ACCESS TO JUSTICE FOR MOTHERS WITH INTELLECTUAL DISABILITIES IN CASES OF CHILD NEGLECT AT TWO KWAZULU-NATAL CHILDREN'S COURTS

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DECLARATION

I declare that this thesis, 'Access to justice for mothers with intellectual disabilities in cases of child neglect at two KwaZulu-Natal Children's Courts', which I hereby submit for the degree of Doctor of Laws (LLD), at the Faculty of Law, University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

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DEDICATION

This thesis is dedicated to mothers with intellectual disabilities in South Africa and their children, particularly those facing barriers in exercising their rights to equality, family life, dignity, and access to justice.

This thesis is also dedicated to my late grandmother, Willem Abraham Potgieter (Ouma Duifie) (20 December 1922 to 1 November 2016), who carried the burden of being given male names with humour. A gentle soul and yet formidable, independent and my greatest source of inspiration. My innige danke Ouma dat jy in my geglo en ondersteun het in alles wat ek wou aanpak. Jou liefde vir jou medemens is altyd ’n voorbeeld.

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Willene Holness
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ABSTRACT

Parents, especially mothers with intellectual disabilities, are at a disproportionately high risk of their children being removed from their care by child protection authorities for alleged child neglect – on the assumption that they are incapable of being adequate parents. This archival study examined the court records of two Children's Courts in Durban and Pietermaritzburg, South Africa, for the period 2010 to 2014. The study explored how the South African social services and two Children's Courts meet their international and constitutional obligations in promoting access to justice and supporting the parental rights and responsibilities of mothers with intellectual disabilities who are at risk of having their children removed from their care due to allegations of neglect.

Of 244 cases of neglect surveyed, nine case studies were analysed. In four cases children were removed from mothers with intellectual disabilities based primarily on the mother's disability. The poverty of the families was found to be a contributing factor for removal. It was found that diagnostic-prognostic thinking pervades the social workers' reports and the outcome of the alternative care placement by the court did not depart from such a grounding. Generally, parenting capacity assessments or psychological or psychiatric evaluations were not obtained, and thus diagnoses were not corroborated nor their 'potential' effect on parenting. The lack of legal representation, diagnostic-prognostic evidence tendered in court, inadequate and adapted prevention and early intervention measures offered to families, and the absence of procedural and reasonable accommodations in court processes, translated into inaccessible justice for these mothers. It was found that poverty correlates with disability in all of the cases. Conflation of intellectual and psycho-social disability occurred in five of the cases studied.

The literature reviewed illustrate the stigma and deprivations that women with intellectual disabilities experience in South Africa, despite the existence of some laws and policies aimed at protecting, respecting, promoting and fulfilling their rights. The mothers' rights under international, African regional and constitutional laws, *inter alia* to equality, dignity and access to justice and children's rights, including best interests, were analysed. The formulation of substantive equality as understood by treaty monitoring bodies requires pertinent measures to support and accommodate persons with disabilities in the justice system. Exacting requirements for determining the best interests of the child under international law have not been replicated in the practice of the Children's Courts. The Children's Act and its regulations are found wanting in relation to pertinent measures of reasonable and procedural accommodation of persons with disabilities in the Children's Courts. The inquisitorial practice of these courts do not promote the rights to legal capacity, equality before the law and access to justice of these parents. Attorneys do not represent parents in these proceedings and the absence of cross-examination of social work reports may prejudice these parents. The policy framework of the main state departments including the

Department of Justice and Constitutional Development and the Department of Social Development is fragmented and do not provide for a coherent plan to promote the participation of persons with disabilities in social services and the justice system.

Best practices from other jurisdictions such as Australia, the United Kingdom, and the United States of America on development of disability specific legislation, provision of procedural accommodations in laws and regulations, adapted social work practice and ethical principles for assessments, provision of intermediaries and formulation of appropriate questioning techniques (AQTs) were considered. Lessons from jurisdictions such as India, selected examples from the African continent were highlighted. The South African state's formal provision for procedural accommodations is minimal and requires major reform to meet state obligations and constitutional duties towards persons with intellectual disabilities.

Recommendations are made in relation to law reform primarily of the Children's Act 38 of 2005 and court rules. Specific recommendations include: providing legal representation at state expense, together with adequate training for lawyers and magistrates on informal measures of accommodations whilst law reform on formal measures is underway, and requiring magistrates' to provide reasons for their decisions to promote deliberative decision-making.

It is recommended that social work practice is adapted to enhance full participation of these mothers and to address stereotypical and harmful ableist norms embedded in statutory services and court proceedings. Obtaining an independent parenting capacity assessment adapted for parents with intellectual disabilities from an expert such as a psychologist for forensic purposes, should be considered where relevant and should meet ethical principles. Magistrates should monitor the implementation of proposed prevention and early intervention and therapeutic measures identified by social workers in their reports.

An audit of the accessibility and procedural accommodations in the courts – after consultation with parties with disabilities before the courts is proposed. A court model is proposed on how to provide procedural accommodations in courts. It is recommended that the Children's Court rules should be amended to include dedicated provisions on reasonable accommodations (individual specific measures); support in decision-making; AQTs; and intermediaries adapted to the civil process and to the inquisitorial role of magistrates and should be extended to adults with communication difficulties.

The drafting of disability-specific legislation to guide lawmakers and courts is recommended on broad measures for provision of procedural accommodations and support to these families. In the meantime, the existing legislative potential of the Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 to enforce duties on certain sectors such as social services to provide reasonable

accommodations to persons with disabilities, should be considered. Substituted decision-making laws, legal capacity inhibiting laws (such as those procedural rules in relation to persons with intellectual disabilities derogatorily described as ‘idiots’ for example) should be abolished.

ABBREVIATIONS AND ACRONYMS

AAC	Alternative and Augmentative Communication
ABA	American Bar Association
ACRWC	African Charter on the Rights and Welfare of the Child
ADA	Americans with Disabilities Act
African Disability Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities
APA	American Psychologists Association
AQTs	Alternative Questioning Techniques
AU	African Union
Banjul Charter	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of Discrimination against Women
CESCR	International Convention on Economic, Social and Cultural Rights
CPA 1	Continental Plan of Action for the African Decade of Persons with Disabilities 1999 to 2009
CPA 2	Continental Plan of Action for the African Decade of Persons with Disabilities 2010 to 2019
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CW	Child Welfare
DOJCD	Department of Justice and Constitutional Development
DPOs	Disabled Persons' Organisations
DSD	Department of Social Development
DSW	Department of Social Welfare
FASD	Foetal alcohol spectrum disorder
GBV	Gender based violence

IASSID	The International Association for the Scientific Study of Intellectual Disabilities
ICCPR	International Convention on Civil Political Rights
ICT	Information Communication Technology
ID	Intellectual Disability
IQ	Intelligence Quotient
ITPs	Independent third persons
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex Queer
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NCD	National Council on Disability
NDP	National Development Plan
NGOs	Non-governmental organisations
NHRIs	National Human Rights Institutions
NPC	National Planning Commission
OAU	Organization of African Unity
OUNHCHR	Office of the United Nations High Commissioner for Human Rights
PAIA	Promotion of Access to Information Act
PCA	Parenting Capacity Assessments
PEPUDA	Promotion of Equality and Prohibition of Unfair Discrimination Act
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SASOP	South African Society of Psychiatrists
Sexual Offences Regulations	Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and related matters) Amendment Act
SIRG	Special Interest Research Group on Parents and Parenting with Intellectual Disabilities
StatsSA	Statistics South Africa
TMBs	Treaty Monitoring Bodies

WCCC Act	Western Cape Commissioner for Children Act 2 of 2019
WHO	World Health Organization
WPA	World Programme of Action Concerning People with Disabilities
WPF	White Paper on Families
WPRPWD	White Paper on the Rights of Persons with Disabilities
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Principles	Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

TABLES & DIAGRAMS

TABLE OF CONTENTS

CHAPTER ONE:

INTRODUCTION

1.1. Introduction

How we perceive legal capacity and equality in society and in the law, has a direct bearing on what rights and responsibilities we attribute to all persons – including persons with intellectual disabilities. Philosophical arguments about the lack of or diminished rationality or reasoning capacity, and therefore moral worth or status of persons with intellectual disabilities, in relation to aspects such as personhood, agency, equality and responsibility[1] – are questioned with the introduction of the United Nations' Convention on the Rights of Persons with Disabilities (the CRPD).[2] The CRPD categorically states that persons with disabilities, including those with intellectual disabilities, are persons before the law, on an equal basis with others (those without disabilities), and who are entitled to all human rights.[3] These human rights include the right to found and maintain families – in other words to procreate and care for children.[4] Denial of legal capacity is not countenanced and any purported legal capacity denial may not result in the deprivation of a person's legal rights.[5]

Parents with intellectual disabilities are at a disproportionately high risk of their children being permanently removed by child protection authorities for alleged child neglect,[6] on the assumption that persons with disabilities cannot be adequate parents.[7] Women with disabilities specifically are often considered incapable of caring for their children because of the perception that they are passive and dependent, and that they are cared for by their children (known as parentification)[8] instead of fulfilling

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1 EF Kittay & L Carlson L (eds) *Cognitive Disability and its challenge to Moral Philosophy* (2010) 1.

2 UN General Assembly *Convention on the Rights of Persons with Disabilities* resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

3 Arts 5 and 12 of the CRPD.

4 Committee on the Rights of Persons with Disabilities issued General Comment 1 'Article 12: Equal Recognition before the Law' (2014) CRPD/C/GC/1 para 8.

5 Council of Europe Commission for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (2012) <https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_GBR.pdf> (accessed 12 January 2016).

6 T Booth et al 'Parents with learning difficulties, care proceedings and the family courts: Threshold decisions and the moral matrix' (2004) 16 *Child and Family Law Quarterly* 409 409 (citing percentages from studies indicating the rate of permanent placement outside the home in Denmark, Germany, Belgium, Norway, New Zealand, Australia, New York and the United Kingdom at 40 to 60% of children in these families).

7 D McConnell et al *Parents with a Disability and the New South Wales Children's Court* (2000) 2 <www.sydney.edu.au> (accessed 12 January 2016).

8 Parentification includes a variety of caring behaviours usually associated with a parent, but is taken on by children and adolescents in some circumstances, which behaviour includes advice giving, cooking and cleaning. TY Khafi et al 'Ethnic differences in the developmental significance of parentification' (2014) 53 *Family Process* 267 268. See J Faureholm 'Children and their life

their role as caregivers.[9] The assumption is further underpinned by the belief that parents with intellectual disabilities are likely perpetrators of child abuse and neglect.[10] This is so – despite studies that show that 'disability is not a causal factor in child neglect or parental inadequacy'.[11] Perceptions of legal capacity and equality can impact on access to justice for mothers with intellectual disabilities, when statutory proceedings are initiated to remove their children from their care.

In the justice system these mothers are presumed incompetent, as judged by assessments and reports prepared by social workers or psychologists after an investigation into the family's circumstances.[12] In Australia,[13] the United States of America,[14] Canada[15] and the United Kingdom,[16] the states' removal of children from these parents continues to emphasise perceived parental inadequacy,[17] and not necessarily the best interests of the child. The decision to intervene in the home is premised on the existence of the disability of the parent, and not on evidence of child abuse or neglect.[18] This disproportionate emphasis on the disability of parents

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experiences' in *Parents with intellectual disabilities: Past, present and futures* (2010) 67, explaining both positive and negative consequences of caring for parents with intellectual disabilities.

9 R Mykitiuk & E Chadha 'Sites of exclusion: Disabled women's sexual, reproductive and parenting rights' (2011) in MH Rioux, LA Baser & M Jones (eds) *Critical perspectives on human rights and disability law* (2011) 157 192.

10 R Hayman 'Presumptions of justice: Law, politics and the mentally retarded parent' (1990) 103 *Harvard Law Review* 1201; D McConnell et al 'Providing service for parents with intellectual disability: Parent needs and service constraints' (1997) 22 *Journal of Intellectual and Developmental Disability* 5.

11 L Dowdney & D Skuse 'Parenting provided by adults with mental retardation' (1993) 34 *Journal of Child Psychology and Child Psychiatry* 25; M Starke 'Descriptions of children's needs and parenthood among mothers with intellectual disability' (2011) 13 *Scandinavian Journal of Disability Research* 283.

12 S Goodinge *A Jigsaw of Services: Inspection of Services to Support Disabled Adults in their Parenting Role* (2000), Social Services Inspectorate, United Kingdom para 1.29; R Levesque 'Maintaining children's relations with mentally disabled parents: Recognizing difference and the difference it makes' (1996) 16 *Children's Legal Rights Journal* 14; and C Watkins 'Beyond status: The Americans with Disabilities Act and the parental rights of people labelled developmentally disabled or mentally retarded' (1995) 83 *California Law Review* 1415.

13 G Llewellyn et al 'Prevalence and outcomes for parents with disabilities and their children in an Australian court sample' (2003) 27 *Child Abuse & Neglect* 235.

14 D Margolin 'No chance to prove themselves: The rights of mentally disabled parents under the Americans with Disabilities and State Law' (2007) 15 *Virginia Journal of Social Policy & Law* 112.

15 D McConnell et al 'Parental cognitive impairment and child maltreatment in Canada' (2011) 35 *Child Abuse & Neglect* 621.

16 T Booth et al 'Care proceedings and parents with learning difficulties: Comparative prevalence and outcomes in an English and Australian court sample' (2005) 10 *Child & Family Social Work* 353; S Gould & K Dodd '"Normal people can have a child but disability can't": The experiences of mothers with mild learning disabilities who have had their children removed' (2014) 42(1) *British Journal of Learning Disabilities* 25.

17 ST Azar et al 'Intellectual disabilities and neglectful parenting: Preliminary findings on the role of cognition in parenting risk' (2012) 5 *Journal of Mental Health Research in Intellectual Disabilities* 94.

18 D McConnell & G Llewellyn 'Disability and Discrimination in Statutory Child Protection Proceedings' (2000) 15 *Disability & Society* 883.

constitutes unfair discrimination.[19] The assessments or reports of parenting capacity therefore carry significant evidentiary weight and are difficult to challenge. The result is that Children's Courts may 'rubberstamp' diagnostic-prognostic assessments.[20] Non-recognition of legal capacity,[21] lack of accessible procedures, lack of reasonable accommodation in the court process[22] and lack of adequate legal representation[23] for these mothers, impact on the treatment of these parents in the legal system and can imbed iniquitous stereotypes of parenting conduct and adequacy.

The literature on parents with intellectual disabilities suggests that they can be taught to care for their children adequately.[24] Positive parenting skills can reduce the risk of child neglect from persisting and strengthen protective factors, and even prevent new instances of maltreatment.[25] The learning of child care skills, where deficient, requires parenting training programmes to be developed specifically for this category of parents, and also requires ongoing support and monitoring,[26] as well as coordination and collaboration between service providers.[27] The welfare system that is supposed to support these parents fails them when preventative services are not adequate or not provided *before* a court intervention, and further when services geared towards reunification are disingenuous.

Two sites of intervention in family life occur (in all jurisdictions, including South Africa). The first site is intervention by social services providing preventative and early

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19 Hayman (n 10 above) 1227 ('A discrete sense of difference pervades the [care and protection] process: discrimination begins with the initial decision to intervene, ends in the decision to terminate the relationship, and is manifest in nearly every significant decision along the way').

20 G Llewellyn et al 'Prevalence and outcomes for parents with disabilities and their children in an Australian court sample' (2003) 27(3) *Child Abuse and Neglect* 235.

21 P Weller 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5 *Laws* 1 2.

22 S Collings et al *Supporting Parents with Intellectual Disability in Care and Protection Proceedings Project: Review Report* (2017) 1.

23 P Swift et al *What Happens when People with Learning Disabilities need Advice about the Law?* (2013) 1 <http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf> (accessed 12 January 2017); B Tarleton 'Specialist advocacy services for parents with learning disabilities involved in child protection proceedings' (2008) 36 *British Journal of Learning Disabilities* 133.

24 Feldman is a notable scholar. See *inter alia* MA Feldman et al 'Effectiveness of a child-care training program for parents at-risk for child neglect' (1992) 24 *Canadian Journal of Behavioural Science* 14; MA Feldman et al 'Using self-instructional pictorial manuals to teach child-care skills to mothers with intellectual disabilities' (1999) 23 *Behavior Modification* 480*;* MA Feldman & L Case 'Step by step child care: A manual for parents and child-care providers (2007) (unpublished).

25 G Ismail et al 'Child maltreatment prevention through positive parenting practices' (2012) *Information Sheet* MRC-HSRC and UNISA (on positive parenting skills, includes effective communication, appropriate discipline, and responding to the children's physical and emotional needs) <http://www.mrc.ac.za/crime/ChildMaltreatmentInformationSheet.pdf> (accessed 12 January 2016).

26 M Makoae et al 'Maltreatment Prevention and the Ethic of Care' in A Van Niekerk et al (eds*) Crime, Violence and Injury in South Africa: 21st Century Solutions for Child Safety* (2012) 67 80.

27 LS Ethier et al 'Impact of multi-dimensional intervention programme applied to families at risk for child neglect' (2000) 9 *Child Abuse Review* 19.

intervention services – initiating removal of the child to alternative care on suspicion, allegations or 'evidence' of neglect. The second site is intervention by

- the Children's Court providing statutory oversight over the placement of the child in alternative care, with the aim of permanency for the child and supervision of family preservation and reunification of the child with the family; and
- social services providing the services that facilitate permanency and family preservation and reunification. This study examines what happens at those sites of interventions in South Africa.

For child protection generally, policy, legislation and guidelines on provision of prevention and early intervention services proliferate,[28] but 'insufficient funds, too few practitioners and low levels of political commitment' have not realised the potential of these services in sufficient quantity or quality – and the demands of maltreated children and their families remain unmet.[29] For parents with intellectual disability (and parents with disabilities generally), these challenges are likely to be greater.

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[28] Guidelines and advice on the design, implementation, monitoring and evaluation of child protection policies and programmes, can be found in the following sources: Plan *Policy and Programming Resource Guide for Child Protection Systems Strengthening in Sub-Saharan Africa* (2011) Plan, Save the Children, TRG, UNICEF, World Vision <http://www.unicef.org/protection/files/Policy_and_Programming_Resource_Guide_final_Oct_2011.pdf>; DM Makoae, MA Warria, MC Bower, DC Ward, DJ Loffell & PA Dawes *South Africa Country Report on the Situation on Prevention of Child Maltreatment Study* (2009) Cape Town: HSRC and WHO; Department of Social Development *The National Policy Framework and the norms, standards and practice guidelines for the Children's Act* (2010)*;* Department of Social Development *Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa* (2011); A Dawes, I Willenberg & W Long *Indicators for child protection: Report for the Research Directorate Department of Social Services & Poverty Alleviation Provincial Government of the Western Cape* (2006) HSRC: <http://www.hsrc.ac.za/Research_Publication-19196.phtml>. Cf Department of Social Development and UNICEF *Identification and Assessment of Early Intervention and Prevention Programmes in South Africa* (2011) Pretoria: DOSD and UNICEF South Africa <http://www.docstoc.com/docs/117521138/Implementation-of-the-Children%EF%BF%BDs-Act> (accessed 12 January 2016).

[29] J Loffell et al 'Human resources needed to give effect to children's right to social services' in P Proudlock et al (eds) *South African Child Gauge 2007/2008* (2008) Children's Institute: The University of Cape Town 48 <http://www.ci.org.za/index.php?option=com_content&view=article&id=510&Itemid=37&phpMyAdmin=xGIUwSo1y0UOOfk9xyQp8iqGULa> (accessed 12 January 2016); D Budlender & P Proudlock *Funding the Children's Act: Assessing the adequacy of the 2011/12 budgets of the provincial departments of social development* (2011) University of Cape Town, Children's Institute: <http://www.ci.org.za/index.php?option=com_content&view=article&id=896:20112012-budget-analysis&catid=32> (accessed 12 January 2016).

The implementation of the Children's Act 38 of 2005 (as amended) requires vast human resources that have not eventuated.[30] This Act is by necessity child-focused.[31] The recognition of the rights of all parents is provided for in the context of generic acquisition or loss of rights and responsibilities of parents – regardless of disability.[32] The Act indicates that the parental rights and responsibilities 'that a person may have in respect of a child, include the responsibility and the right to care for the child, to maintain contact' with him or her, to act as their guardian, and to 'contribute to [their] maintenance.'[33] The Act recognises that parents may need help, such as being taught parenting skills and education, provided for under prevention and early intervention provisions of the legislation, but has no features that indicate proceedings are aimed at promoting the participation of parents with disabilities (and intellectual disabilities in particular) in proceedings affecting their rights as parents.

Other jurisdictions have developed several interventions to assist these parents and other parties with disabilities before courts and in their daily decision-making (which may include decisions around parenting). For example

- Legal capacity law reform away from substituted decision-making to supported decision-making laws, including reform of outdated mental capacity/legal capacity tests and assessments;[34]
- Drafting and implementing rules and regulations of courts to make them accessible to persons with disabilities, both in facilities and proceedings, and to provide reasonable and procedural accommodations where needed;[35] and

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30 Stakeholders who implement the Children's Act includes 'social workers, child and youth care workers, social auxiliary workers and social work supervisors.' A lack of significant budget increases impacted on both 'the quality and prospects for extension of services.' Parliamentary Monitoring Group 'Children's Act: Implementation challenges and proposed amendments' (2013) *Departments of Social Development and Justice and Constitutional Development* <http://www.pmg.org.za/node/40061> (accessed 12 January 2016).

31 J Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34 *Journal for Juridical Science* 1 3.

32 Secs 18 to 29 of the Children's Act 38 of 2005.

33 Sec 18(2) of the Children's Act.

34 For example, Ireland: Mental Capacity Act (Northern Ireland) 2016; Czech Republic: Czech Civil Code: Supportive measures for decreased legal capacity; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* Issue Paper IP 44 (2013) <https://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_44.pdf> (accessed 12 January 2016); South African Law Reform Commission *Assisted Decision-making of Adults with Impaired Decision-making Capacity* (2004) Discussion Paper 105. Cf G Davidson, L Brophy, J Campbell, SJ Farrell, P Gooding & A O'Brien 'An international comparison of legal frameworks for supported and substitute decision-making in mental health services' (2016) 44 *International Journal of Law and Psychiatry* 30.

35 Australia: Victoria Legal Aid's submission to the Victorian Parliamentary Law Reform Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers (focusing on criminal justice) (2011) <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability>; Uganda: MDAC's *Justice for People with Mental Disabilities in Uganda: A Proposal for Reform of Rules of Court* (2015) http://www.mdac.org/sites/mdac.info/files/uganda_rules_of_court_proposal.pdf, and *Access to*

- Drafting of model laws to promote participation of parents with intellectual disabilities in statutory proceedings (custody), such as Children's or Family Courts.[36]

It is hoped that this study, being socio-legal in nature, will take the first step to crafting South Africa's way forward in addressing this gap.

1.2. Background

This background briefly outlines the rights framework, relevant policy and legislation, and identifies some of the gaps for South Africa.

The two rights that frame the issue for these parents and impact directly on their right to found and maintain a family are: the right of access to justice and the right to equal recognition before the law – including legal capacity on an equal basis with others.

Access to justice, at its heart, is about participation. It requires the meaningful involvement of persons in the legal proceedings, with provision of appropriate information, support and accommodations where needed.[37] The existence of several international and domestic law protections against unwarranted discrimination and promotion of substantive equality and access to justice, means that persons with disabilities have the same rights as persons without disabilities to have their disputes heard in 'procedurally and substantively fair ways in all courts in South Africa.'[38] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa[39] (the African Disability Protocol), echoes the CRPD's guarantees of the rights to access justice and equal recognition of legal capacity – but goes further in demanding that states parties 'ensure legal assistance including legal aid to persons with disabilities'.[40] Constitutionally, everyone is entitled to 'have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial

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Courts and Reasonable Accommodations for People with Mental Disabilities in Uganda (2015) <http://www.mdac.org/sites/mdac.info/files/access_to_courts_in_uganda.pdf> (all accessed 12 January 2017).

36 United States of America: US National Council on Disability (NCD) (2012) *Rocking the cradle: Ensuring the rights of parents with disabilities and their children* http://www.ncd.gov/publications/2012/Sep272012/. (accessed 12 January 2016).

37 Weller (n 21 above) 2.

38 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 27 31. These protections will be discussed in chapter 4. Suffice to mention, art 13 of the CRPD at this juncture expects state parties will ensure effective access to justice, which should include procedural accommodations to facilitate the effective role of persons with disabilities as participants in legal proceedings.

39 AU *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) 29 January 2018 (African Disability Protocol).

40 Art 9(4) of the African Disability Protocol.

tribunal or forum'.[41] How this resolution for mothers with intellectual disabilities happens in practice in Children's Courts, is the focus of this study.

In this study, four aspects of access to justice (in civil proceedings such as Children's Court inquiries) are of particular relevance:

- Legal capacity recognition and support provision where needed;
- Procedural accommodations where needed;
- Provision of free adequate legal representation for the indigent; and
- Appropriate training of justice personnel and others involved in the administration of justice.

These four aspects are relevant in that they speak to dismantling – for mothers with intellectual disabilities – barriers to access to justice that mothers without disabilities may not experience, especially in relation to the first and fourth factors. For example, the legal capacity and support to exercise such capacity is rarely questioned for a mother without an intellectual disability, and relevant training for the justice stakeholders is therefore not as sorely needed in this respect. The second and third aspects are relevant for all persons, but their absence in court proceedings with a mother with an intellectual disability compounds their vulnerability – even more so than perhaps for illiterate or indigent mothers without disabilities. With regard to the third aspect, as for many other vulnerable groups, obtaining available, affordable and adequate legal representation is difficult for women with intellectual disabilities, and added to this is the fourth aspect: 'the lack of knowledge by legal professionals of how to work with clients with disabilities, and a lack of knowledge of the legal concerns faced by persons with disabilities'.[42]

Our constitutional jurisprudence[43] has stressed the internationally accepted norm that human rights are interdependent, indivisible and interrelated.[44] One's ability to access justice allows enjoyment of other rights, and inability to access justice frustrates enforcement of rights.[45] Meaningful access to justice will allow a person to

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41 Sec 34 of the Constitution of the Republic of South Africa, 1996.

42 S Ortoleva 'Inaccessible Justice: Persons with Disabilities and the Legal System' (2016) 17 *International Law Society of America, Journal of International and Comparative Law* 281 300.

43 Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 37; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 1 SA (CC) para 36.

44 S Hissa al Thani 'Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument' Statement by the Special Rapporteur on Disability to the United Nations Human Rights Council, September 2006 <http://www.un.org/esa/socdev/enable/srstathrc2006.html> (accessed 12 January 2016). See, also, the Vienna Declaration and Program of Action's (1993) refrain that human rights are 'indivisible, interdependent and interrelated' (para 63) (World Conference on Human Rights 1993) <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)A.CONF.157.23.En)> (accessed 12 January 2016).

45 Ortoleva (n 42 above) 286.

vindicate other rights – for example the right to found and maintain a family and for the child to have parental care.

Equal recognition before the law is the status that the law accords to everyone – legal capacity. Recognition of such capacity of all persons, including persons with disabilities, means that one has all the rights that flow from having legal standing, including having one's decisions about life, including parenting, respected. The CRPD introduced an understanding of legal capacity as a social and legal status accorded to persons with disabilities independent of a person's particular abilities.[46] In short, mothers with intellectual disabilities have legal capacity and can exercise this right with the necessary support they require to do so under international law. Support in decision-making should not be confused with the reasonable accommodation measures and basic accessibility requirements resting on social workers, and, in particular, needed in the Children's Court. There is some overlap, such as requiring proceedings to be explained in easily understood basic terms. However, support is more about how another person, whether formally or informally, provides assistance to the person to articulate his or her will and preferences, in relation to a decision he or she has to make. Described in the most basic terms, such a person should not be the social worker or the magistrate involved in the court proceedings, and should be separate from the proceedings (not have a vested interest). They may be a family member, a trusted friend, a member of a disabled person's organisation, or until our law changes away from substituted decision-making – a curator if so appointed.

Since there is currently no research on the phenomenon of removal of children of parents with disabilities of any type in South Africa or other developing countries, the prevalence of disproportionate child removals from parents with disabilities in the Global South is unclear. This gap requires empirical research to ascertain whether parents with intellectual disabilities are disproportionately represented in child removal cases in selected courts in South Africa.[47] Du Toit has commented that

> Proceedings in the Children's Court are shrouded in mystery through confidentiality and privacy regulation, and the law relating to care and protection proceedings is obscure. The public are therefore not informed of their rights or the process in care and protection proceedings. [48]

Added to this is that the social worker's report, usually the only piece of evidence admitted, is admitted and accepted as evidence with the only requirement that he or she confirms the contents thereof to the court.[49] While in theory parties to the

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46 W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal of Human Rights* 313 314.

47 See, for example, the New South Wales study that reviewed 285 court files in two children's courts for the period 1998-9, McConnell et al (n 7 above). See, also, D Glaun & P Brown 'Motherhood, intellectual disability and child protection: Characteristics of a court sample' (1999) 24 *Journal of Intellectual and Developmental Disability* 98. In that instance, 12 court cases before the Victorian Children's Court were reviewed in 1996-7. Neglect rather than abuse was alleged.

48 C Du Toit 'Children' in *Juta's Quarterly Review of South African Law* January to March 2012 (1).

49 CJ Davel & A Skelton *Commentary on the Children's Act* (2017) 4-25 (commenting on section 58 of the Children's Act relating to who may adduce evidence in the court).

proceedings, including mothers with intellectual disabilities (or their legal representatives) may cross-examine the social worker on the contents of the report, in practice this does not happen, and thus the contents stand and may not be questioned later.

The strengthened and extended role for both social workers and Children's Court magistrates under the Children's Act's provisions for prevention and early intervention services (chapter 8 and 9 of the Act), has been lauded.[50] Unfortunately, most preventative efforts in South Africa are not well resourced or adequately evidence-based.[51] Monitoring the quality and impact of interventions remains haphazard. The link between the appropriateness and adequacy of prevention and intervention services offered by social workers and the Children's Courts magistrates' understanding of what is needed and feasible for a particular family, have not been the focus of any study.

The lack of prioritisation, in South Africa, despite international consensus on the need for measures to dismantle such barriers, is, in part, due to the pernicious continuation of ableism in legal and social welfare institutions. Ableism is discrimination against persons with disabilities, understood as the general preference, or bias, whether implicit or explicit, for 'normality' or *not being disabled.*[52] Such a preference, much like sexism and racism, is premised on the supposed superiority of those without disabilities and for an existence without disability as being ideal.[53] Ableist prejudice impacts not just on how people generally perceive persons with disabilities and their capabilities (or lack thereof), but may have prejudicial effects on the perceptions of professionals about the ability of persons with disabilities to provide testimony and to parent – including social welfare professionals in child protection.[54]

Sanism is part and parcel of our law, as it has been used to deny persons with particular disabilities sexual reproductive health rights (and legal capacity to make determinations about their sexuality). These particular disabilities are psychosocial (mental illness) and intellectual disabilities. Sanism is the 'irrational prejudice' about someone's mental state or illness that results in discriminatory treatment of such

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50 CR Matthias & FN Zaal 'Supporting familial and community care for children: Legislative reform and implementation challenges in South Africa' (2009) 18 *International Journal on Social Welfare* 291 293.

51 M Makoae et al *Children's Court Inquiries in the Western Cape* (2008) Final report to the Research Directorate, Department of Social Development, Provincial Government of the Western Cape. Cape Town: Human Sciences Research Council 67-83.

52 F Campbell *Contours of ableism* (2009) 1 3.

53 C Friedman 'Defining disability: Understanding of and attitudes towards ableism and disability' (2017) 37(1) *Disability Studies Quarterly* <http://dsq-sds.org/article/view/5061/4545> (accessed 10 November 2018).

54 SN Proctor *Implicit bias, attributions, and emotions in decisions about parents with intellectual disabilities by child protection workers* unpublished PhD thesis, Pennsylvania State University (2011) cited in Friedman (n 52 above).

persons.[55] Strictly speaking, prejudice based on ideals of a person's mental state usually pertains to mental illness (psychosocial impairment), but because of the conflation around the difference between intellectual and psychosocial impairment in some instances, sanism plays a role in the way in which persons with intellectual disabilities are treated. In fact, it is submitted that sanism is a derivative of ableism. These sanist laws include legislation (and common law principles) on the sterilisation of persons with psychosocial and intellectual disabilities without their consent;[56] laws that prohibit sexuality or interfere in sexual autonomy[57] and parenting;[58] legal incapacity determinations;[59] and involuntary institutionalisation.[60]

One of the reasons why sanism and ableism creep into the practice of law, is that some persons with intellectual disabilities may also find it difficult to communicate without support or accommodations. Communication difficulties arise when persons cannot, for example, 'fully [understand] what is being said to them, [express] themselves through speech, [concentrate] for long periods of time and [remember] information they have been given'.[61] The first way in which law is complicit in ableism, is the issue of mental and legal capacity. The second way is the inaccessibility of court proceedings – particularly due to lack of procedural accommodations.

There are no regulations or guidelines on access to justice for persons with disabilities in South Africa – except for the context-specific Sexual Offences Courts' regulations that contain limited provisions for accommodations in relation to testifying and for accessible facilities.[62] Other courts (criminal or civil) do not have similar requirements, including the Children's Courts. The latter's proceedings (and premises) have few provisions for accessibility and reasonable accommodation:[63] An analysis of

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55 ML Perlin & AJ Lynch (eds) *Sexuality, disability and the law* (2016) Palgrave MacMillan 14; ML Perlin & A Lynch 'His sexless patients: Persons with mental disabilities and the competence to have sex' (2014) 89 *Washington Law Review* 257 259.

56 W Holness 'Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities' (2013) 27 *Agenda* 35.

57 Mykitiuk & Chadha (n 9 above) 158.

58 W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are 'at risk of neglect' and their parents' (2015) 2 *Stellenbosch Law Review* 313.

59 W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 313.

60 MYH Moosa & FY Jeenah 'Involuntary treatment of psychiatric patients in South Africa' (2008) 11 *African Journal of Psychiatry* 109.

61 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99-120 101, citing J Talbot 'Effective communication' (2017) unpublished conference paper 3. Cf RM White et al 'Transformative equality: Court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* a651. <https://doi.org/10.4102/ajod. v9i0.651>.

62 E.g. regs 5(2)(a) and 15(10)(b) of the Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in GN 108 of 2020 in *Government Gazette* 43000 of 7 February 2020.

63 Sec 52 of the Children's Act requires proceedings in the Children's Courts to follow the Magistrates' Courts Act 32 of 1944 and its rules. Notable provisions are: secs 6(2)(d), 42(8(b) and (d), and

the impact of these provisions on access to justice for parties before the Children's Courts (and an identification of possible gaps) is sorely needed.

This empirical study will use case reviews of court records in two Children's Courts in KwaZulu-Natal (Durban and Pietermaritzburg), from 2010 to 2014, to establish the prevalence, level of evidence and assessment relied upon to remove children from mothers with intellectual disabilities and to place them in alternative care. It will also be determined whether adequate support services were offered before, during and after statutory interventions to preserve the family, and whether the rights to equality and access to justice of these parents (particularly provision of legal representation and reasonable accommodation) have been embedded in the court proceedings.

1.3. Problem statement

The core issue that arises under the current legislative landscape is to what extent the Children's Act (and implementation through court proceedings) and other relevant legislation, adequately protect the bouquet of rights of the children and their mothers with intellectual disabilities, when statutory proceedings are initiated and concluded in cases of allegations of neglect.

An analysis of court records of two Children's Courts in one province is therefore considered to

- Analyse the evidence led in the court inquiries (hearings) to illustrate whether in cases where a parent's disability was flagged as relevant by the social worker, there is an indication that the court, in any of the cases, was aware of the implications of an allegation of incapacity to parent due to intellectual impairment and the availability of any measures (including procedural accommodations and support) to assist the mother (or father) to effectively communicate and participate in the court proceedings. In all cases whether or not the disability of a parent was identified as being present, legal representation, cross-examination of or by parents, and procedural accommodations, where relevant, are also identified (ordinary neglect cases not constituting case studies), legal representation, cross-examination of or by parents, and procedural accommodations, where relevant, are identified;
- Establish whether diagnostic prognostic outcomes for the parent, in the 'disability' labelled cases, were predicted in the social work reports, showing potential bias or ableism. Due to the absence of a justification being provided for the court order, it is impossible to determine with certainty to what extent these assumptions played a role in the court's final decisions, but it indicates

52(2)(ii) of the Children's Act. Cf Rules Board of the Children's Court *Draft Rules regulating the conduct of proceedings of the Children's Court* October 2018 (copy with the author).

potential bias where rigorous questioning of inherent ableism did not occur at the behest of the presiding officer; and

- Considering cases of mothers with intellectual disabilities in a vacuum will be of limited use – the study will therefore compare cases of neglect where: the parent has no disability; the parent has an intellectual disability; and the parent has a disability other than an intellectual disability, and for example is mobility impaired or is a psychiatric survivor or mental health user (known as psychosocial disability). The latter category is important as a comparator since lay persons often confuse intellectual disability and psychosocial disability or conflate them as one and the same, viz. a 'mental' disability.

This study is motivated to better understand the phenomenon of mothers with intellectual disability within the South African legal context because of the lack of attention this group of parents (and their children and families) are receiving in South Africa. In this context, there is no disability-specific legislation that protects the rights of this group compared to, for example, the Americans with Disabilities Act[64] of the United States, nor had there been, until recently, any policies specifically on persons with disabilities.[65] Information about the parenting of parents with intellectual disabilities is also lacking and statistical information is sparse.[66] It is not even apparent how many parents with intellectual disabilities there are in South Africa.

1.4. Research aims

The first aim is to interpret the rights of children and parents in the context of the research topic, including: the rights of the parents to equality and dignity; equal recognition before the law in relation to mental and legal capacity; access to justice and to found and maintain a family; and the rights of children to parental care, to life, survival and development and the best interest of the child standard.

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64 Department of Health 'Sexual and Reproductive Health and Rights: Reviewing the Evidence. Literature review and situation analysis undertaken to inform sexual and reproductive health: Fulfilling our commitments' (2011) <http://www.agenda.org.za/wp-content/uploads/2012/09/SRHR-Reviewing-the-Evidence-July-2011.pdf> (accessed 15 January 2015).

65 Office of the President *The Integrated National Disability Strategy* (1997). Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2016) *Government Gazette* 39792 of 9 March 2016, was released with an Implementation Matrix 2015-2030 <http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=654&Itemid=39> (accessed 15 January 2017). The White Paper supports building and supporting families (para 3.2.1), but does not refer to parenting by persons with disabilities. The Department of Social Development's *White Paper on Families* (2013) 39 requires measures to eradicate discrimination on the basis of *inter alia* disability and 'physical and mental conditions', as one of its strategic priorities (promotion of healthy family life).

66 The 2001 Census recorded that 12.4% of persons with disabilities have an intellectual disability out of 5% of the South African population. Statistics South Africa *Census 2001: Prevalence of Disability in South Africa* (2005) Report No 03-02-44 Pretoria: Statistics South Africa.<http://beta2.statssa.gov.za/publications/Report-03-02-44/Report-03-02-44.pdf> (accessed 15 January 2017).

This interpretation will be based on these rights as understood under the Constitution, the Children's Act and other relevant legislation and regulations, and also regional and international law obligations.

The second research aim is to establish the prevalence of child removal from parents with intellectual disabilities in the two Children's Courts, compared to that of parents with other disabilities and without disabilities. This will require:

- reviewing what evidence was led in court and what assessment tools were utilised to substantiate the removal, as well as the weight attached thereto;
- what, if any, support was provided to the parents by social workers or court personnel during the broader statutory process;
- reviewing if proceedings enabled reasonable and procedural accommodation of mothers with intellectual disabilities; and
- establishing whether guidelines are needed for support that must be provided to parents by social workers as part of early intervention and prevention services, therapeutic intervention, and assessment guidelines and in-court process through accessible procedures and legal advocacy for the parents' rights, with reasonable and procedural accommodation where necessary.

The third aim is to consider whether law reform and policy formulation in these areas is needed:

- identify problems, gaps or challenges in social services with regard to assessment and appropriate support to be provided to mothers with intellectual disabilities, in order to meet their parenting responsibilities;
- identify problems, gaps or challenges in the accessibility of Children's Courts' proceedings and whether reasonable accommodation for mothers with intellectual disabilities is provided;
- identify whether presiding officers are adequately trained in relation to capacity to parent, and in mental and legal capacity (and assessments thereof).
- determine whether the current formulation of neglect discloses possible discrimination in the context of mothers with intellectual disabilities; and
- consider the need for developing guidelines for legal representatives – often family law specialist attorneys as well as legal aid lawyers – regarding the provision of competent and specialised legal representation to mothers with intellectual disabilities.

1.5. Research questions

The main research question is: How are the South African social services and two Children's Courts meeting their international and constitutional obligations in promoting access to justice and supporting the parental rights and responsibilities of

mothers with intellectual disabilities who are at risk of having their children removed from their care due to allegations of neglect?

Key questions to be asked are:

a. What does the literature say about the profile of persons with intellectual disabilities in South Africa; theories on disability; sexuality of these parents; and stereotypes of parenting.

b. How does the domestic legislative scheme, policy framework, international law and jurisprudence express itself on the rights of parents with intellectual disabilities to equality, dignity, legal capacity, reasonable accommodation, access to justice and founding and maintaining a family; on the best interests of the child; protection from maltreatment and neglect; and children's right to life, survival and development?

c. What persuasive law reform efforts on legal capacity, accessibility and reasonable and procedural accommodation of court proceedings, and protection of the right to parent, of parents with intellectual disabilities, has taken place in foreign jurisdictions – including in Australia, the United Kingdom and the United States of America?

d. What do Children's Court case record reviews (archival) say about:
   - the treatment of mothers with intellectual disabilities in the statutory proceedings, in relation to recognition of their legal capacity, equality and access to justice; and
   - the assessment of families' circumstances, provision of prevention and early intervention measures and therapeutic interventions for mothers with intellectual disabilities by social welfare organisations (social workers) and the monitoring of such provision by the courts?

e. What are the implementation challenges with regard to law and policy for the rights of these children and their parents in South African Children's Courts, and what, if any, law reform and policy priorities are necessary to ensure South Africa meets its constitutional and international law obligations towards children and mothers with intellectual disabilities?

1.6. Research methodology

This study uses desktop and archival research methods. The former includes primary and secondary sources, with a distinct doctrinal aspect – analysis of legal texts such as legislation (the Children's Act) and case law.[67] The desktop research method

[67] F Bell 'Empirical research in law' (2016) 25 *Griffith Law Review* 262-282.

employed is primarily found in chapters 3, 4, 5 and 7. The latter is empirical in nature as it considers the social factors identified in evidence and legal consideration in court case files (the archives) that may have had a bearing or which informed the decision-making by a magistrate in a particular case of neglect.

In order to understand the factors that may make mothers with disabilities more susceptible to child removal in the South African context, and to determine a basic prevalence level, this study reviews the archival records of the Children's Court inquiries in the Durban and Pietermaritzburg Children's Courts for the period 2010 to 2014 (a five-year period). The archival method is employed in chapter 6.

1.7. Chapter outline

Chapter 2: Research Methodology
The chapter sets out the desktop literature review and archival methodology for the court case reviews in the two Children's Courts. The relevant ethical considerations in this study are set out. Key terms relevant to the study are explained, including intellectual disability and procedural accommodation.

Chapter 3: Literature Review
The chapter draws a profile of adults with intellectual disability in South Africa, by focusing on seven areas: causes of their disability and the occurrence of rights violations; their experience of community and independent living and stigmatisation; general lack of access to education; poor employment outcomes; violations of safety and security of the person – particularly through gender-based violence (GBV); inadequate access to health care; and lack of agency in civil political participation. Thereafter, literature on legal capacity and a brief exposition of the lack of recognition of their sexuality and parenthood is put forward. Their relevant socio-economic factors in relation to parenting are explored next, as well as the stereotypes about their capacity to parent in social work investigations and in courts.

Chapter 4: International and Regional Law
The chapter analyses the treaty provisions and guidance from treaty monitoring bodies on state obligations in relation to the rights of parents with disabilities to equality, family life, legal capacity, accessibility, and access to justice. It also considers the rights of children to protection from neglect, maltreatment and degradation, to life, survival and development, non-discrimination and the family's entitlement to support from the state – as well as the best interests of the child. The chapter also considers the procedural accommodations available to safeguard a child's best interests.

Chapter 5: Domestic Legislative Framework
This chapter considers the constitutional matrix that frames the rights of parents with disabilities and the rights of children (rights to equality, dignity, access to information, access to justice, children's family or parental care, protection from neglect and

maltreatment, and best interests). The Children's Act and the functioning of the Children's Courts is considered, as well as the role of the social worker and procedural justice in the courts, and provisions relating to legal capacity. The chapter concludes with an analysis of the domestic law's compliance with constitutional rights and regional and international law obligations.

Chapter 6: Children's Court Cases Review Data and Analysis
This chapter is the narrative of the data in the archival court reviews from the two Children's Courts in Durban and Pietermaritzburg. It presents an analysis and conclusions from the findings.

Chapter 7: Comparative Law
This chapter considers the legislative measures and law reform, as well as the jurisprudence of three jurisdictions: Australia, the United Kingdom and the United States of America. The chapter identifies lessons that can be learnt from these jurisdictions with regard to the provision of procedural justice to parents with intellectual disabilities.

Chapter 8: Conclusion and Recommendations
This chapter makes recommendations flowing from the desktop literature (including comparative law analysis) and the analysis of the archival court data. It concludes with a summary of each chapter and the main findings.

CHAPTER TWO:

RESEARCH METHODOLOGY

2.1. Introduction

This study used desktop and archival research methods. The former (desktop) includes primary and secondary sources, with a distinct doctrinal aspect – analysis of legal texts such as legislation, both domestic and foreign, and also case law.[1] The latter (archival) is empirical in nature as it considers the social factors identified in evidence and legal consideration in court case files (the archives) that may have had a bearing or informed the decision-making by a magistrate in a particular case of neglect. The desktop research method used is primarily found in chapters 3 to 5 and 7. The archival method is used in chapter 6.

Since magistrates in Children's Court hearings do not provide judgments (reported or not), the reasoning in a particular case cannot be determined as the court order reveals only the finding in law – with reference to the evidence led that sets out the facts relied upon for the legal finding. In practical terms, the magistrates simply list the relevant annexures (such as the social worker's report or a medical report) in the court file and completes a template for the order granted.

This chapter first considers the desktop review method, and then the archival method. The ethical considerations are set out thereafter.

2.2. Doctrinal research

Primary literature considered comprises the relevant international and regional law treaties and comments by treaty bodies, the relevant domestic legislation in South Africa, the United Kingdom, the United States of America and Australia, as well as judgments (case law) from these countries (and others where relevant).

Generally speaking, analysis of primary sources in law is known as doctrinal research. Doctrinal research is defined as research concerning rules, principles or interpretive guidelines that may be binding or non-binding. As such, it is research into law.[2] In common law jurisdictions such as South Africa (and the other jurisdictions studied in this thesis), the sources of domestic law are primarily case and statute based, but are not 'a complete statement of the law in any given situation' as

1 F Bell 'Empirical research in law' (2016) 25 *Griffith Law Review* 262.

2 T Hutchinson & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 84.

application of legal rules to a particular fact base is how this methodology evolves.[3] It is a process of analysis rather than data-collection, as with empirical research.

While this study proceeds on the basis of doctrinal research, it is grounded in both Socio-Legal Studies and Disability Legal Studies. Accordingly, as will be discussed below, it is not purely doctrinal. In fact, the landmark study, the 'Arthurs report' (named after its author, Harry Arthurs) into legal scholarship in Canada revealed the dire need for fundamental research that seeks to understand 'law as a social phenomenon' – including its implications socially and politically.[4] Such fundamental research would go further than doctrinal roots of legal scholarship. That said, doctrinal research is the 'rigorous analysis and creative synthesis' of primary legal texts, which involves a process of legal reasoning comprising both deduction and induction processes.[5]

Disability Studies involves the application of a variety of perspectives, including 'social, cultural, historical, legal, philosophical and humanities perspectives to understanding the place of disability in society.'[6] As such, similar to the emphasis on 'law in action' in Socio-Legal Studies, it seeks to reflect on the '"real-lived" experiences' of persons with disabilities. Disability Legal Studies is applied disability studies in the law – questioning the place of disability within law and the legal system, as well as the society it regulates.[7] One notable scholar in Disability Legal Studies, Ngwena, sought to deconstruct both the sociological and legal meaning of disability in legislation (in that case the Employment Equity Act).[8]

In the same manner, this research seeks to use Disability Legal Studies as a lens to view how the Children's Act and court rules of procedure are applied in Children's Courts to identify how these laws, justice institutions and culture deal with mothers with intellectual disabilities. As such, the standpoint of this research is a disability critique of the law and its practice in our courts. Such a critique, in line with Disability Legal Studies, should 'explore the role and manifestations of ableism in social practices and institutions that "portray people with disabilities as useless, marginal, abnormal, a burden on society, and perhaps most offensively, as living a life that is not

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3 P Chynoweth *Legal Research* in Andrew Knight & Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 29.

4 Consultative Group on Research and Education in Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada, 1983-2003 (2003), cited in T Hutchinson *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010) 8.

5 Council of Australian Law Deans *CALD Statement on the Nature of Research* (2005) 3, cited in Hutchinson & Duncan (n 2 above) 107.

6 A Kanter 'The law: What's disability studies got to do with it *or* an introduction to disability legal studies' (2011) 42(2) *Columbia Human Rights Law Review* 402 404.

7 Kanter (n 6 above) 478.

8 C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613; C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Legal deconstruction' (2007) 23 *South African Journal on Human Rights* 116.

worth living."'[9] As a standpoint then, I seek to expose the ableism, implicit or explicit, which may be found in the law and the legal system, including procedures. As Ngwena and Israeli scholar Mor put forward, the 'constitutive role of law in producing disability' requires exposition.[10]

Secondary literature considered comprised journal articles, chapters and books, as well as reliable internet literature, government reports and research reports by reputable organisations and researchers. In chapter 3, the themes explored in the literature review are drawn from many disciplines – humanities and social sciences (including psychology), life sciences (medicine, including psychiatry), and law.

In chapter 7, comparative law is considered. Use of comparative law, particularly the United States of America (USA) and the United Kingdom, referred to by Zaal as 'legalistic'[11] jurisdictions, and Australia (particularly New South Wales) is used. The USA is useful because of its emphasis on the protection of families from undue interference (excessive state intervention) – to the point that strict constitutional and statutory safeguards are needed for termination of parental rights.[12] Australia is useful because of the abundance of literature on the experience of parents with intellectual disabilities in the child protection system. New South Wales is an example of an anti-legalistic jurisdiction, in that does not prescribe threshold criteria for state intervention in family life.[13] The emphasis by the adjudicators on support in anti-legalistic systems as to whether support services could be used to enable the child to remain with his or her family,[14] will be helpful. Essentially, anti-legalistic systems envisage an active role for the adjudicators requiring negotiation with the families and social workers.[15]

The UK is a useful comparator because of the value offered in considering accommodations such as intermediaries. South Africa is likely a hybrid in the spectrum of legalistic and anti-legalistic state intervention. While there are some safeguards to protect against permanent termination of parental rights, in practice, the system relies

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9 S Mor 'Between charity, welfare, and warfare: a disability legal studies analysis of privilege and neglect in Israeli disability policy' (2006) 18 *Yale Journal of Law & Humanities* 63 69, cited in Kanter (n 6 above) 478.

10 Mor (n 9 above) 64.

11 FN Zaal *Court services for the child in need of alternative care: a critical evaluation of selected aspects of the South African system* Unpublished PhD Thesis, University of the Witwatersrand (2008) 3.

12 *Stanley v Illinois* 405 U.S. 645 (1972); *Santosky v Kramer* 455 U.S. 745 (1982). Cf TB Harding 'Involuntary termination of parental rights: reform is needed' (2000-2001) 39 *Brandeis Law Journal* 897.

13 The Australian 'family service model' is evident in R Sheehan *Magistrates' decision-making in child protection cases* (2001) 62; P Parkinson 'The child participation principle in child protection law in New South Wales' (2001) 9 *International Journal of Children's Rights* 259 263 (explains the provision in the Children and Young Persons (Care and Protection) Act 1998 of New South Wales, Australia, that 'allows for proceedings to be based on requests for assistance by children or caregivers without any need for labelling or categorising the situation in terms of abuse or neglect.')

14 Sheehan (n 13 above) 15-16. Other jurisdictions with a similar family support approach include the Netherlands, France and Germany.

15 J Waldfogel 'Protecting Children in the 21st Century' (2000) 34 *Family Law Quarterly* 322.

on continuous foster care as alternative care option for families without offering the requisite support for them to improve their circumstances and avoid de facto termination of parental rights.

The comparative aspect will outline the best practice models or pitfalls to avoid in other jurisdictions with regard to legal capacity, procedural accommodations, legal support of legal representatives to the parents, or, if inquisitorial, by the presiding officers in the children's or family courts and training provided to the justice personnel.

Use of comparative law, however, is most persuasive when the law from a country with a similar context is employed to avoid misinterpretation or misapplication. The call for 'Africanising' and 'decolonising' law – particularly for South African scholars – requires deliberate choices in comparative legal analysis. The late Justice Skweyiya remarked in 2015

> Ultimately my message is that we ought to be not only more attentive and receptive to the African voice when we conduct our comparative constitutional interpretation but also more conscious of our responsibility to strengthen that voice in our judgments from which the rest of the continent and even the world may find assistance.[16]

The South African Constitutional Court bench has a penchant for using comparative law.[17] While Justice Ackermann was fond of using (Western) comparative law,[18] Justice Kriegler cautioned against the wholesale use of comparative law, expecting instead that comparative law should be 'conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.'[19] Bearing these cautions in mind, neutral and objective application of comparative law is necessary,[20] while being mindful of the values that different jurisdictions use in their legal cultures.

The challenge with the options available for comparison is that very few similarly situated examples are available in relation to country context (African and Global South); or hybrid legalistic/anti-legalistic responses. Accordingly, reliance on examples from the West is cautiously placed. Chapter 7 considers some legislative

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16 TL Skweyiya 'Presentation at the HSRC colloquium for the Constitutional Justice Project' (26 November 2014) 9, cited in N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the Road by Walking: The Evolution of the South African Constitution* (2018) 24.

17 D Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 *International Journal of Constitutional Law* 18; C Rautenbach & L Du Plessis 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539.

18 T Roux 'The dignity of comparative constitutional law' (2008) 1 *Acta Juridica* 185.

19 *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 127. See, also, K Moyo 'The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to the South African constitutional jurisprudence' in N Bohler-Muller et al (eds) *Making the Road by Walking: The Evolution of the South African Constitution* (2018) 71.

20 EJ Eberle 'The method and role of comparative law' (2009) 8 *Washington University Global Studies Law Review* (2009) 455.

protection examples from India and African examples of disability-specific legislation. Those countries are more apposite contextually however, the parental rights of persons with disabilities is not generally protected in legislation or the focus of literature in those states. Sometimes, learning from countries that may not have taken an approach worth emulating for particular reasons is also helpful in finding the right approach in law reform.

2.3. Archival research: Children's Court record reviews

This research is partly based on archival records: the case files in the Children's Courts. Since the Children's Court inquiries are conducted by magistrates with no judgment issued, but only orders that are not reported, a review of the case files is necessary. Furthermore, since there are no statistics about what type of cases are heard by these courts, it is necessary to review every file and to identify the relevant cases for this study.

In order to understand the factors that may make mothers with disabilities more susceptible to child removal in the South African context, and to determine a basic prevalence level, this study reviewed the archival records of the Children's Court inquiries in the Durban and Pietermaritzburg Children's Courts for the period 2010 to 2014 (a five-year period).

The research question to be answered by the archival data was: What do Children's Court case record reviews (archival) say about: the treatment of mothers with intellectual disabilities in the statutory proceedings in relation to recognition of their legal capacity, equality and access to justice, particularly procedural accommodation; and also the assessment of families' circumstances, provision of prevention and early intervention and therapeutic interventions for mothers with intellectual disabilities by social welfare organisations (social workers) and reunification efforts undertaken to preserve the family?

Archival research comprises primary sources held in repositories as archives (repositories of libraries or courts for example). The sources can be manuscripts or documentary sources or electronic (recordings of court hearings, evidence). In legal research, the archival method can consider court case files.[21] Cuffaro explains that an archival record allows one to 'assess the impact of natural events and examine other issues' in such a way that the subjects are unaware of the research, its aims[22] or impact. This means it has external validity. Unfortunately, one can only use the data as one finds it. Where there are gaps, incomplete records or missing reports, for example, there is no further avenue to ensure the completeness thereof and,

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21 CB Harrington & S Engle Merry 'Empirical Legal Training in the US Academy' in P Cane & HM Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (2010) 1052.

22 M Cuffaro 'Archival research' in S Goldstein & JA Nagliery (eds) *Encyclopedia of Child Behaviour and Development* (2011) 140.

ultimately, to determine whether the data in the files for example 'represented the population'.[23]

The archival method in this study is considered within a socio-legal empirical framework. Socio-Legal Studies look at the study of law within a social context,[24] and also how the social context impacts on legal decision-making (juridical interpretation). Archival research can involve content and discourse analysis of archives – such as court records. As such, the texts are used to analyse 'professional and scholarly discourse to identify paradigm shifts and establish trends in theory and practice. Analysis of the development of policy and laws. Identification of counter- or submerged narratives.'[25] This study focuses on thematic analysis, not content or discourse analysis.

Quantitative and qualitative methods were employed. Quantitatively, the data were analysed to determine the prevalence of the cohort of this study in neglect cases brought before the two courts surveyed. Qualitatively, the data were analysed to show what evidence (the nature of) was led to inform the finding of the magistrate in a particular case and whether any procedural accommodations were made for these litigants.

A host of ethical considerations would enter into the choice of whether to conduct archival versus qualitative interviews with persons with disabilities so affected by court proceedings, in order to obtain their perspective. These are discussed below under 2.5.

It is necessary to consider cases that have been potentially finalised so that the outcome of the cases can be tracked. In these cases, the study compares the data available for cases where allegations of neglect are levelled at mothers with intellectual disabilities, mothers with other disabilities, and mothers without disabilities.

In particular, the court files were perused to ascertain the following information, where such information was available:

- **Demography:** gender, age, race, disability type of the parent with the disability; level of impairment (mild to moderate intellectual disability); number of household members; number of children of the parent; income (disability grant or employment); education; assistance in the household tasks or caring

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23 Cuffaro (n 22 above) 141.

24 DR Harris 'The development of Socio-Legal Studies in the United Kingdom' (1983) 3 *Legal Studies* 315.

25 J Furner 'Conceptual analysis: A method for understanding information as evidence, and evidence as information' (2003) 4 *Archival Science* 233. See S McKemmish & A Gilliland 'Archival and recordkeeping research: Past, present and future' in K Williamson & G Johanson (eds) *Research Methods: Information, Systems and Contexts* (Tilde Publishing Victoria) 95.

responsibility by paid helpers or family members; age, gender and disability of the child; any factors peculiar to the child;

- **Evidence of allegations of neglect:** who referred the case to the Children's Court (e.g. state social worker, private social worker, or member of the public); age of child at time of the referral; case history; content of social worker's report to the Children's Court; content of expert evidence, including psychologist/psychiatrist and medical reports, in particular, about legal or mental capacity and capacity to parent; testing for parenting capacity (e.g. IQ tests); evidence of allegations of neglect; determining whether evidence/testimony was provided by the parents or expert evidence was led by or on behalf of the parents; testimony of the child;

- **Social service interventions:** indications of social service interventions, such as prevention and early intervention and programmes (particularly parenting skills training or education); therapeutic programmes; rehabilitation and reunification efforts, and the outcome of these;

- **Legal representation and self-representation:** whether the parents are legally represented; if so, by whom; whether parents or children provided testimony in court proceedings;

- **Court's decision:** whether the child is found to be in need of care and protection and on what grounds; whether the parent's disability is stated to be decisive or linked with parental inadequacy; whether removal is authorised by the judicial officer; reasons for decision provided; outcome, i.e. reunification or permanent placement on review; further court hearings and evidence given; any *obiter* remarks by the magistrate or further referrals to other organisations or fora; and

- **Procedural accommodations** offered in the procedures and/or accessibility considerations addressed.

Differences in demographic factors are vital to highlight instances of bias in decision-making (whether by a social worker or judge).[26] Sagiv has stressed that cultural differences may lead to bias entering decisions:

> A judge's subconscious or common sense is inseparable from her decisions. When litigants belong to different cultural groups than a judge, the influence of her common sense can be especially problematic. Even when the judge and the litigant are part of the same cultural group, the application of her common sense can lead to biased results.[27]

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[26] See KL Kumpfer et al 'Cultural Sensitivity and Adaptation in Family-Based Prevention Interventions' (2002) 3 *Prevention Science* 241.

[27] M Sagiv 'Cultural Bias in Judicial Decision Making' (2015) 35 *Boston College Journal of Law and Social Justice* 231.

Parenting skills and styles, notions of family[28] and identifiers for adulthood (such as consent to sex and parenting)[29] are understood differently, depending on the culture,[30] race, ethnicity,[31] gender and socio-economic status of a person. It is possible therefore that factors, particularly cultural differences in 'parenting', may influence the decisions of judges (and social workers). It is trite that: 'The physical and mental health of all parents and children are inextricably linked to what is considered culturally familiar or "common sense" understandings of what constitutes "good" parenting.'[32] Accordingly, it is acknowledged that parenting skills are imbricated with culture, and culture is shaped by a range of demographic factors. These demographic factors (race, ethnicity, not only disability) may impact on how social workers and court officials perceive whether someone is a 'good enough' parent.

In order to understand the court process involved in the Children's Court, the following diagram illustrates how the statutory process takes place in two to three stages:

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28 NV Roman et al 'How well are families doing? A description of family well-being in South Africa' (2016) 4 *Family Medicine and Community Health* 9.

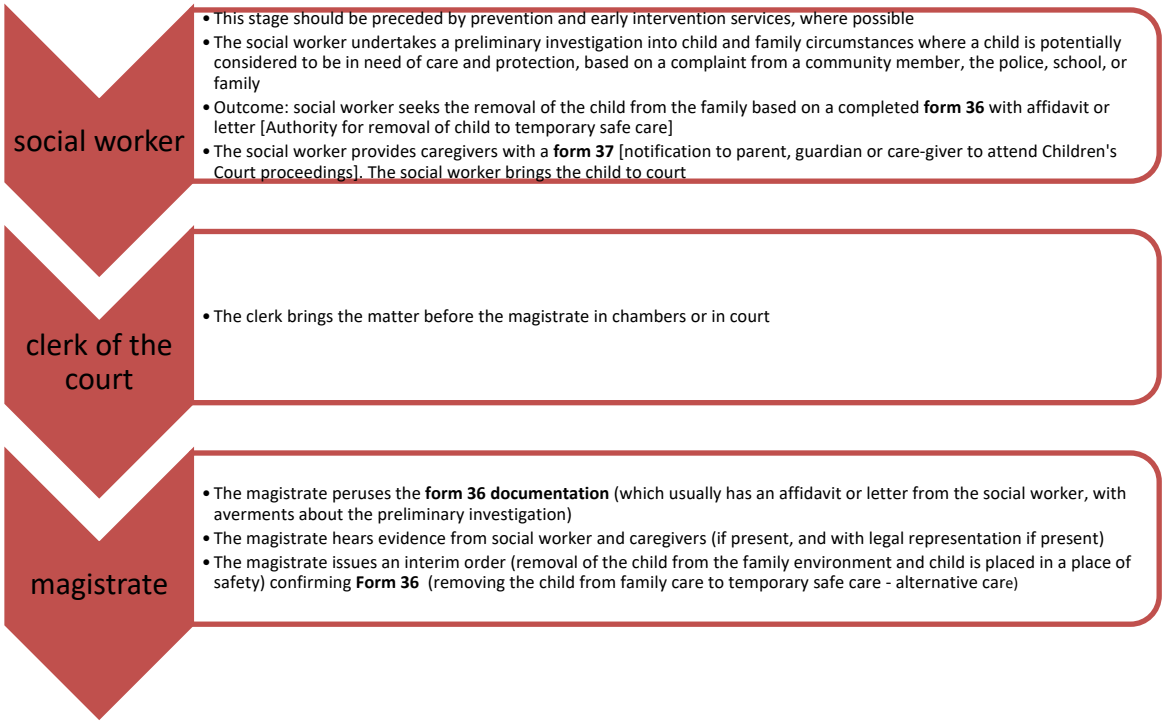
29 SB Richards et al *Cognitive and Intellectual Disabilities: Historical Perspectives, Current Practices and Future Direction* (2016) Routledge 227.

30 J Kelly 'The determination of child custody' (1994) 4 *Children and Divorce* 121.

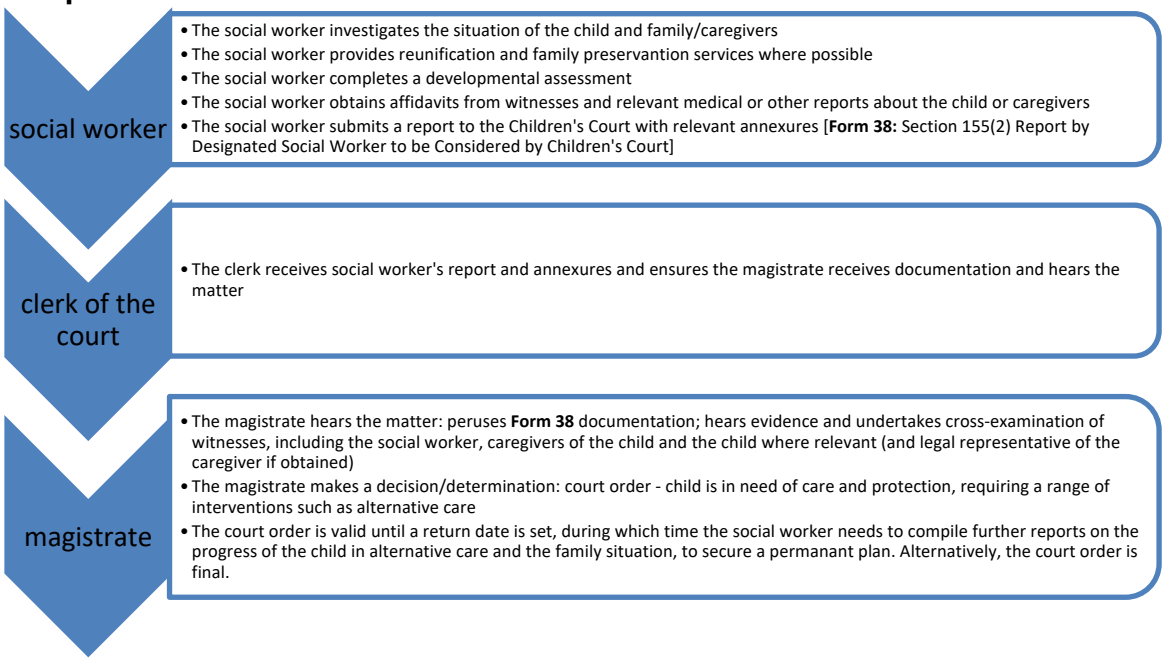
31 NV Roman et al 'Perceptions of parenting styles in South Africa: The effects of gender and ethnicity' (2016) 3 *Cogent Psychology* 4; H Selin *Parenting across Cultures: Childrearing, Motherhood and Fatherhood in Non-Western countries* (2014) 1.

32 S Chalmers *Culture, Health and Parenting in Everyday Life* (2006) 5 <https://www.westernsydney.edu.au/__data/assets/pdf_file/0006/196332/Chalmers_PP_report_Aug_06_Final.pdf> (accessed 10 July 2017).

Stage 1: Initial complaint, and removal from family care and placement into alternative care (temporary safe care)



Stage 2: Formal hearing, and decision on whether the child is in need of care and protection



Stage 3: Permanency planning (reunification and family preservation services) and subsequent hearings

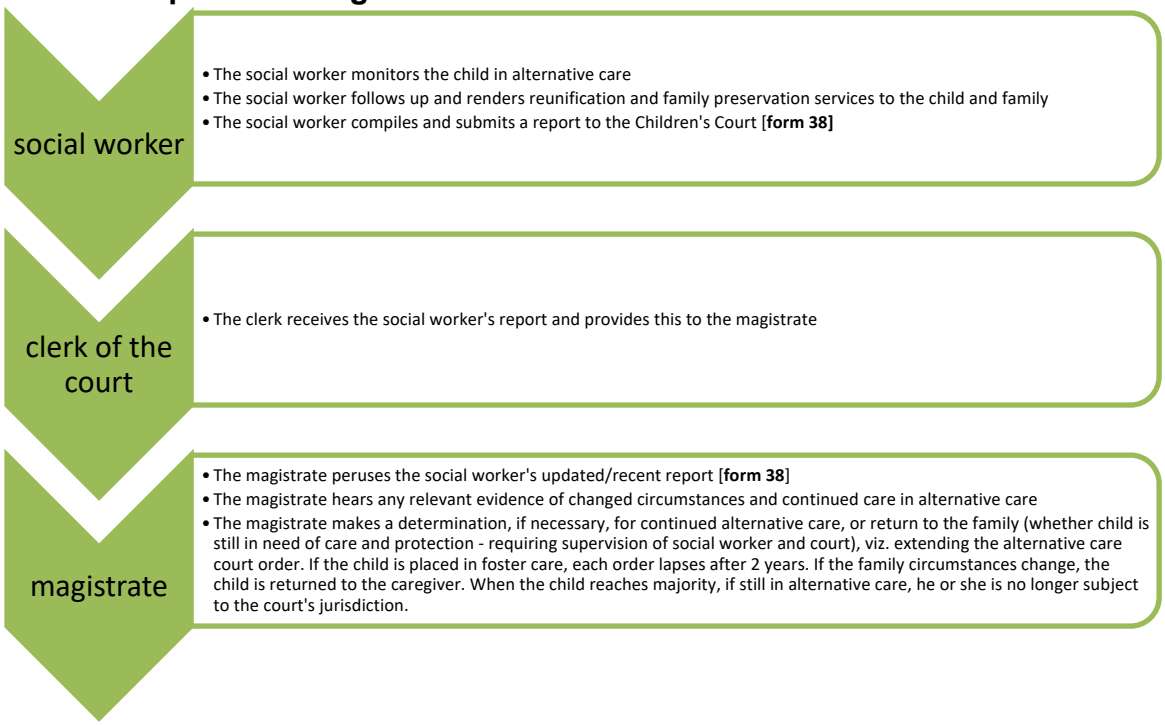


Diagram 1: Three stage social services and justice system interventions

It is clear from the description of the role players above, that the social worker's investigation and subsequent report with recommendations play a major role in the magistrate's decision-making. The parent(s) usually have an opportunity to put their version to the court in the second and third stages set out above. Emphasis is primarily on *verbal* accounts of the mother with the intellectual disability when interviewed by the social worker – and when providing evidence in court. Verbal communication for persons with intellectual disabilities may however be problematic where accommodations for full and equal participation are not made. The proceedings are supposed to be inquisitorial in nature, but where the person is not legally represented, he or she is at the mercy of the court. In theory, where a court is accessible in its procedures and where a clerk and magistrate are aware of reasonable and procedural accommodation needs, and also implement measures to meet these needs, access to justice in the Children's Court should be advanced.

2.4. Data analysis

The data from the archival research was analysed thematically. Thematic analysis was the qualitative method utilised to identify, analyse and report patterns (known as themes) within data. It organises (through codes) and describes the data set. It is a flexible tool that provides rich and detailed data.[33] The significance of a theme is not

[33] V Braun & V Clarke 'Using thematic analysis in psychology' (2006) 3 *Qualitative Research in Psychology* 77 78.

necessarily due to quantifiable measuring (a high prevalence), but because it 'captures something important in relation to the overall research question'.[34]

The main themes were identified in advance to answer two sub-research questions: First, the question about the treatment of mothers with intellectual disabilities in the statutory proceedings in relation to recognition of their legal capacity, equality and access to justice, is answered with reference to the themes of

- Determination of legal capacity and/or parenting capacity by the social worker or other professionals (psychologist or psychiatrist); and
- Procedural accommodations and/or accessibility measures employed in court.

Second, the question pertaining to the assessment of families' circumstances, provision of prevention and early intervention and therapeutic interventions or family preservation and reunification measures for mothers with intellectual disabilities by social welfare organisations (social workers), is answered by referring to the following two themes:

- Demographic factors peculiar to the particular family and
- Provision of prevention and early intervention (and therapeutic interventions) as well as family preservation and reunification measures by social workers and the outcome thereof.

Theoretical thematic analysis was employed (and not inductive analysis), as the themes and their analysis were driven by a theoretical and analytical interest in the area, and link directly to the research questions. Theoretical analysis is theory driven (top down).[35] Accordingly, Disability Legal Studies is the lens through which this was driven, while being cognisant of the fact that the legal role players (magistrates, clerks) are more versed in doctrinal understanding of the law (black letter law) and that social workers are versed in welfare policy perspectives and assumptions from their training and qualifications – which is social-science based.

2.5. Ethical considerations

For a study of this nature, compliance with the ethical requirements listed under sections 66 and 74 of the Children's Act as mandatory. Section 66 of the Children's Act indicates that persons with the purpose of *bona fide* research may access Children's Court case records, provided they comply with section 74 of the Act. Section 74 prohibits the 'publication of any information relating to the proceedings' of a Children's Court, which 'reveals or may reveal the name or identity of a child who is a party in the proceedings.' The children's identities (and that of their parents) are

[34] Braun & Clarke (n 33 above) 82.
[35] Braun & Clarke (n 33 above) 84.

anonymous and were not revealed in this study. The Chief Magistrate of each of the Children's Courts gave permission to access the court records for those years.

Ethical considerations that apply to this study generally include the relationship and qualifications of the reviewer to the data. I have the appropriate training to review the court case files, as I am a qualified attorney. I conducted my research in accordance with the ethical and professional guidelines relating to the legal profession.

Informed consent is not needed due to the method of data gathering (relying on archival court records). However, persons with disabilities are generally considered to be part of vulnerable groups in society, particularly in the research field. It is noteworthy that Atkinson stresses that 'ethical scrutiny of research is not only to prevent harm to the vulnerable, but also to provide a framework to empower such people to take part in research. To do otherwise is to further stigmatise and marginalise them'.[36] This means that while I am cognisant of the impact of my research, in that it will speak 'about' persons with disabilities in my analysis of court records about child care proceedings, I am also aware that my research does not include active participation 'by' or 'with' persons with disabilities.

When the study was conceived a local NGO providing services to persons with intellectual disabilities was approached to gauge whether a study to obtain the perspectives of parents with intellectual disabilities would be feasible and to determine whether purposive or snowball sampling method would be appropriate for such as study. The NGO concerned evinced a charitable approach to their service provision to this population and indicated that their view was that these parents are not able to competently care for their children. The present study was therefore conceived as the first step to determine the evidence that is put forward in the courts on parenting capacity. It was anticipated that the second step, after this study is concluded, will be to consider future research where the perspectives of parents with intellectual disabilities, social workers and magistrates are sought. Due to the paucity of archival research using Children's Court records in South Africa, the reliance on the archival research was anticipated to be valuable even in itself. Further, due to the lack of available statistics on prevalence of parents with disabilities or intellectual disabilities in court proceedings in South Africa, the starting premise was absent. The researcher would have to traverse every court case filed in the two courts (over 3 500 cases for the five-year period) to identify the relevant neglect cases and then to isolate those where a parent's disability (and intellectual disability) was identified. In other words, the sheer scale of the archival study on its own would require time intensive resourcing.

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[36] J Atkinson 'Protecting or empowering the vulnerable: Mental Illness, communication and the research process' (2007) 3 *Research Ethics Review* 134.

During the archival study, the researcher sought the anecdotal input from a magistrate of one of the two courts and two clerks of the court in relation to prevalence of these cases or even the recollection of having presided over such a case. The magistrate concerned was not able to recall such a case. The two clerks of the court identified one relevant case. In the Children's Courts, the magnitude of foster care application cases far outweighs cases with averments of neglect which means that it was difficult to first identify the cases concerned. The scope of the present study was therefore limited to archival research for convenience and time purposes.

Future research that obtains the perspectives of the parents with disabilities, social workers and magistrates would be valuable.

Six principles are key to ethical research about or with persons with disabilities:

- 'promoting the inclusion and participation of people with disabilities in research and research dissemination;
- ensuring that research is accessible to people with disabilities;
- avoiding harm to research participants;
- ensuring voluntary and informed consent before participation in research;
- understanding and fulfilling relevant legal responsibilities; and
- maintaining the highest professional research standards and competencies.'[37]

While this study is not encouraging the participation of persons with disabilities in the research (principle 1), research findings emanating from the study will be disseminated to disability organisations in KwaZulu-Natal. A copy of the research findings will also be provided to the Departments of Social Development and Justice and Constitutional Development and to the Children's Courts that participated in the study.

A user-friendly booklet on the research findings has been drafted for persons with intellectual disabilities, which can be distributed by disability organisations in KwaZulu-Natal. Parents with intellectual disabilities will therefore be able to benefit from the research in accessing user-friendly information about their rights in the child care system. This will also be meaningful in terms of principle 2 (research accessible to persons with intellectual disabilities), as persons with intellectual disabilities require information that is easy-to-read and understand – with simple instructions and illustrations.

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[37] National Disability Authority 'Ethical Guidance for Research with People with Disabilities' (2009) Disability Research Series 13, Ireland, 25. <http://www.nda.ie/cntmgmtnew.nsf/0/D6EFA30A02A47B14802570660054EC16?OpenDocument>.

Avoidance of harm is possible (principle 3) through ensuring the utmost confidentiality of personal information obtained from the court records, because one possible risk is a breach of confidentiality. This can be ameliorated by ensuring that personal data or identifiers (names and surnames obtained from court records) are kept in a separate document that is password protected, and that instead the cases are assigned numbers to ensure confidentiality. The respect for the privacy of parties is important, as stressed in article 22(2) of the CRPD. This means the privacy of individuals' information must be protected. Furthermore, article 33 of the CRPD requires that statistical and data information be kept private and confidential. All data or information obtained from court records are stored responsibly – in hard and soft copies (password protected), in the office cabinet of the supervisor of this study, at the University of Pretoria.

The principle of voluntary and informed consent before participation in research (principle 4) is not required to be adhered to in this research, as the courts' consent to use the records for the purpose of '*bona fide* research' (section 66(d) of the Children's Act) is what is required – not that of the parties in the court cases.

With regard to the fifth principle, understanding and fulfilling relevant legal responsibilities, the requirements of the Children's Act in terms of confidentiality of personal information for both the children and the parents in the court cases, as well as any other parties implicated in the court records, were adhered to.

The sixth principle, maintaining the highest professional research standards and competencies, was adhered to by following the guidelines that arise from professional integrity, as set out by Connelly.[38] The guidelines require, *inter alia,* a commitment to 'the unbiased and objective pursuit of knowledge and the comprehensive and accurate reporting of research findings.'

Generally, beneficence is upheld in this study by preventing possible harms from the research process and conducting research aimed at benefitting the rights of the children and parents in the study.[39]

2.6. Key definitions

The definitions of intellectual disability and procedural accommodations are provided below in order to guide the study.

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38 P Connolly *Ethical Principles for Researching Vulnerable Groups,* Belfast: Central Print Unit, Office of the First Minister and Deputy Minister (2003) <https://cain.ulster.ac.uk/issues/victims/docs/connolly03.pdf> (accessed 12 January 2015).

39 T Beauchamp 'The Principle of Beneficence in Applied Ethics' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2013) <http://plato.stanford.edu/archives/win2013/entries/principle-beneficence/> (accessed 12 January 2015).

2.6.1. Intellectual disability

The terms 'learning difficulties or disability', 'cognitive disability', 'developmental disability' and 'mental retardation' are used in other jurisdictions. Intellectual disability is the preferred term for 'mental retardation' internationally.[40] This study refers to intellectual disability, defined as a person with below average intellectual functioning and adaptive skills, with specifically mild to borderline cognitive limitations. Such a definition implies over-reliance on the functional limitations (impairment)[41] that an individual has,[42] and is unfortunately an over simplification of prevalence of intellectual disability in the South African population.

Capri explains the impairment aspect of intellectual disability as follows

> intellectual impairment originates before the age of 18, and entails limitations in intellectual ability and adaptive behaviours that can include limited receptive, expressive, and written communication skills; personal, domestic, and community daily living skills; gross and fine motor skills; and limited social skills comprising interpersonal relationships, use of play and leisure time, and coping skills.[43]

Labels such as 'mild', 'moderate', 'severe' and 'profound' disability are related to intelligence quotient (IQ) competence, and presupposes deficits and they are therefore not helpful,[44] although relied upon by medical professionals.[45] Also, the use of IQ

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40 *IASSID Special Interest Research Group on Parents and Parenting with Intellectual Disabilities* 'Parent labelled with intellectual disability*:* Position of the IASSID SIRG on parents and parenting' (2008) 21 *Journal of Applied Research in Intellectual Disabilities* 296.

41 In low income countries, data identifies a small portion of persons with disabilities – those who are 'visibly or severely' disabled, because of methods of data collection, i.e. through census. AH Eide & M Loebe 'Counting disabled people: Historical perspectives and the challenges of disability statistics' in S Grech & K Sodatic (eds) *Disability in the Global South: A Critical Handbook* (2016) 52.

42 See, also, WCFID *Annual Report 2012/13* (2013) 1 http://www.wcfid.co.za/WCFID_Annual%20Report%202012-13.pdf, which describes intellectual disability as involving 'a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning) and begins before adulthood with lasting effects on development. The degree of intellectual disability is defined by the terms mild, moderate, severe and profound. This means the degree of intellectual disability is defined by the person's adaptive functioning: how they are able to take care of themselves, manage their day-to-day lives, and communicate with others. It is important to recognise that the level of adaptive functioning will reflect the person's intrinsic disability, but may be further limited by extrinsic factors such as limited learning opportunities, negative attitudes, poverty, and sexual abuse.'

43 C Capri *Thinking about intellectual disability care: An intersubjective approach* unpublished PhD thesis, University of Stellenbosch (2016) 3.

44 S Greenspan et al 'Intellectual disability is "a condition, not a number": Ethics of IQ cut-offs in psychiatry, human services and law' (2015) 1 *Ethics, Medicine and Public Health* 314; S Greenspan & GW Woods 'Intellectual disability as a disorder of reasoning and judgement: The gradual move away from intelligence quotient-ceilings' (2014) 27 *Curr Opin Psychiatry* 110; L Salvador-Carulla et al 'Intellectual development disorders: Towards a new name, definition and framework for "mental retardation/intellectual disability"' (2011) 10 *World Psychiatry* 175.

45 The new ICD11 relies on these classifications. For example: mild intellectual development disorder means 'A mild disorder of intellectual development is a condition originating during the developmental period characterized by significantly below average intellectual functioning and adaptive behaviour that are approximately two to three standard deviations below the mean (approximately 0.1 – 2.3 percentile), based on appropriately normed, individually administered

ceiling cut-offs for categorising in clinical manuals or in decision-making for admission or denial or access to benefits or protections of an individual, is 'ethically suspect'.[46]

Currently, the measurements for statistical prevalence of disability used in the South African context are predominantly based on the medical model, with some interaction with the social model of disability. For example, the Census 2011 and annual General Household Surveys since 2009, used the Washington Group questions[47] revised for the South African context. This was a deviation from the methodology of the 1999 National Disability Survey[48] and the 2001 National Census,[49] which resulted in different prevalence levels. One of the limitations of the Census 2011, was that intellectual disability was not measured directly, but rather an assumption was made that 'a person with a moderate to severe intellectual disability would show difficulties in at least three domains, namely remembering/concentrating, communication and self-care'.[50] Also, the data collected based on questions about the 'difficulties' in the domains, made it difficult to identify 'intellectual disabilities'.[51] Often adults with intellectual disabilities in residential/institutional care are excluded from surveys or censuses, thus making it difficult to obtain a true reflection of prevalence.

Two considerations play a role in the definition used for any study: firstly, the context within which the definition will be employed, and secondly, the grounding of the specific definition in a particular theory.

Context within which the definition of disability is used

With regard to the first consideration, context refers to the status determination for which the definition is utilised:

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standardised tests or by comparable behavioural indicators when standardized testing is unavailable. Affected persons often exhibit difficulties in the acquisition and comprehension of complex language concepts and academic skills. Most master basic self-care, domestic, and practical activities. Persons affected by a mild disorder of intellectual development can generally achieve relatively independent living and employment as adults but may require appropriate support' ICD-11 6A00. The ICD-11 proposes a change to 'disorders of intellectual development'. World Health Organisation *International Classification of Diseases* http://www.who.int/classifications/icd/revision/en/. The ICD-11 was released on 18 June 2018 and reporting on its implementation will need to be provided by member states from 1 January 2022.

46 Greenspan et al (n 44 above) 314.

47 StatsSA *Census 2011: Profile of persons with disabilities* (2014) 20. Prevalence of disability was found at 7.5% for disability (2 870 130 persons with disabilities).

48 M Schneider et al *We also Count: The extent of moderate and severe reported disability and nature of the disability experience in South Africa* (1999). Prevalence of intellectual disability is 1.1% of the population.

49 StatsSA *Census 2001* (2005). Prevalence of intellectual disability was found at 0.5% of the population, but excluded persons in institutional care. See CM Adnams 'Perspectives of intellectual disability in South Africa: Epidemiology, policy, services for children and adults' (2010) 23 *Current Opinion in Psychiatry* 441.

50 StatsSA (n 47 above) 23.

51 J McKenzie 'Caring for adults with intellectual disability: The perspective of family carers in South Africa' (2016) 29 *Journal of Applied Research in Intellectual Disabilities* 532.

- A 'health status' or capacity for informed consent;[52]
- Demographic information obtained from self-reporting for census data collection;[53]
- Eligibility for a tax rebate[54] or access to social grants or social assistance;[55]
- Obtaining reasonable accommodation in the workplace;[56]
- Accessibility, universal design and reasonable accommodation in private and public spaces;

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52 Sec 3(7) of the Sterilisation Act defines 'severe mental disability' as 'a range of functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to restrained sensory and motor functioning and requiring nursing care'. Secs 6-8 of the National Health Act 61 of 2003, and sec 2 of the Mental Health Care Act 17 of 2002, define 'severe or profound intellectual disability' as 'a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care'.

53 M Schneider et al 'Measuring disability in censuses: The case of South Africa' (2009) 3 *Alter: European Journal of Disability Research* 245.

54 Sec 6B of the Income Tax Act 58 of 1962 (as amended by s7(1) of Act 22 of 2012) defines 'disability' as 'moderate to severe limitation of any person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation has lasted or has a prognosis of lasting more than a year; and is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner.' Such disability qualifies for additional medical expenses tax credit.

55 Sec 9 of the Social Assistance Act 13 of 2004 provides that eligibility depends on a person being unfit to obtain 'employment or profession, the means needed to enable him or her to provide for his or her maintenance' due to a 'physical or mental disability'. A medical/assessment report is needed confirming disability in order to apply for a disability grant or care dependency grant per the regulations – for example the disability should be 'confirmed by an assessment which indicates whether the disability is- (i) permanent, in that the disability will continue for a period of more than 12 months; or (ii) temporary, in that the disability will continue for a continuous period of not less than 6 months or for a continuous period of not more than 12 months as the case may be: Provided that the assessment must, at the date of the application, not be older than three months; *(c)* he or she is unable to enter the open labour market or to support himself or herself in light of his or her skills and ability to work; *(d)* he or she does not unreasonably refuse to accept employment which is within his or her capabilities and from which he or she can generate income to provide fully or partially for his or her maintenance; and (*e)* he or she does not, without good reason, refuse to undergo the necessary medical or other treatment recommended by a medical officer' (regulation 3 of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance in GN R898 in *GG* 31356 of 22 August 2008). See Y Wiid *The right to social security of persons with disabilities in South Africa* Unpublished LLD thesis, University of the Western Cape (2015) 55 <http://hdl.handle.net/11394/4774> (About 50% of the persons with disabilities in South Africa are unemployed, meaning that they cannot 'support themselves financially'; L Morgon Banks et al 'Disability and social protection programmes in low and middle-income countries: A systematic review' (2016) *Oxford Development Studies* 1).

56 Sec 1 of the Employment Equity Act defines 'people with disabilities' as 'people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment'. The interpretation of this definition for purposes of unfair discrimination (as opposed to only for affirmative action purposes) is contentious, see C Ngwena 'The New Disability Convention: Implications for Disability Equality Norms in the South African Workplace' in O Dupper & C Garbers (eds) *Equality in the Workplace – Reflections from South Africa and Beyond* (2009) 197 and W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 530.

- Access to services such as education;[57] or
- Capacity determinations for court proceedings[58] – to name a few.

For example, assessment of 'disability' status for the purpose of eligibility for social assistance has been considered a 'subjective' process, where evaluators do not know clear assessment criteria to use for the determination of 'disability',[59] and those with mild and moderate disabilities are sometimes excluded, while severe and visible forms of disability are included.[60]

Effectively, intellectual disability as a label 'is a gateway to necessary support, benefits and services intended to help a person cope and survive in various social settings'.[61] It may also be used as a means of 'persecution' – i.e. involuntary sterilisation and imprisonment.[62] Usually, identification as 'disabled' relies on the assessment of a medical doctor as to impairment and functional capacity, but very few are adequately trained for this task.[63] The psychiatric field relies on diagnostic manuals, e.g. the *Diagnostic and Statistical Manual of Mental Disorders*[64] and increasingly the understanding of intellectual disability has evolved to the point that reliance only on IQ test scores is insufficient.[65]

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57 Department of Education *White Paper 6 of 2001: Special Needs Education* (2001) and the National Strategy on Screening, Identification, Assessment and Support (SIAS), South African Schools Act 84 of 1996.

58 In secs 23-26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, 'mental disability' may indicate intellectual or psychosocial (psychiatric) disability or both. 'Intellectual disability is characterised by significant limitations in both intellectual functioning and in adaptive behaviour, which covers many everyday social and practical skills.' B Pithey & D Smythe *Sexual Offences Commentary* (2014) RS 14-3 explains the meaning of sexual offences against persons who are mentally disabled. Secs 7(2) and 11 of the Child Justice Act 75 of 2008; *S v TS* 2015 (1) SACR 489 (WCC). See, also, B Dickman et al '"How could she possibly manage in court?" An intervention programme assisting complainants with intellectual disability in sexual assault cases in the Western Cape' in B Watermeyer (ed) *Disability and Social Change: A South African Agenda* (2006) 116.

59 H MacGregor 'The grant is what I eat: The politics of social security and disability in the post-apartheid South African state' (2006) 38 *Journal of Biosocial Science* 43.

60 L Berry & A Smit 'Social assistance needs of children with chronic health conditions: A comparative study of international and South African eligibility assessment instruments' (2011) 26 *Social Work in Public Health* 635.

61 Greenspan (n 44 above) 313.

62 Greenspan (n 44 above) 314.

63 T Govender & G Mji 'The profile of disability grant applicants in Bishop Lavis, Cape Town: Original research' (2009) 51 *South African Family Practice* 229.

64 American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (2013) 5th ed.

65 The DSMMD elaborates that: 'Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, important for academic and vocational planning … IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks … For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding and other areas of adaptive functioning that the person's actual functioning is comparable to those with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.'

This study was concerned with intellectual disability as understood by a variety of professionals – social workers, psychiatrists, attorneys and magistrates, and all the service providers in the life space of parents with intellectual disabilities. Accordingly, a narrow definition of intellectual disability is unhelpful as it would exclude individuals that should receive support. However, a broad definition may overestimate prevalence.[66] Since the focus of the study was on how these parents with intellectual disability are dealt with in the justice system, the data obtained from the court file reviews should paint a clearer picture of the courts' understanding of 'intellectual disability'.

Mildon *et al* believe that intellectual disability refers to 'the need for training or skills that people acquire' to enable them to live independently in the community, requiring identification of services for this full participation.[67] The International Association for the Scientific Study of Intellectual Disabilities (IASSID) Special Interest Research Group (SIRG) on Parents and Parenting with Intellectual Disabilities, lists the three groups of parents that were the focus of research on the topic:

- Parents who live 'in the community' and have children, but had previously been institutionalised;
- Parents who were never institutionalised, but had previously received services for persons labelled 'intellectual disability'; and
- Parents labelled as 'slow', with 'development delay, learning difficulties or intellectual disabilities' during their school years, but who received little support on leaving school, are now living in their community, with their cognitive ability again questioned once they become parents.[68]

Estimations of the number of parents with intellectual disability is difficult, due to 'the lack of a common definition of intellectual disability, variable population screening and diagnostic practices, inconsistent record-keeping, and the invisibility of many parents to official agencies'.[69] These parents do not form a 'homogenous' group and differences in intellectual ability and adaptive social skills are vast.[70] This also means that parents will need differing levels of support – depending on individual needs.

Identification of the respondents in this research was done on the basis of a broad definition of intellectual disability – mothers who fall within the categories listed by the SIRG. Of note is that the heterogeneous nature of intellectual disability means that the support required by parents with intellectual disability will vary, depending on individual needs.

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66 C Vermaak & T McKenzie 'The prevalence and opportunity cost of disability in South Africa' (copy with the author).
67 R Mildon et al *Understanding and supporting parents with learning difficulties* (2003) 2.
68 IASSID (n 40 above) 297.
69 IASSID (n 40 above) 297.
70 Mildon et al (n 67 above) 2.

Grounding of the definition of disability within particular theories

The practical outcome of one's preferred theoretical framework is the definition of 'intellectual disability' associated with the relevant framework. For example, the Capability Theory emphasises the need to move beyond functionings, to assessing individual capabilities. The former (functionings) refers to what individuals are doing that is influenced by choice or constrained choice, while the latter (capabilities) refers to what individuals are really able to do or who they can be considering their individual capacities in relation to their specific life environments. The preference in assessments of 'disability' or 'capacity of a person with a disability', is steeped in the model the assessor is schooled in – whether social or medical. The preferred assessment by medical personnel is the International Classification of Functioning, Disability and Health (ICF).[71]

These theoretical standpoints therefore illustrate how intellectual disability is defined differently on discipline and theoretical bases – whether social science, medical or legal. Legal practitioners often rely on statutory definitions or medical definitions, where relevant. In this study, a broader definition is used – persons that have been labelled by others as having an intellectual disability, including based on a diagnosis by a psychiatrist or where a parent or the person with the disability describes him or herself as intellectually disabled, even where this is not confirmed by medical diagnosis. A consideration of the theoretical standpoints of the different stakeholders (medical, social workers, lawyers and court personnel) falls beyond the scope of this study.

2.6.2. Procedural accommodation

Procedural accommodation offered to persons with disabilities (and in other contexts to children or witnesses in sexual offence matters) in court proceedings derives from the right of access to justice. Article 13 of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD)[72] requires that states parties

> shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages
>
> and
>
> shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

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71 Morgon Banks et al (n 55 above) 13.

72 UN General Assembly *Convention on the Rights of Persons with Disabilities* resolution/adopted by the General Assembly 24 January 2007, A/RES/61/106.

Procedural accommodation in the justice system is not subject to progressive realisation. Instead a deliberate decision was made when article 13 of the CRPD was negotiated, to remove the requirement for 'reasonable' accommodation, since procedural accommodation 'is not subject to a proportionality test' and failure to provide such accommodation amounts to discrimination on the basis of disability.[73]

The Committee on the Rights of Persons with Disabilities has called on numerous states to review their legislation with a view to explicitly embed the duty to provide procedural accommodations in all legal proceedings.[74] In this vein, states should:

- define the entity that will be responsible for providing procedural accommodations in its laws and regulations;
- provide details about where and how persons with disabilities can access the accommodations;
- ensure availability of procedural accommodations and ensure that these are provided free of charge; and
- ensure that the entity records procedural accommodation requests in order to promote accountability.[75]

This is a helpful guide because a general comment on access to justice has not yet been developed by the Committee on the Rights of Persons with Disabilities. The African Union's *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) (African Disability Protocol),[76] echoes the CRPD's guarantees of the rights to access justice and equal recognition of legal capacity. However, it goes further in demanding that states parties 'ensure legal assistance including legal aid to persons with disabilities'.[77]

With these guidelines in mind, five kinds of procedural accommodation are considered in this study:

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73 Office of the United Nations High Commissioner for Human Rights (OUNHCHR) *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities* (2017) A/HRC/37/25 para 25. See OUNHCHR *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities* (2016) A/HRC/34/26 para 35; Committee on the Rights of Persons with Disabilities *General Comment 6 (2018) on Equality and Non-discrimination* CRPD/C/GC/6 para 25(d).

74 Committee on the Rights of Persons with Disabilities *Concluding observations in relation to the initial report of Kenya,* 4 September 2015, CRPD/C/KEN/CO/1 para 26 (b); Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of Ecuador*, 27 October 2014,CRPD/C/ECU/CO/1 para 27(c); and Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of China,* 15 October 2012, CRPD/C/CHN/CO/1 para 24.

75 OUNHCHR (n 72 above) para 28; OUNHCHR *Equality* (n 72 above) para 41.

76 AU *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) 29 January 2018 (African Disability Protocol).

77 Article 9(4) of the African Disability Protocol.

- Individual specific accommodations;
- Appropriate questioning techniques;
- Intermediaries as communication partners;
- Support; and
- Legal representation.

Individual specific accommodations, for example include adaptations to the pace of the proceedings, providing sufficient breaks for the person who may need it, and ensuring the person understands his or her rights and duties in the process and crucially understands the evidence of 'neglect' admitted as evidence in the form of social workers' reports or other assessments regarding her capacity to parent; and provision for accommodations when tendering their own evidence (which may include provision of an intermediary or support person). These adaptations to the usual process are person-centred, in that they are uniquely catering for each individual's needs. Not all persons with intellectual disabilities will need these accommodations.

Appropriate questioning techniques to enhance the understanding of a person with an intellectual disability and to allow the person to provide best evidence in court, is another type of procedural accommodation employed in other jurisdictions – but not yet in South Africa.[78]

Intermediaries as specialised court professionals who support the complainant, or witness in communicating their testimony – whether a person with a communication, psychosocial, physical or intellectual disability – is the third relevant accommodation again employed more directly in other jurisdictions and only in a limited extent in South Africa.[79]

Support in decision-making, simply understood, is about how another person, whether formally or informally, provides assistance to the person with the intellectual disability – to articulate her will and preferences in relation to a decision she has to make. This is decision-making that differs fundamentally from substituted decision-making.

Legal representation of the person with the intellectual disability in court proceedings, particularly in family courts, is utilised in other jurisdictions, including the use of support persons to assist the person understand proceedings and instruct counsel effectively[80] – but again only to a limited extent in South Africa. The main

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78 Government of South Australia *Supporting vulnerable witnesses in the giving of evidence: Guidelines for securing best evidence* (2018) <https://www.agd.sa.gov.au/sites/default/files/djp_guidelines_web.pdf?v=1490763319> (accessed 1 April 2019).

79 P Cooper 'A double first in sexual assault cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination cases' (2017) 41 *Alternative Law Journal* 191.

80 Legal Aid Board Circular 2 of 2007 mooted in *Legal Aid Board v Judge Brady and Case Stated* 2005 474/JR, cited in E Flynn *Disabled Justice?* (2016) 96. Legal Aid Board *Circular on Legal*

challenge is one of culture; the utilisation of attorneys (private or legal aid) in the South African Children's Courts is rare. Due to the inquisitorial nature of the proceedings, it may be due to a presumption that legal representation is not necessary, as the magistrate will oversee the process and attend to the rights of all participants. The link between effective legal representation and access to justice is indisputable.

2.7. Conclusion

This chapter explained the methodology used and two key definitions followed in this study. Both desktop and archival methods were employed, with an analysis in the final chapter of the thesis delineating recommendations about how the results from the literature review and thematic analysis of archival records answer the research questions posed.

The next chapter is the literature review.

Services A guide to decision making and best practice (2017) 10th ed, 8-88 https://www.legalaidboard.ie/en/freedom-of-information/circulars-on-legal-services-july-2017-edition-pdf.pdf>.

CHAPTER THREE:

LITERATURE REVIEW

3.1. Introduction

Since the late 1970s, scholars, mostly from the social sciences, have been concerned about the child protection process and the decisions made in cases of parents with intellectual disabilities.[1] Literature on the phenomenon is dominated by studies from Australia, the United Kingdom and the United States of America.[2] The University of Sydney's Australian Family and Disability Research Collaboration Unit, attached to the Faculty of Health Sciences, has made a significant contribution to the field.[3] Llewellyn co-edited a book, *Parents with intellectual disabilities: Past, present and futures* in 2010, which is the first comprehensive international research publication on the lives of parents with intellectual disabilities and their children. Booth and Booth have contributed studies from a British perspective.[4]

Similarly, the Center for Advanced Studies in Child Welfare in the School of Social Work at the University of Minnesota has led research on the intersection between parenting with a disability and child welfare.[5] Notable scholars are LaLiberte and Lightfoot, who have called for parental support to enable persons with disabilities to parent effectively.[6] This marks a shift from 'independent parenting, where a parent

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1 AT Payne 'The law and the problem parent: Custody and parental rights of homosexual, mentally retarded, mentally ill and incarcerated parents' (1978) 16 *Journal of Family Law* 797; RA Hertz 'Retarded parents in neglect proceedings: The erroneous assumption of parental inadequacy' (1979) 31 *Stanford Law Review* 787; K Marafino 'Parental rights of persons with mental retardation' in B Whitman & P Accardo (eds) *When a parent is mentally retarded* (1990) 1.

2 US National Council of Disability (NCD) *Rocking the cradle: Ensuring the rights of parents with disabilities and their children* (2012) <www.ncd.gov> (United States); D McConnell et al *Parents with a Disability and the New South Wales Children's Court* (2000) <www.sydney.edu.au> (Australia); T Booth & W Booth *Parents with Learning Difficulties, Child Protection and the Courts* (2004) Report to the Nuffield Foundation <http://www.supported-parenting.com/projects/courts.html> (United Kingdom) (all accessed 12 January 2016).

3 Australian Family and Disability Research Collaboration Unit, University of Sydney <http://sydney.edu.au/health-sciences/afdsrc/parents/completed/protection.shtml> (accessed 12 January 2016).

4 T Booth & W Booth *Growing up with parents who have learning difficulties* (2013) Taylor & Francis; T Booth, W Booth & D McConnell 'Care proceedings and parents with learning difficulties: Comparative prevalence and outcomes in an English and Australian court sample' (2005) 10 *Child and Family Social Work* 353; T Booth & W Booth *Exceptional Childhoods, Unexceptional Children: Growing Up with Parents who have Learning Difficulties* (1997); T Booth & W Booth 'Parenting with learning difficulties: Lessons for practitioners' (1993) 23 *British Journal of Social Work* 459.

5 Center for Advanced Studies in Child Welfare 'The Intersection of Child Welfare and Disability: Focus on Parents' (2013) School of Social Work, University of Minnesota <http://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf> (accessed 12 January 2016).

