

**ADVANCING THE BEST INTERESTS OF THE CHILD IN SOUTH  
AFRICAN FAMILY-RELATED LEGAL DISPUTES**

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## DECLARATION

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## **ABSTRACT**

This thesis examines the extent to which South Africa complies with international standards in protecting the best interests of the child in family-related legal disputes. The thesis applies a doctrinal methodology, drawing on primary sources such as international treaties, South African legislation, and case law, as well as secondary sources, including academic literature and general comments from treaty bodies. The thesis argues for an approach to protecting the best interests principle that encompasses substantive elements that should guide the courts when determining what is in the child's best interests; and procedural safeguards to ensure that the child's substantive rights are protected during the decision-making process. This approach emphasises the recognition of children as autonomous rights holders with evolving and developing capacities and needs and the significance of their participation in decision-making processes.

The thesis finds that, in general, South Africa's legal framework aligns strongly with substantive elements and procedural safeguards of the best interests principle as developed by international child rights law. The analysis of the practice of the best interests principle in international child abduction decision-making reveals that South African courts generally succeed in incorporating substantive elements into the decision-making process. However, significant procedural challenges, including delays in appointing legal representation, resource constraints, and inefficiencies in expediting decisions, undermine the consistent protection of children's rights. These procedural shortcomings often hinder the practical realisation of the best interests principle, particularly in time-sensitive contexts like international child abduction cases.

To address these challenges, the thesis recommends targeted procedural reforms. This includes mandating the timely appointment of independent legal representatives for children in all abduction cases, supported by clear guidelines and adequate resources. It further advocates for ongoing training for legal professionals representing children and the development of specialised multidisciplinary support services to ensure holistic and child-focused decision-making. These refinements would serve to harmonise procedural efficiency with substantive protections, thereby enhancing the implementation of the best interests principle in practice.

**IN MEMORIAM**

*Gwendoline Rose Cay*

14 October 1939 – 5 September 2022

Thank you for always hearing my voice, Ma.

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Finally, to my children, Seth, Luca, and Isla, may this thesis serve as a testament to the importance of your voice, autonomy and best interests, themes that are at the heart of this work. You inspire me every day to be an advocate for these fundamental rights, just as I aspire to advocate for you in all things. May you always know the power of your voices and the significance of your choices. I hope you grow into courageous individuals seeking social

justice, understanding the profound impact your voices can have on the world. Your best interests have always been my guiding star, and each page of this journey has been for you.

## **KEYWORDS**

Best interests of the child

International child abduction

Convention on the Rights of the Child

African Charter on the Rights and Welfare of the Child

Procedural safeguards

Children's rights in South Africa

Legal representation for children

Child participation

Voice of the child

Expedited decision-making

## ABBREVIATIONS

African Children's Charter	African Charter on the Rights and Welfare of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DoJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
Hague Convention	Hague Convention on the Civil Aspects of International child abduction
HC	High Court
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NAF	National Adoption Coalition of South Africa
NGO	Non-Governmental Organisation
SA	South Africa
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations

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# CHAPTER ONE

## INTRODUCTION

### 1.1 INTRODUCTION

This thesis examines the extent to which South Africa complies with its international obligations in assessing and determining the child's best interests in family-related disputes, with a focus on international child abduction jurisprudence in later chapters. Children are one of the most vulnerable populations.<sup>1</sup> Safeguarding their rights is essential to fostering a just and equitable society.<sup>2</sup>

The principle of the best interests of the child serves as a foundation in international legal frameworks addressing children's rights.<sup>3</sup> Both the UN Convention on the Rights of the Child (CRC)<sup>4</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>5</sup> recognise the importance of protecting the child's best interests in all decisions and actions that affect them. This principle acknowledges that children have unique needs,

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<sup>1</sup> S Adams and S Shazly 'A social justice perspective on children's well-being: Considerations for children's rights in the context of COVID-19' (2022) *Social justice for children in the South* Singapore: Springer Nature Singapore at 61–82.

<sup>2</sup> T Mosikatsana 'Children's rights and family autonomy in the South African context: A comment on children's rights under the final constitution.' (1997) 3 *Michigan Journal of Race & Law* 341, at 345.

<sup>3</sup> J Sloth-Nielsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4 *The International Journal of Children's Rights* 323-344, at 323.

<sup>4</sup> UN General Assembly *Convention on the Rights of the Child* 20 November 1989 United Nations, Treaty Series vol. 1577 p 3; The CRC was adopted and made available for signature and ratification through General Assembly resolution 44/25 on 20 November 1989, and came into effect on 2 September 1990.

<sup>5</sup> Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* 11 July 1990 CAB/LEG/24.9/49 (1990); The African Children's Charter was adopted and made available for signature and ratification on 11 July 1990, and came into effect on 29 November 1999.

vulnerabilities, and rights that must be safeguarded and protected.<sup>6</sup> By examining the role of this principle in family-related disputes, like international child abduction, the study delves into a critical area where its application is particularly significant as these are disputes that directly impact a child's evolving autonomy, capacities and needs.<sup>7</sup> Moreover, these situations often involve complex legal and emotional considerations that require careful examination of the child's best interests. The thesis highlights the legal implications and challenges of securing children's holistic well-being and development in family-related legal disputes by assessing how this principle is applied in such contexts and the extent to which its application aligns with international obligations.

Children are ordinarily seen as a vulnerable group particularly in South Africa where a majority of them face unique social, economic, and systemic vulnerabilities exacerbated by a legacy of apartheid.<sup>8</sup> Their vulnerability can be attributed to several key reasons. First, poverty is prevalent in the country, disproportionately affecting children and depriving them of access to fundamental needs such as nutrition, healthcare, education, and housing. Second, South Africa exhibits high levels of income inequality, resulting in limited resources and opportunities for children, particularly those from marginalised communities, further exacerbating their vulnerability.<sup>9</sup> Moreover, the country grapples with significant challenges related to violence and crime, exposing children to various forms of violence that impair their physical, emotional, and developmental well-being.<sup>10</sup> Additionally, South Africa's high HIV/AIDS prevalence rates contribute to the vulnerability of children, either directly through

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<sup>6</sup> S Goonesekere 'Law reform and children's rights in plural legal systems: Some experiences in Sub-Saharan Africa' (2007) in UNICEF *Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems* Cambridge: Cambridge University Press 209–264, at 211.

<sup>7</sup> SR Rappaport 'Deconstructing the impact of divorce on children' (2013) 47 *Family Law Quarterly* 353–377, at 355.

<sup>8</sup> S Drimie and M Casale 'Multiple stressors in Southern Africa: The link between HIV/AIDS, food insecurity, poverty and children's vulnerability now and in the future' (2009) 21 *AIDS Care* 28-33, at 30.

<sup>9</sup> MR Carter and JA Maluccio 'Social capital and coping with economic shocks: an analysis of stunting of South African children' (2003) 31(7) *World Development* 1147-1163, at 1147.

<sup>10</sup> N Shields K Nadasen and L Pierce 'The effects of community violence on children in Cape Town, South Africa' (2008) 32(5) *Child Abuse & Neglect* 589-601, at 592; See also OA Barbarin L Richter and T DeWet 'Exposure to violence, coping resources, and psychological adjustment of South African children' (2001) 71(1) *American Journal of Orthopsychiatry* 16-25, at 17.

transmission or indirectly through the loss of family members.<sup>11</sup> Legal disputes regarding neglect and abuse are also prevalent, with children experiencing mistreatment within their homes or communities, leading to long-lasting physical and psychological consequences. Furthermore, inadequate social services, varying in availability and quality across different regions, impede the provision of essential support systems, leaving vulnerable children at even greater risk of human rights violations.<sup>12</sup> Finally, the historical legacy of apartheid has resulted in enduring social and economic disparities that disproportionately affect children from marginalised backgrounds.<sup>13</sup> Addressing these multifaceted challenges requires holistic approaches involving a framework that considers the unique position of the South African child and safeguards their well-being.

Consequently, this thesis argues for an approach, aligned with key theoretical perspectives, to protect the best interests principle in decision-making processes. This approach encompasses substantive elements that assist courts in identifying which rights of the child should be promoted, protected, and respected during the assessment and determination of the child's best interests. Additionally, it includes procedural safeguards to guide courts on how to ensure the promotion, protection, and respect of these substantive elements and rights. This approach emphasises acknowledging children as autonomous rights holders with unique developmental needs, facilitating their participation in decision-making processes and ensuring that decisions are made expeditiously. For ease of reference, the term "child abduction" is used throughout this thesis to mean international child abduction within the scope of the Hague Convention;<sup>14</sup> domestic-abduction scenarios fall outside the thesis.

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<sup>11</sup> S Drimie and M Casale (2009) at 30.

<sup>12</sup> L Patel 'Developmental social policy, social welfare services and the non-profit sector in South Africa' (2012) 46(6) *Social Policy & Administration* 603-618, at 612.

<sup>13</sup> A Dawes 'The effects of political violence on children: A consideration of South African and related studies' (1990) 25(1) *International Journal of Psychology* 13-31, at 15; See also Chapter 4 for an overview of the South African context.

<sup>14</sup> Hague Convention on the Civil Aspects of International Child Abduction, 25 Oct 1980.

## 1.2 BACKGROUND

### *1.2.1 The significance of the CRC and African Children's Charter in protecting the rights of children*

The principle of the child's best interests was already well established in international law before it was enshrined in the CRC and the African Children's Charter. It was included in the 1959 Declaration of the Rights of the Child,<sup>15</sup> which emphasised that the child's best interests should be paramount in matters affecting the child and that the child should enjoy special protection.<sup>16</sup> The best interests principle is also incorporated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>17</sup> While it is not expressly mentioned in the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) has emphasised the paramount importance of the child's best interests in divorce proceedings.<sup>18</sup>

Of particular relevance to this thesis are the CRC and the African Children's Charter.<sup>19</sup> The CRC is an extensive international treaty that focuses on the rights of children and was adopted by the United Nations General Assembly in 1989. It has been ratified by nearly all countries globally, making it the most widely ratified human rights treaty in history.<sup>20</sup> The CRC recognises that children possess inherent rights and that their well-being and development must be protected.<sup>21</sup>

Ratified by most African countries thereafter,<sup>22</sup> the African Children's Charter is a regional instrument founded upon the principles and provisions of the CRC that addresses

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<sup>15</sup> UN General Assembly Declaration of the Rights of the Child 20 November 1959, A/RES/1386(XIV).

<sup>16</sup> Principle 2, Declaration of the Rights of the Child 1959.

<sup>17</sup> See art 5(b) and 16(1)(d), Convention on the Elimination of All Forms of Discrimination Against Women 1979.

<sup>18</sup> Human Rights Committee, General Comments No 17 and 19 HRI/GEN/1/Rev 8 185-189.

<sup>19</sup> See Chapter 3 for a discussion of the international and regional legal framework.

<sup>20</sup> See the following for the CRC ratification status: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en).

<sup>21</sup> J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11(3) *South African Journal on Human Rights* 401-420, at 402.

<sup>22</sup> See the following status list for the ratification status of the African Children's Charter: <https://au.int/sites/default/files/treaties/36804-sl->

AFRICAN\_CHARTER\_ON\_THE\_RIGHTS\_AND\_WELFARE\_OF\_THE\_CHILD.pdf

unique challenges faced by African children and redefines children's rights within the African historical and cultural context.<sup>23</sup> Both the CRC and African Children's Charter safeguard the rights of children.<sup>24</sup> These treaties cover children's rights to life,<sup>25</sup> education,<sup>26</sup> health,<sup>27</sup> protection from violence and abuse,<sup>28</sup> and participation in decisions affecting them.<sup>29</sup> These two instruments recognise children as individuals with rights and provide regulatory and institutional frameworks for governments, civil society, and other stakeholders to ensure children's well-being and development.<sup>30</sup>

South Africa has ratified both instruments and integrated their provisions into its domestic law.<sup>31</sup> The South African Constitution explicitly acknowledges children's rights and designates the child's best interests as a primary consideration in all matters related to children,<sup>32</sup> in line with the CRC and African Children's Charter.

In addition, South Africa has enacted the Children's Act,<sup>33</sup> which further incorporates and reflects the principles and provisions of these international instruments. The Children's Act protects and promotes the rights of children, as well as providing for parental responsibilities and rights,<sup>34</sup> guardianship,<sup>35</sup> adoption,<sup>36</sup> children in need of care and

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<sup>23</sup> T Kaime 'The African Children's Charter: Does it represent a relevant vision of childhood and children's rights' (2009) 29 *Children's Legal Rights Journal* 11-29, at 15.

<sup>24</sup> AG Assefa 'Advancing children's rights in Africa: The role of the African Children's Charter and its monitoring body' (2013) 2 *Mekelle University Law Journal* 66-101, at 68.

<sup>25</sup> Art 6, CRC; see also art 5, African Children's Charter.

<sup>26</sup> Art 28, CRC; see also art 11, African Children's Charter.

<sup>27</sup> Art 24, CRC; see also art 14, African Children's Charter.

<sup>28</sup> Art 19, CRC; see also art 16, African Children's Charter.

<sup>29</sup> Art 12, CRC; see also art 4(2), African Children's Charter.

<sup>30</sup> BD Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23(1) *SA Publiekreg/SA Public Law* 1-29, at 7.

<sup>31</sup> South Africa signed the CRC in 1993 and ratified it in 1995; similarly, South Africa signed the African Children's Charter in 1996 and ratified it in 2000.

<sup>32</sup> S28 of the Constitution contains rights specifically for children, with s28(2) providing the best interests of the child principle.

<sup>33</sup> Children's Act 38 of 2005.

<sup>34</sup> Children's Act, ch 3.

<sup>35</sup> Children's Act, s 27.

<sup>36</sup> Children's Act, ch 15.

protection<sup>37</sup> and incorporates other international instruments like the Hague Convention on International Abduction.<sup>38</sup> It also emphasises the importance of the child's best interests.<sup>39</sup>

By incorporating the CRC and African Children's Charter into its legal framework, South Africa demonstrates its commitment to upholding and promoting children's rights. These international instruments set a benchmark for evaluating and improving domestic laws, policies and practises concerning children.<sup>40</sup> They also serve as a basis for advocacy, the development of policies, and implementation of programmes to advance children's rights in South Africa.<sup>41</sup>

Treaty bodies issue General Comments to interpret and provide authoritative guidance on the implementation of international instruments.<sup>42</sup> Thus, in General Comment No. 5 on the general measures of implementation of the CRC, the CRC Committee emphasised that the child's best interests is fundamental in upholding and ensuring the implementation of all other rights of the child.<sup>43</sup> Furthermore, the CRC Committee has emphasised that the child's best interests necessitate measures to be implemented across both the judiciary and the legislature.<sup>44</sup> This is achieved by consistently assessing and determining the child's best interests in decision-making, irrespective of whether the decision directly or indirectly impacts children. It involves thoroughly considering how the decision affects the child's rights.<sup>45</sup> Similarly, in its General Comment No. 7 on implementing child rights in early childhood, the CRC Committee highlighted the significance of protecting the child's best interests in matters concerning the child's care and upbringing.<sup>46</sup> This was confirmed in General Comment No. 14 on the right of

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<sup>37</sup> Children's Act, ch 9.

<sup>38</sup> Children's Act, ch 17.

<sup>39</sup> Children's Act, s 7 and 9.

<sup>40</sup> F Viljoen 'Why South Africa should ratify the African Charter on the Rights and Welfare of the Child' (1999) 116 *South African Law Journal* 660-664, at 660.

<sup>41</sup> A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Journal* 11-32, at 26.

<sup>42</sup> See <https://www.ohchr.org/en/treaty-bodies/general-comments> accessed on 4 August 2023.

<sup>43</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 para 3.

<sup>44</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 para 3.

<sup>45</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 5 para 12.

<sup>46</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005) Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1 para 13.

the child to have their best interests taken as a primary consideration in decision making processes, stating that the principle of best interests of the child is a fundamental value of the CRC.<sup>47</sup>

### ***1.2.2 The importance of children's rights and the best interests principle in South Africa***

Article 3(1) of the CRC states mandates that '[i]n all actions and decisions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interests the child be a primary consideration'.<sup>48</sup> The principle recognises that children have specific rights and vulnerabilities that require special attention and protection, emphasising the need to ensure children's holistic well-being and development. As the CRC was developed under the auspices of the United Nations, a global institution consisting of many member states from various regions, the child's best interests is not exclusive to any particular cultural or geographical context.<sup>49</sup> While it is meant to apply universally to safeguard the rights and well-being of all children,<sup>50</sup> what is considered the child's best interests may vary in different cultural and legal systems. This allows for a contextualised approach considering individual children's needs and circumstances in different regions, including South Africa.<sup>51</sup> In South Africa, for example, this may involve considering children's cultural identity, language, and heritage and the specific challenges and opportunities they face in the South African context. Therefore, although the CRC offers a universal framework for children's rights, including the child's best interests, its

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<sup>47</sup> UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14para 1.

<sup>48</sup> Art 3(1), CRC.

<sup>49</sup> G Lansdown 'Article 3: The best interests of the child' (2022) in Z Vaghri J Zermatten G Lansdown and R Ruggiero (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child: An analysis of attributes* Springer Nature Switzerland 21-30, at 24.

<sup>50</sup> J Sloth-Nielsen 'The African Charter on the rights and welfare of the child' (2017) in T Boezaart (ed) *Child Law in South Africa* Juta Cape Town 424-445, at 432.

<sup>51</sup> K Sandberg 'The role of the United Nations Committee on the Rights of the Child in eliminating corporal punishment in the home' (2018) in BJ Saunders P Leviner and B Naylor (eds) *Corporal Punishment of Children* Brill Nijhoff 39-56, at 40.

implementation should be adapted to respect and reflect the cultural diversity and contexts of different nations.<sup>52</sup>

Article 4 of the African Children's Charter states: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."<sup>53</sup> This principle reflects African nations' dedication to protecting children's well-being, development and protection within their respective contexts in matters concerning children. Since the Charter emphasises the promotion and protection of children's rights within the African context and reflects African societies' values, traditions, and aspirations,<sup>54</sup> it too, like the CRC, admits a contextualised approach to the interpretation of the child's best interests principle that takes into account the cultural, social, and economic realities of African children.

Thus, the rights of children hold significant importance in South Africa for multiple reasons. First, as vulnerable individuals who rely on adults and the state for support, it is crucial to safeguard their rights, meet their needs, and create an environment conducive to their growth.<sup>55</sup> Moreover, recognising and promoting children's rights upholds the principles of equality, dignity, and respect, reinforcing South Africa's commitment to human rights for all its citizens.<sup>56</sup> Investing in children's rights, the country also addresses the cycle of poverty, as access to quality education, healthcare, nutrition, and social services equips children with the tools to overcome disadvantages and build a brighter future.<sup>57</sup> Furthermore, respecting children's rights fosters social cohesion and inclusion by creating an equitable society and reducing disparities. It nurtures a sense of belonging, unity, and shared responsibility for the well-being of all children. Protecting children's rights contributes to sustainable development, as children are future social leaders and contributors. By providing them with a nurturing environment, South Africa ensures they can reach their full potential and positively impact

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<sup>52</sup> D Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127, at 128.

<sup>53</sup> African Children's Charter, art 4.

<sup>54</sup> D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157, at 161.

<sup>55</sup> R Songca 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44(3) *Comparative and International Law Journal of Southern Africa* 340, at 359.

<sup>56</sup> See Chapter 4 for a discussion of the South African legal framework.

<sup>57</sup> D Chirwa 'Child poverty and children's rights of access to food and to basic nutrition in South Africa' (2009) 10(3) *ESR Review: Economic and Social Rights in South Africa* 2-8, at 3.

their communities.<sup>58</sup> Lastly, compliance with international obligations, such as those specified in the CRC and the African Children's Charter, strengthens South Africa's reputation as a responsible member of the global community and aligns its laws and policies with internationally recognised standards.<sup>59</sup>

### ***1.2.3 Conflicting interests***

In family-related disputes, like international child abduction disputes, various interests may conflict with the child's best interests.<sup>60</sup> These conflicting interests may arise due to the complex nature of such arrangements and the involvement of multiple parties. The specific conflict of parental interests is explored in Chapter Two, where the theoretical perspectives necessary for a comprehensive understanding of the dynamics of parental child-abduction disputes are developed. However, in short, some of the interests that may conflict with the child's best interests in international child abduction are:

- i. Parental interests: In international child abduction parents may have their own personal interests and desires, which might not align perfectly with the child's best interests.<sup>61</sup> For this reason, courts have not treated disputes of this nature as ordinary disputes of interference between individual rights but rather as “positive obligation” disputes, which means that there is a positive obligation created upon the court to balance the rights and interests of parents and children.<sup>62</sup> The principle of the child's best interests may operate to limit the rights of parents.<sup>63</sup>

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<sup>58</sup> M Freeman ‘Taking children's rights more seriously’ (1992) 6(1) *International Journal of Law, Policy and the Family* 52-71, at 54.

<sup>59</sup> M Freeman (1992) at 68.

<sup>60</sup> See Chapters 5 and 6 which analyse this issue in further detail.

<sup>61</sup> A MacDonald *The rights of the child: Law and practice* (2011) Jordan Publishing Limited Bristol at 190.

<sup>62</sup> QC Lester QC Pannick and J Herberg *Human Rights Law and practice* (2009) 3 ed Lexis Nexis 425-428, at 424. See also *Kearns v France* (2008) 1 FLR 888 para 74, *Von Hanover v Germany* (2005) 40 EHRR 36 para 57, and *White v Sweden* (2008) 46 EHRR 3.

<sup>63</sup> A Skelton ‘South Africa’ (2014) in T Liefgaard and JE Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* Springer 13-30, at 15.

- ii. Familial interests: The right to family life is recognised by both the Universal Declaration of Human Rights (UDHR)<sup>64</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>65</sup> The right to private family life is a fundamental human right that emphasises respecting and protecting personal relationships within a family unit. Accordingly, the right to private family life recognises that families play a crucial role in shaping children’s identities and well-being and is often considered in international child abduction. In turn, the right to respect private family life imposes a duty and obligation on the State to provide for efficient and appropriate dispute resolution in family-related disputes while taking heed of the paramountcy of the right of best interests of the child. Prabhat and Hambly submit that the law requires a balancing act between the right of respect for private family life and the right of the child's best interests; this obligates the law to provide effective normative and judicial processes for children.<sup>66</sup>
- iii. State intervention: State intervention in family-related disputes often presents a complex interplay of conflicting interests between ensuring the child's best interests and preserving parental and family autonomy or interests. While the state's involvement is generally motivated by the protection of children, particularly in situations where their welfare might be at risk, such intervention can sometimes be perceived as infringing upon the rights and responsibilities of parents and the integrity of the family unit. This tension is highlighted in the work of Hester, who explore the delicate balance that must be maintained between safeguarding children's rights and well-being and respecting family autonomy.<sup>67</sup> They argue that excessive or misdirected state intervention can disrupt familial bonds and undermine parental authority, potentially leading to outcomes that are not in the best interests of the child. This highlights the need for a

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<sup>64</sup> See article 12.

<sup>65</sup> See articles 17 and 23.

<sup>66</sup> D Prabhat and J Hambly ‘Bettering the Best Interests of the Child Determination: Of Checklists and Balancing Exercises’ (2017) 25(3) *The International Journal of Children’s Rights* 754-778, at 754.

<sup>67</sup> M Hester ‘Commentary on mothers, domestic violence, and child protection’ (2010) 16(5) *Violence Against Women* 537-542, at 438.

nuanced approach to state intervention, one that carefully weighs the child's welfare against the fundamental value of family preservation.<sup>68</sup>

Navigating and addressing these potentially conflicting interests is a complex task for decision-makers and stakeholders involved in family-related disputes. However, the child's best interests should always be the guiding principle in such situations, ensuring that the child's holistic well-being and development are prioritised. Prabhat and Hambly assert that centralising children's special roles is crucial to upholding their interests in all decision-making processes that affect them.<sup>69</sup> In line with this, Daly argues that recognising the child's unique role necessitates that courts and dispute resolution mechanisms consider and promote children's autonomy.<sup>70</sup> Additionally, Kilkelly emphasises that achieving this recognition requires the implementation of the child's other rights, including participation rights, freedom of expression, association, and religion, which are widely recognised by international law.<sup>71</sup>

#### ***1.2.4 A brief overview of the evolution and development of family-related jurisprudence in South Africa***

South African family law and jurisprudence have evolved immensely since 1993. The legislative framework has improved even more dramatically after the enactment of the Children's Act.<sup>72</sup> Moreover, the notion of the family has evolved. For example, the introduction of the Civil Union Act made strides in recognising same-sex partnerships.<sup>73</sup> In addition, the pluralistic view of family law has developed to include religious and customary norms.<sup>74</sup>

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<sup>68</sup> MS Wald 'Redesigning State Intervention on Behalf of "Neglected" Children' (2022) 32(5) *Research on Social Work Practice* 504-510, at 504.

<sup>69</sup> D Prabhat & J Hambly 'Bettering the best interests of the child determination: On checklists and balancing exercises' (2017) 25 *International Journal of Children's Rights* 754-778, at 759.

<sup>70</sup> A Daly 'No weight for 'due weight'? A children's autonomy principle in best interest proceedings' (2018) 26 *International Journal of Children's Rights* 61-92, at 61.

<sup>71</sup> U Kilkelly *The child and the European Convention on Human Rights* (1999) Ashgate/Dartmouth at 116; See also the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<sup>72</sup> Act 38 of 2005, which became fully operational in April 2010.

<sup>73</sup> Act 17 of 2006.

<sup>74</sup> J Sloth-Nielsen and B Van Heerden 'The constitutional family: Developments in South African child and family law 2003-2013' (2014) 28 *International Journal of Law Policy and the Family* 100-120, at 101.

Although the evolution of child and family law since the start of the constitutional dispensation has been notable, problems persist. Some areas of family law remain underdeveloped and overlooked. These areas could lead to potentially dire consequences for children, which the law does not adequately provide for.<sup>75</sup> For example, while the Children's Act references the extended family,<sup>76</sup> there is no legal recognition of the grandparents' position in the family's evolution. This is problematic as the extended family is an essential part of the family unit in African communities, social practices, and the lived reality in South Africa.<sup>77</sup> Sloth-Nielsen and Heerden note three significant provisions of the Children's Act, namely sections 23, 24 and 32, that recognise that the child's caregiver may not always be the person who holds parental responsibilities and rights.<sup>78</sup> Likewise, s 7 of the Children's Act emphasises the importance of the extended family caring for the child and continuing the child's cultural and traditional norms. Notably, the recognition of the extended family has extended beyond the provisions of the Children's Act in recent judgments. In *LH and Another v LA and Another*, the child's grandparent successfully acquired rights of contact with their grandson (the son of their deceased son).<sup>79</sup> In its judgement, the court emphasised the importance of the extended family, particularly the grandparents, in the development and well-being of the child. Similarly, in *J v J*,<sup>80</sup> the child's grandmother was unusually party to a parenting plan concerning the child. In this matter, the court refused to remove the grandmother from the parenting plan and encouraged the perpetuation of the relationship between the child and her grandmother.

Furthermore, the stepparent's role has become more prominent in South Africa. Divorce and remarriage have become common with change and development in social and cultural norms. This often results in the child acquiring a stepparent who plays a role in the development of the child.<sup>81</sup> However, the Children's Act does not include provisions for the rights of

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<sup>75</sup> Ibid at 103.

<sup>76</sup> See ss 7(f)(i) and 7(f)(ii).

<sup>77</sup> N Siqwana-Ndulo 'Rural African family structure in the Eastern Cape Province, South Africa' (1998) *Journal of Comparative Family Studies* 29(2) 407-417, at 408.

<sup>78</sup> Children's Act, ss 23–24 (applications for care, contact or guardianship by non-parents) and s 32 (duties and limited authority of a 'caregiver' who is not a parent or guardian); See also Sloth-Nielsen and Van Heerden (2014) at 110.

<sup>79</sup> *LH and Another v LA and Another* 2012 (6) SA 41 (ECG).

<sup>80</sup> *J v J* 2008 (1) SA 30 (CC).

<sup>81</sup> Sloth-Nielsen and Van Heerden (2014) at 111.

stepparents. Still, in *MB v NB*,<sup>82</sup> the court recognised the responsibilities and rights of the stepparent even after the dissolution of the stepparents marriage to the children's mother.

Moreover, it is notable that great steps have been taken to ensure that children know and maintain a relationship with both parents. Before the enactment of the Children's Act, the position of unmarried fathers was stigmatised and often associated with negative generalisations. Unmarried fathers were mostly painted with the same brush and viewed as being 'deadbeat dads'.<sup>83</sup> However, this is not the case for all unmarried fathers. The position was changed by the enactment of s 21 of the Children's Act, which provides certain unmarried fathers with automatic and equal parental responsibilities and rights as unmarried mothers regarding their children.<sup>84</sup> While great strides have been made in this regard, very few disputes have been reported in the years following the enactment of s 21.

Although provision is made for the best interests of the child and the child's participation rights under international law and in South Africa, it remains important to question and explore more effective ways to protect and ensure the holistic well-being of the unique South African child. Furthermore, it is crucial for the courts' practice of the best interests principle to evolve and develop alongside the law for several reasons. First, the law reflects society, and as societal values and norms evolve, new legal issues and contexts arise. By adapting their practice of the best interests principle, courts can ensure that their decisions align with children's changing needs and expectations. Second, evolving the practice is essential for fairness and justice, as it allows courts to apply updated principles and standards to ensure equitable treatment of children under the law. Third, consistency in the court's practice is crucial for maintaining stability and predictability in the legal system. By evolving their practice, courts can avoid conflicting judgments and promote a sense of confidence in the legal system. Fourth, courts play a role in resolving gaps and uncertainties in the law, providing guidance, and establishing precedents as new legal issues arise. Finally, courts must consider evolving international standards when making decisions, ensuring that domestic laws align with global human rights

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<sup>82</sup> *MB v NB* 2010 (3) SA 220 (GSJ).

<sup>83</sup> Sloth-Nielsen and Van Heerden (2014) at 114.

<sup>84</sup> S 21 provides that unmarried fathers will acquire full parental responsibilities and rights regarding their children if they were living with the mother at the time of the child's birth or if not living with the mother, they have contributed to the upbringing of the child, contributed to the maintenance of the child, provided consent or applied to be identified as the child's father or paid customary law damages.

standards. By developing their practice, courts can effectively uphold the rule of law and provide timely and relevant justice to children.

### **1.3 PROBLEM STATEMENT**

Although existing legal frameworks in South Africa recognise the principle of the child's best interests, the application of this principle in practice remains largely understudied. As shown above, this principle is meant to be protected in all decisions affecting the child. As a casuistic principle, it applies in a context of clashing interests described earlier: in disputes involving immediate family, parents, the broader family and the state where children are often not cited as parties but hugely impacted by these decisions. This context of decision making creates possibilities of inconsistent practice in the interpretation and application of the principle of the child's best interests in disputes involving and affecting children. Such inconsistency of practice implicates South Africa's substantive elements and procedural safeguards that stem from the CRC and the African Children's Charter.<sup>85</sup>

It is crucial that the best interests principle is not just codified in domestic law but also interpreted and applied correctly and consistently in keeping with an approach that recognises the intrinsic value of children and considers their inherent vulnerability and evolving autonomy.<sup>86</sup>

### **1.4 RESEARCH QUESTIONS AND THEIR SIGNIFICANCE**

The main question that this thesis answers is: to what extent does South Africa comply with its international obligations regarding the application of the principle of the best interests of the child in decision-making processes?

To answer this question, it is necessary for the thesis to address the following sub-questions:

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<sup>85</sup> See Chapter 3 part 3.4 for a discussion of the substantive factors and procedural safeguards under the CRC.

<sup>86</sup> See Chapters 6 and 7 for an analysis of how the substantive factors and procedural safeguards are applied in practice.

- i. How do key theoretical perspectives related to the child's best interests guide decision-making in family-related disputes and under what circumstances should the state intervene to protect the child's best interests?
- ii. What substantive elements and procedural safeguards stem from the obligations established in the CRC and the African Children's Charter that ought to be incorporated in domestic law to protect the child's best interests in the context of family-related legal disputes?
- iii. To what extent has South Africa incorporated, into the domestic process for assessing and determining a child's best interests, the substantive elements and procedural safeguards identified in international child rights law?
  - a. How do the Constitution and the Children's Act embed these elements and safeguards in the new legal framework?
  - b. Which provisions protect the substantive elements (rights) recognised in international law?
  - c. Which provisions supply the procedural safeguards required for family-related disputes?
- iv. How does the South African framework and courts apply the substantive elements and procedural safeguards when determining the child's best interests in decision-making in the context of international child abduction?

In answering these questions, this research fills the gaps in the existing body of knowledge on the interpretation and application of the best interests of the child principle in South African legal proceedings pertaining to international child abduction. By examining the international and domestic legal frameworks, the development of constitutional jurisprudence related to the best interests principle, and analysing case law, this research provides a comprehensive understanding of how the principle has evolved and is being applied in practice. This understanding is important for legal practitioners, policymakers, and scholars in children's rights. The findings will highlight the importance of a child-centred and rights-based approach in judicial decision-making. Furthermore, this research seeks to identify key issues and challenges in applying the best interests principle in practice.

The potential impact of this research is wide-ranging. Legal practitioners can use these findings to strengthen their arguments and strategies in disputes involving the child. Policymakers can draw upon this research to inform the development of legislation and policies on children. Judges could use it to improve their understanding of the principle and to apply it

consistently in cases that come before the courts. Scholars and researchers can build upon this work to deepen the understanding of the best interests principle and its application in other jurisdictions or related areas of children's rights.

## **1.5 RESEARCH METHODOLOGY**

To address the research questions, the thesis takes a theoretical approach and involves an analysis of various international and domestic legal instruments. Although the main objective of the thesis is to assess the application of the best interests principle in practice, the study does not draw on empirical research as the doctrinal sources relevant to the study are sufficient. Thus, the study relies on primary and secondary law sources to address the research aims.

The primary sources the study predominantly relies on are United Nations treaties and official documents, regional child rights instruments and domestic legislation. At the core of the study is the reliance on the CRC and the African Children's Charter to determine the normative framework created by the international laws that bind South Africa.<sup>87</sup> In addition, at the domestic level, the study relies on the South African Constitution, the Children's Act, other domestic statutes, and government reports. These instruments are essential for examining South African law and policy provisions and determining their alignment with international obligations.<sup>88</sup>

Moreover, the study examines case law related to international child abduction. This is particularly relevant for several reasons, as these disputes often involve complex and sensitive situations that result in conflicting interests with the child's best interests. International child abduction present unique challenges and complexities that significantly impact the welfare and rights of children. By scrutinising this area, the thesis aims to investigate how judicial practices, and legal frameworks address the evolving and developing needs of children in such sensitive situations. Additionally, these disputes often highlight the tensions between domestic legal standards and international obligations, making it essential to evaluate how effectively the principle of the child's best interests is upheld. This focus not only contributes to a deeper understanding of children's rights in these contexts but also offers insights into potential reform to enhance the protection and well-being of children involved in international child abduction

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<sup>87</sup> See chapter 3.

