimate care options. I also propose that the provision must prioritise placement of children in alternative care in the following order: kinship care; care with a non-relative foster parent, placement in a communal family; placement in a cluster foster care; and placement in residential care as the last option.<sup>762</sup> Section 180(2) of the Children’s Act must be amended by adding a provision that considers the different types of care as follows:

“180(2) Where it is not possible to keep the child in his or her family, the child shall be placed in kinship care with –

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<sup>758</sup> UNICEF *The Children’s Act Explained: The Courts and the Protection of Children 7*: accessed from [www.unicef.org/southafrica/SAF\\_resources\\_childact3.pdf](http://www.unicef.org/southafrica/SAF_resources_childact3.pdf) on 2011-04-21.

<sup>759</sup> *Ibid.*

<sup>760</sup> See the discussion in section 2 2 1 9.

<sup>761</sup> See the discussion in section 2 2 1 10.

<sup>762</sup> See the discussion in section 6 5.

- (a) a grandparent;<sup>763</sup>
  - (b) an adult sibling;<sup>764</sup>
  - (c) an aunt or uncle; or
  - (d) anyone related to the child.
- (3) Where it is not possible to place the child in kinship care, a child may be placed with a non-relative foster parent/s who can be –
- (a) a neighbour; or
  - (b) any person who is suitable to provide care.
- (4) Where it is not possible to place a child in kinship or with a non-relative foster parent/s, a child shall be placed in communal care in a community –
- (a) in which the child resides;
  - (b) under care of a committee which is entrusted with the task to administer the affairs of the community and other roles relating to the communal land on which the child lives; or
  - (c) under care of the tribal authority's council in the community in which the child resides.”
- (5) Where it is not possible to place a child in kinship care, with a non-relative foster parent/s,

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<sup>763</sup> See *S S (A minor child)* par 23, the court argues that s 180(3) of the Children's Act provides that a child may be placed in foster care with a family member who is not a parent or guardian of the child. Thus, grandparents qualify as foster parent. The court argued further that to exclude children who are in placement with families who are related to them from receiving foster care grants, if circumstances permit, would be contradictory to the terms of the Children's Act. See the discussion in section 6 4 3.

<sup>764</sup> See the California experience in section 6 3 3.



in communal care, the child shall be placed in a cluster foster care.<sup>765</sup>

- (6) Where it is not possible to place a child in kinship, with a non-relative foster parent/s, in communal care or in a cluster foster care, the child shall be placed in a state residential care.<sup>766</sup>

This is evident from the foster care in Kenya in which Sala<sup>767</sup> reveals that there are complaints regarding inadequate provision of food, clothing and shelter to orphaned children. I am of the view that a foster care system must not fail to provide the basic services that are necessary for the development and well-being of the child. Hence, I propose with regard to South Africa, that the state must, firstly, provide a foster grant to all foster children, including children cared for by grandparents, aunts, uncles who provide kinship care. This should also apply to children in communal families. I also propose that the Social Assistance Act<sup>768</sup> be amended to provide for a provision for a foster grant that is sufficient to meet the costs of maintaining the child.

Thus, South Africa must refer to the Louisiana and California's experience,<sup>769</sup> and incorporate a provision for a foster grant for children under kinship care, which can read as follows:

- "1 A child who is orphaned and without visible means of support, who is receiving kinship care under a grandparent, aunt, uncle, adult sibling, cousin or relative, is eligible to receive a foster grant of an amount that is adequate to support a foster child of his or

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<sup>765</sup> See the discussion in section 6 3 1 for the definition of cluster foster care.

<sup>766</sup> See the definition of residential care as discussed in section 6 4 3.

<sup>767</sup> See the discussion in section 6 3 3.

<sup>768</sup> See ss 5 and 8. See also the discussion in section 6 3 1.

<sup>769</sup> See the discussion in section 6 3 3.

her age<sup>770</sup> and approximated needs on a monthly basis as follows -<sup>771</sup>

- (a) if a baby between age 0-2, an amount of R 1 100 per child;
- (b) if a toddler between age 3-6, an amount of R 750 per child; and
- (c) if older and between age 7-18, an amount of R 650 per child.”

2 A child who is orphaned and without visible means of support, who receives communal care from his or her community, under the communal structure, committee members that administer the affairs of the community or tribal authorities’ council, is eligible to receive a foster grant of an amount that is adequate to support a foster child of his or her age<sup>772</sup> and approximated needs on a monthly basis as follows -<sup>773</sup>

- (a) if a baby between age 0-2, an amount of R 1 100 per child;
- (b) if a toddler between age 3-6, an amount of R 750 per child; and
- (c) if older and between age 7-18, an amount of R 650 per child.”

With regard to reports of incidents of abuse of children in foster care or children remaining in foster care indefinitely, or any other noncompliance with the Children’s Act in respect of the review of care plans, I make the following recommendations: The review of the care plan must be used as a monitoring tool to access the way in which the foster parent administers

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<sup>770</sup> I have selected the three age groups and used interviews to get a sense regarding costs for basic necessities in families. See the discussion in section 3 3 1 2 2, see also Annexures “B” and “C” of interviews held with child-support grant recipients.

<sup>771</sup> See Emerek *Report Fiscal System and Female Employment in Denmark* (2009) 20.

<sup>772</sup> I have selected the three age groups and used interviews to get a sense regarding costs for basic necessities in families. See the discussion in section 3 3 1 2 2, see also Annexure “Bvii and Bviii” of interviews held with child-support grant recipients.

<sup>773</sup> See Emerek *Report Fiscal System and Female Employment in Denmark* (2009) 20.

his or her role as a foster parent. The designated social worker must use the review periods to assess the implementation of services, the well-being and status of the child in care, and also use the review results to recommend the release of the child in care.<sup>774</sup>

I agree with Matthias<sup>775</sup> that it is important not to keep children in temporary foster care for more than two years. My argument is based on the fact that a foster child may be placed with unfamiliar people, places, friends and schools. Research in this chapter revealed that the child has no way of knowing when his or her placement in foster care will end. In a way, a child may be placed in foster care for a weekend and remain there 21 years.<sup>776</sup> Although “foster care” is a better care arrangement compared with “residential care”, the indefinite stay in foster care, new people, routine and other arrangements can easily create challenges in the development and well-being of the child. Thus, it is important to limit the period of stay of the child in alternative care because such care is intended to achieve a particular purpose. Thus, the child must be reintegrated back into his or her family once the reasons for care are resolved.

The Children’s Act does not provide for the development of a care plan for a child who is placed in other forms of alternative care, except for a foster care plan. South Africa must learn from Ireland<sup>777</sup> and the Children and Young Persons Act (New South Wales),<sup>778</sup> which

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<sup>774</sup> McCue & Balestracci (2001) 1259.

<sup>775</sup> (1997) 44.

<sup>776</sup> See the discussions in sections 6 3 1 and 6 3 3.

<sup>777</sup> See the discussion in section 6 3 3.

<sup>778</sup> S 78.

make a care plan a standard requirement for all alternative care arrangements. However, I am of the view that a provision for a *comprehensive care plan*, as emphasised in the United States of America by requiring social workers to develop a “comprehensive plan” under Title IV-B of the Social Security Act,<sup>779</sup> must be enacted in section 167 of the Children’s Act rather than simply a “care plan”<sup>780</sup> in the following fashion:

- “(5) The designated social worker who applies for the removal of the child from the care of parents into alternative care must present a *comprehensive care plan* to the children’s court before the final order is made.
- (6) The *comprehensive care plan* must -
- (a) incorporate arrangements for contact between the child, his or her parents, family members, relatives, friends and other persons closely connected to the child;<sup>781</sup>
  - (b) as far as possible, be established with the agreement of the parents of the child as well as the child concerned;<sup>782</sup>
  - (c) mandate feedback that responds to progress made in the development and service delivery upon implementing the plan by the designated social worker;
  - (d) specify how the services identified by the designated social worker (in the needs assessment) will be funded and delivered;<sup>783</sup>
  - (e) emphasise the provision of early intervention and highly intensive services as a method most likely to promote family maintenance, such services include, family-based/family centred services;
  - (f) provide for all identified services to be made available either -

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<sup>779</sup> See the discussion in section 6 3 3.

<sup>780</sup> Own emphasis.

<sup>781</sup> S 78(2)(c) of the Children and Young Persons Act (New South Wales).

<sup>782</sup> S 78(3) of the Children and Young Persons Act (New South Wales).

<sup>783</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 49.

- (i) directly by the Department of Social Development;
    - (ii) through cooperative arrangements with intersectoral government departments; or
    - (iii) through public-private partnership agreement with the Department of Social Development.
  - (g) include information on sufficient and timeous funding of necessary services;
  - (h) include information regarding all services that are required from the Department of Social Development as well as any services identified in the needs assessment report; and
  - (i) include information on preventative and reunifications services, such as:<sup>784</sup>
    - (i) cash payments;
    - (ii) non-cash payments to meet the basic needs and address specific problems such as, food, housing, respite care, child care, treatment for substance abuse, counselling/psychotherapy, parenting training, life skills training and household management; and
    - (iii) facilitative services such as, visitation and transportation as important in facilitating reunification of child back into their families.
- (7) The plan must provide information regarding the visitation schedule in terms of –<sup>785</sup>
- (a) when visits should begin;
  - (b) what the frequency and length of contacts should be;
  - (c) who should be included in the visits;

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<sup>784</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 50.

<sup>785</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 64.

- (d) where visits should take place; and
  - (e) when visits should be limited or terminated.
- (8) The plan must provide information regarding permanency services which must include, the delivery of structured services which will enhance the likelihood of having preventative services provided to those in need by way maintaining families, returning children safely home or finding a permanent placement for the child. Such will be achieved by ensuring that:
- (a) workers are available by phone and in person 24 hours a day;
  - (b) there is contact between workers and families which is not limited to business hours or weekdays;
  - (c) most contacts occur in the family home or in a setting that is comfortable for the family, at times of day when they would be most helpful and in the best interests of the child;
  - (d) services are provided immediately and most intensively during family crisis; and
  - (e) services are provided as the result of a joint agreement between the designated social worker, the parent, the child and other concerned parties such as, the foster parent, relatives and community service providers.
- (9) The plan must be prepared with efforts to achieve permanency for children by ensuring that-<sup>786</sup>
- (a) permanency hearings are held on time;
  - (b) petitions to terminate parental rights are timely filed; and
  - (c) reasonable efforts are made to timely place children in permanent placements;
  - (d) preparation of timeous adoption studies of both the child and adoptive parents; and

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<sup>786</sup>

California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 53.

- (e) prompt pursuit of adoption assistance funds for special needs children.<sup>787</sup>
- (10) The plan must provide information which makes services that are meant to achieve permanency, available for those children determined by the court to be unable to return safely home or for whom the social worker is undertaking concurrent planning, which includes -<sup>788</sup>
- (a) provision of “time-limited reunification services”.<sup>789</sup>
  - (b) individual, group and family counselling;
  - (c) inpatient, residential, or outpatient substance abuse treatment; mental health services;
  - (d) temporary child care and therapeutic services to families, including crises nurseries; and
  - (e) transportation to access services that are geographically inaccessible.<sup>790</sup>
- (11) The *comprehensive care plan* must be enforced to the extent to which its provisions are embodied in or approved by the order of the children’s court.<sup>791</sup>

I am concerned that children in care are not properly monitored so as to reunite them with their families when the grounds for care no longer exist. I propose for more stringent monitoring measures that would facilitate a process for the reunification of children with their families. I propose that South Africa refer to the Children and Young Persons Act (New

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<sup>787</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 59.

<sup>788</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 62.

<sup>789</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 53.

<sup>790</sup> 42 U.S.C, s 629a(a)(7)(B)

<sup>791</sup> Ss 78(4) and 80 of the Children and Young Persons Act (New South Wales).

South Wales)<sup>792</sup> and incorporate the following provision in the Children’s Act:

- “1 The designated social worker must, after placing the child in care ensure that the child –
- (a) is not moved from one foster care or residential care to another where it causes unnecessary disruption in the development and well-being of the child,<sup>793</sup>
  - (b) is not placed in a foster care or residential care that is far to reach for the birth parent, family members, where necessary, relatives, for purposes of ensuring that the child maintains contact with his or her family.<sup>794</sup>
- 2 The designated social worker must monitor the child in alternative care for purposes of possible reunification of the child with his or her parents,<sup>795</sup> by way of –
- (a) presenting quarterly reports including, therapeutic and medical reports before a family care mediation forum for the review of the care plan or other needs, or as required by the children’s court. The reports must state –
    - (i) the outcome of monitoring the child in foster care;
    - (ii) the possibility of reunifying the child and his or her parents;
    - (iii) aspects that hinder such reunification;
    - (iv) what is currently being done to remove these problems;
    - (v) whether there is a need to continue monitoring the child for purposes of his or her protection;
    - (vi) whether additional orders should be made to protect the child; and
    - (vii) any report indicating progress.”

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<sup>792</sup> S 76.

<sup>793</sup> Stein *Quality Matters in Children’s Services* (2009) 36.

<sup>794</sup> Stein (2009) 37.

<sup>795</sup> S 76(4)(a) of the Children and Young Persons Act (New South Wales).



There is a *lacuna* in the South African Children's Act with regard to the review of care orders. In the absence of such provision, I recommend that South Africa refer to section 150 of the Children and Young Persons Act (New South Wales) and incorporate a provision, before section 175 of the Children's Act, a section stating the following:

“(1) For purposes of determining the safety, welfare and well-being of the child who is placed in care by an order of the children's court, a designated social worker must conduct a review of alternative care in accordance with this section as follows:

- (a) In the case of a child who is in care pursuant to a temporary care order of the children's court, within four months after the interim order is made;
- (b) in the case of a child who is in care pursuant to a final order of the children's court, a review –
  - (i) concerning a child of less than two years of age, must be conducted within two months after the final order is made and thereafter within twelve months after the final order is made;
  - (ii) concerning a child of more than two years of age, but less than seven years, must be conducted within four months after the final order is made and thereafter within twelve months after the final order is made;
  - (iii) concerning a child who is between seven and eighteen years of age, must be conducted within six months after the final order is made and thereafter within two years after the final order is made;
- (c) a review must be conducted after the death of a parent or care-giver;
- (d) a review must be conducted after an unplanned change of placement;

- (e) conduct early assessment of the effect the placement has on the child; and<sup>796</sup>
  - (f) apart from the reviews that are conducted in terms of subsection (b), more and frequent reviews may be.
- (2) A report of the review is to be given to the children’s court and the head of the Department of Social Development.”

South Africa must also refer to a bench book developed in Pennsylvania for judicial officers in their efforts to provide timeous and comprehensive action in child care matters,<sup>797</sup> and enact a provision in the Children’s Act with regards to action that needs to be taken after the review of a *comprehensive care plan* for a child in care. I propose a provision that will assist the designated social worker to share the results of the review of a care plan with interested parties.<sup>798</sup> The latter will ensure that designated social workers carry out their responsibility to review care plans, and follow-up with those who participated in the review of the care plan. It will tie the social worker to his responsibility and make the social worker accountable, and most significantly, will lessen the burden that is given to courts in reviewing care orders.

- “1 The designated social worker must –
- (a) collaboratively with a mediator, organise a voluntary family group conference in order to discuss the results of the review of the care plan;
  - (b) ensure that the family group conference is attended by the child, birth parent, foster

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<sup>796</sup> Stein (2009) 38.

<sup>797</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 160: accessed from [www.adoptpakids.org/documents/act101\\_bulletin.pdf](http://www.adoptpakids.org/documents/act101_bulletin.pdf) on 2012-10-22.

<sup>798</sup> These could be, child, birth parent, foster parent, family member, relatives, where possible, a community representative.

parent, family member, relatives, where possible, a community representative where the child lives; ensure that the views of the child are listened to about placement, to avoid situations where the placement which is under review is not working out;<sup>799</sup>

- (c) the family group conference must, with the assistance of the designated social worker and the mediator, take decisions with regard to -
  - (i) the review of the care order;
  - (ii) any emerging issues relating to the child in alternative care not yet involved in the *comprehensive care plan*;<sup>800</sup>
  - (iii) establishing reasonable efforts to restrict long-term foster care for the child;
  - (iv) the release of the child from alternative care; and
- 2 The designated social worker must ensure that the results of the family group conference are made part of the order issued by the court and incorporated in the *comprehensive care plan*.<sup>801</sup>
- 3 In the event the designated social worker fails to comply with the provisions of this Act, she or he shall be guilty of misconduct.
  - (a) where non-compliance is established for the first time on the side of the designated social worker, he or she shall receive a warning;
  - (b) where non-compliance is established for the second time on the side of the same designated social worker, he or she shall receive a written warning; and
  - (c) where non-compliance is established for the third time on the side of the same designated social worker, he or she shall receive disciplinary action.”

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<sup>799</sup> Stein (2009) 38.

<sup>800</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 160.

<sup>801</sup> *Ibid.*

It may not be easy for foster children to access specialised care, and the same applies to children in state institutions. Research reveals that state care is often not properly maintained and managed in terms of operational facilities.<sup>802</sup> There is therefore a need for government to guarantee specialised care to children in need of care. Most children who enter into alternative care have already been exposed to conditions which undermine their chances for healthy development.

I propose that a clause be incorporated in the Children's Act for the Department of Social Development to work collaboratively with intersectoral government departments to ensure that a range of basic and specialised services are provided to children of all ages and different cultures in a *comprehensive care plan*. I propose that South Africa must refer to the guidelines prepared by the American Academy of Paediatrics and enact a provision that meets the developmental and health needs of young children in care.<sup>803</sup> However, for South Africa, such guidelines must apply in all forms of alternative care. I suggest a provision to the following effect:

- "1 The designated social worker must work with a specialised medical practitioner and ensure that –
- (a) a child receives medical examination before he or she is placed into care<sup>804</sup> and immediately after placement in care to identify immediate medical needs;

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<sup>802</sup> See the discussion in sections 6 3 1, 6 3 3, 6 4 1 and 6 4 3.

<sup>803</sup> Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 8. See the discussion in section 6 3 3.

<sup>804</sup> See also the proposed provision in section 5 6.

- (b) young children must receive a health evaluation before placement into care and a thorough medical assessment within 30 days of entry into care;
  - (c) children in care receive continuous developmental, educational and emotional assessments; and
  - (d) children in care are assigned a consistent source of medical care to ensure continuity of care.
- 2 The designated social worker must ensure that the *comprehensive care plan* developed for a child in care -
- (a) stipulates the collaborative work between the Department of Health and the Department of Social Development to streamline services across geographical areas for children in alternative care and must eliminate any disparities when providing services,<sup>805</sup>
  - (b) stipulates the collaborative work between the Department of Health and the Department of Social Development in providing comprehensive health care services to children in alternative care by requiring a child who is less than 16 years of age, whose care-giver has given an *informed consent*, or a child who is 16 years of age, who has given an *informed consent*, to undergo a health assessment to determine his or her health care needs by under-going –
    - (i) an initial pre-placement health evaluation that must be completed within 24 hours before the enters his or her new place of care;
    - (ii) a physical assessment;
    - (iii) a health and mental assessment;
    - (iv) early and periodic screening;
    - (v) diagnostic and treatment programmes; and

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<sup>805</sup> KilKelly Ombudsman for Children Report *Obstacles to the Realisation of Children's Rights in Ireland* (2007) 125.

- (vi) comprehensive mental health assessment that must be conducted with 21 days of the placement of the child into care.
  - (c) puts in place programmes to provide children with specialised services to children of different age, such as, providing young children with greater access to early childhood pre-school programs and providing older children with educational and transitional support until such time a child is self-sufficient.<sup>806</sup>
  - (g) puts in place programmes that ensure cultural competency of children in care by providing bilingual and culturally proficient social workers and foster families ensuring that workers are sensitive to cultural differences and incorporate assessments of cultural competency skills into worker performance evaluations.<sup>807</sup>
- 3 The child in foster care shall cooperate with the specialised medical practitioner, the care-giver and anyone responsible in ensuring that the child undertakes assessment in establishing a health plan.
  - 4 The child in foster care shall receive health care that is sensitive to his or her evolving capacities, development and well-being from the stage of new born, to adolescent.
  - 5 The care-giver of the child in foster care may enter into agreements with specialised medical practitioners for home-based health assessment.
  - 6 The Department of Health shall collaboratively with the Department of Social Development and the care-giver of the child in foster care ensure that the child receives

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<sup>806</sup> *Children, Families and Foster Care: Analysis and Recommendations* (2003) 13: accessed from [www.futureofchildren.org](http://www.futureofchildren.org) on 2012-10-22. However, the guidelines stipulate that specialised services must be provided to older children with educational and transitional support until age 21. I am of the view that the child must be supported until he or she is able to support himself or herself based on the concern that what would become of a child when the care arrangement gets terminated?

<sup>807</sup> *Children, Families and Foster Care: Analysis and Recommendations* (2003) 15.

health and health maintenance services.<sup>808</sup>

- 7 A child in foster care must be enrolled in special care services if the child has an unstable medical condition.<sup>809</sup>
- 8 The Department of Health must, collaboratively with the Department of Social Development, the foster parent and the birth parents ensure that the child receives special services.”

With regards to foster parents, the Children’s Act provides for training programmes to enhance the capacity of foster parents to provide care to children.<sup>810</sup> However, there is still a need for further training on life skills to marginalise situations of potential risk regarding the social acceptance and the life of the child in the community where the foster parent lives. Although the foster contract may stipulate some of these conditions, I am of the view that these terms must be clearly incorporated in legislation. I therefore recommend that South Africa must learn from the Children and Young Persons Act (New South Wales)<sup>811</sup> and some guidelines in foster care from the Louisiana Office of Community Services in the United

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<sup>808</sup> Preventative health and health maintenance services; routine health care; psychiatric and psychological services; emergency care; specialised health consultation and care is provided including, dental care, optometry services and other paediatric services, see Title V; Phicil *Financing the Special Health Care Needs of Children and Youth in Foster Care: A Primer* (2012) 26.

<sup>809</sup> Such condition includes, amongst others, situation of premature babies; has a brain damage; severe physical disabilities from non-accidental trauma; suffers a condition which requires a ventilator; suffers a chronic medical condition such as cerebral palsy; cystic fibrosis; HIV; seizure disorder; congenital anomalies; defects; renal failure; lupus; multiple sclerosis or uncontrollable diabetes.

<sup>810</sup> Regs 71(7), 72(1) and (2) to the Children’s Act.

<sup>811</sup> S 140(a)-(d).

States of America,<sup>812</sup> and promulgate regulations that stipulate the responsibilities of the foster parent and enable the designated social worker to mentor foster parents to the Children's Act, to read as follows:

- “1 Foster parents shall be responsible for providing:
- (a) daily “care”, as defined in the proposed provisions to the Children's Act,<sup>813</sup> to a foster child until the child returns to his or her family;
  - (b) supervision;
  - (c) a positive discipline which includes –<sup>814</sup>
    - (i) well-defined rules which set the expectations;
    - (ii) respecting individual differences in children such as race, culture, age, personality, likes and dislikes;
    - (iii) setting realistic goals within the ability of the child to achieve; and
    - (iv) the ability to respond to a behaviour caused by anxiety or tension from deliberate misbehaviour.
  - (d) a positive family life.
- 2 Foster parent shall cooperate with the designated social worker –
- (a) in monitoring the care of the child;
  - (b) in modelling to birth parents on how to better care for child;

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<sup>812</sup> Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 34-40.

<sup>813</sup> See the proposed provision in section 2 5.

<sup>814</sup> *Ibid*, 30.



- (c) in ensuring that there is safety, social security for the well-being of the child;
  - (d) with regard to how to provide care for the child;
  - (e) with regard to how to supervise the placement of the child and to ensure that the care, safety and well-being of the child are being protected and promoted;
  - (f) in participating in any court hearing regarding the child who is in his or her care;<sup>815</sup>
  - (g) in making assessment of the child's school needs before the child attends school;
  - (h) in sharing information relating to the education of the child with the birth parent and any person who is designated to assist the child in his or her education; and
  - (i) in putting mechanisms in place to ensure that the child is assisted with his or her school work.
- 3 Foster parents shall work collaboratively with the designated social worker and specialised medical practitioners to ensure that –<sup>816</sup>
- (a) medical and dental care of the child is taken care of;
  - (b) medical expenses relating to the foster child are covered by the department that is responsible;
  - (c) he or she receives reimbursement of all medical emergency costs which could not be covered by the medical allowance of the child;
  - (d) therapeutic treatment is made available for both the foster child and foster parent; and
  - (e) in making decisions regarding the permanency planning for the foster child.

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<sup>815</sup> *Ibid.*

<sup>816</sup> *Ibid.*

- 4 Foster parents shall receive parenting skills, through training with regard to –
- (a) how to introduce the child to third parties and how to become sensitive when relating about the grounds that mandated the removal of child to foster care;<sup>817</sup>
  - (b) maintaining information that may be damaging to the reputation of the child in the community confidential;
  - (c) keeping any person who has the right to have contact with the child, informed of the child's accommodation, including any change of such accommodation.<sup>818</sup>
  - (c) assisting the child to develop and practice what he or she will tell other people about his or her situation; and
  - (e) preparing the child physically and emotionally for his or her return to his family.”

We have already established the fact that NGOs can be effective in the delivery of services.<sup>819</sup> However, research conducted by Harvard Kennedy School reveals that NGOs cannot be a “national solution” to service delivery due to issues of scale for demand of services and scarcity of resources.<sup>820</sup> I agree with this argument in that most South African

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<sup>817</sup> *Ibid.*

<sup>818</sup> South Africa must also learn from S 29(2)(b) of the Children Order (Northern Ireland) regarding the rights of parents to be informed of the change of address of the child in care. Thus, South Africa must refer to Northern Ireland and enact a provision after subsection 46(1)(h)(x) of the Children's Act.

<sup>819</sup> See the discussion in section 4 3 1 3.

<sup>820</sup> Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 3: accessed from [www.hks.harvard.edu/cchrp/sbhrap/.../HarnessingLocalCapacity.pdf](http://www.hks.harvard.edu/cchrp/sbhrap/.../HarnessingLocalCapacity.pdf) on 2012-10-26.

NGOs are dependent entirely on donor funding. NGOs that receive support from the Department of Social Development are those with access to information and with technical capacity to respond to advertisements that are made on availability of funding.

In other instances, public-private partnerships can be used as they have proven to be the most successful way of ensuring cooperation between NGOs and government.<sup>821</sup> I recommend that international agencies such as UNICEF and the World Bank participate in public-private partnerships with government and private entities to facilitate the implementation of particularly specialised services for children in need of care.<sup>822</sup> I recommend UNICEF because its services are more sustainable and responsive to donors in that they involve political motivation and development efforts.<sup>823</sup>

I recommend public-private partnership for the success they have shown in providing bulk services. When work is undertaken by a public-private partnership, it is left in the hands of a few service providers. Also, a public-private partnership is most effective in service delivery and is known to have been successful in bringing modern and quality services to poverty

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<sup>821</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 20.

<sup>822</sup> World Bank's Policy Report *Engendering Development – Through Gender Equality in Rights, Resources, and Voice* (2001) vi: accessed from [www.worldbank.org](http://www.worldbank.org) on 2012-10-26. Public-private partnerships are good for large scale infrastructure projects. The report reveals that Lesotho government, Tshepang Consortium headed by Netcare Ltd and the World Bank's International Finance Corporation entered into a public private partnership which is proven successful.

<sup>823</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 11.

stricken communities.<sup>824</sup> Government may, through public private partnerships, gain value from the assistance of private entities even though it may not be government alone that is borrowing the money. Furthermore, UNICEF should consider providing support for the work that is provided by local NGOs. It can do so by way of partnering with local NGOs to implement services rather than approaching NGOs with UNICEF-defined-work.<sup>825</sup> Thus, local NGOs must be allowed to continue to set their own agendas and UNICEF can determine how locally identified solutions feed into its objectives.<sup>826</sup>

I am of the view that local NGOs do better work, because they operate from the flow of the social concerns of the people.<sup>827</sup> Local NGOs are concentrated in urban centres where there is high capacity to engage local development, civil society, and political leaders for public diplomacy and development purposes.<sup>828</sup> Thus, local NGOs are in a position to provide prompt responses to social needs. However, the fact remains that most local NGOs are established by poor communities, most of whom who lack the capacity to write funding proposals and access to technical methods of communication. These NGOs must be

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<sup>824</sup> World Bank's Policy Report *Engendering Development – Through Gender Equality in Rights, Resources, and Voice* (2001) vi.

<sup>825</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 13.

<sup>826</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 13.

<sup>827</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 4.

<sup>828</sup> *Ibid.*

assisted in soliciting funds, and identifying new initiatives and needs.<sup>829</sup> Local NGOs must also be encouraged to do voluntary work that would further the objectives in the Children's Act.<sup>830</sup>

I am of the view that since government undertakes tasks that it is not able to complete, it must explore the option of using public-private partnerships more for the purposes of access to financial, professional and immediate service provision. There is therefore a need to enact a provision in the Children's Act that will enable the Department of Social Development to work collaboratively with intersectoral government departments, UNICEF and private entities to implement services. The proposed provision can read as follows:

- “1 The Department of Social Development shall provide specialised, enhanced and quality services for children in care by way of working collaboratively with intersectoral government departments and UNICEF to -
- (a) solicit financial resources from private entities for provision of specialised services;
  - (b) negotiate public-private partnership contracts with private entities for provision of service;
  - (c) require assistance from private entities for the provision of substantial financial, technical or operational costs for specialised services from private entities; and
  - (d) require the assistance of private entities for provision of infrastructure for specialised services.
- 2 The Department of Social Development shall collaboratively with intersectoral government departments and UNICEF, solicit the participation of local NGOs to ensure that services reach intended beneficiaries.”

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<sup>829</sup> *Ibid.*

<sup>830</sup> *Ibid.*

The trend that currently prevails in South Africa is that the Department of Social Development would place an advertisement in the newspaper and request NGOs to send their proposals for expression of interests to undertake specific assignments. This style is also used in countries such as Pakistan,<sup>831</sup> and it is said to have been successful because of the transparency, accountability and equal treatment given to NGOs that respond to the advertisement.

This method of soliciting NGOs to avail themselves for government work will not succeed where there is corruption or where certain organisations are given an unfair advantage over others. The advantage of using NGOs to do community work is that it allows NGOs to have local ownership of services that they provide.<sup>832</sup> Also, NGOs are given an opportunity to undertake assignments where government does not have expertise to perform.

An interview with Nompula<sup>833</sup> reveals that there are lots of inefficiencies in social services professionals, particularly with regards to children who are left in foster care placement without proper implementation of a permanency plan. I am of the view that social services professionals need to be trained to take up their responsibilities under the new legislation (the South African Children's Act) so as to prioritise reuniting children with their families

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<sup>831</sup> *Ibid.*

<sup>832</sup> Harvard Kennedy School Policy Analysis Exercise Report *Harnessing Local Capacity: U.S Assistance and NGOs in Pakistan* (2010) 13.

<sup>833</sup> The head of the child and youth care centre called "Thandanani" in Honeydew, Roodepoort with 13 years' experience in social services, interview held on 2011-03-30, see Annexure "E".

rather than placing them in alternative care.<sup>834</sup>

The training must target both government and NGOs' social workers and other professionals so as to strengthen services in the alternative care system. Thus, government must make every effort to provide adequate resources for training.<sup>835</sup> On the same token, government must acknowledge professionals responsible for determining the best form of care to serve as an incentive to do good work.

What South Africa can learn from the Kenyan Children's Act is that each of its residential care facilities (rehabilitation schools, remand homes and charitable children's institutions) provide facilities for the care and protection of children and other special services.<sup>836</sup> This should be of critical interest to South Africa in that it allows child and youth care centres to provide a combination of services in a multi-purpose institution. I am concerned as to whether South Africa will be able to prioritise the provision of services for children with special needs, based on the argument that multi-services are pressed together in one institution. I am of the view that services must be provided according to a child's special needs and readily and timeously be available.

With regard to residential care, South Africa must learn from the experience in Kenya of charitable children's institutions recruiting children into public care because of the availability

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<sup>834</sup> See the discussion in section 7 3 1.

<sup>835</sup> SOS Children's Villages *International Guidelines for the Alternative Care of Children: A United Nations Framework* (2009) 20.

<sup>836</sup> See the discussion in section 6 2 3.

of care and services, and parents placing children in care for easy access of food, clothing and other necessities.<sup>837</sup> This should encourage South Africa to focus on making resources available to families to avoid situations where children are lured into care simply for better livelihoods.<sup>838</sup>

What we can learn from the research regarding some charitable institutions which are operating illegally in Kenya<sup>839</sup> is that some unregistered organisations might not have the best intentions of providing care and protection to children. Some orphanages might be a front for child trafficking. This is confirmed by an incident which took place in 2008 where the Kenyan police prevented four girls from being trafficked to India.<sup>840</sup> It appeared in that case that the parents of the girls believed their children were going into an orphanage.<sup>841</sup> Thus, South Africa must not allow any unregistered organisation to provide care to children.

There is little research that is captured in this chapter regarding the European jurisdiction and children in alternative care. This is so in that the ECtHR has, through the threshold criteria for justifying an action taken by the state in removing a child, restricted the placement of children into care. The states have made sufficient efforts to ensure that children are kept in their families, rather than placing them in care. Lessons to be learnt by South Africa with regard to the European jurisdiction experience are firstly, that state care must be a measure

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<sup>837</sup> *Ibid.*

<sup>838</sup> As discussed in sections 3 3 1 2.

<sup>839</sup> Parry-Williams & Njoka (2008) 21-22.

<sup>840</sup> Parry-Williams & Njoka (2008) 21-22.

<sup>841</sup> *Ibid.*



of last resort; and secondly, state care must be a temporary measure with real efforts being put into reintegrating the child back into his or her family.<sup>842</sup>

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<sup>842</sup> *Johansen v Norway* 33; *Olsson v Sweden* par 81. See the discussion in section 7 2 2.

# CHAPTER 7: THE POSITION OF THE CHILD AFTER REMOVAL INTO ALTERNATIVE CARE WITH EMPHASIS ON THE RIGHT TO ACCESS TO INFORMATION, MAINTAIN CONTACT AND REUNIFICATION SERVICES

## 7.1 Introduction

This chapter discuss the right of the child, parent, foster parent, the designated social worker and other key role players concerning the care of the child, to have access to certain information. However, the Children's Act does not provide for the right to access information for these key role players. Thus, in the discussion I recommend that South Africa must refer to foreign jurisdictions and enact such a provision.<sup>1</sup> The provision must deal with the different kinds of information necessary during the different stages after the removal of the child, such as in the following stages:<sup>2</sup>

- 1 Stage 1: information to be used at review hearing after the removal of the child (including emergency removal);
- 2 Stage 2: information to be used at the main hearing;
- 3 Stage 3: information required when the child is in care which relates to, amongst others –
  - (a) contact between the child and the parent and other persons with families; and
  - (b) reunification of the child back with his or her family.
- 4 Stage 4: information required after reunification or upon failure of reunification efforts,

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<sup>1</sup> See the discussion in section 7 5.

<sup>2</sup> See the proposed provisions in 7 5.

that is, permanency hearing.

I also discuss the right of the child, the parent and any person with family ties to the child to maintain contact when the child is in alternative care.<sup>3</sup> In the discussion, I note the fact that the Children's Act adheres to the principle that a child must maintain links with members of his or her family, even when he or she is removed from the family environment.<sup>4</sup> I clearly point out that the Act omitted to include information regarding the type of contact a child may require according to his or her age, the establishment of a contact plan, what the plan must include, and the minimum requirement of frequency with regard to contact.

In the discussion I recommend that South Africa must refer to foreign jurisdictions<sup>5</sup> and incorporate provisions in the Children's Act for the following: the right of the child to have personal relations and direct contact (including supervised contact) with the parent, siblings, family members and relatives; informing parents of the change of the address of the child in care to ensure contact; to facilitate contact between the child and anyone with family ties with the child and the parent at the state's expense; provision for the criteria to be considered by the children's courts and social workers for supervised contact; guidelines for social workers to ensure that visitations of children and toddlers are tailored differently; a preferred method to ensure that siblings maintain contact; contact arrangements in general; and the role of the

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<sup>3</sup> S 35(1) of the Children's Act. S 7(1)(e) of the Children's Act requires that the best interests of the child be applied, taking into account the difficulty and expense of a child having contact with the parent. Van der Linde (2003) *Obiter* 168.

<sup>4</sup> S 45(1)(b) of the Children's Act expressly states that the children's courts may adjudicate any matter involving contact with a child; *Van Schoor v Van Schoor* 1976 (2) SA 600 (A) 610-611. See the discussion in section 7 3 1.

<sup>5</sup> This notion is adhered to by the ECtHR with regard to Art 8 of the ECHR, see also *Rieme v Sweden* 181; *Johansen v Norway* 33. These judgments are discussed in section 7 3 2.

court in determining visitation.

Furthermore, I discuss the responsibility which the state has to facilitate the return of the child to his or her family after removal. Thus, the child must be reunified with his or her family as an element of his or her rights family life.<sup>6</sup> The Children's Act is not properly developed in the area of reunification services. Thus, I propose that South Africa refer to foreign jurisdictions and enact a provision on how the reunification of the child with his or her family is to be facilitated and a provision for a "complaint channel", giving children access to court when their rights are being ignored after removal into care.

## **7.2 Right of the birth parent, child, foster parent and the social worker to access information when the child is in care**

Whilst in care, the child and other key role players in the life of the child may want access to information concerning the child. For instance, the informational need of the parent may be, amongst others; stage 1: information to be used at review hearing after the removal of the

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<sup>6</sup> S 157(1)(b)(ii) of the Children's Act provides that the children's court must consider the best way of securing stability in the life of the child when making an order for the removal of the child, amongst others, the stability of the child may be secured by way of placing the child in temporary care for a limited period to allow reunification. S 7(1)(f)(i)(ii) of the Children's Act requires that when the best interests of the child is applied constant liaisons and reunification of the child with his or her parent must be taken into account, see discussion in section 7 4 1. See also the discussion on international law in section 7 4 2 that is, the discussion on Art 10(1) of the CRC. Art 25(2)(b) of the ACRWC; *Ignacollo-Zenide v Romania* (2001) 31 EHRR 212; *R v Finland* (2006) 2 FCR 264 (CA) and s 11(1) of the Kenyan Children's Act.

child (including emergency removal); stage 2: information to be used at the main hearing; stage 3: information required when the child is in care which relates to, amongst others (a) contact between the child and the parent and other persons with families; and (b) reunification of the child back into his or her family; and stage 4: information required after reunification or upon failure of reunification efforts which relates to permanency hearing.

For instance, the child may want access to information concerning his or her birth parents, siblings, relatives or any information which may be in his or her best interests. The foster parent may require information concerning the family history of the foster child, birth parents and the previous family life of the child.<sup>7</sup> Also, the designated social worker may require information pertaining to the care of the child, his or her interaction with the birth parent, siblings or family members when in care and the relationship between the child and foster parent.

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<sup>7</sup> S 63(3) of the Children's Act requires the presiding magistrate to have special regard to any person whose rights are prejudiced by any information appearing in the report of the social worker. If the person who is prejudiced by such information is a party to the case, the magistrate must disclose the relevant information of the report to such person. See ss 13(1), 152(2)(a) of the Children's Act as discussed in section 7 1 2; see also the discussion in section 5 2 3. Sections 7 2 2 and 7 2 3 discusses the right of access to information in terms of international law and foreign jurisdictions: *McMichael v UK* (2005); *TP and KM v UK* (2001) 2 FLR 549; *Handyside v UK* 1; s 11(2) of the Children's Act (Kenya).

### *7.2.1 Right of the birth parent, child, foster parent and the social worker (welfare) to access information when the child is in care in terms of South African law*

In this section, I discuss the extent to which the Children's Act and relevant South African laws protect the right of access to information. I do so by emphasising the gaps that exist in legislation, and propose that South Africa must refer to foreign jurisdictions and incorporate a provision for access to information for relevant role players, at the different stages while the child is in care, and any time during care proceedings.<sup>8</sup>

The right of the child to access information is important in South African law. However, there is no description in our law as to what type of information must be accessible and at what stage, for what purpose, and at what age a child should be allowed to access such information. A parent may require information to be used at review hearing after the removal of the child, amongst others, and such information may include a notice of a court review.<sup>9</sup> The notice will provide the parent with date, time and place of the review hearing. However, there is no provision in the Children's Act regarding access to such information. Matthias and Zaal<sup>10</sup> note that, amongst others, the key issue which the court might have to consider before the main hearing on whether a child is in need of care and protection is whether it will

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<sup>8</sup> See the discussion in section 7.1.

<sup>9</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 11: accessed from [www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%20](http://www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%20). On 012-11-23.

<sup>10</sup> In Boezaart (ed.) *Child Law in South Africa* 170: in their discussion on "The Period Pending a Care and Protection Hearing in the Children's Court".

be in the best interests of a child who is lost or abandoned to have his or her information such as photographs, published in the media in an attempt to trace his or her parents or relatives.

The latter may be accessed by parents or next of kin who may assist in locating the child. Furthermore, when the child is under care of a foster parent, the foster parent may require information regarding the visitation schedule for the child and his or her parent. Also, for purposes of reunification of the child with his or her family, the parent may require information regarding the date when the child will be returned to the family. If the child cannot be returned to his or her family, the court may require information in the case plan and court report with regards to when the matter concerning the child will be referred for filing of a petition for termination of parental rights and the placement of the child for adoption.<sup>11</sup>

The Children's Act prohibits access to children's court case records that relate to the child, except for, amongst others, when the records are accessed for the purposes of performing official duties in terms of this Act.<sup>12</sup> In other cases, information relating to the child may be accessed in terms of an order of court if the court finds that such access would not compromise the best interests of the child<sup>13</sup> for the purposes of, amongst others, review of

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<sup>11</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 62: accessed from [www.nc.casaforchildren.org/files/.../Reasonable\\_Efforts\\_2.pdf](http://www.nc.casaforchildren.org/files/.../Reasonable_Efforts_2.pdf)-United States on 2012-11-16.

<sup>12</sup> S 66(a).

<sup>13</sup> S 66(b).



appeal, provided the provisions of section 74 are complied with.<sup>14</sup> In the absence of legislation governing access to information concerning the child in care, requests for information are considered subject to the Promotion of Access to Information Act (PAIA).<sup>15</sup>

The PAIA came into effect on the 9 March 2001 and emphasises the importance of access to information in an open, democratic, accountable and transparent society.<sup>16</sup> The Act gives effect to the fundamental right of access to information as entrenched in section 32 of the Constitution. Section 32 guarantees everyone the right to access information held by the state and to any information held by another person that is required in the exercise or protection of any rights.<sup>17</sup> The person who requests information (a requester)<sup>18</sup> must be given access to any record of a public body if all the procedural requirements are complied with and if access to such records is not refused in terms of the PAIA.<sup>19</sup>

Both the Constitution<sup>20</sup> and the PAIA<sup>21</sup> guarantee everyone, including children, the right of access to any information held by the state and any information held by another person that is required for the purposes of exercise or protection of rights. Access to information may in terms of these provisions include access to any information which is crucial to the foster

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<sup>14</sup> S 66(c).

<sup>15</sup> 2 of 2000, hereinafter referred to as "PAIA".

<sup>16</sup> Preamble; s 1 of the Constitution.

<sup>17</sup> Rautenbach "Introduction to the Bill of Rights" *Bill of Rights Compendium*, (2008) 1A-201.

<sup>18</sup> According to s 1 of PAIA.

<sup>19</sup> S 11(1). See also Malherbe in Boezaart (ed.) *Child Law in South Africa* 451.

<sup>20</sup> S 32.

<sup>21</sup> S 9(a).

parent, social worker, or birth parent. I am of the view that if the information affects the child's right to privacy, it may not be shared.<sup>22</sup> This was illustrated in the case of *Tshabalala-Msimang v Makhanya*<sup>23</sup> where the court (clearly) protected the right to confidentiality of information relating to a person's health status in certain circumstances.<sup>24</sup>

However, if sharing such information is critical to the best interests of the child, information may be shared.

According to the Children's Act, officials in the Department of Social Development may access the records that are in Part B of the Child Protection Register.<sup>25</sup> These records are of

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<sup>22</sup> S 13(1)(d); Kassan & Mahery "Special Child Protective Measures in the Children's Act" in Boezaart (ed.) *Child Law in South Africa* (2009) 223.

<sup>23</sup> Par 27. See the discussion in section 5 2 1. See also Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* 222.

<sup>24</sup> The Children's Act gives the child the right to access to such information: s 13(1). See Kassan & Mahery in Boezaart (ed.) *Child Law in South Africa* (2009) 216. The Act further provides that the information must be provided to children in terms of this subsection and must be relevant and be in a format accessible to children, giving due consideration to the needs of children with disabilities: s 13(2) of the Children's Act. The Children's Act grants the Director-General and the officials of his or her Department (these officials are designated by the Director-General), the right to access the National Child Register Part A for purposes of performing their duties and functions. It is obvious in this case that the child, his or her parent or any other person may access Part A of the Register. The fact that the Children's Act has clearly stipulated persons who are considered to access the Part A of the Register, simply means that the legislature intended excluding all other persons from accessing the Part A of the Register and not the parent and the child, see ss 115(1)(a)-(d) and 114(a)-(c).

<sup>25</sup> S 125(1) provides that: "[o]nly the following persons have access to Part B of the Register: the Director-General;

persons who are unsuitable to work with children,<sup>26</sup> such as a person who is convicted of murder, rape and indecent assault.<sup>27</sup> I am of the view that a provision must be incorporated in the Children's Act for the child to have access to such information so that the child can take extreme caution when relating to different people for purposes of protecting themselves from harm. I opine that since the information is recorded in the *Child*<sup>28</sup> Protection Register, it means that it is aimed at children and must be accessible to them.

There is much information which may be of great importance to different role players regarding the child in care. For instance, the birth parent may want information about the new placement of the child into alternative care, the designated social worker may need information concerning the effect of contact between the child and birth parent in order to

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officials in the Department designated by the Director-General;  
a provincial head of social development;  
officials in the provincial head of social development designated by the provincial head of social development; and  
the manager or person in control of a designated child protection organization dealing with foster care and adoption". See also the discussion in section 4 3 1.

<sup>26</sup> S 119 of the Children's Act.

<sup>27</sup> S 120(4) of the Children's Act provides that: "[i]n criminal proceedings, a person must be found unsuitable to work with children – (a) on conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child". S 120(5) provides that: "Any person who has been convicted of murder, attempted murder, rape, indecent assault or assault with intent to do bodily harm grievous bodily harm with regard to the child during the five years preceding the commencement of this Chapter, is deemed to have been found unsuitable to work with children."

<sup>28</sup> Own emphasis.

argue for an increase or reduction of contact; and the designated social worker may request mandatory assessment of the child's medical condition which could be used in the best interests of the child for the promotion of the child's health and well-being. It must be noted though that in certain circumstances information may be withheld for purposes of confidentiality, as evidenced in *Tshabalala-Msimang* case.<sup>29</sup> However, if the disclosure of information is of importance, for example to curb danger or potential danger to the life of a child, such may be disclosed. In other circumstances, information may be withheld because it has the potential to upset the child psychologically; for example, information regarding the child's parents that the child is unaware of, such as their engagement in the sexual exploitation of girl-children or that the mother is a prostitute.

I propose that the right to access information be explicitly incorporated in the Children's Act is of critical importance. Thus, South Africa must refer to foreign jurisdictions indicating the different role players who may require information for different reasons and at the different stages, and establish a provision to such effect in the Children's Act.<sup>30</sup>

### *7.2.2 Right of the birth parent, child, foster parent and the social worker (welfare) to access information when the child is in care, in terms of international law*

The CRC<sup>31</sup> provides for the right of the child, parent, or any member of the family to have

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<sup>29</sup> See the discussion in sections 5 2 1 and 5 4.

<sup>30</sup> See the discussion in section 7 2 3, see also the proposed provision in section 7 5.

<sup>31</sup> Art 9(4).

access to important information concerning the whereabouts of absent family members as follows:

“Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned. Furthermore, the CRC guarantees access to crucial information equally to all family members.”

There is a positive element in the above mentioned Article for recognising the fact that different persons may require access to different kinds of information, and at during different stages of the child’s absence. This is what I am seeking to point out in the topic of this section. The fact that the South African Children’s Act failed to recognise that the right of access to information may be required by different role players, means that South Africa failed to adhere to the standards of the CRC in this regard.

The right of access to information, as indicated above, refers to “essential information”. Such information includes the “whereabouts” of a person. Hodgkin and Newell<sup>32</sup> argue that the “whereabouts” alone may be insufficient; essential information must include the “cause for

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<sup>32</sup> (2007) 131.

disappearance”. Other relevant information includes where the family members can see the absent member, what their legal rights are, and the status of the place where the absent member is.

