

**PERSPECTIVES ON THE BEST INTERESTS OF
THE CHILD: DEVELOPMENTS IN THE
INTERPRETATION AND APPLICATION OF THE
PRINCIPLE IN THE SOUTH AFRICAN LAW
RELATING TO CUSTODY**

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:..... *Basso*

Date:..... *12 March 2004*

OPSOMMING

Die Grondwet van die Republiek van Suid-Afrika verskans die beste belange van die kind as van deurslaggewende belang in elke aangeleentheid rakende die kind. Die verbintenis tot die bevordering van die belange van kinders is nie 'n verskynsel uniek aan die moderne Suid-Afrikaanse reg nie, maar is 'n erkende beginsel in beide die gemenerereg en die internasionale kinderreg. Met hierdie wyd-verspreide en algemene erkenning ontstaan die vraag, wat dan ook die primêre fokus van hierdie studie vorm, of die beginsel van die beste belang van die kind werkbaar en toepaslik is in ware lewendramas waar 'n beslissing oor die bewaring van 'n kind gemaak moet word. Die uitdaging vir die toepassing van die beginsels in hierdie konteks is om 'n besluit te neem wat die voortbestaan van die ouer-kindverhouding ten spyte van die verbokkeling van die huwelik sal verseker. Die vraag is of die beginsel werklik 'n eerlike bewussyn van en verbintenis tot die welstand van kinders skep wat die besluitnemingsproses in hierdie konteks beïnvloed en lei en of howe en besluitnemers bloot die regte lippetaal gebruik om die lukrake manier waarop besluite geneem word te verbloem.

Om die werkbaarheid en toepasbaarheid van die beginsel te bepaal is dit nodig om die proses van evolusie van die beginsel in die Suid-Afrikaanse reg onder oënskou te neem. Deur die ondersoek en analise van bestaande literatuur, internasionale konvensies, wetgewing en hofuitsprake word 'n aantal perspektiewe op ontwikkelinge in die interpretasie en toepassing van die beginsel voorgelê. Hierdie perspektiewe lei tot die betekenisvolle en opbouende gevolgtrekking en insig dat die waarde van die konsep afhang van 'n korrekte benadering tot die beginsel en sy kenmerke. Die hoofkenmerk van die beste belange van die kind beginsel is die inherente vaagheid en ondefinieerbaarheid daarvan. Hoewel dit die beginsel aan ernstige kritiek onderwerp, ondersteun hierdie studie die argument dat die onbepaaldheid in der waarheid noodsaaklik is. Dit verseker nie alleen buigsaamheid, wat toepassing op alle tye in alle kulturele en sosiale omgewings en besondere omstandighede van 'n spesifieke geval moontlik maak nie, maar ook dat 'n holistiese benadering tot die kind as individue en die gesin as eenheid gevolg word.

Hierdie holistiese benadering vorm die grondslag van die lyste van faktore in *McCall v McCall* 1994 (3) SA 201 (C) en die Wetsontwerp op Kinders 2003 waarmee die werkbaarheid en waarde van die beginsel vir billike en regverdige resultate in alle aangeleenthede rakende die bewaring van kinders verseker kan word.

ABSTRACT

The Constitution of the Republic of South Africa entrenches the best interests of the child as being of paramount importance in all matters concerning the child. This commitment to the promotion of the welfare of children is not unique to modern South African law, but is an acknowledged principle of the common law and international child law as well. With such well-established recognition the question, which forms the primary focus of this study, arises whether the principle of the best interests of the child is workable and applicable in real life scenarios where the custody of a child has to be decided. The challenge to the application of the principle in this context is to reach a decision that will protect the parent-child relationship regardless of the marital breakdown. The question is whether the principle allows for and creates an honest awareness of and commitment to the welfare of children that influence decisions in this context or whether courts and decision-makers merely pay lip service to it in order to conceal the haphazard way in which custody is awarded.

In order to determine the workability and applicability of the principle, it is necessary to know how the principle has evolved in the South African legal context. Through the examination and analysis of existing literature, international conventions, legislation and case law, a number of different perspectives on the developments in the interpretation and application of the principle are provided. These perspectives culminate in the useful and constructive insight and conclusion that the value of the concept is dependant upon the correct approach to the principle and its characteristics. The defining characteristic of the principle of the best interests of the child is its inherent vagueness and indeterminacy. Though this subjects the principle to serious criticism, this study supports the argument that indeterminacy is in fact essential. It ensures not only the flexibility of the concept, rendering it applicable to the time, cultural sphere and social context and unique circumstances of each case it is applied to, but a holistic approach to the child as individual and family as a unit as well.

This holistic approach forms the foundation of the lists of criteria in *McCall v McCall* 1994 (3) SA 201 (C) and the Children's Bill, thereby establishing the workability and value of the principle for fair and just results in all decisions pertaining to the custody of children.

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I dedicate this thesis and all the time and effort it entailed to my Heavenly Father and Lord Jesus Christ. He allowed me to glimpse His Father's heart and ignited a flaming passion in mine for His children.

“Then Jesus called a little child to Him and set him in the midst of them and said, ‘... Whoever humbles himself as this little child is the greatest in the kingdom of Heaven. Whoever receives one little child in My Name receives Me.’”

Matt 18:4-5

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CHAPTER ONE

INTRODUCTION

“[T]he interest of the children is the main or paramount consideration, or furnishes the guiding principle to be observed by the Court.”¹

These words of Schreiner JA in the 1948 decision of *Fletcher v Fletcher*² signify a profound turning point in the South African law relating to the parent-child relationship in general and, more specifically, the custody of children after divorce. This statement is the defining moment for the common law principle that the best interests of the child are paramount in matters relating to the custody of and access to a minor child.³ Almost 50 years later the South African Constitution confirmed the paramountcy of a child’s best interests and extended its scope to every matter concerning the child.⁴

The commitment to the interests of the child as primary, paramount or guiding factor in all matters concerning the child is not unique to South African law, but is an established principle of international child law as well. The most important international document on the rights of the child,⁵ the United Nations Convention on the Rights of the Child (1989),⁶ is premised on the idea that the best interests of the child are of paramount importance in any matter affecting the child⁷ and provides that

¹ Per Schreiner JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) 143.

² 1948 (1) SA 130 (A).

³ See *Cronjé v Cronjé* 1907 TS 871, 872; *Tabb v Tabb* 1909 TS 1033, 1034; *Cook v Cook* 1937 AD 154, 163; *Calitz v Calitz* 1939 AD 56, 60; *Milstein v Milstein* 1943 TPD 227, 228-229. The recognition of the best interests of the child principle in these cases led Schreiner JA in *Fletcher v Fletcher* (*supra*) 143 to remark that the rule that the best interests of the child are the main or paramount consideration is a “well-established but variously expressed rule” because they were unclear as to the relative weight that should be attached to other considerations such as the predominant position of the father and the rights of the innocent spouse to custody of the children.

⁴ Section 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter the Constitution) states: “A child’s best interests are of paramount importance in every matter concerning the child.”

The present study will be confined, however, to developments in the interpretation and application of the principle in the context of custody disputes after divorce.

⁵ The Convention has been held to be a watershed in the history of children’s rights. Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law” 1995 *SAJHR* 401, 401. Alston “The best interests of the child” 1994 *International Journal of Law and the Family* 1, 1; Freeman “Introduction: Children as persons” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 1.

⁶ Abbreviated hereafter as the UNCRC or referred to as the Children’s Convention or the Convention.

⁷ Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” in Davel (ed) *Introduction to Child Law in South Africa* 204-205; Freeman “Children’s rights ten years

“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.”⁸

With such well-established recognition on national as well as international level, the question arises whether the principle of the best interests of the child is a mere philanthropic and philosophical ideal or whether it is in fact workable and applicable in real life scenarios⁹ where the custody of a child has to be decided.¹⁰ These decisions are generally acknowledged to be of the most difficult a judge can be called on to make.¹¹ This difficulty is compounded by the acrimony between the divorcing parents as well as the variety of different custody orders which can be made.¹² The challenge to the application of the best interests of the child in this context is to reach a decision that will protect the parent-child relationship regardless of the marital breakdown. It is, after all widely accepted that children do best if a continuous relationship with both parents after divorce is maintained.¹³ Does the principle, therefore, allow for and create an honest awareness of and commitment to the welfare of children that influence decisions in this context? Or do courts and decision-makers merely pay lip service to it in order to conceal the haphazard way in which custody decisions are reached?

after ratification “ in Franklin (ed) *The New Handbook of Children’s Rights: Comparative Policy and Practice* 98-100.

⁸ Article 3(1) of the Convention.

⁹ “What the court has to deal with is the lives of human beings, and these cannot be regulated by formulae. In my judgement I must take account of all relevant matters; but in considering their effect and weight I must regard the welfare of the [child] as being first and paramount.” Per Meggry J in *F (an infant)* [1969] All ER 776 (ChD) 768E.

¹⁰ The context of custody is demarcated as this study concerns only the custody of a child by its natural parents after divorce. The custody of correctional or governmental institutions over children falls outside the scope of the present study.

¹¹ “In deciding the question of custody [the court] was confronted with a difficult problem which he describes, not inaptly, as ‘the problem of making a selection for the children of the lesser of two evils’.” Per Feetham AJA in *Cook v Cook* 1937 AD 154, 161. See further *Stock v Stock* 1981 (3) SA 1280 (A) 1286. Schäfer “The burgeoning family law and joint custody” Inaugural Lecture at Rhodes University 1986, 17-18.

¹² “It is the attitude of the parents that will achieve the most beneficial relationship between both parents and the child and not the form of the court’s order.” Per Millin J in *Schlebusch v Schlebusch* 1988 (4) SA 548 (E).

¹³ Wallerstein and Kelly *Surviving the Breakup: How Parents and Children Cope With Divorce*.

These are the questions which underlie the present research project and they are compounded by the fact that the principle is inherently vague and indeterminate.¹⁴ As one academic writer has said,

“Application of the best interests of the child standard is far from consistent... Many claim that the best interests of the child is not a standard at all, that it is merely a cloak for judicial discretion and intuition.”¹⁵

In order to alleviate the indeterminacy of the best interests principle and to simplify its application, some countries have opted for the compilation of a statutory list of factors that need to be considered when the principle is applied in the decision-making process.¹⁶ South Africa recently became one of the countries with such a statutory list. The draft Children’s Bill is intended to consolidate all laws and regulations pertaining to children and their rights in South Africa into one comprehensive statute and the guiding principle in every matter is the best interests of the child.¹⁷ However, the objects of the Bill – generally, to promote the protection, development and well-being of children¹⁸ – can only be achieved if the founding principle is workable. Therefore, in order to establish the value of the Children’s Bill for the future a comprehensive assessment of the best interests principle is essential.

It is the underlying assumption of this study that, in order to predict the workability and applicability of the principle in the future, it is necessary to know how the principle has evolved in the South African legal context. Through the examination and analysis of existing literature, international conventions, legislation and case law,

¹⁴ See Chapter Four below.

¹⁵ David Miller “Joint Custody” 1979 *Family Law Quarterly* 345, 354.

¹⁶ See for instance the English Children Act of 1989. Sec 1(1) states that the child’s welfare shall be the court’s paramount consideration when the court determines any question with respect to the upbringing of the child. In sec 1(3) a statutory checklist of factors is set out in order to provide clarity on the factors the court should consider when making one of the wide range of orders in terms of the Act.

These factors are:

- The ascertainable wishes and feelings of the child concerned.
- The child’s physical, emotional and educational needs.
- The likely effect on the child of any change in the child’s circumstances.
- The child’s age, sex, background and any characteristics of the child which the court considers relevant.
- Any harm which the child has suffered or is at risk of suffering.
- The capability of each of the parents, and any other person to whom the court considers the question to be relevant, of meeting the child’s needs.
- The range of powers available to the court under the Act in the proceedings in question.

¹⁷ Section 14(1).

¹⁸ Section 2(f).

a number of different perspectives on the developments in the interpretation and application of the principle will therefore be provided.

Besides being a Constitutional guarantee and statutory provision, the principle is rooted in two other sources of South African law. The first is the common law. Even though much thereof is inferred, the principle has its origins in Roman and Roman Dutch law.¹⁹ These origins will be explored in Chapter Two. The second source, which will form the subject of Chapter Three, is international law.²⁰ The best interest of the child is an established principle of international law, and as a result of the ratification of various international documents on human and children's rights, South Africa is under the obligation to ensure that it is respected and enshrined in its domestic laws.²¹ In this regard section 39(2) of the Constitution plays an important role.

Once the origins are established and before the attention can be focused on the development in the application of the principle in South African law, it is necessary to explore the principles and problems concerning its interpretation.²² Different attempts at the definition of the concept will be provided, after which the principle itself will be critically evaluated. This process, undertaken in Chapter Four, will reveal that the indeterminacy of the best interests of the child can both be a serious drawback, as well as the greatest asset of the principle. Due to the fact that the principle is supposed to be paramount in every matter concerning a child, it must of necessity be open-ended and flexible to ensure that the individual circumstances of the specific child and all relevant factors are taken into account in the decision-making process. Moreover, the social context and cultural values of the sphere where and time when the principle is applied, must be allowed to inform the decision as well. However, decision-makers should guard against the influence of their own background and prejudices.

According to the Constitution and the Children's Bill, the best interests of the child are of paramount importance in every matter concerning the child, but its

¹⁹ Chapter Two will provide the historical perspective on the best interests principle.

²⁰ The international perspective on the principle will be explored in Chapter Three.

²¹ According to section 2(e) of the Children's Bill one of the objects of the Act is to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.

²² Chapter Four.

paramountcy was initially established in the context of the parent-child relationship.²³ A perspective on the parent-child relationship, with special reference to custody and the different types of orders which a court may make, will be provided in Chapter Five.

Chapter Six will reveal that, ever since the conception of the best interests principle, courts have struggled to interpret and apply it.²⁴ Most of the first attempts to give content to it, by subscribing to legal rules and presumptions, led to unsatisfactory results for both the parents or children involved. The developments in the 1990's, for instance the movement away from the maternal preference rule towards a primary caretaker preference and the compilation of a list of criteria in *McCall v McCall*,²⁵ brought the focus back to the individual child and the specific circumstances of each case. The Constitutional Court has also, though not in the context of custody, made some valuable statements regarding the interpretation and application of the principle and developed it even further.²⁶ The last step in this development process is the Children's Bill and the statutory checklist. An investigation into its theoretical foundation will show to what extent there is compliance with international law as well as the extent to which the theoretical challenges posed in Chapter Four have been addressed by the legislature.

The final answer on the workability or otherwise of the principle and whether the Children's Bill has made a positive contribution to its interpretation and application will be provided in the concluding chapter of this study.

²³ See *Fletcher v Fletcher* 1948 (1) SA 130 (A).

²⁴ Developments in the interpretation and application of the principle in South African courts will form the substance of the Chapter Six.

²⁵ 1994 (3) SA 201 (C).

²⁶ See section 4 Chapter Six.

CHAPTER TWO

HISTORICAL PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD

1 Introduction

According to the Constitution of the Republic of South Africa,¹ the best interests of the child are of paramount importance in every matter concerning the child. As the Constitution is the supreme law in the Republic,² the modern South African family law is characterized by this commitment to the welfare of the child.³ However, the Constitution does not regulate each aspect of family law in detail and the greater body thereof is still found in legislation and the common law.⁴ Moreover, the best interests principle was considered a “well-established but variously expressed rule”⁵ of the common law long before its constitutionalization. The aim of this chapter is therefore to explore the origins of the best interests of the child in the historical foundations of the South African law.

¹ Final Constitution, Act 108 of 1996, section 28(2).

The Interim Constitution, Act 200 of 1993, section 30(3) provided that the best interests of the child is paramount in all matters concerning the child.

² Sec 2. All law or conduct inconsistent with the Constitution is invalid.

³ In a case where there is no clear guidance by legislation, a decision of a South African court or the Roman Dutch common law guidance is sought in the decisions of the English courts. Hahlo and Kahn *The South African Legal System and its Background* 575-589.

There is much authority for the view that the best interests principle evolved in the British equity courts and as such is part of the English common law. This is undeniable but this Chapter will provide evidence that the principle, though its development was less explicit or conscious, is as much part of the Roman Dutch common law as the English law.

The developments in the English law fall beyond the scope of the present study but for a comprehensive overview, see Maidment *Child Custody and Divorce* 89-106; Stone “The welfare of the child” in Baxter and Eberts (ed) *The Child and the Courts* 229-256; Cretney and Mason *Principles of Family Law*; Lowe and Douglas *Bromley’s Family Law*.

⁴ These are valid sources of law to the extent that they are consistent with the values, rights and freedoms in the Bill of Rights. Sec 39(3).

African customary law is a further source of family law in South Africa. However, decisions relating to the custody of children in customary law are not traditionally made with reference to the best interests of the individual child, but determined by the fact of (non-)payment of *lobolo*. For this reason customary law falls largely beyond the scope of this study. See however the discussion of the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child in Chapter Three, as well as the influence of social context and cultural values on the interpretation of the best interests principle in Chapter Four. In *Hlope v Mahlalela* 1998 (1) SA 449 (T) the High court held that, even in customary law, custody of a child must be determined according to the best interests of the child. This case is discussed in more detail in Chapter Six.

⁵ Per Schreiner JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) 143.

South African common law is a hybrid system and, though consisting of mainly Roman Dutch law, it is infused with English law as well.⁶ The Roman Dutch law is the law that applied in the Netherlands during the seventeenth and eighteenth centuries and this in turn has two foundations: the Roman law of Justinian and the Dutch customary law with its Germanic origins.⁷ Neither of these systems had any legislation or custom that made such an unequivocal commitment to the welfare of the child as the Constitution, but based upon the study of the legal relationship between parent and child during these periods, it will be possible to determine whether there was any conscious or unconscious recognition of the importance of a child's welfare and the promotion of his or her interests.⁸

2 Roman law

2 1 Introduction

In ancient society people were not regarded as individuals but rather as members belonging to a specific group or class.⁹ The smallest group someone could belong to was the *familia*.¹⁰ This term had differing meanings: on the one hand, *familia* meant the members of a single household related by blood, while on the other hand, it included the slaves and bondservants to the family. In a third sense, it referred to the patrimony of a family.¹¹ For purposes of the present study, unless otherwise specified,

⁶ Hahlo and Kahn *The South African Legal System and its Background* 329.

⁷ Hahlo and Kahn *The South African Legal System and its Background* 329, 330; Wattel *De Beginselen van het Oud-Hollandsch Recht* 3, 4; Wessels *History of the Roman Dutch Law* 18; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 90; Huebner *A History of Germanic Private Law* 3-6; Spiro *Parent and Child* 3.

⁸ One of the main components of the parent-child relationship, which form the focal point of this study, is custody. It is not possible, however, to separate the law pertaining to custody from the parent-child relationship as a whole, since the distinction between the different components is a modern development. In the present Chapter, therefore, the focus will be the common law parent-child relationship and where relevant, reference will be made to the application of the general principles to custody in particular.

On the historical parent-child relationship in general, see Human "Die historiese onderbou van die privaatregtelike ouer-kind verhouding – fondament of struikelblok vir die implementering van kinderregte?" 2000 *THRHR* 200.

⁹ The best example of this distinction is probably the classification of people as being either free or slaves. D 1 6 3 (translation by Watson) "Gaius, *Institutes, book 1*: Certainly, the great divide in the law of persons is this: all men are either free or slaves."

¹⁰ Kaser (translated by Rolf Dannenbring) *Roman Private Law* 2nd ed 60 (hereafter Kaser/Dannenbring *Roman Private Law*).

¹¹ Crook *Law and Life of Rome* 98; Dixon *The Roman Mother* 13; Gardner *Family and Familia in Roman Law and Life* 115; Stein *Roman Law in European History* 5; Treggiari *Roman Marriage* 410, 411; Van Zyl *History and Principles of Roman Private Law* 87 (hereafter Van Zyl *History and*

the term “family” will be used in the first sense, that is, the husband, wife and their offspring living in a single household.

For a family to be recognized as such by society and the law, it had to be a legal marriage concluded between freed or freeborn citizens.¹² Roman marriage was essentially monogamous¹³ and its widely acknowledged primary function was the production of legitimate children who could ensure the continuation of the bloodline of the family,¹⁴ as well as citizens honouring the culture and traditions of the Roman people.

A Roman family established by such a legal marriage was regarded as a monocratic legal unit with the *paterfamilias*¹⁵ as head and representative of the whole family.¹⁶ He was responsible for the welfare of his family and it was regarded as in the interest of society at large that he exercised his disciplinary authority over all those in his power.¹⁷ Except in cases of serious abuse of his power, the law did not concern itself with the internal functioning of the family.¹⁸

Given the wide meaning of *familia*, the number of people falling under the *potestas* of the *paterfamilias*, was potentially extensive. By the time of the Twelve Tables the power already had different names depending on the persons over whom it was

Principles); Rawson “The Roman Family” in Rawson (ed) *The Family in Ancient Rome* 7; Johnston *Roman Law in Context* 30; Dixon *The Roman Family* 2-4.

¹² Crook *Law and Life of Rome* 99.

¹³ Gaius I 1 63 (translation De Zulueta): “A woman cannot have two husbands at the same time, nor a man two wives.”

¹⁴ Dixon *The Roman Family* 24-25, 62; Kaser/Dannenbring *Roman Private Law* 238; Crook *Law and Life of Rome* 99; Treggiari *Roman Marriage* 8, 11, 323; Rawson “The Roman Family” in Rawson (ed) *The Family in Ancient Rome* 9; Johnston *Roman Law in Context* 33.

¹⁵ The Roman family was purely patriarchal as the meaning of *paterfamilias* – father of the family – clearly shows.

¹⁶ Dixon *The Roman Family* 36; Johnston *Roman Law in Context* 30; Jolowicz *Historical Introduction* 112; Stein *Roman Law in European History* 5.

¹⁷ Gardner *Family and Familia in Roman Law and Life* 123.

¹⁸ The most serious abuses of the disciplinary powers of the *paterfamilias* were originally prohibited by sacred law and custom and only from the time of the Principate (27 BC to 284 AD) by principles of private law. See Kaser/Dannenbring *Roman Private Law* 6, 256; Watson *The Law of Persons in the Later Roman Republic* 98; Dixon *The Roman Family* 46.

exercised. Thus, over wives, the power was called *manus*.¹⁹ Over children, it was called *patria potestas* and over slaves, *dominica potestas*.²⁰

This power of the *paterfamilias* influenced the whole of the Roman law relating to persons and the family²¹ and deserves closer examination.

2 2 *Patria potestas*

Under Roman law the *paterfamilias* obtained *patria potestas* over all the members of his household, irrespective of their ages or gender.²² The oldest male in the agnatic line held the position of *paterfamilias* over all his descendants.²³ The power of the *paterfamilias* over his children and family was a unique feature of Roman law, which even the ancient jurists themselves recognized as peculiar to them.²⁴ *Patria potestas* was an absolute power similar to the *imperium* of the consuls or emperors.²⁵ However, though absolute in theory, in practice, the wide-ranging power was held in check by the expected affection of the father for his family,²⁶ as well as the *concillium domesticum* (family council). Any exercise of excessive authority or violence against

¹⁹ G I 1 108-109 (translation De Zulueta): "Let us proceed to consider persons who are in *manu* (hand, marital power), which is another right peculiar to Roman citizens. Now, while both males and females are found in *potestas*, only females can come under *manu*."

²⁰ Jolowicz *Historical Introduction* 112.

²¹ Lacey suggests that *patria potestas* was the "fundamental institution underlying all Roman institutions" and that it was the world view stemming from *patria potestas* that resulted in the way the Romans developed their institutions and created their most prized values of *dignitas* and *fides*, resulting in the development of Roman culture as we know it. Lacey "Patria Potestas" in Rawson (ed) *The Family in Ancient Rome* 123-124.

²² This statement bears qualification in respect of wives. They were only in the *manus* of their husbands if the marriage was concluded *cum manu* and the wife passed from her natal family to that of her husband. G I 1 110. See below 2 2 1.

²³ All sons and unmarried daughters fell under the *patria potestas* of their *paterfamilias*, as well as any children of a son still in power. The children of a married daughter fell in the *potestas* of her husband, or his father. A married daughter passed to the *potestas* of her husband or his father if she married *cum manu*. If the marriage was concluded *sine manu*, the daughter became *sui iuris* when she married, and did not fall in anyone's *potestas*. Though she could hold property in her own right, she did however need a tutor to perform certain legal acts.

²⁴ Gaius I 1 55-6: "Also in our *potestas* are the children whom we beget in *iustae nuptiae* (civil marriage). This right is peculiar to Roman citizens; for scarcely any other men have over their sons a power such as we have."

G I 1 108 (translation by Scott): "Now let us consider those persons who are in our hand, which right is also peculiar to Roman citizens."

See also Jolowicz *Historical Introduction* 118; Dixon *The Roman Mother* 2.

²⁵ The consuls were the highest officials of the Roman State in Republican times and the Emperor during the Principate. See Lacey "Patria Potestas" in Rawson (ed) *The Family in Ancient Rome* 130-133.

²⁶ Gardner *Family and Familia in Roman Law and Life* 123.

members of the family had to be approved by the family council.²⁷ *Pietas* (the expectation of proper affection and respect) was regarded as the foundation of *patria potestas*, requiring its exercise to be morally desirable and equitable. The origins of the best interests principle are visible in these moral considerations that tempered the exercise of *patria potestas*.

The creation, content and termination of *patria potestas* will be discussed in more detail below.

2 2 1 Creation of *patria potestas*

The wife of a *paterfamilias* was subjected to his *manus*²⁸ if she was married to him *cum manu*. If the marriage excluded the *manus*, the wife remained a member of her natal family.²⁹ Regardless of the form of marriage legitimate children always belonged to their father's family, since it was impossible for a woman to have domestic authority over anyone.³⁰ Consequently, an illegitimate child was a person *sui iuris* (one that did not fall under anyone's power, as opposed to a person in power or *alieni iuris*)³¹ because it did not fall under his biological father (or his father's father)'s *potestas*.³² It is explained in the following way in Justinian's Digest,³³

“This is a law of nature: that a child born without lawful wedlock belongs to his mother unless a special statute provides otherwise.”

²⁷ Van Zyl *History and Principles* 88; Jolowicz *Historical Introduction* 118; Dixon *The Roman Mother* 2. The family council probably included members of both sexes, as well as different ages and degrees of relations. Even longstanding friends of the family were included. Dixon *The Roman Family* 139.

²⁸ As stated above (see 2 1), the power which a *paterfamilias* had over his wife, was not called *patria potestas* but *manus*. However, the difference in term made no difference to the content of the power.

²⁹ Crook *Law and Life of Rome* 103; Treggiari *Roman Marriage* 16-32; Kaser/Dannenbring *Roman Private Law* 62; Watson *The Law of Persons in the Later Roman Republic* 19-24; Dixon *The Roman Mother* 15; Jolowicz *Historical Introduction* 113-116.

³⁰ Gardner *Family and Familia in Roman Law and Life* 115.

³¹ G I 1 4 8 (translation by Thomas): “There follows another division in the law of persons. For some persons are independent (*sui iuris*) while others are subject to another (*alieni iuris*): again, of those who are subject, some are in the power of their parent, others in the power of their master.”

³² The illegitimate child could not fall under the *potestas* of his maternal grandfather either, since the relationship was created along the agnatic (male) lines. Kaser/Dannenbring *Roman Private Law* 265; Crook *Law and Life of Rome* 107. D 50 16 195 4. Ulpian: “A woman is the beginning and end of her own family.”

³³ D 1 5 24 Ulpian.

Patria potestas over descendants was acquired by the birth of a legitimate child.³⁴ If the father of the child was a son in power, the child fell under the *potestas* of the father's *paterfamilias*.³⁵ This is explained in the *Institutiones* of Justinian,

“Whoever, then, is born of you and your wife is in your power: in like manner, one born of your son and his wife, i.e. your grandson or granddaughter, is equally in your power, as also great-grandchildren and so on. The issue of your daughter, however, is not in your power but in that of his father.”

But infant mortality was high in ancient times and many children did not survive into adulthood.³⁶ As seen above, the family name, cult and property only passed along male lines, therefore, families without male children were faced with the extinction of the family name and cult. Hence a *paterfamilias* without a male heir (or an heir that did not show the necessary promise) could resort to adopting someone from outside his family as another way to obtain *patria potestas*.³⁷

Where in modern law childless couples are inclined to adopt young children or infants, adoption in Roman law was usually of an adult³⁸ (and usually male) and only the *paterfamilias* had to consent to the adoption.³⁹ His wife apparently had no legal voice

³⁴ G I 1 55-6. The paternity of the husband of the mother of the child was always assumed with the application of the maxim *pater est quem nuptiae demonstrant*. D 2 4 5 Paul.

A child was considered legitimate if it was born not less than 7 months after the conclusion of the marriage, and not more than 10 months after the dissolution of the marriage by death or divorce. D 38 16 3 11. See also D 1 5 12 Paul: “That a child can be born fully formed in the seventh month is now a received view due to the authority of that most learned man Hippocrates. Accordingly, it is credible that a child born in the seventh month of a lawful marriage is a lawful son of the marriage.”

³⁵ The *paterfamilias* was always the eldest male ascendant in the direct male line. Treggiari *Roman Marriage* 15; Dixon *The Roman Family* 40; Kaser/Dannenbring *Roman Private Law* 60; Van Zyl *History and Principles* 87.

³⁶ Treggiari *Roman Marriage* 398; Gardner *Family and Familia in Roman Law and Life* 54. Apparently about a third of all children did not survive their first year and half of those surviving would have died before reaching their tenth birthday.

³⁷ There were two different procedures of adoption, namely *adoptio* and *adrogatio*, depending on whether the adoptee was a person in power or independent. D 1 7 1 Modestinus: “Sons-in-power can be made such not only by nature but also by forms of adoption... Sons-in-power are subject to ‘adoption’; people who are *sui iuris*, to *adrogatio*.” Gaius *Institutes* 1 97-107 sets out the procedure for adoption. See further Gardner *Family and Familia in Roman Law and Life* 115-122; Crook *Law and Life of Rome* 111-112; Watson *The Law of Persons in the Later Roman Republic* 82-90; Van Zyl *History and Principles* 92-95; Kaser/Dannenbring *Roman Private Law* 262; Dixon *The Roman Family* 112.

³⁸ It was possible however for children to be given in adoption at any age, even as infants and no doubt couples unable to conceive might have adopted babies. Gardner *Family and Familia in Roman Law and Life* 115-122. G I 1 102.

³⁹ If a *sui iuris* person was adopted (adrogated), however, his own consent was obviously required. D 1 7 24 Ulpian: “A person can be adrogated neither in his absence nor without his consent.”

in the matter.⁴⁰ A further important difference from modern adoption is that there was apparently little regard for the welfare of the adoptee itself, the focus being more on property, family continuation⁴¹ or political advancement.⁴² The adopted person entered fully into the family and *patria potestas* of the adopting *paterfamilias* and took the family name. The *potestas* of the *paterfamilias* under whom he was born, was completely extinguished and he was counted a full legal member of the adoptive family. No distinction was made between adopted and legitimate children.

2 2 2 “The absolute power”: content

This absolute power over the children of his house lasted not only until adulthood of the children, but until the death of the *paterfamilias*, at which time it was transferred to his sons (or grandsons if his sons were predeceased).⁴³ The modern concepts of guardianship,⁴⁴ custody and access were unknown in Roman times seeing as *patria potestas* denoted unlimited authority over the family members.⁴⁵

In theory the *paterfamilias* enjoyed the maximum number of rights and capacities which a Roman citizen could enjoy⁴⁶ and his power over his family was extensive and unfettered, lasting until death.⁴⁷ This power over his children included the notorious right of life and death (*ius vitae necisque*), the right to sell them⁴⁸ as well as complete

⁴⁰ Since the purpose of adoption was to create *patria potestas*, women could not adopt anyone. Crook *Law and Life of Rome* 112. D 1 7 7 Celsus: “In case of adoption, it is not necessary to secure authority for it from those among whom agnatic ties consequently come into being.”

⁴¹ The purpose of adoption in Roman times was the perpetuation of the family name and the preservation of the cult of the domestic deities. Kaser/Dannenbring *Roman Private Law* 262. Another purpose of adoption was to legitimise natural children. See Crook *Law and Life of Rome* 112.

⁴² Gardner *Family and Familia in Roman Law and Life* 115-122.

⁴³ G I 1 27: “Persons in a parent’s *potestas* become *sui iuris* on his death.” Lee and Honoré *Family, Things and Succession* 3-6; Dixon *The Roman Family* 3; Kaser/Dannenbring *Roman Private Law* 62. The wife of a *paterfamilias*, though technically a *materfamilias*, had no authority over her children regardless of whether she was under the *manus* of her husband herself. For more on the position of the Roman mother, see below 2 4.

⁴⁴ Guardianship was known in a different form called *tutela*. The *tutor* did not take the place of a parent substitute, but was concerned mainly with the administration of the estate of the ward. It did not involve any protection of or custody over the child’s person. See below n73.

⁴⁵ See Labuschagne “Die Hooggereshof as oppervoog van minderjariges – ‘n historiese perspektief” 1992 *TSAR* 353, 353.

⁴⁶ Van Zyl *History and Principles* 88.

⁴⁷ Crook *Law and Life of Rome* 107. The power of the *paterfamilias* was mainly restrained by institutions outside private law, namely sacral law and customs. Kaser/Dannenbring *Roman Private Law* 256.

⁴⁸ The *paterfamilias* could sell his children into bondage in Rome or *trans Tiberim*. If he did so, the children left his *potestas* and entered that of the buyer, but if the buyer set them free, they returned to

economic control. Children-in-power were unable to own or administer any property and were unable to make a will without the consent of their *paterfamilias*.⁴⁹ Sons-in-power could, however, vote, serve in the Roman armies or hold certain public offices⁵⁰ since *patria potestas* did not apply in the public sphere.⁵¹

Though the *paterfamilias* retained the right of life and death over his children even into their adulthood, it should not be assumed that fathers often killed their adult children.⁵² In practice, this right was basically limited to the choice the *paterfamilias* had of accepting paternity of a child, or ordering its exposure.⁵³

No child-in-power could marry legally without the consent of the *paterfamilias* and he could even force his married children to divorce.⁵⁴ Children became eligible for marriage at very young ages⁵⁵ and it is suggested that marriages were arranged and

the *potestas* of their *paterfamilias*. If a son was thus sold three times, according to a provision in the Twelve Tables (rule 4.2), he was to be free from his father's power. Kaser/Dannenbring *Roman Private Law* 258; Van Zyl *History and Principles* 93-96. This led to the development of the law of emancipation – a way for *patria potestas* to be terminated before the death of the *paterfamilias*. See below 2 2 3.

⁴⁹ Dixon *The Roman Mother* 28; Kaser/Dannenbring *Roman Private Law* 257; Jolowicz *Historical Introduction* 118; Stein *Roman Law in European History* 5; Watson *The Law of Persons in the Later Roman Republic* 98; Van Zyl *History and Principles* 88; Treggiari *Roman Marriage* 16; Lacey "Patria Potestas" in Rawson (ed) *The Family in Ancient Rome* 133.

⁵⁰ D 1 6 9 Pomponius (translation by Watson): "The son-of-a-family (*filius familias*) is deemed to be a head of household (*paterfamilias*) for purposes of state, for example, in order that he may act as a magistrate or may be appointed as a tutor."

⁵¹ Crook *Law and Life in Rome* 109; Van Zyl *History and Principles* 98 n49; Kaser/Dannenbring *Roman Private Law* 258; Johnston *Roman Law in Context* 31; Jolowicz *Historical Introduction* 118.

⁵² Crook *Law and Life of Rome* 107-108; Kaser/Dannenbring *Roman Private Law* 63; Dixon *The Roman Family* 36. In the 2nd century AD emperor Hadrian exiled a father for killing his son, arguing that the impulsive punishment was not a proper exercise of *patria potestas*. It was said that *patria potestas* should be characterized by *pietas*, not *atrocitas*. Dixon *The Roman Family* 47.

A further extreme power of the *paterfamilias* was *noxae deditio* – that is, the surrender of a child to the injured party when the child committed a serious delict. G 4 75; I 4 8 *pr*. See Kaser/Dannenbring *Roman Private Law* 77, 308.

⁵³ On the practice of infant exposure and its legal implications, see Kaser/Dannenbring *Roman Private Law* 257; Dixon *The Roman Mother* 19, 27; Treggiari *Roman Marriage* 407; Dixon *The Roman Family* 41; Watson *The Law of Persons in the Later Roman Republic* 98; Crook *Law and Life of Rome* 108. See further Van Zyl "Custodia ventris and custodia partus" 1969 *THRHR* 42.

⁵⁴ Crook *Law and Life of Rome* 108; Van Zyl *History and Principles* 102; Dixon *The Roman Family* 40, 64. According to Treggiari *Roman Marriage* 460, a *paterfamilias* could force even unwilling children to divorce, but it was unreasonable for a *paterfamilias* to dissolve a happy marriage, especially when the marriage was supported by children.

⁵⁵ Children could marry as soon as they reached puberty and were capable of reproducing. The ages of puberty were fixed at twelve for girls and fourteen for boys. D 23 2 4 provides that a marriage is not valid until the girl reaches the age of twelve. Treggiari *Roman Marriage* 398-400; Johnston *Roman Law in Context* 34.

forced onto the younger generations.⁵⁶ Though the legal right to arrange a marriage belonged to the father, the mother had a social right to be involved in the choice.⁵⁷

As stated above,⁵⁸ an important check on the power of the *paterfamilias* was the family council (*concillium domesticum*).⁵⁹ Any exercise of excessive authority or violence against members of the family had to be approved by the family council. Though the *paterfamilias* was under no obligation to convene the *consilium*, the desire to comply with public expectations and morals motivated him to do so.⁶⁰ Roman virtues of *pietas*, family honour and equity played an important role with regard to the proper exercise of *patria potestas*.⁶¹ Dixon⁶² suggests that since children were seen as an economic investment, a source of comfort and care in old age, as well as proper commemoration at death and the only way to improve the family's status and achieve immortality, the *paterfamilias* was most probably not inclined to abuse his powers.

If one accepts that a *paterfamilias* regarded his children in this way, one may assume that the theoretically absolute power was balanced, not by a legal requirement to serve the child's best interests, but by a moral commitment to his welfare. To quote Augustus,

“Is it not blessed, on departing from life, to leave behind as successor and heir to your line and fortune one that is your own, produced by you, and to have only the mortal part of you waste away, while you live on in the child?”⁶³

⁵⁶ From the sections in the Digest on betrothal and marriage it is clear that the parties to the marriage, that is, the children, had to consent to the marriage for it to be valid. However no mention is made of the child's right to choose his or her spouse. D 23 1 4; D 23 1 7; D 23 1 12. That children were in fact sometimes forced to marry someone against their will, also happened. D 13 2 22 Celsus: “Where he marries someone because his father forced him to do so and he would not have married her if the choice had been his, the marriage is neither the less valid, because marriage cannot take place without consent of the parties; he is held to have chosen this course of action.”

⁵⁷ Dixon *The Roman Family* 29, 48, 63; Dixon *The Roman Mother* 28.

⁵⁸ See 2 2 above.

⁵⁹ Also called *privatum consilium*. Van Zyl *History and Principles* 88, Jolowicz *Historical Introduction* 118, Dixon *The Roman Mother* 2. The family council probably included members of both sexes, as well as of different ages and degrees of relations. Even longstanding friends of the family could be included in which case it was called a *consilium propinquorum*. Dixon *The Roman Family* 139.

⁶⁰ Lacey “*Patria Potestas*” in Rawson (ed) *The Family in Ancient Rome* 137-140.

⁶¹ Gardner *Family and Familia in Roman Law and Life* 123.

⁶² Dixon *The Roman Family*.

⁶³ As quoted by Dixon *The Roman Family* 111.

Patria potestas could be protected from intrusion by third parties. The *paterfamilias* could claim the return of any of his *alieni iuris* with a *vindicatio* if they were in the unlawful possession of a third party.⁶⁴ In later classical law, interdicts to protect *patria potestas* were also available.⁶⁵

2 2 3 Termination of *patria potestas*

The usual manner in which the power of the *paterfamilias* was extinguished, was by his death, or if he lost his liberty or citizenship.⁶⁶ At such time, all his dependents became *sui iuris*.⁶⁷ A wife, daughters and young children, however, did still not have full legal capacity and were placed under guardianship or curatorship.⁶⁸

The *paterfamilias* could divest himself of his power by emancipating his child (usually a *filius familias*), by giving the child in adoption⁶⁹ or by giving a daughter in marriage *cum manu*.⁷⁰ If a *paterfamilias* was adrogated himself, his *potestas* was terminated as well, since he would then be under the *potestas* of his adoptive father.⁷¹

⁶⁴ Van Zyl *History and Principles* 88.

⁶⁵ Kaser/Dannenbring *Roman Private Law* 258.

⁶⁶ Kaser/Dannenbring *Roman Private Law* 62, 256, 261-262; Crook *Law and Life of Rome* 107; Johnston *Roman Law in Context* 30; Rawson "The Roman Family" in Rawson (ed) *The Family in Ancient Rome* 7; Stein *Roman Law in European History* 7; Van Zyl *History and Principles* 89.

⁶⁷ Treggiari *Roman Marriage* 15; Crook *Law and Life of Rome* 113; Kaser/Dannenbring *Roman Private Law* 62. On the death of a *paterfamilias*, as many new families came into existence as persons who had been in his power right before his death. G I 1 127; D. Ulpian 50 16 195.

⁶⁸ Irrespective of their ages, all *sui iuris* women were the subject of guardianship called *tutela mulierum*, while children, depending on age, were subjected to either guardianship (*tutela impuberum*) or caretaker-ship (*cura minores*). Neither of these institutions should be equated with modern day guardianship or custody, since the primary purpose of both was the protection of the proprietary interests of the minor and the tutor/caretaker had no control over the person of the minor, or any aspect of his life that did not concern his patrimony. The function was always to protect the youthful person from his own immaturity, lack of experience and naivety as well as to guard against exploitation and fraud in business transactions. For instance, the word "*tutela*" was derived from "*tueri*" which meant "to protect". Therefore, though the right of the *tutor* was equal to that of the *paterfamilias*, it was watered down in the interests of the pupil by its purpose of protection. G I 1 189: "That persons below the age of puberty should be under guardianship occurs by the law of every State, it being consonant with natural reason that a person of immature age should be governed by the guardianship of another person..."

See further Gaius *Institutes* 1 144-199; D 26 1 1; Kaser/Dannenbring *Roman Private Law* 266-276; Jolowicz *Historical Introduction* 245-248; Van Zyl *History and Principles* 113-123; Crook *Law and Life of Rome* 113; Johnston *Roman Law in Context* 37; Watson *Law of Persons in the Later Roman Republic* 102-113; Dixon *The Roman Family* 105-108.

⁶⁹ In the case of adoption of a *filius familias*, it was called *adoptio*. Kaser/Dannenbring *Roman Private Law* 262; Van Zyl *History and Principles* 89.

⁷⁰ G I 1 127. At which time the daughter would enter the *manus* of her husband or his *paterfamilias*. See above 2 2. Kaser/Dannenbring *Roman Private Law* 262; Van Zyl *History and Principles* 89.

⁷¹ G I 1 107. Watson *The Law of Persons in the Later Roman Republic* 86; Kaser/Dannenbring *Roman Private Law* 262.

No person in power could ever force the *paterfamilias* to emancipate him. The choice to end his *potestas* during his lifetime rested solely with the *paterfamilias*.⁷²

2 3 The Roman mother

The Roman matron (*materfamilias*) held an honoured social position.⁷³ Even though she had no direct power or control over her children, often not even belonging to the same family as they,⁷⁴ her presence in and influence on their lives should not be negated. In this regard, the average age difference of ten or more years between a husband and wife in a first marriage should be kept in mind.⁷⁵ Such a difference between mother and father must surely have resulted in a very definite generation-gap between fathers and their children, placing the mother in the position of confidant, mediator and friend. Where the *paterfamilias* might demand obedience to his will, the *materfamilias* used her powers of persuasion to influence her children.⁷⁶

While the image of the *paterfamilias* conjures up the picture of a hard headed, sometimes hard handed, old man ruling over his descendants with an iron fist, the image of the mother is one of a caring woman, completely dedicated to the advancement and welfare of her children. To a father the importance of securing his name through his offspring paled into insignificance if compared with the importance of children for a woman who only gained social standing through her marriage and motherhood.⁷⁷ However, due to the mother's inferior social and legal position, if a marriage ended in divorce she had no rights to the custody of the children. The

⁷²G I 1 12 10 (translation Thomas) "It should also be known that no child, whether so born or by adoption, can in any way oblige his or her father to release them from power." Dixon *The Roman Family* 41.

⁷³ Treggiari *Roman Marriage* 414; Dixon *The Roman Family* 29, 48, 36, 83; Dixon *The Roman Mother* 28, 62; Gardner *Family and Familia in Roman Law and Life* 209.

⁷⁴ Gardner *Family and Familia in Roman Law and Life* 210-211.

⁷⁵ According to Susan Treggiari women tended to marry at around fifteen while in a first marriage, men were probably twenty-five or older. The effect of this age difference was to emphasize the undisputable authority of the husband. Treggiari *Roman Marriage* 399-402.

⁷⁶ Though it was impossible for a woman to have domestic authority over anyone and children without a *paterfamilias* were persons *sui iuris*, in classical times there was a strong social expectation of active maternal concern and involvement in the lives of her children. Gardner *Family and Familia in Roman Law and Life* 115, 211.

Moreover, the basic education of children was left almost exclusively to the mother, except in the case of older boys who went for training in rhetoric and philosophy in public schools. Dixon *The Roman Family* 8-9, 14, 116-119, 131.

question regarding the fitness of either parent or the best interests of the child were completely irrelevant. As a matter of law legitimate children always belonged to and remained with the family of the *paterfamilias*.⁷⁸

2 4 Conclusion

Without a doubt, the Roman family as characterized by the *paterfamilias* and family law of ancient Rome were dominated by the institution of *patria potestas* – that unique and absolute power. Where “the best interests of the child” is a commonplace term in South African law and society, there was certainly no equivalent of this in Roman times, the main emphasis of family law being the preservation and advancement of the family name and estate. But, however unintended it was, it is precisely this focus on preservation and advancement of the estate that led to certain limitations being put on *patria potestas*. Some of these limitations had a legal basis and were enforceable at law, while others were mere moral and ethical considerations, requiring the father to adhere to the prized Roman virtues of *bona fides* and *dignitas*.

3 Roman Dutch Law

3 1 Introduction

The Roman Dutch law that applied in Holland during the seventeenth and eighteenth centuries is an important source of law in contemporary South Africa.⁷⁹ The term *Roomsch-Hollandsch Recht* was first used by Simon van Leeuwen⁸⁰ and clearly shows the two main components of the law: the Roman law of Justinian adopted during the Reception, and the Dutch law with its Germanic origins.⁸¹

⁷⁷ Treggiari *Roman Marriage* 414.

⁷⁸ The principle that the father was responsible for the custody of a child is reflected in the rules relating to dowry. A wife’s dowry was always repaid to her family on divorce, but a deduction could be made for the maintenance of the children who stayed behind in their father’s household. Dixon *The Roman Family* 10, 40; Treggiari *Roman Marriage* 412, 445; Watson *The Law of Persons in the Later Roman Republic* 77; Johnston *Roman Law in Context* 36.

⁷⁹ South African common law is a hybrid system consisting of mainly Roman Dutch law infused with English law. In a case where there is no clear guidance by legislation, a decision of a South African court or the Roman Dutch common law guidance is sought in the decisions of the English courts. Hahlo and Kahn *The South African Legal System and its Background* 575-589.

⁸⁰ Van Leeuwen used this term as a subtitle to his work *Paratitula Juris Novissimi* which was published in Leyden in 1652. In 1664 he used the term as the title of his well-known treatise *Het Roomsch-Hollandsche Recht*. Lee *An Introduction to Roman Dutch Law* 2.

⁸¹ Hahlo and Kahn *The South African Legal System and its Background* 329, 330; Wattel *De Beginselen van het Oud-Hollandsch Recht* 3, 4; Wessels *History of the Roman Dutch Law* 18; Van

Traditionally the history of the Roman Dutch law is divided into four main periods, but since there was little or no development in the law of parent and child during the Middle Ages, only the law of the other three periods are relevant for the present study. These are: Germanic law, the law of the Frankish Empire and the law of the Dutch Republic.⁸² These systems of law reflect the different periods in the social and political development of Europe.⁸³ The gradual progression in the legal position of a child from a faceless member of its father's household to an individual with rights and legal capacity cannot be seen in isolation from the social-political development on the continent.⁸⁴

3 2 Early Germanic Law⁸⁵

3 2 1 Introduction

The Germanic people were divided into many different tribes, each with their own territory and law.⁸⁶ They did not recognize the law of another tribe as binding on them.⁸⁷ However, since their origins seem to be the same,⁸⁸ many of the customs, which formed the substance of their laws, were similar.⁸⁹ Thus it is possible to speak of a Germanic law though in fact there was no such general system.⁹⁰ Similar to Roman law and that of most agrarian communities, the basic social unit of the Germanic tribes was not the individual, but the family,⁹¹ which consisted of the

Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 90; Huebner *A History of Germanic Private Law* 3-6; Spiro *Parent and Child* 3.

⁸² Hahlo and Kahn *The South African Legal System and its Background* 329, 330; Lee *An Introduction to Roman Dutch Law* 2, 3.

⁸³ The different periods developed gradually out of each other and there are no definite boundaries but rather transitional periods discernable between them. Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 90.

⁸⁴ Huebner *A History of Germanic Private Law* 41.

⁸⁵ The Germanic period is considered to be the period from the earliest times up to the end of the fifth century AD. Hahlo and Kahn *The South African Legal System and its Background* 330.

⁸⁶ "Stamrecht". Hahlo and Kahn *The South African Legal System and its Background* 334.

⁸⁷ Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 91; Wessels *History of the Roman Dutch Law* 45-48.

⁸⁸ Aquilius "Insake *Cook v Cook* 1939 AD 154; *sartor resartus*" 1938 *THRHR* 232, 234.

⁸⁹ Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 94; Huebner *A History of Germanic Private Law* 5; Wessels *History of the Roman Dutch Law* 13, 417; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht I* 1; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 6.

⁹⁰ Wattel *De Beginselen van het Oud-Hollandsch Recht* 3-4.

⁹¹ Wessels *History of Roman Dutch Law* 18; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 93.

husband, his wife and their children and slaves.⁹² The wife, children and slaves were under the power of the husband who was the head of the family (house-lord, *Hausherr*)⁹³ and warrior defender of his family.⁹⁴

The power of the house-lord was called *mund* or *mundium*⁹⁵ and according to Brunner it had the appearance of dominion and authority (*Herrschaft*) to those inside the family, while for outsiders it had the appearance of protection and care (*Haftung*).⁹⁶

Due to the similarities between Roman *patria potestas* and *mund*,⁹⁷ it is easy to conclude that the *mund* must have derived from *patria potestas*. However, though the Germanic tribes entered into history at a later date, *mund* was an institution completely independent from *patria potestas*.⁹⁸ This independence is emphasized by the main difference between the two institutions – from a very early age, the definitive characteristic of *mund* was one of protection and care and to be exercised in the

⁹² Brunner *Deutsche Rechtsgeschichte* 70. Families were patriarchal in nature, meaning that the whole family and members of the household were subjected to the power of a single male individual. Huebner *A History of Germanic Private Law* 63, 585.

⁹³ This “monarchical” head of the family was considered the wisest member of the family, the lord of the manor and the representative of the whole family. Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 94; Brunner *Deutsche Rechtsgeschichte* 70; Huebner *A History of Germanic Private Law* 116.

⁹⁴ Donaldson *Minors in Roman Dutch Law* 69; Hahlo *Husband and Wife* 4.

⁹⁵ The name of this power was taken from the symbol of its exercise, namely the hand. It has the same meaning and etymological origin as the *manus* of Roman law. Huebner *A History of Germanic Private Law* 585-586. De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 86; Fockema Andrea *Oud-Nederlandsch Burgerlijk Recht II* 209; Brunner *Deutsche Rechtsgeschichte* 71; Spiro *Parent and Child* 2; Hahlo *Husband and Wife* 4.

⁹⁶ Brunner *Deutsche Rechtsgeschichte* 71.

⁹⁷ See below 3 2 2, 3 2 3 and 3 2 4.

⁹⁸ De Groot *Inleidinge* 1 6 3 “De groote ende zonderlinge macht der vader over de kinderen onder haere hand staende is in deze landen onbekent.”

The reason behind *patria potestas* and *mund* differed greatly. *Patria potestas* is sometimes considered to be an institution through which the *paterfamilias* could possibly receive pecuniary benefit (though it was argued in 2 4 above that this was not necessarily the case). In contrast the reason for *mund* was always to provide protection to those who could not protect themselves. Studiosus “Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders” 1946 *THRHR* 32, 33; Fockema Andrea *Oud-Nederlandsch Burgerlijk Recht I* 112, *II* 209, 222; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 84; Lee *An Introduction to Roman Dutch Law* 33; Wessels *History of the Roman Dutch Law* 417.

interests of the subjected family members.⁹⁹ First moral and then legal limitations already curbed the original unlimited power of the house-lord at an early age.¹⁰⁰

3 2 2 Creation of *munt*

As stated above, the family was the basic unit of society and one's family by birth (the sib, *die Sippe* – a union of blood relations) played an important role in Germanic private law.¹⁰¹ A patriarch stood at the head of the sib, assisted by a family council made up of the heads of the separate families belonging to the extended family. Similar to the Roman *concillium domesticum*, this family council had to approve the use of violence against family members and served as a check on the power of the patriarch.¹⁰² The council exercised the collective guardianship of the sib over widows and orphans in the extended family.¹⁰³

In another sense the sib constituted the family similar to the nuclear family today, with a *paterfamilias* at its head.¹⁰⁴ Upon marriage a woman left the sib of her birth and entered into the sib of her husband. By marriage a man acquired *munt* over his wife¹⁰⁵ and, through her, over all children she bore, either before or during the marriage.¹⁰⁶

⁹⁹ This implied a duty as well as rights to the house-lord. He was bound to exercise *munt* in the interests of those subjected to it. Huebner *A History of Germanic Private Law* 586. According to Brunner, *munt* encompassed the concepts of “*Schutz, Schirm und Friede*” – that is, protection, patronage and peace. *Deutsche Rechtsgeschichte* 72.

¹⁰⁰ First moral and then legal limitations curbed the scope of *munt*. Huebner *A History of Germanic Private Law* 586; Wattel *De Beginzelen van het Oud-Hollandsch Recht* 8-9; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 84.

¹⁰¹ Brunner *Deutsche Rechtsgeschichte* 81; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 93; Huebner *A History of Germanic Private Law* 114.

¹⁰² Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 209; Brunner *Deutsche Rechtsgeschichte* 75; Huebner *A History of Germanic Private Law* 657.

¹⁰³ Huebner *A History of Germanic Private Law* 115; Brunner *Deutsche Rechtsgeschichte* 217; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 94; Hahlo and Kahn *The South African Legal System and its Background* 343; Labuschagne 1992 *TSAR* 354.

¹⁰⁴ Hahlo and Kahn *The South African Legal System and its Background* 343; Labuschagne 1992 *TSAR* 354.

¹⁰⁵ At first marriage was formulated as a bride purchase, the husband paying the price by giving a dowry to the wife and her family, but later it was construed rather as a purchase of the *mundium* over the wife than the wife herself. Huebner *A History of Germanic Private Law* 588-599; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 132-134; Wessels *History of the Roman Dutch Law* 450-451; Hahlo *Husband and Wife* 4.

¹⁰⁶ However, the mere fact that a child was given birth to by the father's wife was insufficient to establish paternal power over that child. Similar to the Roman custom, the newborn baby was laid on the floor at its father's feet and the decision whether the child should live or die belonged to the father. If he picked the child up, this adoption (*Aufnahme*) was the acceptance of paternity and responsibility

According to Huebner the father's power was not based upon his parentage, but upon the *mundium* he had over the child's mother.¹⁰⁷ Brunner, however, disagrees with this view and is of opinion that the authority of a husband over his wife stemmed from the power of a father over his children.¹⁰⁸

However, which power came first is of little consequence since it is undisputed that women were always under the authority of a man – be it husband or father – and children were under paternal power until they married.¹⁰⁹ That the power was definitely paternal and not parental in these ancient times is also certain:

“Van macht der moeder kon oudtijds geen sprake zijn; zij was zelve niet mondig.”¹¹⁰

No ties of relationship were recognized between children and their maternal kindred.¹¹¹

Unlike Roman law and custom where *patria potestas* could be acquired by adoption, adoption for the purposes of establishing parental power over someone not born into the family was unknown in Germanic law.¹¹²

3 2 3 Content of *munt*

In Germanic law, only those capable of bearing arms and protecting themselves and their belongings/family, had any legal capacity.¹¹³ Women and children were considered physically too weak, and children mentally too inexperienced and immature to look after themselves, thus providing the reason behind *munt*.¹¹⁴

over the child and it became a member of the legal community. The right of exposure disappeared as soon as the first acts of care of the child were taken. Huebner *A History of Germanic Private Law* 43-44, 659.

¹⁰⁷ Huebner *A History of Germanic Private Law* 659.

¹⁰⁸ Brunner *Deutsche Rechtsgeschichte* 75.

¹⁰⁹ The attainment of an age of majority did not end the power of a father over his son unless the son left the house and established a hearth of his own. See below 3 2 4.

¹¹⁰ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 210.

¹¹¹ Huebner *A History of Germanic Private Law* 590.

¹¹² Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 215.

¹¹³ Studiosus 1946 *THRHR* 32, 33.

¹¹⁴ Donaldson *Minors in Roman Dutch Law* 5; Aquilius 1938 *THRHR* 235; Wessels *History of Roman Dutch Law* 417.

Originally the power of a father over his children was unlimited – he had power over his child’s life or death, especially the power of exposure of a baby, and could sell the child if times were hard.¹¹⁵ However, since it was implicit in *mundium* that the person under *munt* was vulnerable (*weerloos*) and needed the protection of an able bodied (*weerbare*) man, the duty to protect, maintain and educate their children was ascribed to fathers from an early age.¹¹⁶ *Mundium* also implied that the father had absolute ownership of the child’s property¹¹⁷ and no marriage was valid without paternal consent.¹¹⁸

3 2 4 Termination of *munt*

The power of a father over his children was most commonly extinguished by the death of the father or the marriage of a daughter.¹¹⁹ When a daughter was given in marriage, she automatically entered into the sib of her husband and under his *munt*.¹²⁰ In early Germanic law a boy/youth came of age when he became capable of defending himself and was handed arms (*Wehrhaftmachung*), but apparently this did not bring an end to his father’s *munt*.¹²¹ Coming of age was determined individually¹²² and could be as young as eleven years. Due to this fact, boys who were technically *mondig*, often stayed on in the parental home, and, as long as they lived under that roof, they were subjected to the power of their father.¹²³ Only when they left the parental home to establish their own hearth, they finally became *zelfmondig*.¹²⁴ A formal declaration of

¹¹⁵ Huebner *History of Germanic Private Law* 658; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 84; Lee *An Introduction to Roman Dutch Law* 33; Brunner *Deutsche Rechtsgeschichte* 76; Spiro *Parent and Child* 2.

¹¹⁶ See 3 2 1 above. Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht I* 112; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 93.

¹¹⁷ Huebner *History of Germanic Private Law* 658; Donaldson *Minors in Roman Dutch Law* 63; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 86.

¹¹⁸ Huebner *History of Germanic Private Law* 599; Lee *An Introduction to Roman Dutch Law* 35; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 84.