<sup>88</sup> See chapter 4 and 5.

disputes.<sup>89</sup> The analysis of case law allows the study to draw on court judgements to determine the practice of the child's best interests, i.e., how it is interpreted and applied by courts. It further allows the study to propose recommendations on improvements to the application of the child's best interests to ensure alignment with the international normative framework.<sup>90</sup>

The secondary sources relied on are books, journal articles, internet sources, and general comments by United Nations treaty bodies, particularly the CRC Committee's general comments. These sources were relied on as they provide a dearth of literature on the development and evolution of children's rights and the child's best interests, internationally and in South Africa. As the study's main aim is to determine the extent to which South Africa complies with its international obligations in determining the child's best interests in decision making, it uses international law as the normative framework to which South Africa's law should align. Thus, in exploring international law obligations, the study relied on the extensive legal scholarship that provides commentary on the CRC and the African Children's Charter. Likewise, in examining and assessing South Africa's alignment with the normative framework created by international law obligations, the study relied on South Africa's reports to the CRC Committee and Committee of Experts on the Rights and Welfare of the Child and commentary by legal academics and organisations working with children.

## **1.6 STRUCTURE OF THE DISSERTATION**

This chapter highlights that the thesis examines South Africa's adherence to international standards in protecting the child's best interests in complex and sensitive family-related disputes, such as international child abduction. The research fills a gap in the current understanding of how South African courts interpret and apply this principle in practice. It does so by examining key theoretical perspectives, relevant international instruments, South Africa's legal framework and case law. The thesis demonstrates the importance of an approach to decision-making that recognises children as autonomous rights holders with evolving and developing capacities and needs, the significance of their participation in decision-making processes and the promotion of positive family connections.

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<sup>89</sup> See chapters 6 and 7.

<sup>90</sup> See chapter 8.

Chapter Two explores the philosophical development of children's rights and the child's best interests principle to explore key theoretical perspectives, concepts and frameworks which will later be used to develop a legal understanding of the child's best interests principle.

Chapter three explores the international legal foundation for the principle of the best interests of the child and the manner in which it has been interpreted. The chapter aims to determine the normative framework to which South African law can be measured. While the chapter discusses other relevant instruments, it mainly focuses on the CRC and the African Children's Charter, which serve as the primary foundations of the international legal framework for safeguarding the child's best interests. This chapter explores and discusses the obligations imposed by these instruments on State Parties, highlighting the substantive elements and procedural safeguards that South Africa is expected to comply with.

Chapters four and five analyse the South African legal framework governing the best interests principle and explores its consistency with the international normative framework examined in chapter three. This includes an overview of the legal and policy context relevant to the determination of the child's best interests in decision making in South African family-related disputes.

Chapters six and seven investigate the application of the principle in the international child abduction decision-making process. Through a study of the domestic framework regulating decision making and court decisions, these chapters investigate how the South African framework and courts apply the substantive elements and procedural safeguards, stemming from the international framework identified in chapter three, in practice. Additionally, these chapters highlight and discuss some of the shortfalls that emerge from the application of the best interests of the child principle by courts in South Africa.

Chapter eight concludes the thesis by highlighting the key findings of the thesis and providing recommendations to improve the practice of the child's best interests principle.

## CHAPTER TWO

### THEORETICAL PERSPECTIVES RELATED TO THE CHILD'S BEST INTERESTS

#### 2.1 INTRODUCTION

The objective of this chapter is to establish a theoretical framework for understanding the complexities of ensuring the child's best interests, in decision making, while also balancing parental autonomy and state intervention. In the context of family-related disputes the child's best interests serve as a principle that must be applied in a way that respects the child's evolving autonomy, developing capacity and needs, the significance of their participation and the importance of positive family connections. Although this thesis ultimately concentrates on parental child-abduction (PCA) disputes, the theoretical perspectives explored in this chapter are first presented in their general family-law form because the same concepts ground all family-related decision-making. Each perspective is therefore introduced broadly, with explicit framing when the discussion narrows to PCA.<sup>1</sup>

This chapter, therefore, argues that among various theoretical models explaining the parent-child relationship, the interest theory and the fiduciary theory offer the most effective framework for guiding the application of the child's best interests in decision-making. These models recognise the child's inherent interests and evolving autonomy, while also acknowledging the responsibilities of parents to act in the best interests of their child. The chapter further contends that state intervention is justified under the doctrine of *parens patriae* when parental decisions fail to protect the child's well-being, and that the principle of subsidiarity should guide such intervention, ensuring that state involvement occurs only when necessary and as a last resort, with the family remaining the primary decision-maker whenever possible. Thus, the chapter answers the question, "how do key theoretical perspectives, related to the child's best interests, guide decision-making in family-related disputes and under what circumstances should the state intervene to protect the child's best interests?"

To answer the question the chapter explores several philosophical theories, including the property theory, will theory, paternalism, interest theory, and fiduciary theory. The chapter then

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<sup>1</sup> The thesis initially explored all family-related disputes; it now focuses on PCA, but retains the general theoretical scaffolding, because courts apply the same principles, *mutatis mutandis*, when determining best interests.

explores the state's role as *parens patriae* and introduces the principle of subsidiarity as a guiding doctrine for state intervention, emphasising that the state should only intervene as a last resort when parents are unable or unwilling to protect the child's best interests.

## 2.2 THE PROPERTY THEORY

### 2.2.1 *Defining the property theory*

The property theory suggests that children are possessions or assets of their parents, viewing them as products of their parents' reproductive capacity and thus subject to their control and decision-making.<sup>2</sup> This perspective is grounded in the belief that, because parents create children, they inherently own them. Under this framework, children are seen as commodities and parental authority is based on the biological fact of parenthood.<sup>3</sup> The theory suggests that a child's status is fundamentally tied to their biological origin, which grants parents a natural claim to their child. This ownership model of the parent-child relationship has deep historical roots and has influenced various legal systems and philosophical thought over time.<sup>4</sup>

In early philosophical thought, Aristotle provided a foundation for the property theory by asserting that children belong to their biological parents.<sup>5</sup> His view is often illustrated by the analogy that a product belongs to its producer, indicating that parents, as creators of the child, hold a proprietary interest in their offspring.<sup>6</sup> Aristotle's perspective on the parent-child relationship reflects a belief in a biological and almost mechanical connection, where the child is seen as a part of the parent until they reach a certain level of maturity.<sup>7</sup> In this sense, Aristotle

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<sup>2</sup> AC Dailey & LA Rosenbury 'The new law of the child' (2018) 127(6) *The Yale Law Journal* 1448-1537, at 1457.

<sup>3</sup> BB Woodhouse 'From property to personhood: A child-centered perspective on parents' rights' (1998) 5 *Georgetown Journal on Poverty Law and Policy* 313-320, at 313.

<sup>4</sup> BB Woodhouse 'Who owns the child? Meyer and Pierce and the child as property' (1992) 33(4) *William and Mary Law Review* 995-1122, at 995.

<sup>5</sup> R Parry & T Harald 'Ancient ethical theory' (2021) in EN Zalta (ed) *The Stanford Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/archives/fall2021/entries/ethics-ancient> Accessed on 21 September 2023.

<sup>6</sup> D Haybron 'Well-being and virtue' (2017) 2 (2) *Journal of Ethics & Social Philosophy* 1-28, at 28.

<sup>7</sup> A Moyo *Balancing child participation rights, parental responsibility and state intervention in medical and reproductive decision-making under South African law* (2014) Unpublished PhD thesis, University of Cape Town at 33.

did not strictly consider children to be property, but he did view them as extensions of their parents, whose existence and development are intrinsically linked to the parent's authority and influence.<sup>8</sup>

Building on this, later thinkers like Hobbes further developed the property theory by characterising children as being subordinate to their parents in much the same way that slaves are subordinate to their masters. Hobbes argued that parental authority is derived from the sheer power imbalance between parents and children.<sup>9</sup> In this view, parents possess dominion over their children because they hold the power to save or destroy the child's life.<sup>10</sup> This immense power gives parents rights over the child simply by virtue of their dependency and inability to resist. Hobbes asserts that children are, in essence, subject to their parents' will, and this subordination is a natural consequence of the power dynamics within the family unit.<sup>11</sup>

Hobbes further suggests that the child's consent to parental authority is implicit, even though he acknowledges that children lack the mental competence to engage in genuine consent.<sup>12</sup> In Hobbes' framework, dominion over another can be established through procreation or conquest, and parents acquire dominion over children through procreation.<sup>13</sup> This idea reinforces the notion that children are objects of their parents' control, much like property. Hobbes' view highlights the hierarchical structure within the family, where parents, as the creators of life, hold ultimate authority over their children, who are seen as passive recipients of parental decisions and actions. However, Hobbes' reliance on the concept of tacit consent is problematic, as it raises questions about the legitimacy of parental authority when the child lacks the capacity to meaningfully consent to such an arrangement. Thus, the child's role, in this context, is primarily one of subordination and obedience, with little room for autonomy or independent decision-making.

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<sup>8</sup> D Archard *Children: Rights and childhood* (2004) Routledge at 142.

<sup>9</sup> Moyo (2014) at 34.

<sup>10</sup> Moyo (2014) at 34.

<sup>11</sup> T Hobbes 'Leviathan' (1651) as analysed by B De Villiers in 'The rights of children in international law: guidelines for South Africa' (1993) *Stellenbosch Law Review* 289-310, at 291.

<sup>12</sup> T Hobbes *Leviathan* (1651) as analysed by B De Villiers 'The rights of children in international law: guidelines for South Africa' (1993) *Stellenbosch Law Review* at 291.

<sup>13</sup> B De Villiers (1993) at 292.

The development of the property theory can be traced back to ancient civilizations, such as those of Rome and Greece, where children were regarded as possessions of their fathers.<sup>14</sup> In Roman law, the *paterfamilias*, or head of the household held absolute authority over his descendants, including the power of life and death.<sup>15</sup> This legal authority extended to children, who were seen as property under the control of the *paterfamilias*. The Roman concept of *patria potestas* granted fathers significant power over their children.<sup>16</sup> The child's status as property was further reinforced by the fact that the *paterfamilias* was the only member of the family with legal standing in the state's tribunals and could sue for personal damages if the child's rights were violated.<sup>17</sup>

Over time, the absolute powers of the *paterfamilias* were gradually reduced, but the underlying notion of children as property persisted. This idea remained influential in Roman society and continued to shape legal thought and practices for centuries.<sup>18</sup> Similarly, in ancient Greece, children were treated as property of their fathers, with significant differences in how boys and girls were perceived.<sup>19</sup> Fathers had the ultimate authority over whether a child should be kept alive or exposed, a practice where unwanted infants were abandoned and left to die.<sup>20</sup> Archaeological evidence from ancient Greece reveals instances of child exposure, with the remains of children found in well shafts, reflecting the harsh realities of parental control over life and death.<sup>21</sup> Greek philosopher, Plato, believed that childhood should be distinct from adulthood and that children should be shielded from matters beyond their comprehension,

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<sup>14</sup> D Archard and C Collins 'Introduction' in D Archard and CM Collins (eds) *The moral and political status of children* (2002) at 1.

<sup>15</sup> R Yaron 'Vitae necisque potestas' (1962) 30(2) *Tijdschrift Voor Rechtsgeschiedenis* 243-261, at 244.

<sup>16</sup> JE Grubbs 'Church, state, and children: Christian and imperial attitudes toward infant exposure in Late Antiquity' (2009) *The power of religion in late antiquity* 119 – 131, at 122.

<sup>17</sup> J Crook 'Patria potestas' (1967) 17(1) *The Classical Quarterly* 113-122, at 114; See also H Kruger 'The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview' (2004) (10) *Fundamina : A Journal of Legal History* 84-112, at 86.

<sup>18</sup> Kruger (2004) at 88.

<sup>19</sup> MA Perry 'Redefining childhood through bioarchaeology: Toward an archaeological and biological understanding of children in antiquity' (2005) 15(1) *Archeological Papers of the American Anthropological Association* 89-111, at 90.

<sup>20</sup> M Golden *Children and childhood in classical Athens* (2015) Johns Hopkins University Press: United States of America at 5.

<sup>21</sup> DD Hughes *Human sacrifice in ancient Greece* (1991) Psychology Press at 3.

including the complexities of adult life. He therefore referred to men as the guardians of women and children, emphasising the need to protect children from exposure to adult issues.<sup>22</sup>

The influence of the property theory extended beyond ancient times and also left a mark on English law and philosophy. William Blackstone emphasised the duties of honour and obedience that children owed to their fathers, rather than focusing on the rights of children themselves.<sup>23</sup> Blackstone's writings reflected the view that parents, particularly fathers, had significant control over their children, including the power to sell a child in cases of necessity.<sup>24</sup> Political philosophers like Robert Filmer also contributed to this discourse, arguing that human beings were not born free but were instead born into predetermined roles of subjugation.<sup>25</sup> Filmer's version of the property theory, which was heavily influenced by religious and biblical beliefs, asserted that fathers had absolute power over their children, with no obligation to justify their actions or decisions.<sup>26</sup>

Even in contemporary society, remnants of the property theory persist, particularly in parts of the world where children are still regarded as assets or possessions. In some cultural contexts, children are exploited for the benefit of their parents, reflecting a view of children as resources to be used rather than autonomous individuals with inherent dignity.<sup>27</sup> While modern

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<sup>22</sup> SM Okin 'Philosopher queens and private wives: Plato on women and the family' (1977) *Philosophy & Public Affairs* 345-369, at 345 & 350.

<sup>23</sup> W Blackstone *Commentaries on the laws of England book the second* By William Blackstone Esq Solicitor General to her Majesty (1769) 2 printed for J Exshaw B Grierson H Saunders S Watson E Lynch & J Williams MD CC LXIX at 13; See also J Beckmann 'Some recent developments in the legal relationship between parent and child' (2001) 13(4) *Education and the Law* 335-362, at 335.

<sup>24</sup> Blackstone (1769) at 13.

<sup>25</sup> R Filmer *Filmer: 'Patriarcha' and Other Writings* (1991) Cambridge University Press at 4.

<sup>26</sup> Filmer (1991) at 4.

<sup>27</sup> S Brennan 'Exploitation, children and childhood, and parental responsibilities' in *Exploitation: Perspectives from philosophy, politics, and economics* (2024) Oxford New York at 187.

human rights principles emphasise that children should not be considered property, practices like child labour and *ukuthwala*,<sup>28</sup> continue to reflect aspects of the property theory.<sup>29</sup>

### ***2.2.2 The property theory in decision-making***

The property theory has serious implications for decision-making in family-related disputes. This theory, while criticised in the modern children's rights movement,<sup>30</sup> remains relevant in understanding the assumptions that influence parental and state decision-making. The property theory highlights a fundamental imbalance in how children's rights and interests are considered, often subjugating them to parental control or state authority.

The property theory's emphasis on parental authority and its exclusion of the child's voice is particularly problematic in family-related disputes. In this context, children are often treated as passive objects, rather than active participants in decisions that directly affect their lives.<sup>31</sup> The theory's disregard for child participation mirrors the way property itself cannot assert rights or make claims against its owner. This perspective can lead to the exclusion of the child's voice from the decision-making process, reinforcing a system where children's interests are subsumed under the desires and rights of their parents. This is especially dangerous in international child abduction cases, where the child's welfare may be seriously compromised by the abrupt and traumatic removal from their home, community, and other parent.

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<sup>28</sup> *Ukuthwala* is a traditional South African practice involving the abduction of a girl with the intent of compelling her into marriage without her consent; See also L Mwambene & J Sloth-Nielsen 'Benign accommodation? Ukuthwala, "forced marriage" and the South African Children's Act' (2011) 11(1) *African Human Rights Law Journal* 1-22, at 3.

<sup>29</sup> K Hickie and L Shuker 'The "virtuous" cycle of parental empowerment: Partnering with parents to safeguard young people from exploitation' (2023) 28(2) *Child & Family Social Work* 527-536, at 527; See also A Morice 'Paternal domination: The typical relationship conditioning the exploitation of children' in B Schlemmer (ed) *The exploited child* (2000) Zed Books London at 195; available at [https://horizon.documentation.ird.fr/exl-doc/pleins\\_textes/divers17-08/010024288.pdf](https://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers17-08/010024288.pdf) (accessed on 12 October 2023).

<sup>30</sup> See M Freeman 'The value and values of children's rights' in *The human rights of children* (2016) Routledge at 34.

<sup>31</sup> BB Woodhouse 'Child custody in the age of children's rights: The search for a just and workable standard' (1999) 33(3) *Family law quarterly* 815-832, at 815; See also JB Kelly & JR Johnston 'The alienated child: A reformulation of parental alienation syndrome' (2001) 39(3) *Family court review* 249-266, at 263.

The property theory also complicates the role of the state in intervening to protect children in these disputes. Under this theory, the state is discouraged from interfering in what is perceived as a private matter between parents and their children.<sup>32</sup> This enforces the property theory's view that parents have ultimate authority over their "property" and that the state has no obligation to protect children from their parents harmful decisions. Furthermore, the theoretical justifications for treating children as property are further flawed in modern legal contexts, where advances in reproductive technology and evolving family structures challenge the traditional bonds of genetic parenthood.<sup>33</sup> The property theory's reliance on biological parentage as the basis for ownership of children is increasingly outdated in a world where non-biological parents play significant roles in a child's life. This is especially relevant in adoption, for example, where the interests of adoptive parents, who have often provided care and stability for the child, are devalued in favour of biological parents under the property theory. The property theory's rigid focus on genetic ties disregards the emotional and psychological connections that form between children and their non-biological caregivers, further demonstrating the limitations of the theory in addressing the complexities of modern family-related disputes.

Finally, the issue of the child's hypothetical consent, often used to justify parental control under the property theory, also fails in the context of family-related disputes. The idea that children tacitly consent to being treated as property is flawed, especially in decisions that remove them from their home or force them into a new family environment without their input. The lack of genuine consent in these situations highlight the ethical problems of treating children as property, as the theory denies children the ability to express their own desires, thoughts and views.

Thus, the property theory's application in family-related disputes reveals its deep flaws in recognising the rights and interests of children. By treating children as possessions, the theory undermines the child's autonomy, well-being, and right to participate in decisions that

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<sup>32</sup> FE Olsen 'The myth of state intervention in the family' (1984) 18 *University of Michigan Journal of Law Reform* 835-864, at 835.

<sup>33</sup> R Mykitiuk 'Beyond conception: Legal determinations of filiation in the context of reproductive technologies' (2001) 39 *Osgoode Hall Law Journal* 771-815, at 782; See also M Sullivan, *The family of woman: Lesbian mothers, the children and the undoing of gender* (2004) University of California Press at 1; and SB Boyd 'Gendering legal parenthood: Bio-genetic ties, intentionality and responsibility' *justice* (2007) in *Windsor Yearbook of Access to Justice* 63-94, at 3.

directly affect them. This perspective is likely to lead to outcomes that prioritise parental control over the child's best interests, whether in the context of reclaiming a biological child in adoption disputes or abducting a child across borders. Furthermore, the reluctance of the state to intervene under this theory poses significant risks to the child's welfare, making it an inadequate framework for decision-making in modern family-related disputes.

## 2.3 THE WILL THEORY AND PATERNALISM

### 2.3.1 *Defining the will theory and paternalism*

The will theory is grounded in the presumption that the capacity for rational decision-making is a prerequisite for holding rights.<sup>34</sup> According to this theory, children are deemed incapable of making reasoned decisions due to their cognitive immaturity.<sup>35</sup> As a result, the will theory fundamentally denies children the autonomy that adults are afforded, justifying parental or state intervention to make decisions on their behalf.<sup>36</sup> Decisions made for children are based on the presumption that their limited capacity prevents them from making sound judgments.<sup>37</sup> Consequently, children are expected to follow the instructions of the decision-maker, whether that be a parent or the state.<sup>38</sup> The will theory thus serves as the foundation for paternalism, a related theory that further legitimises the practice of making decisions for children based on their presumed incapacity.

Paternalism provides a framework for understanding why parents, and sometimes the state, are authorised to make decisions on behalf of children.<sup>39</sup> Paternalism allows parents to act as decision-makers in situations where a child lacks the capacity to make an informed choice. This protection extends beyond immediate decisions to encompass long-term

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<sup>34</sup> H Ross 'Children's rights and theories of rights' (2013) 21(4) *The International Journal of Children's Rights* 679-704, at 680.

<sup>35</sup> Ibid.

<sup>36</sup> D Archard *Children : rights and childhood* (2004) 2nd ed London Routledge at 47.

<sup>37</sup> R Cruft 'Rights: beyond interest theory and will theory?' (2004) 23 *Law & Philosophy* 347-398, at 367.

<sup>38</sup> J Fortin *Children's Rights and the Developing Law* (2009) 3 ed Cambridge University Press at 15.

<sup>39</sup> S Human 'The theory of children's rights' in CJ Davel (ed) et al *Introduction to child law in South Africa* (2000) 152-157; See also B Gert and CM Culver 'Paternalistic behaviour' (1976) 6(1) *Philosophy and Public Affairs* at 49-50.

considerations of the child's future.<sup>40</sup> Paternalism aims to safeguard the child's future self from the potentially poor decisions of their present self, reflecting the belief that parents are better suited to determine the child's needs, both present and future.<sup>41</sup>

A key element of paternalism is its focus on the child as an evolving being, transitioning from a state of dependency to eventual autonomy. Paternalism, therefore, considers the interests of the adult the child will become, placing responsibility on parents to protect not only the child's current welfare but also their future well-being.<sup>42</sup> This approach justifies restrictions on a child's autonomy, as it assumes that adults, due to their greater experience and understanding, are better equipped to make decisions that will enhance the child's overall well-being.<sup>43</sup>

The development of paternalism as a theory can be traced back to early philosophers such as Hobbes, Locke, and later, John Stuart Mill. In the 17th century, Thomas Hobbes argued that children's protection depended largely on their usefulness to their fathers.<sup>44</sup> Hobbes viewed the father-child relationship as one characterised primarily by fear and dependence. According to Hobbes, children were subject to their fathers' authority, granting fathers the power of life and death over them.<sup>45</sup> This perspective laid the groundwork for paternalism by positioning children as inherently dependent on parental authority for protection and guidance, unable to exercise autonomy.

John Locke, writing later in the same century, offered another view of children's rights and freedom. Locke acknowledged that children, due to their temporary ignorance and irrationality, were incapable of exercising full autonomy.<sup>46</sup> However, unlike Hobbes, Locke believed that children would eventually develop the capacity for reason and rational decision-making as they aged. Until that point, children were under the temporary authority of their parents, who were tasked with guiding them toward maturity.<sup>47</sup> Locke saw this period of inequality between parent and child as a necessary stage in the child's development, designed

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<sup>40</sup> M Freeman 'The rights of children in the international year of the child' (1980) *Columbia Human Rights Law Review* 601-674, at 615.

<sup>41</sup> J Raz 'Hart on moral rights and legal duties' (1984) 4(1) *Oxford Journal of Legal Studies* 127-129, at 127.

<sup>42</sup> M Freeman 'Taking children's human rights seriously' (2020) *The Oxford Handbook of Children's Rights Law* Oxford University Press at 55.

<sup>43</sup> E Zamir 'The efficiency of paternalism' (1998) *Virginia Law Review* 229-286, at 229.

<sup>44</sup> De Villiers (1993) at 291.

<sup>45</sup> *Ibid.*

<sup>46</sup> J Locke *Second treatise of civil government* (1689) as analysed by B De Villiers (1993) at 291.

<sup>47</sup> *Ibid.*

to help the child attain the rational faculties needed for independence.<sup>48</sup> Locke's approach to paternalism was more liberal than Hobbes', recognising that children, like adults, possessed certain inherent rights that needed safeguarding and made them temporarily dependent on their parents.

In the 19th century, John Stuart Mill further developed the concept of paternalism in the context of his doctrine of individual liberty. Mill argued that individuals should not be compelled to act against their will based on the opinions of others, even if those opinions were believed to be in their best interests.<sup>49</sup> However, Mill made an important exception for children, contending that children were not capable of determining what was in their best interests. He supported the idea of parental paternalism for children, arguing that their immaturity required protection from themselves to allow for their development into rational and autonomous adults.<sup>50</sup> Mill identified the age of majority as the point at which a person could exercise full autonomy, suggesting that until this point, children needed the guidance of parents to protect their future ability to exercise autonomy.<sup>51</sup>

In the 20th century, child liberationists, such as John Holt and Richard Farson, challenged paternalistic views, advocating for children's autonomy in personal decision-making.<sup>52</sup> These scholars believed that children should be afforded rights similar to those of adults, including the ability to participate in political processes, make legal decisions, and control their education and finances.<sup>53</sup> Farson and Holt argued that depriving children of autonomy undermined their freedom of thought and self-determination, which they viewed as fundamental human rights. They criticised the paternalistic approach for overemphasising protection and nurturing at the expense of allowing children to develop autonomy through experience.<sup>54</sup>

In recent years, Michael Freeman proposed an approach to paternalism, that recognises the importance of child autonomy while still acknowledging the necessity of some protective

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<sup>48</sup> R Harrison *Hobbes, Locke, and confusion's masterpiece: an examination of seventeenth-century political philosophy* (2003) Cambridge University Press at 31.

<sup>49</sup> John Stuart Mill *On liberty* (1859) as analysed by B De Villiers (1993) at 292.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> M Freeman 'Whither children: Protection, participation and autonomy' (1993-1994) 22 *Manitoba Law Journal* 307-327, at 316.

<sup>53</sup> J Raz 'Hart on moral rights and legal duties' (1984) 4(1) *Oxford Journal of Legal Studies* 127-129, at 129.

<sup>54</sup> Freeman (1992) at 59; See also Raz (1984) at 127.

measures.<sup>55</sup> Freeman introduced the concept of “liberal paternalism,” which allows for the limitation of children’s autonomy when their actions are irrational or likely to result in significant harm.<sup>56</sup> Freeman argues that paternalism is justified only when it serves to protect the child’s long-term well-being or to develop their capacity for rational decision-making. He suggests that parental or state intervention should be based on objective criteria rather than subjective values, ensuring that interventions are proportionate and focused on the child’s developmental needs.<sup>57</sup>

Freeman’s notion of liberal paternalism offers a middle ground between the extremes of child liberation and strict paternalism. It acknowledges that while children have the right to learn from their mistakes, there are instances where intervention is necessary to prevent serious or lasting harm. This perspective aligns with Kruger’s view that the relationship between nurturance and autonomy is dynamic.<sup>58</sup> As children grow and develop, the need for parental guidance decreases, and their capacity for autonomy increases.<sup>59</sup> The goal, then, is to strike a balance that allows children to develop into autonomous individuals while protecting them from decisions that could undermine their future well-being.<sup>60</sup>

### ***2.3.2 The will theory and paternalism in decision making***

The principles of the will theory and paternalism, when applied to family-related disputes, indicate a tension between the child’s autonomy and the authority of parents or the state to make decisions for them. In international child abduction contexts, these principles play a role in shaping how decisions are made regarding the child’s future, often protecting the child’s long-term welfare over their immediate desires or preferences.<sup>61</sup>

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<sup>55</sup> M Freeman (1993) at 307.

<sup>56</sup> Ibid.

<sup>57</sup> M Freeman ‘Children's education: A test case for best interests and autonomy’ (2013) in *Listening to children in education* Routledge at 29.

<sup>58</sup> Kruger (2004) at 104.

<sup>59</sup> Ibid.

<sup>60</sup> DAJ Richards ‘The individual, the family and the Constitution: A jurisprudential perspective’ (1980) 55 *New York University Law Review* 1-62, at 19.

<sup>61</sup> See part 6.3 of Chapter 6; See also part 7.3 of Chapter 7.

In international child abduction cases, the will theory may justify limiting the child's role in the decision-making process by arguing that children lack the capacity to determine their own best interests. The presumption is that children do not have the foresight or experience to make decisions about who should care for them. This leads to decisions being made by adults - the biological parents, adoptive parents, and the state - based on what they believe to be in the child's best interests. The will theory's underlying rationale is that children are emotionally impulsive and cognitively immature to understand the nature and consequences of these life altering decisions, which makes them unable to participating meaningfully in the decision-making process.

Paternalism adds to this by allowing parents to step in and make decisions as the more rational role players. Paternalism assumes that adults, through their greater knowledge, maturity, and experience, are better equipped to assess the long-term welfare of the child. The child's emotional needs may be overridden by the long-term perspective of what the biological parent believes to be more beneficial in the future. The child's emotional attachments and preferences are often considered to be secondary to the decisions made by adults.<sup>62</sup>

Similarly, in international child abduction, the will theory justifies the exclusion of the child's voice from the decision-making process. Children, viewed through this theoretical lens, are not considered capable of rationally determining which parent they should live with or in which country they should reside. The abducting parent may justify their actions through a paternalistic lens, believing that they are better positioned to make decisions about the child's future. The will theory supports this kind of decision-making by assuming that the child's preferences, in such a complex situation, lack the rational considerations needed to influence the outcome.

Paternalism in international child abduction becomes even more pronounced when courts intervene. Courts may impose decisions on the child, considering what they perceive to be in the child's long-term best interests. For instance, a court may decide that returning the child to their country of habitual residence is best, even if the child expresses a strong desire to remain in the host country. From a paternalistic perspective the state knows what is best for the child even in the face of the child's opposition. The will theory supports this by maintaining that

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<sup>62</sup> See part 6.4 of Chapter 6.

children, due to their lack of mature decision-making abilities, cannot fully comprehend the long-term consequences of their choices.<sup>63</sup>

While paternalism is often framed as a protective measure, safeguarding the child from making harmful or impulsive decisions, it marginalises the child’s voice in the decision-making process. The child’s ability to express preferences and participate in decisions affecting their life is often suppressed under these theories. Thus, while the will theory and paternalism offer valid arguments for protecting children in situations where their lack of decision-making capacity could lead to harm, their application in family-related disputes highlight a tension between safeguarding the child’s well-being and developing capacity and autonomy. This approach risks overlooking the child’s developing autonomy and the importance of including them in decisions that impact their lives. Thus, this thesis maintains that these theories do not provide suitable perspectives for decision-making in family-related disputes.

## **2.4 THE INTEREST THEORY**

### ***2.4.1 Defining the interest theory***

The interest theory offers a compelling argument for the role of parents in decision-making, premised on the belief that parents are best suited to understand and fulfil their children’s needs.<sup>64</sup> This theory supports the idea that families should have the autonomy to make decisions regarding their children, with minimal state interference. It suggests that parents, due to their close relationship and knowledge of their child, are in the most advantageous position to make decisions that serve their child’s interests.<sup>65</sup> At the core of this argument is the notion that over-regulation or excessive state involvement in the parent-child relationship can undermine parental commitment to ensuring the welfare of their children. Instead, the interest theory envisions a framework where parental decision-making revolves around the child’s needs and interests, with only minimal state intervention.<sup>66</sup>

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<sup>63</sup> See part 7.4 of Chapter 7.

<sup>64</sup> H Brighouse ‘What rights (if any) do children have?’ (2002) in *The Moral and Political Status of Children* eds D Archard and C Macleod Oxford University Press 31—52, at 33.

<sup>65</sup> Brighouse (2002) at 45.

<sup>66</sup> R Noggle ‘Special Agents: Children’s autonomy and parental authority’ (2002) in D Archard and Macleod (eds) *The Moral and Political Status of Children* Oxford University Press 97–117, at 99.

According to the interest theory, rights exist to safeguard important interests and needs. In other words, individuals hold rights not as abstract entitlements, but because their well-being requires certain forms of protection.<sup>67</sup> This approach, in its earlier form, is attributed to Jeremy Bentham, who framed it within a utilitarian framework. This meant that the justification for protecting interests and imposing corresponding duties on others was tied to the overall promotion of happiness or utility in society.<sup>68</sup> Bentham's view set the groundwork for understanding rights as tied to the obligations of others.<sup>69</sup>

Raz's approach shifted from Bentham's utilitarian model and instead placed interests at the core of justifying rights.<sup>70</sup> Raz argued that rights exist when a person's interests are strong enough to impose a duty on others to behave in ways that protects those interests.<sup>71</sup> Raz's theory suggests that whether interests are protected by rights depends on certain conditions. Namely, the interest must be substantial enough to hold others accountable, the corresponding duty must carry significant weight, and its impact on the individual's interests must be significant.<sup>72</sup> In this way, rights are justified only when they can genuinely protect or promote an individual's interests. Raz's interest-centred perspective allowed for a stronger justification for the rights of children.<sup>73</sup>

Unlike the will theory, the interest theory extends rights to individuals based on the strength of their interests, not their capacity to enforce those rights. This approach is significant in the context of children, who often lack the capacity to assert their rights independently. The interest theory rejects arguments like Hart's, that to be a rights bearer, one must have the capacity to claim and assert rights to be a rights bearer.<sup>74</sup> Instead, the interest theory insists that children, though often unable to enforce their own rights, are still entitled to have their interests protected by others. According to the interest theory, children hold rights because their interests

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<sup>67</sup> J Raz 'Legal Rights' (1984) 4(1) *Oxford Journal of Legal Studies* 1-21, at 13.

<sup>68</sup> J Mill J Austin J Bentham & M Warnock *Utilitarianism On liberty essay on Bentham: together with selected writings of J. Bentham and J. Austin* (1962) Collins; See also LV Kolosov & KE Sigalov 'Was J Bentham the first legal utilitarian?' (2020) 24(2) *Rudn Journal Of Law* 438-471, at 438.

<sup>69</sup> A Harel 'Theories of rights' (2005) in MP Golding and WA Edmundson (eds) *The Blackwell guide to the philosophy of law and legal theory* 191-206 at 195.

<sup>70</sup> Raz (1984) at 14.

<sup>71</sup> *Ibid.*

<sup>72</sup> J Raz *The morality of freedom* (1986) Clarendon Press at 183.