6 E Lightfoot et al 'Disability in the termination of parental rights and other child custody statutes' (2010) 34 *Child Abuse and Neglect* 927; E Lightfoot, T LaLiberte & K Hill *Guide to creating legislative change: Disability status in termination of parental rights and other child custody statutes* (2007) Minneapolis: University of Minnesota

stood in front of the court as a single being to have his or her parenting assessed irrespective of other supportive factors, to one of interdependent parenting', in the child welfare paradigm.[7] Azar, a psychologist from Pennsylvania State University, has made several recommendations for improved social services supporting parents with intellectual disabilities, including on best practice models such as Head Start.[8] These contributions have not considered issues of legal capacity, reasonable and procedural accommodation, and adapted evidence from a legal perspective. The pertinent question is how court procedures can be adapted to promote full participation of mothers with intellectual disabilities in the court process. Contributions from legal scholars on access to justice for these parents is largely absent. Recently the South Africa literature on procedural accommodations points to a greater awareness of the impact of exclusions of persons with disabilities from full and meaningful participation in the justice system.[9]

There is a dearth of research in developing countries, particularly from the Global South on this topic. Consideration of parenting by mothers with intellectual disabilities in family court proceedings is dominated by studies from the Global North, and is primarily by social and medical scientists. Attention to these issues in the Global South, and particularly in Africa, will be valuable. Court systems, generally, are not friendly towards persons with disabilities in South Africa and in Africa, as support for indigent persons and criminal accused's is usually prioritised by the state. From a Global South perspective, how to address ableism in the investigation and assessment by social workers and the decision-making by magistrates, are pertinent questions.

International consensus is growing about the need to dismantle ableism in society and its structures, particularly as states grapple with the implementation of their obligations under the CRPD, which introduced a paradigm shift in the way in which persons with disabilities are perceived and in which their rights and entitlements are promoted.

<http://www.cehd.umn.edu/ssw/CASCW/attributes/PDF/LegislativeChange.pdf> (accessed 12 January 2016).

7 E Lightfoot & T LaLiberte 'Parenting with Disability: What do we know?' in Center for Advanced Studies in Child Welfare *The Intersection of Child Welfare and Disability: Focus on Parents* (2013) School of Social Work, University of Minnesota 4-5, 5 <http://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf> (accessed 12 January 2016).

8 See, *inter alia*, ST Azar et al 'Practices Changes in the Child Protection System to Address the Needs of Parents With Cognitive Disabilities' (2013) 7 *Journal of Public Child Welfare* 610; ST Azar et al 'Promoting engagement and involvement of parents with cognitive challenges: Suggestions for Head Start programs' (2013) 16 *NHSA Dialog* 216; ST Azar et al 'Chronic neglect and services without borders: A guiding model for social service enhancement to address the needs of parents with intellectually disabilities' (2012) 5 *Journal of Mental Health and Intellectual Disabilities Research* 130.

9 RM White et al 'Transformative equality: Court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* a651 https://doi.org/10.4102/ajod. v9i0.651

The chapter starts with a brief profile of persons with intellectual disabilities in South Africa. Thereafter, the narrative shifts to the historical overview of the (lack of) recognition of the sexuality and parenthood of women with intellectual disabilities. This brief review identifies stereotypes about sexuality and parenthood as being one of the factors that impact on access to justice for mothers with intellectual disabilities. Next, the literature on the socio-economic factors pertaining to the parents will be considered to illustrate that co-existing and intersecting factors, such as poverty, can impact on predicted family outcomes. Thereafter, the literature on the value chain of social services and the court is considered.

3.2. A profile of adults with intellectual disability in South Africa

In order to understand the experience of persons with intellectual disabilities in the court system, the context within which they live in South Africa is sketched. This context includes prejudice experienced daily in communities, lack of access to education and barriers to entry into the labour market, heightened risk of harm and sexual abuse, a denial of sexuality and parenting, and persistent stereotypes about competence and capacity in daily living – including in relation to decision-making. Barriers to accessing services exacerbate the financial and human care burden on families. Undoubtedly, these factors play a role in the way in which persons with intellectual disabilities are perceived by social welfare and court professionals.

The profile next considers the causes of intellectual disability and the precarious living of persons with intellectual disability from a rights perspective. The challenge is that women with intellectual disabilities are considered a vulnerable group as they are at higher risk of rights violations than others; yet their vulnerability should not be a reason for presumptions about their competence and their entitlements to equality before the law.

3.2.1. Social and environmental factors related to intellectual disability and general rights violations

Statistically, in KwaZulu-Natal province, per the 2011 Census, 1.2% of participants indicated severe difficulties with remembering and concentrating; and 4% indicated mild difficulty in doing so.[10] Provincially, both statistics are at the higher end of the scale. Persons in traditional areas indicated high levels of mild and severe difficulties with these tasks (4,5 and 1.6% respectively); and those living in agricultural areas indicated 3.5 and 1% respectively. Urban dwellers showed lower proportions (2.6 and 0.8% respectively). Considering the traditional area and agricultural land geography of KwaZulu-Natal, it potentially shows the relatively high prevalence geographically of persons with intellectual disabilities. The StatsSA report concedes that it conflated

[10] StatsSA *Profile of Persons with Disabilities in South Africa: Census 2011* (2014) 34 <http://www.statssa.gov.za/?p=3180> (accessed 10 January 2015).

psychosocial and intellectual disability measurement in its questions. The 2011 statistics for prevalence should not be relied on, as difficulties in remembering and concentrating do not necessarily – on their own – indicate psychosocial or intellectual disabilities.[11]

The prevalence of intellectual disability (and other disabilities) is not certain – as data from different governmental departments are contradictory.[12] The unreliability of the statistics impacts on policy and law reform, including monitoring and evaluation of programmes and interventions.

Adnams provided an epidemiological perspective and a brief survey of policy and services for children and adults with intellectual disability in South Africa in 2010.[13] Adnams' perspective highlights the disability burden, with correlations to nutritional deficiencies, infectious diseases, including mother-to-child transmitted HIV/AIDS and tuberculous meningitis, foetal alcohol spectrum disorder (FASD) and violence and injury. FASD prevalence in South Africa, particularly in the Western Cape Province, is one of the highest in the world.[14] This prevalence heightens the cost to society and the fiscus due to its burden on 'health, education, social services, labour and criminal justice'.[15] Traumatic brain injury, often acquired from road accidents and from physical violence, despite being preventable, continues unabated in South Africa.[16] Adnams notes a high incidence of co-morbidity of intellectual disability with epilepsy and cerebral palsy, but cautions that mental illness co-morbidity with intellectual disability is unexplored in the literature.[17] Since then, Capri and others have explored the dual diagnosis of intellectual disability and mental illness.[18] Adnams argues that low prioritisation of the provision for the social, educational and health needs of persons with intellectual disabilities in South Africa is evident – despite policy and services ostensibly catering for this population.[19]

Eight years after the Adnams' study, Capri et al sketch, in their comprehensive literature review on the rights of persons with intellectual disabilities in South Africa,

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11 StatsSA (n 10 above) 50.

12 K Foskett 'Intellectual Disability in South Africa' (2014) *Includid Group Homes* 2 <http://www.includid.org.za/Downloads/South%20Africa%20and%20Intellectual%20Disability.pdf > (accessed 10 January 2015).

13 CM Adnams 'Perspectives of intellectual disability in South Africa: Epidemiology, policy, services for children and adults' (2010) 23 *Current Opinion in Psychiatry* 436.

14 Adnams (n 13 above) 438.

15 Adnams (n 13 above) 438.

16 Adnams (n 13 above) 438, citing World Health Organisation *Global status report on road safety: Time for action* (2009) <www.who.int/violence_injury_prevention/road_safety_ status/2009>.

17 Adnams (n 13 above) 439.

18 C Capri *Thinking about intellectual disability care: An intersubjective approach* Unpublished PhD thesis, University of Stellenbosch (2016); C Molteno et al 'Sub-specialties in psychiatry in Africa - intellectual disability' (2011) 14 *African Journal of Psychiatry* 1 3.

19 Adnams (n 13 above) 439.

the rights most frequently focused on in the literature.[20] These rights are not generally related to access to justice in the different courts (except for criminal justice). Capri et al note that the literature reviewed exposes the extent of the care burden of children with intellectual disabilities carried by their parents, particularly due to lack of adequate or appropriate educational programmes, and which impacts on the parent's employability and prospects.[21] Furthermore, they note that sexual reproductive health programmes are not accessed by children with intellectual disabilities due to their lack of access to formal teaching on sexuality.[22] Generally, this population is at risk of 'physical abuse, exclusion, barriers to accessing medical and mental health services, involuntary confinement, denial of marriage or parenting, financial exploitation, unemployment, occupational restrictions and living safely outside of institutions'.[23] The sites for these violations are identified as 'public, family homes, places of education and work, care centres, health care settings, police stations, courts and civic offices'.

The perception of the causes of intellectual disability from a cultural perspective in South Africa can compound stigma. Mothers are often thought to be the cause of their children's disability or the ancestral link 'blames' fathers and mothers for not completing the necessary traditional rituals. Alternatively, 'supernatural forces such as demons, witchcraft' or punishment from a deity can be apportioned as the blame for the disability.[24]

In relation to a theme from the literature reviewed by Capri et al – the right not to be discriminated against – the review noted the 'inferiority' perception in communities which places persons with intellectual disabilities at risk of abuse and exploitation;[25] that poverty and comorbidity with physical disability increases the stigma experienced by young adults with intellectual disability;[26] and that community stigmatisation

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20 C Capri et al 'Intellectual disability rights and inclusive citizenship in South Africa: What can a scoping review tell us?' (2018) 7 *African Journal of Disability* a396 <https://doi.org/10.4102/ajod.v7i0.396> (accessed 10 March 2019).

21 Capri et al (n 20 above), citing M Geiger 'Communication training for centre-based carers of children with severe or profound disabilities in the Western Cape, South Africa' (2012) 1 *African Journal of Disability* 1; J McKenzie & R McKonkey 'Caring for adults with intellectual disability: The perspectives of family carers in South Africa' (2016) 29 *Journal of Applied Research in Intellectual Disabilities* 531.

22 P Rohleder & L Swartz 'Providing sex education to persons with learning disabilities in the era of HIV/AIDS' (2009) 14(4) *Journal of Health Psychology* 601.

23 N Drew et al 'Human rights violations of people with mental and psychosocial disabilities; an unsolved global crisis' (2011) 378 *The Lancet* 1664; A Erasmus et al 'Afrikaans-speaking parents' perceptions of the rights of their children with mild to moderate intellectual disabilities: A descriptive investigation' (2016) 20 *Journal on Child Health Care* 234.

24 MP Mostert 'Stigma as a barrier to the implementation of the Convention on the Rights of Persons with Disabilities in Africa' (2016) 4 *African Disability Rights Yearbook* 3 at 9. A Stone-MacDonald & G Butera 'Cultural beliefs and attitudes about disability in East Africa' (2014) 8 *Review of Disability Studies: An International Journal* 2 5.

25 T Phasha & L Myaka 'Sexuality and sexual abuse involving teenagers with intellectual disability: Community conceptions in a rural village of KwaZulu-Natal, South Africa' (2014) 32 *Sexuality and Disability* 153.

26 A Ali et al 'Ethnicity and self-reported experiences of stigma in adults with intellectual disability in Cape Town, South Africa' (2015) 59 *Journal of Intellectual Disability Research* 530.

experienced in South Africa impacts on such persons' daily living. The stigma experienced in communities is explored in more detail below.

3.2.2. Community living, independent living and stigmatisation

In South Africa, adults with intellectual disabilities live either with families, in group homes or residential institutions, and rarely on their own. Non-governmental organisations (NGOs) offer support so that families care for persons with intellectual disabilities,[27] with some subsidy from the government, but this is insufficient to provide for all the financial and other needs of these families. Group homes are few and far between and are either run by NGOs with some subsidy or privately. Residential facilities, according to the government's baseline report on the implementation of the CRPD in 2013, are operated by NGOs – 149 such facilities caring for 7 982 persons.[28] In that report, the government conceded as accurate the complaints from NGOs that subsidies are paid late and that adjustments to subsidies are not inflation related, so increasing vulnerability of the residents.[29] The exact number of group homes was not provided and the government conceded that 'state subsidisation of such units is presently limited'.[30] Of further concern is that the government also conceded that community-based rehabilitation (CBR) as a method to promote independent living, remains at the behest of NGOs – with very few subsidies provided for such services.[31]

Institutionalisation of persons with intellectual or psychosocial disabilities was the 'norm' but a process of de-institutionalisation started in the early 2000s.[32] The process of de-institutionalisation and community living means that the living arrangements of patients with psychosocial illness or intellectual disability are changed from isolated institutional living to living in the community. The Committee on the Rights of Persons with Disabilities, in its concluding observations on South Africa, recommends that an action plan aimed at developing 'community support services' is adopted, not only for families of children with disabilities, but also for parents with disabilities which would include 'personal assistance, grants and support'.[33] Such an action plan would strengthen independent living and community living (article 19 of the CRPD). Currently, however, living in communities can be fraught with challenges, where family

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27 Cape Mental Health <http://www.capementalhealth.co.za/intellectual.html> (accessed 10 January 2019).

28 Department of Women, Children and People with Disabilities (DWCPWD) *Baseline Country Report to United Nations on the Convention of the Rights of Persons with Disabilities in South Africa* (2013) para 171 <https://ubuntucentre.files.wordpress.com/2010/09/country-report-final-baseline-country-report-on-the-crpd-cabinet-approved-3.pdf> (accessed 1 February 2016).

29 DWCPWD (n 28 above) para 171.

30 DWCPWD (n 28 above) para 172.

31 DWCPWD (n 28 above) para 174, stating that only two of nine provinces provided subsidies to organisations providing CBR services.

32 R Lazarus 'Managing de-institutionalisation in a context of change: the case of Gauteng, South Africa' (2005) 8 *South African Psychiatry Review* 65 66.

33 Committee on the Rights of Persons with Disabilities *Concluding Observations on the Initial Report of South Africa* (2018) para 35(c).

and community stigmatisation continue to undermine the rights guaranteed under the Constitution.

Stigmatisation of persons with intellectual disabilities living with their families, on their own or in group homes or in institutions, can impact on their quality of life and their access to opportunities to live on an equal basis and to participate fully. Du Plessis traces the development of the notion of how disability is understood over time, due to several factors that are material and cultural – including 'the nature of the impairment, the economic policies and structures within a particular society, technological development, interpretations of religious texts and predominant intellectual traditions and social structures'.[34] These factors, she argues, both historically and in contemporary times, 'continue to influence the conception and interpretation of embodied difference and societal responses to such difference'.[35] In South Africa some of these responses are legislative – such as the Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 (PEPUDA), which prohibits discrimination on the basis of disability. However, the lived reality of persons with disability is starkly unequal and unjust.

Phasha and Myaka, for example, identify beliefs such as persons with intellectual disability being inferior to others, as being one of the factors placing them at risk of abuse and exploitation.[36] Intersecting identities also point to stigmatisation within communities. For example, black persons with mild intellectual disability are more stigmatised than counterparts who are Caucasian and/or of 'mixed' ethnicity – race is the intersecting identity here.[37] Multiple disabilities, for example intellectual and physical disabilities, can compound stigmatisation experiences of the person with the disabilities.[38] Stigma is also experienced by the family associated with the person with the disability.[39] The family, however, can be a key advocate to challenging the stigma faced by a person with an intellectual disability, but can unfortunately also reinforce the stigma.[40] Self-stigma can stop persons with intellectual disabilities from confronting discriminatory treatment by family and community members and ignoring discrimination suffered is a reinforced coping mechanism.[41]

Holness and Rule echoed the 'social-spatial' nature of discrimination faced by persons with disabilities, as articulated by Gartrell and Hoban in urban and rural divides in South Africa. This social-spatial process 'isolates and restricts [persons with

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34 M du Plessis *Access to work for disabled persons in South Africa: A rights critique* (2017) 30.
35 Du Plessis (n 34 above) 30.
36 Phasha & Myaka (n 25 above) 153.
37 Ali et al (n 26 above) 535.
38 Ali et al (n 26 above) 536.
39 N Mitter, A Ali & K Scior 'Stigma experienced by family members of people with intellectual and developmental disabilities: Multidimensional construct' (2018) 4 *BJPsych Open* 332.
40 R McConkey et al 'Tackling stigma in developing countries: The key role of families' in K Scior & S Werner (eds) *Intellectual disability and stigma: Stepping out from the margins* (2016) 179 180.
41 D Roth et al 'How stigma affects us: The voice of self-advocates' in Scior & Werner (n 40 above) 49 50.

disabilities] to the home, where household social relations determine [their] access to structurally determined life opportunities'.[42] Holness and Rule describe the stigmatisation that happens with some Zulu cultural beliefs.[43] For example, ancestral beliefs and cultural beliefs about disability can mean that persons with disabilities are treated with 'pity, overprotection' or 'exclusion' 'from opportunities to realise their individual capabilities'.[44] A disabled persons organisation, CREATE (Community Rehabilitation Education and Training), conducted research in traditional communities in KwaZulu-Natal. The findings from their research in 2013, 2014 and 2017, indicate that persons with disabilities face experiences of 'isolation, segregation and stigma' from the community, and are excluded from participating in community meetings.[45] Traditional leaders indicated they believe that persons with disabilities are adequately cared for by their families and therefore are unlikely to have disputes that require referral to traditional courts.[46] However, participants with disabilities highlighted a number of barriers to reporting and positive resolution of disputes, because of their disability.

The international law obligations for states to promote community and independent living, rather than institutionalisation, require anti-stigma interventions to ensure that persons with intellectual disabilities are safe and free from discrimination in their homes. There is however little literature on mothers with intellectual disabilities living in the community in South Africa.

The focus on the opportunities to maximise educational opportunities is discussed next.

3.2.3. Access to education

The educational system is heavily skewed against inclusive education for children with intellectual disabilities.[47] Children with intellectual disabilities are generally not enrolled in school, and when they are, they are usually segregated into special schools. Those with severe and profound disabilities are denied their right to education and relegated to special education centres – care centres run by NGOs that are severely

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42 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 27 29, citing A Gartrell & E Hoban '"Locked in space": Rurality and the politics of location' in S Grech & K Soldatic (eds) *Disability in the Global South: The Critical Handbook* (2016) 348.

43 Holness & Rule (n 42 above) 29.

44 E Munsaka & H Charnley '"We do not have chiefs who are disabled": Disability, development and culture in a continuing complex emergency' (2013) 28 *Disability and Society* 767.

45 CREATE *Baseline study: Impendulo Project in eight traditional courts in uThungulu and Umgungundlovu Districts* (2017), cited in Holness & Rule (n 42 above) 36-37.

46 CREATE *Summary of research on traditional courts and people with disabilities* (2013) Presentation to the House of Traditional Leaders, uThungulu District, cited in Holness & Rule (n 42 above) 36.

47 C Molteno 'Editorial: Education and intellectual disability in South Africa' (2006) 18 *Journal of Child and Adolescent Health* iii.

underfunded.[48] A provincial high court case sought to address the numerous rights violations that children with severe and profound disabilities experience when placed on never-ending waiting lists for access to special care centres, and the centres' inadequate funding and staff training.[49] However, the litigants in that case intimated that implementation of the court order is slow, with large gaps remaining.[50] This means the state continues to violate the right to education of these children, despite the court finding that these children are 'not ineducable'.[51] A draft policy to ensure the education of these children is attended to has not yet been finalised.[52]

Educational attainment for the population of intellectually disabled persons continues to be marred by state inaction or apathy, or perhaps less harshly, financial and human capital deficits.[53] The current segregated education system is in dire need of change – but due to the differing needs of persons with intellectual disabilities will require very large-scale transformation.[54] Such a change will require dedicated training *and* support of teachers, particularly to address negative perceptions of inclusion.[55] Capri et al note that inclusive education of children with intellectual disabilities in South African mainstream schools will rely on flexible teaching,

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48 C Ngwena & L Pretorius 'Substantive equality for disabled learners in state provision of basic education: A commentary on Western Cape Forum for Intellectual Disability v government of the Republic of South Africa' (2012) 28(1) *South African Journal on Human Rights* 81.

49 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC).

50 Western Cape Forum for Intellectual Disabilities 'Out in the cold – the failure of the department of basic education to provide basic education for learners with severe to profound intellectual disability' (2018) <www.raith.org.za/.../2018-Western-Cape-Forum-for-Intellectual-Disability-WCFID.doc> (accessed 1 March 2019). This update on the impact of the litigation notes that: '[The Department of Basic Education (DBE)] claims that they do not intend to implement the curriculum for severe intellectual disability in centres, because centres are not schools. … DBE has to be reminded that centres have been established precisely because DBE refuses admission to learners with severe to profound intellectual disability.'

51 *Western Cape Forum for Intellectual Disability* (n 49 above) paras 20-23.

52 Department of Basic Education 'The draft policy for the provision of quality education and support for children with severe to profound intellectual disability' (2016) <https://www.education.gov.za/Portals/0/Documents/Legislation/Call%20for%20Comments/DraftCSPIDPolicyOct2016.pdf?ver=2016-11-07-092618-000> (accessed 1 February 2019).

53 JA McKenzie et al 'Implementation of Educational Provision for Children with Severe to Profound Intellectual Disability in the Western Cape: From Rights to Reality' (2017) 64(6) *International Journal of Disability, Development and Education* 596; JA Mckenzie & CI Macleod 'Rights discourses in relation to education of people with intellectual disability: Towards an ethics of care that enables participation' (2012) 27 *Disability & Society* 15.

54 P Engelbrecht et al 'Including learners with intellectual disabilities: Stressful for teachers?' (2003) 50 *International Journal of Disability, Development and Education* 293; A Hall & L Theron 'How school ecologies facilitate resilience among adolescents with intellectual disability: Guidelines for teachers' (2016) 36 *South African Journal of Education* 1.

55 DK Donohue & J Bornman 'South African teachers' attitudes toward the inclusion of learners with different abilities in mainstream classrooms' (2015) 62 *International Journal of Disabilty, Development and Education* 42; J McKenzie & CI McCleod 'Rights discourses in relation to education of people with intellectual disability: Towards an ethics of care that enables participation' (2012) 27 *Disability & Society* 15.

accessible assessment practices, and the teaching of 'life preserving skills'.[56] Access to adult basic education for persons with intellectual disabilities is however not explored in the literature in South Africa. The picture of access to education for persons with intellectual disability remains bleak. Obviously, inadequate and incomplete education impacts on civil political and socio-economic participation in the community and public life.

3.2.4. Employment

The literature in South Africa insufficiently addresses the rights of persons with intellectual disabilities in the workplace. This is likely because of the lack of priority this aspect has been given in research. While some of the literature considers the situation of supported employment,[57] the employment uptake of persons with intellectual disability is low, and when they do work, the invisibility of the impairment may mean that support to obtain and remain in employment is not prioritised due to lack of political agency. Lack of disaggregated data in employment also impacts on the evidence of work attainment for persons with intellectual disabilities.[58]

The risk this population faces in respect of gender-based violence and disability hate crime is considered next.

3.2.5. Safety and security of the person

Capri et al identify the high risk that adolescents and adults with intellectual disability will face sexual abuse.[59] This finding is echoed by Meer and Combrinck.[60] Girls and women with intellectual disabilities are most at risk of gender-based violence (GBV) in South Africa.[61] Yet, reporting of GBV to the authorities is low due to several factors, including communication difficulties experienced by persons with intellectual

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56 Capri et al, citing Rohleder & Swartz (2009) and N Nel et al 'Differentiated pedagogy as inclusive practice; the "learn not to burn" curriculum for learners with severe intellectual disabilities' (2011) 15 *Education as Change* 191.

57 L van Niekerk et al 'Time utilisation trends of supported employment services by persons with mental disability in South Africa' (2015) 52 *Work* 825 (referring to both intellectual disability and mental illness).

58 See, also, Foskett (n 12 above).

59 Capri et al (n 20 above), citing G Byrne 'Prevalence and psychological sequelae of sexual abuse among individuals with an intellectual disability: A review of the recent literature' (2017) *Journal of Intellectual Disabilities* <https://doi.org/10.1177/1744629517698844> (accessed 1 January 2019); NG Peckham 'The vulnerability and sexual abuse of people with learning disabilities' (2007) 35 *British Journal of Learning Disabilities* 131.

60 T Meer & H Combrinck 'Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence' (2015) 29 *Agenda* 14.

61 Centre for Disability Law and Policy, University of the Western Cape *Gender-based violence against women with intellectual disabilities or psychosocial disabilities: Promoting access to justice* Policy Brief No 1 (undated) http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/documents/Policy_Brief_No_1.pdf (accessed 1 December 2019).

disabilities.[62] Accessibility of the justice system for disabled victims of GBV is the most problematic aspect.[63]

Hate crimes against persons with disabilities is victimisation aimed at a person specifically because of his or her disability – a 'regular' crime (also known as a base crime such as murder, theft, rape) is committed, being motivated or partly motivated by the fact that the person is disabled.[64] Hate crimes against persons with disabilities are pernicious but are often invisible because of two factors. First, the perceived 'vulnerability' of persons with disabilities is thought to be the reason for the crime and not motivation of hatred towards a person with such characteristics.[65] Second, due to the invisibility of some disabilities and prejudices or ignorance of the potential for disability to be a motivating factor for hostility – the presence of such an element in criminal offences is not easily identified by law enforcement. As a result, under-reporting is a symptom of the failure by society and the law to recognise disability hate crimes.[66]

The Hate Crimes Monitoring Group found that hate crimes are under-reported by persons with disabilities in South Africa.[67] Victims with disabilities may not report (or delay reporting) a crime perpetrated against them because of relationships of dependence on family members or other persons that mitigate against reporting or timeous reporting. This may be because the victim is dependent on the perpetrator for basic survival needs.[68] The myth that hate crimes are perpetrated by strangers does not fit all categories of hate crimes and, in particular, is not always true for persons with disabilities. They usually know the perpetrator. Furthermore, underreporting or a delay in reporting may be due to the inaccessible law enforcement and justice system in South Africa, including a lack of confidence in law enforcement, fear of further

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62 Centre for Disability Law and Policy (n 61 above). See, also, Republic of South Africa *National Strategic Plan On Gender-Based Violence & Femicide* (2020) <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 28 October 2020) 17.

63 Cape Mental Health, Centre for Human Rights at The University of Pretoria, Epilepsy South Africa, Khuluma Family Counselling, Lawyers for Human Rights, Port Elizabeth Mental Health, SA Federation for Mental Health, The Teddy Bear Clinic for Abused Children, and Women Enabled International *Joint Submission to the CRPD Committee Working Group for South Africa* (2018) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=162&ctl00_PlaceHolderMain_radResultsGridChangePage=18> (accessed 1 December 2019.

64 M Sherry & A Neller 'Intellectual disability, stigma and hate crimes' in K Scior and S Werner (eds) *Intellectual Disability and Stigma* (2016) 111. See, also, M Sherry *Disability hate crimes: Does anyone really hate disabled people?* (2012) 1.

65 DN Bryen & J Bornman *Stop violence against people with disabilities! An international resource* (2014) 26.

66 CH Sin 'Making disablist hate crime visible: Addressing the challenges of improving reporting' in A Roulstone & A Mason-Bish (eds), *Disability, Hate Crime and Violence* (2013) 147.

67 Y Mitchell & JA Nel *The Hate and Bias Crimes Monitoring Form Project: January 2013 to September 2017*, Johannesburg: The Hate Crimes Monitoring Group (2017) 9.

68 A Roulstone & K Sadique 'Vulnerable to misinterpretation: Disabled people, "vulnerability", hate crime and the fight for legal recognition' in A Roulstone & H Mason-Bish (eds), *Disability, Hate Crime and Violence* (2013) 25; P Thomas "'Mate crime": Ridicule, hostility and targeted attacks against disabled people' (2011) 26 *Disability & Society* 107.

victimisation when reporting, inaccessible transport to police stations, and also inaccessible police stations. Women with intellectual disabilities, in particular, are not generally considered credible witnesses and face attitudinal barriers – in part due to perceptions of their credibility.[69] This can play out in police stations when reporting a crime and also in court should a charge be prosecuted.

Parliament's efforts in respect of law reform on hate crimes has been to include disability as a category in the Prevention and Combating of Hate Crimes and Hate Speech Bill B9 of 2018, which is laudable. However, the law reform does not take into account the challenges that persons with disabilities find in reporting these crimes and the barriers that lack of accommodation in procedures that the legal system poses for successful prosecution of these crimes.[70] Law reform efforts, when aimed at protecting or promoting the rights of persons with disabilities, however, should avoid relying on terminology such as 'vulnerability' to describe the objectives of the legislation in relation to persons with disabilities.[71] Using the terminology of vulnerability can be counterproductive and in itself can lead to violence in respect of persons with disabilities.

In summary, the risk of gender-based violence and hate crime on the basis of the disability of persons with intellectual disabilities is heightened, and the legal response thereto (and prevention measures) is inadequate. The mistrust experienced by persons with intellectual disabilities in respect of the police and courts, in terms of being victims of crime, may also spill over the civil justice system – such as the Children's Court.

3.2.6. Access to health care

Access to health care is a perpetual challenge for persons with intellectual disabilities. McConkey summarises the global health situation facing persons with intellectual disabilities.[72] He found that they face 'poorer health' than persons without disabilities and those with other disabilities (physical and sensorial); have a higher risk of chronic illnesses and diseases; their access to health care is diminished; and social factors contribute negatively to their health care provision and promotion.[73] Persons with intellectual disabilities face other contributing health challenges. For example, factors

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69 Meer & Combrinck (n above) 14; E Naidu et al *On the margin: Violence against women with disabilities* Centre for the Study of Violence and Reconciliation (2005) 35.

70 See, also, L Maqutu & W Holness 'Submission to Portfolio Committee on Justice and Correctional Services on the Prevention and Combating of Hate Crimes and Hate Speech Bill B9 of 2018' (2019) Copy with the author.

71 W Holness & R Rule (n 42 above) 27.

72 R McConkey 'The need for action' in R McConkey (eds) *Implementing Inclusive Population Health For Youth: Experiences From Low- And Middle-Income Countries* (2018) Disability Catalyst Africa Series No. 6 <http://www.dhrs.uct.ac.za/sites/default/files/image_tool/images/147/disability/2018/DCA6.pdf> (accessed 1 January 2019).

73 McConkey (n 72 above) 17.

such as poverty and inadequate housing contribute to ill-health, as the risk of malnutrition and disease is heightened; challenges in terms of communicating their symptoms and low literacy levels means access to relevant health information is affected; and their sedentary lifestyles can increase health risks where inadequate nutrition and lack of exercise predominate.[74] Furthermore, stigma experienced by health care professionals and families impact on access to health promotion and health services, and the social exclusion and isolation they and their families experience means their 'opportunities for accessing advice and help' are reduced.[75] It can be assumed that similar factors, such as challenges in communicating needs, low literacy levels, and stigma, can negate help-seeking behaviour of parents with intellectual disabilities (and their caregivers) who require support to raise their children from social services. Furthermore, it can be assumed that such challenges can impact on the perceptions and services received in the justice system.

Access to health and deinstitutionalisation: The Life Esidimeni tragedy

Petersen et al, in their analysis of deinstitutionalisation of patients with psychosocial illness and decentralisation of mental health care to primary health care level, found that lack of resources for mental health care and the inefficient use of mental health care resources currently in place, scupper the deinstitutionalisation process.[76] This section explores the Life Esidimeni tragedy and the right of access to health care generally.

Where there is co-morbidity with mental illness, a treatment gap remains. Only those with serious mental illness will be treated under the legislation, while the primary health care system cannot adequately deal with those with less serious and 'common mental disorders'.[77] Stein et al argue for both an 'integrative and convergent' approach to mental illness and intellectual disability.[78] They argue that both primary care screening and management – as well as tertiary speciality services are needed. They also call for consideration of the biomedical and socio-political factors that contribute to the neglect of intellectual disability.[79] Stein et al, as do Molteno et al, bemoan that a subspecialisation of intellectual disability by medical practitioners is lacking.[80]

Recent parlance on persons with intellectual disabilities in South Africa, in the media and even by high-level medical practitioners, in response to the Life Esidimeni

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74 E Emerson & S Baines 'Health inequalities and people with learning disabilities in the UK' (2011) 16(1) *Tizard Learning Disability Review* 42-48, cited in McConkey (n 72 above) 18.

75 As above.

76 I Petersen et al 'Planning for district mental health services in South Africa: A situational analysis of a rural district site' (2009) 24 *Health Policy and Planning* 140.

77 DJ Stein et al 'Intellectual disability in South Africa: Addressing a crisis in mental health services' (2018) 108 *South African Medical Journal* 147 148.

78 Stein et al (n 77 above) 147, citing DJ Stein *Philosophy of Psychopharmacology* (2008) Cambridge: Cambridge University Press.

79 Stein et al (n 77 above) 147.

80 Stein et al (n 77 above) 147. See, also, C Molteno et al 'Sub-specialities in psychiatry in Africa – intellectual disability' (2011) 14 *African Journal of Psychiatry* 1 3.

tragedy and the ensuing arbitration proceedings – emphasises such persons' vulnerability and identifies persons with intellectual disabilities as being a homogenous group of persons in need of care. It also labels them as 'mentally ill', even in instances where there is no co-morbidity with psychosocial illness, and labels them as incapable of making their own decisions and life choices.[81] The tragedy involved the Gauteng Department of Health's decision, based primarily on cost and ostensibly because of the need to deinstitutionalise, to move approximately 1 700 patients with psychosocial and/or severe and profound intellectual disabilities from the Life Esidimeni private hospital contracted to care for them – to non-government organisations that were ill-equipped to do so.

This move of some patients and the discharge of others into the care of their families without providing support, resulted in the deaths of 144 people due to malnutrition, dehydration, lack of basic hygiene and lack of adequate basic medical or highly specialised medical care.[82] Relatives of some the deceased patients were called to testify on their 'plight'[83] in the arbitration hearings into the medical malpractice. However, survivors of the tragedy, patients with intellectual disabilities, were not called to testify. Not providing a space for the voice of persons with intellectual disabilities to be heard in a situation which is truly a matter of life and death, is unconscionable. Such treatment is in line with the medicalised and charitable approach that the government still follows – despite a slew of policies and legislation that espouses the social and human rights approaches to disability.

Incredibly, two sets of litigation brought in 2015 and 2016 by a network of psychiatric and psychological support groups, including a law clinic – concerning the slated plan to move the Esidimeni patients – could not ward off the tragedy that unfolded. In the first High Court application, a settlement agreement was reached outside of court, which included an undertaking that mental health care users from the hospital would not be discharged, unless agreement could be reached by the parties on a plan to ensure the mental health care users received both health and other services – either of the same or higher quality than that they received at the hospital.

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81 C Capri et al 'Esidimenis are going on all the time' *The Mail & Guardian* 8 December 2017 <https://mg.co.za/article/2017-12-08-00-esidimenis-are-going-on-all-the-time> (accessed 2 October 2018).

82 MM Makgoba 'The report into the "circumstances surrounding the deaths of mentally ill patients: Gauteng Province" No guns: 94+ silent deaths and still counting' (2017) <http://ohsc.org.za/wp-content/uploads/2017/09/FINALREPORT.pdf> (accessed 1 March 2018). When this report was released in February 2017, Makgoba stated that when the Health MEC indicated 36 patients had died, 77 had already died.

83 G Nicholson 'Life Esidimeni: Manamela showed no interest in plight of relatives or patients, arbitration hears' *The Daily Maverick* 28 November 2017 <https://www.dailymaverick.co.za/article/2017-11-28-life-esidimeni-manamela-showed-no-interest-in-plight-of-relatives-or-patients-arbitration-hears/#.Wi-I6d-WZPY> (accessed 1 December 2017).

Consultation with affected parties' families and the network of concerned entities was needed.[84]

The second application in March 2016 was aimed at stopping the planned move by the Department of Health of 54 persons to an NGO that had previously catered for the needs of children with intellectual disabilities. These adult mental health care users had a variety of diagnoses – including severe intellectual disability and psychosis, for example. The Department stated that professional assessment indicated these patients were no longer in need of professional care and that the identified service-provider NGO was safe, and in any case the Department had no obligation to consult with their families or stakeholders about the move. This assertion was made despite the previous court settlement agreement, where the department conceded they did have an obligation to consult. The Court held in favour of the planned move. Fourteen of the patients at this particular NGO died.[85] Eventually, 144 patients at various NGOs would die, with only one patient's death attributed to a psychosocial illness. The remainder of the patients died due to negligent medical care.

While this study does not deal with the parenting and life decisions of persons with severe and profound intellectual disabilities, it is insightful to note how this group is treated in respect of their ability to contribute to decision-making about their daily lives. There is no indication from the Esidimeni situation that the agency of persons with intellectual disabilities was of concern for the health care professionals and NGOs implicated in the traumatic events. Nor was their agency of concern to stakeholders such as the South African Human Rights Commission (SAHRC), the Health Ombud, the NGOs who brought the initial litigation, or the families of the survivors. The agency or voice of persons with 'mild' intellectual disabilities is not as difficult to promote and support as that of persons with severe and profound intellectual disabilities, and with high care needs. Their will and preferences in decisions about their lives – who they love, parent, how they parent and *where they live*, for example – is infinitely easier to ascertain. Yet, as will be discussed later under legal capacity in chapters 4 and 5, this is not something that is practised under South African law or policy, despite international pressure to do so.

Measures to address the challenges that persons with intellectual disabilities face in accessing health care and health promotion information, such as presentation of health promoting information in visual rather than text format, for example, have had some success.[86] The application (and monitoring and evaluation) of similar measures

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84 Section27 Life Esidimeni Fact Sheet February 2017 <http://section27.org.za/wp-content/uploads/2017/02/Life-Esidimeni-Fact-Sheet-1.pdf> (accessed 1 December 2017).

85 ENCA 'Families of deceased Esidimeni mentally ill patients cry for justice' 2 February 2017, <http://www.enca.com/south-africa/families-of-deceased-esidimeni-mentally-ill-patients-cry-for-justice> (accessed 1 March 2017).

86 L Taggart & W Cousins *Health Promotion for People with Intellectual and Developmental Disabilities* (2014) cited in R McConkey et al 'Promoting better health for persons with intellectual disabilities through community-based inclusive development' in R McConkey (eds) *Implementing*

to advance access to justice in the social services and justice sector, should therefore be put on the table.

3.2.7. Agency – civil political participation

Persons with intellectual disabilities face numerous barriers in self-representation in society and in public life. Socio-political exclusion results from 'ignorance, fear, misconceptions and discrimination' against them.[87] Notwithstanding the existence of barriers to self-representation and advocacy, Capri & Swartz maintain that

> Relative to levels of functioning … some individuals with [intellectual disability (ID)] can resist subordination, practice self-determination, participate autonomously, and exercise their potential with less assistance. Voluntary-assisted-advocacy can support self-advocacy, but would only occur if asked for and in adherence to the requirements and requests of the person with ID. While individuals with Mild ID might be more able to self-advocate, people living with more severe levels of ID would be less likely to do so unaided.[88]

Huus et al[89] explored the knowledge of caregivers about their children's rights in three provinces (KwaZulu-Natal, Limpopo and Gauteng). They found that the caregivers generally are aware of the rights of their children, but prioritise knowledge of rights related to provision (for example education, identity, privacy) and protection (for example from maltreatment and discrimination) over participation rights (for example to play).[90] The authors postulate that the low frequency of participation rights may be due to the belief that children do not participate in the social sphere such as play, and perhaps because of the assistance and supervision that adults need to provide in order to facilitate such activities outside of the home and school environments.[91] Furthermore, the authors cite the unsafe environments (from a health and well-being perspective) as being another factor that may mitigate against ease of play, for example.[92] The preference for 'provision' rights and 'protection' rights, speaks to the perspective of persons with intellectual disabilities as in need of care and protection primarily – and less so as autonomous agents. This assertion, however, must be mediated by the lack of facilities and opportunities for such participation, due to inaccessible and unaccommodating environments to promote participation in community life. The potential or perceived risk of violence and abuse also contributes to the lack of participation. Inclusion is a prerequisite for full participation in society –

Inclusive Population Health For Youth: Experiences From Low- And Middle-Income Countries (2018) 21.

87 C Capri & L Swartz 'The right to be free people: relational voluntary-assisted-advocacy as a psychological and ethical resource for decolonizing intellectual disability' (2018) 6 *Journal of Social and Political Psychology* 556 558.

88 Capri & Swartz (n 87 above) 558.

89 K Huus et al 'The awareness of primary caregivers in South Africa of the human rights of their children with intellectual disabilities' (2016) 41 *Child: Care, Health and Development* 863 868.

90 See, also, Erasmus et al (n 23 above) 234-242a.

91 Huus et al (n 89 above) 868, citing B Cowart et al 'Social skills and recreational preferences of children with and without disabilities' (2004) 9 *North American Journal of Psychology* 27.

92 Huus et al (n 89 above) 868.

not merely 'tolerating' persons with disabilities, but facilitation of their difference and the willingness to change the environment to allow such participation is required.[93]

Adults with intellectual disabilities find it difficult to navigate public services and spaces. Despite the requirements under domestic legislation (such as PEPUDA) and international law (such as the CRPD's articles on accessibility, including to information and participation in civil and political life), continued lack of provision of reasonable accommodation and inaccessibility persist. This makes full participation in life challenging for persons with disabilities. The then Department of Public Service and Administration issued a *Handbook on Reasonable Accommodation for People with Disabilities in the Public Service* in 2007,[94] and a policy for reasonable accommodation of civil service employees in 2015,[95] but there was no corresponding guide for public services rendered to persons with disabilities to enable full participation. Both the handbook and policy identify only support such as job coaches for persons with intellectual disability.

Combrinck[96] explains how voting in South Africa is premised on the sound mind test, which excludes persons with intellectual and psychosocial disability from casting their vote. Capri and Swartz[97] lament the lack of procedural accessibility and accommodations that offenders with intellectual disabilities face in the criminal justice system – which impact on their equality before the law. The question then is what can be done to ensure that persons with intellectual disabilities are able to have their voices heard in processes affecting them? Capri and Swartz argue for a decolonising approach that will unravel the injustice in denying the socio-political participation of persons with intellectual disability. The authors propose an approach, premised on the 'ethics of care' approach of Kittay,[98] and call their approach 'voluntary-assisted-advocacy'.[99] Voluntary-assisted-advocacy presupposes that the person with the intellectual disability is the agent that has expertise on life as a person with this disability – and not medical or other experts talking 'about' them.[100] Using the voluntary-assisted-advocacy approach, the authors argue that persons with intellectual disabilities could participate in decision-making, with support of assistants,

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93 MH Rioux et al (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 369.

94 Department of Public Service and Administration *Handbook on Reasonable Accommodation for People with Disabilities in the Public Sector* (2007) <http://unpan1.un.org/intradoc/groups/public/documents/CPSI/UNPAN028090.pdf> (accessed 1 January 2018).

95 Department of Public Service and Administration *Policy on Reasonable Accommodation and Assistive Devices for Employees with Disabilities in the Public Service* (2015) <http://www.dpsa.gov.za/dpsa2g/documents/ee/2015/289_1_2_3_20_08_2015_Policy.pdf> (accessed 1 January 2018).

96 H Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) 2 *African Disability Rights Yearbook* 75.

97 Capri & Swartz '(n 87 above) 560.

98 EM Kittay 'The personal is philosophical is political: A philosopher and mother of a cognitively disabled person sends notes from the battlefield' (2009) 40 *Metaphilosophy* 606.

99 Capri & Swartz (n 87 above) 560.

100 Capri & Swartz (n 87 above) 565.

and contribute to society and self-advocate by being members of relevant public and private entities, consulting in health care standards and policy-making, contributing to comments on law reform, lobbying government for socio-political inclusion, and participating in justice issues such as the Esidimeni hearings, for example.[101] This is possible through partnership with these 'assistant activists', who are persons that may support persons with intellectual disabilities participate in usually exclusionary and inaccessible processes. Such activists can advocate not only on the meaning of intellectual disability, but also for enfranchisement.[102]

Literature on legal capacity, self-advocacy and supported decision-making is explored in more detail below.

Measures to support agency of persons with intellectual disabilities in court proceedings are available in some jurisdictions. For example, the communication partners (intermediaries) in the Australian legal system are volunteers that assist persons with intellectual disabilities to navigate the justice system. The idea of these intermediaries is premised on a similar understanding of interdependence – requiring support from others to allow individuals to communicate in a manner that promotes inclusion, equality, and full participation.[103] Intermediaries in the United Kingdom, on which the Australian version is based, perform a similar task. The Council of the Inns of Court issued a best practice guide in 2015 for advocates on how to support persons with learning disabilities through intermediaries, communication aids, and other accommodation measures.[104] Similarly, the New South Wales government issued a guide for 'children's champions' – also known as 'witness intermediaries' for child witnesses in the criminal justice process.[105] More in depth consideration of literature and the potential of this type of accommodation to advance a person's agency is provided in chapter 7. The South African justice system's legal and mental capacity tests, and the absence of accommodation measures to facilitate communication for witnesses, means that such initiatives (such as intermediaries/communication partners) are sorely needed.

Suffice to say, civil political participation of persons with intellectual disabilities may sometimes, if necessary, require the support of persons such as family or professionals, such as intermediaries or 'activist-assistants' to help their voice to be heard. Unfortunately, the status quo is that family members, community members and

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101 Capri & Swartz (n 87 above) 567.

102 Capri & Swartz (n 87 above) 568.

103 See, also, P Cooper 'A double first in sexual assault cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination cases' (2017) 41 *Alternative Law Journal* 191.

104 The Council of the Inns of Court *The Advocate's Gateway: Toolkit 4: Planning to question someone with a learning disability* (2015) <https://www.theadvocatesgateway.org/toolkits/> (accessed 1 May 2019).

105 New South Wales Department of Justice *Children's champion (Witness intermediary): Procedural Guidance Manual* (2016) <https://www.victimsservices.justice.nsw.gov.au/Documents/child-champ_manual.pdf> (accessed 1 May 2019).

the state, generally do not provide adequate measures, nor support an approach that encourages inclusion and participation in civil political spheres.

Participation in several spheres: education, health, social services and justice, is predicated on effective communication. Bornman stresses the 'importance of communication, not only as a basic human right that is essential to ensure one's protection and one's participation in all spheres of life, but also as an essential human need through which opinions, thoughts, emotions and points of view can be shared.'[106]

For persons with intellectual disabilities, depending on the severity of their impairment and co-existing disabilities (such as speech, hearing or sight) – as well as their social exposure – effective communication may require a number of accommodations in daily life. Several disciplines have developed guidelines for effective communication with a person with intellectual disability, including health sciences (psychiatrists and nurses).[107] The justice sector in South Africa has however not followed the examples in the United States, the United Kingdom, Canada and Australia, for example. Measures to promote communication in the legal system, such as provision of intermediaries, is explored in more detail in chapters 5 and 7.

3.3. Legal capacity

Little has been written on the relationship between legal and mental capacity and the rights to found and maintain a family[108] and reproductive choice – despite the need for legislative response to the changes in the notion of legal/mental capacity required by the CRPD. Research in this area is limited to developed countries with some uptake in developing countries (Brazil and India, for example) in relation to caring for and interventions for persons with intellectual disabilities[109] and their sexuality.[110]

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106 J Bornman 'Preventing abuse and providing access to justice for individuals with complex communication needs: The role of Augmentative and Alternative Communication' (2017) 38 *Seminars in Speech and Language* 321.

107 L Boardman et al 'Communicating with people with intellectual disabilities: A guide for general psychiatrists' (2014) 20 *Advances in Psychiatric Treatment* 27; Mencap Communicating with people with a learning disability <https://www.mencap.org.uk/sites/default/files/2016-12/Communicating%20with%20people_updated%20%281%29.pdf> (accessed 1 May 2019); Van der Bilt 'Health care for adults with intellectual and developmental disabilities: Toolkit for Primary Care Providers in *Canadian consensus guidelines for the primary care of people with developmental disabilities* (2011) (undated) <https://vkc.mc.vanderbilt.edu/etoolkit/general-issues/communicating-effectively/> (accessed 1 May 2019).

108 P Weller 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5(13) *Laws* 1 2; A Arstein-Kerslake *Legal capacity & gender: Realising the human right to legal personhood and agency of women, disabled women and gender minorities* (2021).

109 S Edwarraj et al 'Perceptions about intellectual disability: A qualitative study from Vellore, South India (2010) 54 *Journal of Intellectual Disability Research* 736; SC Girimaji & S Srinah 'Perspectives of intellectual disability in India: Epidemiology, policy, services for children and adults' (2010) 23 *Current Opinion in Psychiatry* 441; MT Mercandante et al 'Perspectives of intellectual disability in Latin American countries: Epidemiology, policy, and services for children and adults' (2009) 22 *Current Opinion in Psychiatry* 469.

110 MT Gomez 'The S Words: sexuality, sensuality, sexual expression and people with intellectual disability' (2012) 30 *Sexuality and Disability* 237.

However, there is very little research on parenting by persons with intellectual disabilities.[111] Domestic court decisions and regional and international tribunals' jurisprudence on parenting rights of mothers with intellectual disabilities are also limited to developed countries.[112] Jurisprudence in developing countries, including in Africa, have been limited to broader rights to bodily integrity and reproductive rights of women with intellectual disabilities,[113] and discriminatory language such as 'imbecile' and 'idiot', and prohibitions dealing with indefinite detention of persons with intellectual disabilities in hospitals and prisons.[114]

A judgment that exemplifies the implications of a state's conception of the mental and legal capacity of a mother with intellectual disability, is the European Court of Human Rights case of *R.P. and Others v United Kingdom.*[115] In this case, the legal capacity of a mother with an intellectual disability was in question, as well as her capacity to instruct legal counsel, and the appointment of the Official Solicitor as her curator ad litem. The parenting assessments indicated that RP did not possess the requisite parenting skills to care for her baby daughter with serious medical needs. Her legal capacity was questioned and the Official Solicitor appointed on her behalf consented to place her child in adoption. Despite referencing the provisions relating to access to justice, equality, equal recognition before the law, and respect for family life in the CRPD, the court did not consider the requirement that any support in exercising her legal capacity would have to consider her will and preferences, and not be subject to her 'best interests'.

In *Kocherov and Sergeyva v Russia*,[116] however, the European Court of Human Rights (ECtHR) found in favour of a father with an intellectual disability who sought care of his daughter on the basis that the deprivation of his parental rights violated article 8 of the European Convention on Human Rights (ECHR) relating to family life. The dissenting judgment of Justice Keller would also have found that the domestic court decision discriminated against the father on the basis of his mental disability, in violation of article 14 of the ECHR.

In *Cînţa v Romania*,[117] where a divorced father with a psycho-social disability was denied adequate access to and care of his daughter, the court found both articles 8 and 14 were violated. The father's access to her was limited to twice a week and in

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111 P Block 'Sexuality, parenthood, and cognitive disability in Brazil' (2002) 20 *Sexuality & Disability* 7 (notionally touches on the possibility of parenthood).

112 United Kingdom: *RP and Others v United Kingdom* [2012] ECHR 179; *Medway Council v A & Others (Learning Disability; Foster Placement)* [2015] EWFC B66 (2 June 2015); *Re X Y X (Minors)* [2011] EWHC 402 (Fam); *Re D (A Child)) (No 3)* [2016] EWFC1; United States of America: NCD (n 2 above).

113 India: *Suchita Srivastava v. Chandigarh Administration* (2009) 14 SCR 989 (consent for termination of pregnancy of a woman with an intellectual disability in an institution).

114 Uganda: *Centre for Health, Human Rights and Development (CEHURD), and Three Others. v. The Attorney General* Constitutional Petition No. 64 of 2011 [2012] UGCC 4 (5 June 2012); The Gambia: *Purohit and Moore v. The Gambia* (2003) AHRLR 96 (ACHPR 2003).

115 [2012] ECHR 179.

116 [2016] ECHR 312.

117 [2020] ECHR 150.

the presence of his ex-wife despite his requests for more frequent and less restricted access. The applicant had argued that 'the contact schedule did not allow him to maintain and develop a personal relationship with his daughter and to participate effectively in her education, thus breaching his right to respect for his family life'.[118]

The ECtHR found that his contact to his daughter was restricted based in part on the fact that he has a 'mental illness' and that it was a decisive factor.[119] The ECtHR found that the Romanian court had not conducted a meaningful assessment to determine why his mental health in itself would be sufficient reason to limit his rights particularly as there had been no evidence to indicate that he could not care for his daughter.[120] Allegations that it was not safe for her in his care were not properly examined by the court and the best interests of the child was not adequately considered.[121]The ECtHR clarified that the fact of mental illness cannot in itself justify differential treatment from parents without such an illness in maintaining contact with their children.[122] A prima facie case of discrimination based on the mental health of the parent was made out.[123] The ECtHR held that:

> The respondent State must also convincingly show that the difference in treatment was not discriminatory, that is to say that the applicant's contact with his child was not restricted on discriminatory grounds, but rather that his mental illness had indeed impaired his ability to take care of his child or that there were other reasonable grounds for such a restriction.[124]

The Romanian state had not rebutted the presumption as it failed to provide an appropriate assessment justifying differential treatment. The dissenting opinion of Judges Mourou-Vikström and Ravarani indicates that they would not have found that prima facie discrimination had taken place.

Quite clearly then, the ECtHR is generally loathe to make a finding of discrimination in these cases, with the majority decision in *Cînţa v Romania* being an exception to the rule. That decision identifies that formalistic approach to parental rights, including access to children, will not pass muster. Instead, these cases require the state to provide a proper assessment into the child's best interests (and accordingly the parent's capacity to parent) and that relevant and sufficient reasons must be offered where a differential treatment based on a parent's mental health is sought. In both *Kocherov* and *Cînţa,* the ECtHR did not consider the application of article 12 of the CRPD in relation to legal capacity.

Scholars explain that persons with intellectual disabilities, and those with severe and profound disabilities, can participate in the decisions affecting their lives and are able to express their views, but this may require support to do so.[125]

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118 para 35.
119 para 69.
120 paras 74 and 80.
121 paras 52, 55, and 78.
122 paras 68 and 78.
123 para 79.
124 para 79.
125 D Goodley, A Arnstein-Kerslake & J Black 'Right to legal capacity in therapeutic jurisprudence: Insights from critical disability theory and the convention on the rights of persons with disabilities' (2020) 68 *International Journal of Law and Psychiatry 101535:* DOI: 10.1016/j.ijlp.2019.101535; J Watson, J Anderson, E Wilson & KL Anderson 'The impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on Victorian guardianship practice' (2020) *Disability*

The support that may be needed for some persons to exercise their legal capacity on an equal basis with others, and safeguards such as the will and preferences of the person needing support, are key to the paradigm shift the CRPD has brought. This shift is also needed to fundamentally change how social workers, legal representatives and courts (and other stakeholders) should promote the rights of persons with disabilities to participate in legal proceedings and other matters affecting them.

3.4. Overview of recognition of sexuality and parenthood

There is an extensive literature on the historical trajectory of the denial of the sexual reproductive health rights of persons with disabilities.[126] Historically, persons with disabilities, and particularly persons with intellectual disabilities, have been deemed to be legally incompetent to make their own decisions – this spurred on by eugenicists.[127] Eugenics was the ideology behind institutionalisation, seeking institutionalisation and sex segregation of persons with intellectual disabilities to prevent them procreating.[128] The motto for early twentieth century eugenicists was '[m]ore children from the fit, less from the unfit' – translated into intentional elimination of the 'unfit' to encourage survival of the fittest.[129] This is evident in infamous decisions such as that of the United States Supreme Court in *Buck v Bell*.[130] Since the early 1980s, the literature explored the discomfort that persons without disabilities experience when considering the sexuality of persons with disabilities, and, in particular, persons with intellectual disabilities.[131] Furthermore, the lack of access to information about sexuality has impacted negatively on the experience of sexuality by persons with intellectual disabilities. In other jurisdictions, the move toward deinstitutionalisation and community living did not necessarily have a corresponding level of commitment to dissemination of information to persons with intellectual disabilities on sexuality-

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and Rehabilitation, DOI: 10.1080/09638288.2020.1836680; J Watson 'Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realisation of Article 12 for People with Severe or Profound Intellectual Disability' (2016) 5(1) *Laws* 6. https://doi.org/10.3390/laws5010006; J Watson (2016) *The right to supported decision-making for people rarely heard* unpublished PhD thesis, Deakin University.

126 See from the Swedish perspective: J Areschoug 'Parenthood and Intellectual disability: Discourses on birth control and parents with intellectual disability 1967-2003' (2005) 7 *Scandinavian Journal of Disability Research* 155.

127 RL Burgdorf & MP Burgdorf 'The wicked witch is almost dead: Buck v Bell and the Sterilization of Handicapped Persons' (1977) 50 *Temp Law Quarterly* 997.

128 M Rosen et al *The history of mental retardation: Collected papers* (1976) 1.

129 EJ Larson 'Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse' (2011) 39 *Pepperdine Law Review* 119 122.

130 [1927] 274 US 200 para 4. Justice Holmes infamously declared: 'It is better for all the world, if instead of waiting to execute the degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind ... Three generations of imbeciles are enough.'

131 SF Haavik & KA Menninger *Sexuality, law, and the developmentally disabled person* (1981). Baltimore: Paul H. Brookes Publishing Co, cited in AA Szollos & MP McCabe *The sexuality of people with mild intellectual disability: Perceptions of clients and caregivers* (1995) 20 *Australia and New Zealand Journal of Developmental Disabilities* 205.

related issues to promote the healthy exercising of the right to sexuality.[132] It may be assumed that the South African situation is similar.

The emphasis by scholars on the history of sexual oppression for persons with intellectual disabilities has not occurred in the South African literature, until recently.[133] McKenzie explains that the link between disability and sexuality has been predominantly explored from the angle of HIV/Aids in recent years.[134] While this emphasis is important due to the high infection rate in the country, it may have served 'inadvertently' to 'perpetuate the belief that the sexuality of disabled people will be worthy of consideration only within contexts of risk and sexual victimisation'.[135] Even today, he announcement of pregnancy is met with disbelief or dismay from family, friends and the community,[136] and women with intellectual disabilities encounter opposition to childbearing in the form of pressure to abort.[137] The negative attitudes toward access to sexual education and recognition of the exercising of sexuality of persons with disabilities, is well documented in South Africa.[138]

By and large the myth encountered by persons with disabilities (and particularly persons with intellectual disabilities) is that they 'lack sexual agency and desire, and being less sexual than non-disabled people'.[139] Families of persons with intellectual

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132 Szollos & McCabe (n 131 above) 217.

133 Holness argues that 'the legal capacity of women with disabilities must be uncoupled from their sexuality, fertility and reproductive capacity, to ensure that the agency of women with disabilities to make their own reproductive decisions is recognised.' This, she argues, 'will require demystifying the sexuality of women with disabilities, through policy, advocacy and media efforts and law reform measures, to enhance their autonomy in decision-making about reproduction.' These measures are needed to ensure South Africa's Sterilisation Act (as amended) conforms to constitutional and international law obligations. W Holness 'Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities' (2013) 27(4) *Agenda* 35. See, also, T Boezaart 'Protecting the reproductive rights of children and young adults with disabilities: The roles and responsibilities of the family, the state and judicial decision-making' (2012) 26 *Emory International Law Review* 69 at 85.

134 J Hanass-Hancock 'Interweaving conceptualizations of gender and disability in the context of vulnerability to HIV/AIDS in KwaZulu-Natal, South Africa' (2009) 27 *Sexuality and Disability* 35; P Rohleder et al 'HIV/AIDS and Disability in Southern Africa: A Review of Relevant Literature' (2009) 31 *Disability and Rehabilitation* 51. See, also, L De Reus et al 'Challenges in providing HIV and sexuality education to learners with disabilities in South Africa: The voice of educators' (2015) 15 *Sex Education* 333-347; P Chappell 'Secret languages of sex: Disabled youth's experiences of sexual and HIV communication with their parents/caregivers in KwaZulu-Natal, South Africa' (2015) 16 *Sex Education* 1.

135 J McKenzie 'Disabled people in rural South Africa talk about sexuality' (2013) 15 *Culture Health Sexuality* 372 373.

136 G Llewellyn *Intellectual disability and parenting: A shared experience* Unpublished Phd thesis, University of Sydney (1994).

137 R Mayes et al 'Misconception: The experience of pregnancy for women with intellectual disabilities' (2006) 8 *Scandinavian Journal of Disability Research* 120.

138 X Hunt et al 'Dating persons with physical disabilities: The perceptions of South Africans without disabilities' (2018) 20 *Culture, Health & Sexuality* 141.

139 X Hunt et al 'The sexual and reproductive rights and benefit derived from sexual and reproductive health services of people with physical disabilities in South Africa: Beliefs of non-disabled people' (2017) 25 *Reproductive Health Matters* 66 73. See, also, D Crawford & JM Ostrove 'Representations of disability and the interpersonal relationships of women with disabilities' (2003) 26 *Women Therapy* 179-194; E Kim 'Asexuality in disability narratives' (2011) 14 Se*xualities* 479;

disabilities are likely to shy away from promoting their sexuality – despite knowledge of the need for sexuality education and support.[140] Bleazard's study highlights that educators in schools, for the most part, agreed that sexuality education is necessary for learners with intellectual disability, but felt that 'clear guidelines for sexuality education' are not provided by the Department of Education, and that they themselves did not have the necessary (or any) training on teaching sexuality to learners with intellectual disabilities.[141] Two-thirds of the educators interviewed (those from special schools) were against parenthood for persons with intellectual disabilities.[142] Bleazard refers to the opinion that 'many professionals involved with intellectually disabled women still endorse eugenic principles'.[143] If educators of persons with intellectual disabilities favour such notions, then it is not a far stretch that professionals in social services and the justice system will do so as well.

Eugenic notions are still prevalent in society despite the removal of most eugenic policies, but the retention of involuntary sterilisation of persons with intellectual disabilities in South African law does not hinder such notions.[144] Control and regulation of the sexuality of persons with intellectual disabilities are still exercised in families.[145] At least two studies point to involuntary sterilisation of adults with intellectual disabilities being obtained at the behest of families in South Africa.[146] Involuntary sterilisation of persons with severe and profound intellectual disabilities is legal in South Africa, and yet persons with mild intellectual disabilities are sometimes sterilised without their consent. As in other jurisdictions, such substitute decision-making may be as a 'result of private negotiations between parents and medical practitioners'.[147] The World Health Organisation and other agencies have spoken out against the 'paternalistic justification' that forced sterilisation and forced abortion are in the best interests of women with intellectual disabilities.[148]

M Milligan & A Neufeldt 'The myth of asexuality: A survey of social and empirical evidence' (2001) 19 *Sexuality and Disability* 91.

140 A Bleazard *Sexuality and Intellectual Disability: Perspectives of Young Women with Intellectual Disability* Unpublished Phd thesis, University of Stellenbosch (2010).

141 Bleazard (n 140 above) 177.

142 Bleazard (n 140 above) 148.

143 n 140 above, 148, citing V Lumley & R Scotti 'Supporting the sexuality of adults with mental retardation' (2001) 3 *Journal of Positive Behavior Interventions* 109.

144 S De Villiers *The principle of respect for autonomy and the sterilization of people with intellectual disabilities* (2002) Master of Philosophy thesis , Stellenbosch University.

145 CK Kahonde et al 'Discourse of needs versus discourse of rights: Family caregivers responding to the sexuality of young South African adults with intellectual disability' (2019) 21 *Culture, Health & Sexuality* 278 283.

146 Kahonde et al (n 145 above) 283; Holness (n 123 above) 36.

147 E Tilley et al '"The silence is roaring": Sterilization, reproductive rights and women with intellectual disabilities' (2012) 27 *Disability & Society* 413-426, 419-420.

148 WHO *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO* (2014) 5 <http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf> (accessed 1 December 2015).

Hunt et al[149] studied the beliefs of persons *without* disabilities about the sexuality of persons *with physical* disabilities in South Africa – through a survey administered to 1989 participants. The study measured participants' perceptions of the capacity of persons with physical disabilities to express sexuality; their need to express sexuality; their right to reproduction; and the benefits derived from sexual health care, reproductive health care and sexual education services rendered to them. This study found that there were diminished sexual rights attributed to persons with physical disabilities by persons without disabilities. The perception of participants was found to be that persons with physical disabilities have fewer sexual reproductive health rights and obtain fewer benefits from sexual reproductive health services than their counterparts without disabilities.[150] Indeed, Hunt et al's findings concur with the general 'misconception that people with physical disabilities lack sexuality (including sexual agency or choice, drives or desires) and so are sexually inactive'.[151] The insight into these perceptions and beliefs of sexuality, according to Hunt et al, links neglect in sexual reproductive health service provision with their desexualised and diminished sexuality, and 'suitability/ability for reproduction'.[152] This suitability for reproduction is the eugenic refrain that can potentially permeate into parenting-related decision-making and perceptions of persons without disabilities – including social workers and justice personnel.

Research into sexuality education for children and adults with disabilities in South Africa has increased in recent years.[153] But there is still a paucity of research into parenting by adults with intellectual disabilities in South Africa. In South Africa, without reliable statistics, as explained earlier, it is safe to assume that persons with mild to severe intellectual disabilities generally live either in residential institutions or within families – and rarely live independently from their families (or in group homes). It is therefore difficult to obtain a full picture of the experience of sexuality (and perceptions about sexuality and parenting) of persons with mild intellectual disabilities that are living independently.

The literature on such experiences within the family and/or residential settings is common. Kahonde et al[154] obtained the perspectives of 25 family caregivers of young adults with intellectual disabilities in the Western Cape through focus group and

149 Hunt et al (n 139 above) 66.
150 Hunt et al (n 139 above) 75.
151 n 139 above, 68.
152 Hunt et al (n 139 above) 75.
153 P Chirawu, J Hanass-Hancock & TJ Aderemi 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32(3) *Sexuality and Disability* 259; P Chappell '(Re)Thinking Sexual Access for Adolescents with Disabilities in South Africa: Balancing Rights and Protection' (2016) 4 *African Disability Rights Yearbook* 124; F Dennis 'Sexuality education in South Africa: Three essential questions' (2010) 30(3) *International Journal of Educational Development* 314; R Johns & C Adams 'My Right to Know: Developing Sexuality Education Resources for Learners with Intellectual Disabilities in the Western Cape' (2016) 4 *African Disability Rights Yearbook* 100.
154 n 145 above, 278.

individual interviews about their children's sexuality. This highlighted the preference for needs over rights entitlements. The family caregivers' perceptions of the needs of the young adults were identified to include:

- The need for the young adult to be protected from potential harm related to sexuality – which requires 'strict protective surveillance' from family caregivers. This surveillance approach is based partly, on the perception that the young adults cannot understand and deal with their sexuality, and partly because of their vulnerability to sexual abuse;[155] and
- The young adult's need to experience 'normal' sexuality was articulated (in very few instances) as experiencing sexual intimacy – but without the consequences such as pregnancy.[156]

The needs of the family caregivers highlighted in the study include the need to avoid the extra burden of care for grandchildren – with sterilisation or long-term contraception mooted as an option to avoid pregnancy.[157] It also pointed to the need to protect family/societal norms and values, for example religious or cultural norms that eschew sexual debut or parents talking about sex with their children.[158] Furthermore, the authors assert that parenting or marriage by these young adults is not a 'right' per se, but could be seen as a 'need'. This is based on two contradictory perceptions. First, for a few of the participants, procreation by the young adults is seen as a positive need, since it is believed that children (grandchildren) born from a relationship will be able to care for the intellectually disabled young adult parent when the family caregiver is no longer able to do so. Second, for other participants, procreation by the young adult is perceived as being a burden, in that such children (grandchildren) would have to be cared for by the caregiver of the young adult with intellectual disability – adding to their overall care burden.[159] This finding should partly to be seen in light of the lifetime caring burden that rests on many family caregivers of adults with intellectual disabilities.[160]

The challenge for family caregivers of persons with intellectual disabilities is the apparent contradiction between sexuality needs and the caring role of the caregiver, which, where state and other support is unavailable to that caregiver, often leads to prioritisation of immediate needs over sexuality needs.[161] Several scholars have

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155 Kahonde et al (n 145 above) 283.
156 Kahonde et al (n 145 above) 285.
157 Kahonde et al (n 145 above) 286.
158 Kahonde et al (n 145 above) 286.
159 Kahonde et al (n 145 above) 285.
160 Kahonde et al (n 145 above) 287. See, also, J McKenzie & R McConkey 'Caring for Adults with Intellectual Disability: The Perspectives of Family Carers in South Africa' (2016) 29 *Journal of Applied Research in Intellectual Disabilities* 531.
161 S Foley 'Reluctant 'jailors' speak out: parents of adults with down syndrome living in the parental home on how they negotiate the tension between empowering and protecting their intellectually disabled sons and daughters' (2013) 41 *British Journal of Learning Disabilities* 304 (Britain); JDA Pownall, A Jahoda, R Hastings & L Kerr 'Sexual understanding and development of young people

therefore critiqued the human rights approach to the role of the family in supporting persons with intellectual disabilities, in the absence of relevant external support.[162] In South Africa, such support from the state, in particular, is largely absent.

Van der Heijden et al, in a study on intimate partnerships of women with disabilities in the Western Cape, found that participants with visual, hearing and physical disabilities internalise disability stigma and rejection to the extent that these influence their intimate partnership pursuits.[163] The study also found that some participants used coping strategies to deal with stigma and rejection and continued to pursue intimate partnerships despite experiencing 'limited opportunities to meet potential partners, restricted sexual contact and expectations of being wives and mothers'.[164] The study did not include participants with intellectual disabilities. Furthermore, the recruitment of participants was on the basis of persons in sheltered employment (protective workshops) or residing in institutions. Thus, women with intellectual disabilities living in the community, or possibly independently, did not participate in this study. van der Heijden et al propose the 'destabilisation of patriarchal and ableist assumptions that women with disabilities are unable to have long-lasting and fulfilling partnerships'.[165]

In residential settings in South Africa, as described in para 2.6.2 above, several conditions under legislation make it difficult for mental health users residing in institutions, including persons with intellectual disabilities, to exercise their sexuality.[166] The late Paul Chappell explored the barriers to the exercising of sexuality that persons with disabilities face. Chappell draws on the understanding of ableism, explaining that 'compulsory able-bodiedness creates a norm by which we not only judge ourselves, but through which we judge the ability of others'.[167]

Rioux and Patton explain how sterilisation jurisprudence and legislation 'employ seemingly neutral constructs' that 'do not remove judgement about social policy, but

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with intellectual disabilities: mothers' perspectives of within-family context' (2011) 116 *American Journal on Intellectual and Developmental Disabilities* 205 (USA).

162 Kahonde et al (n 145 above) 279. J McKenzie 'an exploration of an ethics of care in relation to people with intellectual disability and their family caregivers in the Cape Town Metropole in South Africa une exploration de l 'éthique du care pour les personnes avec un handicap mental et leurs pourvo' (2016) 10 *Alter – European Journal of Disability Research, Revue Europeenne De Recherche Sur Le Handicap* 67. See, also, TR Parmenter 'The contribution of science in facilitating the inclusion of people with intellectual disability into the community' (2001) 45(3) *Journal of Intellectual Disability Research* 183.

163 I Van der Heijden et al 'In pursuit of intimacy: Disability stigma, womanhood and intimate partnerships in South Africa' (2019) 21*Culture, Health & Sexuality* 338 342.

164 Van der Heijden et al (n 153 above) 342.

165 n 163 above, 347.

166 J McKenzie et al 'Residential facilities for adults with intellectual disability in a developing country: A case study from South Africa' (2014) 39 *Journal of Intellectual & Developmental Disability* 50.

167 P Chappell 'Queering the social emergence of disabled sexual identities: Linking queer theory with disability studies in the South African context' (2015) 29 *Agenda* 57.

instead veil those judgments in legal rhetoric'.[168] Concepts such as 'consent', 'best interests' and '*parens patriae*' have been employed to deny women with intellectual disabilities the right to reproduce (and bodily integrity) – and violate underpinning values of, and the rights to, dignity and equality.[169] These constructs are used in legal education that is unquestioning and uncritical, and thus perpetuate stereotypes of women with disabilities as being 'genderless and sexless', and in so doing marginalise the socio-economic issues critical to promoting the parenting and sexual reproductive rights of women with disabilities.[170] In fact, the importation of Social Darwinism and eugenics ideas into South African science, including psychology and its laws, has been documented.[171]

For lawyers, language – the written and spoken word – is a tool crafted to describe and interpret legal norms, but using particular terminology or labels can dehumanise, demean and degrade persons with disability.[172] In terms of legal terminology and the value judgments it implies, terms such as 'lunatic', 'imbecile', 'incompetent', and 'criminal responsibility'[173] come to mind. Macurdy explicates the ableism inherent in the structure of law:

> As advocates, we deal every day with the ways in which legal power is used against individuals with disabilities, so the idea that disability bias is embedded in the structure of law is built into how we do our jobs. We see how rigid conceptions of competency are manipulated to deny people with disabilities control over their property, their living arrangements, and their bodies. We have learned that core values of individual autonomy, equality, and due process are left behind by "treatment" models and paternalism. We no longer question, though we each might express the point differently, that the law proceeds as if there were an identifiable standard of "ableness" that describes most of us, and justifies different treatment of everyone else, and that such a standard is myth.[174]

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168 MH Rioux & L Patton 'Beyond legal smokescreens: Applying a human rights analysis to sterilization jurisprudence' in MH Rioux, LA Bassser & M Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 271.

169 Rioux & Patton (n 168 above) 271.

170 R Mykitiuk & E Chadha 'Sites of exclusion: Disabled women's sexual reproductive and parenting rights' (2011) in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 157 199.

171 M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 76; G Sutton 'The Layering of History: A brief look at Eugenics, the Holocaust and Scientific Racism in South Africa' (2007) 1 *Yesterday & Today* 1. See S Klausen '"For the Sake of the Race": Eugenic Discourses of Feeblemindedness and Motherhood in the South African Medical Record, 1903-1926' (1997) 23 *Journal of Southern African Studies* 27; S Dubow *Scientific Racism in Modern South Africa* (1995) 1; J Louw 'Social context and psychological testing in South Africa, 1918–1939' (1997) 7 *Theory & Psychology* 235; P Smith 'Cartographies of Eugenics and Special Education: A history of the (Ab)normal' in SL Gabel & S Danforth (eds) *Disability & the Politics of Education: An International Reader* (2008) 417.

172 A Kanter & BA Ferri *Righting Educational Wrongs: Disability studies in law and education* (2013) 1 25.

173 T Minkowitz 'Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond' (2014) 23 *Griffith Law Review* 434; L Steele & S Thomas 'Disability at the periphery: Legal theory, disability and criminal law' (2014) 23*Griffith Law Review* 357 (Australia).

174 H Macurdy 'Commentary: Disability ideology and the law school curriculum' (1995) 4 *Boston University Public Interest Law Journal* 443 444.

Law in fact participates in forming hierarchies of power, as it is a mirror of society's 'norms, values, and intolerances' and as 'an arbiter of power relations' it also creates obstacles and labels 'based on competency or abilities'.[175]

It is clear then that the sexuality and parenthood of persons with disabilities, particularly intellectual disabilities, is shrouded in mystery, misinformation and prejudice – both in social work practice and in the law and the courts that interpret the law. The result is that bias (ableism) can creep into decision-making by professionals when dealing with parents in neglect proceedings. The denial of the freedom and responsibility to raise their children evident in redemptive laws, non-responsive policies and the stereotypes that pervade these governmental actions, including perceptions of the community and child care professionals, continues to detract from the gains made in recognising their rights to sexual reproductive health, fertility and to live in the community. The denial of these rights continues to be underpinned by the perception of incompetence on the part of persons with intellectual disabilities.[176]

This study interrogates whether there is evidence of a link between stereotypes about sexuality and parenthood and the legal (in)capacity of these parents (ableism and sanism) and findings of neglect in the Children's Court cases.

The impact of socio-economic factors on the quality of life and predicted outcomes for these families where a mother has an intellectual disability is now discussed.

3.5. Some relevant socio-economic factors

When support services for parenting are not available, and particularly when women with disabilities are also suffering from poverty and attendant consequences, parenting may be a challenge.[177] McConnell, Llewellyn and Ferronato have studied the effect of cumulative stressors such as poverty and isolation on perceived risk of neglect.[178] Studies have identified factors that raise the susceptibility of these parents to having their children removed on the basis of perceived neglect. These factors include: non-

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175 Kanter & Ferri (n 172 above) 25.

176 Current law reform on legal capacity provisions is ongoing to seek conformance with CRPD obligations, particularly article 12. The South African Law Reform Commission drafted a Bill for assisted decision-making in 2004, before the CRPD. This necessitated a redrafted bill in 2012 which is still not released for public comment.

177 Office of the Deputy President *Integrated National Disability Strategy* (1997) 3 <https://www.gov.za/sites/default/files/gcis_document/201409/disability2.pdf> (accessed 1 December 2015) (correlation between economic deprivation and disability).

178 D McConnell et al *Parents with a Disability and the New South Wales Children's Court* (2000) 23 <www.sydney.edu.au>. See, also, N Parton 'Neglect as child protection: The political context and the practical outcomes' (1995) 9 *Children and Society* 67.

recognition of legal capacity;[179] stereotyping of parenting and stigma;[180] lack of social service support;[181] lack of information about rights;[182] and poverty.[183] Other factors include 'higher levels of stress, depression' and generally 'poorer mental health than their peers'; 'higher exposure to poverty'; inadequate housing and unsafe neighbourhoods; 'social exclusion' (isolation – limited informal advice and practical and emotional support from family and friends); 'limited access to health promoting services'; and difficulties in sourcing, understanding and applying information.

A Western Cape study by Makoae et al[184] noted that neglect was the major reason for statutory removals of children from parents in the five Children's Courts studied.[185] The risk factors for maltreatment (which included neglect, physical and sexual abuse) were identified as poverty, substance and alcohol abuse, low levels of education of mothers and unemployment of mothers, as well as poor child rearing practices.[186] The link between substance abuse and an inability to care for the child was clear in the context of high levels of alcohol and substance abuse in the Western Cape population. The study showed that this substance abuse weakened child protection and prevention strategies employed by the social workers. The lack of human resources meant that sexual and physical abuse and abandonment as maltreatment were prioritised over cases of neglect. In cases of neglect, children were often removed from the family due to neglectful parenting, so exposing the children to physical and sexual harm.

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179 For legal capacity generally, see: G Quinn 'Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' 14 http://www.nuigalway.ie/cdlp/documents/cdlp-submission-on-legalcapacitythe-oireachtasscommitteeonjustice-defenceandequality_.pdf (accessed 1 December 2016). On legal capacity and parents with intellectual disabilities, see A Lamont & L Bromfield 'Parental intellectual disability and child protection: Key issues' (2009) <http://www.aifs.gov.au/nch/pubs/issues/issues31/issues31.pdf> 31 *NPC Issues,* 17 (accessed 1 December 2016).

180 Lamont and Bromfield (n 169) 9; G Posner & P Diaz 'Everything we always wanted to know about threshold criteria' (2002) *Family Law* 850.

181 B Tarleton 'Turning Policy into Practice' in G Llewellyn et al (eds) *Parents with Intellectual Disabilities: Past, Present and Future* (2010) 154 157; Mykitiuk & Chadha (n 160) 193; C Wade et al 'Service delivery to parents with an intellectual disability: Family-centred or professionally centred?' (2007) 20 *Journal of Applied Research in Intellectual Disabilities* 87; B Tarleton & L Ward 'Parenting with support: The views and experiences of parents with intellectual disabilities' (2007) 4 *Journal of Policy and Practice in Intellectual Disabilities* 194.

182 A Skelton 'From pillar to post: Legal solutions for children with Debilitating conduct disorder' in I Grobbelaar-Du Plessis & T Van Reenen (eds) *Aspects of disability law in Africa* (2011) 121.

183 D McConnell *Disability and Discrimination in the child welfare system: Parents with intellectual disabilities* (2009) 53.

184 M Makoae et al *Children's Court Inquiries in the Western Cape* (2008) Final report to the Research Directorate, Department of Social Development, Provincial Government of the Western Cape. Cape Town: Human Sciences Research Council. This study was based on the grounds of maltreatment – as set out in the Child Care Act 78 of 1983.

185 Makoae et al (n 184 above) 90. The authors note that the distinction between circumstantial and deliberate neglectmwas made difficult due to the widespread problem of substance abuse, which blurs the lines between the two categories.

186 Makoae et al (n 184 above) 90.

Risk factors therefore arise from the context and milieu in which the family operates. These risk factors have an exaggerated impact when preventative and support services that could mitigate the effect of these factors on parenting are inadequate or ineffective. The result from the Makoae study, is that failures in prevention and statutory services occur due to factors such as failure to expose maltreatment, to 'investigate properly', to 'provide adequate reports', and to implement statutory services. This means that current prevention and statutory services in the Western Cape Province are ineffective in protecting children at risk of maltreatment, and fail to support them and their families.[187] This is an important finding to consider for this study.

Holness considered the risk factor of potential developmental delays for children.[188] This is discussed in detail under the literature on the best interests of the child. The literature reviewed found that a risk of developmental delay is exaggerated. Furthermore, even where such potential risk exists, it can be mitigated by provision of appropriate parenting programmes as one method of prevention and early intervention. However, in Australia, it was found that support services aimed at reforming the behaviour or parenting skills of a parent through parenting education is likely to be unsuccessful if the social and material conditions precipitating difficulties and hardship are not addressed.[189] Lamont and Bromfield (also in the Australian context) argue that focused support services that tackle socio-economic disadvantage could reduce the risk of abuse or neglect.[190]

It is important to note that in South Africa (and arguably elsewhere) it is cheaper for the state to maintain a child with his or her family than to provide alternative care in an institution such as a child and youth care facility or the payment of foster care grants to family (kinship care) or unrelated alternative carers.[191] The role of poverty in South Africa and the causal link between poverty and disability cannot be over-emphasised.[192] Persons with disabilities are still disproportionately represented among the poor and unemployed in South Africa.[193] Goldblatt argued that a variety of support services could supplement social assistance in the form of the care

187 Makoae et al (n 184 above) 94.

188 W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are 'at risk of neglect' and their parents' (2015) 2 *Stellenbosch Law Review* 313 318.

189 McConnell (n 183 above) 53.

190 Lamont & Bromfield (n 179 above) 10.

191 C Matthias & F Zaal 'Supporting familial and community care for children: Legislative reform and implementation challenges in South Africa' (2009) *International Journal of Social Welfare* 291 292.

192 L Graham et al 'The disability-poverty nexus and the case for a capabilities approach: Evidence from Johannesburg, South Africa' (2013) 28 *Disability and Society* 324; M Loeb et al 'Poverty and disability in Eastern and Western Cape Provinces, South Africa' (2008) 23 *Disability and Society* 311.

193 M Schneider et al 'Measuring disability in censuses: The case of South Africa' (1999) 3 *Alter: European Journal of Disability* 245; Statistics South Africa *Prevalence of disability in South Africa* (2005) Census 2001 Report No 03-02-44 Pretoria: Statistics South Africa.

dependency or disability grant.[194] The potential empowering nature of section 144(2) of the Children's Act and its current formulation will need be considered, as it allows *inter alia* for the provision of assistance to obtain the basic necessities of life.

Many socio-economic factors can therefore aggravate the barriers that parents with disabilities face when rearing their children. It is difficult to disentangle such factors from the disability-specific barriers that the parents and their children face. It is important that this study sources those factors from the court records. This will be discussed in chapter 6.

3.6. Stereotypes on the capacity to parent in the social work investigation and in court

This section reviews the literature on the stereotypes on the capacity to parent that mothers with intellectual disabilities face when interacting with social services and the courts in neglect proceedings. Due to a paucity of studies on stereotypes on the capacity to parent in South Africa, literature from comparative jurisdictions is considered. However, scholarship on stigma and sexuality was discussed earlier under parts 3.2.2 and 3.4, respectively.

A notable study in Australia explored the court proceedings in the New South Wales Children's Court. The review of 285 court files showed the over-representation of parents with intellectual disability in care proceedings, due to the persistent beliefs about the incapacity of these parents, 'poorly resourced' attorneys, inadequate and inappropriate support services, and the 'diagnostic-prognostic rationality of decision making'.[195] Another study dealt with the implications for children who have parents with an intellectual disability.[196] In general though, research has focused on the difficulties that parents face due to alcohol or drug abuse, or on parents with psychosocial (mental illness) disabilities, rather than on the barriers experienced by parents with intellectual disabilities.[197]

Lamont and Bromfield's literature review of key issues in parental intellectual disability and child protection is based on 25 studies, of which 13 were quantitative, five were qualitative, and seven were mixed methodology.[198] They found some methodological limitations as well as a lack of consistency in definitions of parenting

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194 B Goldblatt 'Gender, rights and the disability grant in South Africa' (2009) 26 *Development Southern Africa* 369.

195 G Llewellyn et al 'Prevalence and outcomes for parents with disabilities and their children in an Australian court sample' (2003) 27 *Child Abuse and Neglect* 235.

196 T Booth & W Booth *Growing up with parents who have learning difficulties* (2013).

197 J Faureholm 'Children and their life experiences' in G Llewellyn et al (eds) (2010) *Parents with Intellectual Disabilities: Past, Present and Future* 63 64. See, also, TS Perkins et al 'Children of mothers with intellectual disability: Stigma, mother-child relationship and self-esteem' (2002) 15 *Journal of Applied Research in Intellectual Disability* 297.

198 Lamont & Bromfield (n 179 above) 9.

competency and the heterogeneity of intellectual disability in these studies.[199] The latter problem is likely to continue in future studies, particularly as 'parenting competency' is notoriously difficult to define. These limitations notwithstanding, the review shows that stereotypical beliefs that parents with intellectual disabilities are unable to adequately care for their children is a factor that not only gives rise to a higher rate of statutory intervention, but also plays a role within the court proceedings.[200]

In a nutshell, two concerns are highlighted by studies on stereotypes facing these mothers. First, social services and the courts may not provide sufficient consideration of the 'individual capabilities and unique circumstances of each parent'; and second, these parents may not receive suitable support from the state when it is required to help them to care and provide for their children's needs.[201] McConnell summarises the available evidence which suggests that children are removed on the basis of

> an empirically invalid presumption that child maltreatment or parenting failure is inevitable and/or that parenting deficiencies are irremediable. The implication is that parents with intellectual disability may be denied the freedom to raise their children when (in at least some cases) it is unnecessary and/or preventable.[202]

The biggest hurdle for mothers with intellectual disabilities is the explicit bias in the law, that they are not competent to testify in court proceedings. Their credibility and reliability is questioned.[203]

In South Africa, the potential for bias creeps in during the social worker's investigation and subsequent reporting, after assessment of the child's circumstances in his or her section 155(2) report to the court (also known as the Form 38 report). That report, on mere production to court, is admissible as evidence in court.[204] A person whose rights 'are prejudiced by a report' may be granted the opportunity to cross-examine or question the social worker who wrote the report and may refute any statement therein.[205] The question, of course, is whether mothers with intellectual disabilities understand the gravity of the situation, communicate effectively with the role players, and are provided with a real opportunity to cross examine or question the social worker. The review of the court records in chapter 6 interrogates this aspect, as the court records should reflect whether this opportunity was granted.

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199 L Dowdney & D Skuse 'Parenting Provided by Adults with Mental Retardation' (1993) 34 *Journal of Child Psychology and Psychiatry* 25-47.

200 Lamont & Bromfield (n 169 above) 17.

201 McConnell (n 183 above) 2.

202 McConnell (n 183 above) 2. See, also, D McConnell & G Llewellyn 'Parental disability and the threat of child removal' (1998) 51 *Family Matters* 33 34.

203 Cape Mental Health (n 63 above) 11.

204 Sec 63 of the Children's Act.

205 Sec 63(2)(a) and (b) of the Children's Act.

3.7. Conclusion

The profile of persons with intellectual disabilities in South Africa shows that children and adults with intellectual disabilities are placed at a distinct disadvantage socially, educationally and in relation to access to the services and support they need to participate in society and reach their potential. Due to pervasive stigma, adults with intellectual disabilities do not receive the support they require to live independently and to remain within communities. Socio-economically, they are depressed as access to work is limited and pervasive poverty means they face multiple cases of discrimination on a daily basis. They suffer from exclusions or lack of social support to that allows full participation in community life. Adults with intellectual disabilities have low educational attainment and without Easy to Read and other accommodations in public places and services and in society in general, awareness of their rights and the ability to realise these rights is limited. The Esidimeni tragedy highlights the extent of health and social neglect that persons with intellectual disability face – not just within communities but also when institutionalised. The process of de-institutionalisation and promotion of independent living and living in the community has been severely curtailed by this tragedy. Services related to sexual reproductive health rights and parenting subscribe to discriminatory practices – particularly for women with intellectual disabilities.

Communication difficulties, if not ameliorated with accommodations when accessing state services, can severely disadvantage women with intellectual disabilities. The perception of 'vulnerability' of persons with intellectual disability is disproportionate compared to an appreciation of their capabilities and rights entitlements. This ableism can be imported into stigmatising attitudes of social workers and justice personnel. The profile of this population is not unexpected, however, considering the pervasive injustices that members faced historically.

Generally speaking, the capabilities of these parents to fully participate in civil and political life, and socio-economically, are under-appreciated in the South African discourse. Rather, a stronger emphasis has been placed on their vulnerability to crime, including gender-based violence, with the need for protective measures identified to address those vulnerabilities.

The literature review identifies relevant social sciences and medical scholarship on the challenges faced by, vulnerabilities suffered by, and capabilities of persons with disabilities in society, and demonstrates that a legal perspective is lacking. It has been established that a case review of neglect proceedings in the Children's Courts in relation to parental disability has not been conducted in South Africa, and there is a need for such a review to explore the interface between social workers, justice personnel and mothers with intellectual disabilities.

CHAPTER FOUR:

INTERNATIONAL LAW FRAMEWORK

4.1. Introduction

This chapter seeks to determine how the international and regional law and jurisprudence express on the rights of parents with intellectual disabilities and their children. Particular focus is placed on the interpretation of provisions in the literature, jurisprudence and from guidelines, through concluding observations and general comments of Treaty Monitoring Bodies (TMBs) of a variety of treaties. These include the United Nations' Convention on the Rights of the Child (CRC)[1] and its Convention on the Rights of Persons with Disabilities (CRPD);[2] the African Union's African Charter on Human and Peoples' Rights (the Banjul Charter);[3] the African Charter on the Rights and Welfare of the Child (ACRWC);[4] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol);[5] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol).[6] Limited reference is also made to the Universal Declaration of Human Rights (UDHR);[7] the International Convention on Civil and Political Rights (ICCPR);[8] the International Convention on

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1 United Nations *Convention on the Rights of the Child* (1989), UN Treaty Series, vol 1577, p. 3 (entry into force 2 September 1990). Ratified on 16 June 1995 and incorporated into domestic legislation - The Preamble of the Children's Act 38 of 2005.

2 United Nations *Convention on the Rights of Persons with Disabilities* (2007) UN General Assembly A/RES/61/106 (entry into force 3 May 2008). Optional Protocol to the Convention on the Rights of persons with Disabilities, UN Doc, A/Res/61/106 (13 December 2006). Both were ratified in November 2007 by South Africa and are not yet incorporated into legislation, but are mentioned in the White Paper on the Rights of Persons with Disabilities (2018) *inter alia* at para 1.2.2. and the Code of Good Practice on Employment of Persons with Disabilities (amended on 9 November 2015) *inter alia* at paras 2.5., 5.1., 5.2. and 6.

3 Organization of African Unity *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

4 Organization of African Unity *African Charter on the Rights and Welfare of the Child* (1990) CAB/LEG/24.9/49 (entry into force 29 November 1999). Incorporated into domestic legislation - The Preamble of the Children's Act 38 of 2005.

5 African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* adopted by the Assembly of the African Union in Mozambique on 21 July 2003 (entry into force 25 November 2005).

6 African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities* adopted by African Union on 29 January 2018 (entry into force not yet determined). Signed by South Africa on 29 April 2019.

7 United Nations *Universal Declaration of Human Rights* adopted by the General Assembly on 10 December 1048 as Resolution 217.

8 United Nations *International Convention on Civil and Political Rights*, Treaty Series, vol 999, p.171 (entry into force 23 March 1976). Ratified by South Africa in 1998.

Socio-Economic and Cultural Rights (CESCR);[9] and the Convention on the Elimination of Discrimination against Women (CEDAW).[10]

A short description ensues to contextualise the applicable international and regional human rights framework. The United Nations' (UN) Decade of Disabled Persons – declared for the period 1983-1992 – raised the hope that states parties would not only implement the World Programme of Action Concerning People with Disabilities (WPA),[11] but would also improve the quality of life of persons with disabilities globally. This UN Decade led to, *inter alia*, the UN Standard Rules on the Equalisation of Opportunities for People with Disabilities in 1993 (a precursor to the CRPD in many ways). However, the Global South and other regions did not feel sufficiently included in the changes brought about, and sought regional solutions. As a result, the Asian and Pacific Decade of Disabled Persons for 1993 to 2002[12] and the first African Decade were proclaimed (the latter is discussed below) by the respective regional bodies, whereafter other regions followed similar declarations and action plans in order to implement the goals agreed to.[13]

The United Nations and the Organization of African Unity (OAU) did not pay much attention to disability in their first three and two decades of existence, respectively.[14] It has been argued that there has been a lack of prioritisation of disability rights in Africa.[15] It was with soft law developments in Africa that disability rights started taking a more prominent role, primarily with two documents: the Continental Plan of Action for the African Decade of Persons with Disabilities for the periods 1999 to 2009 (CPA

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9 United Nations *International Convention on Socio-Economic and Cultural Rights,* Treaty Series, Vol. 993, p. 3 (Entry into force on 3 January 1976). Ratified by South Africa on 12 January 2015.

10 United Nations *Convention on the Elimination of Discrimination against Women,* Treaty Series, Vol. 1249, p.13 (Entry into force on 3 September 1981). Ratified by South Africa on 15 December 1995.

11 WPA adopted by the General Assembly in resolution 37/52 on 3 December 1982.

12 The Asian and Pacific Decade of Disabled Persons (1993-2002) was adopted by the Economic and Social Commission for Asia and the Pacific in April 1992. Relevant documents to bring the Decade to life are: the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and the Agenda for Action for the Asian and Pacific Decade of Disabled Persons, 1993-2002.

13 The Economic and Social Commission for Western Asia declared the Arab Decade of Persons with Disabilities (2003-2014) at a summit of Arab Leaders held in Tunis in 2004. Responsibility for oversight of implementation of the Decade was vested in the Arab League and the Arab Organization of Disabled People. The Permanent Council of the Organization of American States declared the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016). The programme of action for the decade was adopted by the Permanent Council in May 2006; the Council of Europe Committee of Ministers adopted the Recommendation Rec (2006) 5 on the *Council of Europe Action Plan to Promote the Rights and Full Participation of Persons with Disabilities in Society: Improving the Quality of Life of Persons with Disabilities in Europe* (2006-2015). See, also, J Lord et al (2010) *Disability and International Cooperation and Development: A review of policies and Practices* Social Protection Discussion Paper 1003, The World Bank, <http://documents1.worldbank.org/curated/zh/810301468340477288/pdf/560920NWP010030Box349478B01PUBLIC1.pdf> (accessed 20 August 2020).

14 I Grobbelaar-du Plessis & TP van Reenen *Aspects of disability law in Africa* (2011) 56.

15 TP van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' (2011) 14 *SUR International Journal on Human Rights* 2.

1)[16] and 2010 to 2019 (CPA 2).[17] The CPA 1 came about when the OAU's Ministerial Conference on Human Rights[18] and the OAU's Labour and Social Affairs Commission took action to recommend and proclaim, respectively, an African Decade of Disabled Persons for the period 1999 to 2009. This Decade started at a time when the African Union (AU) was established.[19] The CPA 1 was adopted at the AU Executive Council's first ordinary session, and was aimed at reaching the African Decade's goal of 'full participation, equality and empowerment' of persons with disabilities.[20] The CPA 2 came about with the extension of the African Decade of Disabled Persons for the period 2010 to 2019.[21] The Secretariat established to manage the obligations created under the first Decade, faced several logistical and funding constraints.[22]

The CPA 1 aimed to achieve the objective (number 5) of promotion of special measures for categories of persons, including women, and for them in particular to ensure access to relevant reproductive health services.[23] Objective 12 (disability awareness) included the aim of awareness raising geared to 'improving society's perception of women with disabilities'.[24] Lang et al caution against underestimating the CPA 1's performance. Its performance must be seen in the light of the time period during which it came about, which was when disability rights and the social model were nascent developments – but also when the Millennium Development Goals (MDGs) were due to be implemented by states although their impact had not yet been determined.[25]

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16 AU *Continental Plan of Action for the African Decade of Persons with Disabilities for the periods 1999 to 2009* (2003) Addis Ababa: MCBS, <http://www.mhss.gov.na/documents/119527/432781/Continental+plan+of+action.pdf/2b9a9587-1942-4bcc-ab29-725befbfdc25> (accessed 19 August 2020) (CPA 1).

17 AU *Continental Plan of Action for the African Decade of Persons with Disabilities for the periods 2010 to 2019,* <https://au.int/sites/default/files/pages/32900-file-cpoa_handbook._audp.english_-_copy.pdf> (accessed 20 August 2020) (CPA 2).

18 OAU *Grand Bay Declaration and Plan of Action* para 7, adopted by the 35th Session of the OAU Assembly of Heads of State and Government held in Algiers, Algeria, in July 1999.

19 AU Constitutive Act OAU Doc. CAB/LEG/23.25, adopted on 11 July 2000 in Lomé, Togo (entered into force on 26 May 2001).

20 Preface of the CPA 1 (n above).

21 Adopted at the first AU Conference of Ministers of Social Development, in Windhoek, Namibia, October 2012.

22 S Chalklen et al 'Establishing the Secretariat for the African Decade of Persons with Disabilities' in B Watermeyer et al (eds) *Disability and social change: A South African agenda* (2006) HSRC Press 93 95. The Secretariat was established after the African Regional Consultative Conference mooted a continental NGO to strengthen the African Decade's activities. This Secretariat's board consisted of representatives from the African Rehabilitation Institute, the Pan African Federation of the Disabled, The African Union of the Blind, Inclusion Africa, Psychiatric Users Africa, African Federation of the Deaf, the South African Government, and the South African Human Rights Commission.

23 CPA 1 (n 16 above) paras 27-28.

24 n 16 above, para 42.

25 R Lang et al *Disability Inclusion in African Regional Policies Policy review findings from the ESRC/DFID Bridging the Gap Disability and Development in Four African Countries Project* (2017) 42, <https://www.slurc.org/uploads/1/0/9/7/109761391/bridging_the_gap_-_disability_inclusion_in_african_regional_policies.pdf> (accessed 20 August 2020).

The CPA 2 was agreed to after the CRPD was adopted and incorporated many provisions from the UN convention. One of its goals was achievement of 'full participation and equal rights for women with disabilities' – with priority areas inclusive of the adoption of laws, policies and strategies aimed at the removal of 'barriers that hinder or discriminate against the participation of women with disabilities in society'.[26] Neither the CPA 1 or CPA 2 had a budget for the resources needed to fulfil the obligations agreed to, and the latter has been described as a 'wish list' that lacks coherence.[27] Monitoring and evaluation of the implementation of these two policy documents is made difficult by a lack of 'specific, measurable, achievable, relevant or time-bound (SMART) indicators'.[28] A slow evolution of disability rights had taken root on the continent, first with soft law instruments, and then, over time, with more specific and measurable provisions in treaties – some with specific disability provisions.[29]

One of the main contributions to human rights at the African level is the African Charter on Human and Peoples' Rights (the Banjul Charter, from which the two Protocols on women and persons with disabilities derived). This Charter not only recognises human rights requiring international protection, but also places duties on individuals in respect of their family, society and the state, the international community, as well as 'other legally recognized communities'.[30] This is also echoed by articles 27, 28 and 29 of the African Disability Protocol.[31] The emphasis on the duties of persons with disabilities, argues Appiagyei-Atua, is calculated to deal with recognition of the agency and capacity of persons with disabilities – rather than following perceptions under the medical and charity approaches to disability.[32]

The jurisprudence emanating from the African Commission on Human and Peoples' Rights on disability is nascent, with one relevant communication – that of *Purohit and Moore v The Gambia.*[33] In this case, the state detained persons with 'mental illness' indefinitely and without due process. The Commission found that this treatment was discriminatory, and that reference to 'idiots' in legislation, among others, was dehumanising and an affront to dignity.[34] However, the Commission did not

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26 CPA 1 (n 16 above) para 2.2.1.3.(f).

27 Lang et al (n 25 above) 41 and 58.

28 R Lang et al 'Policy development: An analysis of disability inclusion in a selection of African Union policies' (2019) 37 *Development Policy Review* 155 169.

29 H Combrinck 'Disability rights in the African regional human rights system during 2011 and 2012 (Regional Developments)' [2013] 1 *African Disability Rights Yearbook* 361 365.

30 Art 27(1) of the ACHPR.

31 States parties are to ensure persons with disabilities are provided with assistance and support to enable them to perform their duties where needed, including reasonable accommodations – art 26(2).

32 K Appiagyei-Atua 'A comparative analysis of the United Nations Convention on the Rights of Persons with Disabilities and the African Draft Protocol on the Rights of Persons with Disabilities' (2017) 21 *Law, Democracy and Development* 171.

33 *Purohit v The Gambia* African Commission on Human and Peoples' Rights Communication 241/01 (2003) AHRLR 96.

34 *Purohit,* para 54.

consider the issue of disability as an analogous ground of discrimination.[35] Reference to jurisprudence from the European regional system may therefore be instructive, although with due respect to possible African context and application.

The African Disability Protocol finds its origin in the Kigali Declaration in 2003,[36] which called on member states of the African Union to develop a protocol to the ACHPR on the rights of persons with disabilities and the elderly. Much dissatisfaction with piece-meal and fractured implementation of disability-specific provisions in a variety of treaties[37] may have partly contributed to the need for an African-specific treaty.[38] The first draft was developed in 2009 and the final version adopted by the African Union in 2018. The need and feasibility of such an instrument was contentious among scholars,[39] but the decision of the AU will now take this debate to another level – comparisons and evaluations of the implementation of the new treaty should arise in the literature.

The United Nations' documents have been preoccupied with addressing several concerns emanating from the world wars and subsequently attended to group-specific concerns in dedicated treaties. The CRPD, as the first comprehensive disability-specific treaty, brought a paradigm shift in how persons with disabilities are perceived, breaking from the medical and charitable models towards a social and human rights-based model of disability. Most African countries have ratified the CRPD, with recognition of the rights of persons with disabilities being granted in the constitutions of 32 countries on the continent – with a high number enacting domestic enabling legislation.[40] Lord and Stein have predicted that the CRPD may address challenges such as the stigma and discrimination that many persons with disabilities face in Africa, resulting in violations of physical and mental integrity, as well as lack of legal recognition and barriers to access to justice.[41] They propose that the CRPD can act

35 van Reenen & Combrinck (n 15 above) 3.