¹¹⁹ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 218; Huebner *History of Germanic Private Law* 663.

¹²⁰ See above 3 2 2.

¹²¹ Huebner *History of Germanic Private Law* 662; Brunner *Deutsche Rechtsgeschichte* 76; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 57.

¹²² Wattel *De Beginselen van het Oud-Hollandsch Recht* 8; Wessels *History of the Roman Dutch Law* 418.

¹²³ Brunner *Deutsche Rechtsgeschichte* 75; Donaldson *Minors in Roman Dutch Law* 69.

¹²⁴ Huebner *History of Germanic Private Law* 662; Donaldson *Minors in Roman Dutch Law* 69.

majority by the father also ended the *mundium* over a son, and later fixed ages of majority were adopted.¹²⁵

It was impossible for the father to abandon *mundium* over his children during his lifetime.¹²⁶ This was probably due to the fact that *mundium* was aimed at the protection and care of the children and had, therefore, to be exercised in the children's best interests. For someone incapable of any legal act and without any rights except those protected and represented by their fathers, it would certainly not be beneficial to be abandoned.

3 2 5 Conclusion

There are no written sources dating from the early Germanic period and what is known of their law is mainly derived from the customs that have been handed down through the ages.¹²⁷ However, since the law relating to parent and child have always been one based upon custom,¹²⁸ there is no need to doubt what we know.¹²⁹

Like its Roman counterpart the Germanic house-lord or *paterfamilias* was vested with extensive power over his wife and children, but his power in fact had nothing to do with *patria potestas*.¹³⁰ It was necessary in the discussion above, to search in sociological sources for authority to support the assumption that the Roman *paterfamilias* probably would have attempted to exercise his power in the interests of his children. Among the less "civilized" Germanic peoples, however, protection of the interests of the vulnerable was an essential characteristic of the authority of those in power.

¹²⁵ These ages differed greatly among the different tribes and if the sons remained in the father's house beyond this age, he stayed under power. Huebner *History of Germanic Private Law* 55.

¹²⁶ Spiro *Parent and Child* 2.

¹²⁷ Wessels *History of the Roman Dutch Law* 6.

¹²⁸ Grotius 1 6 3. Wessels *History of the Roman Dutch Law* 417.

¹²⁹ According to Wessels antiquarian research has shown that the customs of most European nations today are remarkably similar to their ancient customs therefore this assumption is not without foundation. *History of the Roman Dutch Law* 13.

¹³⁰ See 3 2 1 above.

3 3 Frankish Law

3 3 1 Introduction

The tribes of the greater part of Western Europe became united as an empire under Frankish monarchs from the fifth to the ninth century AD.¹³¹ Towns and cities were established¹³² and the personality principle of customary laws gradually gave way to territorial laws and legislation.¹³³ The two most important influences of this period are the legislation (*capitullaria*)¹³⁴ of the Frankish kings and the rise of Christianity and the powerful Roman Catholic Church.¹³⁵

3 3 2 Decline of the sib

Due to the rise of a central government as well as the recognition of cognate relations through the influence of the Church,¹³⁶ the sib lost much of its power as social structure and body of authority over family members. The blood relationships that formed the bond of association within a sib were replaced by personal relationships of loyalty and protection between unrelated people.¹³⁷ When the sib as greater family started to decline within the unorganised and non-exclusive bodies of relations and neighbours, the house-communities and smaller families re-emerged as independent and basic units of society.¹³⁸

¹³¹ Wessels *History of the Roman Dutch Law* 32-33; Lee *An Introduction to Roman Dutch Law* 3; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 90; Hahlo and Kahn *The South African Legal System and its Background* 345; Labuschagne 1992 *TSAR* 354.

¹³² Hahlo and Kahn *The South African Legal System and its Background* 400

¹³³ Wessels *History of the Roman Dutch Law* 37-44.

¹³⁴ Hahlo and Kahn *The South African Legal System and its Background* 377.

¹³⁵ After the fall of the Western Roman Empire, the Church remained in Western Europe as the heir of Roman civilization and knowledge. As such the Church became the interpreter of laws and assisted the kings in establishing their power. In turn the kings sanctioned the power of the Church in religious matters. This mutual assistance between the Church and the State aided the spread of Roman culture and civilization and, of course, the Roman civil law throughout the Frankish territory. Wessels *History of the Roman Dutch Law* 32-46; Van Lunteren *Overzicht van de Geschiedenis der Romeinsche en Oud-Nederlandsche Rechtsvorming* 97-100; Lee *An Introduction to Roman Dutch Law* 3; Hahlo and Kahn *The South African Legal System and its Background* 358-371.

On the influence of the Church and Christianity in general, see Verdam "Enige algemene Opmerkingen over den Invloed van het Christendom op het Romeinse Recht" 1948 *THRHR* 153.

¹³⁶ Huebner *A History of Germanic Private Law* 115. The reason why the Church recognized maternal kinship relations, was partly in recognition of some rights of a mother to her children, and partly because of the strict prohibitions on marriage within certain degrees of relation. See Huebner 590 and Hahlo and Kahn *The South African Legal System and its Background* 383.

¹³⁷ Brunner *Deutsche Rechtsgeschichte* 217.

¹³⁸ Huebner *A History of Germanic Private Law* 116.

The family was headed by the house-lord/*paterfamilias* who was vested with authority over wife and children and replaced the sib as the individual guardian over minors in the family.¹³⁹ The continuation of paternal power in this era was not only necessary since the central government was not yet strong enough to regulate this most intimate of relationships,¹⁴⁰ it was also sanctioned by the Church.¹⁴¹ However, under the influence of Christianity, though the term paternal power was still used, this power became more limited, ascribing duties to not only the father, but the mother as well.¹⁴²

3 3 3 Paternal power

A father acquired *mundium* over a child born to him during the marriage, and by his authority over his wife, over any children she brought into the marriage as well. Illegitimate children could be legitimised in this manner if marriage between their parents took place after their birth.¹⁴³ Adoption was possible in certain circumstances whereby a (usually childless) man could acquire authority of a child born to another family.¹⁴⁴

The content of *munt* was similar to that of Germanic times, except that the right of baby exposure became more limited under Christian influence.¹⁴⁵ Though there is no evidence that this actually happened, the right to sell a child in times of hardship and necessity continued until as late as 1275.¹⁴⁶

¹³⁹ Hahlo and Kahn *The South African Legal System and its Background* 386, 400; Labuschagne 1992 *TASR* 354.

¹⁴⁰ According to Wattel where the family is still the basic unit of society and society is therefore not governed by something “algemeens, iets maatschappelijks”, the power of a father over his children will be great. See Wattel *De Beginselen van het Oud-Hollandsche Recht* 8.

¹⁴¹ Studiosus 1946 *THRHR* 34; Hahlo and Kahn *The South African Legal System and its Background* 367-368.

¹⁴² Studiosus 1946 *THRHR* 34-37.

¹⁴³ De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 83-88; Fockema Andrea *Oud-Nederlandsch Burgerlijk Recht II* 209-221; Huebner *A History of Germanic Private Law* 659.

¹⁴⁴ The adoption of a son was only permitted to childless parents, unless all their other children agreed to the adoption. Most often, though, adoption was used as a way to end paternal power. This was sometimes necessary owing to the fact that a son was still subject to the authority of his father if he stayed on in the paternal home after attaining majority. The father could then give the son in adoption to someone else whereby his power would be extinguished, and the son could continue living in the household without any limitations on his legal capacities. Huebner *A History of Germanic Private Law* 661-662.

¹⁴⁵ Huebner *A History of Germanic Private Law* 659. Since then the fact of birth was enough to establish parental power over a legitimate child. An illegitimate child had to be legitimised by subsequent marriage for his father to have authority over him.

¹⁴⁶ This right to sell the child was reflected in the “*Schwabenspiegel*”. Huebner *A History of Germanic Private Law* 658; Spiro *Parent and Child* 2.

Children were capable of owning property during this period,¹⁴⁷ but they were still incapable of representing themselves in legal discourse, therefore the administration of property and representation of children were still the right and responsibility of the father. As long as the child lived in the father's house and was under his authority, he had the *usufruct* of property owned by the child.¹⁴⁸ He also had the right to give his daughter into marriage, even against her will. Under influence of Christianity however, the consent of the daughter, even if she was under age, was required as well.¹⁴⁹

The duty of care and protection that was implicit of *munt* became more pronounced. The father had to maintain the child on his standard of living, provide an education and protection. He was still the natural guardian of his children,¹⁵⁰ but after his death, the rights and duties passed to the mother. She retained the custody of the children¹⁵¹ and was responsible for their daily care and education.¹⁵² Of course, since she could not administer property herself she was assisted by the guardian appointed by the father.¹⁵³

Paternal power terminated upon the death of either father or child. Upon death of the father, his children became part of another family as the *mundium* over them passed to the nearest of the father's male relatives.¹⁵⁴ This guardian was appointed by the father in his will or by the decision of the family through law or custom.¹⁵⁵ A daughter's

¹⁴⁷ Hahlo and Kahn *The South-African Legal System and its Background* 383.

¹⁴⁸ Huebner *A History of Germanic Private Law* 663; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 86-87.

¹⁴⁹ Wessels *History of the Roman Dutch Law* 431; Huebner *A History of Germanic Private Law* 597-598.

¹⁵⁰ The fact that a father was natural guardian implied that he had to look after the interests of the minors, and act on their behalf. Wessels *History of the Roman Dutch Law* 422.

¹⁵¹ The mother was considered entitled to the custody of her children by operation of natural law. De Groot *Inleidinge* 1.7.8. Wessels *History of the Roman Dutch Law* 422.

¹⁵² Huebner *A History of Germanic Private Law* 664-665; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 215.

¹⁵³ Wessels *History of the Roman Dutch Law* 422.

¹⁵⁴ The family councils still had a degree of supervision over the guardians. De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 86; Hahlo and Kahn *The South African Legal System and its Background* 386.

¹⁵⁵ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 221-245; Wessels *History of the Roman Dutch Law* 422-423; Huebner *A History of Germanic Private Law* 658-659.

marriage¹⁵⁶ or a son's (if he had already reached the age of majority) leaving of the paternal household to establish his own¹⁵⁷ were the other usual ways in which paternal power were extinguished.

3 3 4 Conclusion

The legislation of the Frankish monarchs had almost no significance for private law and the relationship between parent and child.¹⁵⁸ The changing social-economic circumstances¹⁵⁹ and the influence of Christianity, however, had a profound influence on the decline of the sib and further curtailment of the extensive power of the father over his children.¹⁶⁰ The duty of care became more pronounced¹⁶¹ and was not only ascribed to the father, but also to the mother,¹⁶² explaining Van der Linden's comments, under his heading "*Van de Vaderlijke Magt*",¹⁶³

"Wat de magt der ouders over hunne kinderen betreft, zij verschilt bij ons zeer veel van de uitgestrekte vaderlijke magt bij de Romeinen. Zij komt niet slechts aan den vader, maar ook aan de moeder toe en na's vaders dood, aan de moeder alleen. Zij bestaat in een algemeen toezicht over het onderhoud en de opvoeding hunner kinderen, en de behering van derzelve goederen..."

If the father did not appoint a guardian after his death, or there was no fit and proper person among the nearest relatives,¹⁶⁴ the king or princeps was considered the upper guardian of orphaned children. He exercised his power (*Obervormundschaft*) through

¹⁵⁶ De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 88; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 157; Huebner *A History of Germanic Private Law* 659; Hahlo and Kahn *The South African Legal System and its Background* 383.

¹⁵⁷ Majority was attained at fixed ages. De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 57-58, 87-88; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 219-220; Hahlo and Kahn *The South African Legal System and its Background* 382.

¹⁵⁸ Huebner *A History of Germanic Private Law* 6.

¹⁵⁹ According to Brunner, the development of state authority (*Staatsgewalt*) limited the functioning of the sib as the ordering factor in society. *Deutsche Rechtsgeschichte* 217.

¹⁶⁰ Huebner *A History of Germanic Private Law* 590-591; Verdam 1948 *THRHR* 153.

¹⁶¹ Huebner *A History of Germanic Private Law* 658-659.

¹⁶² It has been argued, however, that it is inconceivable that a mother could have any power over a child against its father, since the mother was always under the *mund* of her husband or another male. Aquilius 1938 *THRHR* 232; 235-236.

¹⁶³ Van der Linden *Koopmans Handboek* 1 4 1; Studiosus 1946 *THRHR* 36.

¹⁶⁴ De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 86; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 224.

the *curia regis*, replacing the supervisory function of the family councils.¹⁶⁵ This developed into the idea of the upper guardianship over all children by the court.¹⁶⁶

3 4 Roman Dutch Law

3 4 1 Introduction

All children (male and female) below the age of twenty-five years¹⁶⁷ were considered minors in Roman Dutch law and were under guardianship of either their parents or another guardian.¹⁶⁸ This guardianship was nothing like the extensive *patria potestas* of Roman times¹⁶⁹ and was characterised by a mutual obligation between the parents and children.¹⁷⁰ Furthermore, the relationship between the father and child did not exclude the mother any more.¹⁷¹ Though some of her rights were still inferior to those of the father, the nature of the power was truly parental and not just paternal.¹⁷² Children were required to respect and have reverence for their parents (as the ways of God dictate) and parents were encumbered with the duty to either assist the child in transactions, or to act on their behalf.¹⁷³

All children who lost one or both of their parents were considered orphans and had to have a legal guardian.¹⁷⁴ Such guardian could be appointed by the parent/s in a will,

¹⁶⁵ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht* I 122; Hahlo and Kahn *The South African Legal System and its Background* 386.

¹⁶⁶ Hahlo and Kahn *The South African Legal System and its Background* 386; Wessels *History of the Roman Dutch Law* 423-424; Huebner *A History of Germanic Private Law* 658-659; Labuschagne 1992 *TSAR* 355; Lee *An Introduction to Roman Dutch Law* 99.

¹⁶⁷ De Groot *Inleidinge* 1 7 3. Lee *An Introduction to Roman Dutch Law* 43; Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht* I 112.

¹⁶⁸ De Groot *Inleidinge* 1 6 1; De Groot 1 7 7 – 1 7 10. Wessels *History of the Roman Dutch Law* 420. See further Conradie “Die verhouding tussen die ouerlike gesag en die voogdy in die Romeins-Hollandse Reg” 1948 *SALJ* 396.

¹⁶⁹ De Groot *Inleidinge* 1 6 3; Groenewegen *De Leg Abr* 1 9 2; Van Leeuwen *RHR* 1 13 1; Van der Linden *Koopmans Handboek* 1 4 1. Lee *An Introduction to Roman Dutch Law* 33; Wessels *History of the Roman Dutch Law* 417.

¹⁷⁰ Van Leeuwen *RHR* 1 13 1.

¹⁷¹ Voet 1 6 3.

¹⁷² De Groot *Inleidinge* 1 6 1; Lee *An Introduction to Roman Dutch Law* 36-37; Studiosus 1946 *THRHR* 42; Spiro *Parent and Child* 3.

¹⁷³ Van Leeuwen *RHR* 1 13 1. “[I]n de eerbiedigheid, die de Kinderen, van Gods wegen, hare Ouders schuldigt zyn: en aan de ander zyde, in een sekere bystand, en hulp by die Ouders in’t mede uitwerken, of uitvoeren van hare Kinders saken te doen.”

¹⁷⁴ De Groot *Inleidinge* 1 7 2. The Roman Dutch jurists did not write on custody as a separate component of the parent-child relationship. However, guardianship in its wide meaning is seen to include custody, which entails the duty of care and control, deciding on the child’s education and religious training as well as the privileges of chastisement and demanding obedience. These details of

and if there was no such provision, a guardian was appointed by the appropriate authority.¹⁷⁵ The guardian had to assist the surviving parent with the administration of the child's estate,¹⁷⁶ but the parent, even the mother, still had parental power over the child.¹⁷⁷

Even in earlier times, the mother was recognised as the guardian over illegitimate children, but in Roman Dutch law, she was also recognised, along with the father, as the guardian over legitimate children.¹⁷⁸ The father's rights, however, were still superior to those of the mother.¹⁷⁹

3 4 2 Creation of parental power

Since adoption of children was unknown in Roman Dutch Law,¹⁸⁰ the only way to acquire parental power was through birth.

A mother automatically acquired parental power over all her children, whether born during a valid marriage or not.¹⁸¹ A father on the other hand, had to be married to the mother to have parental power over the (legitimate) children.¹⁸² He could also acquire power over illegitimate children if they were legitimised.¹⁸³

the parent-child relationship were extensively governed by the writings of the jurists. See 3 4 3 below on the content of the parental power.

¹⁷⁵ De Groot *Inleidinge* 1 7 9 – 1 7 10, 1 7 13, 1 7 16. The mother had equal right to the father to appoint guardians in her will.

¹⁷⁶ De Groot *Inleidinge* 1 7 8.

¹⁷⁷ De Groot *Inleidinge* 1 7 9; Voet 27 2 1; Van der Linden *Koopmans Handboek* 1 4 1; Studiosus 1946 *THRHR* 35-42. The mother was especially responsible for the education, marriage and personal welfare of the child. Wessels *History of the Roman Dutch Law* 422.

¹⁷⁸ De Groot *Inleidinge* 1 7 9; Voet 27 2 1; Van der Linden *Koopmans Handboek* 1 4 1; Studiosus 1946 *THRHR* 35-42; Donaldson *Minors in Roman Dutch Law* 6.

¹⁷⁹ De Groot *Inleidinge* 1 6 1: "Van deze onbestorvene kinderen komt de voogdije de vader toe, die als vader ende voogd voor die selven in rechte spreekt..." Lee *An Introduction to Roman Dutch Law* 36-37; Studiosus 1946 *THRHR* 42; Spiro *Parent and Child* 3.

¹⁸⁰ "Het verkrijgen der vaderlijke magt, door aanneming tot kinderen, is bij ons niet in gebruik." Van der Linden *Koopmans Handboek* 1 4 2.

¹⁸¹ "Een moeder maakt geen bastaard." Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 210; De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 85.

¹⁸² Voet 1 6 4; Van der Linden *Koopmans Handboek* 1 4 2.

¹⁸³ There were two possible ways of legitimisation, namely, legitimisation by the subsequent marriage between the parents of the child, or by a special grant/act of grace on part of the sovereign ("gunst van de hooge overheid"). On following the Canon Law in this regard, Roman Dutch law did not allow children born of adultery and incest to be legitimised by the subsequent marriage between their parents. Lee *An Introduction to Roman Dutch Law* 32. De Groot *Inleidinge* 1 12 5; Van Leeuwen *RHR* 1 7 7; Voet 25 7 8; Van der Linden *Koopmans Handboek* 1 4 2.

3 4 3 Content of parental power

Unlike the Germanic and Frankish law where the exact content and scope of paternal power were unclear due to insufficient source material,¹⁸⁴ the Roman Dutch writers wrote extensively on the subject of parental power. The following extract from Van der Linden shows the detail in which the content of parental power is explained.¹⁸⁵

“The power of parents over their children differs very much among us from the extensive paternal power among the Romans. It belongs not only to the father, but also to the mother, and after the death of the father to the mother alone. It consists in a general supervision of the maintenance and education of their children and in the administration of their property. It gives the parents the right of demanding from their children due reverence and obedience to their orders, and also in case of improper behaviour to inflict such moderate chastisement as may tend to improvement. Parents may not be sued by their children without written leave of the Court, termed *venia agendi*. No marriage can be contracted by children without the consent of their parents. The parents are entitled on their decease to provide for the guardianship of their children.”

The parent-child relationship was a mutual one, implying reciprocal rights and duties between the parents and children. The duty of the parents to educate, protect and care for their children¹⁸⁶ was seen as the *quid pro quo* for the children’s duty of obedience and respect.¹⁸⁷ De Groot ascribes these duties to natural law¹⁸⁸ and, just as the children owed their parents obedience and respect even after attainment of majority,¹⁸⁹ parents were required to maintain their children after majority if they were unable to maintain themselves.¹⁹⁰ Both parents had to contribute to the maintenance of their

See further De Groot *Inleidinge* 1 12 9. Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 210; Lee *An Introduction to Roman Dutch Law* 32.

¹⁸⁴ See above 3 2 3 and 3 3 3.

¹⁸⁵ Van der Linden *Koopmans Handboek* (Juta’s translation) 1 4 1 as quoted by Lee *An Introduction to Roman Dutch Law* 33.

¹⁸⁶ De Groot *Inleidinge* 1 6 6; Van Leeuwen *RHR* 1 13 1, 1 13 7; Van der Linden *Koopmans Handboek* 1 4 1.

¹⁸⁷ Van Leeuwen *RHR* 1 13 8; Voet 25 3 4; Groenewegen *De Leg Abr* 34 1 15; De Groot *Inleidinge* 1 3 8, 1 6 4; Van der Linden *Koopmans Handboek* 1 4 1.

¹⁸⁸ De Groot *Inleidinge* 1 6 4; Van Leeuwen *RHR* 1 13 3. Christian religious values played an important role in this regard. Studiosus suggests that the reason for this is the fact that family relationships are governed more by morals than law. Studiosus 1946 *THRHR* 32, 34.

¹⁸⁹ De Groot *Inleidinge* 1 6 4; Van Leeuwen *RHR* 1 13 3; Van der Linden *Koopmans Handboek* 1 4 1.

¹⁹⁰ Both parents were under an equal duty to maintain their children, even if the child was illegitimate. De Groot *Inleidinge* 1 9 9; Van Leeuwen *RHR* 1 13 7-8; Van der Linden *Koopmans Handboek* 1 4 1; Voet 9 4 10, 25 3 5-6.

children to his or her own ability.¹⁹¹ However, if the parents were in need and a child of any age had the means, he or she had a duty to support and provide for the maintenance of their parents.¹⁹²

The duty to care for and maintain their children was proportional to the means of the family – the parents had to provide the child with food, clothing, shelter, medicine, an education and so forth according to their means and their standard of living.¹⁹³ There was never an option for the parents to sell their child in case of hardship, even if such sale might have improved the material comforts of the child.¹⁹⁴

The duty to bring up and educate their children implied that the parents had a right to use moderate chastisement if the child was disrespectful, disobedient or behaved in any other improper way.¹⁹⁵ However, this right was limited. It had to be exercised in the privacy of the parents' home and had to be proportional to the nature and quality of the improper behaviour.¹⁹⁶ The purpose of the chastisement was always the improvement of the child, and not the abuse of the power.

The parents were responsible for the administration of their minor child's estate¹⁹⁷ and no right of *usufruct* was afforded to them.¹⁹⁸ Children had to be assisted in all legal actions and the conclusion of all contracts¹⁹⁹ and represented by their parents in litigation.²⁰⁰ No child could conclude a valid marriage without the consent of his or her parents.²⁰¹ In this regard the father's right to consent was prevalent to that of the mother, but if the father was unavailable, the mother's consent was sufficient.²⁰²

¹⁹¹ De Groot *Inleidinge* 1 6 1; Voet 25 3 6-7.

¹⁹² Voet 25 3 8.

¹⁹³ Voet 25 3 4-5. Lee *Introduction to Roman Dutch Law* 40.

¹⁹⁴ Voet 1 6 3.

¹⁹⁵ Van der Linden *Koopmans Handboek* 1 4 1; Van Leeuwen *RHR* 1 13 1.

¹⁹⁶ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 217-218.

¹⁹⁷ De Groot *Inleidinge* 1 6 6; Van der Linden *Koopmans Handboek* 1 4 1.

¹⁹⁸ Voet 1 6 3.

¹⁹⁹ De Groot *Inleidinge* 1 6 6; Van der Linden *Koopmans Handboek* 1 4 1.

²⁰⁰ De Groot *Inleidinge* 1 6 1.

²⁰¹ De Groot *Inleidinge* 1 5 14-16; Voet 23 2 11, 23 2 13; Van der Linden *Koopmans Handboek* 1 3 2, 1 3 6, 1 4 1; Van Leeuwen *RHR* 1 12 1, 1 12 4, 1 13 1, 1 14 6; Groenewegen *De Leg Abr* 1 10 2. See also Studiosus 1946 *THRHR* 32, 39-41.

Given the fact that no minor could be without a parent or guardian, both parents had the right to appoint testamentary guardians over their minor children.²⁰³ The guardian was responsible for the administration of the child's estate, but if one of the parents survived the other, that parent retained the general care and custody of the child's person. Even if the guardians were appointed by the father their rights did not exceed that of the mother.²⁰⁴

The content of the parental power did not change or diminish if a marriage ended in divorce but as a general rule, the innocent party was entitled to the custody of the children.²⁰⁵ However, the court, as upper guardian of all children, had a wide discretion to grant custody to the guilty party if the welfare of the children required it.²⁰⁶ If the custody was expressly awarded to one parent after the divorce, the other lost his right to interfere with decisions on the day-to-day upbringing and care of the child. The court was also reluctant to interfere with the decisions of the custodial spouse, unless it was clear that it was detrimental to the interests of the child.²⁰⁷

3 4 4 Termination

Parental power was terminated in the Roman Dutch law in the usual ways through the death of the parent or child,²⁰⁸ the marriage of the child and the attainment of the age of majority.²⁰⁹

Though the marriage of a child of either sex terminated the parental power over that child,²¹⁰ only a son attained majority status through marriage. In contrast to the Germanic and Frankish customs, the fact that a son and his wife still shared the

²⁰² Voet 1 6 3. The Perpetual Edict of 1540 was the first statute to confirm the custom of parental consent to a valid marriage. Studiosus 1946 *THRHR* 32, 40.

²⁰³ De Groot *Inleidinge* 1 3 8, 1 7 9; Voet 27 2 1 Van der Linden *Koopmans Handboek* 1 4 1; Wessels *History of the Roman Dutch Law* 422.

²⁰⁴ Lee *Introduction to Roman Dutch Law* 34; Spiro *Parent and Child* 3.

²⁰⁵ Lee *Introduction to Roman Dutch Law* 87

²⁰⁶ Voet 25 3 20, 25 3 30; Van Leeuwen *RHR* 1 15 6.

²⁰⁷ Lee *Introduction to Roman Dutch Law* 34;

²⁰⁸ Van der Linden *Koopmans Handboek* 1 4 3; Voet 1 7 9.

²⁰⁹ De Groot *Inleidinge* 1 7 3; Voet 1 7 15; Van der Linden *Koopmans Handboek* 1 4 3; Van Leeuwen *RHR* 1 3 6; Groenewegen *De Leg Abr* 1 12.

²¹⁰ De Groot *Inleidinge* 1 5 19; Van der Linden *Koopmans Handboek* 1 3 7; 1 4 3; Voet 1 7 13.

parental home did not prolong the existence of parental power over him.²¹¹ Upon marriage a daughter entered the *mundium* of her husband, rendering her subject to his marital power.²¹² However, if she was married as a minor and her husband died before she reached the age of majority, she did not revert to her father's power unless a statute provided otherwise.²¹³

Another way to end parental authority which was known in Roman law, but absent from Germanic and Fränkish law, is the termination of parental authority by emancipation of the child before he or she reached twenty-five years of age (the age of majority). In Roman Dutch law children were regarded as being tacitly (*stil-zwijende*) emancipated when they were allowed to live on their own and conduct their own trade. They could also be emancipated expressly or “*in rechte*”.²¹⁴

In Roman times it was possible for a child of adult age to still be under the *patria potestas* of his father, therefore it was necessary to end *patria potestas* by operation of law if the child held certain public offices.²¹⁵ According to Van Leeuwen, this was unknown in Roman Dutch law,²¹⁶ while Voet confirms that parental power was lost when a son entered a magisterial office or the priesthood.²¹⁷

3 4 5 Conclusion

There is a clear development in the power that governed the relationship between parent and child in the Roman Dutch law. On the one hand, this development is aimed at establishing more equality between the parents of a legitimate child. On the other hand, there is a definite improvement in the position of the child. The rights of a child to care, protection, maintenance and the provision of an education and medical care, even if it did imply certain duties of obedience and respect and a reciprocal duty to maintain the parents, placed a legal duty on the parents to act in the child's best

²¹¹ Voet 1 7 13.

²¹² De Groot *Inleidinge* 1 5 19; Van der Linden *Koopmans Handboek* 1 3 7; 1 4 3; Voet 1 7 13.

²¹³ Voet 1 7 14.

²¹⁴ De Groot *Inleidinge* 1 6 4; Voet 1 7 11, 1 7 12; Van der Linden *Koopmans Handboek* 1 4 3; Van Leeuwen *RHR* 1 13 5.

²¹⁵ See 2 2 2 above.

²¹⁶ Van Leeuwen *RHR* 1 13 4. It might be that this was unnecessary since everyone attained majority and full capacity to act at twenty-five.

²¹⁷ Voet 1 7 10.

interests. Though children could not sue their parents,²¹⁸ the court as upper guardian had the power to remove a child from the custody of the parents provided such removal was in the child's best interests.

Another example of the recognition of the best interests of the child is the curtailment of the power of discipline and chastisement. The parents had the right to chastise the child but always only moderately and in the privacy of their own home.²¹⁹ According to Van der Linden the purpose of the chastisement had to be the improvement of the child, in other words, it had to be in the child's best interests.²²⁰

4 Conclusion

The South African law of parent and child is built upon the twin pillars of Roman and Roman Dutch law. At first glance these historical foundations seem very similar given the fact that the parent-child relationship in both systems was characterized by the paternal power. However, though the two systems might have had similar origins in the ancient past, the Roman Dutch family law with its roots in Germanic customs, did not develop from the Roman law and the extensive power of the Roman *paterfamilias* was unknown and never received into Roman Dutch law.

Important differences between the power of the father in the two systems include the fact that the Roman *paterfamilias* had extensive powers to punish and chastise their children, for instance selling them into slavery, while the Germanic or Frankish father could only sell their children in times of dire need. By the time of the Roman Dutch writers this power had completely vanished.²²¹ Another very important difference is the position of the mother. Though all women were still under perpetual tutelage in Germanic and Roman Dutch law, they received more recognition, duties and rights for their role as co-parent of their children. Though it was only in the twentieth century

²¹⁸ However, if a child had leave from the court, he or she could sue his or her parents. Van der Linden *Koopmans Handboek* 1 4 1.

²¹⁹ Fockema Andrea *Oud- Nederlandsch Burgerlijk Recht II* 217-218.

²²⁰ Van der Linden *Koopmans Handboek* 1 4 1; Van Leeuwen *RHR* 1 13 1.

²²¹ "De groote ende zonderlinge macht der vader over de kinderen onder haere hand stande is in deze landen onbekent." De Groot *Inleidinge* 1 6 3. Groenewegen *De Leg Abr* 1 9 2; Van Leeuwen *RHR* 1 13 1; Van der Linden *Koopmans Handboek* 1 4 1. Lee *Introduction to Roman Dutch Law* 33; Wessels *History of the Roman Dutch Law* 417.

that the paternal power truly changed to parental power,²²² the Roman Dutch law of the seventeenth and eighteenth centuries shows a definite progression towards the idea of parental power. Furthermore, given the underlying element of protection and care and the greater emphasis on the duties of the parents, the term parental *authority* is arguably a more descriptive term of the governing factor in the relationship between parents and their children in Roman Dutch law.²²³ Thus, while *patria potestas* had the undeniable character of a power to be exercised solely by a male, the idea behind parental authority was always the protection and care of the children and never completely exclusive to the father.

However, though there was no legal duty upon a Roman *paterfamilias* to exercise his power in the interests of his children, it has been shown that he was most probably not the tyrant with the iron fist he is so often made out to be. The family council, morality and the dictates of society prevented serious misuse of his power and, as such, can be considered the Roman roots of the best interests principle. The idea that the welfare of a child should be a guiding factor in matters regarding the child was more pronounced in even the ancient Germanic customs and this idea evolved steadily in the Roman Dutch law. The pinnacle of this development is found in the rule that the innocent party is generally entitled to custody of a child at divorce unless the court as upper guardian considered it in the best interests of the child to be in the custody of the guilty party.²²⁴ It is therefore suggested that the historical foundations of the South African law clearly show that the commitment to the best interests of children, though not couched in the same unequivocal terms, has been part of and a guiding factor in the common law, long preceding the enactment of the Constitution.

The common law is a major source of the law of South Africa and it provides valuable insight into the interpretation of legal principles. According to the Constitution, the common law should be developed to promote the spirit, purport and objects of the Bill of Rights and when interpreting a right in the Bill it must consider international

²²² De Blécourt/Fischer *Het Oud-Vaderlands Burgerlijk Recht* 84.

²²³ Studiosus 1946 *THRHR* 32, 34-42.

²²⁴ Voet 25 3 20, 25 3 30; Van Leeuwen *RHR* 1 15 6.

law.²²⁵ Therefore, before the further developments of the best interests principle in modern South African law can be explored it is necessary to turn the attention to the influences of international law on interpretation of the best interests of the child.

²²⁵ Sec 39(2) and 39(1)(b) of the Constitution.

CHAPTER THREE

INTERNATIONAL PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD

1 Introduction

It is clear from the previous Chapter that the commitment to the best interests of children predates the enactment of the South African Constitution. The Constitution, common law and legislation,¹ however, are not the only sources of the law pertaining to children. In this chapter the focus moves away from South African law to international law, children's rights and the recognition of the principle of the best interests of the child in a number of international treaties ratified by South Africa.²

The concept of children's rights is a fast growing and integral part of human rights³ and since the start of the previous century the development of children's rights has paralleled the development of general human rights.⁴ Even though the first Declaration on the Rights of the Child preceded the Universal Declaration of Human Rights by more than twenty years, the greater part of the development in children's rights have been after 1948. This leads to the perception that children's rights flow from the "overarching and enabling text" of the Universal Declaration of Human Rights.⁵

Due to their physical and mental immaturity, children are generally acknowledged as the weakest and most vulnerable members of society. For the full development of their potential, they need adult supervision, guidance and care. The treaties drafted by global and regional systems aim to ensure that this inherent imbalance of power

¹ There is a vast body of South African legislation pertaining to children for example, the Child Care Act 74 of 1983, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993, the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 and the Divorce Act 70 of 1979. The most recent is the proposed Children's Bill 2003. It is aimed at creating a comprehensive Children's Statute for South Africa. See Chapters Five and Six below.

² As the best interests of the child principle is included in the Bill of Rights, courts are obliged to consider international law in the interpretation of this principle. See sec 39(1)(b) of the Constitution.

³ Olivier "The status of international children's rights instruments in South Africa" in Davel (ed) *Introduction to Child Law in South Africa* 199.

⁴ Van Bueren *The International Law on the Rights of the Child* 1.

⁵ Olivier "The status of international children's rights instruments in South Africa" in Davel (ed) *Introduction to Child Law in South Africa* 199.

between adult and child is not abused.⁶ From the study of a few of the relevant international and regional treaties, it will become clear that, although the Constitution is the supreme law in South Africa, with the inclusion of section 28 the framers of the Constitution brought South African law in line with its responsibilities under these treaties.

2 Global Instruments on Human Rights

2 1 Introduction

The United Nations Organisation was established by the Charter of the United Nations in 1945. Though this constitutional document, setting out *inter alia* the purposes and principles of the United Nations, is not a human rights instrument, its provisions are relevant to international human rights law.⁷ One of its main objectives is the observation of human rights and fundamental freedoms for all without discrimination.⁸

Since the establishment of the United Nations it has adopted a number of treaties, resolutions and declarations pertaining to human rights. In the following section two of the most important of these global instruments on human rights and their influence on the position of children's rights and best interests of the child will be discussed briefly.

2 2 The Universal Declaration on Human Rights (1948)

2 2 1 Introduction

The Universal Declaration on Human Rights⁹ was adopted by the United Nations on December 10, 1948. It was intended to set a common standard of achievement for all peoples and all nations¹⁰ and to create a culture of respect for the rights and freedoms of others, ensuring that the atrocities of the Second World War and the Jewish Holocaust would never be repeated. It has been suggested that the moral foundation of human rights norms is the so-called golden rule – that you are to treat others as you

⁶ Van Bueren *The International Law on the Rights of the Child* 67.

⁷ Van Bueren *The International Law on the Rights of the Child* 16-17.

⁸ Article 55(c).

⁹ The Universal Declaration of Human Rights is also referred to as the UDHR. Even though the Declaration was not adopted unanimously, there were no votes against it, with 8 countries abstaining. See Van Bueren *The International Law on the Rights of the Child* 17.

¹⁰ See the Preamble to the UDHR.

would want to be treated by them. According to this argument universal human rights are those rights, which a person would desire to claim for him or herself, and therefore, must grant to others.¹¹

However, since it was adopted by a resolution in the General Assembly, the status of the UDHR in international law has never been precisely defined. The general opinion is that regardless of the fact that it does not create binding obligations on State Parties, it represents an authoritative interpretation on human rights.¹²

2 2 2 The Universal Declaration and the best interests of the child

The Universal Declaration is a catalogue of human rights¹³ and does not specifically deal with the rights of children. Children are only referred to twice in the text.¹⁴

Article 25(2) provides as follows:

“Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.”

Thus the international community expressly recognized children’s need of and rights to special care and assistance.¹⁵ As will be seen below, the UDHR echoed the 1924 Declaration on the Rights of the Child in this regard.¹⁶

Even though this Declaration does not expressly include children in any other articles, it is generally recognized that they are entitled to the protection of their fundamental human rights. For example, Article 2 of the UDHR states that

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Regardless of the fact that age is not listed the use of the word “everyone” clearly indicates the intention of the Declaration to enshrine these rights indiscriminately.

¹¹ An-Na'im "Cultural transformation and normative consensus on the best interests of the child" 1994 *International Journal of Law and the Family* 62, 68.

¹² Van Bueren *The International Law on the Rights of the Child* 17-18.

¹³ Van Bueren *The International Law on the Rights of the Child* 17.

¹⁴ See Art 25(2) and Art 26 which provides for the right and access to education.

¹⁵ Van Bueren argues that the omission of the role of fatherhood in the Declaration was an oversight and might contribute to the inferior roles women and children are afforded in international law. Van Bueren *The International Law on the Rights of the Child* 18 and "The international protection of family member's rights as the 21st century approaches" 1995 *Human Rights Quarterly* 732, 748.

¹⁶ Though the Declaration on the Rights of the Child 1924 predates the UDHR, because of its specific focus on the rights and welfare of the child, it will be discussed in 3 2 1 below.

This type of inclusive wording is used throughout the text and it is therefore safe to assume that children are afforded the same rights and protection as their parents.¹⁷ It may be that the UDHR did not include a principle specifically aimed at the protection of children's interests, because the parent-child relationship, in which the principle is traditionally applied,¹⁸ was seen as falling in the sphere of private law and therefore beyond the reach of international public law.¹⁹

2 3 The Convention on the Elimination of All Forms of Discrimination Against Women (1979)

2 3 1 Introduction

The Women's Convention²⁰ was adopted by the General Assembly of the United Nations on 18 December 1979 and is specifically aimed at outlining the rights of women as bearers of human rights and promoting equality between men and women.²¹ Article 2 of the Convention provides that the state is under an obligation

“[T]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”²²

Although unambiguously aimed at abolishing discriminatory practices against women, the Women's Convention does bear relevance for the present study.²³ This is due to the fact that one of the main areas where discrimination against women occurs is in the family. Attempting to eradicate discrimination in this most basic form, the

¹⁷ The position under the South African Constitution may serve as further proof in this matter: even though sec 28 is the only one that provides for exclusive rights for children (defined as persons under the age of 18 years by sec 28(3)), it is trite that children are also entitled to all other rights and freedoms afforded to “everyone” in other sections of the Bill of Rights, for instance sec 9 (equality), sec 10 (dignity), sec 11 (life) and so forth.

¹⁸ See Chapter Five below.

¹⁹ It is an interesting coincidence that in the same year that the UDHR was adopted the Appellate Division in South Africa handed down the watershed decision of *Fletcher v Fletcher* 1948 (1) SA 130 (A) in which the best interests of the child principle was elevated to the paramount consideration in all custody and access matters. This may serve as proof that, though the international community did not yet recognize the best interests of the child as principle, it already occupied an important place in domestic law.

²⁰ Term referring to The Convention on the Elimination of All Forms of Discrimination Against Women and used hereafter.

²¹ South Africa became signatory to the Women's Convention on 29 January 1993 and ratified it on 13 September 1995 without entering any reservations.

²² Art 2(f).

²³ The Women's Convention has an indirect influence on the well being of children. Olivier “The status of children's rights instruments in South Africa” in Davel (ed) *Introduction to Child Law in South Africa* 198.

Convention contains provisions explicitly dealing with private family law issues, thereby earning the Convention the label unique.²⁴

3 2 2 The Women's Convention and the best interests of the child

Article 5 of the Women's Convention reads as follows:

“State Parties shall take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”²⁵

The following is provided for in Article 16:

“State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.”²⁶

Though the focus of these articles is undeniably the eradication of discrimination against women in the context of family roles and responsibilities, attempting to place mothers and fathers on equal footing, one can also safely infer from them a commitment to the best interests of the child. Articles 16(1)(d) and (f) declare that “the interests of the children shall be paramount” while Article 5(b) contains one of the strongest formulations of the principle.²⁷ Unfortunately the application of the

²⁴ See Farenda Banda “Meaningless gestures? African nations and the Convention on the Elimination of All Forms of Discrimination Against Women” in Eekelaar and Nhlapo *The Changing Family* at 530.

²⁵ Art 5(b). From the wording of this article it is clear that maternity is regarded by the Convention as a role (“social function”) and not as an identifying characteristic of women. Van Bueren 1995 *Human Rights Quarterly* 732, 748.

²⁶ Art 16(1)(d) and (f).

²⁷ As will be explained in more detail below (see 3 3 2) it has been argued that the formulation of the best interests principle exhibits differing degrees of commitment to the welfare of the child. To say that the best interest is *the* primary consideration is certainly stronger than saying it shall be *a* primary consideration. However, this argument is irrelevant in the greater context of the Women's Convention since Articles 16(1)(d) and (f) simply declare that the interests of the children shall be paramount. See Parker “The best interests of the child – principles and problems” 1994 *International Journal of Law and the Family* 26 and Alston “The best interests principle: towards reconciliation of culture and human rights” 1994 *International Journal of Law and the Family* 1.

principle is circumscribed to the upbringing and development of children and not meant for application in all matters concerning the child.

It is submitted that, even though the Women's Convention does not directly deal with children's rights or attempt to ensure their welfare, if the Convention is properly implemented and the member States fulfil their obligations in terms thereof, the resulting culture of non-discrimination against their parents will certainly have a direct and positive impact on children. Despite financial, cultural, political or social circumstances the equal responsibility for and commitment to a child's welfare by both parents will undeniably be in that child's best interests.

2 4 Conclusion

It is beyond doubt that children, due to their status as human beings, are entitled to the same rights and freedoms as any other person. It has been said that human rights are derived "from an idea of what it means to be human".²⁸ However, due to the natural limitations placed on children by their physical and mental immaturity, they are in need of extra protection and entitled to rights afforded to them *qua* their status as children. Their rights should therefore derive from an idea of what it means to be a young human.²⁹

Therefore, even though these two documents indirectly afford protection to the rights and interests of children there remained a need for the rights of children to be specifically addressed.

3 Global instruments on children's rights

3 1 Introduction

The need for specific global instruments dealing with the rights and interests of children did not remain unnoticed for very long. Since as early as 1924,³⁰ the international community recognized the fact that children are entitled to special

²⁸ Minogue "The idea of human rights" in Loquer and Rubin (eds) *The Human Rights Reader* (as quoted by Van Bueren *The International Law on the Rights of the Child* 6).

²⁹ Van Bueren *The International Law on the Rights of the Child* 6.

³⁰ The Declaration on the Rights of the Child was adopted by the League of Nations in 1924. See below 3 2 1.

safeguards and protection.³¹ However, as will be seen in the discussion below, the early development of the recognition of children's rights was still not aimed directly at children as the bearers of rights and entitlements.

It is only after the adoption of the United Nations Convention on the Rights of the Child (1989) that children were at last recognized as the bearers of a unique set of rights, encompassing all the rights afforded to their parents (adult human beings) as well as certain others that attach to childhood itself as a separate status worthy of additional protection.³²

3 2 Preceding the United Nations Convention on the Rights of the Child

Half a century of international effort to set worldwide standards in the field of human rights, culminated in the Convention on the Rights of the Child (1989).³³ This Convention³⁴ followed upon the Declaration of the Rights of the Child (1924) by the League of Nations, the United Nations Universal Declaration of Human Rights (1948)³⁵ and the United Nations Declaration of the Rights of the Child (1959).

3 2 1 The Declaration on the Rights of the Child (1924)

The Declaration on the Rights of the Child was unanimously adopted by the League of Nations and was the first human rights declaration adopted by any inter-governmental organisation.³⁶ The text of the Declaration consists of a mere five principles, the simplicity of which ensures its applicability to all places and times. However, the Declaration did not place any obligations on the member States, but assigned the duty of mankind, owing the child the best it has to give, directly to the men and women of all nations.³⁷ In the spirit of the time, the Declaration assumed that

³¹ The 1924 Declaration, for instance, assigned the duty "that mankind owes the child the best it has to give" to the "men and women of all nations".

³² See 3 3 3 and 3 3 4 below.

³³ See Alston 1994 *International Journal of Law and the Family* 1, 1; Freeman "Introduction: Children as persons" in Freeman (ed) *Children's Rights: A Comparative Perspective* 1.

³⁴ Hereafter abbreviated as UNCRC or called the Children's Convention.

³⁵ See above 2 2.

³⁶ Van Bueren *The International Law on the Rights of the Child* 6.

³⁷ Introductory paragraph of the Declaration on the Rights of the Child (1924).

children are the recipients of treatment instead of holders of rights³⁸ and “should and could rely upon adults to ensure that their rights... are protected”,³⁹ which proves the point that children were perceived as the objects of international law instead of subjects and right-holders.⁴⁰

However, despite these limitations, the Declaration on the Rights of the Child remains an important part of the foundation of international child law by establishing the concept of the rights of the child internationally.⁴¹ It also serves to prove, firstly, that the international rights of the child are not a new derivative from international human rights law since the Declaration precedes the Universal Declaration of Human Rights (1948). Secondly, the Declaration proves that the early development of human rights law was not just concerned with political and civil rights as it undeniably highlights the social and economic rights of children. And, finally, the importance of the Declaration can be ascribed to the fact that it is the first international acknowledgement of the connection between the rights and the welfare of the child. From the Declaration it becomes clear that if States are committed to the welfare of children, they have to protect the rights of the child. Such protection is possible through the commitment to the development of children through the Declaration’s formulation of ideals, aims and directives.⁴²

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

The Declaration on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1959. The document was called the “Declaration” in order to establish a link with its predecessor, the Universal

³⁸ For example, principle 2 of the Declaration states that a “child that is hungry must be fed” – it does not give the child “the right to basic nutrition” as sec 28(1)(c) of the South African Constitution does. The word “owes” in the introductory paragraph certainly implies the existence of an obligation on mankind. Freeman “Introduction: Children as persons” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 1.

³⁹ Van Bueren *The International Law on the Rights of the Child* 7.

⁴⁰ Van Bueren *The International Law on the Rights of the Child* 8. According to Freeman the Declaration “views children very much as an investment for the future, with a dividend of peace and harmony between nations”, thus explaining why the idea of the child as an autonomous individual did not enter into the Declaration. See Freeman “Introduction: Children as persons” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 1.

⁴¹ The reasons why the Declaration is important as set out here, was formulated by Geraldine Van Bueren *The International Law on the Rights of the Child* 8.

⁴² De Villiers “The rights of children in international law: Guidelines for South Africa” 1993 *Stell LR* 289, 293.

Declaration of Human Rights.⁴³ This is significant in its implication that children are to be afforded all the human rights as provided by the Universal Declaration, but that they have further more extraordinary rights and needs⁴⁴ worthy of an exclusive declaration.⁴⁵ These are, for instance, protection against neglect,⁴⁶ the prohibition against employment which would interfere with the child's education, health and development,⁴⁷ and the right of a physically or mentally disabled child to special treatment and education.⁴⁸

The Preamble of the 1959 Declaration echoes the 1924 pledge that mankind owes the child the best it has to give and states that the Declaration is proclaimed in order to ensure that a child may have

“[A] happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth”.

However, though it still did not create binding obligations for member States, where the 1924 Declaration called merely upon the men and women of all nations, the 1959 Declaration

“[C]alls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles”.

That there was great progress in the conceptual thinking of children's rights since the 1924 Declaration is evident from the fact that the 1959 Declaration adopts the language of entitlement.⁴⁹ Children were finally beginning to be recognized as holders of rights and subjects of international law.

⁴³ Van Bueren *The International Law on the Rights of the Child* 12.

⁴⁴ See the Preamble to the Declaration: “[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” See the Preamble to the Declaration.

⁴⁵ Van Bueren *The International Law on the Rights of the Child* 10.

⁴⁶ Principle 9.

⁴⁷ Principle 9.

⁴⁸ Principle 5.

⁴⁹ Van Bueren *The International Law on the Rights of the Child* 12. According to Freeman, though the scope of the 1959 Declaration is much wider than the 1924 Declaration, the emphasis remains on the protection and welfare of children. “There is no recognition of a child's autonomy, no understanding of the importance of the child's wishes and feelings, and no appreciation of the value of empowerment. The child remains the object of concern, rather than a person with self-determination.” Freeman “Introduction: Children as persons” in Freeman (ed) *Children's Rights: A Comparative Perspective* 3.

3 2 3 The Declarations and the best interests of the child

There is no reference to the best interests-principle in the 1924 Declaration, while in the 1959 Declaration, it is voiced, but in a demarcated manner. The second principle of the Declaration states that the best interests of the child shall be the paramount consideration in the enactment of any legislation for the purpose of affording the child special protection and giving him opportunities to enable his development, while, according to principle seven, “those responsible for [the] education [of the child]” shall be guided by the best interests of the child. It is clear therefore, that the principle was not intended for general application and as such could not have a very profound impact on the life of the child.

However, though the Declarations have not been repealed, they are not legally binding on member States. It is submitted, therefore, that their true value lies in the awareness they create for the rights and welfare of children.⁵⁰

3 3 The United Nations Convention on the Rights of the Child (1989)

3 3 1 Introduction

The United Nations Convention on the Rights of the Child was agreed to by the United Nations in 1989 and is regarded as a watershed in the history of children.⁵¹ It was adopted unanimously by the General Assembly of the United Nations and no other human rights treaty has been ratified so soon after its proposal or, after its adoption, by so many states in such a short time. The Convention took effect on 2 September 1990 and by December 1994 was ratified by more than 160 States.⁵² According to Van Bueren, the UNCRC established a record in the speed with which it came into force after being adopted by the General Assembly. She contributes this to the Convention’s apparent potential for improving the lives of children in both

⁵⁰ Van Bueren *The International Law on the Rights of the Child* 7, 12; De Villiers 1993 *Stell LR* 289, 293-295.

⁵¹ Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law” 1995 *SAJHR* 401, 401. See also Alston 1994 *International Journal of Law and the Family* 1, 1; Freeman “Introduction: Children as persons” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 1; Lowe & Douglas *Bromley’s Family Law* 19.

⁵² De Villiers 1993 *Stell LR* 289, 295; Sloth-Nielsen *SAJHR* 1995 401, 403.

The Convention has been held to be “the most rapidly and universally accepted human rights document in the history of international law, having been adopted before its tenth anniversary by every nation save two: Somalia...and the United States of America.” See Barbara Bennett Woodhouse “Constitutional interpretation and the re-constitution of the family in the United States and South Africa” in Eekelaar and Nhlapo *The Changing Family* 471.

developing and industrialized states,⁵³ thereby truly making it a “powerful yet peaceful agent of social change.”⁵⁴

The goodwill⁵⁵ towards the Convention indicates international acceptance of the view that the fundamental rights of children were not adequately defined and protected by existing global human rights treaties.⁵⁶ The Convention is generally acknowledged to be the single most important standard for the definition of human rights for children.⁵⁷

3 3 2 International commitment

The Convention not only for the first time provides for the full range of civil, political, economic, social and cultural rights for children, the limitation on the best interests principle,⁵⁸ was abandoned in the drafting of the 1989 Convention as well. Premised on the idea that the best interests of the child are of paramount importance in any matter affecting the child,⁵⁹ Article 3(1) of the Convention provides that:

“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.”⁶⁰

⁵³ Van Bueren “The United Nations Convention on the Rights of the Child (1989)” 1991 *Journal of Child Law* 63, 65.

⁵⁴ Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” in Davel (ed) *Introduction to Child Law in South Africa* 202 and Van Bueren 1995 *Human Rights Quarterly* 732, 738.

⁵⁵ This is apparent from the fast ratification by all save two of the member States. Rwezaura “The concept of the child’s best interests in the changing economic and social context of Sub-Saharan Africa” 1994 *International Journal of Law and the Family* 82, 82. According to the author, the Convention received unprecedented support by many member states and this support is shown by the speed at which it had been ratified.

⁵⁶ As a global treaty the Convention is unique in its comprehensive protection of the full range of civil, political, economic, social and cultural rights of children. See Van Beuren 1991 *Journal of Child Law* 63 and Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” in Davel (ed) *Introduction to Child Law in South Africa* 202.

⁵⁷ Olivier “The status of international children’s rights instruments in South Africa” in Davel (ed) *Introduction to Child Law in South Africa* 199.

⁵⁸ As seen above the best interests principle was not included in the 1924 Declaration and in the 1959 Declaration its ambit was demarcated. See 2 3 2 above.

⁵⁹ The Convention established two new principles of interpretation in the international law relating to children, namely the best interests of the child, as well as the evolving capacities of the child (art 5, art 12), enabling children to gradually take responsibility for different areas of their lives. Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” in Davel (ed) *Introduction to Child Law in South Africa* 204-205.

Michael Freeman suggests that art 3, together with art 12, are the most important provisions in the Convention. Freeman “Children’s rights ten years after ratification” in Franklin (ed) *The New Handbook of Children’s Rights: Comparative Policy and Practice* 98-100.

⁶⁰ According to Parker 1994 *International Journal of Law and the Family* 26, this article seems to place the best interests standard at the heart of international children’s rights law.

According to Alston,⁶¹ Article 3(1) of the UNCRC contains the most important formulation of the principle in an international document to date. The first reason for his view is the fact that the Convention, unlike other instruments purporting to recognize children's rights, are not essentially concerned with the rights of women or others and merely referring to the rights of children as an afterthought or inference from the main rights focused upon. The Convention heralds a new approach to children's rights, recognizing it as an essential part of human rights and not something in conflict with the rights of parents.⁶² Second, in the Declaration of the Rights of the Child (1959), the principle is used in a context where the child is the object rather than the subject of rights.⁶³ Third, the wording of Article 3(1) makes it unequivocally clear that the principle is not meant to apply only in legal or administrative proceedings where children are involved, but in relation to all, and by implication therefore, any actions concerning children.

But, whereas Alston considers the formulation of the UNCRC as the most important to date, Parker⁶⁴ criticizes the formulation as weakening the common law principle of Western legal systems that requires the best interests of the child to be the paramount consideration in any decision.⁶⁵ Even though the formulation of Article 3(1) binds a much broader group of decision-makers in a wider range of disputes or cases, the best

According to Van Bueren 1991 *Journal of Child Law* 63, 63 the UNCRC is based on four P's: Prevention of harm to children, Protection of children against discrimination, torture and other harmful practises, Provision of assistance for the basic needs of children and Participation of children in decisions that will affect their future. These four P's are also indicative of the four complementary approaches to the theory of children's rights. See also Van Bueren "The United Nations Convention on the Rights of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 203.

⁶¹ Phillip Alston 1994 *International Journal of Law and the Family* 1, 1.

⁶² See Cretney and Masson *Principles of Family Law* 585.

⁶³ Though the Declaration used the term "children's rights", the term only indicated moral or social goals, since the Declaration established no mechanism whereby the purported "rights" which were intended to produce a happy childhood, could be enforced. See Cretney and Masson *Principles of Family Law* 581.

⁶⁴ Parker 1994 *International Journal of Law and the Family* 26.

⁶⁵ Parker 1994 *International Journal of Law and the Family* 26, 27. The standard, as it applies in one of its strongest formulations in Australia, requires the best interests of the child to be the paramount consideration in all matters regarding the custody, guardianship, welfare of or access to a child. This wording is similar to the South African Constitution's in sec 28(2).

In England the Children Act (1989) states that the best interests of the child is "the paramount consideration" (sec 1(1)), thus formulating the principle in stronger terms than the UNCRC. However, the scope of the provision in the UNCRC by far exceeds the range of decisions to which it may be applied in terms of the Children Act. See Freeman "Children's rights ten years after ratification" in Franklin (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* 98-100.

interests of the child are only “a primary consideration” and, according to Parker, “‘a’ is weaker than ‘the’ and, arguably, ‘primary’ is weaker than ‘paramount’”.⁶⁶

However, regardless of the slightly weaker formulation of the principle, the fact that an international document, accepted and ratified by almost all of the member States, gives undisputable recognition to the best interests of the child as a primary consideration in all actions regarding that child, is a huge leap forward⁶⁷ for the recognition and establishment of a culture of children’s rights.⁶⁸ The measures aimed at the enforcement of the Convention, set out in Part II,⁶⁹ ensure that a culture of children’s right will not stay an unattainable goal.⁷⁰

3 3 3 Human rights for children

Though the recognition, which the Convention affords to the best interests principle⁷¹ is the focal point for purposes of this study that is certainly not the only value of the Convention. In addition to the commitment in Article 3(1), State Parties also agree to

⁶⁶ See Parker 1994 *International Journal of Law and the Family* 26, 28. This argument is also supported by Van Bueren *International Law on the Rights of the Child* 75-76.

⁶⁷ As seen in the previous Chapter, the best interests of the child is not really a new principle, but according to Van Bueren, the UNCRC transformed it from the original principle of compassion and discretionary welfarism to a powerful principle of interpretation that has to be considered in every matter regarding a child. Van Bueren “The United Nations Convention on the Rights of the Child: An evolutionary revolution” in Davel (ed) *Introduction to Child Law in South Africa* 202-205; Van Bueren *The International Law on the Rights of the Child* 45.

⁶⁸ See further Alston 1994 *International Journal of Law and the Family* 1; Parker 1994 *International Journal of Law and the Family* 26; Rwezaura 1994 *International Journal of Law and the Family* 82; Freeman “Taking children’s rights more seriously” 1992 *International Journal of Law and the Family* 52, 69 and Sloth-Nielsen 1995 *SAJHR* 401.

⁶⁹ Art 42-45.

⁷⁰ The Committee on the Rights of the Child is to be presented with reports by the member States on the measures they have adopted which will give effect to the rights recognized in the Convention. See Art 4: “State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” This has been held to be the most important provision in the UNCRC on a practical level. Freeman “Introduction: Children as persons” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 4. Thus State Parties are subject to some degree of scrutiny by the international community and open to international criticism if they are seen to be failing in fulfilling their obligations under the Convention. In this regard it should also be remembered that State Parties, by signing, agreed to the spirit of the Convention and therefore subjected themselves to this kind of scrutiny by agreement. On the Committee on the Rights of the Child in general, see Robinson “Enkele gedagtes oor die Komitee van die Regte van die Kind” 2002 *THRHR* 600-610.

⁷¹ It has been argued that the best interests principle underpins all the other rights guaranteed by the UNCRC and that the true way to ensure the child’s best interests is by granting them all the rights set out in the rest of the Convention. Van Bueren *The International Law on the Rights of the Child* 46-47; McGoldrick “The United Nations Convention on the Rights of the Child” 1991 *International Journal of Law and the Family* 132, 135; Freeman “Children’s rights ten years after ratification” in Franklin (ed) *The New Handbook of Children’s Rights: Comparative Policy and Practice* 98.

recognize the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace.⁷² As an important human rights treaty, the Convention provides basic human rights for all children without discrimination⁷³ while also bearing in mind the need of children, due to their physical and mental immaturity, to special safeguards and care, including appropriate legal protection, before as well as after birth.⁷⁴ The right to life,⁷⁵ the right to a name, nationality and to know and be cared for by his or her parents⁷⁶ and the right to preserve his or her identity⁷⁷ are all provided for every child⁷⁸ by the Convention.