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

<sup>74</sup> J Raz (1984) at 127-129.

are significant enough to place duties on others, particularly parents and the state, to ensure their protection.<sup>75</sup>

John Eekelaar further developed the interest theory by identifying specific interests that apply to children. Eekelaar categorised children's interests into fundamental interests, developmental interests and autonomy interests. Fundamental interests concern the child's immediate physical, emotional, and intellectual needs.<sup>76</sup> Developmental interests involve providing children with opportunities to maximise their potential and enter adulthood on equal footing.<sup>77</sup> Finally, autonomy interests pertain to the child's ability to make decisions about their lifestyle and personal interactions.<sup>78</sup> Eekelaar suggests that although children may not always be able to articulate or pursue these interests, they should be safeguarded, nonetheless.<sup>79</sup>

Eekelaar's approach recognises the inherent tension between a child's desire for autonomy and their need for protection. In such cases, he argues, the child's fundamental and developmental interests should take precedence over their autonomy interests. This is based on the idea that indulging a child's immediate preferences might hinder their ability to achieve rational autonomy as adults.<sup>80</sup> By protecting long-term development over short-term desires, Eekelaar's framework ensures that children are protected from decisions that could compromise their future autonomy.<sup>81</sup>

#### ***2.4.2 The interest theory in decision-making***

The interest theory offers an important framework for understanding the legal and moral considerations in family-related disputes. As discussed above, the interest theory asserts that children hold rights because they have significant interests that deserve protection, regardless of their ability to enforce those rights themselves. In family-related disputes the interest theory

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<sup>75</sup> P Schofield 'Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"' (2010) 1(2) *Jurisprudence* Oxford England at 147.

<sup>76</sup> J Eekelaar 'The emergence of children's rights' (1986) 6 *Oxford Journal of Legal Studies* 161–182, at 170.

<sup>77</sup> *Ibid.*

<sup>78</sup> Eekelaar (1986) at 171–172.

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

<sup>80</sup> J Eekelaar 'Parents and children – Rights, responsibilities and needs: An English perspective' (1984) 2 *Human Rights Annual* 81-93, at 90.

<sup>81</sup> J Eekelaar 'Personal rights and human rights' (2002) 2(2) *Human Rights Law Review* 181–197, at 181.

highlights the need to protect the child's developing capacity and needs. The interest theory emphasises that decisions should be guided by what best serves the child's fundamental and developmental needs. This means that decisions must account for the child's current needs, but also for their developing and future needs, thereby maximising the child's potential.

Using PCA as a case-study within the broader family-law framework, the abducting or left-behind parent's rights are often prioritised with a presumption that they, as biological parents, inherently serve the child's interests. However, the interest theory challenges this presumption by focusing on the interests and needs of the child and not of the parent. A biological parent may argue that their inherent rights as the child's parent should supersede other considerations, but the interest theory would assert that the child's interests, such as emotional stability, attachment to caregivers, and the ability to thrive in a supportive environment, are paramount. The biological parent's rights, under the interest theory, should be on the condition that they align with the child's interests. If reclaiming the child would disrupt their emotional and psychological well-being, the interest theory would support denying the biological parent's claim. In this way, the interest theory moves beyond a simplistic view of parental rights based on biology and instead centres the discussion on what ensures the child's long-term well-being.<sup>82</sup>

Similarly, returning specifically to PCA disputes, when one parent unilaterally decides to take the child to another country, typically arguing that they are acting in the child's interests, the interest theory demands a closer examination of whether the child's interests and needs are truly being served. The abducting parent may justify their actions on cultural, emotional, or personal grounds, but the interest theory insists that these claims must be secondary to the child's actual current and future interests.<sup>83</sup>

Moreover, the interest theory legitimises state intervention in family-related disputes when parents fail to adequately protect their child's interests. While the will theory and paternalism largely exclude the state from decision-making, unless absolutely necessary, the interest theory supports a more active role for the state in ensuring that children's rights are upheld. If a parent behaves in a way that compromise the child's welfare, the state has a duty, under the interest theory, to intervene and protect the child's interests. This is not about

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<sup>82</sup> See part 6.3 of Chapter 6.

<sup>83</sup> See part 7.4 of Chapter 7.

undermining parental authority but about ensuring that the child's interests are not subordinated to parental preferences or desires.

One of the interest theory's most valuable contributions is its insistence that children's interests be assessed holistically, accounting not only for their current circumstances but also for their developing and future potential.<sup>84</sup> In international child abduction, for example, the interest theory would require courts to weigh the long-term emotional and psychological impact of relocation, including the potential damage to the child's relationships with their non-abducting parent and their broader support network.

Thus, the interest theory offers a framework for managing the complexities of decision-making in family-related disputes by placing the child's rights and interests at the centre of the decision-making process. In doing so, it recognises the child as an autonomous rights holder whose interests must be safeguarded, even if they do not have the capacity to assert their rights. This approach ensures that the child's welfare remains the central concern in family-related disputes, allowing for more individualised and contextualised decision-making.

## **2.5 THE FIDUCIARY THEORY**

### ***2.5.1 Defining the fiduciary theory***

The fiduciary theory grounds itself in principles of trust and responsibility. The fiduciary model frames the parent-child relationship by comparing parents to trustees and children to beneficiaries.<sup>85</sup> This perspective draws from the work of early modern scholars like John Locke, who reconceptualised parental authority as one of stewardship rather than absolute power.<sup>86</sup> In this model, parents are entrusted with the responsibility to nurture, protect, and advance the interests of their children until they reach adulthood, emphasising that this responsibility is grounded in trust rather than ownership.<sup>87</sup>

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<sup>84</sup> S Brennan & R Noggle 'The moral status of children: Children's rights, parents' rights, and family justice' (1997) 23(1) *Social Theory and Practice* 1-26, at 23.

<sup>85</sup> ES Scott & RE Scott 'Parents as fiduciaries' (1995) 81 *Virginia Law Review* 2401-2476, at 2401.

<sup>86</sup> JJ Edelman 'When do fiduciary duties arise?' (2010) 1 *Law Quarterly Review* 302-327, at 305.

<sup>87</sup> ES Scott 'Parental autonomy and children's welfare' (2002) 11 *William and Mary Bill of Rights Journal* 1071-1100, at 1074.

At the core of the fiduciary theory is the notion that the parent-child relationship functions much like a traditional fiduciary relationship, where the parent acts as an agent for the child, who, due to their vulnerability and developmental stage, is unable to make critical decisions for themselves. This fiduciary role justifies the actions of parents on behalf of their children, not as an exercise of control but as a necessary intervention to protect the child's rights and interests. Children, as inherently vulnerable individuals, rely on their parents to make decisions that will safeguard their future well-being.<sup>88</sup> Therefore, parental authority, according to this theory, is not an expression of ownership but a duty of care that reflects the child's temporary incapacity for self-governance.<sup>89</sup>

A key principle of the fiduciary theory is that parents are given these responsibilities because they have brought their children into the world. As a result, they assume a moral obligation to act in the child's best interests.<sup>90</sup> This contrasts sharply with the property theory, where the focus is on parental control rather than on the child's inherent rights as an individual. By emphasising the child's personhood and moral standing, the fiduciary theory aligns with Kantian ethics, which argues that individuals must be treated as ends in themselves, not merely as means to an end. In the context of the parent-child relationship, this means that the child, by virtue of their existence, is entitled to protection and care, and the parent's role is to ensure these rights are upheld.<sup>91</sup>

Locke's early ideas on the parent-child relationship have evolved into a more modern understanding of fiduciary responsibilities. Originally, Locke viewed children as being entrusted to their parents by nature or God, with the aim of preparing them for adulthood.<sup>92</sup> In this preparatory role, Locke emphasised that parental authority is not absolute but provisional, meant only to serve the child's development until they are capable of rational self-determination.<sup>93</sup> This contemporary interpretation of this concept expands upon Locke's vision

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<sup>88</sup> Moyo (2014) at 44.

<sup>89</sup> J Tobin ed *The UN Convention on the Rights of the Child: A commentary* (2019) OUP Oxford at 34-40.

<sup>90</sup> E Fox-Decent and EJ Criddle 'The fiduciary constitution of human rights' (2009) 15 *Legal Theory* 301-336, at 313.

<sup>91</sup> I Kant *The metaphysics of morals* (1797) M Gregor (translation) (1991) at 98-99.

<sup>92</sup> J Locke *Two treatises of government* P Laslett (ed) (1988) (1690) (hereafter *First or Second Treatise*) at 176-194 available at <https://www-cambridge-org.ezproxy.uct.ac.za/highereducation/books/locke-political-essays/7DAFC91E0A2ACBEC7741318195B72110/first-tract-on-government-1660/626E5503C3281B7D96812175CE386BF6> (Accessed on 24 February 2024).

<sup>93</sup> M Freeman *Rights and wrongs of children* (1983) at 49-50.

by positioning parents as trustees, whose authority over the child is temporary and aimed at guiding the child toward eventual autonomy.<sup>94</sup>

The fiduciary theory grants parents a degree of discretion similar to that found in traditional fiduciary relationships, where the agent (the parent) exercises judgment on behalf of the principal (the child) who lacks the capacity to act independently.<sup>95</sup> However, this parental discretion is not without limits. Parents are bound by a duty of care, meaning that their decisions must always consider the child's rights and well-being. The fiduciary model acknowledges the child's inherent vulnerabilities and seeks to balance the parent's authority with the child's evolving capacity for autonomy.<sup>96</sup>

An interesting concept within the fiduciary theory is that of 'borrowed capacities,' which suggests that parents, in their role as fiduciaries, make decisions for their children based on what the child would choose if they had the capacity to do so. This forward-looking approach is grounded in the idea that parental decisions should reflect what the child might hypothetically consent to as a fully developed, rational adult. Scholars like Simmons have argued that this approach ensures that the child's long-term interests are safeguarded, even when temporarily limiting their autonomy.<sup>97</sup> The theory supports the idea that parents must act in ways that promote the child's eventual independence, even when it requires making decisions that the child may not fully understand or agree with at the time.<sup>98</sup>

Despite its strengths, the fiduciary model faces challenges, particularly when it comes to understanding the gradual nature of a child's development. Children do not simply go from being entirely dependent to fully autonomous at a single point. Rather, their capacity for decision-making increases over time. The fiduciary theory must therefore account for this gradual acquisition of autonomy, advocating for a proportional reduction in parental oversight as the child matures and develops. While the fiduciary model suggests that parents should retain

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<sup>94</sup> Freeman (1983) at 50.

<sup>95</sup> R Noggle 'Special agents: Children's autonomy and parental authority' in Archard and Macleod *Procreation and parenthood: The ethics of bearing and rearing children* (2010) Oxford University Press at 97-98.

<sup>96</sup> J Feinberg 'The child's right to an open future' (1998) 3 in PH Hirst and P White (eds) *Philosophy of education* 76-97, at 85.

<sup>97</sup> AJ Simmons *The Lockean theory of rights* (1994) 2ed Princeton University Press at 202.

<sup>98</sup> Feinberg (1998) at 251.

a high degree of control when the child is young, it also recognises the need to lessen that control as the child demonstrates increasing competence.<sup>99</sup>

Thus, the fiduciary theory emphasises a balance between the child's developing autonomy and the need for protection. By treating parents as trustees rather than sovereigns, the fiduciary model respects the child's inherent rights, while acknowledging their vulnerability and dependence. It challenges the property theory's outdated view of parental authority, replacing it with a duty-bound relationship aimed at fostering the child's eventual independence. While the model requires ongoing adaptation to account for the dynamic nature of child development, it remains a persuasive approach for ensuring that children's rights and interests are both respected and protected in decision-making processes.

### ***2.5.2 The fiduciary theory in decision-making***

The fiduciary theory offers an insightful framework when applied to complex and often emotional decision-making in family-related disputes. By viewing the parent-child relationship as one of trust and responsibility, rather than control or ownership, the fiduciary theory places the child's best interests at the forefront of decision-making. This theory balances respect for parental interests while ensuring that children's rights and well-being are protected in decision-making processes.

For instance, in international child abduction cases, the fiduciary theory provides a framework for evaluating the actions of the abducting parent. When one parent unilaterally relocates the child to another country, claiming that it is in the child's best interest, the fiduciary model questions whether that parent is genuinely fulfilling their fiduciary duty. The parent, as a fiduciary, is obligated to act not out of self-interest but in ways that protect and promote the child's long-term well-being. If the relocation disrupts the child's emotional security, relationship with the other parent, or stability, the fiduciary theory suggests that the abducting parent has breached their fiduciary duty to the child.

Moreover, the fiduciary theory demands that courts, acting as state agents, also consider the child's best interests in their rulings. Courts must act as fiduciaries themselves, ensuring

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<sup>99</sup> J Fortin *Children's rights and the developing law* (2009) 3 ed Cambridge University Press at 15; See also B Bandman 'Do children have any natural rights? A look at rights and claims in legal, moral and educational discourse' (2009) in *Proceedings of the 29th Annual Meeting of the Philosophy of Education Society* Cambridge University Press 3-32, at 23.

that decisions about a child are grounded in what best promotes the child's overall welfare, rather than focusing on parental rights or preferences. In cases where a child has been taken across international borders, courts should carefully weigh the impact of returning the child to their habitual residence versus allowing the child to remain with the abducting parent. While the law may require returning the child to their country of origin under the Hague Convention, the fiduciary theory ensures that such decisions are scrutinised for how they affect the child's immediate and long-term interests.<sup>100</sup>

A key aspect of the fiduciary theory in decision-making is its forward-looking approach, focusing not only on the child's immediate needs but also on their future autonomy. Thus, the fiduciary theory offers a good framework for decision-making in family-related disputes. By emphasising trust, responsibility, and the child's long-term welfare, it shifts the focus away from parental rights and toward a deeper recognition of the child's rights and evolving autonomy. This theory ensures that decisions are made in the child's best interests, protecting their present and future well-being.

## **2.6 STATE INTERVENTION**

### ***2.6.1 The doctrine of parens patriae***

The doctrine of *parens patriae* embodies two fundamental principles that justify and guide the state's involvement in family matters. The first principle explains why the state has the authority to intervene. It holds that the state has an inherent responsibility to step in when it becomes necessary to protect the welfare of children.<sup>101</sup> This necessity typically arises when parents fail to fulfil their duties toward their children, either due to their inability or unwillingness to provide appropriate care, or because the child's age and immaturity render them especially vulnerable.<sup>102</sup> In such situations, the state is expected to act as a safeguard for children whose parents are incapable of properly supporting their physical, emotional, or developmental needs.

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<sup>100</sup> See part 7.4 of Chapter 7.

<sup>101</sup> EK Hong 'Reexamination of the parents patriae power' (2021) 88(2) *Tennessee Law Review* 278-333, at 283.

<sup>102</sup> K Henning 'Loyalty, paternalism and rights: Client counselling theory and the role of child's counsel in delinquency cases' (2005) 81 *Notre Dame Law Review* 245-284, at 282.

The second principle outlines how the state exercises this authority, positioning itself as a "super parent" when it intervenes.<sup>103</sup> This means that, in applying the *parens patriae* doctrine, the state assumes the role of a wise and caring parent, making decisions that are in the child's best interests.<sup>104</sup> The state's intervention is not intended to be punitive or coercive but rather therapeutic and protective, aiming to ensure the child's welfare when parental care falls short.<sup>105</sup> Essentially, the state is tasked with acting as a caretaker of last resort, stepping in when parents are unable or unwilling to meet the basic needs of the child.

The *parens patriae* doctrine, while rooted in the aim of child protection, has drawn criticism for it granting the state excessive power over the family. Blustein, for example, contends that the doctrine can undermine the autonomy of both parents and children by allowing the state to impose its own views on childrearing.<sup>106</sup> In his view, this overreach poses a threat to the liberal ideal of personal autonomy, where individuals, including parents, have the right to raise their children according to their values and beliefs.<sup>107</sup> The state's imposition on childrearing risks stifling the diversity of family perspectives on how children can live good and fulfilling lives.<sup>108</sup> From this perspective, the doctrine's broad scope could reduce the rich pluralism that characterises family life by centralising power in the state.

Blustein also points out that *parens patriae* limits parental autonomy in two ways. First, it restricts parents from pursuing their personal interests or goals when these conflict with the welfare of the child; and second, it empowers the state to override parents' objections to state-imposed standards of childrearing.<sup>109</sup> Parents, under this doctrine, are stripped of the freedom to make certain decisions about their child's upbringing if those decisions do not align with the state's interpretation of the child's best interests.<sup>110</sup> This implies that parental rights are not inherent or absolute, but are instead functions that are defined and constrained by the state.

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<sup>103</sup> Hong (2021) 287.

<sup>104</sup> P Blanchard 'The child, the clinic and the court symposium in New York' (1925) 4(3) *Social Forces* 466-672, at 656.

<sup>105</sup> BC Feld 'The juvenile court meets the principle of offence: punishment, treatment and the difference it makes' (1988) 68 *B U Law Review* 821-915, at 830.

<sup>106</sup> J Blustein 'On the doctrine of *parens patriae*: Fiduciary obligations and state power' (1983) 2(2) *Criminal Justice Ethics* 39-47, at 42.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Blustein (1983) at 43.

<sup>110</sup> *Ibid.*

Blustein advocates for a more balanced approach that respects both parental autonomy and the need to protect children.<sup>111</sup>

To explore the boundaries of state intervention, various philosophical theories provide insights into the scope of the *parens patriae* doctrine. Liberal individualism, for instance, emphasises the protection of the child's individual rights and liberties, advocating for minimal state intervention except in cases where basic rights are threatened. This theory, often associated with John Rawls, argues that individuals, including children, possess fundamental rights that the state must protect, but it also notes the importance of respecting parental autonomy.<sup>112</sup> In family-related disputes, liberal individualism supports state intervention only when a child's basic rights, such as their right to safety, education, and health, are at risk.<sup>113</sup> It, therefore, endorses a limited role for the state to protect the child's individual welfare in certain circumstances.

In contrast, communitarianism offers a more collective perspective, emphasising the importance of social relationships, community values, and the common good.<sup>114</sup> This theory argues that the welfare of children cannot be fully understood in isolation from the communities that shape their lives.<sup>115</sup> From a communitarian standpoint, the state's role in family disputes should extend beyond protecting individual children and should also aim to preserve and enhance the bonds within the family and the larger community.<sup>116</sup> Communitarianism favours decisions by the state that respect cultural norms and communal values, advocating for solutions that maintain family integrity while ensuring the child's well-being. For example, it might promote family counselling or community-based support systems as alternatives to more disruptive decisions.<sup>117</sup>

Finally, the Ethics of Care perspective focuses on the significance of care and interpersonal relationships in guiding state intervention and decision-making. Care ethics

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<sup>111</sup> Blustein (1983) at 44.

<sup>112</sup> J Rawls *A theory of justice* (2005) Belknap Press of Harvard University Press at 5-8.

<sup>113</sup> Rawls (2005) 9.

<sup>114</sup> MJ Sandel *Liberalism and the limits of justice* (1982) Cambridge University Press at 12.

<sup>115</sup> *Ibid.*

<sup>116</sup> Sandel (1982) 26.

<sup>117</sup> S Benhabib 'Autonomy, modernity, and community: communitarianism and critical social theory in dialogue' in (1992) *Cultural-political interventions in the unfinished project of enlightenment* at 39; See also A Etzioni 'Communitarianism revisited' (2014) 19(3) *Journal of Political Ideologies* 241-260, at 241; and J Friedman 'The politics of communitarianism' (1994) 8(2) *Critical Review* 297-340 at 299.

suggests that the state's involvement in family-related disputes should not simply be about enforcing rights or protecting abstract principles but about supporting the caregiving relationships that children depend on.<sup>118</sup> In this framework, the state's duty is to nurture and sustain these relationships, ensuring that children receive the care they need in a manner that is attentive, responsive, and context sensitive.<sup>119</sup> Care ethics advocates for decisions that strengthen the bonds between parents and children, recognising that the quality of care a child receives is often deeply connected to their relational environment.<sup>120</sup>

Each of these theories, liberal individualism, communitarianism, and the ethics of care, offer distinct perspectives on the *parens patriae* doctrine and the nature of state intervention in family-related disputes. Liberal individualism emphasises the child's rights and welfare, often at the expense of parental autonomy; while communitarianism balances individual rights with the importance of community values; and care ethics highlights the relational aspects of caregiving, urging the state to support and enhance these connections. Together, these perspectives aid in creating a better understanding of the *parens patriae* doctrine in the context of decision-making by courts. These perspectives provide a holistic approach to determining the child's best interests that should incorporate consideration of the child's rights, communal and cultural values, and the fundamental importance of family relationships in ensuring a child's best interests.

## ***2.6.2 The principle of subsidiarity***

The principle of subsidiarity plays an important role in discussions about state intervention in family-related disputes. This principle emphasises that issues should be addressed by the smallest or least centralised authority capable of handling them effectively. In the context of family-related disputes, subsidiarity supports the idea that the family, as the primary social unit

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<sup>118</sup> V Held *The ethics of care: Personal, political, and global* (2006) Oxford University Press at 140.

<sup>119</sup> F Kelly 'Conceptualising the child through an "ethic of care": lessons for family law' (2005) 1(4) *International Journal of Law in Context* 375-396, at 385.

<sup>120</sup> T Pettersen *Comprehending care: Problems and possibilities in the ethics of care* (2008) Rowman & Littlefield; See also T Pettersen 'The ethics of care: Normative structures and empirical implications' (2011) *Health Care Analysis* 51-64, at 51.

of the child, should be the first to address and make decisions concerning the child's welfare.<sup>121</sup> The family, being the child's closest and most immediate environment, is best positioned to make decisions about the child's upbringing, care, and development. State intervention, under this principle, is seen as a last resort, justified only when the family is either unable or unwilling to protect the child from harm or to ensure their well-being.<sup>122</sup>

This preference for family-based decision-making over state intervention is rooted in the belief that the family, due to its intimate connection to the child, is more likely to act in the child's best interests.<sup>123</sup> The principle of subsidiarity thus reflects a cautious approach to state involvement, recognising the potential risks of unnecessary or overly aggressive state action in family matters.<sup>124</sup> The state's role, in this framework, is not to replace the family but to support and intervene only when the family fails to fulfil its protective and caregiving responsibilities. This helps maintain a balance between the autonomy of the family and the state's duty to protect vulnerable children.

Determining when state intervention is necessary, however, requires careful judgment. There is no simple formula for deciding when the state should step in, and several elements guide this decision. One of the most critical elements is the risk of significant harm to the child.<sup>125</sup> State intervention becomes justified when there is a credible threat to the child's physical, emotional, or psychological well-being. This could involve situations of abuse, neglect, or other circumstances where the child's health and safety are at serious risk.<sup>126</sup> The principle of subsidiarity ensures that the state does not intervene lightly, but does so only when such risks are present, and the family has failed to address them.

Another important factor is the failure of parental care. When parents are unable to provide the necessary care, protection, or guidance that a child requires for healthy

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<sup>121</sup> SJ Baskin 'State intrusion into family affairs: Justifications and limitations' (1973) 26 *Stanford Law Review* 1383-1409, at 1386.

<sup>122</sup> M Lotz 'Feinberg, Mills, and the child's right to an open future' (2006) 37(4) *Journal of Social Philosophy* 537-551, at 547.

<sup>123</sup> R Farrugia 'Parental responsibility and state intervention' (2000) 31 *California Western International Law Journal* 127-140, at 131.

<sup>124</sup> J Eekelaar 'The role of the best interests principle in decisions affecting children and decisions about children' (2015) 23(1) *The International Journal of Children's Rights* 3-26, at 26.

<sup>125</sup> JK Stoeber 'Parental abduction and the state intervention paradox' (2017) 92 *Washington Law Review* 861-936, at 870.

<sup>126</sup> *Ibid.*

development, the state may step in.<sup>127</sup> This could happen in cases where parents are incapacitated due to illness, addiction, or other factors that impair their ability to fulfil their parental duties.<sup>128</sup> In such cases, the state's intervention is seen as necessary to fill the gap left by the parents, ensuring that the child's basic needs are met.

The child's capacity and autonomy also play a key role in determining the need for state intervention. As children grow older and develop the ability to express their own views, their preferences and wishes should be considered.<sup>129</sup> For older children who are more capable of forming and articulating their opinions, their voices carry greater weight in decisions that affect their lives.<sup>130</sup> This reflects an understanding of the child's evolving capacity for autonomy and decision-making. While younger children may require greater protection and guidance, older children's perspectives should be considered in balancing parental rights and the state's duty to protect the child's welfare.<sup>131</sup>

Ultimately, the principle of subsidiarity seeks to ensure that state intervention in family-related disputes is both justified and proportionate. The state's involvement should be measured, respecting the family's role while fulfilling its own duty to protect children from harm.<sup>132</sup> This balance ensures that the child's best interests remain at the centre of decision-making processes in family disputes, allowing for appropriate state action only when necessary. In applying this principle, legal frameworks must ensure that parental autonomy is respected but that the state steps in where the child's welfare demands it.<sup>133</sup>

### ***2.6.3 Parens patriae and subsidiarity in decision-making***

The doctrines of *parens patriae* and subsidiarity provide essential frameworks for understanding state intervention in decision-making in family-related disputes. These

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<sup>127</sup> M Antokolskaia 'The search for a common core of divorce law: state intervention v. spouses' autonomy' (2006) *Role of Self-determination in the Modernisation of Family Law in Europe* 33-59 at 40.

<sup>128</sup> Ibid.

<sup>129</sup> M Freeman 'Freedom and the welfare state: child-rearing, parental autonomy and state intervention' (1983) 5(2) *The Journal of Social Welfare & Family Law* 70-91, at 70.

<sup>130</sup> Ibid.

<sup>131</sup> Freeman (1983) at 72.

<sup>132</sup> O Doyle 'Family autonomy and children's best interests: Ireland, Bentham, and the natural law' (2010) 1 *International Journal of the Jurisprudence of the Family* 55-76, at 58.

<sup>133</sup> Stoeber (2017) at 859.

doctrines, though distinct, work in tandem to guide when and how the state should intervene, always with the best interests of the child at the forefront of any decision.

In the context of international child abduction cases, the principles of *parens patriae* and subsidiarity again play crucial roles, albeit in more complex transnational settings. In the PCA context, 'the family' refers primarily to the left-behind and taking parents, but may extend to extended-family caregivers when the child's habitual residence is disrupted. When one parent unilaterally abducts a child and relocates them to another country, often claiming to act in the child's best interest, *parens patriae* empowers the state to intervene to safeguard the child. The state's duty, in this instance, is to assess whether the child's relocation and subsequent living conditions align with their long-term welfare. The state, acting as a "super parent," is tasked with ensuring that the child is not subjected to harm, disruption, or instability, regardless of the abducting parent's intentions. For example, if the child is uprooted from their home, schooling, and social network, the *parens patriae* doctrine justifies state intervention to restore stability and continuity in the child's life.

However, subsidiarity places a check on this intervention by recognising that the family should still be the primary environment where decisions about the child are made. In international abduction cases, subsidiarity argues that the state should intervene in a manner that seeks to reunify the family and restore the child to the least disruptive environment, provided that it serves the child's best interests. Subsidiarity ensures that the state's actions in these circumstances are proportionate, aiming to support, rather than displace, the family's role in the child's life.

*Parens patriae* and subsidiarity operate together to create a balanced approach to state intervention. These doctrines help ensure that the state acts only when necessary, stepping in to protect the child's welfare when the family cannot. It ensures that the state's intervention is protective but also respects the family structure and the child's connection to their parents and family. While *parens patriae* gives the state the authority to act decisively when the child's well-being is at risk, subsidiarity ensures that such actions are measured and only taken when the family fails to provide the necessary care. *Parens patriae* positions the state as a necessary safeguard for children, while subsidiarity, on the other hand, ensures that the state's power is not overused, advocating for minimal interference in the family unless absolutely necessary. A full analysis of how these theoretical perspectives play out in PCA litigation is provided in Chapters Six and Seven, which examine South-African Hague-case jurisprudence in detail.

## 2.7 CONCLUSION

This chapter aimed to provide a framework to guide decision-making in family-related disputes. By examining various theoretical perspectives on the rights and interests of children, parental interests, and the state's responsibility in family-related disputes, this chapter sought to outline principles to ensure the child's best interest and balance it with other relevant interests in the decision-making process.

Of the theories discussed in this chapter, the property theory offers the least insight into protecting children's best interests in decision-making in family-related disputes. This theory views children as commodities that are owned by their parents and subject to their parent's absolute control. This outdated theory does not recognise rights for children and has no place in modern child law. Similarly, the will or choice theory, that requires children to have the necessary intellectual capacity to make choices and decisions in order for them to be afforded rights. This theory does not advance or ensure the protection of the child's best interests and therefore is also not supported by this thesis. Instead, the interest theory saw a societal move away from the child's capacity to recognise that children inherently have developing interests and autonomy that need protection.

Children's rights are necessary to protect their interests and, therefore, relying on traditional theories of children's rights, such as the property and will theory, are risky in the evolved world that children live in today. Rather, the interest theory recognises the developing capacity of children while protecting their interests and respecting their autonomy. Thus, to advance and ensure the child's best interests in family-related disputes it ought to be applied in a way that protects both their current and future interests and well-being while also respecting the child's developing autonomy and granting the child a voice in the decision-making process. This approach is consistent with the substantive elements and procedural safeguards discussed in Chapter Three of this thesis.

In the context of parental interests, this chapter explored paternalism and the fiduciary theory and found that the purpose of the parent-child relationship is to ensure the interests and well-being of the child. This is best supported by the fiduciary theory which conceptualises the parent-child relationship as one based on trust and fiduciary duties. This perspective acknowledges the inherent vulnerability of children and their need for protection and places the duty to protect and ensure their interests and well-being on their parents. The fiduciary

theory presents a good understanding of the child needing varying levels of protection and increased autonomy as the child develops his or her capacities while granting parents autonomy to make decisions for their children while they lack the necessary capacity and ensure their interests until adulthood.

Under circumstances where parents are not fulfilling their inherent duties toward their children, one of which is to protect and ensure the child's well-being and interests, it is appropriate for the state to assert its authority as *parens patriae* and the crucial role it plays in ensuring the child's best interests in family-related disputes, in a way that recognises all of the child's rights and developing autonomy. Notably, the theory has shown that state intervention in family-related matters should be subsidiary.

The next chapter explores the international and regional legal framework for the protection of the child's best interests in family-related disputes and examines the extent to which it draws on the theories discussed in this chapter.

## CHAPTER THREE

### THE BEST INTERESTS OF THE CHILD UNDER INTERNATIONAL LAW

#### 3.1 INTRODUCTION

The discussion in Chapter Two on the theoretical principles related to the child's best interests, their parents and the state highlighted key perspectives required in balancing these interests and ensuring the best interests of the child in family-related disputes. It was established that to advance the child's best interests in decision-making, the best interests principle must be applied in a way that protects both their current and future interests and the well-being of the child while also respecting the child's developing autonomy and granting the child a voice in the decision-making process. Furthermore, it was found that the fiduciary model conceptualises the parent-child relationship as one based on trust where the parent's interests lie in protecting the interests of the child and grants the parent autonomy to make decisions that further the child's interests. In instances where the parent is unable to do this, Chapter Two found that the state may assert its role as *parens patriae* to protect the child's interests.

Moreover, Chapter Two outlined theoretical perspectives suggesting that recognising children as rights-holders is a crucial starting-point for safeguarding their interests; the implications of that proposition are explored in the chapters that follow. Thus, the CRC is a milestone in acknowledging children as rights bearers. Recognising the inherent vulnerability of children, the best interests of the child was established as a key principle of the CRC. The concept of the best interests of the child has evolved since it was first established as it has been shaped by changing cultural and societal attitudes toward childhood, the recognition of children's rights, and shifts in family structures and dynamics.

The primary objective of this chapter is to examine the international legal framework governing children's best interests and determine the substantive elements and procedural safeguards it creates for State Parties to protect the child's best interests. The chapter answers the secondary sub-research question of the thesis, "what substantive elements and procedural safeguards stem from the obligations established in the CRC and the African Children's Charter that ought to be incorporated in domestic law to determine the child's best interests in the context of family-related legal disputes?"

This chapter also explores the extent to which international law draws on the theories discussed in Chapter Two and then establishes the normative framework that will serve as the benchmark for evaluating the South African legal framework in subsequent chapters.

The chapter concludes having identified the key substantive elements and procedural safeguards necessary for the protection of children's best interests in family-related disputes. First, it demonstrates how the international framework embodies the fiduciary and interest theories while respecting the developing capacities of the child. Second, it highlights the importance of incorporating these elements and safeguards into domestic law to ensure that children's rights are widely protected, and their best interests are central to the decision-making process.

### **3.2 SETTING THE BEST INTERESTS OF THE CHILD IN MOTION**

This part of the chapter provides a brief historical overview of the development of the best interests of the child principle under international law. This overview aims to illustrate the evolution of the principle, showcasing how it has progressed from recognising children's needs to embracing the notion of children as rights holders. Through these developments, children are increasingly recognised as active participants in decision-making processes and individuals entitled to inherent rights.

The 1924 Declaration of the Rights of the Child,<sup>1</sup> although not explicitly framing children's rights in terms of the best interests principle, recognised the obligations of adults to meet children's needs.<sup>2</sup> It emphasised the importance of providing children with the best that

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<sup>1</sup> Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>2</sup> The final text of the 1924 Geneva Declaration reads:

By the present Declaration of the rights of the Child, commonly known as the Declaration of Geneva. Men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

The child must be given the man's requisite for its normal development, both materially and spiritually.

The child that is hungry must be fed, the child that is sick must be helped, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.

The child must be the first to receive relief in times of distress.

The child must be put in a position to earn a livelihood and must be protected against every form of exploitation.

The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

society has to offer. While the 1924 Declaration did not establish the child's best interests as we know it today, it did lay the groundwork by acknowledging the significance of considering children's welfare, particularly during times of distress. This recognition of the child's needs as a primary concern set a precedent for subsequent developments in children's rights.

The 1959 Declaration of the Rights of the Child <sup>3</sup> was pivotal in advancing the best interests principle. Unlike its predecessor, the 1959 Declaration explicitly stated that “the best interests of the child shall be the paramount consideration.”<sup>4</sup> This recognition marked a significant step forward in protecting the well-being of children and their rights within legal frameworks.

The principle of the child's best interests found some expression in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>5</sup> While primarily focusing on women's rights, CEDAW acknowledged the importance of considering the interests of children, stating that “the interest of children is the primordial consideration in all cases”.<sup>6</sup> Although not specifically framed as the child's best interests, this provision recognised the need to take children's well-being and rights in decision-making seriously.

However, in 1989 the CRC codified the child's best interests as a general right in art 3(1) and the CRC Committee treated it as a general principle guiding interpretation of all other articles.<sup>7</sup> It recognised children as individual rights bearers entitled to the full range of human rights and placed their best interests as a primary consideration in all actions concerning children. The convention introduced a rights-based approach to the best interests principle, emphasising that children are not merely on their way to becoming rights bearers but are entitled to immediate protection and fulfilment of their rights.

Furthermore, the African Children’s Charter, adopted in 1990, signed by South Africa in 1997 and ratified in 2000, provided a regional framework that recognised the unique

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<sup>3</sup> UN General Assembly *Declaration of the Rights of the Child*, A/RES/1386(XIV) UN General Assembly 20 November 1959.