36 African Union *Kigali Declaration* Min/Conf/HRA/Decl.1(I) adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003.

37 Article 13 of the ACHPR; article 23 of the Maputo Protocol; article 15(4) and 16(n) of the African Youth Charter (2009); article 8(2) of the African Charter on Democracy, Elections and Governance (2007); article 9(2)(c) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009).

38 Appiagyei-Atua (n 32 above) 153.

39 Against: F Viljoen & J Biegon 'The feasibility and desirability of an African disability rights treaty: Further norm-elaboration or firmer norm-implementation?' (2014) 30 *South African Journal on Human Rights* 553; J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 220. In favour: SA Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 226; H Combrinck & LM Mute 'Developments regarding disability rights during 2013: The African Charter and African Commission on Human and Peoples' Rights' (2014) 2 *African Disability Rights Yearbook* 309. See, also, L Mute & E Kalekye 'An appraisal of the Draft Protocol of the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2016) *East African Law Journal* 68.

40 Appiagyei-Atua (n 32 above) 175.

41 J Lord & MA Stein 'Prospects and practices for CRPD implementation in Africa' (2013) 1 *African Disability Rights Yearbook* 111.

as an entry point for regional advocacy, but warned that the African Disability Protocol (then still in its drafting stage) would require relevant political and resource commitments to ensure the change needed at regional and domestic levels.[42] The CRPD has undoubtedly brought to the fore an emphasis on the indivisibility of human rights, rather than narrow distinctions between civil political and socio-economic rights.[43] In the African context, and particularly for mothers with intellectual disabilities, violations of civil and political rights are often interlinked with socio-economic deprivations.

In the main, this chapter sets out the matrix of rights that place a positive duty on the state to assist parents with intellectual disabilities and their families – to provide support for their parental care responsibilities and procedural accommodation in the court process. The rights analysed are rights of the parent with intellectual disability to equality, dignity, legal capacity, access to justice (including procedural accommodation) and founding and maintaining a family; as well as the best interests of the child; protection from maltreatment and neglect; and children's right to life, survival and development.

4.2. The parent's right to equality

The right to equality as a principle has a long history in global politics.[44] Its extension to persons with disabilities was not initially self-evident. Disability-specific instruments recognising the rights of persons with disabilities only came about in the 1970s, such as the Declaration on the Rights of Mentally Retarded Persons,[45] gaining momentum in the 1990s with the the United Nations' Standard Rules on the Equalization of Opportunities for Persons with Disabilities,[46] and culminated with the adoption of the CRPD in 2007. However, even in general treaties and their monitoring bodies, the particular kind of equality needed to ensure not just equal treatment, but sometimes different treatment of persons with disabilities to maximise equal access and benefits, has been recognised. For example, the Committee on Economic, Social and Cultural Rights commented as follows

> The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to

42 J Lord & MA Stein (n 41 above), 112.

43 G de Beco 'The indivisibility of human rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 *International & Comparative Law Quarterly* 141.

44 MH Rioux & CA Riddle 'Values in disability policy and law: Equality' in MH Rioux et al (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 38.

45 United Nations *The Declaration on the Rights of Disabled Persons* (1975). This treaty and the United Nations *The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1991) were precursors to the CRPD, but were based on the medical model of disability and restricted rights based on impairment. See Committee on the Rights of Persons with Disabilities *General Comment 6 (2018) on Equality and Non-discrimination* CRPD/C/GC/6 para 8.

46 UN General Assembly *Standard rules on the equalization of opportunities for persons with disabilities* Resolution adopted by the General Assembly on 20 December 1993, A/RES/48/96.

> people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[47]

The Committee on the Rights of Persons with Disabilities affirms that equality and non-discrimination are key principles under international human rights law and are inexorably linked with dignity.[48] The Committee's general comment on equality and non-discrimination heralds substantive equality as the method through which equality can be assured – including at structural levels (systemically). [49] Equality does not arise in and of itself; it can sometimes only be extended to a person when positive measures are taken to that end. Positive action to ensure inclusion and participation, may then be in the form of reasonable accommodation in the workplace or educational sphere,[50] or procedural accommodation in the courts. Lord and Brown articulate how substantive equality can be used to address not only the process, but also the results of positive measures taken by a stakeholder to ensure equality of a person with a disability: '[i]t compels an inquiry as to whether those efforts taken have adequately involved affected groups and facilitated the actual realization of human rights through the positive measures taken'.[51] Since reasonable accommodation and procedural accommodation are non-discrimination obligations, failure to implement these measures constitute discrimination.[52]

The CRPD, as articulated by its Committee, explains how substantive equality embraces inclusivity.[53] This understanding of substantive equality encompasses four dimensions:

> (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.[54]

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47 Committee on Economic, Social and Cultural Rights *General Comment 5: Persons with disabilities* (1994) UN Doc E/1995/22, 19.

48 Committee on the Rights of Persons with Disabilities (n 45 above) para 4.

49 Committee on the Rights of Persons with Disabilities (n 45 above) para 10.

50 JE Lord & MA Stein 'Assessing economic, social and cultural rights: The Convention on the Rights of Persons with Disabilities' in M Langford & E Reid (eds) *Equality and Economic and social rights* (2010) 4.

51 JE Lord & R Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' in MH Rioux et al (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 274 277.

52 A Lawson *Disability and equality law in Britain: The role of reasonable adjustment* (2008) 222 225.

53 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441 464. See C Sheppard *Inclusive equality: The relational dimensions of systemic discrimination In Canada* (2010) 33; T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35 (argues that the human rights model of disability incorporates transformative equality, while the social model incorporates substantive equality).

54 Committee on the Rights of Persons with Disabilities (n 45 above) para 11.

For parents with intellectual disabilities, all four dimensions of equality apply, but particularly the last three – recognising the stereotyping they face in relation to their ability to parent; the need to facilitate full participation in proceedings affecting them; and the provision of accommodating measures.

The legal interpretation of article 5 of the CRPD on equality, naturally starts with the wording of the provision:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 5(1) entitles persons with disabilities to equality 'under' the law, and not only 'before' the law. This different rendering means that not only are persons with disabilities entitled to protection by the law, but also to 'use the law for personal benefit' and to 'positively engage'.[55] Participation is therefore highlighted. Laws may not deny or limit the rights of persons with disabilities; public authorities are to meet the CRPD's state obligations and 'existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities are modified or abolished'.[56] Here, domestic legislation and its regulations, or court rules, would need to be amended, if and where they fall short of extending equality under the law. Furthermore, where professional practices such as those of social workers and other stakeholders also fall short of this standard, they will have to be changed. Article 5(1)'s reference to 'equal protection of the law' expects parliaments not to continue discrimination in current laws or policies or to create new discriminatory laws or policies.[57] Again, where procedural laws fall short of the standard, they will require amendment. The article's reference to 'equal benefit of the law' articulates the positive steps that states parties must take to remove barriers to access the protections offered by the law articulated as 'the benefits of equal access to the law and justice to assert rights'.[58]

Article 5(2) extends 'equal and effective legal protection against discrimination on all grounds' to persons with disabilities, and 'imposes positive duties of protection on States Parties'. Discrimination on the basis of disability is defined in the CRPD as

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all

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55 Committee on the Rights of Persons with Disabilities (n 45 above) para 14.
56 Committee on the Rights of Persons with Disabilities (n 45 above) para 15.
57 As above.
58 Committee on the Rights of Persons with Disabilities (n 45 above) para 16.

> human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[59]

This definition goes further than previous definitions, by including 'denial of reasonable accommodation' as discrimination and requiring treatment 'on an equal basis with others' – which means the same rights or benefits as persons without disabilities are to be extended and positive steps identified earlier are to be taken by states parties to achieve 'de facto equality'.[60] The Committee articulates that indirect discrimination is prohibited. This occurs where, for example, a law seems to be applying neutrally to all persons, but in fact has a 'disproportionate negative impact on a person with a disability'.[61] Laws and regulations that are silent on procedural accommodations for disability are not inclusive of persons with disabilities, and do not promote their participation in legal proceedings and would accordingly constitute indirect discrimination. Further credence to such an assertion is obtained from the Committee's categoric distinction between reasonable and procedural accommodation – in that the Committee indicates that procedural accommodation is not limited by disproportionality.[62]

Several enforcement measures are required to be taken by states parties to ensure equality and non-discrimination – including: particular rules of evidence and proof in respect of addressing harmful stereotypes and beliefs regarding legal capacity and provision of both 'sufficient and accessible' legal aid in litigation where a claimant alleges discrimination.[63] Domestic court rules therefore have to be adapted and legal aid needs to be extended. The drawback is that the general comment identifies legal aid to be provided in discrimination litigation only. Generally, family court proceedings would therefore not fall in the same bracket – unless there is an allegation of discrimination.

Article 5, in summary, not only requires prohibition of discrimination through anti-discrimination legislation, but also positive steps, where necessary, to enable *de facto* equality for persons with disabilities. For mothers with intellectual disabilities, they may suffer discrimination due to the perceptions about how their disability impacts on their parenting, but also because they are female. Thus intersectional discrimination can occur. The CRPD identifies multiple and intersectional discrimination as requiring promotion of opportunity and outcomes for women and girls with disabilities.[64] The Concluding Observations of the Committee on the Elimination of Discrimination Against Women on South Africa identifies the continuation of 'patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and

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59 Art 2 of the CRPD.
60 Committee on the Rights of Persons with Disabilities (n 45 above) para 17.
61 Committee on the Rights of Persons with Disabilities (n 45 above) para 18(b).
62 Committee on the Rights of Persons with Disabilities (n 45 above) para 25(d).
63 Committee on the Rights of Persons with Disabilities (n 45 above) para 32(e) and (g), respectively.
64 Art 6 of the CRPD; Committee on the Rights of Persons with Disabilities (n 45 above) para 36.

society'.[65] This concern does not identify the multiple discrimination faced by women, such as on the basis of being female and disabled. However, at a general level, guidance can be sought from its recommendation that the state adopt a comprehensive strategy to address stereotypes (and harmful practices) that discriminate against women.[66] The fifth periodic report submitted by South Africa to this Committee identifies steps taken in dealing with teenage pregnancy – as addressing sex-role discrimination.[67] The report does not refer to women with disabilities.

The Committee on the Rights of Persons with Disabilities however sought the state's clarity on a list of questions to its first periodic report, including the provision of information on measures taken to 'prevent and address multiple and intersectional discrimination faced by persons with disabilities, particularly women and girls with disabilities, persons with psychosocial and/or intellectual disabilities' and reports of violations of their rights.[68] The South African state's reply referred to provision in section 9 of the Constitution that addresses 'equality of outcome' and also the provision for elimination of discrimination by domestic anti-discrimination legislation, by 'compelling reasonable accommodation support for persons with disabilities'.[69] South Africa further conceded that due to the number of institutions that receive and investigate complaints on the basis of discrimination, an 'integrated system' that records the number of investigations initiated, and the sanctions or remedies imposed in cases resolved, does not exist.[70] Disaggregated data are therefore a challenge for South Africa.

The state's answer to the Committee's question on what measures in line with article 8 on awareness-raising have been adopted to combat stereotypes and prejudices 'in all aspects of life',[71] is in fact inadequate. It refers to the event-based nature of campaigns to address discrimination, but promisingly refers to modules that will be introduced into selected universities to equip teachers with the 'context and skills' to 'approach the inclusion of learners with disabilities in the classroom with understanding and innovation'.[72] This reply shows the lack of understanding of the need for broad-based measures to address stereotypes about disability, not just the appropriate treatment of some persons with disabilities in selected sectors. Furthermore, the South African state's reply to the CRPD's question on an indication of the measures adopted to prevent the separation of a child from their family on the

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65 Committee on the Elimination of Discrimination Against Women *Concluding Observations on South Africa* (2011) UN Doc CEDAW/C/ZAF/CO/4 para 20.

66 Committee on the Elimination of Discrimination Against Women (n 65 above) para 21(a).

67 Republic of South Africa *Fifth periodic report submitted by South Africa under article 18 of the Convention, due in 2015* (2019) UN Doc CEDAW/C/ZAF/5.

68 Committee on the Rights of Persons with Disabilities *List of issues in relation to the initial report of South Africa* (2018) CRPD/C/ZAF/Q/1 para 3.

69 Republic of South Africa *Reply to List of Issues* (2018) CRPD/C/ZAF/Q/1/Add.1 para 13.

70 n 69 above, para 23 and 24.

71 Committee on the Rights of Persons with Disabilities (n 68 above) para 7(c).

72 Republic of South Africa (n 69 above) para 52.

basis of the disability of the child or parent(s) – misses the mark completely. The reply makes vague reference to the domestic legislation's requirement that 'all actions pertaining to the child must be in the best interest of the child principle'.[73]

The African Protocol on Disability rephrases article 5 of the CRPD to a certain extent, but gives more credence to discrimination by association.[74] It will require states parties to 'take effective and appropriate measures to protect the parents, children, spouses and other family members closely related to the persons with disabilities, caregivers or intermediaries from discrimination on the basis of their association with persons with disabilities'.[75]

The right to equality and non-discrimination for mothers with intellectual disability bestows on them entitlement to equality-enhancing measures and measures to address discrimination suffered, including judicial measures. This right is also aimed at protecting their children from associated discrimination on the basis of their disability.

Two other articles in the CRPD are interrelated to article 5: article 12 on legal capacity and article 13 on access to justice. First, however, the right to family life requires exposition.

4.3. The right to family life

Family privacy has been jealously guarded throughout international law's development, with interference in family life only allowed under exceptional circumstances – for example where parents default in their child-rearing obligations.[76] The CRC also perpetuates the notion that the state only has to assist as a form of 'safety-net' where parents are unable to do so, so retaining parents and caregivers as primary carers.[77] The development of family rights as such for persons with disabilities was slow. Only with the human rights approach of the 1990s were legal protections extended to persons with disabilities to guard against 'interference of others' (also known as 'negative freedom'), but did not extend opportunities to persons with disabilities to positively practice their sexual reproductive rights (also known as 'positive freedom').[78]

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73 Republic of South Africa (n 69 above) para 145.
74 Arts 5 and 6 of the African Disability Protocol.
75 Art 5(2)(c) of the African Disability Protocol.
76 See, for example, art 16(3) of the UDHR, arts 17 and 23(1) of the ICCPR, art 10(1) of the CESCR and article 8 of the European Convention on Human Rights. See, also, J Fortin *Children's Rights and the Developing Law* (2003) 273.
77 Fortin (n 76 above) 285. See arts 8, 9, 10, 18(1) and (2) and 27(2) of the CRC.
78 P van Trigt 'Equal reproduction rights? The right to found a family in United Nations' disability policy since the 1970s' (2020) 25 *The History of the Family* 202 204.

Article 23 of the CRPD on respect for the home and the family, is a crucial right for mothers with intellectual disabilities in particular. The article tasks states parties with measures that tackle discrimination – including matters relating to family and parenthood 'on an equal basis with others', not only so that they can marry and found a family, and also exercise sexual reproductive health rights.[79] It also requires particular measures in the practice of child-rearing to be taken. These measures are: first, to render 'appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities';[80] second, not to separate children from their parents except where competent authorities, after judicial review, determine this is needed under relevant laws, and the 'separation is necessary for the best interests of the child'; and third, children are not to be separated from parents on the basis of their parents' disability.[81]

The Committee on the Rights of Persons with Disabilities identifies that parental and family rights are often impinged on account of discriminatory laws and practices and in particular that parents with disabilities are often considered to be 'inadequate or unable to take care of their children'.[82] Separation of a child from their parent on the basis of the parent's disability violates article 23, as such action is discriminatory. There is a negative and positive dimension – do not separate families on the basis of disability and provide support to these families. Germany, for example, was taken to task by the Committee on the Rights of Persons with Disabilities for not providing sufficient support to parents with disabilities and advised taking legal measures to prohibit removal of children from parents on the basis of the disability of the parent and to make available 'accessible and inclusive community support and safeguard mechanisms' for parents with disabilities, in order to exercise 'parental rights'.[83]

Crucially, therefore, the Committee tasks states parties with providing to parents with disabilities, 'necessary support in the community to care for their children'.[84] Support to families with children with disabilities or to parents with disabilities may include relevant social services or financial support.[85] From the Committee's Concluding Observations to a variety of states parties, it can be noted that such support must be 'community based, adequate, accessible and available and

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79 Art 23(1) of the CRPD. References to sexuality or sexual relationships and parenthood not within the bounds of marriage were deleted from the draft of the article due to objections from religious and conservative circles – according to M Schaaf 'Negotiating sexuality in the convention on the rights of persons with disabilities' (2011) 8(14) *Sur International Journal on Human Rights* 121-123.

80 Art 23(2) of the CRPD.

81 Art 23(4) of the CRPD.

82 Committee on the Rights of Persons with Disabilities (n 45 above) para 61.

83 Committee on the Rights of Persons with Disabilities *Concluding Observations: Germany* UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 44.

84 Committee on the Rights of Persons with Disabilities (n 45) para 62.

85 The Committee on the Rights of Persons with Disabilities *Concluding Observations: Italy* UN Doc CRPD/C/ITA/CO/1 (6 October 2016) para 51.

appropriate to the goal of facilitating [their] child-rearing responsibilities'.[86] The provision of safeguards has also been identified as necessary,[87] although the nature of such safeguards has not been stated.

Safeguards would entail a fit for purpose rationale, in other words ensuring that the support does not undermine the parenting autonomy. Means in which such support could be safeguarded against abuse would be to require supervision of support provided, by for example, a senior social worker. Also, communication of complaints procedures available to parents with intellectual disabilities in an easy to understand format, may be another safeguard. Provision of appropriate training to the social workers and other personnel such as child and youth-care workers rendering the support may need to be mandated by a state. Such training would need to include relevant disability sensitisation and tools and methods to deal with, assess and appropriately refer persons with intellectual disabilities to other necessary stakeholders and service providers. For example, referral to speech therapists may be necessary to enhance communication by and with parents with intellectual disabilities, as many studies have shown that good communication with a parent with an intellectual disability guarantees the success of the social service support offered.[88] One study shows that consistent support from speech and language therapists correlated with successful outcomes in court cases for parents with learning disabilities (a broader definition than intellectual disability) in Britain.[89] Provision of actual social services is not the only aspect of support – access to information is too. For example, the Scottish government compiled a guide for parents with intellectual disabilities in an easy-to-read format on what to expect from attending a Children's Court hearing[90] and how to lay a complaint against service providers involved in the court process.[91]

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86 J Fiala-Butora 'Article 23: Respect for the Home and the Family' in I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2019) 648, referring to Committee on the Rights of Persons with Disabilities *Concluding Observations* on *Ethiopia* UN Doc CRPD/C/ETH/CO/1 (4 November 2016) para 49; *Gabon* UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 50; *El Salvador* UN Doc CRPD/C/SLV/CO/1 (8 October 2013) para 48; and *Mongolia* UN Doc CRPD/MNG/CO/1 (13 May 2015) para 44.

87 Committee on the Rights of Persons with Disabilities (n 83) para 44.

88 J Stansfield 'Parents with learning disabilities and speech and language therapy. A service evaluation of referrals and episodes of care' (2011) 40 *British Journal of Learning Disabilities* 170, citing S McGaw *What works for parents with learning disabilities* (2000); B Tarleton et al *Finding the right support: A review of issues and positive practice in supporting parents with learning difficulties and their children* (2006) <https://baringfoundation.org.uk/wp-content/uploads/2014/10/Findingrightsupport.pdf>. See Scottish Commission for Learning Disability 21 August 2017, citing Working Together with Parents Network *Resources* (2011) <https://www.scld.org.uk/resources-working-together-parents-network-post/> (accessed 1 December 2017).

89 J Stansfield & A Matthews 'Parenting, being a vulnerable adult and communication needs' RCSLT Conference Paper (2000).

90 Scottish Children's Reporter Administration *Going to a Children's Hearing – Easy Read Information for Parents/Carers* (2018) <https://www.scra.gov.uk/wp-content/uploads/2018/04/Going-to-a-Children's-Hearing-—-Easy-Read.pdf> (accessed 1 October 2020).

91 Scottish Children's Reporter Administration *Making a complaint to the reporter – Easy Read Information for Parents/Carers* (2017) <https://www.scra.gov.uk/wp-content/uploads/2017/10/Easy-Read-Complaints.pdf> (accessed 1 October 2020).

The UN Special Rapporteur on the Rights of Persons with Disabilities explains that support offered to families is to be of 'good quality', and, as such, would need to follow 'person-centred approaches' together with drafting of 'guidelines and criteria to regulate delivery' of the assistance and support services required from states under the CRPD, as well as relevant standards for training and certification of support workers.[92] The next chapter considers whether domestic Norms and Standards in social services (including provision of prevention and early intervention services) should be adapted to the needs of persons with intellectual disabilities, and should contain relevant safeguards that are appropriate and adequate.

Fiala-Butora's analysis of the Concluding Observations on article 23 identifies that states should provide for the resources that will ensure both the demand for and 'effective' family support services.[93] Adequate budgeting and financial resources need to also be planned and implemented. For example, funding norms and standards for the financial contributions required from the state by non-governmental organisations offering prevention and early intervention services to families with disabilities should be drafted.[94] Not only are these services to be provided, but statistics on the services and users are to be collected, on a disaggregated basis, to enable the Committee to evaluate the adequacy of the support offered to these families.[95]

Interestingly, South Africa in its Initial Report to the Committee, did not identify any aspect of *parenting* with a disability in their report. The Committee did not comment on or make recommendations in relation to article 23 of the CRPD in its Concluding Observations on South Africa – but rather under comments on article 19 (on living independently and being included in the community).[96] The Committee recommended that the South African state

> Adopt an action plan at the national, regional and local levels to develop community support services in urban and rural areas, including providing personal assistance, grants and support to families of children with disabilities and *parents with disabilities*, covering support for assistive devices, guides and sign language interpreters (emphasis added).[97]

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92 UN Special Rapporteur on the rights of persons with disabilities *Report of the Special Rapporteur on the rights of persons with disabilities* 20 December 2016 UN Doc A/HRC/34/58 para 54.

93 Fiala-Butora (n 66 above) 648, referring to The Committee on the Rights of Persons with Disabilities *Concluding Observations* on: *Gabon* UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 51, and *Republic of Korea* UN Doc CRPD/C/KOR/CO/1 (29 October 2014) para 43.

94 Centre for Child Law *Advocacy Brief: Advancing the Rights of Children with Disabilities* (2017) 6. See, also, L Jamieson et al 'Towards effective child protection: Ensuring adequate financial and human resources' (2014) in Mathews et al (eds) *Child Gauge* 51.

95 The Committee on the Rights of Persons with Disabilities *Concluding Observations: Brazil* UN Doc CRPD/C/BRA/CO/1 (29 September 2015) para 42.

96 Republic of South Africa *Initial Report to the Committee on the Rights of Persons with Disabilities* UN Doc CRPD/C/ZAF/1 (24 November 2014) para 191ff; Committee on the Rights of Persons with Disabilities *Concluding Observations: South Africa* CRPD/C/ZAF/CO/1 (23 October 2018).

97 Committee on the Rights of Persons with Disabilities *Concluding Observations: South Africa* CRPD/C/ZAF/CO/1 (23 October 2018) para 35(c).

How this right of parents to support from the state to enable parenting on an equal basis with others affects the best interests of the child, is discussed later. In summary, interference with family life is to be avoided – particularly when there is discriminatory intent based on the disability of the parent, and states parties must provide adequate and effective support to families.

4.4. The parent's right to legal capacity

Legal capacity as a concept (and its restriction) has been controversially applied to persons with disabilities, and in particular to those with intellectual and psychosocial disabilities. The first recognition of equality before the law came with the UDHR, followed by the ICCPR and CEDAW.[98] The CRPD's provisions on legal capacity[99] builds on these foundations.[100] Article 12 of the CRPD provides that

> (1) States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
> (2) States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
> (3) States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
> (4) States parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
> (5) Subject to the provisions of this article, States parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Some have called the CRPD's provision as extending 'universal legal capacity' to all.[101] The African Disability Protocol frames the entitlements to equal recognition before the law slightly differently, but there should be no substantive consequences flowing therefrom.[102] The most important aspect of the African regional instrument is that it categorically states that: 'States parties shall take all appropriate and effective measures to ensure that policies or laws which have the purpose or the effect of

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98 Art 6 of the UDHR, art 16 of the ICCPR, and art 15 of CEDAW.

99 Art 12 of the CRPD.

100 C De Bhailís & E Flynn 'Recognising legal capacity: Commentary and analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6 7.

101 A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future' (2006-7) 34 *Syracuse Journal of International Law and Commerce* 429; A Dhanda 'Universal legal capacity as a universal human right' in M Dudley, D Silove & F Gale (eds) *Mental health and human rights: vision, praxis, and courage* (2012); E Flynn & A Arstein-Kerslake 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81.

102 Art 7 of the African Disability Protocol.

limiting or restricting the enjoyment of legal capacity by persons with disabilities are reviewed or repealed.'[103] The CRPD's formulation, quoted above, is not as forthright, and, as a result, the Committee on the Rights of Persons with Disabilities issued a general comment to provide clarity to states parties on the point. The Committee stipulates that substituted decision-making is not permitted in legal regimes and ought to be abolished.[104] Abolition, however, is not supported by all scholars and states.[105]

The African Disability Protocol, like the CRPD, will require state parties to put in place effective and appropriate measures to ensure persons with disabilities receive 'effective legal protection' and support for exercising their legal capacity where needed in accordance with their 'rights, will and specific needs' and 'appropriate and effective safeguards' against abuse.[106] The reference to 'preferences of the person' in the CRPD is replaced by 'specific needs' in the African Disability Protocol. Proportionality and regular administrative or judicial review is not prescribed under the African regional instrument. It is hoped that the use of 'specific needs' will not subsume a paternalistic formulation that does not take cognisance of the preferences articulated by a person seeking support for a legal decision.

Holness and Rule submit that the CRPD and African Disability Protocol's support measures' requirement is 'in line with African notions of communitarianism as it requires that a system of society support is set up', and is thus wholly consistent with the interdependence of persons.[107] The forms of accommodation that a person may need to exercise their legal capacity could be to utilise different means of communicating information about a decision, for example through alternative communication, and measures such as appropriate and adapted 'pacing, repetition and a trusted source for information'.[108] In court proceedings, support for exercising legal capacity, including capacity to testify, can take the form of recognising different communication methods, and procedural accommodation, among others.[109] A support person or persons would be a trusted individual(s) that will assist the person with the

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103 Art 7(2)(e) of the African Disability Protocol.

104 Committee on the Rights of Persons with Disabilities *General Comment 1: Equal recognition before the law* (2014) CRPD/GC/1 para 28.

105 W Martin et al 'The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK' (Essex Autonomy Project, University of Essex 2016) 58 https://autonomy.essex.ac.uk/resources/eap-three-jurisdictions-report/ (accessed 1 October 2017); Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014).

106 Art 7(2)(c) and (d) of the African Disability Protocol.

107 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 51. See Kamga (n 39 above) 226 (on African communitarianism).

108 Centre for Disability Law and Policy *Essential principles: Irish legal capacity law* (2012) 4 <https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Legal-Capacity-Essential-Principles.pdf> (accessed 1 September 2014).

109 Committee on the Rights of Persons with Disabilities *General Comment 1: Equal recognition before the law* (2014) CRPD/GC/1 para 39.

disability in 'making, expressing or implementing a decision'.[110] A support person would help list the advantages and disadvantages of different options available in a particular decision and assist the person with the disability to communicate the decision to other persons, including professionals. Such a support person can be appointed through a formal supported decision-making scheme, which could be legislated or informal.

Several jurisdictions are embarking on law reform on this score[111] – including South Africa.[112] Some jurisdictions, like the United States of America, retain guardianship, but as a last resort, prefer the less restrictive alternative such as supported decision-making.[113] Under supported decision-making, the individual with the disability makes the decision, ultimately, but exercises both 'choice and control' over who the supporter is, and how this support happens.[114] Formal statutory schemes can embed strong procedural safeguards, while informal schemes have flexibility in their favour – but may be subject to abuse. Some examples of informal schemes are circles of support, family group conferencing, and personal ombuds.[115]

The challenge is that in many legal systems, legal capacity is inextricably linked with mental capacity of a person.[116] The Committee on the Rights of Persons with Disabilities distinguishes between 'mental' and 'legal' capacity:

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110 L Series & A Nilsson 'Article 12 CRPD: Equal recognition before the law' in I Bantekas, MA Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018) 366.

111 Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014); *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Law Com No. 222, 2015); Representation Agreement Act 1995 (British Columbia, Canada); Decision-making, Support and Protection to Adults Act, 2003 (Yukon, Canada); The Adult Guardianship and Trusteeship Act 2008 (Alberta, Canada); Assisted Decision-Making (Capacity) Act 2015 (Republic of Ireland); Ley 9.379 para la Promoción de la Autonomía Personal de las Personas con Discapacidad (Law for the Promotion of Personal Autonomy of Persons with Disabilities, Civil Procedure Code No. 9,379, Costa Rica 2016); Capacity and Guardianship (Amendment No. 18) Law, 5776-2016 (Israel); Supported decision-making Agreement Act 2015 (Texas) SB No. 1881 2015; Natural Persons and Support Measures (draft) Act (Bulgaria); The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (England).

112 South African Law Reform Commission Project 122: Incapable Adults/Assisted Decision-Making: Adults With Impaired Decision-Making Capacity (Issue paper 18, 2002); Discussion Paper 105, 2004; and Report: Project 122: Assisted Decision-Making Report (December 2015) released on 25 Jun 2019.

113 *Uniform Guardianship and Protective Proceedings Act (1997/1998)*, drafted by the National Conference of Commissioners on Uniform State Laws http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20 proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf, cited in American Bar Association *Practical tool for lawyers: Steps in supporting decision-making* (2016) 6 <http://supporteddecisionmaking.org/sites/default/files/docs/events/PRACTICALGuide.pdf> (accessed 1 October 2020).

114 Series & Nilsson (n 110 above) 366.

115 E Flynn & S Doyle 'Ireland's ratification of the UN Convention on the Rights of Persons with Disabilities: Challenges and opportunities' (2013) 41 *British Journal of Learning Disabilities* 171-180; T Engman et al 'A new profession is born – Personlight Ombud PO', cited in Series & Nilsson (n) fn 209; *Personligt Ombud* <http://www.personligtombud.se> (accessed 3 January 2020).

116 Series & Nilsson (n 110 above) 352.

> Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and societal factors.[117]

Many states rely on a test of competence to determine the mental capacity of a person and should the person fail this test, the person is denied legal capacity. Such tests are known as functional assessments.[118] The Committee has acknowledged that deprivation of legal capacity in relation to exercising their parenthood for persons with disabilities violates their rights.[119] Such deprivation is at odds with the CRPD, as lack of 'mental capacity'

> is not, as it is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.[120]

Functional tests, according to the CRPD, are discriminatory where they are utilised to deny legal capacity.[121] Third parties usually administer such tests and make determinations from the outcome. Self-evidently, legal capacity in the context of child care proceedings is viewed differently by professionals (e.g. social workers, lawyers, psychiatrists) involved in the process. Unsurprisingly, the medical fraternity critique this view of the functional approach.[122] Some even go as far as proposing amendments to the article to allow for a combined functional approach and a supported decision-making approach.[123] Diagnostic thresholds are used in functional tests and considered as direct discrimination – as such a threshold treats particular persons, i.e. those with intellectual or psychosocial disabilities, differently compared to other groups.[124] Such thresholds are often employed in criminal capacity contexts and in competence to testify.

In summary, international and regional law specify that states are to recognise the full legal capacity of all persons and to provide for informal and formal means of supported decision-making to adults with disabilities, only where necessary, in instances where a decision with legal consequences may require such support, and

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117 Committee on the Rights of Persons with Disabilities (n 109 above) para 12.
118 For example, sec 2(1) of the Mental Capacity Act of 2005 of England and Wales.
119 Committee on the Rights of Persons with Disabilities (n 109 above) para 8.
120 Committee on the Rights of Persons with Disabilities (n 109 above) para 12.
121 Committee on the Rights of Persons with Disabilities (n 109 above) para 15.
122 M Freeman 'Reversing hard won victories in the name of human rights: A critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 *Lancet Psychiatry* 844; J Dawson "'A realistic approach to assessing mental health laws" compliance with the UNCRPD' (2015) 40 *International Journal of Law and Psychiatry* 70; PS Appelbaum 'Protecting the rights of persons with disabilities: An international convention and its problems' (2016) 67 *Law & Psychiatry* 366.
123 See M Scholten & J Gather 'Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward' (2018) 44 *Journal of Medical Ethics* 226 232.
124 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 75 *Modern Law Review* 752.

with relevant safeguards in place to limit the potential for abuse. States are also to train legal personnel and others to ensure that legal capacity is recognised and facilitated with support measures such as procedural accommodations. Law reform on these aspects should therefore ensue and such reform is to abolish substituted decision-making – except for 'hard cases' where it is not practicable to determine the person's will and preferences even though efforts were made to do so. In those instances, the 'best interpretation of will and preferences' is to replace previous paternalistic 'best interests' determinations.[125] Such an interpretation aimed at ascertaining a person's will and preference, where it has not been expressed, is known as facilitated decisions.[126]

Following the CRPD's guidance, three law reform agencies recommended abolishing the state's substituted decision-making scheme but many have added supported decision-making schemes as alternatives, presumably due to factors such as a lack of political will to dismantle existing systems[127] or the resource implications of providing support measures.[128] The South African state has committed to undertake legal reform on supported-decision-making, and, as at 2018, indicated, rather nebulously, that this process was 'under Executive consideration for a decision with regards alignment with the CRPD'.[129] Columbia, Costa Rica and Peru have embraced versions of supported decision-making in their laws, abolishing guardianship regimes.[130]

In child care proceedings, a parent with an intellectual disability may exercise their legal capacity and may require support in making any decision with legal consequences. Such decisions are not once-off decisions, such as deciding for whom to vote. Instead, decisions in the course of such a proceeding can range from being given the opportunity, if necessary with support, to understand the meaning of and consequences arising from legal documents, including a social worker's report; to the

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125 Committee on the Rights of Persons with Disabilities (n 109 above) para 21.

126 Series & Nilsson (n 110 above) 365.

127 S Then et al 'Supporting decision-making of adults with cognitive disabilities: The role of law reform agencies – recommendations, rationales and influence' (2018) 61 *International Journal of Law and Psychiatry* 64.

128 T Carney 'Prioritising supported decision-making: running on empty or a basis for glacial-to-steady progress?' (2017) 6(4) *Laws* 18.

129 Republic of South Africa (n 69 above) para 77.

130 Law 1996 of 2019, Colombian Congress (2019); Legislative Decree No. 1384; and 1417, Civil Code and Civil Procedure Code, Peru (2018); Ley 9.379 para la Promoción de la Autonomía Personal de las Personas con Discapacidad (Law for the Promotion of Personal Autonomy of Persons with Disabilities, Civil Procedure Code No. 9, 379, Costa Rica, 2016). Cf A Vásquez Encalada, K Bialik, K Stober 'Supported decision making in South America: Analysis of three countries' experiences' (2021) 18 *International Journal of Environmental Research and Public Health* 5204. https://doi.org/10.3390/ijerph18105204; RA Constantino Caycho 'The flag of Imagination: Peru's new reform on legal capacity for persons with intellectual and psychosocial disabilities and the need for new understandings in Private Law' (2020) 14 *The Age of Human Rights Journal* 155; A Martinez-Pujalte 'Legal capacity and supported decision-making: Lessons from some recent legal reforms' (2019) 8 *Laws* 1-22 doi:10.3390/laws8010004.

provision of testimony about family circumstances and one's ability to care for one's children; and to decisions about where children are to be placed should they require alternative care. Multiple decisions are made when participating in legal proceedings and before such proceedings ensue. While ways in which legal capacity can be recognised and support can be provided in courts for persons involved in the criminal justice system have been explored in literature,[131] as well as medical decision-making (consent)[132] – what supported decision-making should look like in child care proceedings in relation to legal capacity specifically, has not been considered.

4.5. The parent's right to accessibility

Accessibility and access to justice in the context of mothers with disabilities in Children's Courts cannot be divorced. The CRPD provides for both access to information and promoting accessibility.[133] Accessibility may require the use of specific measures such as 'easy to read and understand forms' and 'forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public' and 'other appropriate forms of assistance and support to persons with disabilities to ensure their access to information.'[134] Law enforcement agencies and tribunals (courts) are explicitly mentioned as being subject to this accessibility requirement.[135] Furthermore, the Committee on the Rights of Persons with Disabilities has articulated that such measures would support persons who experience 'cognitive fatigue'.[136]

The African Disability Protocol also extends the 'right to barrier free access to the physical environment, … information, including communication technologies and systems, and other facilities and services open or provided to the public.'[137] The Protocol makes measures to promote accessibility subject to a 'reasonable and progressive' standard, but at least provides a non-exhaustive list of such measures, including 'information, communications, sign languages and tactile interpretation services, braille, audio and other services, including electronic services and emergency services', and 'quality and affordable mobility aids, assistive devices or technologies and forms of live assistance and intermediaries'.[138] The Committee has

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131 A Arstein-Kerslake & J Black 'Right to legal capacity in therapeutic jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities' (2020) 68 *International Journal of Law & Psychiatry* 1; H Combrinck 'Rather bad than mad? A reconsideration of criminal incapacity and psychosocial disability in South African law in light of the Convention on the Rights of Persons with Disabilities' (2018) 6 *African Disability Rights Yearbook* 3.

132 S Paul et al 'Perceptions of key stakeholders on procedural justice in the Consent and Capacity Board of Ontario's hearings' (2020) 68 *International Journal of Law & Psychiatry* 2.

133 Art 9(1) of the CRPD.

134 Art 9(2)(d), (e) and (f) of the CRPD.

135 Committee on the Rights of Persons with Disabilities *General Comment 2 on Accessibility* (2014) CRPD/GC/2 para 17.

136 n 135 above, para 20.

137 Art 15 of the Protocol to the ACHPR on RPD.

138 Art 9(2)(c) and (d) of the Protocol.

also noted the gradual implementation of the right, stating that barriers to accessibility should be removed 'gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility.'[139] The general comment on accessibility of the Committee on the Rights of Persons with Disabilities identifies that

> Persons with intellectual and psychosocial disabilities as well as deaf-blind persons face barriers when attempting to access information and communication owing to a lack of easy-to-read formats and augmentative and alternative modes of communication. They also face barriers when attempting to access services due to prejudices and a lack of adequate training of the staff providing those services.[140]

The Office of the UN Commissioner for Human Rights (OUNCHR), in its report,[141] reaffirms the general comment of the Committee on the Rights of Persons with Disabilities on accessibility, stating that: 'Effective access to information and communication allows persons with disabilities to know and defend their rights'.[142] All information disseminated to the public and court users should therefore be accessible, including court documents.

Parents are thus entitled to accessible court buildings, with the state liable to provide appropriate accessibility measures, such as intermediaries and documents available in accessible formats.

4.6. The parent's right of access to justice

Recall the discussion in chapter 2, part 2.6.2, which identifies article 13 of the CRPD and article 9 of the African Disability Protocol as relevant to access to justice. The African Disability Protocol also includes legal aid. In the African context, access to legal aid is acute for many vulnerable populations – for both criminal and civil matters.[143] However, provision for criminal legal aid is usually prioritised over civil legal aid. Recall further that procedural accommodations in the justice sector are not progressively, but immediately realisable. Lastly, the OUNHCHR provides guidance for states to set up a system of how to access procedural accommodations in courts.[144]

The African Commission on Human and Peoples' Rights (African Commission) issued Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in

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139 Committee on the Rights of Persons with Disabilities (n 135 above) para 14.
140 Committee on the Rights of Persons with Disabilities (n 135 above) para 7.
141 Office of the United Nations High Commissioner for Human Rights (OUNHCHR) *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities* (2017) A/HRC/37/25 para 23.
142 Committee on the Rights of Persons with Disabilities (n 135 above) para 22.
143 D McQuoid-Mason 'Challenges when drafting legal aid legislation to ensure access to justice in African and other developing countries with small numbers of lawyers: Overcoming obstacles to including the use of non-lawyers to assist persons in conflict with the law' (2018) 18 *African Human Rights Law Journal* 486.
144 OUNHCHR (n 141 above) para 28; OUNHCHR *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities* (2016) A/HRC/34/26 para 41.

Africa (the Fair Trial and Legal Assistance Principles),[145] which are generally not binding, as responsibility for their implementation is granted to several stakeholders, including the state and civil society. These Principles articulate two relevant aspects: equality of persons with a disability before a judicial body,[146] and a right to free legal assistance in the interest of justice where the person is indigent.[147]

A fair hearing is described as *inter alia* allowing the applicant or defendant an 'adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence'.[148] While the Fair Trial and Legal Assistance Principles do not refer to disability-specific accommodations, their guidance in relation to the provision of legal aid in the interest of justice is telling. The Principles identify that a party to a civil case is entitled to legal assistance considering: 'the complexity of the case;' 'the ability of the party to adequately represent himself or herself; 'the rights that are affected;' and 'the likely impact of the outcome of the case on the wider community.'[149] For persons with disabilities, the ability to adequately represent themselves are diminished where accommodation measures are not provided.

Ten years after the Fair Trial and Legal Assistance Principles, the United Nations issued their own Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, (UN Principles). These UN Principles, though focused on criminal systems, are insightful in that states are tasked with taking special measures 'to ensure meaningful access to legal aid', and that 'address the special needs' of a number of vulnerable populations – including persons with disabilities and persons with mental illness.[150]

The Fair Trial and Legal Assistance Principles task states to provide judicial training and education, including in 'racial, cultural and gender sensitisation'.[151] The provision of disability sensitisation is not identified in that instrument, but finds its way into the CRPD – as identified earlier. White and Msipa argue that the CRPD's emphasis on training of justice personnel, including presiding officers, is in part necessary because of the 'manner in which the credibility of witnesses is assessed'.[152] For example, demeanour such as lack of eye contact by a witness with a disability

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145 African Commission *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) DOC/OS(XXX)247.

146 General principle A(2)(b) of the Fair Trial and Legal Assistance Principles.

147 Principle H(a) of the Fair Trial and Legal Assistance Principles.

148 General principle A(2)(e) of the Fair Trial and Legal Assistance Principles.

149 Principle H(2)(b)(1-3) of the Fair Trial and Legal Assistance Principles.

150 Principle 32 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013) <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> (accessed 1 October 2017).

151 Principle B(c) of the Fair Trial and Legal Assistance Principles.

152 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 112.

does not necessarily mean a person is dishonest, but could instead be associated with their disability.[153] While the authors are referring to this assessment that takes place, consciously and subconsciously, in the criminal justice system, credibility of witnesses is also important in civil proceedings. Mothers with intellectual disabilities could therefore be judged, without appropriate training, to not be credible.

Training of those involved in the administration of justice has been generously interpreted[154] by the Committee on the Rights of Persons with Disabilities – to extend not only to legal personnel such as police, judges, attorneys and prosecutors, but also to social workers and health care workers.[155]

Taken together then, both treaties place an obligation on the South African state to set in motion the necessary procedural accommodations for parties to legal proceedings in a structured, coherent way – vesting this duty on a particular entity that will take responsibility to execute these. Currently, no such entity exists in South Africa, and the enabling legal framework is not provided, as will be discussed later. Also, a positive duty to train justice personnel, including lawyers and magistrates, is articulated by the international and regional law. Examples of procedural accommodations include individual specific accommodations; appropriate questioning techniques; intermediaries as communication partners; and support in decision-making and legal representation. These are used by different jurisdictions with different results. These examples are discussed in Chapter 7.

The Republic of South Africa has indicated to the Committee on the Rights of Persons with Disabilities that it has taken specific measures to implement procedural accommodations in judicial proceedings, and lists these as the appointment of intermediaries to children and persons under the mental age of 18 when providing testimony in court, and in-camera facilities and court preparation services for persons with disabilities.[156] The state has also identified the training, through disability sensitisation workshops, of one thousand judicial officials in 2016, on article 8 (awareness-raising) and article 13(2) (access to justice); and 2 136 police officers in 2015/6, as well as 'awareness events' targeting 6 625 'attendees'.[157] It is unclear whether these 'attendees' were police officers. The state concedes that it will seek to address 'the absence of persons with disabilities and their representative organisations in the design and implementation of training courses' – primarily through the vehicle of the yet-to-be approved National Framework on Self-Representation by Persons with Disabilities.[158] The state also identifies drafting of several pamphlets,

153 White & Msipa (n 152 above) 112.
154 E Flynn 'Article 13: Access to Justice' in I Bantekas et al (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018) 400.
155 Committee on the Rights of Persons with Disabilities *Concluding Observations on El Salvador* UN Doc CRPD/C/SLV/CO/1 (2013) para 30(c).
156 n 69 above, para 82-83.
157 Republic of South Africa (n 69 above) paras 104-5.
158 Republic of South Africa (n 69 above) para 107.

available in Braille and public education materials into braille, large print and audio, to provide awareness on the right of persons with disabilities to access the courts and obtain police services.[159] The Committee on the Rights of Persons Disabilities' request was specifically to address measures in all areas of law and at all levels of judicial procedures, with information in accessible formats, including Easy Read. The state's response, however, does not refer to Easy Read versions of court documents or awareness pamphlets. It also is preoccupied with a strategy and directive on police services to persons with disabilities and on victim empowerment (including with sign language interpretation), respectively.[160] While these measures are welcome, they do not address the conversion of information on law and procedures to persons with disabilities in Easy Read.

4.7. The child's right to protection from neglect, abuse and maltreatment

Children are to be protected from maltreatment including physical and mental violence, neglect, sexual abuse and exploitation, while in the care of parents or other caregivers.[161] The child is entitled to this protection, but protection is empty without provision of adequate care such as nutrition, shelter, health and education, for example.[162] Such care, as is needed for a child's welfare, is thus also a duty on parents or other caregivers.[163] Where care is absent and neglect or maltreatment occurs, the prohibition against torture and other cruel, inhuman and degrading treatment or punishment is violated.[164] In such instances, separation from families may be necessary to meet the child's best interests.[165] The main obligation on states then is to prevent neglect and other maltreatment from occurring, but where harm has occurred, to respond appropriately.

The main vehicle in international law is article 19 of the CRC, which provides that

1. States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and as appropriate, for judicial involvement.

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159 Republic of South Africa (n 69 above) para 79.
160 Republic of South Africa (n 69 above) para 79.
161 Article 19 of the CRC.
162 K Sandberg 'Children's right to protection under the CRC' in A Falch-Eriksen & E Backe-Hansen (eds) *Human Rights in Child Protection* (2018) 15.
163 Art 3(2) of the CRC.
164 Art 37(a) of the CRC.
165 Art 9(1) of the CRC and Committee on the Rights of the Child *General Comment 13: The right of the child to freedom from all forms of violence* (2011) UN Doc CRC/C/GC/13 para 7(a).

The apparatus available to prevent and adequately respond to neglect and other maltreatment should already exist at systemic levels in a nation state in terms of: providing appropriate legislation, policy and strategy to that end; the establishment and operation of a national coordinating body; the allocation of resources needed to comply with state duties; measures for the evaluation of law and policy and appropriate data collection; information dissemination to the public and to children; training of relevant professionals, including on the best interests; and the accountability mechanisms through national human rights institutions (NHRIs) and the involvement of civil society.[166]

These general implementation measures form the framework in terms of which child care and protection can be maximised, and more specific implementation measures in relation to prevention and response to neglect and other maltreatment are outlined by the Committee on the Rights of the Child in its General Comment on article 19. This comment outlines a much more specific child protection system to be put in place which is 'integrated, cohesive, interdisciplinary and coordinated'.[167] Such a system is to contain measures and interventions such as legislative, administrative and social measures,[168] prevention interventions and 'identification, reporting, referral, investigation, treatment and follow-up'.[169] Prevention, including poverty reduction measures at a policy level, is needed to mitigate against neglect.[170] Furthermore, social programmes both for parents and caregivers, as well as for children, are required to enable those caring for the child to do so adequately. Such programmes can include community-based support groups, counselling and therapeutic programmes related to specific needs of caregivers (e.g. domestic violence, mental health), ante-natal and post-natal services and home visits. Child-specific programmes can include provision of child care, early childhood development and after-school care programmes, counselling and helplines.[171] Educational measures such as positive parenting practices may be required, which can only come to fruition from proper training of relevant stakeholders, including teachers, social workers, health professionals, lawyers, judges, police, community workers, and traditional and religious leaders.[172]

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166 K Sandberg (n 162) 18, citing General Comment 13 (n 165 above) para 72; Committee on the Rights of the Child *General Comment 2: on the role of independent national human rights institutions in the promotion and protection of the rights of the child* (2002) UN Doc CRC/C/GC/2.

167 CRC and Committee on the Rights of the Child *General Comment 13* (n above) para 39.

168 Art 19(1) of the CRC.

169 Art 19(2) of the CRC.

170 Art 27(3) of the CRC; Committee on the Rights of the Child *General Comment 13* (n 164 above) para 43(a); UN Alternative Care Guidelines (2010) para 15. The African Committee of Experts on the Rights and Welfare of the Child in its *Concluding Observations and Recommendations on the Initial Report of South Africa* (2019) para 20, highlighted its concern with provincial disparities in economic status and service delivery. It recommended measures, other than legislation, to shrink this inequality, poverty and service delivery gap.

171 Committee on the Rights of the Child (n 165 above) para 43(b) and (c).

172 Committee on the Rights of the Child (n 165 above) para 44.

Prevention for individual children happens in two stages – first the identification of a child at risk and then implementation of targeted interventions. The promotion of family unity remains a strong principle, which is tempered only by the child's best interests. The Committee on the Rights of the Child cautions against undue interference in family life, instead requiring appropriate support to the family:

> by adopting measures that promote family unity and ensure for children the full exercise and enjoyment of their rights in private settings, abstaining from unduly interfering in children's private and family relations, depending on circumstances.[173]

Identifying a child at risk then requires 'all who come in contact with children are aware of risk factors and indicators of all forms of violence, have received guidance on how to interpret such indicators, and have the necessary knowledge, willingness and ability to take appropriate action'.[174] Such identification should occur *before* breaking-point is reached, before crisis mode.[175] Where neglect or maltreatment occurred, an appropriate system of response is needed. The first step is reporting and referral, followed by investigation and prosecution or initiation of child care proceedings, whichever is necessary, and follow-up and treatment – with judicial involvement where relevant.

In its Concluding Observations on South Africa, the Committee on the Rights of the Child recommends that South Africa develops, adopts and implements a 'comprehensive national strategy' for the prevention of and support for child victims of violence.[176] The Committee uses the term 'violence' as an all-encompassing term for the types of maltreatment prohibited under article 19. The Committee further recommends that the state's policies addressing these phenomena are developed 'on the basis of analysis of objective data'; the Committee requires broad participation that is 'meaningful', including with children; that such a strategy should attend to structural (systemic) violence, such as 'inequality, poverty' for example; and the strategy should seek to address particular groups of children at higher risk of violence – such as those with disabilities and those residing in rural and informal settlements.[177]

The Committee, in its observations, expresses its concern with the challenges faced by the foster-care system and a high number of children placed in residential care when separated from families as a result of *inter alia* abuse, neglect and abandonment.[178] The Committee recommends *inter alia* that solutions are sought by the state to address the systemic challenges highlighted in relation to foster care, should ensure that placement of a child in residential care is curtailed through "timely

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173 n 165 above, para 47.
174 Committee on the Rights of the Child (n 165 above) para 48.
175 As above.
176 Committee on the Rights of the Child *Concluding Observations on the second periodic report of South Africa* (2016) UN Doc CRC/C/ZAF/CO/2 para 33.
177 n 176 above, para 34(a) to (d).
178 n 176 above, para 41.

family reintegration" and shorter periods of court reviews of the child's placement in alternative care; and ensure that sufficient resources are allocated to build 'the capacity of relevant professionals in order to improve the responses of alternative care mechanisms to meet the needs of children deprived of a family environment.'[179]

Several rights are interlinked with protection from harm such as neglect and other maltreatment. This is discussed next.

4.8. The child's right to life, survival and development; non-discrimination and the family's entitlement to support from the state

Three key and mutually dependent concepts are encapsulated in international and regional law on the rights of children and parents with disabilities. These are: the child's right to life, survival and development; the prohibition against discrimination on the basis of a child or parent's disability; and the support that a parent with a disability is entitled to in order to meet their child care responsibilities. A child's right to life, survival and development can be seen as a composite package. Duschke and Abrahams explain the link between survival and development as follows

> Child survival is inextricably linked to child development. The right to maximum survival and development speaks to a continuum that begins at maximum survival and progresses to an endpoint represented by the optimum development of the child. Children therefore have the right to survive under conditions that enable them to develop to their full potential.[180]

The life and survival aspects are primarily the concern of mortality prevention measures, while the development aspects pertain to the continued evolving and developing child – the growing aspect. The challenge with the notion of child development is that it is not a legal term per se, but is used in legal documents as something that can be measured, and which attracts consequences for the child and family life when it is interpreted by different role players. Lawyers' understanding of a child's development is primarily informed by psychology and the discourse of other sciences on child development,[181] and without a concrete legal definition lawyers are at liberty to ascribe their own subjective views of child development in their decision-making.[182]

The meaning of development then, in a legal sense, may not correspond with that of the social science (social work, education or psychology) perspective. Judges are unlikely to be schooled in these scientific or discipline-specific perspectives.[183] To this

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179 n 176 above, para 42 (a), (c), (f) respectively.

180 M Duschke & K Abrahams 'Children's right to maximum survival and development' (2006) 1.

181 E Burman *Deconstructing development psychology* (2008) cited in N Peleg 'Reconceptualising the child's right to development: children and the capability approach' (2013) 21 *International Journal of Children's Rights* 523.

182 N Peleg 'Developing the right to development' (2017) 25(2) *International Journal of Children's Rights* 386.

183 E Buss 'What the law should (and should not) learn from child development research' (2009) 38 *Hofstra Law Review* 13.

end, some authors have recommended particular training on these nuances for judicial officers.[184] The meaning of a child's development, even in law then, requires exposition for, much like the best interests of the child concept, it is ambiguous and has been interpreted inconsistently as a principle or a right.[185] Peleg argues that the child's right to development has both substantive and procedural components and that the relative silence in the general comments from the Committee on the Rights of the Child should be remedied with a general comment on article 6(2) of the CRC.[186]

The discussion that follows shows that both UN treaties place an obligation on the state to: provide for particular measures that may assist a parent in responsibly caring for a child (to ensure the child's development); and where the parent is unable to do so, despite support provided to them to do so, the state is to step in as *parens patriae.* As will be seen below, the two disability-specific treaties entrench the notion that children are not to be deprived of their parental care on account of their parent's disability.

The CRC extends the child's development to eight domains (physical, mental, moral, social, cultural, spiritual, personality and talent), and as a concrete right in the child's right to life, survival and development.[187] This treaty requires states parties to ensure, to the maximum extent possible, a child's right to life, survival and development.[188] The right is subject to the standard of progressive realisation – as such. It is also entrenched as a general principle.[189] This right is linked to the right of every child to a standard of living, which is adequate for that child's physical, mental, spiritual, moral and social development.[190] The obligation to care for and provide for a child's upbringing and development rests on the parents first, and secondary to that on the state.[191] Barnes calls this allocation of responsibility for the child as a 'hierarchy of power', where the parent is responsible first, and failing which the state steps in as 'back-up parent'.[192]

The evolving capacities of the child, and the requirement on parents to give direction and guidance to their children in line with this continuum of growth in

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184 J Cashmore & P Parkinson 'The use and abuse of social science research evidence in children's cases' (2014) 20 *Psychology, Public Policy and Law* 239; L Steinberg 'The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' Criminal Culpability' (2013) 14 *Nature Reviews Neuroscience* 513.

185 Peleg (n 182 above) 383 & 385.

186 n 182 above, 385.

187 Peleg (n 181 above), referring to arts 18, 23, 27, 29 and 32, and 6, respectively. See Peleg (n 180 above) 523.

188 Art 6 of the CRC.

189 UNCRC *Treaty specific Guidelines regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44, paragraph 1(a) of the Convention* 30 October 1991 (2991) UN Doc CFC/C/5 para 23.

190 Arts 18 and 27 of the CRC.

191 Art 18(1) and (2) of the CRC.

192 A Barnes 'CRC's performance of the child as developing' in M Freeman (ed) 14 *Law and Childhood Studies: Current Legal Issues* (2011) 394.

exercising their rights, is recognised in the CRC.[193] Children increasingly participate in the decisions affecting their lives as they develop and mature.[194] Parents are, however, primarily responsible for the child's development. A family's privacy, then, is not 'sacrosanct', and states can intervene in family life where there is risk of neglect.[195] In other words, sub-optimum development of a child can trigger state interference in the family's private sphere.

Children's standard of living, which id adequate for their development, is placed on parents, subject to their 'abilities and financial capabilities', failing which the state steps in to 'the maximum extent of their available resources'.[196] Securing these conditions necessary for child development may require a state to take appropriate measures to assist parents and other caregivers to implement the right to life, survival and development, to the extent that it may need to provide material assistance and support programmes where needed – including with child rearing responsibilities.[197] Separation from family is only condoned, under the CRPD, following applicable law and procedures, and subject to the separation being 'necessary for the best interests of the child'. Again it bears reiterating that separation is prohibited on the basis of a child or parent's disability.[198] Furthermore, the CRPD provides that 'State Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities'.[199] Some jurisprudence has cemented the state's obligation to provide this support to parents.[200]

At a regional level, the ACRWC also recognises this right to life, survival and development, and obligates states parties to ensure 'to the maximum extent possible, the survival, protection and development of the child.'[201] The protection aspect is included in the ACRWC, but does not feature in the CRC. While child rearing responsibilities per se do not attract assistance from the state, the ACRWC requires states to 'ensure that children with disabilities have access to training, preparation for employment, and recreation opportunities' so that they can achieve 'the fullest possible social integration, individual development and his [or her] cultural and moral development'.[202] This provision is subject to available resources.

The CRPD does not include a similar formulation on the right to survival, life and development, but rather requires the right to life to be effectively enjoyed by persons

193 Art 5 of the CRC.
194 G van Bueren *The International Law on the Rights of the Child* (1998) 73.
195 van Bueren (n 194 above) 72.
196 Art 27(2) of the CRC. See, also, van Bueren (n 194 above) 317.
197 Art 18(2) of the CRC.
198 Art 23(4) of the CRPD.
199 Art 23(2) of the CRPD.
200 United Kingdom: *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2009] UKSC 5 [2009] 1 WLR 2496; *Kent County Council v A Mother* [2011] EWHC 402 (Fam) para 132.
201 Art 5 of the ACRWC.
202 Art 13(2) of the ACRWC.

with disabilities 'on an equal basis with others'.[203] The CRPD extends a positive state obligation to assist parents with disabilities in their child-rearing responsibilities.[204]

The African Disability Protocol echoes the ACRWC provision, but in a more nuanced way, in its clause on children with disabilities: 'states parties shall ensure the rights and welfare of children with disabilities by taking policy, legislative and other measures aimed at … ensuring the life, survival, protection and development of children with disabilities'.[205] All persons with disabilities are, under this treaty, to enjoy their inherent right to life and integrity.[206] Again, as with the ACRWC, the protection aspect is added to the wording of the clause. As for the parents' entitlement to support from the state, the African Disability Protocol will extend the right to 'keep their children' to parents with disabilities – and 'not to be deprived of their children on account of their disability.'[207]

Discrimination on the basis of a parent's disability or that of the child is prohibited in the CRC, CRPD and ACRWC.[208] Both disability-specific treaties emphasise the respect for the family by prohibiting discrimination in relation to family and parenthood.[209] How best to ensure that the best interests of the child is met and does not conflict with the non-discrimination injunction, has been considered by authors such as Loh and Ooi. These authors assume that social workers are unlikely to 'consciously discriminate' against a parent on the basis of their disability, but that 'subconscious bias' could occur as a result of ignorance about the 'abilities of persons with particular disabilities, they understate the competence of the parent and effectively discriminate against him or her'.[210] They are in fact describing ableism. Therefore, the assertion is that despite the explicit prohibition against discrimination, social workers, and potentially judicial decision-makers, could employ bias in their decision making about what is in the best interest of a particular child. A useful description of how the apparent conflict between the parent-child obligation and the state-parent obligation could be resolved, is to separate the two sets of obligations and start with the premise that parents – disabled or not – objectively owe the same standard of care to their children.[211] However, this may be predicated on the state's obligation to support parents with disabilities in order to meet their care obligations.

When one reads the three concepts together – development, support and non-discrimination – the state's inherent preventative role is confirmed. Of course,

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203 Art 10 of the CRPD.
204 Art 23(2) of the CRPD.
205 Art 28(4)(c) of the African Disability Protocol.
206 Art 8 of the African Disability Protocol.
207 Art 26(2)(b) of the African Disability Protocol.
208 See, also, art 2 of the CRC.
209 Arts 23(1) of the CRPD and 26(2) of the African Disability Protocol.
210 V Ooi & JW Loh 'Considering the Best Interests Test in the Context of Disabilities' (2016) 5 *Oxford University Undergrad Journal* 68.
211 Ooi & Loh (n 210 above) 75.

sometimes allegations of abuse and neglect will mean that children are separated from their parents as a result of the initiation of care proceedings. The Committee on the Rights of the Child provides guidance on these proceedings, stressing that such separation may only occur if it is in the child's best interests, as determined by competent authorities, and subject to judicial review.[212] It is not, however, a first port of call, as separation is only to be considered where 'the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child's safety'.[213] Such assistance then, is to be provided by the state.

In conclusion, the positive right to provide support to the family in order to avoid separation and the negative right to allow state interference in family life only when necessary and with due process,[214] are set out in the treaties discussed. The obligation resting on the state to provide positive measures to ensure the child's right to life, survival and development, and by corollary the child's adequate standard of living – is internally limited only by the CRC and the ACRWC, but not by the disability-specific treaties.

4.9. The child's best interests

The concept of the child's best interests has evolved and has been extended as a result of the drafters of the CRC taking on the concept – not only as a principle, but also explicitly as a rule of procedure and an independent right.[215] Various domestic systems have incorporated the concept in their laws with varying results.

4.9.1. The dimensions of the best interest of the child

The CRC's primary vehicle for this concept is article 3(1), which provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The Committee on the Rights of the Child has commented that this concept is a 'right of the child'.[216] This concept is also utilised in a variety of other articles. Relevant to this study are the best interests of the child referred to in article 9 on separation from parents; article 18 on parental

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212 Committee on the Rights of the Child *General Comment No 14. on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* (CRC/C/GC/14) para 63.

213 As above.

214 W Holness 'The implications of article 6 of the Convention on the rights of the Child for the state, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26(2) *Stell LR* 318 328.

215 Committee on the Rights of the Child (n 212 above) para 6(a), (b), and (c).

216 n 212 above, para 1, which states that article 3(1): 'gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere'.

responsibilities; and article 20 on deprivation of family environment and alternative care.[217] Article 9 employs the concept as follows

> (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, *that such separation is necessary for the best interests of the child.* Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
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> …
>
> (3) 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*. (emphasis added).

Article 18(1) identifies the concept of the best interests of the child as the 'primary concern' of parents or caregivers:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. *The best interests of the child will be their basic concern*.

Article 20(1) extends special protection to children, including in circumstances where in their 'own best interests' they cannot remain in the family environment:

> A child temporarily or permanently deprived of his or her family environment, or *in whose own best interests cannot be allowed to remain in that environment*, shall be entitled to special protection and assistance provided by the State.

To what end, then, is this concept to be applied? The Committee on the Rights of the Child stresses that its application is aimed at securing 'the holistic physical, psychological, moral and spiritual integrity of the child and [to] promote his or her human dignity'.[218]

Guidance is provided to states parties on how to utilise this concept. First, the Committee on the Rights of the Child identified the best interests concept as a substantive right, which 'creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court'.[219] Second, the concept is identified as a 'fundamental, interpretative legal principle.' Here the Committee put forward that where alternative interpretations of a legal provision are possible, 'the interpretation which most effectively serves the child's best interests' is preferred.[220] Third, the Committee extended the concept to rules of procedure:

> Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. *Assessing and determining the best interests of the child require procedural guarantees*. Furthermore, the

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217 Committee on the Rights of the Child (n 212 above) para 3.
218 n 212 above, para 5.
219 n 212 above, para 6(a).
220 n 212 above, para 6(b).

> justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases. (Emphasis added).[221]

In this explanation, the Committee identified that the best interests is a right with a procedural dimension – not only a substantive dimension. The Committee stressed that justifications of a decision (for example a judicial determination in care proceedings) has to show how the right (of the best interests of the child) has been 'explicitly' taken into account. This particular expectation by the Committee resting on states, will be discussed in more detail in the next part on domestic law. Suffice to say, at this juncture, that Children's Courts' decisions in South Africa are orders and not judgments, which means justifications are not offered for why particular decisions have been reached. However, the duty to provide reasons for decisions cannot be gainsaid.[222]

Crucially, the Committee elucidated that the objective to bring about 'a real change in attitudes leading to the full respect of children as rights holders' has implications for several actors, including 'an elaboration of all implementation measures taken by governments'; 'individual decisions made by judicial or administrative authorities or public entities through their agents that concern one or more identified children'; 'decisions made by civil society entities and the private sector, including profit and non-profit organizations, which provide services concerning or impacting on children';[223] and 'guidelines for actions undertaken by persons working with and for children, including parents and caregivers'. [224]

In the context of this study, the best interests of the child is activated in a number of instances and by several stakeholders. When considering the relevant articles where the best interests are to be assessed, it becomes clear that these actors are: the government in meeting its obligations (implementation measures) in the form of, primarily, the Departments of Social Development and Justice; the Children's Courts when making decisions about the care of children; or social services and the police when removing or making decisions about children; and, finally, the parents caring for children. The best interests of the child then, depending on the context, is a principle, or a substantive or procedural right.

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221 n 212 above, para 6(c).

222 Ooi & Loh (n 210) 78 describe this duty as simply 'a concise account of the way in which they have arrived at their decisions'.

223 Note that both public and private social welfare institutions are included under the scope of article 3(1). See the Committee on the Rights of the Child (n 212 above) para 26. Therefore, NPOs such as child welfare organisations and private social workers are also included under the scope of the article.

224 Committee on the Rights of the Child (n 212 above) para 12(a) to (d).

When focusing on the obligation resting on states parties, and therefore by implication, the Children's Courts, the Committee provides further detailed guidelines:

> (a) The obligation to ensure that the child's best interests are *appropriately integrated and consistently applied* in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;
>
> and
>
> (b) The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision. (Committee's emphasis).[225]

The integration and consistent application of the best interests of a child in court proceedings is required, as is the obligation on the judicial decision-maker to show that the child's best interests were a 'primary consideration'. The Committee on the Rights of the Child clearly identified that such a demonstration would need to describe how this concept was 'examined and assessed', and the weight attached to it in the decision reached. Later on in its comment, the Committee emphasised that: 'The courts must provide for the best interests of the child to be considered in all such situations and decisions [including in care proceedings], whether of a procedural or substantive nature, and must demonstrate that they have effectively done so.'[226]

Again, as will become clear in the next chapter on domestic law, South African Children's Courts issue orders that do not identify how the best interests were assessed and weighed. Rather, in those decisions, statutory provisions are identified as being applicable – that a particular child is in need of care and protection, for example, due to neglect. This finding is then the only information provided without any clarity on how the best interests were interpreted in a particular case.

The meaning of best interests is not explained by the Committee, but rather is described as 'complex', 'determined on a case-by-case basis', 'flexible' and 'adaptable'.[227] The vagueness of the description is somewhat tempered by the explanation that the best interests of the child 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs'.[228] For decision-makers such as judges, however, this may not be a sufficient guide. Fortunately, as explained below, the Committee does set out a few examples of elements that are needed in a best interests determination.

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225 n 212 above, para 14 (a) and (b).
226 n 212 above, para 29.
227 n 212 above, para 32.
228 As above.

The Committee notes both its positive effect and potential negative usage:

> The flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example…[229]

In the context of this study, perhaps the question posed is whether judges utilise the concept of best interest of the child to justify ableist norms on the part of the parents. Ample literature shows that the indeterminate nature of the best interests concept can lead to biased decision making, as much discretion is left to the decision-maker.[230] As to the level of priority that the best interests of the child enjoys in these determinations, the Committee advises that 'primary consideration' denotes that it may not be considered on the same level as all other considerations, and it is of a 'high priority.'[231] Linkages with other rights are clarified. For example, the best interests of the child is linked with the child's right to life, survival and development in that through the assessment and determination of a particular child's best interests, the state party is to 'ensure full respect for his or her inherent right to life, survival and development'.[232]

4.9.2. Elements of the best interests

Guidance to decision-makers on the elements contained in a best interests determination (when assessing and determining a child's best interests) is provided by the Committee – with a disclaimer that the list is both non-exhaustive and open-ended. These elements are to include: '(a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection and safety of the child; (e) situation of vulnerability; (f) the child's right to health; and (g) the child's right to education.'[233] Three elements bear discussion below – (c), (d) and (e).

Preservation of the family environment and maintaining relations

With regard to the element (c) above, the Committee stresses that separation from parents is to happen: First, as a 'last resort measure', for example when the child 'is in danger of experiencing imminent harm or when otherwise necessary'.[234] Second, 'less intrusive measures' to protect the child should have been considered before separation is decided upon as the course of action.[235] Third, the state party should

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229 n 212 above, para 34.

230 RH Mnookin 'Child Custody Adjudication: Judicial functions in the face of indeterminancy' (1976) 30 *Law and Contemporary Problems* 226 229; K Bartlett 'Re-expressing parenthood' in M Freeman (ed) *Family, State & Law* (1999) 173; MA Fineman *The illusion of equality: The rhetoric and reality of divorce reform* (1991) 149.

231 Committee on the Rights of the Child (n 212 above) paras 37 and 39.

232 n 212 above, para 42.

233 n 212 above, paras 52-79.

234 n 212 above, para 61.

235 As above.

'provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child', before the option of separation is chosen.[236] Two statuses are highlighted as not warranting separation: socio-economic status (poverty) and disability of the child or the parent.[237] Both of these are identified as reasons to activate appropriate support to the family. In relation to the disability status of the child or parents, the Committee emphatically indicates that '[s]eparation may be considered only in cases where the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child's safety'.[238] A duty is therefore placed on the state to extend effective support to the family in order to preserve the family unit.

The Committee envisages that an assessment of a child and family's situation is to be executed by 'a multi-disciplinary team of well-trained professionals with appropriate judicial involvement', and expects the state to guarantee this assessment and to 'ensure that no other option can fulfil the child's best interests' – other than separation.[239] As will be seen in the discussion on domestic law, in South Africa the assessment of a child and family's situation is usually done by a single social worker and not a multi-disciplinary team.

Care, protection and safety of the child

The Committee's explanation in relation to the element (d) care, protection and safety of the child, emphasises its positive and negative dimensions, not in just avoiding harm, but also care for the child's well-being and development.[240] A child's well-being is defined broadly to include his or her 'basic material, physical, educational and emotional needs' and 'needs for affecting and safety'.[241] Well-being is the measurable result or 'outcome' hoped for – not a condition of the decision reached.[242] Of course, the Committee highlights that the assessment of the child's best interests is to include a consideration of his or her safety in order to give effect to the child's rights under article 19 to protection against all forms of physical or mental violence, injury or abuse and other aspects.[243]

A long-term vision is required: the Committee directs that states are to assess the safety and integrity of the specific child at the time of the determination, and, looking into the future, is to apply 'the precautionary principle [which] also requires assessing

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236 As above.
237 Committee on the Rights of the Child (n 211 above) paras 62 and 63.
238 n 212 above, para 63.
239 n 212 above, para 64.
240 n 212 above, para 71.
241 As above.
242 E Sutherland 'Article 3 of the CRD: Challenges' in E Sutherland & L Barnes McFarlane (eds) *Implementing article 3 of the United Nations Convention on the Rights of the Child* (2016) 23.
243 n 211 above, para 73.

the possibility of future risk and harm and other consequences of the decision for the child's safety'.[244]

Situation of vulnerability

The element (e), vulnerability of the child, extends also to a status such as the disability of the child. Here states are guided by the Committee as to the purpose of this determination for a child in a 'vulnerable situation', which should not only give effect to the rights set out in the CRC, but also to relevant human rights norms in treaties such as the CRPD.[245] All of these elements are to be balanced and the determination is to be done with an analytical view of the short- and long-term context of the child, including 'possible scenarios of the child's development' (identified as physical, emotional, educational and other needs).[246] Decisions are to 'assess continuity and stability of the child's present and future situation.'[247]

4.9.3. Procedural safeguards

The Committee also provides guidance on what procedural safeguards are necessary to ensure the child's best interests in determinations. The following safeguards are enumerated: (a) the right of the child to express his or her own views; (b) establishment of facts; (c) time perception (of the child); (d) qualified professionals (to conduct the assessment); (e) legal representation (of the child); (f) legal reasoning (that is justified); (g) mechanisms to review or revise decisions; and (h) child-rights impact assessment (CRIA) (relevant for policy, legislative and administrative decisions, rarely for judicial decisions).[248] Of these safeguards, (b), (d), (e), (f) and (g) are particularly pertinent to this study.

Establishment of facts

The safeguard requirement of facts to be established ((b) above) is described by the Committee as follows

> Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment. This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, witnesses to certain incidents, among others. Information and data gathered must be verified and analysed prior to being used in the child's or children's best-interests assessment.[249]

Verification and analysis of the data obtained about the child and family's situation is required before the information is applied in a best interests assessment. Arguably, this places a duty on the social worker who completes a report for the court, which includes a child's best interests assessment, to verify and analyse the information

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244 As above.
245 n 212 above, para 75.
246 Committee on the Rights of the Child (n 212 above) para 84.
247 As above.
248 n 212 above, paras 88 to 99.
249 n 212 above, para 92(b).

obtained from the various sources (interviews and any professional reports, e.g. psychosocial or educational assessments). An assessment of what is in the child's best interests is *also* conducted by the judicial officer in the court proceedings. Again, here the judicial officer would then have to be certain that the information relied upon to make the assessment and final determination has been verified.

Qualified professionals

As for the qualification of professionals who conduct the assessment (safeguard (d) above), the Committee recognises the diversity of children and differing 'characteristics and needs',[250] which by implication includes children with disabilities and those living in poverty – as well as those parented by someone with a disability. The safeguard required to be implemented is the utilisation of professionals in formal assessment processes, with 'expertise in matters related to child and adolescent development'.[251] Not only does the comment require the professionals to be appropriately qualified, but also to consider information received in the course of an assessment 'objectively'.[252] The Committee again stresses the need for a multi-disciplinary team to be involved in assessments of a child's best interests.[253]

The Committee also articulates that a variety of options should be mooted as possible solutions for a particular child, and that such an assessment of the potential consequences of the various options 'must be based on general knowledge (i.e. in the areas of law, sociology, education, social work, psychology, health, etc.) of the likely consequences of each possible solution for the child, given his or her individual characteristics and past experience.'[254] The Committee thus alludes to the multi-disciplinary nature of the expertise of the relevant stakeholders involved in the assessment, and then of course the interdisciplinary knowledge of the decision-makers.

Legal representation of the child

The third relevant safeguard is that of legal representation of the child (safeguard (e) above), which the Committee expects states to provide when a child's best interests are being assessed.[255]

Legal reasoning

The fourth safeguard, requires decision-makers to provide justification for their legal reasoning (safeguard (f) above). Here the Committee identifies that such a decision must be 'motivated, justified and explained' and gives further guidelines as to what the

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250 n 212 above, para 94.
251 As above.
252 As above.
253 As above.
254 n 212 above, para 95.
255 n 212 above, para 96.

motivation should include.[256] The elements of the best interest of the child is situation-specific and child-specific, but general elements can be discerned. A non-exhaustive list of factors is used in some jurisdictions, like South Africa.[257] Some authors propose a process of deliberative decision making, in which all stakeholders participate in the process of determining a child's best interests.[258] Such an approach values the input of all actors – not only the parents and child's views, but also that of professionals. However, the risk of conceding to the expertise of the professionals is warned against, except where opportunities exist for 'challenging and for agreeing such knowledge as is advanced as relevant'.[259] 'Deliberative' refers to the procedure in terms of which 'rational consideration and discussion of the views of all parties' affected by the decision is engaged.[260]

Archard and Skivenes argue that in this process of deliberation, an acute awareness of the difference between an 'objective fact' and 'substantive and contestable assumption' is needed, when deliberating what is in the child's best interest. They further articulate that only such values as are agreeable to 'all reasonable parties' are to be relied upon, and, further, that where substantive assumptions are relied on, a 'clear, transparent and appropriate' justification is required for such reliance.[261]

As discussed in Chapter 2, 'rationality' is contentious when it comes to persons with intellectual and psychosocial disability. Parents with intellectual disabilities should also participate on an equal footing with other participants in the process of determining what is in the best interests of their child.

Mechanisms to review or revise decisions

The fifth relevant safeguard is that of the provision of mechanisms for review or revision of decisions (safeguard (g) above). These mechanisms are to be identified to

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256 Committee on the Rights of the Child (n 212 above) para 97, directs that the motivation should 'state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration ...'

257 Sec 7 of the Children's Act 38 of 2005.

258 J Rawls *Political Liberalism* (1996) (revised ed); J Elster (ed) *Deliberative Democracy* (1998) cited in D Archard & M Skivenes 'Deciding best interests: General principles and the cases of Norway and the UK' (2010) 5(4) *Journal of Children's Services* 43 46 and 48.

259 Archard & Skivenes (n 258 above) 52.

260 Archard & Skivenes (n 258 above) 46.

261 n 258 above, 52.

the child in the proceedings in particular circumstances, such as absence of procedural safeguards, incorrect facts being relied on, inadequate best interests assessment, improper weighting of competing considerations – and the review body is to be tasked to also look into these particular aspects.[262]

4.10. Conclusion

The General Assembly of the United Nations had tasked the drafting group for the CRPD to create a disability-specific treaty, reformulating rights therein, but not to create new rights that are not already existing in international law.[263] Not all scholars share this view, with some arguing that the fuller recognition of the lived realities of persons with disabilities under the Convention gives rise to a more 'holistic' and less 'fragmented' perspective of human rights,[264] while others argue that some rights, such as the right to accessibility, creates additional 'entitlement[s]' for persons with disabilities, including placing obligations on private actors.[265] Much like recognition of the lived realities of women, and LGBTIQ groups assisted feminism to gain traction in international law, the recognition of the lived realities of persons with disabilities finally informed the drafting of an instrument that spoke to dismantling systemic barriers to equal recognition and participation in all aspects of life. Formal equality would not be sufficient. Instead, substantive equality requires that the rights extended to persons with disabilities incorporate both negative and positive dimensions.[266] The state, and other stakeholders in the lives of persons with disabilities, are not only to promote equality and not to discriminate against them, but are also to take positive steps to ensure that particular rights bear fruit. This duty has been said to extend, on the part of the state, primarily, to a minimum level of support to persons with disabilities, in line with their right to dignity.[267] The means with which to attain such rights fulfilment may be in the form of reasonable accommodation, procedural accommodation or support to persons with disabilities in specific contexts. Broderick describes these as 'a means to an end' – the end being the right in question.[268]

The African Disability Protocol has the potential to bring disability-specific issues to the attention of states parties, and the African Commission and African Court on Human and Peoples Rights both have jurisdiction to deal with complaints emanating

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262 Committee on the Rights of the Child (n 212 above) para 98.

263 R Kayess & P French 'Out of darkness into light: Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

264 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Law Review* 494 507; F Mégret 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12 *The International Journal of Human Rights* 261 263.

265 A Broderick 'Of rights and obligations: The birth of accessibility' (2019) *The International Journal of Human Rights* <https://doi.org/10.1080/13642987.2019.1634556>

266 S Fredman *Human Rights Transformed: Positive rights and positive duties* (2008).

267 C O'Cinneide 'Extracting protection for persons with disabilities from human rights frameworks: Established limits and new possibilities' in OM Arnardóttir & G Quinn *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (2009) 164.

268 Broderick (n 265 above) 15.

from the Protocol.[269] States parties will therefore need to report to the Commission on their progress in implementing the Protocol. Whilst a specific TMB for this Protocol has not been appointed, it is hoped that the Commission will ensure that its membership reflects representation by persons with disabilities.

The Committee on the Rights of the Child issued a nuanced interpretation of the best interests of the child principle and provided clear guidelines to states parties on how this principle and right is to be interpreted in determinations for individual children – including those at risk of neglect or those that have suffered neglect. Other TMBs have also issued guidelines on access to justice and equal legal recognition before the law. None of these treaty provisions conflict with each other. The entitlement to support by the state for families is both a right of the child and a right of the parents.

The analysis of the various rights in this chapter, has shown that for parents with intellectual disabilities and in particular mothers with intellectual disabilities and their families (including children), extending rights on paper is meaningless without the *means* to bring these to life where needed. Children at risk of neglect or suffering neglect, just like for parents without disabilities, are entitled to have their best interests considered in proceedings. Parents with intellectual disabilities owe the same duty of care to their children as other parents. The main difference between these parents and non-disabled peers, is that the state owes peculiar duties to them to enable them to effectively rear their children. Also, where factors such as poverty exist, measures to address those external measures are required, as for those without disabilities.

Where does this leave stakeholders in the child care proceedings initiated to protect children from neglect, where a parent has an intellectual disability? First, the rights outlined in this chapter make it clear that all discriminatory practices must be abolished – including stereotypes about the parenting capacity of persons with intellectual disabilities. Stakeholders using such stereotypes in the fulfilment of their duties, including statutory duties, are therefore liable to claims of unfair discrimination. Second, families may require support in attending to child care responsibilities and it is incumbent on the state to provide such support where needed, preferably *before* court proceedings are initiated. Ultimately, children's entitlement to services to promote their right to life, survival and development, may entail provision of support to families to ensure children's optimal development. Third, equal recognition before the law and legal capacity extends, for these parents, the right to access relevant information (including easy-to-read court documents) to make decisions affecting them and their families and the provision of dedicated support, where needed, to make legal decisions. Stakeholders are therefore to ensure that such support is provided by whatever means the common law, legislation or other administrative measures allow, and where there are gaps in existing legislative and other schemes, they should attend to this without delay. Fourth, in court proceedings, stakeholders are to ensure that

[269] Art 34 of the African Disability Protocol.

procedural accommodation is embedded in the procedures of the court, relative to the individual needs of the specific participant before the court. Where procedures have gaps in accommodative measures, this must be remedied – whether in court rules or legislation. Fifth, the court's determination of the best interests of the child is a deliberative process which requires the full participation of the parents. Also, the legal reasoning is to be communicated appropriately in the finding, order or judgment. Sixth, access to justice for these parents is unlikely to be served without access to legal representation due to their perceived and lived vulnerabilities. Means tested legal representation should therefore be offered at state expense.

The next chapter considers whether the South African state is meeting its international law obligations towards these families in its domestic law, policies and other measures.

CHAPTER FIVE:

DOMESTIC LAW

5.1. Introduction

This chapter situates the position of families where a child has a parent with an intellectual disability in the domestic context – analysing the domestication of the international law obligations resting on the South African state in its constitutional, legislative and policy schemes, as well as jurisprudence. The chapter also considers the implementation challenges of legal obligations in South African Children's Courts, and identifies law reform that will be necessary to ensure South Africa meets its obligations towards children and parents – particularly mothers – with intellectual disabilities. The main focus is on the operation of the Children's Courts, and reference is made to procedures in other courts where relevant.

International law has a special status under the Constitution of the Republic of South Africa, 1996 (the Constitution). Interpretation of the Bill of Rights triggers mandatory consideration of international law.[1] Furthermore, the interpretation of legislation is subjected to consistency with international law over interpretation that is inconsistent thereto.[2] Binding international law norms have a higher weight attached, than the guidance courts can gauge from non-binding norms.[3] The international law obligations resting on the state and its agents paint a picture of the need to provide requisite support to families – particularly those identified as vulnerable or at risk of harm. The rights of children, under international law, are of critical importance when adjudicating on their welfare. However, children's rights do not summarily trump those of adults, especially parents. Instead, a delicate balancing is required to determine the best interests of a particular child, in a particular situation. The best interests of the child can be used as a principle, standard or right to ensure that children's interests are met. Crucially, the child's right to life, survival and development is to be promoted throughout proceedings and decisions that affect them, and responsibility for promoting this right is shared by the parent (primarily) and the state (secondarily).

The major shift brought about by the introduction of one particular treaty, the CRPD, fundamentally questions and prohibits arbitrary removal of children from families where a parent has a disability, and obligates states to provide support to these families in order to thrive – particularly in relation to assistance needed by

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1 Sec 39(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 Sec 233 of the Constitution.

3 H Strydom & K Hopkins 'International Law' in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed, OS, December 2005) Chapter 30, 30-11 to 30-14. See, also, *S v Makwanyane* 1995 (3) SA 391 (CC) paras 34, 35 and 39 (Chaskalson P); *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) para 26.

parents to effectively and adequately raise their children. Guidance from treaty monitoring bodies (TMBs) such as the Committee on the Rights of Persons with Disabilities, the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child, makes it exceedingly clear that notions of legal capacity, mental capacity and capacity to parent are extended to all persons, including those with disabilities, on an equal basis. However, different states parties have interpreted the provisions on legal capacity in diverse ways, and law reform on how to effectively change legal capacity provisions in domestic laws is an ongoing process.

International law requires that procedural accommodations and reasonable accommodation, where necessary, are embedded in court and other proceedings, in order to ensure substantive equality for persons with disabilities in court proceedings. States parties are therefore tasked with ensuring that court proceedings, and the rules governing them, provide participants with disabilities with an equal opportunity and relevant adjustments to allow participation on an equal basis with others.

The constitutional rights that mostly mirror the international human rights will be discussed first. Second, the relevant provisions of enabling legislation, primarily the Children's Act 38 of 2005 (the Children's Act), are discussed, including its regulations and other relevant court rules. Third, the policy framework on procedural justice, in particular, is discussed. The chapter then critically analyses whether the legislative provisions meet the international law obligations on the state to promote the rights of these families.

5.2. Constitutional matrix

5.2.1. Introduction

The development of family law in South Africa preceded the entrenched Constitution. Common law principles developed over time and several of those had been codified in the Child Care Act 74 of 1983 and after democracy in the Children's Act. Increasingly, children were granted the status of rights holders, bearing these rights potentially against those of their parents, and demanding promotion of these rights from the state.[4] Children's rights and the protection of the family unit, including in court proceedings such as the Children's Courts, defy artificial distinctions such as those created by private and public law. The Constitution has embedded child-specific rights in section 28, and extended several other rights to 'everyone' – which includes children.

[4] T Boezaart 'Child law, the child and South African private law' in T Boezaart (ed) *Child Law in South Africa* (2009) 1 3.

The Constitution is the bedrock on which the constitutional democracy is founded. The three pillars supporting the constitutional project are equality, dignity and freedom.[5] These three values are crucial to the interpretation of the rights in the Constitution. Furthermore, there are other values that have been read into the Constitution, so to speak, such as *ubuntu.*[6] This value relates to the personhood and recognition of the humaneness of all persons, and, as such, a duty of persons to view others with respect and dignity. In the family context it refers to a particular philosophy of care for children and for categories or groups of people such as persons with disabilities.[7] The rights set out in chapter 2, the Bill of Rights, have been accepted through our jurisprudence[8] as 'interdependent, indivisible and interrelated.'[9]

The next section will discuss particular rights as they have been set out in the Constitution and interpreted by our courts. It must be remembered, however, that transformation of society into one that upholds substantive equality for all persons, remains the job of the state, including through parliament and the executive, by implementing obligations created by the Constitution in policies, laws, programmes and budgetary allocations.[10] While interpretation of the Constitution, as well as enforcement of human rights obligations occasioned by the state, is the job of the courts, the judiciary cannot be held responsible for the large-scale systemic change needed at a societal level.[11]

5.2.2. The right to equality

The right to equality is the diversity-affirming door that heralded a new dawn in the post-apartheid era. The indivisibility and interrelatedness of the rights to equality and justice is indisputable. The right to equality (including equality before the law) and prohibition of unfair discrimination on the basis of disability, are guaranteed in section 9 of the Constitution. Unfair discrimination on the basis of disability by state and private persons is prohibited under section 9(3) and (4) of the Constitution, respectively. "Disability" is an explicitly listed ground.

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5 Secs 1(a) and (7(1) of the Constitution.

6 C Himonga et al 'Reflections on judicial views of ubuntu' (2013) *Potchefstroom Electronic Law Journal* 67. See, for example, *Makwanyane* (n 3 above); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC).

7 See SA Ngubane-Mokiwa 'Ubuntu considered in light of exclusion of people with disabilities' (2018) 7 *African Journal of Disability* 460; LO Oyaro 'Rearticulating ubuntu as a viable framework for the realisation of legal capacity in sub-Saharan Africa' (2018) 6 *African Disability Rights Yearbook* 82; and M Berghs 'Practices and discourses of ubuntu: Implications for an African model of disability?' (2017) 6 *African Journal of Disability* a292.

8 *Port Elizabeth Municipality* (n 6 above) para 37; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) para 55; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA (CC) para 36.

9 Vienna Declaration and Program of Action (1993) para 63, World Conference on Human Rights.

10 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 454.

11 KE Klare 'Legal culture and transformative constitution' (1998) 14 *South African Journal on Human Rights* 147.

Enabling legislation for the right to equality is found in the Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 (the Equality Act) and in the workplace context, in the Employment Equity Act 55 of 1998.[12] The Equality Act prohibits unfair discrimination on the basis of disability explicitly, and identifies the failure to 'eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons'[13] – as unfair discrimination. The Equality Courts, so designated under the Act, may issue orders directing 'the reasonable accommodation of a group or class of persons by the respondent'.[14]

The Equality Act tasks the state with the duty to promote equality through the development of 'codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation'.[15] Limited guidelines have been developed to attend to procedural accommodations in the justice system for persons with disabilities. Notably only the recent Regulations relating to the Sexual Offences Courts indicate the need for 'reasonable accommodation of the needs of complainants with disabilities when they arrive at court' to be provided.[16] No litigation on unaccommodating court procedures has yet been lodged in South Africa. Courts, in litigation on lack of reasonable accommodation[17] in the workplace[18] and schools,[19] as well as the requirement for buildings to be accessible to persons with disabilities (primarily relating to mobility impairments)[20] – have castigated both private and public actors for their failures to heed these obligations.[21]

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12 Sec 9(4) of the Constitution mandated national legislation to prevent or prohibit unfair discrimination.

13 Sec 9(c) of the Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 (the Equality Act).

14 Sec 21(2)(i) of the Equality Act.

15 Sec 25(1)(c)(iii) of the Equality Act.

16 Reg 15(10)(b) of the Regulations relating to the Sexual Offences Courts R108 published in *Government Gazette* No 43000 of 7 February 2020.

17 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 74.

18 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1239 (LC) (reasonable accommodation of an employee with a physical impairment).

19 *Oortman v St Thomas Aquinas Private School & Bernard Langton* (EqC) unreported case number 1/2010 Witbank (reasonable accommodation of a child with a physical impairment).

20 *Muller v Department of Justice and Department of Public Works* (EqC) unreported case number 01/2003 (physically inaccessible court room); *WH Bosch v Minister of Safety and Security* (EqC) unreported case number 25/2005 Port Elizabeth (physical inaccessible police station); *Haskin v Khan* (EqC) unreported case number 03/19 (Mitchell's Plain) (inaccessible shop to wheelchair and adapted pram users with disabilities).

21 W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907; W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510.

The lack of provision of reasonable accommodation, according to workplace law and policy,[22] and the broader policy for persons with disabilities,[23] constitutes unfair discrimination in the same vein as set out in the Equality Act and the CRPD. There is therefore coherence on a legislative and policy level among different sectors (mainly in relation to schooling and labour relations) that reasonable accommodation is a duty borne by both private and public stakeholders. Procedural accommodation, however, is different from reasonable accommodation – as discussed in chapter 4. The South African courts, in the field of the law of evidence, have grappled with the meaning of accommodations to a limited extent, as is explained below under access to justice.

An aspect umbilically tied to the guarantee of equality before the law in South Africa, guaranteed by section 9(1) of the Constitution, that 'everyone is equal before the law and has the right to equal protection and benefit of the law' is legal capacity. In South Africa, no person is summarily denied legal capacity. Cornell argues that sections 9(1) and (2) of the Constitution should be interpreted in line with Sen's Capability Approach.[24] This, she says, would give not only 'philosophical but constitutional weight'[25] to section 9(2)'s injunction that everyone is entitled to 'full and equal enjoyment of all rights and freedoms'. She further elaborates that such a reading also requires that both equal protection *and* equal benefit are constituents of capability freedom. Capability freedom acknowledges that persons are entitled to have their fundamental human functioning protected – functioning such as accessing food and work, and the opportunity to concretely turn capabilities into actual functionings.[26] For a person with an intellectual disability then, guaranteeing the right to equal participation in courts (equality and access to justice) is insufficient if the legal system is inaccessible procedurally, and when substantive discriminatory assumptions are made about their capacity to participate in family life and in court proceedings.

Substantive equality is supported by the jurisprudence of the Constitutional Court. Substantive equality impugns the 'impact or results of social and legal classifications', which is often systemic harm caused by such differentiations.[27] This notion of equality requires the context of the harm occasioned to be evaluated – including the effect on the lived reality of peoples affected.[28] Such an approach utilises values such as 'equal

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22 Secs 1 and 15(2)(c) of the Employment Equity Act and clause 5.1. of the Code of Good Practice on the Employment of Persons with Disabilities published in GN 1085 in *Government Gazette* No 39383 of 9 November 2015.

23 Department of Social Development *White Paper on the Rights of Persons with Disabilitie*s published in GN 230 of *Government Gazette* No. 39792 of 9 March 2016*,* 5, defining disability discrimination as including denial of reasonable accommodation.

24 D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' (2008) 1 *Acta Juridica* 18 39, citing A Sen *Development as Freedom* (2000).

25 Cornell (n 24 above) 39.

26 n 24 above, 39.

27 Albertyn (n 10 above) 456.

28 Albertyn (n 10 above) 457.

dignity, equal capabilities, the eradication of disadvantage and subordination, or equal substantive opportunities'.[29]

Albertyn and Fredman state that disadvantage and dignity have dominated explanations of substantive equality, but that 'participation as an element of equality' has not been favoured to the same extent.[30] The dignity-based concept of substantive equality is therefore 'inclusive' of previously excluded groups – but not necessarily transformative.[31] A reading of substantive equality as participation is crucial for groups outside the mainstream (LGBTIQ for example, or persons with disabilities), who seek to meaningfully participate in decisions affecting them in order to express their 'ideas, experiences and moral approaches'.[32] Social, economic and political exclusion based on group membership speaks to dehumanising othering, in contradistinction with participation and its partner, inclusion, as elements of equality.[33]

Mechanical means of ensuring full and meaningful participation on its own, will not suffice. More is needed. Albertyn's proposition is to reconstruct the liberal egalitarian approach with its predominant perspective of equality as equating to 'equal concern and respect', and as securing minimum basic needs to all persons, state sufficiency, and inclusion of outgroups, which can mitigate but not dismantle the basic premises of inequality.[34] Instead, Albertyn pushes for changing the underlying socio-economic and civil-political conditions under which persons continue to suffer inequality, including through systemic barriers that frustrate the achievement of equality and continue to 'create and reproduce' inequality.[35] Oppression such as ableism (and e.g. racism, patriarchy) would be deconstructed through such a process of ensuring 'equality of condition' to all. The idea of equality of condition is borrowed from other authors[36] and is expanded into our local context for a more redistributive, radical approach, which can meet transformative ends. The means with which to achieve this, Albertyn asserts, is through establishment of 'new, non-hierarchical normative frameworks of pluralism, participation and inclusion', which will require identification of 'the dominant norms, institutions and processes at play in any particular case, to avoid the use of dominant norms as comparators for assessing equality needs, and to identify remedies that aim to disrupt and dismantle these'.[37]

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29 Albertyn (n 10 above) 457.

30 C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Act Juridica* 434.

31 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

32 Albertyn & Fredman (n 30 above) 434, referring to *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 132.

33 Albertyn & Fredman (n 30 above) 439.

34 C Albertyn '(In)equality and the South African Constitution' (2019) 36 *Development Southern Africa* 758.

35 n 10 above, 462.

36 Notably, J Baker et al *Equality: From Theory to Action* 2 ed (2009) 33.

37 n 10 above, 464.

In the context of ableism in statutory child care proceedings, simply integrating court users into the justice system is insufficient, and rather measures to ensure full and meaningful participation are required, which will entail upending ableist notions of mental capacity, autonomy, ability and self-determination within court processes and in the application of socio-legal constructs like the ideal development of children and adequate parental care. A deep analysis of context is needed when utilising transformative substantive equality incorporating an examination of 'complex, structural, intersectional and relational inequalities' at micro, intermediate and macro levels.[38] Accordingly, one would need to consider, at the micro level, the experiences of harm occasioned by an individual with a disability or based on group membership. At intermediate level, one would consider the inequalities and exclusions occasioned at the family and community level (or other institutions such as the workplace or courts). At the macro level, one would consider the structurally occasioned lived reality inequalities such as material disadvantage suffered by persons with disabilities in general, stereotypical ableist and patriarchal assumptions about parenting with a disability and the few supports extended to these parents to exercise family rights; and unequal political participation. The proposal then is that such complex and intersectional considerations would dismantle exclusionary and continued inequality experienced in the courts. As explained later, without not only disability-sensitive training but also knowledge of the transformative epistemologies for the interpretation of apparently neutral legal norms and principles, judges (and magistrates) would struggle to apply this approach to equality.

Freedom is one of the principles that Albertyn advances as being useful in constructing a transformative substantive equality analysis. As such, stressing the vulnerability or status disadvantage experienced by persons (including those with disabilities) should not be the preoccupation – but rather 'whether and how people exercise agency, however constrained, while simultaneously aiming to deepen and enhance their substantive freedom.'[39] As a result, she argues, addressing 'inequality requires a commitment to overcoming structural disadvantage in ways that enhance freedom and do not lock people into systems of protection, patronage and dependence'.[40]

A case that exemplifies status subordination through ableist assumptions, is *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa.*[41] The state did not extend funding to children with severe and profound intellectual disabilities for their education on an equal basis with children without disabilities, based on notions of ineducability and lower priority articulated in practice and in its policy the Screening, Identification, Assessment and Support (SIAS)

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38 Albertyn (n 10 above) 465, referring in part to the multi-level descriptions of C Sheppard *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010) 66.

39 Albertyn (n 10 above) 468.

40 Albertyn (n 10 above) 468.

41 (2011) 5 SA 87 (WCC).

Strategy. These children were not considered able to benefit from mainstream special schooling and were therefore relegated to care centres through an insufficient subsidy from the Department of Health. The court grappled with the injustice in the case where state subsidies and other provision for inclusive education was inadequate or sorely lacking for these children segregated into care institutions under the auspices of NGOs.[42] However, the court's engagement with the unfair discrimination in this case, based on disability, has been said to lack the necessary 'systematic link' between the Constitution's encapsulation of substantive equality under section 9 and the socio-economic right, basic education, in section 29(1).[43] The court rejected the justifiability of the state's policy, finding it was irrational because: the state could not provide an explanation for why a lesser budgetary allocation was provided to the children in care centres and not shared equally by all children in schools; resource scarcity does not excuse exclusion of this vulnerable category of children from access to basic education; and no argument illustrating the resource shortfall that would be occasioned by equal funding being extended to these children, was offered by the state.[44]

Ngwena and Pretorius argue that the first two factors are relevant, but ascribe these to formal equality as 'equal sharing of the burden of resource scarcity'.[45] Instead, substantive equality requires the recognition of positive measures required to address the 'unique' needs of these children – particularly in light of their peculiar 'disadvantage and vulnerability'.[46] Ngwena and Pretorius[47] correctly identify that the court subjected the right of basic education to progressive realisation and availability of resources, in contradistinction with the Constitutional Court's finding of the immediately realisable nature of this right.[48] Instead, they argue that the court should have utilised a 'substantive equality-informed reasonableness' and not a 'neutral cost-benefit rationality' to determine the scope of state obligations in relation to basic education.[49] Ngwena and Pretorius put forward the notion of inclusive citizenship for persons with disabilities, sustained through achieving substantive equality.[50] Such citizenship does not exclude persons due to categories of differentiation, but celebrates diversity and tenders equal recognition and respect, as well as dignity, to all persons, and which may require positive steps to attain enablement, not disablement.

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42 *Western Cape Forum for Intellectual Disability* (n 41 above) paras 3 and 19.

43 C Ngwena & L Pretorius 'Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *South African Journal on Human Rights* 85.

44 *Western Cape Forum for Intellectual Disability* (n above) paras 29-30 39.

45 Ngwena & Pretorius (n 43 above) 95.

46 Ngwena & Pretorius (n 43 above) 95.

47 Ngwena & Pretorius (n 43 above) 95.

48 *Governing Body of the Juma Musjid Primary School v Essay NO* (*Centre for Child Law as* amici curiae) 2011 8 BCLR 761 (CC) para 37.

49 Ngwena & Pretorius (n 43 above) 103.

50 Ngwena & Pretorius (n 43 above) 83; See, also, M Minow *Making All the Difference* (1990) 173.

5.2.3. Dignity and *ubuntu*

The concept of dignity is mentioned eight times in the Constitution.[51] Most notable is the right to human dignity: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'[52] The Constitutional Court's jurisprudence until 2005, according to Woolman,[53] articulated dignity as seeing an 'individual as an end-in-herself';[54] of equal concern and equal respect;[55] as 'self-actualisation';[56] as 'self-governance'[57] and/or in taking 'collective responsibility for the material conditions for agency.'[58]

Dignity and access to justice is mutually interrelated. Access to justice is accepted as enabling, *inter alia*, the promotion of 'empowerment [and] securing access to equal dignity'.[59] At an international level, the CRPD gives explicit recognition of the value of dignity, stating its first general principle: 'Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.'[60] The CRPD further imposes an obligation on states to 'foster respect for the rights and dignity of persons with disabilities'.[61] As will become clearer below, when the right of access to justice is read with the general principle of dignity and the awareness-raising obligation on states, the principle of dignity is operationalised for persons with disabilities accessing the courts. The indignities suffered by persons with disabilities when attempting to access inaccessible justice systems, coupled with the discrimination and deprivation faced in everyday life and those barriers encountered in pursuance of their goal for equal treatment, can preclude meaningful participation in courts and violate a number of related rights.[62]

Basser identifies that human dignity, *inter alia*, encapsulates the 'voice' given to persons in any aspect of their lives, with 'the ability wherever possible to exercise

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51 Secs 1, 7, 10, 26, 39, 165, 181 and 196 of the Constitution.

52 Sec 10 of the Constitution.

53 S Woolman 'Chapter 36: Dignity' in S Woolman et al (eds) *Constitutional Law of South Africa* (2007) OS 12-05, ch 36-1.

54 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

55 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

56 *Ferreira v Levin* 1996 (1) SA 984 (CC) para 49.