The Committee of the Rights of the Child was concerned that the information can only be made available “upon request”. Instead, the Committee pointed out in the Initial Report of the Republic of Korea that the state must take measures in line with Article 9(3) to keep children informed about the whereabouts of their parents in order to fully implement their right to maintain personal relations and direct contact with both parents on a regular basis.<sup>33</sup> However, the right of access to information has a further limitation in that it can only be exercised in circumstances where it will not be detrimental to the well-being of the child. Because of the right to family life, the parent and the child have the right to receive and communicate information and ideas with each other.<sup>34</sup> Unlike Article 9(4), Article 10<sup>35</sup> does

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<sup>33</sup> *Ibid.*

<sup>34</sup> Art 10 of the ECHR; Kilkelly (1999) 127.

<sup>35</sup> Art 10 states that: “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and idea without interference by public authority and regardless of frontiers. This article shall not prevent State from requiring the licensing of broadcasting television or cinema enterprises.

(2) the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, condition, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights or others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

not express or encourage the freedom to exchange information or ideas among children.<sup>36</sup> Kilkelly<sup>37</sup> finds Article 10 a provision with little potential for children wishing to challenge access to state-held records on matters of adoption, care and artificial reproduction.

The case of *Gaskin v UK*<sup>38</sup> is critical to illustrate the fact that children must be given access to court when their rights are being ignored. The case concerns the right of access to information. The court in this case declared that minors<sup>39</sup> who are in foster care, depending on state's authority, are entitled to the confidential file which traces the various stages of their development in child welfare.<sup>40</sup> The court declared that persons in a similar position have fundamental interests protected by the ECHR for them to access information that will enable them to learn and understand their childhood and formative years.<sup>41</sup> The court observed that the applicant did not have the benefit of any independent procedure to enable his request to be tested in respect of each of the various entries in the file where consent is not forthcoming.

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<sup>36</sup> Art 10; Kilkelly (1999) 127. Art 10 also does not encourage the facilitation of the child's freedom of expression through appropriate means.

<sup>37</sup> (1999) 127; Kilkelly (2004) *JSIJ* 74-83.

<sup>38</sup> (1990) 12 EHRR 36: Graham Gaskin was placed in public care in the UK as a baby. He stayed in care until he reached majority. Gaskin claimed that he was abused during his stay in public care. Gaskin claimed access to his personal files kept by Liverpool Social Services to lodge a complaint against local authorities for neglect and retributory damage.

<sup>39</sup> Like Gaskin who claimed the right of access to his personal file to lodge a complaint against local authorities for neglect and retributory damages.

<sup>40</sup> Par 49. See Boucaud "Recourse Procedures Against the Violation of Children's Rights in European Countries" in Verhellen (ed.) *Monitoring Children's Rights* (1996) 149.

<sup>41</sup> *Ibid.*

The Commission concluded that the absence of any procedure to balance Gaskin's interest to access the file against the claim made by the authorities to confidentiality and the consequential automatic preference given to the authorities over Gaskin was disproportionate to the aim pursued and could not be said to be necessary in a democratic society.<sup>42</sup> The court concluded that the procedure followed in *Gaskin's* case had not respected his private and family life as required in Article 8 of the ECHR.<sup>43</sup> The court also decided that people in Gaskin's position who had been in public care as children, should not in principle be obstructed from accessing their care records. These records act as the memories of parents to which most individuals had access, but people in Gaskin's position did not.

This is a good case that South Africa can draw lessons from to improve on the Children's Act with regards to access to information. Thus, I propose that South Africa must refer to the European jurisdiction and incorporate a provision into the Children's Act giving children access to court when their rights are being ignored after removal into care. The rights that should not be ignored include access to information,<sup>44</sup> contact between the child and anyone with family ties with the child, and reunification services to enable the child to reunify with his or her the family if the purpose for alternative care has been achieved.

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<sup>42</sup> Par 47. See the discussion in section 2 2 2 2 4 3.

<sup>43</sup> Par 49.

<sup>44</sup> See the discussion in section 7 1.



In *McMichael v UK*<sup>45</sup> the parents applied for information in reports which were prepared by the social worker which led to the adoption of the child. The parents required this information in order to prepare to have the adoption order set aside. The ECtHR recognised that a hearing is required to consider any relevant information available to it. Amongst other reasons for the judgment, the ECtHR considered that:

“Children’s Hearings are required to consider any relevant information made available to them. Apart from the statement of grounds for referral, this information (which would include any report, document or information submitted by the Reporter) is not usually supplied to the child or his parents. However, the chairman is required at the hearing to inform the child and his parents of the substance of such reports, documents or information if it appears to him that this is material to the manner in which the case should be disposed of and that its disclosure would not be detrimental to the interests of the child.”<sup>46</sup>

Thus, the ECtHR found that there was a right of access by parents to reports about their children in proceedings which could potentially lead to the children being freed from adoption.<sup>47</sup> Thus, I recommend that South Africa refer to European jurisprudence and incorporate a clause in the Children’s Act for parents and children to access records about their children in care which could potentially enable parents to challenge the care proceedings and thus release their children from adoption.<sup>48</sup>

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<sup>45</sup> Paras 101-105.

<sup>46</sup> Par 57.

<sup>47</sup> Harris *et al.* (2009) 394; Kilkelly (2004) *JSIJ* 79.

<sup>48</sup> See the discussion in par 7 5.

In the case of *TP and KM v UK*,<sup>49</sup> where the child of the applicant was placed in care on grounds which turned out to be erroneous, the court held that:

“[T]he positive obligation on the State to respect family life requires that this material be made available to the parent concerned, even in the absence of on any request by the parent. If there were doubts as to whether this posed a risk to the welfare of the child, the matters should have been submitted to the court by the local authority at the earliest stage in the proceedings as possible for it to resolve the issues involve.”<sup>50</sup>

In the event that the domestic authorities fear that the availability of the documents may pose a risk to the welfare of the child, the authorities should submit the matter to court at the earliest stage in the proceedings for it to resolve the issues.<sup>51</sup> There is also a category of information which may be regarded as detrimental to the child’s best interests. This was alluded to by the court in *Handyside v UK*,<sup>52</sup> where it found that freedom of expression applies to ideas and information which may be favourably received or regarded as inoffensive.<sup>53</sup> This was confirmed in the seizure of publications which were allegedly found to be obscene by the court in the *Handyside v UK* case.<sup>54</sup>

In line with the CRC, the ACRWC guarantees the child and any family member the right to

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<sup>49</sup> (2001) 2 *FLR* 549. The court ruled that the non-disclosure of documents by a psychiatrist adverse to the interests of the defendant was wrong.

<sup>50</sup> Par 82.

<sup>51</sup> *Harris et al.* (2009) 394; *Kilkelly* (2004) *JSIJ* 78.

<sup>52</sup> See n 85.

<sup>53</sup> *Kilkelly* (1999) 129.

<sup>54</sup> *Ibid.*

important information concerning a family member that may be absent as a result of the action of the state as follows:

“Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. State Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.”<sup>55</sup>

The state is further obliged to protect the child from any consequences that may arise as a result of the request to disclose the information relating to the whereabouts of the family members.<sup>56</sup> The ACRWC limits the right of access to information to the child or his or her family members in the same way as the CRC. For instance, the CRC guarantees the family member the right of access to information to the extent that the disclosure of information may not be harmful to the child, and the ACRWC guarantees information in as far as the information does not entail any adverse consequences for the person or persons who requested the information.<sup>57</sup>

I am of the view that the ACRWC improved on the right of access to information by recognising the fact that it is not only the family member who may request information but other categories of persons who play a role in the life of a child, such as the foster parents,

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<sup>55</sup> Art 19(3).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

the designated social worker, and the court. Thus, I propose that provisions be enacted in the Children's Act for circumstances in which different role players may request information.<sup>58</sup>

The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions<sup>59</sup> does not explicitly provide for the right to access information held by central authorities after the child's removal from his or her country of origin. Article 1(b) of the convention establishes a system of co-operation for contracting state parties to prevent abduction and trafficking in children and to ensure that the interests of children are safeguarded and respected. Instead, the right to access information is inferred from the co-operation between contracting state parties which is encouraged in terms of the convention. The latter simply means that the information held by contracting state parties may easily be accessed by a child who is placed in terms of an inter-country adoption.

The right of the child to access information is also of critical concern in terms of the Hague Convention on Inter-country Adoptions. The Hague Convention ensures that a child is properly informed and counselled in matters where the child's consent is sought concerning his or her adoption.<sup>60</sup> Access to information may, in this situation, serve the interests of the child who has been removed from family life by way of inter-country adoption, whose parents' identity may have been concealed from the child by the biological parents, care-givers, or

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<sup>58</sup> See the discussion in section 7 5.

<sup>59</sup> Adopted on 29 May 1993 and entered into force on 1 May 1995, hereinafter referred to as the "Hague Convention on Inter-country Adoptions": accessed from <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1999/99AC003.pdf> on 2008-06-20.

<sup>60</sup> Art 4(4)(1).

any person who has such information, or the central authority that had access to information on the child before the child's removal. The Hague Convention requires that the right of the child to access information be consistent with the age at which the child has the capacity to handle the information.<sup>61</sup> The convention further requires competent authorities of contracting states that facilitate inter-country adoptions to preserve information that is gathered in relation to the child's origins, his or her biological parents, and medical history.<sup>62</sup> This information may be accessed by the child and the representative of the child, subject to the law of the state where the information is kept.<sup>63</sup>

### *7.2.3 Right of the birth parent, child, foster parent and the social worker (welfare) to access information when the child is in care in terms of foreign jurisdictions*

In this section, I discuss, amongst others, the different role players in the life of the child who may need to access information concerning the child in care in terms of foreign jurisdictions. I also briefly reflect on the type of information which the child may seek to access and reasons for the request for such information. Since this is an area that is not properly established in the Children's Act, I intend formulating a provision on access to information for all role players in the life of the child who is in care.

In Louisiana, United States of America, the Office of Community Services developed

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<sup>61</sup> Art 4(4)(d).

<sup>62</sup> Art 30(1); Nicholson in Boezaart (ed.) *Child Law in South Africa* 386.

<sup>63</sup> Art 30(2).

guidelines<sup>64</sup> for, amongst others, foster parents to assist the foster child to develop a “Life Book” that provides details of the journey of the child through care placement.<sup>65</sup> This is because of the many experiences, acquaintances and relationships the child has in foster care, and the fact that children in turn do not have clear memories of their past. Thus, the “Life Book” may assist in gathering information concerning the child’s growth, development, feelings and ideas, hopes and dreams for the future. Thus, information that relates to the experience of the child whilst in care must be taken seriously as it forms part of the child’s crucial life history.

When a “Life Book” is established, the child would obviously need information from relevant role players, such as the parent, foster parent, the designated social worker or family members, and such information must be made available. The Louisiana guidelines require, amongst others, the designated social worker to work with the foster parent to incorporate

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<sup>64</sup> *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 46-47.

<sup>65</sup> A “Life Book” is different from a scrap book, diary or memory book. It tells the personal life story of the child. It captures memories, feelings, thoughts as well as personal information regarding the child, see 46. According to Keefer & Schooler *Telling the Truth to Your Adopted or Foster Child* (2000) 215-228, the information in the “Life Book” is crucial in that it recreates the child’s life history. This is an accurate record of the child’s past. It gives the child information about his or her birth family; reasons for placement; it provides photos and pictorial history (child’s development and life events); records the child’s feelings about his life (a record of his personal thoughts and feelings); gives the child information about his development and records of important milestones; and it is a useful tool when working with the child and allows persons who work with the child, a method to organise the information. See also Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 46.

such information. This is a good lesson for South Africa's foster care system. Since there is no provision of a "Life Book" in the Children's Act, I am of the view that regulations must be promulgated to the Children's Act for the foster parent to assist the child in developing a "Life Book" and for the child to access information that may be needed in the "Life Book".<sup>66</sup>

The foster parent has the right to access information that relates to the explanation and clarification of expectations regarding all the role players.<sup>67</sup> Thus, the foster parent has the right to receive, amongst others, personal information that could impact on the care, safety and well-being of the child; information that relates to the support services available for the child, and evaluation and feedback on their role as foster parents.<sup>68</sup> Thus, a provision must be incorporated in the Children's Act for the right of the foster parent to access information in this regard.

Furthermore, the designated social worker may need access to information about the foster child's appropriate or inappropriate behaviour that may assist in determining possible ways of handling the child's behaviour.<sup>69</sup> According to research conducted in Louisiana,<sup>70</sup> foster parents are often not aware of the type of information they need to share with social workers

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<sup>66</sup> See the discussion in section 7.5 for the proposed regulations.

<sup>67</sup> Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 14.

<sup>68</sup> *Ibid*, 88.

<sup>69</sup> *Ibid*, 23.

<sup>70</sup> *Ibid*.

concerning foster children.<sup>71</sup> In other instances, foster parents are afraid to share information for not wanting to be labelled as unsuitable to provide care to the child, or not complying with their responsibilities.<sup>72</sup> It is therefore important that South Africa learn from the Louisiana example and incorporate a provision in the Children's Act that explicitly provides for information that may be needed from and by the foster parent.

The Children's Act (Kenya),<sup>73</sup> guarantees the child the right of access to information in cases where the child needs information or communication that may be accessed from the outside world. What South Africa can learn from Kenya is that the Children's Act (Kenya) makes it the responsibility of the administrative authority to ensure that children are accommodated at an institution and are provided at all times with access to proper facilities to access information.<sup>74</sup> Proper facilities may include a television, a computer with access to the Internet, and other systems. However, it is questionable whether the care institutions in Kenya are able to meet this obligation, as research has revealed that there is insufficient food, clothing and shelter and it is unlikely in these circumstances that such facilities are

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<sup>71</sup> See the discussion in section 7.5 regarding information which the foster parent may share with the designated social worker and the information which the designated social worker may access from the foster parent.

<sup>72</sup> *Ibid.*

<sup>73</sup> S 11(2) with regards to the welfare of Children provides that: "The administering authority shall ensure that children accommodated at an institution are provided at all reasonable times and as far as practicable, with access to relevant facilities for their communication with the outside world."

<sup>74</sup> *Ibid.*



affordable.<sup>75</sup>

Also, there is no guarantee of the right of the parent to access information concerning the child when the child is in alternative care. Instead, the Children’s Act (Kenya) clearly provides for the obligation on the Director of Children’s Affairs to submit to the foster parent a list of information concerning the immunisations carried out in respect of the child, in accordance with the Ministry of Health.<sup>76</sup> Also, the Act requires the foster parent to report all cases of serious illness or accident to a foster child.<sup>77</sup> The fact that the Act is silent on whether the parent of the child can have access to any other information apart from when the child dies,<sup>78</sup> means that information that pertains to the life of the child with the foster family may not be communicated.

In terms of the registration of adoption orders, the Children’s Act (Kenya) requires the Registrar-General to keep a register and books to record and make traceable connections between any entry in the Register on Births which has been marked “adopted” and any corresponding entry in the Adopted Children Register. Such information may not be open to public inspection or search except where the information is requested under the order of a court of competent jurisdiction.<sup>79</sup> Furthermore, the Children’s Act (Kenya) prohibits any act by an officer or member of an adoption society to communicate documents and information

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<sup>75</sup> Parry-Williams & Njoka (2008) 6; see also the discussion in section 6 4 3.

<sup>76</sup> S 8(1) Fourth Schedule: Foster Care Placement Rules.

<sup>77</sup> S 8(5) Fourth Schedule: Foster Care Placement Rules.

<sup>78</sup> S 11(2) Fourth Schedule: Foster Care Placement Rules.

<sup>79</sup> S 169(4).

relating to the adoption or proposed adoption of any child, to the child, the parent or guardian of such child or the proposed adoptive parent.<sup>80</sup> Such information may be communicated to the court, the Adoption Committee, the Minister, the Registrar-General or any other member or officer of the adoption society; an advocate representing the adoptive applicant or guardian *ad litem* appointed in terms of the Act.<sup>81</sup>

I am of the view that the Children's Act (Kenya) unnecessarily restricts access to information relating to the adoption or proposed adoption of any child, to the child, the parent or guardian of such child or the proposed adoptive parent. Kenya can learn from the South African Children's Act, which provides for a post-adoption agreement which aims at facilitating communication between the child and parent or guardian, or any person mentioned in the post-adoption agreement.<sup>82</sup> Furthermore, the South African Children's Act requires that information regarding applications for adoption be given to the child and parent, or guardian or any person mentioned in the agreement, including medical information about the child.<sup>83</sup>

### **7.3 Contact by parent, siblings and anyone with family ties with the child while the child is in public care**

This section discusses the right of the child, parent, siblings, and any one with family ties to

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<sup>80</sup> S 178(1) and 178(2)(c).

<sup>81</sup> S 178(2)(a)-(b).

<sup>82</sup> S 234(1)(a). See the discussion in section 8 3.

<sup>83</sup> S 234(1)(b).

the child to maintain contact. Contact is, amongst others, the essential component of the development and well-being of the child in care and is essential for future family reunification. In the discussion, I reflect on the extent to which South African legislation has provided for the right of the child to maintain contact. Where there are omissions in legislation, I recommend that South Africa must refer to foreign jurisdictions and enact provisions that will ensure that contact arrangements are put in place to enforce the right of the child to maintain contact with anyone who has family ties with the child, provided that such contact is in the best interests of the child.<sup>84</sup>

### *7.3.1 Contact by parent, siblings and anyone with family ties with the child while the child is in public care in terms of South African law*

In this section I discuss what regular contact means, and the extent to which the state provides assistance to facilitate contact between the parent, child, siblings and other family members in the context of the South African jurisprudence. The Children's Act does not have a comprehensive provision for the right of the child to establish contact with his or her family whilst in care. I am of the view that there are critical aspects relating to contact which are omitted in the Children's Act.

Thus, I propose that South Africa refer to foreign jurisdictions<sup>85</sup> and enact provisions in the Children's Act stipulating *inter alia*: the contribution that can be made by the foster parent

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<sup>84</sup> See the discussion in section 7 3 3.

<sup>85</sup> *Ibid.*

and the designated social worker in ensuring that contact is frequent and meaningful towards the envisaged reunification process; persons who may have contact with the child; contact with a young child and toddler (an arrangement which is different from having contact with a young adult);<sup>86</sup> methods of ensuring that siblings maintain contact; what the contact plan should contain; contact arrangements and the location where contact may be exercised; guidelines with regards to what the court should look at in determining the contact; the criteria that must be considered by the courts and social workers for supervised contact; and who can apply the best interests of the child standard in contact cases concerning children in care.<sup>87</sup>

According to the Children's Act,<sup>88</sup> "contact" in relation to a child means:

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

Furthermore, section 7(1) of the Children's Act defines, through the use of the best interests

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<sup>86</sup> See the proposed provision in section 7 5.

<sup>87</sup> See the discussion in section proposed provision in section 7 5.

<sup>88</sup> S 1 (1). See the discussion in section 2 4 1.

of the child principle, an element that needs to be considered when providing for the right of the parent and the child to have contact with each other namely:

“Whenever a provision of this Act requires the best interests of child standard to be applied, the following factors must be taken into consideration where relevant, namely ...

- (e) the practical difficulty and expense of the child being with the parent, and any specific parents and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis.”<sup>89</sup>

I am of the view that the statement “the practical difficulty and expense of the child being with the parent ...” is somewhat carelessly included in this section. Even though the statement may not be the “yardstick” providing for the right of the parent and child to have contact, the fact that the statement will be considered when the best interests of the child standard is to be applied, makes it an element that can determine whether the child must have contact with the parent or not. I am of the view that the “best interests of the child” must be the overriding principle and the driving force to derive strategies that will curb situations where there is “the practical difficulty and (high) expense of the child being with the parent ...”. I further argue that the only circumstances where the statement “the practical difficulty and expense ...” must be used, is in cases where the best interests of the child dictates so.

I also argue that the statement “... the need for the child to maintain a connection with his or

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<sup>89</sup> S 7(1)(e).

her family, extended family, culture or tradition”,<sup>90</sup> must be taken into account when the best interests of the child standard is applied. I am of the view that where “... the need for the child to maintain a connection with his or her family, extended family, culture or tradition” exists, the “best interests of the child” must be the deciding factor as to whether the need for the child to maintain a connection with his or her extended family, culture or tradition must be taken into account.<sup>91</sup>

In terms of common law, the biological parent of the child who is in public care retains the right of reasonable access to the child, that is, contact rights at appropriate times.<sup>92</sup> In terms of recent developments, the unmarried father of the child can acquire full parental responsibilities and rights in respect of the child.<sup>93</sup> These responsibilities and rights include maintaining contact with the child.<sup>94</sup> However, the responsibilities and rights of the unmarried father are based on the premise that he meets the requirements set out in section 21(1) of the Children’s Act.<sup>95</sup> Also, the unmarried father may, in terms of section 28(1)(a) of the

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<sup>90</sup> S 7(1)(f)(ii) of the Children’s Act.

<sup>91</sup> See also the discussion in section 7 3 3.

<sup>92</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 181.

<sup>93</sup> Ss 18(4) and 30(2) of the Children’s Act; Heaton “Parental Responsibilities and Rights” in Davel & Skelton (eds.) *Commentary on the Children’s Act* (2010) 3-9.

<sup>94</sup> S 18(2)(b) of the Children’s Act.

<sup>95</sup> “(a) if at the time of the child’s birth he is living with the mother in a permanent life-partnership; or  
(b) if he, regardless of whether he has lived or is living with the mother –  
(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law;

Children's Act, apply to court for an order "suspending for a period, or terminating, any or all of the parental responsibilities which a specific person has in respect of a child". The dates and times of contact can be specified at a court hearing.

A child who is placed in foster care who has an abusive biological parent can obtain an order from the children's court either to forbid contact entirely or provide that contact must take place in the presence of a supervising social worker.<sup>96</sup> The children's court may issue an order to limit a person's access to the child if the order is meant to protect the child.<sup>97</sup> The protection order that is made in terms of the latter provision does not only apply to a person who wants access to the child, but applies equally to the child who is in public care who wants access to another person. The right of the parent and the child to maintain contact is thus equally limited.<sup>98</sup>

On the other hand, the court may allow a person to contact the child under the conditions

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- (ii) contributes or has attempted in good faith to contribute towards the child's upbringing for a reasonable period; and
  - (iii) contributes or has attempted in good faith to contribute towards the expenses in connection with the maintenance of the child for a reasonable period".

See the discussion in sections 2 2 1 7 and 2 4 2.

<sup>96</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 182.

<sup>97</sup> S 46(1)(h)(x) of the Children's Act.

<sup>98</sup> S 36(1) of the Constitution; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 115-116.

stipulated in the court order.<sup>99</sup> The protection order may be made against any person, including the parent of the child.<sup>100</sup> The Children's Act has given the children's court jurisdiction to adjudicate contact issues. Previously, the High Court held that neither the supervising social worker nor the children's court had the power to define the biological parent's right of access in care cases.<sup>101</sup> This meant that the right of the parent to have access to the child is not absolute. The designated social worker may also request the children's court magistrate to provide a detailed ruling on the right of the parent and child to maintain contact.<sup>102</sup>

The Children's Act respects the right of access that is made by an order of court granting a non-custodian person the right to access the child.<sup>103</sup> Thus, any person who bars access to a person who has been granted the right to have access to the child by order of the court contravenes the law.<sup>104</sup> The right of the child to have contact is not limited to contact with his or her parent only.<sup>105</sup> Thus, South Africa must refer to foreign jurisdictions and incorporate a provision which extends the right of contact between the child and any other person (like a sibling) with whom the child has family ties. However, I am emphatic that such contact must

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<sup>99</sup> S 46(1)(h)(xi) of the Children's Act.

<sup>100</sup> S 46(1)(h)(x) of the Children's Act.

<sup>101</sup> *Van Schoor v Van Schoor* 1976 (2) SA 600 (A) 610-611; Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 181.

<sup>102</sup> *Ibid.*

<sup>103</sup> S 35(1).

<sup>104</sup> *Ibid.*

<sup>105</sup> See Van de Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 115-116.



only be allowed if it is in the best interests of the child.<sup>106</sup>

### *7.3.2 Contact by parent, siblings and anyone with family ties with the child while the child is in public care in terms of international law*

This section discusses the extent to which the right of the child, parent and anyone with family ties with the child to maintain contact with the child, whilst the child is in care, is provided in international law.

The CRC states that:

“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”<sup>107</sup>

The CRC also obliges state parties to maintain personal relations and direct contact with parents in the event that the child is separated from them.<sup>108</sup> According to the CRC,<sup>109</sup> the child may keep in contact with his or her parent if it is in the best interests of the child. The Committee on the Rights of the Child<sup>110</sup> was, with regard to the Initial Report of Liechtenstein,

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<sup>106</sup> See the proposed provision in section 7.5.

<sup>107</sup> Art 9(3).

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> In its Concluding Observation No 18 and 19; Hodgkin & Newell (2007) 130.

specifically concerned that the unmarried father was given no standing to claim custody and that custody is automatically given to the mother. The Committee recommended that the state party amend its legislation to provide fathers with the opportunity to request custody of their children “...where possible, as a joint custody with the mother”.<sup>111</sup>

Hodgkin and Newell<sup>112</sup> point out that the courts might refuse to enforce access if this is likely to affect the child. Thus, the right of the child and the parent to contact each other is not absolute. The right may be limited if it is not in the best interests of the child. For example, if the parent who is claiming contact with the child has abused the child, and if barring the parent from having contact with the child would be in the best interests of the child, such position would be consistent with Article 9(3) of the CRC. Hodgkin and Newell<sup>113</sup> maintain that states could put more resources into providing practical assistance to children whose parents are in conflict; such may be done by way of providing neutral meeting places or access may be supervised. Furthermore, the CRC states that:

“A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstance personal relations and direct contacts with both parents ... States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals of the rights and freedoms of others and are consistent with the other rights recognized in the present

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<sup>111</sup> Hodgkin & Newell (2007) 130.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

CRC.”<sup>114</sup>

According to Hodgkin and Newell,<sup>115</sup> Article 10(2) allows parents to enforce court orders for such access. This provision includes even the right of children with refugee status to return to their state of origin for family visits.<sup>116</sup> Returning home for the purposes of temporary family reunification visits should not prejudice their refugee status.<sup>117</sup> The opinion held by Hodgkin and Newell regarding children with refugee status is well captured in Article 22(2) of the CRC, which further protects the rights of refugee children to maintain contact with their parents. The CRC obliges state parties to cooperate with existing organisations which protect and assist refugees in their efforts to protect and assist a child to trace his or her parents and other close relatives in order to maintain the information necessary for reunification with the family.<sup>118</sup>

I am of the view that the right conferred in Article 10(2) applies only in relation to the child and his or her parents and not other family members. This provision may obviously make it problematic for siblings to enforce court orders for contact. Already, we can think of a child in a child-headed household,<sup>119</sup> who is likely to be denied the right to enforce a contact order. I am of the view that a provision must be established in the Children’s Act to enable the child

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<sup>114</sup> Art 10(2).

<sup>115</sup> (2007) 139.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Art 22(2).

<sup>119</sup> See the discussion in sections 2 2 1 8 and 3 3 1 1.

and his or her siblings, or any person whose contact would be in the best interests of the child, to maintain contact with the child.<sup>120</sup>

Like the CRC, the ACRWC finds the physical contact between the child and his or her parents valuable.<sup>121</sup> The ACRWC guarantees the child the right to maintain personal relationships and direct contact with the parents on a constant basis in the event of separation.<sup>122</sup> In African culture, the family was and still is preserved through marriage and kinship ties.<sup>123</sup> I am of the view that the two systems ensure constant contact between family members and the community in that women and children would not easily leave the family, given the fact that they were taken care of within the ambit of the family.<sup>124</sup> On the same note, men would not leave the family environment as they are tasked with the role of fending for the family unit as the head of the household.

In terms of the European jurisprudence, the case of *Rieme v Sweden*<sup>125</sup> explored the role of the state in ensuring that family ties between the father and the child are maintained by considering the point highlighted by the court that:

“...furthermore, it must be recalled that in cases like the present a father’s right to respect for

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<sup>120</sup> See the discussion in section 7 5.

<sup>121</sup> Art 19(2).

<sup>122</sup> *Ibid.*

<sup>123</sup> See the discussion in section 2 2 1 2.

<sup>124</sup> Nhlapo 1995 *JLF* 211, see n 455.

<sup>125</sup> Par 54; Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 102.

family life under Article 8 includes a right to the *taking of measures*<sup>126</sup> with a view to his being reunited with the child.”<sup>127</sup>

The applicant in *Rieme*'s case could not have adequate access to the child as access arrangements depended on cooperation between the parties.<sup>128</sup> The ECtHR found that the decision to place a child in public care and to restrict parental access while the child is in public care may be appreciated if the decision assumes the risk of family relations between the parents and the young child. It is argued that the natural family relationship is not terminated simply because the child is taken into public care.<sup>129</sup> In *Rieme*<sup>130</sup> the ECtHR stated that:

“The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. The implementation of the public

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<sup>126</sup> Own emphasis.

<sup>127</sup> Par 69; see Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 103.

<sup>128</sup> Par 63.

<sup>129</sup> *Ibid.* See also 155: The facts of this case are that the welfare authorities in Sweden transferred the applicant's 1 year-old daughter from her mother's home to foster care. In terms of Swedish law, the action by the applicant, of removing the child from the foster home was prohibited despite the child's consent to maintain contact with the applicant on a regular basis and for lengthy periods. The applicant got custody of the child in September 1983 and terminated the order prohibiting him from removing the child in November 1990. The child later decided to stay with the foster family. The applicant argued that the execution of the public order, which prohibited him from removing the child constitutes interference with his right to respect for family life.

<sup>130</sup> Paras 54-56. See also the discussion of Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 103.

care order, the subsequent prohibition on removal and its maintenance in force clearly constituted an interference with the applicant's right to respect for family life."

If contact between the child and the parent is stopped, such conduct may be construed as interference with the right to "family life" of both the child and the parent. It was argued in *Rieme's* case that the decision to refuse the removal of the child and the maintenance of such decision for a period of more than five years were not "necessary in a democratic society".<sup>131</sup> The applicant in *Rieme's* case could not have adequate access to the child. However, it was difficult for him to obtain a decision regulating such access.<sup>132</sup> The action taken by the court shall not substitute the duties of domestic authorities for the regulation of the public care of children and the rights of parents of children in public care.<sup>133</sup> Instead, it will be taking advantage of the direct contact the authorities have with every person concerned at the stage the measures were envisaged.

In *Glaser v United Kingdom*,<sup>134</sup> the court found that if the custodial parent does not allow the other parent to exercise visitation rights; the state meets its positive obligation under Article 8 if the state has taken coherent and effective action to enforce visitation rights. However, enforcement mechanisms may be limited if they pose a danger to the children or if visitation rights are enforced against the resistance and will of the children involved. The most important principle in the European jurisdiction when placing children in care is that once the

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<sup>131</sup> Art 8(2) of the ECHR. See *Rieme's* case 184 par 67.

<sup>132</sup> Par 67.

<sup>133</sup> *Ibid.*

<sup>134</sup> 7 July 1989 (Appl no 32346/96).

care order is intended to be a temporary order, it must be guided by the ultimate aim of reunion in its execution.<sup>135</sup> Thus, the court in *Johansen v Norway*<sup>136</sup> stated that:

“[T]aking a child into care should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permit and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child ...”<sup>137</sup>

The care order may thus be allowed to continue for a long period with the aim of terminating it at a time when all arrangements, which were to be implemented during the order, are met.<sup>138</sup>

In *Olsson v Sweden*,<sup>139</sup> three children were placed with separate foster families at a distance that was hundred kilometres from one another and their parents. This arrangement made it difficult for the children to maintain contact with one another. The court found this to be in violation of Article 8 of the ECHR. In reaching this conclusion, the court found that the action by the authorities was unacceptable in that the lack of appropriate foster families<sup>140</sup> or

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<sup>135</sup> Kil Kelly (1999) 271.

<sup>136</sup> Par 33. See the discussion in section 6 3 2.

<sup>137</sup> Par 64. See the discussion in section 6 3 2.

<sup>138</sup> *Ibid.*

<sup>139</sup> Par 59.

<sup>140</sup> Amongst other complaints, was the concern that the child was placed with a Christian foster family.

placement determined where the children would be placed.<sup>141</sup> According to the court, the measures taken by the authorities were not supported by sufficient reasons; thus, they were disproportionate to the aim pursued. In *Hoffman v Austria*,<sup>142</sup> the decision to deny the father contact was essentially based on his religious convictions and as such was discriminatory and violated his right for respect for family life in breach of Articles 14 and 8. The court in *S da Silva Mouta v Portugal*<sup>143</sup> held that denying the father custody of his four year old daughter because of the father's homosexuality contravened his right to privacy in his family life and constituted a violation of Articles 8 and 14 of the ECHR. The ECtHR considered that the applicant had been discriminated against on the basis of his sexual orientation and that this discrimination was unjustifiable in the circumstances.

On the same note, Choudhry and Herring<sup>144</sup> emphasise the fact that when a child is taken into care, it does not mean that the family life between the child and the parent comes to an end. The legal implication of this position is that contact between the child and the parent should continue even after the child has been removed from family life. If contact between the child and the parent is stopped, such conduct may be construed as interference with the right to family life of both the child and the parent.<sup>145</sup> Thus, any person wanting to establish

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<sup>141</sup> Par 82.

<sup>142</sup> (1993) 17 EHRR 293.

<sup>143</sup> (1999) 31 EHRR 1069.

<sup>144</sup> (2010) 316. See also *Olsson's case* par 59.

<sup>145</sup> *Johansen v Norway* (1997) 23 EHRR 33; Choudhry & Herring (2010) 316.



contact with the child, other than the child's parents, may make an application for contact.<sup>146</sup>

When an application for contact is made, it is considered taking into account the views of the parents of the child.<sup>147</sup> The general principles applying to contact orders are, amongst others, the right of the parent and child to obtain and maintain regular contact and that such contact may be restricted if it is not in the interests of the child.<sup>148</sup> In terms of the European jurisdiction, it is argued that a care order must be implemented appropriately to ensure that the right to respect for family life of both parents and children is not infringed.<sup>149</sup>

In *Hokkanen v Finland*<sup>150</sup> the court held that the non-enforcement of a father's right of access to his daughter against other persons (maternal grandparents) who refused to comply with court orders did not respect the father's family life. The ECtHR held that the authorities had failed to take adequate and appropriate measures to enforce the father's right to contact with his daughter.<sup>151</sup> However, the court found that the predominant consideration in this respect must be the best interests of the children, including the protection of their health and morals.<sup>152</sup>

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<sup>146</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 117.

<sup>147</sup> *Ibid.*

<sup>148</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 116.

<sup>149</sup> Kilkelly (1999) 178.

<sup>150</sup> (1995) 19 EHRR 139 paras 58-62.

<sup>151</sup> Par 55.

<sup>152</sup> Par 91.

In *Yousef v Netherlands*<sup>153</sup> where a dispute commenced after the death of the mother over the residence and contact between the child's maternal relatives and the unmarried father, the court found that if there was a clash of Article 8 rights between the child and his father, the rights of the child would always prevail.<sup>154</sup> In *Hoppe v Germany*<sup>155</sup> the court found that the limitation of the father's right of access, based on the careful weighing of evidence on the child's best interests, was sufficient for the purposes of Article 8(2). In the case of *Andersson v Sweden*<sup>156</sup> the mother and the son complained that the decision to bar their right to see and communicate with each other for a period of 18 months violated their right to family life. The reason for the authorities imposing this restriction was that if contact was allowed, there would be a danger that his mother would help him abscond from the security facility where the child was receiving medical treatment. The court was not convinced that the circumstances necessitated the measures that were imposed. Thus, the ECtHR held that:

"The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Moreover, telephone conversations between family members are covered by the notions of 'family life' and 'correspondence' within the meaning of Article 8. It follows and this was contested by the Government – that the measures at issue amounted to interferences with the applicant's right to respect for

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<sup>153</sup> (2002) 3 FCR 577.

<sup>154</sup> Par 66.

<sup>155</sup> (2003) 1 FCR 176.

<sup>156</sup> 615.

family life and correspondence.”<sup>157</sup>

There may be interference with family life in circumstances where a child is sexually abused by a parent, if the interference is proportionate with the need to protect the child.<sup>158</sup> The state may interfere with family life in situations where the relationship between the parents has broken down to a level where the enjoyment of the right to family life is not possible due to threat that the situation may pose to the health, safety, or well-being of family members and any other danger that hinders the exercise of family life.<sup>159</sup> A good example such factors in seeking the application of Article 8(2) is the situation in *Sahin v German*,<sup>160</sup> where the love and affection of the father could not yield in granting the right of access if the child would suffer due to existing conflict between the parents.<sup>161</sup> I submit that where there is lack of peace and harmony between the parents, a child living in such a family may need state intervention for the protection of his or her family life.

The court, in the case of *X v UK*,<sup>162</sup> found that the state has an obligation to assist serving prisoners to maintain contact with their families. The duty may be more extensive between prisoners and their children, rather than prisoners and their spouses. One aspect of the positive duty of the state to respect family life concerns the position of family members who

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<sup>157</sup> Par 72.

<sup>158</sup> Kil Kelly (1999) 264.

<sup>159</sup> Van der Linde (2003) *Obiter* 166 and 168.

<sup>160</sup> Par 18-19.

<sup>161</sup> Van der Linde (2003) *Obiter* 164.

<sup>162</sup> (1982) 30 DR 113.

do not have an independent right to enter or to stay in an ECHR state where other family members have a right to reside.

According to Harris *et al.*, the essence of family life is the right to live together.<sup>163</sup> In the case of *Abdulaziz, Cabalas and Balkandali v UK*<sup>164</sup> the court acknowledged that the duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of the contracting state to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country. In the *Abdulaziz* case, the applicants had not shown that there were obstacles to establishing “family life” in their own or the husbands’ country.<sup>165</sup> There ought to be a more compelling reason, such as benefits will be withdrawn, advantages will not be available or medical treatment may not be available; reasons which might constitute an obstacle to establishing effective family life abroad.<sup>166</sup>

### *7.3.3 Contact by parent, siblings and anyone with family ties with the child while the child is in public care in terms of foreign jurisdictions*

In this section I discuss, amongst others, what the court needs to consider when issuing a contact order and the aspects which must be determined in order for contact to be in the best

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<sup>163</sup> (2009) 395.

<sup>164</sup> 421.

<sup>165</sup> Harris *et al.* (2009) 396.

<sup>166</sup> See also *Fadele v UK* (1991) 70 DR 159.

interests of the child. Since there is no such provision in the Children's Act, I recommend that a provision be enacted to provide for this. I also recommend that a provision be enacted to guide social workers to fashion contact arrangements regarding children and toddlers differently. I make further recommendations in the conclusion of this chapter that a provision be incorporated in the Children's Act to guide the children's courts and social workers on supervised contact and a preferred method of contact between siblings, and that the Act must provide for situations where the state may be required to provide financial assistance to facilitate visitation.

Pennsylvania provides guidelines that specifically cater for contact by the youngest children, that is, from birth to two years and two to four years of age.<sup>167</sup> I am of the view that these children are the most vulnerable upon separation as they may suffer from anxiety or attachment issues. Thus, there is a need for more frequent contact between the parent and these categories of children. According to the Pennsylvanian research, older children need less frequent visits to maintain connection and their visits may be moderate because they are able to engage.<sup>168</sup> Although older children may be vulnerable, they have skills that will enable them to better cope with change.<sup>169</sup> Thus, South Africa can refer to the Pennsylvanian guidelines and incorporate a provision on contact arrangements for children and toddlers.

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<sup>167</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 66: accessed from [www.adoptpakids.org/documents/act101\\_bulletin.pdf](http://www.adoptpakids.org/documents/act101_bulletin.pdf) on 2012-10-22.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

In terms of the Pennsylvanian example, the court determines whether contact can be done safely and if so, when and how contact is going to be exercised.<sup>170</sup> However, the “best interests of the child” standard serves only as an internal guide for contact for the designated social worker and does not set a standard for the court order.<sup>171</sup> Once the goal to reunify the child with his or her family shifts to permanency placement, the “best interests of the child” become the sole guiding basis for continuing contact. This is a discretionary determination by a judge to use his or her experience and wisdom.

Some guidance was offered in the case of *In the Interest of M.B.*<sup>172</sup> When determining whether contact is in the best interests of the child, the court may consider all evidence relating to the child’s best interests, including but not limited, to the following factors:<sup>173</sup> (1) length of separation from natural parents; (2) effect of visitation on the child; (3) the age, sex and health of the child; (4) the emotional relationship between the child and the parent; (5) the special needs of the child; and (6) the effect of the child’s relationship with the current care-giver, usually the foster parents. Thus, South Africa must refer to the *In the Interest of M.B* judgment and incorporate provisions in the Children’s Act to guide the court on aspects that must be considered when determining the contact of the child which are lacking in section 7 of the Act.<sup>174</sup>

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<sup>170</sup> *Pennsylvania Dependency Book Office of Children and Families in the Courts* (2010) 65.

<sup>171</sup> *Ibid*, 67.

<sup>172</sup> (1996) 674 A2d 702.

<sup>173</sup> 705-706.

<sup>174</sup> See the discussion in section 7 5.

Another consideration is the wishes of the child, particularly when the child has been subjected to physical, sexual or emotional abuse. Certainly, contact in such cases must be properly supervised.<sup>175</sup> An older child is of such an age, maturity and level of development to be able to participate<sup>176</sup> and this should also carry weight. According to the Pennsylvanian research, if the child is in a pre-adoption home, maintaining parental contact will generally serve no purpose. It is argued that contact is likely to prolong or delay emotional transitions and create confusion and anxiety for the child.<sup>177</sup> Instead, I am of the view that the wishes of the child are critical to guide the courts as to whether contact should cease or continue.

The Children's Act (Kenya) authorises the court to make orders for the establishment of contact between the child and his or her parent and any person who has parental responsibility for the child.<sup>178</sup> The Act gives the administering authority the responsibility to promote contact between each child with parents, relatives and friends in accordance with the arrangements set out in the child's placement plan.<sup>179</sup> Like South Africa, the Children's Act (Kenya) does not provide details in the placement plan regarding the importance of contact between the child and the parent and the extent to which contact may be exercised. This omission must have been an oversight as the Act clearly states that contact will be exercised in accordance with the arrangements laid out in the placement plan.

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<sup>175</sup> *Pennsylvania Dependency Book Office of Children and Families in the Courts* (2010) 69.

<sup>176</sup> S 10 of the Children's Act.

<sup>177</sup> *Ibid.*

<sup>178</sup> S 120(6).

<sup>179</sup> Reg 11(1)(a) to the Children's Act (Kenya).

Since there are no regulations in the Children’s Act (Kenya) relating to the arrangements that are being referred to in the placement plan, we can only guess that these arrangements that are to be incorporated in the placement plan are about the location and times at which the child and any person who is stipulated in the Act can exercise contact. I recommend that South Africa promulgate regulations to the Children’s Act to stipulate the arrangements that must be considered in a contact plan for the child in care.<sup>180</sup>

Furthermore, the Children’s Act (Kenya) provides that suitable facilities be provided within an institution for any child accommodated there to meet privately at any reasonable time, giving due regard to the institution’s programme of activities, with his or her parents, relatives or any person so authorised.<sup>181</sup> The administering authority is also responsible for ensuring that children that are accommodated at an institution are provided with access to relevant facilities for their communication with the outside world.<sup>182</sup> The administering authority has the power to restrict, prohibit or lay conditions upon the child’s contact and communication if it is necessary for the purposes of safeguarding or promoting the welfare of the child and to ensure that what is done is recorded in the child’s case records.<sup>183</sup>

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<sup>180</sup> See the discussion in section 7 3 1, see also section 7 5 for the proposed regulations.

<sup>181</sup> S 11(1)(b).

<sup>182</sup> S 11(2).

<sup>183</sup> S 11(3).



## 7.4 State's duty to facilitate the child's return, reunification and reintegration into the family

As discussed in the previous chapter, the placement of the child in alternative care is intended to be a temporary arrangement, ultimately aimed at achieving family reunification.<sup>184</sup>

In this section I discuss what "reunification services" are, the aspects the court must consider to ascertain whether the social worker was able to provide support to the child and the parent to facilitate reunification, and the type of reunification services that are to be provided.

When the children's court decides to place a child in alternative care, the court needs to take into account the reunification of the child and his or her family after removal.<sup>185</sup> In situations where the state separates the child from his or her parents, the child has the right to maintain personal relations and direct contact with his or her parents on a regular basis.<sup>186</sup> The overriding purpose when taking the child into care must be reintegrating the child into the natural family.<sup>187</sup>

### 7.4.1 State's Duty to Facilitate the Child's Return, Reunification and Reintegration

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<sup>184</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 142; Kilkelly "Children's Rights: a European Perspective" (2004) *JSIJ* 74. According to the ECtHR, a care order is intended to be temporary in nature, as a result, its implementation must be guided by the ultimate aim of family reunion: *Olsson v Sweden* par 81.

<sup>185</sup> Matthias (1997) 27-44.

<sup>186</sup> Robinson (1998) *Obiter* 338; see the discussion in section 7 3 1.

<sup>187</sup> *Ibid.*

*into the Family in terms of South African law*

There is a lack of information on what must be considered in the application by the child or parent to support family reunification in terms of the Children’s Act. Furthermore, there are omissions with regards to information as to the type of the reunification services that are to be provided and how these services are to be facilitated.

Thus, I recommend that South Africa must refer to foreign jurisdictions<sup>188</sup> and incorporate provisions in the Children’s Act to fill the gaps in our law.<sup>189</sup>

The Child Care Act emphasised “family reunification” when a child was placed in alternative care.<sup>190</sup> “Reunification services”, as defined in the Child Care Act, were services whereby a social worker, where applicable, in consultation with the child and youth care worker, renders services for the purposes of empowering and supporting parents, the family and the child in alternative care. The aim of reunification services was to enable the child to be reunited with his or her family and community of origin in the shortest possible period of time and in a manner consistent with the best interests of the child, subject to a provisional maximum time frame of two years or such extended period.<sup>191</sup>

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<sup>188</sup> See the discussion in section 7 4 3.

<sup>189</sup> See the proposed provisions in section 7 5.

<sup>190</sup> S 60 to the Child Care Act.

<sup>191</sup> Reg 2 to the Child Care Act GG 18770 of 31, 1998 Amendments.

The Child Care Act made it the duty of the state to facilitate the return and reunification of the child and his or her parents from alternative care to the family environment under the supervision of a social worker as ordered by the children's court.<sup>192</sup> However, the Child Care Act and its regulations failed to provide a clear guide as to how the reunification services were to be provided. It might have been the intention of the legislature to leave such responsibility with the designated social worker as the Act provided that the social worker had to, "where applicable", include a proposed plan to facilitate reunification services.<sup>193</sup> Given the importance of reunification between the child and his or her family, the Child Care Act should have drafted more stringent regulations which could have required that the permanency plan clearly outline the type of reunification services that were to be rendered in a particular case.<sup>194</sup> Furthermore, the Act ought to have made the inclusion of a permanency plan in the social worker's report compulsory.

In practice, the social worker that conducts investigations on the circumstances faced by the child in need of care is expected to have a proposed plan in his or her investigation report regarding the possibility of the child returning to his or her family and the ultimate restoration of the child to his or her community.<sup>195</sup> Furthermore, reunification services must be arranged even before the removal of the child is agreed to by a court.<sup>196</sup> Reunification services must

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<sup>192</sup> S 15(1)(a).

<sup>193</sup> Reg 2(4)(f).

<sup>194</sup> See the discussion in section 6 3 1.

<sup>195</sup> See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 172.

<sup>196</sup> Reg 2(4)(f).

have been agreed upon by the parents.<sup>197</sup> Additional requirements may be made of parents upon return of the child, such as attending therapeutic counselling sessions and attending and completing a parenting-skills programme designed to educate the parent in the parenting needs of the child.<sup>198</sup>

There is parity between the Child Care Act and the Children's Act as to when reunification services may be considered for a child. Both statutes consider the reunification of the child with his or her family if it is in the best interests of the child. When a child is taken out of the home for his or her own protection, the child must be returned to live with the family when things change for the better.<sup>199</sup> However, family reunification may hamper the possibility of making the child available for adoption where reunification fails, and where the social worker is reluctant to explore other forms of permanent care.<sup>200</sup>

The Children's Act provides that:

“Before the children's court makes an order in terms of section 156 for the removal of the child from the care of the child's parent or care-giver, the court must ... consider the best way of securing stability in the child's life, including whether such stability could be secured by placing the child in an alternative care for a limited period to *allow for the reunification of the*

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<sup>197</sup> *Ibid*; reg 13(1)(a).

<sup>198</sup> Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 172.

<sup>199</sup> UNICEF *The Children's Act Explained: The Courts and the Protection of Children* (2007) 6: accessed from [www.unicef.org/southafrica/SAF\\_resources\\_childact3.pdf](http://www.unicef.org/southafrica/SAF_resources_childact3.pdf) on 2011-04-21.

<sup>200</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 142.