<sup>4</sup> Principle 2 of the 1959 Declaration.

<sup>5</sup> UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* United Nations Treaty Series vol. 1249 p13 18 December 1979.

<sup>6</sup> CEDAW art 5(b).

<sup>7</sup> General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14 2013 at paras 6–9.

socioeconomic and cultural factors affecting African children.<sup>8</sup> The African Children's Charter addressed issues not adequately covered by the CRC, such as the impact of apartheid, cultural practices, and community responsibilities towards children.<sup>9</sup> By complementing the CRC, the African Children's Charter further enhanced the protection and promotion of children's rights within the African context, particularly for this thesis, South Africa.

### 3.3 DEFINING THE BEST INTERESTS OF THE CHILD

The drafting process of the CRC raised questions about the status of the best interests principle, specifically whether it should be a "paramount consideration" or a "primary consideration" in matters concerning children.<sup>10</sup> While earlier international precedents favoured the concept of "paramountcy", the CRC delegates ultimately agreed on "primary consideration".<sup>11</sup> However, there was still debate regarding the use of "a" and "the" in relation to the best interests principle.<sup>12</sup>

During the drafting phase, concerns were already expressed about the vagueness of the best interests principle.<sup>13</sup> The World Health Organization (WHO) and New Zealand highlighted the potential for varied interpretations, while Venezuela worried about the discretion given to those applying the principle.<sup>14</sup> Unfortunately, no clear explanation was provided, leaving the principle to interpretation.

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<sup>8</sup> The African Children's Charter status list is available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://au.int/sites/default/files/treaties/36804-sl-  
AFRICAN\\_CHARTER\\_ON\\_THE\\_RIGHTS\\_AND\\_WELFARE\\_OF\\_THE\\_CHILD.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://au.int/sites/default/files/treaties/36804-sl-<br/>AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf) accessed on 15 July 2023.

<sup>9</sup> U Kilkelly & T Liefaard 'Legal implementation of the CRC: lessons to be learned from the constitutional experience of South Africa' (2019) *52De Jure Law Journal* 521-539, at 529.

<sup>10</sup> Save the Children Sweden and the Office of the United Nations High Commissioner for Human Rights *Legislative history of the Convention on the Rights of the Child* (2007) New York and Geneva: UNHCHR 1 at 339.

<sup>11</sup> Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, A/RES/41/85, 20 November 1989, Preamble and Art. 5; Although CEDAW used the term 'primordial, ' this term is arguably more similar to paramount than it is to primary.

<sup>12</sup> *Legislative history* 2007 at 344.

<sup>13</sup> *Legislative history* 2007 at 336.

<sup>14</sup> *Legislative history* 2007 at 345.

Notably, the drafting of the CRC needed more African representation, which is significant given the unique context of African children, including those in South Africa.<sup>15</sup> Dissatisfaction with the CRC led to the development of the African Children's Charter, which sought to address the gaps and specific needs of African children.

While the CRC and the African Children's Charter serve different purposes, they both play crucial roles in promoting and protecting children's rights. The CRC, despite its limited African representation, brought international attention to the importance of children's rights. On the other hand, the African Children's Charter addressed African children's specific needs and concerns, providing a regional framework rooted in African culture and values.<sup>16</sup>

Consequently, this overarching duty is codified in articles 3(1) and 3(2) of the CRC, which require all public and private bodies to treat the child's best interests as a primary consideration and to ensure the child such protection and care as is necessary.<sup>17</sup> Similarly, Article 4 of the African Children's Charter also emphasises the importance of the child's best interests in child-related decision-making.<sup>18</sup> However, there are notable differences in the wording and approach between the two instruments.

The CRC states that the child's best interests shall be a primary consideration, applicable to state and private actions. Similarly, the African Children's Charter states that the child's best interests shall be the primary consideration.<sup>19</sup> The use of "a" in the CRC and "the" in the African Children's Charter, as well as the use of "primary" instead of "paramount," may indicate varying degrees of weight to be given to the best interests of the child in decision-making depending on the competing factors at hand.<sup>20</sup>

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<sup>15</sup> A Kaviani Johnson & J Sloth-Nielsen 'Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead' (2020) 20 *African Human Rights Law Journal* 643–666, at 646.

<sup>16</sup> T Kaime 'African Charter on the Rights and Welfare of the Child: A historical and philosophical account' (2009) 3 *African Journal of Legal Studies* 120-136, at 127.

<sup>17</sup> CRC, art 3(1)-(2).

<sup>18</sup> African Children's Charter, art 4.

<sup>19</sup> M Gose 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (2002) *The Comparative and International Law Journal of Southern Africa*.at 18.

<sup>20</sup> W Ncube 'Prospects and challenges in Eastern and Southern Africa- The interplay between international human rights norms and domestic law, tradition and culture' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1992) Aldershot and Brookfield at 1.

Although the terminology may vary, the goal of the best interests principle remains to secure children's full enjoyment of their rights and to support their overall well-being.<sup>21</sup> The child's holistic well-being encompasses various aspects of their life, including their physical, mental, emotional, social, developmental and educational needs.<sup>22</sup> In addition to these basic needs, it includes supportive relationships, a secure environment and social inclusion.<sup>23</sup> A holistic approach to the best interests principle is essential and recognises the interconnectedness of these aspects, which promotes the child's overall growth, health, happiness, and fulfilment.<sup>24</sup>

According to Viljoen the best interests principle, under the African Children's Charter, underpins all the human rights of children and emphasises their status as rights bearers.<sup>25</sup> Unlike the CRC, which primarily focuses on the obligations of state parties to "respect and ensure" children's rights, the African Children's Charter directly addresses children as individuals with specific rights.<sup>26</sup> Moreover, the African Children's Charter dedicates an entire article to the best interests principle, highlighting its significance in decision-making processes concerning children.<sup>27</sup>

While there is no competition between the CRC and the African Children's Charter, the latter provides more robust protection for children's rights and emphasises their status as rights bearers. Article 4 African Children's Charter<sup>28</sup> makes THE CHILD'S BEST INTERESTS the *primary* consideration, whereas Article 3 of the CRC<sup>29</sup> requires it to be *a* primary consideration. By placing the child at the centre of decision-making and acknowledging their rights, the African Children's Charter goes beyond the best interests principle and affirms children's rights

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<sup>21</sup> General Comment No. 14 at para 39.

<sup>22</sup> General Comment No. 14 at paras 42; 82.

<sup>23</sup> A Barnes 'CRC's performance of the child as developing' in M Freeman (ed.) *Law and childhood studies: Current legal issues* (2012) 14 Oxford University Press 392–418, at 399.

<sup>24</sup> P Marjanen A Ornellas and L Mäntynen 'Determining holistic child well-being: Critical reflections on theory and dominant models' (2017) 10 *Child Indicators Research* 633-647, at 642.

<sup>25</sup> F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *The Comparative and International Law Journal of Southern Africa* at 224.

<sup>26</sup> Gose (2002) at 27.

<sup>27</sup> Chirwa (2002) at 160.

<sup>28</sup> African Children's Charter, art 4.

<sup>29</sup> CRC, art 3.

more comprehensively. Article 4(1) stipulates that the primary consideration in all actions by any individual or authority must be the child's best interests. This principle is unconditional, ensuring its broad application and standard. It applies to both private and public entities, thus making it the duty of states to ensure that private actors, including parents, institutions, businesses, and other non-state actors involved with children's rights and services, understand and apply this standard in all their activities and decision-making. The best interests standard is to be protected across different cultural, political, and geographical contexts, and it must hold significant weight when compared to other competing interests. Moreover, there are no limitations to the areas where the best interests of the child must be considered.<sup>30</sup>

Thus, the CRC and the African Children's Charter recognise the importance of the child's best interests as a primary consideration in decision-making. While the CRC focuses on the obligations of state parties, the African Children's Charter adopts a more rights-based approach, emphasising the centrality of the child's best interests and considering them as rights bearers. This is consistent with the interest theory that recognises that children have interests that need to be protected by rights.

### **3.4 THE TWO-STEP PROCESS TO DETERMINE THE BEST INTERESTS OF THE CHILD**

Many scholars have stated that the greatest strength of the best interests principle is its flexibility and adaptability, as it can be applied in various instances involving children.<sup>31</sup> This is important for the complex nature of family-related legal disputes<sup>32</sup> and the developing capacity of children.

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<sup>30</sup> African Committee of Experts on the Rights and Welfare of the Child *General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (article 1) and Systems Strengthening for Child Protection* (2018) at para 12.

<sup>31</sup> E Scott and R Emery 'Gender politics and child custody: The puzzling persistence of the best interests standard' (2014) 77 *Law and Contemporary Problems* 69-108, at 73; See also P Alston 'The best interests principle: towards a reconciliation of culture and human rights' (1994) 8(1) *International Journal of Law, Policy and the Family* 1-25, at 7; M Liebel *Decolonizing childhoods: From exclusion to dignity* (2020) Policy Press; E Burman *Developments: Child, image, nation* (2020) Routledge; R Dixon and MC Nussbaum 'Children's rights and a capabilities approach: The question of special priority' (2011) *Cornell Law Review* 97 at 549.

<sup>32</sup> Alston (1994) at 19.

However, this flexibility and adaptability are often also seen as the biggest weakness of the best interests principle, deemed vague.<sup>33</sup> Mnookin articulated the fundamental flaw of the best interests principle when he stated that determining the child's best interests is “usually indeterminate and speculative.”<sup>34</sup> Likewise, Sutherland notes that the indeterminacy of the child’s best interest principle stems from this “capricious flaw.”<sup>35</sup> The problem is that determining the child’s best interests allows the decision-maker to impose their own values and moral system in deciding what they believe to be best for the child without any basis in scientific research and data.<sup>36</sup> This poses the risk of dominant political, cultural and religious views being imposed on children who do not conform to the same value system.<sup>37</sup> The discretion of the decision-maker permits a subjective value judgment rather than an objective consideration of the child's rights.<sup>38</sup>

This indeterminacy of the child's best interests leads to its unpredictability. The UN Committee on the Rights of the Child (CRC Committee) sought to clarify this in General Comment No 14, which recommends a systemic two-step process for determining the child’s best interests.<sup>39</sup> First, decision-makers must determine the relevant elements to be considered in a best interests assessment for the child or children concerned, give them content and assign a weight to each element. Second, a procedure that ensures legal guarantees and the proper application of the best interests must be followed.<sup>40</sup>

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<sup>33</sup> E Sutherland ‘Article 3 of the United Nations Convention on the Rights of the Child: The challenges of vagueness and priorities’ (2016) in E Sutherland & LA Barnes Macfarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best interests, welfare and well-being* Cambridge: Cambridge University Press 21 – 51, at 36.

<sup>34</sup> R Mnookin ‘Child-custody adjudication: Judicial functions in the face of indeterminacy’ (1975) 39 (3) *Law and Contemporary Problems* 226–293, at 232.

<sup>35</sup> Sutherland (2016) at 36.

<sup>36</sup> K Bartlett ‘Re-expressing parenthood’ (1999) in M Freeman (ed.) *Family, State and Law* Farnham: Ashgate Publishing 293-340, at 293.

<sup>37</sup> L Kohm ‘Tracing the foundations of the best interests of the child standard in American jurisprudence’ (2008) 10 *Journal of Law and Family Studies* 1-40, at 37.

<sup>38</sup> R Warshak ‘The approximation rule, child development research, and children’s best interests after divorce’ (2007) 1(2) *Child Development Perspectives* 119-125, at 120.

<sup>39</sup> JM Pobjoy ‘The best interests of the child principle as an independent source of international protection’ (2015) 64(2) *International and Comparative Law Quarterly* 327-363, at 328.

<sup>40</sup> General Comment No. 14 at para 46 (a)-(b).

### ***3.4.1 Step One: Elements to assess the best interests of the child***

The assessment of the child's best interests is an activity that must be taken on a case-by-case basis, considering the child's individual characteristics and social and cultural context.<sup>41</sup> The application of this two-step process should start with an assessment of the circumstances that make the child in question unique to determine a list of 'non-exhaustive and non-hierarchical elements to consider and assign a weight to each element in accordance with the child's unique position to determine what the child's best interests are.'<sup>42</sup> The list of elements guides decision-makers, and because it is non-exhaustive, the elements to consider are flexible in that decision-makers can go beyond those provided in General Comment No. 14, and domestic legislation, to include any factors relevant to the child in question.<sup>43</sup> Decision-makers should also be mindful of the child's ongoing development and consider the elements to reflect the child's short and long-term development and the continuity and stability of the child's life.<sup>44</sup>

Moreover, the CRC Committee provides seven elements to consider when assessing the child's best interests. In summary, the elements that should be regarded are listed as follows and will be discussed in further detail below:

1. The child's views;<sup>45</sup>
2. The child's identity (sex, sexual orientation, beliefs, culture, personality);<sup>46</sup>
3. Preservation of the family environment and maintaining relations with the family and preservation of the ties of the child to extended family, friends, school, and the environment;<sup>47</sup>
4. The care, protection, and safety of the child;<sup>48</sup>
5. Children in situations of vulnerability;<sup>49</sup>

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<sup>41</sup> M Kalverboer et al 'The best interests of the child in cases of migration' (2017) (25)1 *International Journal of Children's Rights* 114-139, at 120.

<sup>42</sup> General Comment No. 14 at para 49-50.

<sup>43</sup> General Comment No. 14 at para 50-51.

<sup>44</sup> Kalverboer et al (2017) at 120.

<sup>45</sup> General Comment No. 14 at para 53-54.

<sup>46</sup> General Comment No. 14 at para 55-57.

<sup>47</sup> General Comment No. 14 at para 58-70.

<sup>48</sup> General Comment No. 14 at para 71-74.

<sup>49</sup> General Comment No. 14 at para 75-76.

6. The child's right to health;<sup>50</sup> and
7. The child's right to education.<sup>51</sup>

### ***3.4.2 Step Two: Procedure to determine the best interests of the child***

In addressing the determination of a child's best interests within formal family-related legal disputes, it is imperative to establish rigorous processes that uphold the best interests principle effectively. These processes should be delineated clearly from the everyday decision-making by parents or guardians, which do not necessitate such extensive procedural safeguards due to the fiduciary nature of the parent-child relationship. In legal contexts such as international child abduction, the following safeguards are critical to ensure the child's best interests are assessed and prioritised appropriately.<sup>52</sup>

1. The right of the child to express their views providing them a voice in proceedings that directly affect their lives.<sup>53</sup>
2. The establishment of the facts of each case<sup>54</sup> to ensure decisions are made based on accurate and comprehensive information.
3. The process should take place in the shortest possible time<sup>55</sup> to mitigate the potential emotional and psychological toll on the child, without compromising thoroughness or fairness.
4. The process must be carried out in a safe environment by professionals trained in child psychology, child development and other relevant human and social development fields<sup>56</sup> to ensure that the process is conducted in a manner that is sensitive to the child's needs and developmental stage.
5. Legal representation for the child<sup>57</sup> to ensure their interests and rights are adequately represented.

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<sup>50</sup> General Comment No. 14 at para 77-78

<sup>51</sup> General Comment No. 14 at para 79.

<sup>52</sup> General Comment No. 14 at para 87-88.

<sup>53</sup> General Comment No. 14 at para 91.

<sup>54</sup> General Comment No. 14 at para 92.

<sup>55</sup> General Comment No. 14 at para 93.

<sup>56</sup> General Comment No. 14 at para 94-95.

<sup>57</sup> General Comment No. 14 at para 96.

6. Motivation, justification, and an explanation for every decision taken regarding the child must be taken<sup>58</sup> making the decision-making process transparent and accountable.
7. Mechanisms to review or revise decisions to ensure that outcomes remain aligned with the best interests of the child as circumstances evolve.<sup>59</sup>

The following parts of Chapter 3 will discuss the substantive elements and procedural safeguards to determine the child’s best interests in more detail.

## **3.5 SUBSTANTIVE ELEMENTS TO ASSESS THE CHILD’S BEST INTERESTS IN FAMILY-RELATED LEGAL DISPUTES**

### ***3.5.1 Child participation***

The right of the child to be heard, as articulated in General Comment No. 14,<sup>60</sup> is a pivotal aspect of family-related legal proceedings. The normative anchor of this right is article 12 of the CRC, which guarantees every child capable of forming a view “the right to express those views freely.”<sup>61</sup> At the regional level, the same guarantee appears in article 4(2) of the African Children’s Charter, which obliges decision-makers to “provide the opportunity for the views of the child to be heard ... and be given due consideration.”<sup>62</sup> Both highlight the necessity for children to express their views in matters affecting them, particularly in legal disputes within the family context.<sup>63</sup> This principle demands that children's opinions are not only sought but also given due consideration, reflecting their age and maturity.<sup>64</sup> General Comment No. 12

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<sup>58</sup> General Comment No. 14 at para 97.

<sup>59</sup> General Comment No. 14 at para 98.

<sup>60</sup> UN Committee on the Rights of the Child (CRC Committee) *General Comment No 12 (2009) The right of the child to be heard* 20 July 2009 CRC/C/GC/12 para 16.

<sup>61</sup> CRC art 12(1).

<sup>62</sup> African Children’s Charter, art 4(2) and 7.

<sup>63</sup> See Committee on the Rights of the Child ‘Concluding Observations of the Committee on the Rights of the Child: South Africa CRC/C/ZAF/CO/3-6 2024 para 20; Committee on the Rights of the Child ‘Concluding Observations of the Committee on the Rights of the Child: Botswana CRC/C/BWA/CO/2-3 2019 para 28(a); and Committee on the Rights of the Child ‘Concluding Observations of the Committee on the Rights of the Child: Rwanda 2019 para 17(a).

<sup>64</sup> General Comment No 14 at para 53-54.

further elaborates on this, emphasising that the child's right to be heard is not a token gesture but a fundamental right that should be facilitated with due respect for the child's age, maturity, and evolving capacities. It insists on the child being provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, making this a direct obligation for courts.<sup>65</sup> General Comment No. 12 further clarifies this right's application, emphasising its critical role in ensuring children's active participation in legal decisions that impact their lives.<sup>66</sup> In addition, General Comment No. 12 also clarifies that ensuring the child's participation requires an environment where the child can freely express their views without fear, pressure, or manipulation and that their views must be taken seriously in the decision-making process.<sup>67</sup>

Esteban underlined the significance of participation in the assessment of the best interests of the child for several reasons. First, autonomy and agency are crucial to the child's right to participation.<sup>68</sup> By involving children in assessing and determining their best interests in the family-related legal disputes that affect them, their perspectives, preferences, and concerns are considered. This empowers children to have a stake in decisions that directly impact their lives and promotes their sense of self-determination. Notably, the CRC Committee has provided that State Parties must presume that a child can form their views and express them.<sup>69</sup> This means that in a family-related legal dispute, the child does not have to prove that they can express their views. Crucially, the capacity of the child to form and express their views in the family-related legal dispute does not have to be the same for every child. There are no age limits imposed by the international framework for implementing the child's right to participation. It is well known and accepted that children can form views and express them, albeit not always verbally, from a young age.<sup>70</sup> General Comment No. 12 reinforces this by stating that every child capable of forming views must be given the opportunity to express those views freely in

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<sup>65</sup> UN Committee on the Rights of the Child (CRC) *General comment No. 12 (2009): The right of the child to be heard* CRC/C/GC/12, 20 July 2009 para 12.

<sup>66</sup> CRC Committee *General Comment No. 12* para 19.

<sup>67</sup> CRC *General Comment No. 12* para 34; see also African Committee of Experts on the Rights and Welfare of the Child 'Concluding Observations of the Committee: South Africa' 2023 para 19.

<sup>68</sup> M Esteban 'Children's participation, progressive autonomy, and agency for inclusive education in schools. (2022) 10(2) *Social Inclusion* 43-53, at 44.

<sup>69</sup> CRC Committee *General Comment No. 12* para 20.

<sup>70</sup> A Clark and J Statham 'Listening to young children: Experts in their own lives' (2005) 29(1) *Adoption & Fostering* 45-56, at 50.

all matters affecting them, with the views of the child being given due weight according to their age and maturity.<sup>71</sup>

Therefore, implementing the child's participation rights in family-related legal disputes requires courts to recognise and respect non-verbal forms of expression such as play, body language, and drawing.<sup>72</sup> Secondly, incorporating the child's right to participation in family-related legal disputes contributes to informed decision-making. Children possess valuable insights and perspectives that adults may not fully grasp. Their involvement ensures that decision-makers comprehensively understand their needs, desires, and experiences. This leads to more informed and context-specific decision-making by courts.

Respect for the child's other rights is another essential aspect of the child's participation. By actively involving children in family-related legal disputes that affect them, their rights to dignity and freedom of expression are also upheld. This demonstrates a commitment to treating children as rights holders and ensures their voices are respected and valued in decision-making. Crucially, this respect for the child's rights underpins the ability to make decisions that are tailored to the child's unique needs. The acknowledgement of children's rights to participate and express their views directly influences the development of outcomes that reflect their individual circumstances and best interests.

Moreover, the child's right to participation allows for tailored decisions that address the child's individual needs. Children's best interests are highly individualised and context dependent. Engaging with children enables courts to gain insights into the child's unique circumstances, preferences, and context. This facilitates the development of decisions tailored to meet the child's specific and individual needs and best interests. In doing so State Parties must provide the opportunity and create a safe space for the child's active participation. Scholars like Lansdown, Drummond, Franklin and Sloper have emphasised that this means that State Parties must, first, involve the child in the decision-making process in a meaningful way by enabling and supporting the child, in a manner appropriate to the child's age and maturity, to express their views, ideas, and concerns;<sup>73</sup> secondly, to create an environment that is safe and supportive, where children feel empowered to express their opinions and ideas freely,

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<sup>71</sup> CRC Committee *General Comment No. 12* para 1.

<sup>72</sup> CRC Committee *General Comment No. 12* para 21.

<sup>73</sup> G Lansdown *Taking part: Children's participation in decision making* (2015) 1 Institute for Public Policy Research at 20.

without fear of retribution or discrimination;<sup>74</sup> and lastly, to provide children with the necessary information and resources to understand the decision-making process and the implications of the decision made.<sup>75</sup> According to General Comment No. 12, children do not need knowledge of all aspects of the matter affecting them. Instead, the information provided to the child must be appropriate and sufficient for them to gain the necessary understanding to form and express their views on the matter.<sup>76</sup> This process involves creating an inclusive and empowering environment where the child feels encouraged and comfortable expressing their opinions, ideas, and concerns in family-related legal disputes. Supporting the child also means actively listening to their perspectives, validating their experiences, and taking their contributions seriously. It requires creating a non-judgmental and respectful space where the child feels valued and heard.<sup>77</sup> Enabling and supporting the child in a manner appropriate to their age and maturity requires the consideration of their developmental stage, cognitive abilities, and emotional readiness.<sup>78</sup> Smeets and Rap's argument supports the recognition that children of different ages and maturity levels have varying capacities to understand and articulate their thoughts and preferences; therefore, facilitating the child's participation involves using age-appropriate language, communication methods, and tools.<sup>79</sup>

### **3.5.2     *The child's identity***

In the determination of the child's best interests within family-related legal disputes, the child's identity plays a pivotal role. The CRC highlights the importance of acknowledging a child's

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<sup>74</sup> O Drummond 'When the law is not enough: Guaranteeing a child's right to participate at SEN tribunals' (2016) *Education Law Journal* 149-163, at 151.

<sup>75</sup> A Franklin & P Sloper 'Supporting the participation of disabled children and young people in decision-making' (2009) 23(1) *Children & Society* 3-15, at 11.

<sup>76</sup> CRC Committee *General Comment No. 12* para 21 and 25.

<sup>77</sup> E Woodman S Roche & M McArthur 'Children's participation in child protection—How do practitioners understand children's participation in practice?' (2023) 28(1) *Child & Family Social Work* 125-135, at 127.

<sup>78</sup> D Kennan B Brady & C Forkan 'Supporting children's participation in decision making: A systematic literature review exploring the effectiveness of participatory processes' (2018) 48(7) *The British Journal of Social Work* 1985-2002, at 1992.

<sup>79</sup> D Smeets, & S Rap 'Child participation in family law proceedings: Pedagogical insights on why and how to involve children' (2021) in W Schrama M Freeman N Taylor & M Bruning (eds) *International Handbook on Child Participation in Family Law* Intersentia Europe 41-66, at 54.

right to preserve their identity, which includes, but is not limited to, their name, nationality, and family relations as stipulated in Articles 7-8 of the CRC. This right extends to encompass a broader array of attributes that contribute to a child's unique sense of self, including but not limited to their gender, sexual orientation, cultural heritage, religious beliefs, and individual personality traits.<sup>80</sup> While the African Children's Charter significantly addresses the needs and protections specific to African children, it offers a more limited articulation of a child's right to an identity, primarily focusing on the child's right to a name and nationality in Article 6.<sup>81</sup> However, it does not expressly safeguard the continuity of family relations that is covered by Article 8 of the CRC. As a result, courts in the African region still rely on Article 8 of the CRC to fill this dimension of the identity right.

The child's right to an identity is a fundamental human right that encompasses various elements contributing to the child's sense of self, belonging, and personal development. The CRC Committee, through General Comment No. 14, emphasises the importance of considering the child's right to preserve their identity in all actions concerning them.<sup>82</sup> This highlights the recognition of the child's social and cultural heritage in decision-making in family-related legal disputes. Doek confirmed that respecting and preserving a child's identity positively influences self-recognition, emotional well-being, and overall psychological development.<sup>83</sup> A child's cultural and social heritage is a key aspect of their identity, including their customs, traditions, language, beliefs, and values. Other scholars have also found that recognising and preserving these aspects of identity is essential for fostering a child's sense of belonging and helping them maintain a connection to their roots. It allows children to develop a positive self-identity and promotes a diverse and inclusive society.<sup>84</sup> Similarly, in its General Comment on Article 6 of the African Children's Charter, the African Committee emphasised the importance of the

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<sup>80</sup> CRC art 8.

<sup>81</sup> African Children's Charter art 6.

<sup>82</sup> CRC Committee *General Comment No 14* para 55-57; see also African Committee of Experts on the Rights and Welfare of the Child 'Concluding Observations of the Committee: South Africa' 2023 para 20-26.

<sup>83</sup> JE Doek 'The CRC and the right to acquire and to preserve a nationality' (2006) 25(3) *Refugee Survey Quarterly* 26-32, at 30; See also A Falch-Eriksen and E Backe-Hansen 'Children's right to protection under the CRC' (2018) in *Human Rights in Child Protection* Springer International Publishing 15-38, at 17.

<sup>84</sup> I Siraj-Blatchford & P Clarke *Supporting identity, diversity and language in the early years* (2000) McGraw-Hill Education UK at 3.

child's right to a name, birth registration, and nationality and the critical role these rights play in establishing a child's legal identity and protecting their welfare.<sup>85</sup>

Therefore, when assessing and determining the child's best interests in family-related legal disputes, the CRC Committee requires courts to ensure consistency in the child's upbringing and facilitate access to their country and familial culture and language whenever feasible.<sup>86</sup> Understanding and preserving a child's family and biological ties are essential for identity formation. This includes knowledge of their parentage, siblings, extended family, and ancestral background. Ronen confirmed that maintaining these connections when in their best interests, is crucial for a child's sense of belonging, cultural identity, and the development of a healthy self-identity.<sup>87</sup> For example, in the case of children in vulnerable positions, the CRC Committee requires that in determining the child's best interests, there must be a clear and comprehensive assessment of the child's identity.<sup>88</sup> Thus, in family-related legal disputes, courts should be culturally sensitive and respectful, considering the child's cultural background and ensuring their identity is respected and valued. Efforts should be made to maintain and strengthen the child's relationships with their biological family, extended family, and significant caregivers.

The decision in the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. Government of Kenya*<sup>89</sup> by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) provides a critical examination of the best interests of the child concerning identity and nationality. The ACERWC found that the Kenyan government's failure to automatically grant nationality to Nubian children at birth was a violation of their rights under

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<sup>85</sup> African Committee of Experts on the Rights and Welfare General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child *Right to Birth Registration, Name and Nationality*.

<sup>86</sup> *General Comment No 14* at para 55-57; See also Committee on the Rights of the Child 'Concluding observations on the combined fifth to seventh periodic reports of Angola' CRC/C/AGO/CO/5-7 2018 para 28.

<sup>87</sup> Y Ronen 'Redefining the child's right to identity' (2004) 18 *International Journal of Law Policy and the Family* 147-177, at 149.

<sup>88</sup> UN Committee on the Rights of the Child (CRC Committee) General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin 1 September 2005 CRC/GC/2005/6 para 20.

<sup>89</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. Government of Kenya Communication No 002/Com/002/2009 Decision 22 March 2011*.

the African Children’s Charter. This lack of recognised nationality placed Nubian children in a vulnerable position, affecting their access to education, healthcare, and other fundamental rights, and highlighting the significance of legal identity in the context of a child's best interests. This case highlights the importance of ensuring that children have a recognised nationality from birth to safeguard their rights and well-being. The ACERWC's decision emphasises the link between a child's right to nationality, an integral part of their identity, and the full enjoyment of other rights. This case illustrates the critical role that legal identity plays in protecting the rights and well-being of children. It serves as an example of the adverse effects that the denial of identity can have on children's best interests.

### **3.5.3      *Preserving the family environment***

The CRC recognises the family as the fundamental unit of society and protects a child's right to family life, including biological, adoptive, or foster parents and extended family or community members.<sup>90</sup> Article 8 provides that state parties must “respect the right of the child to preserve his or her...family relations...”<sup>91</sup> Similarly, article 9(1) provides that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, by applicable laws and procedures, that such separation is necessary for the best interests of the child.” In addition, other CRC articles strengthen the importance of children’s family relationships, including Article 10 (family reunification),<sup>92</sup> Article 16 (protection from arbitrary or unlawful state interference in the family),<sup>93</sup> Article 18 (affirming the child’s rights to a relationship with both parents),<sup>94</sup> Article 20 (the provision of special protection to children deprived of the family environment),<sup>95</sup> article 21 (in adoption),<sup>96</sup> and article 22 (recognising the rights of child refugees to remain with or be reunified with the family).<sup>97</sup>

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<sup>90</sup> *General Comment No 14* para 59; and the CRC art 5.

<sup>91</sup> CRC art 8.

<sup>92</sup> CRC art 10.

<sup>93</sup> CRC art 16.

<sup>94</sup> CRC art 18.

<sup>95</sup> CRC art 20.

<sup>96</sup> CRC art 21.

<sup>97</sup> CRC art 22.

Likewise, the African Children's Charter provides in its preamble that "the child occupies a unique and privileged position in African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding."<sup>98</sup> While the African Children's Charter provides similar provisions for preserving the family environment as the CRC, it does so in a manner that is nuanced and context-specific. It provides that "the family shall be society's natural unit and basis. It shall enjoy the protection and support of the State for its establishment and development."<sup>99</sup> Furthermore, Article 19(1) provides that "every child shall be entitled to the enjoyment of parental care and protection and shall, wherever possible, have the right to reside with their parents. No child shall be separated from his parents against his will, except when judicial authorities determine that it is in the child's best interest." Article 19(2) recognises the right of a child separated from their parents to maintain relationships and contact with them.<sup>100</sup>

The CRC and African Children's Charter frame the family as the cornerstone of societal structure and highlight the child's intrinsic right to family life, encompassing various family forms. General Comment No. 14 elaborates on this, stressing the significance of the family setting in safeguarding the child's well-being and asserting that any decision leading to family separation should be contemplated with utmost caution and as a measure of last resort.<sup>101</sup> General Comment No. 14 emphasises that such decisions must be made on clear evidence that remaining in the family environment could be detrimental to the child's welfare, thereby necessitating separation to uphold the child's best interests. Moreover, General Comment No. 14 delineates the conditions under which separation may be considered, emphasising that it should only occur when competent authorities, after comprehensive judicial review, conclude that it is imperative for the child's best interests, taking into account factors such as abuse, neglect, or the inability of parents to provide adequate care.<sup>102</sup>

In practical terms, this means that when assessing and determining the child's best interests in family-related legal disputes, courts must ensure, when appropriate, that the child maintains connections with their parents and family, considering the quality of the relationships

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<sup>98</sup> African Children's Charter, Preamble.

<sup>99</sup> African Children's Charter, art 18.

<sup>100</sup> African Children's Charter, art 19(1)-(2).

<sup>101</sup> CRC General Comment No. 14 para 58.

<sup>102</sup> CRC General Comment No. 14 para 63.

and the need to retain them.<sup>103</sup> Woodhouse argues that this is imperative when assessing and determining the best interests of the child because the right to family preservation recognises the importance of maintaining strong, nurturing connections with family members and the broader support system that the family provides.<sup>104</sup> These connections and relationships significantly impact the child's emotional well-being, sense of identity, and overall development. In General Comment No. 14, the CRC Committee highlighted that the family environment plays a crucial role in providing emotional stability and support to a child. Preserving positive family relationships in decision-making, such as those relationships with both parents, siblings, and extended family, can foster a sense of security and belonging for the child.<sup>105</sup> Similarly, in General Comment No. 20, the CRC Committee acknowledged that emotional stability is essential for a child's mental and emotional well-being, positively impacting their overall development.<sup>106</sup> In *Neulinger and Shuruk v. Switzerland*,<sup>107</sup> the European Court of Human Rights (ECHR) emphasised the importance of the best interests of the child in decisions regarding international child abduction and custody disputes. The Court highlighted the need to consider the child's well-being comprehensively, including maintaining family relations and ensuring stability and security.<sup>108</sup> Similarly, in *PC and S v the United Kingdom*,<sup>109</sup> which involved the removal of a child at birth from her parents due to concerns about the mother's mental health and the father's sex offender history, the ECHR found violations of the right to family life due to the immediate and automatic removal of the child without exploring other measures to protect the child while maintaining family bonds.<sup>110</sup> This case highlights the need for an approach in family-related legal disputes that is proportionate

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<sup>103</sup> *General Comment No 14* para 65; See also Committee on the Rights of the Child 'Concluding observations on the combined fifth to seventh periodic reports of Angola' CRC/C/AGO/CO/5-7 2018 para 24(c); Committee on the Rights of the Child 'Concluding observations on the combined second and third reports of Botswana' CRC/C/BWA/CO/2-3 2018 para 42.

<sup>104</sup> BB Woodhouse 'The child's right to family' (2020) in J Todres & S King (eds) *The Oxford Handbook of Children's Rights Law* Oxford Handbooks Oxford Academic 237–256, at 238.

<sup>105</sup> *General Comment No 14* para 60-61; and the CRC art 9(3).

<sup>106</sup> UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20 para 52.

<sup>107</sup> Application no. 41615/07 Council of Europe: European Court of Human Rights 6 July 2010.

<sup>108</sup> *Neulinger and Shuruk v. Switzerland* para 136 and 150.