57 *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17; *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

58 *Port Elizabeth Municipality v Various Occupiers* (n 6 above) para 18; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 74.

59 J Beqiraj et al *Access to justice for persons with disabilities: From international principles to practice* International Bar Association, October 2017, 15 <https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf> (accessed 1 February 2020).

60 Art 3 of the CRPD.

61 Art 8 of the CRPD.

62 L Barklay *Disability with dignity: justice, human rights and equal status: Routledge research in applied ethics* (2019)128.

choice'.[63] Both 'status and recognition' is granted to persons when dignity is protected by the law.[64] Dignity also provides the avenue to analyse the implementation of policies in relation to particular groups – including persons with disabilities.[65] Recognition of the inherent dignity of persons also entitles them to stake a claim on the resources at the disposal of society (and in particular the state), and the ability to action such claims is limited by the fact that other persons also have an entitlement to 'equal concern and respect'.[66] Dignity has 'transformative potential', explains Basser,[67] which starts with status conferral, but continues also with substantive application of the law as a mechanism to assert and realise the rights of persons with disabilities.[68]

Dignity plays an important role in our conception of the interdependence of persons. Even where persons with disabilities live in relationships of dependence, such dependence cannot impinge on their inherent dignity. Basser states forcefully that 'the ability of a person to reason, think rationally or be intellectually "competent" has no bearing on the moral imperative of treating people with dignity and respect'.[69] Furthermore, dignified treatment of persons with disabilities includes ensuring the person's moral worth is protected but is not 'predicated … on some idea about the person's disability', yet also understands the needs of the person with the disability occasioned by the disability itself.[70]

In South Africa, dignity has informed our jurisprudence as a value or a right.[71] In *Pillay,* Chief Justice Pius Langa, as he then was, articulated that the value of dignity (as well as equality and freedom) give rise to the need for 'positive' conduct to 'accommodate diversity' – including disability. Such steps, he stated, may require either an exemption from a rule or changes in 'rules or practices'.[72] The Equality Court in *Bosch v Minister of Safety & Security,*[73] in its finding of unfair discrimination, emphasised the violation of the right to dignity where persons with mobility impairments were denied physical access to the first floor of a police station:

> There is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or the potential violation of the disabled person's right to equality and maintenance of his dignity that was tendered or averred by the Respondent. The Respondent was unyielding and uncompromising, that disabled people just have to be assisted and receive their receipts on the ground floor without a justification or a time limit when the opportunity to be inclusive of them was there, at renovation stage, they did not make organised or rational plans for inclusion.

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63 LA Basser 'Human dignity' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 27.
64 Basser (n 63 above) 18.
65 Basser (n 63 above) 18.
66 Basser (n 63 above) 21.
67 S Cowen 'Can "dignity" guide South Africa's equality jurisprudence? (2001) 17 *South African Journal of Human Rights* 34.
68 n 63 above, 23.
69 Basser (n 63 above) 26.
70 Basser (n 63 above)) 36.
71 *Dawood* (n 54 above) para 35.
72 *Pillay* (n 16 above) para 75.
73 *Bosch* (n 23 above).

The Interim Constitution mentioned *ubuntu* in its post-amble.[74] While it is not contained explicitly in the 1996 Constitution, Kamga maintains that its teleological interpretation in jurisprudence has incorporated it for future constitutional application.[75] *Ubuntu* has been used as a value to articulate the humaneness and responsibility of all persons.[76] The Nguni saying: *Umuntu ngumuntu ngabantu*, meaning that 'A person is a person through other people' has been utilised in our jurisprudence.

In relation to disability, the value of *ubuntu* translates into how persons are treated, including with 'care, respect and compassion'.[77] It includes notions of inclusion and participation.[78] Berghs explains that behaviour towards persons with disabilities where a person's difference (or 'otherness or diversity') is perceived as being 'inhuman', for example seeing a person as 'threatening the social order' or 'kinship relations', stands outside of *ubuntu's* moral philosophy.[79] The value of *ubuntu* has utility in situations where multiple stakeholders with different skills and perspectives can work together – respectful of this diversity.[80] In an empirical study on the perspectives of the elderly in four Zulu communities in relation to persons with disabilities, the meaning of *ubuntu* was found to correlate with context.[81] The participants indicated that historical treatment of persons with disabilities tended to be exclusionary, and was at times cruel, resulting in ostracisation and even murder – which of course contradicts notions of *ubuntu.* On a more positive note, in contradistinction with the Western preoccupation with individualism, Kamga argues that *ubuntu* underscores maintenance of 'social equilibrium, compassion, humaneness and a strong consideration of the other's humanity'.[82] He argues that in the interpretation of this value in the jurisprudence, the 'transformative' potential of the Constitution is realised.[83] In fact, seen through a decolonial lens, the continuation of colonial and postcolonial perspectives on disability, as a biomedical issue in Africa, occurs despite a historical trajectory that shows that persons with disabilities have discernibly been advocating 'justice and rights'.[84]

In the Constitutional Court's jurisprudence (and to some extent that of the High Courts),[85] the communitarian philosophy underpinning *ubuntu* has been

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74 Interim Constitution of the Republic of South Africa, 1993.

75 SD Kamga 'Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa' (2018) 18 *African Human Rights Law Journal* 636.

76 Berghs (n 7 above) a292.

77 SA Ngubane-Mokiwa 'Ubuntu considered in light of exclusion of people with disabilities' (2018) 7 *African Journal on Disability* a460 a460 <https:// doi.org/10.4102/ajod. v7i0.460>

78 Ngubane-Mokiwa (n 77 above) a460.

79 n 7 above, a292.

80 G Mji et al 'An African way of networking around disability' (2011) 26 *Disability & Society* 365.

81 Ngubane-Mokiwa (n 77 above) a460.

82 n 75 above, 625.

83 Kamga (n 75 above) 368.

84 Berghs (n 7 above) a292.

85 *Makwanyane* (n 3 above) para 224 (Langa); paras 307, 308, 309, 311 & 313 (Mokgoro); paras 374-380 (Sachs); paras 237, 241, 243, 244, 245, 250 & 266 (Madala); para 263 (Mahomed); *AZAPO & Others v TRC & Others* 1996 (4) SA 671 (CC) para 67; *Port Elizabeth Municipality* (n 6

acknowledged. In some of the cases, this philosophy embeds a process of 'meaningful engagement' in matters where diverse interests are at stake – particularly in socio-economic cases.[86] In civil political contexts, such as court cases, meaningful engagement or full and meaningful participation using different terminology, is activated by the concepts of both dignity and *ubuntu*. As such, it is a deliberative process that includes all stakeholders in the discussions and has equal respect and concern for the moral worth and participation of all concerned. After all, *ubuntu* is rooted in the 'lived experiences' of persons.[87] It is a relational concept that obligates us to meaningfully relate to others, in order to allow them to fulfil their potential.[88] The concept's ambiguity is defended by Himonga et al, who argue that its flexibility is a positive aspect particularly in light of the fact that constitutional values are generally 'adaptable, contested, evolving and somewhat open-ended' – and this ambiguity then can enable the Constitution to assert its 'transformative power'.[89]

For mothers with disabilities, where they are seen as 'inhuman' or lacking in ability to parent, *ubuntu* is negated. On a positive note, the acknowledgment of interdependence in *ubuntu* means that relationships of interdependence should be cultivated, meaning that extended families raise children in an African context. Therefore, the mother with the disability should be assisted in her care responsibilities by her extended family or community members where possible. This is not a weakness, but a strength. Measures to enhance participation of persons with disabilities in court proceedings enhance their dignity.

5.2.4. Access to information

Challenges with or lack of legal awareness – that is the knowledge of court processes, rights and remedies – is a barrier facing persons with disabilities.[90] The right of access to information in the Constitution extends to 'everyone' and extends to information held by the state, or that which is kept by another person (private persons) and is needed in order to exercise or protect one's human rights.[91] Accordingly, information that is available publicly or which can help a person assert other rights, must be accessible

above); *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC); *Masethla v President of the RSA* 2008 1 BCLR 1 (CC); *Union of Refugee Women v Private Security Industry Regulatory Authority*; 2007 4 BCLR 339 (CC); *Barkhuizen v Napier*; 2007 7 BCLR 691 (CC) para 50; *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) paras 45 & 163; *The Citizen 1978 (Pty) Ltd & Others v McBride (Johnstone & Others as Amici Curiae);* 2011 (4) SA 191 (CC) paras 164-165, 168, 210 & paras 216-218; *Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 62. The High Court jurisprudence is mentioned in Kamga (n 75 above) 639.

86 *Port Elizabeth Municipality* (n 6 above) para 37.

87 Kamga (n 75 above) 649. See, also, MB Ramose *African philosophy through ubuntu* (2005) 87.

88 *Pillay* (n 16 above) para 53 per Langa CJ.

89 Himonga et al (n 6 above) 388.

90 A Broderick & D Ferri *International and European disability law and policy: Text, cases and materials* (2019) 189.

91 Sec 32 of the Constitution.

to that person. Clearly a link between access to justice and information cannot be denied.[92]

The jurisprudence stresses the importance of this right in democratic South Africa:

> The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information' . . . Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.[93]

Accessibility and awareness-raising, as discussed in chapter 4, extends to accessible formats of court documents – including social work reports. Accessibility also means that a person with a communication impairment should have the contents and consequences of legal documents explained to him or her to enable the person to act accordingly. Outside of the court process, the Promotion of Access to Information Act 2 of 2000 (PAIA) entitles persons to obtain information held by the state, and in limited circumstances by private parties, upon application and payment of a fee.[94] The right to access information in the Constitution is rarely directly applicable as the enabling legislation – PAIA is the first port of call.[95] PAIA does not apply to access to information protection sought for the purpose of court proceedings (civil or criminal) where the proceedings have commenced and where such access is provided for in another law.[96]

In a sexual offences case, the accused sought access to the police docket, which contained raw data that informed the report of the intermediary appointed to facilitate the testimony of the child complainants.[97] The court found that the accused did not have a right of disclosure to these documents.[98] The court also made *obiter* reference to the availability of the subpoena *duces tecum*[99] to the accused, instead of resorting to the right of access to information and PAIA's application.[100] Bekink has argued that

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92 *Shabalala v Attorney-General of Transvaal* 1995 (12) BCLR 1593 (CC).

93 *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) para 62.

94 Sec 7(1) of the Promotion of Access to Information Act excludes access to legal documents once litigation has ensued.

95 J Klaaren & G Penfold 'Chapter 62: Access to information' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* OS 2002, ch62-p4.

96 Sec 7(1) of PAIA discussed in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) para 20. (Rule 38(1) of the Uniform Court rules held to be 'law' in relation to the third requirement of section 7(1) and was generously and purposively interpreted so as to not limit the right of access to information in court proceedings). But, see R Baboolal-Frank & F Adeleke 'The limitation of the discovery rules of Court against the right of access to information in South Africa' (2017) 13 *Revista Direito GV* 1039.

97 *Kerkhoff v Minister of Justice and Constitutional Development* (2011) 2 SACR 109 (GNP).

98 *Kerkhoff* (n 97 above) paras 9, 16-17.

99 Sec 179(1)(a) of the Criminal Procedure Act and rules 54(5) of the High Court and 64(1) of the Magistrate's Court.

100 *Kerkhoff* (n 97 above) para 18.

the child's communication with the social worker or psychologist who evaluates the child's development (linguistic, cognitive and emotional) and whether the child should benefit from intermediary services (they would otherwise suffer undue mental stress), should be protected as confidential and privileged under the right to privacy.[101]

In court rules, particularly in relation to access to relevant documents, discovery can assist litigants.[102] But where a litigant is unrepresented and lacks knowledge of legal processes and entitlements, such opportunities are not realised. Furthermore, rules of discovery are narrower than the right of access to information under the Constitution and PAIA. Schwikkard explains that criminal proceedings encapsulate state power over individuals, which means that constitutional issues (and therefore protections) are more easily rendered than in civil proceedings.[103] In the Children's Courts, the state holds the power over the individuals concerned – which means these proceedings are closer to criminal than civil proceedings from this perspective. The relevance of this argument is in relation to the protections available to accused persons in criminal proceedings, including rules of evidence which are not as strictly applied in civil cases. The rights to adequate time and facilities to prepare a defence, and to adduce and challenge evidence, are therefore not directly traceable to the Constitution in civil proceedings – unlike in criminal proceedings.[104] However, access to information to enable a person before a Children's Court to defend him or herself against accusations that they are unfit to parent or neglected their child, equally depends largely on their ability to rely on these core rights. Section 34, discussed under access to justice below, explores this link in more detail, as does the discussion on rules of courts.

The role of Information and Communications Technologies (ICT) is crucial in promoting the right of access to information for persons with disabilities.[105] Access to legal information that affects a person, is an entitlement extended not only by access to justice provision, but also by that of accessibility which includes access to information and communication technology – but also freedom of expression, which includes access to information.[106] Gould et al's survey of CRPD-ratifying countries found that implementation of ICT policies was low and recommended that states

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101 M Bekink 'Kerkhoff v Minister of Justice and Constitutional Development 2011 2 SACR 109 (GNP): Intermediary appointment reports and a child's right to privacy versus the right of an accused to access to information' (2017) 20 *Potchefstroom Electronic Law Journal* 1 12, citing *Director of Public Prosecutions v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 94.

102 Uniform Court Rule 35. See, also, *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 320A-E.

103 PJ Schwikkard 'Chapter 52: Evidence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* RS 5, 01-13 at ch52-p2.

104 Secs 35(3)(b) and (i) respectively.

105 M Toboso 'Rethinking disability in Amartya Sen's approach: ICT and equality of opportunity' (2011) 13 *Ethics and Information Technology* 107.

106 Arts 13, 9 and 21 of the CRPD.

parties should not only promote the use of their ICT policies, but also provide relevant training of professionals to ensure disability inclusion.[107]

Websites of government departments (such as the Department of Justice and Constitutional Development) therefore need to be accessible to persons with disabilities. Court documents that impact on a person's rights of access to justice (and other relevant rights) should also be available to, and accessible to, persons with disabilities. Court room technology for digital case management, assistive devices, mobile apps, service of digital documents, remote appearances (via phone and video), Easy to Read formats, and platforms for information about services to persons with disabilities too, should utilise advances in ICT to make participation in courts more accessible and inclusive. This may necessitate amendments to legislation and court rules.[108] The inattention to the role of e-Technology for promoting access to information and justice for persons with disabilities in civil courts, however, continues to be prevalent in the literature in South Africa.[109] The digital divide affects persons with intellectual disabilities severely.

5.2.5. Access to justice

Access to justice, at its heart, is about participation. It requires the meaningful involvement of persons in the legal proceedings – with provision of appropriate information, support and accommodations where needed.[110] Access to courts is guaranteed under section 34 of the Constitution: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Again as with the other rights, this entitlement extends to 'everyone'. This right acts as a gateway and as 'leverage' to the enjoyment of other rights.[111] This right is said to concretise two values: the supremacy of the Constitution as well as the rule of law.[112] The right applies to civil proceedings and includes the operation of the Children's Courts. The state has a negative obligation not to interfere or restrict

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107 M Gould et al 'Convention on the rights of persons with disabilities, assistive technology and information and communication technology requirements: Where do we stand on implementation?' (2015) 10 *Disability and Rehabilitation: Assistive Technology* 295.

108 Global Initiative for Inclusive Information and Communication Technologies (G3ict) *Statement to the United Nations Committee on the Rights of Persons with Disabilities* (13 February 2018) <https://g3ict.org/news-releases/the-global-initiative-for-inclusive-icts-g3ict-statement-to-the-united-nations-committee-on-the-rights-of-persons-with-disabilities> (accessed 1 October 2020). See also G3ict Technology & Access to Justice for Persons with Disabilities: IACA-G3ict Survey Results (2020) <https://g3ict.org/publication/technology-access-to-justice-for-persons-with-disabilities-iaca-g3ict-survey-results> (accessed 1 October 2020).

109 NQ Mabeka *The impact of E-Technology on law of civil procedure in South Africa* Unpublished LLD thesis, University of South Africa (2018) (did not mention accessibility of court pleadings to persons with disabilities).

110 P Weller 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5 *Laws* 1 2.

111 J Brickhill & A Friedman 'Access to courts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* OS 11-07 ch59-p1 and 3.

112 Brickhill & Friedman (n 111 above) 3.

persons' access to courts, and also a positive one which requires provision of 'the necessary mechanisms for citizens to resolve disputes that arise between them, a legislative framework, institutions such as the courts and an infrastructure designed to facilitate the execution of court orders'.[113]

The right to a fair hearing should be read with section 165(4) of the Constitution, which requires that 'organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'. While the provision of section 34 does not refer to procedural safeguards and accommodations to promote the right of access to justice, section 165(4) identifies accessibility pertinently as being one of the duties resting on organs of state. Accessibility to court buildings is a useful starting point. Accessing justice in its many guises is impossible, if one cannot enter or navigate the infrastructure housing justice personnel.

A settlement in *Muller v Department of Justice and Department of Public Works*[114] brought about massive changes to the construction and retro-fitting of court buildings in order to make them accessible. Ms Muller, an attorney and wheelchair user, challenged the inaccessible court room, where, in one instance, she had to be carried down the stairs to be able to enter the courtroom, and on another her cases had to be postponed as she was unable to enter the court room. The departments admitted that the inaccessibility was a form of unfair discrimination against the applicant and others in a similar position, and committed – within a period of three years – to make court buildings accessible nationwide. Other jurisdictions have made similar findings, in some that direct discrimination flowed from inaccessible courtrooms,[115] and in others that the state's duty to accommodate persons with disabilities is in line with due process requirements stipulating that all persons are to be provided with a meaningful opportunity to be heard in courts – within the limits of practicability.[116] Holness & Rule explain that:

> Accessibility may not just require that official documents are provided in Braille or larger font, or that sign language interpreters are provided to public service users, for example. It may also require that justice personnel are trained and sensitised to the needs of persons requiring augmentative communication and to those with learning and intellectual disabilities, not just in materials and facilities, but also in the attitudes of staff in dealing with and assisting complainants in court.[117]

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113 Brickhill & Friedman (n 111 above) 24, citing *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 39 & 41.

114 *Muller* (n 20 above).

115 *Egyenlő Bánásmód Hatóság (Equal Treatment Authority),* case 13/2006 (Hungary), cited in A Lawson 'Disabled people and access to justice: From disablement to enablement?' in P Blanck & E Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (2017) fn 34.

116 *Tennessee v Lane* 541 US 509, 512 at para 7 (2004); see, further, *Boddie v Connecticut* 401 US 371 (1971).

117 Holness & Rule (n 21 above) 1927.

The Departments of Justice and Correctional Services and Social Development are organs of state whose responsibilities are relate to litigants and witnesses with disabilities to guarantee their access to courts. The state is cognisant of the barriers that persons with disabilities face in accessing the courts, as is evident in a draft report to the Committee on the Rights of Persons with Disabilities in 2013. That report notes barriers such as: 'the inability to afford legal fees, lack of information in the use of equality courts, accessibility of equality courts, communication barriers, lack of a disability-sensitive judiciary and court staff, [and] inaccessible buildings and transport ...'[118] The state can promote access to justice for these persons through a number of means, and primarily through the vehicle of procedural accommodation.

The consensus is that procedural rules should contribute to access to the courts.[119] Rules, however, have been inherited from times of colonisation and apartheid, and even the development thereof to make court proceedings more accessible have happened in a haphazard and fragmented way. Sometimes, the only bulwark against rules that are silent on accommodations, is judicial discretion. Such a discretion must be exercised, in line with section 39(2) of the Constitution, in a manner which promotes the 'spirit, purport and object of the Bill of Rights'. Therefore, whenever a litigant's enjoyment of access to justice is implicated by the exercise of judicial discretion, the section 39(2) obligation requires the court to have due regard to the potential implication thereof on the person's rights – especially to access justice.[120] The continued silence of court rules on procedural accommodation for persons with disabilities, with the exception of the newly published Regulations relating to the Sexual Offences Courts however, cannot be countenanced in light of the obligations activated by the CRPD, as is discussed later.

Section 34 has been argued to 'impose positive obligations on the state to provide free legal representation to civil litigants' on the basis of fairness.[121] The European Court of Human Rights has interpreted a state's failure to provide free legal representation to a litigant in a particular situation (judicial separation), as a violation of the fair public hearing guarantee in *Airey v Ireland*.[122] This means that some instances will warrant state provision of legal aid. The Constitution is only clear about

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118 Department of Women, Children and Persons with Disabilities *Draft First Country Report to the Committee on the Rights of Persons with Disabilities* (2013) para 51 <http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve> (accessed 1 May 2015).

119 *Giddey NO v JC Barnard and Partners* 2007 2 BCLR 125 (CC) para 16.

120 *Giddey* (n 119 above) para 18.

121 Brickhill & Friedman (n 111 above) 68; J Brickhill 'The right to a fair civil trial: the duties of lawyers and law students to act *pro bono*' (2005) 21 *South African Journal on Human Rights* 293; D Holness 'Improving access to justice through compulsory student work at university law clinics' (2013) 16(4) *Potchefstroom Electronic Law Journal* 331; D McQuoid-Mason 'Access to Justice in South Africa' (1999) *Windsor Year Book on Access Justice* 3.

122 *Airey v Ireland* (1979) 2 EHRR 305 cited with approval in *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC).

state-provided legal representation for the criminally accused[123] and children[124] to avoid substantial injustice from occurring. Factors that have been mooted to assist in determining whether failure to provide free legal aid to a civil litigant 'would render a hearing "unfair"' include the:

- interests at stake, including the severity of the consequences;
- complexity of proceedings; and
- capacities of the individuals concerned to participate in the proceedings without representation particularly in order to 'effectively' present their case.[125]

International law has mandated training for law enforcement and legal personnel, including judges and magistrates. The Committee on the Rights of Persons with Disabilities has called on states to provide relevant training on the ambit of the CRPD in order to 'adjudicate cases in a disability-sensitive manner'.[126]

5.2.6. Child's right to family or parental care

Family care is interpreted broadly in South Africa to include all kinds of diverse family types[127] – such as nuclear, extended, foster, adoptive and stepfamilies for example. It extends care and contact with children to a range of parents or caregivers, including those parented by LGBTIQ persons and who are donor-conceived. The constitutional provision section 28(1)(b) states that 'every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment'. Sloth-Nielsen argues that a deliberate decision was made not to include the right to family life, as contained in international and foreign laws.[128] The Constitutional Court has considered this deliberate omission in the certification of the Constitution process and found that its absence facilitated flexible interpretation and recognition of the diversity of families in South Africa – much like in other jurisdictions that also decline to narrowly identify this right.[129] The importance of family life has, however, been recognised in some cases, particularly in relation to the right to dignity.[130] The parents (or family) have primary responsibility for the care of children, with the state stepping in as back-up parent, only when failure of appropriate care occurs – including

123 Sec 35(3)(g) of the Constitution.
124 Sec 28(1)(h) of the Constitution.
125 Brickhill & Friedman (n 111) 70, referring to some factors derived from *Nkuzi Development Association v Government of South Africa* 2002 (2) SA 733 (LCC) at 737 and order para 1.1.
126 *Nyusti and Péter Takács v Hungary* Committee on the Rights of Persons with Disabilities, Communication 1/2010 (21 June 2013) CRPD/C/9/D/1/2010 at para 10(2)(b).
127 A Friedman et al 'Chapter 47: Children's rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2014) RS1, 07-09, ch47-p6.
128 J Sloth-Nielsen 'Children' in D Davis & H Cheadle (eds) *The South African Constitution: The Bill of Rights* (2nd ed, 2006) 511.
129 *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 (4) SA 744 (CC) at para 99.
130 *Dawood* (n 54 above) para 52; *Booysen & Others v Minister of Home Affairs & Another* 2001 (7) BCLR 645 (CC) para 3.

orphanhood, neglect or abuse – with alternative care as the answer.[131] Skelton categorically states that 'parents cannot derive any rights' from section 28(1)(b), as it is a right accrued by the child, with duties for the parents/family and the state.[132] Friedman et al however support finding parental rights and responsibilities, as located within the rights to privacy and dignity in the Bill of Rights, lest the state sets all standards for the care of children and families.[133]

In order for parents to adequately care for their children, the state is duty-bound to ensure children have basic necessities, such as basic nutrition, shelter, health care and social services – in order to support the child's family with the means to meet those requirements.[134] While parents and the family have the primary responsibility of the care of children, including providing the basic necessities, where families struggle to do so the state is constitutionally obliged to assist.[135] The provision for survival of children, and their basic socio-economic rights, is therefore a responsibility that parents and/or the state take on – depending on the ability of the parents to do so without help.

The purpose of the constitutional provision is to positively contribute to 'healthy parent-child relationships' and to avoid gratuitous state interference.[136] The responsibility to care for children is initially derived from the common law, and is now codified in the Children's Act. Its interpretation, particularly the duty to support (which may include maintenance) has been extended to include grandparents and stepparents.[137] In the main, the meaning of parental rights and responsibilities replaced the concept of 'parental authority', referring to: '*(a)* to care for the child; *(b)* to maintain contact with the child; *(c)* to act as guardian of the child; and *(d)* to contribute to the maintenance of the child'.[138] Automatic acquisition of these parental rights and responsibilities is granted to biological mothers and married fathers.[139] In several cases, discrimination against a particular parent or family member was found to be unfair and unconstitutional.[140]

The only jurisprudence on care of children by a parent with a disability is a case that dealt with the removal of children from parents without court supervision

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131 *Grootboom* (n 3 above) para 75; *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) BCLR 11 (CC) para 24.

132 A Skelton 'Children' in I Currie & J De Waal (eds) *The Bill of Rights Handbook* (6th ed) (2013) ch27-p605.

133 Friedman et al (n 127 above) 46.

134 Sec 28(2)(c) of the Constitution.

135 Skelton (n 132 above) 601.

136 Friedman et al (n 127 above) 8.

137 *Heystek v Heystek* 2002 (2) SA 754 (T) 757C-D.

138 Sec 18(2) of the Children's Act.

139 Sec 21 of the Children's Act.

140 *J & Another v Director General, Department of Home Affairs, & Others* 2003 (5) SA 605 (D) para 22; *V v V* 1998 (4) SA 169 (C) 190B-C.

(automatic review).[141] The court explained the impact of state removal of children from family or parental care, as follows

> The coercive removal of a child from her or his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community.[142]

The court explained that removal from family care limits the right to family or parental care, and that the right to alternative care is secondary to the primary right of family or parental care.[143] In relation to participation at the court hearing in statutory proceedings where a child was removed from the family, the court stressed that adequate consideration of the child's best interests is required, which relies in part and as 'a minimum' on both the family members and the child making representations to the court as to whether removal was in the child's best interests.[144] The court referred to a Canadian case, with approval, that explains the duty of the court to hear the parent – in particular on the best interests of the child:

> Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests.'[145]

The Canadian case is an authority for the constitutional entitlement to legal representation in child care proceedings, where such representation is required to ensure a fair proceeding. However, such interpretation of what constitutes necessity in relation to activating the fair hearing right under the Canadian Charter of Rights and Freedoms, is narrow.[146] Commenting on this case, Hughes remarks that the case

> reinforces the individualized approach to determining entitlement to legal counsel which ignores the crucial role law plays *as a system* which includes some people and excludes others in Canada. Gaining access to the legal system in order to enforce rights is, I suggest, one *indicium* of contemporary citizenship. Law is pervasive in Canadian society and those who can mediate the structure of legal rules and policies which govern the distribution of goods and benefits and the

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141 *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC).

142 *C and Others* (n 141 above) para 23.

143 *C and Others* (n 141 above) para 24.

144 *C and Others* (n 141 above) para 52.

145 *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46 para 73.

146 P Hughes 'New Brunswick (Minister of Health and Community Services) v. G. (J.): En route to more equitable access to the legal system' (2000) 15 *Journal of Law and Social Policy* 93.

> web of rights and obligations which govern the relations between government and citizens and citizen and citizen are at a significant advantage.[147]

This remark is telling in relation to the potential inability to effectively 'mediate the structure of legal rules and policies' of some parents, such as those with intellectual disabilities without adequate support and procedural accommodations in child care proceedings, and also without adequate legal representation. The minority judgment of Justices L'Heureux-Dub, Gonthier and McLachlin (on a particular aspect), as well as the majority judgment of Chief Justice Lamer, and Justices Cory, Major, Gonthier, Binnie and McLachlin, reflect on the fact that child care proceedings are mainly brought against disadvantaged persons – whether financially or otherwise.[148] The minority judgment articulated the considerations to be taken in a determination of whether a parent is able to represent him or herself adequately without legal representation, listing the parent's 'education level, linguistic abilities, facility in communicating, age and similar indicators'.[149] Intrusion into family life by the state therefore should trigger measures to ameliorate its impact on the family and to allow relevant persons, such as parents, to provide the court with sufficient information to come to an informed determination of the child's best interests. Such measures should not only be limited to automatic court review, but also, as will be argued later, state-provided legal aid for persons with intellectual disabilities. Hughes argues that because of the nature of the allegations levelled at parents in child care proceedings, that they are 'accused … of being unfit' – their vulnerability needs to be acknowledged.[150] It may even be necessary to extend protections akin to those offered to criminally accused to these parents, such as state-provided legal representation.

When children are removed from their family, the alternative care needs to be suitable and adequate for their needs. If not, where they are then sequestered to inadequate care or poor conditions, both the law and the state are said to 'betray' children as they fail in their duty to protect them.[151] The Constitutional Court stated that state interference should not lead to a negative outcome for children:

> section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can.[152]

5.2.7. Child's right to protection from neglect and maltreatment

Section 28(1)(d) of the Constitution entitles all children to the right 'to be protected from maltreatment, neglect, abuse or degradation'. The state has a positive obligation

147 n 146 above, 94.
148 *New Brunswick* (n 145 above) paras 156 and 165 respectively.
149 *New Brunswick* (n 145 above) para 169.
150 Hughes (n 146 above) 109.
151 *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) 229B-C.
152 *S v M* 2008 (3) SA 232 (CC) para 30.

to prevent these types of harm from occurring. The Children's Act, which is discussed later, defines these kinds of harm, including neglect, and sets up procedures for state intervention in family life when these harms occur – by extending jurisdiction to the Children's Courts. Because Children's Courts do not issue judgments, reporting of outcomes in the Children's Court inquiries do not reach the law reports, unless there is a review or appeal. As a result, there is little to no jurisprudence on neglect cases.[153] Cases on other types of harm, such as corporal punishment, however, have reached the highest courts.[154] Cases where sexual offences or other types of abuse of children considered by the Criminal Courts or Sexual Offences Courts are potentially reportable, as judgments are delivered in those instances.

The challenge with addressing neglect in families is an acute under-appreciation of the conditions required to prevent it. Indeed, neglect can be understood as occurring when necessary resources are lacking to ensure the child's development, or occurring notwithstanding the ability of the family to provide these relevant resources.[155] The former is not legal neglect by parents.[156] Where a legal system does not prioritise support to parents to fulfil their child care responsibilities, but rather interventions when parents fail, parental poverty occasioned neglect may increasingly be the cause to remove children from their families.[157] The South African Law Reform Commission (SALRC), during the drafting of the Children's Bill (the precursor of the Children's Act), noted that it is arguable that the state may be obliged in poverty occasioned neglect, to put in place preventative measures – including a budgetary allowance for family preservation. The SALRC put forward that protection from harm such as abuse and neglect under section 28(1)(d), is not similarly limited by the qualification of progressive realisation and available resources - as is the case for socio-economic rights under section 27.[158] The SALRC recommended regulations be developed to grant the Children's Court the authority to '[o]rder an emergency, short-term, state-funded financial grant to be paid to the child or her primary caregiver either in a lump sum or in monthly payments over a maximum of four months (the maximum rate of payment will be set in the regulations)', or refer the family to a preservation programme

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153 But see *Jooste v Botha* 2000 (2) BCLR 187 (T) at 197F, where the court held that parental care under section 28(1)(b) does not require love and affection to be extended to children by their parents, and failure to do so therefore cannot be considered neglect. D Brand 'Constitutional protection of children' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 184, questions this finding and relies on the fact that the child sought damages for emotional distress, not an interdict to compel the parent to love the child.

154 *S v Williams* 1995 (3) SA 632 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA (CC); *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2020 (1) SACR 113 (CC).

155 SALRC *Review of the Child Care Act* Discussion Paper 103, Project 110 (2001) 327.

156 Centre for Justice and Crime Prevention *Research Brief: Optimus Study on child abuse, violence and neglect in South Africa* (2015) 14 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/cjcp_ubs_web.pdf (accessed 1 February 2020).

157 J Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of Grootboom' (2001) 17 *South African Journal on Human Rights* 230.

158 n 155 above, 53.

where the court finds these services would obviate removal from the home.[159] The Children's Act does not contain such an authority to render financial assistance to relevant families.

5.2.8. Child's best interests

Section 28(2) of the Constitution ascribes 'paramount importance' to the best interests of the child 'in every matter concerning the child'. It finds legislative enumeration in section 7 of the Children's Act. Its first iteration was under common law in the 1940s, and was incorporated into customary law.[160] The weight attached to the paramountcy of the right has been debated. The Constitutional Court has explained that the best interests of the child is not absolute, and does not trump all other considerations.[161] The paramountcy means that the child's best interests is the most important, but does not relegate other considerations to being unimportant.[162] The best interests of the child can be used to interpret other rights, including the right to family or parental care.[163] In *S v M* the Constitutional Court stated

> The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.[164]

The contextual nature of the best interests right, as well as its flexible application, is not a draw-back.[165] The particular circumstances of each child in a particular lived reality, is what is considered in each specific case.[166] However, some criticism is due. The indeterminacy of the right can translate into subjective determinations of its meaning during judicial interpretation (and other professional assessments, for example by social workers).[167] In reality, the determination of a child's best interests is a value judgment.[168] This leaves much scope for variance and potentially for bias.

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159 n 155 above, 326.

160 *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 143; T Bennett 'The best interests of the child in an African context' (1999) *Obiter* 145.

161 *S v M* (n 152 above) para 26.

162 *Centre for Child Law v Minister of Justice* 2009 (6) SA 632 (CC) para 29. See, also, E Bonthuys 'The best
interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 23.

163 *Bannatyne* (n 131 above) paras 24-25.

164 *S v M* (n 152 above) para 42.

165 *S v M* (n 152 above) para 23.

166 *AD v DW* 2008 (3) SA 183 (CC) para 55.

167 B Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' (2000) 11 *Stellenbosch Law Review* 15.

168 S Ferreira 'The best interests of the child: From complete indeterminancy to guidance by the Children's Act' (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 208, citing *K v M* [2007] 4 All SA 883 (E) 891d-e; *P v P* 2007 (5) SA 94 (SCA) 99D-E; M Bekink & B Bekink 'Defining

Barrie has argued that the lack of objectivity may mean that the court cannot truly identify the child's best interests or what makes an ideal parent. Rather, the focus should be on the least harmful or detrimental alternative for a particular child.[169]

As this principle of the best interests of the child is treated as a right under the Constitution, it may be limited.[170] Reyneke asserts that the need for treating each case as an individual determination of the particular child's best interests, is evident when considering the application of section 36 (the limitations analysis) – which balances a number of factors.[171]

5.2.9. Monitoring of constitutional protection: a balancing act

The Constitution is heralded as a beacon extending equality for all and protective measures for the most vulnerable – particularly children – under its Bill of Rights. It creates a network of obligations resting on public and private bodies, and mandates the state to step in where families struggle socially or economically. At a governance level, the Constitution apportions responsibility to the arms of government, courts, parliament and the executive, to implement measures to realise these rights and attaches consequences for the omission to do so. In the end, however, the resources at the disposal of front-line workers, such as social workers, may determine the success of interventions directed at supporting vulnerable families.

This chapter has not addressed the basket of socio-economic rights available to adults (including those with intellectual disabilities), such as access to housing, higher education and basic adult education, health care services, sufficient food and water and social security – due to the limited scope of this study. The literature review in chapter 3 articulated the dire, socio-economically depressed circumstances under which persons with disabilities survive in South Africa, and the correlated stigmatisation, predisposition to being survivors of violence, and consequent paucity of opportunities to thrive on an equal basis with non-disabled peers – whether in the workplace or in the family setting. Since unintentional neglect can often be prevented where poverty-reduction measures are introduced for families, an analysis of such measures should be undertaken in future research.

The Constitution puts in place accountability monitoring measures, such as Chapter Nine institutions like the South African Human Rights Commission[172]

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the standard of the best interests of the child: Modern South African perspectives' (2004) *De Jure* 40.

169 GN Barrie 'Giving due consideration to views expressed by the child in family law proceedings: The Australian experience and lessons for South Africa' (2013) 1 *Tydskrif vir Suid-Afrikaanse Reg* 124.

170 Skelton (n 132 above) 620.

171 M Reyneke 'Realising the Child's Best Interests: Lessons from the *Child Justice Act* to Improve the *South African Schools Act*' (2016) 19 *Potchefstroom Electronic Law Journal* 15.

172 The SAHRC is a national human rights institution, duly recognised by the United Nations Office of the High Commissioner with a A rating under the Paris Principles.

(SAHRC), as watchdogs over compliance with international and constitutional law obligations. The SAHRC, for example, has noted that an independent children's rights monitoring mechanism is necessary – particularly since the previous Department on Women, Children and Persons with Disabilities was disbanded, with the Department of Social Development subsuming the responsibility for children.[173] The SAHRC designates two commissioners to children's rights including compliance with the CRC, and to the rights of persons with disabilities including compliance with the CRPD, respectively.[174] Adv Malatji, the commissioner for disability rights, remarked in 2016 that

> regardless of promises made by the departments in 2013, our follow-up visit in September and November this year found that not much has changed in ensuring the rights of persons with disability. For example, during our site inspections of Ritavi and Thohoyandou Equality Courts, little if not nothing was done to promote the use of these courts by people with disabilities. Not only were the courts inaccessible for someone with physical disability, but the staff was either not trained to deal with matters brought by people with disabilities, or there were no Magistrates sufficiently trained and equipped to take up such cases. There were no sign language interpreters and other resources to enable access to justice to people with disabilities.[175]

The slow track record of the SAHRC in monitoring the compliance of organs of state in implementing the rights of persons with disabilities, has received limited consideration in the literature.[176] Couzens comments on the inconsistent approach of the SAHRC to its mandate on promoting, protecting and monitoring children's rights, and its inaccessibility to child complainants.[177] The latter critique was partly addressed by the institution of child-friendly complaints procedures in 2018.[178] Its most notable recent contribution is its report on disability and equality in 2018, which focused on health, education, and workplace issues.[179] The SAHRC does promote access to justice for persons with disabilities by assisting them through litigation assistance,

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173 SAHRC *NHRI written submission to the Universal Periodic Review (UPR) Mechanism* (28 November 2011) para 4 <https://www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20UPR%20Submission%20FINAL%202011.pdf> (accessed 1 February 2020).

174 SAHRC *Annual Report 2013* (2014) 8 <https://www.sahrc.org.za/home/21/files/Annual%20Report%202012-13.pdf%20October.pdf> (accessed 1 February 2020).

175 SAHRC *Press release: 20 years of right to equality for persons with disabilities .... where to now?* (10 May 2016) <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/663-20-years-of-right-to-equality-for-persons-with-disabilities-where-to-now> (accessed 1 February 2020).

176 Holness & Rule (n 21 above) 1907.

177 M Couzens 'An Analysis of the Contribution of the South African Human Rights Commission to Protecting and Promoting the Rights of Children' (2012) 28 *South African Journal on Human Right*s 570.

178 SAHRC *Child Friendly Complaints Handing Procedures* (undated) <https://www.sahrc.org.za/home/21/files/SAHRC%20Child%20friendly%20complaints%20factsheet-%20FINAL-%20print%20ready.pdf> (accessed 1 February 2020).

179 SAHRC *Research brief on disability and equality in South Africa 2013-2017* (2018) <https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20DISABILITY%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf> (accessed 1 February 2020).

where needed in the Equality Courts.[180] However, the barriers that persons with disabilities face in accessing justice has not been a priority – judged by its lack of research, promotion of awareness, and monitoring on that score. This is a gap to be explored in future research.

The Western Cape Province designated a children's commissioner for the province, but is yet to appoint the first incumbent.[181] This commissioner is mandated to act as an independent watchdog[182] and to follow principles, such as to 'strive to promote the rights, needs and interests of children in all areas of society', and ensure that children can access his or her office.[183] The powers extend to monitoring, investigation, research, education, lobbying, advising and making recommendations on children's rights.[184] Investigation can happen on its own initiative or on receipt of a complaint. The commissioner is set to form cooperative relationships with a number of organs of state including the Children's Courts.[185] The commissioner is to report to the provincial parliament annually on its activities.[186] The mandate of this provincial commissioner does not differ substantially from that of the SAHRC, but due to its provincial footprint, has the potential to be more effective. Unless necessary budgetary allocation scaffolds this legislative enactment, its promise, mooted since 1997, may not be met. The other eight provinces, including KwaZulu-Natal, remain subjected to the operation of the arguably ineffective and under-resourced SAHRC at national level.

The rights discussed above support the dismantling of ableist barriers faced by families in the community, in terms of the provision of social services and court services to persons with disabilities. However, it would be naïve to assume that all the rights analysed in this chapter feature in the deliberate or conscious decision-making of social workers and magistrates during statutory proceedings. Rather, both personal and experientially derived notions of good-enough parenting will likely impact on the assessment of a child and his or her family, and a determination into whether the child is in need of care and protection and, accordingly, what course of action would be in his or her best interests. The decision-making processes are inherently subjective, and yet law sets out ostensibly objective factors to guide decision-makers. This legislative framework is discussed next.

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180 For example, *Oortman* (n 18 above).
181 Sec 79 of the Constitution of the Western Cape, 1997; Western Cape Commissioner for Children Act 2 of 2019 (WCCC Act).
182 Sec 6(a) of the WCCC Act.
183 Secs 6(d) and (e) of the WCCC Act.
184 Secs 7 to 12 of the WCCC Act.
185 Sec 7(4)(d)(iv) of the WCCC Act.
186 Sec 16 of the WCCC Act.

5.3. Legislative framework

First, the position on legal capacity in South Africa requires exposition, as it largely influences the provision of procedural accommodations (or lack thereof) to persons with intellectual and other disabilities.

The remainder of this section sets out the relevant provisions relating to the functioning of the Children's Courts as established in the Children's Act, as well as the role of the social worker. This role is discussed in relation to provision of prevention and early intervention measures, which are to be initiated, where possible, before statutory intervention begins, and drafting of developmental assessments of children, and parenting capacity assessments. Thereafter, the provisions relating to the justice value chain are discussed. First, legal provisions relating to legal capacity is explicated.

5.3.1. Legal capacity

In South Africa, no person is summarily denied legal capacity. However, the court rules in place specifically indicate that persons with intellectual disabilities may have diminished capacity. The substituted decision-making system in place has been criticised by the Committee on the Rights of Persons with Disabilities in its concluding observations, and they called for repealing of the existing system and replacement with supported decision-making, as well as requisite training for stakeholders – including the judiciary.[187] Law reform on supported decision-making has come to nought thus far.[188] In practice, this means that persons with intellectual disabilities give evidence, unless a stakeholder questions their capacity. They provide evidence in courts – however, without procedural accommodations to enable effective testimony. This is so, because there are no court rules that require the provision of procedural accommodation measures specifically for them.

Under our common law, legal capacity has been linked to questioning whether the person has a 'consenting mind'.[189] This has been understood to mean that a person cannot acquire legal capacity where due to his or her *mental* impairment, he or she does not understand or appreciate the nature and consequences of the decision. Legal transactions so concluded while the person was 'incapacitated' are void *ab initio.*[190]

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187 Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of South Africa* (2018) CRPD/C/ZAF/CO/1) paras 22-23.

188 South African Law Reform Commission *Project 122: Incapable adults/assisted decision-making: Adults with impaired decision-making capacity* (Issue paper 18, 2002); Discussion Paper 105, 2004; and Report: Project 122: Assisted decision-making report (December 2015) released on 25 Jun 2019.

189 ML Lupton 'The Law and Older Persons: Legal Capacity' in B Clark (ed) *Family Law Service* (2011) Service Issue 56 para Q30.

190 *Molyneux v Natal Land & Colonization Co Ltd* [1905] AC 555 (PC) 561.

The 'default position' is that everyone has full legal capacity,[191] but 'insane or mentally disordered persons have limited legal capacity'.[192] Where the court declares a person to be of *unsound* mind,[193] a rebuttable presumption of incapacity is created.[194] The intervention of a curator under the common law or an administrator under the Mental Health Care Act 17 of 2002, is then presupposed as necessary to validate a legal decision. Holness and Rule explain that 'both serve to substitute decision making and self-representation of the person who is declared as 'lacking' legal capacity with that of a professional'.[195]

Kruger explains that '[m]ental illness per se or the declaration of a person as mentally ill or disordered does not necessarily affect a person's capacity to contract or litigate'.[196] But even where such declaration is not made by the court, a person may still lack the capacity to contract or litigate, because of 'feeblemindedness or lack of understanding'.[197] Our law, generally speaking, views persons with 'moderate or severe' intellectual disability as having diminished capacity.

In both civil and criminal courts, a witness is competent, qualified and able to provide evidence, if he or she can do so lawfully.[198] Persons with psychosocial disabilities (referred to in legislation as 'mental illness' or 'lunacy or insanity') or intellectual disabilities (referred to in some legislation as 'mental illness' or 'idiocy'), are generally considered incompetent in our law.[199] The legal test for competence is understood as follows:

> It must appear to the trial court or be proved that the witness suffers from –
> (a) a mental illness; or
> (b) that he or she labours under imbecility of mind due to intoxication or drugs or the like; and
> (c) it must also be established that as a *direct result* of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason (emphasis added).[200]

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191 J Heaton 'The concepts of status and capacity: A jurisprudential *excursus*' in Van Heerden et al (eds) *Boberg's law of Persons and the Family* 2nd ed (1999) 37.

192 R Kruger 'Division F: Family law procedures' in B Clark (ed) *Family Law Service* (2015) F11.

193 Rule 57 of the Uniform Court Rules.

194 Kruger (n 192 above) F11.

195 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 42.

196 Kruger (n 192 above) F11.

197 Kruger (n 192 above) F11.

198 A Bellengère (ed) *The Law of Evidence in South Africa: Basic principles* (2013) 102.

199 Section 9 of the Civil Proceedings Evidence Act, 1965: 'No person appearing or proved to be afflicted with idiocy, lunacy or insanity, or to be labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.' Section 194A of the Criminal Procedure Act, 1977 (as amended by Act 8 of 2017): 'For purposes of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, the court may, when it deems it necessary in the interests of justice and with due consideration to the circumstances of the witness, and on such terms and conditions as the court may decide, order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.'

200 Bellangère (n 198 above) 104.

Evidence of the "incompetence" of the witness is tendered, and the court investigates whether the witness is "deprived of the proper use of his or her reason" due to the incompetence.[201] The court may also initiate an investigation into the competence of the witness after its own observations of the witness.[202] This exclusion, according to De Vos, is

> directed at a certain degree of mental illness or imbecility of mind, which deprives the witness of the *ability to communicate properly* in regard to the subject matter in question. Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him *to convey his observations in an understandable way to the court,* will be a competent witness[203] (emphasis added).

Holness and Rule state that '[t]he ability to effectively communicate with the court, therefore, is a key requirement for the competence of witnesses.'[204] Interpreters are sometimes used for those with communication impairments. Msipa puts forward that in criminal proceedings 'the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony'.[205] The South African conception of 'competence' is based on the functional approach. The Committee on the Rights of Persons with Disabilities explains that this is an approach that is discriminatory, as it denies the right to the person when he or she does not pass the 'assessment' and also when the state does not provide support to exercise legal capacity.[206]

In determining competence to testify, the rules of evidence exclude the competence of 'mentally incompetent' persons, such as those who are impaired by a mental disability, still referred to in derogatory terms such as 'idiocy, lunacy or insanity, or to be labouring under any imbecility of the mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason'.[207] The criminal context corollary refers to exclusion, where the person is 'appearing or proved to be afflicted with mental illness',[208] using an all-encompassing term to refer to intellectual disability and psychosocial illness.[209] It is no surprise then, considering that the legal fraternity confuses the effect of and conflates these disparate population groups, that social workers and other professionals may also do so.

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201 Bellengère (n 198 above) 104.
202 Bellengère (n 198 above) 104
203 WL de Vos 'The competence and compellability of witnesses' in PJ Schwikkard & SE van der Merwe (eds) *Principles of evidence* (2016) 452.
204 Holness & Rule (n 195 above) 44.
205 D Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 89.
206 Committee on the Rights of Persons with Disabilities *General Comment 1: Article 12: Equal Recognition before the Law* (2014) CRPD/C/GC/1 at para 13.
207 Sec 9 of the Civil Proceedings Evidence Act of 1965.
208 Sec 194 of the Criminal Procedure Act of 1977.
209 Bellengère (n 198 above) 103.

While strictly speaking it does not appear that legal capacity of persons with intellectual disability is denied in legal proceedings in the Children's Courts, as they are asked to testify at the inquiry, a bias as to their capacity may be embedded in the judicial decision-making. Without empirical evidence, however, this is merely speculation. Judges are trained in civil and criminal procedures, including on evidence, which generally questions the competence of persons with intellectual disability to testify. Accordingly, such an assumption of potential bias is not wholly unfounded in the absence of other safeguards in the law – including in procedural law.

Supported decision-making is still not part of South African law and the curator system will continue until such time as the new informal and formal support system is introduced through legislation. Most importantly, support to exercise legal capacity, where needed, is not currently offered in South Africa – with the exception of the substituted curator system (which is not utilised in the Children's Courts). Continual reliance on the functional threshold tests in South African law, contradicts the CRPD's position on abolishing these regimes. Parents with intellectual disabilities are therefore at a distinct disadvantage when participating in the inquiries.

Law reform on substituted decision-making foresees a type of supported decision-making (labelled 'assisted' decision-making) to run parallel to existing substituted versions in law such as curatorship. This law-reform process is incomplete. The possibilities of a supported decision-making system for parents with intellectual disabilities is endless. Support, not only in daily decision-making, but also in high stakes situation such as child care proceedings, could equalise their participation both at home and in the court system.

5.3.2. The Children's Courts and the Children's Act

In terms of the Children's Act 38 of 2007, child protection services in the form of primarily social workers (and police officers), are authorised to remove children from their families when the child is 'in need of care and protection' – on the basis of an identified ground in section 150(1), including for 'neglect'. Care is defined as *inter alia* providing a 'child with a suitable place to live, living conditions that are conducive to the child's well-being and development, and the necessary financial support,' all within available means.[210] Care obviously includes protecting the child from neglect. Neglect is defined as 'the failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'.[211] These care responsibilities are arguably derived from the right of the child to life, survival and development.[212] However, the Act is silent with regard to the peculiar needs of parents with intellectual disabilities for support (or those with any disability), and the

[210] Sec 1 of the Children's Act.
[211] As above.
[212] Art 6 of the CRC.

requirements for their protection within the child protection system. The Act does, however, set out a few provisions for children with disabilities.

Lofell identifies that it is more expensive in the long run to focus on enforcing the law instead of provision of adequately resourced social services.[213] A disproportionate emphasis on the possible risk that children face when parented by persons with disabilities, may therefore arise. The sheer scope of child abuse and neglect in South Africa can be a catalyst for precipitous removal of children from parents with disabilities – as was evident in *C v Gauteng Department of Health and Social Development*.[214] The legislation at that time excluded automatic court review of temporary safe care removal by social workers, which meant parents were denied access to their children and access to court, as the onus was on the parents to initiate proceedings to challenge the removal of the children from their care. The lack of automatic review was found to be unconstitutional and the gap was remedied in the legislation.[215] However, lack of guidance given to the magistrates on how to conduct such reviews has not been addressed in regulations.[216]

The Children's Act sets out a framework for the provision of child protection services in the country under sections 4, 5 and 104. Section 4(1) sets out the implementers of the Act – identifying organs of state at national, provincial and local government levels. The section stipulates that it would be implemented 'subject to any specific sections of [the Children's Act] and regulations allocating roles and responsibilities, in an integrated and uniform manner.' The implementation of the Act is subjected to progressive realisation, which is a duty to 'take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of the Act'.[217] Section 5 identifies the need for organs of state at all levels to 'cooperate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children'. Section 104(1) tasks the Minister of Social Development, in consultation with other key departments, including Justice, to 'develop a comprehensive inter-sectoral strategy aimed at securing a properly resourced, co-ordinated and managed national child protection system'. Provincial strategies were also to be developed as well as a compilation of a 'provincial profile'

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213 J Loffell 'Policy responses to child sexual abuse in South Africa' in L Richter et al (eds) *Sexual abuse of children in Southern Africa* (2004) 250.

214 *C v Gauteng Department of Health and Social Development* 2012 (2) SA 208 (CC); FN Zaal & CR Matthias 'Urgent care removals and access to children's courts: An analysis of the implications of C v Department of Health and Social Development, Gauteng' (2013) 1 *Stellenbosch Law Review* 107; FN Zaal (2012) 'A first finding of unconstitutionality in the Children's Act 38 of 2005 – *C v Gauteng Department of Health and Social Welfare*' (2012) 75 *Tydskrif vir Rooms-Hollandse Reg* 168.

215 The Constitutional Court confirmed the High Court's finding of unconstitutionality in relation to secs 151 and 152 of the Children's Act, reading in a requirement for review by the court of the temporary safe care removal.

216 Zaal & Matthias (n 214 above) 120.

217 Sec 4(2) of the Children's Act.

that would allow monitoring and review of the strategies.[218] Several proposed provisions from the Children's Bill, which incorporated a detailed inter-sectoral mechanism aimed at coordination and adequate funding of child protection services, were omitted from the final Act.[219] Van Niekerk and Matthias critique the continued lack of a framework for the implementation and inter-sectoral coordination, as well as an absence of necessary inter-sectoral protocols that define relevant role allocations.[220]

In South Africa, like other jurisdictions, the Children's Court (family courts elsewhere) is the final arbiter of whether a child is to be removed from parent or caregiver due to allegations of neglect or possible neglect. The Children's Courts are civil courts – borrowing rules of evidence from the civil system. The Court is inquisitorial in nature, with the presiding officer, the magistrate, and the leading witnesses in testimony. Matthias and Zaal point out that it is the magistrate's duty to identify where the rights of a particular person are prejudiced by information appearing in the social worker's report, because that person is to be provided with the opportunity to cross-examine the social worker.[221] Furthermore, information in the report can be disputed through tendering of evidence.

The judicial role players then are the clerk of the court, who serves an administrative, mainly clerical function, as well as the Children's Court Commissioner (the presiding officer of the Magistrate's Court designated as a Children's Court). The statutory role player is the social worker who removed the child and is to report to the court. Apart from these participants there used to be the Children's Court assistant, a position that existed in the Children's Courts prior to amendments to the Child Care Act and the promulgation of the Children's Act.[222] These assistants performed a variety of tasks, including during pre-trial, ensuring interested parties and witnesses were informed of the need to be present at the hearing;[223] making a determination of whether a child should be present and can provide evidence in court; and acting as an advocate of the child during hearings, where necessary.[224] These vital roles are no longer fulfilled with the level of expertise that these assistants possessed, which included knowledge of child development. Instead, the clerk of the court or the commissioner makes the decisions on whether the child should attend – which creates an ethical problem.[225]

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218 Sec 104(2) of the Children's Act.

219 J van Niekerk & C Matthias 'Government and non-profit organisations: Dysfunctional structures and relationships affecting child protection services' (2019) 55 *Social Work/Maatskaplike Werk* 243.

220 van Niekerk & Matthias (n 219 above) 252.

221 C Matthias & N Zaal 'The child in need of care and protection' in T Boezaart (2009) *Child Law in South Africa* 163 171.

222 Child Care Act of 1937.

223 HM Bosman-Swanepoel & PJ Wessels *A practical approach to the Child Care Act* (1995) 13.

224 FN Zaal 'Court assistants' in C Jones-Pauly & S Elbern (eds) *Access to justice: The role of court administrators and lay adjudicators in African and Islamic contexts* (2002) 202.

225 Zaal (n 224 above) 201.

The experiences of children in neglect and abandonment cases in a Children's Court was the focus of a study by Claasen and Spies.[226] They found that participants had mostly negative experiences of the process – including interactions with the social worker and the presiding officer. Children were generally speaking not informed of the roles of the various court officials, including the social worker, and their participation in the court proceedings was minimal and not meaningful.[227] The child participants did not understand the reasons for attending the court, nor were they told what the outcome in their cases meant, and the consequences thereof (mostly alternative care was ordered).[228] This lack of information mainly led to: 'misconceptions, uncertainty about their future, feelings of fear and anger and overall anxiety, which in turn have a negative influence on the child's experience of Children's Court procedures'.[229] Claasen and Spies propose the design of a dedicated court preparation programme for the children and identify that social workers should be responsible for pre-hearing preparation, as well as building rapport throughout the hearing.[230] The authors also propose training on effective communication for the presiding officers, to facilitate 'maximum understanding and participation' of the children.[231]

Other authors have identified some guidelines on what information children are entitled to with regard to the legal process in the Children's Courts. This includes information about proceedings in court, i.e. discussing children's expectations from the process and identifying what the main role of the court is in determining the best interests of the child; what the roles of the stakeholders are, including those of the child; that the child has a right to be heard; the possible effect of the children's expression of views and preferences; and identifying that their preference may be trumped by other considerations.[232] If Children's Courts conduct child-friendly proceedings under the auspices of legislation that mandates child participation and children's access to information about the proceedings affecting them, and this is still not done satisfactorily – then it is safe to assume that the participation of parents with disabilities and access to relevant legal information may not be facilitated either, particularly as relevant provisions are absent in the legislation.

The role of the social worker, including in the prevention and early intervention measures, the investigation and assessment that is recorded in the social worker's report to the court, and the justice value chain and particular provisions related to disability in the Children's Act, are now discussed in turn.

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226 LT Claasen & GM Spies 'The voice of the child: Experiences of children in middle childhood, regarding Children's Court Procedures' (2017) 53 *Social Work/Maatskaplike Werk* 74.

227 Claasen & Spies (n 226 above) 89.

228 Claasen & Spies (n 226 above) 80-82.

229 Claasen & Spies (n 226 above) 89.

230 n 226 above, 90.

231 As above.

232 Claasen & Spies (n 226 above) 76, citing FM Mahlobogwane 'Determining the best interests of the child in custody battles: Should a child's voice be considered?' (2010) 31 *Obiter* 232; N Taylor et al 'Respecting children's participation in family law proceedings' (2007) 15 *International Journal of Children's Rights* 61.

5.3.3. The role of the social worker

The social worker is usually the first professional who is assigned to investigate the circumstances of families at risk. The provision of prevention and early intervention services is required, where possible, before statutory intervention is activated in court proceedings. The social worker's statutory role becomes circumscribed by the requirements of the report that will be lodged with the court. Each of these aspects is discussed below.

The social worker and prevention and early intervention measures

In the South African context, the support options provided by social workers to vulnerable families have generally not been studied.[233] The precursor to the Children's Act, the Child Care Act of 1983, only required social workers to provide tertiary services. In other words, the statutory removal procedures at the end of a cycle of harm or potential harm occurring, without legally requiring support in prevention and early intervention to ameliorate the need to place children in alternative care. Matthias and Zaal refer to the Child Care Act's emphasis on tertiary 'prevention' as 'outdated' and 'neo-colonial' – and rightly so.[234] Frank explains how the Inter-ministerial Committee on Young People at Risk in 1996, and for several years thereafter, involved a multiplicity of stakeholders, including government and NGOs, working towards developing policy in the criminal justice system as well as the child care system – to move away from a reactive approach towards a more proactive approach of prevention and early intervention.[235] An inter-sectoral group now involved in policy and law reform and implementation consultation, is the National Child Care and Protection Forum, derived from a National Child Care and Protection Committee from 1993. This Forum meets regularly and recently consulted on the proposed amendments to the Children's Act. Both the role of social workers and presiding officers of the Children's Courts were going to change drastically.

The drafters of the Children's Act foresaw the need to include primary and secondary interventions. With the new version, social workers would be obligated to provide such interventions, with the court having a measure of oversight. These services would no longer fall outside of government, having previously only been offered by NGOs, and would be regulated under the legislation.[236]

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233 But see C Matthias 'Can we legislate for prevention and intervention services for children? An analysis of aspects of the 2002 draft Children's Bill' (2004) 40(2) *Social Work* 172.

234 C Matthias & F Zaal 'Supporting familial and community care for children: Legislative reform and implementation challenges in South Africa' (2009) 18 *International Journal of Social Welfare* 291 292.

235 C Frank (updated by J van Niekerk) 'Chapter 8: Prevention and early intervention' in A Skelton *Commentary on the Children's Act* (2018) RS 9 ch9-p9.

236 Matthias and Zaal (n 234) 293, indicate that this was a concern for the situation under the Child Care Act.

The Makoae et al[237] study, mentioned earlier, looked at the lack of prevention and support to parents at risk of maltreating their children based on reviews of 30 maltreatment cases – each from five Children's Courts in 2006.[238] This study found that the social workers seldom reported in their investigation reports what kind of preventative actions were taken before the statutory intervention in court.[239] A major flaw of some of the reports, according to the authors, was that

> they were not comprehensive reports, they did not present the chronology of events and specified social worker interventions appeared to be ad hoc actions that did not reflect continuous relationships with families. Consequently, most of the interventions though not specified for every case under review seemed to be consistent with the nature of risks diagnosed partially. In many instances, social workers left much to be implemented by caregivers who had multiple vulnerabilities including alcohol and drug abuse.

The authors surmised that the poor outcomes for prevention may be a result of high social worker case-loads, and the reality that early interventions involved placing children in places of safety – meaning that it marked the entry into statutory services for these children. Reunification was not the norm, and most children did not return to the care of their biological parents.[240] While Makoae et al's study is helpful in indicating some of the risk factors in the Western Cape for children of parents that are single mothers, have substance abuse problems, or psychosocial disabilities – it did not consider children of parents with intellectual disabilities.[241] It is, however, valuable in sketching the kinds of failures in the system of prevention, early intervention, and statutory intervention, as well as preservation and reunification services by social services. It must be noted that the study concerned Children's Court inquiries in terms of the Child Care Act, and not the Children's Act.

There is thus scope for this study to investigate whether and how social services agencies are implementing early intervention or prevention programmes for parents with intellectual disabilities. This information can be obtained from the court case reviews, but in light of the limitations noted in the Makoae et al study, it is possible that the social workers' report may not include this information. Ascertaining whether such interventions were offered to the families, as identified by the social worker in his or her reports, is limited. This is because the court does not follow up with social workers concerned in respect of more detail on how these interventions were offered and whether these meet with best practice standards and are adapted to the needs of mothers with intellectual disabilities.

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237 M Makoae et al *Children's court inquiries in the Western Cape* (2008) HSRC 1 67. This study: identified risk factors for child maltreatment; developed profiles of children (and their caregivers) involved in the inquiries; analysed their home and socio-economic situation; analysed the alternative care placements; and examined the social services offered during the statutory process.

238 The Children's Courts that were subject to this study were Atlantis, Cape Town, Malmesbury, Mitchell's Plain and Wellington.

239 Makoae et al (n 237 above) 67.

240 Makoae et al (n 237 above) 70.

241 n 237 above, 28.

Holness's findings in relation to parenting programmes (as part of early intervention and prevention services) show that existing parenting programmes are not targeted at parents with intellectual disabilities – nor are they developed with the needs of these parents in mind.[242] Generally speaking, parenting programmes refer to home visits, play groups, parenting workshops and early childhood development workshops that are interventions aimed at improving parents or caregivers' 'knowledge of young children's development, their stimulation for early learning, their management of children's behaviour, and their relationships with their children.'[243] Two programmes reviewed the Centre for Early Childhood Development's parent education workshops and play group sessions. In addition, the Early Learning Resource Unit's family and community motivator programme[244] with home visits and monthly cluster workshops are making strides in addressing some aspects of preventative services for vulnerable families. However, these programmes are deficient in relation to monitoring and evaluation, which makes it difficult to measure their impact and efficacy.[245] Nonetheless, the programmes have the potential needed for development and adaptation to the needs of parents with intellectual disabilities. The challenge is that: First, ableism entrenched in stereotypes about the parenting of these parents needs to be addressed, and second, adequate funding with requisite monitoring and evaluation needs be allocated in order to develop such targeted programmes. Geographically, such programmes exist mostly in the Western and Eastern Cape, and access to the programmes is hampered by the poverty of families (including in relation to transport and child care costs).[246]

Prevention programmes, according to the Children's Act, are aimed at strengthening and building the family's 'capacity and self-reliance to address problems that may or are bound to occur in the family environment which … may lead to statutory intervention'.[247] Early intervention programmes are anticipated to address children identified as 'vulnerable' or 'at risk of harm' in order to prevent removal into alternative care. This would ameliorate any need for court intervention, as these programmes are aimed at 'preserving a child's family structure' and 'avoiding removal of the child from the family environment'.[248] These programmes are to develop the parent's skills and capacity to ensure the well-being and best interests of their children, and to address and prevent neglect and other types of failures in the family environment in order to better meet children's needs.[249] The Children's Act also explicitly mandates the

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242 W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26 *Stellenbosch Law Review* 318 357.

243 C Ward & I Wessels 'Rising to the challenge: Towards effective parenting programmes' in L Berry et al (eds) *Child Gauge* (2013) 62.

244 Holness (n 242 above) 354-356.

245 A Dawes et al 'Towards integrated early childhood development: An evaluation of the Sobambisana Initiative' (2012) *Ilifa Labantwana* 11.

246 Ward & Wessels (n 243 above) 64.

247 Sec 143(1)(b) of the Children's Act.

248 Sec 144(1)(i) of the Children's Act.

249 Secs 144(1)(b) and (f) of the Children's Act.

participation of children, parents or caregivers and other family, to identify and seek 'solutions' to 'their problems'.[250] Frank argues that this involvement relates to 'application of *all* forms of prevention and early intervention programmes, including those ordered by the Children's Court'.[251] She proposes that their engagement should be solicited in the assessment of the nature of the problems experienced; the development of alternatives in response to these problems; and 'decision-making regarding a course of action'.[252]

Under section 149 of the Children's Act, social workers' reports to courts must contain information, in summary form, relating to the prevention and early intervention programme provided by them to the child and his or her family. Davel and Skelton explain the import of this requirement:

> For this information to be of value to the court, the report should at the very least contain information about the nature of programmes provided and the impact of these programmes on the child, parent, care-giver and/or family. This requirement reinforces the need for the court to be able to act proactively, and to be enabled by the relevant information to do so. This provision also enables the court to ensure that social welfare services have made efforts to ensure that children and their parents, care-givers and families have been enabled to seek resolution for their problems before efforts to remove the child are instituted.[253]

Matthias and Zaal commend the change in the legislation, particularly the requirement that courts can mandate prevention and early intervention measures to address the need for 'developmental services', which would assist families promote optimum caring and obviate removal.[254] The authors anticipated that the regulations to the Children's Act would enumerate on the legislative intent and that jurisprudence on the interpretation of these provisions would provide further clarity and guidance down the line.[255] Unfortunately, appeals from the Children's Courts to the High Courts are rare. Jurisprudence on prevention and early prevention services and their scope for change has not developed.

The regulations to the Children's Act do include national norms and standards for prevention and early intervention programmes.[256] These *inter alia,* must 'strengthen and support family structures and build capacity'; 'be aimed at the improvement of the well-being of families and children'; 'be family centred with family members seen as the main focus'; and 'focus on the strengths and capabilities of family members'.[257] The emphasis is clearly on family strengthening and capacitation. The regulations are a good start, but it is not clear to what extent social services self-monitor provision of

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250 Sec 144(3) of the Children's Act.
251 Frank (n 235 above) ch9-p16.
252 As above.
253 C Davel & A Skelton *Commentary on the Children's Act* (2010) 8-18.
254 n 234 above, 293.
255 Matthias and Zaal (n 234 above) 293.
256 Reg 52 of the General Regulations regarding Children, 2010.
257 Items (1)(a), (b), (e) and (f) of Part IV to Annexure B of the General Regulations regarding Children, 2010.

these services, nor whether the courts are adequately supervising such interventions in the court inquiries which focus, generally, on the most at-risk families. Then there are institutional barriers to full implementation of community and family-based services such as: high case load of social workers, underfunded NGOs providing statutory and non-statutory services, insufficient social workers in government employ, and financial capacity constraints in the NGO sector.[258]

A serious flaw in the legislation was identified by Matthias when the Children's Act was still in the drafting stage. Prevention and early intervention programmes were to fall within the purview of social services only. Matthias warned that these services cannot, due to lack of capacity, be provided by social workers alone and would need to entail a host of stakeholders and providers, including child and youth care workers, community workers, educators, and health care workers.[259] This multi-sectoral approach – to be effectively implemented on the scale anticipated – would require adequate resources, including funding.[260]

Fortunately, the Children's Act does promote an intersectoral approach through its strategy that involves an array of stakeholders. However, the strategy remains the primary responsibility of the Department of Social Development as articulated in the Act, with provincial application indicated with a provincial strategy. The funding needed for these programmes is addressed in the legislation, requiring these programmes to comply with the quality espoused in the norms and standards.[261] The legislation prioritises funding for programmes that address poverty-related issues (shelter, food, basic necessities) and programmes for children with disabilities.[262]

The Committee on the Rights of Persons with Disabilities, in its concluding observations on South Africa's initial report, recommended that the state develops and adopts an 'effective implementation plan' for prevention and early intervention programmes – to not only assist with early identification of disability but also to provide support for children *and* adults with disabilities.[263] The Committee stressed that an adequate budget needs to be allocated for these programmes. The budgeting and human resources for the Department of Social Development is discussed in more detail under the policy framework. Not only the quantity, but also the quality of

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258 L Landman & A Lombard 'Integration of community development and statutory social work services within the developmental approach' (2006) 42 *Social Work/Maatskaplike Werk* 1; J Streak *Government's social development response to children made vulnerable by HIV/Aids: Identifying gaps in policy and budget* (2005) Occasional Paper, Institute for Democracy in South Africa, cited in Matthias and Zaal (n 234 above) 296.

259 n 233 above, 174.

260 Matthias (n 233 above) 177.

261 Sec 146(3) of the Children's Act.

262 Sec 146(4)(b) of the Children's Act.

263 Committee on the Rights of Persons with Disabilities (n 187 above) para 13(d).

prevention and early intervention services can be undermined where state subsidisation to NGOs is insufficient.[264]

It is necessary to consider whether and how the norms and standards for prevention and early intervention services may need to be adapted to the disability context to avoid discrimination. To ameliorate some of the concerns about the Act's formulation of neglect, Zaal suggests legislative guidelines in regulations for the courts as to 'whether a child must be classified as neglected to an extent which justifies the imposition of mandatory alternative care measures'.[265] Research should investigate what factors could inform a court's decision in this regard.[266] This may necessitate looking at the suitability of applying an adapted form of the broad assessment framework[267] provided in the regulations for deliberate neglect to situations of neglect *simpliciter*, and to investigate the need for applicable norms and standards that do not narrowly constrain presiding officers, but give them sufficient discretion.[268] It may be necessary to develop guidelines as to indicators of the existence of grounds, such as section 150(1)(f) and (g) and (h). Such guidelines to both social workers and courts would ensure reliable assessment to determine what a child 'needs' and what is in his or her 'best interests'. Importantly, such guidelines to courts on establishing neglect should direct that evaluations of caregivers as being unsuitable to continue to care for a child should not focus exclusively on the caregiver, but also on his or her social context, including an 'assessment of the financial and social resources available' to him or her.[269]

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264 *National Association of Welfare Organisations and Non-Governmental Organisations and Others v MEC of Social Development, Free State and Others* (1719/2010) [2010] ZAFSHC 73 (5 August 2010). See, also, D Budlender *The size of the pie and how to cut it: Assessing the NAWONGO case and the effects on social welfare allocations for children* (2016) 19-25, 34-39; P Proudlock 'Children's socio-economic rights' in T Boezaart (ed) *Child law in South Africa* (2017) 291.

265 FN Zaal *Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system* Unpublished Phd thesis, University of the Witwatersrand (2008) 332.

266 Some factors that have been suggested may increase the discriminatory effect on these parents. For example, the caregivers' mental and physical capacities suggested in BL Bonner, SM Crow & MB Logue 'Fatal Child Neglect' in H Dubowitz (ed) *Neglected Children: Research, Practice and Policy* (1999) 156 169.

267 The drafters of the Children's Act anticipated the need for guidelines for assessment frameworks, particularly for deliberate neglect in regulation 35 to the Act, in terms of section 142(c) of the Children's Act. The aim of the broad risk assessment framework is to provide guidelines for the identification of children who are abused or deliberately neglected, provide an assessment of risk factors to support such conclusion on reasonable grounds, allow an investigation by social services on receipt of a report alleging abuse or neglect, and promote appropriate protective measures to be taken in respect of the child. Indicators of deliberate neglect are provided in regulation 35(2)(d).

268 There are many commentators that warn against checklist-based risk assessments. See M Boursnell 'Assessing the capacity of parents with mental illness: Parents with mental illness and risk' (2014) 57(2) *International Social Work* 92 102. See, also, P Gillingham & LM Bromfield 'Child protection, risk assessment and blame ideology' (2008) 33 *Child Australia* 18.

269 Zaal (n 265 above) 333.

An order of removal should be based on 'prior proof of just cause.'[270] However, the Children's Act allows avoidance of proof of grounds under section 156(4) of the Act. Zaal cautions that this could raise constitutional challenges based on the rights to fair proceedings and family privacy.[271] This lack of proof means that the Act permits mandatory interventions, including instances where a finding was made that the particular child is *not* in need of care and protection – viz. the ground under section 150(1) has not been proven. Zaal recommends that grounds must always be proved before measures are imposed by the court and the Act must be amended accordingly. For parents with intellectual disabilities, the possibility of a court order without the proof of the existence of a ground, i.e. evidence of neglect, is likely to arise.[272]

The content of the social worker's report to the court and its evidentiary value is discussed next.

The social worker's report

The diagram below illustrates the evidence that is most likely led in an inquiry, most of which is attached to the social worker's report to the court. The social work report is accompanied by annexures, including *inter alia* the age estimation of a child where needed and a medical report on the child; affidavits from relevant parties; birth certificates of the children concerned; and school reports. It is rarely accompanied by a medical professional's report on parental capacity assessment, but in theory this is required where a parent is stated not to have the relevant capacity to parent.

While it is acknowledged that parental capacity assessments in and of themselves in principle may contravene the full recognition of the legal capacity of persons with disabilities are required by article 12 of the CRPD, where they indirectly or directly discriminate against the parent with the disability, some evidence of relevant parenting practice or conduct in relation to how the parent's conduct, and disability or health where relevant, may impact on the child's best interests is needed in court. As stated in *Cînţa v Romania,* clear evidence is needed where an allegation is put forward that a parent's mental health (or intellectual disability) impairs their ability to take care of their child at a particular time. This kind of evidence may be set out in a parental capacity assessment as long as the report identifies the actual deficient parenting of the adult concerned as implicating the child's best interests, as opposed to reports where the assessment solely (and discriminatorily) identified the health or disability status of the person as the decisive factor. However, such an assessment would have to, if needed at all, comply with relevant ethical and legal safeguards so as to not violate the parent's rights. Decoupling such an assessment from the legal personhood

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270 n 265 above, 327.
271 As above.
272 As above.

(legal capacity) of the disabled parent is required by the Committee on the Rights of Persons with Disabilities.[273]

An alternative to parenting capacity assessments that is compliant with the requirements of article 12 would be an assessment of the parent which identifies the support needs of the parent to enable him or her to exercise his or her legal capacity in relation to parenting decision-making, as well as in participation in the court proceedings. Furthermore, the support that these parents may require to enable them to effectively exercise their *parenting,* in other words, how to care for their children to meet their best interests, should be identified in such assessments. It is submitted that assessments that only identify the deficiencies in parenting without identifying the relevant support needs would not comply with the CRPD. Reference to deficiencies in parenting here does not in any way refer to the parent's legal capacity but refers to the person's actual parenting practice. Undoubtedly, provision of appropriate parenting capacity assessments should be obtained where relevant in all cases where an allegation of parental neglect arises, not only in cases where the neglect is averred while the child is in the care of a parent with an intellectual or other disability.

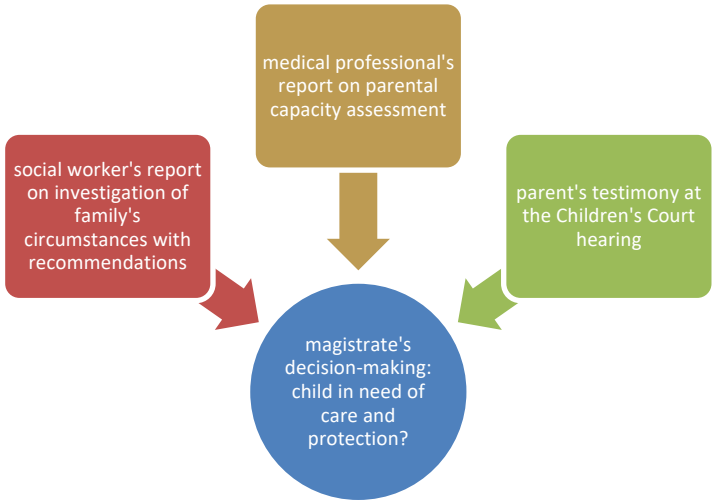

Diagram 2: The evidence that informs the magistrate's decision-making

In the report, the social worker will outline, after an investigation into the child's and family's circumstances, the child's best interests in relation to the 'capacity of the parent, 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'.[274] This is not done explicitly in the report, but is implied by the requirement to outline a description of the family profile in the social worker's report.[275] The family profile comprises the identification of physical and psychological factors relating to the parents. These

273 Committee on the Rights of Persons with Disabilities *General Comment 1: Article 12: Equal Recognition before the Law* (2014) CRPD/C/GC/1 paras 15, 17.
274 Sec 7(1)(c) of the Children's Act.
275 Form 38 of the General Regulations regarding Children, 2010 (sec 155(2) of the Act).

include the indication of disabilities or mental disabilities, and also the family background (e.g. education, employment), structure, relationships, housing and environment, religious and cultural, socio-cultural, and financial aspects.[276] The regulations to the Act require that the social worker's report contains, *inter alia:*

- 'details of previous interventions and family preservation services considered or attempted'; and
- recommendations regarding measures to assist the child's parent, including 'counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.'[277]

The literature on investigation and report writing, as well as social service interventions and recommendations in relation to families where a parent has a disability, is lacking in the South African context.

The social worker's report does not require the social worker to explicitly consider the child's best interests, as the term 'best interests' is not mentioned in the evaluation, conclusion or recommendation aspects in form 38. Rather, the social worker is to:

- evaluate the matter to be decided by the court;
- identify whether after his or her investigation, the child is to be considered to be 'in need of care and protection';
- recommend which court order(s) would be appropriate to the child; and
- assess the 'therapeutic, educational, cultural, linguistic, developmental, socio-economical and spiritual needs of the child.'[278]

Permanency plan recommendation

Under the permanency plan recommendation where the social worker recommends that a child is to be removed from the care of a parent or caregiver, the social worker must state that he or she took into account a number of factors in coming to the conclusion that the child be removed and placed in alternative care (with a list of options listed).[279] These factors are:

> the ideal that every child should be provided with the opportunity to grow up within his or her family and where this is proved not to be in his or her best interest or not possible, to have a permanency plan which works towards life-long relationships in a family or community setting;
> The best way of securing stability in the child's life in terms of section 157(1)(b) of the Act
> The age of the child

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276 As above.

277 Reg 55(1)(e) and (j) of the General Regulations regarding Children, 2010. Note that the South African Council for Social Service Professions *Policy Guidelines for Course of Conduct, Code of Ethics and the Rules for Social Workers* (2007) does not refer to ethical principles in relation to investigation, or assessment in statutory proceedings.

278 Reg 55(1)(f), (h) and (k).

279 Form 38, R: Permanency Plan.

The developmental stage of the child
The child's therapeutic, educational, cultural, linguistic, developmental, socio-economical and spiritual needs; and
The views of the child.

The social worker is to discuss these factors in his or her report.

Developmental and risk assessments

This report, lodged with the court, is supposed to be preceded by a developmental assessment and/or safety and risk assessment, as well as assessments by other relevant professionals. Initially, when neglect of a child is alleged, the social worker will immediately investigate to determine whether maltreatment is suspected or occurred, in order to secure the safety of the child. This process requires a safety assessment. Thereafter, once the child has been removed from the potentially harmful circumstances, the social worker will proceed with the second type of assessment, to ascertain whether the risk of maltreatment will continue.[280] The challenge is that assessment practices in South Africa are not uniform,[281] and yet professionals, including magistrates, rely on the assessment conducted by the social worker in order make a decision (based on evidence) in the best interests of the child.

Spies et al identified that social workers tend to not understand relevant concepts for assessment in the child protection field, and in particular in relation to safety and risk assessment. The social workers (and legal and mental health professionals) that participated in their study articulated the positive impact of a standardised assessment procedure on the quality of safety and risk assessment, and that it would also improve communication among the professionals involved in the child protection value chain.[282] Spies et al assigned by the Department of Social Development to develop standardised safety and risk assessment tools for the South African context, opine that the effectiveness of the new uniform tools (which have been rolled out) can be scuppered by extrinsic factors such as the high case load they face and the general shortage of social workers.[283] The 'quality and effectiveness' of the utilisation of assessment tools is reliant on 'the manner in which the social worker conducts the assessment.'[284] In other words, the approach of the social worker to the task of assessment can impact on its quality and effectiveness.

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280 G Spies et al 'Safety and risk assessment tools for the South African child protection services: Theory and practice' (2017) 30(2) *Acta Criminologica* 116 118.

281 G Spies et al 'Developing Safety and Risk Assessment Tools and Training Materials: A Researcher-practice Dialogue' (2015) 25(6) *Research on Social Work Practice* <https://doi.org/10.1177/1049731514565393> (accessed 1 March 2020).

282 n 279 above, 122.

283 G Spies & M Le Roux 'A critical reflection on the basic principles of assessment of the child at risk' (2017) 1 *International Journal for Studies on Children, Women, Elderly and Disabled* 201 202.

284 Spies & Le Roux (n 282 above) 202.

Guidelines for facilitating children's best interests during the assessments by mediators in divorce proceedings, have been suggested.[285] These guidelines include directing the assessor to conduct extensive and responsible assessments to determine a family's functioning.[286] The frequency and quality of assessments conducted in neglect cases by social workers or other professionals, has not been studied in South Africa. The guidelines in divorce matters may be instructive, particularly since the guidelines proposes development of a uniform assessment protocol.[287] The development of a similar protocol may help in neglect cases. The drafting of compulsory parenting plans in divorce matters[288] could also be of assistance to social workers considering the best interests in neglect cases, including facilitating family preservation. However, parenting plans devised based on 'mere observation and subjective information obtained in brief interviews with parents' result in superficial and ineffective plans, particularly when parents need to rely on these during times of crisis and disagreement.[289] Rather, extensive assessment of the family situation is needed in order to inform the drafting of a suitable parenting plan.[290]

Social workers executing statutory removals have commented that the Children's Act is cumbersome and unclear in many respects, including in terms of the grounds for removal under section 150(1) of the Act, which stipulates when a child is in need of care and protection. Sibanda and Lombard recommend, following findings from their empirical study on social workers' critical perspectives on the ease of use of the Act, that adequate training on the Act is needed. This should include simultaneous training of the presiding officers, police and social workers, so that their roles and obligations are made clear, and to provide clarity on the interpretation of the grounds of removal in particular.[291]

Assessments by other professionals

The social worker's report will be accompanied by several annexures, including reports or assessments by other relevant professionals. The Children's Act does not provide any guidance on the content of such reports. Instead, the legislation nebulously refers to the power of the court to issue an order that requests a report from the social worker, assessing the child's developmental, therapeutic and other

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285 K Meyer *Developing guidelines for professionals to facilitate the best interests of the child during the divorce mediation process* Unpublished Phd thesis, North-West University (2015) 302.

286 Meyer (n 284 above) 202.

287 Meyer (n 284 above) 202.

288 Secs 33 and 34 of the Children's Act.

289 Meyer (n 284 above) 303, citing PR Amato 'Feeling caught between parents: Adult children's relations with parents subjective well-being' (2006) 68 *Journal of Marriage and Family* 222. See, also, TM Robinson *Parenting Plans: The development of substantive guidelines for professionals* Unpublished PhD thesis, North West University (2010).

290 Meyer (n 284 above) 202.

291 S Sibanda & A Lombard 'Challenges faced by social workers working in child protection services in implementing the Children's Act 38 of 2005' (2015) 51 *Social Work/Maatskaplike Werk* 332 345 & 350.

needs.[292] Therapeutic and other needs may be identified by relevant professionals other than social workers. The legislation does not refer to the assessment of parenting capacity by professionals other than social workers, such as psychologists or psychiatrists.

The question then is to what extent a psychologist's or psychiatrist's assessment of a parent's capacity constitutes 'expert evidence' or 'fact witness' testimony, and therefore how the rules relating to expert evidence apply in this context. Discussed below is some guidance taken from the forensic context, which rarely applies in Children's Courts, as parenting capacity assessments are not often prepared by mental health professionals or by intellectual disability specialists – but rather by social workers. Forensic assessments in the Children's Courts have not received attention in the literature. The Children's Court regulations do not set out any rules on forensic assessments or the weight attached thereto. The Magistrates' Courts rules also do not refer to such assessments and only refer to expert testimony in relation to compensation or damages claims.[293]

The civil rules of evidence apply in the Children's Courts where explicit special rules are not made. An expert (or layperson's) opinion provided to the court is only admissible where it is not superfluous and will assist the court because the witness is in a better position than the court, through either experience or qualifications, to form an opinion – and such opinion will help the court determine a fact that is in issue.[294] In other words, the admissibility relies on the consideration that the court will be rendered appreciable assistance. The opinion will be admissible where relevant, particularly where an expert's specialist knowledge is not shared by the court.[295]

The procedural steps required to admit an expert's evidence (such as a psychologist or psychiatrist) includes establishing the expert's credentials (training, knowledge, skill or experience). This may include formal qualifications; determining that he or she is an authoritative expert on the issue at hand; and that the facts on which he or she will express an opinion are relevant to the case and are reconcilable with the other evidence tendered in the case.[296] The expert must lay a foundation for the opinion by substantiating the conclusions and premises which support them, in order for the evidence to have probative value.[297] The court is then to determine whether it is satisfied that the expertise offered is of a specialist nature that can, on the basis of such skills, help the court arrive at a conclusion on a fact that is in issue.[298] The court is to exercise its discretion by 'not blindly' accepting the evidence tendered,

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292 Sec 157(1)(a)(i) of the Children's Act.
293 Rule 24 of the Magistrates' Courts Rules.
294 Bellengère (n 198 above) 256.
295 *Glentiruco AG v Firestone SA(Pty) Ltd* 1972(1) SA 589 (A) 616H.
296 Bellengère (n 198 above) 398.
297 n 198 above, 399. See, also, *Coopers (SA) (Pty) Lted v Deutsche Gesselschaft Fur Shadingsbekamfung MbH* 1976 (3) SA 352 (A) 371.
298 *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (EC) 569.

but can act in line with the conclusions made by the witness where it is satisfied of the two aspects mentioned earlier. This is even in circumstances where the presiding officer's own observations do not confirm such conclusions reached.[299] Experts are to qualify their opinion, where it falls outside their expertise, as provisional.[300] Consultation with the person about whom an assessment is to be done and then conclusions are reached and communicated to the court, is generally expected.[301]

Documentary evidence (a report by the expert witness) is admissible in the absence of oral testimony of an expert witness. Usually the court would then determine the weight to be attached to the document at a later stage.[302] The challenge is that evidence so adduced without the benefit of oral testimony and cross-examination may mean that 'issues that are not fully explained or matters that are open to interpretation cannot then be clarified'.[303] This would obviously be a heightened disadvantage that arises in proceedings where persons are not legally represented or have an intellectual disability.

The duties of the expert witness were clarified in case law, as including the following aspects:

- the evidence offered should be an independent product of the expert, without undue influence in either form or content; and
- the expert should offer to the court objective, an unbiased and independent opinion on the issue that is within the remit of his or her expertise;
- the expert is not an advocate;
- the material facts or assumptions underlying the expert's opinion should be clearly stated;
- the expert must identify where an issue is not within his or her expertise; and
- if insufficient data are available on which to base an opinion, then this qualification should be stated – i.e. that it is a preliminary report.[304]

These duties correspond to a large extent with those offered by the ethical principles attached to some medical professions, as discussed below. Forensic assessments conducted by mental health or other professionals to evaluate a child or parents usually occur in the context of care and contact (custody) proceedings involving divorcing parents;[305] or alternatively in the criminal context in relation to

299 *R v Nksatlala* 1960 (3) SA 543 (A) 546.
300 *Schneider NO and Others v Aspeling and Another* 2010 (5) SA 203 (WCC) 211.
301 *S v O* 2003 (2) SACR 147 (C) at 163J.
302 Bellengère (n 198 above) 400.
303 As above. See, also, *S v S* 1977 (3) SA 830 (A) 836H.
304 *Schneider* (n 299 above) 211.
305 N Themistocleous-Rothner *Child care and contact evaluations: Psychologists' contributions to the problem-determined divorce process in South Africa* Unpublished Phd thesis, University Of South Africa (2017).

cases of assessing fitness to stand trial[306] or sexual or physical abuse of children or child offenders.[307] Psychologists' forensic reports are based on a

> case formulation in which the psychologist attempts to explain a person's past behaviour and/or provide an estimate of the likelihood of a future behaviour occurring. Both require forensic specific training and experience. The former involves acquiring the relevant information through a thorough assessment process and the drawing on theories of offending behaviour to explain human behaviour. The latter requires the use and interpretation of a range of risk assessment tools.[308]

Houidi et al's study into the forensic assessments of accused persons under the Criminal Procedure Act in KwaZulu-Natal, found that the court declared some patients as 'state patients' despite them not having a psychosocial illness or found them to be fit to stand trial even where the forensic psychiatrist did not comment on the criminal responsibility of the person.[309] These inconsistencies between the forensic psychiatrist's opinion and that of the court, could be as a result of lack of consensus, split opinions by forensic psychiatrists, or information available to the presiding officer that was not available to the forensic psychiatrist.[310] In some instances, patients were detained despite the court's finding that they were fit to stand trial and criminally responsible, or where they do not have a psychosocial illness, or did not commit a serious crime. Houidi et al call for better collaboration between the mental health and justice systems to avoid such ethical problems arising where patients' rights are violated.[311] The authors found that diagnosis of intellectual disability was most common in the accused referred for observation.[312]

Due to the ethical problems highlighted in the literature, Stevens recommends the drafting of a specific professional code of ethics for forensic mental health professionals (psychologists and psychiatrists) – where they offer expert witness opinion in criminal responsibility matters.[313] The uneven distribution of forensic observation units, and their inadequate infrastructure as well as falling short of health standards, resulted in the South African Society of Psychiatrists (SASOP) calling on an adequately resourced and up-to-standards unit to be established in each province.[314]

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306 Sec 79 of the Criminal Procedure Act 51 of 1977.

307 M Swanepoel 'Ethical decision-making in forensic psychology' (2010) 75 *Koers* 854.

308 M Zwartz 'Report writing in the forensic context: Recurring problems and the use of a checklist to address them' (2018) 25 *Psychiatry, Psychology and Law* 582.

309 A Houidi et al 'Forensic psychiatric assessment process and outcome in state patients in KwaZulu-Natal, South Africa' (2018) 24 *South African Journal of Psychiatry* a1142 <https://doi.org/10.4102/sajpsychiatry> v24i0.1142. State patient declaration means the person is admitted to a forensic psychiatric facility for an indefinite period. See, also, CP Szabo & SZ Kaliski 'Mental health and the law: A South African perspective' (2017) 14(3) *British Journal of Psychiatry International* 69.

310 As above.

311 Houidi et al (n 308 above) 5.

312 n 308 above, 3.

313 P Stevens 'ethical issues pertaining to forensic assessments in mental capacity proceedings: reflections from South Africa' (2017) 24 *Psychiatry, Psychology and Law* 639.

314 B Janse van Rensburg 'The South African Society of Psychiatrists (SASOP) and SASOP State Employed Special Interest Group (SESIG) Position Statements on Psychiatric Care in the Public

Guidance can be obtained from the ethical principles in the field of psychology.[315] However, it must be remembered that experts need not take an ethical oath that they are an officer of the court in South Africa – unlike in other jurisdictions.[316] Psychology as applied in law, sometimes known as psycho-legal work or forensic psychology, is regulated through these principles, whereas the legal system sets out principles in relation to admission and weight of evidence obtained from the assessments of experts such as psychologists.

The Professional Board for Psychology, under the auspices of the Health Professions Council of South Africa, issued rules for services rendered by registered psychologists in 2018.[317] Chapters 5 and 7 of the Rules are most instructive, with a focus on assessment activities and psycho-legal work. Chapter 7 applies to psychologists conducting assessments, interviews, consultations or expert testimony. It requires this work to be based on 'appropriate knowledge of and competence in the areas' of the work, which extends to specialised knowledge of particular populations.[318] Here, intellectual disability would be a specific population. The assessments, and recommendations as well as reports flowing therefrom, must be based on 'information and techniques sufficient to provide appropriate substantiation for the findings'.[319] The opinion of the psychologist may be limited due to an inability to examine the person, despite reasonable efforts to do so. In these circumstances, the Rules require the psychologist to identify 'the impact of the limited information on the reliability and validity of his or her reports and testimony' – which would appropriately limit the 'nature and extent' of his or her findings.[320] Psychologists are admonished to provide testimony and reports in truthfulness and with candour,[321] and should clarify role expectations where they may appear in different (and potentially conflicting) roles – such as a fact witness and expert witness.[322]

There are potentially ethical implications where psychologists testify for court, as an expert witness and potentially 'competing demands placed upon him or her by the code and the requirements of the court system', which will require him or her to responsibly resolve such a conflict,[323] and similarly where prior relationships exist.[324]

Sector' (2012) 18(3) *South African Journal of Psychiatry* 16.

315 A Allan 'Ethics in psychology and law: An international perspective' (2015) 25 *Ethics & Behavior* 443.

316 Bellengère (n 198 above) 401.

317 Professional Board for Psychology *Rules of Conduct pertaining specifically to Psychology* (2018) <http://www.sapc.org.za/sapc/wp-content/uploads/2018/01/HPCSA-Ethical-Code-of-Professional-Conduct.pdf >(accessed 10 January 2020).

318 Rule 67(2) of the Rules of Conduct pertaining specifically to psychology.

319 Rule 68.

320 Rule 69.

321 Rule 70 states: 'In psycho-legal testimony and reports, a psychologist shall – (a) testify truthfully, honestly, candidly and consistently with applicable legal procedures; and (b) describe fairly the basis for their testimony and conclusions.'

322 Rule 71(1) and (2).

323 Rule 72.

324 Rule 73.

Fact witnesses in their testimony are required to truthfully provide full disclosure of what he or she has observed or were involved in.[325] Allan enjoins forensic psychologists to draft reports for the court that are understandable to both the court *and* the parties involved in the case.[326]

The reality is that social workers undertake parenting capacity assessments (PCAs) – and not medical or other professionals. Aunos and Pacheco[327] analysed the PCAs of psychologists, psycho-educators and a social worker in 20 neglect allegations by mothers with intellectual disabilities in Canada. Some of these professionals were child welfare (CW) employees (or on contract), while some were from dedicated intellectual disability service providers (ID). Expertise and training of the different professionals differed. The study found that the ID workers were more likely to recommend supports for these women to parent effectively, whereas CW workers were more inclined to find impediments to good enough parenting.[328] The CW workers relied on the intelligence quotient (IQ) as a predictor of learning capacity and did not measure the learning capacity of these mothers.[329] Furthermore, IQ was relied on as a determinant of parenting capacity in CW worker's assessments, with their results being based on 'the assumptions and the risk model aimed at child safety'.[330] The best practices identified by the American Psychological Association in 2010[331] for child custody evaluations and those for PCA of persons with intellectual disabilities developed by Feldman and Aunos,[332] have generally not been followed.[333] The CW workers' assessments relied on 'erroneous correlations', such as the fact that low intellectual capacity is the predictor for inability to parent, and employed 'discriminatory terminology' – such as the mother having 'cognitive weakness'.[334] The authors propose evidence-based PCAs as well as clarity on who should conduct these, together with an indication of what their experience and training should be, as well as the context and tools available to them to do so.[335] In other jurisdictions, attorneys and judges seek objective and unbiased assessments from psychologists with relevant forensic and parenting assessment training, experience and adequate communication

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325 Rule 74.

326 A Allan & T Grisso 'Ethical Principles and the Communication of Forensic Mental Health Assessments' (2014) 24 *Ethics & Behavior* 467.

327 M Aunos & L Pacheco 'Able or unable: How do professionals determine the parenting capacity of mothers with intellectual disabilities' (2020) *Journal of Public Child Welfare*, doi: 10.1080/15548732.2020.1729923

328 Aunos & Pacheco (n 326 above) 16.

329 Aunos & Pacheco (n 326 above) 11.

330 Aunos & Pacheco (n 326 above) 20.

331 American Psychological Association 'Guidelines for child custody evaluations in family law proceedings' (2010) 65 *American Psychologist* 863. doi:10.1037/a0021250

332 M Feldman & M Aunos *Comprehensive competence-based parenting assessment for parents with learning difficulties and their children* (2010).

333 Aunos & Pacheco (n 326 above) 4.

334 Aunos & Pacheco (n 326 above) 19.

335 Aunos & Pacheco (n 326 above) 22. See, also, E Lightfoot et al 'A case record review of termination of parental rights cases involving parents with a disability' (2017) 79 *Children and Youth Services Review* 399 (Australian perspective).

skills (including in how to effectively communicate with a person with an intellectual disability). Such psychologists should have a doctorate.[336]

Quite clearly, the South African situation is very different. Social workers do not necessarily have relevant forensic and parenting assessment training, are not trained on how to communicate with persons with intellectual disabilities, do not have the requisite qualifications by definition, and, due to their job description as child welfare workers, would be biased in favour of a child safety perspective. Where a PCA is required to determine a child's best interests – in specialised instances such as where a parent with an intellectual disability is alleged to neglect their child – the requirements mentioned above are sorely needed to be implemented. Where such specialised assessment by a duly trained professional is impossible, the presiding officers need to understand the shortcomings of assessments performed by social workers untrained in these contexts, and the implications for exercising their own discretion in coming to a decision in the best interest of the children – which does not discriminate unfairly against the parent.

The social worker is the only professional involved in the investigation, assessment and reporting to the court on the best interests of the child, which happens most often. Clearly a lot of power is vested in him or her to provide relevant evidence to the court of the family's circumstances. Where the court is not *au fait* with the specific requirements on social workers under the Children's Act or other relevant legislation and regulations to help vulnerable families, nor is aware that ableism can easily creep into assessments if left unchecked – then without its own procedural accommodations to promote the participation of parents with intellectual disabilities, it would not be ameliorating the impact of stereotype and discrimination on the rights of the children and parents.

5.3.4. Procedural justice for persons with disabilities in Children's Courts

An uninformed approach to the ability of persons with intellectual disability to effectively participate in court proceedings affecting them, may mean that the necessary support in order for them to do so, is not offered and that assumptions are made about their mental, legal and parenting capacity. Harris questions whether the current legal frameworks available to persons with disabilities, including in parenting contexts, recognise their legal capacity and respect their 'agency to create and sustain kinship relationships'.[337] Next there is an analysis of the Children's Act and rules of procedure in an attempt to answer this question in the South African context.

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336 JN Bow et al 'Attorney's beliefs & opinions about child custody evaluations' (2011) 49 *Family Court Review* 301.

337 JE Harris 'Legal capacity at a crossroad: Mental disability and family law' (2019) 57 *Family Court Review* 14. See, also, R Powell 'Family law, parents with disabilities, and the Americans with Disabilities Act' (2019) 57 *Family Court Review* 37; L Francis 'Maintaining the legal status of people with intellectual disabilities as parents: The ADA and the CRPD' (2019) 57 *Family Court Review* 21.

Four notable procedural provisions, primarily for children with disabilities in the Children's Act, are:

- court hearings are to be 'held in a room conducive to informality of proceedings and active participation of all persons involved, and must be accessible to persons with disabilities' ('special needs');[338]
- rules are to be made to 'avoid adversarial procedures' and such rules should include AQTs for children (as well as those with 'intellectual or psychiatric difficulties or hearing or other physical disabilities which complicate communication');[339]
- unfair discrimination on the basis of the 'health status or disability of the child or a family member' (including a parent) is not per se prohibited, but rather the legislation requires that the proceedings (or actions or decisions affecting the child) protect the child from such discrimination;[340] and
- intermediaries can be appointed for children where it is in their best interests.[341]

These provisions in the Children's Act are discussed in turn.

Conducive and accessible room

First, sections 42 (8)(b) and (d) of the Children's Act emphasise the need for the room where the hearing is held to be conducive to informality and active participation of parties, and it must also be accessible. However, these provisions relate to the physical location and not to procedural accommodations.[342]

The rules of the Children's Court, set out in its regulations, do not refer to accessibility or procedural accommodation for children or adults with disabilities.[343] This is not unique, because other courts' rules do not do so either (bar the Regulations

338 Sec 42(8(b) and (d) of the Children's Act.

339 Sec 52(2)(ii) of the Children's Act.

340 Sec 6(2)(d) of the Children's Act.

341 Sec 61(1) of the Children's Act, read with sec 170A of the Criminal Procedure Act.

342 These sections hold: 'The children's court hearings must, as far as practicable, be held in a room which (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court; (d) is accessible to disabled persons and persons with special needs.'

343 General Regulations regarding Children, 2010, published under GN R261 in *Government Gazette* 33076 of 1 April 2010 as amended by GN R497 in *Government Gazette* 35476 of 29 June 2012; and the draft Rules Regulating the Conduct of the Proceedings of the Children's Court, October 2018 <http://www.justice.gov.za/rules_board/documents/201810-ChildrensCourtRules-AnnexureB-Rules.pdf>. See, also, Rules Board for Courts of Law *Memorandum on the Objects of the Draft Children's Court Rules* <http://www.justice.gov.za/rules_board/documents/201810-ChildrensCourtRules-AnnexureA-Memorandum.pdf> (accessed 1 November 2018).

for the Sexual Offences Courts discussed below). Barriers to accessing another inquisitorial court, the Equality Court, have been identified in the literature.[344]

Appropriate questioning techniques

While the Children's Act places an obligation for appropriate techniques to be developed, the legislature has not yet done so. Carter and Boezaart[345] sought to address the compliance of the Children's Act with the CRPD in relation to children with disabilities in 2016. The authors identify a number of short-comings, such as the absence of court rules dealing with Appropriate Questioning Techniques (AQTs) for children with disabilities.