*child and the parent or care-giver with the assistance of a designated social worker*<sup>201</sup>.<sup>202</sup>

The Act requires that if the children's court places the child in foster care, the court must ensure that reunification between the child and the biological parents is considered in the best interests of the child.<sup>203</sup> The court must, when issuing a placement order, include the condition to render the placement of the child subject to reunification services being rendered to the child, the child's parents, care-giver or guardian by a designated social worker, or authorised officer, or to comply with any requirement laid down by the court.<sup>204</sup> If the child has not been reunited with the biological parents two months before the expiry of the initial court order, or any extension of the order, the designated social worker appointed to facilitate the reunification must submit a report to the children's court giving the reasons why the child could not be reunited with his or her parents;<sup>205</sup> and recommend any steps that may stabilise the child's life.<sup>206</sup>

When the children's court considers the report, it may order that the designated social worker continue facilitating the reunification;<sup>207</sup> or order the termination of reunification services if

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<sup>201</sup> Own emphasis.

<sup>202</sup> S 157(1)(b)(ii) of the Children's Act.

<sup>203</sup> S 156(1); s 156(3)(a)(i). See the discussion in Bosman-Sadie & Corrie (2010) 179-180 and 208-209.

<sup>204</sup> S 187(1); Bosman-Sadie & Corrie (2010) 208.

<sup>205</sup> S 187(2)(a).

<sup>206</sup> S 187(2)(b).

<sup>207</sup> S 187(3)(a).

there are no possibilities of such taking place.<sup>208</sup> Bosman-Sadie and Corrie<sup>209</sup> argue that providing reunification services as a never-ending programme is a practice of the past and that reunification as applied in the Children's Act is aimed at getting parents to bring up their own children and ensuring the acceptance of parental responsibilities.<sup>210</sup> The Children's Act also stipulates the procedure for the reunification of the child with his or her immediate family or family members before the issuing of a provisional transfer or discharge of the child from alternative care.<sup>211</sup>

The procedure for the reunification of the child with his or her family requires the designated social worker to provide reunification services, compile a report in consultation with the parents or care-giver of the child, or the person in whose custody the child had been prior to placement in alternative care,<sup>212</sup> foster parents, the head of the child and youth care centre, the head of the facility, place or premises<sup>213</sup> and the child himself or herself.<sup>214</sup> The report of the designated social worker must focus on the developmental assessment of the child and permanency plans to meet the developmental and permanency goals of the child.<sup>215</sup> The report must reflect the incidence of parental contact, or contact by relatives, with the child

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<sup>208</sup> S 187(3)(b).

<sup>209</sup> (2010) 209.

<sup>210</sup> S 18 of the Children's Act. See also Bosman-Sadie & Corrie (2010) 209.

<sup>211</sup> See the discussion in section 6 2 1.

<sup>212</sup> Reg 66(1)(a)(i).

<sup>213</sup> Reg 66(2)(a)(ii).

<sup>214</sup> Reg 66(2)(a)(iii).

<sup>215</sup> Reg 66(2)(b).

during the time of placement in alternative care.<sup>216</sup> The report must also include a fully motivated recommendation:

“(i) on the possibility or desirability of restoring the child to the custody of his or her immediate family or other family members; and (ii) if family reunification is desirable, on the nature of activities which can be employed to promote an environment conducive to the development of the strengths and skills of the parent, guardian, care-giver, family member and the child.”<sup>217</sup>

The Children’s Act makes it the duty of the state to make any order for any child in need of care and protection, which promotes the best interests of the child. The order may include facilitating the return of the child to the person under whose care the child was before the child was placed under temporary safe care.<sup>218</sup> The court may order the return of the child if it finds that the person under whose care the child was is a suitable person to promote the safety and well-being of the child. On the same note, if the court finds that a child is in need of care and protection, the court may make any order which is in the best interests of the child and include an order rendering the placement of the child subject to reunification services being rendered by a designated social worker to the child, his or her parents, care-giver or guardian.<sup>219</sup>

The investigative social worker is expected to work out beforehand whether reunification and

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<sup>216</sup> Reg 66(2)(c).

<sup>217</sup> Reg 66(2)(d).

<sup>218</sup> S 156(1)(c).

<sup>219</sup> S 156(3)(ii) of the Children’s Act.

reintegration services,<sup>220</sup> such as family counselling and maintaining contact,<sup>221</sup> ought to be provided by social workers to the child and family in the post-court phase. These services are viewed to have been insufficient in the past.<sup>222</sup> The Children's Act expressly provides that a child is to be allowed to grow up in his or her original family.<sup>223</sup> In situations where a child is temporarily removed from his or her family, reunification includes more than physically reuniting the child with his or her family.<sup>224</sup> It involves optimal reconnection with the family and reconnection to the community of origin.<sup>225</sup>

According to Petr,<sup>226</sup> emotional reconnection includes activities such as family counselling to heal wounds and maintaining contact through letters, visits and phone calls. Reintegration means the physical reintegration of children with their families.

According to Nompula,<sup>227</sup> a programme to reintegrate a child with his or her family after

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<sup>220</sup> Gallinetti & Loffell in Davel & Skelton (eds.) *Commentary on the Children's Act* 12-11.

<sup>221</sup> Petr *Social Work with Children and their Families Pragmatic Foundations* (1998) 146.

<sup>222</sup> During the operation of the Child Care Act: The head of the child and youth care centre called "Thandanani" in Honeydew, Roodepoort with 13 years' experience in social services, interview held on 2011-04-21.

<sup>223</sup> Reg 61(2)(a)(i); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 172.

<sup>224</sup> Petr (1998) 146.

<sup>225</sup> *Ibid.* See Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 172.

<sup>226</sup> Petr (1998) 146.

<sup>227</sup> The head of the child and youth care centre called "Thandanani" in Honeydew, Roodepoort, interview held on 2011-04-21, see Annexure "E". A case manager is a social worker managing the case of the child. In practice, once the social worker is made aware that a particular child who is found abandoned or in a state of neglect is in need of care and protection, the social



removal from the family environment is a process which commences as early as when the social worker arranges for the child and the parent or family members to establish contact. The social worker would contact the parents or care-giver of the child telephonically to make arrangements for the child to visit the parent. The social worker would encourage the parent and family members to regularly visit the child. If the first contact between the child and the parent or family members is successful, it is easy for the child to relate with his or her family members in subsequent visits. In other visits, depending on the merits of the case of each child, the social worker would view the interaction between the child and the family members through a hidden camera. This may be done in cases where the child does not feel free to relate with the parent in the presence of a social worker or any third party. They will later

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worker will liaise with different government departments depending on where the social worker received the case regarding the child.

The social worker will contact the Department of Home Affairs to establish the identity of the child, and the South African Police Services to report the matter and to seek assistance regarding the whereabouts of the family members of the child. The social worker would issue a notice in the local newspaper regarding the child who is found. According to Nompula, there is a problem with regard to the system of the South African Police Services that is currently used to trace children and their parents. Police officers lose information regarding missing children, which makes it difficult for social workers to follow-up the on progress made with regard to a case. If the parents of the child cannot be found, the case manager would prepare an investigation report and a permanency plan for the child.

Whether the family of the child is found or not, the case manager will organise multidisciplinary conferencing so as to ensure that everyone who is involved in the life of the child provides inputs to the permanency plan. Persons who participate in the conference are, amongst others, a psychologist, teacher, occupational therapist, relatives or family members (if they are found) to provide holistic participation throughout the different phases when the case manager starts to engage the child.

encourage the child to visit his or her parents at home under the supervision of a social worker. The social worker will monitor whether the child is able to have a normal family life with his or her family. Once the child is freely able to relate with his or her family, the social worker will eventually allow the child to sleep over for a night and then return to the care centre. In the next visits where the child sleeps over, the social worker will make the child aware that he or she will be with his or her family permanently.

I submit that the efforts that are illustrated by Nompula<sup>228</sup> are likely to ensure that the child receives different support services. According to Bosman-Sadie and Corrie,<sup>229</sup> the preparation of a permanency plan should enhance the child's self-reliance and optimal social functioning. If the services that are identified in the plan are properly administered, it should ensure effective reunification of the child with his or her family and community. If the services are ineffective, the child should be given services that involve a multi-professional team and family or community involvement.<sup>230</sup>

The Children's Act seems to be more practical about the role that the designated social worker must play for reunification to take place. However, the Act does not provide details concerning the type and nature of services that may be provided for reunification. The Child Care Act simply introduced the concept of "reunification", but failed to outline the information that should be in the plan.

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<sup>228</sup> The head of the child and youth care centre called "Thandanani" in Honeydew, Roodepoort, interview held on 2011-04-21, see Annexure "E".

<sup>229</sup> (2010) 163.

<sup>230</sup> *Ibid.*

#### 7.4.2 *The state's duty to facilitate the child's return, reunification and reintegration into the family in terms of international law*

This section discusses how family reunification is prioritised in international laws. In the discussion, I reflect on statements in international law which are most significant for inclusion in the Children's Act. The CRC obliges state parties to consider applications by a child, or his or her parents, to enter or leave a state facility partly for the purposes of family reunification as follows:

"In accordance with the obligation of States Parties under article 9, paragraph 1, application by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, human and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family."<sup>231</sup>

The CRC creates the duty on the state to consider any application by a child or his or her parents to reunite.<sup>232</sup> According to Hodgkin and Newell, most families that are affected by Article 10(1) are either so-called "economic migrants" or refugees. According to the Committee on the Rights of the Child,<sup>233</sup> Article 10(1) must be read with Article 44 of the International Convention on the Protection of the Rights of all Migrant Workers and Members

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<sup>231</sup> Art 10(1).

<sup>232</sup> *Ibid.*

<sup>233</sup> Hodgkin & Newell (2007) 136.

of their Families<sup>234</sup> which states that contracting states should take measures:

“which they consider appropriate and which are within their powers to facilitate the reunion of migrant workers with their spouses, or with any persons having a relationship with them, which in accordance with the law is an equivalent of marriage, as well as their dependent or single children”.<sup>235</sup>

Although Article 10(1) does not talk directly to the situation of the child who is removed from the family environment as a result of the action of the state, it best illustrates the fact that family unity is the fundamental principle of the CRC.<sup>236</sup> However, Hodgkin and Newell<sup>237</sup> are of the view that Article 10(1) is weaker than Article 9(1) in that it does not expressly guarantee the right to family reunification. I find that Article 10(1) has limitations as it permits the child and the parent to leave and also to enter their own country subject to restrictions that are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others.<sup>238</sup>

Furthermore, according to Article 10(1), the state is not necessarily obliged to initiate the process for the application of the child or the parent to enter or leave the country for purposes of reunification. Instead, according to the Article, the state may simply consider an application to reunite the child with his or her parents whenever such application is made.

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<sup>234</sup> Came into force in July 2003.

<sup>235</sup> Hodgkin & Newell (2007) 136.

<sup>236</sup> Hodgkin & Newell (2007) 135.

<sup>237</sup> *Ibid.*

<sup>238</sup> Art 10(2).

Article 10(1) would have had more impact if it obliged state parties to initiate the reunification of the child with his or her parent. Thus, I support Hodgkin and Newell's<sup>239</sup> argument that Article 10(1) CRC failed to guide the process of reunification. There is lack of information on what the state parties must consider in the application by the child or parent to support family reunification. This is also an omission that exists in our law. South Africa must therefore refer to foreign jurisdictions and incorporate a provision for information on reunification services that are to be provided and how these services are to be facilitated.

The ACRWC imposes an obligation on state parties to “take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal or external displacement arising from armed conflicts or natural disasters”.<sup>240</sup> Thus, the ACRWC puts the burden of ensuring that the child is tracked and found on state parties. Article 25(2)(b) is a special provision and targets a certain category of children; that is, those who are separated as a result of displacements arising from armed conflict.

In terms of the European jurisprudence, the public authorities in the case of *Rieme* had acted in a way which hindered the applicant's right to be reunited with the child.<sup>241</sup> The latter contention was founded on the basis that the Swedish authorities had, upon placing the child with the foster parents, promised that they would be able “to keep the child for good”.<sup>242</sup> The child of the applicant in the case of *Rieme* was placed under substitute placement where it

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<sup>239</sup> (2007) 135.

<sup>240</sup> Art 25(2)(b).

<sup>241</sup> 184 par 69.

<sup>242</sup> *Rieme* 181 par 58.

was decided from the beginning that the substitute placement would be long-lasting or of permanent character.<sup>243</sup> It was anticipated that the foster parents would substitute the natural parents.<sup>244</sup> It is as a result of the latter arrangement that little effort was made to reunite the child and the natural parents.<sup>245</sup>

In *Eriksson v Sweden*<sup>246</sup> it was contended that “a mother’s right to respect for family life under Article 8 includes a right to the taking of measures with a view to her being reunited with her child”.<sup>247</sup> The margin of appreciation to be accorded to the national authorities will be, amongst others, the importance of protecting a child who is assessed to be in a serious situation that is harmful to his or her health, development and well-being and the intention to reunite the family as soon as the situation allows.<sup>248</sup> After an extended time of placement in public care, the interests of the child not to have his factual family situation changed may override the interests of the parents to be reunited with the family.<sup>249</sup>

In *Ignacollo-Zenide v Romania*,<sup>250</sup> which concerned an abduction of two daughters by their father from the mother, the court complained that the authorities had not taken sufficient steps to ensure the rapid execution of the court decisions granting her custody and facilitated

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<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> See also the discussion in section 2 2 2 2 4 1.

<sup>247</sup> 172 par 56.

<sup>248</sup> Van der Linde in Nagel *Gedenkbundel Vir JMT Labuschagne* 108-109.

<sup>249</sup> Van der Linde in Nagel *Gedenkbundel Vir JMT Labuschagne* 109.

<sup>250</sup> (2001) 31 EHRR 212 para 94.

the return of her daughters, contrary to her right to respect for her “family life”. According to the court, the authorities had a duty to facilitate reunion of the family. But this was not absolute since the reunion of the children and the parent who had lived for some time with the other parent could not take place immediately and needed preparatory measures to be taken. In the process of the authorities facilitating cooperation, any obligation to apply coercion must be limited, particularly the best interests of the child and his or her rights under Article 8. However, as with concerns raised in the previous section, this case law does not indicate what preparatory measures are to be taken. Since there is an omission in the South African Children’s Act, I propose that a provision be enacted in the Children’s Act to provide for same.<sup>251</sup>

Choudhry and Herring<sup>252</sup> maintain, in terms of the ECHR, that taking a child into care should be regarded as a temporary measure and the aim of intervention should be to reunite the family. The case of *R v Finland*<sup>253</sup> summarises the duty to reunite as follows:

“The positive duty to take measures to facilitate family reunion as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child after a considerable period has passed since the child was taken into public care, the best interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to

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<sup>251</sup> See the propose provision in section 7 5.

<sup>252</sup> (2010) 316.

<sup>253</sup> (2006) 2 FCR 264 (CA) par 89.

have their family reunited.”<sup>254</sup>

#### *7.4.3 The state’s duty to facilitate the child’s return, reunification and reintegration into the family in terms of foreign jurisdictions*

This section will reflect on jurisdictions that have documented some guidelines on “reunification services”. I acknowledge that different jurisdictions may have different criteria for reunification services. Thus, I will reflect on jurisdictions that have information and guidelines that may enable South Africa to refine the Children’s Act on this topic.

“Reunification services” have been ruled as the primary goal for children removed from their families. Amongst others, California and New Jersey have implemented reunification services which are effectively linked to intensive services through the Intensive Family Preservation Services<sup>255</sup> principles and practices.<sup>256</sup> To achieve this need, families are seen by a social worker within 24 hours of their referral to the programme. After such visit, there will be continuous visits. Services which are provided lasted no more than 90 days. These services are provided two to three times a week, for one to four hours at a time. The services are provided in the home and workers are made available 24 hours a day for

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<sup>254</sup> Choudhry & Herring (2010) 316.

<sup>255</sup> Hereinafter referred to as “IFPS”. See Wells & Biegel “Intensive Family Preservation Services Research: Current Status and Future Agenda” 1992 *Oxford Journal* 22-24: accessed from [www.swra.oxfordjournals.org/content/28/1/21.full.pdf](http://www.swra.oxfordjournals.org/content/28/1/21.full.pdf) on 2012-11-07.

<sup>256</sup> Information accessed from [www.hunter.cuny.edu/socwork/nrcfcpp/.../IFRS-Protocol.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/.../IFRS-Protocol.pdf) on 2012-11-05.



emergency visits or calls.<sup>257</sup> Services for treatment are provided with the aim of resolving the crisis that led to the decision to place the child outside the home, and to teach the family the basic skills that are needed for them to stay together.<sup>258</sup>

Some agencies providing “reunification services” use an assessment tool to meet the standards for reunification and prevention of re-entry into care.<sup>259</sup> The assessment tool includes a three stage service; that is a “preparatory” stage, an “intensive services” stage when the child is placed in the home, and a “step down” stage when the intensive services are implemented. The assessment tool was found to be valid and reliable.<sup>260</sup>

According to Wulczyn,<sup>261</sup> “reunification services” are provided when the child is in care though in contact with birth parents, particularly where after the contact increases steadily in frequency and moderation. In this case, the designated social worker may decide to consider unsupervised contacts if the contact between the child and the parent were previously supervised. Contacts will change from a weekly contact to overnights and weekends, to several days in a row. During this phase, the foster parent is expected to make a contribution by way of, amongst others, role modelling appropriate parenting skills to the

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<sup>257</sup> Wells & Biegel 1992 *Oxford Journal* 23-24.

<sup>258</sup> Wells & Biegel 1992 *Oxford Journal* 24.

<sup>259</sup> Craff *What are the Steps to Family Reunification within the Foster Care System?* (2004): accessed from [www.adoption.about.com/od/working-with-birth-parents/a/What-Are-The-Steps-To-Famil](http://www.adoption.about.com/od/working-with-birth-parents/a/What-Are-The-Steps-To-Famil) 2012-11-06.

<sup>260</sup> *Ibid.*

<sup>261</sup> “Family Reunification” 2004 *Future of Children* 99: accessed from the [www.futureofchildren.org](http://www.futureofchildren.org) on 2012-11-06.

birth parents at visits, at doctor's appointments, and teacher meetings.<sup>262</sup> The child must also be assisted through the process of grief and loss.<sup>263</sup>

It is also important that the foster parent work with the child to achieve educational and developmental milestones, give feedback to the social workers, and be actively supportive in the reunification process. The increase in visits leads to a natural transition of the child returning home.<sup>264</sup> However, the latter may take several months. Once the child is returned to the family with birth parents, the social worker and sometimes court officials would pay visits to the family on a monthly basis for a set amount of times. The experience in Kansas is that the family would be monitored for 18 months after the child has returned home. At the end of the monitoring period, the case will be closed and the social workers will no longer visit the family. I agree with Wulczyn that the wishes of the child must be a factor in the decision-making process for reunifying the child with the family.<sup>265</sup>

Freundlich and Wright<sup>266</sup> argue that when engaging in the process for reunifying the child and the family, it is important to note the fact that the child and the parent may have encountered new experiences, developed new relationships, and created new expectations about the nature of their relationship. These factors must be accounted for when facilitating reunification. Furthermore, the writers argue that the trends in implementing permanency

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<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> *Post Permanency Services* (2003) 47.

planning services for children in foster care vary significantly, depending on the age, ethnicity and race. For instance, reunification of the child with the family would be the most viable option for older children. On the other hand, children of a young age would be released from foster care through adoption.<sup>267</sup>

Research suggests that children who are reunified with their families after a shorter period of placement in foster care, have re-entered the foster care system more easily than children who have stayed longer in foster care.<sup>268</sup> The authors' latter argument is based on the notion that reunification is a journey and not an overnight solution.<sup>269</sup> However, I am of the view that such should not be an indication that children should stay longer in foster care. I argue that frequent contact may shorten the long period of stay in care, thus, the child may be reintegrated with the family sooner. I herewith propose that South Africa incorporate a provision in the Children's Act with regards to the different stages of reunification, as with the California and New Jersey experience.<sup>270</sup>

There is no emphasis of the reunification of the child and his or her parents after the removal of the child from family life where the removal was done as a result of the state action and approved by the court in the Children's Act (Kenya). Instead the Act states that: "if a child is separated from their family without the leave of the court the government will work towards

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<sup>267</sup> Freundlich & Wright (2003) 101.

<sup>268</sup> Freundlich & Wright (2003) 105.

<sup>269</sup> Freundlich & Wright (2003) 105-109.

<sup>270</sup> See n 255.

reunification”.<sup>271</sup> The Act emphasises the need for the child and his or her parent to establish contact when the child is in alternative care only.<sup>272</sup>

However, there are non-governmental organisations in Kenya such as the Child Welfare Society<sup>273</sup> of Kenya, which according to Mureith,<sup>274</sup> “exist to secure the rights of children in order for them to realise their full potential”. The CWSK focuses on strengthening families to prevent dissolution. When that is not possible either because the child is an abandoned child or because there are no surviving parents, the child has the right to be adopted.<sup>275</sup> The Kenyan legislature should have amended the Children’s Act to include a provision that will prioritise reunification and the reintegration of the child in the family after removal if reunification is in the best interests of the child. Omitting to provide for reunification services may mean that reunification may have not been viewed as being of critical importance.

## 7.5 Recommendations and conclusion

The right of the parent and child to have access to information is properly entrenched in the Constitution and the PAIA. The Children’s Act may be supplemented by these two prescripts

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<sup>271</sup> Ss 6 and 3.

<sup>272</sup> S 11(1)(a).

<sup>273</sup> Hereinafter referred to as the “CWSK”.

<sup>274</sup> *Adoptive Parents Views, Experiences and Challenges in the Adoption Process in Kenya and their Implications: A Three Year Study Conducted between 2006 and 2009 for Child Welfare Society of Kenya* (2009) 2.

<sup>275</sup> Mureith *Child Welfare Society of Kenya Presentation on Adoption Fees* (2009) 16.

which do not necessarily apply to issues relating to access to information with regard to children in care. There is much that South Africa can learn from the European jurisdiction with regard to the right of the child and parent to have access to information.<sup>276</sup> The ECtHR finds the capacity to participate effectively in the proceedings regarding, amongst others, the care of the child and reunification which is heavily dependent on the right to access information.<sup>277</sup> Thus, the ECtHR has, in a number of rulings, emphasised the importance of ensuring that persons who seek information to assert their right to family life must not be disadvantaged by non-disclosure of documents that may be material to the outcome of the case.<sup>278</sup>

The ECtHR attaches weight to the right of the child and the parent to remain in contact after the removal of the child from family life.<sup>279</sup> Contact or communication between the child, his or her birth parents and any other care-givers who are taking care of the child in all alternative care options, should be allowed in view of the following dictum:

“The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Moreover, telephone conversations between family members are covered by the notions of ‘family life’ and ‘correspondence’ within the meaning of Article 8. It follows and this was contested by the Government – that the measures at issue amounted to interferences with the applicant’s right to respect for

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<sup>276</sup> See the discussion in sections 7 2 2, 7 3 2 and 7 4 2.

<sup>277</sup> See the discussion in section 7 2 2.

<sup>278</sup> *Ibid.*

<sup>279</sup> See the discussion in section 7 3 2.

family life and correspondence.”<sup>280</sup>

I am of the view that South Africa must refer to the California<sup>281</sup> and Nebraska<sup>282</sup> guidelines and incorporate a guideline provision in the form of an opening statement in Part 2: *Children’s Court Processes*, section 155 of the Children’s Act. The opening provision must stipulate the different stages at which information may be accessed and the different role players who may want access to information concerning the removal of the child and can read as follows:

“A Information may be requested by the following role players during the following stages concerning the removal of the child:

**Stage 1:** information to be used at review hearing after the removal of the child (including emergency removal):

- 1 The parent must have access to information concerning -
  - (a) notice of court review<sup>283</sup>
  - (b) the care proceedings to enable the parent to challenge the care proceedings after

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<sup>280</sup> See *Andersson v Sweden* par 72. See the discussion in section 7 3 2.

<sup>281</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 1: accessed from [www.nc.casaforchildren.org/files/.../Reasonable\\_Efforts\\_2.pdf](http://www.nc.casaforchildren.org/files/.../Reasonable_Efforts_2.pdf)-United States on 2012-11-16.

<sup>282</sup> Worker’s Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 11: accessed from [www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2](http://www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2) on 012-11-23.

<sup>283</sup> Worker’s Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 11: accessed from [www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2](http://www.dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2) on 012-11-23.

the removal of the child, which includes –

- (i) the investigation report prepared by the designated social worker regarding the ground for mandatory alternative care intervention;
  - (c) in-home services which must be received by the child and the family; and
  - (d) the assessment or examination of the child by a specialist medical practitioner.
- 2 The designated social worker must have access to information concerning -
- (a) the circumstances of the family environment of the child;
  - (b) specific behaviour or circumstances that put the child at risk; and<sup>284</sup>
  - (c) how family problems are causing or contributing to the risk.
- 3 The child or his or her legal representative must have access to information concerning –
- (a) when can the child participate directly in court and express his or her wishes;
  - (b) the medical assessment or examination that the child must undergo;
  - (c) the right of the child to have access to court when his or her rights are being ignored after removal into care.
  - (d) medical report of the medical practitioner in the event the child has suffered physical, sexual or emotional abuse; and
  - (e) services that are to be provided to the family to diminish the risk and what alternatives, including in-home services and placement with relatives.<sup>285</sup>

**Stage 2:** information to be used at the main hearing:

- 1 The parent must have access to information concerning -
  - (a) care proceedings to enable the parent to participate in the decision-making process concerning the removal of the child;
  - (b) the care of the child upon confirmation of the decision to remove the child to alternative care. This information relates to –
    - (i) information regarding placement of the child with relatives upon confirmation

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<sup>284</sup> California Youth Law Center *Guidelines Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 8.

<sup>285</sup> California Youth Law Center *Guidelines Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 15.

- of the removal of the child from the family;<sup>286</sup>
- (ii) the person who will provide care to the child, such as the name, the place of residence, details of the family which will provide care to the child and other details concerning the foster parent;
  - (iii) how the child will access school;
  - (iv) how the child will access other places for purposes of training and the development of the child;
  - (v) the services which must be provided to the child in care; and
  - (vi) the services which must be provided to the child and his or her family to alleviate the grounds which mandated the removal of the child from his or her family into care. The services are meant to address specific challenges, such as:<sup>287</sup>
    - (aa) treatment for substance abuse/chemical addiction;
    - (bb) parenting training; and
    - (cc) life skills training or household management.
- 2 The child or his or her legal representative must have access to information concerning:
- (a) the comprehensive care plan of the child, which includes -<sup>288</sup>
    - (i) the visitation plan which includes the following information -
      - (aa) visitation arrangements with the parent, siblings, any person who has family ties with the child;
      - (bb) facilitative services such as visitation place and transport;
    - (ii) the reunification and the placement plan (concurrent plan) which must include –
      - (aa) projected date of the child's return to his or her family.
- 3 The designated social worker must have access to information regarding -
- (a) Information to be included in the court order, such as –<sup>289</sup>

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<sup>286</sup> California Youth Law Center *Guidelines Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 8.

<sup>287</sup> California Youth Law Center *Guidelines Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 12.

<sup>288</sup> California Youth Law Center *Guidelines Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 49.



- (i) that the child has been adjudicated;
  - (ii) statement about the parent's financial responsibility for a child in care, maintenance of medical insurance;<sup>290</sup>
  - (iii) statement that the child has been placed under supervision of the Department of Social Department;
  - (iv) statement that continuation of the child in the home would be contrary to the health, safety or the welfare of the child; and
  - (v) statement that reasonable efforts have been made –
    - (aa) to prevent or eliminate the need for removal; and
    - (bb) to make it possible for the child to return home safely.
  - (vi) Statement ordering specific placement, treatment, educational program or payment;
  - (vii) the types of services that are available in the community where the child resides in order to assess the types of services which can be provided the child and his or her family;<sup>291</sup>
  - (viii) statement ordering the Department of Social Development to pay for services to the child or the family when the child is returned home.<sup>292</sup>
- 4 The law enforcement agents investigating a case of abuse, neglect involving a child must have access to confidential information pertaining to the case of the child (by court order).<sup>293</sup>

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<sup>289</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 12: accessed from [dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2](http://dhhs.ne.gov/children.../Court%20and%20Legal%20for%20Child%2) on 2012-11-23.

<sup>290</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 13.

<sup>291</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 9.

<sup>292</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 13.

<sup>293</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 29.

- 5 The court can request access to information regarding:
- (a) the type of care which is recommended for the child such as, kinship care, foster care with non-relatives, long-term foster care etcetera;
  - (b) comprehensive care plan incorporating the following information:
    - (i) the type of services that the designated social worker will provide to the family to alleviate the grounds which mandated the removal of the child from family life into care;
    - (ii) in-home services which are considered for the child and his or her family;
    - (iii) provision of family maintenance services for quality livelihoods and protection of the child in the family;
    - (iv) the designated social worker's plan for reunification services to be provided to the child; and
    - (v) visitation arrangements and projected date of the child's return to his or her family.

**Stage 3:** information required when the child is in care which relates to, amongst others, care and contact:

- 1 The parent must have access to information concerning -
  - (a) date of the review of the care plan concerning the child;
  - (b) change of address of the child in care;
  - (c) visitation arrangements;
  - (d) projected date of the child's return to his or her family; and
  - (e) progress in the education and academic performance of the child.
- 2 The foster parent must have access to information concerning -
  - (a) the family background of the child;
  - (b) any decision regarding the review of the care plan;
  - (c) the child in foster care on an ongoing basis, including information that could impact on the care, safety and well-being of the child;
  - (c) support services available for the child, case plan and review meetings, court hearings and other decision-making processes timeously;
  - (d) policies that are administered by the Department of Social Development in relation to foster care;
  - (e) visitation arrangements which includes information regarding –
    - (i) how the child maintains contact with the parent;
    - (ii) visitation schedule and other measures to ensure visits which require the support of the foster parent; and
    - (iii) projected date of the child's return to his or her family.

**Stage 4:** information required for the reunification of the child back into the family and upon failure of

reunification efforts: permanency hearing:

- 1 The court must have access to information regarding -
  - (a) the appropriateness of a permanency plan;<sup>294</sup>
  - (b) progress with regards to permanency goal;
  - (c) case plan and court report must include information with regards to -
    - (i) when the child will be referred for filing of a petition for termination of parental rights, placed for adoption with a fit and willing relative or guardian; and
    - (ii) reasonable efforts being made to place the child in a timely manner in accordance with a permanency plan.
- 2 The child or his or her legal representative may require access to information regarding -
  - (a) the date when the child will be returned back into his or her family;
  - (b) any new arrangements in the family of the child when the child reunites with the family;
  - (c) the “Life Book” of the child when he or she leaves foster care;
  - (d) specific recruitment efforts to find adoptive home for the child;
  - (e) any pursuits of adoption assistance funds for the child, including a child with special needs; and<sup>295</sup>
  - (f) any provision for family maintenance services for quality livelihoods and protection of the child in the family;
- 3 The parent must have access to information regarding -
  - (a) the date when the child will be returned back into his or her family;
  - (b) service that are to be provided by the Department of Social Development if the court has determined that the child cannot be returned home, such services include undertakings for permanent placement; and<sup>296</sup>
  - (c) information by the designated social worker regarding the services that might address the family's problems.<sup>297</sup>

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<sup>294</sup> Worker's Guide Book Nebraska *Court and Legal for Child Abuse, Neglect, Dependency and Status Offence* (1995) 10.

<sup>295</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 16.

<sup>296</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 62.

- 4 The foster parent may require access to information concerning -
- (a) the date when the child will be returned back into his or her family.

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California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 68.

I furthermore recommend that South Africa must learn from, amongst others, European case law<sup>298</sup> and the Children, Young Persons and Families Act (New Zealand)<sup>299</sup> which reveal the importance of the parent and the child to have access to information in order to enable them to participate. I propose that a provision be incorporated in section 10 of the Children's Act for the right of the child, his or her legal representative, designated social worker, the parent, the foster parent and any key role player in the matter concerning the child, to have access to information in order for them to participate.

The provision must also impose obligations on certain key role players to provide information for participation. Thus, section 10 of the Children's Act must be amended, it can read as follows:

“10(3) The child, his or her parent, foster parent, the designated social worker and any key role player in care proceedings concerning the child shall –<sup>300</sup>

- (a) have access to all documents concerning the care proceedings; and
- (b) have access to documents that are essential to a degree, sufficient to provide them with protection of their interests;<sup>301</sup>
- (c) receive assistance from the state with regard to access to proper facilities to access information;<sup>302</sup>

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<sup>298</sup> *McMichael v UK* par 92. Art 10; Kilkelly (1999) 127. See the discussion in section 1 1 1 2 6.

<sup>299</sup> S 161.

<sup>300</sup> *Ibid.*

<sup>301</sup> *W v United Kingdom* (1987) 10 EHRR 29 par 64. See the discussion in section 5 5 1.

<sup>302</sup> S 11(2) of the Children's Act (Kenya).

- (d) receive assistance from the state to access information in the Part B of the Child Protection Register regarding persons who are unsuitable to work with children, who lives within the jurisdiction of the area where the Register is kept and where the child lives; and
- (e) receive financial and any other form of assistance from the state to access information regarding the whereabouts and well-being of the child.”<sup>303</sup>

I further propose that South Africa amend section 10 of the Children’s Act and incorporate subsection (4) which will give effect to the right of the child, parent foster parent, the designated social worker, and any key role player in care proceedings to access information that is relevant in this regard which is in the best interests of the child to read as follows:

“10(4) The child shall have access to information -

- (a) held by the parent, foster parent, the designated social worker, siblings, family members of the foster parent or anyone who has useful information;
- (b) which will assist the child to develop a “Life Book” or for any purpose that promotes the best interests of the child, his or her well-being and development.”

I also further propose that regulations be promulgated to section 10(4) to read as follows:

“1 The child shall have access to information which will assist him or her to compile a

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<sup>303</sup> Art 19(3) of the CRC.

“Life Book”. Such information shall include -<sup>304</sup>

- (a) visits by birth parents and other persons with close family ties with the child;
- (b) developmental milestones of the foster child;
- (c) childhood diseases the child had;
- (d) details on immunisation of the child;
- (e) information about injuries, illnesses or hospitalisation regarding the child;
- (f) ways the child showed affection to different people and things around him or her;
- (g) what made him or her happy;
- (h) what things the child was afraid of;
- (i) favourite friends, activities and toys of the child;
- (j) birthday and religious celebrations;
- (k) pictures of each foster family, their home and their pets;
- (l) trips taken with the foster parents;
- (m) members of the foster parent’s extended family who were important to the child;
- (n) achievements;
- (o) nicknames of the child;
- (p) family pets;
- (q) names of teachers and schools attended (pictures must be included if possible) and school reports;
- (r) special sporting activities the child may have been involved in such as, scouting, clubs or camping experiences; and
- (s) the religious experiences”.

“10(5) The foster parent has an obligation –

- (a) assist the child to compile information in a “Life Book” and advise him or her as to with whom should the “Life Book” be shared”;
- (b) to treat any personal information about the child and his or her family confidential;
- (c) not to share any confidential information with the relatives of the child, newspaper reporters, television, any media or organisation without inquiring

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<sup>304</sup>

Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* 46-47.

- from the designated social worker;<sup>305</sup>
- (d) share information about the child's appropriate and inappropriate behaviour with the social worker;<sup>306</sup>
  - (e) inform the designated social worker of any person who visits the child before such visit can take place;<sup>307</sup>
  - (f) keep the social worker informed about the life in the foster family with the child; and<sup>308</sup>
  - (g) share with the designated social worker his or her insights about the child.<sup>309</sup>
- 10(6) The birth parents of the foster child have an obligation to provide the social worker with information about the life of the child in the family environment;
- (a) The birth parents of the foster child have the right to -
    - (i) be informed about the all the scheduled medical appointments concerning the child;<sup>310</sup>
    - (ii) be notified when the child is removed to an new placement; and
    - (iii) know about the child's educational progress.
- 10(7) The designated social worker has an obligation to –
- (a) inform the foster parent about the physical and mental health condition of the child;
  - (b) inform the foster parent about medical records where available;<sup>311</sup>
  - (c) properly document the family's progress, or lack of progress, during visits, including interactions between the birth parent and the child; and
  - (d) document the assessment of risk to the child and the birth parent's capacity to care for the child."<sup>312</sup>

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<sup>305</sup> *Ibid*, 14.

<sup>306</sup> *Ibid*, 23.

<sup>307</sup> *Ibid*, 54.

<sup>308</sup> *Ibid*, 51.

<sup>309</sup> *Ibid*, 48.

<sup>310</sup> *Ibid*.

<sup>311</sup> *Ibid*, 32.

<sup>312</sup> Smariga *Practice and Policy Brief Visitation with Infants and Toddlers in Foster Care* (2007) 18: accessed from [www.Main.zerotothree.org/.../visitation\\_with\\_Infants\\_and\\_Toddlers\\_in\\_F](http://www.Main.zerotothree.org/.../visitation_with_Infants_and_Toddlers_in_F)



The discussion in the study revealed that certain information can be denied to the requester on the basis of, amongst others, confidentiality, if the information will cause harm or has the potential to cause harm, or if disclosure of information may be detrimental to the life of the child.<sup>313</sup> I am of the view that such information must be refused.

Thus, I recommend that a provision be incorporated in the Children's Act to read as follows:

"1 The child, parent foster parent, the designated social worker, or any key role player in the care proceedings concerning the child, shall not disclose information that relates to the child which is not in the best interests of the development and well-being of the child.

South Africa must also further learn from the Children Order (Northern Ireland) which provides that parents must be informed of the change of address of the child in care.<sup>314</sup>

Thus, South Africa must refer to Northern Ireland and enact a provision after subsection 46(1)(h)(x) of the Children's Act to read as follows:

"1 Foster parents or a child and youth care centre shall take reasonable steps to ensure that any person who has parental responsibility and rights for the child is kept informed of where the child is accommodated, including any change of such

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on 2012-10-30. This information is important for the court to order reduced or increased restrictions of contact or termination of the parent's visitation rights.

<sup>313</sup> See the discussion in section 7 2 1.

<sup>314</sup> S 29(2)(b).

accommodation.”

It is most significant that a “contact plan” be established which must stipulate the contact arrangements, frequency and the nature of contact between the child, the parent, or anyone with family ties with the child. I am of the view that contact with the child who is in care should not only be a right of the parents and the child. Instead, visits by relatives, including uncles, grandparents or siblings of the child who have significant personal ties or close family ties, with the child must be encouraged. Thus, South Africa must refer to the CRC<sup>315</sup> and the ACRWC<sup>316</sup> which are explicit that the child must have personal relations and (direct) contact with his or her parents, family members or relatives, and incorporate a provision in relation to the right of the child to have personal relations and (direct) contact with the parent, family members, relatives or anyone with family ties with the child to read as follows:

- “1 Contact between the parent, the child and other persons with close family ties with the child, is not terminated by reason of the fact that the child is taken into public care. When in care -<sup>317</sup>
- (a) the child must maintain personal relations with the parent, siblings and anyone with family ties with the child. A preferred method of ensuring that siblings maintain contact is to –
- (i) place siblings together as far as possible, otherwise, other kinds of contact should be arranged;<sup>318</sup>

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<sup>315</sup> Arts 9(3), 10(2) and 22(2). See also the discussion in section 7 3 2.

<sup>316</sup> Art 19(2). See the discussion in section 7 3 2.

<sup>317</sup> *Margareta and Roger Andersson v Sweden* par 72. See the discussion in section 7 3 2.

<sup>318</sup> *Office of Children and Families in the Courts* (2010) 68. South Africa must also refer to the Pennsylvania guidelines for a preferred method of ensuring that siblings maintain contact.

- (ii) make reasonable efforts to provide for frequent visitation or other ongoing interaction between siblings, unless the visitation is contrary to the sibling's safety and well-being; or
  - (iii) ensure other methods of contact.
- (b) authorities must allow direct and frequent contact between the child and his or her family members after the removal;
  - (c) children must be placed in alternative care that is as close as reasonably possible to their parents and siblings to facilitate contact;
  - (d) the state must provide financial and or other forms of support the child and the parent to maintain personal relations and direct contact on a regular basis,<sup>319</sup>

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However, in terms of the Pennsylvanian law, a sibling does not have a standing to seek a court-ordered visitation with a minor sibling.

<sup>319</sup>

S 30(2) of the Children's Act (Northern Ireland) provides that the state should make payment for expenses incurred by the parent when visiting the child. This is remarkable in that it assists parents who do not have the financial means to visit the child. I therefore propose for South Africa to enact the following provision to facilitate contact between children and *parents*, who lack the financial means to read as follows: "The state must make reasonable financial contribution to the parent, family member, relative or any person with parental responsibility for the child as a travelling allowance or other expenses incurred for purposes of visiting the child. The person who receives a travelling allowance must prove that he or she lacks the financial means to make such visit." See also Art 9(1), (3) and 10 of the CRC; Art 19(2) of the ACRWC.

Thus, South Africa must refer to the CRC and the ACRWC which emphasise the roles of parents and the assistance required from the state for parental responsibilities and rights and incorporate a clause in the Children's Act which will provide for same. I am of the view that the state must provide financial assistance to parents in particular, to enable them have contact with their children since they have direct responsibilities and rights over children. I further argue that siblings may be considered for assistance in circumstances where the sibling is not self-sufficient and the parent lack the means to visit the child. All other persons need not be assisted.

- (e) a “contact plan” must incorporate information relating to –
  - (i) the location where the contact is to be held;
  - (ii) how frequent the contact will be;
  - (iii) for how long the contact will be and the level of supervision; and<sup>320</sup>
  - (iv) how the child will be monitored overtime after the contact.”<sup>321</sup>
  - (v) for young children and toddlers, other appropriate settings for parent-child contact may include -<sup>322</sup>
    - (aa) the parent’s home with in-home supervision;
    - (bb) home of a family member who can supervise and support the parent by modelling positive parenting skills
    - (cc) office of the service provider particularly if the parent is receiving therapy or parenting instructions;
    - (dd) early childhood program such as a crèche;
    - (ee) supervised visitation centre; and
    - (ff) alternative care where the child is placed.
  - (vi) contact of young children and toddlers with their parents or anyone who has family ties with the child, must ensure that there are developmentally related contact activities for infants between birth and 2 years as follows -<sup>323</sup>
    - (aa) feeding changing, holding and cuddling must be encouraged;
    - (bb) play peek a boo games;
    - (cc) help with standing walking and holding hands game;
    - (dd) name objects, repeat games and read picture books; and
    - (ee) encourage exploration by taking walks, play with colourful noisy moving items.
  - (vii) Toddler between 2 and 4 years –
    - (i) make and consistently enforce rules;

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<sup>320</sup> Smariga *Practice and Policy Brief Visitation with Infants and Toddlers in Foster Care* (2007) 20.

<sup>321</sup> *Ibid.*

<sup>322</sup> Smariga *Practice and Policy Brief Visitation with Infants and Toddlers in Foster Care* (2007) 13.

<sup>323</sup> *Ibid*, 14.

- (ii) read simple stories and play work games;
- (iii) encourage imitative plays by doing things together, such as clean the house and do shopping together;
- (iv) play together at the park, encouraged to ride a bicycle and dance together to music;
- (v) draw together and string beads together; and
- (vi) allow choice in activities such as, food to be eaten, clothes worn.”

According to the experience in Pennsylvania, contact of the child may be modified over time with a strategic plan that takes care of the different phases of the child in care, including the time when the child is about to leave care to rejoin his or her family.<sup>324</sup> I am of the view that contact with the child must also be modified *consistently with the results of the review of the care plan.*<sup>325</sup>

I am of the view that South Africa must also refer to the Pennsylvania guidelines<sup>326</sup> with regards to what the court should look at in determining the contact of the child, and incorporate provisions in the Children’s Act to read as follows:

- “1 When determining the contact of the child with parent, the court shall assess -
- (a) the length of separation of the child from birth parents;
  - (b) the effect of the contact by any person on the child;
  - (c) the age, sex and health of the child in relation to persons who may contact the child;

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<sup>324</sup> Pennsylvania Dependency *Book Office of Children and Families in the Courts* (2010) 66.

<sup>325</sup> Own emphasis.

<sup>326</sup> Pennsylvania Dependency *Book Office of Children and Families in the Courts* (2010) 65

- (d) the emotional relationship between the child, the parent and anyone who wants to contact the child;
  - (e) the special needs of the child; and
  - (f) the effect of the child's relationship with the foster parent after contact.
- 2 The court shall allow frequent contact if they are likely to –
- (a) reduce trauma in the life of a child;
  - (b) yield to reduction of the pain of separation;
  - (c) promote attachment;
  - (d) increase the birth parents' motivation to change;
  - (e) assist birth parents with conduct and behavioural skills; and
  - (f) increase the likelihood of timely permanency.<sup>327</sup>
- 3 When deciding on the contact of the child, the court shall consider the wishes of the child, and upon receipt of the recommendations of the family care mediation meeting<sup>328</sup> regarding the review of the care plan concerning the child, consider the contact progress and the recommendations made by the family care mediation and issue an order regarding continued contact or termination of contact.”

If the birth parent has a drug addiction problem, random drug testing may be critical; however, with regards to the Louisiana experience, positive drug screening at any point during the care of the child should not be the sole basis for suspending or cancelling a visit.<sup>329</sup>

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<sup>327</sup> *Ibid.*

<sup>328</sup> As per the proposed provision in section 5 6.

<sup>329</sup> Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 22.

South Africa must also refer to Pennsylvania<sup>330</sup> and policy brief by Smariga<sup>331</sup> and incorporate guidelines regarding the criteria that must be considered by the children's court and social workers for supervised contact as follows:

- “1 The children's court shall advise the designated social worker to provide “supervised contact” between the child and the parent or any person who has family ties with the child and whose contact is in the best interests of the child if the court finds that –<sup>332</sup>
- (a) the contact would place the child's life, health and safety at risk;
  - (b) there is danger that the parent will again physically or psychologically abuse the child; and
  - (c) the contacts are extremely traumatic to the child.
- 2 The child shall be supervised appropriately as follows:
- (a) when the child is placed in care on trial basis, he or she shall be supervised overnight when he or she has contact from the parent,<sup>333</sup>
  - (b) supervised to ensure the child's well-being during contacts;
  - (c) to assist the designated social worker gauge parenting skills and identify training or other needs;
  - (d) to identify the presence or absence of a true, healthy bond between the child and the parent;
  - (e) overtime contacts should progress from supervised to unsupervised visits; and<sup>334</sup>
  - (f) contact may be supervised through video or hidden cameras.”

Furthermore, South Africa must refer to the Louisiana handbook and the Pennsylvania guidelines and incorporate provisions in the Children's Act regarding the role of the foster

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<sup>330</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 68.

<sup>331</sup> *Practice and Policy Brief Visitation with Infants and Toddlers in Foster Care* (2007) 7-8

<sup>332</sup> *Ibid.*

<sup>333</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 68.

<sup>334</sup> *Ibid.*

parent and the designated social worker in contributing towards the contact process by ensuring that contact is as frequent as possible and contributes towards the development and the well-being of the child. Thus, a provision must be enacted in the Children's Act to read as follows:

- "1 The foster parent must -
- (a) allow the child to be visited by his or her birth parents and relatives in the foster parent's home;
  - (b) allow the child to visit the birth parent and relatives at their homes;<sup>335</sup>
  - (c) transport the child to and from visits;<sup>336</sup>
  - (d) foster is not use physical force against birth parent to prevent unauthorised removal;<sup>337</sup>
  - (e) communicate with the designated social worker if visits are extremely upsetting to the child; and
  - (f) must attend the school functions and other activities concerning the child if she or he is assisting the child with parenting techniques as part of his or her role.<sup>338</sup>
- 2 The designated social worker must -
- (a) communicate all visitation plans and changes to the foster parent and such arrangements must be in the best interests of the child;
  - (b) allow the foster child to make long distance phone calls using the phone of the foster parent as agreed in the case plan; and
  - (c) be reimbursed for the long distance phone calls."<sup>339</sup>

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<sup>335</sup> Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 53.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> Pennsylvania Dependency Book *Office of Children and Families in the Courts* (2010) 66.

<sup>339</sup> Louisiana Office of Community Services *Foster Parent Hand Book for the Foster and Adoptive Families of Louisiana* (2009) 22.



South Africa must also enforce contact between the child and his or her parents by establishing a provision on contact orders before subsection 46(1)(h)(x) of the Children's Act. South Africa must learn from the Children and Young Persons Act (New South Wales)<sup>340</sup> and enacted a provision to read as follows:<sup>341</sup>

- “1 If a child is the subject of proceedings in court, the court may on application do any one or more of the following:
- (a) make an order stipulating the minimum requirements concerning the frequency and duration of contact between the child, his or her parents, relatives or other persons of significance to the child;
  - (b) make an order that contact with a specific person be supervised;
  - (c) make a contact order with the person specified in the order and the person who is required to supervise the child;
  - (d) make an order denying contact with a specified person if such contact is not in the best interests of the child.
- 2 Nothing in this section prevents contact with the child with the consent of person who has parental responsibility for the child.”

According to Nompula,<sup>342</sup> the process of reunification starts with appointing two social workers to work on the case of the child who is placed in care. One social worker provides counselling activities and therapy to the child, and the other social worker is involved in the case as a case manager and works directly with the family. The two social workers will discuss the progress of the child and the family from time to time in order to assess the

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<sup>340</sup> It has a provision for an order to limit contact to the child.