In addition to the fundamental rights afforded to everyone in other human rights treaties, for instance the right to freedom of expression,⁷⁹ thought, conscience and religion,⁸⁰ the right to freedom of association⁸¹ and the right to privacy,⁸² certain rights that are unique to children are also ensured. This includes for instance, the right of the child to rest and leisure, to engage in play and recreational activities which are appropriate to the age of the child.⁸³

3 3 4 The Convention and custody

In the context of custody the right of the child not to be separated from his or her parents against their will⁸⁴ may be of special relevance. This right is not absolute,

⁷² Preamble to the Convention.

⁷³ Art 2(1): "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". The wording of this article differs substantially from the usual non-discrimination clauses found in human rights instruments. It adds a ground uniquely applicable to children – that they may not be discriminated against on any of the listed grounds even if the difference is that of their parent or legal guardian. This will protect children from the effects of discrimination aimed at their parents, guardians or family. McGoldrick 1991 *International Journal of Law and the Family* 132, 134-135.

⁷⁴ The preamble to the UNCRC here recalled and echoed the words of the preamble to the Declaration of the Rights of the Child (1959).

⁷⁵ Art 6.

⁷⁶ Art 7.

⁷⁷ Art 8.

⁷⁸ Art 1 declares that for the purposes of the Convention, a child means every human being below the age of 18 and this end to childhood is confirmed in sec 28(3) of the South African Constitution. If however, a child should reach majority by the operation of law before this age, he or she will not be regarded as a child or entitled to the special rights or protection afforded by the Convention.

⁷⁹ Art 13.

⁸⁰ Art 14.

⁸¹ Art 15.

⁸² Art 16.

⁸³ Art 30(1).

⁸⁴ Art 9(1).

however. In the same article, provision is made for competent authorities to determine that separation is in the best interests of the child, which may be the case when the parents are separated and a decision about the child's place of residence has to be made.⁸⁵ If a child is to be separated from one of his or her parents, State Parties have to respect the right of the child to maintain personal relations and direct contact with both parents unless such contact is deemed to be contrary to the best interests of the child.⁸⁶

In the making of a decision to separate the child from one of his or her parents, the child has the right to be heard if he or she is capable of forming and expressing his or her own views. The weight given to the view of the child will differ in accordance with the age and maturity of the child.⁸⁷ According to Van Bueren, this right of the child to participate in decisions is the most effective way to establish the best interests of the child.⁸⁸ Furthermore, by respecting a child's autonomy, he or she is also recognized and affirmed as a holder of rights – and to have rights implies that the taking of risks and making of choices are sanctioned.⁸⁹ However, Article 12's objective is not that a child should be forced to express his or her views, pressurized to participate or made to become the delegated decision-maker.⁹⁰ The article affords the child the right to be involved when he or she so desires and attempts to persuade states to adopt and adapt the decision-making process so that these proceedings are

⁸⁵ For instance where a decision has to be made regarding the custody of the child after the divorce of his or her natural parents.

⁸⁶ Art 9(3).

⁸⁷ The UNCRC is the first document to state explicitly that children have a right to have a say in processes affecting their lives (that is the right to self-determination). Freeman "Children's rights ten years after ratification" in Franklin (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* 100-102.

Art 12(1) and (2) as well as art 5 which requires State parties to "respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." According to Freeman art 12 is significant not only for what it says, but also because it recognizes the child as a full human being, with integrity and personality, and with the ability to participate fully in society. Freeman "Introduction: Children as persons" in Freeman (ed) *Children's Rights: A Comparative Perspective* 3.

⁸⁸ Van Bueren 1991 *Journal of Child Law* 63, 63.

⁸⁹ Freeman 1992 *International Journal of Law and the Family* 52, 65.

⁹⁰ Eekelaar "The interests of the child and the child's wishes: The role of dynamic self-determination" 1994 *International Journal of Law and The Family* 42, 53-54. However, Van Bueren is of the opinion that the right to active participation must not be confused with self-determination – a term "which implies not only the right to participate in decision-making, but the right to have decisions followed". See Van Bueren 1995 *Human Rights Quarterly* 732, 743.

accessible to the child.⁹¹ Even if it is decided that a child should permanently live with only one parent, consideration must still be given to the principle that both parents have common responsibilities for the upbringing and development of their children,⁹² which is to be exercised in the best interests of the child.

With proper implementation and enforcement, these rights may serve to realize the goals of the Convention as set out in the Preamble: to ensure that children grow up in a family environment, in an atmosphere of happiness, love and understanding which is necessary for the full and harmonious development of his or her personality, and to afford the family the necessary protection and assistance so that it can assume this responsibility within the community.⁹³

3 4 Conclusion

These global instruments on children's rights created international standards, like the best interests of the child as primary consideration, for the protection of children and the enhancement of their quality of life.

As stated above, with proper implementation and enforcement, the international documents on the rights of children can have a tangible and very positive effect on the position of children in society. The goals of the children's rights movement, as they are embodied in the Preamble to the Convention on the Rights of the Child may be realized: to ensure that children grow up in a family environment, in an atmosphere of happiness, love and understanding which is necessary for the full and harmonious development of his or her personality, and to afford the family the necessary protection and assistance so that it can assume its responsibility within the community.⁹⁴

⁹¹ Van Bueren *The International Law on the Rights of the Child* 137; Sloth-Nielsen 1995 *SAJHR* 401, 401-406.

⁹² Art 18(1). The responsibility for the upbringing and development of the child rests primarily on the parents or legal guardian of the child and the best interests of the child will be the basic concern of the parents or guardians in meeting this responsibility.

⁹³ See Preamble to the Convention.

⁹⁴ See Preamble to the Convention.

However, many of the rights afforded to children by these instruments might prove to be the ideals of industrialised Western countries with little or no meaning for children in developing third world countries.

4 Regional Human Rights Documents

4 1 Introduction

One of the functions of human rights instruments is to ensure that the inherent imbalance of power between state and citizen, or between citizens, is not abused.⁹⁵ A unique African influence is the way in which childhood is viewed and understood. In Western societies, childhood is mostly seen as a time for play and development without placing very much responsibility on children. In African societies, however, childhood is seen as “a time to learn, to build a character and to acquire the social and technical skills necessary to perform the future roles of adulthood”.⁹⁶

Given this context,⁹⁷ the Organisation of African Unity (hereafter the OAU) felt that international human rights documents and treaties were not enough. Africa needed its own unique treaties, which would not be a mere copy of the existing international conventions but assist in achieving a flexible and pragmatic approach to the particular problems of the continent.⁹⁸

⁹⁵ Van Bueren *International Law on the Rights of the Child* 67.

This is of special importance for African human rights treaties since it, given its history and political circumstances, is one of the continents where the imbalance of power and the resulting abuse are undeniable and for many citizens of the continent a daily fact of life.

⁹⁶ Rwezaura “Competing ‘images’ of childhood in the social and legal systems of contemporary Sub-Saharan Africa” 1998 *International Journal of Law and the Family* 253, 255.

⁹⁷ According to Thandabantu Nhlapo, the momentum of the human rights ideal in Africa was very slow. He attributes this to the special conditions of poverty, ignorance, disease and lack of political sophistication affecting the majority of the continent’s population. See Nhlapo “International protection of human rights and the family: African variations on a common theme” 1989 *International Journal of Law and the Family* 1, 2; Viljoen “The African Charter on the Rights and Welfare of the Child” in Davel (ed) *Introduction to Child Law in South Africa* 214.

⁹⁸ Ermacora, Nowak and Tretter *International Human Rights: Documents and Introductory Notes* 269. It has also been argued that the international human rights movement has no relevance for Africa as it reflects the liberal and individualistic traditions of the first world countries of the West (Europe and the United States). Nhlapo 1989 *International Journal of Law and the Family* 1, 2.

4 2 The African Charter of Human and Peoples' Rights (1981)

4 2 1 Introduction

The African Charter of Human and Peoples' Rights (hereafter the African Charter)⁹⁹ was adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986.¹⁰⁰ Similar to its continent of origin, the African Charter reflects aspects both of its European colonial history, as well as its indigenous African cultures and traditions.¹⁰¹ The most distinctive features of the African Charter are, firstly, the fact that it contains a list of third generation or "people's" rights¹⁰² as opposed to merely first and second generation rights.¹⁰³ The second innovation of the African Charter is its recognition of the principle of reciprocity. According to this principle, a person or group's enjoyment of rights and freedoms implies and is dependant upon his, her or their performance of certain related duties.¹⁰⁴

In the same way that rights in terms of the Charter are afforded to everyone or every individual, the duties are also ascribed to every individual. A further distinctive feature of the African Charter is its emphasis on the family as the basic and natural unit of society and the custodian of morals and traditional values recognized by the community.¹⁰⁵

Though the African Charter does not contain any specific rights, or duties, for children it does provide for the protection of children – after all, a child is both an individual and a member of a group or "people" for purposes of the Charter.¹⁰⁶

⁹⁹ The African Charter is also known as the Banjul Charter. It was adopted at the 18th Ordinary Session of the Assembly of Heads of State and Government in Banjul, Gambia. Van Bueren *The International Law on the Rights of the Child* 24.

¹⁰⁰ It has been ratified by all of the fifty-three member States of the OAU. Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 216.

¹⁰¹ See for instance the Preamble to the Charter where reference is made to the "virtues of their historical tradition and values of African civilization" and "[the] duty to promote and protect human and people's rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa." Nhlapo 1989 *International Journal of Law and the Family* 1, 7; Rwezaura 1994 *International Journal of Law and the Family* 82, 83.

¹⁰² The right to development (art 20) is an example of such a collective people's right.

¹⁰³ First and second generation rights are civil, political, economic, social and cultural rights.

¹⁰⁴ The Preamble to the African Charter provides "that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". See also Part I, Chapter II of the Charter.

¹⁰⁵ Art 18(1) and (2).

¹⁰⁶ Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 216.

4 2 2 The family as natural unit and basis of society

The community principle¹⁰⁷ is probably the most easily identifiable common feature to all African traditional systems¹⁰⁸ and this was reaffirmed by the OAU in the wording of Article 18 of the Charter:

“The family shall be the natural unit and basis of society. It shall be protected by the State which shall be take care of its physical health and moral.”¹⁰⁹

And further,

“The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”¹¹⁰

In the African context care of the children within the family is regarded as a “virtue [in the] historical tradition”.¹¹¹ It must be remembered, however, that the family in this sense is not the small nuclear family of Western societies, but the extended family in which a child can have any number of fathers, mothers, grandparents, aunts, uncles or siblings who might carry the responsibility for his or her care.¹¹² This responsibility is reciprocal – children are the investment of their parents,¹¹³ their insurance against old age and therefore responsible to maintain the parents in old age.¹¹⁴ According to Nhlapo the family plays a much wider role than the immediate interests of the members of the nuclear family (married couple and offspring):¹¹⁵

¹⁰⁷ Van Niekerk explains this further, “The concept of human rights as natural, inherent, inalienable rights held by virtue of the fact that one is born a human being remains a creation of Western civilization and is foreign to indigenous law. In indigenous societies rights are assigned on the basis of communal membership, family status or achievement”. *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* 261.

¹⁰⁸ Nhlapo 1989 *International Journal of Law and the Family* 1, 4, 9. The author states it very simply but clearly, “[T]he importance of family law in traditional African systems cannot be sufficiently emphasized.”

¹⁰⁹ Art 18(1).

¹¹⁰ Art 18(2).

¹¹¹ Preamble to the Charter. See further Viljoen “The African Charter on the Rights and Welfare of the Child” in Davel (ed) *Introduction to Child Law in South Africa* 216.

¹¹² Nhlapo 1989 *International Journal of Law and the Family* 1, 9 and 11-13.

¹¹³ According to Goolam no individual member of the family, in fact, not even the family itself, is autonomous. “Constitutional interpretation of the “best interests” principle in South Africa in relation to custody” in Eekelaar and Nhlapo *The Changing Family* 373.

¹¹⁴ Traditionally, this has been called “wealth-in-people” – a term which implies that people have rights in one another according to a system of rules which allocate rights in someone-else’s labour, reproduction and property to a group. See in this regard Rwezaruwa 1998 *International Journal of Law and the Family* 253, 256-260. The author provides a quote from a speech of a former Prime Minister of Tanzania, according to whom children are “Africa’s most valuable resource [in whom] we entrust... our values and knowledge, our hopes and our aspirations”. See 256.

¹¹⁵ Nhlapo “African family law under an undecided Constitution: the challenge for law reform in South Africa” in Eekelaar and Nhlapo *The Changing Family* 622.

“It is a multi-purpose and multi-faceted corporate structure that is in many cases central to an individual’s life. Because of its importance in the business of survival and security, its cherished values include procreation and group solidarity, deference to elders and selflessness.”

It is therefore clear that in traditional African society, the rights one is able to claim depend upon the group one belongs to. And with this belonging comes the unavoidable duty to care for the group.¹¹⁶

The fact that member States are placed under the obligation to take care of the family, ensures that children will always be cared for as well. If the family’s moral and physical health is maintained, the State itself should not be troubled with the care of destitute children.¹¹⁷ Within the traditional African context where children are of social and economic importance for the whole community, the whole community provided for the material and moral welfare of its children.¹¹⁸

4 2 3 The duties of family members

As stated above, the African Charter is unique in the explicit recognition it gives to the correlation between rights and duties.¹¹⁹ This relationship between rights and duties is explained very well in the following statement: “In Africa, laws and duties are regarded as being two facets of the same reality: two inseparable realities.”¹²⁰

Besides the general duties of individuals, family members are vested with the duty to

¹¹⁶ Goolam “Constitutional interpretation of the “best interests” principle in South Africa in relation to custody” in Eekelaar and Nhlapo *The Changing Family* 374.

¹¹⁷ Rwezaura gives an in-depth discussion on the social and economic context of pre-colonial Africa and how in such a society, the community provided for the material and moral welfare of its children. Rwezaura 1994 *International Journal of Law and the Family* 82-114.

¹¹⁸ For instance property was transferred by the payment of bridewealth, thereby assuring affiliation of the children to their fathers’ families (from where the payments came) as well as to the mothers’. (In this regard it is important to remember that in African society, kinship was normally established along the maternal lines.) Rwezaura “The concept of the child’s best interests in the changing economic and social context of Sub-Saharan Africa” in Alston (ed) *The Best Interests of The Child* 84.

¹¹⁹ “[T]he enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.” See the Preamble to the Charter.

The duties of individuals are set out in Chapter II of the Charter. See for instance art 27(1) “Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community” and 27(2) “The rights and freedoms of each individual shall be exercised with due regard to the rights of others...”

¹²⁰ Mbaye “Introduction to the African Charter on Human and Peoples’ Rights” in International Commission of Jurists *Human and Peoples’ Rights in Africa and the African Charter* 27. Van Bueren considers the rights and responsibilities within a family “interconnected like a double helix”. Van Bueren 1995 *Human Rights Quarterly* 732, 758.

“[P]reserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”¹²¹

Though praiseworthy in its recognition of duties of different family members, this article is open to much criticism as the duty to respect his parents at all times is too absolute and too broad.¹²² The ambit of this duty and the weighty responsibility it places on a child, expose the unsettling contradiction within the African Charter.¹²³ The nature of this duty might, given the prevalence of customs in many communities which are harmful to the child’s physical or mental development,¹²⁴ negate the intended protection of the child¹²⁵ if he or she is never allowed to question the decisions of his or her parents.¹²⁶ However, even if a child fails to fulfil his or her duty to respect parents in any circumstance, they do not have the right to withdraw their protection and care from the child. The rights of the child might be reciprocal to those of the parent, but it is not dependant on the fulfilment of duties.¹²⁷

One should, however, not lose sight of the fact that the African Charter was never intended as an instrument for the specific protection of children’s rights. The value that the Charter does have for the recognition of the family as the basic unit of society and the duties placed on the State to maintain families, should therefore not be overshadowed by the fact that these duties might lead to a negation of children’s rights. It was this consciousness that children are worthy of more protection, which led to the drafting of a Charter aimed specifically at the protection of children – the African Charter on the Rights and Welfare of the Child.

¹²¹ Art 29(1).

¹²² Van Bueren 1995 *Human Rights Quarterly* 732, 761 and Van Bueren *International Law on the Rights of the Child* 76-77.

¹²³ Van Bueren 1995 *Human Rights Quarterly* 732, 761 and Van Bueren *International Law on the Rights of the Child* 76-77.

¹²⁴ Rwezaura 1998 *International Journal of Law and the Family* 253, 261.

¹²⁵ The protection afforded by Art 18(1) and (2) of the Charter. See above 4 2 2.

¹²⁶ Van Bueren *International Law on the Rights of the Child* 77.

¹²⁷ Van Bueren *International Law on the Rights of the Child* 77.

4 3 The African Charter on the Rights and Welfare of the Child (1990)

4 3 1 Introduction

The African Charter on the Rights and Welfare of the Child (hereafter the Children's Charter) is the first regional treaty for the specific protection of children's rights¹²⁸ and was adopted to answer the need for a regional human rights instrument addressing issues pertinent to children in Africa.¹²⁹ The Children's Charter is a unique blend of Western values and thinking toward children and African values and traditions.

Similar to the African Charter, the Children's Charter invokes the same African traditions and values intended to inspire and characterize the States' reflection on the concept of the rights and welfare of the child.¹³⁰ However, all African traditions and cultural practices will not be acceptable in light of the Children's Charter¹³¹ because it also reaffirms adherence to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments particularly the United Nations Convention on the Rights of the Child.¹³² Only positive traditions which are reconcilable to the overriding welfare of the child and not harmful to the growth and development of children, are therefore encouraged.¹³³

¹²⁸ It is based on the Declaration on the Rights and Welfare of the African Child which was adopted by the OAU in 1979. Van Bueren *International Law on the Rights of the Child* 26; Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1992 *African Journal of International and Comparative Law* 139, 139.

¹²⁹ The Children's Charter was adopted on 11 July 1990. The Preamble to the Children's Charter stated that the OAU in "[r]ecalling the Declaration on the Rights and Welfare of the African Child... recognized the need to take all appropriate measures to promote and protect the rights and welfare of the African Child". Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 218.

¹³⁰ See the Preamble to the Children's Charter.

¹³¹ According to Thompson the Children's Charter is a radical departure from African cultural traditionalism, and a progressive development in the evolving field of human rights jurisprudence. Significant accomplishments of the Charter include the construction of norms and recognition of rights, as well as its prescription of mechanisms for the protection and enforcement of rights. In this latter regard, the effective implementation of the rights and the setting up of machinery for the protection and enforcement of procedural and substantive rights are very important. See Thompson "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism" 1992 *International and Comparative Law Quarterly* 432, 433.

¹³² Preamble to the Children's Charter.

¹³³ Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 223; Thompson 1992 *International and Comparative Law Quarterly* 432, 439.

The Children's Charter not only contains the same provisions regarding children as the Convention on the Rights of the Child,¹³⁴ its level of protection actually exceeds that of the Convention.¹³⁵ The emphasis in the Preamble on the special safeguards and care needed by children due to their physical and mental immaturity reveals the Charter's unmistakably defensive approach towards children.¹³⁶ The Charter echoes the African Charter on Human and Peoples' Rights in the notion that the performance of duties is required for the promotion and protection of children's rights and the welfare of the child. These duties do not only rest on parents and State parties, but unique to the African culture and context, on the child as well.¹³⁷

4 3 2 Children's rights under the Children's Charter

Chapter One of the African Children's Charter sets out the rights of the child as well as the responsibilities of the child. Keeping in mind the cultural context and the emphasis on family responsibility,¹³⁸ it is clear that the duties imposed on the child are considered to be in the child's interests. The heading of Chapter One is "Rights and welfare of the child", even though the chapter is also concerned with the duties of responsibilities of the child.¹³⁹

Most of the rights of children contained in the UNCRC, has found their way into the African Children's Charter.¹⁴⁰ However, in some cases the rights in the Charter are qualified; for instance, the child is guaranteed the right to freedom of thought, conscience and religion¹⁴¹ and parents have the duty to provide guidance and direction in the exercise of these rights,¹⁴² but though State parties have to respect the duty of

¹³⁴ The UNCRC was a major catalyst for the drafting of the Children's Charter and is acknowledged as such in the Preamble of the Charter. Thompson 1992 *International and Comparative Law Quarterly* 432, 433-434; Viljoen "Why should South Africa ratify the African Charter on the Rights and Welfare of the Child?" 1999 *SALJ* 660-664.

¹³⁵ The three important respects whereby protection is increased are the provisions outlawing the recruitment of child soldiers (art 22(2)), prohibiting child marriages (art 21(2)) and protecting child refugees which is extended also to "internally displaced children" (art 23(4)). Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 224; Viljoen 1999 *SALJ* 661.

¹³⁶ Arts 1992 *African Journal of International and Comparative Law* 139, 144.

¹³⁷ Art 31.

¹³⁸ Art 18 provides that the family is the "natural unit and basis of society", art 19 that children have the right to parental care and protection, while art 20 sets out the responsibilities of the parents.

¹³⁹ Art 31.

¹⁴⁰ Arts 1992 *African Journal of International and Comparative Law* 139, 154.

¹⁴¹ Art 9(1).

¹⁴² Art 9(2).

the parents, this respect is dependent upon national laws and policies.¹⁴³ This implies that State parties may still prohibit certain religions arbitrarily and without the prohibition being essential to the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others.¹⁴⁴ These “clawback clauses” are unique to the African Charter and the Children’s Charter and leads to the criticism that the Charters allow State parties too much scope to avoid their obligations in terms of the Charters.¹⁴⁵

Similar to the UNCRC, according to the Children’s Charter every human being below the age of 18 years is a child¹⁴⁶ and every child is afforded the basic human rights without discrimination.¹⁴⁷ These universal human rights include the right to life,¹⁴⁸ the right to freedom of expression,¹⁴⁹ association,¹⁵⁰ thought, conscience and religion,¹⁵¹ and the right to privacy.¹⁵² Many of these rights are given a unique application to children as well. In the case of the right to life, apart from guaranteeing the inherent right to life for every child, State parties are called upon to guarantee, to the maximum extent possible, the survival, protection and development of children.¹⁵³ The right to freedom of expression is only ensured to the child who is capable of communicating his or her own views¹⁵⁴ and the right to freedom of thought, conscience and religion as well as the right to privacy, are subjected to the appropriate guidance by parents and legal guardians.¹⁵⁵

¹⁴³ Art 9(3).

¹⁴⁴ Art 14(3) of the Children’s Charter limits the right to freedom of thought, conscience and religion in this way

¹⁴⁵ Nhlapo 1989 *International Journal of Law and the Family* 1, 8-9. Clawback clauses are defined as clauses which permit “in normal circumstances, breach of an obligation for a specified number of public reasons”. This is in contrast to the normal limitations on rights which are only allowed in times of war or public emergencies. It is argued that by circumscribing rights in this way, the African Charters limit their ability to provide the protection of the rights they are supposed to guarantee.

¹⁴⁶ Art 2.

¹⁴⁷ Art 3. Similar to the UNCRC, the non-discrimination clause provides that “every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race...or other status”. This broadens the protection of children against discrimination.

¹⁴⁸ Art 5.

¹⁴⁹ Art 7.

¹⁵⁰ Art 8.

¹⁵¹ Art 9.

¹⁵² Art 10.

¹⁵³ Art 5(2).

¹⁵⁴ Art 7.

¹⁵⁵ Art 9(2) and Art 10.

Besides making the basic human rights specifically applicable to children, many of the rights in the Children's Charter have a unique African character in their comprehensive address of uniquely African issues.¹⁵⁶ The Charter furthermore contains certain rights reserved especially for children, for instance the right to rest and leisure, to engage in play and recreational activities¹⁵⁷ and the right to parental care and protection.¹⁵⁸ A child may only be separated from his or her parents if a judicial authority in accordance with appropriate laws, determined that it is in the best interests of the child to do so.¹⁵⁹ In such circumstances, the child always has the right to maintain personal relations and direct contact with his parents.¹⁶⁰

For purposes of the present study the most important similarity with the Children's Convention, is the Charter's commitment to the best interests of the child.¹⁶¹

"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

Though on first glance very similar, the formulation of the best interest-principle is stronger in the Children's Charter¹⁶² and, whereas it is possible to draw the inference from the Convention as a whole that the best way to give effect to the best interests of the child is to allow the child the right to participation, such inference is unnecessary in the case of the Children's Charter.¹⁶³ Article 4(2) clearly states that

"In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative ...and those views shall be taken into consideration by the relevant authority..."

¹⁵⁶ For instance the right to education (Art 11) makes specific mention of the preservation and strengthening of African morals, traditional values and cultures (Art 11(2)(c)) as well as obliging State parties to "take all appropriate measures to encourage the development of secondary education" (Art 11(3)(b)) and to "take measure to encourage regular attendance at schools" (Art 11(3)(d)). A further example is the uniquely African concern regarding health and health services which are addressed in Art 14(2)(a)-(j).

¹⁵⁷ Art 12.

¹⁵⁸ Art 19.

¹⁵⁹ Art 19(1).

¹⁶⁰ Art 19(2).

¹⁶¹ Art 4(1).

¹⁶² The Children's Charter uses "the" whereas the UNCRC uses "a" and, as explained above 2 3, "the" is stronger than "a". See Parker 1994 *International Journal on Law and the Family* 26,28; Van Bueren *International Law on the Rights of the Child* 75-76.

¹⁶³ See the discussion at 2 5 above. According to Van Bueren the right of the child to participate in decisions is the most effective way to establish the best interests of the child. Van Bueren 1991 *Journal of Child Law* 63, 63.

Unfortunately, the Charter does not explain when a child would be seen as capable of communicating or even forming his or her own opinions. It might, therefore, be that the inclusion of the child's right to participate is in fact mere lip service to an ideal.¹⁶⁴ This suspicion is strengthened by the fact that the child's views are to be taken in consideration by the relevant authority "in accordance with the provisions of appropriate laws".¹⁶⁵ Does this mean that State parties may legislate themselves out of their obligation to afford children the right to participation?

4 3 3 Duties of the family members

Similar to the African Charter, the Children's Charter recognizes the family as the basic unit of society and requires State parties to protect and support the establishment and development of families.¹⁶⁶ However, the duty to work for the cohesion of the family does not only rest upon the State, but upon family members as well.

The parents or persons responsible for the child carry the primary responsibility for the upbringing and the development of the child.¹⁶⁷ In the African context, this is not an alien concept – parents have traditionally taken responsibility for the upbringing and development of their children since the children were their only way of investing for the future.¹⁶⁸ This approach does not focus on the welfare or interests of an individual family member or child, but rather on the group, the extended family. Under the Children's Charter, however, there is the specific obligation on parents to ensure that the best interests of the child are their basic concern at all times.¹⁶⁹ It will therefore be necessary for parents to change the way they think about their children.¹⁷⁰

However, all the duties of the parents in terms of the Charter are not as abstract as those set out in Article 20. It has to be remembered that every right afforded to the child implies a duty – sometimes upon the State, but very often on the side of the

¹⁶⁴ This capability of the child might be influenced by age and maturity of the child as well as factors such as his or her articulateness and level of education. Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 221.

¹⁶⁵ Art 4(2).

¹⁶⁶ Art 18(1).

¹⁶⁷ Art 20(1).

¹⁶⁸ See the discussions above at 4 1 and 4 2 2.

¹⁶⁹ Art 20(1)(a).

¹⁷⁰ Art 20(2) obliges State parties to the Charter to assist the parents in this regard.

parents. These duties are stated explicitly or may be inferred from the wording of the Charter.

In some cases the fulfilment of the inferred duty requires conduct by the parents, for instance, if a child has the right to a name,¹⁷¹ parents have the responsibility/duty to name their child and if a child has the right to play,¹⁷² the parents have the duty to allow it. According to Article 10 parents and guardians have the right to exercise reasonable supervision over the conduct of their children. If the best interests and welfare of the child are the parents' primary concern, this right by implication becomes a duty. In other cases, the fulfilment of the duty might require an omission by the parents – if the child has the right to be free from abuse and torture,¹⁷³ parents are under a duty to refrain from abusing their children.

An example where a duty is explicitly stated is the duty of the parent to provide guidance in the exercise of the child's right to freedom of religion.¹⁷⁴

One of the main aims of the Children's Charter is to promote balance between parents and children. This balance requires parents to respect the rights of their children and fulfil their duties and take their responsibilities to heart, but it requires exactly the same from the children. Centuries of tradition and custom have ingrained in children the reciprocal responsibility to work for the cohesion of the family and this responsibility is affirmed by the Children's Charter.¹⁷⁵

The Children's Charter recognizes that children are not only an integral part of their own family, but of their society and the international community as well. Therefore, every child is vested with the duty

“[S]ubject to his age and ability and such limitations as may be contained in the present Charter...

- (a) to work for the cohesion of the family, to respect his parents and elders at all times and to assist them in case of need;

¹⁷¹ Art 6(1).

¹⁷² Art 12.

¹⁷³ Art 16(1).

¹⁷⁴ Art 9.

¹⁷⁵ Art 31(a).

- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and integrity of his country;
- (f) to contribute to the best of his ability, at all times and at all levels, to the promotion and achievement of African Unity.”¹⁷⁶

These duties place a heavy burden on children as the weakest and most vulnerable members of society and it is debatable whether they can be reconciled with the supposed commitment to the best interests of the child.

4 4 The best interests of the African child

If taken on face value, both the African Charter on Human and Peoples’ Rights and the African Children’s Charter are committed to the welfare of Africa’s families,¹⁷⁷ while the Children’s Charter expressly commits State parties, as well as parents, to the best interests of the child as the primary consideration.¹⁷⁸

In the African context the best interests of the child has two versions.¹⁷⁹ The first is the narrower one adopted into the national legislation of African countries *via* the received colonial law. It states that courts and *quasi-judicial* tribunals must make their decisions concerning the child on what they perceive to be in the child’s best interests.¹⁸⁰ The second is the wider conception of what the community or family consider to be in the best interests of the child. This embodies the traditional African ideal that children’s interests are served when the family and community fulfil their responsibilities toward each other. According to Rwezaura, the narrower version will

¹⁷⁶ Art 31.

¹⁷⁷ See 4 2 2 above.

¹⁷⁸ Art 4(1) of the Children's Charter.

¹⁷⁹ The whole argument about the two African interpretations of the best interests of the child, is proposed by Rwezaura 1994 *International Journal of Law and the Family* 100-101.

¹⁸⁰ This approach to the best interests of the child is very individualistic and focuses almost exclusively on the rights and interests of the child, with only passing concern to the interests of the parents or the family as a whole. See Parker “The Best Interests of the Child - Principles and Problems” in Alston (ed) *The Best Interests of the Child* 26-46.

most likely predominate as states continue to comply with their responsibilities in terms of the international treaties on the rights of the child.¹⁸¹

However, since both Charters are permeated with concern for the promotion of traditional African cultures and values, the wider notion, so closely linked with the customs of the people, can in no way be disregarded. The reality is that many local customs and traditions often undermine the legal protection intended for children.¹⁸² The question therefore remains whether these two different attitudes towards the best interests of the child can be reconciled in the African context in a way that will promote and ensure the welfare of the child.

Another important factor to consider is the fact that in pastoral African communities the interests of parents and children can never be seen separate from each other.¹⁸³ As seen in the discussion above, the focus of the traditional, customary family law is not on individuals, but on the extended family¹⁸⁴ and neither the individuals nor even the families themselves are ever truly autonomous.¹⁸⁵ Parents' decisions regarding the future of their child will depend not only upon a range of economic factors, but on the parents' own conception of their children's best interests as well. Inevitably this perception will be based upon parents' own childhood experiences and might therefore not entail the necessary objectivity.¹⁸⁶ Female circumcision¹⁸⁷ is such an example. Statistics show that many circumcised women want their daughters to be circumcised simply because they were.¹⁸⁸ However, given the very young age of the girls (three to eight years), the inability of these children to give informed consent and

¹⁸¹ Rwezaura "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa" in Alston (ed) *The Best Interests of The Child* 100-101.

¹⁸² Rwezaura 1998 *International Journal of Law and the Family* 261.

¹⁸³ Rwezaura 1994 *International Journal of Law and the Family* 100, 101.

¹⁸⁴ See 4 2 2 above.

¹⁸⁵ Goolam "Constitutional Interpretation of the "Best Interests" Principle in South Africa in Relation to Custody" in Eekelaar and Nhlapo *The Changing Family* 373.

¹⁸⁶ Rwezaura 1994 *International Journal of Law and the Family* 100, 101.

¹⁸⁷ Many communities in North, West, Central and East Africa practise girl circumcision. There are different forms of female circumcision, of which some are more invasive than others, but given the young age at which girls undergo this practise and the fact that it is forced on them most of the time and not usually followed up by proper medical care, the practises are definitely harmful to the children and should be discouraged. Arts 1992 *African Journal of International and Comparative Law* 151; Freeman "Cultural pluralism and the rights of the child" in Eekelaar and Nhlapo *The Changing Family* 293, 299-300.

¹⁸⁸ Freeman "Cultural pluralism and the rights of the child" in Eekelaar and Nhlapo *The Changing Family* 293, 299-302.

the severe and irreversible effect it has on their future sexual experience, physical and even mental health, there is no way to justify the practise itself as in the best interests of the child.¹⁸⁹ It often happens that parents circumcise their young daughters because of their ingrained beliefs and traditions.

Aside from these social or religious factors that might influence the perception of the child's best interests, economic factors play an undeniable part as well. For instance, custody is determined by economic factors – as a rule children stay with the resources available for their maintenance. Since women in many traditional societies are still unable to own their own property, very few mothers claim custody of their children. Children will most often stay with their father or his family. This rule of customary law is closely connected to the payment of the bride-wealth. With the *lobolo* the procreative capacity of the woman is “brought” by the husband's family, therefore, any children belong to the father's family as a matter of law. The question whether it is in fact in the child's best interests to stay with his father very seldom enters the decision.¹⁹⁰

Cultural practises and the opinions of parents aside, the greatest threat¹⁹¹ to the achievement of the best interests of African children, ironically lie in the provisions of the Charters themselves. In both the African and the Children's Charters, children have the responsibility to respect their parents and elders at all times.¹⁹² This implies that children are to be obedient to the parents and have to submit to their well-meant advice and direction, as well as to unreasonable demands or practises.¹⁹³ The opportunity which the Children's Charter grants each child to be heard when

¹⁸⁹ Freeman “Cultural pluralism and the rights of the child” in Eckelaar and Nhlapo *The Changing Family* 293, 299-302. It is sometimes argued, however, that the stigma resulting from a woman's being uncircumcised, her low social status and the difficulty she may have to find a husband outweigh the value these women attach to their physical integrity. This means that women would prefer to be circumcised rather than become social outcasts.

¹⁹⁰ Rwezaura 1994 *International Journal of Law and the Family* 100, 106.

¹⁹¹ According to Thompson the Children's Charter is “on a collision course with African cultural heritage and traditions in so far as [it] relate[s] to the status of children”. Thompson 1992 *International and Comparative Law Quarterly* 433, 440.

¹⁹² African Charter Art 29(1) and Children's Charter Art 31(a). See also the discussion above at 4 2 3.

¹⁹³ This is because parental authority over children is perceived in almost absolute terms. Thompson 1992 *International and Comparative Law Quarterly* 433, 439.

decisions regarding his welfare is taken,¹⁹⁴ might be completely negated if grown-ups choose to consider it disrespect.¹⁹⁵ After all,

“In African society, submission to the will of the parent – particularly the father – is highly valued and is considered to be an essential virtue to be cultivated in a child. The duty of the child’s submission to the father is based on the idea that parents make decisions which will be in the best interests of the child.”¹⁹⁶

With so many factors ingrained in the culture and traditions of the African people that may work against the interests of the child, it is not difficult to understand how the question can be asked whether the best interests principle even exists in Africa.¹⁹⁷ One of the main focal points of the African Charter is the protection and development of the traditional culture and values and this is reiterated in the Preamble of the Children’s Charter. A prominent virtue of the African culture and traditions is the recognition of the family as the natural unit and basis of society. And therefore, according to Nhlapo, the answer to the above question is “no” because the welfare of the extended family will always predominate over that of the child.

“According to the Roman Dutch common law the overriding principle in child law is that the interests of the children are paramount. The same cannot be said of customary law. Rules of affiliation, fostering, custody and guardianship all appear to serve interests other than that of the child.”¹⁹⁸

However, Africa’s children will not be destitute. The emphasis of the traditional cultures on the interests of the extended family goes hand in hand with its duty to take care of those belonging to it.¹⁹⁹

“But this is not to suggest that the interests of the child are deemed to be irrelevant. Rather, there exists a presumption that those interests will be served if the strong rights of fathers and

¹⁹⁴ Art 4(2) of the Children’s Charter.

¹⁹⁵ Goolam “Constitutional interpretation of the “best interests” principle in South Africa in Relation to Custody” in Eekelaar and Nhlapo *The Changing Family* 373.

¹⁹⁶ Goolam “Constitutional interpretation of the “best interests” principle in South Africa in Relation to Custody” in Eekelaar and Nhlapo *The Changing Family* 373.

¹⁹⁷ Nhlapo “Biological and social parenthood in african perspective: The movement of children in Swazi family law” in Eekelaar and Sarcevic (eds) *Parenthood in Modern Society* 47.

¹⁹⁸ Nhlapo “Biological and social parenthood in African perspective: The movement of children in Swazi family law” in Eekelaar and Sarcevic (eds) *Parenthood in Modern Society* 47.

¹⁹⁹ “The concept of human rights as natural, inherent, inalienable rights held by virtue of the fact that one is born a human being remains a creation of Western civilization and is foreign to indigenous law. In indigenous societies rights are assigned on the basis of communal membership, family status or achievement.” Van Niekerk *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* 261.

their lineage over children are not lightly interfered with, for it is by 'belonging' that a child is best protected."²⁰⁰

5 Conclusion

South Africa not only ratified all the treaties discussed above, most of the rights of children mentioned are also guaranteed and provided for by the provisions of section 28 of the South African Constitution. The right to a name and nationality,²⁰¹ to parental care or appropriate alternatives,²⁰² to have his or her best interests be of paramount importance in every matter concerning him or her²⁰³ are guaranteed to every person below the age of 18 years.²⁰⁴

The formulation of the best interests principle in the Constitution is stronger than the formulation in the Children's Convention and very similar to that of the Children's Charter. If the Constitution may be disregarded for the sake of argument, however, the question remains: Keeping in mind the fact that the rights and protection in the two treaties are not always the same, if a country ratified both Children's Convention as well as the Children's Charter, which level of protection should be adhered to?

The answer to this question is provided by both treaties: their provisions do not affect any provisions that are more conducive to the realisation of children's rights.²⁰⁵ Perhaps more than anything else contained in the treaties, this answer proves the honest commitment of the international as well as the African community, regardless of culture or difficulties with implementation, to do every thing in their power to ensure that the best interests of the child are served in all matters regarding the child.

At a superficial first glance of the South Africa Constitution, the protection children are entitled to in terms of these treaties, might seem superfluous because of the extensive and explicit protection of children's rights in section 28. This notion is completely wrong however. The Constitution provides in section 39 that a court,

²⁰⁰ Nhlapo "Biological and social parenthood in African perspective: The movement of children in Swazi family law" in Eekelaar and Sarcevic (eds) *Parenthood in Modern Society* 47.

²⁰¹ Sec 28(1)(a).

²⁰² Sec 28(1)(b).

²⁰³ Sec 28(2).

²⁰⁴ Sec 28(3).

²⁰⁵ Art 41 of the CRC and Art 1(2) of the Children's Charter.

tribunal or forum is under a definite obligation to consider international law when interpreting any rights in the Bill of Rights.²⁰⁶ Therefore, even though it may seem as if South African children do not need the protection of international treaties, being so well protected and provided for by the Constitution, the international law must always be given due recognition and might prove helpful in a court's interpretation and application of the best interests principle. However, since neither the Constitution nor any of the international documents discussed above provide any direction on the content of the best interests of the child, the extent of the assistance afforded by the international law in the interpretation and application of the principle is limited.²⁰⁷

Courts and decision-makers are therefore faced with the weighty and difficult responsibility to interpret and apply a principle that is characterized by inherent vagueness and indeterminacy. These characteristics have important implications for the decision-making process and therefore, it is necessary to provide a proper perspective on the best interests of the child as a theoretical concept. The theoretical perspective on the principle, as well as an exposition of its values and the criticism against it, will be provided in the following Chapter. Once the conclusion has been reached that the principle has values that far outweigh the criticism against it, the developments in the interpretation and application of the principle in the context of the South African law pertaining to custody can be explored.²⁰⁸

²⁰⁶ Sec 39(1)(b): "When interpreting the Bill of Rights, a court, tribunal or forum must consider international law." Because the best interests-principle is also part of the South African common law, the courts are also, in terms of sec 39(2) under an obligation to develop it in a way that promotes the spirit, purport and objects of the Bill of Rights. This means that the rights in sec 28(1) and 28(3) as well as in the rest of the Bill of Rights can be used to determine the content of the best interests of the child in a given situation.

²⁰⁷ It seems that, while the world in general agrees that children's best interests should be protected, there is no agreement on what those interests entail. Van Bueren *The International Law on the Rights of the Child* 45.

²⁰⁸ According to the Constitution as well as the international treaties aimed specifically at children, the best interests of the child are of paramount importance in all matters regarding the child. The present study will be limited, however, to the developments in the interpretation and application of the best-interests principle by the South African courts in custody disputes.

CHAPTER FOUR

THEORETICAL PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD

1 Introduction

The preceding two Chapters have established that the best interests of the child principle is neither a new invention by the Constitution, nor uniquely South African. It has formed an integral,¹ though perhaps unspoken,² part of the common and international law regarding children for quite some time. In South Africa the principle has evolved, partly under the influence of international law and the development of children's rights, from the common law principle applicable mainly to custody, access and adoption proceedings³ to a fully-fledged constitutional guarantee to be adhered to in all matters regarding children.⁴ However, regardless of the extensive recognition of the principle and the universal acclaim it receives,⁵ the best interests of the child is a concept with several theoretical implications that need to be addressed before a meaningful study of the developments in its interpretation and application in South African law can be successfully attempted.

The present Chapter will endeavour to provide a theoretical perspective on the best interests principle. Every source of information on this concept invariably mentions the inherent indeterminacy of the principle.⁶ Some consider it an advantage,⁷ others view this as a very serious point of criticism.⁸ Different factors⁹ give rise to the difficulty of giving theoretical content to the principle and it is evident that the

¹ "The best interests of the child is the most important principle in child law." Kirsti Kurki-Suonio "Joint custody as an interpretation of the best interests of the child in critical and comparative perspective" 2000 *International Journal of Law and the Family* 183, 183.

² See Chapter Two above. The principle was never mentioned in Roman or Roman Dutch law, but can be implied from other rules and principles of the law regarding children.

³ See Chapter Six below.

⁴ This evolutionary process will form the content of the following two chapters. See Chapters Five and Six below.

⁵ Helen Reece, in an article which cynically rejects any value which the best interests principle may have, admits that the principle "rests on an astonishingly solid consensus, both inside and outside the discipline of family law". Reece "The paramountcy principle: consensus or construct?" 1996 *Current Legal Problems* 267, 268.

⁶ See section 5 below.

⁷ See section 3 below.

⁸ See section 4 below.

⁹ See 5 1 – 5 3 below.

interpretations given thereto are largely governed by the time when and cultural sphere within which it is applied.¹⁰ The discussion of the theoretical perspective on the best interests of the child will lead to the conclusion that, even though the decision of what is best for a child is a question no less ultimate than the purpose and value of life itself,¹¹ and though there is a lack of consensus on what constitutes these interests, let alone the best interests of children,¹² the best interests standard is irreplaceable. Like democracy, it may not be perfect,¹³ but it is the only standard¹⁴ that is remotely capable of ensuring protection for children, promotion of their rights, prevention of harm, while providing them with assistance and the chance to participate.¹⁵

2 Meaning of the best interests principle

2.1 Introduction

The best interests principle (also called the welfare principle¹⁶ or paramouncy principle¹⁷ or the least detrimental alternative¹⁸) has been defined as

“A process whereby, when all the relevant facts, relationships, claims and wishes of parents,

¹⁰ See section 6 below.

¹¹ Mnookin “Child custody adjudication: Judicial functions in the face of indeterminacy” 1975 *Law and Contemporary Problems* 226, 260.

¹² Van Bueren *International Law on the Rights of the Child* 45.

¹³ According to Mnookin “[w]hile the indeterminate best interests standard may not be good, there is no available alternative that is plainly less detrimental”. Mnookin 1975 *Law and Contemporary Problems* 226, 282.

¹⁴ The commitment to the best interests of the child as international standard by the United Nations Convention on the Rights of the Child (1989) (hereafter the Children’s Convention or UNCRC) in art 3(1) of the Convention, places this standard at the heart of the international law of children’s rights. Parker “The best interests of the child – principle and problems” 1994 *International Journal of Law and the Family* 26; Norrie “The *Children Acts* in Scotland, England and Australia: Lessons for South Africa” 2002 *SALJ* 623, 632.

¹⁵ According to Van Bueren the United Nations Convention on the Rights of the Child (1989) is based on these four P’s: Prevention of harm to children, Protection of children against discrimination, torture and other harmful practices, Provision of assistance for the basic needs of children and Participation of children in decisions that will affect their future. Van Bueren “The United Nations Convention on the Rights of the Child (1989)” 1991 *Journal of Child Law* 63; Van Bueren “The United Nations Convention on the Rights of the Child” in Davel (ed) *Introduction to Child Law in South Africa* 203.

¹⁶ The English Children Act 1989 sec 1(1) provides that when a court determines any question with respect to the child’s upbringing, the welfare of the child shall be the court’s paramount consideration. See further Maidment *Child Custody and Divorce* 13; Norrie 2002 *SALJ* 623, 625-626; Montgomery “Rhetoric and welfare” 1989 *Oxford Journal of Legal Studies* 395.

¹⁷ Reece 1996 *Current Legal Problems* 276.

¹⁸ Mnookin equates the “best” in the best interests principle with “least detrimental”. “Detriment can be regarded as a utility measure that takes into account only harm. Alternatively, detriment may be defined simply as the absence of benefit, in which case it is best interests under a different name.” Because choosing the least detrimental alternative also requires the specification of alternative outcomes and the assessment of probabilities, the conceptual framework and difficulties are exactly the same as those presented by the best interests principle. These difficulties are discussed in section five below. See Mnookin 1975 *Law and Contemporary Problems* 226, 229, 255 n154.

risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is... the paramount consideration because it rules upon and determines the course to be followed."¹⁹

Unfortunately, with the trauma and emotional upheaval parents experience during divorce and their desire to "win" against the other by obtaining a custody order in their favour,²⁰ the best interests of the child are not in practice always the determining factor. As Freeman puts it,

"There can be few areas of life where the treatment of children as property rather than as persons is better exemplified. And this has been accentuated by the growing trend towards private ordering of divorce... Outside a slave society commercial contracts are not concerned with the disposal of human beings: bargains about custody and access are."²¹

The establishment of this principle goes hand in hand with the emergence of children's rights and the idea of children as bearers of substantive rights.²² The development of this principle and its evolution from a common law principle to a constitutional guarantee will be explored in greater detail in a later Chapter. For present purposes it might be interesting to provide different interpretations that have been given to it over the years.²³

2 2 Giving meaning to "best interests"²⁴

In 1948 when the Appellate Division of the Supreme Court in South Africa placed its seal of approval on the best interests of the child as paramount principle in decisions

¹⁹ Per Lord MacDermott in *J v C* [1970] AC 668, 710.

²⁰ According to Elster some parents experience their children as such extensions of their own persons, that they would experience equal trauma in the loss of a limb or worse than by losing custody of their children. See Elster "Solomonic judgments: Against the best interest of the child" 1987 *University of Chicago Law Review* 1, 2.

²¹ Freeman *The Rights and Wrongs of Children* 192, 193.

²² Eekelaar "The emergence of children's rights" 1986 *Oxford Journal of Legal Studies* 161.

²³ While the study mainly concerns the position in the South African law, how the principle is interpreted and defined in other (especially British or American) jurisdictions provide useful insights as well. Due to the internationality of the principle, the theoretical discussion need not be confined to the South African scene only.

For a full account of the creation of the welfare principle by the British equity courts, see Susan Maidment *Child Custody and Divorce* 89-106; Stone "The welfare of the child" in Baxter and Eberts (ed) *The Child and the Courts* 229-256.

²⁴ Alston suggests that in interpreting the phrase it is appropriate to put some emphasis on the term "best" so as to exclude other factors which may arguably be in the overall interests of the child, but not in his or her "best" interests. Alston "The best interests principle: Towards a reconciliation of culture and human rights" 1994 *International Journal of Law and the Family* 5. However, all the relevant factors pertaining to the child's overall welfare should be considered to determine what the child's best interests are.

regarding the custody of a child,²⁵ it unfortunately did not spell out the meaning of the term “best interests”. The courts have, therefore, had to come up with their own interpretation of and meanings for the principle and each case has been decided on its own particular facts and circumstances.²⁶ The ambit of the concept cannot be limited by an exhaustive definition, but over the years courts have attempted to provide a framework within which decisions based on the principle could be made.

In 1966 in *Van Deijl v Van Deijl*²⁷ Young J expressed his opinion on the meaning of the best interests principle in the following way:

“The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes in the matter cannot be ignored.”²⁸

This interpretation was extended in 1971 when Steyn J in *French v French*²⁹ outlined some guidelines for the determination of a child’s best interests. The court considered that above all the child’s sense of security, which includes the extent to which the child feels that it is welcome, wanted and loved, had to be protected by the custody determination. After this came the considerations of suitability of the custodian parent which was to be tested by enquiring into his or her character, as well as religion and the language in which the children were to be brought up, and the general fitness of the parent to guide the child’s moral, cultural and religious development. The material considerations relating to the child’s upbringing, as well as the wishes of the child were also considered to be of importance. With regard to the last factor, the court differentiated between older and younger children. With younger children, their wishes would be taken into account as a constituent element in the enquiry relating to their sense of security, while with older and more mature children, their wishes could be taken into account as a well informed, albeit subjective, judgment of what their

²⁵ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

²⁶ Van Heerden *et al* *Boberg’s Law of Persons and the Family* 562; Palmer “The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995” in Keightley *Children’s Rights* 98.

²⁷ *Van Deijl v Van Deijl* 1966 (4) SA 260 (R).

²⁸ 261H.

²⁹ 1971 (4) SA 298 (W).

best interests really demanded.³⁰ This list was used to guide decision-making in a number of custody cases,³¹ but none of these attempted further definition of the concept.³²

In 1985 Hahlo provided the following summary on what courts considered to constitute the best interests of a child:³³

“[T]he court will take all the circumstances into account in deciding what is in the best interests of the child: the age, state of health and social and financial circumstances of each of the spouses; their characters, temperaments and past behaviour towards the child; the age, sex, state of health and character of the child; and its educational and religious needs and personal preferences. The conduct of the spouse will be taken into account in so far as it may be indicative of his or her suitability to look after the child.”

One important factor which Hahlo neglected to mention, was the race of the child and parents. Though it is unconstitutional to discriminate against anyone on the basis of race,³⁴ the fact that in South Africa the economic, social, moral and religious considerations are often closely linked to a person’s race, will probably cause race to play a definite (though unspoken) role in a custody determination.³⁵

The most comprehensive list of factors giving meaning to the best interests principle was compiled by King J in the influential case *McCall v McCall*.³⁶ Most of the factors in this list were expansions of the factors mentioned in the above definitions,³⁷ while some were included for the first time. Among the latter group are factors such as the

³⁰ 298H-299H. The court made a point of providing authority of previous cases where each of these factors/consideration was applied.

³¹ *M v R* 1989 (1) SA 416 (O); *Märtens v Märtens* 1991 (4) SA 287 (T); *Meyer v Gerber* 1999 (3) SA 650 (O); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O). In the breakthrough case of *McCall v McCall* 1994 (3) SA 201, the court was guided by the criteria suggested in *French v French* (*supra*) to compile its own list. See below.

³² Palmer “The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995” in Keightley *Children’s Rights* 98, 100.

³³ Hahlo *Husband and Wife* 390.

³⁴ Sec 9 of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁵ See Van Heerden *et al* *Boberg’s Law of Persons and the Family* 526-527 n116 and the source material cited there. See also 6 4 2 below.

³⁶ 1994 (3) SA 201 (C) 204J – 205G. This extensive list of factors is quoted in its entirety below in Chapter Six, and for the sake of brevity will not be quoted here as well.

³⁷ For instance instead of just making reference to “emotional needs and ties of affection” as the court did in *Van Deijl v Van Deijl* (*supra*), King J extended this aspect to three separate criteria, namely, the love, affection and other emotional ties which exist between the parent and child and the parent’s compatibility with the child; the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings; the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development.

desirability of keeping siblings together³⁸ and the stability of the child's existing environment and the desirability of maintaining the *status quo*. Interestingly the court did not list the psychological sense of security on which Steyn J placed so much emphasis in *French v French*.³⁹ It is submitted however that the child's sense of security is so closely linked to the factors mentioned in the list that the omission thereof as a separate factor would not mean that it would be overlooked when the best interests of a child are determined according to these guidelines.⁴⁰

The *McCall v McCall*-list of criteria has been widely accepted by the South African courts as "an instructive and valuable guide" to the application and interpretation of the best interests principle.⁴¹

During 2003 the Children's Bill was published in an attempt to consolidate all the statutory, common, customary and religious laws relating to children in South Africa into one comprehensive Children's Statute. It is based on the extensive report and recommendations by the South African Law Commission.⁴² In this report the best interests of the child principle received much attention and the Legislature responded to the recommendations by including an extensive list of guidelines and factors that should be taken into account in the application of the proposed Act.⁴³

³⁸ In *Lubbe v Du Plessis* 2001 (4) SA 57 (C) the court considered it "of cardinal importance" that the children should not be separated. This, however, was a decision on the very particular facts of the case and it may well happen that in some instances it would in fact be in the children's best interests to be in the custody of different parents.

³⁹ *Supra*.

⁴⁰ In *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (C) 101B/C, with reference to the factors listed in *French v French (supra)* and *McCall v McCall (supra)*, Hanke J said, "Om te bepaal wie die geskikste ouer is om bewaring uit te oefen, is dit 'n belangrike oorweging welke ouer nie alleen die meeste sekuriteit bied nie, maar ook die beste in staat sal wees om sy fisiese versorging te behartig en ook sal toesien dat hy op morele, kulturele en godsdienstige vlak behoorlik ontwikkel."

⁴¹ See *Bethell v Bland* 1996 (2) SA 194 (W) 208F-209F; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567f-569c; *Madiehe (born Rathogo) v Madiehe* [1997] 2 All SA 153 (B) 157g-158c; *V v V* 1998 (4) SA 169 (C); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O); *Ex parte Critchfield* 1999 (3) SA 132 (W); *Meyer v Gerber* 1999 (3) 650 (O); *K v K* 1999 (4) SA 691 (C); *I v S* 2000 (2) SA 993 (C); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (C); *Lubbe v Du Plessis* 2001 (4) SA 57 (C).

In *Lubbe v Du Plessis (supra)* the court added to the *McCall*-list that recognition must be given to the rights of the child and the parents' willingness to recognize those rights, especially where children are old enough to form their own opinions.

⁴² Project 110 "Review of the Child Care Act, Report and Children's Bill" (December 2002) under the chairpersonship of Madam Justice Y Mokgoro.

⁴³ Sec 10 of the Children's Bill. The section is quoted in full below in Chapter Six.

2 3 Conclusion

Despite its obvious value⁴⁴ the true difficulty with the best interests principle lies in establishing and ensuring conformity in the criteria used to determine the best interests of a child.⁴⁵ The clear guidelines provided by the new Children's Bill, however, constitute a giant step towards certainty in this regard and if properly applied, will unquestionably promote the application of the best interests principle, despite the impossibility of providing a clear and concise definition of the phrase.

However, since the Bill does not yet have the force of law, and the guidelines in the *McCall*-case were handed down in the Cape Division of the High Court,⁴⁶ the rest of the chapter will proceed from the premise that the best interests principle is inherently indeterminate.

3 Value and advantages of the best interests principle

3 1 Introduction

In this section attention will be drawn to the ideals behind and advantages of the best interests of the child principle. Identifying the advantages however, is no easy task. It seems that, whereas the critics of the principle are often very vocal in their critique, the proponents of the principle mostly accept the value of the principle without discussing the theory behind it in great detail.⁴⁷ The positive attitude⁴⁸ towards the

⁴⁴ See section 3 below.

⁴⁵ Davies *The Divorced Father as Primary Caretaker: A Survey of the Phenomena of Male Custodianship* 1994 MA Dissertation 32; Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995" in Keightley *Children's Rights* 98, 113.

These criteria need to be acceptable not only to members of the legal profession, but to mental health and social work professionals as well. Cumes and Lambiase "Legal and psychological criteria for the determination of custody in South Africa: a review" 1987 *South African Journal of Psychology* 119; Cumes and Lambiase "Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?" 1987 *SALJ* 704; Clark "Custody: the best interests of the child" 1992 *SALJ* 391

⁴⁶ The list used in the *McCall*-case, though often approved by academic writers and used in judgements of other Provincial divisions of the High Court, has not yet been confirmed by either the Supreme Court of Appeal or the Constitutional Court. As such it can have persuasive force in other Provincial Divisions, but they are not obligated to follow it. In 2000 the Constitutional Court mentioned the *McCall*-list and its acceptance in High Court decisions in note 12 of its judgment in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC). Unfortunately the court made no indication of either its acceptance or rejection thereof. Justice Goldstone did, however, mention the necessity of the principle being flexible in order to determine the best interests of a particular child in the individual circumstances of each case. See par [18].

⁴⁷ According to Palmer the principle only seems workable and easily applied because there are so few divorce cases that are deemed reportable. Palmer "The best interests criterion: An overview of its

principle centres mainly around three points, namely, the fact that the principle is child-centred, flexible,⁴⁹ while moreover, it accommodates a holistic approach to the child and the family.

Each of these aspects will be dealt with separately below.

3 2 Child-centred

The main advantage of the best interest principle is the fact that it has the potential⁵⁰ to focus foremost on the child.⁵¹ Not only does the principle allow for the acknowledgment of the child as substantive bearer of rights (instead of being the object of the different parental rights),⁵² it acknowledges the child's vulnerability in the divorce process as well.⁵³

Thus, the child-centred nature of the best interests principle does not only require focus on the interests of the child (in the sense of emotional, psychological, physical and educational welfare),⁵⁴ but on the rights of the child as well. In *Lubbe v Du Plessis*⁵⁵ the court held that, to determine the best interests of the child in a particular case, the court needs to take account of the lists of criteria compiled in *McCall v*

application in custody decisions relating to divorce in the period 1985 – 1995” in Keightley *Children's Rights* 98

⁴⁸ Eekelaar calls it a “humane and natural guide”. Eekelaar “The interests of the child and the child's wishes: The role of dynamic self-determinism” 1994 *International Journal of Law and the Family* 42, 45-49.

⁴⁹ That is, it can be applied in a variety of different scenarios and it keeps track of social changes.

⁵⁰ The statement is made in this qualified way because, regardless of the theoretical ideals behind the best interests principle, the fact remains that is to be applied by real people in real life situations where issues become clouded easily and principles are distorted or misapplied.

⁵¹ Maidment *Child Custody and Divorce* 149

⁵² For the recognition of children as bearers of rights see Chapter Three above and Chapter Five below.