Two years later, the Rules Board drafted a new set of regulations to the Children's Act to replace the previous version. Holness, in a submission to the Rules Board on the proposed Rules regulating the conduct of proceedings in the Children's Court, commented that neither the proposed rules (nor the previous regulations) provide guidance on AQTs for 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication' – as mandated by the Children's Act.[346] Section 52(2) of the Children's Act requires the design of rules concerning AQTs for: (i) 'children in general'; (ii) 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication'; (iii) 'traumatised children'; (iv) and 'very young children'. This *lacuna* was also identified in the South African state report to the Committee on the Rights of Persons with Disabilities in 2014.[347] The proposed Children's Court rules still do not include provisions on AQTs, which flouts international law obligations.

White et al developed an understanding of the communication needs of children with little to no functioning speech in criminal court proceedings, and the accommodations made for Alternative and Augmentative Communication (AAC).[348] Dagut and Morgan[349] stressed the communication needs of deaf parties before the courts. However, no literature on the experience of communication with adults with intellectual disabilities in the Children's Court is available, although there is some

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344 W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907; TJ Powys 'Benefit or impediment? The operation of the Equality Courts in South Africa' (2016) 30 *Agenda* 36.

345 EI Carter & T Boezaart 'Article 13 of the United Nations Convention on the Rights of People with Disabilities: Does the Children's Act 38 of 2005 support access to justice for children with disabilities?' (2016) 79 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248.

346 W Holness 'Submission to the rules board of the Children's Court on the Rules regulating the conduct of proceedings of the Children's Court, October 2018' (2018) para 19 (copy with the author).

347 Republic of South Africa *Initial Report to the Committee on the Rights of Persons with Disabilities* CRPD/C/ZAF/1 and Corr.1 (2014) para 128. See, further, Zaal (n 265 above) 155.

348 R White et al 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal* 1.

349 H Dagut & R Morgan 'Barriers to justice: Violations of the rights of deaf and hard of hearing people in the South African justice system' (2003) 18 *South African Journal on Human Rights* 30.

literature on assessments of competence to testify (mental capacity).[350] AQTs for other vulnerable participants, such as parents with disabilities (including intellectual disabilities) is also needed, and should be drafted.[351] Holness submitted that this gap should be remedied and provisions drafted in this regard.[352] She asserted that this drafting process should involve adequate consultation with experts in the field of AAC, sign language and mental health professionals, children and persons with disabilities with the relevant impairments, and Disabled Persons Organisations (DPOs). Furthermore, she argued that the drafters should refer to best practices from other jurisdictions to identify AQTs.

Unfair discrimination

The legislature has left it up to the relevant role players in the Children's Court to ensure proceedings are conducted in such a manner that they do not infringe on the right to equality, and instead protect the child with the disability or a family member with a disability from unfair discrimination based on their 'health status or disability'.[353] The provision refers to 'proceedings, actions or decisions' and is expressed in mandatory terms. Therefore, both procedurally and substantively (when the decision is made as to the best interests of the particular child), measures and methods to ensure equal treatment and substantive equality are expected to be employed. The Children's Act does not mention reasonable or procedural accommodation.

Unfortunately, there are no guidelines on how this must happen in practice and with no/limited procedural accommodations in place, this is an empty promise – particularly as it is also an open-ended discretion left to the presiding officer. Without guidelines and/or appropriate training of presiding officers, this injunction is unlikely to be met.

Legal representation

Section 54 of the Children's Act grants parties before the court the right to appoint legal representation of their choice, *and* at their own expense. Section 55 extends this right to children, but goes further by designating Legal Aid South Africa (LASA) as the legal aid provider at state expense, where a child does not have a legal representative but the court believes that it would be in the child's best interests to have one appointed.[354] Legal aid may be granted to a child:

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350 D Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 89; Stevens (n 312 above) 628.

351 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99 106.

352 Holness (n 345 above) para 19.

353 Sec 6(2)(d) of the Children's Act.

354 Read with secs 2 and 3(b) of the Legal Aid South Africa Act 39 of 2014. Reg 2(3)(a) and (b) of the Legal Aid of South Africa Regulations published in Government Notice R745 in *Government Gazette* 41005 of 26 July 2017 (as amended). The regulations took effect on 22 August 2017.

who may suffer substantial injustice in a civil case, after consideration of the following factors:
the seriousness of the implications for the child of the issue and whether the child's constitutional rights or personal rights are at risk;
the complexity of the relevant law and procedure;
(c) the financial situation of the child or the child's parents or guardian; and
(d) the child's chances of success in the case.[355]

Mental health care users are able to obtain legal representation from LASA under certain circumstances.[356] Specific provision of legal aid for persons with intellectual disabilities is therefore not included. The Legal Aid Manual, tabled in parliament, is ostensibly written in 'plain language' and is aimed at a variety of persons – including individuals seeking legal representation 'to enforce their legal rights'.[357] An Easy to Read version of the manual is not available. The manual does not refer to particular rights or entitlements to legal aid for persons based on their disability. Persons with intellectual disabilities would therefore have to apply for legal aid representation on a case-by-case basis, with no particular categorical inclusion.

Intermediaries

Eligibility of child witnesses for intermediary services in Children's Court proceedings is guaranteed under the Children's Act, where it is 'in the best interests of that child',[358] in order to promote participation of children in the court proceedings. Use of intermediaries in civil proceedings such as the Children's Courts has been explored, to a limited degree, by Matthias. She postulated that the same challenges that arise for children in criminal courts, when providing evidence, may also arise in Children's Courts, such as fear of an alleged perpetrator 'in close physical proximity', which may impact on the accuracy of testimony in cross-examination.[359] Matthias called for social workers, as they have 'full party status' to request intermediaries to be appointed in the Children's Courts.[360] She critiqued the cross-reference in the Children's Act, which imports intermediary appointments, to the provisions for intermediaries in the Criminal Procedure Act as muddying the water – particularly insofar as the relevance of criminal judgments that interpret those provisions for the civil provisions under the Children's Act.[361] Instead, she recommended that the legislature should have simply extended the magistrate's discretion to consider the appropriateness of using an intermediary 'whenever a child needs to provide testimony'.[362]

Consideration of the intermediary provision in criminal proceedings is necessary. In South Africa, the concept of an intermediary was introduced in 1993 – originally only

355 Reg 22 of the LASA Regulations.
356 Reg 25 of the LASA Regulations.
357 Legal Aid South Africa *Legal Aid Manual* (2017) as amended, 8 <http://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf> (accessed 1 April 2019).
358 Sec 61(1) of the Children's Act read with sec 170A of the Criminal Procedure Act.
359 C Matthias 'Protecting child witnesses: New developments and implications for social workers' (2011) 47(2) *Social Work/Maatskaplike Werk* 200.
360 Matthias (n 358) 200.
361 Matthias (n 358) 202.
362 Matthias (n 358) 202.

for *child* witnesses in *criminal* proceedings in terms of section 170A(1) of the Criminal Procedure Act of 1977.[363] The provision was extended to include persons with 'mental' disability, so to speak, in 2007, through an amendment of the legislation. The amended section reads

> Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.[364]

In other words, where a person's chronological age does not correspond with their mental age, due to immaturity or intellectual impairment, an intermediary may be appointed. The intermediary is defined in relation to its role in respect of the court and the witness. The intermediary is 'accorded the status of a court official' and 'is a conduit between the parties and the child witness'.[365] The job description is summarised as 'conveying questions, albeit possibly in different words, to the witness'.[366] In one sexual offence case, the appointment of a guardian was dismissed as an error because there is no statutory provision for it, whereas an intermediary could have been appointed for the eleven-year-old complainant.[367] The role is thus strictly in relation to relaying questions that are not child-friendly and to avoid the harm occasioned by the adversarial style of criminal proceedings. It is not aimed at enhancing the communication of the witness with the relevant role players. Usually, social workers are appointed as intermediaries.

The professionals appointable as intermediaries have been expanded to include:[368]

- paediatricians or psychiatrists;[369]
- clinical, counselling or educational psychologists;[370]
- family counsellors (clinical, counselling or educational psychologists; social workers, educators, and child and youth care workers);[371]
- social workers with more than two years' experience;[372]

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363 Proc R64 *Gazette* 15025 of 30 July 1993, issued following the recommendations by SA Law Commission in its working paper 28 *The Protection of the Child Witness: Project 71* (April 1989).
364 Sec 68 of the Criminal Procedure Act.
365 Bellengère (n 198 above) 82.
366 Bellengère (n 198 above) 83.
367 *S v Soares & another* (unreported, NWM case no CA 26/2016, 15 June 2017).
368 Department of Justice and Constitutional Development *Determination of Persons or Class or Category of Persons who are competent to be appointed as intermediaries: Section 170A(4) of the Criminal Procedure Act, 1977* in GN R663 in *Government Gazette* 40971 of 14 July 2017.
369 Registered in terms of sec 17 of the Health Professions Act 56 of 1974.
370 As above.
371 Appointed in terms of sec 3(1) of the Mediation in Certain Divorce Matters Act 24 of 1987.
372 Registered in terms of sec 17 of the Social Service Professions Act 110 of 1978.

- educators with three years' experience, among other requirements;[373] and
- child and youth care workers with three years' experience, among other requirements.[374]

The list excludes professionals with particular specialisation in relevant disabilities, such as speech and audiology therapists and occupational therapists. This is a limitation on the ability of persons with communication, neuro-developmental and intellectual disabilities to benefit from specialised intermediary services.

The criteria for appointment is that the child witness would be exposed to 'undue mental stress or suffering' should they testify without the assistance of the intermediary. Use of intermediaries is limited to sexual offences' cases in practice and this option of accommodation is inconsistently applied by the courts – meaning that intermediaries are not appointed in all cases where it is necessary.[375] Also, because the court has a discretion to appoint the intermediary, it is not mandatory to have an intermediary in all cases with child witnesses.[376] In fact, usually the state will need to make application to the court for the intermediary to be appointed (although the presiding officer may enquire into this need *mero motu*, where the state failed to do so).[377]

Mandatory appointment of an intermediary has not been favoured by the court,[378] despite commentators calling for its imposition.[379] However, the legislation requires that the court furnish reasons for a refusal to appoint an intermediary where a child is under the age of 14 years – with the intention to protect younger children.[380] The question of age is pertinent, particularly the 'mental' age of the witness. The jurisprudence points to the interpretation that section 170A only applies to those witnesses under the biological and mental age of 18 – thus not to adults in general, but only where an adult is under the mental age of 18.[381]

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373 Defined, as such, under sec 1 of the South African Schools Act 84 of 1996, registered in terms of sec 21 of the South African Council for Educators Act 31 of 2000, and possesses a tertiary education teaching qualification of three years, including retired or former teachers not removed from the register.

374 With three years tertiary education qualification in child and youth care.

375 *S v F* 1999 (1) SACR 571 (C).

376 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC).

377 *Director of Public Prosecutions, Transvaal* (n 375 above) para 90.

378 *Director of Public Prosecutions, Transvaal* (n 375 above) para 127. But, see, D Iyer & L Ndlovu 'Protecting the child victim in sexual offences: Is there a need for separate legal representation?' (2012) 33 *Obiter* 72 82-3.

379 M Bekink *The protection of child victims and witnesses in a post-constitutional criminal justice system with specific reference to the role of an intermediary: A comparative study* LLD thesis, University of South Africa (2016) 1 452.

380 Section 107A(7) of the Criminal Procedure Act.

381 *ZF v S* [2016] 1 All SA 296 (KZP).

Fambasayi and Koraan comment that South Africa's provision for intermediaries for child witnesses complies with the regional and international law obligations on the state.[382] Their appraisal, however, did not consider the application or impact of the intermediary system on children with disabilities. The only mention of adaptations for children with disabilities is by Schoeman – who identifies that children with Attention Deficit Hyperactive Disorder and 'learning disabilities' may require different techniques and accommodations.[383] Furthermore, Bekink has indicated the need for South Africa to include speech and language therapists in the list of professionals who may qualify to provide intermediary services.[384] None of these authors have considered intermediary provision for adults with disabilities.

Guidelines for the decision to appoint the intermediary were provided in *S v Stefaans.*[385] The guidelines identify that the criterion is 'undue' stress caused to the witness, which means it must be in instances exceeding the ordinary bounds of the stress experienced when testifying in courts.[386] Prevention of the secondary trauma or victimisation that children may face in the adversarial legal system, has therefore been the main reason for the introduction of this intervention.[387] The ability of the witness to be able to communicate better or more effectively, has not been identified as a major reason. In fact, critique of the limited role of the intermediary to intervene when questions do not advance good communication has been identified:

> The power of the intermediary is very limited, since the intermediary is perceived to be nothing more than an interpreter (and not an expert witness) and the court can at any time insist that the intermediary repeat the question exactly as it was phrased. A further disadvantage of the present system is that the intermediary does not have the authority to comment on a question and give an opinion as to whether a child understands a question or not. The intermediary is powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner.[388]

The application for the appointment of an intermediary is usually accompanied by a competency report, after assessment of the witness. But such a report is not compulsory as the assertion of undue mental stress or suffering need not be backed up by evidence, as the age and nature of the charges can be considered on their own for the magistrate to make a determination as to whether an intermediary should be appointed.[389]

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382 R Fambasayi & R Koraan 'Intermediaries and the international obligation to protect child Witnesses in South Africa' (2018) 21 *Potchefstroom Electronic Law Journal* 23, referring to articles 12(2) of the CRC and 4(2) of the ACRWC.

383 UCW Schoemann *A training program for intermediaries for the child witness in South African courts* Unpublished Phd thesis, University of Pretoria (2006) 1 218.

384 Bekink (n 378 above) 455.

385 1999 (1) SACR 182 (C).

386 Bellengère (n 198 above) 84.

387 SE van der Merwe (ed) *Commentary on the Criminal Procedure Act* RS 61 (2018) ch22-p108.

388 G Jonker & R Swanzen 'Intermediary services for child witnesses testifying in South African criminal courts' (2007) 6 *Sur – International Journal on Human Rights* 106.

389 *S v Mabuza* 2018 (2) SACR 54 (GP) para 24; *S v Peyani* 2014 (2) SACR 127 (GP) 128-130. See, also, The directives tabled in parliament in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on 23 September 2010, provide at clause 1 that: 'The

The Sexual Offences Courts Regulations expand on intermediary services available to witnesses, which presumably includes complainants and the accused, and yet the title refers to such services 'for witnesses'. The intermediary[390] is instructed to be 'mindful of the limitations and capacity of a complainant or a witness giving evidence, having regard to his or her form of vulnerability, age, physical and mental status and stage of development'.[391]

An examination of the scope of intermediaries and communication assistants in other jurisdictions where they recognise that the way in which vulnerable witnesses are handled and questioned 'is a specialist skill' , is needed.[392] This is considered in chapter 7. While South African Children's Courts usually do not have legal counsel (defence attorney and prosecutor such as in the criminal courts), the inquisitorial nature of the inquiry often means the magistrate is the only legal professional involved in the court process. The magistrate also needs to have the requisite skill to appropriately handle and question a witness (including a parent) with an intellectual disability, and interrogate the evidence presented by the social worker. Such evidence may have been obtained without due cognisance of the communication difficulties that the parent with the disability experiences. This specialist skill, particularly considering the vast variations in impairments and consequent communication strategies and aids unique to the individual concerned, may mean that an intermediary (and a different one at that), may be needed for a particular vulnerable witness. Communication strategies and aids are unique to particular individuals. For a person with intellectual disability this may be needed because even if he or she utilises speech to communicate, they may nonetheless be more competent to demonstrate the evidence with the use of aids such as dolls, figures or drawings; or may need to combine communication methods such as speech, gestures and AAC; or may use only AAC, where he or she has little or no functioning speech.[393]

In summary, intermediaries are appointed under limited circumstances, and usually for individuals under 18 or those with a mental age under 18 in criminal proceedings. The list of professionals appointable as intermediaries excludes persons with specialisation in disability. In civil proceedings, such as the Children's Court

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prosecutor must consider the application of this measure in all sexual offence matters involving complainants or witnesses under the biological or mental age of 18 years, and should as a rule bring such application where the complainants or witnesses are under the biological or mental age of 14 years.' Further, according to clause 3: 'The circumstances that should be considered when bringing an application in terms of s 170A include, but are not limited to— *(i)* The mental age of the witness'.

390 Intermediaries are appointed in terms of sec 170A(1) of the Criminal Procedure Act.

391 Reg 18(4) of the Sexual Offences Courts Regulations.

392 Advocacy Training Council *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court* (2011) 3 (United Kingdom).

393 Council of the Inns of Court *Planning to question someone with a learning disability Toolkit 4* (2015) <https://www.theadvocatesgateway.org/images/toolkits/14-using-communication-aids-in-the-criminal-justice-system-2015.pdf> (accessed 3 April 2019).

inquiries, intermediaries are generally not utilised and are usually not offered to adults with intellectual disabilities. The communication needs of persons with intellectual disabilities (or other relevant impairment such as psychosocial, communication, sensory or physical impairments), are clearly not met in the current provision for intermediaries under South African law.

Procedural accommodations such as a court preparation programme and accessible facilities re offered in other regulations, which are discussed next.

5.4. Procedural justice in other relevant Court Rules and Regulations

The Regulations relating to the Sexual Offences Courts[394] promulgated in February 2020 are devised to cater for avoiding the secondary traumatisation that occurs when sexual offence complainants or witnesses go through the criminal justice system, and aims to provide support throughout the proceedings to the complainants and witnesses. The regulations oblige the state, as a general requirement, to ensure that facilities in the Sexual Offences Courts (including waiting areas for complainants, testifying rooms, court preparation rooms, prosecutors' consultation rooms, court rooms and restrooms) are accessible to persons with disabilities, and accommodate their assistive devices.[395] However, the provision limits the accessibility requirement of these facilities and the court room and restrooms for the use of 'complainants'. The draft regulations from 2017 also included witnesses in the accessibility requirement.[396] Disappointingly, there is no mention of the requirement applying to accused persons.

The Regulations require waiting areas to not only be accessible to persons with disabilities,[397] but also to display 'information about court procedures, the role of a complainant and witness, witness fees payable to complainants and witnesses and any other relevant court service; and the manner of accessing support services by complainants'.[398] Such information is also to be made accessible to persons with disabilities (and children and older persons). This is a novel requirement not listed in any the regulations of other courts – including the Children's Courts. Access to relevant procedural information is vital for full participation in court proceedings.

Even before the new Regulations, the Sexual Offences Courts in South Africa offered court preparation for witnesses.[399] This support is offered by an officer of the

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394 Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 in GN R108 in *Government Gazette* 43000 of 7 February 2020.

395 Reg 5(2)(a) of the Sexual Offences Courts Regulations.

396 Draft Reg 3(7)(b) of the Draft Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 in GN 921 of 2017 in *Government Gazette* 41272 of 24 November 2017.

397 Reg 8(1) of the Sexual Offences Courts Regulations.

398 Reg 8(3)(a)(i) and (ii) of the Sexual Offences Regulations.

399 <http://www.justice.gov.za/vg/sxo-info.html> (accessed 1 February 2019).

court – duly trained to play a specialised role.[400] This is not to be confused with advocacy programmes offered by NGOs who utilise lay persons to provide court support to child witnesses (supervised by social workers).[401] This role is peculiar to the criminal courts, particularly Sexual Offences Courts, because of the particular vulnerability to secondary trauma that occurs when witnesses interact with the adversarial system.[402] The role involves educating the witness of their role, that of role players, and identifying any protective measures that the witness may need in providing testimony.[403]

At some of the pilot sites, court preparation officers received limited basic training on how to communicate with and prepare a child witness.[404] Heath et al, in a study on the uptake of protective measures such as court preparation, found the following distressing anecdotal information

> People with disabilities: On average prosecutors and Regional Court magistrates estimated that children and adults with disabilities (with an emphasis on adults and children with mental and intellectual disabilities) comprised 10-15% of their cases, with a notable increase in such cases over the last 5 years. While specific statistics on complainants with intellectual disabilities are not available, most of the court actors had not received specific training on consulting with or preparing persons with intellectual disabilities. Senior stakeholders confirmed that many of these cases are not making it to trial and corroborates the statements of some prosecutors that these types of cases get screened carefully and withdrawn early.[405]

Lack of training to communicate with and adequately prepare and question witnesses with intellectual disabilities, is appreciated by the Department of Justice officials. However, concrete action has not been taken to address this gap. Other studies also support that communication is a barrier for the full participation of persons with intellectual disabilities in the courts.[406] Witnesses in civil courts, including Children's Courts, do not receive similar court preparation or support.

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400 A Court Preparation Officer is a professional who mainly, but not only, prepares witnesses for court and facilitates victim impact statements in sexual offences matters – including child witnesses and complainants.

401 L Townsend et al 'Court support workers speak out: Upholding children's rights in the criminal justice system' (2014) 48 *South African Crime Quarterly* 75.

402 F Nagia-Luddy & S Waterhouse *The RAPCAN Child Witness Project: Oiling the wheels of Justice* (2009) 29 *South African Crime Quarterly* 35 36.

403 As above.

404 A Heath, L Artz, M Odayan & H Gihwala *Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts. Cape Town, South Africa* (2018) Gender Health and Justice Research Unit 13 <http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/report_images/1%20ICOP%20BASELINE%20EXEC%20SUMMARY%20FINAL%20PDF2.pdf> (accessed 1 April 2019).

405 Heath et al (n 403 above) 12.

406 JM Reyneke & HB Kruger 'Sexual Offences Courts: Better Justice for Children' (2006) 31*Journal for Juridical Science* 73; M Sadan et al *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and related service* (2001) IDASA 16 <http://www.endvawnow.org/uploads/browser/files/assessment_sexual_offences_courts_sa.pdf> (accessed 5 June 2019).

The new Sexual Offences Courts Regulations stipulate that the court preparation programme, developed by the National Prosecuting Authority and accredited by the Health and Welfare Sector Education and Training Authority (SETA), is aimed at familiarising complainants and witnesses in sexual offence cases with the court environment, with a view to preparing them to testify in court and providing assistance and support to them'.[407] The court preparation officer (or a victim assistance officer) is to identify the 'needs' of a complainant (not a witness), and is instructed to inform either the prosecutor, intermediary or court manager – whoever is applicable – of these needs, so that they can be met 'to the extent possible'.[408] The prosecutor or senior prosecutor is to refer *complainants* (and not witnesses or the accused) before they testify, to the court preparation officer or victim assistance officer, for 'assistance for the complainant in his or her language of choice' and 'reasonable accommodation of the needs of complainants with disabilities when they arrive at court'.[409] There is no further indication of what reasonable accommodation is meant, nor clarity as to whether such accommodation would extend after arrival for the duration of proceedings or only refer to those required on arrival. A provision stipulating a more child- and victim-friendly approach, and one that avoids secondary victimisation and improved communication, is set out in regulation 25. Court officials are mandated to use the following techniques when interacting with complainants or witnesses

(a) use simple vocabulary and avoid technical terms;
(b) inform or explain to a complainant or a witness any concept or question in a manner appropriate to his or her form of vulnerability, age, maturity, and stage of development if the complainant or witness is a child, or a person's intellectual disability;
(c) give enough detail so that a complainant or witness understands the information conveyed to him or her;
(d) allow sufficient time so that a complainant or a witness can absorb the information conveyed to him or her;
(e) elicit responses from a complainant or a witness by asking questions in order to ensure that he or she understands the information conveyed to him or her;
(f) ensure that the atmosphere is conducive to participation by a complainant or a witness; and
(g) be sensitive to the needs of a complainant or a witness and the fact that he or she may be confused and may be experiencing anxiety and may feel intimidated.

These techniques are more appropriate for children and traumatised complainants or witnesses. Of course these should ideally also apply to accused persons who may also be vulnerable. Regulations 25(a); (b); (c); (d); and (e); are particularly valuable for persons with intellectual disabilities or communication disabilities when they testify. Unfortunately, specification of only one disability (intellectual), may exclude persons with neurodevelopmental (e.g. autism) and psychosocial disabilities, and even those with communication disabilities, from explicitly benefiting from these provisions. The regulations do not refer to documents in Easy to Read formats which would benefit a number of persons, including those with intellectual disabilities, nor to AAC, which

407 Reg 15(1) of the Sexual Offences Courts Regulations.
408 Reg 15(8) of the Sexual Offences Courts Regulations.
409 Reg 15(10) of the Sexual Offences Courts Regulations.

would also benefit a number of persons, such as those with communication impairments – including persons with autism.

The Sexual Offences Courts Regulations require 'accessible complaints mechanisms' to be available for complainants and witnesses.[410] The court preparation officer (or victim assistance officer) are the points of reference in relation to identifying particular needs and therefore reasonable or procedural accommodations that may be required by court users, such as complainants and witnesses. Much more specific guidelines than the mere mention of reasonable accommodation are needed for these professionals to be able to appropriately and effectively assist these court users.

The Sexual Offences provisions is at least a start, as other courts (criminal or civil) do not have similar requirements, including the Children's Courts. The challenge of lack of accommodating procedures, particularly in relation to communication needs, is compounded by the fact that persons with other forms of cognitive impairment, not only intellectual disability, may also face similar obstacles to participation: including those with dementia; acquired brain injury from trauma-related incidents, substance abuse or illnesses; psychosocial illness; or temporary psychological distress of an acute nature.[411] In other words, rules cognisant of these diverse needs, would impact on a wider community than only those with intellectual disabilities that are narrowly defined.

The Children's Court rules should therefore include some of the inclusive aspects detailed in the Sexual Offences Courts Regulations, but also attend to the gaps identified in those regulations to ensure optimum adherence to constitutional and international law obligations in relation to non-discrimination (including reasonable accommodation); provision of procedural accommodations; and enacting the relevant AQTs – as mandated by the Children's Act. Court preparation programmes for children and adults, particularly those with disabilities, will enhance their dignity, but, most importantly, their participation in the proceedings.

5.5. Analysis of the compliance of the Children's Act and its Regulations with international and constitutional rights

The Children's Act, at least for children, is model legislation at a global level. Children's right to participation is incorporated in the Children's Act.[412] As a result, proceedings are tailored to provide them with a voice. For adults participating in the inquiries, however, participation is dependent on the civil law rules in place, most of which derive

410 Reg 23(1) of the Sexual Offences Courts Regulations.

411 A Gray, S Forell & S Clarke 'Cognitive impairment, legal need and access to justice' (2009) Paper 10 *Law and Justice Foundation of New South Wales* 1 <http://www.lawfoundation.net.au/ljf/site/articleIDs/2EDD47C8AEB2BB36CA25756F0018AFE0/$file/JI10_Cognitive_impairment.pdf> (accessed 15 February 2020).

412 Sec 10 of the Children's Act.

from outside of the Children's Act, in the form of court rules, and to a limited extent the regulations to the Act. While in theory parents are entitled to legal representation (at their own expense, except where legal aid is provided), in practice parents rarely utilise attorneys – which means they are unrepresented in these courts. It is patently clear, that without procedural and reasonable accommodation explicitly set out in court rules, the risk is that the magistrate's discretion may not be exercised in favour of measures to promote full and meaningful participation – particularly if ableist prejudices remain unmasked.

A brief exposition follows of the relevant rights under international law (most of which favour the domestic formulation of human rights under the Bill of Rights) and to what extent the legislative scheme and procedural rules meet the state's obligations hereunder.

The right to equality under international law requires court rules to be amended to prevent indirect discrimination of facially neutral provisions or direct discrimination on the basis of disability. The provision of reasonable accommodation measures is also required, as well as rules of evidence that address stereotypes and beliefs about legal capacity. The Children's Act and its regulations do not offer this protection and/or positive measures, bar the vague provision of proceedings avoiding unfair discrimination on the basis of the disability of the child or parent and the potential of intermediaries' services being provided to parents with a mental age below 18. These limited provisions are insufficient to promote the right to equality before the law without clear guidelines to magistrates as to how discrimination can unfairly impact on the rights of the parents (and potentially on those of the children affected thereby). The transformative substantive equality that our jurisprudence and literature[413] calls for, which can unmask ableism embedded in proceedings, is difficult to measure in the absence of procedural safeguards to promote participation, and thus equality, before the law and benefit of the law.

Legal capacity per se is not denied outright in the Children's Act, but the rules of evidence exclude testimony of persons with intellectual disabilities in civil and criminal proceedings. These functional tests of mental capacity are discriminatory, as they are used to deny legal capacity. Accordingly, strict application of these rules, or in the absence thereof no clear indication of how equal recognition before the law is to be promoted (with relevant safeguards) – for example through supported decision-making – will negate the legal capacity of parents with intellectual disabilities. The safeguards listed in the CRPD are generally not present in the curator proceedings. In any event, it is not clear whether curators have ever been appointed for parents with intellectual disabilities in Children's Court proceedings. Support measures mandated, such as communicating information about a decision, procedural accommodations, measures to enhance capacity to testify, and the use of a support person in making,

413 Albertyn (n 10 above) above.

expressing and implementing a decision of a parent with an intellectual disability – are all absent from the legislative scheme. There are currently no less intrusive informal or formal support measures available, such as circles of support or personal ombudspersons – as will be discussed in more detail in chapter 7. Since the court rules nor other legislation stipulate the relevant training of court officers in the promotion of legal capacity and support measures, including procedural accommodations, those measures are not implemented.

The right to family life requires appropriate assistance be provided to persons with disabilities to perform their child-rearing responsibilities. While the Children's Act does provide for prevention and early intervention, as well as therapeutic interventions, lack of monitoring of the implementation by social workers and other professionals, and the reality of low levels of usage, mean that such assistance is largely not provided. Accessible and inclusive community support for parents with intellectual disabilities to exercise their parental rights is absent – including personal assistance. The protection of extended family networks and the value of *ubuntu*, give legitimacy to the support of extended family members in supporting parents and children with child rearing responsibilities. In other words, interdependent family relations are to be promoted, and yet Children's Court inquiries may unconsciously promote nuclear family child rearing where the court is oblivious to ableist assumptions about parenting capacity.

The right to accessible public services in courts (and throughout the statutory process engaged to determine whether a child is in need of care and protection) is violated through lack of Easy to Read format of court documents, specific provision of AAC, and the wholly insufficient categories of persons that offer intermediary services (excluding occupational therapists and speech therapists or other relevant disability specialists). Access to information is also scuppered where information about the court proceedings is not provided to parents with intellectual disabilities. Particularly given the hybrid nature of these proceedings, procedural protections are especially needed in the absence of legal representation. The hybrid nature refers to the fact that these proceedings incorporate civil procedures, but are also akin to criminal proceedings in relation to allegations of neglect made against the parent, without the relevant safeguards in place that apply to accused persons.

The right of access to justice is not promoted, as procedural accommodations are mostly absent from the Children's Courts. The Children's Act and rules should therefore be reviewed to define the entity responsible for the provision of procedural and reasonable accommodation; to provide details on where and how court users can access these measures; to stipulate the availability of these measures and the fact that they are free; and to keep records of provision of these measures in order to enhance accountability. Appropriate questioning techniques, as mandated by the Children's Act, need to be devised without delay, and the provision of relevant categories of intermediaries needs to be extended. The lack of explicit provision of legal aid in Children's Courts for persons with intellectual disabilities is problematic,

and can severely prejudice their ability to exercise their rights. Even without legal aid, the lack of legal representation without an inquisitorial system cognisant of the barriers these persons face in fully and meaningfully participating in the proceedings, is problematic. Whether the Children's Act or other legislation is the appropriate vehicle to ensure that legal aid is provided to vulnerable categories of persons such as persons with intellectual disabilities, is a decision for parliament.

No court preparation is offered to vulnerable persons, unlike in the Sexual Offences Courts and no single court officer, for example a clerk or registrar, is tasked with ensuring that the specific needs of a witness, including parents with intellectual disabilities, are met. The Children's Courts no longer use specialised children's assistants. Parents with intellectual disabilities are therefore unassisted and unsupported in court proceedings, with no advocate, formal or informal, that can assist them understand the court proceedings, or push for positive measures that may assist them with their child care responsibilities, where needed – in order to avoid undue separation of their children. A court preparation programme, together with support in the form of relevant court officials or independent support persons, as well as legal representatives trained in communicating and attending to the rights of persons with disabilities, will ameliorate the barriers these adults face in understanding and participating in the proceedings.

Children's right to protection from maltreatment, such as neglect, is violated where positive measures to provide effective procedures for establishing social programmes to provide support for children and caregivers are not offered. A review of such services should therefore shed light on whether this is the case, but it falls outside the scope of this study. Importantly, prevention interventions include poverty reduction measures. Furthermore, social programmes for families should include counselling and therapeutic services related to the specific needs of the parent. The review by Holness of parenting skills programmes,[414] as one example, illustrates the absence of parents with intellectual disabilities from such measures.

Children's right to life, survival and development is to be promoted by the state through measures to assist parents responsibly care for their children to ensure their development. The child's adequate standard of living (including enhancing their development) rests on their parents, but is subject to the parents' abilities and financial capacities, failing which the state should step in as far as their available resources allow. The social services provided to these families subjected to statutory interventions, should therefore be monitored to determine whether this right is being met. The Children's Act provides the framework for the provision of such measures, but it is not clear to what extent these are offered and what their effectiveness is.

414 Holness (n 242 above).

The child's right not to be separated from their family unless it is in their best interests, and determined by a competent authority and subject to judicial review, is partly met by the Children's Act's provisions. The magistrate during the inquiry would make this determination through issuing a court order as to whether the child is in need of protection and what measures are required in line with such a finding. However, it is unclear how magistrates come to their decision on what is in the best interest of the child. This is because their court orders give no indication of the deliberative process engaged in, the weight of the evidence considered, and what the court deems is in the child's best interests.

The child's right to have his or her best interests considered is therefore potentially violated, because a justification of a decision is not provided indicating the process of examination and assessment of the child's best interests and the weight attached to this right and other competing rights. Specifically, steps taken to preserve the family environment and to maintain relationships and support for families to restore their capacity to take care of a child, in order to avoid separation on the basis of socio-economic status or disability, could be taken in terms of the Children's Act. However, again, the monitoring of the implementation of these measures is unclear. Assessment of the best interests of the child by a multi-disciplinary team hardly happens. Instead, the social worker is the only professional who makes this determination in most cases. Where parental capacity assessments are done by professionals other than social workers – such as psychologists and psychiatrists – ethical principles regulate the conduct of these assessments. Courts, however, attach weight to these, and decide to what extent such assessments reflect on the best interests of the child. Where inappropriate, weight is attached to the reports and where diagnostic-prognostic thinking is rubber-stamped by the magistrates, a slew of rights of these parents are violated.

Mechanisms to review or revise decisions are not stipulated in the Children's Act. This is particularly where procedural safeguards are missing, where incorrect facts may have been relied upon, and where the best interests' assessment is inadequate or improper weighting was assigned to competing considerations. Appeals are possible under section 51(1) of the Children's Act, which would be before the High Court. A party can appeal against an order, a refusal to make an order, or variation suspension or rescission of an order. Appeals in these neglect cases are unheard of in South Africa. Furthermore, an appeal to the High Court is an expensive process. Generally, families have to wait for two years before a foster care order is to be extended and to be granted an opportunity to make a case of altered circumstances to the court. The mechanisms to review court orders are lacking, especially since without the presiding officer's justifications for a court order, it is difficult to determine whether a case can be made to review the decision.

The Children's Act and its regulations do not currently meet several international and regional law obligations resting on the state to support families where a parent

has an intellectual disability. These are notably obligations in relation to the right to equality, including equal recognition before the law and benefit of the law; access to information and accessibility; access to justice; family care; and children's rights to life, survival and development as well as having their best interests taken into account. In practice, the mother with the intellectual disability is at the mercy of the clerk of the court, the social worker and the magistrate. These are all role players that work within a statutory and court system which does not explicitly place the duty to provide procedural accommodations on any of them – nor on any external parties or entities.

5.6. Policy framework

Five policies developed by the Department of Social Welfare/Social Development and four policies drafted by the Department of Justice, the National Planning Commission's National Development Plan, and a framework under the legislative sector, are discussed below in chronological order.

5.6.1. DW's White Paper on Social Welfare, 1997

The White Paper on Social Welfare[415] inverted the emphasis in service provision from before 1997, preferring prevention services over protective services, for example. It follows a developmental approach.[416] Unfortunately, the meaning of developmental social services was not initially understood by social workers.[417] As a result, how to implement such services became a challenging prospect.[418] The policy indicates that strategies to promote developmental social welfare would need to be drafted to address social and economic protection of persons.[419]

The White Paper commits the state to strengthening family life, including for those with disabilities (children or adults) and specifically refers to the need for programmes to be 'flexible and innovative' to provide for persons with 'special needs' who are not a part of families or lack social support services.[420] The policy's situational analysis for children reveals that policy and management protocols for child abuse and neglect were absent, and notes a lack of coordinated and comprehensive prevention strategy.[421] One of the key interventions identified by the policy is programmes for

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415 Department of Welfare (DW) *White Paper on Social Welfare* (1997) in GN 286 of *Government Gazette* 18166 of 8 August 1997 <https://www.gov.za/documents/social-welfare-white-paper-0> (accessed 31 January 2020).

416 M Dutschke 'Developmental social welfare policies and children's right to social services' *Child Gauge* (2007) 29 <http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_20072008/social_welfare.pdf> (accessed 31 January 2020).

417 A Lombard 'The impact of social welfare policies on social development in South Africa: An NGO perspective' (2007) 43 *Social Work/Maatskaplike Werk* 298.

418 Lombard (n 216 above) 298.

419 White Paper on Social Welfare (n 414 above) ch 8 para 7.

420 n 414 above, ch 8 para 5.

421 White Paper on Social Welfare (n 414 above) sec 1 para 31.

children and families guided by the need to respect the human dignity and family responsibility, as well as autonomy of families, which would require 'self-reliance' offered through programmes that build capacity and empower families.[422] Here the policy also emphasises the need for 'equal access to resources' – although equality relating to whom is unexplained. Women's needs as caregivers of children and persons with disabilities, among others, is highlighted in the policy. This fact of life, according to the policy, necessitates that community and home-care programmes consider the social and economic needs of these women.[423] However, caregiving by mothers with disabilities is not mentioned.

The White Paper guarantees 'equal opportunities' for persons with disabilities would be ensured by both the national and provincial departments of social welfare, and emphasises that services were to 'enhance the independence and promote the integration of people with disabilities into the mainstream of society'.[424] Integration, and not inclusion, is stressed here. 'Active' participation is encouraged in social activities, but is limited to being 'appropriate, given the nature and extent of the person's disability.'[425] Of course, this policy was drafted before the CRPD came into effect, and therefore uses the language and approach to disability that vacillates between charitable, medical and social models. The policy committed the department to endorse several pre-CRPD international instruments and commitments.[426] The department also committed to utilising 'relevant international policies and programmes' for strategic planning and implementation.[427]

A number of guidelines are identified for strategies to attend to issues relating to persons with disabilities. One principle is 'self-representation' in decision-making processes and structures, with the promise that the department would develop consultation mechanisms to promote participation in 'policy development, planning and monitoring of service delivery'.[428] The policy articulates that a move away from 'care-taking' would be necessary for an approach of social development and intersectoral co-operation in sectors such as 'welfare, health, education, labour, transport, housing and recreation'.[429] A monitored national, co-ordinated disability strategy is mooted as the answer to this injunction. Furthermore, the policy identifies access to public buildings as being an important objective, tasking the department to coordinate this with other departments.[430]

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422 White Paper on Social Welfare (n 414 above) sec 1 para 44(d).
423 White Paper on Social Welfare (n 414 above) sec 3 para 98.
424 n 414 above, sec 3 para 110.
425 White Paper on Social Welfare (n 414 above) sec 3 para 110.
426 The World Programme of Action Concerning Disabled Persons, the Standard Rules on the Equalisation of Opportunities for People with Disabilities, and the United Nations Charter of Rights for People with Mental Handicap.
427 White Paper on Social Welfare (n 414 above) sec 3 para 110.
428 White Paper on Social Welfare (n 414 above) sec 3 para 111.
429 White Paper on Social Welfare (n 414 above) sec 3 para 112.
430 As above.

The policy also sets out 'guidelines to meet special needs', advocating for a 'generic approach to addressing the needs' of persons with disabilities and makes a small concession that different disabilities and needs may require 'specific interventions and care'.[431] Responsibility for implementing programmes is assigned to government in partnership with civil society and the private sector.[432] This guideline is not much in terms of providing real assistance to stakeholders on how to address the peculiar needs of such a heterogenous population.

On the aspect of public communication measures, the policy tasks the department with public education programmes to 'facilitate the integration' of particular persons – listing those who are Deaf and blind as examples.[433] This commitment ostensibly refers to public communication by government and the media such as subtitles and closed captioning. Persons with other communication barriers requiring AAC, Easy to Read documents for persons with autism, speech or intellectual impairments, are not identified as needing improved directed communication measures.

The guidelines for social service programmes list a range of services to be offered and community-based support services are highlighted as the answer for promotion of independent living and 'integration' into community life – with support for family members caring for 'mentally handicapped persons' especially mandated.[434] The agency and autonomy of persons with intellectual disability is therefore not evident from these guidelines, as a catch-all phrase is used for all persons with this impairment, regardless of need for accommodations or level of independence.

Mental health is addressed in a separate section of the policy and here conflation of mental illness (psychosocial disability) and intellectual disability occurs. The policy commits the department to focusing 'mental health programmes' on the following beneficiaries

(a) High-risk groups in order to prevent the occurrence of mental health problems, mental disorders and mental handicap;
(b) individuals, families and communities experiencing mental health problems;
(c) victims of family, social and political violence;
(d) persons with mental health disorders and their families; and
(e) persons with mental handicap and their families.[435]

In its guidelines for strategies on mental health, the policy articulates what a permanent mental health policy structure would look like – coordinated with the department of health. One of the aspects identified is the need for 'the training of

431 White Paper on Social Welfare (n 414 above) sec 3 para 113.
432 As above.
433 White Paper on Social Welfare (n 414 above) sec 3 para 114.
434 White Paper on Social Welfare (n 414 above) sec 3 para 116.
435 White Paper on Social Welfare (n 414 above) sec 4 para 123.

primary health care workers, generic social workers and other appropriate categories of social welfare personnel in diagnostic and treatment skills'.[436]

Women's contribution to care-giving of family members with 'special needs' is acknowledged, and the policy states that 'employment opportunities and financial support' to these women needs to be 'fully explored.'[437] The role of women with disabilities, however, is not identified. In relation to families, the policy sets out guidelines for strategy, including

> Respect for human dignity and family responsibility and autonomy should be upheld. Social welfare personnel should foster self-reliance and promote the personal growth and social competence of families and children through capacity-building and empowerment programmes. Opportunities should be created for the development of families, for equal access to resources and for the appropriate representation of children and families in decision-making structures.[438]

Such an emphasis on the self-reliance of families, Strydom et al postulate, is part of a neoliberal agenda that is wholly at odds with a true developmental approach to the provision of welfare services.[439] In part, this agenda seeks to promote a target-driven managerial approach to the provision of social welfare services, and, as such, may conflict with 'what is in the best interests of the client or the family'.[440] The call for equal access to resources could have offered a door to dignity enhancing and equality promoting services for parents with disabilities, had they not been absent from the policy.

Confusion on how this policy sought to define social development and therefore how stakeholders were to implement such a novel approach, led to the development of an *Integrated Social Services Development Model* (ISSDM) in 2006.[441] Since social development has a clear link with anti-poverty measures and sustainable development, the policy's lack of progress in dealing with the 'structural causes of poverty and inequality' remains a valid critique.[442]

The extent of child abuse and neglect continues to be unknown at a statistical level due to under-reporting and 'uncoordinated record-keeping'.[443] The Ministerial

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436 White Paper on Social Welfare (n 414 above) sec 4 para 124(f).

437 White Paper on Social Welfare (n 414 above) sec 2 para 98.

438 White Paper on Social Welfare (n 414 above) sec 1 para 44(d).

439 M Strydom et al 'South African child and family welfare services: Changing times or business as usual?' (2017) 53(2) *Social Work/Maatskaplike Werk* 147 158.

440 Strydom et al (n 438 above) 158.

441 Department of Social Development *Integrated Social Services Development Model* (2006) <https://www.gov.za/documents/service-delivery-model-developmental-social-welfare-services> (accessed 1 December 2019).

442 A Lombard 'The implementation of the White Paper for Social Welfare: A ten-year review' (2008) 20(2) *The Social Work Practitioner-Researcher* 166.

443 Department of Social Development (DSD) *Comprehensive Report on the Review of the White Paper for Social Welfare, 1997* (2016) 153 <https://www.gov.za/sites/default/files/gcis_document/201610/comprehensive-report-white-paper.pdf> (accessed 31 January 2020).

Committee that reviewed the White Paper in 2016 confirms that budgetary and human resource allocations for the implementation of the Children's Act and its regulations are insufficient.[444] In KwaZulu-Natal, the report of the Committee indicates that spending for child care and protection[445] per child in 2015/16 was R68, while that for poor children was R96.[446] Both allocations are low compared to other provinces, with the former allocation being the fourth highest and the latter the sixth highest province out of the nine provinces.

The Ministerial Committee[447] echoes the sentiments of Lombard from 2007 that there is a need for the White Paper to be turned into a legislative framework that defines developmental social welfare and the role of relevant departments and NGOS, in relation to service delivery and financing.[448] The Committee finds that inaccessibility of social services continue although the level of inaccessibility is not explained.[449] In relation to disability, the emphasis in the review is on issues such as residential care, mental health services (which clashes with Department of Health responsibilities), and schooling of children with disabilities.[450] Parenting with a disability is not mentioned, except for a comment that adoption by parents with disabilities is not supported in a particular province – without further critical discussion of this aspect.[451] The conflation of mental illness and intellectual disability is mentioned[452] and reference is made to NGOs reporting that the department ostensibly does not appreciate the different types of disabilities with resultant different needs, nor the level of expertise required for appropriate delivery of services to this cohort of beneficiaries.[453] The Committee recommends that a clear distinction is necessary for these types of impairments, in order to ensure that the approach, support and role allocation is appropriate – depending on the disability.[454] The quantitative tool utilised in the review of the White Paper rated both social support services and mental health promotion programmes as low.[455] Spending on persons with severe disabilities in KwaZulu-Natal was identified as R1481, with those with disabilities (not severe) listed as receiving R387 of the budget.[456] This calculation referred to persons aged 18 to 59.[457]

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444 DSD (n 442 above) 153.

445 The review notes that its quantitative tool looked at services such as Early Childhood Education, drop-in centres, home-based care, after care centres, play parks, the Isibindi programme, places of safety, foster care services, and Child and Youth Care Centres. The cost of statutory interventions per se was not separately identified.

446 Figure 23 of the DSD *Comprehensive Report* (n 442 above) 154.

447 DSD (n 442 above) 355.

448 Lombard (n 441 above) 314.

449 DSD (n 442 above) 120.

450 DSD (n 442 above) 121ff.

451 DSD (n 442 above) 158.

452 DSD (n 442 above)121.

453 As above.

454 As above.

455 DSD (n 442 above) 124.

456 Figure 16 of the DSD (n 442 above) 126.

457 These are the 2015/16 provincial budget allocations per capita for those with disabilities referred to as 'those with at least some difficulty in respect of seeing, hearing, walking, remembering and concentrating, self-care, and communication'; and those with severe disabilities referred to as

The report refers to the fact that the department is drafting a Bill on social development services for persons with disabilities, and that its preamble sets out the Bill's objective. This objective is 'to improve the well-being of persons with disabilities through the provision of protection, care, empowerment and other forms of support, in order to enable them to live independent lives and to provide for matters connected therewith'.[458] This draft Bill is not available to the public. The development of the Bill, according to the report, was delayed until the finalisation of the White Paper on the Rights of Persons with Disabilities (discussed below). That White Paper was published in 2016, and four years later there is no mention of the progress of this bill.

The Ministerial Committee makes several recommendations to update and attend to gaps in the implementation of the White Paper for Social Welfare. One recommendation is to attend to uncertain role allocation by locating the responsibility for the coordination and policy development in respect of persons with disabilities to an appropriate department, after consultation with cabinet. This ensures that the Department of Social Development's role remains in relation to social security and social development services.[459] Another key recommendation, mentioned above, is the drafting of a National Social Development Bill.

The gaps in the implementation and monitoring and evaluation of the White Paper, as well as the lack of adequate funding for functional areas such as child care and protection disaggregated by disability, and service delivery to persons with disabilities, and the lack of emphasis on participatory rights (bar employment) of adults with disabilities, including parenting – is concerning. Whether it is feasible to develop a National Bill on Social Development, as well as providing a bill targeting services to persons with disabilities, is a policy decision that must be debated after due consultation with persons with disabilities. A separate bill may provide clear guidance to role players on their functions and provide for monitoring and evaluation of service delivery. However, the inclusion of persons with disabilities in all sectors, and across all sectors in policy, law making and adequate budgeting and spending, may mean that a more comprehensive National Bill On Social Development is needed, which pertinently incorporates service delivery to persons with disabilities.

Strydom et al are not convinced that services delivered by the Department of Social Development under the three tiers of the White Paper (prevention, early intervention, and statutory services) 'made a significant change to the macro or structural causes of inequality, service deficits and social injustice'.[460] These authors

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those with 'a lot of difficulty or no ability at all in respect of the above tasks' – when taking into consideration the population numbers reported in the General Household Survey of 2014. DSD (n 442 above) 126.

458 DSD (n 442 above) 133.

459 DSD (n 442 above) 362.

460 Strydom et al (n 438 above) 147.

critique the 2015 *Policy on Financial Awards to Service Providers*, which is the mechanism that sets out how NGOs are funded in order to provide social development services. Funding is not grants-based as under its precursor, but rather depends on NGOs submitting service plans, which are appraised based on performance management standards of the department.[461] Conflict between ethical responsibility to clients, and that of their own organisation and management by the state, may occur.[462] A target-driven approach impacts on the potential for developmental social development to transform service delivery.[463]

5.6.2. White Paper on an Integrated National Disability Strategy, 1997

This policy recognises the discrimination that women with disabilities, particularly black women, experience – including oppression 'without even the status that women traditionally receive as women or wives'. [464] The White Paper also recognises that exclusion can happen in the built environment, service provision, and communication. The objectives of the White Paper include, *inter alia*, 'the facilitation of the integration of disability issues into government developmental strategies, planning and programmes' and 'the development of an integrated management system for the coordination of disability planning, implementation and monitoring in the various line functions at all spheres of government'.[465] In relation to communication as a key policy area, the White Paper identifies AAC for non-verbal persons, as well as sign language and interpreters for deaf persons, as methods to enhance communication. The policy objective would aim to 'develop strategies that will provide people with communication disabilities with equal opportunities to access information, as well as public and private services'.

The White Paper's policy objective on social welfare identifies several activities:

- to 'develop social welfare services that aim to *integrate* people with disabilities within all activities in their communities' (emphasis added);
- 'develop social welfare services which recognise the differing specific needs of people with disabilities as one component of a range of disability-related services';
- 'facilitate the reorientation and training of social welfare workers', including service providers with disabilities;[466] and
- Inclusion and not integration is the preferred approach to transforming attitudes about persons with disabilities, and yet this policy focused on integration. Even

461 Strydom et al (n 438 above) 148.
462 Strydom et al (n 438 above) 149.
463 Strydom et al (n 438 above) 151.
464 Office of the Deputy President *White Paper: Integrated National Disability Strategy* (1997) 8-9 <https://www.gov.za/sites/default/files/gcis_document/201409/disability2.pdf> (accessed 1 December 2019).
465 *White Paper: Integrated National Disability Strategy* (n 463 above) ch2.
466 n 463 above, ch3 (unpaginated).

more worryingly, the social welfare services listed are for residential or institutional care programmes, personal assistance services as well as activity centres for persons with severe disabilities.[467] Social services to persons with mild disabilities were therefore not prioritised.

5.6.3. DSD's White Paper on Families, 2013

The White Paper on Families defines family as: '[a] societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence.'[468] The policy does not mention parenting with a disability, but rather focuses on the burden of women and families in caring for children, the sick, elderly and disabled members of the family – indicating the need for measures to relieve this burden.[469] In two instances, disability is mentioned in slightly more positive terms. First, the need to 'eradicate discrimination' on several grounds, including disability, is identified as a relevant strategy for the strategic priority area of promotion of healthy family life.[470] Second, the Department of Justice is tasked with 'strengthening protective measures' to promote the interests of two vulnerable groups: the elderly and persons with disabilities.[471] Unfortunately, the focus on discrimination, without articulating measures for equality of outcomes, and the focus on vulnerability and the care burden for persons with disabilities, perpetuate the stereotype of dependence.

The policy is aimed at achieving the following

1. Enhance the socialising, caring, nurturing and supporting capabilities of families so that their members are able to contribute effectively to the overall development of the country;
2. Empower families and their members by enabling them to identify, negotiate around, and maximize economic, labour market, and other opportunities available in the country; and
3. Improve the capacities of families and their members to establish social interactions which make a meaningful contribution towards a sense of community, social cohesion and national solidarity.[472]

The emphasis is on building family resilience –with the state intervening *after* it fails. The guiding principles listed are: respect for human rights; recognition of family diversity; recognition of family resilience; active community participation in supporting families; promoting and strengthening marriages; promoting and strengthening responsible parenting; and strategic partnerships between the state, the family and other role-players.[473] The policy explains the social development approach, for which it advocates, as an approach, that it

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467 As above.
468 Department of Social Development (DSD) *White Paper on Families* (2013) 3.
469 White Paper on Families (n 467 above) 20, 25, 41.
470 White Paper on Families (n 467 above) 39 para 4.3.
471 White Paper on Families (n 467 above) 50 para 5.2.1.
472 White Paper on Families (n 467 above) 8 para 1.3.
473 White Paper on Families (n 467 above) 8 para 1.5.

> recognises that the family is the basic unit of society and plays a key role in the survival, protection and development of children. Its rationale is that families should be supported and their capabilities have to be strengthened for the purpose of meeting the needs of members. Theories encompassed in this approach recognise that families require a range of supportive services in order to promote family life and development. Over and above the foregoing, certain families may require additional supportive services so that they can solve problems in human relations such as conflict, communication, parenting, substance abuse, family violence as well as addressing problems arising from life changes and events.[474]

The policy's three strategic priorities are: 'promotion of healthy family life; family strengthening; and family preservation'.[475] The first priority is focused on avoiding family breakdown through measures to promote a 'healthy' family life. The second is aimed at provision of support measures during times of crises. The third is premised on the four service-delivery steps that are promoted by the department in other policy documents and legislation (such as the White Paper on Social Development and the Children's Act). These steps are: prevention, early intervention, statutory intervention and reunification and aftercare services.[476]

Under the first priority area, healthy family life promotion, the strategy seeks to give 'parenting and relationship assistance' to families – including on child development.[477] The strategy further seeks to encourage responsible parenting, which includes parenting by mothers and fathers; enhancing their ability and capability to protect children from harm in several areas (physical, emotional, psychological, intellectual, and sexual well-being); and encouraging family planning so that parents are 'emotionally, physically, financially, and structurally ready' to raise children. While measures to promote the readiness of parents to be effective is commendable, there is a great risk of prejudice when it comes to parenting with a disability – particularly with the emphasis on 'physical' readiness.[478] The emphasis on financial readiness is critiqued as a 'moralistic' approach, which identifies poor persons as 'responsible for their own problems, separating the deserving poor from others'.[479]

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474 White Paper on Families (n 467 above) 7 para 4.1.

475 White Paper on Families (n 467 above) 37 para 4.2.

476 As above.

477 White Paper on Families (n 467 above) 39 para 4.3.

478 The definitions of these types of readiness offered are: 'Emotional readiness means that prospective parents are mature enough to handle the demands of a new born child; physical readiness means that the prospective parent's bodies are ready for the strains of pregnancy and the strains that come with looking after a new born child. Financial readiness means that the prospective families are financially capable of dealing with the costs associated with a new born child; structural readiness means that the prospective parents have a home within which to raise the child close to clinics or hospitals, care giving facilities and educational facilities.'

479 L Patel et al *Reviewing the implementation of the White Paper on Families: Lessons learned for future practice, policy and research* (2018) 8 <https://www.uj.ac.za/faculties/humanities/csda/Documents/Family%20Policy%20Report%20Nov%202018%20Web.pdf> (accessed 1 December 2019) 8, citing M Rabe 'Family policy for all South African families' (2017) 60(5) *International Social Work* 1189.

The second strategic priority, family strengthening, is aimed, *inter alia,* at provision of economic and non-economic measures to support the family in child rearing, including 'affordable and accessible child, community care and afterschool care services'.[480]

The third strategic priority, family preservation, lists several trite measures to prevent social ills such as neglect – generically named 'programmes and structures'. These are: to increase income and psychosocial support and services to give the family the capacity to care for children during financial distress; to strengthen and support 'child care capacities' through improvement of quality and accessibility of schooling, aftercare and social welfare services; and to conduct research for information on risk factors for families in order to monitor and evaluate outcomes on family well-being.[481] For early intervention, the priority area identifies, *inter alia,* the need to put in place accessible and affordable therapeutic services; and offering 'flexible alternatives' to families to have solutions that 'combine their own perspectives with professional assessment of their needs'.[482] Statutory interventions are to, *inter alia,* provide support services to families where a member is removed.[483] How statutory interventions are to be conducted is not clarified in terms of principles that inform practice, – including non-discrimination and full and meaningful participation of families. Reunification and after care (after statutory interventions) are to focus on *inter alia,* implementing relevant reunification and reintegration protocols, without specifying what these are; and sensitising community members to the 'special requirements of vulnerable families' – without specifying what constitutes vulnerability.

The department developed a report on the implementation and costing of the policy in 2012,[484] and a draft monitoring framework in 2018,[485] but these documents are not publicly available. Patel et al assert that the policy has been inadequately monitored and evaluated, and blame, *inter alia*, lack of proper reporting or relevant monitoring protocols or clear indicators.[486]

At worst it can be said that there is no separate budget to implement this policy[487] and at best it can be said that budgetary spending on key programmes for this policy

480 White Paper on Families (n 467 above) 42.
481 As above.
482 White Paper on Families (n 467 above) 43.
483 As above.
484 Department of Social Development *Final Report on the Implementation and Costing of the White Paper on Families in South Africa* (2012), cited in Patel et al (n 478 above) 13.
485 Department of Social Development *Draft Monitoring and evaluation framework for families programme* (2018), cited in Patel et al (n 478 above) 13.
486 Patel et al (n 478 above) 25.
487 T Hochfeld & L Patel 'Weighing up South Africa's family policy: What does and doesn't work' *The Conversation* 27 November 2018 <https://theconversation.com/weighing-up-south-africas-family-policy-what-does-and-doesnt-work-107296> (accessed 10 January 2020).

is 'obscure'.[488] A five-year review by Patel et al in 2018[489] critiques the continued sense of social conservatism in the policy, premised on a curative perspective. In other words, the authors assert that the policy is focused on the dysfunction or 'social pathologies' that families experience and suggests that these should be fixed.[490] Persons with disabilities appreciate how curative discourse can be prejudicial to the support they actually require in order to fully participate in life. While a largely heteronormative, nuclear, pro-marriage middle-class stance is taken by the policy, despite it professing to do otherwise, and which is incongruent with our diversity,[491] the most glaring omission from this policy is parents with disabilities. This omission is not explored in the literature.

5.6.4. DSD's White Paper on the Rights of Persons with Disabilities, 2016

The White Paper on the Rights of Persons with Disabilities[492] updates the Integrated National Disability Strategy policy from 1997. This new policy is accompanied by an implementation matrix, which is a novel action plan that allocates responsibilities for key policy areas to relevant stakeholders – together with medium- and long-term goals.

The policy sets out a purpose statement of nine areas. These areas include stipulating 'norms and standards for the removal of discriminatory barriers that perpetuate the exclusion and segregation of persons with disabilities'; outlining 'the responsibilities and accountabilities of the various stakeholders involved in providing barrier-free, appropriate, effective, efficient and coordinated service delivery to persons with disabilities'; and providing a 'framework against which the delivery of services to persons with disabilities can be monitored and evaluated'.[493] The policy seeks to develop and promulgate minimum norms and standards for reasonable accommodation as a directive – aimed at ensuring equitable access to, and participation of, persons with disabilities in the programmes and services of public and private institutions.[494] The focus areas of access to justice, social integration support, and supported decision-making are discussed in turn.

In relation to access to justice, the policy identifies three directives:

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488 Patel et al (n 478 above) 24.

489 As above.

490 Patel et al (n 478 above) 7, citing T Knijn & L Patel 'Family life and family policy in South Africa: Responding to past legacies, new opportunities and challenges' in T Rostgaard & GB Eydal (eds) *Family life and family policy in South Africa: Dealing with the legacy of Apartheid and responding to new opportunities and challenges* (2018).

491 M Rabe & K Naidoo 'Families in South Africa' (2015) 46(4) *South African Review of Sociology* 2.

492 Department of Social Development (DSD) *White Paper on the Rights of Persons with Disabilities* (WPRPD) (2016) published in GN 230 of *Government Gazette* 39792 of 9 March 2016.

493 WPRPD (n 491 above) 51 para 3.1.

494 WPRPD (n 491 above) 73 para 6.1.1.6.

- Strengthening recourse mechanisms, such as improving access to courts, and equitable access to service delivery, which includes complaint mechanisms and mechanisms of Chapter Nine institutions (such as the SAHRC) to respond to disability issues and complaints. Here, reasonable accommodation, including 'procedural and age-appropriate accommodations' within the police, legal aid and court procedures, is identified.
- Strengthening monitoring systems to track their access to the justice system, with specific emphasis on barrier-free access for persons with intellectual and psychosocial disabilities (highlighting discrimination they face 'due to decision-making or legal capacity, lack of assessments and other relevant issues').
- Developing a national action plan for rights awareness information and empowerment of persons with disabilities and their families, which should include 'what judicial rights are, as well as how to access recourse should these be infringed upon'.[495]

At first glance, these three directives, particularly taken together, significantly raise the bar for full participation in the justice system for persons with disabilities. The directives are more in line with the injunction of full, meaningful and effective participation in the justice system advocated by international and regional law such as the CRPD – rather than existing legislation, rules and common law provisions discussed earlier in this chapter.

The policy seeks to promote social integration support through

> [a]ccess to community-based peer and parent counselling and support programmes [as] central to the empowerment process of children, young persons and adults with disabilities. These programmes, preferably managed and provided by organisations of persons with disabilities and parents of children with disabilities, contribute significantly to reducing a culture of dependency and promoting true empowerment and active citizenship.[496]

The policy therefore calls for subsidisation of peer and parent support programmes.[497]

Supported decision-making services are slated to be developed – especially for those with intellectual, psychological and neurological disabilities.[498] This development is said to 'coincide' with the review of the substituted decision-making regime that South Africa currently has in place. However, of concern is the statement in the policy that: 'This [process] must include the development of mechanisms to protect persons with disabilities from undue influence, coercion, exploitation and/or neglect in situations where their decisions, choices and preferences *are substituted with those of others*.' (emphasis added).[499] As explained earlier, the state's international law

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495 WPRPD (n 491 above) 78-80 para 6.2.1.3.
496 WPRPD (n 491 above) 99 para 6.4.1.3.
497 WPRPD (n 491 above) 99.
498 WPRPD (n 491 above) 101 para 6.4.1.5.
499 WPRPD (n 491 above) 102.

obligations require replacement of substituted decision-making with supported decision-making, and yet the state has opted to create parallel systems – retaining the substituted decision-making system of curatorship. This is highly problematic, not just from the perspective of our obligations in the international sphere, but also because of the confusion that such a parallel existence creates for persons with disabilities and those interested in promoting their rights. Forum shopping can also occur where parallel systems exist.

Disability equitable planning, budgeting and service delivery[500] is another focus area. The planning is aimed at budgeting and expenditure that consider 'equality of outcome' for persons with disabilities.[501] Surprisingly, such equitable budgeting or expenditure is not clear from the Budgetary Review and Recommendation Report of the Portfolio Committee for the 2015/16 financial year.[502] In that report, actual budgeting and expenditure is not listed on disability. The department is said to have been in the process of 'capacitating' other departments to align their human resources policies and annual performance plans with the policy of employment of persons with disabilities and engaging provincial executive councils on the implementation of the policy. In the 2019 Budgetary Review and Recommendation Report, the department's report does not identify any spending in relation to the policy.[503] Mention of disability spending is in relation to subsidisation of civil society organisations and employment of persons with disabilities in the department. Actual spending on relevant programmes is therefore not provided.

The policy directs that public institutions develop and implement *funded* 'universal design access plans', reported in either their annual reports (on the part of provincial or national departments), and in integrated development plans (on the part of municipalities).[504] These plans should then identify two factors: the extent to which planning and designing is changed through the application of universal design principles, and, importantly, 'what reasonable accommodation support measures are funded'.[505] In October 2016, the Department of Social Development reported to the Social Development committee of cabinet on the White Paper and committed to developing a framework for reasonable accommodation that would apply to *all* aspects

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500 WPRPD (n 491 above) 119 para 6.7.1.1.

501 WPRPD (n 491 above) 121 para 6.7.1.1.

502 Budgetary Review and Recommendation Report (BRRR) of the Portfolio Committee on Social Development, on the performance of the Department of Social Development and its entities for the 2015/16 financial year (26 October 2016) 47 in Parliamentary Monitoring Group *National Disability Policy; Social Development Budget Review and Recommendations Report* (26 October 2016) <https://pmg.org.za/committee-meeting/23522/> (accessed 7 January 2018).

503 Parliamentary Monitoring Group 'Budgetary Review and Recommendation Report (BRRR) of the Portfolio Committee on Social Development, on the performance of the Department of Social Development and its entities for the 2018/19 financial year, dated 16 October 2019 (16 October 2019) <https://pmg.org.za/page/SocialDevelopment2019BRRR> (accessed 10 February 2020).

504 WPRPD (n 491 above) 121 para 6.7.1.1.

505 As above.

of the life of the person with a disability.[506] It is unclear what progress has been made with developing this guiding framework.

The monitoring and evaluation of the policy activities is to be measured through targets set in its implementation matrix.[507] In relation to access to justice, for the first five-year period of the policy (2015-2019), the policy tasked the Departments of Justice and Constitutional Development (DOJCD), Public Works, and Correctional Services with providing, *inter alia*, 'Reasonable accommodation support available across all services providing consumer and human rights protection' – whereas the next ten-year period (2020-2013) would see '[a]ll persons with disabilities have full access to the justice system across the justice value chain'.[508] The stakeholders were mandated to implement these targets, including through implementing 'procedural and age-appropriate accommodations within the police services, legal aid services and court procedures.'[509] The Department of Justice and Constitutional Development commenced a project to develop a 'Best Practice Court Services Model' – particularly aimed at promoting the right to access justice by persons with disabilities in the justice system in 2016.[510] A task team was constituted to develop this model. The task team and the project was shelved within a year of its commencement, when the lead official left the department.[511] There is no update on whether the task team or drafting of the model will be revived. Reviewing the proposed reforms on rules of procedures such as the Sexual Offences Court Regulations and the proposed amendments to the Regulations of the Children's Courts is needed.

There is scant evidence of measures put in place to monitor access to the justice system –one of the key policy directives. This directive tasks DOJCD, the Departments of Correctional Services and Social Development, and the South African Police Services, with implementing a monitoring system to draft a baseline (both during the first five-year period of the policy) and publish annual reports (in the next ten-year period) on progress made in securing access to justice for this population. The 'strengthening' of a monitoring system is aimed, in particular, at overcoming barriers such as those faced by 'persons with intellectual and psychosocial disabilities and their resulting discrimination due to decision-making or legal capacity, lack of assessments and other relevant issues.'[512] It is not currently clear what 'system' the policy aims to

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506 Parliamentary Monitoring Group *National Disability Policy; Social Development Budget Review and Recommendations Report* (26 October 2016) <https://pmg.org.za/committee-meeting/23522/> (accessed 7 January 2018).

507 Department of Social Development *White Paper on the Rights of Persons with Disabilities Implementation Matrix 2015-2030* (2015) *(WPRPD Implementation matrix)* <http://www.women.gov.za/images/WPRPD.pdf> (accessed 1 December 2017).

508 WPRPD Implementation matrix (n 506 above) para 2.3.1.

509 As above.

510 Department of Justice and Constitutional Development *Draft Best Court Practice Manual* (2016) (copy with the author).

511 Intersectoral Committee established by the component for Persons with Disabilities within the Chief Directorate: Promotion of the Rights of Vulnerable Groups of the national DOJCD.

512 WPRPD Implementation matrix (n 506 above) para 2.3.2.

'strengthen'. Statistics on access to justice (or barriers faced by these groups) are absent from existing annual reports of relevant government departments, and are not published elsewhere. That said, in a recent report to the Portfolio Committee on Justice and Correctional Services (Parliament), the DOJCD[513] reported that under its court services programme,[514] one of the output indicators includes the percentage of complaints and investigations that are 'disability-related', and 'where reasonable measures were provided' in relation to the 'level of access to justice by sex, age and disability'. The actual measurement of that indicator is not listed in the report. The portfolio Committee issued observations on the DOJCD report, and requested further details (plans to action the responsibility) be provided by the department on developing a system for barrier-free access to justice for persons with disabilities, by 31 July 2020.

The implementation matrix tasks the DOJCD with developing a 'national action plan to inform and empower persons with disabilities and their families of their rights'.[515] The paternalistic reference to their families aside, this policy directive is important as knowledge of rights and complaint mechanisms – where they are violated – is currently minimal in relation to information about the possibility of complaints of human rights violations through, for example the Equality Courts.[516] In relation to how to raise a complaint regarding service provision in the courts, including lack of procedural accommodations, for example, various webpages of courts and legal services provide information on lodging the complaint – but these are not in Easy to Read format.[517] For a person with an intellectual disability, knowing that the Children's Court is a Magistrate's Court and that the complaint mechanism to follow is through the Magistrate's Commission, could be a stretch too far if information is not offered accessibly. Either writing a letter or lodging a complaint via electronic mail only, or a complaints box at service points (which again accepts written complaints only), are not sufficient options. Reliance on the written formal process for legal dispute resolution is not ideal for persons with cognitive disabilities, – including those with intellectual

513 ATC200605: Report of the Portfolio Committee on Justice and Correctional Services on the respective Strategic Plans and Annual Performance Plans 2020/21 of the Department of Justice and Constitutional Development 3 June 2020 in Parliamentary Monitoring Group <https://pmg.org.za/tabled-committee-report/4167/> (accessed 28 August 2020).

514 This programme is focused on provision of, *inter alia,* 'accessible, efficient and quality administrative support to the courts and to manage court facilities', and the facilitation of 'resolution of criminal and civil cases, and family law disputes.' The latter includes children's court proceedings.

515 n 491 above, para 2.3.3.

516 The DOJCD website provides a step-by-step guide on how to lodge a complaint in the Equality Courts <https://www.justice.gov.za/eqcact/eqc_step-guide.html> (accessed 1 March 2020).

517 Complaints processes are listed on: The Magistrate's Commission website: <https://www.justice.gov.za/mgc/complaint.html> (accessed 1 March 2020); Office of the Chief Justice website for superior courts (High Courts and above): <https://www.judiciary.org.za/index.php/complaints/ocj-complaints> (accessed 1 March 2020); the DOJCD website: <https://www.justice.gov.za/faq/faq-service-points.html> (accessed 1 March 2020). The link from the government website that lists many of the portals for complaints is not operational for the portal to the Magistrate's Commission: <https://www.gov.za/faq/justice-and-crime-prevention/how-do-i-lodge-complaint-against-person-legal-services> (accessed 1 March 2020).

disabilities, and can act as a systemic barrier to accessing justice.[518] A phone line or the appointment and publication of the details of a central complaints officer to contact, would create greater accessibility for persons with disabilities. Only the DOJCD's webpage provides a link to a service charter that enables the public to access information about what services to expect and, accordingly, to appreciate what constitutes unacceptable conduct. Disappointingly, the charter does not mention disability or services offered to persons with disabilities – nor reasonable or procedural accommodations.[519]

Kamga[520] is optimistic about the potential of the White Paper on the Rights of Persons with Disabilities, particularly as it gives impetus for the future drafting of a disability-specific Act.[521] Such legislation, Kamga asserts, can translate policy imperatives into enforceable and trackable obligations, which are unlikely to suffer from the vagaries of political changes in government.[522] In relation to access to justice, however, the first four-year period of the policy has expired, and has not yet seen the set targets being met – including the drafting of the action plan or the barrier-free access to justice imperative it committed to.

5.6.5. NPC's National Development Plan 2030, 2012 and DSD's Disability-Disaggregated NDP

The National Development Plan[523] (NDP) mentions persons with disabilities, including in relation to social security programmes and employment,[524] but not in terms of social support services. It also stresses the objective of safer communities – with an emphasis on improving criminal justice.[525] Improvement of civil justice mechanisms is excluded from the plan. It is essentially a plan to improve the socio-economic status of many groups identified in the document, particularly through improved service delivery in key areas such as education, health and social security, and through income-stimulating employment and industrial strategies. Poverty eradication is its main aim.

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518 A Gray et al 'Cognitive impairment, legal need and access to justice' (2009) 10 *Justice Issues* 1 8 <http://www.lawfoundation.net.au/ljf/site/articleIDs/2EDD47C8AEB2BB36CA25756F0018AFE0/$file/JI10_Cognitive_impairment.pdf> (accessed 15 February 2020).

519 DOJCD Service Charter <https://www.justice.gov.za/faq/serive-charter.pdf> and the abridged version <https://www.justice.gov.za/faq/serive-charter-abridged-poster.pdf> (accessed 1 March 2020).

520 SD Kamga 'Disability rights in South Africa: Prospects for their realisation under the White Paper on the Rights of Persons with Disabilities' (2016) 32 *South African Journal on Human Rights* 569.

521 Kamga (n 519 above) 572.

522 n 519 above, 572.

523 National Planning Commission *National Development Plan 2030* (2014) <https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf> (accessed 1 December 2019).

524 National Planning Commission (n 522 above) 34 and 363.

525 National Planning Commission (n 522 above) 385.

DSD published a companion document on persons with disabilities in the NDP, the status of which is not clear.[526] It is labelled a Disability-Disaggregated National Development Plan[527] (Disability NDP), and is aimed at mainstreaming disability in the key indicators of the NDP.[528] While laudable objectives in relation to improving health, education, housing, social assistance and service provision and employment outcomes are set, the justice-related objectives mostly focus on criminal justice.[529] A notable exception is the Disability NDP's objective and targets set on the provision of compulsory community service by law graduates.[530] The Disability NDP sets the targets as compulsory community service offered by 'law graduates with disabilities', with reasonable accommodation measures offered, presumably to them, in the execution of their duties.[531] The Disability NDP does mention that the aims are to 'enhance access to justice' and to 'provide work opportunities for graduate lawyers', and states that the rationale is to improve training and employment of persons with disabilities. However, the appropriate provision of legal services offered to persons with disabilities, cognisant of accessibility, and reasonable and procedural accommodations, are not the explicit emphasis.

The plan is not likely to make progress, because neither the Legal Practice Act's provisions establishing the framework, nor a costed budget for community service provision so envisaged since 2014, have been promulgated or devised – leaving this possibility an empty promise.[532] The NDP, in any event, focuses on the criminal justice system, which would exclude measures targeting much needed changes in the civil justice system, – such as in Children's Courts. Even if civil justice was to be targeted, while the role of postgraduate community legal services will open up access to justice to many indigent and other vulnerable populations in South Africa, the context of the Children's Court proceedings may, however, require specialised legal representation, as discussed earlier. This is, at present, not what postgraduate community service could offer. Initial advice and information and appropriate referrals could, however, be sought from the community service providers, once the enabling provisions are in place. They would need to be properly trained to offer appropriate assistance to this cohort of clients.

The Disability NDP articulates a role for the judiciary, as leader of the court administration, to ensure that the administration is: 'capable of a rights-based,

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526 DSD *National Development Plan 2030: Persons with disabilities as equal citizens* (Disability NDP) (2015) <http://www.women.gov.za/images/Disability-Analysis-of-the-National-Development-Plan-2030.pdf> (accessed 1 December 2019).

527 DSD (n 525 above) 2.

528 DSD (n 525 above) 12.

529 DSD (n 525 above) 68.

530 DSD (n 525 above) 69.

531 DSD (n 525 above) 71.

532 Sec 29 of the Legal Practice Act 28 of 2014. D Holness 'improving access to justice through law graduate post-study community service in South Africa' (2020) 23 *Potchefstroom Electronic Law Journal* doi <http://dx.doi.org/10.17159/1727-3781/2020/v23i0a5968> (on the potential of this legal service).

coordinated, integrated, adequately resourced approach that is sensitive and responsive to gender and the differentiated needs of all different segments of disability and in all provinces', by the 2020 and 2030 dates set, respectively.[533] This is also a much needed goal, but without a strategy or regulations for attending to the needs of persons with disabilities in the justice system, it will be difficult to implement measures to attain the goal and to monitor and evaluate progress in doing so. For parents with intellectual disabilities in the Children's Court proceedings then, this plan does not hold much promise at this stage.

5.6.6. DSD's Draft Child Care and Protection Policy

The DSD committed itself to developing a child care and protection policy in 2016 and aimed to introduce this policy to cabinet in 2017.[534] In November 2017, the department reported that it had developed the policy.[535] This draft policy has not accompanied minutes of the meetings nor is it publicly available – making it impossible to comment on.[536] It is submitted that lack of political will is therefore potentially an impediment to the introduction of this much needed policy.

5.6.7. Brief overview of DSD's policy-driven programmatic implementation

DSD's Strategic Plan for 2010-2015 did not mention prevention and early intervention programmes, and made limited reference to the passing of the Children's Act in 2005.[537] The Department's Strategic Plan for the last five years (2015-2020) provides more detail than the predecessor. The aims of the sub-programme for children is identified as developing, supporting and monitoring the implementation of policies, legislation and norms and standards for social welfare services to children. The programme for families would do the same, aimed at strengthening families, and that for persons with disabilities is aimed at promoting 'the empowerment and rights of persons with disabilities through accelerated mainstreaming of disability considerations and the strengthening of disability specific services'. The objective for the sub-programme of children is identified as to 'strengthen child protection services

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533 DSD (n 525 above) 70.

534 Meeting undated, pmg-assets.s3-website-eu-west-1.amazonaws.com (accessed 1 December 2019).

535 Parliamentary Monitoring Group *Department of Social Development 2016/17 Annual Report, with Deputy Minister,* NCOP Health and Social Services, 7 November 2017, Presentation <https://pmg.org.za/committee-meeting/25468/> (accessed 1 December 2017).

536 Department of Social Development (2017) *Draft Child Care and Protection Policy*. Pretoria: DSD, cited in P Martin, K Hall & L Lake 'Supporting families in South Africa: A policy map' in *South African Child Gauge* (2018) 115 <http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/supporting%20families%20in%20South%20Africa%20-%20a%20policy%20map.pdf> (accessed 1 December 2019).

537 Department of Social Development *Strategic Plan (2010-2015)* 10 <https://www.westerncape.gov.za/assets/departments/social-development/national_social_development_strategic_plan_2010-2015.pdf> (accessed 1 December 2019).

and improve the quality of [early childhood development] services by 2019', and the line item for high-level outputs was listed as 'strengthen child protection services' – with the Children's Act listed as the 'baseline'.[538] The Directorate of Children was staffed by 57 persons, with six on contract and two vacancies during that period.[539]

The sub-programme for persons with disabilities identified the strategic objective as being 'to promote, protect and empower persons with disabilities through the development and implementation of legislation, policies and programmes'. Here, the Department hoped to put in place a legislative framework for the rights of persons with disabilities, to draft a policy on social welfare services and support its implementation, and develop and track a disability inequality index.[540] This programme, according to the plan, was to be staffed with three personnel under the Deputy Director General for persons with disabilities, while services to persons with disabilities would be staffed by eight persons.[541] There is no detail on the sub-programme for families. This directorate is staffed by eight persons, with one vacancy.[542]

Martin et al, in their review of the social policy landscape for children, critique DSD's apparent 'failure to understand the developmental role of the family and the range of support services' required by families to realise their potential. Martin et al note that 'policy incoherence has led to the fragmentation in the design, targeting and reach of services, resulting in the exclusion of many vulnerable families from critical services'.[543] The disability inequality index has not been publicised, that is, if it has been developed as DSD intended. Ultimately, the DSD's focus on offering prevention programmes was not accompanied by necessary budget allocations.[544] As a result, instead of offering prevention first, the first port of call is to offer statutory services due to time and funding implications.[545] Accordingly, the transformation of the social development approach to preventative services has not occurred.[546] Strydom et al

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538 Department of Social Development (DSD) *Strategic Plan (2015-2020)* 33-34 <https://www.westerncape.gov.za/assets/departments/social-development/national_social_development_strategic_plan_2015-2020.pdf> (accessed 1 December 2019).

539 DSD *Strategic Plan (2015-2020)* (n 537 above) 46.

540 DSD (n 537 above) 35-36.

541 DSD (n 537 above) 47.

542 DSD (n 537 above) 46.

543 Martin et al (n 535 above) 126.

544 Strydom et al (n 438 above) 149, citing D Holscher & V Sewpaul *Ethics as a site of resistance: The tension between social control and critical reflection* (2006) Centre for Civil Society Research report 48, 251; J Streak & S Poggenpoel *Towards social welfare services for all vulnerable children in South Africa: A review of policy development, budgeting and service delivery* (2005) Children's Budget Unit, Budget Information Service, Idasa; and M Strydom 'The implementation of family preservation services: Perspectives of social workers at NGOs' (2010) 46(2) *Maatskaplike Werk/Social Work* 192.

545 Strydom et al (n 438 above) 149, citing MM Ndonga *Perceptions of social workers regarding the rights of children to care and protection* Unpublished MA Thesis, University of Stellenbosch (2015); J Van Huysteen & M Strydom 'Utilising group work in the implementation of family preservation services: Views of child protection workers' (2016) 52 *Maatskaplike Werk/Social Work* 546.

546 Strydom et al (n 438 above) 149, citing Ndonga (n 544 above).

assert that the work load and resource constraints faced by social workers may, as in England, motivate social workers to focus their efforts on 'risk management and monitoring families' – and not on sorely needed supportive service delivery.[547] The lack of traction in achieving the objective of integrated and coordinated social development services, whether structured as child protection services or as services to persons with disabilities, is lamented by several authors.[548]

The justice sector-related policies and strategy documents are analysed next.

5.6.8. DOJ's Customer Service Charter for Court Users, 1999

The DOJ's Customer Service Charter for Court Users, 1999 (Customer Charter) promises court users with disabilities the use of 'special services such as ramps and/or assistance from staff'.[549] As a survivor of crime, persons with a disabilities are entitled to 'arrangements to be made to provide reasonable accommodation' for their disability.[550] The Customer Charter further states that court users can expect sign language interpreters to be provided, as well as to have help with the translation of documents into Braille or the use of audio cassettes.[551] Complaints about court services are directed to 'the officer concerned', or the information desk or the head of the court. If there is no positive outcome, the court user can then write to the Regional Head of the court or the Minister of Justice. The Customer Charter promises to display guidelines on how to complain in every court. No guidelines for reasonable or procedural accommodation requests are however visibly displayed in the Magistrate's Courts in Durban and Pietermaritzburg (the sites of the empirical part of this study). Furthermore, these guidelines for complaints have not been made available in Easy Read format on the website or elsewhere.

5.6.9. DOJCD's Justice Vision, 2000

This strategy document groups persons with disabilities with others with 'special needs' – such as women, children, the elderly and rural community members. It provides that these groups cannot be treated 'the same way if their circumstances are not equal', which may necessitate special treatment. The Justice Vision committed the Ministry of Justice to

> Adapt our structure and processes to make sure that the needs of all people are catered for, especially those that are different. Make sure that we have training programmes that focus on different social and psychological contexts. This will help to sensitise the judges and magistrates,

547 Strydom et al (n 438 above) 154.
548 S Philpott *Budgeting for Children with Disabilities in South Africa* (2004) Cape Town, IDASA, cited in N Ganthiram 'A critical review of the developmental approach to disability in South Africa' (2008) 17 *International Journal on Social Welfare* 149; Van Niekerk & Matthias (n 219 above).
549 Department of Justice (DOJ) *Customer Service Charter for Court Users* (Customer Charter) (1999) 2.
550 DOJ (n 548 above) 6.
551 DOJ (n 548 above) 13.

> and the other people who work in the justice system, to recognise and appreciate differences, especially in relation to legal disputes.[552]

The action plan set out to achieve this goal, however, does not mention reasonable or procedural accommodation, but identifies generically that the courts will use strategies to make courts more accessible, responsive to the needs of users, and sensitive to diversity.[553] However, the plan does not mention disability and rather identifies race, gender and children as protective categories.

5.6.10. DOJCD's Legal Services Charter, 2007

This Charter acknowledges that courts are not accessible to persons with disabilities and stakeholders and undertakes to 'take steps to improve the infrastructure and increase capacity at the courts to ensure that conditions under which legal services are performed are improved; and to provide better access'.[554] An implementation plan did not accompany the Charter.

5.6.11. DOJCD's Policy Framework for the Transformation of the State Legal Services, 2012

DOJCD's Policy Framework for the Transformation of the State Legal Services, 2012 (Transformation Framework) defines transformation as

> Transformation means the transformation of the administration of justice, which includes the restructuring of state legal services, as part of the broader societal transformation agenda aimed at fundamentally changing institutions of governance and society with a view to aligning all aspects of South African life with South Africa's post-apartheid Constitution.[555]

Transformation of the civil justice system is identified as one of the goals of the policy through improving the courts' functioning and ensuring accessibility and affordability.[556] The policy aims to transform the offering of state legal services through *inter alia* briefing female and black practitioners, but does not mention practitioners with a disability or those who specialise in disability-related litigation. There is no mention of disability in this policy.

The Children's Courts do not employ legal practitioners on the part of the state, as is done, for example, through the state attorney, state legal adviser, and family advocate's office. As identified earlier, legal representatives generally do not

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552 Ministry of Justice *Justice Vision: Five year National Strategy for Transforming the Administration of Justice and State Legal Affairs* (2000) 26.

553 Ministry of Justice (n 551 above) 28.

554 DOJCD *Legal Services Charter* (2007) 10 <https://www.justice.gov.za/LSC/LSSC_Dec%2007.pdf> (accessed 5 February 2020).

555 Department of Justice and Constitutional Development (DOCJ) *Policy Framework for the Transformation of the State Legal Services* (2012) 7 <https://www.justice.gov.za/docs/other-docs/2012tsls.pdf> (accessed 5 February 2020).

556 DOCJ (n 554 above) 10.

participate in the Children's Courts, as they are inquisitorial and rarely is legal aid granted or private practitioners involved in these court inquiries. This policy framework had the potential to include disability sensitivity, inclusion and meaningful participation, accessibility and reasonable and procedural accommodation imperatives under transformation of the legal system – but failed to do so. When this policy was drafted, unlike the preceding ones, the CRPD had already been adopted and ratified by South Africa. It is therefore surprising and disappointing that the concept of transformation was not also extended to disability.

5.6.12. DOJCD's Handy hints Brochure for Court officials: Equal Access to Justice for Persons with Disabilities, 2019

The DOJCD's Handy hints Brochure for Court officials: Equal Access to Justice for Persons with Disabilities, 2019 (the Brochure) does not find any mention or traction in policy or legislation. However, it is notable in that it mentions reasonable accommodations and provides several examples. For instance, persons with intellectual disabilities are identified as entitled to a 'cognitive interpreter' as reasonable accommodation.[557] That said, such a support person is not discussed in any policy or legislation and the delineation of the boundaries of such a person's assistance is not stated.

The Department is to be commended for publishing this brochure as the first public step to embed the knowledge of the need for, and some examples of, reasonable accommodation in court proceedings. However, the brochure does not set out which entity (or officials) take primary responsibility for ascertaining what is needed, how persons with disabilities are to be informed of their rights in relation to accommodations, and the relevant complaint procedures where measures are not appropriate or offered – for example. It is unclear how a person with a disability will be able to rely on the information in the Brochure to realise their rights or address violations when encountering court officials or the court system. This is so, in particular because appropriate training of court officials and a link with enabling legislation, regulations and policy that strengthens the binding nature of the principles in the Brochure, is not set. For now, the gesture is appreciable but is unlikely to change the landscape in terms of access to justice for persons with disabilities in the various courts.

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[557] Department of Justice and Constitutional Development *Handy hints brochure for court officials: Equal access to justice for persons with disabilities* (2019) <https://www.justice.gov.za/brochure/2019-PWD-HandyHintsForCourtOfficials.pdf> (accessed 1 December 2019).

5.6.13. Framework Strategy and Implementation Plan for Dealing with Disability in the Legislative Sector, 2007

The Framework Strategy and Implementation Plan for Dealing with Disability in the Legislative Sector, 2007 (the framework), developed by the legislative sector of South Africa, identifies mainstreaming of disability within the work of parliamentary committees and provincial legislatures, as a key objective. This objective is to be met in their monitoring and oversight roles and for improved policy utilisation of disability.[558] The policy sets out anticipated budgets, including for training of parliamentarians on legislation and policy on disability – as well as implementation and enforcement strategies to achieve the goals of these instruments.[559] Unfortunately, disability-specific legislation has not yet eventuated, nor has disability featured prominently in law reform on the Children's Act and other relevant legislation.

5.6.14. Brief review of justice policies and programmes

The five justice policies and strategies discussed, as well as the dated legislative policy, can be assessed on the basis of the following factors, discussed in turn:

- Publication and dissemination of complaint guidelines: These are mentioned only in the Customer Charter, but implementation is not clear. Complaint processes were discussed above under the WPRPWD.
- Reasonable accommodation: These measures are mentioned in the Customer Charter and Brochure, but neither offer substantial guidelines, and the latter as a stand-alone 'awareness' brochure offers very little in terms of dependability for persons with disabilities navigating procedural accommodations needed in the court system.
- Training of court and judicial officers: Only the Justice Vision mentions this goal and stresses accessible services to promote diversity – but does not mention disability as a category.
- Mainstreaming disability in services or legislation: The Legislative Sector's framework identifies this aim, but without coordination among state departments, and without disability-specific legislation, this is unlikely to be implemented or appropriately monitored.

Two documents reviewed do not mention disability at all: the Justice Vision and the Transformation Framework. A serious lack of policy coherence is evident, as none of the documents speak to other relevant policies.

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558 Legislative Sector South Africa *A framework strategy and implementation plan for dealing with disability in the legislative sector* (2007) 46 <http://www.sals.gov.za/research/disability.pdf> (accessed 1 October 2020).

559 Legislative Sector South Africa (n 557 above) 50.

5.6.15. Monitoring the implementation of disability rights

The sheer number of challenges faced by persons with disabilities means that institutions (whether state departments, Chapter Nine institutions or DPOs) employ a measure of prioritisation when seeking to implement, enforce and monitor disability rights within their area of expertise. Also, the heterogenous nature of disability has resulted in fragmented approaches for some 'groups' of persons with disabilities. Furthermore, it sometimes appears that lack of political will or lack of concomitant budgetary commitment, has hampered the potential of some of the policies on disability. This monitoring is discussed next.

Kamga bemoans the lack of adequate monitoring of disability rights implementation in government and the private sector by the South African Human Rights Commission (SAHRC), the Public Protector, and the Disabled Persons' Organisations (DPOs).[560] While Kamga's critique of the Chapter Nine institutions may be justified, particularly as the SAHRC is the National Human Rights Institution identified as being sponsible for disability rights monitoring under the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA),[561] and echoes findings of other authors[562] – his critique of DPO involvement has not painted the full picture.

Several DPOs have been involved in advocacy, law reform, international and regional law compliance and litigation, as strategies to advance disability rights and monitoring in the public and private spheres. For example, a number of organisations have monitored compliance with treaty obligations through observer status at the African Commission on Human and Peoples' Rights,[563] shadow reports[564] and submissions to treaty monitoring bodies such as the Committee on the Rights of Persons with Disabilities,[565] the Committee on the Rights of the Child, and the African

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560 Kamga (n 519 above) 573.

561 Secs 25(2) and 28(2) of PEPUDA.

562 Holness & Rule (n 343 above) 1925; SL Clarke *Holding South Africa accountable: A critique of the reports submitted to treaty bodies pertaining to the rights of children with disabilities* Unpublished MA thesis, University of the Western Cape (2016) 64.

563 Centre for Human Rights *Launch of the Regional Action Plan on Albinism in Africa 2017-2012: Online Platform working towards an inclusive world free of discrimination* (23 August 2018) <https://www.chr.up.ac.za/dru-news/927-launch-of-the-regional-action-plan-on-albinism-in-africa-2017-2021-online-platform-working-toward-an-inclusive-world-free-discrimination>, referring to the the African Commission on Human and Peoples' Rights 373 Resolution on the Regional Action Plan on Albinism in Africa (2017-2021) - ACHPR/Res.373(LX)2017.

564 Umgungundlovu Disability Forum *Umgungundlovu Shadow Report to the Committee on the Rights of Persons with Disabilities* (2010) <http://www.create-cbr.co.za/images/stories/umgungundlovu_shadow_report.pdf> (accessed 5 August 2014).

565 Submission by Cape Mental Health et al to the CRPD Committee Working Group for South Africa 31 July 2018 <https://womenenabled.org/pdfs/WEI%20et%20al%20South%20Africa%20CRPD%20Committee%20Shadow%20Report%20Submission%20%20-%20July%2031,%202018%20Final.pdf> (accessed 1 January 2019). See, also, Civil Society Preliminary Submission to the CRPD Committee Pre-Sessional Working Group for South Africa (31 January 2018)

Committee of Experts on the Rights and Welfare of the Child.[566] Others have lobbied government to bring key social justice changes for persons with disabilities over the decades, often culminating in successful litigation. This litigation includes, for example: settlement in a case on sign language as a subject in schools,[567] a structural interdict in a case on early childhood education of children with severe and profound intellectual disabilities,[568] a positive court order on shortlisting criteria for magistrates with disabilities,[569] an ongoing case on school transport for children with disabilities,[570] proposed litigation on forced sterilisation of HIV-positive persons,[571] and proposed litigation on admission to schools of children with disabilities currently on waiting lists and those not in schools.[572] Amicus briefs also contribute to the monitoring of disability rights, for example the *amici* brief of the NGO Cape Mental Health in the *De Vos* case.[573] The DPO sector however, remains divided by donor-driven demands and competing for resources, as well as different perspectives on meeting the needs and realising the rights of persons with disability (such as differences in following charity versus social model or human rights approaches to disability).

In relation to law reform, organisations have pushed for changes through submissions.[574] Research by civil society organisations have also contributed to monitoring disability rights implementation and enforcement.[575] Several law clinics, as

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566 Centre for Human Rights <https://www.up.ac.za/faculty-of-law/news/post_2617084-centre-for-human-rights-granted-observer-status-with-african-childrens-committee-> (accessed 1 October 2020).

567 Deaf Federation of South Africa (DeafSA) in *Springate v Minister of Education and others Case* 4846/2009 (PMB HC) (unreported court order), discussed in W Holness 'The development and use of Sign Language in South African schools: The denial of inclusive education' (2016) 4 *African Disability Rights Yearbook* 141.

568 The Western Cape Forum for Intellectual Disability in the Western Cape in *Western Cape Intellectual Disability Forum v the Republic of South Africa* 2011 (5) SA 87 (WCC).

569 *Singh v Minister of Justice and Constitutional Development and Others (SA National Council for the Blind and another as Amici Curiae)* (2013) 34 ILJ 2807 (EqC).

570 Equal Education Law Centre *Equal Education v MEC for Education, KwaZulu-Natal and 32 Others* Case no 3662/17P <https://eelawcentre.org.za/wp-content/uploads/amicus-heads-of-argument_final.pdf> (accessed 1 October 2020).

571 A Strode, S Mthembu & Z Essack '"She made up a choice for me": 22 HIV-positive women's experiences of involuntary sterilization in two South African provinces' (2012) 20(39) *Reproductive Health Matters* 61.

572 Down Syndrome South Africa, Autism South Africa, National Council of and For Persons with Disabilities *Out of School Campaign* <http://aut2know.co.za/out-of-school-campaign/> (accessed 1 October 2020).

573 *De Vos N.O and Others v Minister of Justice and Constitutional Development and Others* 2015 (2) SACR 217 (CC).

574 CREATE (2012) 'Report on anecdotal evidence of instances of involuntary sterilisation of girls and women with disabilities in KwaZulu-Natal' in Legal Resources Centre 'Submissions on the Proposed Draft Assisted Decision-making Bill of 16 February 2012', South African Law Reform Commission 31 March 2012.

575 Human Rights Watch 'Complicit in exclusion: South Africa's failure to guarantee an inclusive education for children with disabilities (2015) <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education- children> (accessed 1 July 2018).

NGOs, also contribute to law reform, lobbying, advocacy and litigation on disability rights.[576] Accordingly, DPOs and civil society organisations have played a robust role in monitoring disability rights. However, there is, as Kamga asserts, much room for improvement. Nonetheless, the responsibility for implementation of policy primarily rests on the state – with assistance from relevant stakeholders such as DPOs, civil society, and private actors.

The efforts of the SAHRC on monitoring disability rights has increased in recent years.[577] However, as the NHRI with the primary responsibility for this task, more can be done. Its emphasis has been on the rights of children and youth with disabilities, and that of employees with disabilities. The rights of adults with disabilities, generally, including in relation to parenting, has not been the subject of its programme on disability. The 'vulnerability' of persons with disabilities and their economic potential, therefore inform the work of the SAHRC.

5.7. Conclusion

The analysis of the Children's Act shows that there are several violations of international and regional law and constitutional law obligations, including in relation to the rights to equality, information, accessibility, access to justice, family care and children's rights to life, survival and development, and their best interests. The lack of supports and safeguards in the Children's Courts' proceedings, when mothers with intellectual disabilities testify, were identified as discriminatory, and law reform in this regard was recommended to enable them to fully participate in proceedings – cognisant of their legal capacity.

The role of the social worker was analysed and found wanting in relation to a lack of adapted assessment frameworks. The lack of an appropriate code of ethics and training to conduct parenting capacity assessments was also noted.

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576 Centre for Human Rights *Disability Rights Unit* <https://www.chr.up.ac.za/units/disability-rights-unit>; Southern African Litigation Centre *Programmes: Disability Rights* (undated) <https://www.southernafricalitigationcentre.org/our-programmes/disability-rights/>; Section27 *Priority Work Areas* (undated) <http://section27.org.za/priority-work-areas/>; Legal Resources Centre *Our work: Equality and Non-Discrimination* (undated) <http://lrc.org.za/our-work/equality-non-discrimination/>; Socio-Economic Rights Institute of South Africa *The struggle to be ordinary: Sanitation for women with disabilities in informal settlements* (2019) <http://www.seri-sa.org/images/SERI_The_struggle_to_be_ordinary_FINAL_WEB_Spreads.pdf> (all accessed 9 February 2020).

577 SAHRC *Promoting the Right to work of Persons with Disabilities: Toolkit for the Private Sector* (2015); SAHRC *Equality Report:* Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa 2017/18 (2018) 59-62 <https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf>; SAHRC *Learners at special-needs schools: Research brief, The management of and rights of learners at Special-Needs Schools* (2018) <https://www.sahrc.org.za/home/21/files/The%20Right%20to%20Education%20for%20Special%20Needs%20Learners%202017-2018.pdf> (all accessed 9 February 2020)."

The limitations of the Children's Act in relation to AQTs were identified and the need for guidelines for magistrates to enable full participation and no discrimination, was articulated. The role of the intermediary was discussed as limited. The specialist skill to question a person with an intellectual disability, was argued to require specialised training.

The analysis of other court rules and regulations showed that there are some best practices to learn from – such as the court preparation programme of the Sexual Offences Courts.

There is therefore scope for amendments to the court rules to remove the indirect discrimination inherent in the non-provision of procedural accommodations. Furthermore, provision of legal representation, including at state expense where needed, was identified as necessary. The formulation of a court preparation programme was recommended.

A lack of policy coherence as well as vagueness were identified. Complaint mechanisms were unclear and a lack of infrastructure to provide procedural or reasonable accommodations in courts was evident.

Having looked at the legislative framework in this chapter, the next chapter is a thematic analysis of the data obtained from the reviews of the Children's Court files in Durban and Pietermaritzburg. The analysis seeks to shed light on how the Children's Courts (and the social workers) have used the various strategies and techniques at their disposal in investigation and assessment and the court determination of the child's best interests.

CHAPTER SIX:

NARRATIVE AND ANALYSIS OF THE CASE REVIEWS

6.1. Introduction

Chapter 5 discussed how South African Children's Court decisions are not reduced to reportable (or unreportable) judgments. Instead, the reasoning for the court orders in each instance must be gleaned from the court records. This is an imprecise exercise, since the record reflects primarily the documents annexed as exhibits (evidence such as social worker's reports and appendices such as medical reports or affidavits). There is scant indication of what transpired during oral evidence, bar an indication on the hard copy court record on whether questions were asked by the parties and if they wished to cross-examine the social worker's report.

This study investigated the archives of two Children's Courts, where the hard copy court records for the period 2010 to 2014 (inclusive) were perused to identify relevant cases meeting the sampling criteria for the study. Archival research comprises primary sources that are held in repositories as archives (such repositories of libraries or courts, for example). The sources can *inter alia* be manuscripts or documentary sources or electronic (recordings of court hearings, evidence). In legal research, the archival method can consider court case files.[1] An archival record allows one to 'assess the impact of natural events and examine other issues', in such a way that the subjects are unaware of the research, its aims,[2] or impact. This means it has external validity. Unfortunately, one can only use the data as they are found. Where there are gaps, incomplete records, or missing reports, for example, one must ensure the completeness thereof and ultimately determine whether the data in the files, for example, 'represented the population'.[3]

Qualitatively, the data are analysed to show what evidence (the nature of) was led to inform the finding of the magistrate in a particular case and whether any procedural accommodations were made for these litigants. In particular, the documents considered are the social worker's report to the court and the court records of the hearing (termed an 'inquiry') – as penned by the presiding officer. The social work report sets out the information about the family circumstances obtained through the social worker's investigation, any assessments conducted about the child, any parental capacity assessments or reports by third parties such as medical practitioners (including psychologists or psychiatrists), and other reports such as from teachers.

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1 CB Harrington & S Engle Merry 'Empirical Legal Training in the US Academy' in P Cane & HM Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (2010) 1052.

2 M Cuffaro 'Archival research' in S Goldstein & JA Nagliery (eds) *Encyclopedia of Child Behaviour and Development* (2011) 140.

3 Cuffaro (n 2 above) 141.

The report also provides a recommendation on whether the child is in need of care and protection, and then what measures are recommended to be in the child's best interests. The magistrate's queries raised to the social work reports submitted to court may be raised in a query form by the magistrate for further action that need to be taken by the relevant social worker.

The first aim of this chapter is to analyse the evidence led in the court inquiries (hearings) to illustrate whether in cases where a parent's disability was flagged as relevant, there is an indication that the court – in any of the cases – was aware of the implications of an allegation of incapacity to parent due to intellectual impairment and the availability of measures (including procedural accommodations and support) to assist the mother (or father) to effectively communicate and participate in the court proceedings. In cases where disability of a parent was not flagged as relevant (ordinary neglect cases not constituting case studies), legal representation, cross-examination of or by parents, and procedural accommodations, where relevant, were identified.