<sup>341</sup> Ss 86(1), (2) and (3) of the Children and Young Persons Act (New South Wales).

<sup>342</sup> The head of the child and youth care centre called “Thandanani” in Honeydew, Roodepoort, interview held on 2011-04-21, see Annexure “E”.

prospects of reuniting the child with the parents. Previously, when the child was placed in care,<sup>343</sup> one social worker would be designated to work with the child and the family. In practice, the social worker would, after placing the child, only come back after two years to extend the stay of the child in care.<sup>344</sup> In terms of the Children's Act, the social worker must prove that he or she has tried everything to return the child to the family. If the parents lack parental skills, the social worker will arrange family conferencing and arrange for the child to visit the family to see if the family can cope with the child.

South Africa has taken steps to introduce reunification services in order to return the child who is in care to his or her family. Since there is no provision in the Children's Act that articulates the reunification process clearly, I propose that South Africa refer to foreign jurisdictions<sup>345</sup> and incorporate a provision with regards to when the social worker decides on implementing a reunification programme. Thus, regulations must be promulgated to the Children's Act for the designated social worker to facilitate the obligation to reunite the child back into the family as follows:

- "1 The designated social worker shall when deciding to facilitate the reunification programme to return the child back into his or her family, assess -
- (a) the extent to which the parent adheres to court-ordered contact;<sup>346</sup>

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<sup>343</sup> In terms of the Child Care Act.

<sup>344</sup> An interview with Nompula, the head of the child and youth care centre called "Thandanani" in Honeydew, Roodepoort, see Annexure "E".

<sup>345</sup> See the discussion in section 7 4 3.

<sup>346</sup> Freundlich & Wright (2003) 109. The writers are of the view that continuing family connections when children are in care increases the likelihood of reunification.

- (b) prospects of reunification between the parent and the child upon addressing the grounds that mandated the removal of the child;
  - (c) the relations between the child and the parent;
  - (d) interaction between the child and foster parent to establish the change in the behaviour of the child after the child returned from his visit with the parents, siblings, or other persons with family ties with the child;
  - (e) how the child interact with children in his or her community;
  - (f) how the child has adjusted in school;
  - (g) whether the parent call the child or write to the child after the last visitation;
  - (h) how the child respond or react to letters or telephone calls from the parent; and
  - (i) whether the child is happy or content about his or her relationship with the parent.
- 2 If the contact between the child and the birth parent has increased steadily in frequency the designated social worker shall –
- (a) decide to consider unsupervised contacts between the child and the parent if the contact between the child and the parent where previously supervised;
  - (b) ensure that contact session change from a weekly contact to overnights and weekends to several consecutive days;
  - (c) ensure that the foster parent make a contribution to the reunification process by way of, amongst others, role modelling appropriate parenting skills to the birth parents during visits, at doctor's appointments and teacher meetings;
  - (d) ensure that the child is assisted through the process of grief and loss; and
  - (e) ensure that the child is given an opportunity to express his or her wishes concerning returning back into his or her family.”

I further recommend that South Africa must refer to the Children and Young Persons Act (New South Wales)<sup>347</sup> and the Pennsylvania guidelines, and amend section 157(1) of the Children's Act to incorporate section 157(2) in the Act for information with regard to the establishment of a reunification plan. The provision must read as follows:

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<sup>347</sup> S 83(b).

“157(2) If at any time during the preliminary inquiry, the designated social worker holds the opinion that there is a reasonable possibility for the child to be reunited with his or her family, the designated social worker must prepare a reunification plan and submit it to the children’s court for consideration.

3 The “reunification plan” must contain the following -

- (a) the description of the minimum outcome which, according to the discretion of the designated social worker must be achieved before it would be safe for the child to return to his or her parents;
- (b) details of the services to be provided by a designated social worker for the child or his or her parents to facilitate reunification;<sup>348</sup>
- (c) details of other services that the children’s court may request from other government departments or NGO agencies for the child or his or her parents to facilitate reunification;
- (d) the Department of Social Development or NGOs that is requested by the children’s court to provide services to the child or to his or her parents in order to facilitate reunification, must use its endeavours to provide those services;
- (e) statement regarding the period within which reunification should be actively pursued; and<sup>349</sup>
- (f) the day when the child will officially rejoin the family when the reasons for his or her removal are met.<sup>350</sup>

South Africa must also refer to, amongst others, California and New Jersey with regards to the implementation of the intensive family preservation services and promulgate regulations

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<sup>348</sup> See the proposed regulations to the Children’s Act for the designated social worker to facilitate reunification.

<sup>349</sup> Ss 84 and 85 of the Children and Young Persons Act (New South Wales). For instance, the designated social worker may target the holiday period when members of the family are likely to have gathered. Also when members of the community are present in order to assess whether the child is able to readjust in the community and whether the community is able to receive the child.

<sup>350</sup> See the discussion in See Bosman-Sadie & Corrie (2010) 179-180. See also the discussion in section 7 4 1.

to the Children's Act regarding the manner in which reunification services are to be implemented. The regulations will make a valuable contribution in filling the gap which exists in the South African Children's Act and other jurisdictions.<sup>351</sup> Thus, the regulations must read as follows:

- "1 The designated social worker shall facilitate the arrangements for the final visitation between the parent and the child.
- 2 The designated social worker shall use an assessment tool to meet the requirement for reunifying the child with the family and to prevent any re-entry into care. The social worker shall, at the "preparatory" stage –
  - (a) ensure that the child and the parent are at home during the preparatory stage in order to determine the child's progress upon reintegration, behaviour and needs;
  - (b) meet with the family within twenty four hours once the decision is taken regarding the reunification program;
  - (c) after the first visit, see the family as often as they need;
  - (d) ensure that the reunification services last no more than ninety days;
  - (e) ensure that services are provided for two to three times a week for one to four hours at a time;
  - (f) ensure that the services are provided in the home and that the monitoring process takes place also in the home; and
  - (g) ensure that official workers are available twenty four hours a day for emergency visits or calls.<sup>352</sup>
- 3 The designated social worker shall, at "intensive services" stage when the child is placed in the home –
  - (a) ensure that treatment services are provided to resolve the crisis that lead to the decision to place the child outside the home; and
  - (b) ensure that the family is taught the basic skills they need to stay together.<sup>353</sup>

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<sup>351</sup> See the discussion in section 7 4 3. Research revealed that little is documented on how reunification services are to be rolled out.

<sup>352</sup> Wells & Biegel (1992) *Oxford Journal* 23-24.

<sup>353</sup> Wells & Biegel (1992) *Oxford Journal* 24.

- 4 The designated social worker shall, at the “step down” stage when the intensive services are implemented –
- (a) ensure that the family is monitored for eighteen months after the child has returned home; and
  - (b) close the case concerning the child at the end of the monitoring period and cease his or her visits to the family.”

Apart from the provisions I have proposed for the right of the parent, the child and other role players to exercise their right to contact each other and the right to have access to information, there is still room to improve on the rights of children in care by incorporating a provision in the Children’s Act to give children access to court<sup>354</sup> when their rights are being infringed after removal into care. My view is inferred from the recently established international guidelines to the alternative care of children that:

“States should ensure that any child who has been placed in alternative care by a properly constituted court, tribunal or administrative or other competent body, as well as his or her parents or others with parental responsibility, are given the opportunity to make representations on the placement decision before a court, are informed of their rights to make such representations and are assisted in doing so.”<sup>355</sup>

Also that:

“States should ensure the right of any child who has been placed in temporary care to regular

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<sup>354</sup> A so-called “Complaints Channel”.

<sup>355</sup> Par 65 of the Promotional and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development (15 June 2009) *Guidelines for the Alternative Care of Children*, see A/HRC/11/L.13.

and thorough review – preferably at least every three months – of the appropriateness of his/her care and treatment, taking into account notably his/her personal development and any changing needs, development in his/her family environment, and the adequacy and necessity of the current placement in these lights. The review should be carried out by duly qualified authorised persons, and fully involve the child and all relevant persons in the child’s life.”<sup>356</sup>

Thus, I propose that a provision<sup>357</sup> be enacted to read as follows:

- “1 When in care, the child shall have access to court when his or her rights are being ignored after removal into care. The child shall access the court concerning -
- (a) access to information pertaining to –
    - (i) his or her parent or anyone with family ties with the child;
    - (ii) his or her life in foster care; or
    - (iii) his or her care proceedings.
  - (b) The right to maintain contact with the parent or anyone with family ties concerning the child.
  - (c) The right to make presentations concerning the review of the care placement before a court. The child must –
    - (i) be informed of his or her rights to make such representations and must be assisted in doing so; and
    - (ii) have the right to regular and thorough review of the care placement, regarding -
      - (aa) the appropriateness of his/her care and treatment;
      - (bb) his/her personal development and any changing needs;
      - (cc) development and improvement in his/her family environment; and
      - (dd) the appropriateness and necessity of the current placement.”

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<sup>356</sup> *Ibid*, par 66.

<sup>357</sup> For access to a so-called “Complaints Channel”.

# CHAPTER 8: PERMANENCY PLANNING UPON FAILURE OF FAMILY REINTEGRATION ATTEMPTS

## 8.1 Introduction

This chapter focuses on adoption as a permanency care option upon failure to reunite the child with his or her family. In the discussion, I reflect on the concept “permanency planning” as applied in South Africa, other foreign jurisdictions, and the United States of America in particular. I specifically discuss how some of the states in the United States implement concurrent planning as a two-way process which is meant to ensure that the child reunites with his or her family timeously or receives a permanent placement in the form of adoption.<sup>1</sup>

Since there is no provision for concurrent planning in the Children’s Act, I recommend that South Africa refer to the United States and promulgate regulations to the Children’s Act for

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<sup>1</sup> Public law 105-89, 42 U.S.C. s 675; California Welfare and Institution Code s 16501.1(f) (West 2004): accessed from [http://www.childwelfare.gov/systemwide.laws\\_policies/statutes/planning.cfm](http://www.childwelfare.gov/systemwide.laws_policies/statutes/planning.cfm) on 2009-05-12. According to Patton & Pellman “The Reality of Concurrent Planning: Juggling Multiple Family Plan Expediously without Sufficient Resources” 2005-06 *U C Davis Journal of Juvenile & Policy* 172, concurrent planning is an arrangement under which government must simultaneously provide parent assistance to reunify with their children and to prepare for permanent placement for dependent children should reunification fail.



concurrent planning;<sup>2</sup> specify the criteria used for terminating reunification services; and methods that will be used to ensure that timeous hearings are held and that the child is returned home on time.<sup>3</sup>

I also discuss the South African adoption policies and practice which impact both negatively and positively on adoption, with a focus on, amongst other topics, “customary adoption”,<sup>4</sup> “children who can be adopted”,<sup>5</sup> “persons who can adopt a child”,<sup>6</sup> “subsidised adoption”<sup>7</sup> and “post-adoption agreements”.<sup>8</sup>

In the discussion, I make specific recommendations that South Africa must refer to foreign jurisdictions and incorporate the following provisions in the Children’s Act:<sup>9</sup> for the recognition of customary adoptions in the Children’s Act and for the compulsory registration of all customary adoptions; for reporting customary and private adoptions which are taking place in communities; for subsidised adoption for adoptive parents who lack the financial means to maintain a child; for the right of the birth parent and the child to make an application for a post-adoption order and a provision for the procedure regarding the application of the

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<sup>2</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 65, see the proposed provision in section 8 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> See the discussion in section 8 3 1 1.

<sup>5</sup> See the discussion in section 8 3 2 1.

<sup>6</sup> See the discussion in section 8 3 2 2.

<sup>7</sup> See the discussion in section 8 3 2 2 3.

<sup>8</sup> See the discussion in section 8 3 2 6.

<sup>9</sup> See the proposed provision in section 8 5.

openness order; a provision to prohibit unfair discrimination against any child in need of permanent placement; a provision which promotes equality of treatment by adoption agencies of adoptive parents and prohibit unfair discrimination on the grounds that are stipulated in the Constitution; and a provision for public awareness campaigns regarding the rights of children whose parents are victimised by people with anti-gay attitudes.

I also propose that further provisions be enacted as follows:<sup>10</sup> a provision to include information of all children (irrespective of their special needs) who are available for adoption in the adoption register; a provision for the adoption of children with physical or mental health challenges and special needs; and a provision for training of adoption agencies for information and to sensitise agencies on issues of unfair discrimination and the development in our law on adoption and the Constitution which prohibits and unequal treatment of individuals.

## 8.2 Permanency care options

In this section I briefly reflect on the permanency care options that may be explored for a child who cannot be reunified with his or her family. In the discussion, I introduce adoption as the permanency care option which will be discussed in this chapter.

Different jurisdictions explore different permanent placement options. The most common

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<sup>10</sup> *Ibid.*

options that are considered appropriate for children in need of care and protection are either in adoption, subsidised adoption such as providing financial assistance to suitable adoptive parents to adopt,<sup>11</sup> or long-term foster care.<sup>12</sup> Louw<sup>13</sup> argues that other care options, such as placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver,<sup>14</sup> may be considered for a child, even though they may not provide permanency and stability to the same degree as adoption. This means that if the best interests of the child dictate that another care option, such as placing the child in foster care with relatives or non-relatives geographically close to the parent or care-giver,<sup>15</sup> should be considered, rather than adoption, such option must be explored. I discuss adoption as it, amongst others, provides stability in a family. It gives a child who cannot be returned to his or her family of birth another opportunity to exercise the right to family life. Tilbury and Osmond<sup>16</sup> are of the view that adoption gives the child a sense of permanence, as well as a personal and cultural identity.

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<sup>11</sup> Sloth-Nielsen & 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* 255; Louw (2003) *De Jure* 271. See the discussion in section 8 3 2 2 2 3.

<sup>12</sup> SALRC *The Review of the Child Care Act* (1998) section 7 2 9.

<sup>13</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 151.

<sup>14</sup> S 157(1)(b)(iii) of the Children’s Act. See the discussion in section 8 2 1.

<sup>15</sup> Reg 61(1)(b)(i) to the Children’s Act.

<sup>16</sup> “Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners” (2006) *Australian Social Work* 267.

### 8.2.1 *Permanency planning*

This section briefly introduces the concept “permanency planning” and what it entails for a child in need of care and protection. Amongst others, the provision for a permanency plan in the Children’s Act does not contain a clause on concurrent planning. The discussion will assist in identifying the appropriate jurisdiction that South Africa can use to improve our law.

The concept “permanency planning” denotes a lifetime arrangement, and its meaning fits well for a definition of adoption. This is so, given the planning process that is put in place for adoption to ensure that a child is in a permanent arrangement for the harmonious development and his or her well-being. “Permanency planning” was first initiated in the United States of America in the 1970s,<sup>17</sup> and became an effective measure for preventing prolonged foster care and multiple moves of children from one family to another.<sup>18</sup> Permanency planning is a programme aimed at, amongst other options, returning foster children to their biological homes permanently or terminating the parental rights of foster parents for the adoption of the child.<sup>19</sup> In other cases, permanency planning is viewed as a programme which provides children with security in alternative care arrangements when it is not safe for them to remain in their parents’ care.<sup>20</sup> A permanency plan must specifically

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<sup>17</sup> According to Adamec & Pierce (2000) *AJO* 4.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Parkinson (2000) *IJLP&F* 148.

highlight the goal that needs to be achieved when the child is in care.<sup>21</sup> It is therefore important to adhere to the information that is in the plan, including time frames, in order to create security in the life of the child, as the child may feel insecure in situations where the execution of the plan is delayed.<sup>22</sup>

The United States of America has long-standing experience in permanency planning.<sup>23</sup> The Adoption and Safe Families Act<sup>24</sup> considered other forms of legal permanency placement for children in need of care, such as returning a child to the parent, adoption, placement with a willing relative, that is, kinship care,<sup>25</sup> or other planned permanent living arrangements.<sup>26</sup>

Maluccio<sup>27</sup> is of the view that a successful and ongoing permanency plan would involve collaboration between all role players. This collaboration is viewed as necessary to plan for permanent placement to implement programmes and activities that allow more children to grow up in homes and to ensure that children have continuity and stability in their lives.<sup>28</sup> Thus, social services need to use permanency planning programmes in order to ensure that

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<sup>21</sup> Maluccio *et al.* (1986) 12.

<sup>22</sup> *Ibid.*

<sup>23</sup> See the discussion in section 8 3 3.

<sup>24</sup> 1997 Title IV-E42 U.S.C 675(5)(B).

<sup>25</sup> This is a primary form of out-of-home care placement for children removed from their parents. This option is considered for its provision for reunification and continuity of family ties.

<sup>26</sup> Parkinson "Child Protection, Permanency Planning and Children's Right to Family Life" (2003) *IJLP&F* 160.

<sup>27</sup> Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008).

<sup>28</sup> *Ibid.*

children benefit from these programmes.

Given the different forms of permanent placement that can be explored for a child in need of care and protection, I am of the view that where it is not possible to return the child to the family, adoption must be considered as it provides the child with another opportunity to exercise family care and parental care, and also that such is irreversible.<sup>29</sup> This is so, even though continued contact between the birth parent and the child may be considered after the adoption of the child.<sup>30</sup>

### 8.2.2 *Permanency planning in terms of South African law*

In this section I provide a descriptive overview of the utilisation of “permanency planning” in South African law. The discussion reveals the inconsistencies that exist in the provisions of the Children’s Act. Some provisions prioritise reunification as a form of creating stability in the life of the child, whereas others prioritise placement of the child in a permanent care arrangement with non-relatives. The discussion also indicates that there is no concurrent planning in the Children’s Act. Thus, I also propose that lessons be drawn from foreign jurisdictions, such as the United States of America, to refine our law.

The concept of “permanency planning programmes” was welcomed in South Africa, because

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<sup>29</sup> Maluccio *et al.* (1986) 11; Parkinson (2003) *IJLP&F* 160.

<sup>30</sup> See s 234 of the Children’s Act; Louw (2003) *De Jure* 271-275. See the discussion section 8 3 2 6.

it intervened in arrangements where children remained in foster care for a long time.<sup>31</sup> For instance, in terms of the Children's Act, when "permanency planning" is considered in foster care the Act provides that:

"the purposes of foster care are to promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime".<sup>32</sup>

Thus, the Children's Act is clear about the fact that family reunification will be the first consideration, and a lifetime placement elsewhere the second. Thus, there is no consideration to allow both reunification and a lifetime placement elsewhere to run at the same time when permanency planning is explored.<sup>33</sup> This is an area that South Africa should refer to foreign jurisdictions for refinement to our law.<sup>34</sup> The Children's Act allows the designated social worker to complete a permanency plan "if recommended that the child be removed from care of parent or care-giver"<sup>35</sup> for such practical strategies between the parents and social worker. This means that a permanency plan is prepared as soon as it is recommended that a child be removed from the care of his or her parents.

According to the Children's Act, before the children's court makes an order for the removal of

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<sup>31</sup> Matthias (1997) 41.

<sup>32</sup> S 181(b).

<sup>33</sup> See the discussion on foreign jurisprudence in section 8 3 3.

<sup>34</sup> *Ibid.*

<sup>35</sup> Reg 55 to the Children's Act. See Annexure "M": form 38, par r.

the child from the care of the parents or care-giver, the court must consider a report<sup>36</sup> by a designated social worker regarding the conditions of the child's life, including a documented permanency plan taking into account the age and developmental needs of the child, which is aimed at achieving stability in the child's life and that contains prescribed particulars.<sup>37</sup> According to the Regulations of the Act,<sup>38</sup> a permanency plan must consider the following options, and take into account the fact that the first option is the most desirable and the last option the least desirable:

- “(i) if the child is to be removed from the care of his or her parent or care-giver, the possibility of placing the child in foster care with relatives or non-relatives as geographically close to the parent or care-giver as possible to encourage visiting by the parent or care-giver;
- (ii) the possibility of adoption of the child by relatives;
- (iii) the possibility of relative or relatives obtaining guardianship of the child;
- (iv) the possibility of adoption of the child by non-relatives, preferably of similar ethnic, cultural and religious backgrounds; or
- (v) the possibility of placing the child in permanent foster care with relatives or non-relatives or cluster foster care scheme.”

These provisions do not prioritise reunification of the child with his or her family of birth. Instead, they prioritise placement of the child with relatives and non-relatives.<sup>39</sup> Thus, there is a *lacuna* in the provisions in that although the Children's Act emphasises the importance of

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<sup>36</sup> A report contemplated in terms of s 155(2) of the Children's Act.

<sup>37</sup> S 157(1)(a)(iii).

<sup>38</sup> 61(2)(b).

<sup>39</sup> Reg 61(2)(b)(i) to the Children's Act.



reunification in some of its provisions, it missed an opportunity to prioritise, particularly in regulations 61(2)(b), the fact that when the child is removed from the care of his or her parents, he or she must be reunited with his or her parents once the reasons of the removal are met and rectified. Thus, I maintain the view that South Africa must explore the United States of America's concurrent planning model as it ensures that permanency planning and reunification services are pursued at the same time.<sup>40</sup> If the reunification of the child with his or her family seems unattainable, and the foster parents are unwilling or unable to adopt their foster child, adoption may be considered.<sup>41</sup> Therefore the child may be considered for adoption in the event that reunification is unsuccessful.<sup>42</sup>

Furthermore, for an adoption to be considered there must be suitable adoptive parents to adopt the child<sup>43</sup> and the adoption must be in the best interests of the child.<sup>44</sup> Adoption is the preferred permanency planning option, compared with foster care, because it is consistent with the notion of permanency planning, which is regarded as the ultimate aim where children are removed from the family environment.<sup>45</sup> As stipulated in the Regulations to the Children's Act, there is a most desirable and least desirable option that must be considered

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<sup>40</sup> See the discussion in section 8 3 3.

<sup>41</sup> S 181(b) of the Children's Act. See also Louw "Open Adoption: Panacea or Pandora's Box" (2003) *De Jure* 271.

<sup>42</sup> Reg 61(2)(b)(iv) to the Children's Act; Louw in Boezaart (ed.) *Child Law in South Africa* 142.

<sup>43</sup> *Ibid.*

<sup>44</sup> Heaton *The Meaning of the Concept the Best Interests of the Child as Applied in Adoption Applications in South African Law* (LLM Thesis 1998 UNISA) 94; Louw in Boezaart (ed.) *Child Law in South Africa* 151.

<sup>45</sup> Louw (2003) *De Jure* 271.

in a permanency plan. It is also conceded in the European jurisdiction, particularly in *Birmingham CC v S, R and A*<sup>46</sup> that:

“adoption is a last resort for any child. It is only to be considered when neither of the parents nor the wider family and friends can reasonably be considered as potential carers for the child. To deprive a significant member of the wider family of the information that the child exists who might otherwise be adopted, is a fundamental step that can be justified on cogent and compelling grounds”.

The Department of Social Development prepared the Draft National Policy Framework for Families, which introduced a developmental framework for service delivery to families.<sup>47</sup> In terms of the policy, the Ministry of Social Development committed itself to establish a comprehensive programme of family preservation services and included in this programme, amongst others, permanency planning services.<sup>48</sup> In terms of the Draft National Policy Framework for Families, permanency planning is pertinent where children and young people are encouraged to grow up in their families or have a time-limited plan, which may entail a life-long relationship in a family or community.<sup>49</sup> These principles are consistent with the principles contained in the Constitution<sup>50</sup> and the CRC.

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<sup>46</sup> (2006) EWHC 3065 par 75; Choudhry & Herring (2010) 324.

<sup>47</sup> April 2001: accessed from [www.socdev.gov.za/Documents/2001/April/fampol.doc](http://www.socdev.gov.za/Documents/2001/April/fampol.doc) on 2009-07-02.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> S 28(1)(b).

The Child Care Act did not have a special provision on permanency planning. The Regulations to this Act which were promulgated in 1998,<sup>51</sup> particularly regulation 31A, stated that a child in residential care had the right to his or her own personal plan and programme of care and development. This plan included reunification services, security, and lifelong relationships. According to the Regulations, an approved permanency plan would be reviewed every two months after implementation and thereafter at intervals of six months, as opposed to every two years.<sup>52</sup>

If the child was not adopted or placed in permanent foster care, attempts could be made to return the child to the care of his or her parent or care-giver.<sup>53</sup> The frequency at which the permanency plan was reviewed made it possible to identify any obstacles to family reunification at an early stage and the prospects for adoption.<sup>54</sup> Upon expiry of the two-year foster care period when the foster care order was not extended, the child could no longer be under the legal guardianship of his or her foster parent.<sup>55</sup> The foster parent could not get a foster care grant to care for the child and the child would be compelled to return home, even when home was not the suitable place for him or her. The Children's Act<sup>56</sup> defines a permanency plan as a document which is aimed at securing stability in the life of a child in the following way:

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<sup>51</sup> 416 in GG 31 March 1998 No 18770.

<sup>52</sup> *Ibid.*

<sup>53</sup> Reg 15 to the Child Care Act; Louw in Boezaart (ed.) *Child Law in South Africa* 142.

<sup>54</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 142-143.

<sup>55</sup> S 16(1); Matthias (1997) 43.

<sup>56</sup> S 157(1) of the Children's Act, as defined in s 1 of the Act.

- “(1) Before a children’s court makes an order in terms of section 156 for the removal of the child from the care of the child’s parents or care-giver, the court must-
- (a) obtain and consider a report by a designated social worker on the conditions of the child’s life, which must include-
- (i) an assessment of the developmental, therapeutic and other needs of the child;
  - (ii) details of family preservation services that have been considered or attempted; and
  - (iii) a documented permanency plan taking into account the child’s age and developmental needs aimed at achieving stability in the child’s life and containing the prescribed particulars; and
- (b) consider the best way of securing stability in the child’s life, including whether such stability could be secured by-
- (i) leaving the child in the care of the parent or care-giver under the supervision of a designated social worker, provided that the child’s safety and well-being must receive first priority;
  - (ii) placing the child in alternative care for a limited period to allow for the reunification of the child and the parent or care-giver with the assistance of a designated social worker;
  - (iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
  - (iv) making the child available for adoption; or
  - (v) issuing instructions as to the evaluation of progress made with the implementation of the permanency plan at specified intervals.”

Unlike regulation 61(2)(b)(i),<sup>57</sup> regulation 61(2)(a)(i) (above) prioritises the reunification of the child with his or her family. Thus, there are inconsistencies in some of the provisions of the Children’s Act. I propose that since the Children’s Act has, as its objective, the promotion of preservation and the strengthening of families,<sup>58</sup> this in the main refers to the reunification of children with their own families. Thus, reunification must be prioritised in all provisions of the

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<sup>57</sup> As discussed previously in this section.

<sup>58</sup> S 2(a).

Act. Where reunification efforts fail, placement of the child in permanent care with relatives must be explored. If there are no relatives to provide permanent placement, placement with non-relatives must be considered and an alternative option.

According to the Children's Act,<sup>59</sup> the children's court may, upon discovering that a child is in need of care, consider that a permanency plan be established. If the children's court makes an order for the removal of the child from the care of the parent or care-giver it must consider a report by a designated social worker regarding the conditions of the child's life which must be included in a permanency plan.<sup>60</sup> In compiling a permanency plan the designated social worker must take into account:

- “(i) the ideal that every child should be provided with the opportunity to grow up within his or her family where this is proved not to be in his or her best interest or no possible, to have a permanency plan which works towards life-long relationships in a family or community setting;
- (ii) the best way of securing stability in the child's life;
- (iii) the age of the child;
- (iv) the developmental stage of the child;
- (v) the child's therapeutic, educational, cultural, linguistic, developmental, socio-economical and spiritual needs, and
- (vi) the views of the child and the need for his or her participation in all decision-making processes.”<sup>61</sup>

The Children's Act furthermore provides that the children's court that issues an order for the

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<sup>59</sup> S 156.

<sup>60</sup> S 157(1)(i).

<sup>61</sup> Reg 61(2)(a) to the Children's Act.

removal of the child from his or her parents must consider the best way of securing stability in the child's life and whether such stability may be secured by issuing instructions regarding the evaluation of progress made with regard to the implementation of the permanency plan as per specified times.<sup>62</sup> The permanency plan may be evaluated within two months of its implementation, and again after six months, with a view to establishing whether the child may be returned to the care of his or her parent or care-giver.<sup>63</sup>

According to the Children's Act,<sup>64</sup> the goals of permanency planning are to promote adoption and to introduce children to "other" safe and nurturing relationships intended to last for a lifetime. However, there are no details in the Children's Act on how permanency planning is to be constructed and implemented. Instead, the Regulations to the Act have, in the National Norms and Standards for Child Protection, stipulated the characteristics of a permanency plan, what a permanency plan should comprise,<sup>65</sup> and the way in which a permanency plan may be evaluated at specific time intervals.<sup>66</sup> These details are important as they have to be considered when preparing the child for permanency placement.

According to the Regulations to the Children's Act,<sup>67</sup> a permanency plan must be designed by service providers with appropriate training, support and supervision to maximise the ability

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<sup>62</sup> S 157(1)(b)(v).

<sup>63</sup> Reg 61(2)(c) to the Children's Act.

<sup>64</sup> S 229; Louw in Boezaart (ed.) *Child Law in South Africa* 142.

<sup>65</sup> S 160(a).

<sup>66</sup> S 160(b).

<sup>67</sup> Reg (i)(1).

and capacity to develop the plans. The plan must clearly state the reasons why the child cannot remain with his or her family or be placed under court ordered supervision with a particular family.<sup>68</sup> Furthermore, the plan must specify what needs to be achieved in order to terminate court-ordered supervision and restore the child to the care of his or her family.

The services that will be offered, and the person who is offering such services, must be specified.<sup>69</sup> The plan must provide for genuine efforts to restore the child to his or her family while providing for other permanent solutions, such as adoption, foster care or independent living arrangements.<sup>70</sup> The assessment framework, assessment report and any other relevant information must be taken into account in the plan.<sup>71</sup> The permanency planning programme must be family-centred and focus on the strengths and capacities of family members.<sup>72</sup> It must be based on a multi-disciplinary and inter-sectoral approach,<sup>73</sup> be sensitive to the linguistic needs, and the religious and cultural values of the children and their families,<sup>74</sup> ensure that the child, his or her family and other relevant persons are involved,<sup>75</sup> provide sufficient and relevant information to the child and to the persons involved,<sup>76</sup> provide

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<sup>68</sup> Reg (i)(2).

<sup>69</sup> Reg (i)(3).

<sup>70</sup> Reg (i)(4).

<sup>71</sup> Reg (i)(5).

<sup>72</sup> Reg (i)(6).

<sup>73</sup> Reg (i)(7), see the discussion in section 7 3 1, and the interview with Nompula, the head of the child and youth care centre, Thandanani in Honeydew, Roodepoort held on 2011-04-21.

<sup>74</sup> Reg (i)(8).

<sup>75</sup> Reg (i)(9).

<sup>76</sup> Reg (i)(10).

assistance to facilitate any changes that may be introduced by the plan,<sup>77</sup> include a plan for preparing, supporting and monitoring such changes, and ensure that the plan complies with applicable policies and procedures.<sup>78</sup>

The permanency plan must encourage the child to express his or her emotions appropriately and be empowered to find effective and positive ways to express and manage emotions.<sup>79</sup> The plan must encourage positive interaction with service providers,<sup>80</sup> encourage the child to build and maintain appropriate relations with friends,<sup>81</sup> build relationships with service providers, family members and other significant persons in the child's life,<sup>82</sup> and ensure that the child receives support when relations break down so that they can cope with the impact of having contact, or not having contact, with family members and other important persons.<sup>83</sup> The plan must provide for adequate health care and education opportunities,<sup>84</sup> provide capacity and support that will ensure constructive and effective behaviour,<sup>85</sup> provide for measures that will prepare children for reintegration into their families and communities,<sup>86</sup> and provide measures that will enable the children to participate in drafting the plan and to

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<sup>77</sup> Reg (i)(11).

<sup>78</sup> Reg (i)(12).

<sup>79</sup> Reg (i)(13).

<sup>80</sup> Reg (i)(14).

<sup>81</sup> Reg (i)(15).

<sup>82</sup> Reg (i)(16).

<sup>83</sup> Reg (i)(17).

<sup>84</sup> Reg (i)(18).

<sup>85</sup> Reg (i)(19).

<sup>86</sup> Reg (i)(20).



understand any changes made to the plan which are in the best interests of the child.<sup>87</sup> The plan must be reviewed regularly<sup>88</sup> and must be clear on goals and regulations.<sup>89</sup>

Permanency planning may also be explored during the termination of a legal agreement that is entered into by a social worker with the biological parent for the reconstruction of the family.<sup>90</sup> According to Matthias,<sup>91</sup> at the end of the reconstruction period the social worker may assess the legal agreement for compliance and determine whether the parent has improved his or her situation in order to return the child to the family. The legal agreement may also enable the court to terminate parental rights over children in substitute care.<sup>92</sup> This situation may apply if the parents of children who are in substitute care, that are required to have regular contact with the children, breach the agreement by way of, for example, disappearing without a trace. The legal agreement may also serve as a guide regarding the type of permanent placement that may be considered for the child.

In practice, permanency planning is not properly implemented in South Africa. This is confirmed by earlier views regarding the fact that there is much case work that is not attended to due to a shortage of social workers. Thus, there is less review of care plans for

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<sup>87</sup> Reg (i)(21).

<sup>88</sup> Reg (i)(22).

<sup>89</sup> Reg (i)(23).

<sup>90</sup> Matthias (1997) 43.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

children in foster care, leading to children remaining in care for long periods.<sup>93</sup> Thus, cases are often not attended to timeously.

#### 8.2.2.1 *Permanency planning in terms of the South African “living” customary law*

The discussion in this section clearly points out the lack of legislation to recognise permanency planning conducted in terms of “living” customary law, and also the fact that customary adoptions are not registered. Thus, I propose that provisions be enacted in the Children’s Act for the recognition of customary (law) adoptions and its compulsory registration.<sup>94</sup>

In terms of “living”<sup>95</sup> customary law, there are no formalities attached to permanency planning; neither is permanency planning executed regarding a child in need of care. This also applies in situations where adoption is explored as a permanency option for a child in need of care. The practice is influenced by the patriarchal system, which subjects women and children to a system of customary tutelage, even with the repeal of the Black

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<sup>93</sup> In the *S S (A minor child)* case, par 1. Ms Lamani reported a matter to the Department of Social Development, Krugersdorp on the 8 November 2007. It appears to Ms Natanya, the social worker, that “because of the serious backlog in the case work of the social workers” the case was unattended until it was brought to her attention in February 2010. See par 1; see also the interview with Dube, a registered social worker and a registered counsellor in Pretoria, Gauteng province, held on the 2012-10-25, (see Annexure “H”), who confirmed the facts in the *S S (A minor child)* case regarding the backlog of cases.

<sup>94</sup> See the proposed provision in section 8 5.

<sup>95</sup> See the discussion in section 2 2 1 2 with regard to the definition of “living” customary law.

Administration Act.<sup>96</sup> In terms of “living” customary law and the male primogeniture rule,<sup>97</sup> there is inherent acceptance that women and children will be taken care of within the ambit of a family by husbands or male relatives. This means that any child who lives in the family, whether as a close or extended relative of the family, is regarded as a child of the family and will be taken care of by the male head without any planning formalities.

In terms of “living” customary law, the act of adoption or long-term foster care is formally and publicly celebrated when it takes place.<sup>98</sup> It is therefore not easy to conclude that there is permanency planning in “living” customary law. It is also difficult to establish what type of care arrangements are made for the child who is to be adopted or placed in long-term foster care prior to the formal and public celebration of the event.

There are no planning formalities observed, particularly in customary adoption or long-term foster care. Many African parents prefer informal care arrangements when it comes to adoption or long-term foster care. It is also difficult to find a formal permanency plan in terms of customary adoption due to the diversity of culture of the different tribes and ethnic groups that exist in South Africa. For instance, it is sometimes difficult to ascertain whether a

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<sup>96</sup> Women and children were discriminated against in s 23(3) and s 8(2) of Proclamation 142 of 1910. Property would devolve upon one male person who is determined according to a prescribed table of succession. The Act was repealed; see the discussion in section 1 1. See also Bekker & Coetzee *Seymour’s Customary Law in Southern Africa* (1982) 322.

<sup>97</sup> Maithufi “Children, Customary Law and the Constitution” (1999) *Obiter* 198. In terms of this rule, the oldest male descendant inherits the estate including the responsibility to care for the wife and children within the ambit of the family.

<sup>98</sup> See the discussion in section 8 3 3.

particular practice is common to a particular tribe or group of people living in the different provinces in South Africa. What may seem to be a Zulu practice or custom to Zulus living in Kwa-Zulu Natal may differ from a Zulu custom in Gauteng Province. Since South African culture differs from one tribe to another, and also from one province to another, permanency planning may not be common in terms of “living” customary law. It may therefore be concluded that an informal permanency plan is opted for as it is more convenient than a formal plan.

Section 228 of the Children’s Act indirectly disregards customary adoptions by stating that a child is adopted if a child is placed in the permanent care of a person in terms of a court order that has the effect as contemplated in section 242 of the Act.<sup>99</sup> Section 242 does not provide for customary adoptions but deals with an effect of an adoption that is ordered by the court in terms of the Children’s Act.

An incident wherein customary adoption was recognised by the court took place in the case of *Nobongile Sweetness Maneli v Zandile Garnet Maneli*.<sup>100</sup> In this case the court had to determine whether the adoptive father had the legal duty to maintain the minor child who was adopted in terms of Xhosa customary law. The court refused to declare the customary adoption invalid for failure to comply with all the statutory requirements of adoption which are stipulated in the Children’s Act.<sup>101</sup> The court ordered the Department of Home Affairs to

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<sup>99</sup> See the discussion later in section 8 4 2 7.

<sup>100</sup> Case No 14/3/2-234/05 (Unreported), South Gauteng High Court (Johannesburg).

<sup>101</sup> Par 31.

register the minor child as an adopted child of the applicant and the deceased husband in terms of the Birth and Death Registration Act.<sup>102</sup>

The *Nobongile* judgment motivates the proposal for the legalisation of customary adoptions for the protection and promotion of family life of children so adopted. This is so in that the court could have refused to regard the Xhosa customary adoption as valid for reasons that it did not comply with all the statutory requirements of adoption which are stipulated in the Children's Act. The *Nabongile* judgment does not mean that the courts will condone all customary adoptions and find them valid in terms of the Children's Act because, by their nature and practice, they are not covered in the Act. Thus, I propose that a provision be enacted in the Children's Act for the legal recognition of customary adoptions. I further propose that *all*<sup>103</sup> customary adoptions be registered in order to regulate the adoption system for the protection of children.<sup>104</sup> Such registration can be effected with the Director-General of the Department of Social Development who must liaise with the Department of Home Affairs for registration in terms of the Birth and Death Registration Act.<sup>105</sup>

### 8.2.3 *Permanency planning in terms of international law*

This section discusses the extent to which international law provides for adoption. This

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<sup>102</sup> Par 45.

<sup>103</sup> Own emphasis.

<sup>104</sup> See the proposed provision in section 8 5.

<sup>105</sup> *Ibid.*

discussion will assist us to gauge the level at which the Children's Act adheres to international standards, particularly the CRC. According to the Committee on the Rights of the Child,<sup>106</sup> when a permanency plan is considered for a child, it is important to ensure continuity in a child's upbringing. This is interpreted from the statement provided in the CRC that in the case of foster placement or adoption "... when considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's religious, cultural and linguistic background".<sup>107</sup> This means that there must be continuous contact with the parents, family and the wider community, including the continuous practice of religion, culture and language.<sup>108</sup>

The Committee noted that children feel better when they are in their own environment and that this needs to be taken into consideration when they are placed in out-of-home care.<sup>109</sup> It noted further that indigenous communities have a very close family system and that the child protection system should take into account both indigenous culture and values and the right of the child to indigenous identity.<sup>110</sup> The Committee's basic premise is that children should be kept in their own communities.<sup>111</sup> When there is a plan to place them out-of-home, such plan must consider continuity in their lives, which includes maintaining contact with their family and community.

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<sup>106</sup> Hodgkin & Newell (2008) 289.

<sup>107</sup> Art 20(3). See also the discussion in section 6 4 2.

<sup>108</sup> *Ibid.*

<sup>109</sup> Hodgkin & Newell (2008) 288.

<sup>110</sup> Hodgkin & Newell (2008) 289. See also the discussion in section 2 2 1 10 on communal families.

<sup>111</sup> *Ibid.*

The ACRWC has a provision similar to the CRC, which states that when considering alternative family care, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.<sup>112</sup> In terms of the European jurisdiction, in the case of *Re W and B; Re W (Care Plan)*,<sup>113</sup> the Court of Appeal used the Human Rights Act to address the general concerns relating to children who are the subject of a care order, including the purpose of a care plan and the right to respect for family life. Thorpe LJ argued that:

“the care judge should have a wider discretion to make an interim care order or to defer to make an interim care order where the care plan is inchoate or where there are uncertainties capable of resolution; essential milestones in the care plan should be collaboratively assessed and elevated to starred status”.<sup>114</sup>

Hale LJ was concerned as to what might be necessary to comply with Article 8 of the ECHR, particularly the right to respect for family life. Hale LJ highlighted that:

“a care order is a serious interference with the right to respect for family life, not only for the parents but also and more importantly of the child. It becomes more serious still if only minimal contact is permitted between them”.<sup>115</sup> “If the objective of a care plan is reunification, then the court should be able to ask to be informed if this does not take within the time scale envisaged in the plan; if the objective of a care plan is permanency outside the birth family, again the court should be able to ask to be informed if this has not happen

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<sup>112</sup> Arts 25(2)(a), 25(3). See the discussion in 6 2 and 6 4 2.

<sup>113</sup> (2001) EWCA Civ 757.

<sup>114</sup> Par 29-30.

<sup>115</sup> Par 52.

within a reasonable timescale”.<sup>116</sup>

Furthermore, the European jurisdiction emphasises that the care plan must be implemented and monitored to establish whether the activities outlined in the plan are carried out within reasonable timeframes.

The lesson that South Africa can draw from the above instruments is the fact that a permanency plan must not interfere with the development of the child with regards to the child’s culture, religion and language. Also, the plan must ensure that there is continuity in the life of the child, and that the child and his or her birth parents have contact with each other when the child is in care, even after the adoption of the child. However contact between the child and parents after adoption can only happen if the birth parents and the adoptive parents agree to such. I propose that amendments be made to the provisions of the Children’s Act to ensure that the parties who want to exercise their right to contact the child through a post-adoption agreement have their rights fully covered in the Act.

Also, the part of concurrent planning which focuses on returning the child to his or her family must ensure that there is continuity in the life of the child when he or she returns home. This can be done by way of, amongst others, keeping the child informed of any development in his or her family while the child is in care.

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<sup>116</sup> Par 80.



#### 8.2.4 Permanency planning in terms of foreign jurisdictions

This section discusses the improvements made in the United States of America in permanency planning and comparative lessons for South Africa. Amongst other recommendations, I propose that South Africa must refer to the United States and incorporate a provision in the Children's Act to the following extent: for concurrent planning, the criteria to be used for terminating reunification services, and methods that are used in ensuring that the child is returned home or placed permanently with a new family within the time frame set for concurrent planning.

The United States of America enacted legislation, which mandated permanency planning for all states.<sup>117</sup> The legislation provides lessons on how such a programme is implemented in practice, including its successes and challenges. A new Foster Care and Adoption Assistance Program was also created.<sup>118</sup> The legislation ensured that family life-centred child welfare practices in the United States started targeting social services to individual families to ensure that there is respect for the child's right to basic safety and permanency in a family.<sup>119</sup>

According to Maluccio *et al.*,<sup>120</sup> a permanency plan systematically arranges practical

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<sup>117</sup> Public law 96-272.

<sup>118</sup> Under Title IV-E of the Social Security Act. See also Maluccio *et al.* (1986) 21.

<sup>119</sup> Adamec & Pierce (2000) *AJO* 2-4.

<sup>120</sup> (1986) 11; s 157(1)(a). See the discussion in section 8 3 1.

strategies that are used in service agreements between social workers and parents or care-givers in decision-making procedures, frequent case reviews, case management, therapy, time frames and deadlines for goal-directed activities concerning children in care. However, in terms of implementation of a permanency plan, the United States of America's Adoption Assistance and Child Welfare Act<sup>121</sup> introduced concurrent planning which gives timeframes within which reunification efforts should have been achieved. If not, other lifetime relationships such as adoption would be considered. In practice, concurrent planning involves the establishment of a permanency case plan, which describes the services provided to assist reunification to a child who is in out-of-home care while at the same time, a back-up plan of adoption is being made for purposes of convenience in the event that reunification efforts fail.<sup>122</sup>

Child and family social workers developed a primary model of concurrent planning practice with several key components, including:<sup>123</sup> early assessment of a family's prognosis for reunification, an alternative permanent placement that is available, a concurrent plan for placement with care-givers willing to adopt the child in the event that reunification with the birth parents fails, full disclosure to the birth parents, frequent parental visits, and a focus on timely permanency with reunification as the first, but not the only, option.<sup>124</sup> Nevertheless,

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<sup>121</sup> Public law 96-272; see the discussion in section 8 3 3.

<sup>122</sup> Parkinson (2003) *IJLP&F* 154-155.

<sup>123</sup> School of Social Welfare Report *Essential Elements of Implementing a System of Concurrent Planning* (2006) 2: accessed from [www.abanet.org/child/welfare-1.pdf](http://www.abanet.org/child/welfare-1.pdf) on 2011-01-20.

<sup>124</sup> School of Social Welfare Report *Essential Elements of Implementing a System of Concurrent Planning* (2006) 2: accessed from [www.abanet.org/child/welfare-1.pdf](http://www.abanet.org/child/welfare-1.pdf) on 2011-01-20.

the priority of the United States' concurrent plan practice is to prevent the separation of children from their families. Hence other arrangements are made to provide support services to children in their own homes, and care plans are to be developed to enable children to reunite with their families.<sup>125</sup> If these efforts fail, active services are to be employed to enable the adoption of the child or the placement of the child in a permanent foster home.<sup>126</sup>

The preparation of a case plan must include the child who has reached an appropriate age to participate, and the parent or guardian of the child, except where there are compelling reasons to exclude them.<sup>127</sup> In other cases, the open participation of service providers, therapists, educators and other professionals with knowledge of the child and his or her family needs, may be considered if appropriate.<sup>128</sup> According to the Federal law,<sup>129</sup> the case plan must describe the details of the child's care while in placement and must include the following:

- A description of the type of home or institution in which the child is to be placed.
- A plan for ensuring that the child receives safe and proper care and that appropriate

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<sup>125</sup> Maluccio *et al.* (1986) 22. See Annexure "N" with regard to a sample of a "Court Order Permanency Plan is Return Home".

<sup>126</sup> *Ibid.* See Annexure "O" with regard to a sample of a "Court Order Permanency Plan is Adoption".

<sup>127</sup> 42 U.S.C.A. s 675(5)(B).

<sup>128</sup> *Ibid.*

<sup>129</sup> Title IV-E in 42 U.S.C.675(1). A written case plan is also required for every child receiving foster care and maintenance payments under Title IV-E in 42 U.S.C.671(16).

services are provided to the parents, child and foster parents:

- To address the child's needs while in foster care.
- To improve the health and education record of the child.
- Where appropriate, for a child who is 16 years and older, a description of programmes and services that will help the child prepare for independent living.
- If the permanency goal for the child is adoption, documentation of the steps being taken to find an adoptive family.

The Adoption and Safe Families Act imposes strict time limits on when attempts can be made to reunify the child with his or her family. The Act requires that a permanency hearing be held after 12 months in foster care before the judge determines the direction of the case plan; either towards reunification or adoption.<sup>130</sup> Once a child has been in care for 15 months out of the past 22 months, steps must be taken to terminate parental rights and to free the child for adoption, except where the child is placed with a relative or where there are compelling reasons why the termination of parental rights and adoption are not in the best interests of the child.

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<sup>130</sup> 42 U.S.C. s 675(5)(B); Adler "The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act 1997" (2001) *HJL* 1-36; Parkinson (2003) *IJLP&F* 155.

The Adoption and Safe Families Act provides shortened timelines for achieving permanency in foster care. Despite the timelines stipulated for the stay of the child in foster care, the Act provides that the status of each child in foster care must be reviewed every six months by either a court or through an administrative review.<sup>131</sup> The Adoption and Safe Families Act also provides for funding to ensure that reunification services are implemented within set time limits.<sup>132</sup>

The Adoption Assistance Act and the Adoption and Safe Families Act provide that to further the goal of maintaining family integrity, providing safe homes to children, and to promote permanent living for children who cannot return home, permanency hearings must be held within 12 months of the placement of children in foster care.<sup>133</sup> Thus, efforts to return the child to his or her family will not be made in three situations:

- 1 if the parent has subjected the child to “aggravated circumstances”;<sup>134</sup>
- 2 if the parent has committed murder<sup>135</sup> or voluntary manslaughter of another of their

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<sup>131</sup> Public Law 96-272, 42 U.S.C. s 671(a)(15)(E).

<sup>132</sup> See also California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 65.

<sup>133</sup> 42 U.S.C. s 675(5)(C). Previously, the hearings were held within 18 months of the placement of the child into foster care.