⁵³ “The welfare principle is widely supported because ... children who are necessarily more vulnerable and dependent must be protected from harm.” Cretney and Masson *Principles of Family Law* 526. See further Miller “Joint custody” 1979 *Family Law Quarterly* 345, 348-351.

Children are not the only vulnerable parties in the divorce process and a too child-centred approach in these circumstances are strongly criticised by Helen Reece. See Reece 1996 *Current Legal Problems* 267, 268, 277.

On the different vulnerabilities of mothers as well as fathers and how these vulnerabilities can be protected by a proper extension of the notion of parenthood and application of the best interests of the child, see Du Toit “Integrating care and justice in South African family law: Laying the theoretical foundation” 2002 *TSAR* 46-59 and Du Toit “Integrating care and justice in South African family law: Dealing with maternal and paternal vulnerabilities” 2002 *TSAR* 526-540. See further Bonthuys “Labours of love: Child custody and the division of matrimonial property at divorce” 2001 *THRHR* 192, 193-199.

⁵⁴ See 2 3 above.

⁵⁵ 2001 (4) SA 57 (C).

McCall,⁵⁶ as well as of the rights of the child and the parents' willingness to recognize those rights.

3 3 Flexible and adaptable

The best interests principle is (deliberately) indeterminate⁵⁷ and this ensures that the principle remains flexible and adaptable to all circumstances and the facts of each particular case irrespective of the legal disputes involved.⁵⁸ Where the principle originated as an exclusive measure to protect the welfare of children in custody and adoption proceedings,⁵⁹ it has now evolved to an entirely inclusive concept affording paramountcy to the interests of children in a wide (in fact, the total) range of matters regarding children.⁶⁰

Another very important reason for the flexibility and adaptability of the principle is that it ensures that it never becomes outdated. Posed in this undefined way, the principle has the propensity to constantly reinvent itself⁶¹ under the influences of the social context and culture of the sphere where it is applied.⁶² The values, traditions,

⁵⁶ 1994 (3) SA 201 (C).

⁵⁷ *Maidment Child Custody and Divorce* 3.

⁵⁸ "It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child." Per Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 par [18].

⁵⁹ See Chapter Six below.

⁶⁰ This is in accordance with the wording of sec 28(2) of the Constitution. The Constitutional Court has confirmed this interpretation in *Minister of Welfare and Population Development v Fitzpatrick and Others* (*supra*). "The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others* 1999 (1) SA 1 (CC) (1998 (11) BCLR 1357)." Per Goldstone J par [17].

The wording of the sec 28(2) has lain to rest the uncertainty about the applicability of the principle which the wording of sec 30(3) of the Interim Constitution Act 200 of 1993 caused. That section required that "in all matters regarding such child his or her best interests shall be paramount". The question thus arose whether the best interests principle was only applicable in the context of sec 30 or whether it should apply generally to all matters regarding the child. See Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995" in *Keightley Children's Rights* 98; Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South Africa" 1995 *SAJHR* 401.

On the variety of types of cases where the best interests principle has been applied, see further Chapter Six 4 3 below.

⁶¹ "Die begrip 'welsyn van die kind' is nie 'n statiese begrip nie. Dit verander met die waardesisteem en kennis van die mens." Labuschagne "Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577, 579.

⁶² Kirsti Kurki-Suonio 2000 *International Journal of Law and the Family* 183,184-185; Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622, 623; Heaton "Some general remarks on the concept best interests of the child" 1990 *THRHR* 98. In 1984 Rosettenstein published an interesting article on the influence of culture on a determination of the child's best

beliefs as well as current social and cultural views about the needs of children⁶³ can enter into the balancing process and inform the decision on the welfare of the child.⁶⁴ The act of legal interpretation and decision-making does not happen in a vacuum, but in a sphere where the lives of real people, bound to a specific cultural experience, are at stake. The welfare of the child rests entirely upon the current understandings of what is best for children. Maidment suggests that the principle

“[H]as been and probably always will be a code for decisions based on religious, moral, social and ... social science-based beliefs about child-rearing.”⁶⁵

The open-ended nature of the best interests principle allows for interaction between law and culture⁶⁶ which will undoubtedly promote the interest of the people, especially children, involved.⁶⁷

interests. He found that United States' courts adjudicating a matter between South African citizens relocated to the USA, took uniquely South African experiences and influences into account in custody and access disputes between the parents. Rosettenstein “The impact of special aspects of life in South Africa on custody and access orders in the United States of America” 1984 *SALJ* 483-498.

⁶³ Though the needs of the children are the focal point of the decision, the rights and interest of parents are not simply ignored. If the list of criteria in *McCall v McCall* 1994 (3) SA 201 (C) and the new Children's Bill are taken as indicative of the current views on the interests of children of South Africa, it is clear that the constitutional principle of equality permeates the area of family law as well. While it is true that the rights and interests of children are given priority over those of parents, their interests and rights are never simply discounted in the making of a custody order. This issue will be explored in 3 4 below. See further Chapters Five and Six below.

⁶⁴ Maidment *Child Custody and Divorce* 3.

⁶⁵ Maidment *Child Custody and Divorce* 149. Boshoff “Towards a theory of parents and children” 1999 *TSAR* 276, 278.

⁶⁶ Kirsti Kurki-Suonio 2000 *International Journal of Law and the Family* 183, 184-185

⁶⁷ As an example of the influence of cultural values, take for instance the maternal preference or tender years doctrine. This approach originated from the application of the best interests of the child principle. It was accepted that unless the mother is clearly an unfit person to have custody of children, it was generally in the best interests of young children or girls of all ages to be placed in the custody of their mothers. However, as the social context changed and more and more women began to work outside the home and it became more readily acceptable for the father to be actively involved in the care of young children, the interpretation of the best interests of the child changed. Instead of focusing on the gender of the parent, the court will rather focus on the parent's active involvement in the care of and emotional bond with the child as indicative of where the best interests of such child may lie. Du Toit 2002 *TSAR* 46-59; Du Toit 2002 *TSAR* 526-540; Van Blerk “Why is a great work termed seminal and not ovular? Feminism and the law” 1997 *THRHR* 589, 590-591.

On the maternal preference rule in general, see Hahlo *Husband and Wife* 391-392; Hoffman and Pincus *The Law of Custody* 33-38; Rosen “Is there any real basis for the preference accorded to mothers as custodial parents?” 1987 *SALJ* 246; Kahn “A note on ‘Is there any real basis for the preference accorded to mothers as custodial parents?’” 1978 *SALJ* 249; Burman and McLennen “Providing for children? The Family Advocate and the legal profession” in Keightey *Children's Rights* 69, 74-75; Mnookin 1975 *Law and Contemporary Problems* 226, 235-237.

The influence of social context and culture will be explored in greater detail at a later stage. See section six below.

Furthermore, the term “best interests” or “welfare” has a very wide scope⁶⁸ and encompasses all spheres of an individual child’s life. The child’s physical, developmental, intellectual, emotional, psychological, religious and moral welfare, as well as its autonomy interests are all included in a proper inquiry into its welfare or best interests.⁶⁹ This ensures an entirely individualistic approach to each case and the nearest guarantee to justice for the child.

3 4 A holistic approach to the child and the family

As stated previously a very wide variety of circumstances have to be taken into account to determine the best interests of the child. The ideal is that the determination of a child’s interests will always be reckoned with in terms of reality, not fantasy.⁷⁰ This allows for, besides evaluating the circumstances surrounding the child, the consideration of the child’s subjective opinions and preferences and implies that the child should be afforded the opportunity to participate.⁷¹

Article 12 of the United Nations Convention on the Rights of the Child places on courts the obligation to

“[A]ssure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

The child’s participation, as well as the weight his or her opinion will be accorded, therefore depends upon the child’s intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards

⁶⁸ A very important theoretical aspect regarding the best interests principle is the words in which it is couched. In Chapter Three above the attention was called to the difference in meaning and scope of the principle depending on the words “a primary consideration” as opposed to “the paramount consideration” or “of paramount importance”. For the sake of brevity the argument will not be repeated in this Chapter but see Chapter Three 3 3 2 above. See also Alston 1994 *International Journal of Law and the Family* 1; Parker 1994 *International Journal of Law and the Family* 26; Van Bueren *International Law on the Rights of the Child* 75-76.

⁶⁹ Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 166-171; Pfenning “The best interests of the child: Do the courts’ subjective factors really benefit the child?” 1986 *Journal of Juvenile Law* 117; Mnookin 1975 *Law and Contemporary Problems* 226; Van Heerden *et al Boberg’s Law of Persons and the Family* 526-531. See also section 2 above.

⁷⁰ Foster and Freed 1972 *Family Law Quarterly* 343, 344.

⁷¹ Eekelaar 1994 *International Journal of Law and the Family* 42; Lückner-Babel “The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child” 1995 *International Journal of Children’s Rights* 391.

and relationship with each of his parents, in other words to make an informed and intelligent judgment.⁷²

To allow the child to participate in the decision shows a true commitment, not only to the rights of the child, but to his or her emotional and psychological well-being as well since it would prevent the child from feeling inconsequential or objectified.⁷³ It was argued in Chapter Three above that the most efficient way to guarantee that the outcome of a decision serves the best interests of the child is to afford the child the right to be heard.⁷⁴ However, care should be taken to balance the child's participation with other objective factors in order to prevent the child from assuming too much responsibility for the situation or placing him in a position where he feels guilty of having to make a choice between parents.⁷⁵

In taking all the relevant facts pertaining to the child into account and ensuring a right of participation for the child, the best interest of the child principle represents a holistic approach to the child.⁷⁶

However, apart from constituting a holistic approach to the child itself, if correctly applied, the best interests of the child principle will also comprise a holistic approach to the family. The principle has the inherent ability to elevate children's welfare above the petty issues of politics and the social lobbying for rights of the parents⁷⁷ and this

⁷² Per King J in *McCall v McCall* 1994 (3) SA 201 (C) 207H-J.

⁷³ "[T]he responsibility of the decision cannot under any circumstances be left solely to the child. He or she is already a victim of the divorce between his or her parents and should not be forced to accept such a responsibility (ie to express a preference) as well." Bosman-Swanepoel *et al Custody and Visitation Disputes* 5. See further Hoffman and Pincus *The Law of Custody* 23-15; Richards "Children, parents and divorce" in Eekelaar and Sarcevic *Parenthood in Modern Society* 307-315; Stojanowska "The protection of the child against the negative effects of parental conflict" in Eekelaar and Sarcevic *Parenthood in Modern Society* 317-323.

⁷⁴ Van Bueren 1991 *International Journal of Child Law* 63, 63. See Chapter Three 3 3 4 above.

⁷⁵ Van Heerden *et al Boberg's Law of Persons and the Family* 542 n165; Schäfer *Law of Access* 53. See further; Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995" in Keightley *Children's Rights* 98, 111-112; Barrat "The child's right to be heard in custody and access determinations" 2002 *THRHR* 556.

⁷⁶ This means that the decision-maker is not bound to strict rules or formulae that do not cater for individual circumstances or contingencies. As stated by Meggary J in *F (an infant)* [1969] All ER 776 (ChD) 768E, "What the court has to deal with is the lives of human beings, and these cannot be regulated by formulae. In my judgement I must take account of all relevant matters; but in considering their effect and weight I must regard the welfare of the [child] as being first and paramount."

⁷⁷ The best interests principle has at various times been used to further the rights of the father (through the rule relating to the natural guardianship of the father) or the mother (through the maternal preference rule). If correctly applied, however, the principle will lead to a presumption in favour of the

has led to the criticism that the principle ignores the rights of parents⁷⁸ and as such is divisive, setting off one parent against the other.⁷⁹ However, in the light of the meaning of the best interests principle in South African law when determined by the criteria, suggested by *McCall v McCall*⁸⁰ and the new Children's Bill,⁸¹ the rights and welfare of the parents are never simply dismissed or ignored in the decision-making process.⁸² The child's welfare is merely given greater weight than that of the parents. Though this has led to the criticism that children's rights are used as a trump over parents' rights and interests,⁸³ in practice this should not be the case.

In *Government of the Republic of South African and Others v Grootboom and Others*,⁸⁴ the Constitutional Court rejected the idea that children's rights could be used as a trump over government policy.⁸⁵ Except for the fact that it would disturb the carefully constructed socio-economic scheme,⁸⁶ it entailed the obvious danger that children would become stepping-stones for their parents instead of being valued for who they are.⁸⁷ This case may seem far removed from the issue at hand, namely the

parent of either gender who is best suited to take care of the child and ensure his physical, moral, intellectual and emotional welfare, as well as his cultural, religious and educational development.

⁷⁸ See 4 4 below.

⁷⁹ According to Mason the principle "may sound enlightened and child centred. It appears to have moved beyond gendered stereotypes, to focus only on what is good for a particular child. As well intentioned as it may seem, it is not child-centred. It provides no guidance about what a society believes is in the child's interest; it offers no recognition of the developmental needs of a child; it leaves no room for the wishes and feelings of the child; and, perhaps most damningly, its vagueness opens the door to almost complete judicial discretion. This allows for a judge who doesn't believe in day care to award a child to the other parent. In addition, it encourages parents to fight over custody, because the outcome is unpredictable. Fathers, knowing there is real opportunity to win, may play the "custody card" to bargain for financial advantage in a divorce settlement. Thereby the door is open for a full-scale battle that pits fathers against mothers and in no way enhances the best interest of the child." Mason *The Custody Wars* 19.

⁸⁰ 1994 (3) SA 201 (C).

⁸¹ See again the discussion in section 2 above, as well as Chapter Six below.

⁸² The Children's Bill makes provision for the consideration of the nature of the relationship between the child and each of the parents (sec 10(a)(i)); the attitude of the parents towards the child as well as the exercise of parental responsibilities (sec 10(b)(i) and (ii)); the capacities of the parents (sec 10(c)). The explicit recognition which the child's right to maintain a personal relationship with the parent (sec 10(f)(i)) receives, also ensure that the rights of the parents will be given, albeit indirectly, due consideration.

⁸³ Elster 1987 *University of Chicago Law Review* 1, 5, 16-21; Mnookin and Kornhauser "Bargaining in the shadow of the law: The case of divorce" 1979 *Yale Law Journal* 950, 978-979; Parker 1994 *International Journal of Law and the Family* 26, 37-39; Eekelaar 1994 *International Journal of Law and the Family* 42, 45; Reece 1996 *Current Legal Problems* 267, 273.

⁸⁴ 2001 (1) SA 46 (CC). See also *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

⁸⁵ Per Yacoob J in par [70] – [79].

⁸⁶ The case concerned an application by homeless persons for housing to be supplied on State expenses based on the child's right to shelter in sec 28(1)(c).

⁸⁷ Par [71]. The case and its implications will be discussed in greater detail in Chapter Six below.

rights of the parents in a custody-determination, but it is submitted that the principle exposed by this case implies that considerations of fairness and justice will not be summarily overlooked in the application of the best interest principle.

Moreover, by allowing for the due consideration of the parents' interest in their child or the amount of care and commitment they have shown towards the child, application of the best interests principle in effect allows for and acknowledges the indivisibility of the parent-child relationship.⁸⁸ It acknowledges that the welfare of the child is inextricably wound up in the welfare of the entire family. In the words of Spiro,⁸⁹

“[W]hat is in the interests of the child must in the last instance also be in the interests of the parents and *vice versa*.”

It is submitted that this holistic approach to child and family is the most important value of the principle and much too often overlooked by the critics.

3 5 Evaluating the value

South Africans are in the unique position that, given the guidance by the courts and, hopefully if the Children's Bill is accepted, the legislature, on the interpretation and application of the best interests principle, they can accept the advantages of the principle. Moreover, the Constitution compels acceptance and application of the principle in every matter regarding the child.⁹⁰ However the fact remains that there is no concise definition of “best interests”. The advantage of this indeterminacy is that it renders the same principle applicable in any matter and on any particular and individual circumstances.⁹¹ If the decision-makers remain conscious of the possible pitfalls⁹² and tread carefully, focussing their attention on the particular child as a member of a particular family and inextricably bound to both parents, a decision based on the best interests principle would most probably serve justice in every case.

⁸⁸ See Chapter Five below.

⁸⁹ Spiro “Custody and guardianship of children *stante matrimonio* and on dissolution of marriage” 1983 *Acta Juridica* 109, 118.

⁹⁰ Sec 28(2) of Act 108 of 1996.

⁹¹ Though this is very positive and necessary, the danger of this flexibility is that it opens the door for judges to make entirely subjective decisions based ostensibly on the child's interests but without their giving any real consideration to the facts of the case. The unpredictability of such an approach might cause an increase in litigation between parents instead of amicable settlement of custody disputes.

Mason *The Custody Wars* 19.

⁹² See section 4 3 below.

It may be problematic and require more of a decision-maker than the blind application of a legal formula, but its appeal to morality makes it the best system available.⁹³

The next section, however, will consider the problems with and criticisms against the principle in more detail.

4 Criticism against the best interests principle

4 1 Introduction

Child law is often seen as being in an uneasy balance between conflicting principles and interests⁹⁴ and for a successful system of child law, it is necessary to find a proper equilibrium between the various concepts involved. The making of reasonable and rational compromises by courts and decision-makers is the only way to solve disputes because child law is uniquely unsuited to the application of a single and overarching principle.⁹⁵

The best interests of the child principle has been criticized as being paternalistic,⁹⁶ subjective,⁹⁷ entirely meaningless⁹⁸ and indeterminate on its own terms,⁹⁹ of a completely value-laden nature,¹⁰⁰ and nothing but a cliché.¹⁰¹

⁹³ "It seems that no one would argue with the principle of prioritising a child's welfare." Reece 1996 *Current Legal Problems* 267, 274-275.

⁹⁴ Norrie 2002 *SALJ* 623, 624. These conflicting principles and interests are, for instance, the public/private debate, the opposing rights and interests of parent/child, and the question of state intervention or family autonomy. "It seems that children occupy an uneasy position in what is essentially an unarticulated ideological struggle raging in modern family law." Boshoff 1999 *TSAR* 276, 278-280.

See further Dewar "Family law and its discontents" 2000 *International Journal of Law and the Family* 59; Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 161-162; Dewar "The normal chaos of family law" 1998 *Modern Law Review* 467; Bainham *Children – The Modern Law* 70-115; Davis and Schwartz *Children's Rights and the Law* 7-25, 201-209; Human "Die effek van kinderregte op die privaatregtelike ouer-kind verhouding" 2000 *THRHR* 393, 397-401.

⁹⁵ The process of balancing and weighing interests inevitably results in a compromise on some of those interests or rights. Norrie 2002 *SALJ* 623, 624-625.

⁹⁶ "It is paternalistic in that it necessitates imposing someone else's views on the child, whose own wishes are often placed in opposition." Norrie 2002 *SALJ* 623, 625; Parker 1994 *International Journal of Law and the Family* 26, 26-29.

⁹⁷ Reece 1996 *Current Legal Problems* 267, 273-275.

⁹⁸ "The welfare of the child' does not have any objective reality or definitive meaning. It has always been and still is essentially a value-laden tool for focussing on the child in an attempt to resolve disputes between its parents." Maidment *Child Custody and Divorce* 90. Norrie 2002 *SALJ* 623, 625.

⁹⁹ "Considerable difficulties face those who seek to analyse the nature of welfare decisions." Montgomery 1989 *Oxford Journal of Legal Studies* 395, 396. "The principle is essentially indeterminate". Maidment *Child Custody and Divorce* 90. See further Mnookin and Kornhauser 1979 *Yale Law Journal* 950, 957; Mnookin 1975 *Law and Contemporary Problems* 226; Heaton 1990 *THRHR* 95; Coons and Mnookin "Toward a theory of children's rights" in Baxter and Eberts (ed) *The Child and the Courts* 391, 394-396.

The most important points of criticism against the principle will be dealt with separately below.

4 2 Indeterminacy

The foremost criticism levelled against the welfare principle, is its inherent indeterminacy. Though, as seen in the discussion on the flexibility and adaptability of the concept, this is also one of the biggest values and advantages of the principle, most critics consider the indeterminacy a very serious weakness.¹⁰² According to Reece the fact that no objective meaning can be ascribed to the welfare of a child yields a random pattern of outcomes when the principle is applied. These results are characterized by being “subjective, individualistic and idiosyncratic, arbitrary and capricious”.¹⁰³

In custody-determinations courts often find themselves in the Solomonic role¹⁰⁴ of having to make a choice between two equally fit and capable parents and where there is evidence of a strong bond between the child and both parents.¹⁰⁵ In these cases the indeterminacy of the best interests principle is a serious drawback because, without

¹⁰⁰ Reece 1996 *Current Legal Problems* 267, 272.

¹⁰¹ Eekelaar *Family Law and Social Policy* 155-188. See also Olmesdahl “Discretion, social reality and the best interests of the child” Inaugural Lecture at the University of Natal 1986, n7.

¹⁰² Maidment *Child Custody and Divorce* 90; Mnookin and Kornhauser 1979 *Yale Law Journal* 950, 957; Mnookin 1975 *Law and Contemporary Problems* 226; Heaton 1990 *THRHR* 95; Coons and Mnookin “Toward a theory of children’s rights” in Baxter and Eberts (ed) *The Child and the Courts* 391, 394-396.

¹⁰³ Reece 1996 *Current Legal Problems* 267, 273.

¹⁰⁴ This term alludes to the judgment of the biblical King Solomon when, faced with two women claiming maternity of the same child, he granted the custody of the child to the one who was willing to give the child up rather than have it cut in two. 1 Kings 3:16-28. Solomon was able to settle the dispute based on the character of the two women and the love exhibited by the one who was willing to give the child up to save its life. In modern times, however, it is much more difficult to make a judgement on the character of disputing parents if on the face of things they are both equally capable and committed to their child.

¹⁰⁵ According to Elster these types of decisions are not only traumatic and difficult for the parents and children involved, but are also “highly traumatic for the third party called upon to resolve them. Judges and welfare officials report that these are among the most difficult cases to decide.” Elster 1987 *University of Chicago Law Review* 1, 2.

conformity on what the interests are or the values afforded thereto,¹⁰⁶ there is no way to predict the outcome of the decision beforehand.¹⁰⁷

Despite the indeterminacy, however, courts and decision-makers have found ways to use the best interests principle in their decision-making on custody matters. The performance of this “judicial function in the face of indeterminacy”¹⁰⁸ will be discussed in greater detail below.

4.3 Subjective and value-laden nature

From the inherent indeterminacy of the best interests principle follows the implication that it is subjective and has a value-laden character.¹⁰⁹ This is because decision-makers are called upon to provide their own interpretations of what the best interests of the child would entail in a particular case.¹¹⁰ Such interpretations are often informed by not only the current social or psychological views regarding childhood and the upbringing of children, but also by the judges’ own experiences and beliefs.¹¹¹

¹⁰⁶ “There is a lack of agreement over what constitutes children’s interests, let alone their best interests.” Van Bueren *International Law on the Rights of the Child* 45

“Application of the best interests of the child standard is far from consistent. Many claim that the best interests of the child is not a standard at all, that it is merely a cloak for judicial discretion and intuition.” Miller 1979 *Family Law Quarterly* 354.

¹⁰⁷ Schäfer “The burgeoning family law and joint custody” Inaugural Lecture at Rhodes University 1986, 17-18.

¹⁰⁸ This phrase is borrowed from the work of Robert Mnookin “Child custody adjudication: Judicial functions in the face of indeterminacy” 1975 *Law and Contemporary Problems* 226.

¹⁰⁹ “[F]ar from being a neutral criterion, the best interests-test is inherently value-laden. It is filled with ideas about the abilities of parents and the needs of children.” Bonthuys 1997 *SAJHR* 622, 623, 636; Van Heerden *et al Boberg’s Law of Persons and The Family* 503.

Robert Mnookin and Stephen Parker do not list this aspect as a separate point of criticism but consider it as part of the inherent indeterminacy. Others like Eekelaar, Bainham and Reece consider it important enough to warrant separate treatment. See Mnookin 1975 *Law and Contemporary Problems* 226, 260; Parker 1994 *International Journal of Law and the Family* 26, 29-31; Eekelaar “Trust the judges: How far should family law go?” 1984 *Modern Law Review* 593, 596; Bainham *Children – The Modern Law* 43; Reece 1996 *Current Legal Problems* 267, 272.

¹¹⁰ Bonthuys 1997 *SAJHR* 622, 623; Heaton 1990 *THRHR* 95, 98.

¹¹¹ Bonthuys 1994 *Stell LR* 298, 299; Alston 1994 *International Journal of Law and the Family* 1; Parker 1994 *International Journal of Law and the Family* 26; Rwezaura “The concept of the child’s best interests in the changing economic and social context of Sub-Saharan Africa” 1994 *International Journal of Law and the Family* 82; Armstrong “School and Sadza: custody and the best interests of the child in Zimbabwe” 1994 *International Journal of Law and the Family* 151; Banda “Custody and the best interests of the child: Another view from Zimbabwe” 1994 *International Journal of Law and the Family* 191.

In the judgment that established the paramountcy of the best interests of the child in the South African law regarding custody, *Fletcher v Fletcher*,¹¹² Schreiner JA implicitly recognized this fact when he said that

“Questions of custody may properly be decided in relation to human needs and values as they are assessed in civilized countries, generally at the present day.”¹¹³

Though this ensures the elasticity of the principle, the danger is obvious.¹¹⁴ It opens the door for judges to make entirely subjective decisions based ostensibly on the child’s interests but without their giving any real consideration to the facts of the case. Moreover, an individual judge’s prejudice may influence the assessment in such a way that characteristics of a parent may be seen as shortcomings simply because it is in conflict with the judge’s idea of what a “good parent” should or should not be.¹¹⁵ The unpredictability of such an approach might lead to more and more people litigating for custody instead of arriving at a settlement aimed sincerely at promoting the interests of the child.¹¹⁶

4 4 Unjust towards parents

Another important point of criticism often levelled against the best interests principle is that it works towards unjust results for the parents.¹¹⁷ The unfairness is considered to work on two levels. In the first place, the principle makes it impossible to predict the outcome of a custody dispute from the parents’ point of view and parents may feel excluded from the decision.¹¹⁸ Instead of being a plan for the future, custody-determinations are too often a reward of past conduct.¹¹⁹ This would work very unfairly against, for instance, the father who took the responsibility to be the sole breadwinner in order for the mother to stay at home and be the primary care-giver,

¹¹² 1948 (1) SA 130 (A).

¹¹³ *Fletcher v Fletcher* (*supra*) 145.

¹¹⁴ Van Heerden *et al* *Boberg’s Law of Persons and the Family* 544.

¹¹⁵ An example of this in South African law is probably the judgment of Flemming DJP in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W). The case will be discussed below in section 6.

An assessment of parental ability to meet the child’s needs should be based on sound legal or scientific authority and not “viewed through the distorting lens of popular myth.” Bonthuys 1994 *Stell LR* 298, 299. See also Van Heerden *et al* *Boberg’s Law of Persons and the Family* 543-544 and the source material cited there.

¹¹⁶ Mason *The Custody Wars* 19.

¹¹⁷ Eekelaar 1994 *International Journal of Law and the Family* 42, 45; Elster 1987 *University of Chicago Law Review* 1, 11-12, 16-21.

¹¹⁸ Mnookin and Kornhauser 1979 *Yale Law Journal* 950, 969-971.

¹¹⁹ Miller 1979 *Family Law Quarterly* 345, 357.

regardless of his desire to be able to spend more time with his children. If the best interests test is applied in this scenario, the mere fact that the father, out of necessity, spent less time with his children, may cause the judge to award custody to the mother.¹²⁰

On the second level, unfairness results when the needs of children are approached as a trump over any parental rights and needs, ignoring the truth¹²¹ that parental rights and needs could be as relevant in custody disputes as the child's needs and interests.¹²² Maidment suggests that the problem with the child-centred nature of the principle is that it ignores the interaction that exists between parents and children within a normal family as a social unit.¹²³ The child is, after all, merely one of the participants in the process of deciding custody – a process in which justice requires that the interests of all participants should count.¹²⁴

Based on the above the critics argue that the best interests rule should be abandoned because it does not serve the interests of justice,¹²⁵ and therefore, neither the interests of the child.¹²⁶

4 5 Self-defeating

The argument that the principle of the best interests of the child is self-defeating suggests that the promotion of the interests of the child in a particular case, may actually work against the interests of children in general.¹²⁷ At the heart of this statement is the fear of creating parental incentives or disincentives that are

¹²⁰ Elster 1987 *University of Chicago Law Review* 1, 17-19.

¹²¹ "It is important to realize that separation and divorce do give rise to serious conflicts between the interests of parents and children." Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 173.

¹²² Elster 1987 *University of Chicago Law Review* 1, 5; Reece 1996 *Current Legal Problems* 267, 302; Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 174;

¹²³ Maidment *Child Custody and Divorce* 90.

¹²⁴ Reece 1996 *Current Legal Problems* 267, 303.

¹²⁵ "The supreme irony is that a provision which was introduced in order to create equal rights for women is currently serving to deny equal rights to minorities." Reece 1996 *Current Legal Problems* 267, 303.

¹²⁶ Statements like this one have led Reece to point out that "critics who do argue for the repeal of the paramountcy principle...paradoxically...are arguing for this from inside rather than outside the consensus. The paradoxical argument is that the principle that the child's best interests are paramount should be repealed because a more determinate principle would serve the child's interests better, since it would lead to decisions which would be both arrived at more quickly and more acceptable to the parents." Reece 1996 *Current Legal Problems* 267, 274.

¹²⁷ Elster 1987 *University of Chicago Law Review* 1, 11-12, 21-26. See further Bainham "The balance of power in family decisions" 1986 *Cambridge Law Journal* 262, 269.

detrimental to the interests of children in general. A court may, for example, in a number of consecutive cases find that it is in the best interests of the particular children to be placed in the custody of their mothers. Even if these decisions were made after an objective search into the interests of the children, once a precedent like this is created, parents might become inclined to be more neglectful of their parental responsibilities. The idea that mothers are always awarded custody might act as an incentive for fathers to be less involved with their children because they would see it as an ineffective measure – taking care of the children during the marriage would not enhance their chances of getting custody on divorce. It might likewise be a disincentive for mothers to exert themselves in the care of the children during the marriage, because they would be secure in the knowledge that they would get custody regardless of their conduct.¹²⁸ In this way, the application of the best interests rule may create detrimental circumstances for children in general during marriage.

On the other hand, working with a more fixed rule, for instance a presumption against granting custody to an adulterous parent, might work in favour of children in general by creating a disincentive to commit adultery, thereby promoting family stability. This presumption should, however, be rebuttable to ensure that, if it is in a child's best interests, the adulterous parent may still be awarded custody.

4 6 Evaluation of the criticism

The criticisms levelled against the best interests principle are, though valid, not insurmountable.¹²⁹ They mainly pertain to the practicalities surrounding the application of the principle and do not really constitute fundamental theoretical objections.¹³⁰ The vulnerability of children and the moral obligation people in general feel towards their value and protection strongly advocate for the retention of the principle. As Reece suggests, "It seems that no one would argue with the principle of prioritising a child's welfare."¹³¹

¹²⁸ Elster 1987 *University of Chicago Law Review* 1, 11-12, 21-26.

¹²⁹ Bainham *Children – The Modern Law* 43.

¹³⁰ Reece 1996 *Current Legal Problems* 267, 271.

¹³¹ Even those critics that do argue for the repeal of the paramouncy principle do so from within the consensus regarding the principle. "The paradoxical argument is that the principle that the child's best interests are paramount should be repealed because a more determinate principle would serve the child's interests better, since it would lead to decisions which would be both arrived at more quickly and more acceptable to the parents... These arguments are rather reformulations than rejections of the paramouncy principle." Reece 1996 *Current Legal Problems* 267, 274-275.

Of all the criticisms against the principle the two that carry the greatest measure of weight are the indeterminacy and the unfairness of completely discounting the rights of one or more participants (the parents) in favour of the other (the child). For the South African law student or practitioner, however, neither of these justifies calling for the replacement of the principle. The Constitution obliges the application of the best interests principle in every matter concerning a child.¹³² Moreover, provisions have been made to alleviate the indeterminacy. The courts have come to an, albeit tentative, agreement on the types of factors to be taken into account in the application of the best interests test.¹³³ When the new Children's Bill comes into operation, there would be no more uncertainty about the criteria to be used to determine the content of a child's best interests.¹³⁴

The critique that the rights and interests of parents are ignored by the principle, would also lose its force, since the lists in the *McCall*-case¹³⁵ as well as the Children's Bill clearly provide for the recognition of the interests of parents,¹³⁶ even if much thereof is indirectly through the rights afforded to the child.¹³⁷

¹³² Sec 28(2). However, the best interests principle does not attempt to elevate the child to a higher level than the adults to the extent that the latter's rights and interests are ignored. The needs and rights of the parents should be balanced against the interests of the child. "The custody decision should not be made on utilitarian principles, with the goal of maximizing the total welfare of the family members. The child needs special protection. That protection should not, however, extend to small gains in the child's welfare achieved at the expense of large losses in parental welfare." Elster 1987 *University of Chicago Law Review* 1, 20.

The interests of the children are merely given the priority necessary to balance their greater vulnerability and prevent their subjugation to objects instead of bearers of their own rights. As a result of this, it might be argued that even if the interests of the parents are not ignored, prioritising the interests of children in this way infringes on the right to equality guaranteed by the Constitution in section 9. However, the right to equality is not encroached upon when a substantive approach to equality requires the formally unequal treatment of persons. After all, only unfair discrimination is prohibited by the Constitution. Very early in the new Constitutional dispensation, the Constitutional Court made it clear that differentiation or fair discrimination is allowed. See *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC), 1998 (1) SA 300 (CC). See further Du Toit 2002 *TSAR* 46-59, 526-540.

¹³³ *McCall v McCall* 1994 (3) SA 201 (C).

¹³⁴ Sec 9(2) of the Children's Bill states, "In all matters concerning the child the standard referred to in section 28(2) of the Constitution that the child's best interests is of paramount importance, must be applied. What is in the best interests of a child must be determined with reference to section 10 of this Act." Sec 10 sets out a comprehensive list of factors that must be taken into consideration where relevant.

¹³⁵ *Supra*.

¹³⁶ This is evident from the objectives of the Act which implies recognition of the family as the basic unit of society. See Chapter Six section 5 below.

¹³⁷ For instance, the child has the right to family life and not to be separated from his family or primary care-giver (sec 16(1)), and should separation be in his or her best interests, the child has the right to maintain a personal relationship with the parent or care-giver (sec 16(2)).

Two quotes may serve as proper conclusion to the discussion and evaluation of the values of and criticism against the best interests principle:

“It is ironic that, despite the profundity of these criticisms, they actually reinforce the stronghold of the paramountcy principle, since, if it is considered desirable to retain the paramountcy principle in the face of these practical difficulties, the implication is that the principle must theoretically be unrivalled.”¹³⁸

“At the end of the day, the thing that annoys me most about the welfare test is that, for all its flaws, I can’t think of anything better.”¹³⁹

5 “Judicial functions in the face of indeterminacy”¹⁴⁰

5.1 Introduction

Mnookin explains that the application of the best interests of the child is in effect merely the making of a rational choice by the decision-maker.

“The decision-maker specifies alternative outcomes associated with different courses of action and then chooses the alternative that “maximizes” his values, subject to whatever constraints the decision-maker faces.”¹⁴¹

In the context of a decision affecting a child, the commitment to such child’s welfare and best interests is the “value” that is to be maximized, while the “constraints” are obviously the problems associated with this principle, in particular, its indeterminacy. The problem therefore does not lie with the choice itself, but with the context in which that choice is to be made. While most would agree that children’s welfare and interests should be paramount, nobody really knows what these interests are or demand.¹⁴² The lives of people, both that of the child and the parents or other adults involved, are at stake.¹⁴³ The decision will not only affect their present situation, but will have a lasting impact on their futures as well. One need only to look at the results

¹³⁸ Reece 1996 *Current Legal Problems* 267, 273.

¹³⁹ Norrie 2002 *SALJ* 623, 633.

¹⁴⁰ This phrase is borrowed from the seminal work on the indeterminacy of the best interest principle by Robert H Mnookin. “Child custody adjudication: Judicial functions in the face of indeterminacy” 1975 *Law and Contemporary Problems* 226. The following section will draw extensively on this work as well as the work of Jon Elster. “Solomonic judgments: Against the best interest of the child” 1987 *University of Chicago Law Review* 1 and Jacqueline Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 *THRHR* 95.

¹⁴¹ Mnookin 1975 *Law and Contemporary Problems* 226, 256.

¹⁴² Reece 1996 *Current Legal Problems* 267, 271. See further Eekelaar *Family Law and Social Policy* 76; Cretney and Masson *Principles of Family Law* 526; Parker 1994 *International Journal of Law and the Family* 26; Van Bueren *International Law on the Rights of the Child* 45; Elster 1987 *University of Chicago Law Review* 1, 11; Mnookin and Kornhauser 1979 *Yale Law Journal* 950, 957.

¹⁴³ Elster 1987 *University of Chicago Law Review* 1, 2.

of studies of post divorce families to realize that the responsibility resting on the decision-maker is indeed daunting.¹⁴⁴

5 2 The making of a rational choice

For a determinate answer in deciding any problem four conditions have to be satisfied:¹⁴⁵

- a) All the options must be known.
- b) All the possible outcomes of each option must be known.
- c) The probabilities of each outcome must be known.
- d) The value attached to each outcome must be known.

On face value, these requirements seem very simple and easily met. However, the following discussion will reveal that, given the reality of family relationships after marital breakdown, in the context of a custody dispute, not one of these conditions are likely to be satisfied.

5 2 1 Knowing all the options

Though it is technically possible for a decision-maker to know all the feasible options in a decision on the best interests of the child, each of the options is not necessarily available to him.¹⁴⁶ The decision-maker would, however, consider the first requirement of a rational choice to be satisfied by being fully informed, not on all the options, but on the limited options that are available to him. He should also be furnished with as complete an account as possible of the child's background and present circumstances, his or her interests, emotional and intellectual development, health, the relationship between the child and both parents and any other relevant information.¹⁴⁷ Guided by this knowledge of who the child is and what the available

¹⁴⁴ See in general Wallerstein and Kelly *Surviving the Breakup: How children and parents cope with divorce*; Thompson and Amato *The Post Divorce Family*; Wallerstein and Blakeslee *Second Chances*; Folberg (ed) *Joint Custody and Shared Parenting*.

¹⁴⁵ Mnookin 1975 *Law and Contemporary Problems* 226, 256-262; Elster 1987 *University of Chicago Law Review* 1, 12; Heaton 1990 *THRHR* 95; 95.

¹⁴⁶ Mnookin 1975 *Law and Contemporary Problems* 226, 257-258; Heaton 1990 *THRHR* 95; 95; Parker 1994 *International Journal of Law and the Family* 26, 29-30.

¹⁴⁷ "It is beyond the wit of man to imagine every possible circumstance that may arise and to provide for every such circumstance by a single defined rule of law. Some of the abortive attempts to do this are evidence of human pride attempting to dictate to posterity and are not evidence of human wisdom." Per Price J in *Myers v Leviton* 1949 (1) SA 203 (T) 209. Heaton 1990 *THRHR* 95; 95. On how the

options are, a choice has then to be made for the alternative that would maximize what is best for the particular child or comes closest to the ideal.¹⁴⁸

5 2 2 Possible outcomes of each option

The second requirement likewise can never be met in reality – it is entirely impossible to know what the outcome of each option would be.¹⁴⁹ After all, the outcome of a specific choice or act not only rests on unpredictable human behaviour, but on the future development of the universe itself. Elster¹⁵⁰ admits that this objection, though entirely valid, logically speaking, is in a sense too strong. It is an essential part of life that unknown and essentially unknowable possibilities accompany each option of each decision.¹⁵¹ In making a choice one therefore assumes that the unknowable factors on each side cancel each other out and proceeds with the decision based on those circumstances and outcomes that can be known.¹⁵² Thus, the decision-maker should not focus on all the things he or she is intrinsically unable to know, but should focus upon the outcomes of the options in consideration, which might probably and plausibly happen.

decision-maker or court could gather this type of information, see 5 2 5 Assistance of the Family Advocate below.

¹⁴⁸ “I regard it as axiomatic that the ideal environment for the upbringing of a child is in the home of loving, caring and sensible parents, her father and her mother. When the marriage between father and mother is at an end, that ideal cannot be attained. When the court is called upon to decide which of two possible alternatives is then preferable for the child’s welfare, its task is to choose the alternative which comes closest to that ideal.” Per Glidewell LJ in *C v C* [1991] FLR 223, 228.

“Die keuse-beslissing wat deur ‘n hofuitspraak gedoen word, kan nooit die betrokke jeugdige ... se geluk verseker nie, maar kan slegs die maksimale sekuriteitsgevoel en beste vormingsvooruitsigte vir die kinders verseker.” Per Styen AJ in *Willers v Serfontein en ‘n Ander* 1985 (2) SA 591 (T) 595C. Mnookin 1975 *Law and Contemporary Problems* 226, 255.

¹⁴⁹ Heaton 1990 *THRHR* 95; 95; Mnookin 1975 *Law and Contemporary Problems* 226, 257-258.

¹⁵⁰ Elster 1987 *University of Chicago Law Review* 1, 12-13.

¹⁵¹ Even if a considerable amount of information on the child were available to the decision maker, Coons and Mnookin suggest that it would still be impossible to predict the possible outcomes of each option because “[P]resent-day knowledge about human behaviour [including human reactions] provides no basis for the individualized prediction required by the best interests standard. There are numerous competing theories of human behaviour, based on radically different conceptions of the nature of man, and no consensus exists that any one is correct. No theory is widely considered capable of generating reliable predictions about the psychological and behavioural consequences of alternative decisions for a particular child.” Coons and Mnookin “Toward a theory of children’s rights” in Baxter and Eberts (eds) *The Child and the Courts* 395.

¹⁵² “The ensuing decision, although not ideally rational from the point of view of an omniscient observer, will at least be as rational as can be expected.” Elster 1987 *University of Chicago Law Review* 1, 12-13.

5 2 3 Probability of outcomes

It is obvious that for each decision the judge may make, there are various possible outcomes. Therefore it is necessary to assess the probability of each outcome.¹⁵³ This assessment constitutes an evaluation of the possible benefits and harms that are associated with each probable outcome. If the probabilities can be assessed with a matter of certainty, based on the “normal” course of human behaviour and one can attach a value to the outcomes, the one with the greatest benefit to the child will be the one in its best interests. However, if it is impossible to attach probability to the outcomes, Elster suggests “the natural response is to play it safe”. This means that custody should be given to the parent with whom the child’s worst conceivable future will be best. In practice this would amount to rewarding¹⁵⁴ the parent with the greatest emotional and financial stability with custody of the child.¹⁵⁵

5 2 4 Attaching value to each outcome

The final hurdle in the path of making a rational choice is the impossibility to attach values to each of the probable outcomes.¹⁵⁶ The problem concerning the value attached to each outcome exists on two levels.

The first and obvious problem is that different people will attach different values to particular outcomes. For instance, the value which the child itself might attach to short term comfort or immediate gratification, would be more than that which the parent will attach to it. However, since children do not have enough experience to attach a realistic value to a probable outcome, they should perhaps not be the ones to

¹⁵³ Mnookin 1975 *Law and Contemporary Problems* 226, 258-260; Elster 1987 *University of Chicago Law Review* 1, 13-16.

¹⁵⁴ There are definite problems with this approach. Children are not the property of the parents and should not be “rewarded” to one as if they were. Mason, however, suggests that, though children are undeniably not “economic assets” the fact that parents fight over custody implies that children are seen as “emotional assets” and parents consider themselves as having “emotional property rights” over their children. Mason *The Custody Wars* 3-5, 69-92.

¹⁵⁵ Elster 1987 *University of Chicago Law Review* 1, 13.

Goldstein, Freud and Solnit suggest that predictions of the least detrimental placement for a child should be made in accordance with the child’s sense of time, that is on a short-term basis. Their main consideration is to provide the child with an opportunity to feel wanted and to maintain a relationship with a psychological parent on a continuous basis. They advocate strongly for acceptance of the law’s incapacity to supervise interpersonal relationships, as well as the limits of knowledge, which prevents the making of long-range predictions. Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* 47-54.

¹⁵⁶ Elster 1987 *University of Chicago Law Review* 1, 14; Mnookin 1975 *Law and Contemporary Problems* 226, 260-261.

assign the value.¹⁵⁷ Their preferences and wishes will surely have to be taken into account,¹⁵⁸ but it is important not to assign the final say to them, as this would be placing too great a responsibility on their young shoulders. Moreover, if the child were made responsible for the choice, it would substantially injure his or her relationship with the non-custodial parent.¹⁵⁹

If one should decide that the person to attach the values in every case should be the decision-maker the second problem is the concept of value itself. How is the value or utility to be determined? Mnookin lists a variety of questions in this regard:¹⁶⁰ should the judge assign value based on a short, medium or long term perspective?¹⁶¹ Should he decide by thinking about what decision the child, as an adult looking back, would have wanted made?¹⁶² Should the child's happiness, spiritual or religious training, interpersonal relationships or desire for stability and security be the most important values? Which set of values should inform the decision? Moreover, a decision-maker will inevitably be influenced by his or her personal value-system, preferences and prejudices as well as those of the society of which he or she forms part.¹⁶³

Thus it is clear that the determination of the best interests of the child by making a rational choice rests in fact largely on speculation, in which the prevailing theories and points of view of the child and judge's community form a major part.¹⁶⁴

5 2 5 Assistance of the Family Advocate

For a judge to make a decision that is truly in the best interests of the child, he or she needs to be fully informed on the facts and circumstances of the particular family

¹⁵⁷ Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 170. The judge might correct the child's tendency to seek immediate gratification, but that is morally objectionable, as it constitutes paternalism. Elster 1987 *University of Chicago Law Review* 1, 14.

¹⁵⁸ Art 12 of the United Nations Convention on the Rights of the Child affords the child the right to express his own views and preferences in a custody determination. The weight attached to those wishes will depend on the age and maturity of the child.

¹⁵⁹ Mnookin 1975 *Law and Contemporary Problems* 226, 285.

¹⁶⁰ Mnookin 1975 *Law and Contemporary Problems* 226, 260.

¹⁶¹ See 5 3 below.

¹⁶² Given the propensity of children to grow up and change, it is not realistic to assume that a judge can make a prediction on the future preferences of the child. See 5 5 4 below.

¹⁶³ See section 6 below.

¹⁶⁴ Bromley and Lowe *Bromley's Family Law* 317; Maidment *Child Custody and Divorce* 149; Heaton 1990 *THRHR* 95, 96.

involved.¹⁶⁵ The majority of divorce cases, however, are undefended and the judge is seldom provided with enough information to really determine which parent would be the better custodian.¹⁶⁶

To assist the court in the decision-making process the office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act.¹⁶⁷ The court may order any investigation which it deems necessary to assess the arrangements made for the children.¹⁶⁸ Even if the court does not order an investigation the Family Advocate may approach the court for authority to make an enquiry.¹⁶⁹ The reports and recommendations by the Family Advocate are usually of great assistance to the court, but though courts often endorse these reports, they are not binding on the court.¹⁷⁰ The Family Advocate is assisted in her duties by Family Counsellors.¹⁷¹

It may seem that the Family Advocate is in a better position than the judge to make an informed decision on the best interests of the child because she has more information

¹⁶⁵ Some of the most peculiar traits of a decision in the field of family law are "much reliance on expert evidence, much attention to the detailed particulars of each cases and much untrammelled discretion by decision-makers". Dewar 1998 *Modern Law Review* 467.

¹⁶⁶ "[T]he court has ordinarily in such cases no material form which to judge whether the children would be better off with the plaintiff or the defendant beyond the fact that the latter has not taken the trouble to claim the custody." Per Shreiner JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) 145.

¹⁶⁷ Act 24 of 1987. In terms of the Divorce Act 70 of 1979 a degree of divorce may be withheld until, if the Family Advocate has made an enquiry into the provisions made for the children, the court have considered the report and recommendations of the Family Advocate (sec 6(1)(b)).

¹⁶⁸ Sec 6(2) of the Divorce Act, read with 4(1) of the Mediation in Certain Divorce Matters Act. This may entail the hearing of expert evidence from psychologists, psychiatrists or any other person who is familiar with the child, its circumstances and peculiar needs. Van Heerden *et al Boberg's Law of Persons and the Family* 515 n73.

¹⁶⁹ It has been suggested that the Family Advocate should always institute an enquiry where it appears that: there are serious problems concerning the access of the children; there is an intention not to place young children under the custody of their mother; there is an intention to separate siblings, by awarding custody of one to the mother and of another to the father; there is an intention to award the custody of the child to a person other than the child's parents; there is an intention to make an arrangement in respect of the custody or access which is *prima facie* not in the interests of the child." *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T) 116F-I.

¹⁷⁰ Though the recommendations are not binding, judges invariably follow them. Glasser 2002 *THRHR* 74, 80. See further Van Heerden *et al Boberg's Law of Persons and the Family* 520-521 n94 and 95 and the source material cited there.

¹⁷¹ On the duties and functioning of the Family Advocate in general, see Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* Ph D Dissertation, Rhodes University 1994; Van Heerden *et al Boberg's Law of Persons and the Family* 515-526; Burman and McLennan "Providing for children? The Family Advocate and the Legal Profession" in Keightley (ed) *Children's Rights* 69; Mowatt "Divorce mediation – the Mediation in Certain Divorce Matters Act 1987" 1988 *TSAR* 47; Schäfer "Alternative divorce procedures in the interests of children: Some comparative aspects" 1988 *THRHR* 297; Burman and Rudolph "Repression by mediation: Mediation and divorce in South Africa" 1990 *SALJ* 251; Bonthuys "Epistemological envy: legal and psychological discourses in child custody evaluations" 2001 *SALJ* 329; Glasser "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74; Glasser "Taking children's rights seriously" 2002 *De Jure* 223.

at her disposal. However, though the first requirement of the rational choice model may be fulfilled, the future is still entirely unknown and unpredictable. She must attempt to specify the alternate outcomes, by prediction if necessary,¹⁷² attach a value to each and furnish the court with a recommendation. And, though it might be very difficult to know what is best for a child when the scales in favour of both parents are equally balanced,¹⁷³ there is no lack of consensus on what is very bad for children. Some, especially short-term, predictions may therefore be made with confidence.¹⁷⁴

5 3 Short, medium or long term perspective

Custody determinations boil down to predictions of the future, but due to the inherent indeterminacy and speculative value of the best interest principle, confident predictions are in most cases beyond the power of any judge or decision-maker. Moreover, even if a prediction were possible, there is a lack of clear-cut consensus about the values that are to be used to determine what is the best or least detrimental alternative.¹⁷⁵ As shown in an earlier part of this Chapter both the South African judiciary and legislature have attempted, by compiling lists of factors to be taken into account in the determination of the best interests of the child, to establish a better consensus on the criteria that underlie the decision.

However, even if there is consensus on the criteria, the question remains whether the best interests of the child should be viewed from a short, medium or long-term perspective.¹⁷⁶ Sometimes a court may be faced with a decision where the immediate effect might be disruptive to the child and place the child under some stress, but, in the light of the long-term advantages that are expected to result, the court may consider it in the best interests of the child. In *Petersen v Kruger*¹⁷⁷ the court had to decide whether a two-year-old boy who was switched at birth in the hospital, should be returned to his natural parents. Although the boy was attached to the parents he had

¹⁷² "These predictions would necessarily involve estimates of not only the child's mutual relationship with the custodial parent, but also his future contacts with the other parent and siblings, the probable number of visits by the non-custodial spouse, the probable financial circumstances of each of the spouses, and a myriad of other factors." Mnookin 1975 *Law and Contemporary Problems* 226, 257. See further Mnookin and Kornhauser 1979 *Yale Law Journal* 950, 957.

¹⁷³ Elster 1987 *University of Chicago Law Review* 1, 16.

¹⁷⁴ Mnookin 1975 *Law and Contemporary Problems* 226, 261.

¹⁷⁵ Mnookin 1975 *Law and Contemporary Problems* 226, 229.

¹⁷⁶ Coons and Mnookin "Toward a theory of children's rights" in Baxter and Eberts (eds) *The Child and the Courts* 395; Heaton 1990 *THRHR* 95, 96.

¹⁷⁷ 1975 (4) SA 171 (C).

been with since birth and the disruption of the *status quo* would inevitably have been somewhat traumatic, the court decided that it would be in his best interests to be returned to his biological parents. The court based its decision on the fitness of the biological parents to take care of the boy's physical, moral or psychological welfare, as well as on the balancing of the immediate and future advantages of such a step.¹⁷⁸

The answer on the time question lies in this type of balancing. One cannot focus on the short or medium-term interests without bringing the (predicated) long-term effects into account as well.¹⁷⁹ Eekelaar suggests that, because children often lack the information or ability to appreciate what would serve them best, one should make an imaginative leap and guess what the child, looking back as a reasonable adult, would have chosen for himself.¹⁸⁰ With the greater maturity and knowledge that comes with adulthood, most people would probably have wanted the focus to be on their long-term interests, instead of short-term gratification. On the other hand, Elster, draws attention to the fact that it is not realistic to assume that a judge would be able to predict the future preferences of a child. Moreover, the circumstances in which a child grows up greatly influence the development of reasonable and mature preferences. The preferences the child has as adult therefore, largely depend on the initial choice that was made.¹⁸¹ He suggests that one should rather attempt to achieve the more formal goal of protecting the child's opportunity and ability to make choices.

Though these two authors disagree on whether to approach the question from the child's or the child-as-adult's point of view, both approaches would probably result in the same answer to the question of what constitutes a child's best interests.¹⁸²

¹⁷⁸ *Petersen v Kruger* 975 (4) SA 171 (C) 174D-E.

¹⁷⁹ Heaton submits that a weighing of interests should take place. "No child's best interests can, or should be, established with reference merely to the short or medium or long term. In the search for the child's best interests attention ought to be paid to the short-term, medium-term and long-term consequences a particular decision would have for the child. These consequences should all be taken into account to ensure that the decision is taken that, most probably, best serves the interests of the child in the specific case, always bearing in mind that limited options are available to the court." Heaton 1990 *THRHR* 95, 97.

¹⁸⁰ Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 170.

¹⁸¹ Elster 1987 *University of Chicago Law Review* 1,14.

¹⁸² The scope of the term "interests" is wide and it encompasses the basic, developmental and autonomy interests of the child. "The child needs physical health and material well-being to assure survival and development of his potentialities, and emotional care as a condition for autonomous choice. Whatever the interests of the child ultimately turn out to be, he has an antecedent interest in being able to choose without material or physical constraints." Elster 1987 *University of Chicago Law*

5 4 The best interests principle approached from different perspectives

5 4 1 Subjective or objective point of view

The best interests of the child can be approached from either a subjective point of view, as opposed to the objective point of view.¹⁸³

When approached from the subjective point of view, the best interests of the child would be determined by the subjective opinion of one or more of the people involved in the matter, for instance the child or the parents. The individualistic character of the principle seems to suggest that the best interests should automatically be approached from a subjective viewpoint. However, the child and family form part of a wider community whose views cannot be ignored. In practice, however, the objective views of the community are in fact often ignored because there is so little consensus on what the best interests of a child would entail.

Like so many other aspects of the best interests principle the answer does not lie in choosing either one or the other, but instead in a combination of the two and a balancing of the one with the other.

“The test of the welfare of the child has to be determined having regard to contemporary social standards, that is, it cannot be a totally subjective test based upon the views or standards of the individual parent [or child or other interested party], but objective at least in the sense of falling within the wide range of existing social standards.”¹⁸⁴

The influence which the values of the community, and the decision-maker as representative of the community may have on the interpretation of the best interests of children in general, will be considered in more detail below.

5 4 2 The parents’ or child’s perspective

From the perspective of the parents, child custody disputes may on the face of it seem like any other issue of distributive justice after divorce.¹⁸⁵ In the same way that economical assets of the marriage have to be distributed on divorce, the children, as

Review 1, 15. See further Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 170; Heaton 1990 *THRHR* 95, 96.

¹⁸³ Heaton 1990 *THRHR* 95, 97.

¹⁸⁴ This statement was made by Fogerty J in the Australian case *In the Marriage of Homan* 1976 FLC 90-024, as quoted by Heaton 1990 *THRHR* 95, 97.

¹⁸⁵ Elster 1987 *University of Chicago Law Review* 1, 4.

emotional assets of the parents, must be allocated to either one or the other.¹⁸⁶ A child, however, is not simply an object¹⁸⁷ but is predominantly a person in his or her own right and has rights and interests in the outcome of the decision.

From the point of view of the child the best interests principle is focused on protecting the child's opportunity and ability to make choices. Application of the principle should, therefore, result in arrangements that would best promote the child's attainment of majority and the maximum of his or her potential, while respecting his autonomy.¹⁸⁸ While keeping in mind that children are not often, or even usually, the best judges of what is good for them and are therefore in need of guidance and protection against immediate danger,¹⁸⁹ a child is afforded the right to make his own mistakes.¹⁹⁰

The advantage of approaching the principle from the child's point of view is that, because the fitness of the parents determines the custody award, it does not yield a preference of one parent over the other based on gender. However, this approach does not provide an answer for those circumstances where neither parent is patently unfit or financially or emotionally handicapped.¹⁹¹

5.5 Conclusion

The preceding discussion attempted to provide some insight into how a decision based on the best interests of the child can be made in spite of the inherent indeterminacy of the principle and the unpredictability of the future. Though an interesting and enriching process, the discussion is actually moot and academic. The law does not only exist on paper and in the mind of academic writers, it is foremost a living system

¹⁸⁶ Mason suggests that children are the emotional assets of their parents who, therefore, have "emotional property rights" in their children. Mason *The Custody Wars* 3-5, 69-92.

¹⁸⁷ Though the use of the word "object" in relation to the child may seem onerous, it should be noted that Elster is arguing that custody determinations "superficially ... look like other distributive issues". He concludes by making it clear that "[t]o treat the child as a consumption good for the parents, by deciding on child custody solely according to the needs or rights of the parents, would violate the Kantian principle that persons ought to be treated as ends in themselves, not merely as means for other people". According to him, this "intuition" lies at the root of the best interests of the child principle. Elster 1987 *University of Chicago Law Review* 1, 4-5.

¹⁸⁸ Elster 1987 *University of Chicago Law Review* 1, 14-15.

¹⁸⁹ MacCormick "Children's rights: A test case for theories of right" 1976 *Archiv für Rechts- und Sozialphilosophie* 305, 316 as quoted by Bates "Some theoretical aspects of modern family law" 1983 *SALJ* 664, 674.

¹⁹⁰ Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 174-182.

¹⁹¹ Elster 1987 *University of Chicago Law Review* 1, 14-15.

practised and applied by courts and decision-makers. Despite its indeterminacy courts seem to have no difficulty in applying the best interests principle. It is after all not the only legal concept that is indeterminate or which involves a process of balancing different interests or factors.¹⁹² No South African judge has ever set out the process of making a rational choice as discussed above. In fact, they often pronounce a case on the best interests of the child without providing any clarity on how the decision was reached or which factors were taken into account. Moreover, with the guidelines laid down in *McCall v McCall*¹⁹³ and the statutory guidelines of the Children's Bill much of the indeterminacy of the concept has been alleviated. It is important to note, however, that neither of these lists proposes to be a *numerus clausus* of criteria. This is because the indeterminacy or inherent flexibility of the best interests principle is precisely that which makes the principle so valuable. In its flexible state it can be applied across a very broad scope of decisions with proper attention to each one's unique facts and circumstances. Furthermore, it is impossible to give a fixed content that is valid for all communities at all times.¹⁹⁴ The principle needs to adapt and reinvent itself with the influences of traditions, social context and culture if it is to remain of paramount importance in all matters regarding children. It is to these influences that the discussion turns next.