The second aim is to establish whether diagnostic prognostic outcomes for the parent, in the 'disability' labelled cases, were predicted in the social work reports – showing potential bias or ableism. Due to the absence of a justification provided for the court order, it is impossible to determine with certainty to what extent these assumptions played a role in the court's final decisions, but it is an indicator of potential bias where rigorous questioning of inherent ableism did not occur at the behest of the presiding officer.

The review of the court files showed the following statistics for the five-year period (Table 1 below), indicating 244 cases of neglect (and abandonment) with 69 cases of disability or illness indicated – amounting to 28 percent of cases. This is almost a quarter of the cases.

Table 1: Children's Court case reviews

Type of cases	Durban Children's Court	Pietermaritzburg Children's Court	Total
Unstated disability	1 (mother)	0	1
Psychosocial	8 (mother) 3 (father)	9 (mother) 1 (father)	17 mothers 4 fathers *21 cases in total*
Physical	3 (mother) 3 (father)	3 (mother) 1 (father)	6 mothers 4 fathers *10 cases in total*
Intellectual	5 (mother) 1 (father)	0	5 mothers 1 father *6 cases in total*

Co-morbid/conflate intellectual and psychosocial	2 (mother)	4 (mother) 1 (father)	6 mothers 1 father *7 cases in total*
Illness	9 (mother) 2 (father)	12 (mother) 1 (father)	21 mothers 3 fathers *24 cases in total*
	Subtotal: 28 mothers 9 fathers *37 cases*	Subtotal: 28 mothers 4 fathers *32 cases*	Total: 69 cases *(56 mothers)* *(13 fathers)*

Table 1 (above) shows that the Pietermaritzburg court had a higher number of cases overall compared to the Durban court (137 cases compared to 107). The cases where the disability or illness of a parent was flagged, were 37 for Durban and 32 for Pietermaritzburg. Of the total cases, intellectual disability of a parent for Durban was indicated in five cases (four of which dealt with mothers), with none for Pietermaritzburg. Cases of intellectual disability amount to 2 percent of the total neglect cases surveyed and 7 percent of cases where a parent had a disability.

Of note, in the Pietermaritzburg cases, the diagnosis of the parent was unclear as there was a conflation of terminology for intellectual and psychosocial disability in four cases. The incidence of psychosocial disability of a parent was much higher in the cases reviewed – 21 cases in total – where the psychosocial illness or disability of a mother was indicated in 17 cases and the father in four cases. In 10 cases, the physical disabilities of the parents were indicated, often where a person was a wheelchair user or were amputees, for example. For the category of illness, (24 cases identified) the HIV status of parents was most often cited in social work reports. However, whether the parent's illness was at a level of impairment that impacted on their parenting ability was only indicated in one case. In this category, other illnesses such as epilepsy and tuberculosis were indicated.

The narrative below, as well as the findings in each instance, will focus on particular cases where the parent is labelled as having an intellectual disability (or using the terminology of the social workers is 'mentally retarded' or 'mentally challenged'). Both cases initially identified as allegations of neglect and abandonment were reviewed because there was often an overlap and a change of label, as the investigation into the child and family's circumstances proceeded. Nine case studies are used for an in-depth narrative to identify, qualitatively, the relevant information from the data. Thus only nine of the 69 cases are discussed in detail, particularly as only four of these cases dealt with intellectual disability of the mother – the focus of this study.

6.2. Neglect and abandonment cases where the parent has an intellectual disability (case studies)

Seven cases are relevant where a parent was identified as having an intellectual disability; alternatively a conflation of intellectual and psychosocial disability was indicated. These cases are discussed in turn, with an analysis for each case following a description of the investigation, reports and hearings. The section thereafter discusses the themes emerging from these case studies.

6.2.1. Case study 1

This case was initiated in Pietermaritzburg and later transferred to Durban. In summary, allegations of sexual abuse by the 18-year-old brother of an eight-year old girl were levelled by the school after she had disclosed such to the teacher. She was taken to a hospital for medical examination by a police inspector. The social worker removed the child from the care of the mother. The mother lived with the grandmother, who is elderly and 'wheelchair bound'. At different stages, various adult male members of the family also lived in the home. The social worker's intervention was initially premised solely on the need to protect the child from sexual abuse. The allegations of abuse were not substantiated later on. However, the sleeping arrangements at the house remained a major concern for the social worker. Furthermore, the poverty and overcrowded living arrangements were cited as risk factors. Eventually, the reports indicated that the social worker became mostly animated by the intellectual capacity of the mother and her ability to meet the child's developmental needs – rather than the alleged sexual abuse.

Investigation, reports and hearings

Removal: The child was removed from her mother, on recommendation of the social worker, as being in need of care and protection under the Child Care Act of 1983, (sections 14(4)(aB)(iii) – behaviour that cannot be controlled by the mother; and (iv) – lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child). Over time, the new Children's Act 38 of 2005 came into effect and the court order, finding the child to be in need of care and protection was based on sections 150(1)(a), (b) and (g).[4] The child was placed in alternative care, initially with a non-relative, later with relatives in Durban, and eventually in a child and youth care centre (CYCC). At the first court inquiry, the detention order was issued. The mother was not present.

[4] That the child has been 'abandoned or orphaned and is without any visible means of support'; 'displays behaviour which cannot be controlled by the parent or caregiver'; and 'may be at risk if returned to the custody of the parent of the child as there is reason to believe that she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child.'

The first social work report referred to the mother as having *'limited'* or *'very low intellectual ability'* on numerous occasions. There is reference in the report of the mother having attended a special school during high school and having received a disability grant at some stage. The mother is described as *'immature and childish,'* and *'unstructured and not capable of taking responsibility for her actions or learning new skills.'*

The factors contributing to the opening of the inquiry were

> *The child is unsupervised and uncontrolled wandering around the streets the overcrowded house, the mother's limited mental abilities, the grandmother's physical challenged condition and both women's financial dependency were also assessed as risk factors.*

Protective factors identified were therapy at an assessment centre and partial care after school, and also new sleeping arrangements. The brother would attend therapy at Childline. Alternative care was recommended, based on the following assertions

> *Due to the mother's limited mental ability and lack of responsibility, she is not able to protect the child in the family home and outside. She is not able to manage the child's behaviour in general to ensure her development. The denial of the inhabitants of the abuse in the house will prevent them to follow protective measures. The mother shows no insight and ability to protect the child in the house. The child cannot protect herself.*

The evaluation states that *'… there is no prognosis to teach the mother the necessary skills to protect her child.'*

At the second court inquiry, the mother and child were present. The record of proceedings note, in the handwriting of the magistrate, that *'The child's mother is "satisfied" with the variation.'* A breakdown in foster care occurred and the child was placed with relatives. It is noted that the child asked no questions.

The second social work report indicated that the mother had very low intellectual ability and

> *is not able to take responsibility for her actions or learning new skills, is immature and childish. She does not have any insight in[to] the emotional and developmental needs of children. Due to her friendly nature and big social need she will enjoy it so much when visiting people that she will stay out the whole day, losing track of time and her responsibilities. She can be very stubborn and sensitive.*

It is unclear from the report whether these assertions were made by family members that were interviewed, or are the opinion of the social worker. The evaluation noted *'no positive changes have taken place in the mother's circumstances due to the very low intellectual functioning of the family*.' It further noted the decrease of family income by R5000 – to only the grandmother's old-age grant. The social worker noted that

> *The home circumstances are very depressing with the adults mostly house bound due to their unemployment, the grandmother and the uncle's health problems. This also results in increased crowdedness [sic] which puts the child, in view of her alleged sexual abuse within the family, even more at risk if she has to be reunited with her family.*

The report further stated that the mother does take on household responsibility:

> *The mother and grandmother are interdependent on each other. The grandmother needs the mother to help with her physical care, manage the household, cook and do shopping. Due to the mother's low intellectual functioning, the grandmother must tell her what needs to be done, give her guidance and sometimes even reprimands her.*

The mother was present at the third court inquiry. The record of proceedings noted that: *'Rights and legal representation and legal aid explained. The party understands. Legal representation is not required. Rights of cross-examination and [the] purpose thereof are again explained in full and understood. They have no questions.'* The case was then transferred to Durban, as that is where the foster parents live.

Two years later, at the fourth court inquiry, the mother was present. The record of proceedings note that: *'The rights to legal aid and legal representation explained to the parties present. They understand and inform proceedings explained in simple terms.'* The *third social work report* stressed that '*The mother has limited abilities and lack[s] responsibility skills. She was unable to protect the child in the family home and outside, [and] manage the child's behaviour in general to ensure her development.'* The report notes that the foster parents could not anticipate fostering the child for another two years, as they could not control her. The social worker evaluated the family circumstances, noting that

> *no positive changes appear to have taken place in the biological mother's circumstances, due to her very low intellectual functioning … The mother's social circumstances is unsatisfactory and she is not in a financial emotional or intellectual position to provide satisfactorily for the child's immediate needs.*

The report referred to two psychosocial educational reports by the child's teacher and aftercare teacher – but did not indicate any major problems. At the fifth court inquiry, the foster care order was extended, with no record of proceedings attached to the court file.

The fourth social work report indicated that the child was experiencing problems in foster care with relatives. The report repeated the mother's profile and evaluation from the third report. At the *sixth court inquiry* the mother was present. The record reflected that *'they understand and inform they do not need a lawyer'* . The court varied the alternative care to a CYCC, indicating that *'the child is aware of where she is going and she accepts that it is the best for her.'* The court found her to be in need of care and protection on the basis of sections 150(1)(a), (b) and (g) of the Children's Act.

Three years later, a letter from the social worker noted that the file would be transferred to Pietermaritzburg. Furthermore, it noted that the mother of the child *'due*

to various reasons (low intellectual functioning, inability to provide for the child's immediate needs, etc.) was unable to care for her daughter.'

Child's situation
The description of the child's situation was initially premised on the safety of the child in relation to alleged sexual abuse by her brother, fear of potential sexual abuse because the child sleeps in the same bed as her mother and the mother's boyfriend, and the allegation by an unidentified extended family member that she was *'at risk in the mother's care'.* The first social work report noted that a psychologist and social worker counselled the mother against allowing the child to sleep in her bed.

The child was said to *'wander the streets of her village'* and was '*in constant distress (attention seeking, being very sad, crying and aggressive[ly] scratching in her work books [which] prevented her from making any progress at school.'* A recommendation was made that she be transferred to an Afrikaans medium school from an English one, as that was her home language.

The evaluation of the social worker was that the child was at risk at home and in the village due to *'high incidences of crime and antisocial problems'.* The child's school progress was said to be affected by her home circumstances, which would not allow her to '*develop her full potential'* if not removed. The report stated that the mother and *'family'* agreed that care within the extended family would be better for the child. The phrase *'best interests'* of the child is not mentioned in the first report.

The psychosocial assessments accompanying the second social worker's report indicated that the child was well-behaved, strong willed, and easily influenced by her friends. The report recommended psychological counselling to improve the child's self-protective and interpersonal skills, self-esteem and to prevent *'inalienability'* by other children. It also identified the child as having learning problems, which would require monitoring of her schooling.

The third social worker's report noted a breakdown in foster care, with conflict between the child and her twelve-year-old foster sister, and also disciplinary challenges. The child (then ten years old) stated she would prefer returning to her mother's care, failing which she would rather reside in a children's home than in foster care. The foster parents indicated the child was not controllable and that they would not be able to care for her emotional needs.

Analysis
There was no assessment done to ascertain the extent of the mother's intellectual impairment and the limitations this placed on her adaptive functioning, nor was there a formal parenting capacity assessment (PCA). In fact, aside from the indication that the mother attended a special school, there is no document purporting to be medical or educational proof of her impairment.

Despite the social worker's assertion that the mother had an intellectual disability, the record did not reflect that the court considered, at any of the inquiries where the mother was present (two in Durban and one in Pietermaritzburg), that she was incapable of providing evidence, due to her disability, or that she needed support to do so, nor that she may have required legal representation. The presiding officer in the Pietermaritzburg court, however, noted that the proceedings were explained to her in *'simple terms'.*

The reports of the social worker are damning in respect of the abilities of the mother to care for her child, based explicitly on her intellectual disability. There are other factors, such as risk of sexual abuse and poverty that also played a role, as well as the child's apparent uncontrollable behaviour - though little proof is offered. While none of the four social worker's reports indicate a specific communication barrier when interviewing the mother, based on the allegations about her intellectual disability, it appears she may have been a prime candidate for measures to enhance her participation in court. Had these been available in the South African civil system, it could have included a support person to explain proceedings to her in terms she would understand, as well as her rights, ad an intermediary to explain in simple terms the content and import of the statements and findings made by the presiding officer.

The parental rights of the mother were impeded by the court intervention and the child was placed in three alternative care situations from age 8 to 14 – eventually being sent to a CYCC. A legal representative to advance the mother's rights, and, in particular to cross-examine the evidence, would have greatly assisted her, and the court.

The mother and grandmother were identified as being active members of the Salvation Army, with regular attendance of religious services. The mother was said to attend weekly women's meetings and helped with serving tea and cleaning afterwards. The family therefore had a measure of community support and was integrated in the community. The mother helped the grandmother with physical care and in managing the household. The poverty of the mother and extended family was documented and despite relying on the mother's disability as a risk factor and stating that she was not in receipt of a disability grant at the time – the first social worker (nor the second social worker) did not take steps to help the mother obtain a disability grant. It was noted that the mother had two previous periods of employment. Overall, the recommendations of the social worker primarily relied on the inability of the mother to care for the child due to her intellectual disability, – with no measures to support the mother, her family, and with no reunification measures offered.

The evidence led on the child's circumstances (potential sexual abuse, uncontrollable behaviour), on its own, could support the averments of the child being in need of care and protection, but poverty assertions needed to have been addressed

with positive measures. The diagnostic-prognostic assertions made by the social worker – not corroborated by an independent PCA of the mother (without even proof of her diagnosis) – raise red flags.

6.2.2. Case study 2

In summary, a boy child, in Durban, aged eighteen months, was ostensibly abandoned by the mother an handed over to a stranger on the beachfront. The police placed the child in temporary safe care. The stranger provided the police with the mother and child's names and indicated which area they resided in. The court, a month after the temporary placing, confirmed the removal and found that the child was abandoned and without any visible means of support. A medical report indicated the child was malnourished and developmentally delayed and would receive treatment from the hospital. The child's details were published in the newspaper and a relative responded – indicating the mother was in hospital. In a letter to the court, the social worker from the Department of Social Development stated that the mother was traced to a psychiatric hospital and was *'assessed as suffering from moderate mental retardation with impairment in her behaviour*'. On numerous occasions the court subpoenaed the social worker to appear before it and to report on the case. Each time, an adjournment was sought. Eventually the child was placed in cluster foster care. A year and four months after the court intervention, the social worker lodged her first report.

The first social work report identified *that 'she [the mother] is unable to care for the child concerned as she has been assessed as suffering from mild retardation with impairment in her behaviour. Her present whereabouts and circumstances are unknown'.* The report noted, however, that the social worker did interview the mother. She attended a high school until age 18 when her grant terminated (passing grade 7). She had previously been employed as a domestic worker for a short time. The social worker referred to findings from three reports by a psychologist and psychiatrist, and the hospital social worker. All three had been obtained between nine and ten months prior to the social worker's report being drafted and lodged with the court. No reports were obtained once the mother was discharged from the hospital into the care of her family.

The evaluation noted that the mother

> *attempted to provide for him on her own for eighteen months. His mother struggled to meet his physical, emotional and medical needs, as was evident from his condition when he was abandoned. In addition, she lived a lifestyle that placed her son and herself at risk of being abused or illtreated. She has been assessed as suffering from an intellectual impairment. As a result of this she is not capable of logical reasoning that she has to feed and protect her child and she subjects him to high risks. She is also non-compliant with treatment, is nomadic and the prognosis for her recovery is poor.*

From an interview with the maternal cousin of the mother, the social worker noted an allegation *'that she abused alcohol and tended to sleep for most of the day'* and

that the mother *'has to be guided about taking care of her child as she sometimes took good care of him and at other [times] did not feed him properly gave him coffee instead of milk and slapped him when he cried'.* Furthermore, the mother's insecure living arrangements (changing from residing at the family home to unknown lodgings) and unemployment were mentioned. An allegation was also made by the maternal cousin that the mother was in receipt of child support grants for two children not in her care, and that she uses the social assistance to buy *'take-away food for herself, instead of milk formula and nappies for her son'* , and did *'not contribute financially when she is with the family and expects them to feed and accommodate her'.*

The social worker recommended that the child be placed in alternative care, as he is in need of care and protection in terms of section 150(1)(g) of the Children's Act.

The annexures of the reports indicated the following. The hospital social worker indicated that the mother had been taken to hospital by the police after relatives found out that she had abandoned her child. She had absconded from hospital a few times and was readmitted. The hospital social worker indicated that she presented with behavioural problems in the ward, had a history of instability, poor insight and judgment, and presented with high risk behaviour and an inability to anticipate and appreciate the possible consequences of her behaviour. She was not eager to see her child or to be reunited with her child. The mother was informed that she was *'a candidate for institutionalisation*', which the hospital social worker stated was refused, saying the mother was *'adamant that she was not mad, [and that] she was able to take care of herself.'*

As to the child's circumstances, reference was made in the social work report to the medical report – indicating his malnourishment and development delays. After treatment in hospital and placement in cluster foster care, the child's physical and developmental condition improved, with him meeting his developmental milestones. He had not been observed with his mother as she had not had contact with him. The social worker referred to the annexure of the hospital social worker from 11 months prior, which stated that the mother was not eager to see the child or be reunited with him. No interview with the mother after her discharge was therefore conducted. In the evaluation, the social worker stated that the child *'is in need of nurturing in a stable and secure environment. In the absence of extended family being able to care for him, a cluster foster home is deemed to be the best option for him'.*

The psychologist's report noted that the report was requested by the psychiatry department to *'clarify the patient's diagnosis in order to facilitate treatment*'. The report categorically stated that it was not commissioned for forensic purposes and that it was not recommended that the conclusions be put to any other use. The psychologist reported that the mother's version was that she had not abandoned her child, but that a man took her child. The psychologist noted that the mother answered questions appropriately and that her speech was clear and audible. Her conclusion was that an

intellectual impairment may be present, but *'the level of functioning is unclear at this time*'. The psychologist indicated that her assessment was not complete and that *'an accurate diagnosis cannot be provided as yet'*. However, she stated that: *'It is also recommended that an investigation of the patient's fitness to continue to care for her son be evaluated by social workers and that he remain in alternative care until a satisfactory conclusion is reached'.*

A psychiatrist's report noted that, clinically, the mother was found to have impaired intellectual functioning, no overt psychotic symptoms, but had mild depressive symptoms for which an anti-depressant was prescribed. She had displayed *'problematic behaviour'* and was put onto anti-psychotic medication to control her symptoms; yet the report also states there were *'no psychotic or mood symptoms noted'.* The psychiatrist noted that the mother *'voiced fears of returning home due to being ostracised by her family and community for giving her child away and at this point, was also being seen by the social work department regarding placement'.* The prognosis was said to be *'poor due to the presence of moderate intellectual impairment with significant behavioural problems. Clinically she demonstrated the ability to perform basic activities of daily living, but required supervision with instrumental activities. Strict supervision is also required with medication compliance.'* The mother was discharged into the care of her family.

The report noted, as a measure to assist the family, that an attempt was made to reach out to a relative to support the mother and child – but that the person *'distanced herself'* from the family. Earlier in the report, the social worker noted that the mother had been raised by an aunt, and later lived in a CYCC. Extended family support was therefore not available to her.

The first court inquiry, took place a year after the psychiatrist's report and the mother's discharge from hospital, noted that the child was found in need of care and protection in terms of sections 150(1)(a) and (g) of the Children's Act. The child was placed in foster care in a cluster home.

There are no further court orders in the file. The inside cover of the court file indicated the following annotations: '40 adjournments noted'. And, a year and three months after the previous court order, it is noted, presumably by the magistrate (or a clerk) that there were 'no extensions of foster care grants after the [previous] court order. No other correspondence or court orders in the file thereafter!'

Analysis

This case is different from the first case in that the mother abandoned the child, was hospitalised at different stages and according to the social worker's report placed on court record, she indicated only on one instance that she wanted to be reunited with her child. She did not have contact with the child from the day she abandoned him to the last court order – a year and five months later. She also did not have the support

of her extended family, although she periodically lived with them. The mother was assessed by a psychologist and psychiatrist and their findings indicated a spectrum of a possible intellectual impairment and 'moderate' intellectual impairment. The mother's socio-economic position is not stable and her whereabouts became unknown.

The mother did not appear before court on either of the two occasions. However, the 40 postponements noted on the file is cause for concern about the competence and capacity of the social worker and court system. These postponements also meant that the court's intervention was substantially delayed. The psychologist had noted that the mother had no issues with communication. However, because of the diagnosis of intellectual disability, it could well be contemplated that she may have a challenge with understanding information and thus may have required support in understanding the import of the court proceedings, and the need for her to participate.

The psychologist's assessment of the intellectual functioning of the mother was incomplete and the averment that the report was not for 'forensic purposes' presumably should have affected the weight the court should have attached to this report. The social worker relied on this report – quoting from it in her own report. The psychiatrist's report indicated a poor prognosis and stated the low functional ability in categorical terms. This averment as to her functional ability was made despite the fact that the psychologist's report which was sought for this purpose did not provide a conclusion on that aspect.

By the stage the matter came before court, the mother's whereabouts were unknown. After the mother was discharged from hospital, it does not appear that social services were offered to her, and no follow ups were made by a community health worker. She did not appear before the court and that means an opportunity to have a legal representative appointed, or other measures made available to her, did not eventuate.

The evaluation of the social worker in the first (and only) report filed, refers to the mother's situation, but does not mention what factors influenced the determination of the child's best interests – other than references to his developmental delays and the need for a nurturing home environment. The report also largely relied on information obtained eleven months prior (hospital social worker, psychologist and psychiatrist reports) when the mother was hospitalised. This outdated information may or may not have been confirmed by proper investigation into the current circumstances of the mother. The court should have been seriously concerned about the reliability and validity of this information, so late after the fact, with no further corroboration or updates of circumstances made.

The evidence led as to the circumstances of the child (abandonment, malnourishment and development delays), however supported the social worker's

averments of the child being in need of care and protection at the outset. Whether such a finding should have been sustained later on cannot be ascertained, due to the outdated information put before the court.

This mother may have benefitted from support, informal or formal – particularly in understanding the proceedings and managing her condition. A peer support group or DPO specialising in intellectual disability may have been able to help her manage her diagnosis.

6.2.3. Case study 3

This case, from Durban, was initiated by the social worker from a NGO that serves the needs of persons with intellectual and psychosocial disabilities. The social worker, in the first report, notes that she received a referral from the special school where two children with profound intellectual disability were reported to be in a *'very dirty and neglected state', 'always hungry'*, and with lice in their hair. The second eldest child, a boy aged 9, was apparently not in receipt of medical supervision – despite his epileptic seizures. The second child was a girl, aged 10. Attempts to discuss the children's situation with the father of the child were not successful. The social worker reported that the mother and two other children, not yet in school, also *'present with intellectual disability'.* She stated that on a house visit, she found the state of the room the family lived in was *'unconducive to the well-being of the children and they do not have any food in the house*'. She noted that the mother was pregnant with the fifth child. On a second visit, after the mother had given birth, she noted that the family was *'in an unkempt state'* and both parents were unemployed without a disability grant, and therefore *'As a result, the social worker is of the opinion that the present placement and situation will not serve the best interest of the children concerned as it will not help to enhance the children's development and sense of belonging'*. The social worker indicated that the children were placed, temporarily, in a child and youth care centre.

The social worker noted in her report that the mother and four children present with intellectual disability (including two boys aged 5 and 3 years) and that the mother also presents with epilepsy. The social worker indicated that she employed measures to assist the family – namely conducting home visits. She would render supportive services to the parents, such as assistance with application for a disability grant and inclusion in a parenting programme. She noted that her opinion was that the children's placement with their parents *'will not serve the best interest of the children concerned as it will not help to enhance the children's development and sense of belonging'.*

Further documentary evidence annexed to the first social worker's report was a medical report from the district surgeon which noted *'low cognition'* for all four children, as well *'poor nutrition, milestones and development'* for the third eldest and youngest children, and epilepsy noted for the fourth child. A medical report from the special school indicated that the eldest and second eldest children had not been attending

school until that year (thus for approximately three and two years respectively), and that both drool. Some scratches and bruises were noted on both children, as well as burn marks on the younger of the two. His epilepsy was also noted.

The first court inquiry occurred three months after the initial referral by the children's school. The record of proceedings noted that the parents were not present, but that the children were. The court ordered all four children to be in need of care and protection under section 150(1)(f) and (g) of the Children's Act.[5] The children were placed in a child and youth care centre. The new born baby was not removed and was not mentioned in the court proceedings.

Four months later, the second court inquiry took place. The record of proceedings identified that both parents and children were before the court. Furthermore, the rights to legal aid and legal representation were explained to them and they stated they *'will speak on their own'*. Next to the right to cross-examine, the record noted: '*Father raises visitation rights for weekends and Christmas. Father states he has now secured a job and will try to work and get accommodation for his children in the future. He states he accepts at present there is not accommodation for his children.'* The court extended the order.

A year and one month later, the second social work report was lodged. This report noted the following: 'Mother is intellectually disabled and according to (Mildeon et al, 2003 NSW Department of Community Services) it will influence a parent with intellectual to their children. The problems are associated are employment stress and relationship difficulties' (verbatim). The report also noted the view of the children (two of whom are 'profoundly intellectual disabled' and two that are aged 3 and 5, respectively, and also said to be intellectually disabled) as follows: 'While in the care of their parents, the children were in terrible conditions. They do relate well to their parents but the parents are failing to take proper care of them.'

The social worker reported that an employee of the CYCC advised that they are not equipped to take care of the children due to the children's *'mental disability'*. Nonetheless, she recommended the children remain at the CYCC. The social worker recommended that the court find the children in need of care and protection in terms of section 150(1)(i), (f), (h) and (g) of the Children's Act. The report noted that measures to assist the family would be assistance with the application for a disability grant and enrolling the parents in a parenting programme (both commitments she made in the first report). The social worker's evaluation in emotionally-laden terms was that: *'As much as the parents love their children, they are unable to [take] proper care*

[5] 'Lives in or is exposed to circumstances which may seriously harm' the children's 'physical, mental or social well-being'; and may be at risk if returned to the parent, 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 wellbeing of the children.'

of them and this has caused the children to have not developed efficiently and the children have been neglected tremendously.'

Attached to the social worker's report was further documentary evidence. Letters from the principal of the special school '*for severely cognitively challenged learners'* confirmed the two children's attendance. A medical report of a District Surgeon (form 7) indicated the following information about the children

- First child: cavities, poor speech articulation; neurological: unable to assess; intellectual: mental retardation;
- Second child: poor oral hygiene with multiple cavities; well-articulated speech; intellectual: average;
- Third child: multiple cavities; poor oral hygiene; poor articulation of speech; neurological: unable to assess; intellectual: mental retardation; known epileptic, on treatment; and
- Fourth child: poor oral hygiene, multiple cavities; poor speech articulation; unable to assess; intellectual: mental retardation.

The record of proceedings of the third court inquiry noted that the parents attended and that *'Parents have requested an opportunity to consult legal aid'*. The court again found the children to be in need of care and protection. However, the court noted that the court order was to be monitored: *'subject to regular monitoring by the social worker with the aim of addressing reunification of the children with their biological parents'*.

A letter from the social worker at the CYCC was annexed to the court file, dated eight months after the court order was extended. It noted that the children visited the parents over weekends and holidays and that the CYCC provided the family with food parcels and milk money for the baby on occasions. The parents also visited the children every weekend. The social worker noted that *'There are a close emotional bond between the parents and children'.* At this stage, the father was said to be employed and paying rent for a three-bedroom home. The CYCC staff performed a home visit and found the family residing in a one-room house with no toilet or mattresses, with the children sleeping in one bed with the parents. The CYCC letter noted that the children had been cold without warm clothes and had become sick. The CYCC would not allow the children to visit the parents going forward, without permission from the social worker each time. The letter concluded, stating: *'As much as these parents try and work hard to solve their problems and get the children back, that much it seems impossible that it can become reality.'*

The third social work report repeats content from previous reports. The only additions were that the mother was still not in receipt of a disability grant. Furthermore, it stated that numerous home visits were conducted while the children were in the CYCC and that the family's situation *'has not changed'*. The social worker further noted

that the social worker from the CYCC advised that the children do not qualify to be placed at the CYCC, and indicated that she would try to obtain a suitable placement.

Two years after the third inquiry, the matter came before court again. The fourth court inquiry took place without the parents being present and the court order was extended for another two years. This means the children had been in a CYCC for three years and would be there for another two, at least. A year later, a letter from the CYCC was placed on file indicating that the children were well adapted at the centre and *'Despite their severe physical and mental challenges they show no behavioural problems and seem to have formed a sense of belonging with their individual child and youth care worker.'* The letter noted that the parents had occasional contact with the children and had relocated to Pietermaritzburg. The CYCC averred that it would be in the children's *'best interests'* that they remain in their current placement. No further documents were on file.

Analysis

The social worker's reference to "Mildeon et al" in her second report is a reference to a book by R Mildon, J Matthews and S Gavidia-Payne *Understanding and supporting parents with learning difficulties* (2003). Mildon and her contemporaries argue for support for parents with intellectual disabilities to effectively parent their children. The conclusion that the social worker, in a badly worded manner, was trying to come to, is that intellectual disability equates to bad parenting. This is stated categorically – although the literature she refers to does not support such a finding. The social worker was ostensibly trained in the rights of persons with intellectual disabilities, considering the nature of her employment as a social worker serving clients with intellectual disabilities. However, the report does not reflect such an understanding.

It is disingenuous of the social worker to indicate that she would assist the parents to apply for disability grants when the same assertation was made in a report dated a year and four months prior. There is no indication why this had not yet been done. Since the poverty of the family is indicated as one of the risk factors, the fact that the social relief of distress grants was not accessed, and that attempts were not made to help the family with an application for a disability grant, is concerning. It is also remarkable that the social worker again made a commitment to place the parents in a parenting programme – when there is no evidence tendered to the court that such measures had been taken since the same commitment was made in the first report. Holness noted that parenting programmes currently offered in South Africa are not adapted for persons with disabilities, and particularly not for persons with intellectual disabilities.[6] This does not mean that the social worker of an organisation that

[6] W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26 *Stellenbosch Law Review* 313.

ostensibly focuses on the rights of persons with intellectual disabilities, would not be in a position to adapt such a programme or advocate for this to happen.

At the fourth hearing, the parents indicated they wanted to engage the services of a legal representative. Considering the assertion that the mother had an intellectual disability and little was stated about the father's educational or intellectual ability, one might have expected the court to refer the parents to Legal Aid South Africa (LASA) or an appropriate law clinic for legal representation. The challenge of course is that the Children's Act entitles an unrepresented child to legal aid referral, but not adults.[7] However, LASA has a process in place for indigent persons to access civil legal aid. The record does not reflect what attempts were made by the parents to obtain legal aid. Furthermore, while the father is not identified as having a disability, the mother's disability on its own should have triggered procedural accommodation or support measures during the court hearings. No assessments were done of the mother's disability by medical professionals. The assertion of the social worker was relied on for this diagnosis.

The poverty of the family is the most notable risk factor, and yet was not successfully addressed by the social worker – despite this being a statutory duty resting on her. The court required the social worker to aim to reunify the family, and yet such measures are not articulated in the reports.

6.2.4. Case study 4

This case from Pietermaritzburg did not originate as an instance of alleged neglect by the mother, but by the maternal aunt with whom the 14-year-old female child was placed in informal foster care. The case was referred by a hospital where the child was receiving treatment. The social worker from the hospital indicated to the social worker from the Department of Social Development that the child was HIV-positive and that the child was neglected by the aunt and grandmother. She was in a state of untidiness and was made to 'sell chips at school and when stock [was] not finished she is beaten by the aunt', and further she had no school requirements. The social worker indicated that the child was neglected and abused emotionally and physically and 'looked malnourished compared to her age'. The letter also indicated that the mother of the child was 'mentally retarded'. The temporary placement documents were accompanied by a form 7 medical report, which indicated the child was immunocompromised with delayed secondary sexual characteristics. At the first court inquiry, the form 36 was confirmed and the child was placed in foster care. An affidavit by the social worker from the hospital, dated three months after the first hearing, indicated that treatment adherence was compromised by social problems. The affidavit further noted that *'The mother was diagnosed with a mental illness and is*

7 Sec 55(1) of the Children's Act.

being mistreated by the aunt.' The child was not attending school and had reported she was being neglected and was not always fed.

A letter from the DSD social worker was filed in the court file a month later, indicating the mother was *'mentally ill'* and that she herself was ill-treated and neglected by the aunt. Variance of the placement of the child was sought, as she was misbehaving in foster care. At the second court inquiry the care was varied.

The first social work report was lodged four months after the child was removed from the care of her maternal family. The social worker interviewed the maternal aunt and neighbour, but not the mother of the child. However, in the report, the social worker refers to the mother confirming that the child was abused by the aunt and that she *'used to give the child and her mother perished food'*. There is no confirmation that the mother lived with the child and the maternal family, but this assumption can be made. The social worker stated that the mother was *'mentally ill'*. The report refers to the family structure of the proposed foster parents and not to that of the child's biological family where she lived. The social worker contacted the grandmother who slept at her employer's home (she is a domestic worker) – but she *'didn't show any interest in knowing the whereabouts of the child'*. The child reported physical abuse from her aunt (a sjambok was used on her) and that she was woken at 3 am to clean the house and cook breakfast for the aunt and her children. She was denied school requirements, but her nieces and nephews were not.

The report highlighted that the family relationship was *'destructed'*, which presumably means dysfunctional. Furthermore, the family did not have *'cohesion'* and the aunt was *'authoritative'*. As for physical factors and health, the report noted the mother of the child as being epileptic, with a confirmation letter from the clinic which stipulated her treatment, attached thereto. The social worker also included a description of the foster parents' health, housing and environment, religious and cultural, as well as financial aspects. It is therefore unclear what financial income the maternal family had. The proposed foster mother was said to be unemployed and the foster father was a messenger, but his income was not stated, although their family's expenditure was stipulated.

As for the child, the report indicated the child was 'content and comfortable' with her foster parents, had developed a close bond, and that they offered her a sense of *'stability and security'*. The report reflected on the physical factors and health of the child as being HIV-positive (but that she was not yet on ARVs as her CD4 count was 311.93). With regard to the psychological factors of the child, the report restated that the mother was epileptic. This is a conflation of the mother's health with that of the child's. The child was said to be in grade 8 and *'did not achieve in the first term as she attended court for variations of placement when two exam papers were being written'*. A certificate from the principal of the school confirmed the child's attendance, but no school report was annexed. The report then sets out the special circumstances for

consideration, indicating the child is in need of care as she is neglected by the maternal family, and the person the family believes was the father of the child denied paternity when he was alive. The view of the child was that *'she is content to remain in care of the foster parent'.* The social worker also stated that the child would be without visible support if not taken care of by the foster parent. The measures to assist the family were indicated as follows: '*it is the best interest of the child to be placed in foster care'.* This is problematic, as this is not an answer to the question of relevant measures to be provided to assist her biological family – such as mediation and counselling. In her evaluation, the social worker asserted that the child was in need of care and protection under section 150(1)(a) of the Children's Act. The documentary evidence annexed, included the school attendance certificate; the child's laboratory report indicating her HIV status and viral load; a letter confirming the mother's epileptic treatment; the identity document of the mother, death certificate of the father, and birth certificate of the child; but nothing indicating the 'mentally ill' or other status of the mother.

The third court inquiry took place four months after the removal of the child, and the maternal family was not present. The social worker adduced her report as evidence. The record of the proceedings indicated that the clerk of the court recommended that the social worker's recommendations be ratified. The court found that the child was in need of care and protection, because she was in a state of physical or mental neglect under section 150(1)(h) of the Children's Act, and thus placed her with the proposed foster parents.

A second social worker's report was tendered to the court two years later, but a copy of the report was not on file because a letter from the magistrate noted that the report was returned to the social worker to 'attend to shortcomings'. Furthermore, the matter had to first be dealt with in terms of section 171 of the Children's Act (which refers to transfer from one CYCC to another), before the order could be extended. No further documents were on file. A second file opened eight months after this file, included a form 2 with the particulars of the foster care of the child. It was dated two weeks prior, with a copy of the last dated detention order from the first file. No further documents were filed.

Analysis

A real engagement about the mother's circumstances was glaringly absent from the social worker's first report. Proof for the averment that the mother was 'mentally ill' was not offered, nor was her relationship with the child discussed. The report gives the impression that the mother was dependent on the aunt. Whether the mother was in receipt of a disability grant and a child support grant for the child, or whether the maternal aunt was in receipt of a foster care grant for the child, was not indicated. It is therefore not evident whether poverty was a contributing risk factor. The report frequently details the circumstances of the proposed foster parents, which should have been done in a separate foster care suitability report. This conflation means that vital information about the biological family was missing from the report. The deficient

report was however not questioned by the presiding officer. The mother was not called to be present at the hearings and, accordingly, it may be assumed that the social worker's assertions that the mother was 'mentally ill' were accepted without demur. Since the second social worker's report was not on file, information about the child adapting to foster care and her relationship with her mother (family reunification) was absent. No therapeutic or other measures to help her biological family were provided.

In the letter accompanying the form 36 request for removal of the child from her family care, the social worker averred that the mother was 'mentally retarded' and in her first report averred that the mother was 'mentally ill'. This case is an example, discussed next, of a tendency to conflate mental illness (psychosocial illness) with intellectual disability. Whether epilepsy of the mother is comorbid with a psychosocial illness or neurological impairment or an intellectual disability, is unclear from the social worker's report, and here a lack of medical diagnostic evidence or assessment of the mother paints an incomplete picture.

6.2.5. Case studies 5 to 9 (conflation of psychosocial and intellectual disabilities)

The next brief discussion details where the mother (in four cases) and a father (in one case) were interchangeably labelled as being 'mentally challenged', 'mentally ill' and 'mentally disturbed'. In the main, it can be assumed that the mothers in these cases may have psychosocial illnesses, but the lack of clarity may mean that the social worker and potentially witnesses consulted by the social worker, conflate psychosocial illness and intellectual disability. This is similar to case 4 – discussed above. These cases are useful for identifying what evidence was led to support contentions that the children were at risk of neglect or other harms, particularly in relation to the diagnosis and prognosis of the parents' illnesses/disabilities.

Case study 5

In *Case 5* from the Pietermaritzburg court, two children, aged 17 months and 4 years, were removed from their mother's care. She was said to be *'mentally challenged'* or *'mentally ill'* - having suicidal ideation and made threats to harm her children. The children were removed, by the social worker from an NGO, after ingesting paraffin (as did the mother) and being referred by the hospital social worker. The form 36 indicated section 150(1)(f) of the Children's Act as being the reason for the removal. At the first hearing, form 36 was confirmed and a report from the hospital superintendent confirmed that the mother was a mental health user on treatment – indicating psychosis as a diagnosis. Seven months later, the first social work report was lodged, citing that the children were in need of care and protection under section 150(1)(g) of the Children's Act. In the report, the mother was described as *'aggressive from age 14'*, HIV positive, and *'mentally challenged',* and suffered from schizophrenia, according to the grandmother. The family believed the mother was bewitched by the girlfriend of a man she dated, and they sought help from traditional healers and

eventually a hospital. The mother was said to be unemployed and not in receipt of a disability grant, as her birth was not registered. Her mother (the grandmother) did not give an estimation of her age. The report noted that the mother had attempted suicide on numerous occasions, was aggressive, and the grandmother was unable to protect herself and the children from her. Furthermore, the report indicated that the mother was not taking her medication. The social worker requested that a mental health institution admit the mother, but was apparently told that she was receiving treatment as an outpatient from another hospital, and would be stable if she took her medication. After the children were removed, the grandmother reported that the mother was medication compliant and calm.

The social worker recommended the grandmother as foster care parent, despite the mother residing in the same home, and indicated she would monitor the children's care *'very closely'*. The report noted, for the permanency plan, that: *'The mother is mentally challenged and unable to care for her children, it is in their best interests that they are placed with the grandmother.'* There were no measures listed to assist the family. At the second inquiry, the mother did not attend, as she did *'not have transport fees and did not wish to attend'.* The only evidence tendered was the social worker's report and the form 7 medical report on the children from the initial removal, as well as the letter from the hospital from that time (and the affidavit from the grandmother that she was willing to act as foster carer). No current evidence of the mother's mental health was tendered. The court found the children to be in need of care and protection, in terms of section 150(1)(g) of the Children's Act.

Nine months later, the second social work report was lodged, which stated that the foster care situation was progressing well – but did not provide any update on the mother's health or circumstances. It maintained that she was still *'mentally challenged'*. At the third inquiry the foster care order was extended. The third social work report was lodged three months later, and at the fourth inquiry the court extended the order for two years. In May 2017, the fourth social work report was lodged and the court at the fifth inquiry extended the order to May 2021. The social worker's last three reports were identical to the second report, with no updates on the family and mother's circumstances.

The so-called close monitoring of the social worker was not evident from her reports, as the reports were not updated with current information about the mother's health and circumstances. The mother did not appear at any of the hearings, and yet could have been subpoenaed to do so, in order to obtain her testimony. In none of the social work reports is it indicated that the mother was interviewed.

Case study 6

Case 6, from Pietermaritzburg, arose from a foster care application by a grandmother caring for her nine-year-old grandson and her 46-year-old daughter, alleged to be *'mentally ill' and/or 'mentally challenged'*. The grandmother cared for her daughter and

grandson, as well as six children under age 17, four of which were foster children and an adult cousin. The mother had been receiving treatment from a mental health institution and was *'unable to take care of the child'*. The report noted that distribution of food parcels to the family on *'several occasions'* was a previous intervention. Measures to assist the family were indicated as follows: *'No reconstruction services will be rendered as the mother of the child is mentally ill and the father is alleged to be deceased'.* The court, at the first inquiry, found the child to be in need of care and ordered foster care with the grandmother. The mother was not present at the hearing, but the grandmother (the proposed foster parent, was). The record of the proceedings indicated that the child was placed with the grandmother 'pending further investigation and a medical report from the [mental health institution].' Ten months later, the social worker was not present at the second inquiry. The court order had lapsed nine months earlier, and the presiding officer noted: *'No attempts were made by the social worker to extend the order despite being requested to do so.'* The case was discharged and the file was closed.

This magistrate was aware that corroborating evidence was needed of the mother's diagnosis, prognosis and an assessment of her parenting capacity – but the social worker made no attempt to obtain these. Tellingly, the social worker pre-empted family reunification as a futile exercise, by stating categorically that the mental health of the mother precluded this.

Case study 7

Case 7, from Pietermaritzburg, was a matter referred to an NGO social worker from a community worker, when the 20-year-old mother allegedly fed a five-week-old baby water and maize porridge. The social worker indicated that the baby was *'underweight due to malnutrition'* according to a clinic sister from a pharmacy. The social worker then informally placed the mother and child with a baby haven (an NGO). This baby haven then referred the matter back to the social worker a few weeks later, stating that the mother of the baby had allegedly *'overdosed'* the baby with Panado syrup. The male infant, then aged 2 months old, was removed from the care of her mother on the basis of the social worker's assertion that the child was in need of care and protection under sections 150(1)(g), (h), and (i) of the Children's Act. She was placed in a CYCC, in temporary safe care. An affidavit from the baby haven attested to the fact that the mother at first seemed *'normal'* when she joined their teen mother programme – but had *'overdosed'* the baby from birth and beat her baby in order to *'teach'* him to *'listen'.* Threats by the mother to kill her baby should she not have formula were mentioned, as well as aggressive behaviour and suicidal ideation. The affidavit indicated that the carers from the baby haven found her 'unstable, abuse to her child and others' and that members from her community allegedly stated that she *'slept around', 'beat the child'*, *'refused to buy formula and would rather feed him water'.*

The social worker, in her letter to the court annexed to the form 36, indicated that the child was removed when the mother threatened to leave the baby haven. The

paternal grandmother was identified as being ideal for temporary safe care of the child. The child was placed with his grandmother, but informally and voluntarily returned to the mother's care two months later. The child was then removed from the mother's care again and she was placed in a CYCC. The mother was then, according to a letter from the social worker at the CYCC, offered an opportunity to be taught how to care for her child when visiting him at the children's home. The letter also noted that while the mother did originally visit and assisted with the care of her child, it was *'clear that she loves her baby, clearly she does not have the skills to care for him adequately'*; that she *'lacks insight and needs much assistance by the staff regards [regarding] the care of the baby'*; and *'that she 'might harm him with all the best intentions'*. Furthermore, the child was identified as being a *'high need baby'* that would need assessment and possible medical intervention for a possible neurological problem, and that *'if the mother is not equipped to deal with her baby, the situation could easily become overwhelming for her'*, and that she would *'benefit from parenting skills training'*.

The first social work report noted the mother had been raped as a child on two occasions – the latter time by her brother. Furthermore, the mother and father of the child were separated. A home visit to the maternal home showed a *'positive'* relationship in the family. The mother is said to have suffered a stroke as a girl and had urinary problems for which she was hospitalised for a year; she received mental health treatment at an institution 13 years before; and the mother's late aunt told her that she needed therapy for the historical sexual abuse she had suffered. The mother was described as having a

> *childlike personality. She is very friendly but can also get very emotional and impulsive. When it was discussed with her that her child will not be placed back in her care right now she threatened to kill herself or take the life of the social worker or go to the media.*

The father of the child, a traditional healer, was interviewed and described as being *'charming'*. However, in the same report he is accused of raping a boy child, with a criminal case pending against him. The socio-cultural aspect was described thus: *'The overall feeling about the mother in the community is more negative than positive. People see her as somewhat mentally disturbed and obsessed.'*

The social worker indicated in her report that the child was not originally removed from the care of the mother, but rather placed in a baby haven with the mother – as she was not sure '*whether the malnutrition was due to negligence by the mother or just being uninformed. She appeared as a very loving mother while holding the baby.'* She furthermore, however, indicated that she became concerned for the well-being of the infant when the mother

> *claimed that she did not finish school because every time she tried to read animals would come out of the paper. It became clear that she is not completely in touch with reality and it is suspected by the social worker that the mother might suffer some kind of psychological disorder because of the multiple traumas she experienced as a child.*

The report referred to the mother's behaviour at the baby haven and stated that *'She does not seem to know or understand how to care for a young baby and at times seemed to be disillusioned.'* The social worker then stated that *'the above information is confirmed by the biological father, family and community members.'* It is however surprising that the mother's behaviour at the baby haven could be confirmed by persons who had not been present at the home itself. The report then continues to state that: *'She doesn't have any insight on her part to the negligence of her baby's health. She seems abnormally obsessed with her baby and says she'll kill herself without him.'* Observations by the social worker of the mother not feeding the child properly, constituting a choking hazard, and overdressing the child in hot weather, were stated, and the report concluded that *'The mother showed a lack of parenting skills, even after being involved as a volunteer at the centre'*; and that *'Through observation it was confirmed that the mother does not show the capability to care for the child at this moment.'* The report indicated that the mother was monitored at the baby haven and as volunteer at the CYCC and that the social worker found her not capable of taking care of the child – despite *'all this guidance and help'*. The report noted that the mother had

> *strengths but needs HEALING and closure of her issues as a child FIRST with herself before she can be mentored to become a good mother – she has potential. She deserves a chance. Without this as the reunification plan an active agreement of opportunity will be lost and the child might stay in the system forever.*

The evaluation recommended that the child was in need of care and protection in terms of sections 150(1)(g) and (h) of the Children's Act, and noted that the mother showed a *'serious lack of parenting skills and current incapacity to learn these'* – which supported the exposure to harm provision of the Act. The social worker recommended counselling of the mother for childhood trauma and family reunification services to the mother and father, including a parenting programme for the mother. Behaviour modification was advised for the mother. As for the permanency plan, the report noted that the mother needed to develop her parenting skills.

At the third court inquiry the mother was present and opposed the application, seeking to apply for legal aid. At the postponement a week later, at the fourth court inquiry, the mother was said not to require legal representation and did not oppose the matter further. The social worker's report and annexures were admitted into evidence, and the court found the child in need of care and protection under section 150(1)(i) of the Children's Act.

The second social work report, filed a year after the first report, noted that the CYCC advised that the

> *mother should be given a period of no longer than two years to change her circumstances and learn the necessary parenting skills. If after this period of time [she] is unable or unwilling to cooperate then the child should be placed in foster or adoptive care as it becomes convenient for*

both parents to have the child in a place where they can have easy access to the children at their convenience without any responsibilities.

The report noted that support was provided to the child's caregivers (the CYCC), that there was mediation between the CYCC and the biological parents, and also contact between the child and 'other parties'. To the parents, support services were said to be rendered when the mother contacted the office, that she was interviewed, as well as the father – and both simultaneously (three interviews). It is notable that there is no mention of the status of the measures (counselling, parenting programme or behaviour modification programme) that were recommended as support to the mother in the first social work report.

The report noted that the reasons for the removal still existed, as the parents had not kept regular contact with the child. Furthermore, the parents conceived a second child. During an interview with the mother, the social worker noted *'she has learned from her previous mistakes with the child. She handled the baby with care and is also breastfeeding him. His progress is good and is being monitored by the clinic and the mother has to report back to the social worker on a monthly basis. She has the support of her family who helps her with taking care of the child.'* She was said to have 'lost some interest' in the first child and that

This is in line with her behaviour from before. She appears to want to hold a baby to comfort and hold – even if it is in a naïve kind of way. Nothing else matters when she has a baby in her arms. The question remains if she is capable of managing being a caring mother without hurting or harming her children.

The social worker's evaluation referred to the fact that the father still denied paternity, but conceived a second child with the mother; that the mother seems to have lost interest in her firstborn; that she has apparently learned from her previous mistakes regarding the care-giving of a baby – but that continued monitoring of the care-giving of her new baby was necessary. The recommendation was that the child was still in need of care and protection in terms of section 150(1)(g) of the Children's Act. The child was said to have thrived in the care of the CYCC. Reunification services would be provided to the family, stated the social worker in her report, including encouragement of contact, investigation of future placements, and monitoring of the mother's care-giving of the 'new' baby. At the fifth court inquiry, the order was extended for two years. No further documents were filed.

Over almost two years, no medical report confirming the mother's mental health, a diagnosis, or treatment, nor a parenting capacity assessment, were filed. However, three letters from the social worker while investigating the matter, as well as a letter from the social worker of the CYCC, were filed. Two social work reports were filed and five hearings took place. The mother was present at two of the hearings and opposed the matter once (at the fourth hearing), seeking legal representation, after which the matter was adjourned. A week later, she apparently no longer opposed the matter, nor

sought legal representation. The support measures recommended to the mother by the social worker were not implemented.

Case study 8

Case 8, from Pietermaritzburg, is different to the other cases, in that the 47-year-old mother voluntarily indicated that she was unable to continue caring for her 7-year-old son and wanted her sister (the child's maternal aunt) to care for him as a foster parent. In her affidavit, she stated that she suffered from meningitis in 1986 and was not getting better. A letter from her doctor dated August 1992, stated she suffered from TB meningitis and received monthly treatment. An affidavit by the father of the child, aged 45 years, stated he was unemployed, had obtained a head injury, was in receipt of a disability grant, and was unable to care for his child due to his illness. An affidavit by the mother from six years prior, indicated that *'My sister has to do everything for the child even to apply for the grant for him, because I am not able to help the child as I am not even able to work and walk.'*

The first social work report noted that both parents were incapacitated due to poor health and unable to care for the child, and that the maternal aunt cared for the child since its birth. The mother was *'never actively involved in caring for the child due to poor health'* and *'is wheelchair bound after recovering from a stroke. The father obtained head injuries in an accident and is mentally challenged.'* The evaluation stated that the child was in need of care and protection in terms of section 150(1)(a) of the Children's Act, and repeated that this was because *'the mother was wheelchair bound and unable to care for the child and the father was mentally challenged.'* The report stated that support services would be rendered to the family, in that the parents would be encouraged to maintain contact with the child to meet his therapeutic needs. At the first court inquiry, the court found the child to be in need of care and protection in terms of section 150(1)(g) of the Children's Act.

A second social work report filed three years later noted that the parents' health still did not permit them to care for the child, and recommended continued foster care. The court order was extended for another three years at the second court inquiry. The child had therefore been in official foster care with the maternal aunt for six years without proper follow-up interviews with the parents, nor support measures offered to them. The record of proceedings is silent on whether the parents attended the court hearings and there was no proof tendered of recent medical diagnosis of the mother's health, including that she had suffered a stroke. The only purported medical evidence was a letter from 1992 by her physician, attesting to her TB meningitis treatment. The affidavit lodged by the father does not necessarily confirm that he was 'mentally challenged'.

Case study 9

Case 9 was the only instance where a father was labelled as being *'psychologically unfit'* to care for his seven-year-old daughter. Here the 40-year-old father was said to

be *'mentally challenged'*. The first social work report indicated the mother was deceased, the father 'mentally challenged', and that the child had stayed with the grandmother since the mother's death (undated). A letter from a medical doctor from two years prior stated that the father was attending a clinic for HIV treatment, and was *'unable to work due to his illness'*, and had poor vision in his left eye. There is no affidavit from the father or grandmother attached to the report. The social worker recommended that the child was in need of care and protection in terms of section 150(1)(a) of the Children's Act, and that she should be placed in the foster care of the grandmother. The presiding officer then issued a query on the report indicating that '*according to the supporting document, the father appears to be physically unfit and not psychologically unfit. Please clarify and correct'.* The social worker's report ostensibly was retracted and a new copy was filed that removed allegations of the father being 'mentally challenged' – and rather stated that he is *'physically unfit to care for her'*. The first court inquiry found the child to be in need of care and protection in terms of section 150(1)(g) of the Children's Act. No further updates were on file.

It is concerning that the social worker initially identified the father as ostensibly suffering from a psychosocial illness that rendered him incapable of caring for his daughter – but did not interview the father, nor tender evidence of this allegation. Fortunately, the presiding officer picked up this error. However, inability to work (identified in the doctor's letter) does not necessarily mean a parent's is incapable of caring for a child.

Children were removed from mothers with intellectual disabilities in three cases where they were averred to be neglected, and in a fourth case where the aunt (and possible mother with the disability) neglected the child (case studies 1 to 4). It can be concluded then, that the three women, and particularly the women in the first and third cases, were not provided with measures to enhance accessibility to court documents, reasonable or procedural accommodations, support to exercise legal capacity and legal representation.

6.3. Thematic analysis

The thematic analysis was arrived at through a process of coding and grouping the documents contained in the court files. Shepard explains that the records are primarily organised to meet the needs and requirements of the legal system and particular judicial body.[8] Accordingly, the requirements of the Children's Courts, as Magistrate's Courts that do not convert their deliberative decision-making into judgments or reasons for their decision, are primarily administrative in nature in so far as a list of relevant documents are usually found in the file. The documents contained in the court files include:

[8] CJ Shepard 'Court records as archival records' (1984) 18 *Archivaria* 124 126.

- the record of the enquiries conducted which is a pro forma document completed by the presiding officer;
- any completed forms required under the Children's Act, such as the Form 38;
- Social work reports with annexures such as affidavits, proof of birth, identity documents, assessments and other evidence;
- query forms (where the magistrate queries an aspect of the social worker's report and request clarification or a response).

The format of the record of the enquiries document is stipulated by Form 17 contained in the Regulations relating to the Children's Courts and Child Abduction, under regulation 33. This document stipulates:

- the details of the children concerned, their names, gender, age, and presence at the proceedings;
- the name of the presiding officer;
- the date of the hearing and whether the children were or were not brought before court and the reasons therefore;
- who appeared (with the following categories identified: social worker, interpreter, clerk of the court, mother/father/guardian/caregivers, respondent, parties allowed to join the proceedings, legal representatives and witnesses);
- the evidence adduced (here usually the Exhibits are listed alphabetically, with the social work report being one such exhibit);
- the finding or order (here the court usually identifies the ground on which it finds the child is in need of care and protection under section 150(1) of the Children's Act and the nature of the alternative care order, i.e. foster care, for example, or return to the parent).

The reasons for the finding or order are not articulated in the record of the proceedings.

The report of the social worker and its contents and requirements is discussed in chapter 5. It bears reiteration that the format of the social work report is prescribed by Form 38 formulated to meet the requirements of regulation 55 of the General Regulations regarding Children.

The raw data was therefore gleaned from these various documentary sources.

The data analysis was explained in 2.4 of chapter 2. Initially, broad preliminary codes were assigned to the data, based on the content in the social work reports as derived from the possible themes identified at the outset. These preliminary codes were:

- demographic data (mother or father's disability, race, age, marital status, other family members, income including grants, and the age, sex and disability of the child or children concerned) evident from the social worker's reports.

- The measures utilised to support the family subject to the proceedings identified in the social work report both before and during the statutory intervention (including prevention and early intervention measures, therapeutic interventions or referrals, family reunification measures or court mandated measures.
- Documentary evidence listed in the court reports, including assessments and reports such as proof of the parent's diagnosis; assessments regarding the child and assessments regarding the parent or any other evidence led.
- Measures identified in the court record particularly the inquiry record, regarding parental attendance at the hearings, legal representation of the parents, whether testifying competence was discussed in court or identified as relevant, procedural accommodations or support options offered to the parents.
- The recommendations of the social worker based on the grounds stated in section 150(1) of the Children's Act stated in the various social work reports and the court's findings.
- The outcome of the statutory intervention placing the child in alternative care as evident in the court record of inquiries and the social work reports.
- The factors identified in the social work reports as factors impacting on the best interests of the children in line with section 7(1) of the Children's Act.

Once the data was grouped in the above format under preliminary themes, the codes were refined into the following codes:

- To focus on the particular demographic factors of the parents highlighted by the social workers as relevant such as poverty and disability status as these emerged as most prevalent patterns.
- Determining which risk factor was identified as the main risk factor for statutory intervention.
- Whether the pre and post statutory interventions were adequately implemented by the social workers and monitored by the court.
- The extent of the evidence led in relation to parental capacity and disability.
- The types of procedural and other support and accommodations offered to parents, if any.
- How often parents were legally represented and any attention of the presiding officers on this aspect.
- Any correlation between the social worker's intervention ground recommendation and the court's ultimate finding(s) in terms of section 150(1).
- The basis on which factors on the best interests of the child were identified by the social worker, considering risk and protective factors.

Patterns and themes emerging from these codes were identified from the content analysis of the documents in the court records. The content of the social work reports in relation to descriptions of the relevance of the disability of the parent in relation to

the statutory intervention, including manifest codes (verbatim descriptions) was analysed as well as one of the patterns evident from looking at the content of the social work reports was stereotypes of intellectual disability and parenting identified by the social workers.

Below, the thematic analysis of the nine cases follows under seven themes:

- Disability and poverty are correlating demographic factors cited in the social work reports of most of the case studies;
- Disability is a major risk factor for statutory intervention cited in the social work reports of most of the case studies and intellectual disability is a relevant risk factor cited in the first three case studies;
- Measures to support the families before and after statutory interventions are inadequately implemented and monitored;
- Parenting capacity assessments and proof of disability diagnoses are not generally obtained;
- Procedural and other accommodations are not offered to parents, with no legal representation in any of the cases;
- There is some correlation between the social worker's recommendations to find the children in need of care and protection and the court's findings in terms of the Children's Act; and
- The best interests' recommendation in the social work reports are generally vague, overemphasise risk factors over protective factors, and are diagnostic-prognostic.

6.3.1. Disability and poverty are correlating demographic factors cited in the case studies

In seven of the nine cases, the mothers' fitness to parent due to a variety of disabilities was disputed by the social workers. Four were due to their intellectual disability (cases 1-4) and three due to their psychosocial illnesses (cases 5-7). In two cases, the fathers' incapacity to parent was asserted based on physical and psychosocial disabilities respectively (cases 8 and 9). Only in one of the nine cases was the parent with the disability in receipt of a disability grant (case 8, the father). As for race, the mothers were African in three cases, Caucasian in two cases, and Indian in one case – with the two fathers of African descent. In two cases, the parents were married (cases 1 and 3), in one instance they were separated, and in another still married. Maternal grandmothers featured as other adult family members residing with the mother in four cases (two each where mothers were said to have psychosocial illnesses and intellectual disabilities, these being cases 1, 4, 5 and 6).

In five of the cases, the children subject to the statutory proceedings did not have siblings (cases 1, 4, 6, 8, 9), whereas in three cases the mother had two children

(cases 2, 5 and 7), and in one case five children (case 3). In two cases (3 and 7) the mothers had subsequent children, but these infant children were not removed from their care. In one case, three of the children of the family had intellectual disabilities (case 3), while in another case the child was immunocompromised (case 3). Four female children were the subjects of the inquiries (aged 7, 8, 10 to 14). Eight male children were the subjects of inquiries, ranging from infancy to 9 years of age – aged 2 months, 2 years, 3 years, 4, years, 5 years, 7 years and two boys aged 9 years. The girl children were generally older than the boy children, including one child in her teens. The boys were all under nine years of age.

The income of the family was precarious in all of the nine families – an old age grant was listed in case 1, and a disability grant for the father in case 9. Two cases did not state the income or employment status of the parents (cases 2 and 4), whereas in the social work reports of six it was stated that the parents were unemployed (cases 3, 5-9). None of the social work reports stated that the families were in receipt of child support grants or child dependency grants for the children.

While in 6.3.2. there is clear evidence of disability of the parents being cited as the key or main risk factor for intervention in those case studies, the poverty of the families were not cited in the evaluations as determinative. The prevention and early intervention measures implemented to tackle the poverty of the families is discussed in more detail in 6.3.4 below. An analysis on the social work report's reliance on the poverty of parents in general neglect cases (where parents did not have a disability) falls outside the scope of this study.

See table 2 in the Appendices, which set out the demographic factors per family.

6.3.2. Preponderance of disability identified as risk factors for statutory intervention

The parent's disability was identified as relevant in the nine cases, disaggregated by disability as follows:

- The intellectual disability of mothers in four cases (cases 1-4);
- Psychosocial illness of mothers in three cases (cases 5-7);
- Psychosocial illness of a father in one case (case 8) and physical disability in one as comorbid (also in case 8); and
- The visual impairment (and originally purported psychosocial illness) of a father (case 9).

For the mothers, co-morbidity with epilepsy and psychosocial illness together with their intellectual disabilities were identified in two cases (cases 3 and 4). The physical disability of the grandmother in one case was cited as a risk factor (case 1). The

intellectual disabilities of three children in one case were cited as a risk factor (case 3). Other risk factors identified were the child's unsupervised and uncontrollable behaviour in case 1, and neglect by the child's maternal family in case 4. In six of the cases then, the disability label attached to the parent was identified as relevant for statutory proceedings (cases 2, 5-9). It is notable that labels for disability were sometimes conflated. For example, 'mentally challenged' was used in several cases to describe ostensibly psychosocial illnesses (cases 5, 6, 8 and 9). Mentally challenged is a dated term, which was used as a euphemistic description of intellectual disability. As with the term 'mental retardation', mentally challenged or handicapped is now considered offensive.[9] The use of this description of 'mentally challenged' in the social work reports to refer to a person with a psychosocial illness (previously mental illness) is suspect, and frankly incorrect. The use of this term therefore could conflate the two different diagnoses – intellectual disability and psychosocial illness. One must have regard to the fact that language could play a role here. The social workers' home language was isiZulu in those cases, while the reports were written in English.

Only in three cases was the poverty of the family stated categorically as being a risk factor (cases 1, 3 and 6). However, in all the cases, as discussed above under the demographic factors, the parents were unemployed and only in two cases did the families receive disability grants (grandmother and father respectively) – with none of the children receiving child support grants or care dependency grants.

Family or community members views' on the persons' disability and its impact on their parenting ability are difficult to verify because of the narrative in the social worker's reports. The social workers, in their reports, often identify who they consulted with in drafting the report (who they interviewed, for example particular community members or family members), but affidavits are rarely appended as verification of the assertions of family members or community members' views on the parent. Accordingly, it is not easy to analyse such statements as their veracity is not certain from an evidential perspective. Yet, the court proceeds, presumably, on the basis that the statements by family and community members about the parent's abilities as reflected in the social work reports are truthful and 'objective'. The poverty of the parent with the disability is more easily verifiable as the social worker can more easily verify the income and grant status of the parent.

Table 3 in the Appendices sets out the risk factors identified in the social workers' reports.

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9 See for example, Federal Register 'Change in Terminology: "Mental Retardation" to "Intellectual Disability" A Rule by the Social Security Administration on 08/01/2013' 78 FR 46499 (United States of America). Cf Rosa's Law *Public Law* 111-256. SAHRC *Human Rights and Persons with Disabilities* (2019) Educational Booklet 6-7 https://www.sahrc.org.za/index.php/sahrc-publications/pamphlets (accessed 1 August 2021).

The relevance of the disability of the parent was identified in all of the social work reports of the case studies. Reports where disability as a risk factor was emphasised as the main risk factor were identified from the evaluative aspect of the social work reports. In the following cases the evaluation section of the social work reports predominantly categorised the disability of the parent as the main risk factor either by identifying the disability itself as the factor, or stereotypical notions associated with the disability.

Case Study 1: Factors contributing to the enquiry were cited in the first report to include:

> *Child unsupervised and uncontrolled wandering around the streets, the overcrowded house, the* mother's limited mental abilities*, the grandmother's physical challenged condition and both women's financial dependency were also assessed as risk factors.* (Emphasis added).

The evaluation in the first report states that:

> *Although no evidence of the child's abuse in the family home could be found, her constant distress, allegations of abuse,* inability of the mother to protect and provide for her development needs in general *are cause for concern. Outside family members must discipline the child and there is* no prognosis to teach the mother the necessary skills to protect her child. (Emphases added).

The evaluation in the second report provides:

> *'No positive changes appear to have taken place in the biological mother's circumstances, due to her* very low intellectual functioning*… Mother's social circumstances is unsatisfactory and she is not in a financial, emotional or* intellectual position *to provide satisfactorily for the child's immediate needs.'* (Emphasis added).

In this case study, while other risk factors were also cited as relevant, the evaluations repeatedly stress the intellectual disability of the mother as the risk factor for intervention and the need for the child to be placed in alternative care.

Case study 2: Under evaluation, the report states:

> *She has been assessed as* suffering from an intellectual impairment*. As a result of this she is* not capable of logical reasoning *that she has to feed and protect her child and she subjects him to high risks. She is also non-compliant with treatment, is nomadic and the* prognosis for her recovery is poor. (Emphasis added).

This case study identifies the mother's intellectual disability as the primary risk factor. Treatment non-compliance and her nomadic lifestyle are cited as secondary factors.

Case 3: Earlier in the report, the social worker stated that: '*Mother* is intellectually disabled *and according to (Mildeon et al, 2003 NSW Department of Community Services'* it will influence a parent with intellectual to their children.*'* (Emphasis added). Under evaluation, the report states: *'As much as the parents love their children, they*

are unable to [take] proper care of them *and this has caused the children to have not developed efficiently and the children have been neglected Tremendously*.' (Emphasis added).

The inability of the parents to adequately care for the children is presumably ascribed to the intellectual disability of the mother cited earlier in the report.

Case study 4: Earlier in the report, the social worker stated that: *'Mother is* mentally retarded… *Mother diagnosed with a* mental illness *and being mistreated by aunt…Biological mother is epileptic. She is on treatment….'* Under evaluation, the report states: '*Child neglected and physically abused by maternal aunt.'*

This case centred on the neglect of the child by the maternal aunt with whom she was apparently informally fostered though the mother resides with the aunt as well. While the mental and physical abuse of the child at the hands of the aunt cannot be disputed due to the evidence led on that score, the mother's apparent inability to care for her daughter was not sufficiently investigated. The mother's disability was therefore not directly cited as a risk factor in this case study but played a secondary role.

Case study 5: Under evaluation, the report states: '*Mother is* mentally challenged *and* unable to care *for her children, it is in the best interests of the child to be placed with the grandmother'.* (Emphases added).

Similar to case study 4, the child was informally fostered (here by the grandmother) with whom the mother also resided. The psycho-social illness of the mother was directly cited earlier in the report, together with suicidal ideation, aggression and that the *'grandmother was unable to protect herself and the children concerned were in* danger.' Further that the mother was '*defaulting on medication, which resulted in her being* unstable.' Very clearly the mother's disability (psycho-social) was cited as the main risk factor.

In another report, the evaluation stated that *'The* mother is mentally challenged*. Foster care placement is progressing well.'* Without more, the status of the mother as having the psycho-social disability is cited as the only risk factor and reason for continued alternative placement of the child.

Case study 6: Earlier in the report, the social worker stated that: '*Biological mother is* mentally challenged*… Receiving treatment from [the psychiatric] hospital and unable to take care of the child….'* Under evaluation, the report states: *'Grandmother has been a stabilising and positive influence in the child's life as she has sound values and the child' interests at heart.'*

While the evaluation does not cite the mother's psycho-social disability, there is a sufficiently strong link with the allegations of the mother's health status and the social

worker's view that the grandmother is an appropriate foster parent. Further evidence of the social worker's possible bias is the statement under measures to assist the family that '*No construction services will be rendered* as the mother of the child is mentally ill.*'*

Case study 7: When the child was temporarily placed, the social worker stated that in the letter to accompany the placement that: *'It is suspected that the mother might suffer from some kind of* psychological disorder*…*' Under evaluation, the social worker's letter to court states: *'Mother* does not impress as fit mother *to the baby. She has proven that she is not able to effectively care for her baby and harms him with* lack of insight*…'* (Emphases added).

The social worker changes tack from the next reports onwards, emphasising how the mother needs parenting skills to improve her caring for the child; but also that she is unable to adequately care for the child. The first report evaluation states a long list of factors, including suicidal ideation, the child's high care needs, and:

> *…the mother has a* childlike personality*. She is very friendly but can also get very emotional and impulsive. When it was discussed with her that the child will not be placed back in her care right now she threatened to kill herself, to take the life of the social worker and to go to the media.*

Her nomadic lifestyle and the father's lack of interest are also cited are relevant in the evaluation. Further, the evaluation states that:

> *The observations that were made by the social worker and the social worker from the Child and Youth Care Centre confirmed that the mother is still not capable of taking care of her baby (see attached letter). The evaluation also states that 'The mother really loves her child but does not seem to know HOW to take care of him. Even with continued advice she is still battling… Mother was offered the opportunity to be involved as a volunteer… With all this guidance and help she is still not achieving successful caretaking of her child. Mother has strengths but needs HEALING and closure of her issues as a child FIRST with herself before she can be mentored to become a good mother – she has potential. She deserves a chance. Without this as the reunification plan and an active agreement this window of opportunity will be lost and the child might stay in the system forever. In the process a number of alternative placements were used and considered without positive and changed results. The placement of the child in CYCC is in his best interest as it is a secure environment where the mother's interaction with her child can be monitored and controlled. It will also restrict her from abducting her baby as this is a concern.*

The report concludes that the mother *'has shown* serious lack of parenting skills and current incapacity to learn *these'*… and that:

> *the child was found in a state of physical and mental neglect. He is malnourished and underweight. The mother's reaction to the child's physical needs in a number of incidences were not helpful or effective but instead potentially dangerous. Because there is no change in her behaviour despite guidance and supervision by a number of supportive caregivers, she is not in a position to provide adequate care to him now.*

The letter from the Child and Youth Care Centre social worker accompanying the social worker's report states that:

> *It is evident that the mother loves her baby dearly and wants to have him in her care, she* however lacks the ability to care for her child *to the extent that she might harm him with all the best intentions. The child is also a high need baby and as he grows will require assessment and possible medical intervention. If the mother is not equipped to deal with her baby the situation could easily become overwhelming for her. It is my opinion that she would benefit from some parenting skills training.* (Emphasis added).

In a later report, the social worker's evaluation identifies that the mother continues to show '*serious lack of parenting skills and* incapacity to learn these.' Notwithstanding this claim, the social worker also states that '*With her new baby she has now shown positive growth in her caretaking of the baby, but has now lost interest in her firstborn.*'

This case study did not emphasise the mother's apparent psycho-social disability in later reports, as was done at the initial removal but the reports stressed the mother's inability to learn despite parenting skills training being offered to her. The possibility of the social workers' biased thinking related to the claims about the mother's possible psycho-social disability referred to at times in these reports would not be an exaggeration.

Case study 8: Under evaluation, the report states: '*Biological mother is* wheelchair bound and unable to care for the child*; the father is* mentally challenged.' (Emphases added). The health statuses of the parents are cited as the key factors.

Case study 9: Under evaluation, the first report states: *'Father is* mentally challenged and therefore cannot provide for the basic needs of the child as he needs to be taken care of.*' 'Father is* psychologically unfit *to care for her. (Emphases added)*' The second report states that the father is '*physically unfit to care for her*' as a key change from the original averment. This change, it bears reiteration, happened after the presiding officer pointed out that the medical evidence did not support the conclusion of the father's psycho-social disability.

In three of the four cases where the mother had an apparent intellectual disability, her disability statues was the key risk factor for continued alternative care placement of the children' concerned as based on the social workers' evaluations provided to the court. Only in one case was it a secondary factor. In three of the other cases, the parent's disability – psycho-social or physical was stated as the key factor whilst in three cases stereotypical notions about disability or parenting with a disability were cited, such as a lack of insight, inability to learn parenting skills, being unable or 'unfit' to care for their children, or needing to be cared for themselves. There is sufficient evidence therefore to conclude in the case studies that the disability of the parents were predominantly the key or secondary risk factors, where not directly cited as applicable, in the social worker's evaluations.

6.3.3. Social Work Reports exhibited stereotypical generalisations about parenting with an intellectual disability

Stereotypical attitudes of social workers towards parenting with an intellectual disability, particularly in the absence of expert opinions on parenting capacity, are evident in the first three case studies. The following generalisations were listed in the social work reports, as discussed under case studies 1 to 3

- The mother's supposed lack of capacity to change ('unable to learn new skills', 'no prognosis to teach skills to protect the child' and 'not capable of logical reasoning to feed and protect the child');
- Characteristics attributed to be universal to persons with intellectual disabilities ('lack of responsibility, no insight');
- Impossibility of improvement ('impossible' to solve their problems and have children returned to them; 'prognosis for recovery is poor'); and
- Categorical statements that intellectual disability equates to incapability or inability to parent ('because of her low intellectual functioning' and the intellectual disability of the mother will 'influence a parent with intellectual to their children' (sic)).

These statements confirm findings in other jurisdictions regarding prejudicial attitudes or stereotypical notions about the parenting capacity of parents with intellectual disabilities (McConnell, 2009; Booth & Booth, 2004).

6.3.4. Inadequately implemented and monitored measures to support the families before and after statutory interventions

Poverty was identified as a risk factor in three cases, and all the parents in the nine cases were unemployed (with only one parent in receipt of a disability grant). Accordingly, it is concerning that measures to combat family poverty were generally not prioritised. Provision of food parcels as a prevention and early intervention measure was listed in one case (case 6), with assistance to apply for a disability grant identified as a therapeutic intervention measure to be provided in case 3, and counselling in relation to improving the family's income in case 1. Prevention and early intervention measures were provided to three families: (therapy to the alleged perpetrator in the sexual abuse case (case 1); the food parcels (case 3); and informal placement of a mother and infant in a baby haven to monitor her caregiving (case 7).

Therapeutic interventions were identified in five of the cases, but the actual provision of these measures were largely not verified in subsequent reports. In case 1, the therapy for the child at an assessment centre, monitoring of sleeping arrangements and partial care for the child were offered, as attested to by the social worker's subsequent reports. However, the only measure identified for the benefit of

the parents - counselling for the family to improve income and housing – was not verified as having been offered. Surprisingly, despite the assertion that the poverty of the family was a risk factor in this case, the social worker did not help the family to obtain a disability grant for the mother. In case 2, the hospital that provided counselling to the mother was identified by the social worker as a therapeutic intervention, and yet this was provided when the mother was admitted to the psychiatric unit of the hospital and the nature of this therapy was not identified. In case 3, however, while home visits were conducted as proposed, as attested to by the social worker's subsequent reports, assistance with the application for disability grants and inclusion in parenting programmes were not offered after to her original stated intention to do so. In case 7, on a positive note, the mother was provided with an opportunity to learn parenting skills at the CYCC where her child was placed on visitation, but on the other hand the suggested counselling for her behaviour and inclusion in a parenting programme was not offered. Thus, in two cases, parenting skills programmes were recommended for the mothers by the social workers, but in none of them were formal enrolment in such programmes noted in the subsequent social work reports.

In three cases, family reunification measures taken by the social worker were listed in the social work reports. However, the track record was not good. In one case, the proposed mediation between the parents and CYCC can be assumed to have been offered subsequently, although no dates or details were provided (case 3). In another case, encouragement of contact between the child and parents was stated to occur, as well as ongoing monitoring of the mother's care of the couple's second born (though that child was not subject to statutory proceedings) (case 7). Because no subsequent reports were filed in that case, the actual provision of these measures cannot be confirmed. In a third case (case 6) the social worker, in her report, stated categorically that *'No reconstruction services will be rendered as the mother of the child is mentally ill'*. This statement is an indication of diagnostic-prognostic decision-making by the social worker. The last-mentioned case is the only case where the social worker attempted to take informal measures to support the mother in learning parenting skills (originally as a prevention and early intervention measure and later as a therapeutic measure) – with both happening when the child was in alternative care (the baby haven and CYCC respectively). However, formal parenting skills programmes and/or counselling were not offered. These gaps in support would render family reunification challenging.

Only in two cases were court-mandated measures proposed by the presiding officers. In case 1, the court required the visits with the mother to be supervised and ordered no sleep overs (overnight stays). In case 6, a medical report from the mental health institution where the mother received treatment was requested by the court, but in a subsequent social work report, this medical report had not been obtained nor had reasons for this failure been indicated. In none of the cases did the presiding officers follow up on the measures proposed by the social workers in their subsequent orders.

In six cases then, prevention and early intervention measures were not identified. However, in two cases (cases 8 and 9) the fact that the matters arose as foster care applications, ostensibly with the consent of the parents, means that those cases did not come to the social worker's attention until later on – which means prevention and early intervention measures are generally not offered. In four cases, therapeutic interventions were not identified and offered by the social worker or third parties (referrals). In six cases, family reunification measures were not identified and in a seventh case the social worker indicated she would *not* provide these due to the mental health of the mother. In six cases, the court did not mandate any further measures.

Table 4 in the Appendices outlines the various measures discussed above. It is noteworthy that the offer of 'parenting skills' or 'counselling on responsibilities as a mother' were offered in nine of the total neglect cases reviewed in this study.

6.3.5. Parenting Capacity Assessments and disability diagnoses not generally obtained

Purported documentary proof of the diagnosis of the parent's disability or illness (evidence) was attached to social work reports as annexures in four cases. However, these were not clear-cut diagnoses. In case 2, the psychiatrist and psychologist reports identified the mother as having an intellectual disability, but the extent of the impairment and adaptive functioning was not made clear. This is the only case where medical professionals' (mental health) input was obtained. However, neither of these were forensic reports and neither of the professionals testified in court.

In case 4, the only proof of incapacity offered was a letter confirming the mother's epilepsy, not an intellectual disability or psychosocial illness. Case 5 included a letter from a mental health professional confirming the mother is a mental health user and identifying 'psychosis' as the cause. Psychosis is a symptom of some psychosocial illnesses and not a diagnosis in its own right.

In case 8, the ostensible proof of the mother's disability was a 21-year-old letter from a treating physician indicating that she was receiving treatment for tuberculosis meningitis and a dated affidavit (from 6 years prior) indicating she was 'unable to walk' and care for her child. The social work report further indicated the mother was a wheelchair user and had suffered a stroke. However, none of these assertions were corroborated with current medical evidence. No medical proof of the father's disability was attached to the social work report, but an affidavit from the father stating that he received a disability grant due to a head injury (acquired brain injury) was annexed. The social worker nonetheless labelled the father as 'mentally challenged' in her report. It must be noted that this was a foster care application by a relative who had been raising the child when the mother seemed to voluntarily gave the child up for foster care and the father confirmed under oath that he was unable to care for the

child. Nonetheless, the presiding officer should have followed up on the proof of the diagnoses of the parents, and the extent of these impairments and their impact on the care of the child.

Case 9 is an example of extreme professional negligence. In that case, the social work report referred to the father as 'mentally challenged' – and yet attached a letter from the treating physician that the father had a visual impairment in one eye and was receiving treatment for HIV. Here the presiding officer did identify this grave error and requested the social worker to rectify this information. The social worker resubmitted her report and changed the wording in the report accordingly.

None of these cases included a parenting capacity assessment of the relevant parents. It can be concluded from this small sample that parenting capacity assessments are obtained in care and contact cases (custody during divorce proceedings for example),[10] and not in maltreatment cases. One reason may be the cost involved in obtaining these. Another may be the lack of appreciation of the need for verifiable testimony that a particular parent is *not* capable of caring for a child or, rather, that the care is inadequate for meeting the child's right to have his or her best interests adhered to.

Assessments/medical reports were obtained of the children's situations in six of the cases (cases 1-5 and 7). The District Surgeons' reports indicated a variety of problems, ranging through malnourishment, intellectual disability, HIV status and, in two cases, dire maltreatment (paraffin ingestion and substance abuse – both at the hand of the mothers). Perhaps here the practice of obtaining medical reports for children when they are removed from their parents/caregivers care into temporary safe care, is the reason for a higher uptake of medical reports to substantiate the harm suffered by the children. These reports are obtained to ascertain the child's age in terms of regulation 10(2) of the Regulations relating to the Children's Courts and International Child Abduction of 2010.[11] Of note, the form is divided into two parts: part A is the medical report of the person whose age is estimated, and indicates the medical particulars of the child, including description of

- His or her height, weight, lungs, heart, teeth;
- Apparent impairments with degrees of impairment (sight, hearing, speech, orthopaedic, neurological or intellectual);
- The presence of diseases or infections or injuries;
- An indication of whether the following aspects are within the 'normal' or 'abnormal' range for the child's age: physical development, nutrition, vaccinations, substance abuse, and other observations; and

[10] Although in these cases, assessments can also be inadequate, as in *H v R* (3450/2017) [2018] ZAECPEHC 19 (8 May 2018).

[11] Form 7 of the Regulations relating to the Children's Courts and International Child Abduction, 2010, published in GN R250 in *Government Gazette No* 33067 of 31 March 2010.

- Any required/recommended medical treatment.

The second part, part B, requires the medical professional to estimate the child's age based on *inter alia* his or her weight, height, breasts, molar teeth, pubic hair and genitals.

The Children's Act does not mention the medical report aspect in any of the provisions. However, reference to conditions for the examination or assessment of abused or neglected children, without stating the nature of such assessment or examination, is made in regulation 38 of the General Regulations.[12]

In summary, for most cases the averred disability of the parent was not affirmed with proof of the diagnosis. Diagnostic-prognostic thinking could have resulted from mere averments of such disabilities/illnesses becoming deciding factors in determinations relating to the children's care. Table 5 in the Appendices sets out the evidence led in these cases.

6.3.6. Procedural and other accommodations not offered to parents, including no legal representation offered in any case

The parents were present at the court inquiries in only three of the nine cases. Testifying competence and procedural accommodation was not considered in those three cases, nor was any support offered to the parents.

In relation to legal representation, in case 1 the presiding officer noted in the record that the right was explained to the parties 'in simple terms'. This in itself shows an awareness of an adjustment being needed to accommodate the intellectual level of understanding of the parent. In two other cases (3 and 7), parents indicated a wish to engage legal aid, but there was no indication as to whether they actually contacted legal aid or whether the court helped them contact LASA or other legal service providers. In the end, they were not legally represented. Without information on their engagement with LASA or other providers, it is uncertain whether their applications for legal aid were unsuccessful or whether there were other barriers encountered in seeking legal assistance. The finding here is that procedural and other accommodations were not offered to parents and that none of them were legally represented in the court hearings.

Table 6 in the Appendices sets out the accommodations – including legal representation per case.

[12] General Regulations regarding Children, 2010, published in GN R261 in *Government Gazette* 33076 of 1 April 2010 (as amended).

6.3.7. Some correlation between the social worker's recommendations and the court's findings of care and protection grounds in terms of the Children's Act

The determination of whether a child is in need of care and protection under the Children's Act, is premised on an averment by a social worker (or other designated person) that the child is in need of such care and protection based on a stipulated ground (grounds (a) to (i)) in section 150(1), and then a finding by the Children's Court indicating which ground is the basis for its decision. If in the affirmative, an order is made in terms of sections 155(7) and 156. If negative, the court may still make an order under section 155(8) returning the child to its caregiver's care, for early intervention services to be rendered, or decline to make an order.

The grounds for a finding of care and protection averred in the cases in this study were:

- ground (a): the child has been 'abandoned or orphaned and is without any visible means of support' (before amendment in 2016 and in effect until 2018);[13]
- ground (b): the child 'displays behaviour' which cannot be 'controlled' by the parent or caregiver;
  ground (f): the child 'lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being';
- ground (g): the child 'may be at risk if returned to the custody of the parent, guardian or caregiver 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;'
- ground (h): the child 'is in a state of physical or mental neglect;' or
- ground (i): the child is being 'maltreated, abused, deliberately neglected or degraded by a parent,' a caregiver, 'a person who has parental responsibilities and rights, a family member of the child or by a person' who controls the child.

Matthias and Zaal assert that caregiver fault is only implied by ground (i), the maltreatment ground. Furthermore, they state that the proof to be supplied to support such findings would require an emphasis on the child's circumstances, not those of the parent. Such an emphasis on the child's situation they state

> indicates an intention by the legislature to ensure that stigmatising care-givers as inadequate is as far as possible avoided. Avoiding such stigma is important because it alienates and angers care-givers. This may discourage them from subsequently providing co-operation that may be urgently needed in the child's best interests.[14]

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13 In 2016, this ground was amended to state that the child is abandoned and orphaned and 'does not have the ability to support himself or herself and such inability is readily apparent', substituted by s 5*(b)* of the Children's Amendment Act 17 of 2016, which came into effect on 26 January 2018.

14 N Zaal & C Matthias 'Chapter 9: Child in need of care and protection (ss150-160)' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2018) Revised Service 8, ch9-7.

As will be seen in the analysis of the data below, while most of the cases did focus on the situation (or circumstances) of the particular child or children involved, the labels of disability or illness attached to the parent played a stigmatising role. However, even where caregiver fault was alleged, proof of the parent's diagnosis and parenting capacity assessments affirming lack of capacity, was not offered.

In three cases, the social work report relied solely on the ground of section 150(1)(a) (abandoned or orphaned and is without any visible means of support). Two of those cases were foster care applications by relatives, where the father (and in one case the mother) were averred to have disabilities (cases 8 and 9), and the third was case 4 (mother with intellectual disability). In none of these cases did the magistrate agree with this averment, and instead made orders on grounds (h) – physical or mental neglect (case 4), and (g) – the risk of exposure to harmful circumstances (cases 8 and 9).

A review of the social work reports and the social worker's evaluation and the documentary evidence attached thereto for case 8, does not reveal that a finding of future risk of harm to the child is supported. The parents indicated that due to their health they were unable to care for the child and wished, voluntarily, for the child to be placed in formal foster care (she had been in informal foster care with a relative until that time). No evidence was led as to the child having been exposed to harmful circumstances or being at risk of such exposure. A proper finding on the evidence presented would have been that the child was without visible means of support, under section 150(1)(a), as the social worker asserted in her report. Furthermore, the social worker had recommended contact with the parents to be maintained in order to meet the therapeutic needs of the child.

In case 9, similarly, no evidence was led as to what would be reasonably construed as amounting to risk of the child's (future) exposure to seriously harmful circumstances as per section 150(1)(g) of the Act – for example a medical report of the child or other averments in that regard from witnesses interviewed. Here the mother was deceased, rendering the child an orphan, and the father was ostensibly physically unable to care for the child due to his ill-health. While an affidavit from the father confirming this information was not tendered, and the social worker made a grave error in averring psychosocial illness where the illness was due to immunocompromising illness and a visual impairment – this foster care application did not indicate potential risk of harmful circumstances for the child. Again, here the child had been in informal foster care with a family member for some time.

Case 4 is a clear case of neglect (and possibly physical and emotional abuse and even potentially deliberate neglect) by the maternal aunt. The neglect was attested to by the evidence offered by the 14-year-old child; some limited indication in the social

work report of relevant information obtained from an interview with the mother; a medical report on the child; and a hospital social worker's letter as to her medical treatment. However, the complete absence of an affidavit from the mother confirming this information (who ostensibly also resided with the maternal aunt), or from the child who may have had sufficient mental maturity to attest to her treatment at the hands of her mother in court or in an affidavit, is problematic. Here the presiding officer's finding was in line with the evidence led on the information presented about the child. However, the magistrate did not seek to obtain the testimony of the mother. In these three cases then, there is no correlation between the ground applicable, as averred by the social worker, and the ultimate finding of the court.

In case 1, the social worker averred grounds (a) and (f) – exposure to harmful circumstances, as applicable and, subsequently, that grounds (a), (b) – uncontrollable behaviour, and (g) – risk of exposure to harmful circumstances, were applicable. The court agreed with the social worker's subsequent assertions. There is thus sufficient correlation between the grounds. While the child was neither abandoned nor orphaned, the poverty of the family may have led the presiding officer to find that she had no 'visible means of support'. Yet again, it bears repeating that no supportive interventions were offered to attend to this risk factor. Evidence of the child's uncontrollable behaviour was offered. The allegations of sexual abuse (though not proven) could be considered sufficient for the finding of the ground of risk of harmful circumstances. However, the disability of the mother (intellectual) and the grandmother (physical), may have played a decisive role in both grounds (a) and (g), and yet no documentary proof of disability of the mother (see table 5 in the Appendicdes) or grandmother was offered.

Case 2 shows sufficient correlation between the social worker and presiding officer's decision-making (both indicating grounds (a) and (g)). Factually, the mother abandoned the child in the care of a stranger, and the medical evidence led of the child's health (malnourishment), on its own, may have supported a finding of maltreatment. It is extremely likely that the mother's disability played a significant role in the presiding officer's decision-making. However, again no parenting capacity assessment was obtained, though the letters from the psychologist and psychiatrist did not paint a picture of a competent mother, with relevant family or other support available to her to raise her child.

Case 3 shows some correlation between the grounds. The social worker averred grounds (i) – maltreatment, (f), (h) and (g), while the presiding officer initially found in favour of ground (g) – risk of exposure to harmful circumstances, and later grounds (a), (b), (f) and (g). The social worker's averment on the maltreatment ground and neglect was not supported by the presiding officer. However, the presiding officer did find that the evidence supported that the children were exposed to harmful circumstances and faced future risk of such harm, and surprisingly that they exhibited uncontrollable behaviour (which was not supported by any evidence led). The officer

also found the ground of being without visible means of support (the children were neither abandoned or orphaned). Again, the poverty of the family could have contributed to the finding that they had no 'visible means of support', although no actual poverty alleviation or relief was offered to the family. It is very likely that the mother's averred intellectual disability played a role in the magistrate's decision-making – particularly since the social work reports repeatedly referred to this as a diagnostic-prognostic outcome. However, without any medical reports or parenting capacity assessments in relation to the mother's purported disability, such a finding would not have been supported by corroborating evidence. Had these parents accessed social housing, disability grants and care dependency grants, and received training through the mooted parenting skills programmes, the family's situation may have been conducive to the care of these children. Without any of these measures, the dire poverty they endured was indeed harmful to the children's well-being. As for the children's circumstances, medical reports, school reports and the CYCC letters indicated a need for high support being offered so that these children could thrive.

In case 5, there is complete correlation between the social worker's averment of the applicable ground (g) – risk of future harm, and the finding of the presiding officer. The medical evidence of paraffin ingestion by the children, in itself, should have meant that a finding of grounds (f) and (i) was supported. The children had already been exposed the harmful circumstances as a result of the purported action of the mother, and such action arguably amounted to maltreatment. The social worker and presiding officer however agreed that only future risk was at issue. Medical evidence tendered as to the children's health, attested to their treatment at the hands of their mother. Confirmation that the mother was a mental health care user, however, was the only evidence tendered as proof of her diagnosis, with no parenting capacity assessment being filed. Furthermore, subsequent to the first report placing the children in temporary safe care and then their placement in foster care with their grandmother, no further updates on the mother's health were provided in either narrative form in the social worker's reports or as corroborating evidence in documentary form – for the subsequent period of four years.

Cases 6 and 7 show a limited but positive correlation between the grounds in the social work report and the court's finding. Both were cases where instances where exposure to risk of harmful circumstances and neglect (grounds (g) and (h)), were averred by the social worker – while in the second case an averment of the maltreatment (ground (i)) was also made. In both cases, the court made a finding based on ground (i). Case 6 did not have any medical evidence of the child's circumstances or those of the mother. The presiding officer did request a medical report from the mental health institution about the mother. The only corroborating evidence before the court was however an affidavit by the grandmother, stating that her daughter was disabled. There is no indication of the any maltreatment suffered by the child, and like cases 8 and 9, this was a case where the child had been in the informal foster care (kinship care) of the grandmother for some time (period uncertain).

It is submitted that a finding of maltreatment was therefore not supported by the evidence before the court, and neither was neglect. In fact, the absence of corroborated evidence of the mother's circumstances, renders such a finding suspect.

In case 7, the social worker attached a medical report of the infant's health, stating he was malnourished, with abnormal physical development, and was exposed to substance abuse. However, no corroborating evidence of the mother's alleged psychosocial illness was put forward. The allegations of child neglect and maltreatment or exposure to harmful circumstances were corroborated by further documentary evidence (an affidavit by the child care worker from the baby haven and a letter from a social worker of the CYCC). However, neither of these two documents indicated an observation that the mother had a psychosocial illness. For a further year and three months, no updated information about the mother's averred psychosocial illness was offered and the child remained in foster care for three years (the file was closed thereafter, with no further paperwork). Clearly, in this case, the medical report of the child's circumstances was sufficient for an original finding of maltreatment. Whether this was sustained thereafter is debatable, considering that limited informal parenting skills training was offered to the mother while the child was in the CYCC, and no formal and properly monitored and supervised parenting skills programme was offered to her.

In case 7, the fact that the social worker averred that the mother had an existing psychosocial illness that impacted on her child-care capacity, would have undoubtedly played a role in the presiding officer's decision-making. However, no proof of the health status of the mother was offered in this regard. That said, the child's circumstances (malnourishment and substance abuse) clearly point to a finding that the mothers' care was not optimum for the child's best interests to be assured at the time he was removed from her care, and possibly for some time thereafter. Compare that to case 6, where a psychosocial illness was averred, and yet no proof of the diagnosis or of maltreatment or other harm to the child was offered – and yet the court made such an adverse finding.

In summary, for the most part, where evidence was led of the child's circumstances (particularly documentary evidence such as medical reports corroborating harm suffered by the children), the social worker's averment of applicable child care and protection grounds and the ultimate findings of the presiding officers were supported – particularly at the original (temporary) removal stage. Where labels were attached to the mother (and father) in relation to their professed disabilities or illnesses, it is likely, even where medical evidence was absent to confirm the diagnosis or its effect on the parenting capacity of the person concerned, that diagnostic-prognostic thinking on the part of the presiding officer, would have taken place and influenced the ultimate findings of the courts.

In eight of the cases, either the social worker or presiding officer supported the ground of section 150(1)(g) being present (future risk of exposure to seriously harmful circumstances). In such instances, Matthias and Zaal assert that a 'convincing and well-motivated assessment about what is likely to happen to a child' needs to be provided by the social worker and, in so doing, the court would need to 'draw inferences based upon what has already occurred'.[15] In three of those cases, no evidence was led as to what would constitute future risk of exposure to harm (cases 6, 8 and 9) – all three cases where the mothers and fathers were alleged to have psychosocial illnesses (and in the last case where the person had a chronic medical condition and visual impairment, and not a psychosocial illness).

Table 7, in the Appendices, identifies the grounds averred by the social worker as existing in the cases reviewed – as well as the court's findings in this regard. The alternative care placement of the children was also indicated for each case. Children of mothers with intellectual disabilities were placed in non-relative foster care in four cases (cases 1-4). Such placement shows that assistance from extended families for mothers with intellectual disabilities in child care is limited – if not non-existent. However, comparison with the general population is not possible, due to the limited scope of this study. In cases 1, 3 and 7, children were also placed in CYCCs (for 2 to 4 years). In the first case, the social worker indicated that she planned to maintain the close bond between the child and her family in her second report. However, placement of the child with relatives later on, and in another city, made that difficult. Only in one case was the child placed in cluster foster care for a relatively short period (case 2). In the first three cases, children's placements were varied for different reasons – usually because placement broke down due to the child's behaviour. Only in one case was adoption mooted as a possibility (case 7 dealing with an infant), but for a period of five years the child received care from a non-relative foster parent and a CYCC.

Children were placed in alternative care for most cases for under five years (files were not updated thereafter), and in two cases for 8 and 11 years respectively (cases 5 and 4) In both situations the frequency (if any) of contact with biological mothers was not described in the social work reports. In four of the nine cases, the social work reports reflected that the children had contact with their mothers (cases 1, 3, 6 and 7), with such contact being of differing degrees (from daily contact to intermittent contact, including one with overnight stays). In five cases, the reports did not provide any information about the children's contact with their biological parents (cases 2, 4, 5, 8 and 9). In none of the cases were the children permanently reunited with their families. The fact that some follow-up social work reports contained verbatim accounts of families' circumstances without updates as to current circumstances of the parents, including the nature of (or any) contact with their parents – is contrary to the requirements of family reunification. The most egregious examples are cases 4 and 5. Unlike the situation in other jurisdictions where court intervention often means formal

[15] Zaal & Matthias (n 12 above) ch9-7.

termination of parental rights and responsibilities, the children in the cases surveyed were placed in alternative care for long periods, and rarely with family preservation or reunification services offered.

6.3.8. Best interests decision-making not articulated

In none of the cases did the records of proceedings from the court hearings reflect on what the presiding officers considered to be in the relevant children's 'best interests'. This deliberative determination, then, is assumed to have taken place without a written account of what weight was attached to different factors – including the 14 factors enumerated in section 7 of the Children's Act.

As for the social work reports, these hardly articulated which factors were considered in precise terms. However, in-depth analysis of the narrative embedded in the social work reports shows that the following factors were ostensibly considered for each child (or set of children), listed in table 8 in the Appendices. Separate reports on the best interests, in cases where there were more than one child (siblings), were not filed. The circumstances of the children, as a group, therefore were generally or interchangeably discussed.

Numerous factors featured in the best interests determination of the social workers:

- Section 7(1)(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'. This factor was mentioned in case 1 as a positive factor.

- Section 7(1)(b): 'the attitude of the parents, or any specific parent, towards— (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child'. This factor was mentioned in cases 7, 8 and 9. In the first case, this was a negative factor, as the mother 'lost' interest in her child after initially visiting the child, and in the last two foster care applications, the relevant parents indicated their inability to care for the children due to their own disabilities and a wish for the children to be placed in foster care with relatives.

- Section 7(1)(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.' This factor was the most regularly relied upon. It was identified in all nine cases. The nature of the 'incapacity' to provide for the children's needs was linked to the parents' disability (or alleged disability) in all nine cases, and in cases 8 and 9 the parents voluntarily indicated they were incapable of caring for their children due to their own

disabilities. Other characteristics were the financial status of the parents which were discussed above and will not be repeated here. In the following cases the disability of the parent was *directly* linked to the incapacity: intellectual disability of the mother in cases 1 to 4; the psychosocial disability of the parent, the mother, in cases 5, 6 and 7, and of the father in case 8; with physical disability in cases 8 (the mother) and 9 (the father). This direct nexus is gleaned from words used in the first three cases, such as 'inability to provide'; 'as a result of this she is not capable of logical reasoning'; 'it will influence' her care of her children; 'unable to proper[ly] care of them'. Related to this factor is the discussion further below of section 7(1)(g), on the development of the children.

- Section 7(1)(d): 'the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from— (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living.' This factor was only identified in case 7, where the need not to have an infant remain in the child care system was elucidated.

- Section 7(1)(f): 'the need for the child— (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition.' This factor was not mentioned, except in an ancillary fashion in relation to placement with relatives in cases 5 to 9 – but not in relation to remaining in the care of a parent.

- Section 7(1)(g): 'the child's— (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child'. These characteristics were mentioned in all the cases, but to differing degrees. In all the cases the reports noted the children's ages and genders. However, gender (except in case 1 dealing with alleged sexual abuse) did not feature as a notable characteristic. The age of the children was not specifically relied upon, bar in case 7 where the new-born status of the infant was relevant. Children's stages of development or development generally (or delays therein) were identified as relevant in cases 2, 3, and 7, where either diagnosed disabilities or assumed delays were imputed. Only in one case was the linguistic needs of the child identified as relevant (case 1).

- Section 7(1)(h): 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development.' There is potential overlap between this factor and section 7(1)(g). Emotional security of a child was identified as relevant in case 1 (as negative) and in case 6 (as a positive factor for bonding with the foster care by the grandmother). The children's 'development' however, was relied on in cases 2 (delays) and 3 (not developed

properly, and the intellectual disability of three children was relied upon on numerous occasions).

- Section 7(1)(i): 'any disability that a child may have'. The intellectual disability of three of the children in case 3 was a key factor in predicting best interests determination in relation to care for these children.

- Section 7(1)(j): 'any chronic illness from which a child may suffer'. This factor was mentioned in relation to the epilepsy of a child in case 3, where the child was not receiving adequate medical care, as well as in relation to the HIV-positive status of a child in case 4, where her adherence to medical treatment was questioned due to her home circumstances.

- Section 7(1)(k): 'the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment'. This factor was mentioned in case 1 as being relevant, because the 'primary and secondary needs [of the child] can be best met by the foster care placement'. In case 2, this factor was identified as necessary to ensure the secure environment for the child (in cluster foster care). In case 3, the alternative care was necessary to 'enhance the children's development and sense of belonging', and because their home 'situation will not serve their best interests'. In case 4, again the 'best interests' of the child to be placed in foster care was proffered as being necessary. In case 5, the report stated that the mother's disability was the reason why the children's best interests' were to be placed with the grandmother as foster carer. In case 6, the grandmother's stabilising and positive influence was identified as relevant for the need to place the child in alternative care, whereas in case 7 the attachments of the child to the caregivers at the CYCC were offered as relevant, including the parents' lack of interest and commitment in the care of the child. In case 9, the father's willingness to have the child placed in the foster care of the grandmother due to his disability is uncertain, as he did not depose to an affidavit nor appear in court – but this factor was imputed by the social worker in her report.

- Section 7(1)(l) 'the need to protect the child from any physical or psychological harm that may be caused by— (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person.' It is not surprising that this factor features predominantly in the social work reports, as these were the grounds relied upon for initial removal from family care, particularly in relation to potential or actual neglect or harm suffered and possible future harm occurring (except in the

foster care application cases 8 and 9). Only in one case (case 1) was this factor relevant in relation to sexual abuse, where the mother's apparent inability to protect the child from abuse was cited as relevant. In case 2, the mother's lifestyle was said to place her and her son at risk of being abused or ill-treated. In case 5, the mother harmed one child by forcing him to ingest a poisonous substance. In case 7, the potential risk to the child, if returned to the mother's care in future, was identified as relevant.