<sup>134</sup> According to U.S.C. s 671(a)(15)(D)(i), such circumstances include, but are not limited to torture, abandonment, chronic abuse and sexual abuse.

<sup>135</sup> See also California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 65.

children, or felony assault<sup>136</sup> that results in serious bodily harm of any of their children;

or

- 3 if the parent's rights to a sibling of the child have terminated.

Maluccio *et al.*<sup>137</sup> are of the view that permanency planning, as practised in the United States, results in improvements in the quality of care and services provided to children and their families, and is the goal of permanency for every child who is separated from his or her parents through reunification with the parents. In assessing whether a permanency plan was properly implemented, it would be crucial to assess whether a permanency plan hearing included the participation of the child, parents or guardian of the child, and any other person relevant to the proceedings. The deliberations at the hearing must reflect on the child's current placement and whether it is safe and appropriate for the needs of the child. The case plan must be appropriate in addressing the needs of the child and his or her family. The

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<sup>136</sup> *Ibid.*

<sup>137</sup> (1986) 22: The law seeks to promote permanency planning through a variety of approaches, including:

- (i) provision of pre-placement prevention services and post-placement supportive services to keep children in their own homes or reunite them within their families as soon as possible;
- (ii) requirements of case plans, periodic reviews, information systems, and other protections intended that children enter care only when necessary, are placed appropriately, and are moved onto permanent families in a timely fashion;
- (iii) redirecting federal funds away from inappropriate out of home placement and toward permanent alternatives such as adoption;
- (iv) establishment of adoption assistance programs, including federally funded subsidies for adoption of children with special needs, such as older children, children with disabilities and children of minority groups.

extent to which the case plan was complied with must also be assessed; including any developments made in addressing the conditions that lead the child to alternative care.<sup>138</sup>

### 8.3 Adoption in terms of South African law

This section briefly provides a descriptive view of adoption in South African law and improvements made thus far in the Children's Act. According to the Children's Act, a child is adopted if he or she has been placed in the permanent care of, amongst others, partners in a permanent domestic life-partnership,<sup>139</sup> same-sex partners,<sup>140</sup> single parents,<sup>141</sup> or persons sharing a common household.<sup>142</sup> Thus, the Children's Act is consistent in acknowledging the diverse families that provide family care to children in South Africa.<sup>143</sup>

Adoption is therefore a legal relationship between the child and adoptive parent(s).<sup>144</sup> A child who is adopted is treated in law as if born to the adoptive parents.<sup>145</sup> Although adoption offers more benefits than other care placement such as foster care and substitute care, it is

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<sup>138</sup> *Ibid.*

<sup>139</sup> See the discussion in section 8 4 2 2 1 1.

<sup>140</sup> See the discussion in section 8 4 2 2 1 2.

<sup>141</sup> See the discussion in section 8 4 2 2 1 3.

<sup>142</sup> See the discussion in section 8 4 2 2 1 4.

<sup>143</sup> See the discussion in section 2 2 1.

<sup>144</sup> S 242(1) of the Children's Act; Louw in Boezaart (ed.) *Child Law in South Africa* 133.

<sup>145</sup> Josling *Adoption of children* (1980) 143.

the least used.<sup>146</sup> Adoption has been seen as something that may break family ties between the child and his or her parents, family members or guardian.<sup>147</sup> With post-adoption agreements becoming more prevalent in recent years, ongoing contact between the adopted child and his or her birth parents is viewed as desirable and beneficial.<sup>148</sup>

### *8.3.1 Adoption – permanency planning upon failure of family reintegration attempts*

In this section I discuss the purpose of adoption in relation to a child who is in need of permanent placement where efforts to reunify the child with his or her family of birth are unsuccessful. The discussion is valuable in that it sets out a position that must be maintained for the promotion of the right of the child to family life, especially with regards to some of the negative findings in the practice of adoption.<sup>149</sup>

According to the Children’s Act, the purpose of adoption is to protect and nurture children by providing a safe and healthy environment with positive support.<sup>150</sup> Adoption is aimed at promoting the goals of permanency planning by connecting children to other safe and

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<sup>146</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 134; Mosikatsana & Loffell “Adoption” in Davel & Skelton (eds.) *Commentary on the Children’s Rights Act* (2011) 15-3.

<sup>147</sup> Kil Kelly (1999) 188-189.

<sup>148</sup> S 234 of the Children’s Act; *Re T Minors (Adopted Children: Contact)* (1995) 2 FLR 792. See the discussion in section 8 3 2 6.

<sup>149</sup> See the discussion later in this section.

<sup>150</sup> S 229(a).



nurturing family relationships intended to last a lifetime.<sup>151</sup> The benefits which a child derives from adoption are consonant with the constitutionally entrenched right to family care, parental care or appropriate alternative care<sup>152</sup> in that adoption secures stability, well-being and development in a child's life.<sup>153</sup> Bosman-Sadie and Corrie<sup>154</sup> are of the view that stability and security are essential building blocks that enable a child to grow up in the care of a responsible thriving adult. Adoption is the most cost-effective way of dealing with children whose parents cannot make the necessary provision for them.

In the case of *SW v F*<sup>155</sup> the court held that section 30 of the Interim Constitution,<sup>156</sup> dealing with the child's right to parental care, does not only refer to parental care by natural parents and that such a right is not a bar to an adoption order. The case of *SW v F* clearly demonstrates that courts support adoption. However, South African adoption procedures and practices, previously regulated by the Child Care Act, seemed inadequate to protect the rights of children placed in adoption.<sup>157</sup> Criticism includes the allegation that adoption was used to sell children to wealthy adoptive parents who cannot conceive.<sup>158</sup> Skweyiya J in *Du*

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<sup>151</sup> S 229(b).

<sup>152</sup> S 28(1)(b) of the Constitution.

<sup>153</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 133-134 and 151.

<sup>154</sup> (2010) 248.

<sup>155</sup> 1997 (1) SA 796 (O) 799B.

<sup>156</sup> The Interim Constitution was replaced by section 28(1)(b) of the Constitution. See also the discussion by Louw in Boezaart (ed.) *Child Law in South Africa* 134.

<sup>157</sup> S 17 of the Child Care Act.

<sup>158</sup> Mosikatsana "Adoption as Substitute Family Care" SALRC *The Review of the Child Care Act* (1998) 96.

*Toit v The Minister for Welfare and Population Development* stated that: “[a]doption is a valuable way of affording children the benefits of family life which might not otherwise be available to them”.<sup>159</sup> Louw<sup>160</sup> is of the view that the interests of any prospective adoptive parent are explicitly made subordinate to the best interests of the adoptive child, which gives effect to section 28(2) of the Constitution.

My position in this regard is that adoption must be a conducive arrangement which must serve the best interests of the child. This argument is captured in the discussion later in this chapter under the heading “Some adoption policies and practice which impact on adoption”. Amongst other arguments in favour of adoption, I argue that adoption may serve the best interests of a child who is abandoned, or whose parents or relatives cannot be traced.<sup>161</sup> On the other hand, I acknowledge that South Africa recognises the relationships of same-sex partners, including their right to adopt.<sup>162</sup>

However, we should not underestimate the violence that is perpetuated against same sex couples and the effect that it may have on children. Thus, I am of the view that the public must be sensitised concerning the adoption of children by same-sex partners to avoid

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<sup>159</sup> 2002 10 BCLR 1006 (CC) section 18; 2003 (2) SA 198 (CC).

<sup>160</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 134.

<sup>161</sup> Art 20(3) of the CRC; Hodgkin & Newell (2007) 280. See also the discussion in section 3 3 1 1.

<sup>162</sup> As evident in, amongst others, *National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs*: 37D-E, Satchwell: 1287D, *Du Plessis v Road Accident Fund*: 375B-C, Gory: 110C-D. See the discussion in section 2 2 1 6.

situations where children of adoptive parents are humiliated, or indirectly victimised, as a result of the physical and emotional abuse that is targeted at their parents by people with anti-gay attitudes.<sup>163</sup> Another permanent planning option in South Africa is inter-country adoption, which was not properly regulated during the operation of the Child Care Act<sup>164</sup> despite South Africa's signing the Hague Convention on Inter-country Adoption. The case of *Minister of Social Welfare and Population Development v Fitzpatrick*<sup>165</sup> challenged the constitutionality of section 18(4)(f) of the Child Care Act. After the *Fitzpatrick* case, inter-country adoptions were facilitated in accordance with chapter 4 of the Child Care Act. However, there are no guarantees that inter-country adoption will be in the best interests of

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<sup>163</sup> Recent reports in the *Mail & Guardian* (2011-05-06); and *City Press* (2011-06-26) revealed the constant attacks suffered by lesbians in townships by heterosexual men who want to "correct" the sexual orientation of lesbians. See the discussion in section 2.2.1.6.

<sup>164</sup> Although inter-country adoptions in South Africa were facilitated through s 18(4)(f) of the Child Care Act, these adoptions were unlawful as South Africa did not ratify the Hague Convention on Inter-country Adoption. This means that inter-country adoptions carried out during the enforcement of the Child Care Act lacked proper regulation and cooperation between state parties that facilitated inter-country adoptions.

<sup>165</sup> 2000 (7) BCLR 713 (CC), 2000 (3) SA 422 (CC). The applicants were denied the right to adopt because they were not South African citizens even though they qualified for naturalization. The fact that they did not apply for South African citizenship and that they intended to leave for the United States of America within a year or two placed them in an uncompromising position concerning the adoption of their child. The applicants made an application declaring s 18(4)(f) unconstitutional and invalid alternatively for joint custody and joint guardianship of the child. The High Court granted alternative relief and declared s 18(4)(f) unconstitutional and instructed Parliament to correct the defect within two years. Despite the decision of the High Court, the Constitutional Court refused to uphold the suspension of the finding of invalidity and called upon the Minister to distribute the judgment to its agencies to alert them to the possibility that problems may arise and to advise them on how such matters might be dealt with in terms of the existing legislation.

the child who is placed in a family that is different to his or her biological one in terms of race, language and culture. This contention is based on Mosikatsana's<sup>166</sup> argument that there is normally an inherent disruption of the child's upbringing, culture, religion, language, family and national ties in inter-country adoption. In this regard, I support inter-country adoptions only in circumstances where the child cannot find placement within his or her country of origin.

### *8.3.2 Some findings on adoption policies and practice and their impact on adoption*

This section discusses the findings regarding the criteria used to provide permanency placement to children in need of care and protection. Amongst others, I reflect on: children who are eligible for adoption; using age as the criteria for adoption; physical and mental health of a child; and racial, religious and cultural origin of the child. Furthermore, I discuss the criteria used by the adoption agencies in preferring certain adoptive applicants for adoption, such as married parents, partners in a permanent domestic life-partnership; same-sex partners; single parents; and persons sharing a common household. Thus, I provide recommendations in the discussion of the topics reflected above.

#### *8.3.2.1 Child who may be adopted*

In this section, I discuss the adoption practice and the child who is eligible for adoption. In

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<sup>166</sup> "Intercountry Adoptions: Is there a Need for New Provision in the Child Care Act?" (2000) *SAJHR* 46, 69.

the discussion, I point out that the Children's Act focuses more on the rights of adoptive parents to choose a child of their own liking, rather than the right of the child to find a permanent placement. I argue that the rights of the child, as entrenched in the Children's Act, are critical for the promotion of the right to family life.

I am of the view that adoption agencies must simply provide information of children who are available for adoption to prospective adoptive parents rather than present children of their own liking to adoptive parents. Since the Children's Act seems to focus more on the rights of the adoptive parents, I recommend that a provision be incorporated in chapter 15 of the Children's Act,<sup>167</sup> as an opening statement to guide adoption agencies to promote the right of the child to family care or parental care. Most significantly, the provision must prohibit unfair discrimination against any child in need of permanent placement on the grounds stipulated in the Constitution.<sup>168</sup>

The Children's Act provides that a child may be adopted if the adoption is in the best interests of the child.<sup>169</sup> Furthermore, the Act provides that the child must be adoptable.<sup>170</sup> The fact that the Act is explicit that the child must be adoptable<sup>171</sup> gives adoption agencies the discretion to decide which child may be adoptable and which one is not. It is unfortunate

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<sup>167</sup> Chapter 15 provides for "adoption".

<sup>168</sup> Ss 9(1) and (3); see the proposed provision in section 8 5.

<sup>169</sup> S 230(1)(a) of the Children's Act; Mosikatsana & Loffell "Adoption" in Davel & Skelton *Commentary on the Children's Act* (2011) 15-4.

<sup>170</sup> S 230(1)(b) of the Children's Act.

<sup>171</sup> *Ibid.*

that the right of adoptive parents to choose a child of their own liking through adoption agencies is still perpetuated in the Children's Act. This approach was used in the Child Care Act where the focus was more on the capacity of adoptive parents to adopt rather than the child who is in need of care and protection in the context of permanent placement.

The Children's Act requires the designated social worker to assess and determine if a child is adoptable.<sup>172</sup> Amongst others, the social worker is required to establish and determine: the child that is to be adopted is an "orphan" and has no parent or care-giver who is willing to adopt him or her;<sup>173</sup> the whereabouts of the parent or guardian of the child who cannot be traced;<sup>174</sup> that the child has been "abandoned";<sup>175</sup> that the child's parent or guardian has "abused" or "deliberately neglected" the child or has allowed the child to be "abused" or "deliberately neglected";<sup>176</sup> and that the child is in need of a permanent alternative placement.<sup>177</sup>

The key terms that are used in section 230(3) are "orphan", "abandon", "abuse and neglect" which are defined in chapter three of this study. The Children's Act has, in terms of section 230(3), limited its focus by listing a few<sup>178</sup> of the wide list of grounds which suggest that a

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<sup>172</sup> S 230(2); Louw in Boezaart (ed.) *Child Law in South Africa* 141.

<sup>173</sup> S 230(3)(a) of the Children's Act.

<sup>174</sup> S 230(3)(b) of the Children's Act.

<sup>175</sup> S 230(3)(c) of the Children's Act.

<sup>176</sup> S 230(3)(d) of the Children's Act.

<sup>177</sup> S 230(3)(e) of the Children's Act.

<sup>178</sup> S 230(3)(a)-(e).

child is in need of care and protection.<sup>179</sup> The focus on limited grounds, that is, “orphaned”,<sup>180</sup> “abandoned”,<sup>181</sup> “abused”<sup>182</sup> and neglected”<sup>183</sup> clearly indicates that these are the categories of children who are adoptable, and it excludes, amongst others, a child in a child-headed household, and children who are not necessarily listed in section 150(1) of the Children’s Act but who may be adopted by the spouses or life partners of their parents.<sup>184</sup>

The approach used by the Children’s Act in terms of children who are adoptable is similar to the Child Care Act, which focused on the rights of the adoptive applicants, rather than the child. The improvement made in the Children’s Act is the emphasis on the fact that any child who is in need of permanent placement in the form of adoption is adoptable if it is in the best interests of the child and if the requirements set out in the Act are complied with.<sup>185</sup>

#### 8.3.2.1.1 Age of the child

In this section, I discuss the importance that most adoption agencies would give to children of younger age as eligible for adoption rather than availing any child to the discretion of

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<sup>179</sup> S 150(1).

<sup>180</sup> See the discussion in section 3 3 1.

<sup>181</sup> *Ibid.*

<sup>182</sup> See the discussion in section 3 3 9.

<sup>183</sup> See the discussion in section 3 3 8.

<sup>184</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 142.

<sup>185</sup> S 230(1) provides that: “Any child may be adopted if: - (a) the adoption is in the best interests of the child; (b) the child is adoptable; and (c) the provisions of this chapter are complied with.” See also Louw in Boezaart (ed.) *Child Law in South Africa* 141.

adoptive applicants to choose. I argue further that a provision must be incorporated in chapter 15 of the Children's Act as an opening statement prohibiting discrimination against children available for adoption on the basis of age.<sup>186</sup>

The Child Care Act was silent about the age at which a child may be adopted. The Children's Act expressly directs that a very young child who has been "orphaned or abandoned" must be made available for adoption unless this is not in the best interests of the child.<sup>187</sup> Research has revealed that adoption agencies would match parents with younger children, and also that adoptive parents often prefer to adopt younger children<sup>188</sup> (from birth to eight month's age range) thus making older children, especially boys, hard to place.<sup>189</sup>

The preference for younger children is difficult to deal with. It may be difficult to challenge the right of an adoptive mother to choose a young child. On the same note, it may be difficult to promote the right of the child to family life<sup>190</sup> as the right may be overridden by the adoptive parent's right to have a child of his or her choice,<sup>191</sup> including the right of the adoptive parent to associate with a child of his or her own liking.<sup>192</sup> The practice of preferring a child of a

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<sup>186</sup> See the proposed provision in section 8 5.

<sup>187</sup> S 157.

<sup>188</sup> Parkinson (2003) *IJLP&F* 147; see also Patricelli *Deciding Adoption Preferences: Age Race/Ethnicity and Special Needs* (2006): accessed from [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=10050&cn=11](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=10050&cn=11) on 2009-05-15.

<sup>189</sup> *Ibid.*

<sup>190</sup> S 28(1)(b) of the Constitution.

<sup>191</sup> S 9(1)(2) and (3) of the Constitution.

<sup>192</sup> S 18 of the Constitution.



younger age for adoption is rife in South Africa, even with the enactment of the equality clause which prohibits unfair discrimination on the grounds of, amongst others, age.<sup>193</sup> The Constitution protects everyone; adoptive parents and children alike. However, it may be difficult to defend a claim on the part of a child who is denied the right to family care because of age. It is even more difficult to challenge the competing right of an adoptive parent to equality and the right to freely associate with the child of his or her own choice and the right of the child to family care.

Louw is of the view that in determining whether a child is in need of permanent alternative care requires a value judgment on the part of the social worker involved in the case.<sup>194</sup> However, I argue that such does not give the social worker the right to discriminate against children for adoption on the basis of age as such is contrary to the Constitution regarding the right to equal treatment and also the prohibition of unfair discrimination.<sup>195</sup> I am of the view that the grounds that are listed in the Constitution must be incorporated in the Children's Act in order to guide social workers to implement the section on adoption in line with such grounds.<sup>196</sup>

The Children's Act provides for the establishment of a Register of Adoptable Children and

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<sup>193</sup> S 9(3) of the Constitution.

<sup>194</sup> In Boezaart (ed.) *Child Law in South Africa* 141.

<sup>195</sup> Ss 9(1) and (3) of the Constitution. See the proposed provision in section 8 5.

<sup>196</sup> *Ibid.*

Prospective Adoptive Parents (RACAP).<sup>197</sup> The purpose of the Register is to keep a record of children who are adoptable and fit them with adoptive parents. For a child to be registered in the RACAP, he or she must be adoptable<sup>198</sup> and adoptive parents must have been screened by adoption social workers.<sup>199</sup> The prospective adoptive parent must be a permanent resident in order to register with the RACAP.<sup>200</sup> Unlike the Child Care Act,<sup>201</sup> the Children's Act<sup>202</sup> does not require an adoptive parent to be a South African citizen for him or her to register.<sup>203</sup> Furthermore, the Act is silent as to whether a foreigner can register with the RACAP as an adoptive parent. This implies that a foreigner cannot register in the RACAP.<sup>204</sup> The legislature may have excluded foreign prospective adoptive parents from registration because they are screened for suitability to adopt by the competent authorities in their own countries.<sup>205</sup>

The registration of prospective adoptive parents is valid for only three years<sup>206</sup> and may be

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<sup>197</sup> Hereinafter referred to as "RACAP". See s 232; Mosikatsana & Loffel in Davel & Skelton (eds.) *Commentary on the Children's Act* 15-10.

<sup>198</sup> S 232(1).

<sup>199</sup> S 232.

<sup>200</sup> S 232(4)(b).

<sup>201</sup> S 18(4)(f).

<sup>202</sup> S 232(2).

<sup>203</sup> This requirement was found unconstitutional in the *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

<sup>204</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 136.

<sup>205</sup> Art 5 of the Hague Convention on Inter-country Adoptions. See also the discussion in Louw *Acquisition of Parental Responsibilities and Rights* (LLD Thesis 2009 UP) 417.

<sup>206</sup> S 232(5)(a).

renewed.<sup>207</sup> Information contained in the RACAP can be accessed by the Director-General or designated officials of the Department of Social Development and child protection organisations accredited to provide adoption services.<sup>208</sup> Although the Children's Act is not clear as to how the RACAP will function, it is anticipated that it will facilitate the matching of adoptive children and prospective adoptive parents for both local and inter-country adoptions.<sup>209</sup>

I am of the view that caution must be taken when registering the names of prospective adoptive parents and children. Thus, the names of all children who are in need of permanent placement must be registered in the RACAP to enable prospective adoptive parents to choose the child of their own liking. Otherwise, if the system of matching children results in the unreasonable exclusion of other children on, amongst others, the basis of race, gender or religion, the RACAP system would discriminate against children in need of permanent placement. Thus, I propose that a provision must be enacted in the Children's Act for the listing of all children in need of placement in the RACAP. This will afford children an opportunity to be adopted, rather than leaving it to the discretion of the adoption social worker to match children with parents. Also, prospective adoptive parents will have an opportunity to make their own decision regarding the child to adopt.<sup>210</sup>

The Children's Act also requires any parent who wishes his or her child to be adopted by a

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<sup>207</sup> S 232(5)(b).

<sup>208</sup> S 232(6)(a)-(c).

<sup>209</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 137.

<sup>210</sup> See the proposed provision in section 8 5.

particular person to state the name of that person in his or her consent to the adoption of the child.<sup>211</sup> It may be rewarding for a child in need of care to be adopted by a person who is chosen by his or her biological parent. However, if the biological parent did not choose the prospective adoptive parents out of good will, that is, if he or she chooses the adoptive parent for reasons of wanting to have unreasonable contact or to monitor the development and well-being of the child without the consent of the adoptive parent, such may hamper the adoptive parent from having a sense of belonging and attachment to the child and may not be in the best interests of the child.

#### 8.3.2.1.2 Physical and mental health of a child

In the discussion of this section, I argue that in practice, the child is matched with the adoptive parent using the physical and mental state of the child. I am of the view that there are many adoptive parents who can provide permanent placement to children, regardless of the state of physical or health of the child. However, adoptive parents who adopt children who have physical or health challenges must be supported by the state. I propose that South Africa refer to foreign jurisdiction and incorporate a provision which will provide for same.<sup>212</sup>

The matching of the child with prospective adoptive parents takes place during permanency

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<sup>211</sup> S 233(3).

<sup>212</sup> See the discussion in section 8 4 5 on foreign jurisdictions, see also the proposed provision in section 8 5.

planning.<sup>213</sup> In practice, adoptive parents are given an opportunity to choose a child during the matching process. In most cases, “a perfect child” would be their choice; that is, a child in good health that probably has particular features. Adoption agencies would make great efforts to create a family for the prospective adoptive parent or a child similar to the biological one. It was explained in the case of *C v Commissioner of Child Welfare, Wynberg*,<sup>214</sup> that when the children’s court requests a social welfare organisation to investigate the suitability of adoptive parents, such investigation includes the background of the birth parents and the suitability of the child for adoption, which includes the fact that the child does not suffer from a mental disability. Excluding a child from adoption because of mental disability means that the interests of the child to find permanent placement are compromised.

The discussion on foreign jurisdictions will indicate that some countries are far ahead of South Africa with regards to the adoption of children, irrespective of their state of physical or mental health. Thus South Africa must refer to these jurisdictions and incorporate a provision in the Children’s Act to provide for the adoption of children with physical or mental challenges. I further recommend that a provision be enacted in the Children’s Act for the Department of Social Development to provide special assistance to such children; including medical assistance.

Although the circumstances differed from the above case, in the case of *Davy v Douglas*,<sup>215</sup>

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<sup>213</sup> Fogg-Davis *The Ethics of Transracial Adoption* (2002) 3.

<sup>214</sup> Par D.

<sup>215</sup> 1999 (1) SA 1044 (N).

the applicant who was also the natural father of the child, made an urgent evaluation by a clinical psychologist of his choice available to establish whether the child was at risk in the custody of the respondent. The court granted the application order as it was seen as entirely consonant with the interests of the child, despite the risk it carried of setting aside the adoption order. Given the consequences in the case of *Davy* above, the courts must not entertain applications, which, on the basis of their facts, such as the fact that the adoptive applicant resides far from the birth parents, are lodged against the best interests of the child. Some parents may approach the courts with vengeful hearts due to a bitter relationship with their partners and bar an adoption, which may not serve the interests of the child and thus prevent the child from receiving permanent family care.

Given the fact that the child in the *Davy* case was already adopted, it is worth noting that a sudden move from one family to a new one is likely to affect the child psychologically. However, this might be of a temporary nature. The courts should avoid applications with the potential to set aside a good permanency placement as it could cause major psychological problems in the life of a child.

#### 8.3.2.1.3 Race, religion and cultural origin of a child

This section discusses the importance of race, religion and cultural origin of a child. However, I point out that race, culture and language should not be used to deny a child an opportunity to grow up in a family. Thus, a provision should be enacted in the Children's Act

which clearly states that religion, language and cultural backgrounds of the child must *where possible*,<sup>216</sup> be considered when deciding on the adoption of the child.

An adoptive parent would most probably choose a child with the same racial, religious and cultural identities as him/herself.<sup>217</sup> Neither the repealed Child Care Act nor the Children's Act impose any strict conditions regarding religion or "religious matching" during an application for adoption. In terms of the Children's Act, the children's court must, when considering an application for adoption, take into account all appropriate factors, including the religious and cultural background of the child,<sup>218</sup> the parents of the child,<sup>219</sup> and the prospective adoptive parents.<sup>220</sup> The children's court may therefore make an adoption order if the adoption is in the best interests of the child.<sup>221</sup> However, in the Act there is no further information with regard to how the cultural and religious background of the child will be established and how it will be used to consider an adoption application.

The religious and cultural identity of the child is normally inferred from the child's natural parents. It would be difficult for an abandoned child (whose parents cannot be identified) to know his or her religious or cultural background. A child who does know his or her religious

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<sup>216</sup> See the proposed provision in section 8 5.

<sup>217</sup> See also Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD Thesis 2009 UNISA) 421. See the discussion in section 8 4 2 3.

<sup>218</sup> S 240(1)(a) of the Children's Act.

<sup>219</sup> S 240(1)(b) of the Children's Act.

<sup>220</sup> S 240(1)(c) of the Children's Act.

<sup>221</sup> S 240(2)(a) of the Children's Act.

background can only develop such interests and practice the religion, culture and language independently when older. According to the Children's Act,<sup>222</sup> it is important to assess the religion, culture and language of the adoptive parents and the child when considering an adoption application.

I am of the view that religion, culture and language of the child must be assessed where possible. I argue that an adopted infant may easily grow to appreciate a culture or religious persuasion of the adoptive parents. However, a child who is of an age and level of maturity to understand and appreciate the culture, religion and language of his or her origin, may not easily find a sense of belonging when brought up in a culture, religion and language that is not his or her own.

Thus, I agree with Zaal<sup>223</sup> that culture and language should not be used to deny a child an opportunity to grow up in a family.<sup>224</sup> I propose that South Africa must refer to the views of the SALRC<sup>225</sup> and practitioners who agree that the culture, language and religion of the child must *where possible*<sup>226</sup> be considered for the permanent placement of the child and

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<sup>222</sup> S 240(1)(a) of the Children's Act; *C v Commissioner of Child Welfare, Wynberg* 87E-88C. See the discussion in section 6 2.

<sup>223</sup> Zaal "Avoiding the Best Interests of the Child. Race-Matching and the Child Care Act 74 of 1983" (1994) *SAJHR* 372.

<sup>224</sup> See the discussion in section 6 2.

<sup>225</sup> *Discussion Paper on the Review of the Child Care Act and the Children's Bill Project* 110 (2002) 22-23; see the discussion in section 6 2.

<sup>226</sup> Own emphasis.



incorporate a provision to that effect in the Children's Act.<sup>227</sup>

### 8.3.2.2 *Persons who may adopt a child*

This section discusses the criteria used by adoption agencies to place a child with adoptive parents. In this section I reflect on persons who may adopt a child with regards the following criteria: marital status of the adoptive parent(s); partners in a permanent domestic life-partnership; same-sex partners; single parents; persons sharing a common household and forming a permanent family unit. In the discussion I recommend that South Africa must enact a provision which accommodates the adoption of children by kinship parents (as a priority)<sup>228</sup> as recognised in the previous chapters that kinship care is a type of foster care.<sup>229</sup>

#### 8.3.2.2.1 Marital status of the adoptive parent(s)

In this section I discuss the improvements made by the Children's Act in acknowledging more types of families that can provide permanent placement to children. The discussion in this section reveals some consistency regarding families that can adopt and the diverse families that are recognised in South Africa. However, there is a need to provide clarity around foster carers who are eligible to adopt. Thus, I propose that regulations be

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<sup>227</sup> See the proposed provision in section 8 5.

<sup>228</sup> I am of the view that if it is not possible for the child to be adopted by relatives as a priority, non-relatives must be considered.

<sup>229</sup> See the discussion later in this section; see also the discussion in section 6 3 3 and the proposed provision in section 6 5.

promulgated to the Children's Act to provide for same.

There has been extensive debate about different adoption practices, many of which are not legislated, that discriminate against adoptive parents. For instance, during the operation of the Child Care Act, the persons who qualified to adopt a child were defined as follows: a husband and his wife jointly;<sup>230</sup> a widower or widow or unmarried or divorced person;<sup>231</sup> a married person whose spouse is the parent of the child;<sup>232</sup> and the natural father of a child born out of wedlock.<sup>233</sup> The Children's Act has expanded the categories of persons who may adopt.<sup>234</sup> Persons jointly beyond the confines of marriage may now adopt a child.<sup>235</sup> The Children's Act provides that a child may be adopted jointly by a husband and his wife;<sup>236</sup> partners in a permanent domestic life-partnership;<sup>237</sup> persons sharing a common household and forming a permanent family unit;<sup>238</sup> by a widower, widow, divorced or unmarried person;<sup>239</sup> a married person whose spouse is the parent of the child or by a person whose domestic-life partner is the parent of the child;<sup>240</sup> a biological father of the child born out of

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<sup>230</sup> S 17(a).

<sup>231</sup> S 17(b).

<sup>232</sup> S 17(c).

<sup>233</sup> S 17(d).

<sup>234</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-7.

<sup>235</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 137.

<sup>236</sup> S 231(1)(a)(i). Husband and wife includes same sex partners in a civil union partnership, see the discussion in section 8 3 2 2 1 2.

<sup>237</sup> S 231(1)(a)(ii).

<sup>238</sup> S 231(1)(iii).

<sup>239</sup> S 231(1)(b).

<sup>240</sup> S 231(1)(c).

wedlock;<sup>241</sup> or by a foster parent of the child.<sup>242</sup> The discussion in the study reveals that there is no legal provision for kinship care as a foster care type in the Children's Act.<sup>243</sup> I am of the view that regulations must be promulgated to section 231(1)(e) of the Act to unpack the foster carers that are eligible to adopt a child. Such care must include grandparents, siblings, aunts and other kinship carers, as proposed in the previous chapter.<sup>244</sup>

#### **8.3.2.2.1.1 Permanent domestic life-partnerships**

The Children's Act allows partners in a permanent domestic life-partnership to adopt a child jointly.<sup>245</sup> At the same time, the Act gives a person whose domestic-life partner is the parent of the child the right to adopt.<sup>246</sup> The provision regarding the right of permanent domestic life-partners to adopt a child jointly<sup>247</sup> is new in South African child law. In the case of *Richard Gordon Volks NO*<sup>248</sup> heterosexual partners did not seem to have the right to adopt jointly because they chose not to formalise their relationship even when they had an opportunity to do so.<sup>249</sup> The legislature must have anticipated the fact that South African law would eventually recognise permanent domestic life-partnerships, as could be inferred from the

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<sup>241</sup> S 231(1)(d).

<sup>242</sup> S 231(1)(e).

<sup>243</sup> See the discussion in section 6 3 1.

<sup>244</sup> See the discussion in section 6 5 and the proposed provision in section 8 5.

<sup>245</sup> S 231(1)(a)(ii).

<sup>246</sup> S 231(1)(c).

<sup>247</sup> S 231(1)(a)(ii).

<sup>248</sup> See the discussion in section 2 2 1 5.

<sup>249</sup> Paras 54 and 58.

diverse approach taken in the Constitution of recognising different kinds of families.<sup>250</sup> At the same time, the Children’s Act aligned itself with the proposed legislation on permanent domestic life-partnerships to address the rights of parents and children in these relationships.<sup>251</sup>

#### **8.3.2.2.1.2 Same-sex partners**

This section acknowledges the development in law of the recognition of same-sex families. However, in the discussion I highlight some of the experiences that children of same-sex parents may be subjected to. I also bring forward some of the experiences that same-sex partners go through, because of anti-gay attitudes. I am of the view that the state must create strategies to mitigate the risk of having children who are cared for in same-sex families being victimised, directly or indirectly, as a result of the violence that is perpetuated against their parents.<sup>252</sup>

The Children’s Act does not expressly give same-sex partners or civil union partners the right to adopt a child jointly in the same way that it provides for partners in a permanent domestic life-partnership.<sup>253</sup> Instead, the Act provides that a husband and wife can adopt a child jointly.<sup>254</sup> By legal implication and as provided in the Civil Union Act, reference to “husband

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<sup>250</sup> S 15(3)(a). See also the discussion in section 2 2 2.

<sup>251</sup> Domestic Partnership Bill [B–2008]. See the discussion in section 2 2 1 5.

<sup>252</sup> See the proposed provision in section 8 5.

<sup>253</sup> S 231(1)(a)(ii) of the Children’s Act.

<sup>254</sup> S 231(1)(a)(i) of the Children’s Act.

and wife” is to be read as if it includes a civil union partner.<sup>255</sup> The repealed Child Care Act was strict in confining adoption to, amongst other persons, a husband and wife jointly<sup>256</sup> who are by implication married in terms of the Marriages Act.<sup>257</sup> The Child Care Act was challenged in the case of *Du Toit*<sup>258</sup> in that it excluded same sex partners from joint adoption.<sup>259</sup> The provision that was specifically challenged in *Du Toit*'s case was section 17(a) of the Child Care Act as it was seen to have the potential to exclude other persons from adoption by including the words “husband and wife jointly”. The court found in favour of the children in *Du Toit*'s case in that section 18 of the Child Care Act defeated the essence and social purpose of adoption, i.e. being to provide stability, commitment, affection and support important in the development of the child.<sup>260</sup>

Despite the recognition of same-sex unions by case law,<sup>261</sup> the Civil Union Act, and

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<sup>255</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 137.

<sup>256</sup> S 17(a).

<sup>257</sup> See the discussion in section 2 2 1 5.

<sup>258</sup> See the discussion in section 2 2 1 6.

<sup>259</sup> In terms of the facts of this judgment an application was brought before the court for orders declaring ss 17(a), 17(c) and 20(1) of the Child Care Act and s 1(2) of the Guardianship Act unconstitutional and therefore invalid. The orders sought before the court were to read into the challenged provisions specific wording to cure the constitutional complaints of applicants. For instance the words “or by the two members of a permanent same-sex life partnership jointly” were read into s 17(a) the word “jointly”. The same was true of other provisions which seem to favour heterosexual couples over same sex couples.

<sup>260</sup> 1014F-1015A.

<sup>261</sup> Amongst others, *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *Dawood* 2000 (3) SA 936 (CC); *National Coalition for Gays and Lesbian Equality v The Minister of Home Affairs* 2000 (2) SA 1 (CC) 37D-E; *Satchwell v The President of the Republic of South*

consequently the Children's Act in recognising the rights of civil union partners to adopt jointly, the challenges that are encountered by civil union partners in adoption and in the community, and spiritual and other gatherings, are far from over. Although not recorded, in practice adoption agencies have been reluctant to place children in the care of same-sex partners as they find it difficult to understand how same-sex partners operate and the possible negative effects that the relationship may have on the child.<sup>262</sup> Children of civil union partners are likely to suffer humiliation at school and in other social environments when they refer to their parents as "mum and mum", "dad and dad", "mum and aunt" or "dad and uncle" rather than "mum and dad", that is, male and female or "mum" or "dad" who are single parents.

As discussed earlier, certain groups in society do not accept same-sex relationships even though they have existed for a long time.<sup>263</sup> The situation has worsened recently, with homosexuals, lesbians in particular, suffering vicious attacks in the townships. A child who is adopted by same-sex partners may find it difficult to defend the nature of his or her family

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*Africa* 2001 (12) BCLR 1284 (T); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); 2003 (11) BCLR 1220 (SCA); *Minister of Home Affairs v Fourie* 2005 ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) par 60. See also the discussion in section 2 2 1 6.

<sup>262</sup> See the discussion in sections 2 2 1 6 and 8 4 1.

<sup>263</sup> See the discussion in section 8 4 1. See also International Bible Society "Genesis" 18:20-21 *Holy Bible* (1984) 9: homosexuality is viewed by some Christians as immoral and an abomination before God. See also the discussion in section 2 2 1 6.

and will forever suffer the stigma of not living in a “natural” family.<sup>264</sup> Thus, I propose that the Department of Social Development must conduct public awareness campaigns regarding the rights of children whose parents’ are victimised by people with anti-gay attitudes. This will serve as a way to change the mind-sets of people with anti-gay attitudes in order to protect children who are raised in same-sex families.<sup>265</sup>

#### **8.3.2.2.1.3 Single parents**

This section reflects on the improvements made in the Children’s Act, in particular, the recognition of unmarried fathers to adopt. I am of the view that a provision must be incorporated in the Children’s Act which promotes equality amongst adoptive parents and prohibits unfair discrimination on the grounds that are stipulated in the Constitution on the right to equality.<sup>266</sup>

The Children’s Act has created several provisions, which cater for the right of a biological father to adopt.<sup>267</sup> The Act provides that the biological father, who does not have guardianship of the child, has an opportunity to adopt the child once the child becomes available for adoption.<sup>268</sup> A biological father may elect to apply for the adoption of the child

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<sup>264</sup> *Ibid.*

<sup>265</sup> See the proposed provision in section 8 5.

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

<sup>267</sup> S 231(1)(d).

<sup>268</sup> S 233(7)(a).

within 30 days of receipt of a notice served by a sheriff calling on him to adopt the child.<sup>269</sup>

The position taken by the Children's Act with regard to unmarried fathers may be seen as an attempt to clear up the confusion previously created in the Child Care Act regarding the rights of unmarried fathers.

In terms of section 18(4)(d) of the Child Care Act, only the consent of the mother of the child was required. At the same time section 18(4)(d) provided that where an application for an adoption of the child of an unmarried father was made, the children's court should not grant the application unless it is satisfied that consent for the adoption was given by both the parents of the child. In the case of *Fraser v Children's Court, Pretoria North*<sup>270</sup> the court held that a strong argument could be advanced that the effect of section 18(4)(d) was to discriminate against the fathers of certain children on the basis of their gender or marital status.<sup>271</sup> This could have been so, given the fact that the unmarried mother of the child had an automatic right to grant or withhold her consent to the adoption of the child in terms of section 19 of the Child Care Act.<sup>272</sup> Section 18(4)(d) created conditions upon which the

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<sup>269</sup> S 233(7)(b).

<sup>270</sup> 1997 (2) SA 261 (CC).

<sup>271</sup> S 19A(2)(c). The Act required the consent of the natural father to the adoption of his own child if he had acknowledged in writing that he was the natural father or if he made his identity and whereabouts known in terms of s 19A of the Child Care Act. The consent of the natural father was mainly required for the purposes of giving the father an opportunity to give or withhold his consent or to advance reasons why his consent should not be dispensed with in terms of s 19 or to apply for the adoption of the child in terms of s 18.

<sup>272</sup> *Frazer v Children's Court, Pretoria North* paras 24 and 25, 273H-I and 274C-D and F; see also *W v S* (1) SA 475 (N) 496-497.



consent of the father for the adoption of the child could have been dispensed with. There were inconsistencies in section 17(d) and 18(4)(d) of the Child Care Act. Section 18(4)(d) did not permit the unmarried father to consent to the adoption of his child, whereas section 17(d) gave the father a qualified right to adopt the child. This inconsistency was remedied in the Child Care Amendment Act.<sup>273</sup>

The Children's Act has unequivocally recognised the rights of a biological father to adopt.<sup>274</sup> Nevertheless women are generally preferred as adoptive parents given their role as mothers and primary care-givers.<sup>275</sup> This practice is influenced by perceptions that women make good mothers.<sup>276</sup> There are cases that have disproved this perception, where men assume

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<sup>273</sup> S 19A(2)(c).

<sup>274</sup> S 232(1)(d). See also ss 1(1)(a)(i), (1)(1)(a)(ii), (1)(1)(a)(iii), (1)(1)(b), (1)(1)(c), (1)(1)(d), (1)(1)(e), (1)(1)(f), (1)(1)(g), (1)(1)(h), (1)(1)(i) of the Children's Act. See the discussion in section 2 4 2.

<sup>275</sup> *President of the Republic of South Africa v Hugo* par 38: the court considered the position of women in society in relation to their role as mothers and primary care-givers and noted how this role had been a source of social and economic inequality in employment and in society. See the discussion in section 2 2 1 7.

<sup>276</sup> See the discussion in section 2 2 1 7. Although it may not always be true, some people have had experiences that lead to the view that women make better parents as compared to men amongst others, Kanazawa *Why are mothers better parents than fathers Part I* (2008), said that "...from an evolutionary perspective...children are more important to their mothers than their fathers, and, as a result, their loss would be more devastating to their mothers than to their fathers. It is not difficult to find abundant evidence for the fact that mothers are more dedicated. For example, when married couples with children get divorced, chances are that the children stay with the mother, not with the father, especially if they are young": accessed from [www.psychologytoday.com/.../200806/why-are-mothers-better-parents-fathers-part-i](http://www.psychologytoday.com/.../200806/why-are-mothers-better-parents-fathers-part-i) on 2009-05-20.

the role of motherhood as competently as, or even better than, women.<sup>277</sup> The Children's Act appears to have recognised the right of the biological father to adopt in order to encourage the full sharing of parental rights and responsibilities between the biological parents of the child.<sup>278</sup> However, the best interests of the child principle<sup>279</sup> should be the overriding guide in the decision as to whether to give the child to the unmarried father.<sup>280</sup> Thus I propose that an opening statement be incorporated in section 230, chapter 15 of the Children's Act, for the right of the adoptive parents to be treated equally and not discriminated against unfairly with regards to the adoption of children.<sup>281</sup>

#### **8.3.2.2.1.4 Persons sharing a common household and forming a permanent family unit**

In this section I discuss the adoption of children by persons who share a common household. This type of adoption is prevalent in situations where children are cared for in communal families.<sup>282</sup> I recommend that South Africa enact a provision that recognises common

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<sup>277</sup> *Van der Linde v Van der Linde* 1996 1 All SA 43 (O).

<sup>278</sup> S 20 of the Children's Act. See the discussion in sections 2 4 1 and 2 4 2.

<sup>279</sup> *Girdwood* 708J; *Jackson* 307G-H: "The court will evaluate, weigh and balance the many considerations and competing factors which are relevant to the decision whether the proposed change to the children's circumstances is in their best interest". See also the discussion in section 2 4 2.

<sup>280</sup> See the discussion in section 2 4 2.

<sup>281</sup> See the proposed provision in section 8 5.

<sup>282</sup> See the discussion in section 2 2 1 10.

households as entities that are eligible to adopt children.<sup>283</sup>

The Children's Act introduced changes in the category of persons who can adopt a child jointly. The Act provides for adoption of a child by persons who share a common household and form a family unit.<sup>284</sup> This provision stands to benefit many children in need of permanent placement, particularly those in rural communities, HIV/Aids orphans, and children in child-headed households.<sup>285</sup> The SALRC<sup>286</sup> saw the need for joint adoption by two or more persons who share a common household; that is, by members of the extended family<sup>287</sup> or kinship<sup>288</sup> group in the interests of securing the future of the child and to cover situations where the single care-giver is himself or herself later affected by HIV/Aids.<sup>289</sup>

### 8.3.2.3 *Requirements for prospective adoptive parent to qualify for adoption*

This section discusses further requirements used in South African law to identify qualified adoptive parents for adoption. I specifically discuss the "means test" requirement which seem to exclude parents who are willing to provide care to children in need of care and protection from adopting. I recommend that South Africa incorporates a provision in the

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<sup>283</sup> See the proposed provision in section 8 5.

<sup>284</sup> S 231(1)(a)(iii). See also the discussion in section 2 2 1 10.

<sup>285</sup> See the discussion in section 3 3 1 1.

<sup>286</sup> *The Review of the Child Care Act (1998)* section 18 6 3.

<sup>287</sup> See the discussion in sections 2 2 1 9 and 2 2 1 1 0.

<sup>288</sup> See the discussion in section 6 4 1.

<sup>289</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 138.

Children's Act and regulations in the Social Assistance Act for subsidised adoption of an amount that is consistent with the age of the child for parents who lack the financial means to maintain the child.<sup>290</sup>

The adoptive parent must be fit and proper to be entrusted with full responsibilities and rights in respect of the child.<sup>291</sup> The concept "fit and proper" may be construed as physical readiness and appropriateness in terms of possessing the knowledge and skills to carry out child rearing responsibilities. It is the responsibility of the adoption social worker to assess and ascertain if the adoptive parent possesses these qualities and is willing and able to undertake full parental responsibilities and rights in respect of the child.<sup>292</sup>

During its operation, the Child Care Act required the adoption applicant to possess "adequate means"<sup>293</sup> to maintain the child. This provision had the potential to exclude suitable applicants from adopting because of their impoverished status. The Children's Act excluded the "adequate means" requirement completely.<sup>294</sup> The Act clearly states that "[a] person may not be disqualified from adopting a child by virtue of his or her financial status". Furthermore,

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<sup>290</sup> See the proposed provision for adoption allowance in section 8 5. See also the proposed provision for child-support grant in section 3 4; proposed provision for foster care grant in section 6 5.

<sup>291</sup> S 231(2)(a) of the Children's Act.

<sup>292</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 139.

<sup>293</sup> S 17 of the Child Care Act; Van Heerden *et al. Boberg's Law of Persons and the Family* (1999) 441.

<sup>294</sup> S 231(4); Louw in Davel & Skelton *Commentary on the Children's Act* 15-9. See also the discussion in section 6 4 1.

the Act provides that any person who adopts a child may apply for “means-tested social assistance” where relevant.<sup>295</sup>

The objective of the Children’s Act is to ensure that an adopted child receives the child support grant like any child who meets the threshold criteria. However, “means-tested social assistance”, in the form of the child support grant, is not sufficient to cater for the needs of a child whose adoptive parents are poverty stricken. I support Sloth-Nielsen and Van Heerden’s<sup>296</sup> proposal that a more constitutionally correct test that establishes the willingness of the adoptive parents to carry out their responsibilities should be applied. Furthermore, I submit that the state must provide financial assistance that is adequate to meet the needs of the adopted child; that is, what it costs to maintain the child every month.

According to Louw,<sup>297</sup> state foster parents receive a foster care grant. Louw<sup>298</sup> is of the view that state subsidised adoption would address a situation where foster parents are in danger of losing their foster child to adoption. I propose that South Africa refer to foreign jurisdictions and enact a provision for subsidised adoption for adoptive parents who lack the financial means to maintain a child.<sup>299</sup> Other states in the European jurisdiction, such as Northern Ireland, provide for an adoption allowance.<sup>300</sup> A prospective adoptive parent must

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<sup>295</sup> S 231(5). See the discussion in section 6 4 1.

<sup>296</sup> (1996) *SAJHR* 255. See the discussion in section 6 4 1.

<sup>297</sup> (2003) *De Jure* 271; Louw in Davel & Skelton *Commentary on the Children’s Act* 15-9.

<sup>298</sup> *Ibid.*

<sup>299</sup> See the discussion in section 8 4 5 and the proposed provision in section 8 5.

<sup>300</sup> O`Halloran (2003) 414. See the discussion in section 8 4 5.

be above the age of 18.<sup>301</sup>

The Children's Act<sup>302</sup> has embraced the principle of the Constitution<sup>303</sup> and international law,<sup>304</sup> which provide that any person below the age of 18 is a child. The Children's Act provides for the designation of an adult person to perform general supervisory functions in a child-headed household.<sup>305</sup> The supervising adult is meant to assist the child heading the household who is, according to the Children's Act, over the age of 16.<sup>306</sup>

The cultural background of the child is an issue of concern in the Children's Act and is mentioned twice in the Act.<sup>307</sup> The Children's Act requires the social worker facilitating the adoption of a child to take into account the cultural and community diversity of the adoptable child and the adoptive parents.<sup>308</sup> Ferreira<sup>309</sup> considers that the cultural background of the child may not only be in line with the best interests of the child but also that it is preferable

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<sup>301</sup> S 231(2)(c) of the Children's Act.

<sup>302</sup> S 1(1).

<sup>303</sup> S 28(3) of the Constitution of the Republic provides that: "In this section 'child' is a person under the age of 18 years."