<sup>109</sup> *PC and S v the United Kingdom* Application no. 56547/00.

<sup>110</sup> *PC and S v the United Kingdom* para 110 and 117.

and considers maintaining family connections where possible. Moreover, the child's return must secure the child's "development in a sound environment," not just physical security, and courts must carry out an in-depth, contemporaneous best interests analysis.<sup>111</sup> In addition, the protection of family life and the child's holistic development are the twin constitutive elements of THE CHILD'S BEST INTERESTS; therefore, automatic preference for return violates Article 8 of the CRC.<sup>112</sup>

Moreover, the CRC Committee confirms that family is the child's primary source of care and nurturance. When courts ensure that family relationships are maintained there is continuity in the caregiving and attachment of the child, which is critical for a child's healthy emotional development.<sup>113</sup> Disruption of these relationships can lead to feelings of loss, anxiety, and insecurity. The family environment also plays a significant role in shaping a child's cultural and social identity. Preserving family relationships allows the child to maintain connections to their cultural heritage, traditions, and values. This continuity is essential for fostering a positive sense of identity and belonging.<sup>114</sup>

#### **3.5.4 *The care, protection, and safety of the child***

Article 19 of the CRC requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.' While complementary safeguards appear in articles 32-37 of the CRC (economic exploitation, drug abuse, sexual abuse, trafficking).<sup>115</sup> General Comment No. 14 expands on this and provides that state parties must ensure the care, protection, and safety necessary for a child's well-being when assessing and determining their best interests. This includes the court's consideration of the child's basic material, physical, educational, and emotional needs.<sup>116</sup> The CRC Committee affirms that the child's care, protection, and safety are paramount when assessing and determining their best interests because it ensures that the child's well-being and

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<sup>111</sup> *X v Latvia* [GC] 2013 (27853/09) paras 95-106.

<sup>112</sup> *K.B. & Others v Croatia* [GC] 2017 (41424/10) paras 145-148.

<sup>113</sup> General Comment No 14 para 63.

<sup>114</sup> UN Committee on the Rights of the Child (CRC) General Comment No. 19 on public budgeting for the realization of children's rights (2016) 20 July 2016 CRC/C/GC/19 para 2.

<sup>115</sup> CRC, arts 19, 32-37.

<sup>116</sup> General Comment No 14 para 73.

physical safety are safeguarded in all decision-making processes.<sup>117</sup> Children need a safe and nurturing environment to grow physically, emotionally, and intellectually; and ensuring their care and protection gives them the foundation to thrive and reach their full potential.<sup>118</sup>

Therefore, in family-related legal disputes courts are tasked with conducting a holistic assessment that encompasses the child's material, physical, educational, and emotional needs. This thorough evaluation ensures that all aspects of the child's well-being, including living conditions and emotional support, are adequately addressed to facilitate their current and future development. Safety and protection are paramount in these considerations.<sup>119</sup> The court's process must prioritise the child's protection from potential harm or risks, as well as future risk, which necessitates a careful examination of the child's current or proposed care environment for any risk of abuse, neglect, or exploitation.<sup>120</sup> The proactive measures taken in this regard are fundamental to safeguarding the child's welfare. Moreover, the court must ensure that the child's environment is not merely safe but also nurturing and supportive. The quality of care and emotional support provided by caregivers is critical, as a stable and loving environment lays the foundation for the child's physical, emotional, and intellectual growth.<sup>121</sup> This requirement underscores the importance of maintaining a supportive atmosphere conducive to the child's overall development.

Recognising the inherent vulnerabilities of children, the CRC Committee requires courts to be particularly vigilant in protecting them from all forms of exploitation and abuse, including sexual, economic, and psychological mistreatment.<sup>122</sup> This protective stance involves a rigorous assessment of the child's environment and relationships, in family-related legal disputes, to identify and mitigate any potential risks, ensuring the child's safety and well-being. In instances where children have experienced violence or are at risk, courts must ensure access to comprehensive support services.<sup>123</sup> These services, including social services, healthcare,

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<sup>117</sup> General Comment No 14 para 74.

<sup>118</sup> General Comment No 14 para 71.

<sup>119</sup> General Comment No 14 para 72.

<sup>120</sup> General Comment No 14 para 73.

<sup>121</sup> General Comment No 14 para 74.

<sup>122</sup> See Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of Sweden' CRC/C/SWE/CO/6-7 2023 para 24; and Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of France' CRC/C/FRA/CO/6-7 2023 para 26.

<sup>123</sup> General Comment No 14 para 73.

education, and counselling, must be tailored to meet the child's specific needs and challenges, facilitating their recovery and promoting their welfare.

### **3.5.5 *Children in vulnerable situations***

International instruments emphasise the heightened protection owed to refugee and disabled children. Article 22(1) of the Convention on the Rights of the Child obliges States Parties to “ensure that a child who is seeking refugee status or who is considered a refugee shall receive appropriate protection and humanitarian assistance.”<sup>124</sup> Moreover, For minority or indigenous children, article 30 of the CRC confirms the right “to enjoy their own culture, practise their own religion and use their own language.”<sup>125</sup> Likewise, Article 23(1) recognises that “a mentally or physically disabled child should enjoy a full and decent life ... and receive special care.”<sup>126</sup> The regional framework mirrors these guarantees. Article 25 of the African Children’s Charter requires States to “ensure appropriate protection and assistance for every child seeking refugee status,” while Article 23 mandates “special measures of protection” for children with disabilities.<sup>127</sup> Incorporating these provisions into the South-African context highlights that refugee and disabled children constitute a distinct category of vulnerability; one that the best-interests assessment must expressly factor into both its substantive elements and procedural safeguards.

Thus, the CRC Committee recommends that the court’s assessments of a child's best interests in family-related legal disputes involving children in vulnerable situations necessitate the recognition of the unique vulnerabilities and circumstances of each child involved in such disputes. Firstly, courts must acknowledge the specific vulnerabilities a child may face, such as disabilities, minority status, refugee or asylum-seeker status, experiences of abuse, or living in street situations.<sup>128</sup> Recognising these vulnerabilities of children in family-related legal disputes is crucial for ensuring that the child's best interests are assessed with a deep understanding of their unique challenges and needs. This involves not only considering the rights outlined in the CRC but also integrating relevant protections from other human rights

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<sup>124</sup> CRC, art 22(1).

<sup>125</sup> CRC, art 30.

<sup>126</sup> CRC, art 23(1).

<sup>127</sup> African Children’s Charter, arts 25 and 23.

<sup>128</sup> General Comment No 14 para 75.

instruments, such as the Convention on the Rights of Persons with Disabilities (CRPD)<sup>129</sup> and the Convention relating to the Status of Refugees.<sup>130</sup> For Indigenous children, the CRC's General Comment No. 11 highlights the importance of considering the cultural, social, and linguistic context of the child's upbringing and the potential impacts of legal decisions on their ability to maintain connections with their heritage and community.<sup>131</sup> This includes recognising the right of indigenous children to enjoy their own culture, practice their religion, and use their language, as stated in Article 30 of the CRC.<sup>132</sup> Courts must ensure that decisions in family-related legal disputes do not inadvertently sever these essential cultural ties, considering the profound impact such disconnection could have on the child's identity and well-being.

Similarly, when addressing the circumstances of children in street situations, as elaborated in General Comment No. 21, courts must acknowledge the complex interplay of factors that contribute to this vulnerable state, including poverty, family breakdown, and exclusion from social services.<sup>133</sup> These children often face multiple risks, including exploitation, violence, and neglect, and require specific protection and assistance to ensure their rights are upheld. General Comment No. 21 calls for a rights-based approach to support these children, emphasising the need for interventions that go beyond immediate protection and aim to reintegrate them into society and, where possible, into their families, in a manner that respects their dignity and all of their rights.<sup>134</sup> This approach ensures that the child's best interests are evaluated holistically and encompasses all aspects of their well-being and rights.

Secondly, courts must avoid a one-size-fits-all approach when dealing with children in similarly vulnerable situations. Each child's best interests must be determined based on their individual circumstances, acknowledging that even within the same category of vulnerability, children may have different needs, strengths, and experiences. This requires a tailored assessment that considers the child's history, personal development, and the specific factors

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<sup>129</sup> UN General Assembly *Convention on the Rights of Persons with Disabilities* resolution / adopted by the General Assembly A/RES/61/106 24 January 2007.

<sup>130</sup> General Comment No 14 para 76.

<sup>131</sup> UN Committee on the Rights of the Child (CRC) General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child] CRC/C/GC/11, 12 February 2009 paras 46-48.

<sup>132</sup> CRC art 30.

<sup>133</sup> UN Committee on the Rights of the Child (CRC) *General comment No. 21 (2017): Children in street situations* CRC/C/GC/21 20 June 2017 para 28.

<sup>134</sup> CRC General Comment No. 21 paras 31-32.

contributing to their vulnerability.<sup>135</sup> The Inter-American Court of Human Rights (IACHR) addressed the best interests of children from diverse family backgrounds and the importance of a non-discriminatory approach in assessing those interests. In *Atala Riffo and Daughters v. Chile*, the IACHR considered the best interests of children in the context of custody disputes involving LGBTQ+ parents. The IACHR condemned discrimination based on sexual orientation and reaffirmed the need to focus on the well-being and best interests of the children involved, free from prejudices and stereotypes.<sup>136</sup>

### ***3.5.6 The rights to health and education***

General Comment No. 14 provides that courts must ensure that decisions in family-related legal disputes prioritise the child's health and educational needs, recognising these as integral components of their overall well-being and development.<sup>137</sup> When health-related decisions are specifically part of the dispute, such as in disputes involving medical treatment or the child's healthcare arrangements, courts must consider the child's right to health as outlined in Article 24 of the CRC.<sup>138</sup> This is supported by the CRC Committee in General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health, where it is provided that courts must recognise that ensuring the child's health goes beyond immediate medical treatment to encompass a holistic view of health that includes physical, mental, and emotional well-being.<sup>139</sup> This approach to a child's right to health necessitates that courts, when faced with health-related decisions in family-related legal disputes, consider not only the medical aspects but also the social, environmental, and familial factors contributing to the child's overall health.

Similarly, in disputes affecting a child's living arrangements, such as primary care or guardianship disputes, the CRC Committee provides that courts must assess the potential

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<sup>135</sup> UN General Assembly, Convention Relating to the Status of Refugees, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951.

<sup>136</sup> *Atala Riffo and Daughters v Chile* Series C No. 239.

<sup>137</sup> General Comment No 14 para 77.

<sup>138</sup> CRC art 24; See also African Children's Charter art 14.

<sup>139</sup> UN Committee on the Rights of the Child (CRC) General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) CRC/C/GC/15 17 April 2013 para 4.

impact on the child's access to quality education.<sup>140</sup> This includes considering the availability of early childhood, formal, non-formal, or informal education opportunities that can cater to the child's needs and aspirations.<sup>141</sup> The General Comment highlights the importance of a child-friendly educational environment, trained educators, and suitable teaching methods that not only contribute to the child's academic development but also to their enjoyment and fulfilment.<sup>142</sup>

The CRC Committee emphasised that the right to education is an essential element of the child's best interests, and courts must ensure that decisions do not inadvertently hinder their access to or the quality of education they receive.<sup>143</sup> This is particularly relevant in disputes that may result in significant changes to the child's living arrangements or socio-economic status, like international child abduction disputes, which could impact their educational continuity and quality. In practical terms, courts involved in family-related legal disputes must integrate a comprehensive understanding of the child's health and educational rights into their decision-making processes. McConnachie confirmed that this involves an assessment that considers the child's current and future health conditions, treatment options, or educational needs ensuring that the ultimate decisions serve to enhance the child's well-being, development, and fulfilment of their rights as enshrined in the CRC and African Children's Charter.<sup>144</sup>

Similarly, the CRC Committee's General Comment No. 1 on the aims of education highlights the transformative role of education in a child's life, asserting that education must be aimed at developing the child's personality, talents, and mental and physical abilities to their fullest potential.<sup>145</sup> This directive calls for courts to consider the broader objectives of education when assessing its impact on a child's best interests. A child-friendly educational environment, as highlighted in the General Comment, fosters respect for human rights, social justice, and environmental sustainability, preparing the child for a responsible life in a free

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<sup>140</sup> General Comment No 14 para 79.

<sup>141</sup> AB Halina 'The child right to education in the care and educational work of a foster care institutions' (2019) 22(3) *Studia Paedagogica Ignatiana* 161–181, at 165.

<sup>142</sup> Ibid.

<sup>143</sup> CRC art 28; See also African Children's Charter art 11.

<sup>144</sup> C McConnachie 'Concretising the right to basic education' (2012) 129(3) *South African Law Journal* 554-590, at 555.

<sup>145</sup> UN Committee on the Rights of the Child (CRC) *General comment No. 1 (2001), Article 29 (1), The aims of education* CRC/GC/2001/1 17 April 2001 para 1.

society.<sup>146</sup> In disputes that might disrupt a child's education, such as those involving changes in guardianship or living arrangements, courts must scrutinise how these changes could affect the child's right to a continuous, inclusive, and quality education. Decisions must facilitate, rather than obstruct, the child's access to education that adheres to the principles outlined in General Comment No. 1, ensuring that education serves as a means of empowerment and a foundation for the child's future.

### ***3.5.7 Balancing the elements***

Determining the child's best interests requires a delicate balancing of the elements relevant to the legal dispute. The CRC Committee confirmed that different elements will apply in different ways and disputes.<sup>147</sup> This is the advantage of the flexibility of the best interests principle, and where elements conflict in a particular family-related dispute, they will have to be weighed against each other to find a solution that is best for the child.<sup>148</sup> In such instances, the child's age, maturity, physical, emotional, cognitive, and social development should be considered, and decisions should be taken with the awareness of the evolving and developing child. In other words, decisions taken can be reviewed and adjusted according to the child's evolving age and development to promote stability in the child's life.<sup>149</sup>

The CRC introduced the principle of the "evolving capacities" of the child, which is a fundamental consideration in understanding and applying the rights enshrined within the Convention.<sup>150</sup> This principle acknowledges that children progressively acquire capacities as they grow and develop, which influences their ability to exercise and participate in their rights. Article 5 of the CRC specifically addresses this concept, stating that "States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide, in a manner consistent with the evolving

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<sup>146</sup> CRC *General Comment No. 1* para 8; See also Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland' CRC/C/GBR/CO/6-7 2023 para 47.

<sup>147</sup> General Comment No 14 para 80.

<sup>148</sup> General Comment No 14 para 81.

<sup>149</sup> General Comment No 14 para 84.

<sup>150</sup> See CRC art 5, 14(2) and African Children's Charter art 9(2) and 11(4).

capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention”.<sup>151</sup> This acknowledges that as children develop, so too does their ability to form their own views, make decisions, and take responsibility for those decisions. Article 5 of the CRC makes clear that this developmental concept is not child autonomy in the abstract; it is calibrated by the appropriate guidance and direction of parents or other caregivers in a manner consistent with the child’s growing capacities. Varadan shows that the provision “mediates a dynamic partnership between the child and her parents, replacing parental control with parental support as capacity evolves.” At the same time, Tobin and Varadan emphasise that the provision simultaneously secures children’s agency and recognises the family as the primary sphere for nurturing it.<sup>152</sup>

Moreover, the principle of evolving capacities is integral to the realisation of the child’s right to be heard and to have their views given due weight, as articulated in Article 12 of the CRC. It underlines the necessity for an approach in all actions concerning children, ensuring that their autonomy is respected and encouraged in line with their development, and that protection and guidance adjust appropriately as they grow. This principle is crucial in ensuring that children’s rights are respected in a manner that is both age-appropriate and individualised, recognising each child as an active participant in their own development. General Comment No. 7 on implementing child rights in early childhood further highlights the concept of evolving capacities, emphasising the need for early recognition of children as active rights holders from a young age.<sup>153</sup>

The principle of evolving capacities supports both the fiduciary and interest theories discussed in Chapter Two, which provided a framework that balanced the need for protection for children with the recognition of their developing autonomy. As discussed in Chapter Two, the fiduciary theory emphasises the duty of care and protection owed by parents to children, acknowledging their vulnerability and the need for guidance. The evolving capacities principle complements this by recognising that as children grow, their capacity for autonomy and decision-making increases, necessitating a gradual shift in the nature of fiduciary

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<sup>151</sup> CRC art 5.

<sup>152</sup> S Varadan, “Article 5 and the Child’s Right to Parental Direction and Guidance” (2019) 27 *International Journal of Children’s Rights* 305–333 at 311; J Tobin & S Varadan, “Article 5” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 165-183 at 170-172.

<sup>153</sup> UN Committee on the Rights of the Child (CRC) *General comment No. 7 (2005): Implementing Child Rights in Early Childhood* CRC/C/GC/7/Rev.1 20 September 2006 para 3 and 13.

responsibilities, from direct decision-making towards more of a guiding role, allowing children to exercise greater agency in accordance with their development.<sup>154</sup> The interest theory, which focuses on the rights and best interests of the child as paramount, is also supported by the evolving capacities principle. This principle ensures that children's rights are not static and that their ability to express and act on their interests grows over time. It advocates for a dynamic application of rights, ensuring that children's voices are heard and given weight in decisions affecting them, in line with their maturity.<sup>155</sup> Thus, the evolving capacities principle serves as a bridge between these theories, encouraging a model of guardianship and rights recognition that adapts to the child's developmental stage, ensuring their protection while progressively fostering their independence and respect for their autonomy.

Therefore, when assessing and determining the child's best interests, courts must take an individualised and child-centred approach that reflects the child's growth and changing needs over time. This involves not just a snapshot of the child's current state but an understanding that the child is in a continuous process of development. Elements such as the child's educational needs and aspirations, cultural and linguistic background, and any special needs or disabilities should be integral to this assessment. In recognising the child as an evolving individual, the child's participation in the decision-making process is crucial. This participatory approach respects the child's autonomy and supports the interest theory of children's rights.

Ultimately, the principle of the child's best interests must be applied with the flexibility to adapt to the child's changing circumstances. This may require periodic reassessment and adjustment of decisions to ensure that they continue to serve the child's best interests over time, providing a stable and supportive framework for their ongoing development. Throughout the process of assessing and determining the child's best interests in family-related legal disputes, courts must be mindful that the purpose of considering them is to ensure the full enjoyment of all of the child's rights and to protect and promote the child's holistic development.

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<sup>154</sup> See Chapter Two part 2.3.1.

<sup>155</sup> See Chapter Two part 2.3 and 2.3.3.

### **3.6 PROCEDURAL SAFEGUARDS TO DETERMINE THE BEST INTERESTS OF THE CHILD IN FAMILY-RELATED LEGAL DISPUTES**

The CRC Committee suggests procedural safeguards and guarantees to ensure that the best interests of the child in implemented correctly. The committee further recommends that State Parties put formal processes, with these objective procedural safeguards, in place for decision-makers.<sup>156</sup> Particularly for this thesis, this means that courts responsible for resolving family-related disputes should implement these procedural safeguards. Implementing these safeguards is necessary to ensure that children's rights are adequately protected and established throughout the decision-making process, ultimately promoting and realising the full range of children's rights, as envisaged in the CRC and the African Children's Charter.

Establishing objective procedural safeguards and formal processes ensures that the substantive elements to ensure the child's best interests are protected and not dismissed during the decision-making process. Implementing procedural safeguards is also crucial in promoting and maintaining decision-maker accountability. It ensures that courts do not act outside of the established legal framework or in a manner that is not in the child's best interests.

Such safeguards include the right of the child to participate in legal proceedings and have their views heard and given due weight,<sup>157</sup> the right to legal representation,<sup>158</sup> the gathering of facts about the child, to determine the relevant elements to consider in determining the child's best interest, by well-trained professionals;<sup>159</sup> the assessment and determination of the child's best interests to occur within the shortest time possible;<sup>160</sup> and by qualified professionals with the necessary expertise in child development;<sup>161</sup> mechanisms that are known and accessible by the child to appeal or revise decisions that are not made in accordance with the correct procedure.<sup>162</sup> This will be explored further below.

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<sup>156</sup> General Comment No 14 para 87.

<sup>157</sup> General Comment No 14 para 89-91.

<sup>158</sup> General Comment No 14 para 96.

<sup>159</sup> General Comment No 14 para 92.

<sup>160</sup> General Comment No 14 para 93.

<sup>161</sup> General Comment No 14 para 94.

<sup>162</sup> General Comment No 14 para 98.

### ***3.6.1 Communication with the child, hearing the child's voice and giving it due consideration***

The CRC Committee recognises that communicating with the child is an imperative aspect of the implementation of the best interests. Communicating with the child fosters meaningful child participation and means that the child is informed of all aspects of the process. It also means that information, views, and opinions can be sought from the child.<sup>163</sup> This ensures that the child is given the opportunity to participate in the decision-making process and that their views are considered in assessing the child's best interests. This critical aspect of the child's best interests is a substantive factor and a procedural safeguard. Therefore, it is essential to consider how this should practically happen in legal disputes.

Article 12(2) of the CRC obliges States to ensure that the child is “provided the opportunity to be heard in any judicial or administrative proceedings.”<sup>164</sup> The CRC Committee recommends that representation is appointed to the child to ensure the implementation of the child's right to express their views. The representative may be the child's parent, a legal professional or another suitably trained person. However, the conflict of interest between a potential representative and the child must be carefully considered before the representative is appointed. The main aim of the representative is to accurately transmit the child's views to the court and represent the child's interests only, not the interests of any other parties to the dispute.<sup>165</sup> As mentioned in part 3.5.1 above, the child's participation rights consist of two components: one for the child's views to be given due weight. Article 12 of the CRC requires that due weight is given to the child's views in accordance with the age and maturity of the child. This means that simply listening to the child is not enough; their views should be taken seriously and assessed in light of their understanding and capacity to form opinions. Age alone cannot determine the significance of a child's views, as children's levels of comprehension vary due to factors such as information, experience, environment, social and cultural influences, and

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<sup>163</sup> General Comment No 14 para 89.

<sup>164</sup> CRC, art 12(2).

<sup>165</sup> General Comment No 12 para 36 – 37.

support systems.<sup>166</sup> Therefore, a case-by-case examination is necessary to evaluate the child's capacity to express their views reasonably and independently. In this context, maturity refers to the child's ability to understand and assess the implications of the matter at hand. It is challenging to define maturity precisely, but it involves the child's capacity to express their views thoughtfully and independently, considering the issue's impact on their life. The more significant the impact, the more crucial it is to appropriately assess the child's maturity.<sup>167</sup> For a child to be able to express themselves effectively, the environment should not be intimidating, hostile, or unsuitable for their age. The proceedings should be accessible and tailored to suit the child's needs. This involves ensuring that the information provided is child-friendly and easy to understand. Additionally, the child should receive adequate support to advocate for themselves, and the professionals involved should be well-trained in dealing with children's disputes.<sup>168</sup> The format of acquiring the child's views should be conversational rather than a one-sided examination of the child, and the child should preferably not express their opinions in open court but somewhat under conditions of confidentiality.<sup>169</sup>

The CRC Committee further recommends appointing a *curator ad litem* in disputes of conflict between the child and their representative.<sup>170</sup> While the CRC Committee does not specify the official position or office that the representative should hold, it can be deduced by the provision for a curator and further provision for legal representation in General Comment No. 14 that the representative is appointed with the primary objective of representing the child's views. Thus, it can be deduced that this would be a professional person trained in child development and able to create a safe and conducive environment for the child to share their views freely. Therefore, where necessary, the court may appoint a *curator ad litem*, a court-appointed legal representative whose sole duty is to advance the child's best interests and who is distinct from any privately instructed lawyer.<sup>171</sup>

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<sup>166</sup> See Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of Bulgaria' CRC/C/BGR/CO/6-7 2024 para 20 where the CRC Committee encouraged Bulgaria to respect the views of children even when they are below the age of 10 years.

<sup>167</sup> General Comment No 12 para 28-30.

<sup>168</sup> General Comment No 12 para 34.

<sup>169</sup> General Comment No 12 para 43.

<sup>170</sup> General Comment No 14 para 90.

<sup>171</sup> A *curator ad litem* is appointed under High Court Rule 57 to represent the interests of a minor or person under disability; South African law does not employ the US term "*guardian ad litem*." See Soller NO v G and Another 2003 (5) SA 430 (W).

The CRC Committee also recognises the need for the child to have legal representation in disputes where their best interests are being assessed and determined. This legal representation is in addition to the child's guardian, curator, or representative of their views.<sup>172</sup> The child's legal representative would be a legal practitioner appointed separately from the parent's legal representatives to represent the child during the court proceedings.<sup>173</sup>

These representatives are imperative when determining the child's best interests in court to ensure that the child's rights and perspectives are adequately represented and heard. Having a separate legal representative for the child ensures the child's rights are safeguarded throughout the legal process. Children may only sometimes be able to understand the complexities of legal proceedings fully and might not be aware of their rights. A dedicated legal representative for the child can advocate for their rights, ensure due process, and protect them from potential exploitation or manipulation.

The court encourages the child's active involvement in the decision-making process by providing the child with his legal representative and an additional representative to hear and share his views. This participation empowers the child and allows him to express his preferences, needs, and concerns related to the above substantive elements, which are crucial in assessing and determining their best interests. Moreover, State Parties are obligated to ensure that funding is available in the public budget to achieve the meaningful participation of children in matters that affect them.<sup>174</sup>

Having multiple representatives dedicated to the child's interests helps ensure a more comprehensive and objective assessment of the child's situation—the child's legal representative advocates for the child's rights and interests. In contrast, the additional representative, such as a *curator ad litem*, psychologist, or social worker, provides an impartial perspective to the court. This helps the court assess, consider, and balance the substantive elements and make a best interests determination that prioritises the child's well-being without bias or undue influence.

Moreover, in some disputes, the child's best interests may conflict with those of the parents, caregivers, or other parties involved. Having independent legal representation for the

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<sup>172</sup> General Comment No 14 para 96.

<sup>173</sup> See Committee on the Rights of the Child 'Concluding observations on the combined sixth and seventh periodic reports of Sweden' CRC/C/SWE/CO/6-7 2023 para 28.

<sup>174</sup> UN Committee on the Rights of the Child (CRC Committee) *General comment no. 19 (2016) on public budgeting for the realization of children's rights* 20 July 2016 CRC/C/GC/19 para 53.

child allows the court to address potential conflicts and balance the interests. It ensures that the child's well-being remains the central focus and that decisions are made with the child's best interests as the guiding principle.

In addition, children may face communication barriers in expressing their views effectively in court due to, for example, a very young age, language difficulties or disability. The child's representatives can help bridge this gap by facilitating communication and ensuring that the child's views are accurately conveyed to the court for consideration.

Having dedicated representatives for the child also helps create a supportive and child-sensitive atmosphere in the courtroom, making the process less intimidating and more child-friendly.

### ***3.6.2 An interdisciplinary team of trained professionals***

To ensure the implementation of the child's best interests, the CRC Committee recommends that well-trained professionals acquire facts and information related to the case. These facts and information are essential to determine which elements must be considered in assessing the child's best interests.<sup>175</sup> Moreover, the duty in Article 3(3) of the CRC, to ensure institutions conform to standards of competence and supervision, underpins the call for multidisciplinary teams.<sup>176</sup> Children are not a homogenous group, they have their personalities and characteristics, and therefore, the professionals tasked with working with children to assist in assessing and determining their best interests must have the necessary expertise in children and adolescent development to understand the uniqueness of each child. The CRC Committee has emphasised that it is ideal for a multi-disciplinary group of professionals to assess the child's best interests.<sup>177</sup> This could be a teacher, social worker, or specialist like a psychologist or physician.<sup>178</sup>

Moreover, to ensure the implementation of the child's best interests, the professional process must be done in a child-friendly setting that is conducive to the child's personality. The court must adequately prepare the child before the hearing by explaining how, when and where

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<sup>175</sup> General Comment No 14 para 92.

<sup>176</sup> CRC, art 3(3).

<sup>177</sup> General Comment No 14 para 94.

<sup>178</sup> General Comment No 12 para 42.

the hearing will take place and who will be involved.<sup>179</sup> In addition, the child's characteristics must be considered when considering the likely consequences of possible outcomes of the case.<sup>180</sup> Pertinent to South Africa is the consideration of children's cultural nuances and identity when assessing the child's best interest. Successfully achieving this goal and fulfilling the obligation of State Parties necessitates the training and awareness-raising of the professionals involved in the matter.<sup>181</sup>

Having an interdisciplinary team of professionals involved in assessing and determining the child's best interests is essential for several reasons. First, the child's best interests are complex, encompassing various aspects of their lives, such as physical, emotional, psychological, educational, and social well-being, and will change over time as the child develops. By bringing together professionals from different fields related to child development and law, each with expertise in specific areas, an interdisciplinary team can conduct a thorough and holistic assessment of the child's needs and circumstances.<sup>182</sup>

Moreover, professionals bring diverse perspectives and insights based on their respective disciplines.<sup>183</sup> For example, psychologists can provide valuable insights into the child's emotional and mental well-being, educators can assess their educational needs, social workers can evaluate their family and social environment, and medical professionals can address their health-related concerns. This diverse input ensures a well-rounded understanding of the substantive elements regarding the child that are necessary for assessing and determining their best interests. It helps avoid tunnel vision or bias resulting from a single disciplinary perspective.

Furthermore, an interdisciplinary team fosters a collaborative approach to decision-making. Professionals can share information, exchange ideas, and collectively assess the child's situation by working together. This collaboration can lead to more comprehensive and informed decisions considering multiple perspectives. It also encourages open discussions, where experts

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<sup>179</sup> General Comment No 12 para 41.

<sup>180</sup> General Comment No 14 para 95.

<sup>181</sup> UN Committee on the Rights of the Child (CRC Committee), General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child], 12 February 2009, *CRC/C/GC/11* para 33.

<sup>182</sup> General Comment No 14 para 52-79.

<sup>183</sup> UNICEF & WHO *INSPIRE* (2016) at 60-66.

can challenge each other's assumptions and contribute to a more thorough and robust assessment and determination of the child's best interests.<sup>184</sup>

An interdisciplinary team is particularly effective in providing a child-centred approach to decision-making. The child's well-being and interests remain the central focus throughout the assessment process. The team ensures that all decisions and recommendations consider the child's best interests, promoting their overall development and protection.

Lastly, an interdisciplinary team facilitates effective coordination among professionals involved in the child's case. This ensures a seamless transition between different services and support systems, leading to continuity of care for the child as the child develops.

### ***3.6.3 Expedited judicial action with processes for review***

In family-related legal disputes, the distinctive way children perceive and experience time compared to adults becomes particularly significant.<sup>185</sup> The rapid pace of a child's development highlights the need for the judicial system to expedite decisions in these disputes. Delays can not only hinder the child's immediate well-being but also have long-lasting effects, as the child's needs and circumstances may evolve over time. Prompt judicial action ensures that resolutions are aligned with the child's current developmental stage and immediate needs, providing them with stability and security essential for their growth.<sup>186</sup> *G.N. v Italy* reiterates that delays undermine the child's "sound development" and may tilt THE CHILD'S BEST INTERESTS analysis against return.<sup>187</sup>

Recognising the child's evolving capacities, as discussed in part 3.5.7 above, courts must prioritise swift decision-making in family-related legal disputes to minimise potential disruptions to the child's emotional and social development. Quick resolutions help maintain a sense of continuity and security for the child, contributing to a stable environment conducive to their well-being.<sup>188</sup> Furthermore, timely decisions allow for the child's meaningful participation in the process, ensuring their views are considered in a context that remains

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<sup>184</sup> A Healy & Y Darlington "Service user participation in multidisciplinary child protection teams" (2009) *British Journal of Social Work* 39 (1) 109-123 at 111-112.

<sup>185</sup> General Comment No 14 para 93.

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

<sup>187</sup> *G.N. v Italy* 2021 (43134/15) paras 103-109.

<sup>188</sup> *Ibid.*

relevant to their current situation and experiences.<sup>189</sup> The practical benefits of expedited judicial processes extend to the implementation of court orders and recommendations, enabling child welfare services and support networks to promptly address the child's needs. This efficiency is crucial in mitigating the emotional and financial strains that prolonged legal proceedings can place on families, ultimately supporting the child's best interests by fostering a nurturing family environment.

Courts must also articulate clearly how the child's best interests were central to their decision-making, as mandated by the CRC Committee.<sup>190</sup> This includes detailing the considerations taken into account, how various elements were weighed, and providing specific reasons for decisions, especially those that may not align with the child's expressed wishes.<sup>191</sup> Such transparency and accountability are vital for upholding the child's rights and for fostering an environment where the child's participation is taken seriously.

Moreover, the judicial system should have mechanisms for reviewing or appealing decisions, particularly if the initial assessment of the child's best interests is deemed incorrect or if procedural safeguards were not respected.<sup>192</sup> Periodic reviews of court decisions are essential, reflecting the child's changing needs and circumstances as they grow. As discussed in part 3.5.7 above, this dynamic approach to judicial decision-making in family-related legal disputes ensures that the child's rights and well-being are protected throughout their developmental journey. Additionally, the establishment of a complaint procedure and the appointment of an ombudsman or a similar role are crucial for providing children with avenues to voice their concerns and grievances.<sup>193</sup> Such measures ensure that children's rights are not only recognised but also actively protected within the legal framework, aligning with the principles outlined in the CRC and African Children's Charter.

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<sup>189</sup> General Comment No 14 para 91.

<sup>190</sup> General Comment No 14 para 97.

<sup>191</sup> Ibid.

<sup>192</sup> General Comment No 14 para 98.

<sup>193</sup> Ibid; See also *General Comment No 12* para 46; and UN Committee on the Rights of the Child (CRC Committee) General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child 27 November 2003, CRC/GC/2003/5 para. 24.

### 3.7 CONCLUSION

The primary objective of this chapter was to determine what substantive elements and procedural safeguards stem from the obligations established by the CRC and the African Children's Charter that ought to be incorporated in domestic law to determine the child's best interests in family-related disputes. To achieve this objective, the chapter first explored the CRC and the African Children's Charter as the two primary instruments that establish the best interests obligation; and then examined the substantive elements and procedural safeguards that stem from the international obligations related to the best interests principle.

Drawing on chapter two, this chapter determined that the CRC and the African Children's Charter have set standards for recognising children as independent rights holders rather than extensions of their families. These frameworks have established a range of elements, from ensuring children's holistic well-being to safeguarding their individual rights, that play a critical role in guiding decision-making in family-related disputes.

Accordingly, the chapter found that substantive elements should guide decision-makers in determining the child's best interests and highlighted three main substantive aspects that should be considered in decision-making. Child participation is a core substantive element requiring that children's views be heard and considered in matters affecting them. This element recognises children's developing autonomy and supports their right to participate meaningfully in decisions that impact their lives. Second, other substantive elements, such as the child's identity and preserving family connections, are vital for the child's overall development as it encompasses their physical, mental, social, and emotional needs. Finally, the child's education and health rights are crucial in safeguarding the child's current and future well-being.