The following factors did not appear: sections 7(1)(e): 'the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis'; (m): 'any family violence involving the child or a family member of the child'; and (n): 'which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

The deliberative nature of a best interests determination cannot be ascertained with certainty from the court records in these cases. Only in one case did a presiding officer enter a query to a social worker on the record in relation to an averment that a parent was not able to care for a child due to his *physical* disability – not his *psychosocial* disability. In all the cases surveyed, the courts ratified the decisions to remove the children from family care and the recommendations to place them in alternative care.

The factors most relevant in the nine cases were factors (c), (g), (h), (k) and (l). There was not always a clear delineation between child-specific characteristics and parent characteristics, and, as a result, a fluid relationship between parental ability or capacity and children's needs (including developmental needs) was asserted in the reports. Children's Court Commissioners are not necessarily trained in aspects of and decision-making in relation to child development specifically. It can therefore be safely assumed, since no disagreements are entered into the record between the social workers' assessments of the children's best interests (including in relation to what is best for their development) and the presiding officer, that the social workers' assessments were ratified. The challenge is that when best interests determinations are left at the behest of social workers, with little engagement by the court on the veracity or corroborated nature of such recommendations, an argument about the potential for incorrect decisions being made, whether in the short or long term, and in the best interest of children, can be maintained. If presiding officers do not interrogate the factors relied upon for the best interests determination, positive supporting factors (which are hardly mentioned), will almost always be outweighed by negative risk factors. Furthermore, prevention, early intervention and therapeutic measures mandated by the Children's Act, where they could be implemented to ameliorate or address concerns about the care of children and could enhance their best interests, can positively impact on their best interests. However, where these measures are

either not implemented by the social workers or third parties, or not monitored by the presiding officers in subsequent hearings – their potential is lost and irreparable harm can occur to children's physical and emotional development when family bonds are not maintained or severed.

Most concerning are the direct links between parental disability and incapacity to care appropriately for their children made in the social work reports - which points to diagnostic-prognostic thinking. The most egregious example is case 3, where the parent's intellectual disability was relied on for the assertion that she could not adequately care for the children based on an erroneous reading of the literature. The literature in fact found the opposite – that parents with intellectual disability *can* adequately care for their children if they be provided with support to do so. A more nuanced interpretation of a child's best interests where a parent has a disability that *may,* if not provided with support or adequate support, impact on that child's care is needed This is particularly because of the Children's Act's injunction against unfair discrimination against children based on the health status or disability of family members.[16]

Another concern is the relatively inadequate supervision or monitoring by the social workers of the children's circumstances and the circumstances of the families after the initial placement. Subsequent social work reports often indicated that the family circumstances had not changed from previous reporting, although a year or two years elapsed between reporting cycles. This was not followed up by the presiding officers, even in instances where reports were copied verbatim from previous years' reports (thrice) – as in case 5. The impetus for implementing measures to enhance family preservation or family reunification is therefore lost, meaning that children remain in alternative care for prolonged periods.

Related to this argument, is the health or disability status of a parent and its potential impact on child care responsibilities not necessarily being a permanent factor. In other words, because of the episodic nature of many psychosocial illnesses, for example, and because of the potential for adequate management of symptoms through medical and therapeutic adherence, any perceived or actual inability to care for a child at a particular point in time does not necessarily mean the parent is permanently incapacitated. While intellectual disability as a diagnostic label is generally permanent, the parents' ability to learn and implement parenting skills is a potential positive factor for building their parenting capacity. However, only in one case was a parenting skills programme (an informal one) offered and monitored by the social worker – case 7 where the mother was identified as having a psychosocial illness. Constant surveillance of change in family circumstances and of the implementation of support measures, including parenting skills programmes, is

[16] Sec 6(2)(d) of the Children's Act.

therefore necessary to appropriately assist these parents and to avoid discriminatory treatment.

In some of the cases surveyed, positive networks of support from immediate and extended family appeared to be lacking for most parents and children. The parents were alienated from extended family in cases 2, 3, 4 and 7. In case 4, the child was neglected by the maternal aunt. Where *ubuntu* fails, however, non-family networks of support could be implemented in theory – but these were not evident in any of the cases (such as peer support or assistance from DPOs).

Table 8 in the Appendices sets out the best interests categories and grounds identified in the social work reports for each case. It must be noted that these grounds identified have been taken from the social work reports but were not in fact explicitly identified as 'best interest' grounds in the reports. Rather, where information in the reports corresponded with those grounds, these were grouped under the relevant categories.

6.4. Specific interventions – evidence, specific social services rendered and procedural accommodations in general neglect cases

The case studies above were analysed, as these pertained to specific examples where the disability of a parent was averred to play a role in their parenting capacity in some way or form. This part analyses the general neglect cases in relation to specific interventions. The general neglect cases refers to where a diagnosis or label of an illness or disability was not directly noted in the social worker's reports to court as being of import, or where no illnesses or disabilities were identified. Lack of legal representation is discussed and the general lack of parental assessment obtained by social workers. Also discussed are the offer of parenting skills programmes as a therapeutic intervention by the social workers, and the absence of procedural accommodations offered by the court.

In the case reviews, no legal representation was offered to any of the parents in the 107 cases in the Durban Children's Court. In Pietermaritzburg, a representative was present in one case only (where the grandparents had referred a case of physical abuse and neglect to the social worker). The attorney represented the grandparents, and not the parents alleged to have been abusive or neglectful. Referrals to legal aid (LASA) were made in three cases (one in Durban and two in Pietermaritzburg), where the mother sought a legal representative when present at the first hearings. However, in none of these cases were legal representatives obtained. In other words, in none of the cases reviewed in this study were parents who were alleged to be neglectful, legally represented. In none of the cases did the court files note cross-examination of the social workers' reports by the parents, although this is their right.

Assessments of parents were generally not obtained in the case studies surveyed and the other cases. Often the evidence relied on for an averment that a parent had a disability or illness was a doctor's letter. For example, letters from psychiatrists identifying the diagnosis of the father (DBN case 4 and Case study 2) would be appended to the social worker's report. Often these would be several years out of date and generally identified the diagnosis of the parent and not the prognosis for their health. Furthermore, a causal link to parenting ability or capacity was not drawn.

On the other hand, the medical evidence (the medical reports on children) relied on for indicators of neglect in children, identifying malnutrition for example, is incontrovertible in relation to the effect of neglect on children. This example, however, is also fraught because often poverty was the reason for the neglect and not uncaring parents. In one case where a psychological evaluation was done on a child, in a report provided to court the psychologist attested that the poverty of the parents should not be relied on to determine their fitness to parent (PMB case 10): '[T]heir current socio-economic situation and personal issues should not be used as a yardstick to measure their suitability as parents. They should instead be given the emotional support to help them cope.' In that case, another psychologist reported about the same child and family, that the parents' emotional instability impacted negatively on the child and that they do not 'fit the criteria of "fit parents".' Both the parents and child were assessed. In light of both of these reports, seemingly at odds with each other, the social worker recommended the child's return to the parents. Eventually this outcome was confirmed by the magistrate, despite a finding that the child was in need of care and protection as he lived in or was exposed to circumstances which could seriously harm his physical, mental or social well-being (section 150(1)(f)). The magistrate's notes for a period of a few months indicated that the social worker's recommendation was 'purely based on the psychological report'. Later on, the magistrate queried the social worker's report and expected the parents to provide an agreement that they would comply with a number of requirements, such as his therapy sessions and supervision services. The final court order was confirmed with this agreement in place. This is clearly a good example where the deliberation of the magistrate is evident in the court file and the evidence presented by the social worker was considered. The various factors put forward were weighed and balanced in favour of parental care of the child, but with mandatory social services supervision imposed thereafter. This is a lone example in the 244 case files surveyed, where the magistrate did not merely rubber stamp the social worker's recommendation where a psychological report was relied upon. Compare this to the four case studies discussed under part 6.3.4., above.

A therapeutic intervention of parenting skills was offered to mothers in five cases in Durban and nine cases in Pietermaritzburg – with one case signifying a positive outcome from the parenting skills. In that case, the child was reunified with the parents as a direct result of their engagement with the parenting skills offered. In no other cases was the social worker's proposal of parenting skills programmes followed up on in subsequent reports, indicating these were offered and the parents' level of

involvement therein. Parenting skills programmes were not identified as a prevention and early intervention measure, but rather as a therapeutic intervention once statutory proceedings commenced.

In none of the court files were procedural accommodations noted whether a parent had a disability or not. One case stands out for the utterly deplorable treatment and discrimination that the mother faced. In PMB case 17, the mother, a wheelchair user, was unable to access the court building to attend a hearing due to the inaccessible doors. The case file notes that the clerk of the court was dispatched to speak to the mother. The clerk then reported to the magistrate that the mother of the child consented to the child being placed in foster care with the grandmother, and that 'she is happy with the arrangements'. Surprisingly, an affidavit by the grandmother was put before court – but not one by the mother. Also, no proof of her diagnosis (as a stroke survivor) was presented. Why the magistrate could not herself have spoken to the mother outside of the court building, is not clear.

6.5. Conclusion

Particularly in the four case studies of mothers with intellectual disabilities, it is notable that the social workers were not concerned about the participation of the mothers in the statutory processes. Their communication needs may have required support in the interviews conducted by the social workers or during their court attendance. The social workers' averments of parenting incapacity were directly related to the alleged intellectual disability of the mothers, pointing to an ableist gaze being employed, as evidenced in the third theme (part 6.3.3.), where stereotypical assumptions were listed in social work reports. The record of proceedings did not identify any assistance with communication being offered to the mothers. This questions whether the magistrates were oblivious to the impact of lack of communication on effective participation in court. Court information, including the social workers' reports, were not made available to the parents in easy to read format. This means that the ability of the parents to absorb the information from the statutory process was not determined.

From the case studies surveyed, seven themes emerged. These themes point to findings that illustrate large gaps of knowledge and training on the part of the social workers and the presiding officers, in relation to parenting capacity of persons with disabilities, and in particular those with intellectual disability. It also illustrates diagnostic-prognostic decision making with very little deliberative decision-making evident. While presiding officers retain a measure of discretion in the inquisitorial proceedings to incorporate procedural accommodations where needed (despite these not being very clearly set out in the legislation and regulations), there seems to be no appreciation for the need for these to equalise participation in the court proceedings for these parents. Tellingly, the parents with disabilities were not legally represented – although that is also the case for non-disabled parties in these courts.

The procedural accommodations forming the core of what may be needed by parents with intellectual disabilities to meaningfully and fully participate in court proceedings discussed in this study are: individual specific measures, alternative questioning techniques, the presence of intermediaries, support in decision-making, and legal representation. In none of the cases surveyed were these offered, aside from the one case study where the magistrate noted that the parents' rights were explained in 'simple terms'.

Due to the small sample of parents with intellectual disabilities (two percent of the 244 case surveyed), general prevalence cannot be determined. Therefore, it is not clear that parents with intellectual disabilities are disproportionately represented in child care proceedings. Further research is required to determine this, including in other courts in various provinces. The Western Cape Province would make a good comparator because of the general prevalence of foetal alcohol syndrome and its known impact on intellectual disability.[17]

Section 63(2)(a) and (b) of the Children's Act mandates cross-examination of a social worker's report if a person is 'prejudiced' by the report. Parents were however not meaningfully offered this opportunity. While legal representation is generally not obtained in Children's Court inquiries, the absence of cross-examination of social workers' reports by parents in these cases is a cause for concern. If parents are not engaging with these reports and the magistrates largely do not note their deliberative decision-making, it becomes evident that social workers' reports carry the most evidentiary weight.

Linking the data from this study with the literature reviewed, the following can be noted. In other jurisdictions, social services' support was recommended in the form of dedicated (and adapted) programmes such as Head Start.[18] This study is the first one considering the procedural accommodations (or lack thereof) offered in family or Children's Court proceedings. Llewellyn et al's study considered the social workers and magistrates' perceptions of parenting incapacity, the attorneys' challenges and the court's decision-making process.[19] In this study, perceptions and resources of

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17 S Popova et al 'Estimation of national, regional, and global prevalence of alcohol use during pregnancy and fetal alcohol syndrome: A systematic review and meta-analysis' (2017) 5 *Lancet Global Health* e290–e299; DL Viljoen et al 'Fetal alcohol syndrome epidemiology in a South African community: A second study of a very high prevalence area' (2005) 66(5) *Journal of Studies on Alcohol* 593-604.

18 ST Azar et al 'Practices Changes in the Child Protection System to Address the Needs of Parents With Cognitive Disabilities' (2013) 7 *Journal of Public Child Welfare* 610; ST Azar et al 'Promoting engagement and involvement of parents with cognitive challenges: Suggestions for Head Start programs' (2013) 16 *NHSA Dialog* 216; ST Azar et al 'Chronic neglect and services without borders: A guiding model for social service enhancement to address the needs of parents with intellectually disabilities' (2012) 5 *Journal of Mental Health and Intellectual Disabilities Research* 130.

19 G Llewellyn et al 'Prevalence and outcomes for parents with disabilities and their children in an Australian court sample' (2003) 27(3) *Child Abuse and Neglect* 235.

attorneys were not considered. However, the lack of suitable support to these parents is corroborated in this study, as is diagnostic-prognostic decision-making. The small sample size, however, should mean that these findings should be cautiously interpreted.

McConnell's study on the inevitability of parental failure[20] is partially correct for the findings from this study, considering the review of the evidence offered to the courts in the court files. Self-evidently, this study did not determine the perceptions of the magistrates and social workers in the cases where a parent's disability, particularly intellectual disability, was identified as relevant. Without empirical data eliciting these perspectives or perceptions, one cannot decisively state that the magistrates and social workers are biased against parenting with an intellectual disability. However, the cases surveyed show that proof of diagnosis was not obtained in any of the cases, nor was a link with inadequate parenting decisively drawn on evidence. Parenting capacity assessments were generally not obtained. However, the social work reports from the first three case studies show four stereotypical assumptions about parenting by mothers with intellectual disabilities, in line with studies by McConnell[21] and Booth and Booth[22] in the British and Australian contexts:

- The mother's supposed lack of capacity to change, such as being unable to learn new skills required to be a good enough parent;
- The mother exhibited characteristics attributed to be universal to persons with intellectual disabilities, such as lack of responsibility or insight;
- That it would be impossible to improve the mother's personal circumstances and obtain remedies for her problems.; and
- That the mother's intellectual disability equates to incapability or inability to parent.

Mothers with intellectual disabilities were also not interviewed, and this is a notable limitation of the study.

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20 D McConnell et al *Parents with a Disability and the New South Wales Children's Court* (2000) 23 www.sydney.edu.au (accessed 12 January 2016).

21 D McConnell *Disability and Discrimination in the child welfare system: Parents with intellectual disabilities* (2009).

22 T Booth & W Booth *Parents with Learning Difficulties, Child Protection and the Courts* (2004) Report to the Nuffield Foundation <http://www.supported-parenting.com/projects/courts.html> (United Kingdom) (accessed 12 January 2016).

CHAPTER SEVEN:

LESSONS FROM FOREIGN JURISDICTIONS

> [F]ailure to accommodate persons with disabilities [in courts] will often have the same practical effect as outright exclusion.[1]
>
> It is incumbent on all judges and judicial staff to ensure that every person with a disability be provided with reasonable accommodation, if available, to ensure that she can be a full and equal participant in our system of justice.[2]
>
> The courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals' ineffectiveness in engaging with parents in appropriate terms.[3]

7.1. Introduction

The preceding chapters identified the following challenges and gaps in the South African legal system and social services provision for parents with intellectual disabilities:

- Children were removed from mothers with intellectual disabilities in four cases and placed in foster care without them being returned to their parents, with only one case involving some reunification efforts made by the social worker assigned to the case. Formal termination of parenting rights and responsibilities did not occur (as it does in other jurisdictions). Conflation of psychosocial and intellectual disability occurred in many social work reports.
- Social work reports obtained in the four cases of mothers with intellectual disability, indicated presumptions about parental incapacity based on their disability, and articulated ableist prejudices.
- Unadapted and unaccommodating social services provision in the form of prevention and early intervention services (as well as therapeutic services) are (rarely) offered to parents with intellectual disabilities – including parenting skills programmes.
- Insufficient evidence (and (rarely) unadapted parenting capacity assessments) is relied upon to determine the likelihood of harm or harm occasioned by the parent with the intellectual disability.
- There is a lack of procedural and reasonable accommodations in the South African court system, and in Children's Courts, in particular.
- There is a complete lack of legal representation of parents with intellectual disabilities (and any parent) in the Children's Court proceedings.

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1 *Tennessee v Lane* 541 US 509 (2004) 511.
2 *In Re McDonough* 457 Mass. 512 (Mass. 2010) 528.
3 *Re G and A [2006] (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NIFam 8 (United Kingdom).

- Intermediaries are generally not provided to adults with intellectual disabilities – and definitely not in Children's Court proceedings.
- The possibility of alternative questioning techniques (AQTs) for helping with more effective communication with persons with intellectual disabilities, has not been explored, and in fact AQTs for children have not been developed – despite being required under the Children's Act.
- The curatorship system and the incomplete and stalled law-reform process on supported decision-making (legal capacity) still offers insufficient support in decision-making of persons with intellectual disabilities, and a contextual support solution should be sought.
- There is no clearly articulated deliberative decision-making in the court orders in the Children's Courts, as this is not reported on and not reviewed or appealed – despite the possibility to do so.
- Parents with intellectual disabilities (and other court users) are unable to obtain accessible information on court processes, accommodations available to them in court proceedings, and complaint mechanisms.

This chapter seeks to establish what practices exist in other jurisdictions that South Africa may learn from in formulating an appropriate response to the above gaps. It must be stated at the outset that examples taken from the United States of America, whether state or federal, do not proceed on the basis that these jurisdictions have appropriately dealt with parenting with a disability in their legislation, procedural rules, or policy and social service provision. In fact, Francis and Cooper, in their analyses of the variance in US state legislation on the topic, have identified the discriminatory treatment that parents with intellectual disabilities experience in many state laws.[4] However, there are pockets of good examples and practices in some American states, including in legislation, that promote the rights of parents with intellectual disabilities, without detracting from the rights of their children. On the issue of legal capacity and procedural accommodations and adapted social services – jurisprudence and legislation in Africa is sorely lacking. Reference is also made to unsuitable examples of practices from some jurisdictions in order to identify what pitfalls should be avoided in formulating legislative or other responses.

First, reference is made to a few supported decision-making reforms. Second, provision of disability-specific framework legislation that prohibits unfair discrimination and provides for disability-specific protections is discussed – including procedural accommodations in courts and adapted services. Third, particular supports and accommodations are considered, including the possibility of intermediary provision akin to communication assistants to address communication challenges in provision

4 L Francis 'Maintaining the legal status of people with intellectual disabilities as parents: The ADA and the CRPD' (2019) 57 *Family Court Review* 21; CJ Cooper 'Too stupid: Intellectual disability as a statutory ground for termination of parental rights' (2018) 11 *The Modern American* Article 4 <https://digitalcommons.wcl.american.edu/tma/vol11/iss1/4> (accessed 1 July 2020).

of evidence, and the appropriate adaptation of parenting capacity assessments and adapted social services provision. Fourth, the role of the lawyer, including the formulation of legal representation, or support in instructing counsel or understanding proceedings, is explicated, including the McKenzie friend or Brady Circular examples. Also, the utilisation of AQTs and appropriate training for legal professionals to address communication challenges is dealt with. Fifth, alterations to the role of the presiding officer (the magistrate) is considered, including formulations of the presiding officers' deliberative decision-making in best interests determination and training. Last, use of mechanisms to promote access to information, legal awareness of persons with intellectual disabilities, as well as the development of complaint procedures, is set out.

7.2. Supported decision-making for the parent

The starting point to enhance the participation of parents with intellectual disabilities in social services and court proceedings, is both de facto and de jure recognition of their legal capacity and the supports required to exercise it. The CRPD's article 12 has fundamentally altered the understanding of mental and legal capacity. It decouples the two concepts through its proposition that every person, regardless of cognitive ability, has the right to make decisions and should be granted support in order to do so effectively.[5]

Formal supported decision-making systems have been developed in, for example, British Columbia, Canada (representation agreements)[6] and Sweden (Godman).[7] Personal ombuds, such as in the Swedish context, is another version of a support person offered to a person with a disability (predominantly psychosocial disability), as a supporter solely for the person and independent of any authorities – whether court, social welfare or other.[8] Independent advocates are offered in Australia as a pilot project.[9] In some jurisdictions, the courts are making findings in line with article 12 of the CRPD, even where legal systems may not yet have developed to provide the kinds

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5 M Bach 'Inclusive citizenship: Refusing the construction of "cognitive foreigners" in neo-liberal times' (2017) 4 *Research and Practice in Intellectual and Developmental Disabilities* 4; L Series 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80.

6 T Stainton 'Supported decision-making in Canada: Principles, policy and practice' (2016) 3 *Research and Practice in Intellectual and Developmental Disabilities* 1.

7 M Tideman *Swedish "god man": An unique supported decision making system – but does it work?* Paper presented to the Living with Disability Research Center Roundtable: Supporting people with cognitive disabilities with decision making, Melbourne (2016), cited in C Bigby et al 'Providing support for decision making to adults with intellectual disability: Perspectives of family members and workers in disability support services' (2019) 44 *Journal of Intellectual & Developmental Disability* 396.

8 M Jespersson 'Personal Ombudsman in Skåne – A User-controlled Service with Personal Agents' in P Stastny & P Lehmann (eds) *Alternatives Beyond Psychiatry* (2007) 299ff.

9 S Collings et al '"She was there if I needed to talk or to try and get my point across": Specialist advocacy for parents with intellectual disability in the Australian child protection system' (2018) *Australian Journal of Human Rights* doi: 10.1080/1323238X.2018.1478595. See, also, <https://starvictoria.org.au/wp-content/uploads/2013/10/OPA_Rebuilding-the-village_OPA_Rebuilding-the-village_Report-2_Child-Protection_2015.pdf>

of support required. For example, India's Supreme Court upheld the legal capacity of a woman with an intellectual disability in relation to consent for termination of a pregnancy:

> Her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter.[10]

Examples of formalised support to persons with intellectual disability are few and far between. Many states are still grappling with law reform on this score and some authors are cautious about the potential of supported decision-making to truly change the face of decision-making for adults with disabilities – particularly intellectual disabilities.[11] Further research is needed on the most apposite formulations of supported decision-making that meet the safeguards encapsulated in article 12 of the CRPD. Kenya's law reform[12] in relation to legal capacity protections is still not finalised, despite efforts made from before 2014.[13] Critique of the initial Bill from 2012 has not been addressed as a representative (family member, spouse or others) is still slated as substituted decision-maker for the person with the 'mental illness'. Kenyan courts are still to make capacity determinations.

Support in decision-making also extends to the court room. Careful attention will be needed to ensure that testifying competence and supports in testifying are re-conceived in criminal and civil proceedings to accommodate persons with disabilities – in particular intellectual disabilities' needs and equal participation in court

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10 *Suchita Srivastava v Chandigarh Administration* 2009 (9) SCC 1 para 10. The woman was a resident of a state facility and fell pregnant following a rape by a staff member. She wished to carry the pregnancy to term and care for the child. The administration sought to terminate her pregnancy under the Medical Termination of Pregnancy Act of 1971, as she was thought to be incapable of carrying the pregnancy to term and caring for the child. The High Court directed termination to take place. An amicus appealed the decision to the Supreme Court, which found in favour of her legal capacity.

11 For example, Law Commission Ontario *Legal capacity, decision-making and guardianship. discussion paper* (2014) Toronto: Law Commission of Ontario; T Carney 'Participation & service access rights for people with intellectual disability: A role for law?' (2013) 38 *Journal of Intellectual & Developmental Disability* 59; T Carney & F Beaupert 'Public and private bricolage – challenges balancing law, services & civil society in advancing CRPD supported decision making' (2013) 36 *UNSW Law Journal* 175; M Browning et al 'Supported decision making: Understanding how its conceptual link to legal capacity is influencing the development of practice' (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities* 34.

12 Kenya's The Mental Health (Amendment) Bill, 2018 <http://www.parliament.go.ke/sites/default/files/2018-12/Mental%20Health%20%28Amendment%29%20Bill%2C%202018.pdf> (accessed 1 December 2020). Section 3K of Part II: Rights of persons with mental illness of this proposed legislation will provide: '(1) A person with mental illness has a right to recognition before the law and shall enjoy legal rights on an equal basis with other persons in all aspects of life. (2) Upon application, the court may make a determination whether a person with mental illness has legal capacity. (3) Where, under subsection (2), the court determines that a person lacks legal capacity, the court shall appoint a representative to manage that person's affairs in accordance with the provisions of this Act.'

13 DM Ndetei et al 'Kenya's mental health law' (2017) 14 *BJPsych International* 96.

proceedings. This will require a massive overhaul of the law of evidence and is beyond the scope of this study.

7.3. Disability-specific legislation

Some countries have codified disability legislation to promote and protect the rights of persons with disabilities, while others have included disability as a protected ground in general anti-discrimination legislation – such as South Africa's Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA).[14] Others prefer to prohibit discrimination in their disability-specific legislation.[15] The reality for the goal of disability inclusion in laws and the conduct it relates to in society, is that harmonisation of existing ableist laws and the intensive law reform it requires of numerous disparate pieces of legislation, regulations and common law, is a cumbersome and long-term project. Hasty and haphazard reforms may bring incoherence, vagueness and inconsistencies to laws. It is therefore rare for countries to have standalone framework legislation dealing with pertinent aspects on the law treating persons with disabilities, and where this exists, the scope may be limited to provisions on the establishment of disability councils, social security, education, employment and federal or state funding allocations. The notion that these provisions amount to window-dressing may find favour, or the fact that they may continue to embed ableist assumptions in laws – for example in relation to legal capacity. Comprehensive reform is therefore unlikely. Family law statutes are generally child-centred and were not conceived when disability rights were favoured. This means that any necessary amendments to make these inclusive and aimed at promoting equal participation of persons with disabilities, can also be haphazard 'add ons'.

South Africa has chosen the route of an overhaul of existing legislation, as well as the enactment of a disability-specific framework legislation, as mandated by the White Paper on the Rights of Persons with Disabilities (WPRPWD).[16] Accordingly, this review of best practices commences with consideration of disability framework legislation in some relevant countries.

7.3.1. Selected examples from the African continent

A brief review of legislation in Africa shows that several countries have enacted legislation relating to persons with disabilities: Ghana, Kenya and Tanzania, for example.[17] A few others enacted specific laws in relation to employment. For example,

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14 Sec 9 of the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000.

15 Sec 19(1) of the Persons with Disabilities Act of 1996 (Zambia), for example.

16 Department of Social Development *White Paper on the Rights of Persons with Disabilities* (WPRPD) (2016) published in GN 230 of *Government Gazette* 39792 of 9 March 2016, 10.

17 The Repository of Disability Rights in Africa <www.rodra.co.za> (accessed 1 January 2021), hosts a collection of laws from the continent, specifically relating to disability. The specific country laws considered were limited to language (English) and mostly common law countries. A table with a selection of the legislation from African on disability follows below:

many enacted legislation establishing disability councils or boards – such as Sierra Leone, Mozambique, Zimbabwe, Zambia and Namibia.

Of note is a Bill proposed in Kenya from 2019, which is aimed at amending the existing Persons with Disabilities legislation from 2003.[18] A new section is proposed, which guarantees equal protection before the law.[19] However, nothing in the new Bill or Act pertains to procedural accommodations in courts. However, the Evidence Act provides some good practice to learn from, though limited, in relation to oral evidence of a person requiring the use of signs.[20]

African jurisdictions generally choose to have disability-related issues included in existing legislation, rather than enacting disability-specific framework legislation. However, since the mid 1990s, more disability-specific laws have been passed.

Country	**Legislation**
Burundi:	Law 1/03 of 10 January 2018 (the protection and promotion of the rights of people with disabilities).
Ghana:	Persons with Disability Act 715 of 2006.
Kenya:	The Persons with Disabilities Act 14 of 2003. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009; *Persons with Disabilities Bill of 2019.*
Malawi:	Disability Act 8 of 2012 and new *Disability Bill: Assistive Technologies of 2019.*
Mauritius:	Equal Opportunities Act 2008.
Mozambique:	Decree no 78/2009 of 15 December 2009 (National Disabilities Council).
Namibia:	The National Disability Council Act 26 of 2004.
Nigeria:	1993 Nigerians with Disability Decree passed by the Nigerian military government in 1993. Discrimination against persons with disabilities (Prohibition) Bill of 2015 (Senate).
Republic of Mali:	Law 2018-027 of 2018 on the Rights of Persons with Disabilities.
Rwanda:	National Law 01/2007 (the protection of persons with disabilities).
Sierra Leone:	The Persons with Disability Act 22 of 2011.
Swaziland:	The Persons with Disabilities Act 16 of 2018.
Tanzania:	The Persons with Disabilities Act, 2010.
Uganda:	Laws of Uganda, Persons with Disabilities Act, 2006. *The Persons with Disabilities Bill 19 of 2018.*
Zambia:	Persons with Disabilities Act 6 of 2012.
Zimbabwe:	Disabled Persons Act 5 of 1992 (Chapter 17:01).

[18] Kenyan Parliament *The Persons with Disabilities (Amendment) Bill, 2019* (undated) <http://www.parliament.go.ke/sites/default/files/2019-02/The%20Persons%20with%20Disabilities%20%28Amendment%29%20Bill%2C%202019.pdf> (accessed 1 December 2020).

[19] Sec 11 of the Persons with Disabilities (Amendment Bill) of Kenya will substitute the existing sec 11, and pertinently sec 11 (d) will provide: 'The National government and county governments shall take steps to achieve the full realisation of the rights of persons with disabilities and shall, for this purpose ensure that persons with disabilities enjoy equal protection before the law.'

[20] Sec 126(1) of the Evidence Act of 1963 (as amended): CAP 80 (Kenya). But see sec 125, which provides: '(b) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.'

Unfortunately, some of the provisions still hark back to the medical model.[21] When it comes to anti-discrimination provisions, the preference is generally to include disability as a ground of protection in general equality laws. More and more, however, some countries are opting for disability-specific framework legislation, particularly following the ratification of those countries to the CRPD. Major law reforms are necessary for the haphazard and incoherent (and sometimes contradictory) laws in some countries relating to persons with disabilities. This may, in part, be the reason for the delay in amending non-compliant laws or regulations or promulgating new laws in line with international law obligations.

7.3.2. India's disability-specific legislation

Another jurisdiction to consider is India, due to its status as a BRICS member.[22] India's Rights of Persons with Disabilities Act[23] ostensibly extends legal capacity to all persons with disability on an equal basis with others, and yet also provides for limited guardianship.[24] Guardianship is to be provided where, despite support provided, a person is still unable to exercise legal capacity according to the Act.[25] A novel provision, which reinforces an understanding that support in exercising legal capacity is often informal, is as follows

> Designation of authorities to support—

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21 For a critique of Zimbabwe's legislation, see E Mandipa 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' (2013) 1 *African Disability Rights Yearbook* 73 75.

22 BRICS is an acronymn referring to the emerging economies of Brazil, Russia, India, China and South Africa. These countries have established trade and other links due to the similarities in their regional economic influence.

23 Rights of Persons with Disabilities Act of 2016 (India). See, also, the Mental Health Care Act of 2017 and the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act of 1999.

24 Secs 13 and 14 of the Rights of Persons with Disabilities Act of India, respectively.

25 Sec 14 provides for guardianship:
'(1) Notwithstanding anything contained in any other law for the time being in force, on and from the date of commencement of this Act, where a district court or any designated authority, as notified by the State Government, finds that a person with disability, who had been provided adequate and appropriate support but is unable to take legally binding decisions, may be provided further support of a limited guardian to take legally binding decisions on his behalf in consultation with such person, in such manner, as may be prescribed by the State Government: Provided that the District Court or the designated authority, as the case may be, may grant total support to the person with disability requiring such support or where the limited guardianship is to be granted repeatedly, in which case, the decision regarding the support to be provided shall be reviewed by the Court or the designated authority, as the case may be, to determine the nature and manner of support to be provided.'
Explanation: For the purposes of this sub-section, 'limited guardianship' means a system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability, which shall be limited to a specific period and for specific decision and situation and shall operate in accordance to the will of the person with disability.
(2) On and from the date of commencement of this Act, every guardian appointed under any provision of any other law for the time being in force, for a person with disability shall be deemed to function as a limited guardian.
(3) Any person with disability aggrieved by the decision of the designated authority appointing a legal guardian may prefer an appeal to such appellate authority, as may be notified by the State Government for the purpose.'

(1) The appropriate Government shall designate one or more authorities to mobilise the community and create social awareness to support persons with disabilities in exercise of their legal capacity.
(2) The authority designated under sub-section (1) shall take measures for setting up suitable support arrangements to exercise legal capacity by persons with disabilities living in institutions and those with high support needs and any other measures as may be required.[26]

The problem, however, is that guardianship is seen as a form of support by the Indian government.[27] Also, safeguards such as will and preference of the person with the disability, are not embedded in supports offered.

The Indian legislation's 'rights-based' nature is questioned in the face of some gaps such as challenges with certification of intellectual disability, among others.[28] This legislation mandates the Indian government to ensure access to justice for persons with disabilities, including reasonable accommodations, – though the provision of procedural accommodation is not explicitly stated.[29] In practice, access to justice for women with disabilities in India remains problematic, due to several laws that are inconsistent with the 2016 Act and the CRPD's provisions.[30]

The Committee on the Rights of Persons with Disabilities has noted its concern in relation to the continued reliance on the medical model in disparate legislation[31] and

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26 Sec 15 of the Rights of Persons with Disabilities Act (India).

27 Republic of India *List of issues in relation to the initial report of India Addendum: Replies of India to the List of Issues* (2019) CRPD/C/IND/Q/1/Add.1, para. 62.

28 SB Math et al 'The Rights of Persons with Disability Act, 2016: Challenges and opportunities' (2019) 61 *Indian Journal of Psychiatry* S809; A Balakrishnan et al 'The rights of persons with disabilities Act 2016: Mental health implications' (2019) 41 *Indian Journal of Psychological Medicine* 119 123. Problems with certification of disability were somewhat clarified with *The Rights of Persons with Disabilities Rules, 2017* published vide Notification No. G.S.R. 591(E), 15 June 2017.

29 Sec 12 of the Rights of Persons with Disabilities Act (India) provides for access to justice:
'(1) The appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.
(2) The appropriate Government shall take steps to put in place suitable support measures for persons with disabilities especially those living outside family and those disabled requiring high support for exercising legal rights.
(3) The National Legal Services Authority and the State Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987) shall make provisions including reasonable accommodation to ensure that persons with disabilities have access to any scheme, programme, facility or service offered by them equally with others.
(4) The appropriate Government shall take steps to—
(a) ensure that all their public documents are in accessible formats;
(b) ensure that the filing departments, registry or any other office of records are supplied with necessary equipment to enable filing, storing and referring to the documents and evidence in accessible formats; and
(c) make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.'

30 Women with Disabilities in India Network *Women with Disabilities in India* (undated) <https://womenenabled.org/pdfs/mapping/Women%20with%20Disabilities%20in%20India.pdf> (accessed 1 January 2021).

31 Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of India* (2019) CRPD/C/IND/CO/1 para 6(a).

the erroneous understanding of 'support'.[32] In relation to access to justice, the Committee noted the limited provisions for procedural accommodations; the continued barriers faced by persons with disabilities in accessing justice; the courts' practice of discounting the evidence of women with intellectual disabilities; and lack of knowledge and capacity-enhancing measures in the justice system for providing accommodations that would allow persons with disabilities to be represented in the judiciary, among other concerns.[33] India's new legislation and general approach to access to justice and legal capacity for women with intellectual disabilities, is therefore not ideal as a best practice model to draw from.

7.3.3. The United Kingdom's varied provisions for support and accommodations

The UK's Equality Act of 2010 places a duty on public sector services[34] such as the Children and Family Court Advisory Support Service (CFCASS)[35] to provide services that do not discriminate, for example. This extends to persons with disabilities, as disability is a protected ground under the Equality Act. This duty encompasses taking 'due regard' of the aims of the legislation when making decisions, namely to 'eliminate discrimination, advance equality of opportunity, and foster good relations.'[36] The Equality and Human Rights Commission's *Technical Guidance on the Public Sector Equality Duty for England* explicates this duty.[37] The Equality Act also requires reasonable adjustments to be made for persons with disabilities and their needs to be addressed in services provided to them, and they may require more favourable treatment than those without disabilities.[38] Her Majesty's Courts and Tribunals Service (HMCTS) offers reasonable accommodations to court users with disabilities.[39] Disability-specific legislation has therefore been subsumed by general legislation, but

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32 Committee on the Rights of Persons with Disabilities (n 31 above) paras 26 and 27.

33 Committee on the Rights of Persons with Disabilities (n 31 above) para 28 (a), (c) and (d).

34 Sec 149 of the Equality Act of 2010 (United Kingdom) provides: 'Public sector equality duty (1) A public authority must, in the exercise of its functions, have due regard to the need to—(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

35 CFCASS provides services to families, not only in care and access cases similar to the Family Advocate services in South Africa in cases of divorce or separations, but also in care applications. Here a CAFCASS social worker is appointed to be the child's guardian in the court proceedings to put together a plan for the best interests of the child concerned. The commission works in terms of the Criminal Justice and Court Services Act 2000.

36 *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 paras 90-96.

37 Equality and Human Rights Commission's *Technical Guidance on the Public Sector Equality Duty for England* <https://www.equalityhumanrights.com/sites/default/files/technical_guidance_on_the_psed_england.pdf> (accessed 1 November 2020).

38 Secs 20 and 149(4) of the Equality Act of 2010.

39 HMCTS administers criminal, civil and family courts, and also tribunals in England and Wales and some tribunals in Scotland and Northern Ireland. HMCTS *Equality and Diversity* (undated) <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/equality-and-diversity> (accessed 1 November 2020).

specialised services and adapted supports are offered to persons with disabilities navigating the social services and court systems. Some good practices from the UK, such as application of intermediaries, is considered later.

7.3.4. The Committee on the Rights of Persons with Disabilities' rebuke of Australia's slow reform on legal capacity and supports to parents

Despite decades of evidence that parents with intellectual disabilities are prejudiced by an unadapted legal and social service system that continues to deny the exercising of their parenting rights, law reform has been slow.[40] The Australian government has been under pressure to change its substituted decision-making scheme, since 2014.[41] It issued an interpretative declaration in relation to article 12, which self-evidently limits the possibility for adequate law reform as required by the CRPD:

> Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.[42]

The Committee on the Rights of Persons with Disabilities twice recommended that the Australian state ensures its anti-discrimination laws, especially the commonwealth Disability Discrimination Act,[43] provide for supported decision-making, especially for persons with intellectual disabilities, among others.[44] It recently recommended the elimination of current substituted decision-making and the provision of individualised support for persons with disabilities in the justice system. Furthermore, training on working with persons with disabilities is mandated for lawyers, judicial officers, judges and court staff, among others.[45] Parents with intellectual disability continue to complain of a lack of procedural accommodations and support in exercising their legal capacity.[46] The Committee raised its concerns about the higher likelihood of children

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40 A Gray et al 'Cognitive impairment, legal need and access to justice' (2009) Paper 10 *Law and Justice Foundation of New South Wales* 4 <http://www.lawfoundation.net.au/ljf/site/articleIDs/2EDD47C8AEB2BB36CA25756F0018AFE0/$file/JI10_Cognitive_impairment.pdf> (accessed 5 February 2020).

41 Australian Law Reform Commission *Equality, capacity and disability in Commonwealth laws* (2014) Report 124 <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf> (accessed 5 February 2020).

42 United Nations Treaty Collections *Convention on the Rights of Persons with Disabilities* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec> (accessed 1 November 2020).

43 Disability Discrimination Act of 1992 (Australia).

44 Committee on the Rights of Persons with Disabilities *Concluding observations on the Initial report of Australia* (2013) CRPD/C/AUS/CO/1 para 15; Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia* (2019) CRPD/C/AUS/CO/2-3 para 10.

45 Committee on the Rights of Persons with Disabilities (n 44 above) para 26 (e) and (f).

46 WWILD/Community Living Association (CLA) *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission)* (2019) 29

being removed from parents with disabilities, 'often on the basis of disability', as well as the lack of support provided to them to enable exercising of their parenting responsibilities.[47] The Committee recommended that children are not separated from parents because of their parents' disability and urged the Australian state to provide 'comprehensive and gender- and culturally-specific parenting and family support measures for parents with disabilities'.[48]

The Australian Law Reform Commission (ALRC) explicitly dismissed the need to consider the impact of purported discrimination on parents with disabilities (including intellectual disabilities) in courts, and stated that the issue fell outside of its remit in relation to reform on legal capacity laws.[49] This was despite numerous submissions on this point. It is submitted that it is short-sighted of the ALRC not to have considered the link between legal capacity and parenting with a disability in more detail. The excellent contribution of scholars such as Llewellyn and McConnell and others on this issue in Australia, will therefore have to wait for future law reform of family law.

Australian child protection laws differ between states and territories – with the commonwealth legislation providing a framework.[50] Some of the reforms in child protection laws include more emphasis on prevention and early intervention services offered to families,[51] and increased use of family group meetings or conferences and other alternatives such as conciliation to avoid contested court hearings.[52] Parent responsibility contracts (similar to parenting plans in South Africa) are used to set up an agreement with the state and a caregiver or parent, aimed at improving the person's parenting skills (including where a pre-natal report is made concerning an unborn child at risk of significant harm after birth).[53] Parenting capacity assessments can be ordered by the court to determine the capacity of a person to parent.[54] Assessment reports are not tendered as evidence, but are considered a report made to the court.[55] Similar to the South African provision in the Children's Act prohibiting unfair

<https://wwild.org.au/wp/wp-content/uploads/2020/09/WWILDCLA-Disability-Royal-Commission-SubmissionFinal_2019.pdf> (accessed 1 November 2020).

47 Committee on the Rights of Persons with Disabilities (n 44 above) para 43.

48 n 44 above, para 44(a) and (b).

49 Australian Law Reform Commission (n 41 above) paras 11.90-93.

50 Family Law Act 1975 (Commonwealth); Children and Young People Act 2008 (Australian Capital Territory); Children and Young Persons (Care and Protection) Act 1998 (New South Wales); Care and Protection of Children Act 2007 (Northern Territory); Child Protection Act 1999 (Queensland) and the Child Protection Reform Amendment Bill 2017; Children's Protection Act 1993 (South Australia); Children, Young Persons and their Families Act 1997 (Tasmania); Children, Youth and Families Act 2005 (Victoria); and Children and Community Services Act 2004 (Western Australia).

51 S Wise Developments to strengthen systems for child protection across Australia (2017) CFCA Paper No 44, Australian Institute of Family Studies 8 <https://aifs.gov.au/cfca/sites/default/files/publication-documents/44_child_protection_reforms.pdf> (accessed 1 December 2020).

52 Wise (n 51 above) 9.

53 Sec 38A of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales).

54 Sec 54 of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales).

55 Sec 59 of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales).

discrimination against a child on the basis of a parent's disability,[56] but much more explicitly stated, the NSW legislation provides that the parent's disability may not be the reason that a parent is deemed unable to meet a child's basic needs.[57] However, provision of specific and adapted support to parents with disabilities is not legislated.

The NSW legislation, however, includes a provision relating to presumption of parenting incapacity and immediate removal of a child from a parent where an older sibling was previously removed from the parent:

> (1). The Children's Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of a care application:
> (a) is a person;
> (i) from whose care and protection a child or young person was previously removed by a court under this Act or the Children (Care and Protection) Act 1987, or by a court of another jurisdiction under an Act of that jurisdiction, and
> (ii) to whose care and protection the child or young person has not been restored, or
> …
> (2). Evidence adduced under subsection (1) is prima facie evidence that the child or young person the subject of the care application is in need of care and protection.
> (3). A parent or primary care-giver in respect of whom evidence referred to in subsection (1) has been adduced may rebut the prima facie evidence referred to in subsection (2) by satisfying the Children's Court that, on the balance of probabilities:
> (a) the circumstances that gave rise to the previous removal of a child or young person no longer exist …[58]

This practice of assumption of care can have devastating immediate and long-term consequences for the child and mother, and also for professionals involved in the process.[59] Parents with an intellectual disability who have had previous experience with child protection may therefore also have new born babies removed on this basis. The Royal Commission's public hearings are ongoing and have notably concentrated on the higher rate of involvement of First Nations' parents with disabilities in the child protection system.[60] A recent hearing identifies the discriminatory impact of this section on parents with intellectual disabilities, particularly assumption of care at birth based on evidence of previous interventions.[61] A solicitor from an NGO providing services to parents with intellectual disabilities testified on section 106A as follows

> it is a presumption that does away with the need to prove that the child is in need of care and protection, which is unfortunate. The only way you can get around that is if you can get involved

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56 Sec 6(2)(d) of the Children's Act 38 of 2005.

57 Sec 71(2)(a) of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales). Sec 71(2)(b) similarly provides for poverty as a ground.

58 Sec 106 A of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales).

59 CA Marsh et al 'Guilty until proven innocent? – The Assumption of Care of a baby at birth' (2015) 28 *Women and Birth* 65.

60 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (The Royal Commission) *Public hearing 8: The experiences of First Nations people with disability and their families in contact with child protection* 25 November 2020 (2020) <https://disability.royalcommission.gov.au/rounds/public-hearing-8-experiences-first-nations-people-disability-and-their-families-contact-child-protection-systems> (accessed 1 January 2021).

61 *Transcript of proceedings* in the Royal Commission (n 60 above) <https://disability.royalcommission.gov.au/system/files/2020-11/Transcript%20Day%203%20-%20Public%20hearing%208%2C%20Brisbane.pdf> (accessed 1 January 2021).

> early enough to work with the Department and the parents to show that the situation has changed, and that the relevant circumstances have changed so there is no need to lodge a care application. But that rarely happens, so generally what happens is matters go to court and the presumption comes into effect and it is just assumed that this child is in need of care and protection because the first one was.[62]

'Kate', an Aboriginal woman with an intellectual disability (as well as borderline Asperger's and Autism), testified to the Commission about the removal of three of her children, notably regarding her third child who was removed based on the operation of the presumption

> I was going to live with my foster mum and co-parent with her, but they did not even give me that option. They basically came in and ripped him away from me. At birth, like the day after I had my [emergency] caesarean. At that time I could not even walk or you know, get up and actually go and see him. So he was in nursery … And I'm sitting there and I was crying and I'm going 'How can you do this? I have just had an emergency caesarean, like I can't believe this', and like I was so upset that that is what they were doing.[63]

With legal advocacy services through an NGO that specialises in intellectual disability services, the mother was assisted from the early stages of her fourth pregnancy to access intensive support through the state – enabling her to 'keep' and care for her child in the face of the presumption operating against her again.[64] Innovative practices such as the Healthy Start programme show how multi-sectoral cooperation, dedicated training for professionals in child protection, services on how to support a parent with an intellectual disability, and monitoring and evaluation, can all reap benefits.[65] The New South Wales government, after a parliamentary inquiry into existing supports for new parents, signalled its support, in principle, for a number of recommendations – including the need for parenting supports for new parents and adapted parenting programmes, as well as training of child welfare personnel.[66]

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62 *Transcript of proceedings: Testimony of Kenneth Robert Clift* in the Royal Commission (n 60 above) 228.

63 The Royal Commission *Transcript of Proceedings: Testimony of Ms Kate* in the Royal Commission (n 60 above) 209. Her full statement can be found as an exhibit submitted to the Royal Commission *EXHIBIT 8-010 - STAT.0251.0001.0001* <https://disability.royalcommission.gov.au/publications/exhibit-8-010-stat025100010001-statement-kate> (accessed 1 January 2021).

64 The Royal Commission *Exhibit of statement of Julia Wren of Intellectual Disability Rights Service* EXHIBIT 8-012 - STAT.0225.0001.0001 <https://disability.royalcommission.gov.au/system/files/exhibit/STAT.0225.0001.0001.pdf> (accessed 1 January 2021).

65 Australian Supported Parenting Consortium *Final evaluation report of Healthy Start: A national strategy for children of parents with learning difficulties* (2008), cited in Australian Institute of Family Studies *Healthy Start: A national strategy for children of parents with learning difficulties* <http://www3.aifs.gov.au/institute/cafcappp/ppp/profiles/itg_healthy_start.html> (accessed 1 November 2020).

66 Legislative Assembly of New South Wales/Committee on Community Services *Support for new parents and babies in New South Wales* (2018) Report 2/56, Recommendations 14, 15, 31 and 32 <https://www.parliament.nsw.gov.au/ladocs/inquiries/2461/Final%20report%20-%20Support%20for%20new%20parents%20and%20babies%20-%20November%202018.pdf> (accessed 1 November 2020); New South Wales Government Response to the Report of the Committee on Community Services *Support for new parents and babies in New South Wales* (2019) 55-56

The NSW Department of Communities and Justice attested to the number of programmes, assessment tools, practice guides and other documents that are utilised to ensure staff use dignity-enhancing methods when working with parents with intellectual disabilities.[67] The report from the Royal Commission on this topic, once completed, will hopefully provide concrete proposals for law and practice reform to ensure that appropriately supporting parents with intellectual disabilities in exercising their legal capacity, family rights, and access to justice – does not occur only on paper. Much can be learnt from the NSW practices, both government and NGO-driven. However, the legal frameworks offer less comparative potential for South Africa than originally thought, due to the impact of some provisions (such as the operation of the presumption about incapacity due to previous child removals) and the slowness of law reform on legal capacity and support to parents with intellectual disabilities in child protection systems.

7.3.5. Americans with Disabilities Act and state legislation

As early as the late 1970s, the US Supreme Court ruled that parental disability should not be a factor in determining the best interests of the child in care and contact disputes.[68] However, this approach has not been consistently followed by the courts.[69] The United States of America's federal legislation, Americans with Disabilities Act (and the Amendment Act) defines disability as a physical or mental impairment that substantially limits a major life activity, or alternatively having a record of the impairment or being regarded as having the impairment due to actual or perceived physical or mental impairment.[70]

The ADA's Title I and II requires state and local law enforcement and judicial systems to promote equal opportunity for persons with disabilities to participate and

https://www.parliament.nsw.gov.au/ladocs/inquiries/2461/Government%20Response%20-%20Support%20for%20new%20parents%20and%20babies%20in%20NSW.pdf (accessed 1 November 2020).

67 The Royal Commission (n 60 above) *Statement of Michael Couttts-Trotter, Secretary NSW Department of Communities and Justice* <https://disability.royalcommission.gov.au/system/files/2021-01/STAT.0201.0001.0001.pdf> and <https://disability.royalcommission.gov.au/public-hearings/public-hearing-8-day-3> (accessed 1 January 2021).

68 *In re Marriage of Carne*y 598 P2d 36 (Cal 1979) 37-42.

69 US National Council of Disability (NCD) *Rocking the Cradle: Ensuring the rights of Parents with Disabilities and their Children* (2012) 116 <www.ncd.gov> (accessed 12 January 2016). See, also, *Holtz v Holtz* 595 NW2d 1 (ND 1999) para 11 (mother with intellectual disability lost care of child to absent father as she was considered incapable or incompetent and lacked the capacity to 'develop as [her child] grows').

70 Americans with Disabilities Act PPub L No 101-336, 104 Stat. 327 (1990) (USA). ADA Amendment Act of 2008.

benefit from public services (and employment).[71] Title II extends to courts[72] and Title III refers to public accommodations. Courts are not expected to fundamentally alter the nature of the procedures, in order to accommodate the person, and the accommodation is not to pose an undue burden on the judiciary. This of course differs from the requirements of the CRPD (although the US is not a signatory to the treaty), which differentiate between reasonable accommodations (which are limited by defences such as undue burden) versus procedural accommodations, which are not. Individualised treatment of persons with disabilities, in other words by treating each individual person's situation on a case-by-case and on an objective basis), is required by the ADA.[73] Reasonable modifications in the court room are fact-specific and factor in the effectiveness of the accommodation in relation to the nature of the disability and of course the 'cost' to be incurred by the entity.[74] These accommodations extend to physical and communication accessibility measures. The process of determining appropriate accommodations required is considered to be an 'interactive' one, which involves the person requesting the modifications.[75]

In *Tennessee v Lane*, Lane, a wheelchair user, was charged with offences occasioned when he drove with a revoked license and was involved in an accident, during which time he lost his leg. He had to drag himself up the stairs for his first court appearance, and at the second hearing refused to do the same and be carried by officers. He was arrested and jailed for failure to appear before the court. In further hearings, Lane stayed on the ground floor of the county courthouse, while the hearing proceeded without him on the second floor. His attorney walked up and down the stairs during the criminal proceedings, but inevitably his meaningful participation was affected. He was unable to participate in his trial due to lack of physical access to the court room. Together with another applicant, he sued the state for damages due to this failure. The issue then before the US Supreme Court was whether Title II of the ADA is a proper exercise of Congress's power in terms of section 5 of the Fourteenth Amendment and thus also an exercise of Congress's power to abrogate state's

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71 42 U.S.C. §12132 of the ADA: 'No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, and activities of a public entity, or be subjected to discrimination by any such entity.' 42 U.S.C. § 1213 Regulations at 28 C.F.R. Part 35.

72 Title II's application was confirmed in *Tennessee v Lane*. See, also, KK Gould 'And Equal Participation for All ...The Americans with Disabilities Act in the Courtroom' (1993) 8 *Journal of Law & Health* 123 (1993-1994) (discuss ADA accommodations in courts).

73 § 35.130(b); 28 C.F.R. pt. 35, App. B (2018) – the guidelines for the Title II regulation, stating: '[t]aken together, the provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion ... of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not presumptions as to what a class of individuals with disabilities can or cannot do.'

74 *Mary Jo C v New York State & Local Retirement System* 707 F3d 144, 153 (2d Cir. 2013).

75 42 U.S.C. § 12112(b)(5)(A) (2018). *Wright v New York State Department of Corrections* 831 F3d 64, 80 (2d Cir. 2016); *Aponte v Olatoye* 94 N.E3d, 466, 469 (NY 2018) (per Rivera, J).

immunity from suit (under the Eleventh Amendment). In this case, the court elaborated on the rationale of accessible courts:

> Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response."…
>
> This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts.[76]

In a concurring opinion, Justice Ginsburg's description is closer to the notion of substantive equality: that the legislators, in 'shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation'.[77] Justice Ginsburg's concurrence reflects an appreciation of the social model of disability, which involves a 'barrier-lowering' solution to discrimination suffered in accessing courts. Another concurring opinion cites evidence that the judiciary itself has been responsible for the endorsement of discrimination against persons with disabilities.[78] One dissenting opinion focuses more narrowly on the lack of evidence (not merely anecdotal) proffered regarding states' violations of the due process rights of persons with disabilities,[79] while another focuses on the undesirability of a legal test (the congruence and proportionality test).[80]

From pertinent case law, the following aspects have been clarified. State courts are mandated to respond to requests for accommodations and must inform the application of the accommodation in writing of the outcome.[81] The process for requesting accommodations is flexible, in that the request may be directed to the clerk of the court, the judge, a 'case management officer', or mediator.[82] In practice, courts designate an ADA coordinator to receive and manage accommodation requests.[83] In South Africa, case management officers or mediators are not employed as court administrative or judicial staff. The Registrar of the Court or a designated clerk of the

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76 *Tennessee,* opinion by Justice Stevens.

77 *Tennessee,* concurrence by Justice Ginsburg.

78 *Tennessee,* concurrence by Justice Souter, citing *Buck v Bell* 274 U. S. 200 (1927); *State ex rel. Beattie v Board of Education of Antigo* 169 Wis. 231, 232, 172 N. W. 153 (1919); and *Cleburne v Cleburne Living Center Inc.* 473 U. S. 432, 463ñ464 (1985).

79 *Tennessee,* dissent by Chief Justice Rehnquist, and that of Justice Thomas.

80 *Tennessee,* dissent by Justice Scalia.

81 *Biscaro v Stern, California* 181 Cal. App. 4th 702 (2010).

82 *Blackhouse v Doe, Maine SJC* ME 86, 24 A.3d 72 (2011).

83 New York State Unified Court System *How court users can obtain accommodations* (undated) <http://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml> (accessed 30 October 2020); New Jersey Judiciary *The New Jersey Judiciary's Title II ADA Procedures for Access to the Courts by Individuals with Disabilities* (2020) <https://www.njcourts.gov/forms/10775_ada_titleII.pdf> (accessed 30 October 2020).

court may be more apposite to direct the request to, in our context. In the USA, where a witness with a disability appears before the judge and requires accommodation, an inquiry is to be made on the record, and even where the inquiry requires accommodation, that accommodation must be ordered.[84]

Public services are to take steps to provide effective communication in courts, for example. This may require the provision of interpreter or facilitator services, where information processing is 'complex, lengthy or important'.[85] Courts have, since 1994, provided accommodations, often after reaching settlement with aggrieved court users.[86] One such accommodation is the provision of a cognitive facilitator to a witness with an intellectual disability, which the Vermont court found to be an appropriate accommodation:

> There is nothing to prevent a court from qualifying its competency finding and suggesting accommodations that will enable the defendant to better capitalize on his capacity to understand and participate effectively in the proceedings.[87]

Such a facilitator is similar to the communication assistants discussed later on.

Title II of the ADA, as well as section 504 of the Rehabilitation Act of 1973,[88] also extend to child welfare agencies. Accordingly, full and equal access to their services in relation to *inter alia* investigations, witness interviews, assessments, removal of children procedures, reunification services, and court hearings (including proceedings to terminate parental rights), is mandated. For example, individualised assessment must be conducted, even where in emergency investigations, assessments of a child's situation is to be based on facts and objective evidence and not stereotypical notions of parental incapacity of the parent with the disability.[89] Full and equal opportunity to participate is to be ensured, for example through adapting a method of teaching parenting skills (such as a class on feeding and bathing a child) to enable the mother with an intellectual disability to learn the techniques.[90] Technical Assistance

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84 *In re: McDonough* (n 2 above).

85 National Center for State Courts 'Communication accessibility in the courts' (2002) <https://cdm16501.contentdm.oclc.org/digital/collection/accessfair/id/115> (accessed 30 October 2020).

86 National Center for State Courts 'Enforcement activities under the Americans with Disabilities Act Title II: Programs, services and activities of state and local courts, 1994-2004' (2004) <https://cdm16501.contentdm.oclc.org/digital/collection/accessfair/id/66> (accessed 30 October 2020).

87 *State v Cleary* 824 A2d 509 (Vt 2003) para 12.

88 Sec 504 applies to agencies receiving federal assistance in the form of financial subsidies, for example.

89 ADA National Network *Parents with disabilities in child welfare agencies and courts* (2017) <https://adata.org/factsheet/child-welfare> (accessed 30 October 2020).

90 US Department of Health and Human Services and US Department of Justice *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (2015) <https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html> (accessed 30 October 2020).

Guidelines to the ADA were issued to child welfare agencies and courts in 2015. One of the guidelines stipulates that

> To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements of Title II and Section 504 for individuals with disabilities.

When it comes to the family law position in relation to care and contact cases, the parent's disability is a factor considered to be relevant to the best interests inquiry in the statutes of many US states.[91] Powell advocates the use of the ADA, particularly early on in proceedings, to mitigate the ableism involved in court proceedings and parental capacity stereotypes.[92] She urges attorneys to regularly request the accommodations their clients need to enable effective participation in court proceedings.[93] She also cautions that attorneys are also bound to provide accommodations in the legal service they provide to their clients with disabilities - and risk liability under the ADA when they fail to do so.[94]

Taking the cue from these examples, in South Africa, disability-specific legislation (once enacted) should set out the requirement or duty on organs of state (and agencies subsidised by them to perform statutory services) to offer equality enhancing services that promote the participation rights of persons with intellectual (and other) disabilities in social services and court proceedings. This should start with provisions dealing with recognition of legal capacity on an equal basis with others and supports to exercise legal capacity, as well as safeguards.

The Equality Courts under PEPUDA, have the potential to enforce a legal duty on the part of social services to provide adapted support services to persons with disabilities. It is an indirect route, however, and has not yet found application in this context. More apposite would be enactment of disability-specific legislation, like the ADA, and the UK's Equality Act, that places a duty on organs of state, including social services and courts, to provide the relevant supports needed to these families and to contain measures to ensure accountability. More urgent, however, is the enactment of

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91 § 402 of the Uniform Marriage and Divorce Act (federal legislation); M Lanci 'On the child's best interests? Rethinking consideration of physical disability in child custody disputes' (2018) 188 *Columbia Law Review* 875 881; TD Economou 'The plight of the disabled parent in contested child custody cases: Is there federal redress under the Americans with Disabilities Act (Nearly) Twenty-Five Years Hence' (2016) 10 *Charleston Law Review* 71 77.

92 RM Powell 'Family law, parents with disabilities, and the Americans with Disabilities Act' (2019) 57 *Family Law Review* 37.

93 Powell (n 92 above) 47.

94 Powell (n 92 above) 46. See, also, Department of Justice, Settlement Agreement Between the United States of America and Gregg Tirone, Esq., ADA (14 Jan. 2004) <http://www.ada.gov/tirone.htm>; and Model Rules of Professional Conduct R1.3 cmt.1 (American Bar Association, 2015), cited in Powell (n 92 above) 53.

appropriate rules of procedure in courts to enable full participation of persons with disabilities.

7.4. Supports and accommodations, including the social worker's role

7.4.1. Intermediaries and communication assistants for the parent

Specialised court professionals who support the complainant, or witness in communicating their testimony – whether a person with a communication, psychosocial, physical or intellectual disability – have been utilised in *inter alia* the United Kingdom, Northern Ireland and Australia. The emphasis has largely been, historically, to introduce intermediaries for *child* victims of sexual offences or in criminal proceedings, and not for adults with relevant disabilities, and certainly not in civil proceedings. The UN Guidelines for matters involving child witnesses does not directly refer to intermediaries.[95] The Guidelines articulate that the personhood of the child and the individuality of the child are to be embraced in the justice system.[96] These aspects refer to the fact that every child's 'individual needs, wishes and feelings, should be upheld in a caring and sensitive manner' – with due regard for their 'immediate needs, age, gender, mental or moral integrity, disability, and level of maturity.'

The Tasmanian Law Reform Commission explains the nature of challenges with communication that are not readily apparent:

> [I]t can be very difficult to identify and screen for communication difficulties, particularly if they are not immediately apparent, as may be the case with some conditions such as speech and language disorders, working memory difficulties and other masked or misattributed communication problems. In some instances, where suspects appear uncooperative or recalcitrant, it may in fact be that they experience a hidden communication difficulty.[97]

The difficulty in identifying and screening intellectual disability and attendant communication difficulties when social workers and legal professionals interact with the person, can have serious consequences for their participation in the justice system.

In other jurisdictions, intermediaries are usually professionals with specialist training such as occupational therapists, speech therapists, psychologists, and

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95 United Nations *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (2005) ECOSOC Resolution 2005/20 (2005).

96 UN Guidelines (2005) para 10. See, also, R Fambasayi & R Koraan 'Intermediaries and the International Obligation to Protect Child Witnesses in South Africa' (2018) 21 *Potchefstroom Electronic Law Journal* 11.

97 Tasmania Law Reform Institute *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (2016) Issue Paper 16, 1 at 7 <http://www.utas.edu.au/__data/assets/pdf_file/0005/1062599/Intermediaries_Issues-Paper-22.pdf> (accessed 3 April 2019).

teachers.[98] These professionals may have knowledge of the communication strategies and aids that a particular individual may need to effectively communicate.[99]

Special measures to facilitate communication are not merely agreed upon by stakeholders, but must be applied for by the parties.[100] Legislation includes special measures for an intermediary in England and Northern Ireland.[101] The United Kingdom and some Australian states provide guidance to their intermediaries on how best to secure the evidence of vulnerable witnesses.[102] In New South Wales, intermediaries for children are called 'children's champions'.[103] Their role is to facilitate communication of and with the child during the investigatory interview by the police and in the court. These jurisdictions have developed rules and codes of ethics for the intermediaries.[104] Tasmania is considering the introduction of a communication assistant.[105] In these jurisdictions, often the emphasis is not only on the *vulnerability to psychological suffering* that a witness may endure if not allowed to provide evidence through the conduit or relay of an intermediary (as it is in South Africa). Rather the emphasis is on fulfilling the communication needs of the witness to improve the quality of the evidence and to assist in the understanding between the court, prosecutor and defence attorney and witness.

The role of the intermediary involves assessment of the communication needs of a vulnerable witness by the intermediary, and provision of 'practical strategies and recommendations on how to best communicate with the witness so they can

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98 Clause 89(2) of the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (New South Wales).

99 Inns of Court College of Advocacy *Using communication aids in the criminal justice system. Toolkit 14* (2015) <https://www.theadvocatesgateway.org/images/toolkits/14-using-communication-aids-in-the-criminal-justice-system-2015.pdf> (accessed 30 October 2020).

100 The rules for special measures are set out in the United Kingdom's Criminal Procedure Rules of 2015, Part 18.

101 Sec 29 of the Youth Justice and Criminal Evidence Act 1999 (England); art 17 of the Criminal Evidence (Northern Ireland) Order 1999 (CE(NI)O 1999).

102 Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2016) (United Kingdom). The Attorney-General's Department Disability Justice Plan 2014-2017 in Government of South Australia *Supporting vulnerable witnesses in the giving of evidence: Guidelines for securing best evidence* (2018) (Australia) <https://www.agd.sa.gov.au/sites/g/files/net2876/f/djp_guidelines_web.pdf?v=1490763319> (accessed 1 April 2019).

103 New South Wales *Children's Champion: Witness (Intermediary) Procedural Guidance Manual* (2016) <https://www.victimsservices.justice.nsw.gov.au/Documents/child-champ_manual.pdf> (accessed 3 April 2019).

104 See, for example, Supreme Court of Victoria *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearing* (2018) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/criminal-division/multi-jurisdictional-court-guide-for-the> (accessed 3 April 2019). See, also, Office of the Public Advocate *Breaking the cycle: Summary Report* (2012) (Victoria, Australia) <https://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/justice-system/64-breaking-the-cycle-full-report> (accessed 3 April 2019).

105 Tasmanian Law Reform Institute *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (2018) <https://www.utas.edu.au/__data/assets/pdf_file/0011/1061858/Intermediaries-Final-Report.pdf> (accessed 3 April 2019).

understand the questions and provide their best evidence'.[106] The role of the intermediary in jurisdictions such as Victoria extends to advice:

> on the formulation of questions so as to avoid misunderstanding, as they commonly do in other jurisdictions where intermediaries are used in Court. When necessary and as directed by the Court, they actively assist and intervene during questioning. The extent to which they do so (if at all) depends on factors such as the communication needs of the witness, and the skill of counsel in adapting their language and questioning style to meet those needs.[107]

This expanded role clearly extends beyond a mere 'conduit' to remove the potential secondary traumatisation involved in providing evidence in court. In fact, intermediaries are even provided at the statement-taking phase in police stations.[108] The level of expertise and objectivity of the person assisting as intermediary however varies. For example, in Victoria, the programme supports persons with intellectual disabilities and psychosocial illness when interviewed by the police, primarily in criminal cases. This support comes through the training of independent third persons (ITPs) to 'facilitate communication between the person and the police, assist the person to understand their rights, and support the person through the police interview process'.[109] These ITPs are usually volunteers, as they are preferable to family and friends from the perspective of independence, objectivity and familiarity with police procedures.[110] This preference is also because family members or friends may themselves be the subject of criminal investigations. The ITPs are therefore not necessarily intermediaries, but are akin thereto and are limited to the police interview process.

More formal recognition pf intermediaries is granted in England and Wales than in the Victorian example.[111] In the United Kingdom, intermediaries have been recognised since 2004 for facilitating communication with vulnerable witnesses in the criminal justice system through a witness intermediary scheme, originally piloted and formally implemented in 2008.[112] The Ministry of Justice has statutory responsibility for vulnerable witnesses, and under the Witness Intermediary Scheme, the ministry recruits, selects, trains and accredits intermediaries to assist vulnerable witnesses.[113] The role of the intermediary is broader in England and Wales, and the person is understood to be someone

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106 Supreme Court of Victoria (n 104 above) para 22.3.
107 Supreme Court of Victoria (n 104 above) para 22.10. See, also, sec 389I(2) of the Act.
108 Office of the Public Advocate (n 104 above) 6.
109 Office of the Public Advocate (n 104 above) 18.
110 Office of the Public Advocate (n 104 above) 20.
111 The Youth Justice & Criminal Evidence Act 1999. Intermediaries were originally only available to complainants and witnesses, and not defendants. But sec 47 of the Police and Justice Act of 2006 allows evidence by live link, while sec 104 of the Coroners and Justice Act of 2009 will, once enacted, allow vulnerable defendants to provide oral testimony through an intermediary at the criminal trial.
112 United Kingdom Ministry of Justice *The Registered Intermediary Procedural Guidance Manual* (2015) 7 <https://www.theadvocatesgateway.org/images/procedures/registered-intermediary-procedural-guidance-manual.pdf> (accessed 3 April 2019).
113 United Kingdom Ministry of Justice (n 112 above) 7.

> who facilitates two-way communication between the witness and any other participants in the criminal justice process to ensure that communication with the witness is as complete, coherent and accurate as possible. This includes communication at meetings between the witness and the police and/or the [prosecution], in the [evidence] interview, during any identification procedures and during the trial process. It may also include communication at meetings between the defence solicitor and a defence witness.[114]

The intermediary's role is to facilitate the communication needs of the witness, and the person is not a 'supporter, counsellor or legal advisor … expert witness … interpreter'.[115] Factors that impact on the communication of a vulnerable person could be:

> the ability to understand and make sense of words and images, the level of ability to use speech and language to express needs or ideas, age and level of development and physical disabilities. Communication may also be affected by anxiety which may be linked to a number of issues including mental health issues or the trial process or a condition such as autism spectrum disorder.[116]

These factors are usually identified in the assessment of the witness by the intermediary. The assessment of the witness focuses on the determination of the communication needs of the person in relation to giving evidence, and may include determining the following communication capabilities, for example:

> receptive communication (ability to understand language and question forms); expressive language (ability to use language to inform, describe and clarify); ability to refute inaccurate suggestions; ability to shift perspective (comprehension of other people's thoughts and beliefs and feelings); ability to concentrate and attend to tasks, and to manage his/her own arousal and anxiety; use of external aids to support communication, such as drawing and 'cue cards' – this enables a person to effectively learn and practice the communication 'rules' associated with giving evidence such as 'Say if you don't know', 'Say if someone gets it wrong' and 'No guessing'.[117]

The data obtained from the tasks conducted by the professional that informs the recommendation on whether an intermediary is needed in a particular case (and to identify the communication needs of the witness in other jurisdictions), pertain only to that specific recommendation. The data would not form part of the evidence or police docket, as the facts or evidence to be led are not to be discussed during the assessment.[118]

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114 United Kingdom Ministry of Justice (n 112 above) para 3.12.

115 United Kingdom Ministry of Justice (n 112 above) para 3.14.

116 United Kingdom Ministry of Justice (n 112 above) para 20.

117 P Cooper & M Mattison 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model' (2017) 21 *The International Journal of Evidence & Proof* 351 358.

118 In South Africa, the case of *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 SACR 109 (GNP), did not answer the question of whether the communications between the complainant and intermediary during the assessment were protected by professional privilege – but did at least hold that the 'raw data' used to compile the report were not part of the police docket. Such a conundrum can be avoided where practice rules are developed to ensure the facts and evidence are not discussed in the assessment, but rather the needs of the witness in order to provide best evidence (as is done in other jurisdictions). Bekink stresses the privacy element

Most jurisdictions retain the discretion for the presiding officer to ensure a fair trial, which may require reasonable adaptations to the trial process to allow meaningful participation by a defendant with communication or other impairments.[119] One cannot shy away from the fact that the South African legislature, when introducing intermediary recognition in criminal proceedings, aimed this intervention at protecting the witness from undue secondary traumatisation which requires deviation from the usual rules of evidence (as discussed in chapter 5). However, in other jurisdictions, the communication needs of the witness are the main reason for alternative measures of securing the witness's evidence and not the avoidance of secondary trauma.

Accessibility of the court procedure and the need for procedural accommodation is therefore met when the communication needs of the witness are being attended to. Once the intermediary is formally appointed,[120] the first step is the assessment of the person's communication needs (whether he or she has a communication, sensory, intellectual or psychosocial impairment, or if it is age-related, e.g. children). Determining the witness's communication abilities and needs is done through the assessment by the intermediary, in order to indicate 'whether or not the witness has demonstrated the ability to communicate their evidence and if so how', and 'whether the use of an [intermediary] is likely to improve the quality (completeness, coherence and accuracy) of the witness's evidence'. This assessment will allow the intermediary to provide advice to the justice professionals on 'the most effective way of communicating questions to the witness'. This may require the intermediary to also 'make recommendations as to special measures and other adjustments to enable the most effective communication with the witness.'[121] This activist role is a deviation from intermediaries for child witnesses in South Africa.

In some jurisdictions, before the trial commences, a ground rules hearing is called to discuss and agree on the ground rules for the questioning of the witness – with his or her individual communication needs in mind. This hearing is held, even where an intermediary is not appointed but advocacy needs to be adapted to take into account the witness's communication needs.[122] At this hearing, the court may make or vary directions for the conduct of the proceedings to allow these communication needs to be met.[123] The presiding officer is therefore in charge of the proceedings at all times and can ensure that the requests to accommodate the communication needs of the witness are reasonable. Even where an intermediary is not appointed, but evidence

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attached to the communication and that the discussions in the assessment may be unrelated to the case. M Bekink '*Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 SACR109 (GNP): Intermediary Appointment Reports and a Child's Right to Privacy Versus the Right of an Accused to Access Information' (2017) 20 *Potchefstroom Electronic Law Journal* 12.

119 *R v Anthony Cox* [2012] EWCA Crim 549.

120 Appointment is regulated, for example Form 6-1D – General Application of the *Supreme Court (Criminal Procedure) Rules 2017 (Victoria)*.

121 United Kingdom Ministry of Justice (n 112 above) para 3.32.

122 Sec 389C(1) of the *Criminal Procedure Act 2009* (Victoria).

123 Supreme Court of Victoria (n 104 above) para 23.3.

shows that a vulnerable witness may require some accommodations in the leading of evidence and cross-examination, the presiding officer may provide directions in a ground rules hearing as to the details of such accommodations.[124] Usually the hearing is scheduled at least a day before a witness is to provide testimony – to allow adaptations to questions and to have other accommodations put in place.[125] The intermediary identifies the individualised plan and discusses with the presiding officer and legal representatives how he or she will intervene during cross-examination, if and when relevant.[126]

Importantly, intermediaries are not responsible for determining the competence of a witness. The determination of competence is still a legal test. This being so, nonetheless, competency is not determined in relation to the diagnosis of the witness, but in relation to the statutory criteria – as fulfilled by the individual witness:

> The question [of competence] is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Whenever the competency question is addressed, what is required is not the exercise of a discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria.[127]

However, adaptations to advocacy style are necessary, which heralds a departure from usual adversarial training and trial advocacy, and these accommodations enhance competence to testify without detracting from the fairness of the trial:

> The competency test is not failed because the forensic techniques of the advocate or the processes of the court have to be adapted to enable the witness to give their best evidence of which he or she is capable.[128]

> It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round.[129]

These adapted techniques are already mooted in the Children's Act for vulnerable witnesses such as children in South Africa, although it is not yet used, because enabling regulations have still not been promulgated.

Cooper and Mattison compared the intermediary system, modelled on the English system, as applied in England, New South Wales and Northern Ireland.[130] It bears

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124 Supreme Court of Victoria (n 104 above) para 16.4.

125 Supreme Court of Victoria (n 104 above) para 16.5 – Section 389C(1) of the *Criminal Procedure Act* 2009 (Victoria).

126 P Cooper, P Backen & R Marchant 'Getting to grips with Ground Rules Hearings – A checklist for judges, advocates and intermediaries' (2015) 6 *Criminal Law Review* 417.

127 *R v Barker* [2010] EWCA Crim 4.

128 The Court of Appeal in *R v F* [2013] EWCA Crim 424.

129 *R v Lubemba* [2014] EWCA Crim 2064.

130 Cooper & Mattison (n 117 above) 351.

repeating that the English version of intermediaries, unlike the South African version, is not a conduit but a trained facilitator who facilitates

> communication by supporting professionals to communicate with the witness … advise the questioners (police and advocates) and only intervene if miscommunication occurred … make recommendations about special measures and other adjustments which could enhance communication with the vulnerable witness.[131]

The Northern Ireland version is also available to vulnerable accused persons, and not just witnesses.[132] The New South Wales version is only available to child witnesses.[133] Cooper and Mattison explain that the ministries of justice in all three jurisdictions set in place a referral system whereby intermediaries are matched with witnesses, depending on the skillset required to match the communication needs and the geographical availability of the intermediary.[134] In these jurisdictions, the implementation of the intermediary as a measure to enhance communication differs on the basis of *inter alia* eligibility criteria and the guidance for legal professionals interviewing vulnerable witnesses.[135]

Eligibility is therefore a distinguishing factor: age or incapacity determines a person's eligibility for an intermediary.[136] Incapacity refers to a person with a 'mental disorder' within the meaning of the Mental Health Act 1983 (England or Wales) or the Mental Health Order 1986 (Northern Ireland), or who has a 'significant impairment of intelligence and social functioning' or 'a physical disability or is suffering from a physical disorder' that will impact on the quality of the evidence.[137] The eligibility for a protective measure such as an intermediary should ideally be premised on the peculiar needs of the witness (what has been termed 'vulnerability'). Eligibility should not be limited to characteristics such as age and psychological factors and the role of that person within the justice system – as victim, witness, or accused person.[138]

For parents in neglect proceedings several factors point to the need to implement protective measures such as intermediaries to allow best evidence to be presented, and to allow them to refute evidence where relevant. Factors that compound the stigma they experience include the allegation that they are responsible for neglecting their children, akin to allegations levelled at accused in criminal proceedings. Their disability is another factor which creates barriers to full participation in the court proceedings. The challenge is that factors that heighten vulnerability such as psychosocial illness and intellectual impairment are usually 'hidden' and not easily

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131 Cooper & Mattison (n 117 above) 353, citing Office for Criminal Justice Reform (2005) 13.
132 Arts 4 and 21BA of the Criminal Evidence Order 1999 (Northern Ireland).
133 The Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015.
134 Cooper & Mattison (n 117 above) 257.
135 Cooper & Mattison (n 117 above) 261.
136 Sec 16 of the Youth Justice and Criminal Evidence Act 1999 (England and Wales); art 4 of the Criminal Evidence (Northern Ireland) Order 1999.
137 Cooper & Mattison (n 117 above) 360.
138 Cooper & Mattison (n 117 above) 361.

identifiable by professionals such as police, social workers or even magistrates.[139] Awareness of factors that may help identify persons that are vulnerable and therefore in need of protective measures for their communication to be facilitated in order to enhance their participation in court proceedings, is needed in the South African context.

For intermediaries to assist vulnerable adults – including in the civil system – with an extended role that goes beyond mitigating undue stress and trauma to ensure that best evidence is obtained or communication barriers are overcome, existing challenges in the intermediary system must be addressed. These challenges include inadequate training and issues with recruitment and retainment of intermediaries.[140] Practice rules from other jurisdictions that apply to the criminal justice system cannot be imported, without adjustment, into the civil system, and in particular the Children's Court, which is an inquisitorial system. The relevant matching of intermediary expertise and qualifications with the particular communication needs of the witness (autism spectrum, dyspraxia, intellectual disability or psychosocial illness, for example) is more challenging in the South African context due to the shortage of medical and other relevant professionals.[141] Professionals in Australia identified a similar concern – that the level of qualifications and training of intermediaries expected, if used for communication purposes, would be expensive and tough to maintain.[142] Alternatives to introducing intermediaries with the expanded communication role have been suggested in Australia, such as improving interviewing techniques of legal representatives (and by corollary of presiding officers in civil proceedings that are inquisitorial in nature) – to ensure better communication and that best evidence is elicited.[143]

In the USA, a liaison or 'informed assistant' is suggested with a role similar to a communication assistant, for person with intellectual disabilities in the criminal courts, in order to enhance their communication.[144]

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139 Cooper & Mattison (n 117 above) 364.

140 CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251.

141 MB Powell et al 'Stakeholders' perceptions of the benefit of introducing an Australian intermediary system for vulnerable witnesses' (2014) 48 *Australian & New Zealand Journal of Criminology* 498 501.

142 Powell et al (n 141 above) 507.

143 Powell et al (n 141 above) 510. See, also, P Cooper et al 'One step forward and two steps back? The '20 principles' for questioning vulnerable witnesses and the lack of an evidence-based approach' (2018) 22 *The International Journal of Evidence & Proof* 392.

144 ME Wood et al 'Reasonable accommodations for meeting the unique needs of defendants with intellectual disability' (2019) 47 *Journal of the American Academy of Psychiatry and the Law* 8 19. See, also, BW Wall et al 'Restoration of competency to stand trial: A training program for persons with mental retardation' (2003) 31 *Journal of the American Academy of Psychiatry and the Law* 189; and The Arc's National Center on Criminal Justice and Disability *Competency of Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System: A Call to Action for the Criminal Justice Community.* Washington, DC: The Arc (2017).

Cooper and Mattison argue that barriers in communication negatively affect not only the witness's experience, but also 'the fairness of the outcome and other people's perceptions of the fairness of the system'.[145] In the Children's Court proceedings, the outcome of one miscommunication can impact on the determination of a child's care, not just in the short-term, but also in the long-term – impacting on the life of the child and the parent. Intermediary provision, generally, remains the purview of criminal law.[146]

Intermediary provision in South Africa, in the form of communication assistants, is a potential method to attend to communication challenges faced by persons with a variety of disabilities, including intellectual disabilities. The slow uptake of intermediary services in Children's Courts for children, however, shows that it may require a cultural shift to ensure that these professionals are used. The Children's Act (section 61(1)) would need to be amended to reflect the changed beneficiary eligible for this measure (adults). It also needs to reflect the changed purpose (not in a person's 'best interests' or for the purpose of avoiding secondary victimisation, but rather to adduce best evidence where a person experiences communication challenges). Procedural steps may need to be set out in the regulations to the Children's Act, such as the role of the intermediary, including an assessment of the person, as well as identifying procedural accommodations that may be needed for facilitating their testimony. Furthermore, a ground rules hearing should be scheduled, even where legal representation is absent, to enable the magistrate to understand what would be appropriate adaptations to questioning for the particular witness. Should intermediary provision be deemed to be too costly for parliament, then training of magistrates and attorneys in AQTs should be prioritised as a secondary measure.

7.4.2. Evidential adaptation and relevance (appropriate assessment)

There are no guidelines from practice, nor from legislation and policy, on how magistrates should go about deciding whether a parent has the requisite capacity to adequately care for a child in South Africa. The process in the Children's Court relies on the evidence provided by the social worker in his or her report to the court, together with supporting evidence such as a psychologist's or psychiatrist's report. Chapter 6 showed that expert reports such as parenting capacity assessments (PCAs) or other evaluations are rarely obtained in these child care proceedings. The reliance on IQ

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145 Cooper & Mattison (n 117 above) 364.

146 Republic of Kenya *The Judiciary, Criminal Procedure Bench Book* (2018) paras 99ff, 97, cited in E Flynn, C Moloney, J Fiala-Butora & IV Echevarria Access to Justice of Persons with Disabilities (2019) Centre for Disability Law and Policy 28 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiayK-PneDuAhVdUBUIHXitDRsQFjAGegQIDhAC&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FDisability%2FSR_Disability%2FGoodPractices%2FCDLP-Finalreport-Access2JusticePWD.docx&usg=AOvVaw1wPGigz_SVmoBohQNzvG4w> (accessed 1 January 2021).

tests as a determinant of parenting ability has not occurred in South Africa, unlike in other jurisdictions. The potential role for an intermediary to assist a parent with an intellectual disability to present their evidence to the court, was identified above. The evidence obtained, however, commences earlier in the process – with the social worker's investigation. Considering that adaptations to obtaining evidence (how social workers go about interviewing parents with intellectual disabilities) and what constitutes evidence of parental capacity is lacking in the South African context, regard should be had for the situation in other jurisdictions, such as the United States of America (USA).

The heavy reliance of judges on evaluations in the USA can reinforce existing biases of professionals conducting assessments: '[Health professionals conducting assessments] may harbor their own stereotypes about people with disabilities. These stereotypes may reinforce those that judges ... bring to the table, thereby replacing meaningful individualized inquiry with class-based declarations.'[147]

The American Bar Association (ABA) issued a resolution that states should not remove children or terminate parental rights on the basis of a parent disability unless it can be shown 'supported by clear and convincing evidence – that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, or other reasonable modifications'.[148] Francis reports that the resolution was used to bring about change in South Carolina's legislative protection.[149] However, even this novel resolution places emphasis on the disability of the parent. Instead, Leslie argues that the harm or risk of harm to the child should be cited as the ground for consideration, not the disability as a 'casual explanation for the likelihood of harm'.[150]

The US government's National Council on Disability (NCD) drafted a model law to preserve families that include a parent with a disability, as well as a proposed amendment to the ADA to ensure the rights of these parents in their report *Rocking the Cradle: Ensuring the rights of Parents with Disabilities and their Children*.[151] These draft laws are based on the NCD's comprehensive review of the barriers persons with disabilities face when exercising their right to create and maintain families. It describes

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147 JB Kay 'Representing parents with disabilities in child protection proceedings' (2009) 13 *Michigan Child Welfare Law Journal* 27 33. See, also, AS Geva 'Judicial determination of child custody when a parent is mentally ill: A little bit of law, a little bit of pop psychology, and a little bit of common sense' (2012) 16 *UC Davis Journal of Juvenile Law and Policy* 47.

148 ABA *Resolution 114* (2017) <https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/disabled-parents-and-custody--visitation--and-termination-of-par/> (accessed 29 October 2020).

149 Francis (n 4 above) 22, citing John D. Elliott, Testimony for the Hearing on behalf of ABA on House Bill 3538 (2 March 2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017mar2_SChearingonHR3538_t.authcheckdam.pdf> (accessed 30 October 2020).

150 Francis (n 4 above) 23.

151 NCD (n 69 above) 369-374 and 375-381, respectively.

the persistent, systemic and pervasive discrimination against these parents and analyses how US disability law[152] and policy apply to persons with disabilities within the child welfare and family law systems, as well as the disparate treatment of these parents and their children. The report sets out 20 major findings and several concrete recommendations aimed at ensuring that persons with disabilities are able to exercise their right to create and maintain families.[153]

The NCD found that persons with disabilities in family courts often encounter face 'evidence regarding their parental fitness, which is developed using inappropriate and unadapted parenting assessments.'[154] The NCD found that this unbalanced evidentiary burden is exacerbated by the lack of resources to provide 'adapted services and adaptive parenting equipment, and to teach adapted parenting techniques.' The NCD recommended that legislation, rules of court, and professional standards, must require those tasked with assessing parental capacity or a child's circumstances to thoroughly investigate whether they comply with: a) disability-sensitive assessment guidelines, and b) the 'need to modify the evaluation process or incorporate parenting adaptions' to provide more 'valid, reliable assessment of a parent's capacities.'[155] These standards should 'require explicit evidentiary support for statements' made 'about a parent's capacity and prohibit the use of speculation and global diagnostic or disability labels,' as grounds for intervention.[156] For parents with intellectual disabilities, assessors must use the tools developed to assess their capabilities and needs, and should include existing and natural supports in the assessment.[157]

The use of adapted parenting capacity assessments is recommended by Powell and Rubinstein.[158] They put forward that the evaluator should be trained in working with parents with disabilities. The authors assert that assessment should be fully accessible and set out the use of the adapted parenting equipment and strategies and support services required. Lightfoot et al also stress the need for requisite expertise in parenting with a disability, and the skills required to parent and the need for accommodations of disability.[159] The particular context of parenting, in light of

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152 The Rehabilitation Act of 1973, the Americans with Disabilities Act PPub L No 101-336, 104 Stat. 327 (1990).

153 NCD (n 69 above) 305-331.

154 n 69 above, 311.

155 n 69 above, 312.

156 As above.

157 As above.

158 RM Powell & J Rubinstein *Supporting legislation to protect the rights of parents with disabilities and their children: Toolkit for legislators* (2020) Waltham, MA: Brandeis University. <https://heller.brandeis.edu/parents-with-disabilities/pdfs/legislative-toolkit-legislators.pdf> (accessed 1 October 2020).

159 E Lightfoot et al *Guide for creative legislative change: Disability status in termination of parental rights and other child custody statutes* (2007) 4 Minneapolis: University of Minnesota <https://cascw.umn.edu/wp-content/uploads/2013/12/LegislativeChange.pdf> (accessed 1 October 2020).

accommodations, is appropriate to measure parenting ability, and this requires expertise.

The American Psychological Association (APA) issued guidelines for adapted assessments.[160] These guidelines encourage disability-sensitive approaches to clients with disabilities, but also appropriate and accommodative assessment and intervention measures and protocols. The guidelines receive their impetus from core values from the APA's *Ethical Principles of Psychologists and Code of Conduct* adopted in 2003, and amended in 2016 – namely justice and respect for rights and dignity.[161]

Five guidelines focus on assessment:

> Guideline 13: In assessing persons with disabilities, psychologists strive to consider disability as a dimension of diversity together with other individual and contextual dimensions
> Guideline 14: Depending on the context and goals of assessment and testing, psychologists strive to apply the assessment approach that is most psychometrically sound, fair, comprehensive, and appropriate for clients with disabilities
> Guideline 15: Psychologists strive to determine whether accommodations are appropriate for clients to yield a valid test score
> Guideline 16: Consistent with the goals of the assessment and disability-related barriers to assessment, psychologists in clinical settings strive to appropriately balance quantitative, qualitative, and ecological perspectives, and articulate both the strengths and limitations of assessment
> Guideline 17: Psychologists in clinical settings strive to maximize fairness and relevance in interpreting assessment of data of clients who have disabilities by applying approaches which reduce potential bias and balance and integrate data from multiple sources.

Of note from these guidelines is the requirement to determine what accommodations are needed in the assessment process (guideline 15), as well as a requirement for the provision of an accessible environment to access psychological services – including in relation to communication (guideline 5).[162] Furthermore, note the acknowledgement that bias may be embedded in assessment approaches, and that assessment may have limitations (guideline 17).

What is more, the guidelines also promote culturally appropriate sensitisation to disability. For example: guideline 1 requires that 'Psychologists strive to learn about various disability paradigms and models and their implications for service provision'; guideline 2: 'Psychologists strive to examine their beliefs and emotional reactions toward various disabilities and determine how these might influence their work'; and guideline 10: 'Psychologists strive to recognize that families of individuals with

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160 APA *Guidelines for assessment of and intervention with persons with disabilities* (2011) <https://www.apa.org/pi/disability/resources/assessment-disabilities> (accessed 30 October 2020).

161 Principles D and E of the APA *Ethical Principles of Psychologists and Code of Conduct* (2002, updated in 2016, effective 2017) <https://www.apa.org/ethics/code/ethics-code-2017.pdf> (accessed 30 October 2020).

162 Guideline 5: 'Psychologists strive to provide a barrier-free physical and communication environment in which clients with disabilities may access psychological services.'

disabilities have strengths and challenges.' Quite helpfully, the APA sets out how the different models translate for psychological services. It explains how the social model can work in practice: 'In this model, a psychologist can facilitate a client's positive disability identity and self-advocacy skills, or consult with others to ensure that the client has adequate accommodations, opportunities for participation, and a voice in decision making.'[163] The forensic model of disability focuses on legal concepts and not the individual experiences of the person with the disability. Its aim is to obtain objective proof of impairment and disability and to ascertain the 'honesty and motivation of individuals seeking recognition, benefits or compensation for disability'. The APA also explains the WHO's *International Classification of Functioning, Disability and Health (ICF)* model of disability, which is a hybrid approach integrating medical, social and functional dimensions. The ICF assessment model for interventions to the individual and social spheres is explained. The guideline on recognition of parents' strengths and challenges is very important in relation to not over-emphasising risk factors over strength factors.

The APA's refreshingly objective approach in its guidelines departs from diagnostic-prognostic thinking and over reliance on the validity of assessments, and promotes an approach cognisant of potential personal and assessment bias. Recall the discussion on ethical principles discussed in chapter 5 for psychologists. Social workers could also benefit from similar guidelines to the APA's guidelines to ensure their investigation and assessments are appropriate in the disability context and are not discriminatory. Psychologists are also expected to be familiar with American laws that support and protect persons with disabilities.[164] In the UK, guidelines have also been formulated for clinical psychologists.[165]

In the South African context, authors have proposed an active role for psychiatrists and other professionals such as occupational therapists, in advocating for the rights of persons with disabilities in the employment context. This includes in relation to legal knowledge and reasonable accommodations they may need to effectively participate in the workplace.[166]

Lightfoot et al explain that the investigation preceding the court proceedings is the beginning of discriminatory treatment. Accordingly, specialised protocols for investigations of a person with a disability are needed. Here, risk assessments as well

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163 APA (n 160 above).

164 Guideline 4: 'Psychologists strive to learn about federal and state laws that support and protect people with disabilities.'

165 British Psychological Society *Clinical Psychologists when Assessing Parents with Learning Disabilities* (2011) <https://www.bps.org.uk/sites/www.bps.org.uk/files/Member%20Networks/Faculties/Intellectual%20Disabilities/Good%20Practice%20Guidelines%20for%20Clinical%20Psychologists%20when%20assessing%20Parents%20with%20Learning%20Disabilities%20%282011%29.pdf> (accessed 1 October 2020)." WTPN *Parenting Assessments for Parents with Learning Difficulties*.

166 L Van Niekerk et al 'Conceptualising disability: Health and legal perspectives related to psychosocial disability and work' (2020) 13 *South African Journal of Bioethics and Law* 43 49.

as the conduct of the interview should be focused on the person's behaviour, and not their condition. Chapter 6 highlighted the possibility for social work investigations to focus on the disability of the parent, rather than their behaviour. Accordingly, specialised protocols for investigation are needed. Lightfoot et al recommend that legislation stipulates that: 'Investigations of child maltreatment cases involving people with disabilities shall use a protocol that has been modified based on the individual with disabilities' abilities.'[167]

Suitable direction from other jurisdictions on how to adapt assessment, is therefore available to South Africa to ensure that assessments provided by psychologists, social workers and other professionals does not inadvertently discriminate against persons with disabilities and intellectual disabilities, in particular. Appropriate assessments, where required in neglect cases, should be obtained in all cases, not only in cases where the parent has a disability. Requiring evidence of parental incapacity in itself is not the problem, the challenge is where unadapted assessments pre-judge persons with disabilities as incapable of being good parents. The reinforcement of disability prejudice is ever present in the formulation of assessments, as are prejudices against single parent households, for example. That does not mean that the assessments lose their value from an evidential perspective. Rather, what that means is that social workers, psychologists and other relevant professionals as well as magistrates (and lawyers) need training on what appropriate assessments are in relation to adaptability for persons with disabilities and in relation to removing embedded disability prejudice, whether stated or unstated. The current situation is that parenting capacity assessments are not utilised for parents without disabilities as a routine practice either. Singling out parents with disabilities as requiring to undergo such assessments, and not their non-disabled counterparts is discriminatory.

Parenting capacity assessments are, of course, blunt instruments and on their own not flawless predictors of parenting ability. Lindstrom and Choate question the validity of these tools considering the historical Colonial and current use of these instruments on aboriginal parents in Canada.[168] Similarly, the unquestioning reliance on parenting capacity assessments that rely on ableist stereotypes of parenting would be problematic and discriminatory in the context of parents with disabilities. In another commentary, Choate et al recommend that the Euro-centric bias about family and good parenting is unmasked and that professionals involved in child protection reflect on their 'knowledge, beliefs and values' determine what expectations are placed on parents and also to consider how the best interests of a child is considered from the

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167 Lightfoot et al (n 159 above) 5.

168 G Lindstrom & PW Choate 'Nistawatsiman: Rethinking Assessment of Aboriginal Parents for Child Welfare Following the Truth and Reconciliation Commission' (2017) 11(2) *First Peoples Child & Family Review* 45-59.

'Indigenous worldviews'.[169] Similarly, considering how the best interest of a child is observed from the worldview of a parent with a disability, including those operating within kinship care frameworks or where outside of this African kinship form, within smaller family unit or as single parents is needed to dismantle ableist bias embedded in parenting capacity assessment, including in relation to cultural aspects of parenting that my differ from that of the social worker, assessor or presiding officer involved.

Curtis, in the Canadian context as well, argues that judges are essentially gatekeepers for the 'qualifications of and the quality of assessors' as the assessors (whether a social worker, psychologist or psychiatrist or similar professional) are unregulated.[170] Further, Curtis, a former family law judge, posits that judges should be examining the assessment process critically to determine validity and reliability of the opinion officered and should be familiar with the testing process and the fact that the clinical observations of the assessor is opinion, not scientific fact.[171] Once the assessment is determined to be admissible, he argues, the next question is the weight to be attached to that particular evidence. While it may be relevant and admissible, the judge may discount the expert evidence if there are flaws or gaps where the testing does not align with the opinion, for example. The opinion of the assessor, is just that, an opinion.

Curtis warns against the overreliance on assessments in Canada in child protection cases with disastrous consequences for the families concerned.[172] In South Africa, however, parenting capacity assessments in child protection matters are hardly ever utilised as evident from the cases reviewed in this study on the two Children's Courts in KwaZulu-Natal. Where they are utilised, the question is then whether they are relied on uncritically by the presiding officer? Curtis' analysis of the entire assessment process is useful and could be adapted for South African judicial and magisterial training purposes. The article contains a practical appendix of critical questions that can guide the presiding officer in unpacking the admissibility and weight of the assessment reports.[173] Not only are parenting capacity assessments not generally utilised in South Africa, but where they are, experts are not cross-examined on its contents, as evident from the cases reviewed in this study on the two Children's Courts in KwaZulu-Natal. The role of the presiding officer, Curtis, warns, is more acute where the parents are unrepresented, particularly in relation to such evidence as the parents may not understand the import of the evidence. Curtis, however, also explains that even in cases where the parent is legally represented, the presiding officer's

169 P Choate, R Bear Chief, D Lindstrom, B CrazyBull 'Sustaining Cultural Genocide—A Look at Indigenous Children in Non-Indigenous Placement and the Place of Judicial Decision Making—A Canadian Example' (2021) 10(3) *Laws* 59 https://doi.org/10.3390/laws10030059

170 C Curtis 'Limits of Parenting Capacity Assessments in Child Protection Cases' (2009) 28 *Canadian Family Law Quarterly* 1 16.

171 Curtis (n 170 above) 10.

172 Curtis (n 170 above) 5.

173 Curtis (n 170 above) 18-23.

critical role is imperative as the assessor is the 'court's expert' and not that of the parties.[174]

Parenting capacity assessments, it is submitted, remain useful as a tool that should force the professional to engage what support measures parents may need to fulfil their parenting responsibilities, including parents with disabilities. However, the presiding officer's role as gatekeeper requires adept critical evaluative skills to ensure that the assessment is fair, valid, reliable, admissible, and that the weight attached thereto is appropriate. Since most parties in the Children's Courts are currently unrepresented, the court's active role in evaluating the assessment process is even more vital. Moreover, where the parent has an intellectual disability, the presiding officer has to ensure that the parent consented to the assessment, understands the process and content of the assessment. Further research into the utility of parenting capacity assessments in the South African context of family law proceedings is needed.

7.4.3. Appropriately adapted social services and support to parents

Only the state of Michigan has thus far found that the ADA's Title II applies to parental termination decisions. Title II provides that 'no qualified individual with a disability' shall be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by any such entity' – 'by reason of the disability'.[175] In one case, the services recommended to a mother with an intellectual disability to allow her to benefit from a reunification plan, were not received by her.[176] The termination of her parental rights was therefore deemed premature without reasonable accommodated services being offered to her. The court held that the child welfare agency has a duty to provide reasonable accommodations, once it is aware that a person has a disability.

There is hope in the legislative sphere from South Carolina. Section 63-21-20 of the South Carolina Persons with Disabilities Right to Parent Act provides for the requirement of provision of reasonable accommodations in services rendered to parents with disabilities:

> The department, family court, probate court, and any other covered entity shall comply with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Fourteenth Amendment, before taking any action pursuant to Chapters 7, 9, or 15, Title 63, or Title 62 that could impact the parental rights of a person with a disability.
> (B)(1) The department shall, consistent with its purposes as mandated in Section 63-7-10:
> (a) make reasonable efforts, that are individualized and based upon a parent's or legal guardian's specific disability, to avoid removal of a child from the home of a parent or legal guardian with a disability, including referrals for access to adaptive parenting equipment, referrals for instruction on adaptive parenting techniques, and reasonable accommodations with regard to accessing services that are otherwise made available to a parent or legal guardian who does not have a disability;

174 Curtis (n 170 above) 12.
175 42 U.S.C. § 12132 (2018).
176 *In re Hicks/Brown* 89 NW2d 637 (Mich 2017).

(b) make reasonable accommodations to a parent or legal guardian with a disability as part of placement and visitation decisions; preventive, maintenance, and reunification services; and evaluations or assessments of parenting capacity.
(2) The department, and any other covered entity, must not deny reunification services to a parent or legal guardian with a disability solely on the basis of the disability.
(C) If any party to the proceedings alleges that the parent or legal guardian has a disability that affects the parent's ability to fulfil parent responsibilities, the family court shall determine and include as findings in the probable cause order:
(1) the nature of the parent's or legal guardian's disability, if any, that affects the parent's ability to fulfill parent responsibilities;
(2) the reasonable efforts made by the department to avoid removal of the child from the parent or legal guardian, including reasonable efforts made to address the parenting limitations caused by the disability; and
(3) reasonable accommodations the department, and any other covered entity, shall make to provide the parent or legal guardian with the opportunity to participate fully in the child protection proceedings throughout the duration of the case. [177]

Building on the success of the South Carolina legislation, Powell and Rubinstein's toolkit for legislators recommends that legislation promoting the rights of parents with disabilities, including intellectual disabilities, define adaptive parenting equipment, strategies and supportive services.[178] For example, parental supports can be understood to be a range of services that allow the parents to ameliorate aspects that impact on their parenting responsibilities – such as activities of daily living. Lightfoot et al, in their guide for legislative change, suggest that parental supports are offered, and defined as including the following

> Parents may need human support in Activities of Daily Living (ADLs) such as dressing, bathing, walking, transferring, feeding, toileting; Instrumental Activities of Daily Living (IADLs) such as meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone and other media, and getting around and participating in the community; education and training to help develop parenting skills; and parenting activities such as parental care and supervision, subsistence, medical or other care or supervision necessary for child well-being. [179]

Parental Supports may include day-care services, respite care and informal support networks from faith-based organisations or community members such as neighbours, child care assistants or personal assistants and supported housing.[180]

Modifications to social services rendered to a parent with a disability may include: increased 'repetition of information and training'; modified 'counselling/parenting skills training to provide more concrete hands-on instruction in a natural environment'; provision of 'in-home parent modelling'; linking the parent with 'a co-parent or mentor'; and tailoring the 'parenting education to the needs of the parent'.[181] The norms and standards on early intervention and prevention programmes under the Children's Act contain some of these examples. However, these are not adapted for parents with disabilities.