<sup>304</sup> Amongst others, Art 1 of the CRC. According to the CRC a child means every human being below the age of 18 years save in circumstances where under the law applicable to the child, majority is attained earlier.

<sup>305</sup> S 137(2); s 46(1)(b); Matthias & Zaal in Boezaart (ed.) *Child Law in South Africa* 177. See the discussion in section 3 4 11.

<sup>306</sup> S 137(2). See the discussion in section 3 3 11.

<sup>307</sup> Ss 240(1)(a) and 231(3).

<sup>308</sup> S 231(3).

<sup>309</sup> (2009) 421.

compared with inter-country adoption.<sup>310</sup> However, Ferreira holds the view that culture is not decisive and should not be considered more important than any other relevant factor, such as race or religion, in adoption. I agree with Ferreira that the cultural and community background of both the adoptive parents and the child are important, but hold the view that it is of critical importance to a child who is at such a level of maturity to understand and embrace it. On the other hand, investigation into the cultural and community background of the child and prospective adoptive parents may be a long process. Given the fact that culture changes with lifestyle, and that trends change from one generation to another, investigations into such background may delay the adoption.

A family member of the child who prior to the adoption of the child has given notice to the clerk of the children's court that he or she is interested in adopting the child is, in terms of the Children's Act, given an opportunity to adopt the child when the child becomes available for adoption.<sup>311</sup> Furthermore, the Act provides the foster parent of the child with an opportunity to adopt the child when the child becomes available for adoption.<sup>312</sup> This provision acknowledges the contribution that may be made to the life of the child whilst in foster care placement. Thus, it gives foster parent an opportunity to adopt a child. This situation applies

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<sup>310</sup> Inter-country adoptions are enforced by the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions adopted on 29 May 1993 and entered into force on the 1 May 1995, "Hague Convention on Inter-country Adoptions": accessed from <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1999/99AC003.pdf> on 2008-06-20.

<sup>311</sup> S 233(8).

<sup>312</sup> S 233(7)(a).

in cases where foster care services were administered properly.<sup>313</sup> The Children's Act prohibits any person who is unsuitable to work with children from adopting a child.<sup>314</sup>

#### 8.3.2.4 *Consent to adoption*

The discussion in this section describes the improvements made in our law regarding persons who can consent to the adoption of the child. In particular, I allude to the fact that the consent of the unmarried father was never a requirement during the operation of the Child Care Act. Thus, the fact that the unmarried father is allowed to give consent to the adoption of his child confirms the improvement in our law of the recognition of the rights of unmarried fathers who are committed and have shown an interest in the lives of their children. Also that, by seeking his consent, the unmarried father is presented with a golden opportunity to adopt the child himself.

Consent is the pre-requisite for the adoption of the child and plays an important role in facilitating the adoption process.<sup>315</sup> Many problems were encountered under the Child Care Act relating to consent; particularly in the case of a child born out of wedlock. Some of the problems were alluded to by the SALRC.<sup>316</sup> The requirement of consent was applied

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<sup>313</sup> McCue & Balestracci *Foster Care Placement Improves Children's Functioning* (2001) 1255: accessed from [www.archpediatrics.com](http://www.archpediatrics.com) on 2009-05-26.

<sup>314</sup> S 233(6).

<sup>315</sup> S 233(1) of the Children's Act; Louw in Boezaart (ed.) *Child Law in South Africa* 145.

<sup>316</sup> S 18(4)(d). See *The Review of the Child Care Act* (1998) par 18 4 7; Louw in Boezaart (ed.) *Child Law in South Africa* 145.



discriminatorily with regard to unmarried and married fathers.<sup>317</sup> The consent of both parents was only required if the parents of the child were married. This provision dispensed with the consent of the unmarried father. The Children's Act makes the consent of both parents of the child a pre-requisite, irrespective of whether the parents of the child are married or not.<sup>318</sup>

The Act also stipulates the circumstances under which a parent's consent can be dispensed with<sup>319</sup> and situations in terms of which the guardian or the parent of the child must give consent to the adoption.<sup>320</sup> The consent of the parent or guardian may be dispensed with if the parent or guardian is not in the right state of mind to give consent.<sup>321</sup> On the other hand, consent may not be required where the parent has abandoned the child and the parent's whereabouts and identity cannot be traced.<sup>322</sup> The Children's Act<sup>323</sup> does not require consent from any person who has abused or neglected the child whilst the child was in his or her guardianship. Consent may also not be required from the parent who consistently failed to

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<sup>317</sup> S 18(4)(d) of the Child Care Act.

<sup>318</sup> S 233(1); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-11; Louw in Boezaart (ed.) *Child Law in South Africa* 146.

<sup>319</sup> In terms of s 1(1) of the Children's Act regarding category of persons who do not qualify as "parent". See also ss 233(1)(a), 233(1)(b), 236 and reg 99(3)(a) to the Children's Act. See the discussion in section 2 4 1.

<sup>320</sup> S 233(1)(c).

<sup>321</sup> S 236(1)(a); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-16; Bosman-Sadie & Corrie (2010) 258.

<sup>322</sup> S 236(1)(b); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-16; Bosman-Sadie & Corrie (2010) 258.

<sup>323</sup> S 236(1)(c); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-16; Bosman-Sadie & Corrie (2010) 258.

fulfil his or her parental responsibilities towards the child in the past 12 months.<sup>324</sup> Where the parent is ordered by the court to consent to the adoption of the child,<sup>325</sup> or where the parent has failed to respond to the notice of the proposed adoption within 30 days of service of the notice, the parent is not required to give consent.<sup>326</sup> The consent of the biological father can be dispensed with if the biological father is not married to the child's mother, was not married to the child's mother at the time of conception or at any time thereafter, or where the biological father has not acknowledged that he is the biological father of the child.<sup>327</sup>

An unmarried biological father must acknowledge in writing that he is the biological father of the child, either to the mother or the clerk of the children's court before the child reaches the age of six months.<sup>328</sup> The Act requires the biological father to have voluntarily paid maintenance in respect of the child for him to give consent.<sup>329</sup> The biological father must have paid damages in terms of customary law<sup>330</sup> or caused his particulars to be entered in the birth registration of the child in terms of the Births and Deaths Registration Act for him to

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<sup>324</sup> S 236(1)(d); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-16; Bosman-Sadie & Corrie (2010) 258.

<sup>325</sup> S 236(1)(e); Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-16; Bosman-Sadie & Corrie (2010) 258.

<sup>326</sup> S 236(1)(f).

<sup>327</sup> S 236(3)(a) of the Children's Act; Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-17.

<sup>328</sup> S 236(4)(a).

<sup>329</sup> S 236(4)(b).

<sup>330</sup> S 236(4)(c).

give consent to the adoption.<sup>331</sup> Thus, the biological father may give such consent if he has acknowledged paternity of the child and has taken some responsibility for the child.<sup>332</sup> Generally, unmarried fathers dispute paternity by way of, amongst others, refusing to allow the child to use their surname, refusing to maintain the child, or not making their whereabouts known.<sup>333</sup> If an unmarried father refuses to be acknowledged as the biological father, dispensing with his consent for the adoption of the child may assist in speeding up the adoption process, thus avoiding situations where adoption may unnecessarily be denied.

The Children's Act provides that the unmarried father acquires parental rights and responsibilities if he is or has been living in a permanent life partnership with the mother of the child at the time the child is born.<sup>334</sup> If the unmarried father is not living, or has never lived, with the mother in a permanent life partnership, in order to acquire automatic parental rights and responsibilities he must:<sup>335</sup>

- consent to being identified as the child's father or apply to be identified as such or he must pay damages in terms of customary law;
- contribute to, or must have attempted to contribute to, the child's upbringing for a reasonable period; and
- contribute to, or must have attempted to contribute to, the maintenance of the child for a

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<sup>331</sup> S 236(4)(d). See s 10(1)(b) or s 11(4) of Act 51 of 1992.

<sup>332</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 147.

<sup>333</sup> S 236(4).

<sup>334</sup> S 21(1).

<sup>335</sup> S 21(2).

reasonable period.

Thus, the consent of the biological father cannot be dispensed with in terms of the Children's Act if he proves that he has parental rights and responsibilities as indicated above. According to the Children's Act, a child who is 10 years old must consent to his or her own adoption.<sup>336</sup> The child who gives consent must have the level of maturity, age and be at a stage of development to understand the implications of such consent.<sup>337</sup> Thus, the Children's Act has embraced the CRC by acknowledging the fact that the child who can form his or her own views has to be given the opportunity to express same in matters affecting them.<sup>338</sup> However, the child's views must be ascertained as expressed in the CRC.<sup>339</sup>

#### 8.3.2.5 *Unreasonable withholding of consent*

In the case of *SW v F*<sup>340</sup> the court dispensed with the consent of the mother on the grounds that she made no effort to establish a bond between herself and the child even after being released from prison, and that the adoption was clearly in the best interests of the child.<sup>341</sup> In terms of the question of whether the refusal to consent to the adoption of the child could be

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<sup>336</sup> S 233(1)(c)(i) of the Children's Act.

<sup>337</sup> S 233(1)(c) (ii) of the Children's Act.

<sup>338</sup> Art 12(2). See also the discussion in section 5 5 2.

<sup>339</sup> See the discussion in section 8 4 4.

<sup>340</sup> 805C-D. See also Louw in Boezaart (ed.) *Child Law in South Africa* 149.

<sup>341</sup> In *S v S* 1956 (1) SA 66 (SR) 70B-C the court found that the refusal of the mother to consent to the adoption of her children by the father was not unreasonable.

considered unreasonable, the Children's Act considers the essential elements that are identified in *SW v F*; namely that the court must take into account all relevant factors, including the nature of the relationship between the child and the person withholding consent during the past two year;<sup>342</sup> and the prospects of a sound relationship developing between the child and the person withholding consent in determining whether the consent was unreasonably withheld.<sup>343</sup>

Mosikatsana and Loffell<sup>344</sup> argue that the aim of the provisions on unreasonably withholding consent is to prevent situations where consent to adoption is withheld against the interests and welfare of the child with a view to retaining control over the child or the other parent. The provision may also curb situations where the person withholding consent has no prospects of being able to meet the needs of the child within a reasonable period of time. The intention of this provision could also be to address situations where parents would withhold their consent to the adoption of the child with a view to settling scores with each other.<sup>345</sup>

#### 8.3.2.6 *Post-adoption agreements*

This section discusses the improvements made in the Children's Act with regard to the

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<sup>342</sup> S 241(2)(a).

<sup>343</sup> S 241(2)(b).

<sup>344</sup> In Davel & Skelton (eds.) *Commentary on the Children's Act* 15-21.

<sup>345</sup> See Louw in Boezaart (ed.) *Child Law in South Africa* 150.

provision of post-adoption agreements. However, further improvements must be made for a provision which allows the child and the birth parent to apply for a post-adoption order.<sup>346</sup> I am also of the view that if customary adoptions are recognised in the Children's Act, post-adoption agreements will enable the child and the birth parent to have frequent contact after adoption, rather than the practice where children are not even allowed to know their birth parents.

Post-adoption agreements are arrangements that allow some level of contact between the child's birth parents and another person who has established a relationship with the child, such as foster parents and the adoptive family.<sup>347</sup> Adoption is referred to as "closed" or "secret" if the birth parents or adoptive parents are not permitted to access each other and the biological origins of the child are kept secret from the child even when the child reaches adulthood.<sup>348</sup> "Open" adoption seems to be the norm unless it is specifically indicated that the best interests of the child require otherwise.<sup>349</sup> "Open" adoption agreements can range from informal, mutual understandings between the birth and adoptive families, to written and

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<sup>346</sup> See the discussion in section 8 4 5, see also the proposed provision in section 8 5.

<sup>347</sup> See Child Welfare Information Gateway Report *Post-adoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*: accessed from [www.childwelfare.gov/systemwide/laws\\_policies/statutes/cooperative.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm) on 2011-06-06.

<sup>348</sup> Louw (2003) *De Jure* 253-254.

<sup>349</sup> Louw (2003) *De Jure* 260.

formal contracts.<sup>350</sup>

Transracial and inter-country adoptions are mostly “open” adoptions.<sup>351</sup> South Africa has since the mid-1980s followed an “open” form of adoption.<sup>352</sup> This approach is also seen in the Children’s Act<sup>353</sup> in the provision for post-adoption agreements as follows:

“the parent or guardian of a child may, before an application for the adoption of a child is made in terms of section 239, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for-

- (a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and
- (b) the provision of information, including medical information, about the child, after the application for adoption is granted”.

Louw<sup>354</sup> notes that the post-adoption contact includes communication, exchange of information about the child between adoptive parents and birth parents, exchange of letters, photos and personal visits. Our courts have recognised the informal adoptions that are taking place in Black communities.<sup>355</sup> However, Louw<sup>356</sup> notes the fact that adoption in Black

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<sup>350</sup> See Child Welfare Information Gateway Report *Post-adoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*: accessed from [www.childwelfare.gov/systemwide/laws\\_policies/statutes/cooperative.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm) on 2011-06-06.

<sup>351</sup> Louw (2003) *De Jure* 274.

<sup>352</sup> Louw (2003) *De Jure* 254.

<sup>353</sup> S 234(1).

<sup>354</sup> (2003) *De Jure* 257.

<sup>355</sup> Louw (2003) *De Jure* 274.

communities is still an alien concept. There is a tremendous amount of secrecy surrounding adoption in Black communities.<sup>357</sup> The proponents of “closed” adoption argue that openness will prevent adoptive parents from bonding with their adopted child.<sup>358</sup>

Previously, contact between the adopted child and his or her birth parent or guardian was informal and was allowed if the adoptive parent agreed. Now the Children’s Act<sup>359</sup> allows the parent or guardian of the child to enter into a post-adoption agreement with prospective adoptive parents before the adoption application is made. According to Van Schalkwyk,<sup>360</sup> if the adoptive parents and the birth parents decide to enter into a post-adoption agreement, the agreement must be in existence before the application for the adoption of the child is made. When an application for adoption is made, information must be given; including medical information about the child.<sup>361</sup>

The Children’s Act is silent as to the discretion the adoptive parent has with regard to the frequency of contact between the adoptive child and the birth parents. This leads to an assumption that contact may be arranged by mutual agreement between the birth parents

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<sup>356</sup> *Ibid.*

<sup>357</sup> Louw (2003) *De Jure* 275.

<sup>358</sup> Louw (2003) *De Jure* 269.

<sup>359</sup> S 234.

<sup>360</sup> *General Principles of the Family Law* (2011) 40.

<sup>361</sup> S 234(1)(b).



and adoptive parents. According to the Children's Act,<sup>362</sup> the children's court will confirm the post-adoption agreement if it is in the best interests of the child. However, Ferreira<sup>363</sup> raises a critical point as to whether the refusal or willingness of a party to enter into a post-adoption agreement will be taken into account when a post-adoption application is being considered.

Ferreira further raises concern as to whether the refusal of the adoptive parent to enter into a post-adoption agreement would be viewed as against the best interests of the child. Ferreira<sup>364</sup> is concerned that an adoptive parent who is not willing to participate in a post-adoption agreement may feel pressured to participate. I am of the view that contact between the birth parent and the adopted child must be considered if it is in the best interests of the child. Thus, the adoptive parent must create conducive arrangements to ensure that contact takes place between the birth parent and the child.

Skelton *et al.*<sup>365</sup> provide an example of a case study that is suitable for a post-adoption agreement as a situation where:<sup>366</sup>

Susan who never married the father (Stuart) of her daughter, Caitlyn. Susan has been married to David for five years. David now wishes to adopt Caitlyn who is eleven years old who also agrees to this. Stuart who is the biological father is reluctant to allow his daughter to be adopted. When Caitlyn was born he agreed that she be registered in his surname.

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<sup>362</sup> S 234(4); Van Schalkwyk (2011) 40.

<sup>363</sup> (2009) 310.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Family Law in South Africa* (2010) 295-296.

<sup>366</sup> Paraphrased.

Stuart's relationship broke a year after Caitlyn's birth and since then he (Stuart) has been minimally involved with the upbringing of Caitlyn and has visited Caitlyn once a year only. The social worker counselling the parties discovers that Stuart recognises the role that David plays in Caitlyn's life and that he (David) does not want to be cut off from her upbringing. The social worker suggests that a post-adoption agreement be made that will allow information to be passed on regularly to Stuart about Caitlyn, allow Stuart to visit Caitlyn once a year when he comes to Johannesburg, and that Caitlyn's name be changed to David's surname, which is also her mother's surname. The parties agree and Caitlyn gives her consent to the agreement.

In the case of *Re J*,<sup>367</sup> the High Court argued that it will always order that contact be retained between the adopted child and his or her natural parents or other persons if, in the light of adoption, such contact was considered to be in the best interests of the child.<sup>368</sup> This is the case with the Children's Act. A post-adoption agreement can only be confirmed if it is in the best interests of the child.<sup>369</sup> However, a post-adoption agreement is enforced if it is made an order of court.<sup>370</sup> An adoption social worker is required to prepare a statement indicating that he or she has assisted the parties in preparing the post-adoption agreement and that he or she has provided the parties with proper counselling.<sup>371</sup> If the court is satisfied with the post-

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<sup>367</sup> 1981 (2) SA 330 (Z) 335H.

<sup>368</sup> Louw in Boezaart (ed.) *Child Law in South Africa* 150.

<sup>369</sup> S 234(4).

<sup>370</sup> S 234(6)(a) of the Children's Act.

<sup>371</sup> S 234(3) and reg 116(1)(4) to the Children's Act.

adoption agreement, the court can make the agreement an order of court.<sup>372</sup>

The agreement may only be terminated or amended by an order of court.<sup>373</sup> However, this does not necessarily mean that adoption is not final. The post-adoption agreement simply offers birth parents and the adopted child the right to maintain contact if it is envisaged that the contact will be in the best interests of the child. Thus, the Children's Act recognises the valuable ties that a child may have developed with the parent or guardian by virtue of his or her birth.<sup>374</sup>

However, the Children's Act is not clear as to who should lodge an application for a post-adoption agreement. The Act excludes the child from the agreement as it mentions the birth parent and the adoptive parent only. The Children's Act also omits to provide the procedure for the application for a post-adoption order. I propose that South Africa refer to foreign jurisdictions and incorporate a provision which allows birth parents and children to make an application for an "openness order".<sup>375</sup> The consent to enter into a post-adoption agreement

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<sup>372</sup> S 234(6)(a) of the Children's Act. In terms of s 234(6)(b) the post-adoption agreement may be amended or terminated by an order of court on application or in terms of s 234(6)(b)(i) by a party to the agreement and in terms of s 234(6)(b)(ii) by the adopted child.

<sup>373</sup> S 234(6)(b) of the Children's Act; Van Schalkwyk (2011) 40.

<sup>374</sup> SALRC *The Review of the Child Care Act* (1998) section 18 6 1.

<sup>375</sup> According to the submissions made by the Ontario Bar Association, Family Law Section, to the Standing Committee of Social Policy towards the "Building Families and Supporting Youth to be Successful Bill 2011" [Bill 179] in May 2011, which amends some provisions of the Child Family Services Act 1990 (Ontario), "openness order" is defined as "continued contact in the

may be sought from the child who is 10 years of age or older, or under the age of 10 but of such a level of maturity to understand the implications of the agreement.<sup>376</sup> I support this provision on the basis that it gives the child an opportunity to consent or refuse to have contact with a birth parent that could have abused or exploited him or her.<sup>377</sup> This aspect is not properly covered in the European jurisprudence.<sup>378</sup>

I am also of the view that the proposed provision for legal recognition and registration of all customary adoptions<sup>379</sup> will assist in keeping all adoptions within the protective screen of the formal child protection system for purposes of regulation. Thus, amongst others, the provision for an openness order would apply even in customary adoptions. There is furthermore a need to enact a provision to monitor and report customary and private adoptions that are taking place within communities.<sup>380</sup>

### 8.3.2.7 *Effect of an adoption order*

In this section I analyse section 242(1)(b) in relation to the improvement made in the

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face of terminated rights”: accessed from [www.oba.org/En/...en/.../11may16\\_Bill179-Building\\_Families.pdf](http://www.oba.org/En/...en/.../11may16_Bill179-Building_Families.pdf) on 2012-11-28. See further the discussion in section 8 4 5.

<sup>376</sup> S 234(2) and reg 116(1)(3) to the Children’s Act.

<sup>377</sup> S 234(2) of the Children’s Act.

<sup>378</sup> See the discussion in section 8 4 4.

<sup>379</sup> See the proposed provision in section 8 5.

<sup>380</sup> *Ibid.*

Children's Act for the recognition of post-adoption agreements and the proposal I have made for the birth parent and the adopted child to apply for an openness order.<sup>381</sup> I am of the view that, firstly, section 234 (post-adoption agreement) is not clear as to who must apply for the post-adoption order. Secondly, it excludes the adopted child from applying for an openness order.<sup>382</sup> Thus, section 242(1)(b) only acknowledges an open adoption agreement which is confirmed by the court, obviously in terms of section 234.

I propose that section 234 be amended to specifically include a provision for an adopted child and the parent to make an application for an adoption order. Thus, when section 242(1)(b) applies, it will automatically include the child.

Section 242 of the Children's Act provides that:

- “(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates-
- (a) all parental responsibilities and rights any person, including a parent, step parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;
  - (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
  - (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
  - (d) any previous order made in respect of the placement of the child
- (2) An adoption order –

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<sup>381</sup> *Ibid.*

<sup>382</sup> S 234(1).

- (a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;
  - (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;
  - (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
  - (d) does not affect any rights to property the child acquired before the adoption;
- (3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.”

Adoption confers full parental responsibilities and rights on the adoptive parent.<sup>383</sup> An adopted child assumes the surname of the adoptive parent.<sup>384</sup> However, some writers<sup>385</sup> argue that the latter is not compulsory. According to the Children’s Act, this means that an adopted child is for all purposes the child of the adoptive parent.<sup>386</sup> The Children’s Act is explicit that an adoption order terminates all parental responsibilities and rights which any person, parent, partner in a domestic life partnership or step-parent had in respect of the child before adoption, except in circumstances where the post-adoption agreement or an order of the court indicates otherwise.<sup>387</sup> An adoption order also terminates all claims of contact with the child by any family member and any previous order made with regard to the placement of the child unless provided otherwise in the post-adoption agreement or by the

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<sup>383</sup> S 242(2)(a).

<sup>384</sup> S 242(2)(b) of the Children’s Act.

<sup>385</sup> Bosman-Sadie & Corrie (2010) 262.

<sup>386</sup> S 242(1) of the Children’s Act; Louw in Boezaart (ed.) *Child Law in South Africa* 133.

<sup>387</sup> S 242(1)(a) of the Children’s Act.

court order.<sup>388</sup>

This provision simply refers to post-adoption contact as provided in section 234. Since section 242(1) confirms what is contained in section 234, it indirectly bars situations where the child may want to initiate contact with his or her family members.<sup>389</sup> I propose that section 234 be amended to allow the adopted child and his or her parents to lodge an application for an openness order, and also for a provision which stipulates the procedure for making such an order.<sup>390</sup>

#### 8.3.2.8 *Rescission of adoption order*

The Child Care Act allowed an adoptive applicant to make an order to rescind<sup>391</sup> an adoption order if the child was found to be sick, suffering from a congenital disorder, or mental illness at the time of making the adoption order and the prospective adoptive parent was unaware of it.<sup>392</sup> According to the Child Care Act, the adoption order could be rescinded within six months of the date upon which the adoption applicant became aware of the sickness of the child.<sup>393</sup> The Child Care had the potential to cause hurt and emotional instability in the lives of many children who were almost successful in finding a permanent placement, but whose

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<sup>388</sup> S 242(1)(b) of the Children's Act.

<sup>389</sup> *Ibid.*

<sup>390</sup> See the proposed provision in section 8 5.

<sup>391</sup> S 21(1).

<sup>392</sup> S 21(1)(b).

<sup>393</sup> *Ibid.*

adoption had to be rescinded within or before the expiry of a six months period.<sup>394</sup> Although the Child Care Act did not mention anything about rescinding an adoption order of a child who was found to be disabled, children with disabilities, congenital disorders, chronic illness and those infected by HIV/Aids may fall within the category of children whose adoption order may easily be rescinded.

The Children's Act permits the children's court or the High Court to rescind an adoption order upon application by the adopted child, parent, or any person who had the guardianship of the child or adoptive parent.<sup>395</sup> The application to rescind an adoption order may be lodged within a reasonable time or two years from the date on which the adoption order was issued.<sup>396</sup>

An argument can be made that rescinding an adoption order may affect the child who has already adjusted in the new family environment. Hence I consider the extension of the rescission period, that is, from six months (as was the case with the Child Care Act) to two years or reasonable time period as it applies in terms of the Children's Act to be harsh. This is likely to cause severe emotional and psychological harm to the child when he or she is removed from the adoptive family and returned to his or her previous care. If it is to serve the best interests of the child, amendments to Section 243 of the Children's Act need to be considered. This may be done by way of assessing whether granting the rescission order will

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<sup>394</sup> *Ibid.*

<sup>395</sup> S 242(1)(a)-(c) of the Children's Act.

<sup>396</sup> S 243(2) of the Children's Act.



be in the best interests of the child, rather than granting the adoptive parent two years or reasonable time to rescind such adoption order. Rescission has the effect of cancelling all the legal effects of adoption and returning the child to the situation he or she was in before the order was made.<sup>397</sup> Thus, rescission affects permanency planning.

#### 8.3.2.9 *Prohibition of payment in respect of adoptions*

This section discusses the prohibition in the Children's Act against payment in respect of adoption. I further argue in respect of customary adoptions that even though the customary adoption may be conducted openly, it is important to curb any potential that exists where money can be exchanged for customary adoption.

The Children's Act prohibits the payment of any gift, or receipt of any consideration in cash or in kind for adoption.<sup>398</sup> At the same time, the Act prohibits any person from inducing another person to give up a child for adoption.<sup>399</sup> According to the Act, the biological mother of the adopted child may receive compensation for reasonable medical expenses and any further treatment incurred in respect of the pregnancy, reasonable expenses incurred for

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<sup>397</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-24; Bosman-Sadie & Corrie (2010) 264.

<sup>398</sup> S 249(1)(a).

<sup>399</sup> S 249(1)(b) of the Children's Act.

counselling, and any other prescribed fees.<sup>400</sup>

The Children's Act is very specific about who may receive fees for adoption, such as the child protection organisation, professional persons, and any other prescribed persons that provide services in connection with the adoption.<sup>401</sup> Furthermore, the Act states that prescribed fees<sup>402</sup> may be provided to the biological mother of the child who is being adopted.<sup>403</sup> The biological mother may, in addition to compensation, receive a consideration for live-in expenses, and a consideration for any costs incurred at a pregnancy crisis centre and travelling expenses.<sup>404</sup> Even though the Act is clear as to what fees may be paid in relation to adoption, it is important for monitoring mechanisms to be put in place to curb situations of abuse.

The discussion on customary adoption indicates how customary adoption is carried out, particularly the fact that it is celebrated publicly.<sup>405</sup> However, I am concerned about the type of customary adoption where the unmarried father adopts the child of his prospective wife by paying an additional cow. Such customary adoption practice could possibly be open to abuse and against the provision that prohibits payment in respect of adoption. Given the fact that customary adoption practice differs from one ethnic group to another, I emphasise the

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<sup>400</sup> S 249(1)(a)(i)-(iii) of the Children's Act.

<sup>401</sup> S 249(2)(b)-(g) of the Children Act.

<sup>402</sup> S 249(2)(c)-(e).

<sup>403</sup> Reg 124(1) to the Children's Act.

<sup>404</sup> *Ibid.*

<sup>405</sup> See the discussion in sections 8 3 1 1 and 8 4 3.

proposal that all customary adoptions be registered and that all provisions stipulated in the Children's Act apply to them.<sup>406</sup> The latter is a step towards regulating customary adoption and ensuring that it is carried out within the confines of the Children's Act.

### 8.3.3 Adoption in terms of South African "living"<sup>407</sup> and official"<sup>408</sup> customary law

This section discusses adoption as conducted in terms of customary law, the formalities that are complied with, and the effect of adoption. Amongst others, I propose that adoptions that are conducted in terms of "living" and "official" customary law must be registered also find recognition in the Children's Act.<sup>409</sup> Thus, amongst others, a provision for post-adoption agreements, which is incorporated in the Children's Act, will apply to customary adoptions. This will encourage frequent contact between the child and his or her birth parents, and also the right of the child to know his or her birth parents. This will be a strong original contribution to the development of South African law on adoption.

Children given in customary adoption are regarded for all purposes as children of the adoptive parents. In terms of "living" customary law, adoption of a child is often carried out informally. Only in very rare cases are customary law formalities complied with to effect

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<sup>406</sup> See the proposed provision in section 8 5.

<sup>407</sup> See the discussion in section 2 2 1 2 for the definition of "living" customary law.

<sup>408</sup> "Official" customary law is a customary practice that is coded or written into law. See Bekker & Maithufi "The Dichotomy between 'Official Customary Law' and Non-Official Customary Law" (1992) *JJS* 47-60; Bennett *Customary Law in South Africa* (2004) 337-345.

<sup>409</sup> See the proposed provision in section 8 5.

adoption.<sup>410</sup> Both “living” and “official” customary law adoptions are recognised by the Constitution. The Constitution obliges the courts to apply customary law whenever applicable,<sup>411</sup> but subject to the Constitution as the supreme law of the country.<sup>412</sup> The “living”, or informal adoption, practice seems to be preferred by many Black adoptive parents, as it is more convenient compared with the “official” or formal one.<sup>413</sup> African culture is quite diverse given the different tribes and ethnic groups that exist in South Africa. It is sometimes difficult to establish parity in practice from similar tribes or ethnic groups.

South African customs differ from one tribe to another, and also from one province to the other, with the exception of customs, which are commonly observed within communities and

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<sup>410</sup> It is argued that any adoption that is facilitated, “private” or “underhand” has no legal force and no parent and child relationship is created on that basis. See Mosikatsana “Adoption” in Van Heerden *et al.* (eds.) *Boberg’s Law of Persons and the Family* (1999) 435-436; Schäfer “Protection of Children in terms of the Child Care Act 74 of 1983” Schäfer *Family Law Service* (1988) 65.

<sup>411</sup> S 211 of the Constitution.

<sup>412</sup> S 2 of the Constitution.

<sup>413</sup> Sabela “Inkedam” *Heyns Films* (1971). A true story which occurred in the Eastern Cape illustrates how a child is adopted informally. An 11 year-old boy (Zwelibanzi) was, upon the death of his parents taken to his aunt’s place for a visit. The adult members agreed amongst themselves that the boy would be raised by the aunt as her son. This arrangement was not negotiated with the boy. In the new home the young boy woke up every morning to wash the floors, feed the chickens, and prepare the fire and breakfast for the family. He attended the same school as his two cousins, a male and female and was always late for classes due to the heavy domestic load. He also washed dishes after dinner when his cousins were studying. Although in a stressful environment, he worked hard for his secondary level, scored high marks and received a bursary to study medicine. He prospered in that field and became a doctor.

which may or may not be coded.<sup>414</sup> For instance, in terms of the Xhosa tribe in Transkei, a sheep or goat may be slaughtered to publicise an adoption event. The solemnisation of adoption is celebrated to affirm the fact that the act of adoption has taken place and that the tribal customs have been complied with.<sup>415</sup> A well-known practice of adoption in Black culture is where the family of an unmarried woman who has a child requests the family of the new husband who is not the biological father of the child to pay an additional cow, together with the payment of *lobola* or *bogadi* (bride price)<sup>416</sup> to confirm the adoption of the child by the new husband. The additional cow binds the new husband, irrespective of whether he is the biological father of the child or not, to responsibility for the maintenance and upbringing of the child.<sup>417</sup>

Generally, African culture celebrates solemn occasions (including marriages) the same way as a formal customary adoption is concluded.<sup>418</sup> A goat is often slaughtered in a traditional

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<sup>414</sup> In the case of *Ryland v Edros* 1997 (2) SA 690 (C) 709 B-C. The court emphasised the fact that there is a duty placed on the judiciary to apply the values of equality and tolerance and diversity which “radiate...the concept of public policy and *boni mores*”.

<sup>415</sup> *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 773 (A).

<sup>416</sup> Bennett *Application of Customary Law in South Africa* (1985) 148. See the discussion in section 2 2 1 2 1.

<sup>417</sup> *Thibela v Minister van Wet and Orde* 1995 (3) SA 147 (T).

<sup>418</sup> Nonyana “Changing Land Arrangements: Marginalising the Role of Traditional Leaders” *Property Law Digest* (2001) 4. An interview held with Chief (Kgosi) Boleu Rammupudu and his councillors at Tafelkop, Groblersdal in the Northern Province on 14 December 2000. The bride and the groom would visit the chief’s palace (mosate) before the celebration to present the marriage formally to the chief or his or her representatives. The chief or his or her

ceremony where the chief, or his or her representative, is either present as a witness or receives a report concerning the occurrence of a particular event. In the case of *Metiso v Road Accident Fund*,<sup>419</sup> a claim was lodged wherein the court in its judgment relied on an affidavit made by Maithufi that the brother of the deceased had legally adopted the minor children by complying with the formalities generally practised in a traditional ceremony. Maithufi described a customary adoption as a process that is valid if due publicity is given to the process and where the adoptive parents and biological parents have reached agreement regarding the adoption.<sup>420</sup> In the case of *Metiso v Road Accident Fund*, it was found that the brother of the deceased had legally adopted the minor children by complying with the above formalities, despite a lack of publication, as prescribed by custom.<sup>421</sup>

Except for the formalities required by customary law, adoption in the African culture remains a private arrangement between the two families.<sup>422</sup> Sometimes payment is made to

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representatives would respond by welcoming the new bride or groom to his or her region if one partner to the marriage is an outsider and provide marital guidance to the couple.

<sup>419</sup> 2001 (3) SA 1142 (T); Louw (2003) *De Jure* 274.

<sup>420</sup> Maithufi “*Metiso v Road Accident Fund* Case No 44588/2000 (T) Adoption According to Customary Law – *Kewana v Santam Co Ltd* 1993 (4) SA 771 (Tk) Followed” (2001) *De Jure* 391-392; Ngidi “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart (ed.) *Child Law in South Africa* (2009) 229.

<sup>421</sup> 1150C-D.

<sup>422</sup> Ngidi in Boezaart (ed.) *Child Law in South Africa* 230; see also Sabela *Heyns Films* discussed in section 8 4 3.

compensate the natural parents for the rearing of the child.<sup>423</sup> The private nature of cultural adoptions did not compel adherence to the dictates of the Child Care Act<sup>424</sup> of making adoption an open procedure. The openness in statutory adoptions is solely to prevent trafficking in children. It remains questionable whether the payment of an additional cow with *lobola* for the unmarried woman and her child may not result in the sale of children of unmarried fathers as is already the case with *lobola*, which has become subject to commercial gain.<sup>425</sup>

Another form of customary adoption is when grandparents would, without any formalities, provide care to their grandchildren or children of close relatives when children are in need of care.<sup>426</sup> This informal arrangement often ensures that the relationship between the child and his or her parents is maintained by way of contact between the child and his or her parent's relatives.<sup>427</sup> Ferreira<sup>428</sup> applauds customary adoption for promoting continuous contact

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<sup>423</sup> SALRC *The Review of the Child Care Act* (1998) 68.

<sup>424</sup> S 18(1)(a) which provides that the adoption of a child shall be effected by an order of the children's court of the district in which the child concerned resides.

<sup>425</sup> Although the courts acknowledged the payment of damages for the mother of the child born out of wedlock as the duty of the father arising in customary law, the payment entitles the father of the child to maintain the child. The court held in amongst others, *Mpawu v Lebona* 1938 NAC (T & N) 121 and *Nkambula v Shongwe* 1942 NAC (T & N) 2, that this type of transaction was regarded in the past as trafficking in children.

<sup>426</sup> Bekker *A Sourcebook of African Customary Law in Southern Africa* (1991) 377-378; Ledderbogge *Transracial placements of children in the Durban metropolitan area* (Master's Thesis 1996 KZN) 22.

<sup>427</sup> *Ibid.*

<sup>428</sup> (2009) 311.

between the adopted child and his or her birth parents. However, a child who is adopted by relatives, particularly aunts and uncles, may suffer some kind of emotional abuse in the new home.<sup>429</sup> An adopted child who is of a mature age and development may feel estranged from the new family. Sometimes the new family members may make it difficult for the adopted child to adapt to the new family environment when they express bitterness towards what is now an overcrowded family. In other circumstances, an adopted child is treated like a domestic worker in the new home.<sup>430</sup> Hodgkin and Newell<sup>431</sup> concur that alternative care arrangements can be used to disguise hidden aspects of child abuse where children are kept as domestic workers in conditions that are similar to slavery.

Cultural considerations discourage many African families from availing themselves for adoption.<sup>432</sup> The stigma around infertility and the fact that the African culture has always looked down on barren women, make African adopters secretive about the children who they adopt using civil law.<sup>433</sup> This may include denying the adopted child an opportunity to know his or her birth parents or origin and concealing information about the birth parents from the

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<sup>429</sup> Sabela *Heyns Films* discussed earlier in section 8 4 3: a mature male or female would in these circumstances perform domestic chores and overwork himself or herself in order to be accepted in the new family.

<sup>430</sup> *Ibid.*

<sup>431</sup> (2007) 281. See the discussion in section 6 4 2.

<sup>432</sup> Maithufi “Children, Customary Law and the Constitution” (1999) *Obiter* 198.

<sup>433</sup> *Ibid.* The general expectations of an African community are that a woman should bear children. It is appreciated even more if the child is a male rather than a female due to the customary law and practice which requires a major male to succeed to his father’s status and that every male is likely to keep the family name.



adopted child.<sup>434</sup> I believe that adoption is often kept a secret in African communities because, amongst other reasons, the adopting parents want the child to appreciate their parental rights and responsibilities. Concealing information about the birth parents is also seen as a way of preventing the child from continuous longing for his or her birth parents, which may interrupt his or her enjoyment of family life in his or her adoptive home. Thus, the values of the CRC with regard to ensuring continuity in the life of the child may be viewed as completely detached from some African traditional and cultural practices.<sup>435</sup>

The decision to adopt a child is in terms of “living” customary law taken by the adult members of the family and excludes the child. Ferreira<sup>436</sup> regards this conduct as being adult-centred and not child-centred. In circumstances where the biological parents are still alive but are irresponsible in caring for the child, the decision to place the child in permanency planning may be taken without the consent of the parents.<sup>437</sup> In terms of the African culture, persons who may participate in decision-making processes, including adoption of a child, vary according to, amongst others, age, ability and gender.<sup>438</sup> Adult members may be allowed to participate in decision-making in order of seniority and their experience in child rearing. With regard to gender, men often participate more than women, given the fact that according to

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<sup>434</sup> Louw (2003) *De Jure* 275. See the discussion in section 8 4 2 6.

<sup>435</sup> Lloyd (2002) *AHLJ* 31; Hodgkin & Newell (2007) 296. See the discussion in section 8 4 4.

<sup>436</sup> (2009) 311.

<sup>437</sup> Ledderbogge (1996) 22.

<sup>438</sup> 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* 30.

culture, men are viewed as decision-makers rather than women.<sup>439</sup> On the other hand, the decision to adopt a child who is orphaned, or whose parents resided in the community, may be taken with the consent of the community or if the parents resided in a community that was under a traditional leader, and the consent of the traditional leader will be sought since he or she has power over the dealings of the community.<sup>440</sup>

#### 8.3.4 *Adoption in terms of international law*

The CRC also considers the fact that a child needs stability, continuity, and permanency of relationships to promote his or her growth and development.<sup>441</sup> According to the CRC,<sup>442</sup> adoption of the child must be:

“...permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary”.

Furthermore, the CRC states that inter-country adoption may be considered as an alternative means of care for the child “...if a child cannot be placed in a foster or adoptive family or

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<sup>439</sup> Nonyana “Redressing Gender Imbalances on Land in the Rural Sector” *Property Law Digest Property Law Digest* (2000) 7; Gutto (2001) 63.

<sup>440</sup> Nonyana *Property Law Digest* (2001) 4.

<sup>441</sup> The Preamble of the CRC.

<sup>442</sup> Art 21(a).

cannot in any suitable manner be cared for in the child's country of origin".<sup>443</sup> According to Hodgkin and Newell,<sup>444</sup> there is a presumption within the CRC that the best interests of the children can be served wherever possible by being with their parents. Parents have the primary responsibility for their children; thus adoption can only be considered if parents are unwilling or are by judicial process deemed incapable of discharging their responsibilities.<sup>445</sup>

The views of children regarding the adoption must be ascertained as required by Article 12 of the CRC.<sup>446</sup> However, extreme caution needs to be exercised when children express their views on adoptions without the presence of parents, relatives or a family member to avoid situations where uncontrollable children, street children, and refugee children who have run away from home, consent to their own adoptions. According to the Committee on the Rights of the Child, adopted children have the right to be told that they are adopted and to know the identity of their biological parents.<sup>447</sup> I am of the view that the emphasis of the CRC regarding the right of the adopted child to know the identity of his or her biological parents includes contact or communication about the birth parents' cultural history, which forms part of the information that may be exchanged after the adoption.

The Committee was, in its response to Latvia's report towards the CRC,<sup>448</sup> concerned about

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<sup>443</sup> Art 21(b).

<sup>444</sup> (2007) 296.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> CRC/C/LVA/CO/2 par 34.

the number of children who are adopted domestically, which is lower than the number of children adopted through inter-country adoption.<sup>449</sup> The Committee recommended that preference be given to domestic rather than inter-country adoptions in order to ensure continuity in the upbringing of the child.<sup>450</sup> In practice, priority should be given to the relatives of the child to adopt the child; where the latter is not possible, preference will be given to adoption within the community from which the child came and which practises the child's culture.<sup>451</sup> Furthermore, the Committee pointed out that the adoption of unaccompanied children or children who are separated from their parents can only be considered once it has been established that the child is available for adoption.<sup>452</sup> Efforts must be made to trace the family and reunite the child with his or her family members. If reunification is unsuccessful, the care-giver may consent freely to the adoption of the child.<sup>453</sup>

The ACRWC obliges state parties to ensure that a child who is parentless, or who is deprived of his or her family environment temporarily or permanently, or who in his or her best interests cannot be brought up or allowed to live in that environment, be provided with alternative family care, which may include, amongst others, placement in foster care or suitable institutions for the care of children.<sup>454</sup> Although the latter provision is open to different alternative care options, it limits itself to foster care and suitable institutions. This

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449 (2007) 298.

450 Art 20(3). See the discussion in section 6 2.

451 *Ibid.*

452 *Ibid.*

453 *Ibid.*

454 Art 25(2)(b).

may be construed to mean that adoption is not a priority for a child in need of care.<sup>455</sup>

With regard to the European jurisdiction, once family life is found to exist between the parent and his or her child, the placement of the child for adoption without the parent's consent or knowledge constitutes an interference with family life.<sup>456</sup> On the other hand, the court in *S da Silva Mouta v Portugal*<sup>457</sup> found that the discrimination against the applicant, who was refused to adopt on the basis of her homosexuality, cannot constitute a claim in Article 14 and Article 8 of the ECHR. The court held that states have a margin of discretion in determining which measures may appropriately be adopted under the ECHR in pursuing a legitimate aim.

On similar facts, the court in *Frettè v France*<sup>458</sup> found that the refusal to grant an application made by a homosexual parent to adopt was based on the best interests of the child who was to be adopted, and that it could not therefore amount to direct discrimination based on sexual orientation. In *Frettè*, the court considered that it is important that the interests of the child should prevail over those of the parents in relation to adoption, as it has previously been held

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<sup>455</sup> *Ibid.*

<sup>456</sup> *Keegan v Ireland* par 55. See the discussion later in this section.

<sup>457</sup> (1999) 31 EHRR 1069: in par 2, the applicant alleged that at every stage of her application for authorisation to adopt, she suffered discriminatory treatment based on her sexual orientation which interfered with her right to respect for her private life by relying on Art 8 and Art 14 (that her rights are secured without discrimination on, amongst other grounds, sex, race, gender, language and religion) of the ECHR. See the discussion in section 7 2 2.

<sup>458</sup> (2002) ECHR 156.

that “adoption means providing the child with a family, not a family with a child”<sup>459</sup> According to the reasoning of the courts in the above cases, same-sex adoptive parents were not refused the right to adopt on the basis of their sexual orientation. However, these cases depict the general reluctance to authorise adoption of children by homosexuals.

In order to curb similar situations occurring in South Africa and those taking place which are unreported, I am of the view that a provision must be incorporated in the Children’s Act which must impose a responsibility on the Department of Social Development to provide training to adoption agencies. The training must be in the form of information sharing sessions regarding the development in our law on adoption. The training will assist to sensitise adoption agencies regarding the need of children for permanent placement, and how the Children’s Act requires agents that implement the Act to apply the provisions of the Act in order to meet the need.<sup>460</sup>

In the case of *Keegan v Ireland*,<sup>461</sup> the court questioned whether the unmarried father, who was denied any role in the decision-making and judicial process concerning the adoption of his child, should be consulted in relation to the adoption.<sup>462</sup> The court held that the rights of the father, as entrenched in Article 6 and 8 of the ECHR, had been violated. The court noted that Irish law permitted the secret placement of the child for adoption without the consent of

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<sup>459</sup> Par 42.

<sup>460</sup> See the proposed provision in section 8 5.

<sup>461</sup> 342.

<sup>462</sup> 165.

the father, and that the child had bonded with proposed adopters leading to the making of the adoption order, which amounted to an interference with the right to respect for family life.<sup>463</sup> This means that family life between the natural parent and the adopted child can in principle also be intact after the adoption of the child.<sup>464</sup>

However, this does not mean that every father has the right to be involved in the adoption proceedings of his or her child. According to *Re H Re G (A Child) (Adoption Disclosure)*,<sup>465</sup> the father must first establish that he has a family life with the child. However, the right of the father to family life is not absolute. Hedley J referred to compelling reasons which justify that the father should not be involved in the adoption proceedings.<sup>466</sup> The compelling reasons that are referred to by Hedley J include reasons which suggest that if the father is involved, the child or the mother's life will be at risk.<sup>467</sup> Likewise, in *X v France*<sup>468</sup> the ECtHR stated that:

“although the right to adopt does not as such appear amongst the rights guaranteed by the Convention, the relationship between an adoption parent and his adopted child is in principle of the same nature as the family relationship protected by art 8”.

In support of the right of the child and the birth parent to have contact with each other after

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<sup>463</sup> 362 par 51.

<sup>464</sup> See the discussion on post-adoption agreements in section 8 4 2 6.

<sup>465</sup> (2001) 1 FCR 726.

<sup>466</sup> *Re C (Adoption: Disclosure to Father)* (2005) EWHC 933.

<sup>467</sup> *Re H Re G (A Child) (Adoption Disclosure)* (2001) 1 FCR 726; Choudry & Herring (2010) 324.

<sup>468</sup> (1983) 5 EHRR 302.

adoption, Lowe and Douglas<sup>469</sup> point out that the valuable ties could create a family life that is comparable to that protected under Article 8 of the ECHR. The authors are aware of the fact that an adopted child and probably his family members, especially siblings and grandparents could claim a breach of their right in Article 8 because of the severance of the legal ties with the whole family as a result of the adoption.<sup>470</sup>

Thus, in the case of *Emonet v Switzerland*<sup>471</sup> the court considered that the severing of the parental tie between Isabelle Emonet and her father by her adoptive parent had breached the right to respect for private and family life between Isabelle and her father under Article 8 of the ECHR.

An important aspect of the ECHR's intervention in relation to adoption has been to emphasise the right of anyone with Article 8 rights in respect of the child to be involved in proceedings relating to adoption. Van der Linde<sup>472</sup> refers to *H v United Kingdom*<sup>473</sup> where it was argued that:

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<sup>469</sup> *Bromley's Family Law* (2007) 821.

<sup>470</sup> Lowe & Douglas (2007) 821.

<sup>471</sup> 13 December 2007 (Appl no 39051/03).

<sup>472</sup> (2001) 76-77.

<sup>473</sup> (1988) 10 EHRR 95 par 68. See further cases on adoption by the ECtHR, such as, *Wagner and J.M.W.L v Luxemburg* Applic no 21949/03, 25 January 2007; *Chepelev v Rusland* Applic no 58077/00 26 July 2007; *Kearns v Frankrijk* Applic no 35991/04, 10 January 2008; *Moretti et Benedetti v Italy* Applic no 16318/07, 27 April 2010; *Gas et Dubois v Frankrijk* Applic no 25951/07, 15 March 2012.



“The proceedings in question related not only to the applicant’s access to A but also the latter’s adoption. Their outcome was thus decisive for the future relations between mother and child, in that they could - and did - lead to the total dissolution of their natural ties.”