6 Influence of social context, cultural values and the identity of the decision-maker

6 1 Introduction

As was mentioned in the discussion on the value-laden nature of the best interests of the child principle above,¹⁹⁵ it is anything but static.¹⁹⁶ It has the inherent, deliberate, indeterminacy which allows current social and cultural views to be incorporated into

¹⁹² The *boni mores* and the reasonable man tests applied to determine unlawfulness in the law of delict are also unavoidably vague and indeterminate. See Van der Merwe and Olivier *Die onregmatige daad* 58; Heaton 1990 *THRHR* 95, 98. In the law of contract the rule that a contractual term is void *ab initio* if it was *contra bonos mores*, is also a vague and indeterminate term. See Ferreira and Robinson "Reflections on the *boni mores* in the light of Chapter Three of the 1993 Constitution" 1997 *THRHR* 303.

¹⁹³ 1994 (3) SA 201 (C). See the discussion in section 2 above.

¹⁹⁴ Heaton 1990 *THRHR* 95, 98.

¹⁹⁵ See section 4 3 above on the subjectivity and value-laden nature of the best interests principle.

¹⁹⁶ "Die begrip 'welsyn van die kind' is nie 'n statiese begrip nie. Dit verander met die waardesisteen en kennis van die mens." Labuschagne 1996 *TSAR* 577, 579.

the law and inform decisions based on a child's best interests.¹⁹⁷ Aside from the influences of the social context and cultural values which will be attended to below, the identity of the decision-maker or judge¹⁹⁸ plays an important role in the interpretation that will be given to the best interests principle.

6 2 Identity of the decision-maker

In the same way that custody decisions are not made in a vacuum,¹⁹⁹ the decision is not made by an automaton, but by a person with a specific background and upbringing, emotional baggage, preferences and prejudices.²⁰⁰ Judges need to put themselves in the shoes of the child in order to determine what would be in that child's best interests. However, they must realize,²⁰¹ and admit to the fact, that their subjective beliefs and convictions will unconsciously but inevitably influence their decision.²⁰² This is especially true when they are called upon to make a custody determination.²⁰³ These decisions are widely regarded as among the most difficult for

¹⁹⁷ "The 'welfare of the child' principle is therefore now a deliberately indeterminate standard incorporated into the law in order to allow current social and cultural views about the needs of children, and also, it must be said, of their parents to be embodied in the legal decision-making process surrounding divorce." Maidment *Child Custody and Divorce* 3.

¹⁹⁸ According to Montgomery, "[D]ecisions are an exercise of power rather than logic and ... we should be more concerned with who makes decisions than how they are reached." Montgomery 1989 *Oxford Journal of Legal Studies* 395, 402.

¹⁹⁹ Bonthuys 1994 *Stell LR* 298, 299; Alston 1994 *International Journal of Law and the Family* 1; Parker 1994 *International Journal of Law and the Family* 26; Rwezaura 1994 *International Journal of Law and the Family* 82; Armstrong 1994 *International Journal of Law and the Family* 151; Banda 1994 *International Journal of Law and the Family* 191; Van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* 8.

²⁰⁰ "Judges' decisions may be informed by their middle- and upper-class backgrounds, by their patriarchal values, or simply by their personal prejudices." Reece 1996 *Current Legal Problems* 267, 267.

²⁰¹ Judges "no less than others, are vulnerable to self-deception, wishful thinking and other forms of motivated irrationality." Elster 1987 *University of Chicago Law Review* 1, 29.

²⁰² The judge has the important task to decide not only which factors are relevant, but also has to decide on the relative weight of a specific factor. Bonthuys 1997 *SAJHR* 622, 623; Nöthling-Slabbert "Child custody and race in the light of the new South African Constitution: A comparative approach" 1995 *Comparative and International Law Journal of South Africa* 363, 381; Pfenning 1996 *Journal of Juvenile Law* 117, 118-119.

²⁰³ The fact that judges are influenced by their subjective opinion and experience is, however, certainly not limited to custody decisions. In *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) 316F-H the judge held that the common-law duty of maintenance should extend to same-sex life partners. Apparently the core of the judgement was the judge's own "experience and knowledge of several same-sex couples who have lived together for years. The stability and permanence of their relationship is no different from the many married couples I know." For a full discussion of the case, see Bonthuys "The South African Bill of Rights and the development of family law" 2002 *SALJ* 748, 755.

a judge to make and bring forth more of their emotion and personal background than any other case.²⁰⁴

The decision of Flemming DJP²⁰⁵ in *Van Rooyen v Van Rooyen*²⁰⁶ is a prime example of the influence of a judge's personal convictions and opinions. This case concerned the application of a mother who participated in a lesbian relationship for an order defining her rights of access to two minor children.²⁰⁷ The court order was so intrusive that it basically forced her to choose between access to her children and continuance of her relationship with her life-partner.²⁰⁸ The judgement is permeated with barely concealed homophobia and considerations that homosexuality is abnormal and constitutes wrong signals on sexuality to the children. Flemming DJP dismissed observations about the mother and homosexuality in general by the family counsellor, Mrs Garb, as being her subjective views and therefore irrelevant.²⁰⁹ However, he continued in the following way,

“She states that homosexuality is no longer regarded as a mental illness or as a sin. I accept the former but nobody has brought that in issue so I do not know why she comments on that.

²⁰⁴ Atkinson “Criteria for determining Joint custody” 1984 *Family law Quarterly* 1, 3.

²⁰⁵ In *Greenshields v Wyllie* 1989 (4) SA 989 (W) 899D-G Flemming (then judge) made a custody award that was contrary to the children's expressed preferences. He justified his decision by stating, “Children come into storms, they come into upheavals. At the age of 12 and 14 it is particularly difficult to know who you are and where you are going and where you belong. Everyone knows that. I may add that I have four daughters. It is understandable that they may resent certain things, that they may dislike certain things, that they may not like ... even their mother or grandmother and at times not even their best boyfriend. That is normal. But the court also knows that as time goes by their own perspective changes. ... For these reasons, because the court knows that children grow up, ... that their needs change, a court is not inclined to give much weight to the preference of children of 12 and 14.” This is contrary to the approach of King J in *McCall v McCall* 1994 (3) SA 201 (C) 208A-H where the court gave a great measure of attention to the preference of the boy, aged twelve, to be placed in his father's care. The court affirmed the principle of Art 12 of the United Nations Convention on the Rights of the Child (1989) that the determining factor for the consideration of a child's preference should not be age, as Flemming seems to think, but the maturity and intellectual development of the child.

²⁰⁶ 1994 (2) SA 325 (W).

²⁰⁷ For a full discussion on this case, see Bonthuys 1994 *Stell LR* 298. See further Steyn “From closet to Constitution: The gay family rights odyssey” 1998 *TSAR* 97, 114.

²⁰⁸ “She will have to make the choice between persisting in those activities or part thereof and having access on a wider basis than would otherwise be permitted.” See *Van Rooyen v Van Rooyen* (*supra*) 329F. The order entailed that she was to refrain from giving the children any “wrong signals” about sexuality and the children would only be allowed to sleep over with her on weekends provided that she did not share a room with her partner. When the children came to visit for longer periods over alternate school-holidays, the partner was not allowed to even sleep under the same roof as applicant and the children.

²⁰⁹ “It is quite clear that Mrs Garb has her own sense of values in the ascertainment of what should be dealt with or what should be ordered in regard to these parties.” 327H.

As to whether it is a sin, I defer to her view but perhaps I would prefer to leave that to the Heavenly Father to decide.”²¹⁰

It therefore seems that, even though he made the statement that “neither her nor [his] subjective views are what count”²¹¹ his perception of what would be in the true best interests of the children were strongly coloured by his personal views regarding the abnormality of a homosexual life-style.²¹²

The factors used to determine the best interests of the child will therefore not only reflect the values and prejudices of the decision-maker, but those of the community as well and those will inevitably vary over time,²¹³ space and culture.²¹⁴

6 3 Social context

Social values change²¹⁵ and these changes influence the law and legal principles.²¹⁶ For instance, due to a major policy change based on altered perceptions of social reality,²¹⁷ the sexual orientation of a person has changed from being a ground for the persecution and social stigmatisation of someone, to a constitutionally entrenched ground of non-discrimination.²¹⁸ In the same way, over the last two centuries,²¹⁹ the

²¹⁰ 327F.

²¹¹ 327H-I.

²¹² That he perceived homosexuality as abnormal is evident from his explanation about the “wrong signals” which the children would be exposed to, which are “given by the fact that the children know that, contrary to what they should be taught as normal or what they should be guided to as be correct (that is a male and a female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared. It is detrimental to the child because it is the wrong signal.” 329J-330A.

²¹³ In the context of the child’s right to freedom of religion, conscience, thought, belief and opinion, Fabricius AJ said, “Views have differed in the past on this topic and will no doubt differ in the future” *Kotze v Kotze* 2003 (3) SA 628 (TPD) 630J-631A.

²¹⁴ Bonthuys 1997 *SAJHR* 622, 623.

²¹⁵ General ideas in a society or community will form part of the local convention on how the best interests standard should be operated. Parker 1994 *International Journal of Law and the Family* 26, 39. See also Rosettenstein 1984 *SALJ* 483-498.

²¹⁶ There is a constant interaction between law and social behaviour and opinion. In the same manner that social opinion can influence law, social behaviour may be influenced by law. Agell “Should and can family law influence social behaviour?” in Eekelaar and Nhlapo *The Changing Family* 125, 125.

²¹⁷ Steyn 1998 *TSAR* 97, 97.

²¹⁸ Sec 9(2) of the Constitution Act 108 of 1996.

Visser mentions the extensive publicity which *Van Rooyen v Van Rooyen* (*supra*) received, the demands made for the recognition of gay and lesbian relationships as normal, as well as the admission by a supreme court judge of a homosexual preference and suggests that this is “aanduidend van die skepping van ‘n klimaat ingevolge waarvan die familiereg mettertyd aangepas gaan word...” thus there is a definite perception that the social climate can influence the development of the law. See Visser “Enkele gedagtes oor fundamentele regte en die familiereg” 1995 *THRHR* 702, 704-705.

perception regarding children has changed from focussing on the father's rights over the child and his interests in the child's labour,²²⁰ to children as substantive rights-bearers.²²¹

The most important aspect of the South African social context that will influence decision-making on the best interests principle is the recent movement away from the apartheid system to a Constitutional society based on equality, democracy and freedom.²²² In the field of child law the influence of the Constitution is not limited to the entrenchment of the best interests principle, it definitely has an important influence on its interpretation as well. A telling example is the movement away from the maternal preference rule to a gender-neutral presumption in favour of the parent with the best ability to care for the children.²²³ The starting point in this enquiry is that "Constitutionally ... parents are parents."²²⁴ A full discussion of this development will follow at a later stage,²²⁵ but for the time being it is important to acknowledge the influence which the current age of non-discrimination, equality and the changing roles of men and women has on the interpretation of the best interests principle.²²⁶

²¹⁹ *Maidment Child Custody and Divorce* 100. She mentions the decision in *Re McGrath* [1893] 1 Ch 143 where Lindley LJ said, "the word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being, nor can the ties of affection be disregarded." See further Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 169.

²²⁰ The father's rights and interests, though substantial, were never absolute but subordinate to the greater interests of the community. "Immorality, profligacy, impiety and radical social views, all of which might undermine the child's commitment to the dominant social values, were frequently the bases for denying custody to fathers (sometimes to mothers). The welfare of the child was thus routinely equated with the transmission of conventional social norms; and, of course, one of the most powerful of these norms was that the interests of parents (in practice of fathers) should be enforced." Eekelaar 1986 *Oxford Journal of Legal Studies* 161, 169.

²²¹ Eekelaar 1986 *Oxford journal of legal studies* 170.

²²² The Preamble to the Constitution Act 108 of 1996 declares that the people of South Africa recognizes the injustices of the past and section 1 states: "The Republic of South Africa is one, sovereign, democratic state founded upon the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms; (b) non-racism and non-sexism; (c) supremacy of the Constitution and the rule of law."

²²³ *Van der Linde v Van der Linde* 1996 (3) SA 509(O) 515B-H.

²²⁴ Per Kriegler J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1(CC) par 87.

²²⁵ See Chapter Six below.

²²⁶ Van Heerden *et al* *Boberg's The Law of Persons and the Family* 537-451.

6 4 Cultural values

6 4 1 Introduction

The best interests of the child principle is linked inextricably to the cultural context in which it is invoked.²²⁷ Culture is a very wide term, which encompasses more than one element of human life.²²⁸ It is impossible to discuss all the different cultural influences that might inform the interpretation and application of the best interests of the child in so diverse a society as South Africa. As examples of the cultural influence the following section will briefly concentrate on the African culture, including the influence of race, and the religion of the parties involved.

The Constitution affords every person the right to use the language and participate in the culture of his or her choice as long as these rights are not exercised in a manner inconsistent with other provisions in the Bill of Rights.²²⁹ A court should therefore consider the impact on the welfare of the child of any cultural practices of the parents in a custody assessment. Any cultural practice that is harmful to the child will not be in the child's best interests and will therefore count against the parent practising it.

6 4 2 The influence of African culture on the interpretation of the best interests of the child

Given South Africa's history of apartheid and racial segregation, the first ground on which unfair discrimination is prohibited by the Constitution, is race.²³⁰ However, in determining the best interests of a child, the court must take into account all the relevant factors and interrelated circumstances. The best interests of the child must always relate to the general welfare of the child and the assessment must therefore include all economic, social, moral and religious considerations, which, in South Africa, are often inseparably linked to race.²³¹ Courts will therefore not be able to

²²⁷ Alston 1994 *International Journal of Law and the Family* 1, 5.

²²⁸ Under the term "culture" is understood "the particular system of art, thought, and customs of a society, the arts, customs, beliefs, and all the other products of human thought made by a people at a particular time." *The Longman Dictionary of Contemporary English*. A person's way of life, background and ethnicity are encompassed by the term as well.

²²⁹ Sec 30.

²³⁰ Sec 9(3).

²³¹ "The child's cultural environment is seldom ignored as a criterion in the best interests analysis in South Africa, Canada and the United States. In deciding what is in the interests of the child, the court must take cognisance of all relevant factors... the age, state of health, social and financial position of the parents, the parent's characters and temperaments, their past behaviour towards the child, the age, sex, health and character of the child, the child's educational and religious needs and its personal

ignore the race of either the child or the parents, provided however, that it is relevant to the assessment of the best interests.²³²

In determining the best interests of the African child, the terms and provisions of the African Charter on Human and Peoples' Rights (1981) and the African Charter on the Rights and Welfare of the Child (1990)²³³ must also be taken into account. These Charters invoke certain uniquely African values and traditions.²³⁴ However, the African Children's Charter also affirms adherence to "the principles of the rights and welfare of the child contained in ... particularly the United Nation's Convention on the Rights of the Child".²³⁵ It is therefore clear that all African practices and customs will not be acceptable, but only those that constitute positive traditions and that are reconcilable with the overriding welfare of the child.²³⁶

6 4 3 The influence of religion

At the heart of a person's culture is the religion he or she belongs to. The Constitution recognizes every person's right to freedom of conscience, religion, thought, belief and opinion.²³⁷ In considering the influence of the religion of the parties on the best interests of the child, the judge is in a doubly difficult position: he or she needs to take into account the religious rights of the child and the right to freedom of religion of both parents, and yet he or she must remain completely unbiased. The decision must be made on what is in the child's best interests (also in terms of his religious upbringing, development and other religious rights)²³⁸ and not what the judge perceives as the "better or more moral" religion.²³⁹

preferences. Therefore, what is in the best interests of a specific child is undoubtedly a question of interpretation of many interrelated circumstances. The child's best interests must relate to its general welfare, and the child's well-being must include all economic, social, moral and religious considerations, which, in South Africa, are regrettably often inseparably linked to race." Nöthling-Slabbert 1995 *Comparative and International Law Journal of South Africa* 363, 367.

²³² Heaton 1990 *THRHR* 95, 97.

²³³ Hereafter the African Children's Charter.

²³⁴ See Chapter Three above.

²³⁵ Preamble to the African Children's Charter.

²³⁶ See the discussion in Chapter Three, section 4 3 and 4 4.

²³⁷ Sec 15(1). Other constitutional rights which also come into play when the right to freedom of religion is at stake is the right to freedom of association (sec 18), the right to use the language and participate in the culture of their choice (sec 30) and the right to form religious communities (sec 31).

²³⁸ For a discussion of the instances where the religious convictions of the parents come into conflict with the interests of the child, see Bekink "Parental religious freedom and the rights and best interests of children" 2003 *THRHR* 246.

²³⁹ This was illustrated by the judgement of Milne DJP in *Duncombe v Willies* 1982 (3) SA 311 (D). The question before the court was whether the father, a devout Jehovah's Witness, should be allowed

Certain religious communities have their own systems of religious law. The prime example is Islamic *Shari'ah*. This is a comprehensive system of law governing the conduct and practices of the followers of Islam. However, in case of a conflict between the two systems, South African law will always take precedence over the *Shari'ah*. Besides infringing on the child's right to freedom of religion, it has been argued that this might in certain circumstances even be against the best interests of the child.²⁴⁰

Vahed submits that section 28 of the Constitution should be interpreted in such a way that the best interests of the child should be considered to determine not only the outcome of a dispute, but the system of law which is to govern that dispute.

"A minor's interests might therefore be better served if his or her rights were not judged merely by the perceived superior norms of international and South African law, but from his or her own cultural and religious perspective. ... [I]t would not be difficult to prove that it would be in the Muslim child's best interests that his or her rights be judged by Islamic law and not by South African law or any other system foreign to the child."²⁴¹

6 5 Conclusion

The best interests of the child must be of paramount importance in every matter regarding the child therefore it is imperative that the principle must remain flexible and adaptable. As upper guardian of all children,²⁴² in applying the principle the High Court must allow itself to be influenced by the prevailing social and moral standards.

contact with and access to his minor children whom the custodian mother were rearing as Protestants (in the Anglican and Methodist Churches). The father was attempting to proselytise the children for the Jehovah's Witnesses and indoctrinating them against the religion chosen by their mother. In holding that it was against the interests of the children to expose them to such indoctrination, the judge said, "Without going into detail as to the desirability from a moral point of view, or from a religious point of view, a matter on which I am indeed not qualified to pronounce, of the faith or details of the faith of the Jehovah's Witnesses, it is quite clear that they are, in a number of respects, different from the generally accepted norms of the society in which these children have been born and in which they find themselves at present." See 317A/B-C.

²⁴⁰ For instance the *Shari'ah* lays down detailed principles of succession which are characterized by restrictions on how much a girl may inherit. (A boy is entitled to receive a double share over his sisters.) When taken on face value, these provisions discriminate against girls on the basis of gender and should therefore be invalid. However, if the provisions are interpreted in the context of the cultural and religious perspectives of the Muslim child, what appears to be unequal treatment is in fact fair and just. The smaller right of inheritance is supplemented by an extensive right to maintenance by her father, brother and, in the absence of father or brother, further removed male relatives. Vahed "Should the question: 'What is in a child's best interests?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim child" 1999 *Comparative and International Law Journal of South Africa* 365, 366.

²⁴¹ Vahed 1999 *Comparative and International Law Journal of South Africa* 365, 370, 374-375.

²⁴² See Chapter Five below.

It must consider all factors relevant to the interests of the child, including considerations of race, culture and religion. However, the court must have sound legal or scientific authority for the weight it attaches to each of these factors and guard very carefully against merely duplicating popular myths and prejudices to the detriment of the child.²⁴³

7 Conclusion

In this Chapter attention was paid to the nature of the best interests principle and the value and advantages thereof, as well as the criticisms against it. The definitive characteristic of the principle is its vagueness and indeterminacy. In the discussion it was shown how this is simultaneously the greatest advantage and the greatest drawback of the principle. It ensures the flexibility and adaptability of the principle, but largely complicates its application and interpretation.

Though South African judges, like their counterparts in other jurisdictions, are faced with the daunting responsibility of making a decision under a standard that seems unworkably vague, with the guidelines provided by the Cape High Court in *McCall v McCall*²⁴⁴ and the legislature in the new Children's Bill, the indeterminacy has been assuaged. Therefore, instead of lamenting the difficulties surrounding the decision-making process, they can focus on the positive aspects of a flexible legal rule. After all,

“Matters of access and custody ... are largely matters of discretion, adjustment and arrangement, and I should be sorry to see the Court tie its hands by laying down rigid and artificial rules, which would certainly in many cases make it impossible to make just, equitable and rational orders, having regard to the infinite variety of circumstances that must inevitably arise from time to time.

The law should as little be rigid as it should be vague. When too close a definition of the application of principles is attempted, the only effect is to produce the kind of rigidity and formalism that is characteristic of primitive law. A developed system of law avoids too close a definition of detail and is satisfied with broad principles of justice, the detailed application of which must be left to be suited to the infinite variety of circumstances that may arise.

²⁴³ Bonthuys 1994 *Stell LR* 298, 298.

²⁴⁴ 1994 (3) SA 201 (C).

If a particular application of a principle of law in one case is elevated unto a rule that must ever be followed, it will soon be found to work grave injustice in another case where the circumstances are very different and to assume an aspect of unreality and artificiality, and it may not be followed – so that so far from clarifying the law, its only effect is to confuse it.”²⁴⁵

The statements made in this passage are very closely linked with the questions that were posed in the introductory Chapter of this study. Legal principles should be flexible enough to allow for discretion, adjustment and arrangement, but not so vague as to be inapplicable, nor so rigid that they become artificial or confuse the law. In Chapters Two and Three it was established that the best interests of the child principle has been “elevated unto a rule that must ever be followed”, while this Chapter established the undeniable indeterminacy (and flexibility) of this rule. The question now remains whether the principle is workable in all cases or whether it will “be found to work grave injustice in another case”.²⁴⁶ The following two Chapters will endeavour to answer this question by providing a perspective on the context of custody where the principle is applied,²⁴⁷ and exploring the developments in the courts’ interpretation and application thereof in the context of custody.

²⁴⁵ Per Price J in *Myers v Leviton* 1949 (1) SA 203 (T) 209.

²⁴⁶ The truth of this statement will be revealed in Chapter Six. When the courts elevated a certain application of the best interests principle (for instance mother-custody for young children) to a legal rule, it lead to unjust orders against fathers of young children. See Chapter Six, section 3 2 below.

²⁴⁷ Chapter Five will provide perspective on the parent-child relationship in the South African law, with special reference to custody as incidence of this relationship.

CHAPTER FIVE

SOUTH AFRICAN PERSPECTIVE ON THE PARENT-CHILD RELATIONSHIP WITH SPECIAL REFERENCE TO CUSTODY

1 Introduction

The previous Chapters respectively provided the historical, international and theoretical perspectives on the best interests principle. This was necessary to achieve not only a comprehensive understanding of the historical and international development of the best interests principle, but insight into the theoretical implications thereof as well. Without understanding the origins of the principle and the international influences on its development or its theoretical advantages and disadvantages, a meaningful study of the developments in the interpretation and application thereof in South African law relating to custody would be impossible. At various points reference has already been made to the South African law and Constitution but, as this study is primarily concerned with the developments in the interpretation and application of the principle by the South African judiciary in custody disputes, the unique South African perspective on the best interests of the child as applied in this context bears further scrutiny.

Though the best interests of the child are of paramount importance in every matter regarding the child,¹ and the principle therefore governs every aspect of the parent-child relationship, its main evolution has been in the field of custody disputes.² It is widely accepted and acknowledged that decisions regarding custody of children are among the most difficult decisions judges are called on to make. In Chapter Four the difficulties surrounding the decision-making process and the application of the best interests principle were explained. However, as was mentioned in the Introduction, the difficulty is compounded by the variety of custody orders which the court may make. The present chapter will therefore provide a perspective on the context of custody as a component of the parent-child relationship. This sets the scene for the discussion pertaining to the development of the best interests principle as the “golden

¹ Sec 28(2) of the South African Constitution, Act 108 of 1996.

² *Fletcher v Fletcher* 1948 (1) SA 130 (A).

thread which runs throughout the fabric of our law relating to children³ in the following chapter.

2 The parent-child relationship

The parent-child relationship is largely governed by rules of common law combined with the legislative changes that have been made from time to time.⁴ Traditionally the common law focused on the rights of the parents and their moral obligation to care for their children.⁵ There is a strong shift in emphasis, however, from the common law focus on the rights of the parent, to the responsibilities of the parents,⁶ which become much stronger than moral obligations when combined with the new recognition for the rights of the child.⁷ In the case of *B v S*,⁸ in the context of an unmarried father's right of access to his child, the court remarked that

³ Per Tebbutt AJ (as he then was) in *Kaiser v Chambers* 1969 (4) SA 224 (C) 228G. See also Clark "Some aspects of the application of the standard of the best interests of the child in South African family law" 2000 *Stell LR* 1.

⁴ The most recent is the Children's Bill 2003. This bill contains a number of sections that may have a definite impact on the parent-child relationship. However, given the fact that it is not yet in force, most of the references to the Children's Bill will only be contained in footnotes.

⁵ Oliver points out that "traditionally, in South African legal literature, minority and the parental power are treated from the point of view of the parent". Olivier "Minority and the Parental Power" 1983 *Acta Juridica* 97, 100.

However, morality by itself is an "incomplete guide to conduct" and the "general exhortations to care for others, need institutional arrangements to be effective". Maclean and Eekelaar define obligations as "what we ought to do. They provide reasons for acting in certain ways." They add however, that "where [these obligations] come from is not always easy to tell" but that "most people surely think that parents have obligations towards their children". Legal and social mechanisms give substance to moral principles and according to the authors, parenthood itself is such a mechanism. See Maclean and Eekelaar *The Parental Obligation: A Study of Parenthood Across Households* 1-4. See further Eekelaar *Family Law and Social Policy* 3. Van Westing argues that family law is the one branch of the law which cannot be separated from moral and religious considerations and is of opinion that morality and law are interdependent. Van Westing *Konkretisering van Ouerlike Gesagsbevoegdhe* LLM Dissertation Randse Afrikaanse Universiteit 1994, 15-16. See also Devlin *The Enforcement of Morals* 61: "In the regulation of marriage and divorce the secular law is bound more closely to the moral law than in any other subject. The institution of marriage is the creation of morality."

⁶ Van Heerden *et al Boberg's The Law of Persons and the Family* 313-314; Sinclair assisted by Heaton *Marriage Vol I* 111-112; Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 50. See further Chapter five "Parental Responsibilities and Rights" in the Children's Bill.

One of the responsibilities of the parents is to make the child aware of his or her status as a bearer of fundamental rights. Human "Die effek van kinderregte op die privaatregtelike ouer-kind verhouding" 2000 *THRHR* 393, 395.

⁷ Children's rights ostensibly may seem to be in conflict with the common law approach to the parent-child relationship – it may seem to be a limitation on the exercise of parental authority because it vests the child with a status that seems irreconcilable with the status of the child as an immature and vulnerable person. See Human 2000 *THRHR* 393, 394.

⁸ 1995 (3) SA 571 (A). "The parental power of modern law is, however, no longer a power to be exercised for the benefit of the parents, but rather a complex of duties and responsibilities to be carried out in the interests of the minor child." Lee & Honoré *Family, Things and Succession* 152. See further Van Heerden *et al Boberg's Law of Persons and the Family* 314: "The twentieth century has seen a

“It is inappropriate to talk of a parent having a legal right at all in this context: no parental right, privilege or claim will have any substance or meaning if access will be inimical to the welfare of the child.”⁹

Though this case concerned only the access component of the parent-child relationship/parental authority, in the light of the Constitution of South Africa, which requires that the best interests of the child shall be of paramount importance in all matters regarding the child,¹⁰ this statement holds true for every component of parental authority.¹¹

Parental authority (also called “parental control” or “parental power”)¹² can be defined as

“[T]he complex of rights, powers, duties and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of their minor child and his or her property.”¹³

dramatic shift in emphasis from the notion of rights of parents *vis-à-vis* their children (and the duties of parents to care for and protect their children) to the idea of children as bearers of their own rights and entitlements, especially the right to a certain degree of self-determination. Increasingly, children have been recognized as independent beings having positive claims... while at the same time being subject to certain disabilities relative to their age and immaturity.”

⁹ 571H. It is interesting to note that there has been objection to the use of expressions implying rights of parents over children as early as 1947. In *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 Centlivres JA, in the context of a custody claim by the “innocent party” to the divorce (the wife having committed adultery), made the following remark: “With great respect, however, I do not like the expression ‘the rights of the innocent spouse’ because when one talks of rights, it implies that the one spouse has rights against the other spouse to claim custody of a child, as if that child were a mere chattel.”

The same sentiment has been expressed in the context of the guardianship component of parental authority as well by Margo J in *Ex parte Van Dam* 1973 (2) SA 182 (W) 185D: “Guardianship is a duty much more than a right.”

Clark suggests that with the rise in non-marital parenthood family relationships need to be redefined in terms of parent and child, rather than the relationships between the adults. Clark “Families and domestic partnerships” 2002 *SALJ* 634, 635.

¹⁰ Sec 28(2) of Act 108 of 1996.

¹¹ The Children’s Bill introduces changes in the terminology. “Parental authority” is changed to the more neutral term “parental rights and responsibilities”, which implies greater equality of status as persons in the eyes of the law between parents and children; custody is now termed “care”, while “contact” is preferred over “access”. The terms “guardianship” and “maintenance” are retained. The Law Commission in Project 110 (Review of the Child Care Act Report and Children Bill, December 2002) suggested these more neutral terms in an attempt to reduce conflict and let both parents focus on their responsibilities and continued involvement with their child, rather than on their rights. According to the Report, the use of the words “custody”, “sole custody”, “guardianship” and “sole guardianship” promote a potentially damaging sense of winners and losers. See 195 of the Report.

The different components of parental authority are explained below. See section 2.2.

¹² Bosman and Van Zyl “Children, young persons and their parents” in Robinson (ed) *The Law of Children and Young Persons in South Africa* 51.

¹³ Van Heerden *et al* *Boberg’s The Law of Persons and Family* 313; Spiro *Parent and Child* 36; Barnard, Cronjé and Oliver *Law of Persons and the Family* 303; Cronjé and Heaton *South African Family Law* 197; Van der Vyver and Joubert *Personen- en Familiereg* 595. See further Bosman and Van Zyl “Children, young persons and their parents” in Robinson (ed) *The Law of Children and Young*

During the subsistence of a valid marriage, parents share equally in these rights and obligations. It is very hard to distinguish and define the variety of obligations between family members in the same household since everything is resolved in the way that is mutually the most practical and convenient in the circumstances.¹⁴ When families are in harmony, the law is not generally involved. It is only when a child is born out of wedlock or after the dissolution of a marriage by divorce that any problems arise with regard to the parental authority over children and it becomes necessary to differentiate between and specifically assign the components of parental authority.¹⁵

In earlier times when marriage was regarded as the cornerstone of society¹⁶ and a divorce highly difficult to obtain,¹⁷ family relationships necessitated less legal regulation and provision. However, times have certainly changed and the only requirement for a divorce is to prove the irretrievable breakdown of the marriage relationship.¹⁸ The revolution of the divorce law not only aided the dissolution of an

Persons in South Africa 52: "Parental authority is the collective term for the sum total of rights and obligations which a parent enjoys in relation to his child, the child's estate and administration thereof, and includes assisting the child in legal proceedings."

In the definitions clause of the Children's Bill the terms parental responsibilities and rights replace the term parental authority and mean, respectively, the responsibility and right to care for the child, to have and maintain contact with the child, and to act as guardian of the child.

¹⁴ "People who live together have differences, but these enmesh with the dynamic of the entire relationship, and can frequently be resolved within that dynamic. So quarrels and misunderstandings can often be resolved in the context of the general benefits which sharing a household holds for each partner. Resorting to law has negative implications which outweigh the benefits of the interactive relationship. But if people live apart, a point of tension or dispute can become the dominant focus of the relationship; there may be few, if any, compensatory benefits which are threatened by legal intervention. It therefore becomes necessary to define more sharply what their legal obligations are and to provide mechanisms for regulating them." Maclean and Eekelaar *The Parental Obligation* 2.

¹⁵ Donald Black explains it in the following way: "It is difficult to disentangle and articulate the variety of obligations between family members who are living together. The law tends to be less implicated in people's dealings the closer they are related to each other and that the greater the social distance is between people, the more likely it is that the law will enter into the relationship" As quoted by Maclean and Eekelaar *The Parental Obligation* 2.

¹⁶ "Marriage may be regarded as the cornerstone of society – a fixed traditional structure essential for the raising of children and a healthy family life" Hutchings and Delpont "Cohabitation: a responsible approach" 1992 *De Rebus* 121. "[T]he institution of marriage all over the world, whether it be a Christian marriage, a ritual or a customary union between man and wife, remains the cornerstone of society and is *prima facie* responsible for that complex whole which includes morals, knowledge, belief and all other capabilities acquired by man as a member of society." Per Erasmus J in *Campher v Campher* 1978 (3) SA 797 (O) 802C.

¹⁷ At common law divorce was based on fault and the only grounds were marital infidelity and malicious desertion. Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 75.

¹⁸ Sec 3 of the Divorce Act 70 of 1979 determines that "the only grounds on which [a divorce] may be granted are (a) the irretrievable breakdown..." and "(b) the mental illness or the continuous unconsciousness ... of a party to the marriage". Sec 4(1) provides that a divorce may be granted on the ground of irretrievable breakdown if "[the court] is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of

existing marriage, it caused the disintegration of marriage as the central organising institution of legal and familial relationships as well.¹⁹ The era since the 1960's has been called that of "démariage" – a term coined by French legal sociologist, Irene Théry,²⁰ which

"captures the intense social change from a time when marriage symbolized society's highest ideals to the present, when marriage has become a private matter, a subjective experience, to be entered, or left, as a matter of individual choice".

A very important characteristic of this type of society however, is that regardless of the breakdown of the family structures,²¹ the family survives the breakdown – this means that the family relationship, with its rights and obligations, stays intact even though the family does not live together any more.²²

It is submitted that South Africa is also part of this "démariage" society. The Divorce Act²³ enables frequent and easy divorces,²⁴ but it also provides for the High Court, with its inherent jurisdiction as upper guardian of all children,²⁵ to withhold a divorce

the restoration of a normal marriage relationship between them". Sec 4(2) provides examples of circumstances which the plaintiff may use to prove the irretrievable breakdown of a marriage. However, in terms of sec 4(3) a court may, "if it appears ... that there is a reasonable possibility that parties may become reconciled through marriage counsel, treatment or reflection... postpone the proceedings in order that the parties may attempt a reconciliation."

¹⁹ Maclean and Eekelaar *The Parental Obligation* 8; Clark 2002 *SALJ* 634, 634-637.

²⁰ As quoted by Maclean and Eekelaar *The Parental Obligation* 8.

²¹ The frequent and easy dissolution of marriages as well as the frequency with which individuals enter into marriage are both regarded as catalysts in the breakdown of family structures. Maclean and Eekelaar *The Parental Obligation* 8.

²² Maclean and Eekelaar *The Parental Obligation* 8. The legislature's support of this principle is evidenced by section 16 of the Children's Bill, which provides for the right of the child to not be separated from his or her family or primary-care giver against the will of the person and the child (where the child is capable of expressing a choice) unless it is in the best interests of the child. Even if a child is thus separated from his or her parents or primary care-giver he or she has the right to maintain a personal relationship and regular contact with that person, except where those personal relations and that contact are not in the best interests of the child.

²³ Act 70 of 1979.

²⁴ See sec 3, 4 and 5 of the Divorce Act which deal with the grounds for divorce. Van Heerden *et al* *Boberg's Law of Persons and The Family* 507.

²⁵ As upper guardian the court's authority surpasses that of the parents, therefore, in any circumstances, if the court deems it to be in the best interests of the minor, the court may interfere with and overrule the decision of a parent. As will be seen below, the court may even deprive either or both parents of their parental authority or a component thereof. However, the court will not lightly interfere with the exercise of parental power. *Van Rooyen v Werner* 1892 (9) SC 425, 428. *Lee and Honoré Family, Things and Succession* 152-153; *Van der Vyver and Joubert Persone- en Familiereg* 623-628; *Bosman and Van Zyl* "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 52; *Van Heerden et al Boberg's Law of Persons and the Family* 497-499. See further *Vista University, Bloemfontein Campus v SRC, Vista University and Others* 1998 (4) SA 102 O.

order until it is satisfied that the provisions made or contemplated with regard to the welfare of any minor and dependent children of the marriage are satisfactory and the best that can be effected in the circumstances.²⁶ A decree of dissolution of the marriage shall not be granted either until the report and recommendations of the Family Advocate, if the Family Advocate instituted an enquiry in terms of sec 4(1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act,²⁷ are considered.²⁸ The court may also cause any investigation which it may deem necessary, may order any person to appear before it and may order any one of the parties to pay the cost of such investigation.²⁹ The order made by the court with regard to the children may contain provisions regarding the guardianship, custody and maintenance of and access to the

This upper guardianship of the High Court stems from the period of the Frankish Empire (500-900 AD) when the king (princeps) could be petitioned for relief by widows and orphaned children. The king delegated his “*Obervormundschaft*” to his chancellor and the *curia regis* and so the duty became that of the court – to which the High Court regards itself as successor. See *Kotze NO v Santam Insurance Ltd* 1994 (1) SA 237 (CPD) 244G; Hahlo and Kahn *The South African Legal System and its Background* 369; Van der Vyver and Joubert *Persone- en Familiereg* 623. See also Chapter Two, 3 3 4 above. Parents can in no circumstances come to any arrangement regarding their children that will be immune to scrutiny by the court. In *Girdwood v Girdwood* 1995 (4) SA 698 (C) the parents included a clause in their divorce settlement that purported to prevent the wife (who had custody of the minor children) to approach the court for a variation of the maintenance order. On appeal from the lower court, which held that the wife had waived her right to apply for a variation, the Cape High Court confirmed the common law upper guardianship of the court and stated that the court “has an inalienable right and authority to establish what is in the best interests of the children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between [the parents] can encroach upon this authority”. 7081/J-709A.

²⁶ Sec 6(1)(a).

²⁷ Act 24 of 1987. See further Golberg “Practical and ethical concerns in alternative dispute resolution” 1998 *TSAR* 748; Mowatt “Divorce mediation – the Mediation in Certain Divorce Matters Act, 1987” 1988 *TSAR* 47; Schäfer “Alternative divorce procedures in the interests of children: Some comparative aspects” 1988 *THRHR* 297; Clark “No holy cow – some caveats on family mediation” 1993 *THRHR* 454; Burman and McLennan “Providing for children: The Family Advocate and the legal profession” in Keightley *Children’s Rights* 69. See also Chapter Four 5 2 5 above.

²⁸ Sec 6(1)(b).

²⁹ Sec 6(2).

children,³⁰ thereby ensuring that the family relationships, together with its rights and obligations, should survive.³¹

The present study will focus especially on custody orders, but before it can be discussed in detail, it is necessary to place custody in context as a component of parental authority.

3 Parental authority³²

As briefly stated in the introduction above, parental authority is the sum total of all the rights and obligations the parents of a legitimate child enjoy in relation to that child.³³ At common law, while it was recognized that the parents of a legitimate child had joint parental authority³⁴ over the child, the father's rights were superior to those of the mother.³⁵ Even though a mother could be afforded the custody of her children

³⁰ In terms of sec 6(3) a court may make any order it may deem fit with regard to the maintenance, custody or guardianship of as well as access to a dependent and minor child of the marriage. It may even grant an order of sole guardianship or custody of the child to either parent and may order that "on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent". However, these orders, especially those relating to sole guardianship, will not be made lightly and only if the court is convinced that "it would be in the interests of the minor child to do so". In *Kastan v Kastan* 1985 (3) SA 235 (C) 236C-D, King AJ argued that the wideness of sec 6(3) is a recognition by the legislature that matters involving the regulation of the lives of young children should be left with the court as the upper guardian of all children and that the discretion should as far as possible, remain free and unfettered. "It is a discretion which must be exercised within the framework of one guiding rule. It must be exercised so as best to promote the welfare and advance and protect the interests of young children."

³¹ Van Heerden *et al* suggests that the reform in the law relating to divorce "had as its primary objective the formulation of realistic rules for the dissolution of marriage; rules which rendered it possible to dissolve failed marriages in a way that caused the least possible disruption for the spouses and their dependants and that best safeguarded the interests of minor children." Van Heerden *et al* *Boberg's The Law of Persons and the Family* 507.

³² Unless otherwise specified this chapter will concern the parent-child relationship between the parents (either married or divorced) of a legitimate child. The main components of the parent-child relationship are guardianship, custody, access and maintenance. Since this study is focused on the custody component, only custody will be discussed in detail. Guardianship and access will only receive cursory attention.

The Children's Bill regulates the acquisition and loss (sec 30 – 41), as well as co-exercise (sec 42-44) of parental responsibilities and rights and the innovation of parenting plans (sec 45-47) in detail.

³³ Van Heerden *et al* *Boberg's The Law of Persons and Family* 313; Lee and Honoré *Family, Things and Succession* 152; Spiro *Parent and Child* 36; Barnard, Cronjé and Oliver *Law of Persons and the Family* 303; Cronjé and Heaton *South African Family Law* 197; Van der Vyver and Joubert *Persone-en Familiereg* 595, 609-617; Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 52; Robinson "Children and divorce" in Davel (ed) *Introduction to Child Law in South Africa* 68.

³⁴ De Groot *Inleidinge* 1 6 1, 1 7 8; Voet 1 6 3, 26 1 1; Van der Linden *Koopman's Handboek* 1 4 1.

³⁵ Van Heerden *et al* *Boberg's The Law of Persons and the Family* 317 n7; Hahlo and Kahn *South African Legal System and its Background* 367; Van der Vyver and Joubert *Persone- en Familiereg* 599; Sinclair assisted by Heaton *Marriage Vol I* 112-113; Hahlo *Husband and Wife* 389; Lee and Honoré *Family, Things and Succession* 161; Van Heerden and Clark "Parenthood in South African law –

after a divorce, the father always remained the natural guardian.³⁶ If the child was born out of wedlock, however, only the mother had parental authority over the child.³⁷

Parental authority is acquired by the birth³⁸ or adoption³⁹ of a child. A father can also acquire parental authority over his biological child if he marries the mother after the

Equality and independence? Recent developments in the law relating to guardianship” 1995 *SALJ* 141, 141-143. See further *Calitz v Calitz* 1939 AD 56; *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W).

³⁶ *Van Rooyen v Werner* 1892 (9) SC 425; *Kallie v Kallie* 1947 (2) SA 1207 (SR); *Walters v Walters* 1949 (3) SA 906 (O). The father was only deprived of the guardianship over his children if there was very good reason for it, for instance where the father refused to perform the functions of a guardian, was irresponsible and neglectful of the interests of the child or had left or was about to leave the country. Hahlo *Husband and Wife* 394; Van Heerden *et al Boberg's The Law of Persons and the Family* 508. For a thorough explanation on the position relating to guardianship, as well as custody, before as well as after the Matrimonial Affairs Act 37 of 1953 see Cilliers “Sole Guardianship and Sole Custody” 1977 *Tydskrif vir Regswetenskap* 93.

³⁷ This common law rule stems from the saying “Eene moeder maakt geen bastaard”. See Grotius *Inleidinge* 2 27 28; Van Leeuwen *RHR* 1 7 4; Van der Linden *Koopmans Handboek* 1 4 2. A child born out of wedlock is therefore on the same footing with a legitimate child with respect to their mothers and maternal relations. This has been confirmed by the Guardianship Act 192 of 1993, as well as the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. Though the Act does not expressly state that the mother is the only one with parental authority over her child born out of wedlock, the implication is clear from the object of the Act, namely “[t]o make provision for the possibility of access to and custody and guardianship of children born out of wedlock by their natural fathers.” See further Lee and Honoré *Family Things and Succession* 162; *Van Rooyen v Werner* 1892 (9) SC 425, 430; *September v Karriem* 1959 (3) SA 687 (C); *Ex parte Van Dam* 1973 (2) SA 182 (W). The Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 changed the common law position dramatically. The unmarried father may now apply to the court for an order vesting him with any or more of the components of parental authority.

According to sec 2(1) “a court may on application of a natural father of a child born out of wedlock make an order granting the natural father access rights to or custody or guardianship of the child on the conditions determined by the court.” Any application in terms of the Act shall only be granted if the court is satisfied that it is in the best interests of the child (sec 2(2)(a)) and to determine the best interests of the child, the court shall take a wide range of circumstances into account (sec 2(5)(a) – (g)). If the court deems it fit in the particular circumstances the court may even grant an order for the sole guardianship or custody of the child to either party (sec 2(6)).

In terms of the Children’s Bill the biological father (who neither is nor was married to the mother of the child at the time of the child’s conception or birth or any time in between) does not have full parental responsibilities and rights over the child. He may apply to the court for an order granting him parental rights and responsibilities (sec 33(c) and 34), or he may acquire it in certain circumstances. These (set out in sec 33(1)(a) and (b)) are such as to prevent a biological father from acquiring parental responsibilities and rights over the child unless he was in a serious relationship with the mother or has shown a definite commitment to the care of the child.

³⁸ Van Heerden *et al Boberg's The Law of Persons and the Family* 317; Van der Vyver and Joubert *Persone- en Familiereg* 598; Spiro *Parent and Child* 51; Cronjé and Heaton *South African Family Law* 197. Hahlo and Kahn *South African Legal System and its Background* 367; Sinclair assisted by Heaton *Marriage Vol I* 112 –113; Hahlo *Husband and Wife* 389; Van der Vyver and Joubert *Persone- en Familiereg* 598-600.

³⁹ Sec 20(2) of the Child Care Act 74 of 1983 provides that an adoptive child “for all purposes whatever” is “deemed in law to be the legitimate child of the adoptive parent, as if he [or she] was born of that parent during the existence of a lawful marriage” and sec 20(1) determines that an adoption order shall terminate all rights and obligations existing between a child and any person who was his parent immediately prior to such adoption, and that parent’s relatives. Van Heerden *et al Boberg's The Law of Persons and the Family* 320; Spiro *Parent and Child* 76-78; Cronjé and Heaton *South African Family Law* 198.,

birth of the child.⁴⁰ Parental authority is not, however, acquired over stepchildren, though the stepparent may be under an obligation to maintain the children.⁴¹

Parental authority terminates on the death of either the parent or the child.⁴² Unless the court orders so specifically, a divorce does not bring about the termination of any aspect of parental authority over a child, though for reasons of practicality the court will make an order regarding the custody over and access to the child.⁴³ A parent can only be divested of parental authority by an order of a competent court.⁴⁴ Any agreement between either the natural parents of a child or a parent and a third party purporting to terminate parental authority will be *contra bonos mores* and invalid.⁴⁵ Furthermore, because the obligation to maintain children is based on the blood

⁴⁰ The Children's Status Act 82 of 1987, sec 4, read together with sec 1 of the Guardianship Act 192 of 1993. "As from the date of the marriage" the child will then fall under the equal natural guardianship (parental authority) of both parents. Van Heerden *et al Boberg's The Law of Persons and the Family* 320; Van der Vyver and Joubert *Persone- en Familiereg* 598-600; Cronjé and Heaton *South African Family Law* 198.

⁴¹ No legal consequences attach to the stepchild and stepparent relationship, therefore there is no *ex lege* (reciprocal) obligation of maintenance. The obligation to maintain a stepchild will only arise if the marriage with the child's biological parent is in community of property. Spiro *Parent and Child* 58-59, 392, 394, 404 and the authorities cited there. See also Voet 25 3 10; Van Heerden *et al Boberg's The Law of Persons and the Family* 323; Cronjé and Heaton *South African Family Law* 213; Spiro "Children of unmarried but cohabiting parents and of successive marriages" 1979 *THRHR* 403, 407-409; *Jacobs v Cape Town Municipality* 1935 CPD 474; *In re Visser* 1948 (3) SA 1129; *Ex parte Pienaar* 1964 (1) SA 600 (T); *Mentz v Simpson* 1990 (4) 455 (A); *Heystek v Heystek* 2002 (2) SA 754 (T). See further Van Schalkwyk and Van der Linde "Onderhoudsplig van die stiefouer" 2003 *THRHR* 301-312.

⁴² Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 52; Van der Vyver and Joubert *Persone- en Familiereg* 628; Spiro *Parent and Child* 245- 253; Cronjé and Heaton *South African Family Law* 215.

⁴³ The Matrimonial Affairs Act 37 of 1953 sec 5(1) and 5(5); sec 6(1) and 6(3) of the Divorce Act 70 of 1979; sec 2(c) of the Guardianship Act 192 of 1993. See also Van Heerden *et al Boberg's The Law of Persons and the Family* 321-322; Van der Vyver and Joubert *Persone- en Familiereg* 619-622; Cronjé and Heaton *South African Family Law* 215-219.

⁴⁴ During the subsistence of a marriage the court will only intervene in the exercise of parental power where there is abuse of power or neglect of the children. *Rowan v Faifer* 1959 (2) SA 705 (E); *Ex parte Van Dam* 1973 (2) SA 182 (W); *Edwards v Edwards* 1960 (2) SA 523 (D); *Martin v Mason* 1949(1) PH B9 (N); *Niemeyer v De Villiers* 1951 (4) SA 100 (T).

⁴⁵ "As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach upon this authority." Per Van Zyl J in *Girdwood v Girdwood* 1995 (4) SA 698 (C) 708-709. See also *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (WLD); *Ex parte Van Dam* 1973 (3) SA 182 (W) 185 C-D; *Rowe v Rowe* 1997 (4) SA 160 (SCA) 167 C. See further Spiro *Parent and Child* 44-45, 57-58, 273-275; Lee and Honoré *Family Things and Succession* 161-162; Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 52; Cronjé and Heaton *South African Family Law* 215; Spiro "Custody and guardianship of children *stante matrimonio* and on dissolution of marriage" 1983 *Acta Juridica* 109, 118.

relationship between the parent and child,⁴⁶ this obligation will not terminate on divorce, but only when the child attains majority and becomes self-sufficient.⁴⁷

One of the main components of parental authority is guardianship, which is a much less contentious issue than custody and access. The reasons for this are twofold. In the first place guardianship is extensively covered by legislation.⁴⁸ The second reason is

⁴⁶ Though maintenance is one of the main components of parental authority, it falls beyond the scope of the present study. For the most important general principles applicable to maintenance, however, see Grotius *Inleidinge* 1 9 9, 3 35 8; Voet 25 3 4 5, 25 3 5 6; Van Leeuwen *RHR* 1 13 7, 8; Spiro *Parent and Child* 385-397; Van der Vyver and Joubert *Persone- en Familiereg* 628-634; Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 68-70; Lee and Honoré *Family, Things and Succession* 181-186; Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 50; Hahlo and Kahn *The South African Legal System and its Background* 354; Schäfer "An upward variation of a maintenance order – an expensive luxury or the best interests of the child?" 1979 *SALJ* 540-545; Bonthuys 2001 *THRHR* 192.

See further *In re Knoop* (1893) 10 SC 198; *Motan and Another v Joosub* 1930 AD 61; *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Farrel v Hankey* 1921 TPD 590; *Woodhead v Woodhead* 1955 (3) SA 33 (SCA); *Ex Parte Pienaar* 1964 (1) SA 600 (T); *Herfst v Herfst* 1964 (4) SA 127 (W); *Harwood v Harwood* 1976 (4) SA 586 (C); *Van der Harst v Viljoen* 1977 (1) SA 795 (C); *Glicksman v Talekinsky* 1955 (4) SA 468 (W); *Micklem v Micklem* 1988 (3) SA 259 (C); *Oosthuizen v Stanley* 1938 AD 322; *In re Estate Visser* 1948 (3) SA 1129 (W); *Jones v Jones* 1970 (2) SA 308; *Watson v Watson* 1979 (2) SA 854 (C); *Smit v Smit* 1980 (3) SA 1010 (O) and *Ncubu v National Employers General Insurance Co Ltd* 1988 (2) SA 190 (N); *Mentz v Simpson* 1990 (4) SA 455 (A).

Maintenance is usually one of the aspects covered by the consent paper drawn up by the parties. Courts must pay close attention to the terms of the agreement before ratifying in because "[m]ost people in the throes of divorce are unable to approach the question of custody and maintenance objectively. The children become a tool in the negotiations. Their interests are invariably traded off against the interests of the parents." Lind 1989 *Businessman's Law* 149, 150. See further *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T); *Baart v Malan* 1990 (2) SA 862 (E); *Senior NO v National Employers General Insurance Co Ltd* 1989 (2) SA 136 (W); *Lambrakis v Santam Ltd* 2000 (3) SA 1098 (W); *Baadjies v Matubela* 2002 (3) SA 427 (W); *Zimelka v Zimelka* 1990 (4) SA 303 (W).

⁴⁷ Van der Vyver and Joubert *Persone- en Familiereg* 628-634; Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 41-42, 56-61; Cronjé and Heaton *South African Family Law* 210-212; Van Heerden *et al Boberg's Law of Persons and the Family* 247; Hahlo *Husband and Wife* 413. See also *Richter v Richter* 1947 (3) SA 86 (W); *Gold v Gold* 1975 (4) SA 237 (D). *Ex parte Pienaar* 1964 (1) SA 600 (T); *Kemp v Kemp* 1958 (3) SA 736 (D).

⁴⁸ The Guardianship Act 192 of 1993. The definition of guardianship and the principles adhering to it remain virtually unchanged in the Children's Bill.

Sec 1(1) of the Guardianship Act 192 of 1993: "Notwithstanding anything to the contrary contained in any law or the common law ... a woman shall be the guardian of her minor children born out of a marriage and such guardianship shall be equal to that which a father has under the common law in respect of his minor children." From this section it is clear that the parents have equal guardianship over their child which means that they are not obliged to consider or get the consent of the other parent in the assistance of the child in juristic acts or litigation or the general administration of the child's estate.

Sec 1(2) of the Guardianship Act declares both parents competent to exercise independently and without consent of the other any right or power or to carry out any duty arising from such guardianship. This is confirmed by sec 42(2) of the Children's Bill: "When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act or order of court provides otherwise."

that the normal position, that both parents are equal and joint guardians of a legitimate child,⁴⁹ will only change if the court makes an order for sole guardianship in the interests of the child.⁵⁰

Guardianship in the extended meaning applies while the parents are married and living in the same household.⁵¹ It includes custody⁵² as well as the administration of the minor's estate, assistance of the minor in litigation and the performance of legal/juristic acts, the appointment of a testamentary guardian for the child and the right to excise obedience from the child and inflict moderate punishment.⁵³ In its narrow meaning, guardianship does not include custody⁵⁴ and is retained by the non-custodian parent after a court assigned custody to the other parent.

There are, however, certain instances of such importance to the child that the consent of both parents is required. These include the consent to a minor child's marriage, the adoption of the child, the removal of the child from the Republic by either parent or a third party, the application for a passport by or on behalf of a child under 18 as well as the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor. Sec 2(1)(a) – (e) of the Guardianship Act 192 of 1993. See also sec 42(5)(a) – (e) and 43 of the Children's Bill, requiring the consent of "all persons holding parental responsibilities and rights" for these actions.

⁴⁹ Cronjé and Heaton *South African Family Law* 205.

In terms of sec 42(1) of the Children's Bill more than one person may hold parental responsibilities and rights in respect of the same child, and both the mother (sec 31) and the father to whom she is or was married (sec 32) acquire parental responsibilities and rights at the birth of the child.

⁵⁰ Both sec 1(1) and 1(2) of the Guardianship Act contains the phrase "subject to any order of a competent court". The Divorce Act 70 of 1979 determines that a court, when granting a decree of divorce, may make any order it may deem fit in regard to the, amongst other things, guardianship of the child, including an order granting sole guardianship to either parent. See sec 6(3) of the Act. A court may, therefore, expressly divest one parent of the guardianship over his or her child and make an order of sole guardianship in favour of the other parent. Because of the far-reaching effects of such an order, the court will not make it lightly but must be convinced that it is in the best interests of the minor to do so. See further Cronjé and Heaton *South African Family Law* 182, 205-207; Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 72; Van Heerden *et al Boberg's Law of Persons and the Family* 508; Hahlo *Husband and Wife* 394; Cronjé and Heaton *South African Family Law* 182; Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 70-72; Schäfer "The burgeoning family law and joint custody" Inaugural Lecture at Rhodes University 1986, 14-15.

The power of the court does not only extend to taking guardianship away from one parent, it also has the power to make an order for joint guardianship in favour of the parent and a third party, provided of course that it is in the child's best interests. See *Ex parte Kedar* 1993 (1) SA 242 (W).

⁵¹ Cronjé and Heaton *South African Family Law* 205; Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 69; Van Heerden *et al Boberg's Law of Persons and the Family* 660, 671; Cilliers 1977 *Tydskrif vir Regswetenskap* 93.

⁵² Custody (sometimes called "care and control") relates to a parent's control over the person of the child as well as the child's day-to-day activities and personal life. This is excluded from guardianship in the narrow sense and usually becomes an issue only when the parents are separated or divorced. See below.

⁵³ *Germani v Herf and Another* 1975 (4) SA 887 (A). Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 69.

⁵⁴ Van Heerden *et al Boberg's Law of Persons and the Family* 427-428, 457-458; Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons*

4 Custody⁵⁵

Custody is generally acknowledged as the incidence of parental power⁵⁶ which invokes the greatest amount of post divorce litigation. Because it relates to the actual physical “possession” of the child,⁵⁷ the parent favoured by the custody order is seen to have won the right to have the child with him or her, while the losing non-custodian is excluded from the daily life of the child.⁵⁸

in South Africa 53; Hahlo *Husband and Wife* 394-396; Sinclair (assisted by Heaton) *The Law of Marriage Vol I* 112.

Even where guardianship and custody are separated both parents are entitled to be involved in any major decisions regarding the child, for instance the child’s upbringing, the administration of the estate and so forth. The implication of continued joint guardianship is that, during those times that the non-custodian has *de facto* custody of the child, he or she is in the same (and not inferior) position to assist the child and make decisions regarding him or her. The non-custodian may demand the same obedience from the child and exercise moderate and reasonable discipline. While a child is in the temporary custody of the non-custodian parent his parental authority revives. See *Germani v Herf and Another* 1975 (4) SA 887 (A). See further Cronjé and Heaton *South African Family Law* 182; Van Heerden *et al* *Boberg’s Law of Persons and the Family* 508.

⁵⁵ Spiro explains that the word custody, being used in various branches of the law, is incapable of precise definition, but that it usually connotes a degree of responsibility. Spiro *Parent and Child* 86. In the field of family law and the parent-child relationship, however, the word has acquired a specific meaning. “[B]y an order of custody in favour of the mother, the Court entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary, daily life of the child – shelter, nourishment and training of the mind.” Per Solomon J in *Simleit v Cunliffe* 1940 TPD 67, 75.

“The custodian parent is ... entrusted with the usual care of the physical, mental, educational and spiritual welfare of the children.” Per Goldin J in *Nugent v Nugent* 1978 (2) SA 690 (R) 692B-C.

“Custody of children involves day-to-day decisions and also decisions of longer and more permanent duration involving [the children’s] education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness.” Per King AJ in *Kastan v Kastan* 1985 (3) SA 235 (C) 236E-F.

See further *Calitz v Calitz* 1939 AD 56; *Rowan v Faifer* 1953 (2) SA 705 (EDL); *September v Karriem* 1959 (3) SA 687 (C); *Petersen v Kruger* 1975 (4) SA 171 (C); *Nugent v Nugent* 1979 (2) SA 690 (R).