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177 South Carolina Children's Code Chapter 21, 2018, South Carolina Code of Laws Title 63.
178 Powell & Rubinstein (n 158 above).
179 Lightfoot et al (n 159 above).
180 n 159 above, 10.
181 As above.

The UK provides for dedicated services to parents under the Care Act of 2014 and its regulations. It requires an assessment of the parents' needs for support and provision for eligible parents on receiving such assistance – subject to available resources. In *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* the court highlighted the meaning of 'parenting with support' as follows

> The concept of "parenting with support" must underpin the way in which courts and professionals approach wherever possible parents with learning difficulties. Courts must be aware of the distinction between direct and indirect discrimination. Careful consideration must be given to the assessment phase and in the application of the threshold test. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. Joint training needed for adult and children's services.[182]

Tarleton and Turney, in an evaluation of supports offered to parents with intellectual disabilities, posit that long-term support may be needed.[183] The social work participants in that study identified that neglect of the children was generally due to a lack of knowledge of the child's specific needs, which could be remedied through provision of support. Norms and standards on service provision and supports for persons with disabilities are needed in the South African context including in relation to peer support.

7.5. The lawyers' role

7.5.1. Legal representation for the parent

Some jurisdictions provide legal aid to persons with disabilities, while others recognise that not only is legal representation needed, but also support for persons who can help the person with the intellectual disability to understand the proceedings and instruct their counsel effectively. Importantly, the role of the legal representative is not solely appreciated as that of legal adviser and representative, but also as an advocate in relation to provision of reasonable and procedural accommodations:

> Lawyers may assist in explaining the court processes in clear terms, identifying disabilities, advising the court of appropriate adjustments, assistance to read documents, and protecting rights.
>
> Some lawyers may be inexperienced in assisting people with a disability and therefore fail to take adequate instructions and identify requirements. Judicial officers should look for signs of disconnectedness between a lawyer and client, and may stand down or adjourn a hearing to allow the lawyer and client to communicate effectively and confidentially.
>
> With the consent of their client, lawyers should make the court aware of any adjustments required for clients with disabilities at the earliest possible time. Ideally, this should occur before a hearing

182 [2006] NIFam 8.

183 B Tarleton & D Turney 'Understanding 'successful practice/s' with parents with learning difficulties when there are concerns about child neglect: the contribution of Social Practice Theory' (2020) 13 *Child Indicators Research* 387.

> … However, fluctuating disabilities mean that a lawyer may need to raise adjustment issues at any stage of a hearing, even after thorough planning.[184]

In the USA, persons with disabilities in family courts encounter major barriers to obtaining 'effective and affordable legal representation'.[185] The NCD found that attorneys who represent these parents often fail to represent their interests, and may 'harbour stereotypes about the parents that can reinforce the impression that their cases are unwinnable.' They may also 'fail to understand the implications of the Americans with Disabilities Act' for their clients in those cases.[186] The NCD recommended agencies should protect and advocate for these parents' rights, and to provide adequate funding for such measures.

In Ireland, a legal aid circular was developed – known as the Brady Circular – to allow their state legal aid provider to appoint a person, independent of the legal representative, for parents with intellectual disabilities (or persons with psychosocial disabilities) involved in family court proceedings.[187] This person supports the person with 'impaired capacity' to understand proceedings, including potential outcomes, instructs counsel (e.g. relays information from the solicitor to the client and vice versa) and attends court when this is deemed essential by the solicitor. The most recent version identifies that support may be needed in a child care matter:

> if it is envisaged that this person is to be furnished with social work reports or other reports connected to the proceedings then application will have to made to the Court in advance seeing authority for these reports to be furnished to the person and for permission for that person to sit in on the proceedings with the client.[188]

The support person is usually an advocate from the National Advocacy Service. This support person is a unique measure, as support persons to persons with intellectual disabilities are usually provided in the criminal court context in other jurisdictions.

Another useful form of support is offered by a McKenzie friend[189] in the UK and in Australia.[190] A McKenzie friend may be granted leave by the court to help a self-represented person with a disability in court and may be paid in particular circumstances. In other words, where the person does not have a legal representative,

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184 Judicial College of Victoria *Disability Access Bench Book* (2016) para 5.6.3. <https://www.judicialcollege.vic.edu.au/eManuals/DABB/59261.htm> (accessed 1 November 2020).

185 NCD (n 69 above) 324.

186 n 69 above, 324-325.

187 Legal Aid Board Circular 2 of 2007, mooted in *Legal Aid Board v Judge Brady and Case Stated* 2005 474/JR, cited in E Flynn *Disabled Justice?* (2016) 96.

188 Legal Aid Board *Circular on Legal Services : A guide to decision making and best practice* (2017) 10th ed, 8-88 <https://www.legalaidboard.ie/en/freedom-of-information/circulars-on-legal-services-july-2017-edition-pdf.pdf>

189 *McKenzie v McKenzie* [1970] 3 All ER 1034. See, also, para 1(2) of schedule 3 to the Legal Services Act 2007.

190 See, for example, the Judicial College of Victoria *Victorian Criminal Proceedings Manual* (2014) para 9.2. <https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27574.htm> (accessed 1 November 2020).

this person may reasonably help by providing prompts, taking notes and making suggestions – but may not examine a witness or address the court. Factors considered by the court to grant leave for the appointment of such a person to help a person with a disability (usually a volunteer with some legal background), include, in the Australian criminal court context

> the complexity of the evidence and the issues; the accused's ability to understand the evidence and the course of proceedings; the accused's ability to express him or herself in the court setting; whether the accused can receive the same benefits by conferring with his friend or lay adviser during adjournments.[191]

The Equal Treatment Bench Book of 2020[192] guidance provided to presiding officers in the UK, provides specific guidelines for the appointment of a McKenzie friend.[193] Reform of this offering is ongoing. The application of this form of non-traditional legal assistance in South Africa would depend in part on the political will exercised in favour of regulation of paralegal services, and relaxing practice rules for lawyers and non-lawyers. Considering the delay in finalising the relevant provisions on community service for law graduates and paralegals in the Legal Practice Act, this option is unlikely to be on the cards in the foreseeable future. This would leave the option of current attorneys practising in family law as a more apt area of reform for the time being.

7.5.2. Appropriate training of lawyers

Appropriate training for attorneys to represent clients with intellectual disabilities requires not only that they obtain an understanding of relevant procedural accommodations. They should also learn contextual information about disability that may promote effective representation which is culturally appropriate and non discriminatory.[194] A guide for attorneys, similar to the one developed in New Jersey, USA, may help professionals understand the differences between different disabilities, the meaning of intellectual disability, how to effectively represent a client with an intellectual disability, and procedural accommodations required for the client and how to effectively communicate with the client.[195] Importantly, knowledge of accommodations under legislation is vital for attorneys. For example, in the criminal context in the United States, attorneys are urged to

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191 Judicial College of Victoria (n 184 above).

192 The Judiciary *Equal Treatment Bench Book* (2020) <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf> (accessed 1 November 2020). This edition was updated in 2018 and revised in 2020.

193 *The Practice Guidance (McKenzie Friends: Civil and Family Courts)* issued by the Master of the Rolls and the President of the Family Division on 12 July 2010, replace the Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note [2008] EWHC 2042 (Fam) [2008] 1 WLR 2743.

194 The Arc of New Jersey *Individuals with Intellectual and Developmental Disabilities Who Become Involved in the Criminal Justice System: A Guide For Attorneys* (2014) <https://frdat.niagara.edu/assets/THE-FINAL-ATTORNEY-GUIDE-1.pdf> (accessed 30 October 2020).

195 The Arc of New Jersey (n 194 above) 9, 15, 20.

> Know the accommodations [under the ADA that] you can request and ensure that before you came on the case, the person's disability was respected and they did not waive rights or confess because they did not understand what was happening.[196]

It is not difficult to anticipate that parents in child care proceedings could equally waive rights or not effectively participate in proceedings due to a lack of understanding.

Concerningly, in the United Kingdom, guidance has been provided by government to legal professionals since 2007 on relevant legislative protections,[197]and yet prejudicial attitudes about parenting with an intellectual disability continue.

In South Africa, the starting point would be the feasibility of appointing state-funded legal representation for all persons with intellectual disabilities, means dependent, in all matters affecting their rights – which includes civil proceedings such as in Children's Court proceedings. A cadre of civil lawyers is already employed by LASA. The next step would be to ensure that they receive adequate training to advocate for their clients' rights, in order to avoid the American scenario provided above. The feasibility of employing support persons as a measure will also have to be gauged in light of the more glaring need for intermediaries to provide support during hearings. As a starting point, however, the legal representative's role of identifying the accommodation needs of their client and apprising the court of the same, should be cemented in the practical training that (new and existing) attorneys receive under the Legal Practice Act.[198] Law schools should also prioritise the teaching of the skills' set required for representing clients with disabilities effectively, in their procedural and substantive law courses.[199]

7.5.3. Training and guidance on Appropriate Questioning Techniques

Wood et al outline the accommodations that attorneys may provide in their questioning during examination, in the criminal court context.[200] These changes may need to include allowing clarification of information by permitting the witness to provide questions and clarifications where it otherwise may be inappropriate, giving the person additional time to process information, and simplifying language.

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196 The Arc Northern Virginia *When Individuals with Developmental Disabilities Become Involved in the Criminal Justice System: A Guide for Attorneys* (2018) 26 <https://thearcofnova.org/content/uploads/sites/6/2018/08/Justice-System-Guide-for-Attorneys-8-13-18.pdf> (accessed 1 October 2020).

197 UK Department of Health and Department for Education and Skills *Good Practice Guidance on Working with Parents with a Learning Disability* (2007), updated in 2016 Working Together with Parents Network (WTPN) update of the DoH/DfES *Good practice guidance on working with parents with a learning disability* (2016) <https://www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf> (accessed 1 October 2020).

198 Sec 84(1) of the Legal Practice Act 28 of 2014.

199 See, also, DF Larson 'Access to justice for persons with disabilities: An emerging strategy' (2014) 3 *Laws* 220.

200 Wood et al (n 144 above) 8.

In South Australia and in New Zealand, guidelines have been developed in the criminal context, on how to support and secure the best evidence of witnesses with intellectual disabilities (and other 'vulnerable' categories).[201] The Arc of New Jersey's guide to attorneys, mentioned earlier, provides useful hints to legal representatives on how to improve communication with their clients having intellectual disabilities.[202]

Development of appropriate questioning techniques in South Africa for persons with intellectual disabilities, therefore would not need to start from scratch. However, these guidelines would need to be adapted for the South African context. Furthermore, considering the inquisitorial role of magistrates, such guidelines would also be of use to them in fulfilling their function.

7.6. The Magistrate's role

7.6.1. Magistrates' deliberative decision-making (best interests determination)

In their study of magistrates' perspectives on parents with intellectual disabilities in child care proceedings, Kollinsky et al found that the magistrates did not have an understanding of the complex needs that parents have, and, as a result, they not only made unfounded generalisations about their parenting capacity but also relied uncritically on experts.[203] In the United Kingdom, unlike in South Africa, magistrates are lay persons with no formal legal training. A child care proceeding can take place before a magistrate or before a county judge (the latter being legally trained).

In Australia, the assessments of magistrates included a determination as to whether the parents obtained a reasonable opportunity to correct or learn from their behaviour through support offered by social workers and agencies (for example parenting skills programmes).[204] McConnell also found that magistrates emphasised the cooperation of the parent and willingness to accept direction, show an understanding of gaps in their parenting ability, and that they could remedy these gaps.

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201 Government of South Australia *Supporting vulnerable witnesses in the giving of evidence: Guidelines for securing best evidence* (2018) <https://www.agd.sa.gov.au/sites/default/files/djp_guidelines_web.pdf?v=1490763319> (accessed 1 April 2019); Benchmark *Responsive practice with adults with intellectual disability* (2018) <https://www.benchmark.org.nz/assets/Uploads/ID-full-guide-in-pdf.pdf> (accessed 1 October 2020).

202 The Arc of New Jersey (n 194 above) 21.

203 LL Kollinsky et al 'A qualitative exploration of the views and experiences of family court magistrates making decisions in care proceedings involving parents with learning disabilities' (2013) 41 *British Journal of Learning Disabilities* 86.

204 D McConnell et al 'Disability and decision-making in Australian care proceedings' (2002) 16 *International Journal of Law and Policy on Family* 270 299.

In Britain, Booth and Booth found *inter alia* that magistrates were more likely to order removal considering the seriousness of a case; magistrates perceived that parents with intellectual disabilities cannot learn new skills or do so fast enough considering the developing child's needs (a temporal aspect related to a perception and time scale for capacity to change); and where magistrates found a lack of support from families.[205] Financial constraints placed on statutory services to provide support and a perception that such support would not address the parents' complex and difficult needs, also played a role.[206] Booth and Booth's study also found that the magistrates did not take into account the accommodations that may be required by the parents during the hearings.[207] The authors argued that lack of accommodations in the proceedings amounted to indirect discrimination under the UK's Discrimination Act of 1995 (now the Equality Act of 2010). Lack of capacity to change is also a major theme in child care or parental rights termination cases in the USA.[208]

The experience of solicitors garnered by Cox et al were, on the one hand, that the reports of experts were generally of inadequate quality, and, on the other hand, magistrates were reticent to instruct the obtaining of an expert report – despite the usefulness of their independent reports in general.[209]

In South Africa, White et al support the appointment of lay assessors to help magistrates understand intellectual disability or communication disabilities in the criminal courts – but also dedicated training of magistrates and legal professionals on disability.[210] There are no studies on the effectiveness of training of legal professionals on disability, nor reports of monitoring and evaluation by service providers of training in South Africa. The training of legal professionals must therefore not just be relevant and appropriate – but also monitored and evaluated to ensure that it is fit for purpose.

Where a person is legally represented by a well-trained attorney, where magistrates have received relevant training on disability, and where procedural accommodations such as appointment of intermediaries are made, the appointment of a lay assessor may not be apt or necessary in the civil context of Children's Courts. Cultural competence and technical expertise of a lay assessor can however be useful

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205 T Booth & W Booth *Parents with learning difficulties: Child protection and the courts, a report to The Nuffield Foundation* on Grant No. CPF/00151/G. Sheffield University, Department of Sociological Studies (2004) <www.supported-parenting.com/projects/NuffieldReport.pdf> (accessed 12 January 2016).

206 Booth & Booth (n 205 above) 141.

207 Booth & Booth (n 205 above) 156.

208 Francis (n 4 above) 27.

209 R Cox et al 'Solicitors' experiences of representing parents with intellectual disabilities in care proceedings: Attitudes, influence and legal processes' (2015) 30 *Disability & Society* 284 289-291.

210 R White et al 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal* 1 9; J Bornman et al 'Identifying barriers in the South African criminal justice system: Implications for individuals with severe communication disability' (2016) 29 *Acta Criminologica: Southern African Journal of Criminology* 1.

to the court.[211] They are appointable in the lower courts.[212] This has been shown in the contribution of lay assessors on customary law in purported *ukuthwala* cases, although one of the few reported decisions *Jezile v S*[213] did not have an assessor, but rather included testimony from an expert in customary law in the trial, and a number of organisations on *inter alia* women's rights, being admitted as *amici* in the appeal. However, as things stand, with no legal representation, no evidence of disability training of magistrates, and no intermediary provision, consideration of the appointment of an expert in disability to assist the magistrate in child care proceedings may be needed. There is scope for future research to determine whether such a lay assessor (with experience in a particular disability such as intellectual disability) would help promote access to justice for persons with intellectual disabilities.

7.6.2. Appropriate training for judicial officers

The UK's Equal Treatment Bench Book provides information about adjustments that could be made for persons with disabilities in hearings and in case preparation, but also explains the differences between the medical and social models of disabilities, among other useful information.[214] Appropriate communication – particularly for those with intellectual disabilities – is stressed:

> Depending on the nature of the disability, it may be necessary for the judge, advocates and other court staff to adjust their communication style. This is a difficult skill for all involved. Long experience of questioning witnesses with, e.g., learning difficulties, does not mean that an advocate does it well.[215]

Helpful hints on how to improve communication with witnesses with intellectual disabilities is provided. Similarly, the Victorian state bench book on disability also provides examples to help judicial officers on accommodations that can be made to hearings, including specifically those relevant for persons with intellectual disabilities.[216] The duty of the presiding officer in identifying accommodations that may be needed by the court users, is emphasised:

> While lawyers may assist the court to identify disability, it is the role of judicial officers to ensure equality before the law, and therefore they may need to make inquiries about people's requirements and necessary adjustments.[217]

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211 H Lerm 'Two heads are better than one: Assessors in High Court civil cases' (2012) October *De Rebus* 22; J Seekings & C Murray *Lay assessors in South Africa's Magistrates' Courts* (1998) University of Cape Town; *S v Msitshama and Another* [2000] JOL 7074 (W).

212 Secs 34 and 93 of the Magistrates' Courts Act 32 of 1994 (appointment of lay assessors in civil and criminal matters, respectively). See, also, rule 59 of the Magistrates' Courts Rules.

213 2016 (2) SA 62 (WCC).

214 The Judiciary (n 192 above) 89 and 115.

215 The Judiciary (n 192 above) para 60. The UK uses the term 'learning disability' or 'learning difficulties' – instead of intellectual disability.

216 Judicial College of Victoria (n 184 above) on 'Considerations during hearings' para 5; and 'People with an intellectual disability' para 7.8.

217 Judicial College of Victoria (n 184 above) para 5.6.3.

Some jurisdictions are alive to the need for accessibility – even in judgments. For example, there is the practice in the United Kingdom where judgments are written as 'Easy Read' for court users with intellectual disabilities.[218]

In South Africa, a Bench Book for Equality Courts was issued in 2002, but is not publicly available. Specialised training for members of the magistracy and judiciary, as well as the administration of justice, is overdue. The development of a Bench Book or toolkit on disability will go a long way in addressing some of the gaps in knowledge, and also ableist stereotypes that persist in the practice and adjudication of law.

The United Kingdom's legislative and policy provisions in relation to support for persons with disabilities, including intellectual disabilities in child care proceedings, place a duty on local authorities to promote equal participation and opportunity for these parents. Guidelines issued to authorities to ensure this duty is fulfilled have been cited in reported decisions by the UK courts.[219] Attorneys and service providers therefore have enough direction to execute their job in relation to these parents – as is discussed in more detail below.

7.7. Promotion of access to information, legal awareness and complaint procedures

Fact sheets with information on the legal system, and complaint procedures that are adapted in Easy to Read format, have been formulated in the US context, for example.[220] Another example is the Australian Bumpy Road Easy Read information fact sheets and short videos for parents with intellectual disabilities involved in child care proceedings – including on expectations in court and procedures.[221] These were developed by parents with intellectual disabilities. Legal awareness of rights can be offered by disability-specific advocates from DPOs, but also from mainstream legal aid providers like Legal Aid South Africa or law clinics and NGOs. Disability-specific law clinics do not exist in South Africa, and the IDRS's example may be one to consider, where the legal advocacy and support in court is separated from the legal representation offered to the clients.[222] The practice of having persons with intellectual disabilities well represented on the board of an organisation, is one to follow in order to ensure appropriate representation and that services are also appropriate for the users.

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218 *Jack (A Child: Care and placement orders)* [2018] EWFC B12; *Dorset Council v A (Residential placement: Lack of resources)* [2019] EWFC 62, cited in Flynn et al (n 146 above) 26.

219 *Kent CC v A Mother* [2011] EWHC 402 (Fam) para 132; *Medway v A & Others (Learning Disability: Foster Placement)* [2015] EWFC B66 (2 June 2015) para 103.

220 ADA National Network *Parents With Disabilities in Child Welfare Agencies and Courts* (undated) <https://adata.org/factsheet/child-welfare> (accessed 30 October 2020).

221 The Bumpy Road (undated) *Easy English fact sheets for parents dealing with the child protection system. Advice from parents with experience* <https://www.bumpyroad.org.au/home/index> (accessed 1 November 2020). See, also, Intellectual Disability Rights Service (IDRS) *Fact Sheets (*undated) <https://idrs.org.au/resources/fact-sheets/> (accessed 1 November 2020).

222 Intellectual Disability Rights Service <https://idrs.org.au> (accessed 1 November 2020).

Websites also need to be made accessible and relevant apps need to be developed to act as an information hub on relevant information and referral to appropriate stakeholders.

The complaint procedures available in many jurisdictions, including South Africa, should be made more accessible and adapted to make them user-friendly for persons with disabilities. Where courts and other service providers are required to retain disability-aggregated statistics – including around services provided and accommodations sought – it will be easier to track where gaps in accommodations remain.

7.8. Conclusion

This chapter sought to garner examples from other jurisdictions that have grappled with the fact that parents with intellectual disabilities are disproportionately represented in child care proceedings, and, as a result, require adapted procedures and protocols in social work, psychology, and legal practice to meet their support needs and to provide accommodations where required. Some of these examples require further investigation through applied research and possibly development of pilot studies once baselines have been obtained in the South African context – including communication assistance through a form of intermediary In some areas, such as supported decision-making, South Africa has already started the law reform process, but this has stalled. However, the discrimination, both indirect and direct, that persons with intellectual disabilities face in the justice system, has not received nearly the amount of attention it deserves, like other jurisdictions that have focused on this phenomenon. There are best practice examples, such as the bench books from jurisdictions such as the UK and the state of Victoria in Australia, where legislation, guidelines and training are all made available to judicial officers in a regularly updated and accessible repository. Some relevant case law is also cited.[223] The brief review of some practices in several countries, shows that state's provisions for and the implementation of legal capacity and access to justice, is inextricably linked. Without dismantling outdated notions of incapacity, justice will remain inaccessible for many persons with disabilities.

The examples of how adequate legal representation can be offered in a different form to traditional lawyers (such as the McKenzie friend or Brady Circular for example), show that alternative forms of assistance are available as best practices, but may, in practice, come up against a lack of political will in transforming the legal profession.

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[223] See, for example, a case where the reasonableness of adjustments offered to a party with Asperger's syndrome was considered – particularly as to whether the adjustments offered were in line with the Bench Book. *JW Rackham v NHS Professionals Ltd* [2015] UKEAT 0110_15_1612 (16 December 2015).

There are tentative first steps made in policy such as the WPRPWD and the potential of legislation such as PEPUDA, and there is potential for existing measures to be adapted to the context of parents with intellectual disabilities (such as intermediaries and appropriate questioning techniques under the Children's Act). However, for a real sea change to occur in social service provision to these families, disability-specific legislation and development of procedural rules of court are needed to direct stakeholders on the correct approach to follow. Ultimately, these examples show that all role players (social workers, medical professional experts, lawyers and magistrates) need to adapt their practices to ensure full participation of persons with intellectual disabilities. They also need to excise ableism embedded in unadapted and unsupportive services and ableist prejudices in investigations and decision-making.

CHAPTER EIGHT:

CONCLUSION AND RECOMMENDATIONS

8.1. Introduction

The inquisitorial nature of Children's Court proceedings should be an asset, but without formal mechanisms to employ measures of accessibility and procedural accommodations, it appears from the cases analysed in chapter 6 that the leeway granted to presiding officers to make proceedings informal and accessible is mainly exercised in favour of children and not adult parties – and especially not those with intellectual disabilities. It is unacceptable hat persons with intellectual disabilities may be considered to have diminished legal capacity under current South African law. While it is not argued that the courts should have necessarily subjected the mothers in these cases to assessments to determine their legal capacity or should have denied it in any way, the *mere* continuation with proceedings as if *support* to exercise legal capacity is not needed is, in itself, discriminatory. Lack of procedural accommodation amounts to indirect discrimination under international law.

The Commissioner for Human Rights has called on states to put in place 'mechanisms to monitor their legal proceedings and evaluate the success of their policies with regard to access to justice', and such 'markers that allow for the identification of persons with disabilities who access the justice system and the outcomes'.[224] The lack of disaggregated statistics on the Children's Courts is a problem that means it is difficult to anticipate what measures are needed to promote access to justice for persons with disabilities – including those with intellectual disabilities. Furthermore, the monitoring and evaluation of measures that may be implemented, can only take place if relevant mechanisms to do so are established. That is the first priority. The Children's Court statistics are non-existent and parents with intellectual disabilities are invisible in terms of a recognition of their unique needs in terms of effectively communicating and meaningfully participating in proceedings.

The South African Department of Justice and Constitutional Development started a project to develop a 'Best Practice Court Services Model' aimed at promoting the right to access the justice of persons with disabilities in the justice system in 2016.[225] The author participated in a task team that sought to develop this model. The task team and the project was, however, shelved within a year of its

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224 Office of the United Nations High Commissioner for Human Rights (OUNHCHR) *Right of access to justice under article 13 of the Convention on the Rights of Persons with Disabilities* (2017) A/HRC/37/25 para 23.

225 Department of Justice and Constitutional Development (DOJCD) *Draft best court practice manual* (2016) (copy with the author).

commencement.[226] It is submitted that the project should be revived or reconvened. Such a model will require reconfiguring all the court rules, including those of the Children's Courts, to be in line with the state's international and regional law obligations to make proceedings accessible, and to accommodate communication and participation needs where relevant.

A summary of the findings from each chapter follows.

8.2. Summary of chapter findings

Chapter 1 introduced the scope of the study. The research question sought to determine how the South African social services and two Children's Courts (Durban and Pietermaritzburg in KwaZulu-Natal) meet their international and constitutional obligations. This is in terms of promoting access to justice and supporting the parental rights and responsibilities of mothers with intellectual disabilities who are at risk of having their children removed from their care due to allegations of neglect.

Chapter 2 identified the archival research methodology used in chapter 6 – review of case files for the period of 2010 to 2014 (five years) in two Children's Courts, as well as the doctrinal and socio-legal methods employed in the other chapters. Critical Disability Studies was categorised as the lens through which this study was approached.

Chapter 3 found that little research had been undertaken on adults with intellectual disabilities living independently in communities. In all the cases surveyed in chapter 6, all of the parents with intellectual disabilities lived independently. That said, they did not have extended family or paid or state support in respect of their daily activities. Another finding from the literature review was that socio-economically, the existence of persons with intellectual disability is precarious in South Africa. In this study, the poverty facing the family is a real factor that impacted on the quality of life of the parents in the cases surveyed. In relation to education and work, none of the mothers in the case studies were employed and their educational attainment was not clear. However, it can be noted that none of them had matriculated.

This chapter articulated that the voice of persons with intellectual disabilities is generally not heard, such as in the Life Esidimeni case. Persons with an intellectual disability face stigma and perceptions regarding their sexuality, their vulnerability to crime, and their real risk in respect of gender-based violence, requiring protective measures. Yet, capacity enhancing measures are rarely discussed in the literature and the law perpetuates this ableism – for example in sterilisation legislation.

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[226] Intersectoral Committee established by the component for Persons with Disabilities within the Chief Directorate: Promotion of the Rights of Vulnerable Groups of the national DOJCD.

Studies from Australia, for example those of Llewellyn and McConnell, have not been done in South Africa (from a social science perspective), nor have procedural accommodations for this cohort of parents been considered from a legal perspective. However, White and other colleagues have considered communication accommodations in criminal court proceedings, mostly for those with severe communication disabilities – but not for parents in Children's Courts.[227] This illustrated a gap in the literature which this study wished to pursue.

Chapter 4 considered the international and regional law obligations resting on the South African state in a number of soft law instruments and binding treaties. Primarily, the civil political and socio-economic deprivations faced by persons with disabilities, particularly those with intellectual disabilities, is linked. The United Nations' Convention on the Rights of Persons with Disabilities (CRPD) acknowledges this causality.

The chapter's major finding was that there rests a positive duty on the state to assist families, provide support for their responsibilities, and to provide procedural accommodations in court. Court regulations are to be amended if they do not meet the requirements of the CRPD for procedural accommodations. Furthermore, social work practices, including professional conduct or procedures, are to be changed where they fall short of full inclusion and participation. Where laws are silent on procedural accommodation, it amounts to indirect discrimination.

Pertinently, the poverty and disability of a parents may not be relied on as a reason for separating children from their families. International law has articulated the elements of the best interests in the legal determination thereof. International law also elucidated the procedural safeguards that are to be provided such as the establishment of the facts; that it must be ensured that qualified professionals conduct assessments of families; that multi-disciplinary teams should be used to assess and assist families; and that legal reasoning should be justified. This is a deliberative process that should be clearly set out in the court's order or judgment. Review mechanisms should also be put in place and implemented.

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227 R White et al 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal* 1 9; J Bornman et al 'Identifying barriers in the South African criminal justice system: Implications for individuals with severe communication disability' (2016) 29 *Acta Criminologica: Southern African Journal of Criminology* 1; R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99; RM White et al 'Transformative equality: Court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* a651. <https://doi.org/10.4102/ajod. v9i0.651>

Chapter 5 analysed the domestic legal and policy landscape. The constitutional rights matrix was explained, including jurisprudence in relation to the parent's rights to equality, dignity and *ubuntu*, access to information, access to justice, as well as the child's rights to family or parental care, protection from neglect and maltreatment, and their best interests. The interrelatedness of equality and justice was stressed.

It was argued that substantive equality requires inclusion and full participation of persons with disabilities. It was submitted that integration of persons with disabilities into the existing justice system does not amount to inclusion and the dismantling of ableist barriers. Rather, there should be provision of procedural accommodations, as well as the development of concepts such as mental capacity, autonomy, ability and self-determination that promote equal recognition before the law. Furthermore, socio-legal constructs such as the ideal development of children and adequate parental care need to be applied without reverting to ableist stereotypes. Promotion of substantive equality requires the context of parents with intellectual disabilities to be examined, particularly the inequalities they suffer at micro, intermediate and macro levels. This is why chapter 3's literature review outlined the profile of persons with intellectual disabilities in detail, so that it could provide an understanding of these inequalities suffered at all levels of society. Examples of these inequalities outlined are

- Micro level: the experiences of harm occasioned by a mother with an intellectual disability;
- Intermediate level: exclusions from participation in court and family life; and
- Macro level: the experience of heightened poverty, stereotypical ableist and patriarchal assumptions about parenting with a disability, and the few or non-existent supports extended to a mother so that she can exercise her care responsibilities.

It was proposed that these complex and intersectional considerations could address, in part, the exclusionary and continued inequality experienced in the courts, and promote full participation in court processes and a deeper understanding of the substantive equality context. It has become clear that disability-sensitive training and transformation of legal epistemologies for interpretation of apparently neutral legal norms and principles, is needed.

The analysis of dignity and *ubuntu* found that perceptions of incapacity to parent negates these values. The interdependence notion employed in *ubuntu* requires support of the mother and her children by members of the extended family in her care responsibilities where possible. Furthermore, it was suggested that employment of procedural accommodation measures enhance their dignity.

The right of access to information, it was argued, includes accessibility of court documents – including social work reports. Accordingly, explanation of the contents

and consequences of a legal document is crucial for a person with a communication disability. It was argued that less protection is offered to an unrepresented parent before the Children's Courts than to a represented person in the criminal courts. Protections such as rules of evidence, adequate time and facilities to mount a defence, and adducing and challenging evidence are not embedded in civil proceedings to the same extent. Therefore access to information is very important for those whose rights are affected by the proceedings. The use of Easy to Read formats and platforms for information is not yet available electronically (and not in hard copy). It was submitted that court rules may need to be amended to allow legal documents to be more accessible digitally.

The positive and negative dimensions of the right of access to justice were stressed. It was submitted that the departments of Justice and Social Development are responsible for promoting access to the courts, through appropriate procedural rules. The fairness of a hearing necessitates granting legal aid to a civil litigant.

The state's responsibility, secondary to that of the parent, and in relation to a child's right to family or parental care, was identified. This includes provision of the basic necessities of life. Unnecessary state interference in family life is to be avoided. The case of *C and Others* was discussed. There the court stressed the need for effective parental participation in the hearing where the best interests of a child is to be determined. Relying on the Canadian case of *New Brunswick,* it was argued that lack of adequate support, procedural accommodations and legal representation, may render Children's Court proceedings unfair.

The state's positive obligation towards children to protect them from neglect and maltreatment necessitates state intervention in family life where such harm occurs. The risk of removal of children from families due to parental poverty is possible (and as found later in chapter 6 does occur). The rendering of financial assistance to families could ameliorate this risk, and yet potential regulations in this regard, as proposed by the SALRC, have not seen the light of day.

The best interests of the child, as being of paramount importance, was explained. This right can be used to interpret other rights and is contextual and flexible in nature. At its core, it is a value judgement, leaving the possibility of bias occurring in its application.

The rights monitoring role of the SAHRC – particularly in relation to children and persons with disabilities – was identified and found to be wanting. Its ineffectiveness could be due to its broad mandate and lack of resources and prioritisation of disability.

An analysis of the Children's Act in light of international and regional law obligations and constitutional rights of parents and of children, was set out in part 5.5. That analysis concluded that the Act and its regulations do not meet international and

regional law obligations in relation to equality, information and accessibility, access to justice, family care and children's rights to life, survival and development, and best interests. The Children's Court does not explicitly require the magistrate or administrative staff, nor external entities, to provide procedural accommodations.

The legal position in relation to capacity was discussed, including under common law and in civil and criminal proceedings – as well as legislation such as the Mental Health Care Act. Substituted decision-making through the appointment of a curator, it was argued, deprives the person of self-representation and equal recognition before the law. The law in relation to competence to testify was discussed and here the ability of a witness to effectively communicate with the court is a key requirement. The functional approach of the conception of competence is discriminatory. This approach can only be saved, should support be provided to the person in order to effectively communicate and participate. Our legislation still uses inappropriate terms such as 'idiocy' and 'imbecility'. While legal capacity of persons with intellectual disabilities is not formally denied in Children's Court proceedings, it was submitted that bias as to their capacity could be embedded in the proceedings. Furthermore, lack of support and safeguards to testify, could discriminate against parents with intellectual disabilities. The law reform process in relation to supported decision-making should therefore be accelerated.

While the Children's Act enshrines the principle of child participation, children are not adequately prepared for participation in a Children's Court. Similarly, persons with intellectual disabilities are not adequately prepared for court.

The role of the social worker was considered, particularly in relation to offering and monitoring prevention and early intervention services to families, to avoid more intrusive intervention into family life. The parenting skills programmes offered, the literature reviewed makes clear, are not adapted for persons with intellectual disabilities in South Africa, while the effectiveness of those unadapted programmes in place is hampered by the poverty of the families. While section 149 of the Children's Act mandates that the social worker's report contains information about prevention and early intervention measures identified, the monitoring thereof by the magistrates during the court process, is not clear. The norms and standards on the Children's Act emphasises family strengthening and capacitation, but not the monitoring and implementation of prevention and early intervention programmes. The development of an adapted broad assessment framework and guidelines for the grounds of section 150(1)(f), (g) and (h) (particularly neglect), was mooted. Development and risk assessments are to be conducted according to the Children's Act. Considering the reports filed in the court files in chapter 6, these are generally not conducted in a methodical manner, and the social work reports do not pertinently reflect on these and whether they were conducted in line with relevant best practice. In fact, the reports do not have separate development and risk assessments annexed as evidence. Guidelines from assessments in divorce proceedings were suggested, in order to

develop a uniform assessment protocol, especially in neglect cases and the drafting of parenting plans where relevant to guide social workers and parents on their responsibilities. No code of ethics for forensic mental health professionals was identified, where expert witness opinion was offered in criminal matters. Equally, in civil instances such as the Children's Court, such a code of ethics is lacking, and the relevance thereof to social workers should also be considered in future research. The necessity to draft reports that are understandable to both the court and the parties before it, cannot be denied. Social workers are not adequately qualified and trained to conduct parenting capacity assessments (PCAs).

Procedural justice in the Children's Courts is limited, per the Children's Act, to a conducive and accessible room; appropriate questioning techniques (AQTs) for children (such regulations still not in place); and a general unfair discrimination prohibition (on the basis of disability). Chapter 7 elaborates on such AQTs as being sorely needed for those with communication disabilities or needs. Guidelines are needed for magistrates on how to ensure there is no discrimination inherent in the conduct of proceedings.

In South Africa, the role of the intermediary is limited to a relay of questions and avoiding secondary harm, and not to enhancing the communication of the witness with other role players. A list of professionals eligible for appointment excludes those with specialisation in disability – such as speech and audiology or occupational therapists. It was concluded that it is a specialist skill to question a person with an intellectual disability and that magistrates need specific training or a specialised intermediary to ensure full and meaningful participation of the person with the disability.

In relation to legal representation, it was found that persons with intellectual disabilities may apply for legal aid on a case-by-case basis. There is no special provision by LASA for this category of 'vulnerable' adults, and no easy-to-read manual is available to them.

Examples of procedural accommodations offered in other court rules were considered. It was recommended that the Children's Court rules should include aspects from the Sexual Offences Courts regulations, such as a court preparation programme for 'vulnerable' adults inclusive of those with communication and intellectual disabilities (or any other relevant disabilities which may include neurological/cognitive/developmental/psychosocial disabilities). Importantly, the general lack of a support process to enhance legal capacity of persons with intellectual disabilities was noted.

The policy landscape is vague and incoherent. Implementation of complaint processes is not clear. Reasonable accommodation measures are generally not embedded in policy guidelines and one stand-alone brochure provides awareness but no infrastructure for persons with disabilities to rely on, when seeking procedural or

reasonable accommodations. Training of court and judicial officers is not a pertinent goal of policy, and there is lack of coordination in relation to 'mainstreaming' disability in services or legislation.

Chapter 6 provided a narrative of the data obtained from the case reviews of 244 cases in the two Children's Courts. Nine case studies were the focus of this chapter in so far as intellectual disability and conflation of intellectual disability with psychosocial disability occurred in these cases. The parents' treatment by the social workers and magistrates in the statutory proceedings could only be gleaned, in a limited fashion, from the evidence annexed to the case files – particularly that of the social worker's reports. Seven themes were identified from the data analysed. First, disability and poverty were both demographic factors correlatively present. Second, disability was identified as a major risk factor for statutory intervention in all nine case studies. Third, measures to support families were not adequately implemented and monitored before and after statutory interventions. Fourth, parenting capacity assessments and reliable and up-to-date disability diagnosis were generally not obtained. Fifth, procedural and other accommodations were not offered to the parents, and not one parent was legally represented. Sixth, the courts largely agreed with the social worker's recommendations in relation to finding a child in need of care and protection and the relevant grounds relied upon. Seventh, the best interest determination was not articulated as a deliberative decision-making process in the social workers' reports nor in the court proceedings.

Further findings in relation to the other cases surveyed were listed. These correspond with the findings from the disability-specific case studies. A number of shortcomings identified with social work practice and the court proceedings apply to all parents and families in the statutory process. For example, a lack of legal representation and no cross-examination of the (sometimes) uncorroborated social workers' reports with high probative and evidentiary weight, took place. Although parenting skills' programmes or measures were identified in many social work reports, the court's monitoring of the implementation and effectiveness of these measures through monitoring was not evident. In a nutshell, procedural accommodations were not offered to parents in these cases.

Chapter 7 considered best practices from other jurisdictions in relation to the following developments. Disability-specific framework legislation that guides equal recognition before the law and full and meaningful participation in the justice system, as well as equal opportunity to benefit from social services, was explored. Disability specific legislation is becoming more common on the African continent in the last decade, but very few examples of procedural accommodations are yet legislated and many still rely on the medical model. Similarly, India's new legislation and general approach to access to justice and legal capacity for women with intellectual disabilities, is not ideal as an example to learn from. The Committee on the Rights of Person with Disabilities has recommended a number of measures to bring Australia's legal system

closer to supported decision-making and procedural accommodations for persons with disabilities in courts. However, that state has been slow in bringing the necessary reforms. The provision for presumption of parenting incapacity and immediate removal of a child from a parent where an older sibling was previously removed from the parent is highly prejudicial for parents with disabilities. A Royal Commission investigation into parents with intellectual disabilities in the justice system, particularly Aboriginal parents with disabilities is not yet completed and its report will hopefully provide a way forward for that country. A caution of the USA courts' inconsistent treatment of the injunction against discriminatory treatment of parents with disabilities in family court proceedings, bears reiteration. It was submitted that examples from South Carolina legislation on provisions for reasonable accommodations in the parental support provided by social workers and others and the New Jersey guide to attorneys on how to appropriately communicate with their clients are worth considering in the South African context.

Intermediary or communication assistant provision, as adapted in the Australian context primarily, was considered. Guidelines from jurisdictions on how social workers and psychologists can adapt their assessment practices to the context of parents with intellectual disabilities were obtained. Some law reform examples on supported decision-making were briefly explored. The need for appropriate and well trained attorneys to represent parents with intellectual disabilities in child care proceedings was put forward, with direction obtained from guidelines developed in other jurisdictions on how best to represent these parents. The feasibility of non-traditional assistance, such as McKenzie friends and also the Brady Circular, was considered. Appropriate questioning techniques that have been developed and adapted to meet the communication needs of persons with intellectual disabilities, particularly in the criminal courts, were explored. The literature considering magistrates' perspectives on parenting with an intellectual disability, as well as the necessity to garner reasons for decisions in court orders in order to review those where needed, was discussed. Appropriate adaptations to social services and supports to be offered to parents with intellectual disabilities, including in the British context, were outlined. A few examples of how to promote access to information, legal awareness and the development of complaint procedures – all adapted to meet the needs of persons with intellectual disabilities – were provided.

8.3. Recommendations

Next, six recommendations flowing from the findings are set out.

8.3.1. Mandatory legal representation to 'vulnerable' adults such as those with intellectual disabilities

In order to measure the adequacy of legal representation offered to parents, attorneys must represent them. In South Africa, legal representation is generally not offered to

parents involved in Children's Court proceedings whether they have a disability or not. Guidance from Britain is that adequate representation must be offered.[228]

Since it is not currently clear whether attorneys in state or private practice have training on the accommodations needed to adequately represent a client with a disability, particularly communication challenges, education and training on both social context and accommodation needs are probably required. There is great scope for Legal Aid South Africa (LASA) to extend its net for legal representation to persons with disabilities, particularly in neglect proceedings – similar to the Brady Circular in Ireland.

It is recommended that Legal Aid South Africa formulates a policy that will allow 'vulnerable' adults, such as those with intellectual disabilities (and other relevant disabilities), to access legal representation at state expense. The Children's Act should also be amended to reflect meaningful access to legal representation for these adults

The adequacy of this legal representation can only be measured once it is offered. The chances of adequate legal representation are heightened where relevant training is offered to legal practitioners. It is recommended that the Legal Practice Act reflects on this aspect and that appropriate training, not only on 'disability sensitivity', but also on adequately representing a client with a disability, be included in the training of legal practitioners. This training should also be extended to magistrates and judicial officers. Dedicated training for presiding officers is needed, not only in formal measures to make proceedings accessible and accommodating when they are put in place, but also in informal measures that can be used in the interim. Furthermore, social context training is sorely needed.

The merits and applicability of McKenzie friends in the South African context should be considered, particularly as paralegals or law graduates could provide this service should they receive appropriate training to do so.

8.3.2. Court supervision of Prevention and Early Intervention Services and therapeutic interventions

While in theory magistrates are expected to consider the effectiveness of measures offered by social workers and other stakeholders to parents and families, the cases surveyed in this study show that this largely did not happen. The analysis of the data in chapter 6 showed that the social workers' recommendation of parenting skills to be offered to parents was often not followed up by averments that these programmes or type of counselling were indeed implemented. The need for relevant adaptation of parenting skills' programmes for those with intellectual disabilities is clear from the literature review. It is recommended that the magistrates monitor the prevention and

[228] See, for example, B Tarleton 'Specialist advocacy services for parents with learning disabilities involved in child protection proceedings' (2008) 36 *British Journal of Learning Disabilities* 133.

early intervention and therapeutic measures identified by social workers in their reports. In subsequent reports, where a social worker has to update the court on the measures offered, specific reporting on these measures (when they were offered, by whom, parental involvement, and monitoring and evaluation of their effectiveness) is needed.

This supervision aspect can be strengthened in dedicated training of magistrates, in relation to these measures. The court retains much discretion to ask a social worker to report back on the adequacy of such measures offered. This may then mitigate against the veritable 'shopping list' of measures identified by social workers in their reports, without proper follow through in actual provision of such measures.

8.3.3. Training of social workers in intellectual disability and parenting as well as development of non-discriminatory and adapted assessment practices

It is submitted that social workers receive social context training to debunk stereotypical attitudes about intellectual disability and parenting that may permeate their reports to court. Developing appropriate supports and a reliable referral network to provide services to parents with intellectual disabilities is needed. This should be in line with the Committee on the Rights of Persons with Disabilities guidance of support that is: 'community based, adequate, accessible and available and appropriate to the goal of facilitating [their] child-rearing responsibilities'.[229] While the primary consideration in child care matters is the best interests of the child, social workers should not lose sight of the fact that service provision is for the benefit of the whole family and family preservation is the main aim – with child removal as last resort.

Social worker's assessment practices need to be adapted for persons with intellectual disabilities. Social workers also need to provide accommodations for intellectual disabilities when conducting their investigation, and need to ensure effective communication and full participation in the process.

Obtaining an independent parenting capacity assessment adapted for parents with intellectual disabilities from an expert such as a psychologist for forensic purposes, should be considered where relevant and should meet ethical principles. In general, obtaining parenting capacity assessments of all parents in neglect cases (whether they have a disability or not) would ameliorate claims of discriminatorily singling out parents with disabilities and those with intellectual disabilities to be assessed in this way. As discussed in chapter 7, parenting capacity assessments are usually not obtained in South Africa, whether parents are disabled or not. Further study

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[229] J Fiala-Butora 'Article 23: Respect for the Home and the Family' in I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2019) 648 (reference to a number of concluding observations of the Committee).

into the potential colonial and ableist biases implicit in current parenting capacity assessments falls outside the scope of this study but would warrant future research as would an analysis of the utility of these assessments.

8.3.4. Inclusion of participation-enhancing provisions, including procedural accommodations in the Children's Act and Court Rules: a court model

Similar to the situation in Uganda[230] and elsewhere,[231] court rules in South Africa retain discriminatory terminology such as 'idiot' and persons of unsound mind, which entrenches the stigma they face in court proceedings – even where those very rules are not relied on in a particular court's processes. This is because the lawyers' training on these aspects will impact on their treatment of such persons in other court proceedings. The lack of credibility of parents with intellectual disabilities being inferred when providing testimony/evidence, is therefore not a far-fetched possibility. Understanding the complex processes involved in court can also be a barrier for persons with intellectual disabilities. Support should therefore be one of the measures offered to them so that they can fully participate. The form of questioning may require alternative techniques.

It is therefore recommended that the Regulations (court rules) to the Children's Act be amended to include dedicated provisions on the following aspects:

- reasonable accommodations (individual specific measures);
- support in decision-making;
- AQTs; and
- intermediaries.

Before the viability of particular measures that have been employed in other jurisdictions can be tested and adapted for the South African context, a baseline study needs to be undertaken to determine the extent of the barriers to accessing justice faced by mothers with intellectual disabilities (and other disabilities) in the Children's Courts (and other courts where relevant). The study's findings show that it is very likely that other courts, including adversarial ones, do not employ the protective measures required. The Sexual Offences Courts' regulations show some potential, but political will and appropriate funding will be needed to ensure that this potential is reached. It is submitted that the South African Law Reform Commission, or alternatively the South

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230 MDAC *Justice for People with Mental Disabilities in Uganda: A Proposal for Reform of Rules of Court* (2015) <http://www.mdac.org/sites/mdac.info/files/uganda_rules_of_court_proposal.pdf> (accessed 1 December 2017). The Ugandan Family and Children Court is established under sec 13 of the Children Act, Chapter 59, Laws of Uganda of 2000.

231 MDAC *The right to legal capacity in Kenya* (2014) <http://mdac.org/sites/mdac.org/files/mdac_kenya_legal_capacity_9apr2014_0.pdf> (accessed 1 December 2017). Discriminatory terminology is utilised in art 83(1)(b) of the Constitution of Kenya (2010).

African Human Rights Commission, should embark on an audit of the accessibility and procedural accommodations in the courts – after consultation with parties with disabilities before the courts.

Measures such as intermediaries are already employed in South Africa in criminal court contexts and are theoretically available in Children's Courts as discussed in chapters 5 and 7.[232] However, the distinctive role that intermediaries play in relation to facilitating communication and understanding for persons in court proceedings in criminal courts, such as in Australia, [233] need to be adapted to the civil process and to the inquisitorial role of magistrates. These should also be extended to adults with communication difficulties.

Once the baseline alluded to above has been conducted, it will behove the law reformers to first define the entity responsible for providing these accommodations in the Children's Act (amending same) and its rules. Second, the rules need to specify where and how the accommodations may be accessed by persons with disabilities. A consideration here may be expanding the role of the clerk of the court as accommodations officer. Third, the availability of accommodations needs to be assured. Relevant budgeting also needs to accompany the planning for such accommodations. Furthermore, it must be made clear to parties before the courts that these accommodations are gratis. Fourth, the court should record the uptake of such measures to promote accountability. Monitoring by the Department of Justice will need to be in place of the use of and availability of accommodations in all the magistrates' courts. These recommendations are made based partly on the guidance provided by the OUHCH to states.[234]

It would be speculation to surmise what factors weighed more in the presiding officer's decision-making when the children were removed on the basis of allegations of neglect from the care of the mothers in two of the cases reviewed in chapter 6, and not reunited with the mother after an alleged abandonment in the other case. Furthermore, it is also speculation as to whether or not ableist prejudices played a role in their decisions and the way in which proceedings were conducted. But, more importantly, based on the fact that court procedures are not formally accommodating

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232 CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251; M Bekink 'Kerkhoff v Minister of Justice and Constitutional Development 2011 2 SACR 109 (GNP): Intermediary appointment reports and a child's right to privacy versus the right of an accused to access to information' (2017) 20 *Potchefstroom Electronic Law Journal* 1; M Bekink *The protection of child victims and witnesses in a post-constitutional criminal justice system with specific reference to the role of an intermediary: A comparative study* LLD thesis, University of South Africa (2016) 1.

233 P Cooper & M Mattison 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model' (2017) 21 *The International Journal of Evidence & Proof* 351.

234 OUNHCHR (n 1 above) para 28; OUNHCHR *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities* (2016) A/HRC/34/26 para 41.

in terms of the legislation and court rules (currently under the regulations), without social context training one cannot anticipate that the presiding officers would put in place informal measures to enhance meaningful participation.

It bears reiteration that the Children's Act requires rules to be put in place to formulate best questioning techniques for children with disabilities. However, these have not eventuated, including in the new draft formulation of the rules. Questioning techniques should also be formulated for *adults* with communication difficulties. Attorneys should receive appropriate training in these techniques.

The diagram below provides several examples of reasonable and procedural accommodation measures that can be provided to persons with intellectual disabilities in the statutory process. These are derived from examples in the literature and other jurisdictions.

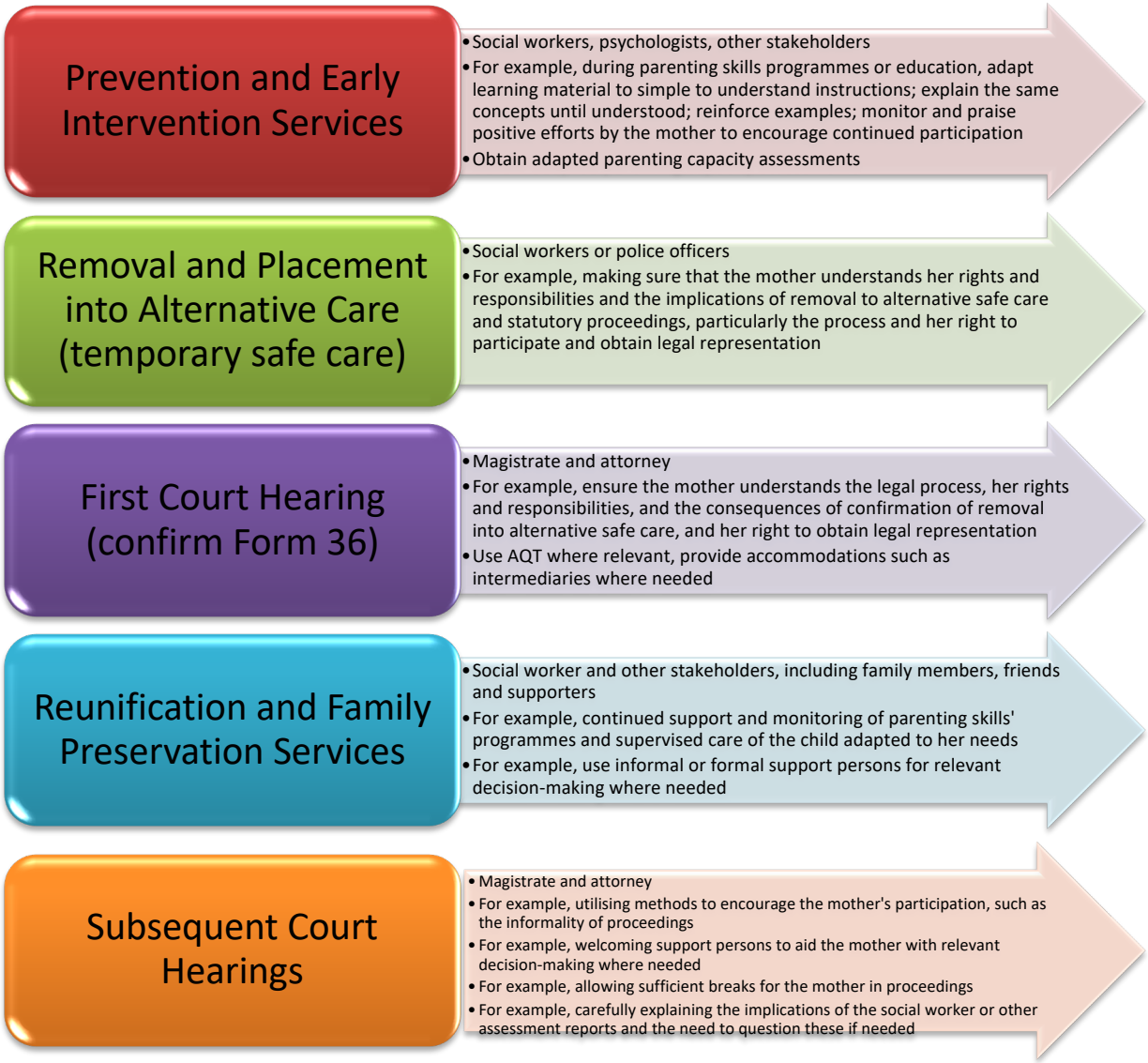

Diagram 3: Diagram depicting examples of provision of reasonable and procedural accommodation during the entire statutory process

These measures are access to information, access to justice and legal capacity enhancing. Such examples should be provided in court rules or guidelines, and potentially also in the form of relevant policy or framework legislation (on disability), which is discussed in more detail below.

In summary, it is recommended that the court rules are reconfigured to be in line with the state's international and regional law obligations to make proceedings accessible and to accommodate communication and participation needs where relevant.

A court model is proposed that plans how to establish a procedure for reasonable and procedural accommodations in the Children's Courts (and other courts where relevant). This process is set out in the diagram below.

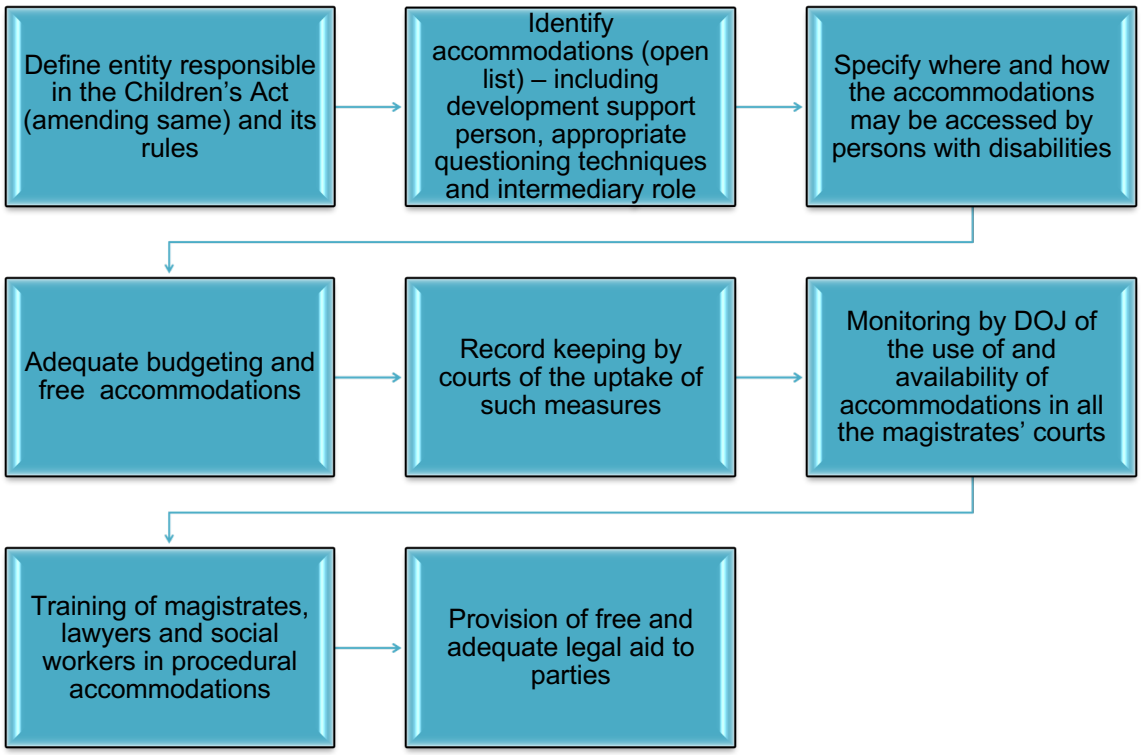

Diagram 4: Model of a process of establishing and elements of procedural and reasonable accommodations offered in courts

Considering the intersectional discrimination faced by women and girls with disabilities, drafting of court rules cannot be conducted without adequate consultation with women likely to be affected by these rules.[235] Similarly, men with disabilities

[235] Committee on the Rights of Persons with Disabilities *General Comment 3: Article 6: Women and girls with disabilities* (2016) CRPD/C/GC/3 para 63(a), points out that states parties should be 'Addressing all barriers that prevent or restrict the participation of women with disabilities and ensuring that women with disabilities, as well as the views and opinions of girls with disabilities, through their representative organizations, are included in the design, implementation and

should also be consulted to ensure the rules are accessible and truly inclusive of the diversity of disabilities – particularly as caregiving of children should not predominantly remain the burden of women.

8.3.5. Amending the Children's Court processes to allow for reasons for decisions

The wide discretion awarded to magistrates to make decisions in the best interests of children, yet not putting in place a mechanism for accountability on how these decisions are reached, is problematic. Magistrates do not provide reasons for their decisions in the form of a judgment or short list of reasons. The possibility of review of decisions is therefore illusory, as it is not easy for parents to question the decision-making in a particular case.

Deliberative decision-making should be the starting point. If magistrates were to provide reasons for their decisions, rather than merely citing a relevant ground for care and protection of children under the legislation, it would also force them to engage with a potential ableist lens in their decision-making.

It is recommended that the Children's Act be amended to require explicit deliberative decision-making in the form of a short judgment or list of reasons to be provided by the magistrate. Other jurisdictions provide permission and funding for researchers to observe the proceedings and report anonymously on these, such as the Child Care Law Reporting project in Ireland.[236] A similar project in South Africa may serve as a check on child care proceedings in South Africa to demystify the court process and identify good and bad practices in our system, but primarily to promote accountability and transparency.

8.3.6. Disability-specific legislation and implementation of policy

Some authors have proposed disability-specific legislation for the South African context.[237] The White Paper on the Rights of Persons with Disabilities (WPRPWD) also refers to this gap and the analysis of the policies shows that there are large gaps in procedural accommodations. The South African Law Reform Commission (SALRC) has recently appointed an advisory team to start the law reform process to domesticate the CRPD – particularly to adopt or modify and abolish and develop disability rights laws in the country.[238] This process will be incomplete without an assessment of the

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monitoring of all programmes that have an impact on their lives; and including women with disabilities in all branches and bodies of the national monitoring system.'

236 Child Law Project <https://childlawproject.ie> (accessed 1 August 2021).

237 I Grobelaar-du Plessis *Gestremdheidsreg: 'n Internasionaalregtelike en regsvergelykende analise (Disability Law: An international and legal comparative analysis)* (2010) Unpublished LLD thesis, University of Pretoria 563.

238 SALRC *Project 148: Domestication of the United Nations Convention on the Rights of Persons with Disabilities.*

procedural accommodations required in court processes in South Africa, including in the Children's Courts. Guidance to courts on how to formulate a court model should be considered in this law reform process.

Disability-specific legislation to guide lawmakers and courts is needed. Gender mainstreaming legislation in the form of the Women's Empowerment and Gender Equality Bill[239] never saw the light of day, despite the presence of some political will to bring about such a change. Hopefully the traction of the WPRPWD will positively affect political will in relation to drafting and promulgation of disability-specific legislation. The disparate way in which legislation and policy deals with disability can be mended through clear and unequivocal requirements from all law and conduct to comply with substantive equality, and to promote dignity and participation enhancing measures in society – including in court proceedings in dedicated framework legislation.

In the meantime, the limited opportunities and potential of relying on the Promotion of Equality and Prohibition of Unfair Discrimination Act to enforce duties on certain sectors such as social services to provide reasonable accommodations to persons with disabilities, should be considered. Accountability monitoring through requiring reporting to relevant parliamentary committees and the monitoring and evaluation by the South African Human Rights Commission (SAHRC) of progress in adaptations and inclusionary practices in social service provision to persons with disabilities – especially those with intellectual and communication disabilities – is needed.

At the same time, discriminatory laws need to be abolished, including substituted decision-making laws, legal capacity inhibiting laws (such as those procedural rules in relation to 'idiots' for example), and forced sterilisation laws. The process of bringing all laws under the democratic dispensation in line with the Constitution began in 1993, and must continue to abolish ableist laws and develop participation-enhancing laws (and court rules) for persons with disabilities. The impact of equal recognition before the law and supported decision-making under the CRPD, requires a major overhaul of the legal system and discriminatory laws.

8.3.7. Investigating the predominance of poverty as a risk factor

Many of the cases of neglect surveyed in this study identify that poverty is a major contributing risk factor for the removal of children from families into alternative care. Further research into the predominance of this factor is necessary. The Children's Act does require that the basic necessities of life be offered to families. Whether this actually happens is not monitored. Poverty as a factor can overshadow other protective measures, but it may also enhance other risk factors too, such as the alleged impact of parental disability on parenting capacity.

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[239] Parliamentary Monitoring Group *Women's Empowerment and Gender Equality Bill* <https://pmg.org.za/bill/26/> (accessed 1 November 2020).

It is incongruous that foster care grants are offered to foster parents to assist with providing basic necessities to children in need, but no financial support, other than paltry child support grants are offered to indigent families. It is noteworthy that in the three case studies on intellectual disability, the mothers did not receive disability grants, although on the face of the reports they appeared to be eligible. It is not far-fetched to assume that in some cases, were the biological parents of the children offered appropriate social assistance in the form of a grant, and other supportive services, including social housing, they may have been able to adequately care for their children.

8.4. Conclusion

This study sought to unpack and understand the treatment of mothers with intellectual disabilities in two Children's Courts in South Africa, through analysis of the evidence and documents in the court files. The review of 244 cases categorised as neglect found only three cases where mothers with an intellectual disability were alleged to have neglected their child or children. An analysis of these cases, as well as those where psychosocial illness or disability was flagged (particularly where it was conflated with intellectual disability as a 'mental challenge'), identified the following findings together with the doctrinal and socio-legal analysis of the relevant domestic, regional and international laws and policies.

These findings correlate with the research aims set out in part 1.4. of chapter 1. First, an interpretation of the rights of children and parents in the context of the phenomenon showed that sufficient ground has been laid in international, regional and domestic constitutional law that points to both the rights of children and parents with intellectual disabilities being protected and requiring positive measures to ensure substantive equality.

Second, the prevalence of child removal from parents with intellectual disabilities in the two Children's Courts, compared to that of parents with other disabilities and without disabilities, was established. A high prevalence of child removal from mothers with intellectual disability was not noted in this study due to the sample size. The review of the evidence that is led in court in the court files identified that the assessment tools that were utilised to substantiate the removal, were not readily ascertainable from the social work reports. Furthermore, the weight attached thereto cannot be determined without reasons being offered in a judgment by the magistrate. In particular, it is of note that:

- No support was provided to the parents by social workers or court personnel during the broader statutory process;
- The proceedings did not enable even informal measures of reasonable and procedural accommodations to be provided to mothers with intellectual

disabilities in the absence of formalised court rules mandating these measures; and

- The need for guidelines for the support that must be provided to parents by social workers as part of early intervention and prevention services, therapeutic intervention, assessment guidelines, and in court process through accessible procedures and legal advocacy for the parents' rights, with reasonable and procedural accommodation where necessary, was established.

It was, however, noted that stereotypical attitudes about intellectual disability and its impact on parenting were evinced in the social work reports in the three case studies dealing with mothers with intellectual disability.

Third, it was determined that law reform and policy formulation in particular areas are needed.

Challenges in social services with regard to assessment and appropriate support that needs to be provided to mothers with intellectual disabilities to meet their parenting responsibilities, were identified. Generally, the social work reports were vague and provided generalisations about the support offered to parents to meet their responsibilities. Assessments were not clearly defined, nor adapted.

The Children's Courts' proceedings are generally not accessible to persons with intellectual disabilities. For example, Easy to Read information is not provided. In one example, a mother with a physical disability was unable to access the court building, and her testimony was obtained through a clerk. Reasonable and procedural accommodations for mothers with intellectual disabilities were not provided in any of the cases surveyed.

It was impossible to identify whether presiding officers are adequately trained in relation to capacity to parent and mental and legal capacity (and assessments thereof), and this should be an area for future research.

The current formulation of neglect discloses possible discrimination in the context of mothers with intellectual disabilities. This discriminatory potential can be ameliorated if guidelines in the form of adapted broad assessment frameworks are developed in tandem with social context training of magistrates and social workers, to engage better with these parents and to promote their rights.

The need for developing guidelines for legal representatives regarding the provision of competent and specialised legal representation to mothers with intellectual disabilities was identified.

Diagnostic-prognostic thinking pervades the social workers' reports and the outcome of the alternative care placement by the court did not depart from such a

grounding. Generally, parenting capacity assessments or psychological or psychiatric evaluations were not obtained, and thus diagnoses were not corroborated nor their 'potential' effect on parenting.

The seven themes that emerged from the study of nine case studies point to a situation that is not sustainable from a rights perspective. However, it will continue if the Children's Court processes are not changed to promote better deliberative decision-making. A court model for provision of procedural accommodations was recommended.

Six recommendations were made in this chapter on how to address the failings of the South African domestic law and policy system, to bring it closer to the state's obligations under international and regional law. While attempts have been made to hold the state accountable through Treaty Monitoring Bodies' (TMBs) concluding observations, political will to remove barriers to full participation in the justice system have not yet borne fruit for parents with intellectual disabilities or other disabilities in the Children's Courts. It is hoped that the law reform process of the SALRC to domesticate the CRPD will be the first step towards a major overhaul of the legal system in terms of promoting the rights of persons with disabilities. However, it is in its infancy and law reform can take decades. In the meantime, procedural laws (regulations and court rules) need to be prioritised and developed or amended to ensure that procedural accommodations are offered to adults with disabilities engaging in the justice system – particularly in the Children's Courts.

The voice of women with intellectual disabilities was rendered virtually inaudible by the social workers who drastically intervened in their family lives, often with lifelong consequences for them and their children. The social work reports did not show sufficient engagement and supports offered to the mothers. This treatment was perpetuated in the justice system, where procedural accommodations were absent and potentially ableist decision-making changed the life course of those affected. The best interests of the child standard should not be used to unfairly discriminate against parents with intellectual disabilities. Instead, procedural and substantive law should ensure that they receive the supports and accommodations necessary so that can equally participate in the justice system and receive meaningful opportunities to parent.

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APPENDICES

Appendix A: Tables for the data of the case studies from Chapter 6

Table 2: Demographic factors of the parent and family

Case Study	Mother disability, race, age	Father disability, race, age	Marital status of parents	Other adult family	Income, including grants	Age; sex; disability of child 1	Age; sex; disability of child 2	Age; disability; sex of child 3
1	Intellectual; Caucasian; unstated.	None; unstated; unstated. Denies paternity	Married, but separated.	Grandmother, (wheelchair user), sickly uncle, half brother, mother's boyfriend	Old-age grant for grandmother	8y f		
2	Intellectual; African; 1982: 30y	Unstated.	Unstated.		Unstated.	17m m (2y)	[3y girl with father]	
3	Intellectual; Caucasian; 1971: 42y	None; Caucasian; 1962: 51y	Married.	None.	No grants, unemployed.	10y f; intellectual	9y m; intellectual	5y m; (epilepsy, intellectual) 3y m; intellectual. Infant not part of proceedings
4	Intellectual; epileptic; African; 1970: 40y	None; African; 1972: 38y; deceased in 2011.	Single.	Maternal aunt and maternal grandmother.	Unstated.	14y f; HIV-positive		
5	Psychosocial; HIV-positive; Indian; birth not registered or estimated.	Not traceable.	Single.	Maternal grandmother.	No grants, unemployed.	Approx 4y m	Approx. 17m f	
6	Psychosocial; African; age not provided.	Allegedly deceased.	Single.	Maternal grandmother, adult cousin and 6 minor cousins.	Unemployed.	9y m		
7	Psychosocial; African; year not provided but age stated as 20y	Age not stated.	Single.		Unemployed.	2m m.	[2 m (sex not stated)]	
8	Physical? wheelchair user, stroke, TB,	'Mentally challenged';	Single.		Unemployed (both parents);	7y m		

	meningitis; African 1967: 47y	African; 1969: 45y			father: disability grant.			
9	Deceased.	'Mentally challenged'; HIV; visual impairment; 1973: 40y	Single.		Father unemployed.	7y f		

*Age is indicated as at the date of the file being opened.

Table 3: Risk factors identified for statutory intervention

Case Study	Intellectual disability of the parent averred	Poverty	Other
1	Yes.	Yes.	Grandmother's physical disability; child's unsupervised and uncontrolled behaviour; overcrowded house.
2	Yes.	Not stated.	
3	Yes. Also epilepsy.	Yes.	Children's intellectual disability.
4	Yes. Also epilepsy and' mental illness'.	Not stated.	Neglect by maternal family.
5	No. 'Mental illness/mentally challenged'; HIV-positive.	Not stated.	
6	No. 'Mentally ill/mentally challenged'.	Yes.	
7	No. 'Mentally ill; mentally disturbed'.	Not stated.	
8	No. Physical disability (wheelchair user, stroke, TB meningitis) of mother. 'Mentally challenged' father (head injury).	Not stated. (unemployed)	*Foster care application.*
9	No. 'Mentally challenged' father; and visual impairment. *** Note, query by presiding officer for social worker to rectify report in relation to physical disability, and delete reference to 'psychologically unfit'.	Not stated. (unemployed).	*Foster care application.*

Table 4: Measures to support the family taken before and during the statutory intervention

Case Study	Prevention and early intervention measures taken by the social worker	Therapeutic interventions identified by the social worker/referrals after statutory proceedings initiated	Family reunification measures taken by the social worker	Any measures mandated by the court
1	Previous investigation into abuse allegedly by brother. Childline therapy then recommended for him. No other PEI measures recommended.	Therapy at an assessment centre; partial care after school; new sleeping arrangements suggested and monitored; Childline	None.	Supervised visits with mother; no sleep overs in first order.

		therapy for the brother recommended; counselling for family to improve income and housing.		
2	Not stated.	While hospitalised, hospital social worker provided counselling.	None.	None.
3	Not stated.	Home visits; proposed assistance with application for disability grants; inclusion in parenting programme.	To 'mediate' parents' visits to foster care/CYCC.	
4	Not stated.	None.	None.	None.
5	Not stated.	To closely monitor foster care.	None.	None.
6	Food parcels on 'several' occasions.	None.	'No reconstruction services will be rendered as the mother of the child is mentally ill'.	A medical report from the mental health institution where the mother received treatment was requested by the court (and not obtained).
7	Mother and child placed in baby haven before removal to monitor caregiving.	Offered opportunity to 'learn' how to care for her child at CYCC; counselling for behaviour and parenting programme recommended.	Reunification services would be provided to the family, including encouragement of contact, investigation of future placements, and monitoring of the mother's caregiving of the 'new' baby.	None.
8	None.	None.	None.	None.
9	None.	None.	None.	None.

Table 5: Documentary evidence led (assessments and reports)

Case Study	Social work reports	Proof of parent's diagnosis	Assessments or reports of the child	Assessments of the parent	Other
1	4 reports.	None.	Medical report shows no signs of sexual abuse, only noting bruises. Two psychosocial and educational reports by teacher and aftercare carer	None.	
2	1 report.	Yes, to an extent.	Medical report shows malnourishment and delayed development (speech and motor).	Psychologist's report; psychiatrist report.	Hospital social worker's report.
3	3 reports.	None.	Three medical reports of the children indicating intellectual disability of three of the four children.	None.	Letters from CYCC and School.

4	2 reports (one on file).	Only of epileptic treatment.	Laboratory report confirming HIV status; form 7 medical report stating child is immunocompromised.	None.	None.
5	4 reports.	Letter from hospital confirming being mental health user with psychosis.	Medical report stating paraffin ingestion by children and estimation of ages.	None.	
6	1 report.	None.			
7	2 reports.	None.	Medical report on child stating physical development is abnormal due to malnourishment. The doctor noted substance abuse.		Affidavit from baby haven and letter from the CYCC.
8	2 reports.	Letter from doctor dated 1992 (21 years ago) confirming mother's treatment. None for father. *Affidavits from both parents.*	None.	None.	None.
9	1 report.	Letter from doctor confirming HIV treatment and visual impairment.	None.	None.	None.

Table 6: Measures taken during the court process to enhance the legal capacity, communication and participation of the parent

Case Study	Parent present at hearing	Legal representation	Testifying competence	Procedural accommodations	Support
1	4/6	Right to legal representation and legal aid explained in 'full' and in 'simple terms' at separate hearings.	Not discussed.	None.	None.
2	0/2	N/A	N/A	N/A	N/A
3	2/4	Hearing 3: 'Will speak on their own' in one hearing. Hearing 4: 'Parents to engage the services of legal aid'. 'Parents have requested an opportunity to consult legal aid'.	Not discussed	None.	None.

4	0/3	N/A	N/A	N/A	N/A
5	0/5	N/A	N/A	N/A	N/A
6	0/2	N/A	N/A	N/A	N/A
7	2/5	Hearing 3: 'Mother opposed the application, adjourned for mother to apply for legal aid.' A week later, the mother no longer required legal representation and no longer opposed the matter.	Not discussed.	None.	None.
8	0/2	N/A	N/A	N/A	N/A
9	0/1	N/A	N/A	N/A	N/A

Table 7: Correlation between the social worker's recommendations and the court's findings in terms of the Children's Act[240]

Case Study	Social worker's initial recommendations of the applicable grounds (section 150(1))	Subsequent report recommendations of the applicable grounds	Court's finding of the applicable grounds	Outcome for the child (alternative care placement)
1	(a) and (f).	2nd: (a), (b), (g). 3rd: (a), (b), (g). 4th: (a), (b), (g).	(a), (b) and (g).	Non-relative foster parents for 2y; then with relative for 5m; thereafter in CYCC for 2y. Contact with biological family supervised initially; intermittent contact.
2	(a), (g).		(a) initially; (a) and (g) at second hearing.	Cluster foster care for 1y, 2m; later non-relative foster care for 2y, 3m. No contact with mother (whereabouts unknown).
3	(i), (f), (h), (g).		(g); later (a,), (b), (f) and (g).	Non-relative foster care for 4m; then in CYCC for 4y, with intermittent contact with parents, including overnight.
4	(a)	Not filed.	(h)	Non-relative foster care for 11y. No indication of contact with mother.
5	(g)	(g)	(g)	Relative foster care for 8y. No indication of contact with mother.
6	(g), (h), (i).	Not stated.	Court order, section 150(1)(i).	Relative foster care for 1y. Mother resides with grandmother so daily contact.

[240] Abbreviations 'y' means year and 'm' means month.

7	(g)(h)	(g)	Court order (section 150(1)(i).	Relative foster care for 2m; then CYCC for 3y. Periodic contact with mother, all supervised at CYCC.
8	(a)	(a)	(g)	Relative foster care for 5y. No indication of contact with mother or father.
9	(a)		(g).	Relative foster care for uncertain period. No indication of contact with father.

Table 8: Best interests factors considered in the social work reports

Case Study	Social work report	Best interests factor in section 7(1) of the Children's Act	Factors stated in report
1	First	(l)(i) need to protect child from harm including subjecting the child to abuse	Alleged sexual abuse
	Second	(a)(i) and (ii) nature of relationship with parents	Close with mother and grandmother); fights with brother. Father - no contact; separated from mother.
		(c) capacity of parent to provide for needs of child	'[Mother's] inability to provide for her development needs' due to her intellectual disability and grandmother's physical disability; Unemployed; reliant on grandmother's disability grant.
		(g) Child's characteristics	Age, background, language of learning Afrikaans, not English, wanders the streets unsupervised
		(h) child's physical and emotional security and development	'Visible distress, throws tantrums'
		(l)(i) need to protect child from harm including abuse	'The mother shows no insight and ability to protect the child in the house. Child can't protect herself.
		(k) need for the child to be brought up in stable family environment or resembling one	'Primary and secondary needs can be best met by the foster care placement'
2	First	(c) capacity of parent to provide for needs of child.	Father unknown. Mother 'struggled to meet his physical, emotional and medical needs'; and 'assessed as suffering from an intellectual impairment. As a result of this, she is not capable of logical reasoning that she has to feed and

			protect her child and she subjects him to high risks'; 'non-compliant with treatment, is nomadic and the prognosis for her recovery is poor'; 'alleged [by maternal cousin] that she abused alcohol and tended to sleep for most of the day; she has to be guided about taking care of her child as she sometimes took good care of him and at others did not feed him properly [and] gave him coffee instead of milk and slapped him when he cried'; unemployed.
		(b) The attitude of the parent towards the child and exercise of parental responsibilities and rights in respect of the child	'Child not observed with the mother as she was hospitalised and her whereabouts unknown thereafter'; '[She] did not enquire about his well-being or made a request to see him' – report by hospital social worker).
		(g) child's characteristics	'Developmental delays (speech and motor); 18 months of age.
		(h) the child's physical and emotional security and intellectual, emotional, social and cultural development	'Malnourishment and development delays'.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	'In need of nurturing in a stable and secure environment. In the absence of extended family being able to care for him, a cluster foster home is deemed to be the best option for him'
		(l)(i) need to protect child from harm including abuse	'Lived a lifestyle that placed her son and herself at risk of being abused or illtreated'.
3	First	(c) capacity of parent to provide for needs of child	Parents married and live together. 'Mother and children present with intellectual disabilities'; unemployment of mother, periodic employment of father; no grants; no food; unconducive rental accommodation.
		(g) child's characteristics	10-year-old female; 9-year-old male; 5-year-old male; 3-year-

			old male; new born infant (latter not part of proceedings); 'very dirty and neglected state', 'always hungry'; one child not in receipt of medical care, despite his epileptic seizures; children's intellectual disability with eldest two children in special school.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	'[Home] situation will not serve the best interest of the children concerned as it will not help to enhance the children's development and sense of belonging'.
		(i) child's disability	Intellectual disability of three children
		(j) child's chronic illness	Epilepsy of one child.
	Second	(c) capacity of parent to provide for needs of child	'Mother is intellectually disabled and.. it will influence a parent with intellectual to their children'; 'house dirty with just one bed and television'; 'unable to [take] proper care of them and this has caused the children to have not developed efficiently and the children have been neglected tremendously'.
		(h) child's physical and emotional security and intellectual, emotional, social and cultural development	'Not developed properly, they are not even toilet trained at the age they are in and they do not have proper speech'.
	Third	(c) capacity of parent to provide for needs of child	No disability grant for mother; family's situation has not changed.
		(g) child's characteristics	'Children are unable to undertake age-appropriate duties'.
4	First	(c) capacity of parent to provide for needs of child	Father deceased; Form 36 removal: mother is 'mentally retarded'; first report: mother is 'mentally ill'; epileptic.
		(g) child's characteristics	Grade 8 girl, average pupil
		(j) child's chronic illness	HIV-positive
		(h) child's physical and emotional security and intellectual, emotional, social and cultural development	Neglect, physical abuse, maltreatment, no school

		(k) the need for the child to be brought up in a stable family environment, or one resembling one	supplies provided by maternal aunt. 'Best interests of the child to be placed in foster care'.
5	First	(c) capacity of parent to provide for needs of child	Father unknown. Form 36: Mother threatened to kill children; fed children own faeces, aggressive, refuses medication; admitted for paraffin ingestion. First report: Mother 'mentally challenged'; schizophrenia; psychotic; suicidal ideation; aggressive; unstable; unable to protect herself and children in danger; Unemployed; no disability grant; Resides with grandmother.
		(g) child's characteristics	17-month-old girl; 4-year-old boy.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	'Mother is mentally challenged and unable to care for her children, best interests placed with grandmother', 'even though the natural mother is residing in the home'.
		(l)(i) need to protect child from harm including maltreatment, abuse, neglect	One child 'given paraffin to drink' by the mother – hospitalised.
	Second	(c) capacity of parent to provide for needs of child	'Mother is mentally challenged'.
	Third	Verbatim of previous report.	
	Fourth	Verbatim of previous reports.	
6	First	(c) capacity of parent to provide for needs of child	Father allegedly deceased. Mother is 'mentally ill'; 'mentally challenged'. 'Receiving treatment from [a psychiatric institution] and unable to take care of the child.'
		(g) child's characteristics	9-year-old boy
		(h) child's physical and emotional security and intellectual, emotional, social and cultural development	'Child accepted the mother's condition and has bonded with grandmother; child expressed desire to remain in care of grandmother'.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	Grandmother 'has a stabilising and positive influence on the child's life'.
7	First	(c) capacity of parent to provide for needs of child	Father denies paternity; Form 36: mother overdosed child with Panado;

			First report: suicidal ideation if child is not returned to her care; Psychological disorder due to trauma experienced as a child; Resides with grandmother; Mother lacks insight; lacks parenting skills; current incapacity to learn parenting skills.
		(d) likely effect on the child of change in circumstances including separation from parents or others	Reunification plan suggested to ensure child does not 'stay in the system forever.'
		(g) child's characteristics	5-week-old infant boy; Malnourished; Possible neurological damage.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	Placement in CYCC in best interests, as a secure environment where the mother's interaction with her child can be monitored and controlled; empowering for the child, provides stability.
		(l)(i) need to protect child from harm including maltreatment and neglect	Mother fed child water and maize meal
	Second	(b) The attitude of the parent towards the child and exercise of parental responsibilities and rights in respect of the child	Neither parents kept contact with the child on a regular basis; Initial daily visits petered out to weekly, then 3 monthly; second child born.
		(c) capacity of parent to provide for needs of child	Father (who disputes paternity) accused in sexual offence against minor; Lost interest in first-born child
		(g) child's characteristics	Child bonded well in CYCC.
		(k) the need for the child to be brought up in a stable family environment, or one resembling one	CYCC providing a home, a family, strong attachments and stability for the child Continuation of alternative care is in the best interests of the child because of child's attachment to caregivers, progress and the parents lack of current interest and commitment towards the child.
		(l)(i) need to protect child from harm including neglect	Child at risk if returned to care of mother.
8	First	(b) The attitude of the parent towards the child and exercise of parental	Parents indicate foster care best for the child.

		responsibilities and rights in respect of the child (c) capacity of parents to provide for needs of child (k) the need for the child to be brought up in a stable family environment, or one resembling one	 Both parents incapacitated due to poor health and not able to care for the child. Mother a wheelchair user after stroke; treatment for TB meningitis. Father 'mentally challenged'; head injury. Both parents unemployed, father receives disability grant; never lived together. Child lived with maternal aunt since birth, continue foster care.
9	First	(b) The attitude of the parent towards the child and exercise of parental responsibilities and rights in respect of the child (c) capacity of parents to provide for needs of child (g) child's characteristics	Father ostensibly unable to care for the child due to his disability, but no affidavit is attached from him – only a letter from the doctor. Mother deceased. Father 'mentally challenged and therefore cannot provide for the basic needs of the child as he needs to be taken care of'. 17-year-old girl; living with maternal grandmother.
	Second	(c) capacity of parents to provide for needs of child	Father is 'physically unfit to care for her'.

Appendix B: Ethical clearance from the Research Ethics Committee, Faculty of Law, University of Pretoria

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

DEPARTMENT OF PUBLIC LAW

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E-mail: annelize.nienaber@up.ac.za

15 November 2017

DECISION OF RESEARCH ETHICS COMMITTEE:
W HOLNESS: 'ACCESS TO JUSTICE FOR MOTHERS WITH INTELLECTUAL DISABILITIES IN CASES OF CHILD NEGLECT AT TWO KWAZULU-NATAL CHILDREN'S COURTS'

After review of the above research proposal and supporting documentation, ETHICAL CLEARANCE for the proposed research was hereby APPROVED.

Signed: _30 August 2017_____ (Chairperson of the REC)

Date: _____

PLEASE NOTE:
As stipulated in the Policy for the Preservation and Retention of Research Data (Rt 306/07), researchers are required to retain data for a minimum of 10 (ten) years. It is the responsibility of the Head of Department of the Department in which the research is undertaken to ensure the safekeeping of this data.

You are thus hereby informed that you must retain the data generated by this research project for the prescribed period. Audits may be carried out on such data.

As well, you need to conduct your research strictly according to the protocol on which you were granted ethics clearance on. Any deviations will invalidate your ethics clearance.

Yours faithfully

(PROF) ANNELIZE G NIENABER
CHAIR: RESEARCH ETHICS COMMITTEE, FACULTY OF LAW

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Appendix C: Letters to the Chief Magistrates requesting permission to access court records

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr EB Ngubane
Head of the Administrative Region
KwaZulu-Natal A
Chief Magistrate,
Private Bag X54308,
DURBAN, 4000
Tel: 031 302 4151
Fax: 031 368 1366/086 629 2690

Secretary: Ms Babongile Ntuli
Tel: 031 302 5149
Email: BaNtuli@justice.gov.za

20 June 2017

Dear Sir,

RE: REQUEST FOR PERMISSION TO ACCESS CHLDREN'S COURT FILES OF THE DURBAN CHILDREN'S COURT, KWAZULU-NATAL FOR A RESEARCH STUDY

I am a doctoral candidate with the Centre for Human Rights at the University of Pretoria under the supervision of Professor Charles Ngwena with student number 20304723. I am conducting research into the topic of 'Access to justice for mothers with intellectual disabilities in cases of child neglect at two KwaZulu-Natal Children's Courts'. These two courts are the Durban and Pietermaritzburg Children's Courts respectively.

I am an admitted attorney of the High Court of South Africa and last practiced in 2012 at the Legal Resources Centre, Durban. Since 2013, I have been a lecturer at the School of Law at the University of KwaZulu-Natal where I teach *inter alia* in postgraduate programmes such as Child Care and Protection (Master of Laws) and Constitutional Litigation (Master of Laws) and Bachelor of Laws (LLB) modules such as Constitutional Law. I have 12 peer-reviewed publications on issues dealing with human rights, children's rights and disability rights. I therefore have extensive experience in legal practice, as well as research and including in children's rights.

I am writing to you to request permission to access case files in the Durban Children's Court for the period 2010 to 2014. My research seeks to understand the factors that may make mothers with disabilities more susceptible to child removal through statutory proceedings under the Children's Act 38 of 2005.

In order to determine a basic prevalence level, I wish to review Children's Court records in the Durban and Pietermaritzburg Children's Courts and compare the prevalence of statutory proceedings on the ground of 'neglect' for mothers with intellectual disabilities and mothers without disabilities.

This request is in terms of section 66 of the Children's Act which indicates that persons with the purpose of *bona fide* research may access children's court case records, provided they comply with section 74 of the Act.

Section 74 prohibits the publication of any information relating to the proceedings of a children's court which reveals or my reveal the name or identity of a child who is a party in the proceedings. I will therefore ensure that the children's identities (and that of their parents) are anonymous and not revealed in my research or publications flowing therefrom.

The requirements for ethics approval under the research ethics committee of the Faculty of Law, University of Pretoria, is that the application for ethical approval is accompanied by official letter of approval from the relevant institution that will be involved in the research. As such I am applying to you as the Chief Magistrate of KwaZulu-Natal (Durban), for permission to access and take notes on the contents of case files in cases of 'neglect' from 2010 to 2014 for my *bona fide* research.

Court case file reviews:

In particular, I will peruse the court files to ascertain the following information upon which I will base my analysis:

a. Demography: gender, age, race, disability type of the parent with the disability; level of impairment (mild to moderate intellectual disability); number of members in the household; number of children of the parent; income (disability grant or employment); assistance in the household tasks or caring responsibility by paid helpers or family members; age, gender and disability of the child; any factors peculiar to the child;

b. Evidence of allegations of neglect: who referred the case to the Children's Court (e.g. state social worker, private social worker, or member of the public); age of child at the time of the referral; case history; content of social worker's report to the children's court; content of expert evidence, including psychologists' reports; evidence of allegations of neglect; testing for parenting capacity (e.g. IQ tests); whether evidence/testimony was provided by the parents or expert evidence was led by or on behalf of the parents; testimony of the child;

c. Social service interventions: indications of social service interventions, such as early intervention and prevention programmes (particularly parenting skills training or education); therapeutic programmes; rehabilitation and reunification efforts and the outcome of these;

d. Legal representation: whether the parents are legally represented; if so, by whom; whether parents or children provided testimony in the court proceedings;

e. Court's decision: whether the child is found to be in need of care and protection and on what grounds; whether the parent's disability is stated to be decisive or linked with parental inadequacy; whether removal is authorised by judicial officer; reasons for decision provided; outcome i.e. reunification or permanent placement on review; further court hearings and evidence given; any *obiter* remarks by the magistrate or further referrals to other organisations or fora.

What follows below is a short description of the research to be conducted.

Research question:

My research question is the following: How are the South African social services and two Children's Courts meeting their international and constitutional obligations in promoting access to justice and supporting the parental rights and responsibilities of mothers with intellectual disabilities who are at risk of having their children removed from their care due to allegations of neglect?

To answer this main question, further key questions to be asked are the following:

a. Against the background of the recognition of the right to parental care of parents with disabilities, and for children to parental care in international law, how does the South African legislative scheme (predominantly the Children's Act) recognise, promote and protect the parental rights and responsibilities of mothers with intellectual disabilities?

b. How does the legislative scheme and jurisprudence express itself on the constitutional rights of parents with intellectual disabilities to equality, dignity, legal capacity, and founding and maintaining a family; as well as the best interests of the child; protection from maltreatment and neglect; and children's right to life, survival and development?

c. What do court record reviews say about whether the treatment of mothers with intellectual disabilities by the Children's Court system complies with international standards and best practice, and whether the assessment, early prevention and therapeutic interventions for mothers with intellectual disabilities by the Department of Social Development complies with international standards and best practice?

d. How does the South African social services and justice system compare with Australia, the United Kingdom and the United States of America's systems and law reform efforts?

e. What are the implementation challenges with regard to law and policy for the rights of these children and their parents in South Africa, and what, if any, law reform and policy priorities will be necessary to ensure South Africa meets its constitutional and international law obligations towards both children and their parents who have intellectual disabilities?

What follows below is an outline of some of the ethical implications that arise from this study.

Ethical concerns:

This study looks at the rights of children and their parents with intellectual disabilities. These are both vulnerable groups and therefore confidentiality is of utmost concern when it comes to the Children's Court case files. This study is relevant for this group of persons particularly because it concerns the parents' perceived lack of legal capacity, agency and parenting capacity. I will ensure that the rights and welfare of the parties cited in the court cases, both parents with intellectual disabilities and those without disabilities, and their children are protected. I will protect the identities and interests of those involved. I guarantee the confidentiality of the information obtained.
I have the appropriate training, since I am a qualified attorney, to review the court case files. I will conduct my research in accordance with the ethical and professional guidelines relating to the Legal profession.

The research, as indicated earlier, is also contingent on granting of ethics approval from the Research Ethics Committee of the Faculty of Law, University of Pretoria. Should I receive ethics approval from the Committee, I will be allocated an ethics reference number. I would then provide you with the number before proceeding with the research at the Children's Court in Durban.

Attached hereto is a letter of support from my supervisor, Professor Charles Ngwena.

Please note that I will address a similar letter to Mrs E Moneymore, the Chief Magistrate for KwaZulu-Natal, B region (Pietermaritzburg).

Yours truly,

Willene WHolness.

Ms Willene Holness
BA, LLB (Rhodes), LLM (UKZN)
Admitted Attorney of the High Court of South Africa

Lecturer, School of Law
College of Law and Management Studies
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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Ms Monyemore
Head of the Administrative Region 7
KwaZulu-Natal B
Chief Magistrate,
Private Bag X9011
PIETERMARITZBURG, 3200
Tel: 0333555166/5302
Fax: 033 345 0324

Secretary: Ms Uresha Kesari
Tel: 033 3555166
Email: UKesari@justice.gov.za

20 June 2017

Dear Madam,

RE: REQUEST FOR PERMISSION TO ACCESS CHLDREN'S COURT FILES OF THE PIETERMARITZBURG CHILDREN'S COURT, KWAZULU-NATAL FOR A RESEARCH STUDY

I am a doctoral candidate with the Centre for Human Rights at the University of Pretoria under the supervision of Professor Charles Ngwena with student number 20304723. I am conducting research into the topic of 'Access to justice for mothers with intellectual disabilities in cases of child neglect at two KwaZulu-Natal Children's Courts'. These two courts are the Durban and Pietermaritzburg Children's Courts respectively.

I am an admitted attorney of the High Court of South Africa and last practiced in 2012 at the Legal Resources Centre, Durban. Since 2013, I have been a lecturer at the School of Law at the University of KwaZulu-Natal where I teach *inter alia* in postgraduate programmes such as Child Care and Protection (Master of Laws) and Constitutional Litigation (Master of Laws) and Bachelor of Laws (LLB) modules such as Constitutional Law. I have 12 peer-reviewed publications on issues dealing with human rights, children's rights and disability rights. I therefore have extensive experience in legal practice, as well as research and including in children's rights.

I am writing to you to request permission to access case files in the Pietermaritzburg Children's Court for the period 2010 to 2014. My research seeks to understand the factors that may make mothers with disabilities more susceptible to child removal through statutory proceedings under the Children's Act 38 of 2005.

In order to determine a basic prevalence level, I wish to review Children's Court records in the Durban and Pietermaritzburg Children's Courts and compare the prevalence of statutory proceedings on the ground of 'neglect' for mothers with intellectual disabilities and mothers without disabilities.

This request is in terms of section 66 of the Children's Act which indicates that persons with the purpose of *bona fide* research may access children's court case records, provided they comply with section 74 of the Act.

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The requirements for ethics approval under the research ethics committee of the Faculty of Law, University of Pretoria, is that the application for ethical approval is accompanied by official letter of approval from the relevant institution that will be involved in the research. As such I am applying to you as the Chief Magistrate of KwaZulu-Natal (Pietermaritzburg), for permission to access and take notes on the contents of case files in cases of 'neglect' from 2010 to 2014 for my *bona fide* research.

Court case file reviews:

In particular, I will peruse the court files to ascertain the following information upon which I will base my analysis:

a. Demography: gender, age, race, disability type of the parent with the disability; level of impairment (mild to moderate intellectual disability); number of members in the household; number of children of the parent; income (disability grant or employment); assistance in the household tasks or caring responsibility by paid helpers or family members; age, gender and disability of the child; any factors peculiar to the child;

b. Evidence of allegations of neglect: who referred the case to the Children's Court (e.g. state social worker, private social worker, or member of the public); age of child at the time of the referral; case history; content of social worker's report to the children's court; content of expert evidence, including psychologists' reports; evidence of allegations of neglect; testing for parenting capacity (e.g. IQ tests); whether evidence/testimony was provided by the parents or expert evidence was led by or on behalf of the parents; testimony of the child;

c. Social service interventions: indications of social service interventions, such as early intervention and prevention programmes (particularly parenting skills training or education); therapeutic programmes; rehabilitation and reunification efforts and the outcome of these;

d. Legal representation: whether the parents are legally represented; if so, by whom; whether parents or children provided testimony in the court proceedings;

e. Court's decision: whether the child is found to be in need of care and protection and on what grounds; whether the parent's disability is stated to be decisive or linked with parental inadequacy; whether removal is authorised by judicial officer; reasons for decision provided; outcome i.e. reunification or permanent placement on review; further court hearings and evidence given; any *obiter* remarks by the magistrate or further referrals to other organisations or fora.

What follows below is a short description of the research to be conducted.

Research question:

My research question is the following: How are the South African social services and two Children's Courts meeting their international and constitutional obligations in promoting access to justice and supporting the parental rights and responsibilities of mothers with intellectual disabilities who are at risk of having their children removed from their care due to allegations of neglect?

To answer this main question, further key questions to be asked are the following:

a. Against the background of the recognition of the right to parental care of parents with disabilities, and for children to parental care in international law, how does the South African legislative scheme (predominantly the Children's Act) recognise, promote and protect the parental rights and responsibilities of mothers with intellectual disabilities?

b. How does the legislative scheme and jurisprudence express itself on the constitutional rights of parents with intellectual disabilities to equality, dignity, legal capacity, and founding and maintaining a family; as well as the best interests of the child; protection from maltreatment and neglect; and children's right to life, survival and development?

c. What do court record reviews say about whether the treatment of mothers with intellectual disabilities by the Children's Court system complies with international standards and best practice, and whether the assessment, early prevention and therapeutic interventions for mothers with intellectual disabilities by the Department of Social Development complies with international standards and best practice?

d. How does the South African social services and justice system compare with Australia, the United Kingdom and the United States of America's systems and law reform efforts?

e. What are the implementation challenges with regard to law and policy for the rights of these children and their parents in South Africa, and what, if any, law reform and policy priorities will be necessary to ensure South Africa meets its constitutional and international law obligations towards both children and their parents who have intellectual disabilities?

What follows below is an outline of some of the ethical implications that arise from this study.

Ethical concerns:

This study looks at the rights of children and their parents with intellectual disabilities. These are both vulnerable groups and therefore confidentiality is of utmost concern when it comes to the Children's Court case files. This study is relevant for this group of persons particularly because it concerns the parents' perceived lack of legal capacity, agency and parenting capacity. I will ensure that the rights and welfare of the parties cited in the court cases, both parents with intellectual disabilities and those without disabilities, and their children are protected. I will protect the identities and interests of those involved. I guarantee the confidentiality of the information obtained.

I have the appropriate training, since I am a qualified attorney, to review the court case files. I will conduct my research in accordance with the ethical and professional guidelines relating to the Legal profession.

The research, as indicated earlier, is also contingent on granting of ethics approval from the Research Ethics Committee of the Faculty of Law, University of Pretoria. Should I receive ethics approval from the Committee, I will be allocated an ethics reference number. I would then provide you with the number before proceeding with the research at the Children's Court in Durban.

Attached hereto is a letter of support from my supervisor, Professor Charles Ngwena.

Please note that I will address a similar letter to Mr E Ngubane, the Chief Magistrate for KwaZulu-Natal, A region (Durban).

Yours truly,

Willene  .

Ms Willene Holness
BA, LLB (Rhodes), LLM (UKZN)
Admitted Attorney of the High Court of South Africa

Lecturer, School of Law
College of Law and Management Studies
Howard College, Durban
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Appendix D: Permission from the Chief Magistrates to conduct archival research at the Children's Court, Durban and Pietermaritzburg

LOWER COURTS JUDICIARY
REPUBLIC OF SOUTH AFRICA
Private Bag X54308 Durban, 4000 Tel [031] 302 4151, Fax [031] 36 81366
E-mail: ENgubane@justice.gov.za

ENQUIRIES: E B NGUBANE/sng REF: 17/1/2 [LCJ]

Ms W Holness
C/o Howard College, Durban
University of KwaZulu-Natal
DURBAN
4000

23 June 2017

Dear Ms Holness

REQUEST FOR PERMISSION TO CONDUCT RESEARCH IN DURBAN CHILDREN'S COURT-ACCESS TO JUSTICE FOR MOTHERS WITH INTELLECTUAL DISABILITIES IN CASES OF CHILD NEGLECT AT TWO KWAZULU-NATAL CHILDREN'S COURTS

Your letter dated 20 June 2017 requesting access to case files in the Durban Children's Court, for the purpose of the abovementioned research, bears reference.

Consent is hereby given to you in terms of Section 66 of Act 38 of 2005 to access files for bona fide research the period 2010 to 2014. This is of course subject to the provisions of Section 74 of the Act.

I wish you the best of luck in your research in an aspect which is not commonly investigated and would be glad to receive your report once it has been finalised.

I congratulate you for embarking on such research and I am confident that the results of your findings will also benefit the Department of Justice and Constitutional Development as well as the Magistracy.

Yours faithfully

E B NGUBANE
CHIEF MAGISTRATE: DURBAN
KWAZULU-NATAL

Private Bag X54308, Durban 4000
2017 -06- 23
FIFTEEN

MAGISTRATES COURTS JUDICIARY
REPUBLIC OF SOUTH AFRICA

P/Bag x9011, PIETERMARITZBURG, 3200 –Tel (033) 3555100, Fax 033 3450324,
Cnr Church and Otto Streets Pietermaritzburg 3200

ENQUIRIES: I KHALLIL REF: 17/1/2 (LCJ)

10 July 2017

Ms W Holness
C/o Howard College, Durban
University of KwaZulu-Natal
DURBAN
4000

Dear Ms Holness

REQUEST FOR PERMISSION TO CONDUCT RESEARCH IN PIETERMARITZBURG CHILDREN'S COURT-ACCESS TO JUSTICE FOR MOTHERS WITH INTELLECTUAL DISABILITIES IN CASES OF CHILD NEGLECT AT TWO KWAZULU-NATAL CHILDREN'S COURTS

Your letter dated 20 June 2017 requesting access to case files in the Pietermaritzburg Children's Court, for the purpose of conducting research, bears reference.

Consent is hereby given to you in terms of Section 66 of Act 38 of 2005 to access files for bona fide research the period 2010 to 2014. This is of course subject to the provisions of Section 74 of the Act.

You are commended for undertaking such research and wish you the best of luck.

I KHALLIL
ACTING CHIEF MAGISTRATE: PIETERMARITZBURG
KWAZULU-NATAL