According to the European jurisdiction, if an adoption is supported with a contact order, that is, that contact between the child and birth family is appropriate, such contact would be desirable. In *R and H v UK*,<sup>474</sup> the Health and Social Services Trust was looking for a prospective adopter for a child belonging to a mother who had a long history of alcohol problems. The Trust argued that it would be in the best interests of the child if the prospective adopters would ensure continued contact between the child and the parent.<sup>475</sup> Potential adopters who were found by the Trust were opposed to contact with the birth parents. The ECtHR found that the interests of the child comprise two considerations. On the one hand, it dictates that the child’s ties with its family must be maintained, except in cases where the family was proved particularly unfit.<sup>476</sup> On the other hand, it is clearly also in the child’s interests to ensure its sound development in a sound environment and the parents of the child cannot be entitled under Article 8 to maintain family ties if such would harm the child’s health and development.<sup>477</sup>

However, according to Choudhry and Herring,<sup>478</sup> the courts have been reluctant to make an order requiring contact between the child and birth parents. Furthermore, if the adopters do

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<sup>474</sup> (2011) ECHR 844.

<sup>475</sup> Par 70.

<sup>476</sup> Par 73.

<sup>477</sup> *Ibid.*

<sup>478</sup> (2010) 334.

not want the child to have contact with the birth family, the court in *Re T (Adoption: Contact)*<sup>479</sup> found that it would be wrong to force them to do so. The court in *Down Lisburn Health and Social Services Trust v H*<sup>480</sup> held that forcing contact against the wishes of the adopter is unlikely to benefit the child in the long run.

Only in a few cases has the court granted leave of contact against the wishes of the adopters. This is evident in the case of *Re T Minors (Adopted Children: Contact)*<sup>481</sup> where the adopters had failed to provide an annual report to the adopted children's adult half-sister. In this case the court held that there was no interference with the private and family life of the adoptive parents. In *Re P (Children) (Adoption: Parental Consent)*<sup>482</sup> the court held that it was of fundamental importance that two siblings keep contact. What we learn from the European jurisdiction is that adoption terminates all responsibilities between the parent and the child. However, this does not mean that their family life within the meaning of Article 8 of the ECHR is also terminated. Post-adoption agreements may be useful in this regard since they formalise contact between the child and his or her birth parent and the family.

The Department of Health and Social Services in Northern Ireland has the power to make payment of adoption allowances.<sup>483</sup> The Adoption Allowance Regulations require an

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<sup>479</sup> (1995) 2 FLR 251.

<sup>480</sup> (2006) UKHL 36.

<sup>481</sup> (1995) 2 FLR 792.

<sup>482</sup> (2008) 2 FCR 185; Choudhry & Herring (2010) 335.

<sup>483</sup> Reg 12(1)(f) of the Adoption Allowance Regulations (N.I.) 1996 to the Adoption (N.I.) Order 1987.

adoption agency “to provide such advice and assistance to the prospective adopter as the agency considers necessary”.<sup>484</sup> According to the Regulation, there are circumstances under which an adoption agency may pay adoption allowances; that is in, amongst other circumstances, where the adoption agency is satisfied that the child has established a strong relationship with the adopter before the adoption is made.<sup>485</sup> It must also be desirable that the child be placed with the same adopter where his or her siblings are placed.<sup>486</sup> Also, where at the time of adoption it became clear that the child was at high risk of developing an illness or disability, and as a result he or she will require more care and greater expenditure at a later date, an adoption allowance may be granted.<sup>487</sup>

Furthermore, the Adoption Allowance Regulations determine the amount of the allowance,<sup>488</sup> the procedure that is to be followed in determining whether an allowance may be paid,<sup>489</sup> and supplies information about allowances to adopters,<sup>490</sup> and the responsibilities of the adoption agencies in reviewing<sup>491</sup> and terminating the allowances.<sup>492</sup> Thus, an adoption allowance may be paid if an adoption agency makes arrangements to apply for the allowance,<sup>493</sup> has

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<sup>484</sup> O`Halloran (2003) 414. See the discussion in section 8 4 5.

<sup>485</sup> Reg 2(a) to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>486</sup> Reg 2(b) to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>487</sup> Reg 2(e) to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>488</sup> Reg 3 to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>489</sup> Reg 4 to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>490</sup> Reg 5 to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>491</sup> Reg 6 to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>492</sup> Reg 7 to the Adoption (N.I) Order; O`Halloran (2003) 414.

<sup>493</sup> Reg 2(a) to the Adoption (N.I) Order; O`Halloran (2003) 414.

determined that the adoption by the adopters will be in the best interests of the child<sup>494</sup> and if after determining the recommendations of the adoption panel, it has become clear that the adoption will not be practicable without payment of an allowance.<sup>495</sup>

### 8.3.5 *Adoption in terms of foreign jurisdiction*

In this section I discuss the Australian and the Canadian approach to customary adoptions. The discussion reveals how the two jurisdictions used the courts to confirm the existence of customary adoption instead of providing legislation to regulate customary adoptions. I emphasise the fact that a provision be enacted in the Children's Act for the registration of customary adoptions and also a provision to ensure the legal recognition of customary adoption.<sup>496</sup>

I also propose that South Africa refer to foreign jurisdictions and incorporate the following into the Children's Act: a provision that would encourage prospective adoptive parents to adopt children with special needs;<sup>497</sup> a provision for an adoption allowance for parents who lack financial means to adopt; a provision for training to sensitise adoption agencies not to discriminate against adoptive parents on the grounds of gender or marital status during the adoption process; provision for the appointment of a substitute parent in the event of death of

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<sup>494</sup> Reg 2(b)(i) to the Adoption (N.I) Order; O`Halloran (2003) 415.

<sup>495</sup> Reg 2(b)(ii) to the Adoption (N.I) Order; O`Halloran (2003) 415.

<sup>496</sup> See the proposed provision in section 8 5.

<sup>497</sup> *Ibid.*

the adoptive parent or when the adoptive parent is unable to provide for the child due to incapacitation; and a provision to monitor customary and private adoptions.

Customary adoption in Australia is practised more by the Torres Straits Islanders, an indigenous group in the area. The practice of adoption has a spiritual and cultural relevance which is not covered by the western law on adoption. The parties to an adoption and the community are the ones that determine that an adoption has taken place. Thus, the court does not have to conclude that a customary adoption had occurred.<sup>498</sup> After adoption, the birth parents have nothing to do with the child.<sup>499</sup> When a child is given up for adoption, he or she is given to the members of the extended family of birth parents.<sup>500</sup> This enables the maintenance of blood connections. When a woman is single, the decision to give the child up for adoption is hers and not the father of the child. The promise to give a child is binding to the parties. In the event of a dispute regarding the adoption, the council will be involved and will endeavour to assist the parties to reach an agreement.<sup>501</sup> There is no legislation that governs customary adoption in Australia.

Customary adoption has been considered by the Canadian courts as practised by the Inuit

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<sup>498</sup> Nicholson "The Law of Customary Adoption: A Comparison of Australian and Canadian Approaches to its legal Recognition" (2009) *World Congress on Family Law and Children's Rights Halifax, Nova Scotia, Canada* Nicholson Unpublished conference paper (2009) 7: accessed from [www.mcf.gov.bc.ca/adoption/pdf](http://www.mcf.gov.bc.ca/adoption/pdf) on 2012-11-21.

<sup>499</sup> Nicholson Unpublished conference paper (2009) 8.

<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid.*

group and the Aboriginal people of Western Canada.<sup>502</sup> Families living in camps need children to assist with work. Thus, customary adoption will take place if a couple is childless and cannot have children or where a couple lose children during childbirth. In some practices, the camp leader would be involved in the adoption negotiations. The most common feature of the Canadian and the Australian customary adoption is that they are only considered by the courts once they have taken place.<sup>503</sup>

In recent years, the Australian court has given couples who adopted a child through a customary practice their residence orders. The residence orders did not amount to adoption orders but were simply conferring sole parental responsibility upon a couple adopting a child.<sup>504</sup> A judge who adjudicates over a customary adoption matter would do so through the assistance of an indigenous family court consultant who sits with one or more of the community elders to witness customary adoptions taking place.<sup>505</sup> The legislature of British Columbia enacted amendments to the adoption legislation which provided in section 46(1) of the Act<sup>506</sup> that the court may recognise that an adoption of a person effected by custom of an Indian tribe or aboriginal community has the effect of an adoption under the Act. Section 46(2) provides that the preceding subsection did not affect any Aboriginal rights that a person

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<sup>502</sup> Nicholson Unpublished conference paper (2009) 9.

<sup>503</sup> Nicholson Unpublished conference paper (2009)12-13.

<sup>504</sup> Nicholson Unpublished conference paper (2009) 14.

<sup>505</sup> Nicholson Unpublished conference paper (2009) 14-15.

<sup>506</sup> 1995.

has.<sup>507</sup>

I am of the view that by inserting a provision in the adoption legislation is simply a step towards recognising customary adoption, like I have proposed for South Africa. It would be ideal to enact legislation which would govern customary adoption in order to resist producing results which simply equate customary adoption with statutory adoption and impose the requirement of the latter upon the former.

I am of the view that customary adoption carries with it practical difficulties in relation to inheritance, proof of identity, and the need for children to have access to certain information which concerns their lineage. Given these needs, it is important for customary adoption to find recognition in law, the same as civil law. The basis of acknowledging that customary adoption exists must be by way of a declaration made by the parties involved, or in the case of the Canadian and Australian experience, having the elders or community members who witness the customary adoption taking place, testify to it. I am of the view that after adducing such declaration, all other legal provisions and benefits that apply in law in relation to adoption must apply to adopted children.<sup>508</sup>

The Kenya's Children's Act fails to recognise cultural adoption in the Children's Act. This omission is also found the in South African Children's Act. However, South African cultural

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<sup>507</sup> Nicholson Unpublished conference paper (2009) 17.

<sup>508</sup> See the proposed provision in section 8 5 regarding registration of customary adoptions for legal recognition.

adoptions may be enforced by inferring from the Constitution, which specifically recognises a system of family law under a particular tradition adhered to by persons<sup>509</sup> to recognise cultural adoptions. Also, South Africa's Children's Act provides that an application for registration of adoption must be accompanied by, amongst others, a fee prescribed in terms of "any applicable law".<sup>510</sup> "Any applicable law" includes customary law. I am of the view that this level of recognition is not sufficient. Thus, a provision must be created in the Children's Act for the recognition of customary adoption.

A state that specifically recognises cultural adoption is Ghana. Ghana's Children's Act provides that a child who is adopted through customary law is the natural child of the adoptive parents.<sup>511</sup> Kenya and South Africa should learn from Ghana in this regard, given the fact that the practice of cultural, particularly, informal, adoption is rife in Africa. The Committee on the Rights of the Child has, in its comments regarding Ghana's report towards the CRC,<sup>512</sup> expressed its satisfaction about the adoption practice and procedure in Ghana as regulated by the Adoption Act<sup>513</sup> and the fact that it is in harmony with the CRC. The Committee on the Rights of the Child also noted the fact that there are an undetected

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<sup>509</sup> S 15(3)(a)(ii) and s 39(3), the Constitution does not deny the existence of rights that are conferred by, amongst others, customary law to the extent that they are consistent with the Constitution.

<sup>510</sup> S 245(2)(d).

<sup>511</sup> S 79.

<sup>512</sup> Concluding Observation No 73 of Ghana's 1995 report for the CRC.

<sup>513</sup> 104 of 1965.



number of girl children who are abused in adoption as many work as domestic servants.<sup>514</sup>

Children with physical or mental challenges and children with special needs still want to be adopted to belong to a particular family.<sup>515</sup> Nevada, in the United States of America, made available a special adoption assistance programme to encourage and support the adoption of children with special needs. The programme is meant to encourage prospective adoptive parents to adopt without placing an undue burden on the family.<sup>516</sup> The programme consists of the following benefits: medical coverage; limited reimbursement of adoption related costs; social services and financial assistance. Children that are considered to have special needs are children of any age who have behavioural needs with developmental, physical and mental challenges. Thus, children who could not be defined as such are not eligible for the subsidy assistance.<sup>517</sup> I also propose that South Africa refer to the Northern Ireland which provides for an adoption allowance to prospective adoptive parents who have developed a relationship with the child but lack the financial means to adopt the child.<sup>518</sup>

Nevada established an office for the Adoption Exchange, which assists in locating families

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<sup>514</sup> Concluding Observation No. 74 Ghana's 19 December 1995 State Party Report towards the United Nations Convention on the Rights of the Child, 16.

<sup>515</sup> Child Welfare Information Gateway *Guide to Adoption in Nevada* (2010) 6: accessed from [www.dcfs.state.nv.us/GuideToAdoptionInNevada.PDF](http://www.dcfs.state.nv.us/GuideToAdoptionInNevada.PDF) on 2012-11-20.

<sup>516</sup> *Ibid.*

<sup>517</sup> *Ibid.*

<sup>518</sup> S 2(1) and (2) Adoption Allowance Regulations (N.I) 1996 to the Adoption (N.I) Order; O'Halloran *Child Care and Protection: Law and Practice in Northern Ireland* (2003) 414, see the proposed provision in section 8 5.

for children with special needs.<sup>519</sup> The Exchange has a photo-listing booklet of children who need permanent “forever” families. Families that have been screened are registered with the exchange. I am of the view that South Africa must refer to Nevada’s experience and enact a provision in the Children’s Act under section 230 of the Act for the adoption of children with special needs.<sup>520</sup> However, I am of the view that a separate record must not be established for children in need of permanent placement, but that children with special needs must be recorded in the RACAP (Adoption Register) used for all children who need for permanent placement.<sup>521</sup>

The Adoption Network Law Centre in Costa Mesa, California, alluded to the fact that some agencies would, in the process of evaluating the eligibility of adoptive parents, consider factors such as the marital status of the applicant, and if married, the length of marriage and previous marriages.<sup>522</sup> For instance, it is pointed out that it would generally be easier to consider a married couple than a single applicant for the adoption of a child. This consideration is more practical rather than legal. I am of the view that this discriminates unfairly against persons because of their marital status. Thus, I recommend that since this practice is entrenched by adoption agencies, it is important that South Africa incorporate a provision for training to sensitise adoption agencies regarding issues of discrimination

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<sup>519</sup> Child Welfare Information Gateway *Guide to Adoption in Nevada* (2010) 6.

<sup>520</sup> See the proposed provision in section 8 4 2 1 3.

<sup>521</sup> See the discussion in section 8 4 2 1 2.

<sup>522</sup> Child Welfare Information Gateway *Review of Qualification Requirements for Prospective Adoptive Parents* (2011) 1-2: accessed from [www.adopting.adoption.com/.../review-of-qualification-requirements-for-](http://www.adopting.adoption.com/.../review-of-qualification-requirements-for-) on 2012-11-22.

against adoptive parents on the grounds of gender, marital status or age. Also, a provision must be enacted in the Children's Act as an opening statement indicating that no one must be discriminated against on the grounds that are listed in the Constitution.<sup>523</sup>

The Child and Family Services Act (Ontario) allows birth parents to make an application for an openness order. The children's court gives the parent or care-giver notice to apply for a post-adoption order, within 30 days of the adoption application of the child if the parent or care-giver can be located. The person who makes the application for a post-adoption order shall give notice to the adoption social worker who is designated with the care of the child, and the child, if the child is of an age, maturity and stage of development to understand the contents of the application. If the child is bringing the application, such application is given to the person whom the child wants to relate.<sup>524</sup> The adoption social worker who is designated for the care of the child may not place the child for adoption before the expiration of 30 days unless every person who is entitled to do so has made an application for a post-adoption order.<sup>525</sup>

If an application for a post-adoption order has been made, the adoption social worker shall advise the prospective adoptive parent about the fact that a post-adoption application has been made,<sup>526</sup> the relationship between the applicant and the child<sup>527</sup> and the nature and

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<sup>523</sup> See the proposed provision in section 8 5.

<sup>524</sup> S 145.1.2 (2)(c) of the Child and Family Services Act.

<sup>525</sup> S 145.1.2 (3) of the Child and Family Services Act.

<sup>526</sup> S 145.1.2 (4)1 of the Child and Family Services Act.

<sup>527</sup> S 145.1.2 (4)2 of the Child and Family Services Act.

implication of a post-adoption arrangement.<sup>528</sup> The court may make a post-adoption order if it is satisfied that the order is in the best interests of the child.<sup>529</sup> The order will secure a continuous and meaningful relationship between the child and the applicant of a post-adoption order,<sup>530</sup> and if the child has consented to a post-adoption order if he or she is of an age, maturity and stage of development to understand the order.<sup>531</sup>

Kenya's Children's Act prohibits any person from taking the care, possession or control of the child if he or she has proposed to adopt the child.<sup>532</sup> South Africa should in this regard learn from Kenya, as this provision is another way of protecting the child from emotional disruption in the event the proposed adoption is unsuccessful. Kenya's Children's Act allows spouses to adopt jointly.<sup>533</sup> According to the Act, at least one of the joint adoptive applicants must be 25 years of age and be at least 21 years older than the adopted child but not 65 years of age.<sup>534</sup> I am of the view that the legislature should not have used age as an eligibility criterion to adopt. Given the fact children can be taken care of by grandparents, such group must be allowed to adopt. However, given the fact that parents generally, including older parents, may suffer common old age illnesses such as high blood pressure and cardiac problems which may make them unfit to rear and nurture children, health may be used as an

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<sup>528</sup> S 145.1.2 (4)3 of the Child and Family Services Act.

<sup>529</sup> S 145.1.2(6)(a) of the Child and Family Services Act.

<sup>530</sup> S 145.1.2(6)(b) of the Child and Family Services Act.

<sup>531</sup> S 145.1.2(6)(c) of the Child and Family Services Act.

<sup>532</sup> S 156(2).

<sup>533</sup> S 158(1).

<sup>534</sup> S 158(1)(a).

eligibility criterion.<sup>535</sup>

I argue further that because children need an opportunity to grow and be nurtured with both parents around them, a parent with a severe illness may find it difficult to nurture a child. Also, a premature loss of a parent will be traumatic for any child. Thus, a provision must be enacted in the Children's Act which stipulates health as an eligibility criterion. Specifically, a parent with chronic illness in an advanced stage must preferably not be eligible to adopt.<sup>536</sup> Bacchetta<sup>537</sup> argues that parental eligibility is more restrictive in an international adoption compared with a domestic one. Most countries have a maximum age cut-off for prospective adoptive parents, and many will not allow adoption by single parents or same-sex couples. Thus, agencies have different rules and guidelines that may be imposed on adoptive parents. This means that the requirements will vary from one agency to another. Adoption Network Law Centre in the United States of America, Costa Mesa, California<sup>538</sup> alludes to the fact that some agencies will not work with couples that are over 40 years of age, while others will work with adoptive applicants who are older.<sup>539</sup> For instance, according to the Centacare Adoption Services in the United States of America, the possible age at which an adoptive

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<sup>535</sup> Child Welfare Information Gateway *Review of Qualification Requirements for Prospective Adoptive Parents* (2011) 1-2.

<sup>536</sup> See the proposed provision in section 8 5.

<sup>537</sup> Bacchetta *Genesse Valley Parent* (2009): accessed from [www.gvparent.com/articles/2009/09-09-connecting-grandparents](http://www.gvparent.com/articles/2009/09-09-connecting-grandparents) on 2012-11-15.

<sup>538</sup> Adoption Network Law Center *Review of Qualification Requirements for Prospective Adoptive Applicants* (2010): accessed from [www.adopting.adoption.com/.../review-of-qualification-requirements-form](http://www.adopting.adoption.com/.../review-of-qualification-requirements-form) on 2012-11-15.

<sup>539</sup> *Ibid.*

applicant or partner can adopt is 42 years.<sup>540</sup> Like the South African Children's Act,<sup>541</sup> Kenya's Children's Act provides that an adoption order may also be granted to adoptive applicants jointly, where one of the applicants is a relative of the child<sup>542</sup> or is the child's mother.<sup>543</sup>

Kenya's Children's Act prohibits the granting of an adoption order to a male applicant in respect of a female child,<sup>544</sup> a female applicant in respect of a male child,<sup>545</sup> a sole foreign female applicant,<sup>546</sup> or a sole foreign male applicant.<sup>547</sup> The Act further prohibits the granting of an adoption order to a couple where both or one of them is mentally disturbed,<sup>548</sup> where both applicants or one of them has been charged and convicted by a court of offences stipulated in the Act,<sup>549</sup> homosexual couples,<sup>550</sup> and couples who are not married to each other.<sup>551</sup> Overall, the court may refuse to grant an adoption order on the basis that it is not in the best interests of the welfare of the child to do so. Kenya's position of refusing the

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<sup>540</sup> *Centrecare Adoption Services Eligibility Criteria* (2008): accessed from [www.catholiccare.org/.../Adoptions/](http://www.catholiccare.org/.../Adoptions/) on 2012-11-15.

<sup>541</sup> S 231(1)(c). See the discussion in section 8 4 2 2 1.

<sup>542</sup> S 158(1)(b).

<sup>543</sup> S 158(1)(c).

<sup>544</sup> S 158(2)(a).

<sup>545</sup> S 158(2)(b).

<sup>546</sup> S 158(2)(d).

<sup>547</sup> S 158(3)(e).

<sup>548</sup> S 158(3)(a).

<sup>549</sup> S 158(3)(b).

<sup>550</sup> S 158(3)(c).

<sup>551</sup> S 158(3)(d).

adoption of children by homosexual couples<sup>552</sup> and couples who are not married to each other<sup>553</sup> raises concerns as to whether South Africa<sup>554</sup> has not been too lenient in recognising the adoption of children by similar groups. This argument is raised in relation to the fact that, amongst other African countries, Ghana<sup>555</sup> supports Kenya's<sup>556</sup> position of prohibiting adoption of children by homosexual couples.

When making an adoption order, the Kenyan Children's Act allows the court, upon application for adoption by the adoptive parent or of its own motion, to appoint any person that is approved by the adoptive parent as the guardian of the child, in the event the adoptive parent dies or becomes incapacitated before he or she reaches full age. This provision is important and should have been considered in Children's Act. It may be taken for granted that an adoptive parent will provide in a will as to what will happen to the adopted child in the event of his or her death. Also, we may argue that laws of *intestate succession* may kick-in. I am of the view that it is important for the Children's Act to incorporate a provision which can be used in an eventuality where the adoptive parent dies *intestate* and to avoid situations of conflict with regard to who bears the responsibilities and the rights over the child. The provision must also cater for the appointment of a substitute parent in the event of death of the adoptive parent or when the adoptive parent is incapacitated and unable to provide for

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<sup>552</sup> S 158(3)(c).

<sup>553</sup> S 158(3)(d).

<sup>554</sup> See the discussion in section 8 3 2 2 1 2.

<sup>555</sup> S 75(2) of Ghana Children's Act 560 of 1998.

<sup>556</sup> S 158(3)(c) of Kenya Children's Act.

the child.<sup>557</sup>

I propose that a provision be enacted in the Children's Act for guidelines to monitor customary and private adoptions. This may be done by way of, amongst others, requiring the registration of all adoptions and awareness campaigns which will motivate the public to report these adoptions in order to keep adoptions within the ambit of the formal child protection system. One of the best measures of protection against misuse of a system and exploitation of children is transparency. Thus, issues regarding fees that are paid for adoption and processes should be clearly defined and communicated to all concerned. This transparency enables users to see what protection is in place and to identify where actual and potential abuse of the system may occur.<sup>558</sup>

## 8.4 Recommendations and conclusion

Permanency planning may be more beneficial for the child if he or she is placed in the care of relatives, because it will enable the child to maintain family ties. Permanency planning with relatives is welcomed in South African culture, particularly where there are grandparents in good health and other relatives are still alive who would informally adopt the child. Research has revealed that grandparents often prefer to care for their grandchildren, rather

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<sup>557</sup> See the proposed provision in section 8 5.

<sup>558</sup> Hague Conference on Private International Law *The Implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008) 43: accessed from [www.hcch.net/upload/adoguide\\_e.pdf](http://www.hcch.net/upload/adoguide_e.pdf) on 2012-11-20.



than leaving them with people with whom they are not related. It may be advisable to apply the cultural principles of adoption to statutory adoption, particularly where grandparents adopt children, which allows easy contact between the birth parents and the adopted child.

On the face of it, this practice would not appear to require any documentation, because children are adopted by their relatives. However, I hold the view that even when children are adopted by their relatives, it is important to formalise the adoption arrangement, including creating a post-adoption agreement to take care of any eventualities such as the birth parent or relatives wanting their child back.

Research has revealed that African parents who have formally adopted a child have denied the child the right to know his or her birth parents and to have their identity legally established. This practice clearly bars contact between the child and his or her birth parents, even when the contact may be in the best interests of the child.<sup>559</sup> These types of adoption are open to abuse and could lead to situations where adopted children provide domestic labour to their adopted parents rather than receive care.

With regards to the recognition of customary adoptions, I propose that section 228 of the Children's Act, which provides for adoptions in terms of the Act, be amended to include sections 228(1) to (10), for the legal recognition and registration of customary adoptions. The proposed provision can read as follows:

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<sup>559</sup> Maithufi (1999) *Obiter* 198.

- “(1) Save as provided in section 228 of the Children’s Act, a customary adoption concluded under customary law or a system of any tradition adhered to by persons professing a particular culture shall be valid in as far as the formalities of such culture or a system of any tradition are complied with.
- (2) The Director-General of the Department of Social Development shall be responsible for the registration of customary adoptions<sup>560</sup> executed through customary law or a system of any tradition adhered to by persons professing a particular culture.
- (3) Where an adoptive parent has adopted a child under a customary adoption after the commencement of this provision, he or she must make an application to the Director-General of the Department of Social Development responsible for the registration of a customary adoption.
- (4) The Director-General of the Department of Social Development who registers a customary adoption shall require the adoptive parent who registers a customary adoption to adduce the following information for purposes of registration -
- (a) evidence or a written declaration by the adoptive parents and birth parents stating that the child is adopted under a customary adoption; and
  - (b) a declaration which contains a date and the area where the child was adopted or where the birth parents of the child live.
- (5) In an event the adoptive parent executed a customary adoption before the commencement of this provision, he or she shall register the adoption within twelve months after the enactment of the provision.<sup>561</sup>
- (6) If the adoptive parent cannot facilitate the late registration of a customary adoption, he or she must obtain an order from the court for the registration of a customary adoption.
- (7) Failure to register a customary adoption affects the validity of such adoption.
- (8) The Director-General of the Department of Social Development shall liaise with the Department of Home Affairs for registration of customary adoptions in terms of the Birth and Death Registration Act.
- (9) The Department of Home Affairs shall register *all*<sup>562</sup> customary adoptions and shall designate the days upon which registration may take place.
- (10) The Department of Home Affairs shall put in place facilities for the registration of

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<sup>560</sup> Emphasis in the ACRWC, see the discussion in section 2 2 2 7.

<sup>561</sup> S 4(3)(a) and (b).

<sup>562</sup> Own emphasis.

customary adoptions such as -

- (a) providing mobile stations in communities;
- (b) using markets and government buildings that are accessible by people in different geographical locations, including rural communities; and
- (c) using faith-based and community based buildings for registration.”

Furthermore, a provision must be incorporated in the Children’s Act for purposes of reporting customary and private adoptions which are taking place in communities for the regulation of adoption system and protection of children.

The provision can read as follows:

- “1 The Department of Social Development shall monitor adoptions taking place privately in communities by way of conducting public awareness campaigns to report incidences of private adoptions taking place in communities through media, such as:
- (a) radio;
  - (b) television;
  - (c) newspapers; and
  - (c) toll-free line.”

I am of the view that South Africa must, in its goal of providing permanency planning for every child who is separated from his or her parents, refer to the United States of America that uses different approaches to fortify the reunification of children with their parents.<sup>563</sup> Thus, I also propose that provisions be enacted in the Children’s Act for concurrent planning<sup>564</sup> and the criteria that must be used for terminating reunification services during permanency planning. The provisions can read as follows:

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<sup>563</sup> See the discussion in section 8 3 3.

<sup>564</sup> See the definition in section 8 1.

- “1 The designated social worker shall work towards permanency placement concurrently with the aim to reunite the child back into his or her family. In order to achieve this need, the designated social worker shall:<sup>565</sup>
- (a) advise parents from the beginning of a case about the possibility of their rights to the child or children being terminated if they fail to comply with their case plan;
  - (b) place siblings in the same foster home at the time of initial placement;
  - (c) increase the recruitment of foster or adoptive parents;
  - (d) train foster parents to act as mentors for parents and encourage a relationship between them;
  - (e) place children on adoption exchanges as soon as possible;
  - (f) document steps to locate permanent homes for children; and
  - (g) ensure timely completion of reports, including children’s adoption evaluations, home studies of potential adoptive parents and assessments of children’s qualification for adoption subsidies.
- 2 The designated social worker shall stop reunification services if he or she is made aware of the fact that the parent of the child –<sup>566</sup>
- (a) has subjected the child to “aggravated circumstances”,<sup>567</sup>
  - (b) has committed murder<sup>568</sup> or voluntary manslaughter of another of their children, or felony assault<sup>569</sup> that results in serious bodily harm of any of their children; or
  - (c) had his or her rights to a sibling of the child terminated.”

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<sup>565</sup> California Youth Law Center Guidelines Making Reasonable Efforts: A Permanent Home for Every Child (2000) 65.

<sup>566</sup> According to U.S.C. Section 671(a)(15)(D)(i), such circumstances include, but are not limited to torture, abandonment, chronic abuse and sexual abuse.

<sup>567</sup> According to U.S.C. Section 671(a)(15)(D)(i), such circumstances include, but are not limited to torture, abandonment, chronic abuse and sexual abuse.

<sup>568</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 65

<sup>569</sup> *Ibid.*

I also propose that regulations be promulgated to the Children's Act for a criterion which would ensure that permanency hearings are held on time and that appropriate findings are made to either reunite the child with his or her family or place the child permanently with a new family.<sup>570</sup> The proposed provision can read as follows:

- “1 The court shall indicate the date when the child will be returned, if the child remains in foster care for 12 months, or within 30 days after the reasonable efforts have been determined as to whether the child will be returned back home.
- 2 When the court decides that the child be adopted, the designated social worker shall file the termination of parental rights petition -
  - (a) if the child has been in the care of the state for 15 months out of the most recent 22 months; and<sup>571</sup>
  - (a) if the child has been abandoned or the parent has committed murder or voluntary manslaughter of another of their children or a felony assault resulting in grievous bodily injury of the parent's child.
- 3 The court shall order that the termination petition not be filed if –
  - (a) the child is under care of a relative;
  - (b) the care plan of the child contains compelling reason why the filing of the petition is not in the child's best interests; and
  - (c) the agency has not provided the child's family with services deemed necessary to return the child safely home.”<sup>572</sup>

This study has revealed practice issues which highlight the discrimination that is taking place as a result of adoption agencies discriminating against children wherein younger children are

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<sup>570</sup> California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 65.

<sup>571</sup> 42 U.S.C. Section 675(5)(E).

<sup>572</sup> *Ibid*; See also California Youth Law Center Guidelines *Making Reasonable Efforts: A Permanent Home for Every Child* (2000) 66.

often preferred, a child of a particular sex or particular physical appearance is preferred,<sup>573</sup> and a child of specific race, religion and cultural persuasion is preferred<sup>574</sup> rather than any children who is in need of permanent placement. On the other hand, adoptive parents are discriminated on the basis of, amongst other aspects, marital status, gender and sexual orientation. Thus, I propose that an opening statement be incorporated in section 230, chapter 15 of the Children's Act for the right of the child in need of care and protection to have permanent placement. The provision must prohibit unfair discrimination against any child in need of permanent placement, consistently with the grounds stipulated in the Constitution on the right to equality.<sup>575</sup> The provision can read as follows:

- “(A) Every child in need of permanent placement has the right to family care or parental care in the form of adoption. The child shall not be discriminated against unfairly, directly or indirectly for purposes of adoption on one or more of the following grounds:
- (1) race, age, gender, sex, ethnic or social origin of the birth parents of the child, sexual orientation of the birth parents of the child, physical and mental health of a child, religion, belief, culture, language or any background of the child which is disclosed in the care plan and profile of the child; and
- (B) The best interests of the child must be of paramount importance.

I further propose that an opening statement be incorporated in section 230, chapter 15 of the Children's Act, for the right of the adoptive parent to be treated equally and not to be disadvantaged by unfair discrimination with regards adopting a child. The provision must promote equality of treatment of adoptive parents by adoption agencies on the grounds that

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<sup>573</sup> See the discussion in section 8 4 2 1 3.

<sup>574</sup> See the discussion in section 8 4 2 1 4.

<sup>575</sup> Ss 9(1) and (3).

are stipulated in the Constitution on the right to equality.<sup>576</sup> Also, a provision must be enacted in the Children's Act for public awareness campaigns regarding the rights of children whose parents are victimised by people with anti-gay attitudes. The provisions can read as follows:

- “(B) Every adoptive parent has the right to equal treatment and protection of the law with regards to adopting a child. The adoptive parent shall not be discriminated against unfairly, directly or indirectly for purposes of adoption on one or more of the following grounds:
- (1) race, age, gender, sex, ethnic or social origin, sexual orientation, disability, conscience, religion, belief, culture or language,<sup>577</sup> *including his or her economic status and the area of residence.*<sup>578</sup>
  - (2) The Department of Social Development shall facilitate public awareness campaigns regarding the rights of children whose parents are victimised by people with anti-gay attitudes for the protection of children who are raised in same-sex families through media, such as:
    - (a) radio;
    - (b) television;
    - (c) newspapers; and
    - (d) toll-free line.”

I am of the view that section 232(3) of the Children's Act must be amended to include information of all children who are available for adoption in the RAPCAN (adoption register) to enable prospective parents to view same for prospective adoptive children. The amended

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<sup>576</sup> *Ibid.*

<sup>577</sup> S 9(3) of the Constitution.

<sup>578</sup> Own emphasis. The adoptive parent must not be discriminated against because of his financial status, instead, the state must provide adoption allowance for adoptive parents who lack the financial means to adopt. Also the adoptive parent must not be discriminated against on the basis of the fact that he or she lives in rural communities.

provision can read as follows:

- “(3) The designated social worker shall incorporate the name and details of any child who is in need of care and protection and the name and details of any screened adoptive applicant for purposes of adoption in the Register on Adoptable Children and Prospective Adoptive Parents.
- (4) The information that is recorded in the Register on Adoptable Children and Prospective Adoptive Parents shall be accessible by prospective adoptive parents who are screened and willing to adopt, the Director-General or designated officials of the Department of Social Development and Child Protection Organisations accredited to provide adoption services.”

It is also important that a provision be incorporated in the Children’s Act which must impose a responsibility on the Department of Social Development to provide training to adoption agencies. The training must be in the form of information sharing sessions which must sensitise adoption agencies with regards to the development in our law on adoption, and the Constitution which prohibits unfair discrimination and unequal treatment of individuals. The provision for training can read as follows:

- “1 The Department of Social Development shall provide training to adoption agencies in order to sensitise them on issues of unfair discrimination with regard to provision of adoption services to adoptive parents and children in need of permanent placement. The training must –
  - (a) advance the practice of adoption agencies in ensuring that human rights norms and values are integrated in their adoption practice;
  - (b) inform adoption agencies of the developments in the area of adoption on legislation and at policy level in relation with the Constitution of the Republic, particularly, section 9;
  - (c) share experiences and concerns with adoption agencies regarding adoptions practices which impact on adoptive parents and children in need of permanent placement;
  - (d) strengthen the capacity and skills of adoption agencies in less resourced areas;



- (e) afford a wider audience to adoption agencies for exposure to quality services that are consonant with the Constitution and relevant legal prescripts.”

With regard to the consideration of the background of the child in relation to religion, culture and language when placing the child in care, I am of the view that these attributes must be considered *where possible*. Thus, section 240(1)(a) of the Children’s Act must be amended to incorporate a provision which requires that, *where possible*, consideration be given to such convictions when placing a child into care. The provision can read as follows:

“240(1)(a) When considering placement of the child with prospective adoptive or foster parents, the designated social worker shall, *where possible* consider the ethnic, religious, cultural and linguistic background of the child for desirability of continuity in a child’s upbringing.”

I agree with Skelton<sup>579</sup> that post-adoption agreements will become the order of the day, given the fact that this arrangement is new in South Africa and that there are children who are in families with parents who are not necessarily their biological parents. I concur with Ferreira that it is important to establish the willingness of the parties who enter into a post-adoption agreement when an application to enter into a post-adoption agreement is being considered.<sup>580</sup> This will ensure that the post-adoption agreement is in the best interests of the child and will ensure that the consent to enter into a post-adoption agreement by the adoptive parents was made in sound and sober senses. South Africa must also learn from the European jurisdiction, which allows the child, through a post-adoption agreement, to

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<sup>579</sup> (2010) 295.

<sup>580</sup> See the discussion in section 8 4 2 6.

maintain contact with his or her siblings, grandparents and family members who could claim a breach of their rights in Article 8 because of the severance of the legal ties with the whole family.

Thus, with regard to the omission in the Children's Act regarding the right of the birth parents and the child to make an application for a post-adoption order, I propose that South Africa refer to the Child and Family Services Act (Ontario) which allows birth parents to make an application for an openness order, and incorporate provisions before section 234(1) of the Children's Act to accommodate this need:

- "1 The children's court may give the parent or care-giver notice to apply for a post-adoption order, within thirty days of the adoption application of the child if the parent or care-giver can be located.<sup>581</sup>
2. The person making the application for post-adoption order shall give notice to -
- (a) the adoption social worker that is designated for the care of the child;<sup>582</sup>
  - (b) the child, if the child is -
    - (i) of age, maturity and stage of development to understand the contents of the application;<sup>583</sup>
    - (ii) is bringing the application; and
  - (c) the person whom the child wants to relate with.<sup>584</sup>
3. The adoption social worker who is designated for the care of the child may not place the child before the expiration of thirty days unless every person who is entitled to do so has made an application for a post-adoption order.<sup>585</sup>

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<sup>581</sup> S 145.1.1(6)(a) of the Child and Family Services Act.

<sup>582</sup> S 145.1.2 (2)(a) of the Child and Family Services Act.

<sup>583</sup> S 145.1.2 (2)(b) of the Child and Family Services Act.

<sup>584</sup> S 145.1.2 (2)(c) of the Child and Family Services Act.

<sup>585</sup> S 145.1.2 (3) of the Child and Family Services Act.

4. Where an application for a post-adoption order has been made, the adoption social worker designated for the care of the child shall advise the prospective adoptive parent -<sup>586</sup>
  - (a) that a post-adoption application has been made;<sup>587</sup>
  - (b) on the relationship between the applicant and the child;<sup>588</sup>
  - (c) about the nature and implication of a post-adoption arrangement.<sup>589</sup>
5. The court may make post-adoption order if it is satisfied that -
  - (a) the order is in the best interests of the child;<sup>590</sup>
  - (b) the order will secure continuous and meaningful relationship between the child and the applicant of a post-adoption order;<sup>591</sup>
  - (c) the child has consented to a post-adoption order is he or she is of age, maturity and stage of development to understand the order.<sup>592</sup>
6. The court shall not vary or terminate a post-adoption order unless it is satisfied that:
  - (a) there are material changes which have occurred requiring the varying or termination;<sup>593</sup>
  - (b) the termination of the order is in the best interests of the child;<sup>594</sup>
  - (c) the relationship of the applicant requesting the order is no longer beneficial to the child".<sup>595</sup>

South Africa must also learn from Kenya with regard to the appointment of a guardian *ad litem* pending the adoption application, and the fact that an adoptive parent is required to

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<sup>586</sup> S 145.1.2 (4) of the Child and Family Services Act.

<sup>587</sup> S 145.1.2 (4)1 of the Child and Family Services Act.

<sup>588</sup> S 145.1.2 (4)2 of the Child and Family Services Act.

<sup>589</sup> S 145.1.2 (4)3 of the Child and Family Services Act.

<sup>590</sup> S 145.1.2(6)(a) of the Child and Family Services Act.

<sup>591</sup> S 145.1.2(6)(b) of the Child and Family Services Act.

<sup>592</sup> S 145.1.2(6)(c) of the Child and Family Services Act.

<sup>593</sup> Ss 145.1.2(4)(a) and 145.1.2(5)(a) of the Child and Family Services Act.

<sup>594</sup> S 145.1.2(4)(b) and S 145.1.2(5)(b) of the Child and Family Services Act.

<sup>595</sup> S 145.1.2(4)(c) and S 145.1.2(5)(c) of the Child and Family Services Act.

appoint a guardian for the adopted child who will take care of the child in the event of his or her death.<sup>596</sup> Kenya has, in this regard, taken measures to safeguard the interests of the child pending the determination of the adoption proceedings and in the event of the death of the adoptive parent. Thus, South Africa must refer to the Kenyan Children's Act which allows an adoptive parent to appoint a care-giver to provide care to the child in the event of the death of the adoptive parent as follows:

“the adoptive parent must appoint any person as the guardian of the child in the event of the adoptive parent's death or incapacitation to provide care to the child”.<sup>597</sup>

Most significantly, South Africa must provide an adoption allowance in situations where parents are willing to adopt, but do not have financial means to care for the child.<sup>598</sup> Thus, South Africa does not provide an adoption allowance to prospective adoptive parents. Northern Ireland<sup>599</sup> provides an adoption allowance to a prospective adoptive parent who has developed strong relationship with a child but lacks financial means to adopt the child.<sup>600</sup> I recommend that South Africa follow the approach of Northern Ireland and incorporate a provision for adoption allowance.

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<sup>596</sup> S 160(2)(a), see the discussion in section 8 4 5.

<sup>597</sup> S 164(1) of Kenyan Children's Act. See the discussion in section 8 4 5.

<sup>598</sup> See the discussion in section 8 3 2 2 2 3.

<sup>599</sup> Adoption Allowance Regulations (N.I) 1996 to the Adoption (N.I) Order.

<sup>600</sup> O`Halloran *Child Care and Protection: Law and Practice in Northern Ireland* (2003) 414. See the discussion in section 8 4 4.

- “1 (1) Adoption allowance may be paid to prospective adoptive parents -<sup>601</sup>
- (a) where the adoption social worker is satisfied that the child to be adopted has established strong and important relationship with the adoptive parents before the adoption order is made;
  - (b) where it is desirable that the child will be placed with the same adopters, as his brothers or sisters or with a child with whom he has previously shared a home;
  - (c) where at the time of placement for adoption the child is –
    - (i) mentally or physically disabled or suffering from the effects of emotional or behavioural difficulties;
    - (ii) needs special care which requires greater expenditure of resources than it would be required if the child were not mentally or physically disabled or suffering from the effects of emotional or behavioural difficulties;
  - (a) where at the time of placement for adoption the child was mentally or physically disabled or suffering from the effects of emotional or behavioural difficulties and as a result, at a later date requires more care and a greater expenditure of resources than were required at the time he or she was placed for adoption because there is -
    - (i) deterioration in the child’s health or condition; and
    - (ii) an increase in the age of the child.
  - (b) where at the time of placement for adoption it was known that there was a high risk that the child would develop an illness or disability and as a result, at a later date he or she requires more care and a greater expenditure of resources than were required at the time he or she was placed for adoption because of the occurrence of such illness or disability.
- 2 (1) A Child Protection Organisation accredited to provide adoption services in terms of section 251 of the Children’s Act and an adoption social worker shall determine the amount of the adoption allowance and shall take into account –<sup>602</sup>

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<sup>601</sup> S 2(1) and (2) Adoption Allowance Regulations (N.I) 1996 to the Adoption (N.I) Order.

<sup>602</sup> S 3(2) Adoption Allowance Regulations (N.I) 1996 to the Adoption N.I Order.

- (a) the financial resources available to the adopters, including any financial resources available in respect of the child when adopted;
  - (b) the amount required by the adopters in respect of their reasonable costs (excluding costs in respect of the child) and commitments; and
  - (c) the financial needs and resources of the child.
- (2) In assessing income available to the adopters, a Child Protection Organisation and the adoption social worker shall disregard disability living allowance payable in respect of the child and any child -support grant or foster care grant received by adoptive parents on behalf of another child.
- (3) The allowance to be paid to the adoptive parents must not -
- (a) include any element of remuneration for the care of the child by the adopters;
  - (b) exceed the amount of child-support or foster care grant, including any grant payable to the family of the child as maintenance allowance.”

Furthermore, South Africa must refer to the Louisiana and California’s experience,<sup>603</sup> and incorporate a provision for adoption allowance, which can read as follows:

- “1 A child who is adopted is eligible to receive an adoption allowance of an amount that is adequate to support the child of his or her age<sup>604</sup> and approximated needs on a monthly basis as follows -<sup>605</sup>
- (d). if a baby between age 0-2, an amount of R 1 100 per child;
  - (e). if a toddler between age 3-6, an amount of R 750 per child; and
  - (f). if older and between age 7-18, an amount of R 650 per child.”

A subsidised adoption may also assist in situations where a child requires a high level of

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<sup>603</sup> See the proposed provision in section 6 5.

<sup>604</sup> I have selected the three age groups and used interviews to get a sense regarding costs for basic necessities in families. See the discussion in section 3 3 1 2 2, see also Annexures “B” and “C” of interviews held with child-support grant recipients.

<sup>605</sup> See Emerek Report *Fiscal System and Female Employment in Denmark* (2009) 20.

attention, such as a disabled child or a child with chronic illness. I propose that South Africa must refer to Nevada and incorporate a provision for the adoption of children with physical or mental health challenges and special needs. Furthermore, the provision must state the kind of support that children with special needs would receive from the state, and the support that the adoptive parents would receive when providing care to such children.

The provision must be incorporated as section 230(4) and can read as follows:<sup>606</sup>

- “1 A child who is assessed and reported by a medical specialist to have physical or mental health challenges or any special needs is eligible for adoption.
- 2 A child who has special needs and is adopted as indicated in section 1, shall be eligible to receive –
  - (a) medical care through state’s medical assistance for his or her special needs including, his or her pre-medical condition; and<sup>607</sup>
  - (b) a monthly grant which cannot exceed the established payment rate for the child if he or she was in foster care;
3. Any adoptive parent adopting a child with special needs shall be reimbursed for fees relating to the finalization of the adoption up to a fixed amount. The amount may include –
  - (a) legal costs, court filing fees and attorney’s fees;
  - (b) agency fees for the screening of the adoptive parent; and
  - (c) travel costs pertaining to visiting the child *prior* to placement.
4. The adoption social worker shall assist the adoptive parent to facilitate for the application of the subsidy and the compilation of professional documentation of the child’s special needs.”

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<sup>606</sup> See the discussion on foreign jurisdiction, see also the proposed provision in section 8 5.

<sup>607</sup> *Ibid.*

## CHAPTER 9: CONCLUSION

### 9.1 Introduction

The study emphasised that many children become vulnerable in the family environment due to, amongst other things, poverty, abuse, neglect and maltreatment.<sup>1</sup> Thus, the study dealt with the key question:

“Is South Africa’s constitutional provision on the right to ‘family care’, ‘parental care’ or ‘appropriate alternative care’ ‘when removed from the family environment’<sup>2</sup> effective in preserving and protecting ‘family life’?”<sup>3</sup>

In answering the main question, sub-questions<sup>4</sup> were developed which were answered under the following topics:

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<sup>1</sup> See the discussion in section 1 1 2.

<sup>2</sup> S 28(1)(b). See also the discussion in section 1 1.

<sup>3</sup> See the discussion in section 1 1 3 1.

<sup>4</sup> *Ibid.*



### 9.1.1 *Diversity of family forms, parental responsibilities and rights*<sup>5</sup>

Under this topic, the research emphasised the fact that there are diverse family arrangements that children grow up in, in South African society. Amongst others, children living in families of parents in civil marriages, same sex partners, religious marriages, domestic life partnerships, customary marriages, single parent families and communal families were discussed.<sup>6</sup> The recognition of the variety of family forms by our law is acknowledged as a positive development in the area of child law.

However, the discussion noted, amongst others, the fact that even with these developments, there is no provision for the wide definition of “family” which recognises the diverse families in the Republic; there is no universal definition of “family care”; there is a lack of strict provision which requires registration of customary marriages; and a lack of an explicit provision for the definition of “parental care” which recognises the equal responsibilities and rights of unmarried fathers. Thus, I proposed that the following provisions be enacted:

1. That South Africa must improve on the definition of “family” as provided in the guidelines document<sup>7</sup> and provide a wide definition of “family” to accommodate the

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<sup>5</sup> The topic answers the question “what constitutional and other legislation protect and promote a ‘family’, the right to ‘family care’ or ‘parental care’ and ‘family life’”? See the discussion in section 1 1 3 1.

<sup>6</sup> See the discussion in section 2 2 1.

<sup>7</sup> See the discussion in section 2 2.

diverse family forms.<sup>8</sup>

2. It came to the fore that there is also no definition of “family care” in the context of section 28(1)(b). Thus, I proposed that the definition of “family care” be provided in the Children’s Act to provide some kind of introduction that would facilitate the interpretation of this concept with regard to chapter 7 of the Act.<sup>9</sup>
3. With regards to the recognition of families of parents in customary marriages, I proposed that section 7(6) of the Recognition of Customary Marriages Act be amended for a provision that recognises the right of the wife in a customary marriage to make an application to court to approve a written contract regarding their matrimonial property system. I proposed further that the written contract be available in the language that is understood by the parties to the contract and that the assistance of an interpreter be provided at the state’s expense.
3. The discussion on “parental care”<sup>10</sup> indicated the fact that a child has the right to: “care”, “maintenance”, “guardianship” and the right to maintain “contact” with his or her parents.<sup>11</sup> Parents have a corresponding responsibility to provide for these rights.<sup>12</sup> Research emphasised the fact that there is a failure in the Children’s Act to

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<sup>8</sup> See the proposed provision in section 2 5.