⁵⁶ “Custody is an incident or sector of guardianship. The custodial parent is entitled to have the child with her; to control its daily life; to decide all questions relating to its education, training and religious upbringing; and to determine what homes or houses the child may or may not enter and with whom it may or may not associate... Because custody is an incidence of guardianship, where custody is awarded to the mother and no order is made as to guardianship, the father is then left with guardianship minus custody.” Hoffman and Pincus *The Law of Custody* 5. See further Van der Vyver and Joubert *Persone- en Familiereg* 609-613; Lee and Honoré *Family, Things and Succession* 163.

Wringe goes as far as to say that it appears to be that against a custodian parent a child has no legal right of privacy. See Wringe *Children’s Rights: A Philosophical Perspective* 93. Since the right to privacy (sec 14 of the Constitution Act 108 of 1996) is not incapable of limitation, parents would indeed be able to encroach upon their children’s privacy if in the best interests of the child.

According to Lord Denning MR, though courts will not hesitate to enforce custody against the wish of the child, if in the child’s interests, custody is a “dwindling right... It starts with a right of control and ends with little more than advice.” See *Hewer v Bryant* [1980] 1 QB 537, 369.

⁵⁷ Cronjé and Heaton *South African Family Law* 182.

⁵⁸ As will be seen below, the fact that a custody dispute between divorcing parents often escalates to this type of battle exacerbating acrimony among the parties involved is one of the arguments in favour of joint custody. If parents are able to overcome their personal difficulties and acrimony and are able to work together for the best interests of their children, a joint custody order might pave the way to a win-win situation where one parent will not feel excluded from the life of his or her children by “losing” custody. See Atkinson “Criteria for deciding child custody in the Trial and Appellate courts” 1984 *Family Law Quarterly* 1; Schwartz “Toward a presumption of joint custody” 1984 *Family Law*

Custody entails the day-to-day care and control over the person of the child.⁵⁹ It includes the responsibility to provide the child with the necessities of life – food, clothing, shelter and medical care – as well as the ability to decide upon the child’s education,⁶⁰ religious upbringing⁶¹ and to control the child’s associations and social life.⁶² It also encompasses other competencies, for instance the right to exact

Quarterly 225; Miller “Joint custody” 1979 *Family Law Quarterly* 345; Trombetta “Joint custody: recent research and overloaded courtrooms inspire new solutions to custody disputes” 1980 *Journal of Family Law* 213.

⁵⁹Van Leeuwen *RHR* 1 13 1; Voet 26 1 1, 47 10 2; Van der Linden *Koopman’s Handboek* 1 4 1. In *Stassen v Stassen* 1998 (2) SA 105 (W) Wunsh J objected against the use term “custody and control” when providing for the custody of children after divorce since the meaning of “control” in this context is unclear. Since then it has become usual to speak merely of custody instead of “care and control”, while the Afrikaans terms “toesig en beheer” have been replaced with “bewareing”. See also Eekelaar *Family Law and Social Policy* 76.

In the Children’s Bill the term custody is replaced by “care” and is defined as to include -

- a) Within available means, providing the child with –
 - (i) a suitable place to live; and
 - (ii) living conditions that are conducive to the child’s health, well-being and development;
- b) Safeguarding and promoting the well-being of the child;
- c) Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical and moral harm or hazards;
- d) Respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the rights set out in Chapter 4 of this Act;
- e) Guiding and directing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
- f) Guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child’s age, maturity and stage of development;
- g) Guiding the behaviour of the child in a humane manner;
- h) Maintaining a sound relationship with the child;
- i) Generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child.

⁶⁰ If divorced parents are at loggerheads as to the choice of the school a child should attend, the final decision rests with the custodian spouse. In *Martin v Mason* 1949 (1) PH B9 (N) the court rejected the argument that, upon disagreement between the parents, the duty to decide upon the school for the child devolves upon the court as upper guardian. It was held that the court shall not interfere in the exercise of the custodian parent (in this case the father)’s decision, unless it is shown that such decision is harmful to the child and against the child’s interests. As the mother was unable to show improper exercise of the father’s rights as custodian, the court refrained from interfering with his decision to send the child to a boarding school. See also *Mitchell v Mitchell* 1904 TS 128; *Simleit v Cunliffe* 1940 TPD 67 and *Niemeyer v De Villiers* 1951 (4) SA 100 (T). In the latter case Blackwell J, 109B/C and 109F, said that the court will interfere in the matters of education and upbringing of the children “slowly, cautiously and with great reluctance” and not “unless [the court] is prepared to hold that those views have been arrived at improperly or are so unreasonable as to suggest that no reasonable father who is solicitous for the welfare of his child could have arrived at them.”

In English law the position is somewhat different. In *Dipper v Dipper* [1980] 1 FLR 286 298, Cumming-Bruce LJ said that “a parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major issues.”

⁶¹ *Allsop v McCann* [2000] 3 All SA 475 (C). Bonthuys and Pieterse “Divorced parents and the religious instruction of their children” 2001 *SALJ* 216; Bekink “Parental religious freedom and the rights and best interests of the children” 2003 *THRHR* 246.

⁶² Though this is not often the issue in litigation, the custodian parent has the right to determine with whom the minor child may or may not associate and be in relationship with. There have been a few

obedience from child and to exercise reasonable disciplinary powers⁶³ over the child.⁶⁴

During the existence of a marriage the custody of any minor children born of the marriage vests in both parents to an equal extent.⁶⁵ Traditionally, in cases of conflict between the parents *stante matrimonio*, the will of the father in these matters prevailed.⁶⁶ In the current era of constitutional equality it is unsure where the final word will lie and it is to be hoped that parents will work out their differences amicably and with the interests of the children at heart. Of course it would be possible to approach the court as upper guardian of all minors to settle a dispute, but the high cost of litigation and disruptive effect it will have on families serve as prohibitive factors. As stated previously, the law prefers to keep its distance from normal family disputes in an intact family.⁶⁷

cases where fathers have approached the courts for an interdict to restrain a third party from contact and association with a minor. In two of the cases the father was unsuccessful. However, the failure of the applications can be attributed to the specific circumstances of each case, the minors being close to majority and to a certain extent not under the parental authority of their parents any more, rather than the fact that a parent does not have the capacity to prescribe the people their child may associate with. The court did, however, remark that the parent's duty of care and instruction decrease progressively as the child becomes older and more mature. See *Meyer v Van Niekerk* 1976 (1) SA 252 (T) and *Coetzee v Meintjies* 1976 (1) SA 257 (T) and for a discussion of these cases, see Sonnekus "Meyer v Van Niekerk 1976 (1) SA 252 (T) en Coetzee v Meintjies 1976 (1) SA 257 (T): Ouerlike gesagsregte – kompetensiebevoegdheid – reg van ouers teen aansien van minderjarige kind" 1977 *TSAR* 81. Successful applications for a restraining interdict were made in *Gordon v Barnard* 1977(1) SA 887 (K) and *H v I* 1985 (3) SA 235 (C). In the latter case the father was successful in interdicting a twenty-three year old man from associating with his daughter, aged seventeen, any more. The man had a criminal record, a drug abuse problem and had gotten the girl pregnant at an earlier time. In the opinion of the court he did not have the true interests of the minor at heart, whereas the father sought to protect his daughter from her gullibility and immaturity. For a discussion of the *Gordon*-case, see further Sonnekus "Gordon v Barnard 1977 (1) SA 887 (K): Ouerlike gesagsregte – afbakening van subjektiewe reg" 1978 *TSAR* 76.

See also Sonnekus "Die onwelkome vryer en die regsweeg van die ontstoke vader" 1992 *THRHR* 649; Labuschagne "Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577, 579; Pauw "Onregmatigheid en aantasting van die ouer-kind verhouding" 1979 *TSAR* 140.

⁶³ Heaton "Die tugbevoegdheid ten opsigte van kinders" 1987 *THRHR* 398.

⁶⁴ In *Chamani v Chamani* WLD 277/79 (unreported), Nestadt J defined custody as "that portion of parental power that pertains to the personal life of the child. The importance of one of the parents obtaining custody of a minor child of the marriage lies in the fact that he or she will be entitled to have the child with him or her, to discipline it, to control and regulate its daily life, such as its shelter, nourishment and training of the mind, to decide all questions relating to its education and religious upbringing, how its health should be cared for, and to determine with whom it may or may not associate." As quoted by Hofmann and Pincus *The Law of Custody* 5.

⁶⁵ *Calitz v Calitz* 1939 AD 56; *Van der Westhuizen v Van Wyk and Another* 1952 (2) SA 119 (GW); *Rowan v Faifer* 1953 (2) SA 705 (E); *Short v Naisby* 1955 (3) SA 572 (D); *Kaiser v Chambers* 1969 (4) SA 224 (C); *Petersen en 'n Ander v Kruger en 'n Ander* 1975 (4) SA 171 (K).

⁶⁶ *Calitz v Calitz* 1939 AD 56; *Simleit v Cunliffe* 1940 TPD 67; *Hill v Hill* 1969 (3) SA 544 (RAD); *Nugent v Nugent* 1978 (2) SA 690 (R).

⁶⁷ See section 2.1 above.

When a marriage is dissolved by divorce, the court is required to make an order concerning the custody of the minor and dependent children.⁶⁸ The parties will often arrive at a settlement, submitted to court in a consent paper, setting out the custody arrangements.⁶⁹ The court has to be convinced that these arrangements are the best that can be effected in the circumstances before making such consent paper an order of court.⁷⁰ There are a variety of possible orders which the court can make, depending upon the facts of the case and subject to the overriding best interests of the minor involved. No doubt the type of order made by the court is important to the child's welfare and future happiness, but it is also true that

“It is the attitude of the parents that will achieve the most beneficial relationship between both parents and the child, not the form of the court's order.”⁷¹

Some of the most common custody orders will now be discussed in greater detail.

4 1 Sole custody

In terms of section 6(3) of the Divorce Act⁷² a court may make any order concerning the custody of the children, even grant sole custody to one parent, if it is of the opinion that it is the best interests of the child to do so. Sole custody has been ordered so consistently by South African courts that it has come to be regarded as the normal type of custody order.⁷³

⁶⁸ Sec 6(3) of the Divorce Act 70 of 1979.

⁶⁹ Lind “The changing face of divorce” 1989 *Businessman's Law* 149, 150.

The Children's Bill requires parents (co-holders of parental responsibilities and rights) if they are experiencing difficulties in exercising their responsibilities and rights to first seek to agree on a parenting plan determining the exercise of their respective rights and responsibilities. Such a plan must be in the best interests of the child and may contain provisions regarding where and with whom the child is to live, maintenance of the child, contact between the child and the parents or any other person and the guardianship of the child. See sec 45(1) – (4).

⁷⁰ See *Collier v Collier* 1944 NPC 249, 250. In this case the father was awarded the custody of the minor child on divorce, but while he was away on active service, the mother was “to have control of the child who [was] to reside with her” until his return. The parents entered into an agreement that the child should be placed in a boarding school when he became of school-going age. When the time came the father was still in Italy in active service and, therefore, the mother refused to send the child to school as boarder. The court held that “one of the interested parties [to the agreement] is the child and the court will not give effect to any agreement come to by the parents unless it is satisfied that it is right and proper in the child's interests and for his welfare to do so”. Since sending the child to boarding school would in effect have deprived him of all parental care and nurturing, the court refused to enforce the agreement.

⁷¹ Millin J in *Schlebusch v Schlebusch* 1988 (4) SA 548 (E).

⁷² Act 70 of 1979.

⁷³ According to Schäfer the courts tend to legal traditionalism in their preference for sole custody. “The danger of our excessively ‘legal traditionalism’ is that what might be dressed up to look like the predominant interests of the children, might, in reality, be nothing more than what is convenient to the

Unless combined with an order conferring sole guardianship of the child on the custodian parent, an order for sole custody has no influence on the fact that both parents are the legal guardians of the children.⁷⁴ On decisions regarding the adoption or marriage of the minor, the administration of certain properties, application for a passport and the removal of the child from the Republic, the consent of both the custodian and non-custodian parents is needed.⁷⁵ Any other decisions are left to the discretion of the custodian parent and he or she must exercise this discretion in the best interests of the child.⁷⁶

It has been argued that a sole custody order is the obvious order to be made on divorce, because it is the most beneficial situation for the child if he or she has only one psychological parent after the divorce.⁷⁷ It is supposed to create and improve the child's sense of belonging and security if he or she knows with which parent the final authority on decisions regarding him or her lies.⁷⁸ However, though this argument, put

parents so that the interests of the children are subordinated to those of the parents." Schäfer Inaugural Lecture 1986, 18.

⁷⁴ It has been argued that the only difference between "custody" and "sole custody" is that a sole custodian has the power to appoint a custodian successor to the exclusion of the surviving parent. See Van Heerden *et al Boberg's Law of Persons and the Family* 322 n27. See further Spiro *Parent and Child* 87, 338; Lee and Honoré *Family, Things and Succession* 148; Hahlo *Husband and Wife* 389; Cilliers 1977 *Tydskrif vir Regswetenskap* 93, 101-104.

⁷⁵ Sec 1(2) of the Guardianship Act 192 of 1993. On the removal of children from the Republic, see *Schutte v Jacobs Nr 2* 2001 (2) SA 478 (W); *H v R* 2001 (3) SA 636 (C); *Godbeer v Godbeer* 2000 (3) SA 976 (W); *Jackson v Jackson* 2002 (2) SA 303 (SCA). See further Davel and Boniface "Cross-boarder relocation of children and custodial parent" 2003 *THRHR* 138; Bekker and Van Zyl "Application by custodian parent to emigrate with children opposed. How should the best interests of the children be evaluated?" 2003 *THRHR* 146.

⁷⁶ The fact that one parent may make decisions regarding the child without reference to the other parent does not often create problems when it is a small and everyday decision. However, when it comes to matters such as education and religious upbringing, non-custodians often feel that they should be allowed a say in the matter. There have been a few cases where non-custodian fathers have approached the courts for an order compelling the custodian mothers to raise the children in the religion chosen by the fathers. The argument put forward by the fathers was usually that they, as natural guardians of the children, had the right to decide on the religious training their children is to receive and that their will in this matter overrides that of the former spouses. The court has made it unequivocally clear, however, that the right to determine the religious upbringing of a child rests with the custodian spouse after divorce, unless the religion they intend to teach the children is in any way harmful to the children, will bring them in conflict with the authority or be detrimental to their general welfare in any way. See *Duncombe v Willies* 1982 (3) SA 311 (D) 315A-E. See further *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W); *Nugent v Nugent* 1978 (2) SA 690 (R); *Mohaud v Mohaud* 1964 (4) SA 348 (T).

⁷⁷ Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* 37-38.

⁷⁸ This was one of the reasons why an application for an order for joint custody was refused by Page J in *Pinion v Pinion* 1994 (2) SA 725 (D).

forward by Goldstein, Freud and Solnit, is grounded in empirical research, it has been subjected to extensive criticism.⁷⁹

From the point of view the parents, sole custody is not an ideal solution because it creates a win-lose situation.⁸⁰ One parent will lose the right to the companionship of the child, often carrying with it the stigma that that person is an unfit parent, though this is not necessarily the case. Regardless of the fact that a sole custody order is usually coupled with an order for access in favour of the non-custodian, it often happens that the non-custodian finds it too upsetting to be faced with his or her loss every time he or she visits the children and such visitation are very often discontinued after a while.⁸¹ The child thus loses one of his or her parents and this may exacerbate feelings of abandonment and insecurity in the child.⁸² Children are often placed in a position where they feel that they have to choose between their parents and this is emotionally and psychologically distressing for them.⁸³

⁷⁹ According to Schwartz "[t]he authors assume that a judge can look into the future and predict what is in the best interest of a child. A judge cannot. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two 'good enough' parents, no one can choose who should parent... the best interest of the child, under these circumstances is unpredictable and indeterminate. If one parent must be chosen, a flip of a coin might do the job as well as anything else. And a flip of the coin would be quicker, cheaper, and less divisive." Schwartz 1984 *Family Law Quarterly* 225, 232. See also Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 1975 *Law and Contemporary Problems* 226, 229.

⁸⁰ The notion that one parent wins custody while the other loses, forces the parents to take adversary positions regarding custody. A mudslinging often ensues which forces exaggeration and mistruth and discourages the parents from focussing on what is really in the interests of the children. The adversary procedure discourages compromise and encourages competition for control where children are often placed in the middle of these power games. See Schwartz 1984 *Family Law Quarterly* 225, 231. See also Mason *The Custody Wars*.

⁸¹ Wallerstein and Kelly did extensive research on the relationships of parents and children during the divorce with follow up studies over the next five years. Their research includes whole chapters on the relationship between the child and the visiting parent (ie the non-custodian parent who has access rights). Regardless of the sex of the parent or the age and sex of the child, their conclusion was that the visiting parent seemed to lose interest in continuing the relationship. See Wallerstein and Kelly *Surviving the Breakup: How Children and Parents Cope with Divorce* 121-132. For further empirical research on the experiences of family members during and after divorce, see Wallerstein and Blakeslee *Second Chances* and Thompson and Amato *The Post Divorce Family: Children, Parenting and Society*.

⁸² Divorce and parental hostility have a profound and negative impact on the children involved. Their pain and sense of loss is severe and they feel small, weak and vulnerable. They often experience learning problems as well as emotional and psychological problems. See Miller 1979 *Family Law Quarterly* 345, 349-352. Schwartz suggests that the clinical damage to children result less from the fact of the divorce, than from the way in which the family handles the divorce and post-divorce litigation. If seen from this perspective, handling the divorce and especially custody arrangements in a mature and calm and cooperative way will as much serve the best interests of the child as the eventual decision itself. Schwartz 1984 *Family Law Quarterly* 225, 230.

⁸³ Mnookin 1975 *Law and Contemporary Problems* 226, 260, 285.

It is not only the parents and children involved in the divorce process that suffer the negative consequences of a sole custody order. Such an order is among the most difficult decisions a judge will ever have to make.⁸⁴ They are often faced with the very difficult task of choosing between two equally capable and “good” parents, or left with no other option than choosing between two equally selfish, immature and “bad” parents.⁸⁵ With the weighty responsibility of making a decision that is in the best interests of the child, unless the parents agree on the order to be made, judges agonize over sole custody orders.⁸⁶

4.2 Divided custody⁸⁷

A divided custody order is actually a sole custody order where one parent has the child with him or her permanently and the other parent has certain rights of access. It differs from the ordinary sole custody order in that the children are split or divided between the parents. For instance the boys and older children might be in the father’s custody while the girls and younger ones are in the custody of their mother.

At common law the father was considered the only natural guardian of the children of a marriage and therefore, upon divorce, was *prima facie* entitled to their custody. In these circumstances divided custody was often ordered, supported by the maternal preference rule, in order to leave very young children and young girls in the custody

⁸⁴ “This is a worrying case, as are all cases in which the care and custody of children are in dispute.” Per Diemont JA in *Stock v Stock* 1981 (3) SA 1280 (A) 1286. “Child custody cases involve the imprecise exercise of appraising people’s characters and dispositions and then trying to work out how each possible decision might affect them and indirectly the child.” The opinion that custody cases are by “far the most difficult of all classes of cases that a judge has to deal with” prevails among English judges as well. Sachs LJ in *W v W & C* [1968] 3 All ER 408 (CA) 409. Parker 1994 *International Journal of Law and the Family* 26, 30.

⁸⁵ “[I]n dealing with this question of custody [the court] was confronted with a difficult problem which he describes, not inaptly, as ‘the problem of making a selection for the children of the lesser of two evils’.” Per Feetham AJA in *Cook v Cook* 1937 AD 154, 161. Schäfer Inaugural Lecture 1986, 17. See further Mnookin 1975 *Law and Contemporary Problems* 226, 262.

⁸⁶ As shown in the discussion above the yardstick of the best interests of the child is often a very vague one and it is very seldom that a judge is in a position where he can easily identify what the best interests of a child in a specific case demand. See Chapter Four above.

⁸⁷ The terms split custody and divided custody are often used interchangeably and one should always look at the circumstances of the case and the terms of the order made by the court to determine which form is actually intended. For instance Davies speaks of split custody as a custody order where “children are simply divided between parents... some with mother and some with father... siblings separated”. Davies *The Unmarried Father as Primary Caregiver: A Survey of the Phenomena of Male Custodianship* MA Dissertation 1994, 36. Schäfer on the other hand, defines this type of custody as divided custody, while he sees split custody as an arrangement where children go first to the one parent for a while and after a time custody is transferred to the other. See Schäfer Inaugural Lecture 1986, 18.

of their mothers. In the case of *Painter v Painter*,⁸⁸ for instance, the court held that it was in its discretion to decide upon the custody of the children and decided, upon the facts of the case, that the custody of the two eldest sons (aged thirteen and ten) should be entrusted to the father, while the youngest boy (aged two) and the girl (aged four) should be with the mother.⁸⁹

4 3 Split custody

Split custody orders entail that custody is granted to one parent and transferred to the other after the passage of a certain amount of time. Similar to orders for divided custody discussed above, this type of arrangement would have satisfied both the father's common law right to the custody of his children, and the belief that young children are better off in the care of their mothers.⁹⁰

In *Schwartz v Smollen*⁹¹ the father was granted custody of the daughter of the marriage, but the mother was to have the "physical possession" of the girl until she turned eight. When it became time for the child to be transferred to her father's custody, the mother applied for a variation order. The court admitted that orders splitting custody were undesirable, but that there may well be cases in which such orders would be fitting. In this case the parents had come to an agreement about the mother having "physical possession" of the child and it was made an order of the court. Therefore, the mother had to show that it would "be more in [the child's] interests that she should be from now until she is grown with the mother rather than the father". It is doubtful whether the mother would have been able to satisfy this high standard of proof, but the father once again agreed to leave the child in the mother's possession until she turned twelve. The court so ordered, allowing the mother the

⁸⁸ 1882 2 EDC 147. See also *Kennedy v Kennedy* 1929 EDL 257, where the mother was awarded custody of two girls, aged seventeen and seven, while the boy and the thirteen-year-old daughter was in the custody of their father. The fact that the mother was living in an adulterous relationship had a great influence in the decision around the thirteen-year-old daughter.

⁸⁹ In *Siyaya v Siyaya* 1958 (2) PH B17 (C) the court also divided the children between their mother and father. Though the division was partly determined by the gender and ages of the children (the two eldest boys were placed in the father's custody and younger children with the mother), the court was undoubtedly influenced by the preferences of the children themselves. The father might have been able to provide superior accommodation, but the court held that the interests of such young children cannot be measured purely in terms of superior accommodation or amenities and, since the mother is to all accounts able to provide a home for them, they would be happier with her.

⁹⁰ In *Lecler v Grossman* 1939 WLD 41 the custody of a three-and-a-half year old boy was given to his mother until he attained the age of eight, at which time he was to pass to the custody of his father.

⁹¹ 1951 (2) PH B26 (T).

opportunity to reapply for a variation of the order at such time. It is submitted, however that, given a child's need for stability and to bond with his or her psychological parent, the postponement of a final custody order over such long periods of time is perhaps not in the best interests of the child.⁹²

4 4 Custody awarded to a third party⁹³

Courts are generally inclined to believe that a child should be in the custody of its natural parents as far as possible.⁹⁴ In *Petersen v Kruger*⁹⁵ it was ordered that a two-year-old boy should be returned to the custody of his biological parents⁹⁶ after it became known that he was switched in the hospital shortly after birth.⁹⁷ Though there was no relationship with the boy and his biological parents and though there was no criticism against the people who had raised him, the court held that it was in the best interests of the child to be returned.⁹⁸

⁹² As will be shown in the discussion on joint custody below, joint custody can take two forms: joint physical and joint legal custody. It is submitted that this case is actually an example of the parents sharing in the joint legal custody of the child, because the father, being vested with the custody, would have had to be involved in any decision-making regarding important things in the child's life, while the mother had the physical possession (physical custody) of the child and full decision making ability regarding everyday matters.

In *Niemeyer v De Villiers* 1951 (4) SA 100 (T) 101A Millin J said that "it is important to the parties and the child that judgment should be given as speedily as possible." Though this statement was made with regard to the right to custody and the determination of the child's education, it holds true for matters relating to children in general.

⁹³ A third party in this sense is anyone but the biological mother and father of a child. The person may be a relative (grandparent, aunt, uncle) or even someone not related to the child in any way.

⁹⁴ See, for instance, *Bethell v Bland* 1996 (2) SA 194 (W) 209G-H; *Chodree v Vally* 1996 (2) SA 28 (W) 32E-F; *Haskins v Wildgoose* [1996] 3 All SA 446 (T); *Re J (An Infant)* 1981 (2) SA 330 (Z) 337-338 for the emphasis courts place on the tie between natural parents and their children.

⁹⁵ 1975 (4) SA 171 (K).

⁹⁶ "Dit lê aan die grondslag van ons regstelsel dat, onderhewig aan sekere beperkinge, die reg van beheer en toesig oor 'n kind aan sy natuurlike ouers toekom." Per Van Winsen AJP 173H.

⁹⁷ See further *Clinton-Parker v Administrator, Transvaal*; *Dwakins v Administrator Transvaal* 1996 (2) SA 37 (W). This case, however, focused on the contractual/delictual damages claimable by the parents after a baby-switching in a hospital, instead of the family law aspects, seeing as both mothers decided to keep the baby she was handed.

⁹⁸ The judge was at pains to recognize the fact that the Krugers loved the boy and provided a good home for him, that they were good parents, but the focus of the inquiry was upon the applicants. "Dit gaan in hierdie verband in die eerste instansie oor die bevoegdheid van die aansoekdoeners om sodanige regte uit te oefen, en die geskiktheid van die familie omgewing, beide op materiële, sowel as sedelike, vlak, waarheen Dawid verplaas sal moet word as die aansoek toegestaan word. In die tweede plaas vereis dit die opweeg teen mekaar van beide die onmiddellike en toekomstige voordele en nadele wat so 'n stap vir Dawid inhou." See 174 D-E.

However, where it would be in the interests of a child, the courts are willing to grant custody of a child to a third party.⁹⁹ In *Short v Naisby*¹⁰⁰ the paternal grandmother claimed custody of her grandchildren against their mother after the death of her son. The children were placed in the custody of their father at the time of the divorce, but it appeared that they were in the *de facto* custody of the grandmother even before the father's death. Henochsberg J explained the parental rights to custody¹⁰¹ and went on to say that the court has no jurisdiction to deprive a surviving parent of her custody at the instance of a third party, except under the court's power as upper guardian to interfere on special grounds. Such special grounds include a danger to the child's life, health and morals, or whenever good cause is shown.¹⁰²

In *September v Karriem*¹⁰³ the court reaffirmed its willingness to interfere with the rights of the mother of an illegitimate child (in this case considering a non-relative), stating that in principle there seems to be no good reason for drawing any distinction between relatives and strangers.¹⁰⁴ In both these cases the court made it unequivocally clear that it will only interfere with the rights of a parent if it is proven that it is on the merits of the case in the best interests of the child.¹⁰⁵

4 5 Temporary custody

Temporary custody refers to an award of custody for a limited, temporary period only. This may be the case where the custodian parent goes abroad for a time, is in active

⁹⁹ According to Leslie Gray unless it is shown that the biological parents are unfit to be parents, "our courts would take a lot of convincing" before making such an order. See Gray "Psychological Parenthood?" 1981 *Codicillus* 49, 51. Exceptional circumstances justifying the award of custody to a third party were present in *Ex parte Sakota* 1964 (3) SA 8 (W). The child's father murdered its mother and was committed to prison. The court found that it was in the best interests of the child that both guardianship and custody should be awarded to the child's uncle.

¹⁰⁰ 1955 (3) SA 572D.

¹⁰¹ 574H-575A. Henochsberg J quoted from *Bloem v Vucinovich* 1946 AD 501 in explaining the common law position where the rights of the father were superior to those of the mother, but that upon the death of the father the mother became entitled to the custody of the children.

¹⁰² 575B-C.

¹⁰³ 1959 (3) SA 687 (C).

¹⁰⁴ 688H-689A. The court referred in this regard to *Farrington v Shugan* 1908 CTR 912 where Maasdorp J refused the application by a mother for the custody of her child and allowed a stranger to retain custody of the child.

¹⁰⁵ *Short v Short* (*supra*) 575C; *September v September* (*supra*) 689A-B. Neither of the two judges made a final order but referred the matter back to the trial court to determine the best interests of the child.

service¹⁰⁶ or in any other way temporarily unable to have the child in his or her care. Such an order may be made in favour of the other parent or the child's paternal or maternal grandparents.

4 6 Deferred or postponed custody

Where the court makes an order for deferred or postponed custody, a parent will only be entitled to the actual custody of the child at a later stage, for instance, once the parent have proven him or herself in a sufficiently stable position to look after and provide for the child.

4 7 Joint custody¹⁰⁷

In line with the modern perception that family relationships can withstand the breakdown of the marriage, a new form of custody order, an order for joint custody, has evolved.¹⁰⁸ When divorcing parents are joint custodians both retain an active involvement in the child's life, either through joint decision-making¹⁰⁹ or through substantial amounts of time which the child spends with both parents.¹¹⁰

South African courts are still very hesitant to order joint custody – even to the point of considering it a legal impossibility.¹¹¹ Academic writers however, seem to subscribe to the idea that, though joint custody have a number of disadvantages and important requirements that should be met before it can succeed, it is a concept “whose time has come”.¹¹² However, a discussion of the advantages, disadvantages and requirements

¹⁰⁶ In *Collier v Collier* 1944 NPD 249 the mother had temporary custody of the child while the father was in active service in Italy. During this time, though an attorney was appointed as the legal guardian of the child, the mother could make all decisions a custodian parent normally can.

¹⁰⁷ The following is merely an introduction to the concept of joint custody, what it means and its most basic requirements. An in depth discussion of this concept as an interpretation of the best interests of the child will follow in Chapter Six below.

¹⁰⁸ Shared parenting, dual parenting, shared custody, joint parenting, co-custody are different terms sometimes used to describe joint custody. See Davies *The Unmarried Father as Primary Caregiver* 37.

¹⁰⁹ Joint legal custody indicates joint decision-making responsibility on all major issues concerning the child for instance, the medical care a child should receive, where the child should be educated and in which religion it should be trained. See *Edwards v Edwards* 1960 (2) SA 523 (D).

¹¹⁰ When joint physical custody is ordered, children will alternate between the two homes on a determined schedule, with the underlying idea that the child should spend both weekdays and -nights with each parent.

¹¹¹ “It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals.” Per Jansen J in *Edwards v Edwards* 1960 (2) SA 523 (D), 524G. See further *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) and *Pinion v Pinion* 1994 (2) SA 725 (D).

¹¹² Robinson “Joint custody: An idea whose time has come” 1932-1983 *Journal of Family Law* 641; Schäfer “Joint Custody” 1987 *SALJ* 149; Schäfer “Joint Custody: Is It a Factual Impossibility?” 1994

of joint custody cannot be separated from the developments in the interpretation and application of the best interests principle by the South African courts. For the sake of cohesion therefore, both the theory behind and practical implications of joint custody will be discussed fully in Chapter Six.¹¹³

5 Access

Every custody order has important implications for the access between the non-custodian parent and the child.¹¹⁴ According to section 28(1)(b) of the Constitution, every child has the right to family and parental care, or suitable alternatives if the child is taken from the family environment.¹¹⁵ Thus upon the break-up of the family home, if a child is placed in the custody of one parent, provision should be made for

THRHR 671; Hoffman and Pincus *Law of Custody* 53-56; ; Clark and Van Heerden "Joint Custody: Perspectives and Permutations" 1995 *SALJ* 315; Schoeman "Gesamentlike Bewaring van Kinders" 1989 *THRHR* 462; Joubert "Gesamentlike Bewaring" 1986 *De Jure* 535.

¹¹³ On joint custody in general see Van Heerden *et al Boberg's Law of Persons and the Family* 551; Schäfer "Joint Custody" 1987 *SALJ* 149; Schäfer "Joint Custody: Is It a Factual Impossibility?" 1994 *THRHR* 671; Hoffman and Pincus *Law of Custody* 53-56; Spiro "Joint Custody" 1981 *THRHR* 163; Meintjies-Van der Walt "Gesamentlike Bewaring in die Weegskaal" 1991 *De Rebus* 578; Clark and Van Heerden "Joint Custody: Perspectives and Permutations" 1995 *SALJ* 315; Schoeman "Gesamentlike Bewaring van Kinders" 1989 *THRHR* 462; Joubert "Gesamentlike Bewaring" 1986 *De Jure* 535.

¹¹⁴ The omission of terms defining access rights does, however, not mean that access is precluded, because it is a principle of the common law that a non-custodian parent has the right to reasonable access. Reasonable access is impossible to define conclusively. According to Innes CJ it is all a question of degree to be determined on the facts of the case. See *Mitchell v Mitchell* 1904 TS 128, 131. See further *Lecler v Grossman* 1939 WLD 41; *Myers v Leviton* 1949 (1) SA 203 (T); *Taylor v Taylor* 1952 (4) SA 279 (SR); *Marais v Marais* 1960 (1) SA 844 (C); *Botes v Daly and Another* 1976 (2) SA 215 (N); *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T); *Kougianos v Kougianos* 1995 (1) PH B4 (D). See further Van Heerden *et al Boberg's Law of Persons and the Family* 565-567; Schäfer *The Law of Access* 34; Rosen "Access: Expressed feelings of children of divorce on continued contact with non-custodian parent" 1979 *SALJ* 342-346.

¹¹⁵ This is in accordance with the general opinion that all family relationships should not be terminated upon the dissolution of a marriage as well as with the provisions of the United Nations Convention on the Rights of the Child concerning the child's right not to be removed from its parents and to retain contact with both its parents if removal from one or other is deemed in the child's interests. Art 9(1) of the Convention provides for the right of the child not to be separated from his or her parents against its will and only in circumstances where competent authorities have determined that it is in fact in the best interests of the child to be separated. Once a child is separated from its parents, Art 9(3) obliges State Parties to respect the child's right to maintain personal relations and direct contact with both parents unless such contact is deemed contrary to the child's interests. See Chapter Three 3 3 4 above. The South African legislature has brought South Africa a step closer to fulfilling its obligations in terms of the Convention by the inclusion of section 16 in the Children's Bill which provides that every child has the right not to be separated from his or her family, except where such separation is in the interest of the child (for instance when his or her parents divorce and he or she is placed in the care of only one). In such a situation the child has the right to maintain a personal relationship and regular contact with his or her parent.

the possibility of contact between the non-custodian parent and the child.¹¹⁶ If no order is made the non-custodian has the right to reasonable access.¹¹⁷

It is not unusual for courts and academic writers to make reference to a parent's rights of access to his or her child. However, access is more and more often approached from the child's point of view.¹¹⁸ This means that it is rather seen as a right of the child against the parent instead of *vice-versa*.¹¹⁹ The variety of forms which the access between a child and non-custodian parent may take, is as many as the unique circumstances of each family.¹²⁰ Though this will happen only in very exceptional

¹¹⁶ Hahlo *Husband and Wife* 396-402; Van Heerden *et al Boberg's Law of Persons and the Family* 565-567; Schäfer *The Law of Access* 34; Singh "The non-custodian parent's 'right of access': a note to the complacent" 1996 *SALJ* 170.

The Children's Bill defines contact as maintaining a personal relationship with the child, and if the child lives with someone else, in person communication with the child on a regular basis, including visiting or being visited by the child, and regular communication in any other manner including through post, telephone or any other form of electronic communication.

¹¹⁷ In each case what is deemed reasonable will be a question of fact, the determination of which is largely left in the discretion of the custodian parent. *Mitchell v Mitchell* 1904 TS 128. In *Myers v Leviton* 1949 (1) SA 203 (T) Price J held that "how rights of access shall be enjoyed are largely matters of discretion, adjustment and arrangement... having regard to the infinite variety of circumstances that must inevitably arise from time to time".

It was held in *Ressel v Ressel* 1976 (1) SA 289 (W) that the custodian father was not at fault in refusing to approve the mother's arrangements for a holiday with their son.

See also Hahlo *Husband and Wife* 399.

The custodian may, however, not exercise this discretion in such a way as to negate the access rights. *Vucinovich v Vucinovich* 1944 TPD 143; *Fraser v Fraser* 1945 WLD 112; *Hodgkinson v Hodgkinson* 1949 (1) SA 51 (E); *Marais v Marais* 1960 (1) SA 844 (C); *Segal v Segal* 1971 (4) SA 317 (C).

A non-custodian parent who is prevented by the other from exercising his access rights may institute court proceedings against the custodian. *Oppel v Oppel* 1973 SA 675 (T); *Germani v Herf* 1975 (4) SA 887 (A); *Evans v Evans* 1982 (1) SA 370 (W); *Kougianos v Kougianos* 1995 (1) PH B4 (D). See further Van Heerden *et al Boberg's Law of Persons and the Family* 567; Schäfer *The Law of Access* 61-62; Hahlo *Husband and Wife* 399; Singh "Kougianos v Kougianos on Appeal" 1996 *SALJ* 701.

¹¹⁸ *B v S* 1995 (3) 571 (A); *Haskins v Wildgoose* [1996] 3 All SA 446 (T); *V v V* 1998 (4) SA 169 (C); *Duncombe v Willies* 1982 (3) SA 311 (D).

¹¹⁹ In *B v S* 1995 (3) 571 (A) 571H, 582A-B the Appellate Division laid to rest a great deal of uncertainty about the rights of an unmarried father, especially with regard to the access of such father to his child. Howie JA stated, "It is inappropriate to talk of a parent having a legal right at all in this context: no parental right, privilege or claim will have any substance or meaning if access will be inimical to the welfare of the child." And, "It is thus the child's right to have access or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent." However, treating access as a right of the child, does not mean that it can be treated exclusively from the rights of the parent. In *V v V* 1998 (4) SA 169 (C) 198C-E.

Foxcroft J said, "Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to children is likely to be."

¹²⁰ Bosman and Van Zyl "Children, young persons and their parents" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 62 identify five forms of defined (also called structured)

circumstances, the court may completely deny the non-custodian parent access to his or her children.¹²¹

Thus, whether concerning access to a child born out of wedlock or access of a non-custodian parent to his or her legitimate child after divorce, the interests of the child will always determine the existence of the parent's right, privilege or claim to access.¹²² The mere fact that a non-custodian parent makes contribution towards the maintenance of the child does not create a right to access.¹²³

access, namely supervised access, divided access, visiting access, staying access and deferred access. See also Schäfer *The Law of Access* 67-76; Singh 1996 *SALJ* 170; Hahlo *Husband and Wife* 398.

On the different types of access orders, see further *Krasin v Ogle* [1997] 1 All SA 557 (W). *Kok v Clifton* 1955 (2) SA 326 (W); *Oosthuizen v Uqart* 1959 (4) SA 520 (O); *Willers v Serfontein en 'n Ander* 1985 (2) SA 591 (T); *Clement v Clement* 1961 (3) SA 861 (T); *Grobler v Grobler* 1978 (3) SA 578 (T); *Germani v Herf* 1975 (4) SA 887 (A); *Dann v Dann* 1968 (1) PH B3 (D); *Hodgkinson v Hodgkinson* 1949 (1) SA 51 (E); *S v S* 1993 (2) SA 200 (W); *Evans v Evans* 1982 (1) SA 370 (W).

¹²¹ This will happen where the parent is unfit to have contact with the child, or is otherwise inclined to use access as a means to an improper end. *Van den Berg v Van den Berg* 1959 (4) SA 259 (W); *Re J (An Infant)* 1981 (2) SA 330 (Z); Van Heerden *et al* *Boberg's Law of Persons and the Family* 567; Schäfer *The Law of Access* 115-118.

In *Duncombe v Willies* 1982 (3) SA 311 (D) the father's access rights were suspended because he refused to refrain from indoctrinating the children against the religion chosen for their education by the custodian mother. The court granted the application based upon the right of the custodian to decide on the children's religious upbringing, as well as the fact that being taught two such divergent religions at such young and impressionable ages was contrary to the best interests of the children. Milne DJP held that by refusing to stop the attempted proselytising of the children, the father had deprived himself of the right of access and deprived the children of other benefits which contact with their father would have brought them. See 315A-E, 317E-F, 317G.

¹²² *Chodree v Vally* 1996 (2) SA 28 (W); *V v H* [1996] 3 All SA 579 (K); *T v M* 1997 (1) SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (W); *W v F* [1998] 9 BCLR 1199 (N); *I v S* 2000 (2) SA 993 (C). See further Sonnekus and Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232; Hutchings "Reg van toegang vir die vader van die buite-egtelike kind – Outomatiese toegangsregte – Sal die beste belang van die kind altyd seëvier?" 1993 *THRHR* 310; Davel and Jordaan "Het die belange van die kind uiteindelik geseëvier?" 1997 *De Jure* 33; Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622; Kruger "Die toegangsbevoegdheid van die ongetroude vader – is die finale woord gesprek? *B v S* 1995 (3) SA 571 (A)" 1996 *THRHR* 514; Goldberg "The right of access of a father of an illegitimate child: further reflections" 1996 *THRHR* 282; Labuschagne "Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsontwerp van geregtigheid" 1996 *THRHR* 181; Van der Linde "Begrensing van die omgangsreg van die biologiese vader met sy natuurlike kind: Blote biologiese vaderskap onvoldoende" 1999 *De Jure* 181.

¹²³ In *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T) the parties entered into an agreement, submitted to the court in a consent paper, whereby the mother was to have custody of the children. The father was to have quite liberal rights of access despite the fact that he had a severe drinking problem. Regardless of the fact that, in terms of the agreement, the mother was entitled to discontinue any access if the father did not curb his drinking, the court refused to make the consent paper an order of the court. The main reason was the judge's doubt whether the interests of the children would be served by spending so much, if any, time with their father. In addition to his own doubt about the access, it was clear to him that the mother was not at all satisfied with the agreement either. He concluded that the only reason why the mother agreed to the settlement in the first place was the financial concessions which the father was willing to make. He considered the conduct of the legal practitioners who advised such a settlement to be malpractice, reaffirming the fact that, as officers of the court, their first obligation should have been to ensure the welfare of the minors. Though De Villiers J never explicitly said so, this

6 Conclusion

A marriage may be dissolved by divorce but the essence of the relationship between the parents and children remains unchanged.¹²⁴ The parent-child relationship is continuous and it survives the breakdown of the relationship between parents that is inherent to separation and divorce.¹²⁵ However, due to the practical impossibility of the child's continuing to live with both parents as it did during the marriage, the court is obliged to make an order regarding the future of the child.¹²⁶

The common law upper guardianship of the High Court as well as the Divorce Act¹²⁷ vest the court with the capacity to make any order regarding the different components of the parent-child relationship.¹²⁸ Before making such an order the report and recommendations of the Family Advocate will be considered.¹²⁹ The court's discretion is very wide and the variety of possible orders, endless, the only limitation

case clearly lays down the principle that the payment of maintenance should never be seen as a sort of *quid pro quo* for access to the children. See 164H-I; 164 J-165A; 165D; 167C-D.

This principle is valid for children born out of wedlock as well. In terms of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 sec 5(e) the financial contributions to the mother for her lying-in expenses and the maintenance of the child, by the father, are circumstances which the court will take into account in considering an application in terms of the Act. However, since this is only one of the factors which the court will take into account it is impossible to come to a conclusion suggesting that payment of maintenance will entitle a father to access.

In *Matthews v Haswari* 1937 WLD 110 and *Wilson v Eli* 1914 WR 34 the courts erroneously based the father's right of access upon his duty to support and maintain the child. See also *F v L and Another* 1987 (4) SA 525 (W); *Douglas v Mayers* 1987 (1) SA 910 (ZH); Boberg 1988 *Businessman's Law* 35.¹²⁴ See 2 above.

¹²⁵ "One should not lose sight of the fact that a decree of divorce merely terminates the legal relationship between a man and a woman. The personal, psychological and emotional relationships between the parties and their children continue after divorce. In this sense divorce does not terminate the problems of marriage. Many only begin at that time." Lind 1989 *Businessman's Law* 149, 150. "To be trite, parents do not divorce their children." Miller 1979 *Family Law Quarterly* 345, 363. "Divorce terminates marriage, but not parenthood or psychological parenthood..." Freeman "The best interests of children. – Is the *Best Interests of the Child* in the best interests of children?" 1997 *International Journal of Law and the Family* 360, 380.

In a contrary view, however, it has been said that "The relationship between the parents and children is necessarily different after divorce and, accordingly, it may be unrealistic in some cases to try to preserve the non-custodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit." Bruch and Bowermaster "The relocation of children and the custodial parents" 1996 *American Family Law Quarterly* 298, as quoted by McDougall AJ in *H v R* 2001 (3) SA 623 (C) 628G.

¹²⁶ "When a marriage is dissolved a triangular conflict of interests arises: the minor children are entitled to proper maintenance and education and to the guidance and society of their parents. As the home has been broken up and the parents are now at arms length and as the child is indivisible, some adjustment has to be made in this respect. Similarly each parent has a natural right to the society of his children; since they cannot both exercise this right, the matter calls for adjustment on the most equitable grounds." Van den Heever J in *Landman v Minnie* 1944 OPD 59 63.

¹²⁷ Act 70 of 1979.

¹²⁸ Sec 6(1)(a).

¹²⁹ The Mediation in Certain Divorce Matters Act 24 of 1987. See Chapter Four 5 2 5 above.

being the requirement that the order should be made in the best interests of the child. However, since the conception of the best interests of the child as paramount consideration in custody matters,¹³⁰ courts have struggled to interpret and apply it in a satisfactory way. Fortunately, a study of South African case law reveals that courts do not approach the principle as a rigid rule, but that generous allowance has been made for development in the interpretation and application thereof. It is based on these developments, explored in the following Chapter, that the determination on the workability of the best interests principle will finally be made.

¹³⁰ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

CHAPTER SIX

SOUTH AFRICAN PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD

1 Introduction

It has been argued in Chapter Two above that the concept of the child's best interests, though not a statutory principle, has always formed part of the South African common law. In exercising its inherent jurisdiction as the upper guardian of all minor children the High Court has a wide discretion to award the custody of a child to either parent according to considerations of the best interests of the minor.¹ In order to determine the best interests of the child legal presumptions and rules, for instance the principle stating that it is in the best interests of the child that custody should not be awarded to the parent responsible for the breakdown of the marriage, were applied.² However, these legal rules could not provide satisfactory outcomes in all cases and in 1948 the Appellate Division³ provided the proper perspective⁴ – that an end result serving the welfare of the child, can only be achieved if the best interests of that child is the starting point of the decision-making process.⁵

The following Chapter is devoted to an explanation of the developments in the interpretation and application of the best interests-principle in three eras: before 1948 when it was considered as a factor in the decision-making process alongside the fault principle without having overriding weight, after 1948 when the principle was supposed to be paramount in cases concerning the parent-child relationship and, finally, the era since the constitutionalization of the principle in section 28(2). The developments in these eras form the backdrop for the new Children's Bill 2003 and

¹ Voet 25 3 20, 25 3 30; Van Leeuwen *RHR* 1 15 6.

² See 2 2 below on the fault-principle.

³ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

⁴ Later the perspective was further broadened. Tebbutt AJ (as he then was) called the best interests principle “[a] golden thread which runs throughout the whole of the fabric of the law relating to children”. See *Kaiser v Chambers* 1969 (4) SA 224 (C) 228G.

⁵ “[T]he interest of the children is the main or paramount consideration, or furnishes the guiding principle to be observed by the Court.” *Fletcher v Fletcher* (*supra*) 143 per Schreiner JA.

will provide a measure by which to determine the value and workability of the concept as it is defined in the Bill.⁶

2 Common law

2 1 Point of departure: natural guardianship and the superiority of father's rights

According to Spiro the common law of parent and child is subject to two fundamental rules.⁷ The first entails the non-interference with parental power due to its superiority⁸ while the second rule confirms the upper guardianship of the court over all minors. The interaction of these two rules gave rise to two exceptions on the superiority of the parental power in favour of the upper guardianship of the court. These exceptions turned upon the question whether a court has authorized a separate home or not,⁹ as well as what the interests of the child demand.¹⁰

Where the parents were still living together and a separate home had not been authorized, the court could only interfere with the exercise of parental power if the conduct was such as to constitute a danger to the child's life, health and morals.¹¹ This rule was authoritatively laid down by the Appellate Division in *Calitz v Calitz*,¹² but

⁶ In sec 10 the Bill lists a number of criteria or factors to be considered, when relevant, when the best interests of the child principle is applied in terms of the Act. Sec 14(1) reiterates the Constitution and provides for the paramountcy of the best interests of the child in every matter concerning the child.

⁷ Spiro *Parent and Child* 257-259.

⁸ "[T]he father... is the natural guardian of his legitimate children until they attain majority... He alone is entitled to their custody, has control over their education, and can consent to their marriage." De Villiers in *Van Rooyen v Werner* 1892 (9) SC 425, 428.

⁹ A separate home was authorized in the course of a matrimonial cause by a decree of judicial separation or divorce. Van Heerden *et al* *Boberg's Law of Persons and the Family* 505.

¹⁰ Even at common law the court could interfere with the exercise of parental authority if the interests of the child were at stake. However, because of the superiority of the father's rights and natural guardianship, courts were very reluctant to interfere where a separate home had not been granted. Where the parents divorced or separated legally, the interference was necessary in order to determine the custody arrangements. As will be seen below, until 1948, the best interests of the child were considered alongside other principles and factors.

¹¹ "The court has no jurisdiction where no divorce or separation authorizing the separate home has been granted, to deprive the father of his custody except under the court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such, for example, as danger to the child's life, health and morals." Per Tindall JA in *Calitz v Calitz* 1939 AD 56, 63. The "special grounds" were in fact an interpretation of the best interests principle as they are concerned with the welfare of the child. Unfortunately, the words were interpreted too literally and give rise to a rule that interference was only justified in these three circumstances.

¹² 1939 AD 56. In this case the trial court awarded the custody of a two-and-a-half year old girl to her mother on the ground that it was in her best interests. The Appellate Division however, allowed the father's appeal, holding that the father's rights were superior to those of the mother – he was the natural guardian as well as the innocent party. The court acknowledged that the power of the father was not

was later qualified¹³ to the extent that the court could interfere at any time on any special grounds and not merely the three mentioned in this case.¹⁴ The principle thus evolved that the court may, even *stante matrimonio*, interfere with the exercise of the parental power whenever the interests of the child so demanded.¹⁵ But, unless such interference was justified during the marriage, in accordance with the common law rule, the father's right to the custody of the children was superior to that of the mother. This was clearly formulated in *Calitz v Calitz* as follows:

“Although ...the parental power belongs to the mother as well as the father, there is no doubt that under our law... the rights of the father are superior to those of the mother.”¹⁶

Initially, this position remained the same after divorce as well. As the father was the natural guardian with superior rights, he was entitled to the custody of the children. Lord De Villiers explained this principle in *Van Rooyen v Werner* in the following way:

“[T]he father ... is the natural guardian of his legitimate children until they attain majority. ... He alone is entitled to their custody, has control over their education, and can consent to their marriage. ... [T]he mother[‘s] rights of control over the person and property of her legitimate children do not arise until after the death of the father.”¹⁷

2 2 Upon the facts of the case: the fault-principle

The second exception on the superiority of the father's rights existed where the divorce or separation of the parents necessitated interference with the parental power

beyond the control of the law or the interference of the court, but that the court's ability to interfere was limited to exceptional circumstances like a “danger to the child's life, health or morals”.

See Bonthuys “Of biological bonds, new fathers and the best interests of children” 1997 *SAJHR* 622, 633; De Soysa “Resolving custody disputes between married parents in Roman-Dutch jurisdictions: will English law continue to be relevant?” 1993 *Comparative and International Journal of South Africa* 364, 365.

¹³ The rule laid down in *Calitz v Calitz* (*supra*) was originally only applicable in cases where the parents were legally married and one party deserted the other. See *Bam v Bhabha* 1947 (4) SA 798 (A) 806; Spiro “Custody orders in respect of minors with one parent” 1958 *THRHR* 16; Spiro *Parent and Child* 259; Van Heerden *et al* *Boberg's Law of Persons and the Family* 503-505.

¹⁴ “[T]he question which... I must ask myself, is whether the interests of the children demand that I should vary the order of Court in the applicant's favour, deprive her of the custody of the children and leave them where they are. That, in my opinion, would amount to good cause or ‘special grounds’.” Per Fannin JA in *Horsford v De Jager* 1959 (2) SA 152 (N) 154C.

¹⁵ Sornarajah “Parental custody: recent trends” 1973 *SALJ* 131, 133; Kruger “Enkele opmerkings oor die bevoegdhede van die Hooggeregshof as oppervoog van minderjariges om in te meng met oerlike gesag” 1994 *THRHR* 305, 309. See also *Short v Naisby* 1955 (3) SA 572 (D) 575B-C; *September v Karriem* 1959 (3) SA 687 (K) 689E; *Ex parte van Dam* 1973 (2) SA 182 (W) 183H; *Petersen en 'n Ander v Kruger en 'n Ander* 1975 (4) SA 171 (K) 174A-C.

¹⁶ Per Tindall JA in *Calitz v Calitz* 1939 AD 56, 61.

¹⁷ Per De Villiers in *Van Rooyen v Werner* 1892 (9) SC 425, 428-431.

and reassignment of its incidents by the court as upper guardian.¹⁸ In *Cronjé v Cronje*¹⁹ the Transvaal Supreme Court held that where a marriage was dissolved by divorce different considerations than the superiority of the father's rights applied to custody:

“The father as natural guardian, is by law entitled to their custody; but that of course is subject to any order the Court may make. I think it is clear that, by our law, where a decree of divorce is granted, the Court has the widest discretion in making an order with regard to the custody of the children either to the father or to the mother, even though he or she is the guilty party, and may also, in certain circumstances, give the custody of the children to a third person, if it considers that neither the father nor the mother is a fit and proper person to have their custody. I think it is clear that that is our law. No doubt the general rule in these cases is to give custody of the children to the innocent party. But that is by no means an invariable rule; it is a rule which is subject to many exceptions according to the special circumstances of each case. In all cases the main consideration for the court in making an order with regard to the custody of the children, is what is best in the interests of the children themselves.”²⁰

Thus it may seem that, even in 1907, the law was settled and the best interests of the children regarded as the main consideration.²¹ The reason for the emphasis on the guilt or innocence of the parties was that at this time, divorce was based on the fault principle. Thus, only an innocent party (the one not responsible for the breakdown in the marriage relationship) was entitled to sue for divorce. The guilt of a party also played a determinative role regarding the patrimonial consequences.²²

¹⁸ Van Heerden *et al* *Boberg's Law of Persons and the Family* 505 n24.

¹⁹ 1907 TS 871.

²⁰ Per Solomon J, 872.

²¹ However, despite this statement quoted above, the court needed “very peculiar circumstances” to justify depriving the father and natural guardian of custody and deciding that it is in fact in the children's best interests to live with the mother. The father had been away from home for a number of years, spending time as prisoner of war in St Helena and, a lunatic on his return, four years in an asylum. He was discharged as uncured and though “perfectly harmless” in the court's opinion “not a fit person to have the care of young children and scarcely a person who could earn his own living”. See *Cronjé v Cronjé* (*supra*) 873-874.

According to Van Heerden *et al* early Transvaal decisions, such as *Simey v Simey* 1881 (1) SC 171; *Kramarski v Kramarski* 1906 TS 937; *Cronjé v Cronjé* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033 paid lip-service to the “general rule” that the innocent spouse was entitled to custody while actually giving effect to the child's best interests. Van Heerden *et al* *Boberg's Law of Persons and the Family* 506 n26

²² See Lee and Honoré *Family, Things and Succession* 126n2 and 131; Hahlo *Husband and Wife* 361, 428-455; Barnard, Cronjé and Olivier *Law of Persons and Family Law* 252-254; Van der Vyver and Joubert *Persone en Familiereg* 646-651, 669, 677-678; Van Heerden *et al* *Boberg's The Law of Persons and the Family* 507.

However, until 1948 there was not one governing rule consistently applied in all custody decisions.²³ The predominant position of the father as natural guardian,²⁴ the guilt or innocence of the parties,²⁵ the age²⁶ or sex²⁷ of the children, as well as the best interests of the children were all considered, without any certainty as to the priority and relative weight of each.²⁸

According to Sornarajah this uncertainty is indicative of the tension that existed between the pure Roman Dutch principles of predominant rights for the father and the importance of innocence or guilt of the parties on the one hand and the movement towards the English view that the paramount consideration is the best interests of the child.²⁹ The authority of cases like *Cook v Cook*³⁰ and *Calitz v Calitz*,³¹ which emphasized the rule that the innocent spouse was to be preferred in a custody award, was undermined by *Milstein v Milstein*³² and *Dunsterville v Dunsterville*.³³ In both these cases, the Transvaal and Natal Provincial Divisions respectively held that the

²³ *Spiro Parent and Child* 279.

²⁴ *Van Rooyen v Werner* 1892 (9) SC 425; *Ferguson v Ferguson* 1906 EDC 218; *Cronjé v Cronjé* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033; *Baskir v Baskir* 1920 EDL 19; *Van Rensburg v Van Rensburg* 1929 OPD 122; *Smith v Smith* 1937 (2) PH B71 (W); *Ackerman v Ackerman* 1940 CPD 16; *Burnett v Burnett* 1941 (2) PH B77 (C); *Johnstone v Johnstone* 1941 NPD 279.

²⁵ *Cook v Cook* 1937 AD 154; *Calitz v Calitz* 1939 AD 56; *Milstein v Milstein* 1943 TPD 227. See further the cases quoted by Centlivres JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) 131-135.

²⁶ Until 1996 when the High Court convincingly argued for a movement away from the maternal preference or tender years doctrine in *Van der Linde v Van der Linde* 1996 (3) SA 502 (O) it was generally accepted that children of a tender age should be in the custody of their mothers unless there were particular circumstances that rendered the mother unfit to have custody. See *Ex parte Jensen* (1901) 18 SC 154; *Ferguson v Ferguson* 1906 EDC 218; *Stapelberg v Stapelberg* 1939 OPD 129; *Letlho v Letlho* 1942 (2) PH B70 (O); *James v James* 1943 (2) PH B50 (O); *Collier v Collier* 1944 NPD 249; *Van der Merwe v Van der Merwe* 1946 (2) PH B68 (W); *Dunsterville v Dunsterville* 1946 NPD 594.

In *Myers v Leviton* 1947 (1) SA 203 (T) 214 it was agreed upon by the parents that custody would be given to the father, while the mother was to have liberal access rights. In justifying these rights, Price J said, "There is no one who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the psychological development of a healthy child."

²⁷ *Painter v Painter* 1882 2 EDC 147; *Ferguson v Ferguson* 1906 EDC 218; *Coleby-Clark v Coleby-Clark* 1909 TH 60; *Jennings v Jennings* 1910 EDL 420.

²⁸ Van Heerden *et al* *Boberg's Law of Persons and the Family* 506 n26.

²⁹ "The movement in South Africa... towards the English-law position that, in matters of custody, the welfare of the children is the paramount consideration, is a movement away from the traditional principle of the Roman Dutch law, namely, that as long as a marriage remains undissolved the father has a superior right to custody, a right that may be violated only in exceptional circumstances, and, where a marriage is dissolved, custody should be awarded to the innocent party." Sornarajah 1973 *SALJ* 131, 134-136.

³⁰ 1937 AD 154.

³¹ 1939 AD 56.

³² 1943 TPD 227.