Moreover, the chapter determined that procedural safeguards provide a necessary framework informing decision-makers how to consider the substantive aspects effectively and consistently. In this respect, three main safeguards were highlighted. First, representation of the child to protect the child's participation in practice is essential to ensuring that children's perspectives are not marginalised. This procedural safeguard is accompanied by the requirement for child-friendly environments, enabling children to understand the decision-making process and contribute meaningfully to it. For instance, appointing a legal representative or *curator ad litem* in cases where the child's best interests conflict with those of their family helps to avoid further potential conflicts and maintain an unbiased focus on the child's well-being.

Second, is the establishment of an interdisciplinary team of professionals to advise courts. The diverse insights provided by professionals such as psychologists, social workers, and child development experts ensure that decisions are objective and based on an informed and evidence-based understanding of children and their developmental needs. This interdisciplinary approach also prevents reliance on a single disciplinary perspective, which could skew outcomes, and instead promotes a more balanced and individualised assessment of the child's best interests.

Finally, timely decision-making processes are vital to implementing the best interests principle effectively. Given that delays in legal proceedings can have detrimental impacts on a child's development and emotional well-being, the CRC and African Children's Charter highlight the need for expedited judicial action. Alongside this, mechanisms for reviewing or revisiting decisions in light of the child's evolving needs and circumstances provide a dynamic approach that responds to changes in the child's development and circumstances over time. These substantive and procedural aspects of decision-making reinforce the central principles of the fiduciary and interest theories.

Thus, the thesis argues that the decision-making process, in family-related disputes, must protect the child's best interests by assessing substantive elements and implementing procedural safeguards, that respect the developing autonomy of the child and the child's meaningful participation, to determine the child's best interests. To advance the child's best interests in family-related disputes, domestic law must adequately incorporate these principles.

In particular, the law should establish clear rights for the child's participation; to protect and promote the child's identity and family and cultural connections; to ensure the health and education of the child; and special protection for vulnerable children.

Of parallel significance, the domestic framework must include procedures by which the rights of the child can be enforced in practice. The availability of representation for the child and child-friendly environments, who advises the court on the child's current and future well-being, how quickly family-related disputes are resolved, and whether children can appeal or request a review of decisions made must be made clear by the law.

Therefore, Chapter Four begins a two-part enquiry, first examining how South Africa has positioned the child's best interests in its new domestic framework and then, analysing the extent to which the substantive elements are incorporated in domestic law to protect the child's best interests in the decision-making process.

## **CHAPTER FOUR**

### **THE PROTECTION OF THE CHILD'S BEST INTERESTS AND SUBSTANTIVE ELEMENTS UNDER SOUTH AFRICAN LAW**

#### **4.1 INTRODUCTION**

The preceding chapters identified the substantive elements and procedural safeguards that ought to underpin the protection of the child's best interests in the decision-making process in family-related disputes. Having established that the international normative framework essentially requires states to recognise children as autonomous rights holders, while respecting family and cultural connections and the child's developing autonomy, the next three chapters will evaluate how South Africa's legal framework and court decisions fare against the international standards with regard to protecting the child's best interests in the decision-making process.

Before turning to the analysis, it is important to discuss South Africa's context and the evolution of the best interests principle within its law. South Africa's recognition of the child's best interests has undergone a fundamental transformation, evolving from a concept that was minimally protected under apartheid to a constitutional imperative. Under apartheid, non-white children lacked legal recognition as rights holders, and were subjected to systemic neglect, exploitation, and inequality. With the transition to democracy in 1994, the new Constitution radically shifted this approach, making the child's best interests a matter of paramount importance in all matters concerning the child.

This chapter forms part of a two-chapter enquiry to analyse the extent to which South Africa's domestic legal framework incorporates international standards for determining the child's best interests. The chapter is divided into two parts. The first part provides an overview of the evolution of the concept of the child's best interests in South Africa, tracing its progression from a history marked by severe violations of children's rights to the present

recognition of children as rights holders. It aims to determine how the Constitution and the Children's Act<sup>1</sup> have positioned the principle in the new legal framework.

The second part evaluates the substantive elements that stem from the international framework and that should be considered in decision-making to advance the child's best interests. This part aims to determine the extent to which the South African legal framework protects the substantive elements of children as outlined in Chapter Three. This discussion focuses on child participation, preserving the family environment, protecting the child's identity, ensuring access to health and education, and addressing the unique needs of vulnerable children. Together, this chapter and the next address the third sub-research question of the thesis, "to what extent has South Africa incorporated the substantive and procedural recommendations stemming from its international obligations into its domestic framework?"

## **4.2 SOUTH AFRICA'S HISTORICAL INEQUALITY AND LIVED REALITY**

The historical and socio-economic context of South African children's rights serve as a foundation for understanding the discussion and assessment that follows in this chapter and the next. The overview of South Africa's lived reality contextualises the best interests principle within a society that seeks to redress severe historical abuses and fulfil its duty to children, providing a moral and legal rationale for the current children's rights framework in the South African Constitution and Children's Act.

Under apartheid, children's rights were gravely neglected, and systemic racism dictated access to basic human rights.<sup>2</sup> By 1994, South Africa's population of approximately 41 million was racially divided with black Africans making up 76%, whites 12.8%, coloureds 8.5%,<sup>3</sup> and Asians 2.6%.<sup>4</sup> This stratification was not merely a demographic reality but an enforced system

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<sup>1</sup> The first part evaluates the substantive elements of the child's best interests principle, answering the question, "to what extent does the South African legal framework protect the substantive rights of children as outlined in Chapter Three?" This discussion focuses on child participation, preserving the family environment, protecting the child's identity, ensuring access to health and education, and addressing the unique needs of vulnerable children.

<sup>2</sup> M Mutua 'Hope and despair for a new South Africa: The limits of rights discourse' (1997) *Harvard Human Rights Journal* 63-114, at 71.

<sup>3</sup> 'Coloured' is a term referring to a mixed race of African, white, and Asian descent.

<sup>4</sup> M Mutua (1997) at 72.

of exclusion and discrimination that permeated every aspect of social, economic, and political life.<sup>5</sup> For non-white children, apartheid meant limited, if any, access to education, healthcare, and stable family life and connections. Children were exposed to violence, deprivation, and exploitation as their most formative experiences.<sup>6</sup>

A plethora of laws, regulations, and policies were passed to realise the ideology of the Apartheid government. Despite the 1959 Declaration<sup>7</sup> providing that “mankind owes to the child the best that it has to give” and its protection of children from abuse, neglect, and exploitation, the Apartheid regime was entirely abusive; and its laws, like the Population Registration Act<sup>8</sup> and the Group Areas Act,<sup>9</sup> fostered conditions where the abuse, neglect, and exploitation of children was rampant.<sup>10</sup>

As children bore witness to violence, forced removals, detentions, and even torture, their childhoods were marked by severe trauma and instability.<sup>11</sup> Such exposure to systemic neglect and violence inevitably led to intergenerational cycles of poverty, lack of education, and limited economic opportunities for black and coloured families.<sup>12</sup> In effect, apartheid entrenched the exclusion of children from fundamental protections, revealing the absence of a framework that recognised their basic human dignity or best interests.<sup>13</sup>

With the end of apartheid in 1994, South Africa faced the enormous task of addressing a fractured society with a deep-rooted legacy of inequality and abuse.<sup>14</sup> The history of gross violations of children’s rights highlighted why, in the post-apartheid era, South Africa adopted

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<sup>5</sup> L Thompson & L Berat *A history of South Africa: from the earliest known human habitation to the present* 4 ed (2014) Johannesburg: Jonathan Ball at 188.

<sup>6</sup> Thompson & Berat (2014) at 187–220.

<sup>7</sup> 1959 Declaration.

<sup>8</sup> Population Registration Act No 30 of 1950.

<sup>9</sup> Group Areas Act No 41 of 1950.

<sup>10</sup> E Fourie ‘The UN Convention on the Rights of the Child and the crisis for children in South Africa: Apartheid and detention (1990) 12 *Human Rights Quarterly* 106-114, at 106.

<sup>11</sup> BB Woodhouse ‘Recognising children’s rights: Lessons from South Africa’ (1999) 26 *Human Rights* 15-18, at 17.

<sup>12</sup> Woodhouse (1999) at 18.

<sup>13</sup> Fourie (1990) at 108.

<sup>14</sup> S Smith & N Somhlaba ‘Post-Apartheid South African children’s coping with daily hassles: Relation to psychological adjustment’ (2015) 24(5) *Journal of Child and Family Studies* Smith, Samantha J. and Nceba Z. Somhlaba. “Post-Apartheid South African Children’s Coping with Daily Hassles: Relation to Psychological Adjustment.” *Journal of Child and Family Studies* 24 (2015): 1358-1372, at 1361.

a constitution that emphasises children’s rights with unprecedented clarity.<sup>15</sup> The apartheid legacy left an urgent mandate for the new government to establish a legal framework that would not only protect children from harm but also affirm their intrinsic rights as individuals.<sup>16</sup>

Post-apartheid South Africa assumed a renewed fiduciary duty toward its children, reflecting a commitment to protect, nurture, and honour their inherent rights. Likewise, it reinforces that children’s rights are not granted by the state but are intrinsic to the child’s personhood. In establishing children’s rights within the Constitution, the state not only acknowledges its duty but commits to actively supporting children’s welfare. The inclusion of the best interests principle thus serves as a testament to this commitment, designed to safeguard children’s welfare and redress the injustices of the past.

Despite the end of apartheid, South Africa remains a society characterised by deep-rooted inequalities and systemic disparities that continue to shape children’s access to and enjoyment of their rights.<sup>17</sup> Economic hardship, urban-rural divides, inadequate service delivery, and lingering racial inequities persist and often limit children’s opportunities for participation and development.<sup>18</sup> The legacy of apartheid includes over 50% of births in the country being children born out of wedlock.<sup>19</sup> Moreover, just over 30% of South African children live with both of their biological children.<sup>20</sup> As a result, while South African law now recognises children as rights holders, the lived reality of many children reflects a complex struggle to assert these rights meaningfully. Against this backdrop, the next part discusses the evolution of the child’s best interests in South Africa.

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<sup>15</sup> W Binford (2015) at 343.

<sup>16</sup> W Binford (2015) at 343.

<sup>17</sup> L Richter L Sherr & C Desmond *An obvious truth: children affected by HIV and AIDS are best cared for in functional families with basic income security, access to health care and education, and support from kin and community. Synthesis report, joint learning initiative on children and HIV/AIDS learning group 1: Strengthening families* (2008) Pretoria: Human Sciences Research Council Press.

<sup>18</sup> K Hall & Z Mokomane ‘The shape of children’s families and households a demographic overview’ (2018) in K Hall, L Richter, Z Mokomane & L Lake (eds) *South African Child Gauge* Cape Town: Children’s Institute University of Cape Town 32-45, at 32; See also M Rabe ‘Can the “African household” be presented meaningfully in large-scale surveys?’ (2008) 12 *African Sociological Review* 167–181, at 170.

<sup>19</sup> South African Law Reform Commission *Discussion Paper 148 Alternative Dispute Resolution in Family Matters* (2019) para. 2.1.2.

<sup>20</sup> *Ibid.*

## 4.3 OVERVIEW OF THE EVOLUTION OF THE CHILD'S BEST INTERESTS IN SOUTH AFRICA

This part of the thesis, and the next, discuss the evolution of the child's best interests in South Africa and provides an overview of the framework regulating it. This part aims to evaluate the development of the domestic framework for protecting the child's best interests against the backdrop of Chapters Two and Three. The discussion follows a chronological order from 1948, when the paramountcy of the child's best interests was first recognised by courts in South Africa, to the current legal framework.

### 4.3.1 *Fletcher v Fletcher*

The evolution of the principle of the best interests of the child in South Africa reflects both legal and societal changes over several decades. Each phase in this evolution reflects changing attitudes towards children, their role in society, and the obligations of the state and families in safeguarding their best interests. *Fletcher v Fletcher*<sup>21</sup> marked a turning point for the child's best interests principle. This case was the first to recognise the distinct status of child in families and to view children as the bearer of rights.<sup>22</sup> Before *Fletcher*, it was unheard of for courts to consider the status of children in family-related disputes; decisions typically focused on fathers' rights or applied the "fault principle," where the actions of one parent leading to the dispute would result in more favourable outcomes for the "innocent spouse."<sup>23</sup>

*Fletcher* embedded the child's best interests in South African law as a paramount and overriding consideration in family-related disputes.<sup>24</sup> This meant that in disputes involving

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<sup>21</sup> *Fletcher v Fletcher* 1948 (1) SA 130 (A).

<sup>22</sup> In the judgment Centlivres JA stated, "...I do not like the expression 'the rights against 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 the child were a mere chattel." Implying that children hold valuable positions within their families and are holders of rights themselves; See *Fletcher v Fletcher* at 134.

<sup>23</sup> See, for example, cases like *Cook v Cook* 1937 AD 154, *Calitz v Calitz* 1939 AD 56, *Cronje v Cronje* 1907 TS 871 and *Van Rooyen v Werner* 1982 (9) SC 425 where courts determined the custody of the children involved based on the fault principle.

<sup>24</sup> *Fletcher v Fletcher* at 134.

children, all other considerations, such as a parent's guilt or innocence, became secondary to the child's best interests. The court confirmed that the question of a parent's guilt or innocence should only be taken into account when the child's best interests are unclear.<sup>25</sup> While this case brought about certainty on the paramountcy of the child's best interests in family-related disputes, the interpretation of this principle by courts were still uncertain. Mnookin attributes this to the fact that it is impossible to define the child's best interests.<sup>26</sup> This view was seen in various cases after *Fletcher* where courts recognised the paramountcy of the child's best interests but applied and interpreted the principle in different ways.<sup>27</sup> There was a clear need for guidelines for courts to determine the child's best interests in the decision-making process.

#### ***4.3.2 Pre-constitutional legislative protection of the child's best interests***

Between the *Fletcher* case and the introduction of the Constitution, several statutes were enacted that, although not exclusively focused on children, provided some clarity on the consideration of the welfare of children in decision-making. The Matrimonial Affairs Act<sup>28</sup> came into effect in 1953 and contained limited provisions relevant to children and primarily concerned guardianship and custody. Section 5 of the Act allowed courts to make determinations on the guardianship or custody of a child involved in divorce or separation cases, provided that it was in the child's best interests.<sup>29</sup> However, the Act provided no guidance on what to consider or how to determine the child's best interests, the focus instead was on parental interests than on the child's interests.

The Matrimonial Affairs Act, which has been repealed, fell short of the standards set by international law.<sup>30</sup> Unlike the international standards, the Matrimonial Affairs Act did not recognise the inherent rights that children possess and as such, did not include provisions for

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<sup>25</sup> The majority judgment held 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"; See *Fletcher v Fletcher* at 132.

<sup>26</sup> R Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) *Law and Contemporary Problems* 226-293, at 260.

<sup>27</sup> See cases like *Manning v Manning* 1975 (4) SA 659 (T); *French v French* 1971 (4) SA 298 (W) and *Myers v Leviton* 1949 (1) SA 203 (T) where the maternal preference rule and tender years doctrine arose.

<sup>28</sup> Matrimonial Affairs Act 37 of 1953.

<sup>29</sup> Matrimonial Affairs Act s 5(2) – (7).

<sup>30</sup> See Chapter Three.

child participation or mechanisms to ensure that the child's perspective is considered in the decision-making process. Additionally, this Act did not recognise the developing autonomy of children and there was no requirement for courts to provide explanations of decisions taken in terms that a child might understand, a procedural safeguard that international law considers essential for ensuring the child's engagement in their own welfare.

Likewise, the Divorce Act,<sup>31</sup> which came into effect in 1979 and is currently in force, includes specific provisions concerning the welfare of children in divorce proceedings. Section 6 establishes that a divorce decree cannot be granted until the court is satisfied that arrangements concerning any child of the marriage are adequate.<sup>32</sup> The court must assess whether these provisions are "satisfactory or are the best that can be effected in the circumstances", thereby ensuring that the child's welfare remains a primary consideration in divorce cases.<sup>33</sup> The Divorce Act further empowers the court to conduct any necessary investigations and to summon relevant individuals to ensure that the welfare of the child is adequately addressed.<sup>34</sup> Moreover, the Act emphasises the flexibility that courts should have in addressing each child's unique circumstances.<sup>35</sup> This approach is partially consistent with international standards, because it recognises the significance of the child's best interests. It improves on the Matrimonial Affairs Act by considering the individual circumstances of children. However, although the Act implicitly provides for the child's voice through the court's discretionary investigation, it lacks direct mechanisms for including the child's voice in the decision-making process which is critical to ensure the child's participation and representation. This is unsurprising given that the Divorce Act's aim is to regulate the consequences of the dissolution of marriage and not to protect the welfare of children. Accordingly, like the Matrimonial Affairs Act, the Divorce Act does not mandate explicit child-centred procedures, such as appointing legal representation for the child or ensuring a child friendly environment.

Similarly, the Child Care Act,<sup>36</sup> which came into effect in 1987 and was the cornerstone statute for child welfare during the apartheid period, falls short. The name of this Act makes it

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<sup>31</sup> Divorce Act 70 of 1979.

<sup>32</sup> Divorce Act s 6(1).

<sup>33</sup> Ibid.

<sup>34</sup> Divorce Act s 6(2); See part 5. for further discussion on the court's discretion to investigate and summon relevant individuals in Chapter Five.

<sup>35</sup> Divorce Act s 6(3).

<sup>36</sup> Child Care Act 74 of 1983.

clear that its aim was to provide for the protection of children, not for their autonomy or personhood. The Act largely reflected a paternalistic perspective, in which children were perceived as passive recipients of state protection rather than as autonomous rights holders. The paternalistic nature of the Child Care Act is evident in its treatment of children as individuals in need of protection, but without recognition of their evolving autonomy, participation rights or other elements relevant to the child's holistic development. Furthermore, this approach did not consider the unique contexts in which children lived or the individual needs and circumstances of children. Moreover, while the Child Care Act refers to the child's "welfare", it does not explicitly include the child's best interests. Rather, it seems that "welfare" in the Act, refers mainly to the child's physical care, with no guidance provided on how care for the other needs of the child should be considered.

Despite these limitations, the Child Care Act established some foundational concepts that influenced the development of subsequent child rights legislation. For example, the recognition of children "in need of care" introduced a basic level of protection for child welfare, although it lacked a coherent framework to substantiate what constituted the "best interests" of the child.<sup>37</sup> Notably, the Act's emphasis on the nuclear family failed to acknowledge the diverse family structures that characterised many South African communities, including those with strong extended kin connections. This oversight was partly a legacy of apartheid-era ideologies, which undermined and marginalised communal child-rearing practices, thereby distorting the legal framework's responsiveness to children's actual social realities. This omission highlights the inadequacy of the Act in addressing the lived realities of many South African children, whose welfare often depended on broader community connections and structures rather than the narrow confines of nuclear family units. The Child Care Act's failure to fully incorporate children's actual interests and rights led to inconsistencies in the application of child welfare provisions. Without clear guidelines or procedures for considering each child's unique circumstances, these deficiencies ultimately drove the need for the more comprehensive reforms introduced in subsequent legislation.<sup>38</sup>

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<sup>37</sup> South African Law Reform Commission *Issue Paper 13 Project 110 The Review of the Child Care Act* First Issue Paper 18 April 1998 at 59; See also HM Bosman-Swanepoel PJ Wessels & JJ Scherman *A practical approach to the Child Care Act* (1995) Digma.

<sup>38</sup> SALRC (1998) at 19-21.

### 4.3.3 The McCall list

In the absence of clear guidelines, the pre-constitutional framework placed the burden on parents to show that existing arrangements were not in the child's best interests and that a change would better serve those interests.<sup>39</sup> As noted above, courts tended to focus heavily on parental concerns rather than engaging with the child's perspective.<sup>40</sup> Although courts enjoyed broad discretion, they often exercised it with minimal regard for the child's actual interests, offering explanations primarily to parents rather than including children in the process.<sup>41</sup>

This changed with *McCall v McCall*,<sup>42</sup> which represented a significant advancement in the interpretation of the best interests principle. In this landmark case, the "McCall list" provided a comprehensive set of factors for courts to consider when determining a child's best interests. The McCall list provides:

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;

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<sup>39</sup> A Moyo 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child' (2012) 1 *African Human Rights Law Journal* 142-177, at 143.

<sup>40</sup> Ibid.

<sup>41</sup> B Banach 'The best interests of the child: decision-making factors. families in society' (1998) 79 *Journal of Computational Social Science* at 331; See also A Barratt 'The best interests of the child: where is the child's voice?' in S Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) at 145.

<sup>42</sup> *McCall v McCall* 1994 (3) SA 201 (C).

- 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; and
- m) any other factor which is relevant to the particular case with which the court is concerned.<sup>43</sup>

The introduction of the McCall list brought greater structure and consistency to determining a child's best interests,<sup>44</sup> marking a partial shift toward a more child-focused approach aligned with international standards. Yet, while the list acknowledged that each child's circumstances require individualised consideration, it still largely reflected a parent-centred, paternalistic view of children, failing to fully recognise their evolving autonomy or meaningful participation in the process. These limitations, already highlighted under the pre-constitutional framework, highlight the need for stronger protections that acknowledge children as autonomous rights holders with significant voices and perspectives. Such protections were ultimately advanced by the Constitution and the Children's Act, which aimed to ensure that children's rights and interests are given proper consideration in the decision-making process.

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<sup>43</sup> *McCall v McCall* at 204I-205A.

<sup>44</sup> The McCall list was subsequently applied in many cases to determine the child's best interests; See *Bethell v Bland and Others* 1996 (2) SA 194 (W); *Van der Linde v Van der Linde* 1996 (3) SA 509 (O); *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); and *Lubbe v Du Plessis* 2001 (4) SA 57 (C).

## 4.4 THE NEW LEGAL FRAMEWORK

South Africa follows a dualist legal system, meaning that international and domestic law are treated as separate legal spheres within the country's legal framework.<sup>45</sup> In a dualist system, international treaties are not automatically incorporated into domestic law but require specific domestic legislation for implementation and enforcement.<sup>46</sup> Thus, in South Africa, for international law to become part of domestic law, it must be incorporated through an act of parliament or be deemed directly enforceable by the Constitution.<sup>47</sup> Consequently, the South African Constitution plays a vital role in the dualist legal system by defining the relationship between international law and domestic law. For example, the Constitution provides that an “international agreement becomes law in the Republic when it is enacted into law by national legislation”.<sup>48</sup> Additionally, it requires courts to favour any reasonable interpretation of legislation that aligns with international law over interpretations that conflict with it.<sup>49</sup> Thus, the CRC and African Children’s Charter’s influence on South African children’s rights cannot be overstated. The following part of this chapter discusses the incorporation of the international standards in domestic law through the Constitution and the Children’s Act.<sup>50</sup>

### 4.4.1 *The Constitution*

The South African constitutional framework does not conform with property and paternal perspectives, instead it reflects a significant commitment to the protection and advancement of children’s interests and needs.<sup>51</sup> This focus was initiated by the interim Constitution of 1994, which emerged in the country’s transition from the oppressive apartheid regime to a democratic order grounded in human rights. The interim Constitution introduced the principle that a child’s

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<sup>45</sup> <https://www.un.org/esa/socdev/enable/comp101.htm> accessed on 14 July 2023.

<sup>46</sup> G Ferreira & A Ferreira-Snyman ‘The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism’ (2014) *Potchefstroom Electronic Law Journal (PELJ)* 17(4) 1471-1496, at 1482.

<sup>47</sup> See the Constitution s231.

<sup>48</sup> Constitution s231(4).

<sup>49</sup> The Constitution s39(1)(b).

<sup>50</sup> The Children’s Act 38 of 2005.

<sup>51</sup> Interim Constitution of the Republic of South Africa Act No 200 of 1993.

best interests should be central in all matters affecting them.<sup>52</sup> When the final Constitution came into effect in 1997, it not only continued this but strengthened it. Section 28 is a notable achievement in this regard, as it is specifically dedicated to children's rights and outlines an array of protections that extend beyond those available to the general population. These protections, ranging from the right to family or parental care, to basic necessities such as adequate nutrition and shelter, as well as freedom from abuse, acknowledge children's particular vulnerabilities.<sup>53</sup> This recognition ensures that children are regarded as autonomous rights holders, not simply passive recipients of adult decision-making.

The best interests principle, in 28(2), brought South African law into accordance with international law. However, while the Constitution incorporates international law and echoes the sentiments of the CRC and African Children's Charter, it takes it a step further in declaring that a child's best interests are paramount.<sup>54</sup> South Africa's decision to define the best interests of the child as "paramount" in its Constitution, as opposed to "a primary consideration" under the CRC<sup>55</sup> and "the primary consideration" under the African Children's Charter,<sup>56</sup> signifies a deliberate emphasis on the strongest and highest level of protection of children's rights within its jurisdiction. This choice reflects the broader historical context, notably the country's transition from an era marked by significant human rights violations during apartheid to a democratic society committed to safeguarding the rights of children.<sup>57</sup> By adopting the term "paramount," South Africa acknowledged a legal and societal commitment to place children's interests at the forefront of decision-making processes, thereby setting a stringent standard for judicial interpretation and enforcement.<sup>58</sup> By promoting the child's best interests as "paramount," s 28(2) elevates children's rights and obligates courts to place the child's welfare first in the decision-making process.

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<sup>52</sup> Interim Constitution s 30(3).

<sup>53</sup> Constitution s28(1).

<sup>54</sup> Constitution s28(2).

<sup>55</sup> CRC, article 3(1).

<sup>56</sup> African Children's Charter, article 4(1).

<sup>57</sup> See part 4.1 of Chapter 4 for a discussion of the South African context.

<sup>58</sup> J Sloth-Nielsen 'Children's rights jurisprudence in South Africa – a 20 year retrospective' (2019) 52 *De Jure* 501-520, at 513; See also J Sloth-Nielsen 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' 2002 *International Journal of Children's Rights* 137-156, at 137.

The Constitutional Court has played a formative role in shaping the child's best interests. *Minister for Welfare and Population Development v Fitzpatrick and Others*<sup>59</sup> clarified that the best interests requirement in s 28(2) is not confined to the rights listed in s 28(1). Instead, it stands as an independent principle that can extend into all areas affecting a child.<sup>60</sup> This interpretation encourages an inquiry where decision-makers consider each child's unique needs, context, and the interplay of multiple constitutional rights. Such an approach reflects the Court's understanding that children's interests cannot be adequately protected through a rigid or formulaic application of rules. Rather, the principle demands a holistic and context-sensitive inquiry. By treating the best interests principle as independent, the Court implicitly supports a substantive inquiry that attends to a child's evolving capacities, circumstances, and relationships. This perspective also complements the need for procedural safeguards that secure meaningful child participation, ultimately promoting a framework that recognises children as autonomous rights holders.

Subsequent cases have added to this interpretation, consistently adopting a flexible and contextually responsive framework. *Centre for Child Law v Minister of Justice and Constitutional Development*,<sup>61</sup> the Court reiterated that children's best interests must be evaluated in relation to the individual child's position, ensuring a tailored approach rather than a uniform application.<sup>62</sup> Similarly, in *AB and Another v Pridwin Preparatory School*,<sup>63</sup> the Court emphasised that the child's perspective and voice should be integral to the decision-making process, reflecting a procedural obligation to respect children's agency.<sup>64</sup>

This approach does not, however, imply that children's interests will automatically prevail over those of parents or other parties in the decision-making process. *S v M*<sup>65</sup> clarified that while the paramountcy principle requires that children's best interests receive the highest

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<sup>59</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] 7 BCLR 731 (CC).

<sup>60</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] 7 BCLR 731 (CC) para 17-18.

<sup>61</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC).

<sup>62</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) para 24-25; See for also *Fraser v Naude and Others* 1999 (1) SA 1(CC) para 9; *Du Toit v Minister of Welfare and Population Development* 2003 (2)SA 198 (CC) para 20 where the Constitutional Court considered various substantive rights of the child to determine their best interests.

<sup>63</sup> *AB and Another v Pridwin Preparatory School* 2020 (9) BCLR 1029 (CC).

<sup>64</sup> *AB and Another v Pridwin Preparatory School* 2020 (9) BCLR 1029 (CC) para 73.

<sup>65</sup> *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC).

level of consideration, it does not mean that these interests are absolute. Rather, they must be weighed thoughtfully against other relevant factors.<sup>66</sup> The aim is to ensure that the child's welfare is accorded serious attention without disregarding the legitimate interests of parents or families.<sup>67</sup> The judgment in *Christian Education South Africa v Minister of Education*<sup>68</sup> demonstrates this balancing act, showing how the Court has sought to reconcile the rights of parents with the child's best interests and broader constitutional values. This balanced method ensures that the principle remains contextually grounded and attuned to the complexities of family life.<sup>69</sup>

The influence of the best interests in decision-making has also extended beyond traditional areas of family and child law. *S v The State*<sup>70</sup> held that sentencing courts must consider the implications of their decisions on a child's primary caregiver, demonstrating the principle's reach into domains previously focused on the protection of other interests and not concerned with the children affected by the decision.<sup>71</sup> More recently, *Centre for Child Law v T S and Others*<sup>72</sup> examined the constitutional implications of the Family Advocate's unavailability to children of unmarried parents. This judgement emphasised the importance of both substantive elements, like dignity and equality, as well as procedural safeguards, like child-friendly processes that prevent delays in decisions impacting the child.<sup>73</sup>

The overview of cases presented here show how South African jurisprudence on the child's best interests principle is both consistent with international norms and responsive to the country's own constitutional ethos. The result is a progressive, contextually aware, and adaptable legal framework for the child's best interests in decision-making. The Constitution ensures that decision-making in family-related disputes involves a careful, individualised process that regards children as active rights holders in a transforming society. Moreover, section 28(1)(h) of the Constitution, is of particular relevance as it grants every child the right

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<sup>66</sup> *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC) para 42.

<sup>67</sup> *Ibid*; See also *De Reuck v Director of Public Prosecutors* 2004 (1) SA 406 (CC) para 57 where the courts confirmed that the best interests principle does not trump other rights, instead rights are interrelated.

<sup>68</sup> *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 para 41.

<sup>69</sup> E Bonthuys 'The best interests of children in the South African constitution' (2006) 20(1) *International Journal of Law, Policy and the Family* 23-43, at 33.

<sup>70</sup> *S v The State (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC).

<sup>71</sup> *S v The State (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC) para 20-22.

<sup>72</sup> *Centre for Child Law v T S and Others* (CCT 157/22) [2023] ZACC 22.

<sup>73</sup> *Centre for Child Law v T S and Others* (CCT 157/22) [2023] ZACC 22 para 18-20 and 28.

“to have a legal practitioner assigned ... at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.” Du Toit calls this “the most important right in South-African law in respect of child participation”.<sup>74</sup> The provision crystallises the move from purely representative litigation to meaningful, rights-based participation for children.

#### ***4.4.2 The Children’s Act***

The Children’s Act,<sup>75</sup> which came into effect in 2010, was introduced to address the shortcomings of the Child Care Act and provided a unified framework for protecting children’s rights in the post-constitutional era. Until then, the Child Care Act was still the primary legislation governing child welfare and was inadequate, as it lacked clear guidance for courts on how to apply the child’s best interests principle.<sup>76</sup> This gap left courts reliant on common law and precedent, which, as discussed in part 4.3, often led to inconsistent and unclear decisions.<sup>77</sup> This legislative gap prompted the South African Law Reform Commission (SALRC) to envision a unified statute that would consolidate all children’s rights into a single, comprehensive framework.<sup>78</sup> From the outset, the SALRC aimed to not only to incorporate the constitutional imperatives for children, but also to ensure that the new legislation aligned with international frameworks for children’s rights.<sup>79</sup>

The Children’s Act directly responds to the obligations set out in the Constitution and provides a framework that protects and promotes children’s rights. The Preamble, of the Children’s Act, defines principles for the care and protection of children, clarifies parental responsibilities and rights, and enhances the role of children’s courts.<sup>80</sup> This means that all the

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<sup>74</sup> D du Toit ‘Legal Representation of Children’ in T Boezaart (ed) *Child Law in South Africa* (2 ed 2017) 108 at 111.

<sup>75</sup> Children’s Act 38 of 2005.

<sup>76</sup> See part 4.3 of Chapter Four.

<sup>77</sup> SALRC Discussion Paper 103 (Project 110) at 76.

<sup>78</sup> SALRC Report (Project 110) at 3.

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

<sup>80</sup> The Children’s Act provides that it aims “[t]o give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children’s courts; to provide for the issuing of contribution orders;

sections of the Children's Act were drafted and enacted to give effect to the Constitution as well as the objectives of the Children's Act. The Act's objectives reflect a commitment to promoting and protecting the rights and well-being of children in South Africa. The Act aims to preserve and strengthen family structures, recognising the vital role families play in a child's development. It gives effect to several constitutional rights, including a child's right to family or parental care, appropriate alternative care if removed from their family, access to social services, and protection from abuse, neglect, and degradation. Central to the Act's objectives is the child's best interests. Additionally, the Act's objectives provide for structures and services to support children's physical, emotional, social, and intellectual development. It also seeks to strengthen community-based initiatives that offer care and protection, safeguard children from discrimination and harm, and address the unique needs of children with disabilities.<sup>81</sup> Ultimately, the Act is designed to promote the holistic protection, development, and well-being of all children.

Moreover, s 6 provides general principles that guide the implementation of all decision-making regarding children.<sup>82</sup> It provides that all decisions affecting a child must uphold the child's rights as set out in the Constitution, apply the best interests standard outlined in section 7 of the Children's Act, and adhere to the principles and objectives of the Children's Act.<sup>83</sup> This includes treating the child with dignity, fairness, and equity, while also protecting them from discrimination, including discrimination based on their health or disability, or that of a family member.<sup>84</sup> It further requires recognising the child's developmental needs, providing opportunities for play and recreation appropriate to their age, and creating an environment that accommodates and supports any special needs.<sup>85</sup>

The general principles and objectives of the Act represent a significant shift in aligning South African child law with constitutional principles, as well as the theoretical framework,<sup>86</sup>

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to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit international child abduction and to give effect to the Hague Convention on International child abduction; to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith.”

<sup>81</sup> Children's Act s 2.

<sup>82</sup> Children's Act s 6(1)(b).

<sup>83</sup> Children's Act s 6(2)(a).

<sup>84</sup> Children's Act s 6(2)(b)-(d).

<sup>85</sup> Children's Act s 6(2)(e)-(f).