<sup>9</sup> *Ibid.*

<sup>10</sup> See the discussion in section 2 4 2.

<sup>11</sup> S 18(2) of the Children’s Act. See the discussion in section 2 4 2.

<sup>12</sup> See the discussion in section 2 4 2. *Grootboom par 77.*

provide for the definition of “parental care”; in particular, the equal responsibilities and rights of unmarried fathers. I proposed that South Africa must infer from case law,<sup>13</sup> international law<sup>14</sup> and foreign jurisdictions<sup>15</sup> and enact an additional provision in section 18(2) of the Children’s Act for the *equal*<sup>16</sup> responsibilities and rights of parents with the argument that the non-custodian parent falls within the scope of the term “parent” in terms of section 28(1)(b).<sup>17</sup>

4. I furthermore proposed that regulations be promulgated to section 21(1) of the Children’s Act that would clearly cater for *automatic*<sup>18</sup> responsibilities and rights of the unmarried father in relation to the child.<sup>19</sup>

### 9.1.2 *Grounds for removal*<sup>20</sup>

The analysis of the grounds for mandatory alternative care interventions illustrated the improvements made in the Children’s Act regarding these grounds. However, it came to the fore that there is still a high incidence of vulnerability of children which is identified through

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<sup>13</sup> Par 77. See also the discussion in section 2 4 2.

<sup>14</sup> See the discussion in sections 2 4 3 1 and 2 4 3 2.

<sup>15</sup> See the discussion in section 2 4 4.

<sup>16</sup> Own emphasis.

<sup>17</sup> See the discussion in section 2 4 2; see also the proposed provision in section 2 5.

<sup>18</sup> Own emphasis.

<sup>19</sup> See the discussion in section 2 2 1 7; see also the proposed regulations in section 2 5.

<sup>20</sup> The sub-topic answers the sub-question “what grounds or factors do courts consider in their decision to remove a child”? See the discussion in section 1 1 3 1.

the circumstances that children face in the family environment and gaps that exist in our law. Thus, the need for additional provisions for further improvement in our law was emphasised. I therefore proposed that the following provisions be incorporated in the Children's Act:

1. That the ground for mandatory alternative care intervention regarding a child who "has been abandoned or is without visible means of support", be separated to provide two special provisions with separate meanings in the Act.<sup>21</sup>
  
2. With regards to the ground which identifies "a child who is maltreated, abused, degraded and neglected" as a child in need of care,<sup>22</sup> I proposed that more specific and separate provisions be established in the Act<sup>23</sup> to remove any ambiguity and opportunity for misinterpretation with regards to this ground.<sup>24</sup> I also proposed with regard to this ground, that regulations be promulgated to the Children's Act to provide for the duty of the Department of Social Development and the Department of Education to provide teachings and other assistance to protect children from situations of abuse, maltreatment and degradation.<sup>25</sup>

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<sup>21</sup> See the proposed provision in section 3 4.

<sup>22</sup> S 150(1)(i).

<sup>23</sup> That is, a provision relating to a child who is sexually abused; had corporal punishment administered to him or her; or who is exposed to, or suffered domestic violence.

<sup>24</sup> This is based on the discussion in sections 3 3 9 1 1, 3 3 9 1 2 and 3 3 9 1 3. See also the proposed provision in section 3 4.

<sup>25</sup> See the proposed provision in section 3 4.

3. For purposes of protecting pregnant learners and preventing the abandonment of newborns,<sup>26</sup> I proposed that regulations be promulgated to the Children's Act to provide a list of reasonable provisions and a range of services to protect pregnant learners within schools and the family environment.<sup>27</sup>
4. With regard to the ground "a child has been exploited or lives in circumstances that expose the child to exploitation", I proposed that the ground be unpacked to provide for additional grounds such as,<sup>28</sup> a child who is: subjected to early marriage; is forced into marriage; has his or her body tampered with or body parts removed, including female genital mutilation; circumcision; has been subjected to virginity testing; and is being sexually exploited, including being subjected to prostitution; and trafficking.<sup>29</sup>
5. I also proposed that section 12 of the Children's Act be amended to include a provision that prohibits child marriage; forced marriage, and any form of exploitation, abuse or harmful cultural practices against children.<sup>30</sup>
6. I proposed that regulations to the Social Assistance Act with regard to the child-

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<sup>26</sup> See the discussion in section 3 3 1 1.

<sup>27</sup> *Ibid.*

<sup>28</sup> See the discussion in sections 3 3 5 1 "early marriage", "forced marriage"; 3 3 5 2 "removal of body parts"; 3 3 5 3 1 "child prostitution"; 3 3 5 3 2 "child trafficking"; 3 3 5 2 1 "female genital mutilation"; 3 3 5 2 2 "circumcision".

<sup>29</sup> See the proposed provision in section 3 4.

<sup>30</sup> *Ibid.*

support grant be amended or that new regulations be promulgated to section 150(1)(a) of the Children’s Act for the duty of the state to assist children in need and their families. I proposed that the child-support grant must be of an amount that is consistent with the needs of children according to their age and stages of development. Furthermore, I proposed that an additional provision be enacted for “special temporary family maintenance”<sup>31</sup> to families without means of subsistence in the Social Assistance Act or the Children’s Act, in order to improve the conditions of children in families.

7. With regards to the ground that identifies children “who are difficult-to-manage”,<sup>32</sup> I proposed that a provision be enacted in the Children’s Act for the Department of Social Development to collaborate with the Department of Education in order to provide skills to parents and care-givers to ensure that parents and care-givers adhere to particular standards that promote good behaviour when providing care to children. I also proposed that regulations be promulgated to provide parents and care-givers with skills that promote positive behaviour in the child.
8. In relation to “children who live on the streets”,<sup>33</sup> I proposed that a provision be enacted in Children’s Act for the duty of the Department of Social Development to implement a programme that will commence with an evidence-based study on

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<sup>31</sup> See the discussion in section 3 3 1 2.

<sup>32</sup> See the discussion in section 3 3 2.

<sup>33</sup> See the discussion in section 3 3 3.

children living on the streets. I further proposed that the provision must include the involvement of the community and the NGO sector and that they must work together in reunifying children with their families. I also proposed that funding be provided for such intervention programmes to ensure proper and successful coordination of services.

9. For the ground regarding a child who “is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency”, I proposed that a provision be enacted in the Children’s Act which ensures that treatment for dependence-producing substance is undertaken at home, as such would promote the right to family life.<sup>34</sup> I also proposed for a provision for the Department of Social Development to establish a framework to be used by community-based service centres and home-based carers to assess and monitor treatment by service users.
10. I proposed, with regard to situations of sexual abuse of children, that a table of offences which describes penalties that must be imposed on the offenders regarding offences committed against children and that such be stipulated in the Sexual Offences and Related Matters Amendment Act to guide the courts when imposing punishment.<sup>35</sup>
11. I proposed that a provision be enacted in the Children’s Act to provide for safeguards

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<sup>34</sup> See the discussion in section 3.3.4.

<sup>35</sup> See the proposed provision and the table of a list of offences and penalties in section 3.4.

that would limit the exposure of children in conflict with the law to possible harmful effects of prosecution and detention. I furthermore proposed that regulations be promulgated to facilitate for the diversion of criminal matters concerning children to alternative dispute resolution mechanisms for restorative justice services, such as allowing the family of the child to repair the damaged property or allowing the child to tender an apology to the victim, in order to keep the child within the community rather than imprisonment.

12. With regard to curbing child labour,<sup>36</sup> I proposed that a provision be enacted in the Children's Act for the Department of Social Development to collaborate with the South African Police Services, the Department of Education, the Department of Labour, the NGO sector and the community, and conduct investigations, raise awareness regarding child labour, and provide basic services to ensure that children go to school rather than provide labour to afford such services.<sup>37</sup>
13. I further proposed that South Africa must learn from foreign jurisdictions, such as Canada and Kenya, and provide for more grounds for mandatory alternative care interventions which are currently omitted in the Children's Act.<sup>38</sup>
14. South Africa has numerous orphans and high levels of deprivation of care on the part

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<sup>36</sup> See the discussion in section 3 3 10.

<sup>37</sup> See the proposed provision in section 3 4.

<sup>38</sup> *Ibid.*



of child-headed households as a result of HIV/Aids.<sup>39</sup> I proposed in relation to child-headed households that a provision be enacted which, amongst others, imposes an obligation on the Department of Social Development to hire stay-in care-givers to provide care to child-headed households and for the provision of a range of services to enable children not take on roles as care-givers of ill parents, or of siblings, in their families.<sup>40</sup>

15. The European jurisdiction uses a threshold criteria which allows the state to interfere with the right to respect for family life if the interference is “in accordance with the law”,<sup>41</sup> it is “for a legitimate purpose,”<sup>42</sup> and that “it is necessary”<sup>43</sup> in a democratic society. The positive aspect about the threshold criteria list is that it is better suited to address the new grounds. Thus, I proposed that a provision be enacted in the Children’s Act for the threshold criteria. However, I recommended that the criteria be used for current and any new grounds for mandatory alternative care interventions. Thus, once the designated social worker has established in his or her investigation report that the circumstances faced by the child warrant that the child be removed, such decision must be scrutinised by the court by applying the threshold criteria

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<sup>39</sup> See the discussion in section 3 3 11.

<sup>40</sup> See the proposed provision in section 3 4.

<sup>41</sup> See the discussion in sections 2 2 2 2 4 1 and 3 2 2.

<sup>42</sup> See the discussion in sections 2 2 2 2 4 2 and 3 2 2.

<sup>43</sup> *K & T v Finland* 707. See also the discussion in sections 2 2 2 2 4 3 and 3 2 2.

before interfering with the right to respect for family life.<sup>44</sup>

### *9.1.3 Prevention and early intervention measures for protection and the socio-economic needs of children<sup>45</sup>*

This section illustrated the increased recognition of early intervention and prevention services in South Africa.<sup>46</sup> It emphasised the fact that preservation of family life may be done by way of protecting the child against abuse, neglect, maltreatment and degradation.<sup>47</sup> In other instances, poverty must be alleviated in the family home where the child lives in order to preserve family life.<sup>48</sup> The responsibilities and rights that parents have over their children are acknowledged.<sup>49</sup>

However, I recommended that the responsibility of the state to support parents in situations where parents are not able to fulfil their child-rearing responsibilities must be expressed in the Children's Act.<sup>50</sup> In the discussion of this section, I proposed, amongst others, that the following provisions be enacted in the Children's Act:

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<sup>44</sup> See the proposed provision in section 3 4.

<sup>45</sup> The topic answers the sub-question "what laws protect, strengthen and preserve the right of the child to grow up in a family environment"? See the discussion in section 1 1 3 1.

<sup>46</sup> See the discussion in section 4 1.

<sup>47</sup> See the discussion in sections 4 1 1 and 4 3 1.

<sup>48</sup> Van der Linde in Nagel (ed.) *Gedenkbundel vir JMT Labuschagne* 109. See a full discussion in ch 4.

<sup>49</sup> See the discussion in sections 2 4 1 and 2 4 2.

<sup>50</sup> See the discussion in sections 4 1 1, 4 2 1 and 4 3 1.



1. For the assistance that must be provided by the state to enable parents to fulfil their responsibilities;<sup>51</sup>
2. For the duty of the Minister of Social Development to promote partnerships and collaborative work between the national, provincial, local government and NGOs.<sup>52</sup> These stakeholders must work together to assist children and their families. Where there are no parents<sup>53</sup> to provide for the care of children, the stakeholders must collaborate and provide direct assistance to children, such as material assistance and any services which will enable children to enjoy quality and sustainable livelihoods for their development and well-being.<sup>54</sup>
3. Furthermore, I proposed that regulations be promulgated to the Children's Act to provide information to intended beneficiaries, with regards to prevention and early intervention services that are available to ensure quality and sustainable livelihoods in families.<sup>55</sup>
4. I proposed that regulations be promulgated to section 144(1)(a) of the Children's Act to guide the designated social worker when investigating the grounds for mandatory alternative care intervention concerning the child, and to consider intervention that is

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<sup>51</sup> See the discussion in sections 4 2 1 and 4 2 3 and the proposed provision in section 4 5.

<sup>52</sup> See the discussion in sections 4 3 1 3 and the proposed provision in section 4 5.

<sup>53</sup> See the discussion in section 3 3 11, in the case of a child in a child-headed household.

<sup>54</sup> See the discussion in sections 4 3 1 1 and 4 3 1 3 and the proposed provision in section 4 5.

<sup>55</sup> See the discussion in sections 4 3 1 and 4 3 3 and the proposed provision in section 4 5.

as non-disruptive to family life as possible.<sup>56</sup>

5. With regard to situations where government is not able to spend money allocated to it for the implementation of the Children's Act, I proposed that regulations be promulgated to the Children's Act to enable the designated social workers to monitor the implementation of prevention and early intervention programmes. I also proposed for the promulgation of regulations that compel the performance of government officials to be monitored and to ensure that government officials are accountability for money that is not spent.<sup>57</sup>
6. I proposed that section 110 of the Children's Act be amended to provide for information regarding the following: the referral process of children in need of protection to Child Protection Organisations; the period of stay of the child in a Child Protection Organisation; the need for a case plan for the care of the child; the situation in which a child protection order can be granted; the types of child protection orders which can be made by the court; the period of effectiveness and monitoring of the order; and who should fund the establishment of Child Protection Organisations.
7. Given the dire need for child protection services in South Africa, I proposed that a provision be established in the Children's Act to ensure the effective use of the Child Protection Organisations. I also proposed that regulations be promulgated to section

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<sup>56</sup> See the discussion in sections 4 3 1 and the proposed provision in section 4 5.

<sup>57</sup> See the discussion in sections 4 3 1 3 and the proposed provision in section 4 5.

105 of the Act to serve as a guide to the strategy required from the Minister of Social Development, regarding the geographical location of Child Protection Organisations; the collaborative work of intersectoral government departments and civil society to provide child protection services; and the monitoring of services provided by Child Protection Organisations.<sup>58</sup>

8. I also proposed that a provision be incorporated in the Children's Act which prioritises Department of Social Development and NGO<sup>59</sup> contract services relating to prevention and early intervention.

#### 9.1.4 *Preparation for removal and the decision-making process*<sup>60</sup>

This section illustrated the situations that may make children and their parents vulnerable with regard to the process in terms of which children are brought into care. These situations relate to the removal of children with or without a warrant; misuse of emergency removals by social workers; instances where the medical practitioner may compel a child to undergo medical examination for removal; keeping certain information that concerns the child confidential; lack of appropriate provision that prioritises mediation in child care proceedings in the Children's Act; the right of the parent and the child to be involved in the decision-

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<sup>58</sup> *Ibid.*

<sup>59</sup> See the discussion in sections 4 4 and 4 4 2 and the proposed provision in section 4 5.

<sup>60</sup> The topic answers the question "what measures are in place that prepare the child and the parent for the removal of the child from family life"? See the discussion in section 1 1 3 1.

making process concerning the removal of the child from family life, including the right of the parent to challenge the removal of the child; situations when the child must be directly involved in proceedings affecting him or her;<sup>61</sup> when a legal representative must be appointed for the child; and measures that must be put in place to enable the child to participate in matters affecting him or her. In the discussion, I proposed that provisions be enacted in the Children's Act:

1. For the judicial review of decisions taken by social worker to remove children from family life.<sup>62</sup>
2. I proposed that a provision be enacted in section 305(8) of the Children's Act which stipulates a list of actions which constitute unprofessional conduct by social workers which cannot be sanctioned.<sup>63</sup>
3. I also proposed that a provision be incorporated in the Children's Act which imposes a duty on the South African Council for Social Services to monitor the functions of social workers who are registered with the council. Also, for such provisions to take action regarding unlawful conduct committed by social worker using the disciplinary powers enlisted in legal prescripts that govern the institution that employs the social worker.

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<sup>61</sup> S 10 of the Children's Act; Van der Linde in Nagel *Gedenkbundel vir JMT Labuschagne* 103 with reference to case law by the ECtHR on the content of the right to family life.

<sup>62</sup> See the discussion in sections 5 2 and 5 5, see also the proposed provision in section 5 6.

<sup>63</sup> See the discussion in section 5 2 2.

4. Furthermore, I proposed that a provision be enacted which allows the institution that employs the designated social worker to report any unlawful conduct by the designated social worker to the South African Council for Social Services Professions in order to enable the social worker to account for his or her actions and be disciplined accordingly.
  
5. I proposed for a provision for the child to undergo medical assessment or examination to assess his or her health condition or possible abuse immediately or after placement into alternative care. Furthermore, the proposed provision must stipulate the age at which the child must consent to medical assessment or examination;<sup>64</sup> situations in which the medical practitioner may compel a child to undergo an assessment or examination; and the circumstances which may require the medical practitioner to disclose information concerning the medical status of the child. The provision must also be clear on the fact that the child must give *informed consent* for him or her to undertake medical examination.
  
6. In order to avoid situations where children are removed from family life without just cause, I proposed that provisions be incorporated in the Children's Act for the right of the parent to participate in the investigation conducted by the social worker concerning the ground for mandatory removal of the child; that a provision be established in section 155(10) of the Children's Act for the right of the parents to

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<sup>64</sup> See the discussion in section 5.2.1 and the proposed provision in section 5.6.



participate in the decision-making process<sup>65</sup> regarding the removal of the child; and for the parent to have access to information concerning the removal of the child to enable the parent to challenge the removal of the child.<sup>66</sup>

7. I proposed that regulations be promulgated to the Children's Act which will guide the interests of attorneys and advocates appointed as legal representatives for children.<sup>67</sup> Also, that guidelines be established which stipulate the responsibilities of the attorneys and advocates as legal representatives on behalf of parents in matters involving their children. Such guidelines must focus on the reasonable efforts that must be exercised by advocates and attorneys in the different phases concerning the removal of the child, such as the prevention of the actual removal, contact, reunification of the child with his or her family and permanency planning upon failure of reunification attempts.<sup>68</sup>
  
8. I proposed that section 55 of the Children's Act be amended for a provision which stipulates the functions of the legal representative in the matter concerning the child. The provision must further provide for information with regards to who bears the costs for legal representation and stakeholders that may provide assistance to the legal representative.<sup>69</sup> Another provision is proposed, which requires the court or any

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<sup>65</sup> See the discussion in section 5 5 2.

<sup>66</sup> See the proposed provision in section 5 6.

<sup>67</sup> See the discussion in section 5 5 2.

<sup>68</sup> *Ibid.*

<sup>69</sup> See the proposed provision in section 5 6.

forum that adjudicates a matter concerning a child to request the Legal Aid to appoint a legal representative for the child. I also proposed for a further provision which stipulates the duties of such legal representative<sup>70</sup>

9. I proposed that regulations be promulgated to section 10 of Children's Act,<sup>71</sup> which must refer to Roger Hart's Participation Ladder<sup>72</sup> and describe the different levels at which the child may participate, the type of support that can be given to the child to ensure meaningful participation, and the impact such participation may have on the child and the proceedings.
10. I also proposed that a provision be enacted in the Children's Act which states the general principles that must guide mediation proceedings. I further proposed that section 6(4) of the Children's Act be amended by inserting a provision which must, where appropriate, give effect to mediation as a priority and court proceedings as the last option. A further provision is proposed which must give information as to where mediators in care proceedings concerning children must be drawn.<sup>73</sup>
11. I also proposed that further regulations be promulgated to section 6(5) of the Children's Act to provide for the requirement of knowledge and skills and the legal responsibility of a mediator who participates in family care mediation, such as

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> See the discussion in section 5 5 1.

<sup>73</sup> *Ibid.*

handling information concerning the child and keeping certain information concerning the child confidential.<sup>74</sup>

12. I proposed that a provision be enacted which must provide information as to what is family care mediation; how family care mediation must be facilitated; and what training a mediator needs.<sup>75</sup> I also proposed for a provision with regard to persons who must participate in the family care mediation of the child.
  
13. With regard to the concern as to the age at which a child can request a *curator*, I proposed that a provision be enacted in section 10 of the Children's Act which permits a child who is of such maturity and level of development to understand the proceedings concerning him or her, be given an opportunity to request a *curator*.<sup>76</sup> I also proposed that section 10 of the Children's Act be amended to identify the different forums at which the parent and the child must be given an opportunity to express their views.<sup>77</sup>

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> See the discussion in section 5.5.1, see also the proposed provision in section 5.6.

### 9.1.5 *Alternative care options*<sup>78</sup>

This section emphasised the fact that when a child is considered for alternative placement, social workers would match the identification of a child with prospective foster parents (including, adoptive parents) in relation to culture, religion and the background of the child in order to create a stable home for the child.<sup>79</sup> Foster care is illustrated as the most preferred care option because it gives the child an opportunity to live in a family<sup>80</sup> compared with placement in a child and youth care centre.<sup>81</sup> This section also indicated the fact that many children are taken care of by extended families as commonly embraced by indigenous people.<sup>82</sup>

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<sup>78</sup> The sub-topic answers the sub-question “what legal measures are in place to ensure that appropriate alternative care is explored for the child in need of care and protection”? See the discussion in section 1 1 3 1.

<sup>79</sup> See the discussion in section 6 1.

<sup>80</sup> See the discussion in section 6 3 1.

<sup>81</sup> See the discussion in section 6 4 1.

<sup>82</sup> See the discussion in sections 2 2 1 2, 2 2 1 9, 6 3 1 and 8 3 1 1.

However, there is no provision for “kinship care” and “communal care” as the types of foster care in the Children’s Act;<sup>83</sup> the Act do not explicitly provide for the responsibilities of foster parents; neither does it provide for the training that is needed to enhance the capacity of foster parents to provide care to children. The discussion also acknowledged the backlog in foster care extensions; and the non-compliance on the part of social workers with the Children’s Act regarding the review of care plans. In the discussion of this section I proposed that the following provisions be enacted in the Children’s Act:

1. For the definition of “communal care” and “kinship care”.<sup>84</sup> Also that a provision be incorporated for the placement of children in alternative care in the order which prioritises: kinship care, foster care with non-relatives, placement in a communal family, and placement in a child and youth care centre as the last option be enacted in the Children’s Act.<sup>85</sup>
2. I proposed that a provision be provided stating that, *where possible*,<sup>86</sup> the child must be placed with foster parents or adoptive parents with a religious, cultural or language background that is similar to the child’s. Another provision that was proposed is the provision of a foster grant to all foster children, including orphaned children who live

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<sup>83</sup> See the discussion in section 2 2 1 9.

<sup>84</sup> See the discussion in para 6 3 1 and 6 3 3; see also the proposed provision in section 6 5.

<sup>85</sup> *Ibid.*

<sup>86</sup> Own emphasis.

with grandparents to adequately meet the needs of such children.<sup>87</sup>

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<sup>87</sup> See the discussion in section 6 3 1 and the proposed provision in section 6 5.

3. I also proposed for a provision for the establishment of a *comprehensive care plan* which includes well co-ordinated services which promote health, development and the well-being of children. I recommended that a *comprehensive care plan* must be made a standard requirement for all alternative care arrangements.<sup>88</sup>
4. I further proposed that a provision be enacted in the Children's Act for the provision of training programmes to foster parents to enhance their capacity to provide care to children. Also that regulations be promulgated to the Act that explicitly stipulate the responsibilities of foster parents. Further, that a provision be established for the cooperation between social workers and foster parents in promoting the development and well-being of the child.<sup>89</sup>
5. I also proposed for a provision for the strict monitoring of foster care placements by the designated social workers in order to marginalise situations of potential risks that come with incapacitated foster parents.<sup>90</sup>
6. With regard to the issue of the backlog in foster care extensions, I proposed that a provision be incorporated in the Children's Act which will ensure that social workers review care plans, and impose an obligation on social workers to communicate the results of the review of foster care plans to a family care mediation forum in order to

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<sup>88</sup> See the discussion in section 6 3 3.

<sup>89</sup> See the proposed provision in section 6 5.

<sup>90</sup> See the discussion in section 6 3 3 and the proposed provision in section 6 5.

bind social workers to act on the report concerning the review of the care plan and the recommendations of the family care mediation forum.<sup>91</sup> I also proposed that a penalty clause be established for situations where the designated social worker does not review care plans or omits to communicate the results of the review of the care plan to the family care mediation forum.<sup>92</sup>

7. I also proposed that a provision be enacted in the Children's Act which to guide the fact that funding be directed to collaborative work by intersectoral government departments, private entities, and NGOs for the implementation of services and the provision of special care services necessary for children in alternative care.<sup>93</sup>

#### *9.1.6 The right to maintain contact and to be reunited with the family after removal<sup>94</sup>*

This section illustrated the absence of a provision for the right of the child, parent, foster parent, the designated social worker, and other key role players concerning the care of the child, to have access to information. With regard to the discussion on the right of the child, the parent, and any person with family ties with the child to maintain contact with the child

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> The sub-topic answers the sub-question "what measures are put in place to ensure that a child in alternative care is able to maintain contact with his or her parents or care-giver after removal from family life? And what measures are put in place to ensure that a child reunites with his or her family after removal from family life"? See the discussion in section 1 1 3 1.



when the child is in alternative care, I noted<sup>95</sup> that the Children's Act omitted to include information regarding the type of contact which may be required by the child and the age at which the child may be provided with such information.

I also noted the fact that there is no information in the Children's Act regarding the establishment of a contact plan; what the plan must include; information regarding supervised contact, and visitation arrangements; and the minimum requirement of frequency of contact. In this section, I proposed that provisions be enacted in the Children's Act:<sup>96</sup>

1. A provision which indicates the different stages at which information may be required after the removal of the child and the kinds of information that may be required by specific role players.<sup>97</sup>
2. For the right of the child to have personal relations and direct contact (including supervised contact) with the parent, siblings, family members and relatives. Also a provision for the information which must be provided to parents, amongst others, regarding the change of the address of the child in care to ensure contact, and also

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<sup>95</sup> See the discussion in section 7 3 1.

<sup>96</sup> See the discussion in section 7 3 2.

<sup>97</sup> Stage 1: information to be used at review hearing after the removal of the child (including emergency removal); stage 2: information to be used at the main hearing; stage 3: information required when the child is in care which relates to, amongst others – contact between the child and the parent and other persons with families; and (b) reunification of the child back into his or her family; and stage 4: information required after reunification or upon failure of reunification efforts, that is, permanency hearing. See the proposed provisions in 7 5.

information that will facilitate contact between the child, the parent, and anyone with family ties with the child, at the state's expense.

3. Another provision that I proposed is for the criteria that must be considered by the children's court and the designated social worker in recommending supervised contact; a provision for guidelines to social workers to ensure that visitations of children and toddlers are tailored differently; a provision for a preferred method of care which ensures that siblings maintain contact; a provision for contact arrangements in general; and the role of the court in determining visitation.
4. For a provision on how the reunification of the child with his or her family is to be facilitated; and a provision for a "complaints channel", which must give children access to the court when their rights are being ignored after removal into care.

#### *9.1.7 Permanency planning when reunification fails*<sup>98</sup>

This section brought to the fore the concept of "concurrent planning" as applied in other foreign jurisdictions; the United States of America in particular. The section specifically discussed how concurrent planning is implemented as a two-way process which is meant to ensure that the child reunites with his or her family timeously or receives a permanent

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<sup>98</sup> The topic answered the sub-question "what happens when reunification fails"? See the discussion in section 1 1 3 1.

placement in the form of adoption.<sup>99</sup> I also discussed in this section, how adoption policies and practice impact both negatively and positively on prospective adoptive parents<sup>100</sup> and children in need of permanent placement.<sup>101</sup>

The discussion noted the fact that customary adoptions are not recognised in the Children's Act, including the fact that such adoptions are not registered.<sup>102</sup> The discussion also illustrated the importance of subsidised adoptions for adoptive parents who do not have the means to provide care to the child,<sup>103</sup> and the fact that the Children's Act does not provide for the right of the child and the birth parent to lodge an application for a post-adoption agreement and other relevant processes that facilitate post-adoption contact.<sup>104</sup> I proposed:<sup>105</sup>

1. That regulations be promulgated to the Children's Act for concurrent planning.<sup>106</sup> Such regulations must specify the criteria which must be used for terminating reunification services; and methods that will be used to ensure that timeous hearings

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<sup>99</sup> See the discussion in section 8 3 3.

<sup>100</sup> See the discussion in section 8 3 2 2.

<sup>101</sup> See the discussion in section 8 3 2 1.

<sup>102</sup> See the discussion in section 8 3 1 1.

<sup>103</sup> See the discussion in section 8 3 2 2 2 3.

<sup>104</sup> See the discussion in section 8 3 2 6.

<sup>105</sup> See the proposed provision in section 8 5

<sup>106</sup> *Ibid.*

are held and that the child is returned home on time.<sup>107</sup>

2. For the recognition of customary adoptions in the Children's Act; for the compulsory registration of all customary adoptions; and for the reporting customary and private adoptions which are taking place in communities;<sup>108</sup>
3. For subsidised adoption for adoptive parents who lack the financial means to maintain a child;<sup>109</sup>

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<sup>107</sup> *Ibid.*

<sup>108</sup> See the discussion in sections 8 3 1 1 and 8 4 2, see also the proposed provision in section 8 5.

<sup>109</sup> See the discussion in section 8 4 2 3, see also the proposed provision in section 8 5.

4. For the right of the birth parent and the child to make an application for a post-adoption or openness order, and a provision which stipulates the procedure regarding the application of the post-adoption contact;<sup>110</sup>
5. For a provision which prohibits unfair discrimination against any child with regards to adoption; that is, providing all children in need of permanent placement an equal opportunity to be adopted. Such provision must also promote equality of treatment by adoption agencies of adoptive parents by prohibiting unfair discrimination against prospective adoptive parents on the grounds of, amongst others, gender, marital status, and sexual orientation, as stipulated in the Constitution. I also proposed that a provision be enacted in the Act for the Department of Social Development to conduct public awareness campaigns regarding the rights of children whose parents are victimised by people with anti-gay attitudes.<sup>111</sup>
6. I furthermore proposed that provisions be enacted in the Children's Act for<sup>112</sup> information which includes all children (irrespective of their special needs), who are available for adoption in the adoption register; for a provision for the adoption of children with physical or mental health challenges and special needs, and the support

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<sup>110</sup> See the discussion in section 8 4 2 6, see also the proposed provision in section 8 5.

<sup>111</sup> See the discussion in section 8 4 2 2 1 2, see also the proposed provision in section 8 5.

<sup>112</sup> See the proposed provision in section 8 5.

that must be provided by the state to children so adopted;<sup>113</sup>

7. For a provision for training of adoption agencies in order to sensitise them on issues of unfair discrimination and the development in our law of the provision which prohibits unfair and unequal treatment of persons on, amongst other grounds, gender, age, marital status and race.<sup>114</sup>

## 9.2 Final remarks

Even though the Constitution does not contain an explicit right to family life, section 28(1)(b) and the South African Children's Act provides sufficient protection for, and the promotion of, the right of the child to family care or parental care or alternative care when removed from the family environment. The insertion of especially, "Prevention and Early Intervention Programmes" can be seen as an attempt to comply with the duty of the state to preserve and promote a child's right to family life (care). As indicated, these programmes are explicitly required, with emphasis consequently being placed on the need to keep children within a family, and with removal being seen as a measure of last resort.

There is a growing appreciation that children have the right to family care or parental care.<sup>115</sup>

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Hence, I have emphasised the need to provide prevention and early intervention services in order to preserve families. See the discussion in section 4 2 1.

I am not in favour of the form of care and protection intervention that is provided to children only when they have suffered poverty, abuse, neglect and other forms of exploitation. I am of the opinion that the livelihoods of children must be advanced whilst in families.

This study has shown that children's rights have become part of South Africa's domestic law. This means that South Africa can have a far greater impact on issues underpinning children's rights as stipulated in the CRC. However, South Africa still needs practitioners, the legislature, and the judiciary to consider international instruments as an important source of guidance on the standards that need to be reached in South African law. I also emphasise that funding must be allocated in the children's budget to facilitate processes that will enable children to participate in the drafting of plans, programmes, legislation in Parliament, legal representation, and other matters affecting them.

When good policies are established to preserve family life, it is important to build capacity for implementation, put systems in place, and ensure that more money is allocated to programmes aimed at preserving family life. Such will ensure that children grow up in families for the full and harmonious development of their personalities, in an atmosphere of happiness, love and understanding.<sup>116</sup> This need, in conclusion, is perhaps best illustrated by the following quote on the ideals behind the Children's Act:

“The state's responsibility is placed centre stage in that part of the preamble declares that the state must respect, protect, promote and fulfil the rights contained in s 28 of the Bill of

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<sup>116</sup> Preamble of the CRC and Preamble of the Children's Act. See the discussion in section 1 1 4.

Rights. The clause that follows explains the rationale for this - to protect children's right requires a commitment to also improving the right of the adults around them because it is 'neither desirable nor possible to protect children's rights in isolation from their families and communities'.<sup>117</sup>

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<sup>117</sup> Skelton & Proudlock (Own emphasis), in Davel & Skelton (eds.) "Interpretation, Objects, Application and Implementation of the Children's Act" *Commentary on the Children's Act* (2007) 1-21.



## CHAPTER 10: REFERENCES

### 10.1 Abbreviations

#### *10.1.1 Abbreviations of Journal Names*

AHRJ	African Human Rights Journal
BJP	British Journal of Psychiatry
C&ILJSA	Comparative and International Law Journal of South Africa
CLR	Columbia Law Review
EAJPH	East African Journal of Public Health
HJL	International Journal of Children's Rights
Int Jour of Children's	International Journal of Children's Rights
IJLP&F	International Journal of Law, Policy and the Family
ICLQ	Islamic Comparative Law Quarterly
JAL	Journal of African Law
JSIJ	Judicial Studies Institute Journal
JASH	Journal of the American Society of Haematology
JICL	Journal of Islamic and Comparative Law
JJS	Journal for Juridical Science
LPAA & LA	Law, Politics in Asia, Africa, Asia and Latin America

MJE&CL	Maastricht Journal of European and Comparative Law
MJR&L	Michigan Journal of Race & Law
OJLS	Oxford Journal of Legal Studies
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
THRHR	Journal of Contemporary Roman-Dutch Law
VJMAS	Vena Journal of Modern African Studies

#### *10.1.2 Other abbreviations*

ACHPR	African Commission on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution
Aids	Acquired Immunodeficiency Syndrome
AID	Artificial Insemination Donor
ANC	African National Congress
AU	African Unity
CAL	Coalition of African Lesbians
CAT	Convention against Torture
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CLRA	Communal Land Rights Act

CPA	Communal Property Associations
CRC	United Nations Convention on the Rights of the Child
CWSK	Child Welfare Society of Kenya
DSD	Department of Social Development
DoJ&CD	Department of Justice and Constitutional Development
ECHR	European Commission for Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court for Human Rights
EHRR	European Human Rights Reporter
FAMSA	Family Association Mediation of South Africa
FGC	Female Genital Cutting
FGM	Female Genital Mutilation
GAATW	International Coordinator of the Global Alliance against Traffic in Women
GN	Government Notice
HCPCCRIA	Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Social, Economic and Cultural Rights

IDASA	Institute for Democracy in South Africa
ILO	International Labour Organisation
JCICS	Joint Council on International Children's Services
MEC	Member of the Executive Council
NEPAD	New Partnership for Africa's Development
OAU	Organisation of the African Unity
PAIA	Promotion of Access to Information Act
PMTCT	Prevention of Mother to Child Transmission
RACAP	Register on Adoptable Children and Prospective Adoptive Parents
SAHRC	South African Human Rights Commission
SAIRR	South African Institute of Race Relations
SALRC	South African Law Reform Commission
STD	Sexually Transmitted Disease
TAC	Treatment Action Campaign
UNCPS	United Nations Convention on Psychotropic Substances
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commission for Refugees
UNSND	United Nations on Single Narcotic Drugs
UNITCD	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances



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*Mazibuko v City of Johannesburg* Case CCT 39/09 2009 ZACC 28 (Unreported)  
*Mentz v Simpson* 1990 (4) SA 455 (A)

*Metiso v Road Accident Fund* 2001 (3) SA 1142 (T)

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*S v Maluleke* 2008 (1) SACR (T)  
*S v Manamela* 2000 (3) SA 1 (CC)  
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*Airey v Ireland* (1970-1980) 2 EHRR 305

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*A v United Kingdom* (1998) 2 FLR 952

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*Berrehab v Netherlands* (1988) 11 EHRR 322

*Beoku v Betts* (2008) UKHL 39

*Birmingham CC v S, R and A* (2006) EWHC 3065

*Boughanemi v France* (1996) 22 EHRR 228

*Boyle v UK* (1996) 19 EHRR 179

*Bronda v Italy* (2001) 33 EHRR 81

*Burghartz v Switzerland* (1994) 18 EHRR 101

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*Chapman v United Kingdom* (2001) 33 EHRR 399

*Couillard Maugery v France* 1 July 2004 (Appl no 64796/01)

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*Eriksson v Sweden* (1989) 12 EHRR 183

*Fadele v UK* (1991) 70 DR 159

*F.N v Minister for Education* (1995) 1 IR 409; (1995) ILRM 297

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*Gaskin v UK* (1990) 12 EHRR 36

*Gezer v Secretary of State for the Home Department* (2004) EWCA Civ 1730

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*Gnahore v France* (2002) 34 EHRR 38

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*H v United Kingdom* (1988) 10 EHRR 95



*H and W v United Kingdom* (1987) 10 EHRR 112  
*Hendricks v Netherlands* (1982) 5 EHRR 223  
*Hoffman v Austria* (1993) 17 EHRR 293  
*Hoffman v Germany* (2003) 2 DLR 671  
*Hoge Laad* (23 June 1995) 1996 NJ 17  
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*Ignacollo-Zenide v Romania* (2001) 31 EHRR 212  
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*Sahin v Germany* (2001) 36 EHRR 765

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*Sommerfeld v Germany* 8 July 2003 (Appl no 31871/96)

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*Tyrer v United Kingdom* (1978) 2 EHRR 1

*Treharne v Secretary of State for Work and Pensions* (2008) EWHC 3222

*T P and K M v United Kingdom* (2001) 2 FLR 549

*Williamson v Secretary of state for Education and Employment* (2005) UKHL 15

*W v Essex County Council* (1997) 2 FLR 535

*W v UK* (1987) 10 EHRR 29

*X v France* (1983) 5 EHRR 302

*X v Switzerland* (1978) 13 DR 248

*X v United Kingdom* 11 July 1977 (Appl no 7626/76)

*X v UK* (1982) 30 DR 113

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*X and Y v United Kingdom* (1983) 32 DR 220

*X, Y & Z v UK* 27 June 1995 (Appl no 21830/93)

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*Yousef v Netherlands* (2002) 3 FCR 577

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### 10.3.2.2 Kenya

Kenyan High Court, Criminal (Appl no 631/02)

*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* (Criminal Appl no 185 of 2004)

### 10.3.3 International and Regional Instruments

African Charter on Human and People's Rights 1981

African Charter on the Rights and Welfare of the Child 1990

Convention 102 on Equality of Treatment of Non-National Residents 1962

Convention on Prevention and Combating Trafficking in Women and Children for Prostitution 2002

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions 1993

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural 1966

International Convention on the Elimination of All Forms of Discrimination against Women 1979

United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 2000

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

United Nations Convention on the Rights of the Child 1989

United Nations Convention on Psychotropic Substances 1977

United Nations Guidelines for the Alternative Care of Children (15 June 2009) A/HRC/11/L.1

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## 10.4 Internet

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## 10.5 Interviews

- 1) Interview with Mrs “Deborah Molebatsi” not her real name, Supervisor in the Professional Services Registration Division, the South African Council for Social Services Professions in Pretoria, Gauteng province, held 2012-10-12
- 2) Interview with Ms Nompula, the head of the child and youth care centre called Thandanani in Honeydew, Roodepoort, held on 2011-03-30
- 3) Interview with Mr Theron, the head of the child and youth care centre called Child Welfare South Africa, Edenvale, Johannesburg, interview held on 2011-04-11
- 4) Interview with Ms Tshikalange, a social worker for the Johannesburg Child Welfare Society, held on 2011-03-31
- 5) Interview with Ms Khoza, the director of the Department of Social Development: Child Protection Unit: Alternative Care, held on 2011-04-14
- 6) Interview with Mr Dube, a registered social worker and a registered counsellor in Pretoria, Gauteng province, held on the 2012-10-25
- 7) Interview with Mr Mqonci, deputy director of the Child Protection Unit of the national Department of Social Development, Tshwane, held on the 2011-04-05
- 8) Interview with Ms Muller, the director in the Child Protection Unit of the national Department of Social Development, Tshwane, held on 2011-04-06
- 9) Interview with Mr “Sipho Mahlangu” not his real name a farm worker in Emmerpan, rural area in the Limpopo province, held on the 2011-06-27
- 10) Interview with Ms Mokoena, a domestic worker in Ruimsig, Roodepoort in Gauteng whose home is in Elandsdoorn, a township in the Limpopo province, held on the 2011-06-27



## 10.6 Statutes

### 10.6.1.1 *South African Statutes*

Age of Majority Act 57 of 1972

Abolition of Influx Control Act 68 of 1986

Administration Amendment Act 9 of 1929

Adoption Matters Amendment Act 56 of 1998

Age of Majority Act 57 of 1972

Aliens Control Act 96 of 1991

Basic Conditions of Employment Act 75 of 1997

Births and Deaths Registration Act 51 of 1992

Births and Deaths Registration Amendment Act 40 of 1996

Black Administration Act 38 of 1927

Children's Act 33 of 1960

Children's Act 38 of 2005

Child Care Act 74 of 1983

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Child Justice Act 75 of 2008

Children's Protection Act 25 of 1913

Children Status Act 82 of 1987

Civil Union Act 17 of 2006

Civil Proceedings Evidence Act 25 of 1965

Communal Property Associations Act 28 of 1996

Communal Land Rights Act 11 of 2004

Company Act 61 of 1973

Constitution of the Republic of South Africa Act 108 1996

Criminal Procedure Act 51 of 1977

Divorce Act 70 of 1979

Domestic Violence Act 116 of 1998

Employment Equity Act 55 of 1998

Estate Duty Act 45 of 1955

Estate Duty Act 59 of 2000

Estate Duty Act 5 of 2001

Extension of Security of Tenure Act 62 of 1997

General Law Amendment Act 46 of 1935

General Law Amendment 92 of 1971

Group Areas Act 41 of 1950

Guardianship Act 192 of 1993

Housing Act 107 of 1997

Indians Relief Act 22 of 1914

Intestate Succession Act 81 of 1987 as amended

Interim Constitution of the Republic of South Africa 200 of 1993

Interim Protection of Informal Land Rights Act 31 of 1996

Judges' Remuneration Conditions of Employment Act 88 of 1989

Kwa Zulu Act on the Code of Zulu Law 16 of 1988

Land Reform (Labour Tenants) Act 3 of 1996

Liquor Act 59 of 2003

Maintenance Act 99 of 1998

Maintenance of Surviving Spouse Act 27 of 1990

Marriage Act 25 of 1961

Matrimonial Affairs Act 37 of 1953

Medical Schemes Act 131 of 1998

Medicines and Related Substances and Control Amendment Act 90 of 1997

Natal Code of Zulu Law R151 of 1987

National Education Policy Act 27 of 1996

National Health Act 61 of 2003

Natural Fathers of Children Born Out of Wedlock Act 86 of 1997

Non-profit Organisation Act 71 of 1997

Pension Funds Act 24 of 1956

Prevention and Treatment of Drug Dependency Act 2 of 1992 (as amended in 1999)

Prevention of and Treatment for Substance Abuse Act 70 of 2008

Prisons and Reformatories Act 13 of 1911

Promotion of Access to Information Act 2 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Public Finance Management Act 1 of 1999

Recognition of Customary Marriages Act 120 of 1998

Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

Restitution of Land Rights Act 22 of 1994

Sexual Offences Act 23 of 1957

Sexual Offences and Related Matters Amendment Act 32 of 2007

Social Assistant Act 59 of 1992

Social Assistant Act 13 of 2004

South African Social Service Professions Act 110 of 1978

Social Work Act 110 of 1978

Social Work Act 86 of 1991

Social Work Act 96 of 1996

South African Police Service Act 68 of 1995

South African Schools Act 84 of 1996

Trust Control Property Act 56 of 1988

Transfer Duty Act 40 of 1949

Upgrading of Land Tenure Rights Act 112 of 1993

Value Added Tax Act 89 of 1991

Welfare Laws Amendment Act 106 of 1997

### *10.6.2 Foreign statutes*

#### *10.6.2.1 Australia*

Children's Act 1995

Children and Young People Act (Australia) 2008

Children's Protection Act (South Australia) 1993

Child Protection Act (Queensland), 1999

Crimes Act 1900 (New South Wales)

Children and Young Persons (Care and Protection Act) (New South Wales), 157 of 1998

#### *10.6.2.2 Botswana*

Penal Code Amendment Act 5 of 1998

Constitution of Botswana Act 1966

### 10.6.2.3 *Burkina Faso*

Government of Burkina Faso 1998

Individual and Family Code 1989

### 10.6.2.4 *England*

Children's Act 2004

### 10.6.2.5 *Ghana*

Adoption Act 104 of 1965, Ghana

Children's Act 950 of 1998

Customary Marriage and Divorce (Registration) Law 112 PNDC 1985

Marriage Ordinance 1884 (Cap 127)

Marriage of Mahommedans Ordinance 1907 (Cap 129)

Children's Act 1998, s 14(2)

### 10.6.2.6 *Nigeria*

Government of Nigeria 2003

Matrimonial Causes Act (Cap 220), Laws of the Federation of Nigeria 1990

Marriage Act (Cap 218), Laws of the Federation of Nigeria 1990

#### *10.6.2.7 Kenya*

Marriage Act, Hindu rites and Divorce Act 1960 (Cap 157)

African Christian Marriage and Divorce Act 2008 (Cap 151)

Mahommendan Marriage and Divorce Act 1962 (Cap 156)

#### *10.6.2.8 Canada*

Child Protection Act (Canada), 2010;

Children and Family Services Act (The Nova Scotia, Canada), 1990;

Child Family and Community Services Act (Victoria, Britain, Columbia and Canada), 1996

Child and Family Services Act (Ontario), 1990

#### *10.6.2.9 Denmark*

Consolidated Act on Social Services (Denmark) 346 of 2007.

(Denmark elected not to incorporate the CRC into its domestic law following its review in 2001. Nevertheless, where there is conflict with relevant national law the Danish courts consider all binding international conventions, including the CRC.)

#### *10.6.2.10 Germany*

German Basic Law 1990

#### *10.6.2.11 India*

Constitution of India Act 1949

Children's Act (India), 1960

The Prohibition of Child Marriages Act 6 of 2007

#### *10.6.2.12 Ireland*

Child Care Amendment Act (Ireland) 19 of 2011

#### *10.6.2.13 Kenya*

Borstal Institutions Act 1991 (Revised in 2009)

Children's Act 8 of 2001

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Criminal Law Amendment Act 5 of 2003

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Kenya's Ministry of Education's Legal Notice 5 of 2005

National Hospital Insurance Fund Act 1998

National Social Security Fund Act 5 of 1977

Pensions Act 31 of 1965

Retirement Benefits Act 1997

#### *10.6.2.14 Lesotho*

Lesotho Sexual Offences Act 29 of 2003

#### *10.6.2.15 Namibia*

Namibian Draft Care and Protection Act 1 of 1996

#### *10.6.2.16 New Zealand*

New Zealand Guardianship Act 1968

Children, Young Persons and their Families Act 1989

Children, Young Persons and their Families Act (New Zealand) 1989

Care of Children Act (New Zealand) 2004

#### *10.6.2.17 Northern Ireland*

Adoption (N.I) Order 1987

Adoption Allowance Regulations (N.I) 1996

Children Order 1995

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Adoption Allowance Regulations (Northern Ireland) 438 of 1996



#### *10.6.2.18 Scotland*

Children Act 1995

Scotland Act 1978

#### *10.6.2.19 Uganda*

Children's Act 6 of 1996

Constitution of Uganda Act 2001

Constitution of Uganda Amendment Act 2005

#### *10.6.2.20 United Kingdom*

Children Act 1989

Children's Act (England), 2004

Children Act (United Kingdom) 1989

Criminal Justice and Police Act of 2000

Family Proceedings Rules 1999

Family Tribunal Courts Act 459 of 1993

Human Rights Act 1998

Human Fertilisation and Embryo Act 1990

#### *10.6.2.21 United States of America*

Adoption and Safe Families Act 1997

Education Amendments Act 235 of 1972

Adoption and Safe Families Act (United States of America) 1997

National Minimum Drinking Age Act 1984

Personal Responsibility and Work Opportunity Act 1996

Social Security Act 1965, Title XIX

# Annexures

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