³³ 1946 NPD 594.

considerations of fatherhood or innocence or guilt of the parties only become relevant where the interests of the children were evenly balanced.³⁴

Against this background the decision of the Appellate Division in *Fletcher v Fletcher*³⁵ – that the welfare of the child is to be the paramount consideration in custody matters – was an extremely valuable step towards legal certainty as well as towards the recognition of the rights of the child.³⁶

3 The best interests of the child as the paramount consideration

3 1 The moment of truth: *Fletcher v Fletcher* 1948 (1) SA 130 (A)

In the watershed decision of *Fletcher v Fletcher* the Appellate Division entrenched the best interests of the child principle as not merely a factor to be considered in a custody determination, but as the paramount and overriding factor.³⁷ All other

³⁴ “On the question of custody I have always understood that if the interests of the child or children will clearly be better served by its being in the custody of one spouse, then custody will be given to that spouse even though the other spouse is both the father and the innocent party, and perhaps *a fortiori* if the other spouse is the mother and the innocent party... I venture to suggest that questions of fatherhood or innocence come into account only when it is not clear what is best for the children... [T]he guilt of one of the spouses may be relevant on the question of his or her fitness to have the custody but this is part of the question of the best interests of the children.” Per Greenberg JP in *Milstein v Milstein (supra)* 228-229.

“If the children’s welfare – using that word in the widest sense and not confining it to mere physical well-being – will be equally safeguarded with either parent, then considerations of guilt or innocence and of natural guardianship will tip the scale, but otherwise I do not think they carry any weight, though the question of guilt or innocence may have a bearing upon the question of welfare... I may say at once that I do not regard the fact that the defendant committed adultery as unfitting her, in the circumstances, for the care of young children.” Per Broome J in *Dunsterville v Dunsterville (supra)* 596.

³⁵ 1948 (1) SA 130 (A).

³⁶ After making reference to the view of Feetham AJA in *Cook v Cook (supra)* – that the rights of the innocent spouse cannot be altogether ignored – Centlivres JA in *Fletcher v Fletcher (supra)* 134 said, “With great respect, however, I do not like the expression ‘the rights of the innocent spouse’ because when one talks of rights, it implies that the one spouse has rights against the other spouse to claim custody of a child, as if that child were a mere chattel.” This statement implies recognition of the child as a subject and bearer of rights.

³⁷ “What is really in issue in all custody cases is the interest of the child itself.” Per Centlivres JA in *Fletcher v Fletcher (supra)* 134.

It has been argued that the true value of the decision in this case, lies in its recognition of the status of the child as a subject in the parent-child relationship and within the family. “Die ouer-kind verhouding in die privaatreg [word as] paternalisties van aard beskou. Hierdie vorm van ouerlike gesag kan verklaar word aan die hand van ‘n historiese ontwikkelingsgang wat sy ontstaansbron in die absolute gesagsbevoegdheid van die Romeinse *paterfamilias* gehad het. Vaderlike gesag het wel afgewater tot die ouerlike gesag met ‘n tempering van die omvang en inhoud van ouerlike gesag. Hierdie verandering was die resultaat van godsdienstige, morele en sosiale oorwegings en nie ‘n direkte gevolg van ‘n verhoogde status waarmee ‘n kind bekleed is nie. Dit verklaar waarom *Fletcher v Fletcher* in die betrokke tydsgewrig so ‘n belangrike beslissing was. Gesien teen die historiese agtergrond was dit die eerste keer wat die appélhof die status van ‘n kind as rolspeler binne gesinsverband by egskeiding erken het. In hierdie geval is die beste belang van die kind bo gemeenregtelike oorwegings

considerations, for instance, the guilt or innocence of the parties, the gender of either the parents or children, the ages of the children and anything else, were now of subsidiary nature.³⁸

In the majority judgment³⁹ Centlivres JA carefully explained the legal principles applicable to a custody determination. He referred to the judgments in *Cook v Cook* and *Calitz v Calitz* and attempted to place them in the proper perspective.⁴⁰

“[T]he case of *Cook v Cook* is not, when the facts of that case are carefully examined, an authority for the proposition that when the evidence proves that the interests of the child will clearly be better served by its being in the custody of the one spouse, the Court may give the custody to the other spouse because the latter is the innocent party.”⁴¹

According to him the judgments in both these cases were based on the facts and that it was in the best interests of the particular children to be in the custody of the innocent party. The cases were, therefore, never intended to elevate the innocence or guilt of the parties as the determining factor in a custody award. He also emphasized the statement of Feetham AJA in *Cook* that

“[T]he rights of the innocent spouse cannot be altogether ignored, though the children’s interests must undoubtedly be the main consideration.”⁴²

The court agreed with the suggestion made by Greenberg JP in *Milstein v Milstein*⁴³ that the questions of innocence only comes into account when it is not clear what is best for the children.

“[I]t should follow that when it is clear that, in the interests of the children themselves, their custody should be awarded to the guilty party, such interests must override the fact that the other party was the innocent party.”⁴⁴

soos vaderskap of die skuld of onskuld van gades by egskeiding verhef.” Human “Die effek van kinderregte op die privaatregtelike ouer-kind verhouding” 2000 *THRHR* 393, 396.

³⁸ *Spiro Parent and Child* 281; Van Heerden *et al Boberg’s Law of Persons and the Family* 504-508.

These factors will be considered cumulatively to determine what the best interests of the child in the specific circumstances require. See below 3 3 2 and 3 3 3, as well as the discussion on the indeterminacy of the best interests principle in Chapter Four above.

³⁹ Greenberg JA concurred.

⁴⁰ According to Sornarajah Centlivres JA attempted to rationalize the judgment in *Cook v Cook* (*supra*) and *Calitz v Calitz* (*supra*) and reconcile it with the newer principle that the welfare of the children is the paramount consideration. Sornarajah 1973 *SALJ* 131, 135.

⁴¹ Per Centlivres JA in *Fletcher v Fletcher* (*supra*) 132.

⁴² *Cook v Cook* 1937 AD 154, 163.

⁴³ 1943 TPD 227.

⁴⁴ *Fletcher v Fletcher* (*supra*) 134. In *Dionisio v Dionisio* 1981 (3) SA 149 (ZA) 151-152 Baron JA affirmed this by saying that “[i]t is a fundamental principle of our common law that the sins and

The weight that should be attached to the guilt, being in the court's opinion a matter of degree, must always depend upon the facts of the case.

In considering all the facts,⁴⁵ Centlivres JA came to the conclusion that the children should remain in the custody of the father, who was, incidentally, also the innocent spouse.

In essence Schreiner JA, in his minority judgment, agreed with the legal principles set by Centlivres JA. According to him the judgment in *Cook v Cook* was an affirmation of the "well-established but variously expressed rule that the interest of the children is the main or paramount consideration" but admitted that

"[T]he difficulty remains...that these cases do mention as factors the predominant or advantageous position of the father... and of the innocent spouse... without clarifying the relationship of the several factors to each other."⁴⁶

This difficulty, however, is not insurmountable if, instead of weighing the factors of fatherhood, innocence and welfare one against the other (which is rendered completely impracticable by the essential difference and absence of any relationship between the factors), the questions of fatherhood and innocence are taken into account only if it is unclear what is best for the children.⁴⁷

On face value it seems that Schreiner JA was in agreement with the majority on the legal principles. However, Centlivres JA attempted to justify the best interest-principle on Roman Dutch authorities, whereas Schreiner JA did not hesitate to refer to English law.⁴⁸

quarrels of the parents are not visited on the children; where in the course of matrimonial disputes questions arise concerning children, their interests are paramount".

⁴⁵ The court took into account and dealt with a variety of considerations, for instance, the ages of the children (seven and five years respectively), the danger of uprooting them from an existing environment and placing them in another, the fact that the children would be exposed to and influenced by bitterness and bad relations if they were placed in the custody of their mother, the conduct of the mother during the trial which convinced the court that she was not a fit and proper person to look after the moral and spiritual welfare of children, as well as the innocence of the father in the divorce.

⁴⁶ He refers here to the judgments of *Cronjé v Cronjé* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033 as well as *Cook v Cook* 1937 AD 154. See *Fletcher v Fletcher* (*supra*) 143.

⁴⁷ Schreiner JA in *Fletcher v Fletcher* (*supra*) 145. See further Spiro *Parent and Child* 283; Hahlo *Husband and Wife* 390.

⁴⁸ According to Somarajah Schreiner acknowledged and approved a departure from the old view, while Centlivres attempted a reconciliation of the old and the new. Somarajah 1973 *SALJ* 131, 135. Bonthuys argues that "[t]he best interests-test is a refinement of the Roman-Dutch rule that the custody of the

“No apology is required for citing the practice under the English or any other modern legal system, since questions of custody may properly be decided in relation to human needs and values as they are assessed in civilised countries, generally, at the present day.”⁴⁹

Upon the facts of the case, however, Schreiner JA dissented and would have allowed the children to be placed in the custody of their mother.

Thus legal certainty on the principle to be used in custody decisions was established.⁵⁰ However, the establishment of this principle did not promote certainty on the outcome of any custody dispute. The reason is simple: it is impossible to provide an exact definition of the best interests of a child.⁵¹ Every case has to be determined on its own facts⁵² and even on similar facts decision-makers are bound to disagree.⁵³ Even after the Appellate Division established the paramountcy of the best interests principle,

children is a matter for the discretion of the judge. It directs the judge to exercise his discretion towards the promotion of the interests of the child instead of focusing on the rights and entitlements of the parents.” Bonthuys 1997 *SAJHR* 622, 623. See also *Simleit v Cunliffe* 1940 TPD 67-81; *Shepstone v Shepstone* 1974 (2) SA 462 (N); De Soysa 1993 *Comparative and International Journal of South Africa* 364, 367.

⁴⁹ Schreiner JA in *Fletcher v Fletcher* (*supra*) 145.

⁵⁰ In *Shawzin v Laufer* 1968 (4) SA 457 (A) 662G-H Rumpff JA aptly described the predominant interests of the child as substantially the only norm to be applied by the court as upper guardian in the somewhat singular problem of custody disputes. The *dicta* in *Fletcher* was applied in the following cases: *Hubert v Hubert* 1960 (3) SA 181 (W); *Engar and Engar v Desai* 1966 (1) SA 621 (T); *Allcock v Allcock and Another* 1969 (1) SA 427 (N); *Kaiser v Chambers* 1969 (4) SA 224 (C); *French v French* 1971 (4) SA 298 (W); *Littauer v Littauer* 1973 (4) SA 290 (W); *M v R* 1989 (1) 416 (O); *Märtens v Märtens* 1991 (4) SA 287 (T); *Jooste v Botha* 2000 (2) SA 199 (T); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Jackson v Jackson* 2002 (2) SA 303 (SCA).

⁵¹ Mnookin “Child Custody Adjudication: Judicial functions in the face of indeterminacy” 1975 *Law and Contemporary Problems* 226, 260: “Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.”

See further Palmer “The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 – 1995” in Keightley *Children’s Rights* 98.

⁵² See *September v Karriem* 1959 (3) SA 687 (K) 689G. “It seems to me that the Court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. For while certain aspects taken separately might appear to be of no real importance, in combination they might build up a strong case in favour of one or other conclusion.” Another attempt to define the ambit of the welfare principle was that of Young J in *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) 261H. “The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes must not be ignored.” Van Heerden *et al* add to this the child’s vital need for a sense of stability and continuity in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 526-527. See further Hoffman and Pincus *The Law of Custody* 6-9, 31-32, 60-61; Bosman-Swanepoel *et al* *Custody and Visitation Disputes* 69-70. See also *Manning v Manning* 1975 (4) SA 659 (T); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O); *French v French* 1971 (4) SA 298 (W); *Myers v Leviton* 1949 (1) SA 203 (T); *McCall v McCall* 1994 (3) SA 201 (C).

⁵³ This is proven by the difference in opinion between Centlivres JA and Schreiner JA in the discussion above.

courts have applied it in different ways.⁵⁴ For instance, the maternal preference-rule or tender years doctrine arose, whereby courts considered the best interests of a young child to require its custody to be given to the mother.

3 2 The maternal preference rule

3 2 1 “There is no one who quite takes the place of a child’s mother”

These words of Price J in *Myers v Leviton*⁵⁵ represent the bottom-line of thinking that constitutes the maternal preference rule.

“There is no one who quite takes the place of a child’s mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his or her own mother – an important factor in the normal psychological development of a healthy child.”⁵⁶

It is clear that the court, without stating it explicitly, was attempting to allow the best interests of the child⁵⁷ to outweigh the superiority of the rights of the father and the fault-principle, by creating the maternal preference rule.⁵⁸ According to this rule it is

⁵⁴ Though this was not done in the South African context, Kurki-Suonio identified three periods during which the interpretation of the best interests principle had predictable outcomes: the maternal preference, psychological parenthood and gender neutrality, and joint custody. Kurki-Suonio “Joint custody as an interpretation of the best interests of the child in critical and comparative perspective” 2000 *International Journal of Law and the Family* 183, 185-187. Though it is impossible to pinpoint any exact dates separating them, these three stages can be identified in South African law as well.

⁵⁵ 1949 (1) SA 203 (T) 214.

⁵⁶ 1949 (1) SA 203 (T) 214.

⁵⁷ Trombetta calls the maternal preference rule “a view on the best interests of the child”. Trombetta “Joint custody” 1981 *Journal of Family Law* 213, 215.

⁵⁸ The maternal preference rule is also known as the tender years doctrine. “If it is in the best interests of the child that it should be with the mother, the custody will be awarded to the mother even where there has been no misdemeanour or shortcoming on the part of the father.” Hahlo *Husband and Wife* 391-392. See further Hoffman and Pincus *The Law of Custody* 33-38; Rosen “Is there any real basis for the preference accorded to mothers as custodial parents?” 1978 *SALJ* 246; Kahn “A note on ‘Is there any real basis for the preference accorded to mothers as custodial parents?’” 1978 *SALJ* 249; Burman and McLennan “Providing for children? The Family Advocate and the legal profession” in Keightley *Children’s Rights* 69, 74-75; Schäfer “The burgeoning family law and joint custody” 1986 Inaugural lecture at Rhodes University 17-18; Van Heerden *et al* *Boberg’s Law of Persons and the Family* 534-536; Sornarajah 1973 *SALJ* 131; Van Heerden and Clark “Parenthood in South African law: Equality and Independence? Recent developments in the law relating to guardianship” 1995 *SALJ* 140-151; Bonthuys “Labours of love: Child custody and the division of matrimonial property after divorce” 2001 *THRHR* 192, 194-196; Du Toit “Integrating care and justice in South African family law: Laying the theoretical foundation” 2002 *TSAR* 46, 54-56; Du Toit “Integrating care and justice in South African family law: Dealing with maternal and paternal vulnerabilities” 2002 *TSAR* 526, 527-537.

The development in the South African law, from father superiority to maternal preference rule (through the back door of the best interests principle) mirrored the developments in the Anglo-American jurisdictions. For the Anglo-American perspective, see Atkinson “Criteria for deciding child custody in the trial and appellate courts” 1984 *Family Law Quarterly* 1, 8-16; Miller “Joint custody” 1979 *Family Law Quarterly* 347, 352-355; Title “The father’s right to custody in inter-parental disputes” 1974 *Tulane Law Review* 189; Mnookin 1975 *Law and Contemporary Problems* 226, 235-237; Roth “The

generally presumed that, except where the mother displays characteristics that render her unfit to have custody,⁵⁹ the best interests of young children and girls of all ages required them to be placed in the custody of their mothers.⁶⁰ Custody of adolescent boys is more readily awarded to the father.⁶¹

Though the courts guarded very carefully against creating the impression that material wealth of a parent is the determining factor, the maternal preference was trumped, even in the absence of any impeachable characteristics or conduct by the mother, if the father was able to make substantially better provision for the material needs and well-being of the child.⁶² If, however, the mother was able to provide sufficiently, the mere fact that the father could offer more luxury, did not entitle him to the custody of young children.

tender years presumption in custody disputes” 1976-1977 *Journal of Family Law* 422; Maidment *Child Custody and Divorce* 107-148, 177-201.

⁵⁹ In *Mohaud v Mohaud* 1964 (4) SA 348 (T) 353B the custody of three young children was awarded to the father rather than the mother. The mother had committed adultery on more than one occasion. Vieyra J found the mother to be “a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children it would not be in their interests to entrust their custody to her if there exists a better choice.”

See also *Mayer v Mayer* 1974 (1) PH B4 (C). The court found itself in the “somewhat perplexing situation where the case was finely balanced in the sense that the child being only three-and-a-half years old would normally be given to the mother.” She was, however, a career woman and had intimate relationships with more than one man and, in the court’s opinion, possessed a basically unstable personality. The father, on the other hand was a steady and stable person. The court found that it was in the best interests of boy to be in the father’s custody.

⁶⁰ *Tabb v Tabb* 1909 TS 1033; *Kennedy v Kennedy* 1929 EDL 257; *Dunsterville v Dunsterville* 1946 NPD; *Collier v Collier* 1944 NPC 249; *Myers v Leviton* 1949 (1) SA 203 (T); *Fortune v Fortune* 1955 (3) SA 348 (A); *French v French* 1971 (4) SA 298 (W); *Manning v Manning* 1975 (4) SA 659 (T); *Schwartz v Schwartz* 1984 (4) SA 467 (A); *Baart v Malan* 1990 (2) SA 862 (E); *Madiehe (born Rathlogo) v Madiehe* [1997] 2 All SA 153 (B).

⁶¹ “There comes a time ... especially in the case of boys, when, all other things being equal, they require the care and guidance of their father more than of their mother: this is especially the case when the boy is approaching the difficult age of puberty.” Per Franklin J in *Manning v Manning* 1975 (4) SA 659 (T). See also *Stock v Stock* 1981 (3) SA 1280 (A); *McCall v McCall* 1994 (3) SA 201 (C).

However, the fact that boys of adolescent age need their fathers, never gave rise to the same kind of rule as that of young children and their mothers. There have been many cases where the courts decided in favour of mother custody of adolescent boys. *Schawzin v Laufer* 1968 (4) SA 657 (A); *Bailey v Bailey* 1979 (3) SA 128 (A). In the latter case the majority of the court refused the application for the variation of the custody of adolescent boys by the father, while the minority emphasised the importance of “male guidance and companionship of his father as [the young boy] grows older”. Per Diemont J 132A-B. The minority was of opinion that the better environment which the mother might possibly provide for the children in England, did not outweigh their need for their father’s continued involvement in their lives.

⁶² *Van Rensburg v Van Rensburg* 1929 OPD 122, 123. Even while acknowledging that such a young child would be “undoubtedly better off in the hands of its mother”, the court awarded custody of a sixteen month old baby to the father because the mother “is at present not in a position to give the child the same comforts and necessities which the father is able to provide.”

*Siyaya v Siyaya*⁶³ concerned the custody dispute between the parents of seven minor children. The eldest two boys expressed a clear preference to stay with their father and the court allowed it. Following the maternal preference rule in respect of the younger boys and girls, the court held that “the interests of children cannot be measured purely in terms of superior accommodation or amenities”. Therefore, since the mother was able to look after and provide for the children properly, it was held to be in their best interests to remain with their mother even though she could provide less luxury and comfort than the father. This decision displays the truth that “there is more to a child’s life than supplying its physical needs”.⁶⁴

The reasoning behind the maternal preference rule as explained by Broome J in *Dunsterville v Dunsterville*⁶⁵ reveals the psychological thinking prevalent in a time when there was great divide between the perceived social roles of husband/father and wife/mother.⁶⁶

“[I]t is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending to the bodily needs of their offspring as efficiently as an institution-trained nurse. But that is not the end of the matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child’s life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later. It seems to me that if the father is awarded custody of these young children, they will in all probability, notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will

⁶³ 1958 (2) PH B17 (C)

⁶⁴ See further the statement of Holmes J in *Bashford v Bashford* 1957 (1) SA 21 (N) 24G-H: “It is not necessary to cite authority for the proposition that, in a case like this, other things being equal, a child of tender years should be with its mother... It is no answer to say that the physical needs of the child will be adequately met by his grandparents. There is more to a child’s life than supplying its physical needs. Despite the atomic age of robots and automotion in which we live, natural factors such as family life and mother-love are still fundamental in a child’s life.”

⁶⁵ 1946 NPD 594.

⁶⁶ On the social roles of men and women, see chapters one, two and three of Eekelaar *Family Law and Social Policy*. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). O’Regan J said that “as a matter of fact... mothers not only bear a considerably greater proportion of the burdens of child rearing than fathers, but ... mothers, as a general rule, do have a special role in relation to the nurturing and care of children.”

realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the paternal link.”⁶⁷

3 2 2 “Mothering is a function rather than a persona”⁶⁸

The reasoning that mothers are necessarily the most, sometimes even the only, important figure in a young child’s life and forming years, was convincingly rejected by Hattingh J in *Van der Linde v Van der Linde*:⁶⁹

“[Ek] betwyfel... of daardie aanname sondermeer as ‘n universeel geldende aksioom kan dien. Hedendaags is bemoedering ook deel van ‘n man se wese. Die begrip ‘bemoedering’ is aanduidend van ‘n funksie eerder as ‘n persona en is hierdie funksie nie noodwendig geleë in die biologiese moeder nie. Dit behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging. Alleenlik die ouer wat hierdie behoeftes kan bevredig sal daarin slaag om ‘n psigologiese band met die kind te smee in welke ouer se sorg die kind kan ervaar dat sy bestaan welbeduidend is, en wat met toegeentheid beskut en beskerm word. Bemoedering veronderstel om onvoorwaardelik liefde te kan betoon sonder om noodwendig ‘n teenprestasie te verwag... Hedendaags het die man die vrymoedigheid om sy bemoederingsgevoel te openbaar en uit te leef. Al meer mans is bereid om bemoedering as deel van hul persoonlikheid te herken, te erken en uitdrukking daaraan te verleen.”⁷⁰

Although this *dictum* serves as authority for a movement away from the maternal preference rule, it remains to be seen whether the Supreme Court of Appeal will confirm this movement towards a primary caregiver/psychological parent preference. In light of the court’s responsibility to develop the common law in terms of the provisions of the Bill of Rights,⁷¹ fathers may certainly argue that their right to equality⁷² is infringed by the maternal preference rule. On the other hand, to ignore

⁶⁷ *Dunsterville v Dunsterville (supra)* 597.

⁶⁸ The heading is based on the *dicta* by Hattingh J in *Van der Linde v Van der Linde* 1996 (3) SA 509 (O). This case signified the start of the decline of the maternal preference rule by ascribing the function of “mothering” to both the mother and the father. It therefore implies that there would be no good reason to award custody of young children to the mother as a rule. Each case should be judged on its own facts, circumstances and abilities of either parent.

See further Wessels “Men can make good mothers” 2000 *ChildrenFIRST* 16-17.

⁶⁹ 1996 (3) SA 509 (O).

⁷⁰ 515B-H.

⁷¹ Sec 39(2) of the Constitution, Act 108 of 1996. See further the discussion in section four below.

⁷² Sec 9 of the Constitution. Sec 9(2) provides that any discrimination against a person based on, amongst other things, gender and marital status is unfair. See further Bonthuys “The South African Bill of Rights and the development of family law” 2002 *SALJ* 748, 766-769.

the biological fact of motherhood would be unfair to the mothers.⁷³ In *Ex parte Critchfield*⁷⁴ the Witwatersrand Local Division suggested the solution that, especially when children are young, biological motherhood should always be one of the factors weighed in the decision, but this should never be given undue weight.⁷⁵

Such an approach by the courts would, besides being constitutionally sound, bring South African family law in accordance with its responsibilities⁷⁶ in terms of the Convention on the Elimination of All Forms of Discrimination Against Women (1979).⁷⁷

Given the emphasis in the new Children's Bill⁷⁸ on shared parental responsibilities and the introduction of the concept of the primary caretaker, it is to be expected that a blind application of the maternal preference rule will eventually become a thing of the past.

⁷³ In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1(CC) paragraph 80 and 83, O'Regan J in her minority judgement argued that, although equality between men and women should be the long-term goal, there may be circumstances where equal treatment would actually entrench inequality. For instance, if on a day-to-day basis the mother were the only parent concerned with the care of a very young child, it would be unfair to deny any cognisance of the fact to play a role in a custody determination.

See the discussion of the *Hugo*-case (*supra*) by Carpenter "Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of cases" 2001 *THRHR* 619, 619-627.

⁷⁴ 1999 (3) SA 132 (W).

⁷⁵ "Parents are not in fact socially equal, and should thus not legally be treated as if on par. Treating them the same would do serious damage to our ideal of complete equality in this instance... Thus, there should be certain *prima facie* distinctions made between mothers and fathers with regard to parental authority, based on the natural and social systematic differences between them with regard to parental responsibility typically assumed." Du Toit 2002 *TSAR* 526, 527-540.

⁷⁶ Art 5(b) of this Convention places State Parties under the responsibility to "take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the paramount consideration in all cases."

Art 16(1)(d) and (f) further requires States Parties to

"take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in all matters relating to their children; in all cases the interests of the children shall be paramount;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount."

⁷⁷ Hereafter called the Women's Convention. South Africa ratified the Women's Convention on 13 September 1995 without any reservations. See Chapter Three 3 2 above.

⁷⁸ The Children's Bill makes specific provision for more than one person having parental responsibilities and rights over a child (sec 30-34) as well as the co-exercise of these responsibilities and rights (sec 42-44).

3 3 Sole custody: Psychological parenthood

Since the early seventies ordering sole custody in favour of the “psychological” parent of the child has been an attractive option for the courts. This phenomena was largely influenced by the work of Joseph Goldstein, Anna Freud and Albert Solnit.⁷⁹ Their main argument is that there should be a single custodian parent after divorce. This psychological parent is the adult whom the child primarily perceives as his parent – that is, the adult with whom the child has the strongest emotional and psychological tie and with whom the child feels the most valued, cared for and wanted.⁸⁰ Apart from the importance they attach to this sense of security,⁸¹ they very highly rate the appearance of stability in the child’s life. They suggest that, because,

“[P]hysical, emotional, intellectual, social and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources.”⁸²

A further very profound suggestion, as logical extension of the argument above, is that the non-custodian parent should have no legally enforceable right of access to or contact with the child after the initial custody determination.⁸³

“[A] custody decree should be final, that is, not subject to modification.... Children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other... Thus, the non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.”⁸⁴

⁷⁹ Goldstein, Freud and Solnit *Beyond the Best Interests of the Child, Before the Best Interests of the Child, In the Best Interests of the Child*.

⁸⁰ Schwartz 1984 *Family Law Quarterly* 225, 230-232; Trombetta 1981 *Journal of Family Law* 213, 214-216; Atkinson 1984 *Family Law Quarterly* 1, 16-18;

⁸¹ Interestingly, it was during the early seventies that Steyn J in *French v French* 1971 (4) SA 298 (W) emphasized the child’s sense of security, to the extent that the child feels welcome, wanted and loved, in a custody determinations. See Chapter Four 2 3 above.

⁸² Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* 32.

⁸³ See Van Heerden *et al Boberg’s Law of Persons and the Family* 527-528 for their discussion of these suggestions.

⁸⁴ Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* 37-38.

Though the last suggestion has never really taken root with South African courts, the idea that a child is better off with one parent in a sole custody situation,⁸⁵ has received much support from South African judges.⁸⁶ The proposed need for stability and a parent with whom the final say lies, has been one of the main arguments levelled against joint custody.⁸⁷

In deciding the child's best interests the personality and capabilities of the parent play an important role. The psychological parent is usually seen as the one who bore the greatest burden of child-rearing responsibilities during the marriage.⁸⁸ Thus, though in theory it is supposed to be a gender-neutral ideal, mothers are still most often the custodian after the marriage.⁸⁹ This has led to the criticism that the best interests principle works unfairly towards parents.⁹⁰ The primary care-taker preference does, however, reduce the likelihood of unnecessary litigation, as well as diminishing the

⁸⁵ Sole custody is often regarded as the usual or normal custody order and anything different from it, is regarded as an exception. Schäfer "Joint custody" 1987 *SALJ* 146, 154-155. On sole custody in general, see Chapter Five 3 2 1 above.

⁸⁶ In *Pinion v Pinion* 1994 (2) SA 725 (D) 730J Page J refused to make a settlement paper that proposed a joint custody agreement an order of the court. One of the main reasons was that "[i]t is ... imperative that a child should know with whom the final say lies, and not be afforded the opportunity of playing one parent off against the other." See also *M v R* 1989 (1) SA 416 (O) 423C; *Märtens v Märtens* 1991 (4) SA 287 (T) 292-3, 295C; *V v V* 1998 (4) SA 169 (C) 191F-H. See further Hoffman and Pincus *Law of Custody* 31-32; Bosman-Swanepoel *et al Custody and Visitation Disputes* 69-70.

⁸⁷ See the discussion on joint custody 3 5 below.

⁸⁸ The parent can establish his or her role as primary care-taker through leading evidence concerning the following:

- 1) preparing and planning of meals;
- 2) bathing, grooming and dressing the child;
- 3) purchasing, cleaning and care of clothes;
- 4) medical care, including nursing and doctor's visits;
- 5) arranging social interaction after school – transporting to friends' houses or children's birthday parties, or other extracurricular activities;
- 6) arranging alternative care – babysitting, day-care etc;
- 7) disciplining;
- 8) putting the child to bed at night, attending to the child at night and waking the child in the morning;
- 9) education – religious, cultural and social;
- 10) teaching elementary skills such as reading, writing and arithmetic.

See Clark and Van Heerden "Joint custody – perspectives and permutations" 1995 *SALJ* 315, 321-322.

⁸⁹ Kurki-Suonio 2000 *International Journal of Law and the Family* 183, 186-187.

⁹⁰ See Chapter Four 4 4 above. Eekelaar "The interests of the child and the child's wishes – The role of dynamic self-determination" 1994 *International Journal of Law and the Family* 42, 45; Elster "Solomonic judgments: Against the best interests of the child" 1987 *University of Chicago Law Review* 1, 16-21.

uncertainty of case-by-case determinations, as it can be predicted (based on past events) which parent would most likely be the custodian.⁹¹

In applying both the maternal preference rule and the concept of psychological parenthood the courts focused mainly on the parents (either their gender or their personality and abilities) to determine the best interests of the child. It was only in the nineties and since the new constitutional dispensation that South African courts finally turned their attention primarily to the child.

3 4 The focus upon the child: *McCall v McCall* 1994 (3) SA 201 (C)

Between the judgment in *Fletcher v Fletcher*⁹² and the introduction of the Constitution, the courts attempted to find an equilibrium between the principles of Roman Dutch law on the one hand, and social and moral considerations for the justification of the best interests principle on the other.⁹³ Cases often had unsatisfactory results leaving the non-custodian with the feeling of not being a good enough parent but without either understanding the reasons for the court's decision or feeling that the reasons were fair towards him or her. The reason for this is most probably the fact that the courts tended to focus on one specific factor⁹⁴ to determine the child's best interests instead of acknowledging that

“There is a broad spectrum of needs that should be met if children are to cope effectively with the demands of life. There is not one specific need that stands out above others, but if any one need is not met, the child's coping mechanism is considerably weakened.”⁹⁵

With the lack of uniform criteria used by the courts and the uncertainty as to the meaning of the best interests principle,⁹⁶ the decision of King J in the Cape High

⁹¹ Clark and Van Heerden 1995 *SALJ* 315, 322; Cochran “Reconciling the primary care-taker preference, joint custody and the case-by-case rule” in Folberg (ed) *Joint Custody and Shared Parenting* 218, 129.

⁹² *Supra*.

⁹³ Human 2000 *THRHR* 392, 393-394.

⁹⁴ For instance maternity, or the parent with the closer psychological bond with the child (usually favouring the mother as well).

⁹⁵ Hoffman and Pincus *The Law of Custody* 17. See further *September v Karriem* 1959 (3) SA 687 (C) 689G. “It seems that the court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. For while certain aspects taken separately might appear of no real importance, in combination they might build up a strong case in favour of one or other conclusion.”

⁹⁶ In England the Children Act 1989 resolved some of the uncertainty of the meaning of the best interests principle by compiling a list of factors (sec 1(3)) to which the court must pay particular

Court in *McCall v McCall*⁹⁷ was extremely welcome and well timed. This case concerned an application for the variation of a custody order made previously by the court in which the custody of two children was awarded to their mother. The father wanted custody of the twelve year-old boy, Rowan, who had also expressed a clear preference to be with his father.

There was so much hostility between the parties that King started his judgment with reference to the war and battle raging and considered it important to remind the parties that the function of the court is to determine what is in the best interests of the child and not to adjudicate a dispute between antagonists.⁹⁸ However, lest these remarks should create the impression that the parties are “unfeeling and selfish brutes”, he immediately affirmed that they were both “essentially fine and decent persons, of good repute and background” and that neither could be seen as an unfit parent.⁹⁹ It is precisely this fact that caused the difficulty in this case, as it does in so many others. The court had to make a decision between two equally good parents.

Without wasting any time in considering previous case law or academic authority about the meaning of the best interests of the child and how the principle should be applied, King laid to rest years of uncertainty by stating,

attention when considering to make, vary or discharge an order with respect to children in family proceedings and where the making, variation or discharge is opposed. These criteria are,

- 1) the ascertainable wishes and feelings of the child concerned;
- 2) the child’s physical, emotional and educational needs;
- 3) the likely effect on the child of any change in the child’s circumstances;
- 4) the child’s age, sex, background, and any characteristics of the child which the court considers relevant;
- 5) any harm which the child has suffered or is at risk of suffering;
- 6) the capability of each of the parents, and of any other person to whom the court considers the question to be relevant, of meeting the child’s needs;
- 7) the range of powers available to the court under the Act in the proceedings in question.

Other important principles introduced by this Act are the “principle of non-intervention” (sec 1(4)) and “the general principle that any delay in determining the question is likely to prejudice the welfare of the child” (sec 1(5)).

See Robinson “n Oorsig oor die verterkpunte van die Engelse Children Act 1989” 1993 *Tydskrif vir Regswetenskap* 41, 46-49; Ramolotja “Determining the best interests of the child” 1999 *Codicillius* 10, 11; De Soysa 1993 *Comparative and International Law Journal of South Africa* 364, 368-370; Robinson “Divorce settlements, package deals and the best interests of the child” 1993 *THRHR* 495, 496-499; Bainham *Children – The Modern Law* 34-41; Van Heerden *et al Boberg’s The Law of Persons and the Family* 524-525 n111.

⁹⁷ 1994 (3) SA 201 (C).

⁹⁸ 203D-F.

⁹⁹ 203G.

“In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure his physical, moral, emotional, and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- a) the love, affection and other emotional ties which exists between parent and child and the parent’s compatibility with the child;
- b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
- d) the capacity and disposition of the parent to give the child the guidance which he requires;
- e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- h) the mental and physical health and moral fitness of the parent;
- i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*;
- j) the desirability or otherwise of keeping siblings together;
- k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- l) the desirability or otherwise of applying the doctrine of same sex matching...
- m) any other factor which is relevant to the particular case with which the court is concerned.”¹⁰⁰

¹⁰⁰ *McCall v McCall* 1994 (3) SA 201 (CPD) per King J, 2041/J-205A. This list is very similar to that compiled by Hofmann and Pincus *The Law of Custody* 17-18. The fourteen criteria they identified are:

1. The child’s cultural and religious environment.
2. The importance of the custodial parent being able to support the child and provide him with a home.
3. The morality of the custodial parent (values and belief systems).
4. The value of an adequate support-system (family, friends, interests and activities).
5. The importance of not subjecting the child to unnecessary moves.
6. The importance of a loving environment.
7. The importance of an on-going relationship between the mother and children who are still extremely young, particularly in the case of young girls.
8. The importance of not separating siblings.
9. The importance of not undermining the image a child has of either one or both parents (indoctrination).

After dealing with each factor individually, King J came to the conclusion that it would be in Rowan's best interests if his request to be transferred to the custody of his father were granted. Though on all accounts the mother and father were both equally able and loving parents, what tipped the scales in favour of the father were Rowan's age¹⁰¹ and his expressed preference.¹⁰²

The *dicta* of this case has been extensively approved, quoted and used as authority in a number of other cases.¹⁰³

3 5 Joint custody

3 5 1 Introduction

A joint custody order entails that both parents retain custody of their children after divorce.¹⁰⁴ This does not, however, necessarily mean that both parents will have the

10. The importance of a child knowing that there is only one parent who is responsible for the administration of daily activities.

11. The importance of the parent being a capable, stable and adequate personality.

12. The importance of considering the wishes of the older child.

13. The importance of effective discipline.

14. The importance of the parent taking easily to advice and not frustrating access.

See further Cumes and Lambiase "Legal and psychological criteria for the determination of custody in South Africa: a review" 1987 *South African Journal of Psychology* 119; Cumes and Lambiase "Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?" 1987 *SALJ* 704; Clark "Custody: the best interests of the child" 1992 *SALJ* 391, 392. Bosman-Swanepoel *et al Custody and Visitation Disputes* discuss in detail the general psycho-social aspects of divorce (59-63), how to assess parental capacity (65-87) and the needs of children (89-95) – all of which must be considered in the making of a custody order.

¹⁰¹ The boy was about to turn twelve and needed the masculine environment, including the discipline which his father could provide, as well as a positive male role model. 208E-H.

¹⁰² King referred to *French v French* 1971 (4) SA 298 (W) 299H; *Manning v Manning* 1975 (4) SA 659 (T) 661H and *Märtens v Märtens* 1991 (4) SA 287 (T) 294-295 in considering when the child's preference will be given any weight in a custody determination. "[I]f the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference." 207H-I. Rowan had consistently expressed the preference to be with his father, and articulated this preference "explicitly and positively" to the judge in the interview. The reasons he gave for "really need[ing] [his] dad" was such that King was convinced that he was "an intelligent, articulate, persuasive, sincere and candid child who displayed ... a degree of maturity and intellectual development that satisfied [the court] that he is capable of forming and expressing an intelligent and informed judgment on what he subjectively perceive[d] to be in his best interests." 208A-E.

¹⁰³ *Bethell v Bland and Others* 1996 (2) SA 194 (W); *Van der Linde v Van der Linde* 1996 (3) SA 509 (O); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Madiehe (born Rathlogo) v Madiehe* [1997] 2 All SA 153 (B); *V v V* 1998 (4) SA 169 (C); *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O); *Ex parte Critchfield* 1999 (3) SA 132 (W); *Meyer v Gerber* 1999 (3) SA 650 (O); *K v K* 1999 (4) SA 691 (C); *I v S* 2000 (2) SA 993 (C); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001(4) SA 57 (C).

¹⁰⁴ Shared parenting, dual parenting, shared custody, joint parenting, co-custody are different terms sometimes used to describe joint custody. See Davies *The Unmarried Father as Primary Caregiver* 37.

child with them for equal amounts of time,¹⁰⁵ for in South African law joint custody has two meanings.¹⁰⁶ In one sense it means joint physical custody where the parents do in fact have the person of the child in their care and control for equal, substantial amounts of time. Children will then alternate between the homes of both parents on a determined schedule, with the underlying idea that the child should spend both weekdays and -nights with each parent.¹⁰⁷

In the other sense, which is the meaning more often ascribed to it by South African judges, it means joint legal custody.¹⁰⁸ This indicates the joint decision-making responsibility on major issues concerning the child, for instance, the medical care a child should receive, where the child should be educated and in which religion it should be trained.¹⁰⁹ All the smaller decisions, concerning for instance, nutrition, clothing, hobbies, friendships and bedtime, which need to be taken on a day-to-day

¹⁰⁵ Schäfer 1987 *SALJ* 149, 155. "Perceptions of joint custody are certainly not uniform, and a precise definition of the term is elusive. It is a term that is often used loosely to describe divided custody, or split custody, or shared custody which has two components – joint physical custody and joint legal custody, which can be combined or kept separate."

¹⁰⁶ "Joint physical custody means both parents spend substantial amounts of time with the child and share in the day-to-day upbringing. Although the definition of joint physical custody is not precise, it usually means both parents spend weekdays and weeknights with the child. Time with the child is not confined to weekends and a few weeks in the [holidays]. Joint legal custody means both parents have equal rights to make major decision affecting the child, including such matters as schooling, religious training and medical care." Atkinson 1984 *Family Law Quarterly* 1, 36. Van Heerden *et al Boberg's Law of Persons and the Family* 551; Schäfer "The burgeoning family law and joint custody" 1986 Inaugural Lecture at Rhodes University; Schäfer 1987 *SALJ* 149; Schäfer "Joint Custody: Is It a Factual Impossibility?" 1994 *THRHR* 671; Hoffman and Pincus *Law of Custody* 53-56; Spiro "Joint Custody" 1981 *THRHR* 163; Meintjies-Van der Walt "Gesamentlike Bewaring in die Weegskaal" 1991 *De Rebus* 578; Clark and Van Heerden "Joint Custody: Perspectives and Permutations" 1995 *SALJ* 315; Schoeman "Gesamentlike Bewaring van Kinders" 1989 *THRHR* 462; Joubert "Gesamentlike Bewaring" 1986 *De Jure* 535.

¹⁰⁷ See Mason *The Custody Wars* 39-43. Wallerstein and Kelly approach joint physical custody somewhat differently. "Central to the notion of shared physical custody is an understanding that it does not mean a precise apportioning of the child's life, but a concept of two committed parents, in two separate homes, caring for their youngsters in a post-divorce atmosphere of civilized, respectful exchange." Wallerstein and Kelly *Surviving the Breakup* 310.

¹⁰⁸ The distinction between legal and physical custody is also made in English courts, but their terminology differ. They call physical custody "care and control", while legal custody is just called "custody" and entails the power to make decisions on important matters, for instance education. See Eekelaar *Family Law and Social Policy* 76.

¹⁰⁹ *Edwards v Edwards* 1960 (2) SA 523 (D).

"The essence of joint custody is that both parents share responsibility and authority with respect to the children. This involves parental consultation and agreement on all major decisions affecting the children." Miller 1979 *Family Law Quarterly* 345, 360.

basis, are usually left up to the parent with whom the child resides at the time of the decision.¹¹⁰

3 5 2 Advantages of joint custody: Serving the best interests of the child¹¹¹

Of all the different custody orders which a court may make, joint custody is perhaps the one which, human fallibility and the unpredictable future put aside, comes closest to ensuring the continuance of the family ties and a meaningful relationship between the child and both parents.¹¹² It

“symbolizes the expectation that a parental role will be maintained by an absent parent, impresses the adults that this is necessary from the children’s point of view and may help to create an atmosphere of successful visiting arrangements.”¹¹³

Preservation of a continuing relationship between the child and both parents is, excepting parental abuse and neglect, generally in the best interests of a child.¹¹⁴ Studies on children and parents have proven that children who continued to have a meaningful relationship with both parents after divorce, are the ones who were least traumatized by the divorce because they did not feel abandoned or rejected by either parent.¹¹⁵ The parents will also benefit from the arrangement as the feeling of “winner

¹¹⁰ Van Heerden *et al* identify a potential problem in this regard – that is, exactly which decisions qualify as “major” decisions and which day-to-day decisions that can be taken independently. See Van Heerden *et al* *Boberg’s Law of Persons and the Family* 552 n186.

In *Corris v Corris* 1997 (2) SA 930 (W) 934G-H joint custody of two young girls were granted to the parents. On the question of which decisions are “major” decisions, it seems they are those decisions in sec 1(2) of the Guardianship Act 192 of 1993 as well as decisions relating to schooling, religion, choice of associates, health, extra-mural activities and relocation within the country.

¹¹¹ “[J]oint custody has [become] the ideal custody arrangement. .. [It] is considered to be in the best interests of the child.” Kurki-Suonio 2000 *International Journal of Law and the Family* 183, 187-188.

¹¹² A joint custody order contributes to the promotion of children’s rights, especially the child’s right to know and be cared for by both parents and to maintain personal relations and contact with both parents. See Van Heerden *et al* *Boberg’s Law of Persons and the Family* 554 n188.

“Taken as a whole our findings point to the desirability of the child’s continuing relationship with both parents during the post-divorce years in an arrangement which enables each parent to be responsible for and genuinely concerned with the well-being of the children. For those parents who are able to reach an agreement on child related matters after divorce and are willing to give the needs of the children priority or a significant role in their decision-making regarding how and where the children reside, joint legal custody may provide the legal structure of choice.” Wallerstein and Kelly *Surviving the Breakup* 310.

See further Van Westing “Faktore vir die verlening van ‘n bevel van gesamentlike toesig en beheer na ‘n egskeiding” 1995 *TSAR* 605, 606 n5 and the source material cited there.

¹¹³ Eekelaar *Family Law and Social Policy* 72.

¹¹⁴ “Children do best with a father and a mother. Divorce is not their choice.” Schwartz “Towards a presumption of joint custody” 1984 *Family Law Quarterly* 225, 230.

See further Chapter Five above on the parent-child relationship.

¹¹⁵ Wallerstein and Kelly *Surviving the Breakup*; Eekelaar *Family Law and Social Policy* 64-67.

takes all” that so often accompanies an order for sole custody is reduced as well.¹¹⁶ Moreover, if the parents have equal rights to involvement in the child’s life, less questions concerning access arise and neither parent withdraws from the child’s life completely.¹¹⁷ An order for joint custody, therefore, would “largely eliminate the custody contest”, not only during the divorce, but it reduces post-divorce litigation as well,¹¹⁸ which would beyond doubt serve the interests of the children involved.¹¹⁹

A joint custody arrangement is flexible and can be adapted to the changing needs and circumstances of the family.¹²⁰ For instance, while children are very young and do not have many after school activities or engagements, it might not be a problem for them to be shuttled back and forth between two homes and neighbourhoods. However, as they become older, they may wish to spend more time in one home and circle of friends. They will also wish to have more of a say in their day-to-day activities and not be confined to a predetermined schedule.¹²¹ The flexible nature of a joint custody arrangement can easily accommodate the evolving capacities of the child in this way, serving his interests as they arise.¹²²

¹¹⁶ “The notion of winner takes all causes the parents to take adversary positions regarding custody. It forces exaggeration and mistruth. It discourages the parents from focussing on what is really in the best interests of any individual child. It discourages mature compromise and encourages competition for control and struggles for power. It denies parents and children available mutual support and makes the child unnecessarily dependent on the ‘psychological parent’ ... Furthermore, the child is often forced to lose one side of an extended family and the grandparents, cousins and friends it includes.” Schwartz 1984 *Family Law Quarterly* 225, 231. See also Trombetta 1981 *Journal of Family Law* 213, 231. See further *Pinion v Pinion* 1994 (2) SA 725 (D).

¹¹⁷ “There is no need to banish the father or overburden the mother.” Miller 1979 *Family Law Quarterly* 345, 363; Robinson “Joint custody: An idea whose time has come” 1982-1983 *Journal of Family Law* 641, 648-649; Clark and Van Heerden 1995 *SALJ* 315, 318.

¹¹⁸ Schäfer 1987 *SALJ* 149, 159; Miller 1979 *Family Law Quarterly* 345, 366; Maidment *Child Custody and Divorce* 260.

¹¹⁹ One of the most important principles in the British Children Act 1989 is “the general principle that any delay in determining the question [concerning the welfare of a child] is likely to prejudice the welfare of the child.” See sec 1(5) of the Act.

¹²⁰ Miller 1979 *Family Law Quarterly* 345, 361.

¹²¹ Mason *The Custody Wars* 43- 64.

¹²² This is also in accordance with the United Nations Convention on the Rights of the Child (1989). The Convention explicitly provides for the evolving capacities of the child to be taken into account and Van Bueren has argued that this is actually the best way to ensure that the best interests of the child are afforded the paramountcy the Convention has as its goal. Van Bueren “The United Nations Convention on the Rights of the Child (1989)” 1991 *Journal of Child Law* 63, 63. See further Freeman “Taking children’s rights more seriously” 1992 *International Journal of Law and the Family* 52, 65; Eekelaar “The interests of the child and the child’s wishes – the role of dynamic self-determination” 1994 *International Journal of Law and the Family* 42, 53-54. See also Chapter Three 3 3 4 above as well as Chapter Four 3 4

An order for the joint custody of children reduces the risk of kidnapping of children by disgruntled parents considerably,¹²³ while parental co-operation after divorce is greatly improved.¹²⁴ Moreover, the gender-neutral concept of joint custody is consistent with the movement towards sexual equality.¹²⁵

3 5 3 “Courting disaster”: Disadvantages of joint custody¹²⁶

South African courts are very hesitant to make an order for the joint custody of children, even acknowledging that such an order might be “courting disaster”.¹²⁷ The main reason for this hesitance is the great deal of co-operation joint custody requires from the parents – co-operation which, in the light of a failed marriage and the acrimony often involved, seems beyond the reach of most divorcing parents.¹²⁸

¹²³ Schäfer 1987 *SALJ* 149, 159. See for instance *Märtens v Märtens* 1991 (4) SA 287 (T) where custody of twin girls (aged eleven) was given to the mother by a German court. The father, in blatant disregard of the order, abducted them. The case concerned an application by the mother for restoration of her custody-rights. After considering the children’s best interests, the court refused the application. The main reason was the amount of time that had elapsed and the fact that the children were settled and well-adjusted. See Clark 1992 *SALJ* 591.

¹²⁴ Palmer “The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 - 1995” in Keightley (ed) *Children’s Rights* 98, 110-111; Miller 1984 *Family Law Quarterly* 345, 365.

¹²⁵ *Kastan v Kastan* 1985 (3) SA 235 (C). However, a claim for joint custody based purely on the equality of the parents (as provided for by the Constitution sec 9) will fail, unless the court considers the order for joint custody to be in the interests of the child as well. In this sense the interests of the child will trump the parents’ rights to equality. See Clark and Van Heerden 1995 *SALJ* 315, 318; Van Heerden *et al Boberg’s Law of Persons and the Family* 553-554 n189.

¹²⁶ King AJ in *Kastan v Kastan* (*supra*) 236D-F called an order involving joint decision-making by the divorced parents possible courting of disaster. See also Hoffman and Pincus *The Law of Custody* 53.

¹²⁷ “It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals.” Per Jansen J in *Edwards v Edwards* 1960 (2) SA 523 (D), 524G. See further *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) and *Pinion v Pinion* 1994 (2) SA 725 (D).

In *V v V* 1998 (4) SA 169 (C) 179C/D-F Foxcroft J listed and discussed the perceived major disadvantages of a joint custody order. The first was the imagined need for the security of one decision-maker, which the court held harked back to the patriarchal past and assumed that there would always be disagreement that requires resolution by one authoritarian parent.

The second objection to joint custody is the view that, if parents had been unable to maintain a stable marriage, they could never be expected to achieve the degree of co-operation required for joint custody. This objection was held to lose track of the reality that though parents could not abide each other any longer, their love for their children would continue.

Thirdly, the objection that joint custody is considered to run counter to the clean-break principle in divorce was easily dismissed as having little to do with the best interests of the child.

The fourth objection, that joint custody requires the parents to live in close proximity, was partly conceded – it would surely be beneficial if the parents live reasonably near each other, but it is not of absolute necessity.

Lastly, with regard to the objection that a joint custody order is taking the easy way out and relieving the court of a difficult sole custody decision, the court acknowledged that it might be so in cases where a decision was reached in a Motion court in an unopposed trial. However, where much time had been spent in grappling with the merits of sole custody as opposed to joint custody, this objection would not be valid.

¹²⁸ “Orders for joint custody are rare. Such few examples as can be gleaned from the law reports would seem to point emphatically in a direction away from orders of this nature and the reason for this, I

Without this necessary co-operation, an order for joint custody would not only create a variety of situations for conflict between the parents, the resulting instability¹²⁹ would cause the child to feel caught in the tug-of-war between them as well.¹³⁰ However, though co-operation between the parents is certainly necessary, one should not exaggerate its importance.¹³¹ Parents are bound to disagree and the mere risk of disagreement should not prevent an order for joint custody when all the other circumstances seem to advocate it.¹³²

The other objection voiced most often is the child's need for one psychological parent with whom the final decision-making responsibility should lie.¹³³ The court has also

would think, is clear. Custody of children involves day-to-day decisions and also decisions of a longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness. To leave decisions of this nature to the joint decision of parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been preceded by acrimony and disharmony between the parents." Per King AJ in *Kastan v Kastan* 1985 (3) SA 235 (C), 236D-F.

¹²⁹ Instability in the child's life would be caused by frequent moves and inconsistency in living arrangements. "Any arrangement by which the child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns. To reconcile these for the purpose of providing the child with stable and consistent support necessarily must involve substantial agreement and co-operation between the parents." Per Gault J in *B v VE* (1988) 5 NZFR 65, 70 as cited by Van Heerden *et al Boberg's Law of Persons and the Family* 555 n190

¹³⁰ Atkinson 1984 *Family Law Quarterly* 1, 37. In support of this, Atkinson refers to a teacher who testified that the child "never refers to *his* home. He refers only to his daddy's home and his mommy's home." (Emphasis included.) See further Mason *The Custody Wars* 63; Kurki-Suonio 2000 *International Journal of Law and the Family* 183, 188.

¹³¹ "[T]he risk of future hostilities and conflict between the parents must not be over-exaggerated. After all, as several writers have pointed out, the 'traditional' award of sole custody to one parent is no guarantee against ongoing conflict." Van Heerden *et al Boberg's Law of Persons and the Family* 557.

¹³² In *Pinion v Pinion* 1994 (2) SA 725 (D) 730E-F Page J refused to grant an order for joint custody of a six-year-old girl. He said that "[t]he future behaviour of parents... is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation where it can occur unless the advantages to the minor of such a course are so significant as to justify taking the risk involved. I do not think the fact that the parties may approach the court should the risk materialise is any justification for taking it; it would serve the minor's interests far better not to take it at all." It is submitted that he placed too great a premium on the possibility that the parents may disagree, while it was evident from the facts that they were willing to do anything to make the joint custody arrangement work. They even preferred not to be divorced unless the joint custody order was granted.

See further *Corris v Corris* 1997 (2) SA 930 (W) 934G per Kuper J, "I [do not] believe that the risk of future disagreement is necessarily greater where an award for joint custody has been made."

"To second-guess those... parents who are both eminently fit to have custody of their child, who are able and prepared to co-operate with each other in a truly mature and egalitarian manner, who both have strong bonds with the child ... and who have worked out how joint custodianship will fit in with their particular circumstances in order to serve the best interests of their child, appears to constitute a degree of paternalism on the part of the court 'at odds with the strong idea of autonomous personhood on which Chapter 2 of our Constitution is premised.'" See Van Heerden *et al Boberg's Law of Persons and the Family* 558 n197 and the authorities cited there.

¹³³ Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* 37-38.

indicated its reluctance against experimenting with the life and welfare of children in ordering a form of custody that has as yet not been proven successful.¹³⁴ Though it may be praiseworthy not to experiment with the lives of children, other decision-makers and parents may choose joint custody simply because it creates an easy way out of a very difficult decision.¹³⁵

Other objections are that joint custody creates confusion for the child and even disciplinary problems, as well as that, besides giving children the opportunity of playing one parent off against the other, parents are placed in position where they can easily indoctrinate children against each other.¹³⁶ In light of this, it becomes easy to understand why Mason considers the attitude of the parents the determinative factor for the failure or success of a joint custody venture.¹³⁷

Furthermore, joint legal custody puts the parent with physical custody of the child (usually the mother) in a position of responsibility without power, while the non-care-

In his judgment refusing an application for joint custody, Page J said, "It is... imperative that a child should know... with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other." *Pinion v Pinion* 1994 (2) SA 725 (D) 730J. See further Miller 1984 *Family Law Quarterly* 345, 367; Van Heerden *et al Boberg's Law of Persons and the Family* 556 n190 and 191.

¹³⁴ "[T]here is undoubted truth in the observation that human relationships are not constant. The future behaviour of parents, as of other humans, is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude the possibility by avoiding creating a situation where it can occur, unless the advantages to the minor of such a course are so significant as to justify taking the risk involved... In the present case the parties are firmly convinced that they will be able jointly to discharge the function of custodian parents without friction or deadlock... Whilst I do not doubt the *bona fides* of their belief, I do doubt their infallibility. I am unconvinced that there is no real risk of acrimonious or irresoluble disagreement between them in the future, which will redound to the detriment of the minor." Per Page J in *Pinion v Pinion* 1994 (2) SA 725 (D) 730E-731C.

See also the statement of Hattingh J *Van der Linde v Van der Linde* 1996 (3) SA 509 (O) 516B. "Ek is nie bereid om die sekere met die onsekere te vervang en [die kind] as proefkonyn ... op die spreekwoordelike eksperimentele altaar te offer nie."

¹³⁵ Miller 1984 *Family Law Quarterly* 345, 368. "[J]oint custody is condemned as an evasive action on the part of both judges and parents... Couples often enter into joint custody for improper reasons: to avoid hurting the father's feelings; so an unfit mother will not lose face by appearing to give up her children; or as a perceived way of saving expenses... Joint custody is also seen as a way for the judge to avoid decisiveness. As one mental health professional puts it, joint custody is 'easier than predicting the future.' Joint custody is an experiment, and 'an experiment is not to be indulged with a trust of this character', that is, the future lives of children."

¹³⁶ Miller 1984 *Family Law Quarterly* 345, 367.

¹³⁷ Mason *The Custody Wars* 43. In *Venton v Venton* 1993 (1) SA 763 (D) the willingness of the parents to co-operate for the success of joint custody as well as the fact that they had given successful practical effect to the arrangement for eight months prior to the order weighed heavily with Didcott J in the granting of the order for joint custody.

See further Van Westing 1995 *TSAR* 605, 611-615.

taker (usually the father) is granted power without responsibility.¹³⁸ For this reason, Clark and Van Heerden consider joint custody to be only ostensibly egalitarian, while in fact being unfair to women and others who are in weaker bargaining positions.¹³⁹

They conclude, therefore, that,

“In this country, where shared parenting is not the norm, joint legal custody as implemented by the courts may in many cases be a premature development which will only serve to further discriminate against women. However, where there is evidence of real co-operation and equality between the parties and such an arrangement is definitely in the interests of the child, then such an arrangement is probably the best possible solution to the break-up of the marriage.”¹⁴⁰

It is submitted, however, that in many cases the circumstances may be such as to not render joint custody “premature”. Everything would depend on the facts of the case and provided that certain requirements are met, there is ample reason to expect such a venture to succeed.

3 5 4 Requirements

In 1960 Jansen J declared that joint custody is a legal impossibility:¹⁴¹

“It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals. The legal custody involves the privilege and responsibility of taking certain decisions in regard to, for example, the education of the child. It would seem that such a decision should appertain to a single individual. If the responsibility is shared between two individuals there is the continuing possibility of deadlock arising over every triviality.”¹⁴²

Today, however, joint custody is not considered to be a legal impossibility anymore,¹⁴³ though, depending on the circumstances of the case and the best interests

¹³⁸ Clark and Van Heerden 1995 *SALJ* 315, 322.

¹³⁹ “Joint custody [is] controversial from a woman’s point of view.” The gender-neutral standard eradicates stereotypical roles of men and women which confined women to the home. However, after divorce, a mother is forced to work, especially if she has custody, even if it is shared, of the children. The result is that fathers are given greater bargaining power against mothers – mothers will often bargain away certain economic benefits to ensure greater access to or longer periods of custody of the children. Clark and Van Heerden 1995 *SALJ* 315, 322-323.

¹⁴⁰ Clark and Van Heerden 1995 *SALJ* 315, 323.

¹⁴¹ *Edwards v Edwards* 1960 (2) SA 523 (D).

¹⁴² 524F-H.

¹⁴³ This is evident from the prominence of shared parental responsibilities and rights in the Children’s Bill. Sections 30 – 34 make provision for more than one person having parental responsibilities and rights over a child, while sections 42 – 44 regulate the co-exercise of these responsibilities and rights.

of the child, it might be a practical or factual impossibility.¹⁴⁴ Though the factual (im)possibility must be judged upon the particular facts of each individual case,¹⁴⁵ certain general requirements have been identified as indicative of the probable success or failure of such a venture.¹⁴⁶

The most important requirements are that both parents must be fit for the care of children and desire continuous involvement with their children; both must be perceived by the child as a source of security and love; and it is imperative that both are able to communicate and co-operate for the promotion of the children's best interests.¹⁴⁷ Moreover, while not absolutely essential, parents should share similar outlooks and values on important issues like childrearing, religion and discipline,¹⁴⁸ and the two households should be in geographical proximity.¹⁴⁹ Finally, the ages and number of children must also be considered.¹⁵⁰

¹⁴⁴ *Venton v Venton* 1993 (1) SA 763 (D) 766D-E per Didcott J. "I do not see why joint custody should be regarded as 'a legal impossibility'. The difficulties raised by Jansen J do not strike me as reasons for taking that view. Instead they suggest that joint custody may well be a practical impossibility. So, of course, it usually is. Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the court that no practical impossibility of any consequence seems likely to ensue."