<sup>86</sup> See Chapter Two.

international standards discussed in earlier chapters.<sup>87</sup> Both reflect recognition of the state's duty, under the *parens patriae* doctrine, to protect children when parents may not fully meet their child's needs. By explicitly grounding its objectives in constitutional rights, the Act recognises children as rights holders. Its focus on preserving families, ensuring the child's best interests are paramount, and protecting children from abuse, neglect, and discrimination reflects a child-centred approach that is consistent with international standards.

When first introduced, the Children's Act was divided into two parts.<sup>88</sup> The first part was finalised in 2005 and came into effect in 2007, while the second was finalised in 2007 and came into effect in 2010.<sup>89</sup> The most notable sections of the Act, related to the child's best interests, came into force with the first part of the Act in 2007. Section 9 of the Children's Act incorporates the international obligation and echoes s 28(2) of the Constitution by providing that the child's best interests are paramount in all matters concerning child.<sup>90</sup> As a high-level constitutional principle, s 28(2) of the Constitution does not detail the procedures or factors required to give full effect to this right. In contrast, Section 9 of the Children's Act essentially reaffirms the constitutional standard and the Act, through various related provisions,<sup>91</sup> sets out procedural safeguards, substantive aspects, and structures designed to apply the best interests principle effectively. The Children's Act strengthens the practical enforcement of the constitutional principle and helps prevent a purely discretionary or ad hoc approach by decision-makers.

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<sup>87</sup> See Chapter Three.

<sup>88</sup> P Mahery L Jamieson and K Scott *Children's Act Guide for Child and Youth Care Workers* (2011) Edition 1 Cape Town: Children's Institute, University of Cape Town and National Association of Child and Youth Care Workers at 7.

<sup>89</sup> J Sloth-Nielsen 'A developing dialogue – children's rights, children's law and economics: surveying experiences from southern and eastern African law reform processes' (2008) *Electronic Journal of Comparative Law* 1-17, at 3.

<sup>90</sup> Children's Act s 9 provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

<sup>91</sup> The Children's Act refers to the child's best interests in 43 provisions; see ss 6(2)(a), 6(3), 13(d), 22(5), 23(2)(a), 23(3)(a), 24(2)(a), 28(4)(a), 29(3), 33(4), 55(1), 60(2), 61(1)(c), 61(2), 61(3)(a), 64(1)(a), 66(b), 72(2), 116(2), 127(2), 130(1)(a), 133(2)(e), 151(8), 152(4), 153(1), 153(6)(b), 154(1), 156(1)(g)(ii), 157(3), 230(1)(a), 234(4), 235(4)(b), 239(1)(b)(ii), 240(2)(a), 241(1)(b), 243(3)(a), 261(5)(a), 261(6)(a), 262(5)(a), 262(6)(a), 270(1), 286(2)(a) and 290(2)(a).

Section 7 offers a detailed framework for assessing the child’s best interests. Courts must carefully assess the relevant factors considering the child’s specific circumstances and needs. To guide courts in determining the child’s best interests, s 7 provides a closed list of factors to consider when determining the child’s best interests.<sup>92</sup> The s 7 list includes the following:

- ‘(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 care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
  - (i) the child; and
  - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
  - (i) both or either of the parents; or
  - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
  - (i) to remain in the care of his or her parent, family and extended family; and
  - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
  - (i) age, maturity and stage of development;
  - (ii) gender;

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<sup>92</sup> This differs from the *McCall* list, which allowed courts to consider not only the listed factors but also any other factors they deemed relevant.

- (iii) background; and
- (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
  - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.’<sup>93</sup>

On its face, the s 7 list moves away from the ad hoc approaches to decision-making of the past by providing clear factors that courts must weigh, thereby reducing uncertainty and promoting a degree of uniformity in the decision-making process. The criteria address a range of considerations and arguably strengthens the substantive dimension of the best interests principle, ensuring that courts engage with a wide array of relevant aspects of the child’s life.

However, the closed nature of this list has significant implications. Most notably, it omits a direct reference to child participation. This omission sits awkwardly alongside international standards, which emphasise the importance of hearing and giving due weight to children’s voices in any decision affecting them. Without explicit guidance to consider the child’s perspective, there is a risk that children’s capacities, preferences, and lived experiences remain overshadowed by adult’s subjective evaluations. The child, thereby, becomes an object of inquiry rather than an active participant in shaping the outcome of the family-related dispute.

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<sup>93</sup> Children’s Act, s 7.

The absence of explicit mention of participation may also limit the practical application of procedural safeguards that stem from the international standards and are aimed at ensuring children's involvement in decisions that affect their lives. By failing to incorporate direct acknowledgement of children's evolving capacities and their right to express views, the list, like the McCall list, still signals a somewhat paternalistic perspective that falls short of the more holistic, rights-based approach that international law recommends. In this sense, while section 7 strives to improve clarity in best-interests determinations, it ultimately constrains the decision-making space by not including the child's own views among the listed factors; the statutory invitation to hear the child appears only in sections 10 and 14 of the Children's Act.<sup>94</sup> The result is a framework that is structured and comprehensive in terms of contextual substantive factors, yet still incomplete, because it stops short of recognising children as active, engaged rights-holders whose voices deserve direct consideration in the decision-making process.<sup>95</sup>

## **4.5 THE PROTECTION OF SUBSTANTIVE ELEMENTS UNDER SOUTH AFRICAN LAW**

South Africa's past continues to influence its social structures and the way children experience their rights today.<sup>96</sup> Persistent economic, racial, and geographical inequalities limit children's access to and experience of meaningful participation, education, healthcare, and supportive family environments. Against this backdrop, this part of the chapter evaluates domestic law against international standards that ensure the child's best interests by protecting the substantive elements in the decision-making process.

### ***4.5.1 Child participation***

Chapter Three established that participation is fundamental to autonomy and that all children, regardless of age, must have the opportunity to express their views in matters that affect them.

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<sup>94</sup> Children's Act ss10 & 14.

<sup>95</sup> See CRC, art 12; African Children's Charter, art 4(2); and Children's Act, s 14, all of which embed child participation as a substantive element to be considered in any determination of the child's best interests.

<sup>96</sup> See 4.2 of Chapter Four.

The child's age and maturity are relevant only in determining the weight that should be accorded to the child's views, not whether they should be allowed to participate.<sup>97</sup> This inclusive approach ensures that children, regardless of their developmental stage, have their perspectives heard and valued, acknowledging their preferences and concerns. Thereby promoting the child's self-determination and empowering them as stakeholders in decisions that affect their lives. Moreover, this approach supports context-specific decision-making, as children's insights often reveal their individual needs and preferences that might otherwise be overlooked by adults. Thus, child participation is a pivotal element in decision-making, as articulated in the CRC, the African Children's Charter.<sup>98</sup> The international standards go beyond tokenism, demanding that children are meaningfully involved in decision-making processes in ways that respect their autonomy, dignity, and evolving capacities.

South African law recognises a statutory right of direct participation in section 14 of the Children's Act, that provides "every child that is of such age, maturity and stage of development as to be able to participate in any matter concerning [him or her] has the right to participate in an appropriate way and views expressed by the child must be given due consideration."<sup>99</sup> Commentators on the Children's Act note that section 14 does not grant minors unlimited *locus standi*; instead it codifies the court's discretion to permit direct access to courts where the child's evolving capacity justifies it, while the long-standing distinction between *infans*<sup>100</sup> and *pubes*<sup>101</sup> remains a useful in practice.<sup>102</sup> This provision, of the Children's Act, therefore alters the common-law rule that only a parent or guardian could sue or be sued on a minor's behalf,

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<sup>97</sup> See part 3.5.1 of Chapter Three.

<sup>98</sup> See part 3.5 of Chapter Three.

<sup>99</sup> Children's Act s 14.

<sup>100</sup> In Roman-Dutch and South-African private law, a child under the age of seven years **who possesses** no legal capacity to litigate or to perform juristic acts. See LAWSA, *Minors and Other Persons* (vol 17 part 1, 2023 update) para 88; J-A Faris & C-J Davel "Capacity to Act" in R Zimmermann & D Visser (eds) *Southern Cross* (1996) 411.

<sup>101</sup> *Pubes* refers to the category of children over seven but still below the age of full majority; traditionally impubes boys (7–14) and girls (7–12). Such a child has limited capacity; he or she may perform legal acts and sue or be sued with the assistance of a parent, guardian or *curator ad litem*. See Heaton, *South African Family Law* (4 ed, 2020) 247; Voet 1.7.6.

<sup>102</sup> A Skelton & J Proudlock (eds), *Commentary on the Children's Act* (Service Issue 2024) ch 4-13; D du Toit, "Legal Representation of Children" in T Boezaart (ed) *Child Law in South Africa* (2 ed, 2017) 108-120.

creating a hybrid position, whereby an *infans* still lacks capacity, but an older child may now approach court with the assistance of a *curator ad litem* or legal practitioner.

South Africa's Constitution guarantees every child the right "to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."<sup>103</sup> In addition, the Constitution provides other rights that relate to participation and can be argued to necessitate hearing the child's view and perspective in decision-making. The rights to dignity,<sup>104</sup> freedom of expression<sup>105</sup> and the child's best interests<sup>106</sup> recognise the child as an individual with inherent worth, evolving capacities, and a perspective that is integral to ensuring that decisions made genuinely reflect their needs, circumstances, and development.

First, the right to dignity acknowledges the intrinsic value of every human being, regardless of age.<sup>107</sup> Treating a child with dignity involves more than providing basic necessities or shielding them from harm.<sup>108</sup> It includes respecting them as persons capable of forming views, understanding their experiences, and acknowledging their feelings and desires. If the child's voice is disregarded, they are reduced to an object of protection rather than recognised as an autonomous bearer of rights.<sup>109</sup> Allowing the child to express their perspective and taking it seriously in decision-making processes affirms their dignity and acknowledges their role as an active participant rather than a passive beneficiary.

Similarly, freedom of expression extends to all persons, including children. This right ensures that a child's voice is not only permissible but valued.<sup>110</sup> Where a child can express

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<sup>103</sup> Constitution s 28(1)(h).

<sup>104</sup> Constitution s 10.

<sup>105</sup> Constitution s 16.

<sup>106</sup> Constitution s 28(2).

<sup>107</sup> P Lee and RP George 'The nature and basis of human dignity' (2008) 21(2) *Ratio Juris* 173-193, at 174.

<sup>108</sup> GB Melton 'Preserving the dignity of children around the world: The UN Convention on the Rights of the Child' (1991) 15(4) *Child Abuse & Neglect* 343-350, at 345; See also H Baumann and B Bleisch 'Respecting children and children's dignity' (2014) in *The nature of children's well-being: theory and practice* Dordrecht: Springer 141-156, at 142.

<sup>109</sup> M Liebel 'Beyond paternalism: Plea for the de-paternalization of children's protection and participation' in *Decolonizing childhoods: from exclusion to dignity* (2020) Bristol University Press 161-190, at 163.

<sup>110</sup> A Falch-Eriksen et al 'Professional child protection and the child's freedom of expression' (2023) in *Professional practice in child protection and the child's right to participate* United Kingdom: Routledge 31-46,

their views, they exercise their freedom of expression, and where parents and courts listen meaningfully, they validate the child's social and legal identity as a rights holder.

Finally, the child's best interests principle demands an assessment of what will serve the child most effectively in the decision-making process. Children's interests cannot be determined solely through parental and court protective assumptions.<sup>111</sup> Instead, adults must engage directly with the child's viewpoint, taking into account the child's sense of well-being, emotional state, personal connections, and hopes for the future. As argued by Archard, meaningful participation goes beyond mere consultation with the child and rather ensures that the best interests inquiry is informed and authentic, rather than one-dimensional and adult centric.<sup>112</sup>

While this is commendable, unlike the CRC<sup>113</sup> and the African Children's Charter,<sup>114</sup> the Constitution does not contain a stand-alone right for a child to be heard. This omission is significant and warrants explicit analysis. First, it reflects the framers' choice to locate children's procedural protection primarily in section 28(1)(h), the right to state-funded legal representation where substantial injustice would otherwise result, and in the broader fair-hearing guarantee of section 34. Secondly, the Constitutional Court has compensated for the textual gap by reading participation into section 28(2) and the overarching values of dignity and equality. In *S v M*,<sup>115</sup> the Court held that a sentencing court must actively "engage with the child's circumstances". Until a constitutional amendment addresses the gap, statutory mechanisms such as sections 10 and 14 of the Children's Act remain the principal vehicles for realising the child's voice in civil proceedings.

Child participation is recognised as a general principle under the Children's Act.<sup>116</sup> This means that the Children's Act and the decision-making process must be implemented in a manner that respects and protects child participation. Under the Act's general principles,

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at 40; See also L Smith 'Convention on the Rights of the Child: freedom of expression for children' (2015) in T McGonagle & Y Donders (eds) *The United Nations and freedom of expression and information: critical perspectives* Cambridge University Press 145-170, at 145.

<sup>111</sup> D Archard & M Skivenes 'Balancing a child's best interests and a child's views' (2009) 17(1) *The International Journal of Children's Rights* 1-21, at 3.

<sup>112</sup> Ibid.

<sup>113</sup> CRC, art 12.

<sup>114</sup> African Children's Charter, art 4(2).

<sup>115</sup> *S v M* 2008 (3) SA 232 (CC) para 18.

<sup>116</sup> See part 4.2.2 of Chapter Four.

section 6(5) of the Children's Act provides that children must be informed of any action or decisions taken that affects them.<sup>117</sup> Providing children with information is a critical component of child participation as it empowers them to understand the decisions being made and their potential impact. This fosters a sense of inclusion and respect for children's autonomy. *DD v FD*<sup>118</sup> confirmed that this provision creates an enabling environment for meaningful participation.<sup>119</sup>

In addition, s 10 of the Children's Act expressly states that every child capable of participating, according to their age, maturity, and stage of development, has the right to express their views, and that these views must be given due consideration.<sup>120</sup> Similarly, s 31(1)(a) mandates any person, making decisions regarding parental responsibilities and rights, to consider the views of the children concerned.<sup>121</sup> Fokala argues that meaningful child participation involves a gradual transfer of responsibility from parents to children, empowering children to become thoughtful and capable decision-makers in their own lives.<sup>122</sup> Furthermore, meaningful participation enhances the parent-child relationship by fostering better communication and trust.<sup>123</sup> Finally, effective participation ensures that parents and courts can give balanced and rational consideration to the child's views.<sup>124</sup> This thesis agrees with Fokala's argument, as it highlights the importance of empowering children through participation, not only as a mechanism to respect their autonomy but also as a way to strengthen family dynamics and ensure that the child's voice is genuinely heard and valued in decision-making processes.

However, the South African framework's reliance on developmental criteria as a prerequisite for participation introduces limitations. While the international standards recommend developmental considerations to determine the weight accorded to a child's views, South African courts often use the age factor to determine whether the child can participate at

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<sup>117</sup> Children's Act s 6(5).

<sup>118</sup> *DD v FD* (72897/2019) [2020] ZAGPPHC 778.

<sup>119</sup> *DD v FD* para 7.

<sup>120</sup> Children's Act s 10.

<sup>121</sup> Children's Act s 31(1)(a).

<sup>122</sup> E Fokala 'Calibrating children's rights to participate in a family setting 30 years after the adoption of the Convention on the Rights of the Child and the African Children's Charter' (2021) 34 *Speculum Juris* 116-127, at 122.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

all, potentially excluding younger children or those perceived as less articulate.<sup>125</sup> The international standards recognise that all children can form and express their views, and that no child should have to prove their capacity to participate.<sup>126</sup> This recognition ensures inclusivity, enabling courts to consider the unique ways children of varying developmental stages can communicate their preferences and concerns in the decision-making process. This approach is particularly relevant in family-related disputes, where even young children can express attachment to caregivers, preferences regarding living arrangements, or discomfort with certain environments.<sup>127</sup>

Although early case-law was hesitant, more recent judgments indicate a gradual but discernible shift towards the fully inclusive approach mandated by international law; what is still lacking is a consistent standard. For example, in early cases like *Soller v G*<sup>128</sup> the court expressly acknowledged the importance of a fifteen-year-old child's age in relation to his right to participation.<sup>129</sup> Similarly, in *HG v CG* the court respected the views of an eleven-year-old

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<sup>125</sup> See *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18 where the court did not directly engage with the children's views, as they were not formally presented; See also *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae)* [2007] ZACC 27 where the court considered the child's views, noting that the child was of an age and maturity to express a meaningful opinion. The court relied on the child's age and perceived maturity as prerequisites for participation. This case is further discussed in Chapter Seven.

<sup>126</sup> See part 3.5 in Chapter Three; See also CRC Committee *General Comment No. 12* para 19.

<sup>127</sup> LA Sroufe 'The role of infant-caregiver attachment in development' (2015) in *Clinical implications of attachment* Routledge at 21, Sroufe highlights that attachment behaviours in infants, such as seeking proximity to caregivers, expressing distress when separated, and showing comfort in familiar settings, are fundamental ways children communicate their emotional and relational needs. These behaviours are seen as clear indicators of the child's attachment patterns and preferences, even in the absence of verbal expression. Sroufe argues for the need to consider these attachment signals in decisions about caregiving and living arrangements; See also D Howe 'Attachment theory' (2012) in *Social Work Theories and Methods* at 75, Howe explains that children, even at a young age, demonstrate clear behavioural cues reflecting their comfort or discomfort in specific environments or with certain individuals.

<sup>128</sup> *Soller v G* 2003 5 SA 430 (W).

<sup>129</sup> *Soller v G* para 7 where the court held "I can envisage few proceedings of greater importance to a child/young adult of K's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling."

child.<sup>130</sup> However, in cases involving younger children, like *JP v JC*<sup>131</sup> and *WS v LS*,<sup>132</sup> the courts presumed that the children involved could not express their views due to their ages being between one and four and disregarded their participation rights entirely. Despite being so young, these children have inherent value and dignity that can be respected by allowing them to participate in an appropriate way. Their perspectives can provide critical insights into underlying concerns, such as the child's sense of safety, identity, or relationships.

While reported precedents remain sparse, some recent cases show a clear judicial trend towards realising s 28(1)(h) of the Constitution and s 14 of the Children's Act by actively seeking the child's own views. For example, in *Centre for Child Law v TS & Others*<sup>133</sup> the Constitutional Court appointed a *curator ad litem* under s 28(1)(h) specifically to present the child's independent perspective in a care-and-contact dispute, emphasising that meaningful participation is integral to a best-interests enquiry.<sup>134</sup> Similarly, in *YB v SB*,<sup>135</sup> the High Court heard a ten-year-old in chambers before granting an order, expressly referring to the child's participation right.<sup>136</sup> Likewise, in *C v Department of Health, Gauteng*<sup>137</sup> the Court refused to approve a medical-negligence settlement until the affected minor's views had been heard, again citing s 28(1)(h).<sup>138</sup> Although the volume of authority remains limited, these judgments indicate a growing willingness to realise the constitutional and statutory mandates by ensuring that children are heard, directly or through a dedicated representative, in proceedings that materially affect them.

#### ***4.5.2 The child's identity***

Identity is integral to recognising children as autonomous rights holders, enabling meaningful participation in decisions affecting them, and ensuring that decision-making processes foster

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<sup>130</sup> *HG v CG* 2010 3 SA 352 (ECP) para 17.

<sup>131</sup> *JP v JC* 2016 1 All SA 794 (KZD).

<sup>132</sup> *WS v LS* 2000 4 SA 104 (C).

<sup>133</sup> *Centre for Child Law v TS & Others* 2023 (2) SA 15 (CC).

<sup>134</sup> *Centre for Child Law v TS & Others* paras 24–28 (appointment of curator ad litem to convey child's views).

<sup>135</sup> *YB v SB* 2021 (4) SA 403 (GJ).

<sup>136</sup> *YB v SB* paras 22–25 (in-chambers hearing of 10-year-old; supervisory order linked to s 28(1)(h)).

<sup>137</sup> *C v Department of Health, Gauteng* 2019 (2) SA 26 (CC).

<sup>138</sup> *C v Department of Health, Gauteng* paras 42–46.

positive family connections. Protecting identity further ensures that decisions are informed by the child's individuality, evolving capacities, and sense of belonging, promoting their overall well-being and development. As demonstrated in Chapter Three, the international standard emphasises the importance of preserving a child's identity, including their name and nationality in decision-making.<sup>139</sup>

South Africa's legal framework acknowledges the importance of identity. Section 28(1)(a) of the Constitution establishes the child's right to a name and nationality from birth, creating a baseline for legal identity. The Births and Deaths Registration Act<sup>140</sup> operationalises this right by mandating birth registration, which is essential for establishing a child's legal identity.<sup>141</sup> A child's name and nationality are fundamental aspects of their identity as these rights ensure recognition as an individual and affirm the child's status as a member of a family, community, and nation.<sup>142</sup> However, barriers such as administrative inefficiencies and systemic inequities disproportionately affect vulnerable children, particularly those from marginalised communities, and have a profound impact on decision-making processes aimed at determining their best interests. Reports from organisations like UNICEF reveal that children in rural areas, impoverished communities, and informal settlements often face obstacles to registering their births, such as lack of access to registration offices, limited awareness of registration requirements, and fees associated with late registration.<sup>143</sup> In South Africa, complex procedures and administrative delays hinder birth registration. Recently, the constitutionality of unmarried fathers being unable to register the birth of their child was successfully challenged.<sup>144</sup>

The ability to make decisions in the child's best interests is intrinsically tied to their right to an identity, as identity provides the foundation for understanding their unique needs and circumstances. Without proper birth registration, children lack formal recognition, making it

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<sup>139</sup> See part 3.5 of Chapter Three.

<sup>140</sup> The Births and Deaths Registration Act 51 of 1992.

<sup>141</sup> The Births and Deaths Registration Act s 9.

<sup>142</sup> H Kruger 'The invisible children – protecting the right to birth registration in South Africa' (2022) 47(2) *Tydskrif Vir Regswetenskap* 55-87, at 56; See also Y Ronen 'Redefining the child's right to identity' (2004) 18(2) *International Journal of Law, Policy, and the Family* 147–177, at 159.

<sup>143</sup> United Nations Children's Fund *Every Child's Birth Right: Inequities and trends in birth registration* (2013) UNICEF New York available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.unicef.org/media/73661/file/Every-Childs-Birth-Right-2013.pdf](https://www.unicef.org/media/73661/file/Every-Childs-Birth-Right-2013.pdf) Accessed on 18.12.2024.

<sup>144</sup> *Centre for Child Law v Director General: Department of Home Affairs and Others* 2022 (4) BCLR 478 (CC).

difficult to establish their familial, cultural, and societal ties. In family-related disputes decision-makers may struggle to fully consider the child's identity when these elements are not formally documented. For example, in cases like *Naki and Others v Director-General: Department of Home Affairs and Others*,<sup>145</sup> delayed or denied birth registration prevented children from accessing their rights to education and healthcare. This failure to affirm a child's legal identity undermines the principle of their best interests by denying them the protections and resources necessary for their development as well as denying them access to other substantive rights that protect their best interests. However, the jurisprudence is evolving. In *Naki v Director-General: Department of Home Affairs*, the Supreme Court of Appeal declared s 10 of the Births and Deaths Registration Act unconstitutional precisely because it undermined children's right to identity and the derivative social-service rights that depend on proof of identity.<sup>146</sup> This decision demonstrates the transformative potential of constitutional litigation in removing systemic obstacles, even while practical delays persist at the administrative level.

The issue of statelessness is a common one in South Africa with many children being born to parents who are living in the country illegally. This was an issue in the recent case of *Khoza v Minister of Home Affairs and Another*<sup>147</sup> where the applicant was born in South Africa to parents who were in the country illegally. As a result, his birth was never registered which the court recognised as having had dire consequences on his identity and his recognition as a South African.<sup>148</sup>

However, identity encompasses more than a child's name or nationality, it includes their familial and cultural connections, which contribute to their emotional and psychological well-being. However, systemic barriers to birth registration can sever these connections by leaving children without legal acknowledgment of their parentage, cultural heritage, or community ties. For decision-makers, this lack of information can result in outcomes that fail to adequately consider the child's sense of belonging and individuality, which are critical components of the best interests principle. For example, a child returned to a country without sufficient regard for their cultural heritage may lose connections vital to their sense of self, ultimately affecting their emotional stability and long-term development.

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<sup>145</sup> *Naki and Others v Director General: Department of Home Affairs and Another* (Case No 4996/2016).

<sup>146</sup> *Naki v Director-General: Department of Home Affairs* 2018 (4) SA 225 (SCA).

<sup>147</sup> *Khoza v Minister of Home Affairs and Another* [2023] ZAGPPHC 1639.

<sup>148</sup> *Khoza v Minister of Home Affairs and Another* para 66.

The link between identity and culture is particularly important in a diverse society like South Africa, where these aspects of identity were historically suppressed for children from marginalised groups under apartheid. Thus, s 31 of the Constitution protects cultural, religious and linguistic rights.<sup>149</sup> Similarly, the Children's Act protects the child's identity in s 7(1)(f) which mandates courts to consider the child's need to maintain a connection with their cultural heritage, community, and family when determining their best interests.<sup>150</sup> While South Africa's legal framework reflects the protection a child's identity, systemic barriers such as administrative inefficiencies and inequities often hinder their realisation. This disconnect has profound implications for decision-making in family-related disputes, where the lack of formal documentation and recognition of identity can lead to outcomes that fail to fully protect the child's welfare and development.

#### ***4.5.3 Preserving the family environment***

The family is recognised internationally as the primary unit of society and central to a child's development.<sup>151</sup> The international standard emphasises the child's right to maintain family relations across diverse family forms, including biological, adoptive, foster, and extended family arrangements. South Africa's Constitution affirms this in s 28(1)(b), which guarantees every child the right to family care, parental care, or appropriate alternative care when removed from the family environment.<sup>152</sup> This constitutional foundation establishes the family's pivotal role in supporting the child's holistic development, reinforcing the need to preserve family ties wherever possible.

The right to family and parental care, as enshrined in the Constitution, is rooted in the acknowledgment of the family as a source of emotional support, stability, and cultural identity for children.<sup>153</sup> The constitutional imperative to preserve these connections demands that children are not separated from their parents unless competent authorities, subject to judicial

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<sup>149</sup> Constitution s 31.

<sup>150</sup> Children's Act s 7(1)(f).

<sup>151</sup> See part 3.5.3 of Chapter 3.

<sup>152</sup> Constitution s 28(1)(b).

<sup>153</sup> G van der Walt 'A consideration of sections 249, 250 and 259 of the proposed third amendment bill to the Children's Act in light of the best interests principle' (2021) 41(4) *Obiter* 934-947, at 937.

review, determine that such separation is necessary in the child's best interests.<sup>154</sup> Thus, in decision-making, separation should be treated as a measure of last resort and be substantiated by clear evidence of harm or parental incapacity. The separation of children and their parents is taken so seriously that in a groundbreaking decision in *M v Minister of Police*<sup>155</sup> constitutional damages were awarded to two mothers, on behalf of their minor children, for the wrongful death of the children's father that was caused by the police.<sup>156</sup> The court's reasoning was based on s 38 of the Constitution,<sup>157</sup> read with s 15(1) of the Children's Act,<sup>158</sup> which allow for appropriate relief to be granted, such as a claim for damages, in the event of the violation of any constitutional right. In this case the constitutional right that was violated by the police was the children's right to parental care under s 28(1)(b). This drastic approach to the right to parental care extends to family care and highlights the importance of decision-makers prioritising these relationships in the decision-making process. It emphasises the critical role that family and parental care play in a child's development and the need for thoughtful and careful consideration in decisions that may affect these connections.

The constitutional provisions are mirrored in the Children's Act and set out a framework that emphasises the preservation of family ties and broader relationships that contribute to the child's upbringing.<sup>159</sup> Moreover, the Children's Act recognises the diverse relationships that shape a child's life; the child's right to maintain connections not only with their immediate family but also with their extended family, friends, school community, and familiar environment.<sup>160</sup> This provision ensures that decisions regarding family separation, adoption, or foster care are not made lightly and prioritise the preservation of familial connections where feasible.

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<sup>154</sup> Ibid.

<sup>155</sup> *M v Minister of Police* 2013 5 SA 622 (GNP).

<sup>156</sup> Ibid; See also J Parker & FN Zaal 'Damages for deprivation of parental care: Initiating a groundbreaking new remedy for children *M v Minister of Police* 2013 (5) SA 622 (GNP)' (2015) 36 (1) *Obiter* 164-170, at 166; JA Robinson & R Prinsloo 'The right of the child to care and constitutional damages for the loss of parental care: some thoughts on *M v Minister of Police* and *Minister of Police v Mboweni*' (2015) 18(5) *Potchefstroom Electronic Law Journal* 1669-1690, at 1671.

<sup>157</sup> Constitution s 38.

<sup>158</sup> Children's Act s 15(1).

<sup>159</sup> Children's Act s2(b)(i).

<sup>160</sup> Children's Act s7(f)(i)-(ii) and s158(4).

Preserving family ties is also a critical factor in supporting a child's cultural identity.<sup>161</sup> Research consistently highlights the role of stable family environments in fostering a child's sense of security and belonging. Archard and Skivenes argue that maintaining family relationships contributes to a child's self-esteem and cultural rootedness, which are essential for their overall development.<sup>162</sup> In adoption, the Children's Act explicitly recognises the importance of assessing a child's family ties, including their connections to biological relatives and broader social networks.<sup>163</sup> This comprehensive assessment seeks to ensure that adoption decisions consider the preservation of the child's existing relationships, contributing to their emotional stability and cultural identity.

Foster care arrangements similarly prioritise family preservation, as the primary goal is often reunification with biological parents or family when it is safe and in the child's best interests.<sup>164</sup> Regular reviews of foster care placements, mandated under the Children's Act, ensure that the child's well-being and relationships with their family remain central considerations in further decision-making processes.<sup>165</sup> In *SS v Presiding Officer of the Children's Court, Krugersdorp*<sup>166</sup> the children's court affirmed the importance of considering the child's family ties in decisions relating to foster care and highlighted the decision-makers role in safeguarding family ties.<sup>167</sup>

The Children's Act also acknowledges the importance of emotional bonds and the child's need for consistency in relationships.<sup>168</sup> In *Minister for Welfare and Population Development v Fitzpatrick and Others*,<sup>169</sup> the Constitutional Court recognised the significance of maintaining family environments that reflect the child's cultural identity, but also acknowledged the emotional bond that the children had established with their prospective adoptive parents.<sup>170</sup> This highlights the careful balancing of the child's best interests, prioritising the preservation

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<sup>161</sup> See part 5.2.2 of Chapter Five.

<sup>162</sup> D Archard & M Skivenes 'Hearing the child' (2009) 14 (4) *Child & Family Social Work* 391–399, at 393.

<sup>163</sup> Children's Act s231(7)-(8).

<sup>164</sup> Children's Act s187.

<sup>165</sup> Children's Act s186(3).

<sup>166</sup> *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* (14/1/4-206/10, A3056/11) [2012] ZAGPJHC 149.

<sup>167</sup> *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* paras 19-23.

<sup>168</sup> Children's Act s 7(1)(f).

<sup>169</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

<sup>170</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others* para 9.

of the family environment to which the child is accustomed, even if it is not their biological family or culture. Moreover, this judgement also demonstrates the importance of the child's need for stability in their living environment which is also well-protected by the Children's Act. The Act recognises that disruptions to the child's stable living environment can have far-reaching effects on their development and reinforces the importance of maintaining a child's sense of familiarity and stability within their social, educational, and environmental contexts.<sup>171</sup>

Family preservation is an integral aspect of the child's best interests and is well embedded in South Africa's constitutional and legislative framework. By protecting family relationships, domestic law not only aligns with international obligations but also promotes the child's well-being, stability, and identity. The emphasis on family preservation demonstrates how decision-making processes must respect the interconnectedness of identity, familial ties, and the child's autonomy.

#### ***4.5.4 The rights to health and education***

The international standards require state parties to include the consideration of children's health and education as substantive elements in best interests determinations, within domestic legal frameworks. These rights are foundational to a child's development, supporting their evolving capacities, autonomy, and long-term well-being. In family-related legal disputes, decision-makers must integrate considerations of health and education into their assessments of the child's best interests, ensuring that these essential rights are protected in a manner that empowers children as rights holders and supports their future potential.

The right to health encompasses more than access to medical services; it requires an approach that includes physical, mental, and emotional well-being, influenced by social, environmental, and familial factors. South Africa's Constitution enshrines the right to access healthcare services<sup>172</sup> and specifically protects children's rights to basic health care services.<sup>173</sup> The National Health Act operationalises these rights by promoting equitable access to healthcare services, particularly for vulnerable populations like children.<sup>174</sup>

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<sup>171</sup> Children's Act s 157.

<sup>172</sup> Constitution s 27(1)(a).

<sup>173</sup> Children's Act s 28(1)(c).

<sup>174</sup> National Health Care Act 61 of 2003 s 2(c)(iii)-(iv).

However, the practical application of these rights often reveals systemic challenges. Budlender, Proudlock and Jamieson critique the implementation of children's health rights in South Africa, pointing out that while the legal framework is robust, access to healthcare remains uneven due to socio-economic disparities, administrative inefficiencies, and resource constraints.<sup>175</sup> These systemic issues are particularly relevant in family-related disputes, where the child's health needs may be overlooked or insufficiently addressed.

In *Minister of Health v Treatment Action Campaign (No 2)*,<sup>176</sup> the Constitutional Court affirmed the government's obligation to take reasonable measures to progressively realise children's right to health.<sup>177</sup> This case dealt with the state's duty to proactively provide medication to HIV positive mothers to reduce the risk of transmitting the disease to their babies at birth and highlights the importance of a proactive approach in family-related disputes to ensure that health considerations are adequately addressed and prevented where possible.<sup>178</sup> Similarly, the Children's Act mandates that the health status of a child be disclosed to prospective adoptive parents,<sup>179</sup> ensuring that important medical information regarding the child is available to them when necessary. While this provision is commendable, it could be critiqued for focusing on medical disclosure rather than ensuring the availability of adequate healthcare for the child post-adoption, which may leave gaps in fulfilling the child's right to health care. Prioritising health in family-related disputes is important as a child's health directly impacts their ability to engage in education, social relationships, and other developmental activities. This demonstrates the interconnectedness of rights and the importance of a holistic approach to decision-making.

Likewise, the right to education, recognised as a fundamental right in s 29(1) of the Constitution, is critical for a child's autonomy, self-determination, and future opportunities.<sup>180</sup> Education equips children with the knowledge and skills to exercise their rights, achieve their potential, and contribute meaningfully to society. The Children's Act reflects this by requiring

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<sup>175</sup> D Budlender P Proudlock & L Jamieson *Formulating and implementing socioeconomic policies for children in the context of HIV/AIDS: A South African case study* (2008) the Children's Institute, University of Cape Town and the Community Agency for Social Enquiry at 44.