¹⁴⁵ As in all matters concerning children the obvious main requirement for an order for joint custody is that it must be in the overall best interests of the children involved.

¹⁴⁶ Clark and Van Heerden 1995 *SALJ* 315, 318-319. See further Atkinson 1984 *Family Law Quarterly* 1; Schwartz 1984 *Family Law Quarterly* 225, 239-243; Trombetta 1981 *Journal of Family Law* 213, 226-234; Miller 1979 *Family Law Quarterly* 345, 369-374.

¹⁴⁷ Van Westing suggests the following factors to be emphasized in an order for joint custody:

- 1) the best interests of the child;
- 2) the willingness and ability of both parents to exercise joint custody and to succeed in exercising of joint authority;
- 3) a successful trial period;
- 4) a relationship of understanding and co-operation between the parents;
- 5) the absence of tension and conflict between the parents;
- 6) the practical enforceability of the order (logistics) and
- 7) the wishes of the children.

See further Van Westing 1995 *TSAR* 605, 610-616; Schäfer 1987 *SALJ* 149, 160-161; Hoffman and Pincus *The Law of Custody* 53-55.

¹⁴⁸ Continuous difficulties will arise if parents differ too much on these aspects. Schäfer 1987 *SALJ* 149, 161. See further *Hill v Hill* 1969 (3) SA 544 (RA); *Holland v Holland* 1975 (3) SA 553 (A); *Duncombe v Willies* 1982 (3) SA 311 (D).

¹⁴⁹ Schäfer 1987 *SALJ* 149, 161; Mason *The Custody Wars* 43-47. Miller adds to geographical proximity that the two homes in a joint custody arrangement should be fairly similar, or at least not extremely unequal with regard to standard of living. Miller 1979 *Family Law Quarterly* 345, 372; Van Heerden *et al* *Boberg's Law of Persons and the Family* 557.

¹⁵⁰ The precise influence of the ages and number of children on the workability or otherwise of a joint custody order is unclear. Some suggest that joint custody is more appropriate for younger children, while others consider older children to benefit more from it. See Schäfer 1987 *SALJ* 149, 161; Miller 1979 *Family Law Quarterly* 345, 374; Maidment *Child Custody and Divorce* 268; Mason *The Custody Wars* 43-47.

It is obvious that no parent with a history of child neglect or abuse or other characteristics that render him or her unfit for the custody of children should succeed with an application for the joint custody of a child.¹⁵¹ Furthermore, joint custody is not something that can be forced on parents if they desire a clean break on divorce.¹⁵² Thus, the most important and contentious factor for the success of joint custody is clearly the attitude of the parents.¹⁵³ It is of absolute necessity that they are able to cooperate for the best interests of their children.

In *Venton v Venton*¹⁵⁴ Didcott J appointed the mother and father of two boys (aged four and eight) the joint custodians. He relied heavily on the report and recommendations of the Family Advocate and family counsellor¹⁵⁵ and, though he admitted that the state of affairs was probably not a Utopian one, he was satisfied that the best interests of the boys demanded the grant of the order.¹⁵⁶ He considered the prospects for joint custody to look promising given the following circumstances:

“The plaintiff and defendant were sensible, mature, responsible and temperamentally stable people. The relationship between them was a remarkably good one for a couple whose marriage had collapsed. They respected, trusted and remained fond of each other. Throughout their cohabitation they had shared the duties of parenthood, co-operating amicably and constructively on every matter that concerned the children. With similar outlooks and values, they had usually seen eye to eye in such areas as routine, discipline, hygiene, upbringing and education. Compromise rather than altercation had been their way of coping with any difference of opinion that happened to arise. None of them had changed since they parted. They were acutely conscious of the need to render their parting as painless to the children as it could be. To that end each took care to say nothing to either boy or in his presence, which might be understood as criticism or disparagement of the other. Indeed, they made a point of praising each other in front of the children. The danger inherent in the situation that the boys might try to exploit it by manipulating them was one to which they were alert and for which they felt prepared. They were committed to the experiment of joint custody and dedicated to its success. In effect they had acted as joint custodians ever since their separation. And they

¹⁵¹ Part of the reason why Foxcroft J was willing to grant joint custody in *V v V* 1998 (4) SA 169 (C) 1911 is that “[t]here is no evidence that they have ever used the children as weapons of war to get at each other. Joint custody in such a situation would be unthinkable.”

¹⁵² “It is unlikely that a court will award joint custody to parents who are not, at least initially, willing and able properly to communicate with each other and to co-operate to promoting the child’s best interests.” Van Heerden *et al* *Boberg’s Law of Persons and the Family* 557.

¹⁵³ Mason *The Custody Wars* 43: “To my mind it is the attitude of the parents and the ages of the children that determine the success or failure of this difficult venture.”

¹⁵⁴ 1993 (1) SA 763 (D).

¹⁵⁵ 766I-767C.

¹⁵⁶ 767H.

planned to continue doing so, even if they were not appointed as such. The children appeared to have adapted themselves well to their altered pattern of life, and to be happy and contented.”¹⁵⁷

However, where Didcott J considered the evidence and extent of the parents’ willingness to co-operate and find ways to agree enough reason to grant the order for joint custody, Page J in *Pinion v Pinion*,¹⁵⁸ attached great importance to the inevitable deadlocks that may arise from time to time and refused such an order.

“[T]he parties are firmly convinced that they will be able jointly to discharge the function of custodian parents without friction or deadlock. They have faith in their ability to resolve any disputes which may arise by discussions. Whilst I do not doubt the *bona fides* of their belief, I do doubt their infallibility. I am unconvinced that there is no real risk of acrimonious or irresoluble disagreement between them in the future, which will redound to the detriment of the minor. The risk involved is enhanced by the extremely wide field which will have to be covered by their joint decisions as custodian parents, and the extremely long period over which they will be required to function as such. It is, of course, possible that they may be entirely successful; but there exists a very real danger that they will not. Moreover, even if they do succeed, ultimately in resolving their differences by discussion, it will not be practically possible to conceal those differences from or present a united front to the minor, particularly as she grows older. It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.”¹⁵⁹

If the requirements for joint custody as discussed above are not met in a specific case, it may be indicative of the fact that the joint custody venture is likely to fail. However, as in every matter concerning children, their best interests are of paramount

¹⁵⁷ *Venton v Venton (supra)* 767C-G.

See also *Kastan v Kastan* 1985 (3) SA 235 (C) 236H-237B. The factors which convinced King AJ to grant the application for joint custody of three young girls, were the following: “Both the parties are experienced and competent parents. All three of the children are equally bonded to both their parents. They love their parents very much. Both parents reciprocate this love. The children, young as they are, have expressed their satisfaction with and approval of this arrangement. It has removed from their young minds and hearts the fear that they will lose a parent. Both parents are willing to accept this arrangement and what, of course, is more important, are determined to make it work because they both recognize that it is in their children’s interests. In the almost six months since the divorce the parties have established a far better relationship between themselves. The animosities which had previously existed and which the pending litigation had exacerbated have largely subsided. The parties are conciliatory and compromising towards each other. In fact, over the period since the divorce the children have experienced a relationship *vis-à-vis* their parents not essentially dissimilar to what is now envisaged and it has proved beneficial to them.”

¹⁵⁸ 1994 (2) SA 725 (D).

¹⁵⁹ 730G-J. For a critical discussion of this judgement, see Schäfer “Joint custody: Is it a factual impossibility?” 1994 *THRHR* 671-674.

importance and the factors used to determine those interests (or to make a projection on the success of a type of custody order) should never be approached as a *numerus clausus* or shopping list. As Didcott J said in *Venton v Venton*,¹⁶⁰

“Neither inventory is exhaustive. Nor are there any hard and fast rules, except for the ‘one guiding rule’ ... the rule governing all questions of custody, the rule that the interests of the child or children are paramount. And these must always be assessed with reference to the particular circumstances of the case.”¹⁶¹

3 5 5 Conclusion

South African courts very seldom order joint custody¹⁶² and when they do, it is usually an order for joint legal custody,¹⁶³ thus leaving one parent with the sole physical custody and the other liberal rights of access.¹⁶⁴ In other countries, however, such orders have become the norm rather than the exception.¹⁶⁵ In the United States of America there is even a presumption in favour of joint custody and only if the facts provide sufficient proof of its undesirability, will a court order otherwise.¹⁶⁶ Though at first glance the approach of the South African courts may appear too strict and conservative, given the undeniable dangers and disadvantages of joint custody,¹⁶⁷

¹⁶⁰ *Supra* 766G/H.

¹⁶¹ Didcott J referred to the lists of requirements compiled by Schäfer 1987 *SALJ* 149 and Hoffman and Pincus *The Law of Custody* 53 when he made this remark.

¹⁶² “[South African] judges are not partial to the joint custody order.” Schäfer 1987 *SALJ* 149, 161.

Palmer suggests that, though the number of reported decisions ordering joint custody is very small, in reality, many such orders are granted and just not reported. Palmer “The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 - 1995” in Keightley (ed) *Children's Rights* 98, 108.

¹⁶³ “The essence of joint custody is that both parents share responsibility and authority with respect to the children. This involves parental consultation and agreement on all major decisions affecting the children.” Miller 1979 *Family Law Quarterly* 345, 360.

¹⁶⁴ Applications for joint custody have succeeded in *Kastan v Kastan* 1985 (3) SA 235 (C); *Venton v Venton* 1993 (1) SA 763 (D); *Corris v Corris* 1997 (2) SA 930 (W) and *V v V* 1998 (4) SA 169 (C). In *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) and *Pinion v Pinion* 1994 (2) SA 725 (D) orders for joint custody were refused. For a critical discussion of *Schlebusch v Schlebusch* (*supra*) see Schoeman “Gesamentlike bewaring van kinders” 1989 *THRHR* 462-466.

¹⁶⁵ According to sec 8 of the Children Act 1989 English courts may make a so-called residence order. Such order entails “time shared sole custody” – this means that the parents function as sole custodians during the time they are actually caring for the child and that they do so independently. This arrangement requires only a minimum of parental co-operation and minimizes situations which could cause conflict. It does however allow both parents to keep their legal status and parental responsibility.

¹⁶⁶ See in general on the approach of the American courts Schwartz 1984 *Family Law Quarterly* 225; Miller 1979 *Family Law Quarterly* 345; Trombetta 1981 *Journal of Family Law* 213; Atkinson 1984 *Family Law Quarterly* 1.

¹⁶⁷ *Pinion v Pinion* (*supra*) 728G.

such a cautious approach is in fact what is called for and sanctioned by the best interests principle.¹⁶⁸

In cases where joint custody is not appropriate, the aims and goals of joint custody can be served by granting custody to the parent who is least likely to interfere or prevent the other parent's frequent and continuing access.¹⁶⁹

Regardless of the possible pitfalls of a joint custody order, the time has certainly come for South African courts to become more willing to, or at least consider to order joint custody. It is clearly the form of custody that comes closest to the pre-divorce environment, and most likely serves the interests of the children,¹⁷⁰ while at the same time furthering the movement towards equality between the parents as well.

“Joint custody assumes that two parents continue each to parent as much as possible and to the best of their abilities. It assumes that absent abuse or neglect communicating parents are best able to evaluate the best interests of their children during marriage, during separation, and following divorce. And it assumes that constructive parental communication following divorce benefits children and parents alike.”¹⁷¹

4 Constitutionalization

4 1 Introduction

The common law principle that the best interests of the child are the most important consideration in custody decisions is constitutionalized¹⁷² in terms of section 28(2) of

¹⁶⁸ South African legal writers advocate a cautious approach to joint custody as well. See Hahlo *Husband and Wife* 398, 402; Van der Vyver and Joubert *Persone- en Familiereg* 618-619; Schoeman 1989 *THRHR* 462, 466; Joubert 1986 *De Jure* 353-357; Spiro 1981 *THRHR* 163, 164.

“In our opinion, however, joint custody is a particularly delicate matter, with far-reaching implications. It is a recommendation that should only be made in special cases where it has been clearly demonstrated to the courts that the parents retain no hostility or resentment towards each other, that they are mutually supportive of each other in regard to the children, and that they have a great deal of respect for each other and mutually desire joint custody. Joint custody should, without exception, only be awarded to those parents who are truly adult in their dealings with each other, and mature in the way they relate to their children. To grant custody to a couple who have not resolved their differences, who frequently place their children in the middle of the conflicts and who are unable to communicate effectively with each other, would be courting disaster. Such a judgement would merely add fuel to the fire and clearly not be in the interests of the child.” Hoffman and Pincus *The Law of Custody* 53-56.

¹⁶⁹ Atkinson 1984 *Family Law Quarterly* 1, 25-27, 38.

¹⁷⁰ Van Heerden *et al Boberg's Law of Persons and the Family* 554 n188 and n189.

¹⁷¹ Schwartz 1984 *Family Law Quarterly* 225, 245.

¹⁷² Sec 2 of the Constitution establishes the supremacy of the Constitution. The Constitution is the highest/supreme law in the country and any law or conduct inconsistent with it is invalid and all obligations imposed by it must be fulfilled.

the Constitution of the Republic of South Africa.¹⁷³ This means that courts and decision-makers are obliged to apply the principle even in circumstances for which there are no precedents and for which the common law principle was not intended.¹⁷⁴

The Constitutional Court has explained the principle in the following way:¹⁷⁵

“Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to those rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates rights that are independent of those specified in section 28(1).”

Thus section 28(2) does not only bring the South African law in accordance with its international obligations, it has a profound impact on the law relating to children. In light of the fact that the best interests principle has formed part of the common law relating to the parent-child relationship and custody for so long,¹⁷⁶ section 28(2)’s impact on this part of the law might be less apparent. Nevertheless, a brief discussion of the merits of section 28(2) is warranted.

4 2 South African law in accordance with international obligations

South Africa has signed and ratified a number of international human rights documents and treaties,¹⁷⁷ thereby incurring the obligations in terms thereof. Section 28 goes a long way towards fulfilling these obligations given the fact that it guarantees and provides for most of the rights mentioned in the various documents. Every child¹⁷⁸ is guaranteed the right to a name and nationality,¹⁷⁹ to parental care or appropriate alternatives,¹⁸⁰ as well as other socio-economic rights.¹⁸¹

¹⁷³ Act 108 of 1996. The principle was also entrenched in the Interim Constitution, Act 200 of 1993 in sec 30(3).

¹⁷⁴ See the discussion in 4 3 4 below.

¹⁷⁵ Per Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] 7 BCLR 713 (CC) par 18. See also *Fraser v Naudé and Others* 1999 (1) SA 1 (CC) par 9; *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par 20.

¹⁷⁶ See Chapter Two above as well as 3 2 and 3 3 above.

¹⁷⁷ The Universal Declaration on Human Rights (1948), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the United Nations Convention on the Rights of the Child (1989), the African Charter of Human and People’s Rights (1981) and the African Charter on the Rights and Welfare of the Child (1990). Refer to Chapter Three above for the complete discussion of these documents and their approach to the best interests principle.

¹⁷⁸ A child is defined in sec 28(3) as every person under the age of eighteen.

¹⁷⁹ Sec 28(1)(a).

¹⁸⁰ Sec 28(1)(b). The constitutional provision for the child’s right to parental care has raised the interesting question whether a father of a child born out of wedlock is constitutionally obliged to

In a very important respect however, the Constitution differs from the United Nations Convention on the Rights of the Child (1989),¹⁸² while resembling the African Charter on the Rights and Welfare of the Child (1990).¹⁸³ Section 28(2) contains one of the strongest formulations of the best interests-principle, namely that the best interests of the child are of paramount importance in every matter concerning the child. This is essentially similar to the wording of article 4(1) of the Children's Charter, while article 3(1) of the Children's Convention on the other hand elevates the best interests only to "a primary consideration".¹⁸⁴

Given the fact that South Africa has ratified both the Children's Convention and Children's Charter and that the principle is enshrined in the Constitution, comparing the wording of the different documents might be an unnecessary splitting of hairs. After all, both international documents provide that their provisions do not affect any provisions that are more conducive to the realisation of children's rights and the protection of their welfare.¹⁸⁵ The Constitution does not contain a similar provision but it is trite that any legislative provisions not in conflict with the rights and

provide his child with "such love, cherishment, attention and interest as can normally be expected of a father towards his natural son". *Jooste v Botha* [2000] 2 BCLR 187 (T) 189H per Van Dijkorst J. The eleven-year-old plaintiff based his claim for delictual damages for *iniuria*, emotional distress and loss of amenities of life on his sec 28(1)(b) right to family or parental care. Even though the father had consistently made the required maintenance payments, the boy claimed that he suffered emotionally due to his father's refusal and failure "to admit that he is his natural son; to communicate with him; to render him love, cherishment or recognition; to show any interest in him; and to take any steps that would naturally be expected of a father towards his son". See 189F. It was held that neither the common law nor the Constitution created a legal obligation for a parent to provide his or child with the before-mentioned intangible elements of care. The claim on section 28(1)(b) was dismissed for two reasons. Firstly, it was held that the right to family care was envisioned for a two-parent family, while the right to parental care was the alternative where care is provided by a single parent with custody over the child. Since the respondent was the non-custodian parent, the right in 28(1)(b) did not create an obligation for him. The second insurmountable obstacle to the child's claim was held to be the absence of any remedy. "The law will not enforce the impossible. It cannot create love and affection where there is none." See 197F.

Though it is true that the law cannot create the love and affection which the young boy longed for, his claim was for delictual damages based on the breach of a constitutional duty. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), it was held that constitutional damages could be claimed. The court did not deal with this matter since it found that there was no constitutional duty on the father.

¹⁸¹ On the widened scope of the best interests principle and its application to the socio-economic rights of children, see 4 3 4 below.

¹⁸² Hereafter the Children's Convention.

¹⁸³ Hereafter the Children's Charter.

¹⁸⁴ See Chapter Three 3 3 2 above.

¹⁸⁵ Art 4(1) of the Children's Convention and art 1(2) of the Children's Charter.

freedoms in the Bill of Rights¹⁸⁶ remain fully valid and enforceable. Moreover, section 39 places a definite obligation on any court, tribunal or forum to consider international law when interpreting any of the rights in the Bill.¹⁸⁷

The value of this overlapping provision for and protection of the rights of the child, becomes apparent when notice is taken of the fact that the Constitution does not expressly guarantee the child the right to be heard if he or she is capable of forming and expressing his or her own views.¹⁸⁸ Without the ability to refer to international law, or to develop the common law,¹⁸⁹ the rights and protection afforded by the Constitution might have been insufficient to give the child the right to be heard in custody disputes.¹⁹⁰ The right of the child to express his or her opinion in custody matters if the child is of sufficient mental and emotional maturity and has the intellectual capability to make a rational choice concerning his custody has been recognised in a number of cases.¹⁹¹ Therefore, regardless of the omission of the Constitution to guarantee this right,¹⁹² the child is not completely without the right to be heard.¹⁹³ Moreover, by respecting the child's autonomy in this way, he or she is also recognised and affirmed as a holder of rights.¹⁹⁴ As was submitted in the

¹⁸⁶ See sec 39(3) of the Constitution: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

¹⁸⁷ Sec 39(1)(b).

¹⁸⁸ Art 12(1) and (2) of the Children's Convention give the child the right to be heard. The weight given to his or her views and wishes will depend upon the age and maturity of the child. The Children's Charter contains a similar provision in article 4(2).

¹⁸⁹ Sec 39(2). Case law forms part of the common law of South Africa.

¹⁹⁰ Barrat "The child's right to be heard in custody and access determinations" 2002 *THRHR* 556; Eekelaar "The Interests of the child and the child's wishes: The role of dynamic self-determination" in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* 42. See also Chapter Four above.

¹⁹¹ See *Siyaya v Siyaya* 1958 (2) PH B17 (C); *Smith v Smith* 1937 PH B71 (W); *French v French* 1971 (4) SA 298 (W); *Manning v Manning* 1975 (4) SA 659 (T); *Germani v Herf and Another* 1975 (4) SA 887 (AD); *Märtens v Märtens* 1991 (4) SA 287 (T); *McCall v McCall* 1994 (3) SA 201 (C); *I v S* 2000 (2) SA 993 (C).

¹⁹² The existence of this right, according to Van Bueren, is very important since it is the most efficient way to ensure the best interests of the child. Van Bueren 1991 *International Journal of Child Law* 63, 63.

¹⁹³ De Waal, Currie and Erasmus argue that any claim to personal autonomy or self-determination by a child will, in the absence of the provision of such a right in section 28, have to be based on the ordinary rights of the child provided by other sections of the Constitution, for instance: the right to privacy (sec 14), the right to freedom of religion, belief and opinion (sec 15), the right to freedom of expression (sec 16) and the right to freedom of association (sec 18). See De Waal, Currie and Erasmus *The Bill of Rights Handbook* 411.

¹⁹⁴ Freeman 1992 *International Journal of Law and the Family* 52, 65.

However important the right to self-determination may be, it should not be considered absolute. Children are physically, emotionally and intellectually immature and therefore in need of guidance and

discussion in Chapter Four, ensuring the best interests of a child by his or her right to participation constitutes a holistic approach not only to the child as individual, but to the family as well.¹⁹⁵

4 3 The influence of the Constitution: Paramountcy in all matters and interpretation of the best interests of the child

As seen from the discussions above, the best interests principle was strongly rooted in the common law even before the enactment of the Constitution. It may therefore be argued that the Constitution does not really contribute to the application and development of the principle. This is not true however. At common law the best interests of the child was the paramount consideration mainly in cases concerning the parent-child relationship.¹⁹⁶ In contrast with this narrow field of application, the constitutional principle is applicable in every matter concerning the child¹⁹⁷ and courts have proven their willingness to apply it in a variety of new scenarios.¹⁹⁸ Though these cases do not concern the custody of children and as such may seem to fall beyond the scope of the present study, the courts' approach to and interpretation

care by their parents and caregivers. Bekink and Brand submit that the interest of children in their own autonomy must be seen in the context of this relationship of dependence that exists between a child and its parents. Thus the extent to which a child can lay claim to his or her self-determinations, is limited by the parent's responsibilities of care and support towards the child, as well as the rights and powers he or she may have over the child. Bekink and Brand "Constitutional protection of children" in Davel (ed) *Introduction to Child Law in South Africa* 169, 180-181. See also the argument by Eekelaar that the child's autonomy interests are subordinate to its basic and developmental interests. Eekelaar "The emergence of children's rights" 1986 *Oxford Journal of Legal Studies* 161, 170; Elster 1987 *University of Chicago Law Review* 1, 14.

¹⁹⁵ See Chapter Four 3 4 above.

¹⁹⁶ As upper guardian of all minors the High Court undoubtedly had the capacity to interfere in any matter if it was considered in the best interests of the minor, but considerations of privacy and family autonomy generally prevented such interference except where the court was approached for an order concerning custody of or access to a minor child.

¹⁹⁷ For instance in *In re Moatsi se Boedel* 2002 (4) SA 712 (T) the court held that the best interests of the child are paramount in every matter concerning the child, therefore, if the interests of the child dictate, the court can exercise its powers of review despite the absence of provisions expressly authorising such review.

¹⁹⁸ The question arises whether the principle is really applicable in every matter concerning the child. For instance, in criminal proceedings where the guilt or innocence of the child is in issue, it does not make sense to apply this standard since it would inevitably be in the child's best interests that he or she should be found innocent. It is submitted however, that the application of the best interest-principle in criminal proceedings would not so much require a child to be found innocent regardless of his or her criminal conduct, but that the legal process should proceed in an expeditious and fair manner. After all, section 28(1)(g)-(i) and section 35 of the Constitution does not guarantee freedom from criminal prosecution, but that such prosecution and resultant punishment should not negate the fundamental rights of the arrested, detained or accused person or child. See Bekink and Brand "Constitutional Protection of Children" in Davel (ed) *Introduction to Child Law in South Africa* 169, 194-195; Pantazis and Mosikatsana "Children's Rights" in Chaskalson *et al Constitutional Law in South Africa*, 33-20.

and application of the best interests principle are of great relevance to the study of its development.

4 3 1 Protection for children as a group: *De Reuck v Director of Public Prosecutions*¹⁹⁹

Since the constitutionalization of the best interests principle South African courts have been willing to apply it in cases that did not concern the welfare of a specific child, but rather the welfare of children as a broad and unlimited group.²⁰⁰ For instance, the principle was applied in *De Reuck v Director of Public Prosecutions (WLD) and Others*.²⁰¹ The applicant was arrested for the possession of child pornography. He applied to the court for an order declaring section 27 of the Films and Publications Act²⁰² unconstitutional on the ground that it invades the rights to privacy²⁰³ and freedom of expression²⁰⁴ guaranteed by the Constitution.²⁰⁵ The Respondents disputed the unconstitutionality and submitted that the Applicant's alleged rights were in conflict with every child's right to be protected from, *inter alia*, maltreatment, neglect, abuse or degradation.²⁰⁶ From the outset of his judgment, Epstein AJ made it very clear that he considered the best interests of the child as the "single most important factor to be considered when balancing or weighing competing rights and interests concerning children".²⁰⁷ Later in the judgment he said,

"Where one deals with a hierarchy of values, the child's rights and interests are the most important. This is made clear by section 28(2)... In a system where no rights are absolute, certain rights must yield to others. When several constitutional rights are vying for position and consequent protection, a balancing of the relevant values is necessary but the rights of

¹⁹⁹ *De Reuck v Director of Public Prosecutions (WLD) and Others* Case no 2000/27709 – unreported.

²⁰⁰ See further *Fraser v Naude and Others* [1998] 11 BCLR 1357 (CC); *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] 7 BCLR 713 (CC); *Grootboom v Oostenberg Municipality* [2000] 3 BCLR 277 (C); *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

²⁰¹ Case no 2000/27709 – unreported.

²⁰² Act 65 of 1996.

²⁰³ Sec 14.

²⁰⁴ Sec 16. De Reuck argued that the Films and Publications Act is unconstitutional because it does not exclude *bona fide* art and artistic expression from the definition of child pornography and because it does not provide for a defence of legitimate purpose, public good or public interest where the material is possessed or imported for creation of a *bona fide* documentary, research work, drama or work of art without involving real children.

²⁰⁵ See par 7 of the judgment.

²⁰⁶ Sec 28(1)(d) of the Constitution.

²⁰⁷ Par 10.

children will always be deferred to... In the balance of conflicting rights, children's rights are always paramount."²⁰⁸

The application was thus dismissed. From the *dictum* quoted above it is clear that children's rights are placed in a hierarchy above the rights of adults which might be harmful to the interests of children as a group even though no one specific child was harmed in the exercise of those rights.²⁰⁹ In the balancing of the different rights, the best interests of the child will always be paramount.²¹⁰

4 3 2 Indirect recognition of and protection for the rights of adults: The case of homosexual parenthood: *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC)

When the best interests of a child are given the proper recognition as the paramount consideration in all matters concerning that child, it opens a door for greater recognition and protection of the rights of adults. A prime example is that, because the gender of the parents does not play the determinative role in a custody award anymore, the father and mother are to a great extent treated as equals. The differentiation that may be made between the two is not based on gender, but on their commitment to the child and their capabilities as caregivers. Furthermore, the best interests principle has been used to achieve greater equality between hetero- and

²⁰⁸ Par 40 and 89.

²⁰⁹ De Reuck's argument was that the pornographic material was created by artificial means and that no children were abused in the process.

²¹⁰ De Reuck subsequently approached the Constitutional Court for leave to appeal against the High Court judgment. *De Reuck v Director of Public Prosecutions (WLD) and Others* case number CCT5/03 (unreported). The Constitutional Court's decision was handed down on October 15, 2003 by Deputy Chief Justice Langa. The case was decided mainly on the child's right to human dignity (section 10 of the Constitution) and section 28(2) received only cursory attention. Note however the approach followed with regard to section 28 and the principle of the child's best interests: "It was argued that section 28(2) ... is relevant to the present enquiry. In the view I take of the matter, it is not necessary to decide this in the present case. In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution "trumps" other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights is subject to limitations that are reasonable and justifiable in compliance with section 36." See paragraph [1] and [2] of the judgment. The court referred here to *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) paragraphs 27-30.

It is submitted that on a different interpretation, the approach of the High Court to the best interests principle is in effect not in conflict with the Constitutional Court's. The High Court did not elevate the principle above limitation that is reasonable and justifiable in accordance with section 36, it did however reveal how hard it would be, given the commitment to the protection of the rights and interests in the South African society, to prove circumstances that justifies such limitation.

homosexual parents. In *V v V*²¹¹ the court held that the sexual orientation of the lesbian mother would only be taken into account to the extent that it impacts negatively on the development and happiness of the child.²¹²

The judgment of Foxcroft J in this case contrasts sharply with that of Flemming DJP in *Van Rooyen v Van Rooyen*.²¹³ Where Flemming treated homosexuality as *per se* abnormal, Foxcroft refused to discriminate between the parents based on the mother's sexual orientation and ordered joint custody. He found that ordering the sole custody and supervised access the father applied for, would be unfair against both the mother and the children.

“They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other?”²¹⁴

Apart from providing for equal rights for fathers and mothers regardless of their sexual orientation, the best interests principle has also been applied in order to provide people with homosexual orientation the ability to acquire parental rights and responsibilities over non-biological children. In *Du Toit and Another v Minister of Welfare and Population Development and Others*²¹⁵ the applicants, partners in a longstanding lesbian relationship, challenged the constitutional validity of certain sections of the Child Care Act²¹⁶ as well as section 1(2) of the Guardianship Act.²¹⁷ The relevant sections of legislation made it impossible for them to jointly adopt children, even though as technically unmarried women, they would both have been able to adopt children in their individual capacities. The Constitutional Court confirmed the decision of the High Court that the impugned provisions were

²¹¹ 1998 (4) SA 169 (C).

²¹² Van Heerden *et al* *Boberg's Law of Persons and the Family* 544-546; Brits “Toegang tot kinders, lesbiansme en die Konstitusie” 1994 *THRHR* 710; Viljoen “Signs of the times: Changing attitudes under the new Constitution” 1995 *Stell LR* 232, 235; Reece “The paramountcy principle: Consensus or construct?” 1996 *Current Legal Problems* 267, 287; Steyn “From closet to Constitution: The gay family rights odyssey” 1998 *TSAR* 97.

²¹³ 1994 (2) SA 325 (W). See the discussion in Chapter Four above

²¹⁴ 192C-D. See also Steyn “Women who love women – A female perspective on gay family law” 2001 *TSAR* 340, 346-348.

²¹⁵ 2003 (2) SA 198 (CC).

²¹⁶ Sections 17(a), 17(c) and 20(1) of Act 74 of 1983.

²¹⁷ 192 of 1993.

unconstitutional not only because it infringed the women's rights to equality and dignity, but also because it was in conflict with the principle enshrined in section 28(2).

"The impugned provisions of the Child Care Act deprive children of the possibility of a loving and stable family life as required by sec 28(1)(b) of the Constitution. This is a matter of particular concern given the social reality of the vast number of parentless children in our country. The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children and I conclude that, in this regard section 17(a) and (c) of the Act are in conflict with section 28(2) of the Constitution."²¹⁸

This breakthrough case has brought South African family law one step closer to the ideal proposed in 1996 by Mosikatsana,²¹⁹

"[I]n order to make adoptive placements in the child's best interests, the South African law on adoption and social welfare agency practices should include sexual minorities as prospective adoptive parents since any adoptive child may turn out to be a self-identified gay or lesbian adolescent ..."

4 3 3 Influence on the customary law: *Hlope v Mahlalela* 1998 (1) SA 449 (T)

Not only did the constitutionalization of the principle open the way for its application in a broader variety of common law cases, it changed the face of customary law relating to children as well.²²⁰ Though these changes fall largely beyond the scope of the present study, the case of *Hlope v Mahlalela and Another*²²¹ is of interest. This case concerned a claim by a widowed father for the custody of his minor child who lived with its maternal grandparents. The grandparents disputed the father's right to custody based on the fact that the *lobolo*²²² was never paid in full. The court held that no agreement which may in any way be construed as trafficking in children will ever be enforced by a court and that the main consideration in a custody dispute must always remain the best interests of the child and not the fact of (non-)payment of any amount of cattle. The court made reference to section 30(3) of the Interim

²¹⁸ Par 22 of the judgment, per Skweyiya AJ.

²¹⁹ Mosikatsana "Gay/lesbian adoptions and the best interests standard: A critical analytical perspective" in Keightley *Children's Rights* 114, 115.

²²⁰ Bennet "The best interests of the child in the African context" 1999 *Obiter* 145; Knoetze "Custody of a black child" 1999 *Obiter* 207; Maithufi "Children, customary law and the Constitution" 1999 *Obiter* 198; Knoetze "The modern significance of *lobolo*" 2000 *TSAR* 532.

²²¹ 1998 (1) SA 449 (T).

²²² "*Lobolo* denotes the giving of property by a husband or his family head to his wife's family as part of the process of marrying." Knoetze "The modern significance of *lobolo*" 2000 *TSAR* 532, 532.

Constitution determining that rules of customary law shall give way to the best interests of the child. On the facts the court held that it was in fact in the best interests of the specific child to be in the custody of the father.²²³

4 3 4 Socio-economic rights for children: *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC)

Socio-economic rights are the so-called second generation rights, for instance the right to housing²²⁴ and the right to health care, food, water and social security.²²⁵ Besides these general socio-economic rights, children are afforded extra ones in section 28, for instance, the right to basic nutrition, shelter, basic health care and social services,²²⁶ the right to be protected from exploitative labour practices,²²⁷ as well as the right not to be detained except as a last resort²²⁸ and the right to have legal representation in civil proceedings at state expense if substantial injustice would otherwise result.²²⁹ The main characteristic of the socio-economic rights of children, especially those in section 28(1)(c), is that the child's right to basic nutrition, shelter and health care services is not dependent on state resources as section 26 and 27 rights are.

In *Government of the RSA and Others v Grootboom and Others*²³⁰ the Constitutional Court was called upon to decide an appeal against a decision of the Cape High Court in *Grootboom v Oostenberg Municipality and Others*.²³¹ In the Constitutional Court judgment Yacoob J summarised the High Court judgment to amount to the following:²³²

²²³ See further Van Heerden *et al* *Boberg's The Law of Persons and the Family* 511.

²²⁴ Sec 26 of the Constitution.

²²⁵ Sec 27 of the Constitution.

²²⁶ Sec 28 (1)(c).

²²⁷ Sec 28(1)(e).

²²⁸ Sec 28 (1)(g).

²²⁹ Sec 28(1)(h),

²³⁰ 2001 (1) SA 46 (CC).

²³¹ [2000] 3 BCLR 277 (C).

²³² See par 70 of the Constitutional Court judgment.

- (a) that the section 28(1)(c) right to basic shelter obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children;
- (b) that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that
- (c) the State was bound to provide this rudimentary shelter irrespective of the availability of resources.

This type of reasoning would give parents with children two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c). The High Court held further that the shelter was to be provided to the children as well as their parents because it would not have been in the children's best interests to provide them with shelter if it meant that they would have had to be removed from the care and company of their parents.²³³

According to the Constitutional Court the High Court's reasoning produced an anomalous result.

"People who have children have a direct and enforceable right to housing under sec 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic right would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are."²³⁴

²³³ "Were the right to shelter to be so interpreted, it would inevitably result in these children being wrenched from their family context and any form of parental control and placed in a state institution even in cases such as the present one where there is no suggestion that the parents have neglected their children. Were this to be the case section 28(1)(c) would effectively be at war with section 28(2) which provides that children's best interests are of paramount importance in every matter concerning the child. It would surely not be in the interests of a child to be taken away from his or her parents in order to be provided with shelter. ... As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family. The justification for such a conclusion is that a failure to recognize the parents would prevent the children from remaining within the family fabric. This would penalize the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children. ... [A]n order which enforces the child's right to shelter should take account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 read as a whole. ... In the present case it is in the best interests of the children applicants that they be accompanied by their parents..." Per Davis J 288G/H-289J of the High Court judgment.

²³⁴ Per Yacoob J par 71 of the Constitutional Court judgment.

It is submitted that even though the court never made direct mention of the section 28(2) paramountcy of the best interests of the children, this principle must have played an important role in the decision. The awareness of the danger of allowing children to become a stepping-stone for the enforcement of their parents' rights undeniably implies a commitment to the welfare and prevention of harm to or exploitation of children.²³⁵

In *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*²³⁶ the section 28(1)(b) and (c) rights of children were material considerations in the decision of the Constitutional Court to order Government to revise its policy on the availability and administration of Nevirapine.²³⁷ It was held that the provision of a single dose of Nevirapine to the mother and child to prevent transmission of HIV was, as far as the children were concerned, essential. Their needs were most urgent and their inability to have access to Nevirapine profoundly affected their ability to enjoy any other rights to which they were entitled. The State was thus obliged to ensure that children were accorded the protection contemplated by section 28.²³⁸

4 3 5 Conclusion

From these cases it is evident that even though the Constitution did not introduce a new principle into South African law, it certainly had a profound impact upon the scope of its application. Decisions concerning children are permeated with a genuine awareness of the rights and interests of the child and a commitment to the advancement and protection of these rights and interests. Though some of these cases display the belief that children's rights could be used as a trump over those of the parents,²³⁹ the Constitutional court has convincingly rejected this idea as a misinterpretation of section 28(2).²⁴⁰ This confirms the theoretical value that the best

²³⁵ See further 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 *SAJHR* 211; Sloth-Nielsen and Van Heerden "The political economy of child law reform: pie in the sky?" in Davel (ed) *Children's Rights in a Transitional Society* 107; Sloth-Nielsen "Chicken soup or chainsaws: some implications of the constitutionalization of children's rights in South Africa" in Keightley (ed) *Children's Rights* 6.

²³⁶ 2002 (5) SA 721 (CC).

²³⁷ Nevirapine is an antiretroviral drug that, if administered to mothers and newborn babies, can prevent the transmission of the HI-virus from the mother to the infant.

²³⁸ See par [78] and [79] of the judgment.

²³⁹ The *De Reuck*- and the *Grootboom* High Court judgments (*supra*).

²⁴⁰ The *Grootboom*- and *De Reuck* Constitutional Court judgements (*supra*).

interests of the child principle constitutes a holistic approach to both the child and the family. Moreover, the successful application of the principle in these divergent circumstances provides evidence for the submission that the principle is, though vague and problematic, a workable ideal which will continue to enhance the position of children in South Africa through the commitment to their welfare.

5 The future and the Children's Bill 2003

5 1 Introduction

The Children's Bill was published in an attempt to consolidate all the statutory, common, customary and religious laws relating to children in South Africa into one comprehensive Children's Statute. The Bill is based on the extensive report and recommendations by the South African Law Commission.²⁴¹ In this report the best interests of the child principle received much attention and the Legislature responded to the recommendations by including an extensive list of guidelines on the factors that should be taken into account in the application of the Act.²⁴² An order for the assignment of parental responsibilities and rights (in particular the care of the child)²⁴³

²⁴¹ South African Law Commission, Project 110 "Review of the Child Care Act, Report and Recommendations", December 2002 under the chairpersonship of Madame Justice Y Mokgoro.

²⁴² The best interest principle is considered sound. The difficulty lies in establishing and ensuring conformity in the criteria used to determine the best interests which are acceptable not only to members of the legal profession, but to mental health and social work professionals as well. See Davies *The Divorced Father as Primary Caretaker: A Survey of the Phenomena of Male Custodianship* 1994 MA Dissertation 32.

²⁴³ The Children's Bill introduces a change in terminology. The word custody is replaced by the word "care". According to Chapter 1 of the Bill care in relation to a child includes –

- a) within available means, providing the child with –
 - (i) a suitable place to live; and
 - (ii) living conditions that are conducive to the child's health, well-being and development;
- b) safeguarding and promoting the well-being of the child;
- c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical act and moral harm or hazards;
- d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the rights set out in Chapter 4 of this Act;
- e) guiding and directing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- f) guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child's age, maturity and stage of development;
- g) guiding the behaviour of the child in a humane manner;
- h) maintaining a sound relationship with the child; and
- i) generally, ensuring that the best interest of the child is the paramount consideration in all matters affecting the child.

made by the court after the divorce of the parents will certainly fall under the ambit of the Act.

In the Report the Commission referred to section 28(2) of the Constitution, article 3(1) of the United Nations Convention on the Rights of the Child and articles 16(1)(d) and (f) of the UN Convention on the Elimination of All Forms of Discrimination Against Women, all of which enshrines the best interests of the child as paramount or primary consideration in all matters regarding children. The Commission acknowledged that the best interests principle is problematic in that –

- “(i) it is indeterminate;
- (ii) the different professionals involved with matters relating to children have different perspectives on the concept; and
- (iii) the way in which the criterion is interpreted and applied by different countries (and indeed by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value-system of the relevant decision-maker.”²⁴⁴

Accepting the practical problems which application of the principle create, the Commission was of opinion that decision-makers, including parents and judicial officers, will benefit greatly from having regard to a list of criteria in determining the interests of a child.²⁴⁵ Such a list was therefore included in the draft Children’s Bill.

5 2 Criteria to determine the best interests of the child

Section 10 of the Bill determines that, wherever a provision of the Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant –

- a) [T]he nature of the personal relationship between –
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other person relevant in those circumstances;
- b) the attitude of the parents, or any specific parent, towards –
 - (i) the child; and
 - (ii) the exercise of parental responsibilities in respect of the child;

²⁴⁴ See Chapter One 3 3 of the “Review of the Child Care Act Report and Children’s Bill” 14.

²⁴⁵ See Chapter One 3 3 of the “Review of the Child Care Act Report and Children’s Bill” 16.

- c) the capacity of the parents, or any specific parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other person, with whom the child has been living;
- e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family;
 - (ii) to maintain a connection with his or her family, extended family, tribe, culture or religion;
- g) the child's –
 - (i) age, maturity and stage of development;
 - (ii) gender; and
 - (iii) background and any other relevant characteristics of the child;
- h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- i) the need for the child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a family environment;
- j) 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 or degradation or exposing the child to violence or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- k) any family violence involving the child or a family member of the child; and
- l) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.

The clear guidelines provided by the new Children's Bill constitute a giant step towards certainty on and conformity of the criteria used to determine the best interests of a child in a given scenario and will, if but properly applied, unquestioningly promote the application of the principle.²⁴⁶ However, this list of criteria, similar to the

²⁴⁶ See Chapter Four 2 3 above.

list in *McCall v McCall*,²⁴⁷ should never be elevated to the status of a checklist²⁴⁸ since this can lead to the failure to consider extraordinary and individual circumstances influencing the welfare of the child. The criteria can only serve as guidelines. There must be room for each different case to be determined on its own merits and facts.²⁴⁹

For instance, if the list is taken as a strict checklist and a *numerus clausus* of factors to be considered, the child may be denied the opportunity to share his or her own views and wishes, since section 10 does not contain a provision to that effect, even though it does require the age, maturity and development of the child to be kept in mind. However, the Bill does afford every child capable of participating meaningfully in an administrative or judicial matter concerning him or her, the right to participate and to have his or her views duly considered.²⁵⁰

5 3 Theoretical foundation of the Children's Bill

The criteria listed in section 10 of the Bill display a consciousness of both the advantages and the disadvantages of the best interests principle as explored and discussed in Chapter Four above. Section 10 addresses both the main criticisms against the principle.²⁵¹ The compilation of the list obviously eliminates the indeterminacy of the principle while, though less apparently, it addresses the conflict between the rights and interests of the child and parents as well.

²⁴⁷ *Supra*. 2041/J-205A.

²⁴⁸ According to Van Heerden *et al* there "is indeed much to be said for the statutory checklist approach". It is perceived as a means of providing greater consistency and clarity in the law, it lays the foundation for a more systematic approach in decision-making concerning children. A very important advantage of a checklist is the possibility that it might assist parents and children in achieving a better understanding of how decisions are made. However, if a checklist is not very carefully formulated, it may increase the burden on the courts and encourage them to intervene (or people to approach the court) unnecessarily. It is important, therefore, Van Heerden *et al* argue, that only truly essential points be included in the list, "so that the court is not in any way prevented from taking into account everything that is relevant to a particular case". Van Heerden *et al* *Boberg's The Law of Persons and the Family* 532.

²⁴⁹ Per Foxcroft J in *V v V* 1998 (4) SA 169 (C) 187E-F. See also *Ex parte Critchfield* 1999 (3) SA 132 (W) 145C where Willis J held that the criteria in the *McCall*-case were not a "shopping list".

²⁵⁰ Sec 14(b).

²⁵¹ These are the indeterminacy of the principle and the fact that the child-centred nature of the principle ignores the rights and interests of the parents. See Chapter Four 4 above.

Many of the criteria, though focused on the child, indirectly recognize and cater for the consideration of the rights and interests of the parents,²⁵² while the family as unit also receives recognition. Among the objects of the Bill are the following:

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

Since the family is considered to be the cornerstone and smallest structure of society it is therefore implicit that the Bill is aimed at the promotion and protection of the family. Moreover, the child has the right to family life and not to be separated from his or her family or primary care-giver and, should separation be in his or her best interests, the child has the right to maintain a personal relationship with the parents or care-giver.²⁵³ Therefore, though the rights of the adults may be subordinated to those of the child,²⁵⁴ parents need not fear that it will, as a matter of law, ever be simply ignored.²⁵⁵ In this way the list of criteria encompass the holistic approach to family that is one of the main advantages of the principle.²⁵⁶

As seen in Chapter Four above the best interests principle constitutes a holistic approach not only to the family, but to the child as an individual as well in that it affords the child the opportunity to participate in the decision-making process. Section 10 however, does not include as criteria the opinion or preference of the child, though it does require the child’s age, maturity and stage of development to be considered,²⁵⁷ as well as his or her intellectual, emotional, social and cultural development.²⁵⁸ Though this can be seen as an omission it serves as valuable proof for the submission that the list must not be accepted as exhaustive. – The child is unequivocally afforded

²⁵² See for instance sec 10(a); 10(b); 10(c); 10(d)(i); 10(e); 10(f); 10(i).

²⁵³ Section 16 of the Bill.

²⁵⁴ This merely means that the rights of the child are given greater weight than those of the parents, but it does not mean that children’s rights can be used as a trump over the rights of parents in any or all situations. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

²⁵⁵ See Chapter Four 4 6 above. The Children’s Bill makes provision for the consideration of the nature of the relationship between the child and each of the parents (sec 10(a)(i)); the attitude of the parents towards the child as well as the exercise of parental responsibilities (sec 10(b)(i) and (ii)); the capacities of the parents (sec 10(c)). The explicit recognition which the child’s right to maintain a personal relationship with the parent (sec 10(f)(i)) receives, also ensure that the rights of the parents will be given, albeit indirectly, due consideration.

²⁵⁶ See Chapter Four 3 4 above.

²⁵⁷ Sec 10(g)(i).

²⁵⁸ Sec 10(h).

the right to participation in any judicial or administrative proceedings concerning him or her in the same section which confirms the paramountcy of the best interests of the child in all matters regarding the child.²⁵⁹

Section 14 of the Bill echoes the wording of section 28(2) of the Constitution,²⁶⁰ thereby sidestepping the theoretical debate concerning the scope of the principle that depends upon the words “a primary consideration” or “the paramount consideration”.²⁶¹

The open-ended nature of the list of criteria ensures that the important value of flexibility and adaptability of the principle is retained.²⁶² The term “best interests” clearly has a very wide scope and encompasses all the different spheres of an individual child’s life. Moreover, it has the ability to constantly reinvent itself²⁶³ under the influence of the social context and culture of the sphere where it is applied.²⁶⁴

The Children’s Bill is formulated to compel decision-makers to focus their attention upon the particular child as a member of a particular family and inextricably bound to both parents. A decision based truthfully on such an approach would most probably serve justice for the family in most cases.

²⁵⁹ Sec 14. Sec 14(2) states, “Every child capable of participating meaningfully in any judicial or administrative proceedings in a matter concerning that child has the right to participate in an appropriate way in those proceedings. Views expressed by the child must be given due consideration.”

²⁶⁰ “The child’s best interests are of paramount importance in every matter concerning the child.”

²⁶¹ See Chapter Three 3 3 2 and Chapter Four 3 3 above.

See further Alston 1994 *International Journal of Law and the Family* 1; Parker 1994 *International Journal of Law and the Family* 26; Van Bueren *International Law on the Rights of the Child* 75-76.

²⁶² See Chapter Four 3 3 above.

²⁶³ “Die begrip welsyn van die kind is nie ‘n statiese begrip nie. Dit verander met die waardesisteem en kennis van die mens.” Labuschagne “Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese integriteit” 1996 *TSAR* 577, 579.

²⁶⁴ It was submitted in Chapter Four that the identity of the decision-maker, cultural values and social context may influence the interpretation and application of the standard. If notice is taken of the how many of the recommendations of the Law Commission in the Report were actually included in the Children’s Bill, as well as how the Bill was influenced by the comments made by public institutions or private individuals incorporated in the Report, it seems that it is not only the courts, but the Legislature as well, that are influenced by current opinions.

6 Conclusion

The commitment to the best interests of the child is deeply embedded in the law governing the parent-child relationship. A concept that started out as a principle of equity in the English law and could only be inferred from the Roman Dutch law²⁶⁵ is now the most important principle in this branch of the law. Though the principle has been recognized since the early nineteenth hundreds by South African courts,²⁶⁶ great uncertainty existed as to its rightful place and the proper weight to be attached to the best interests of a child. Courts have attempted to give effect to the principle through the application of certain rules, which, at various times, were generally considered to embody a child's best interests.²⁶⁷ It was only in the 1990's that the attention was finally and unequivocally turned towards the child and his or her individual reality.²⁶⁸

Due to the entrenchment of the principle in section 28(2) of the Constitution, the focus on the child is not confined to the private law parent-child relationship any more. The best interests of the child are of paramount importance in all matters regarding the child, and the courts have proven their willingness to adhere to it and apply it in a variety of new circumstances.²⁶⁹

The new Children's Bill is the latest development in the South African law relating to the best interests of the child and, with the list of criteria, along the lines of which the best interests of a child are to be determined in a given situation,²⁷⁰ has laid to rest much of the uncertainty and objections against the principle. Provided that decision-makers steer clear of the obvious pitfall of approaching the guidelines as a hard and fast checklist,²⁷¹ the South African law is well on its way to adherence to its international obligations²⁷² and creating an exemplary culture in which children are afforded protection and rights.

²⁶⁵ Sornarajah 1973 *SALJ* 131.

²⁶⁶ *Cronjé v Cronjé* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033. See section 2 above.

²⁶⁷ See sections 2 and 3 above.

²⁶⁸ *McCall v McCall* 1994 (3) SA 201 (C). See section 3 4 above.

²⁶⁹ See section 4 above, in particular 4 3.

²⁷⁰ Section 10 of the Bill. See section 5 above.

²⁷¹ See *V v V* 1998 (4) SA 169 (C) 187E-F; *Ex parte Critchfield* 1999 (3) SA 132 (W) 145C; Van Heerden *et al* *Boberg's Law of Persons and the Family* 532. See also section 5 above.

²⁷² See 4 2 above, as well as Chapter Three.

CHAPTER SEVEN

CONCLUSION

The primary aim of this study was to determine whether the best interests of the child, as a principle of the common,¹ statutory² and Constitutional law of South Africa, as well as the international law,³ is a workable concept. It is submitted that the answer to this question is positive. It is indeed a concept with great value to promote the welfare of children caught up in their parents' divorce.

Given the secondary aim of this study – to explore the developments in the interpretation and application of the best interests principle in the South African law relating to custody – the extensive historical, international and theoretical perspectives provided might seem superfluous. However, without a comprehensive understanding of the origins of the principle, the international influences on its development or its theoretical advantages and disadvantages, a meaningful study of the developments in the interpretation and application thereof in the South African law of custody and, therefore, achieving the primary aim, would have been impossible. The study provided the useful and constructive insight that the value of the concept is dependant upon the correct approach to the principle and its characteristics.

The defining characteristic of the principle of the best interests of the child is its inherent vagueness and indeterminacy.⁴ Though many consider this as a serious drawback in the application of the principle, it is in fact the principle's greatest advantage and asset. In the discussion of the advantages in Chapter Four above three different advantages were listed: the child-centred nature of the principle, its flexibility and adaptability and the fact that it constitutes a holistic approach to the child and the family.⁵

¹ See Chapter Two above, as well as cases such as *Fletcher v Fletcher* 1948 (1) SA 130 (A); *Cook v Cook* 1937 AD 154; *Calitz v Calitz* 1939 AD 56.

² Section 14(1) of the Children's Bill.

³ Article 3(1) of the United Nations Convention on the Rights of the Child (1989). See Chapter Three above.

⁴ See Chapter Four 7. The indeterminacy of the principle ensures its flexibility and adaptability but largely complicates its interpretation and application.

⁵ Chapter Four 3 above.

At first glance it may seem as if the flexibility and adaptability is the only advantage that can be ascribed to the indeterminacy of the principle. In order for it to be flexible and adaptable to the time, cultural sphere and social context and unique circumstances of each case it is applied to, the indeterminacy of the principle is essential.⁶ However, the holistic approach to the child and family depends on it as well.⁷ If “best interests” were concisely defined it would have been impossible that the definition could cover the myriad of factors that may influence and enter into a specific child or family’s life. For this reason the approach of the Cape High Court in *McCall v McCall*⁸ and the legislature in the Children’s Bill is to be commended. Neither list of criteria purposes to be an exclusive list or *numerus clausus* of factors that have to be taken into account, thereby ensuring that every circumstance of specific relevance for a particular child can be considered and irrelevant ones overlooked. With the addition of the opportunity each child has of voicing his or her own views and opinions on the matter, and to have these views afforded due weight, a holistic approach to an individual child is ensured.⁹

One of the main objections to the use of the best interests principle is that it ignores the rights and interests of the parents or elevates the interests of the child to a much higher level.¹⁰ However, this is not the intention behind the principle. The principle is intended to promote substantive equality between the family members, both parents and children alike, by providing additional protection for the child as the most vulnerable party in a custody dispute. It does not negate the rights of the parents¹¹ as

⁶ “It is necessary that the standard should be flexible as individual circumstance will determine which factors secure the best interests of a particular child.” Per Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) par [18].

⁷ In Chapter Four the holistic approach which the best interests principle constitute towards the child as an individual and the family as a unit was discussed in detail. It is submitted that, though this advantage is often overlooked, it is possibly the greatest advantage of the principle.

⁸ 1994 (3) SA 201 (C).

⁹ See Chapter Three 3 3 4, Chapter Four 3 4, Chapter Six 5 2 and 5 3 above.

¹⁰ See Chapter Four 4 4 above.

¹¹ This interpretation of the best interests principle has recently been confirmed by the Constitutional Court in *De Reuck v Director of Public Prosecutions (WLD) and Others* case number CCT5/03 (unreported). The approach which the Constitutional Court followed towards the principle of the child’s best interests was somewhat different from that of the High Court. “In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution “trumps” other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights is subject to limitations that are

many of the factors listed in the *McCall*-case¹² as well as the Children's Bill prove. Even though the criteria are focused upon the child as the subject, the lists make ample, albeit indirect, provision for the rights and interests of the parents to be considered in the process as well.¹³

It is submitted that if decision-makers and judges interpret and apply the best interests principle with this holistic intention in a custody dispute, the outcome of the decision would most probably be in the best interests of the child, as well as fair and just towards the parents. Though it would still be impossible to predict what kind of custody order the court would make, the order would, baring circumstances which require exclusion of one parent from the child's life,¹⁴ be such as to ensure continuance of the family relationships regardless of the divorce.¹⁵ And therefore, because the holistic approach forms the foundation of the list in the Children's Bill,¹⁶ the workability and value of the principle for fair and just results in other decisions pertaining to children is established.

However, the workability of the principle depends upon two very important conditions. The first relates to the fact that, because of the indeterminacy of the principle, judges' own background and opinions will unavoidably enter into the decision. Though this can be an asset towards the interpretation and application of the principle in that it ensures that contemporary values and ideas are taken into account,¹⁷ the very real danger exists that their prejudice may work unjustly towards one of the parties.¹⁸ Decision-makers should guard very carefully against considering

reasonable and justifiable in compliance with section 36." Per Langa DCJ in paragraph [1] and [2] of the judgment.

This case was discussed in Chapter Six 4 3 2.

¹² *Supra*.

¹³ See Chapter Four 4 6, Chapter Six 5 2 and 5 3 above. This is evident from the Children's Bill's recognition of the family as a unit as well. Among the objects of the Bill are the provision of structures for promoting the sound physical, intellectual, emotional and social development of children and the strengthening and developing of community structures which can assist in the care and protection of children. It is submitted that the family as basic social unit and cornerstone of communities is such a structure and that the Bill is therefore, indirectly, aimed at the promotion and protection of the family.

¹⁴ Such as parental unfitness or abuse and neglect of the child.

¹⁵ At various places in the study it was submitted that it is generally in the best interests of children to maintain stable and continuous relationships with both parents after divorce. See in general Chapter Five 2 above.

¹⁶ See Chapter Six 5 3 above.

¹⁷ See Chapter Four 6 above.

¹⁸ See the discussion of the decision by Flemming J in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) in Chapter Four 6 2 above.

and attaching undue weight to certain issues based on prejudice. Using the list as guidelines on what is relevant in such a decision can help to prevent them from focussing on irrelevant personal characteristics or preferences of the parents. However, it is of utmost importance that the list is not elevated to a shopping list of factors to be considered.¹⁹ This is the second condition for the workability of the principle. Thus, if the list is in all circumstances approached as guidelines, it will exclude what is irrelevant and prevent the making of decisions on prejudice, while including anything of relevance to the child or parents.

But when all is said and done about the value of the best interests principle to promote the welfare of the child and family when it is applied, the problem remains that judges seldom give a full account of the mental process by which they arrived at their decisions. No South African judge has ever set out the rational process of making a choice on the best interests of the child as discussed in Chapter Four. This creates the impression that they pay lip service to the ideal of the best interests of the child while making a decision based on a personal preference for one or other type of custody. If this were to be the case in practice, the best interests principle will be entirely meaningless and devoid of any value.

At first glance it may seem a simple solution to require the decision-maker to show the result of each factor listed in section 10 of the Bill as it is applied on the facts of the case. The problem with such an approach, however, is that it may cause the list to become that which it was not intended – a rigid checklist of factors. This will eradicate the flexibility of the principle and may cause the process to become distorted. Considering the overburdened South African courts, the solution will definitely not be found in further encumbering the process of custody determinations. Perhaps the answer lies in another direction, for instance greater involvement of the Family Advocate or even binding mediation. The possible solutions, however, fall beyond the scope of the present study.

¹⁹ See *V v V* 1998 (4) SA 169 (C) 187E-F; *Ex parte Critchfield* 1999 (3) SA 132 (W) 145C. The remarks in these decisions related to the list in the *McCall*-case (*supra*) but are certainly applicable to the statutory list as well.

The study attempted to prove, in light of the developments in the interpretation and application thereof, that the best interests principle has the potential to bring South African law in accordance with its international obligations and to enhance the welfare of children. From a mere moral obligation in Roman times the principle has evolved to one where the child is approached as a well-rounded individual with rights and interests within an equally protected family unit. Therefore, if one thing can be gleaned from a study of the best interests principle, it is that it is characterized by an inherent adaptability and the end of its evolution has certainly not been reached.

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