<sup>176</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (10) BCLR 1033 (CC).

<sup>177</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) para 74-79.

<sup>178</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) para 2.

<sup>179</sup> Children's Act s 248(3).

<sup>180</sup> Constitution s 29(1).

decision-makers to consider the impact of their decisions on the child's educational continuity and development.<sup>181</sup> Decisions affecting a child should support their holistic development, as held in *Centre for Child Law v Minister of Basic Education*,<sup>182</sup> where the court recognised the importance of inclusive and non-discriminatory access to education as fundamental to children's dignity and equality.<sup>183</sup> This judgement also noted the importance of education in fulfilling a child's potential.<sup>184</sup>

However, the practical application of these protections often falls short. Scholarly critiques by Woolman and Fleisch argue that while the legal framework promotes access to education, socio-economic inequalities and resource limitations often undermine the realisation of this right.<sup>185</sup> For instance, children in rural areas or informal settlements frequently face barriers to quality education,<sup>186</sup> which may be exacerbated by decisions that change the child's living arrangements or socio-economic status. Decision-makers must be aware that their decisions do not inadvertently and unnecessarily disrupt the child's educational continuity, which is crucial for their stability and future prospects.

Health and education are not marginal considerations in decision-making in family-related legal disputes but are integral to the child's best interests. These rights support the child's evolving capacities, autonomy, and future development, ensuring that they can fully develop and exercise their rights as autonomous individuals. The South African framework for health and education demonstrates consistency with international obligations and also highlights the connection between these rights and a child's overall development.

#### ***4.5.5 Vulnerable children***

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<sup>181</sup> Children's Act s 7(1)(h).

<sup>182</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) para 32-36.

<sup>183</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* para 131-134.

<sup>184</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* para 2-4.

<sup>185</sup> S Woolman & B Fleisch *The Constitution in the classroom: Law and education in South Africa 1994 – 2008* (2009) Pretoria University Law Press at 181.

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

The international standards discussed under Chapter Three<sup>187</sup> require state parties to recognise and address the unique vulnerabilities of children in decision-making processes. The international standards emphasise that decision-makers must move beyond generic assessments and instead adopt tailored approaches that account for the specific circumstances and needs of children in vulnerable situations. In the South African context, vulnerability is deeply influenced by the country's history of apartheid and continues to shape the lived experiences of children who are doubly vulnerable. The double vulnerability can arise from being a child and simultaneously being disabled, having minority status, being a refugee or asylum-seeker, experiencing of abuse or neglect, or living in street situations.

South Africa's Constitution enshrines the rights to equality<sup>188</sup> and dignity,<sup>189</sup> providing a foundational framework for addressing the vulnerabilities of children. These rights, applicable to all individuals, extend to children in particularly precarious situations, highlighting the need to treat them with respect, recognise their inherent value, provide protection against discrimination, and ensure equitable access to opportunities. This is closely linked to the Constitution's protection of the child's best interests, mandating that children be shielded from harm and provided with care that addresses their unique needs.<sup>190</sup>

The Children's Act adds to the constitutional guarantees by incorporating specific provisions for vulnerable children. For instance, s 11 of the Act highlights the rights of children with disabilities, mandating the provision of care, education, and services tailored to their needs.<sup>191</sup> This is consistent with the international standards and emphasises the importance of accessibility, inclusion, and equal participation for children with disabilities. However, scholarly critiques, argue that while South Africa's legal framework is progressive on paper, practical implementation is often problematic due to inadequate funding and lack of specialised

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<sup>187</sup> See part 3.5.5 of Chapter Three.

<sup>188</sup> Constitution s 9.

<sup>189</sup> Constitution s 10.

<sup>190</sup> Constitution s 28(2).

<sup>191</sup> Children's Act s 11 provides "(1) In any matter concerning a child with a disability due consideration must be given to- (a) providing the child with parental care, family care or special care as and when appropriate; (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have; (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and (d) providing the child and the child's care-giver with the necessary support services."

services for children with disabilities, highlighting a significant gap in fulfilling these rights in practice.<sup>192</sup>

Similarly, the Refugees Act<sup>193</sup> protects refugee and asylum-seeker children, ensuring they are not subjected to persecution or harm and granting them access to basic services, including education and healthcare.<sup>194</sup> However, studies reveal systemic challenges in the implementation of these protections, including bureaucratic delays, discrimination, and limited access to resources for refugee children.<sup>195</sup> These barriers often prevent refugee children from enjoying rights afforded to them and undermines the principle of the child's best interests. Yet, in *Mubake and Others v Minister of Home Affairs and Others*,<sup>196</sup> the court highlighted the importance of decision-making for undocumented refugee children that genuinely considers what is best for them even if there are risks to others in doing so.<sup>197</sup>

The protection of vulnerable children in decision-making demonstrates the importance of recognising children as rights holders with unique needs and circumstances. Tailored decision-making that addresses the specific vulnerabilities of children is consistent with their best interests and supports their development. Furthermore, it highlights the intersection between vulnerability, autonomy, and the child's evolving capacities, demonstrating that

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<sup>192</sup> S Mkabile & L Swartz 'I waited for it until forever: community barriers to accessing intellectual disability services for children and their families in Cape Town, South Africa' (2020) 17(22) *International Journal of Environmental Research and Public Health* at 8504; See also M Dowling & L Dolan 'Families with children with disabilities-inequalities and the social model' (2001) 16(1) *Disability & Society* at 21; A Karisa C Samuels B Watermeyer J McKenzie & R Vergunst 'Priorities for access to early childhood development services for children with disabilities in South Africa' (2022) 12(1) *South African Journal of Childhood Education* at 1119; and S Pillay M Duncan & PJ de Vries 'We are doing the best we can to bridge the gap-service provider perspectives of educational services for autism spectrum disorder in South Africa' (2022) 13 *Frontiers in Psychiatry* at 907.

<sup>193</sup> Refugees Act 130 of 1998.

<sup>194</sup> Refugees Act s 32.

<sup>195</sup> L Meda R Sookrajh & B Maharaj 'Refugee children in South Africa: access and challenges to achieving universal primary education' (2012) 9(1) *Africa Education Review* S152-S168, at S154; See also TE Lubisi AO Jegede & P Letuka 'International human rights law and the access of children of asylum seekers to social assistance in South Africa' (2020) 53(3) *The Comparative and International Law Journal of Southern Africa* 1-32, at 6; K Anderson K Aplan & E Yarrow 'Unaccompanied and unprotected: the systemic vulnerability of unaccompanied migrant children in South Africa' (2017) in *The United Nations Convention on the Rights of the Child : Taking Stock after 25 Years and Looking Ahead* Brill Nijhoff 361-389, at 369.

<sup>196</sup> *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP).

<sup>197</sup> *Mubake and Others v Minister of Home Affairs and Others* para 23.

effective decision-making must go beyond formalistic applications of the law to ensure meaningful outcomes. Thus, while the domestic legal framework demonstrates significant alignment with international standards for vulnerable children, the challenges in implementation highlight areas for improvement.

## **4.6 CONCLUSION**

This chapter has traced the evolution of the child's best interests principle in South Africa's legal framework, from the predominantly parent-focused approaches of the pre-constitutional era, through the partial guidance provided by the McCall list, to the current constitutional framework that enshrines the child's best interests as paramount. South Africa's decision to set a "paramount" standard for the child's best interests, exceeding the "primary consideration" threshold in international instruments, signifies a strong commitment to protecting children's rights. Both the Constitution and the Children's Act firmly recognise children as rights holders with developing autonomy, aligning domestic law closely with international standards.

In the discussion of the domestic legal framework, the chapter demonstrated the law's substantive provisions reflect substantial consistency with international standards discussed in Chapter Three. This chapter demonstrated that although the Constitution does not explicitly affirm participation rights, the related guarantees of dignity, freedom of expression, and paramountcy of the child's best interests collectively ensure that children's voices can be heard and considered in decision-making processes. Likewise, the Children's Act expressly recognises the child's voice and strengthens participation rights by mandating that children are informed of decisions affecting them, and, when fully realised, these frameworks have the potential to foster greater autonomy, fortify family relationships, and encourage contextually appropriate decision-making.

The chapter also demonstrated that additional substantive protections in domestic law reinforce its consistency with international standards. Domestic law protects the child's identity, thereby promoting their emotional and psychological well-being through secure family connections and the recognition of their name, nationality, and cultural heritage. The Constitution and Children's Act's emphasis on family preservation is consistent with international norms that acknowledge the significance of stable familial environments for a child's best interests. Furthermore, the rights to health, education, and the consideration of

vulnerable children in domestic law demonstrate the acknowledgment of the holistic needs that support a child's evolving capacities and long-term development.

Nonetheless, the chapter highlighted some challenges that exist in respect of the child's substantive rights. One of the main challenges relates to practice demonstrating that court's rely on developmental criteria for determining if a child can exercise their voice in proceedings. This may exclude younger children's participation. This implementation gap indicates that, although the legislative and constitutional framework sets a strong substantive foundation, procedural efforts are needed to translate these principles into consistent, inclusive practices.

Having established a largely favourable picture of the substantive elements embedded in South African law, the next chapter investigates the procedural safeguards that can give these substantive elements practical effect. In the next chapter, the thesis demonstrates how procedural aspects of domestic law ensure the meaningful and effective protection of children's best interests in decision-making processes.

## CHAPTER FIVE

### THE PROTECTION OF PROCEDURAL SAFEGUARDS UNDER SOUTH AFRICAN LAW

#### 5.1 INTRODUCTION

Thus far, this thesis has demonstrated that to advance the child's best interests in decision-making processes, the law must clearly define the child's rights to have their views heard and appropriately considered, to safeguard and foster their identity, family ties, and cultural heritage, to guarantee access to health and education, and to provide special protections for vulnerable children. Equally, the legal framework must establish practical mechanisms to enforce these rights. This includes ensuring the availability of child representation, creating child-sensitive environments, outlining the role of professionals advising the court on the child's current and future welfare, promoting the timely resolution of family-related disputes, and specifying how children can appeal or seek a review of decisions affecting them.

Chapter Four initiated a two-part enquiry into the evolution of the child's best interests principle within South African law and the extent to which the domestic framework incorporates substantive elements that ought to be considered in the decision-making process. It demonstrated how the Constitution and the Children's Act have positioned the principle within the country's new legal framework, renewing its fiduciary duty toward children and ensuring respect for their interests and them as autonomous rights-bearers. The chapter also established that the domestic law largely incorporates the substantive elements to protect the child's best interests in decision-making but requires strong protection of procedural safeguards to ensure the consistent realisation of the substantive elements necessary for the child's best interests.

This chapter continues the enquiry by focusing on how South Africa's legal framework incorporates the procedural safeguards that stem from the international framework.<sup>1</sup> The chapter aims to determine what provisions, in the South African legal framework, provide procedural protection for children in the decision-making process in family-related disputes. Together, this chapter and Chapter Four address the third sub-research question of this thesis,

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<sup>1</sup> See Chapter Three.

“to what extent has South Africa incorporated the substantive and procedural recommendations stemming from its international obligations into its domestic framework?”

## **5.2 PROCEDURES FOR MEANINGFUL CHILD PARTICIPATION**

Chapter Three identified how international standards highlight the importance of child participation as a core component of the best interests principle. These standards recommend that children be both informed about all aspects of legal proceedings and meaningfully supported so that their views can be accurately conveyed and considered. Two key aspects for child participation procedures were identified in Chapter Three.<sup>2</sup> First, a child should be able to express their own perspective in an environment that respects their evolving capacities and unique needs. Second, children should have access to representation whose primary responsibility is to communicate the child’s viewpoint effectively and protect their rights throughout the decision-making process.

The following discussion, therefore, investigates how domestic law provides children with adequate representation, including a separate legal practitioner for the child where needed, as well as an enabling environment necessary to facilitate real and meaningful child participation. It also considers the role of a *curator ad litem* and the conditions under which a safe and supportive atmosphere is created for children in court.

### ***5.2.1 Representation for children***

South African domestic law expressly recognises children as active participants, rather than passive subjects, in family-related disputes. The domestic framework for child participation mirrors that of international law. The Constitution and Children’s Act affirm that every child capable of participating in a matter concerning them has the right to express their views freely and have those views given due weight.<sup>3</sup> Prior to the enactment of the Children’s Act, the legal framework did not consistently mandate that courts actively seek and consider the child’s own perspective. In many instances, children’s views were either entirely absent from the

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<sup>2</sup> See part 3.6 of Chapter Three.

<sup>3</sup> Children’s Act s 10; See also part 4.5.1 Of Chapter Four.

proceedings or presented indirectly through the interpretations of adults, such as parents, rather than being sought and weighed in their own right.<sup>4</sup>

A key mechanism for ensuring children's voices are heard is the provision of independent legal representation for children. Before the child's right to legal representation was included in the Children's Act, the appointment of legal representation for the child was limited to the provisions of the Divorce Act.<sup>5</sup> In terms of the Divorce Act, which is still applicable in divorce matters involving children, the court may appoint legal representation for the child if necessary and at the expense of the child's parents.<sup>6</sup> It is well known, particularly in South Africa, that access to private legal services is costly. Combined with the legacy of apartheid and persistent socio-economic disparities it is untenable that a child's right to legal representation should depend on the family's financial position. By restricting meaningful representation to children from families with sufficient financial resources, the system effectively denies many children the opportunity to have their voices fully heard and respected in legal proceedings.<sup>7</sup> This situation raises further concerns that if a parent is funding the child's legal representation, it could potentially lead to conflicts of interest with one or both parents.<sup>8</sup> When one parent is responsible for the costs of the child's legal representation, there is a risk that the legal representation might not be entirely impartial, whether intentional or not, the funding parent may expect the legal practitioner to promote their own interests instead of focusing on the child's best interests. This arrangement may undermine the objectivity essential to legal proceedings, especially when the child's needs and preferences diverge significantly from those of the parents. Relying on one parent to fund the child's legal representation may also distort

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<sup>4</sup> The Child Care Act did not explicitly address child participation or the child's views in legal proceedings. However, it did contain provisions that indirectly relate to child welfare and input. For instance, the Act also establishes children's courts, in s 5, with procedures for inquiries into children's welfare but does not explicitly mandate mechanisms for routinely hearing the child's views. Additionally, Section 14(2) required a social worker's report on the child's and their family's circumstances during court inquiries, focusing on fact-finding rather than directly seeking the child's perspective.

<sup>5</sup> Divorce Act s 6(4).

<sup>6</sup> Ibid.

<sup>7</sup> Sloth-Nielsen (2008) at 502-503; See also DG Kassan 'The Voice of the Child in Family Law Proceedings' (2003) *De Jure* 164-179, at 169.

<sup>8</sup> M Carnelley 'The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia' (2010) *Obiter* 638-661, at 643; See also Sloth-Nielsen (2008) at 507.

family dynamics, potentially causing the child to feel indebted or aligned with the paying parent and alienated from the other. To prevent such outcomes and ensure that the child's voice is genuinely heard, domestic law ought to guarantee fully independent and impartial representation for the child.

The legal starting point is twofold. Section 28(1)(h) of the Constitution<sup>9</sup> entitles every child to a legal practitioner appointed at state expense if substantial injustice would otherwise result, and section 14 of the Children's Act 38 of 2005<sup>10</sup> expressly confirms the child's right to participate, directly or through a representative, in any matter concerning the child.<sup>11</sup> These provisions override the pre-constitutional common-law position that a minor could litigate only through a guardian, as well as the position in the Divorce Act. This reform addresses the economic barriers that previously may have restricted effective child participation in divorce matters. However, unlike the Divorce Act, this provision applies in all family-related disputes. By providing independent legal representation, the Children's Act ensures that the child's voice is conveyed by a professional dedicated solely to advancing the child's interests, free from parental influence or financial constraints. However, it is not practical for every child in every family-related legal dispute to have his or her own legal representation and neither it is always necessary. Insisting on legal representation in all disputes involving children is futile. Instead, it is more reasonable to assess the need for a child's separate legal representative at the state's expense on a case-by-case basis.

The Centre for Child Law published guidelines for the legal representation of children in civil matters (the CCL guidelines) that provide clarity on the roles and responsibilities of legal representation in the form of a separate legal practitioner for children and a *curator ad litem*.<sup>12</sup> The CCL guidelines confirm that a legal practitioner functions either in a client-directed capacity, following the child's explicit instructions if they are sufficiently mature, or in a best interests capacity when the child cannot provide clear instructions.<sup>13</sup> By contrast, a *curator ad litem*, is often appointed in cases where there is a risk of substantial injustice if the child has no

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<sup>9</sup> Constitution s 28(1)(h).

<sup>10</sup> Children's Act s 14.

<sup>11</sup> See Chapter Four part 4.5.1.

<sup>12</sup> A Skelton and C du Toit *Guidelines for legal representatives of children in civil matters* (2016) Pretoria University Law Press at 9.

<sup>13</sup> *Ibid.*

representation and the child's interests are at stake.<sup>14</sup> Unlike a legal practitioner, a *curator ad litem* adopts an investigative role, reporting to the court on what serves the child's best interests rather than solely advocating for the child's views.<sup>15</sup> The two roles reflect a balance between enabling children to participate in decisions affecting them and ensuring their welfare is protected when they are too young or immature to express their views and preferences directly.<sup>16</sup> Legal practitioners are typically engaged in cases where the child is mature enough to express views, while *curators ad litem* are appointed in more complex or contentious disputes.<sup>17</sup> The *curator ad litem*, traditionally a protective measure derived from common law,<sup>18</sup> now functions to safeguard the child's interests and inform the court of all relevant factors in respect of the child. The distinction between representation in the form of a legal practitioner and a *curator ad litem* is generally more apparent in international abduction cases. For very young children, legal representation often resembles the role of a *curator ad litem*, as the representative acts to safeguard the child's best interests. In contrast, for older children, legal practitioners typically take direct instructions from the child, reflecting the child's ability to participate actively in the legal process.<sup>19</sup>

Despite the legal provision for children to have legal representation, it is still uncommon for children to be independently represented in court. Exceptions are limited to certain cases, such as international abduction disputes, where a *curator ad litem* is usually appointed to act as the child's representative.<sup>20</sup> Generally, the child's views are still mainly heard indirectly by courts.<sup>21</sup> The reluctance of courts to hear the child's views directly often stems from various generalised presumptions about children, such as concerns about immaturity or the undue influence of parents on the child.<sup>22</sup> Therefore, in addition to legal representatives in the form of a practitioner and a *curator ad litem*, domestic law makes provision for other professionals

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<sup>14</sup> *Du Toit v Minister of Welfare and Population Development* SA 198 (CC) 201G-201H provides that “[w]here there is a risk of injustice, a court is obliged to appoint a *curator [ad litem]* to represent the interests of children.”

<sup>15</sup> T Boezaart ‘The role of a curator ad litem and children’s access to the courts’ (2013) *De Jure* 707-726, at 712.

<sup>16</sup> *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para 23.

<sup>17</sup> Skelton and du Toit (2016) at 16.

<sup>18</sup> See *Ex parte Phillipson and Wells NNO* 1954 1 SA 245 (E) 246.

<sup>19</sup> *Central Authority of the Republic of South Africa v B* 2012 2 SA 296 (GSJ) para 2.

<sup>20</sup> Skelton and du Toit (2016) at 2.

<sup>21</sup> J Sloth-Nielsen ‘Realising children’s rights to legal representation and to be heard in judicial proceedings: an update’ (2008) *South African Journal of Human Rights* 495-524, at 503.

<sup>22</sup> Barratt (2002) at 562-565.

to contribute to somewhat of an indirect participatory model for children. This is largely through the establishment of the Office of the Family Advocate, which is intended to uphold the child's best interests and realise the Constitutional imperative for children to be represented in civil matters.<sup>23</sup>

Contrary to its name, the Mediation in Certain Divorce Matters Act,<sup>24</sup> did not introduce mediation and instead established the Office of the Family Advocate. The Family Advocate conducts inquiries into the child's best interests in divorce proceedings. Although the Family Advocate does not act on the child's instructions, their impartial investigation and reporting often involve interviewing the child.<sup>25</sup> In *Soller v G*,<sup>26</sup> the court confirmed that the Family Advocate has three core responsibilities which are to review court documents and settlement agreements to confirm that they are consistent with the child's best interests; to facilitate mediation between disputing parties; and to conduct thorough evaluations of children and their circumstances, providing the court with a detailed report that includes their findings and recommendations.<sup>27</sup> Similarly, in *Van Vuuren v Van Vuuren*,<sup>28</sup> the court clarified the Family Advocate's responsibility to ensure thorough examinations of proposed care and contact arrangements of children.<sup>29</sup> Notably, the Family Advocate's report may provide some insight for the court's assessment of the child's perspective, but it is not a substitute for independent representation. Unlike the Family Advocate, legal representatives for the child directly advocate on behalf of the child's wishes (where the child is sufficiently mature to provide instructions) or, if not, as said earlier, adopt a best-interests role that focuses on ensuring the child's needs and welfare remain paramount. Whereas the Family Advocate adopts a more neutral role in their assessment of the child's best interests that does not necessarily include the child's views.<sup>30</sup>

The domestic framework, providing for state-funded legal representation, the Family Advocate and *curator ad litem*, work in tandem to safeguard the child's participation rights and

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<sup>23</sup> J Sloth-Nielsen 'South Africa' (2021) in W Schrama M Freeman et al (eds) *International Handbook on Child Participation in Family Law* 303-316, at 308.

<sup>24</sup> Mediation in Certain Divorce Matters Act 24 of 1987.

<sup>25</sup> Sloth-Nielsen (2008) at 503.

<sup>26</sup> *Soller v G* 2003 5 SA 430 (W).

<sup>27</sup> *Soller v G* para 22-21.

<sup>28</sup> *Van Vuuren v Van Vuuren* 1993 SA 163 (T).

<sup>29</sup> *Van Vuuren v Van Vuuren* at 167A-B.

<sup>30</sup> *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) 606-610.

strives to ensure that the child's perspective is not only heard but also meaningfully integrated into decision-making. Independent legal representatives bridge gaps between the child and the court. They ensure that the child's instructions (in client-directed representation) or best interests (in best-interests representation) are rigorously presented. This approach reduces the risk that decisions will be shaped solely by parental interests or judicial assumptions.

While resource constraints continue to hamper universal implementation, the combined effect of s 28(1)(h) of the Constitution and s 14 of the Children's Act is that South African courts are obliged, at least in principle, to ensure that every child whose interests are materially affected is provided with either an appointed legal practitioner, a *curator ad litem*, or another appropriate participation mechanism. Thus, the South African framework's core principles for procedures that support child participation are consistent with international standards that acknowledge children's rights to be heard and to assume progressively greater decision-making authority for children.

### ***5.2.2 Child-friendly environments***

Against Chapter Three's finding that a child should be able to express their perspective in an environment that respects their evolving capacities and unique needs, this section examines the domestic framework's efforts to create child-friendly environments that facilitate meaningful participation. South Africa's approach to resolving family-related disputes has historically adopted an adversarial model, which is a system better suited to other areas of civil law than to the needs of children caught in family-related conflict.<sup>31</sup> In such proceedings, parents often compete to prove the other's shortcomings, fostering a tense and combative atmosphere that overlooks the child's voice.<sup>32</sup> This approach risks marginalising the child's perspective and undermines the principles promoted by international standards that prioritise the child's best interests and meaningful participation.

In response to these limitations, the South African legal framework has introduced several reforms aimed at cultivating a more child-friendly environment. One prominent

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<sup>31</sup> R Adler (2001) at 16.

<sup>32</sup> M De Jong 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation' (2005) *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 33-47, at 33.

development is the establishment of specialised Children's Courts under the Children's Act.<sup>33</sup> These courts are tasked with conducting proceedings in a manner that is informal, accessible, and less intimidating.<sup>34</sup> The Draft Children's Court Rules (Draft Rules) reinforce these aims, promoting features like child-sized furniture, straightforward language, and the ability to exclude individuals who distress the child.<sup>35</sup> The Draft Rules include provisions allowing a "comfort person" to accompany a child in court, ensuring emotional support during proceedings.<sup>36</sup> These measures encourage a more inquisitorial role for presiding officers, who can actively engage with the child, seek relevant information, and ensure the child's views are genuinely heard and considered.<sup>37</sup> This approach aligns closely with international standards and acknowledges that the traditional adversarial model does not readily accommodate the emotional complexities involved in matters concerning children.

Moreover, the Children's Act specifies that the Children's Court must be held in a room that is design puts children at ease, is an informal environment that allows for the child's active participation and is accessible to disabled children.<sup>38</sup> In a practical sense, this means that the physical setting and design of the Children's Courtroom should be intentionally created to make children feel comfortable. The environment should encourage the child's active participation by being informal, welcoming, and accommodating to their needs.<sup>39</sup> Creating a child-friendly

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<sup>33</sup> Children's Act Ch 4.

<sup>34</sup> Children's Act s 42.

<sup>35</sup> Department of Justice and Constitutional Development *Rules regulating the conduct of the proceedings of the children's courts in South Africa* (2018) s 3 available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://juta.co.za/media/filestore/2018/10/Draft\\_Childrens\\_Court\\_Rules.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://juta.co.za/media/filestore/2018/10/Draft_Childrens_Court_Rules.pdf).

<sup>36</sup> The Draft Rules define a "comfort person" as

"...a person who

(a) is trusted by the child;

(b) has close relationship with the child;

(c) is not necessarily a party to the proceedings; and

(d) who will provide reassurance and comfort to the child during the proceedings;"

<sup>37</sup> Draft Rules s3(1)-(3).

<sup>38</sup> Children's Act s42(8)(a)-(d).

<sup>39</sup> JD Berrick J Dickens T Pösö and M Skivenes 'International perspectives on child-responsive courts' (2018) 26(2) *The International Journal of Children's Rights* 251-277, at 256.

environment involves thoughtful considerations. This includes incorporating bright and cheerful colours, comfortable seating, and child-sized furniture contribute to this atmosphere.<sup>40</sup>

Further supporting the shift away from a purely adversarial setting is the involvement of professionals like the Family Advocate, by conducting impartial investigations focused on the best interests of the child.<sup>41</sup> Although High Courts, Regional Courts, and Children's Courts operate within a tiered system, legislative changes and the work of the Family Advocate have influenced procedural norms. The Family Advocate's role provides expert reports focused on the child's best interests, interviewing the child and evaluating family circumstances beyond the constraints of adversarial advocacy.<sup>42</sup> Judgements like *De Groot v De Groot*<sup>43</sup> highlight the benefits of these investigative methods, where the court can draw on neutral expert assessments rather than competing allegations.<sup>44</sup> Scholars such as Skelton and Proudlock regard this development as a positive step toward meeting international standards, by paying greater attention to children's evolving capacities and right to participation.<sup>45</sup>

Mediation further complements these efforts by offering a less confrontational means of resolving disputes.<sup>46</sup> In mediation, children can participate in a more supportive setting, enabling them to express their views openly and directly, influencing outcomes that genuinely reflect their best interests.<sup>47</sup> Although mediation is not a cure-all, its potential to mitigate the zero-sum nature of adversarial conflict is a valuable advancement in promoting a more nurturing, child-sensitive approach to decision-making. South Africa's legal framework demonstrates significant progress toward aligning with international standards for child-friendly environments.

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<sup>40</sup> Ibid.

<sup>41</sup> See part 5.2.1 of Chapter Five for a discussion of the role of the Family Advocate.

<sup>42</sup> N Glasser 'Can the family advocate adequately safeguard our children's best interests' (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 74-86, at 75.

<sup>43</sup> *HM De Groot v CE De Groot* unreported (EHC) Case No. 1408/2009, 10 September 2009.

<sup>44</sup> *HM De Groot v CE De Groot* para 19-23.

<sup>45</sup> A Skelton and P Proudlock 'Interpretation, objects, application and implementation of the Act' in CJ Davel and A Skelton *Commentary on the Children's Act* (2013) 2nd ed Juta Cape Town.

<sup>46</sup> B Hewlett 'Accessing the parental mind through the heart: A case study in child-inclusive mediation' (2007) 13 (1) *Journal of Family Studies* 94-103, at 97.

<sup>47</sup> Ibid.

## **5.3 INTERDISCIPLINARY TEAM TO ASSESS THE CHILD'S BEST INTERESTS**

Chapter Three determined that the international standards recommend a multi-disciplinary group of trained professionals to gather information and insights relevant to the child's unique circumstances. This approach ensures that the child's best interests are assessed holistically, reflecting the complexity and evolving nature of a child's physical, emotional, psychological, educational, and cultural needs. This approach involves a range of experts, such as teachers, social workers, psychologists, and medical professionals, each equipped with specialised knowledge of child and adolescent development. Due to their expertise, these professionals can more accurately identify the factors pertinent to the child's well-being, considering the child's individuality, cultural context, and developmental stage.

Against this background, the following discussion investigates the provision of procedural safeguards in domestic law that facilitates the involvement of suitably qualified interdisciplinary professionals to gather evidence related to the child and inform judicial decision-making. Thereby ensuring that courts move beyond adult-centric assumptions and incorporate an evidence-based understanding of the child's individual circumstances.

### ***5.3.1 Involvement of interdisciplinary professionals***

South African law, albeit very brief in this regard, recognises the value in acquiring input from professionals with expertise in child development, psychology, and related fields in decision-making. However, the existing legislative framework provides only vague references to the need for "suitably qualified persons" without setting out clear, uniform standards or procedures governing their selection and involvement.<sup>48</sup> The Children's Act does not explicitly specify

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<sup>48</sup> Children's Act s 62 provides that

"(1) A children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of

- (a) the child;
- (b) the parents or a parent of the child;
- (c) a person who has parental responsibilities and rights in respect of the child;

who, when or how such experts should be appointed to aid in decision-making, leaving this determination to the broad discretion of the court.

Alternatively, the Family Advocate, who typically holds a qualification in law,<sup>49</sup> can seek the assistance of additional experts when conducting inquiries into a child's best interests.<sup>50</sup> These experts typically include social workers, psychologists, or educators who possess specialised knowledge of children's developmental needs. This makes sense given the Family Advocate's knowledge and experience being mainly in law and, presumably, not child development. Yet the decision to engage these professionals lies largely at the Family Advocate's discretion.

Similarly, *curators ad litem*, are appointed by courts based on their legal qualifications and experience rather than formal child-specific training.<sup>51</sup> Despite their largely legal background, presiding officers in the Children's Court, tend to rely heavily on the Family Advocate and *curator ad litem's* reports, often due to their own lack of training in child specific issues. This lack of training can lead to inconsistencies in decision-making due to a limited understanding of the unique needs of children. Without expertise in child development, family or social dynamics, decisions may inadvertently reflect adult-centric assumptions or overlook key developmental, emotional, or psychological factors critical to determining the child's best interests. For instance, a legal professional might undervalue the impact of cultural or familial relationships on a child's well-being or fail to properly assess a child's evolving capacities and needs. Involving child development and social work experts in the decision-making process can mitigate these inconsistencies by providing a well-rounded, evidence-based understanding of the child's situation. These professionals bring a depth of understanding that ensures

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(d) a care-giver of the child;

(e) the person under whose control the child is; or

(f) any other relevant person.

(2) A person referred to in subsection (1) may, subject to section 63( 1) and (2)

(a) obtain supplementary evidence or reports from other suitably qualified persons..."

<sup>49</sup> The Mediation in Certain Divorce Matters Act No 24 of 1987 s 2(2) provides that 'No person shall be appointed as a Family Advocate unless he is qualified to be admitted to practice as an advocate in terms of the Admission of Advocates Act, 1964 {Act No. 74 of 1964), and the Minister deems him to be suitable for appointment as a Family Advocate by reason of his involvement in or experience of the adjudication or settlement of family matters.'

<sup>50</sup> The Mediation in Certain Divorce Matters Act s 4(2).

<sup>51</sup> Boezaart (2013) at 707.

decisions are better aligned with the child’s developmental needs, fostering a more consistent and holistic approach to protecting the child’s best interests.

Moreover, the current training provided to these professionals often falls under the auspices of various professional bodies rather than being directly mandated by the Children's Act. While bodies such as the South African Judicial Education Institute (SAJEI) and professional councils offer relevant training in child development,<sup>52</sup> a unified, mandated training framework specific to the needs of children in legal disputes does not exist and means that the quality of training and development in different regions can vary. This thesis agrees with the SALRC proposal in Project 100D Discussion Paper 130 (DP 130) to amend the Children's Act to mandate specialised training for Children’s Court magistrates.<sup>53</sup> This training, which should encompass the provisions of the Children's Act, the Bill of Rights, and international laws concerning children, would enhance the capacity of presiding officers to effectively prioritise and uphold the child’s best interests in the decision-making process.

## **5.4 EXPEDITED DECISION-MAKING WITH PROCESSES FOR REVIEW**

Chapter Three demonstrated that children’s distinct perception of time, along with the rapid pace of their development, necessitates prompt and context-sensitive decision-making in family-related legal disputes. Delays may adversely affect the child’s immediate well-being and have long-lasting consequences, given the evolving nature of their needs and capacities. Swift resolution not only caters to a child’s current developmental stage and emotional security but also provides stability conducive to their healthy growth. Building on these considerations,

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<sup>52</sup> See the annual training schedule for magistrates and judges available at <https://www.judiciary.org.za/index.php/sajei/workshops-and-seminars/workshops-and-seminars-national> (accessed 6 May 2023); See also See the SACSSP policy of continuing professional development for social workers available at <https://www.sacssp.co.za/2021/PBSW%20CPD%20Policy%202021.pdf>; See also the SACSSP norms and standards document on continuous professional development of social workers available at [https://www.sacssp.co.za/2021/Norms%20and%20Standards%20for%20Bachelor%20of%20Social%20Work%20\(PBSW\).pdf](https://www.sacssp.co.za/2021/Norms%20and%20Standards%20for%20Bachelor%20of%20Social%20Work%20(PBSW).pdf); See also the LPC Code of Conduct clause 3.13 available at <https://drive.google.com/file/d/1s8Ysf8LLrmQAwcfSgtJZpqq00t-LAbC-/view>.

<sup>53</sup> South African Law Reform Commission (SALRC), *Project 100D: Review of Aspects of the Law Relating to Children — Discussion Paper 130, July 2015 (“DP 130”)* vi-vii; See also South African Law Reform Commission *Issue Paper 9 Project 106 Juvenile Justice* (1997) at 17.

the following part investigates the procedural safeguards in domestic law that ensure prompt decision-making and whether accessible avenues exist for children to challenge outcomes that may not serve their best interests.

#### ***5.4.1 Expedited decision-making***

International standards emphasise that decisions impacting children's lives should be reached as promptly as possible.<sup>54</sup> Delays prolong uncertainty, potentially harming the child's well-being, development, and sense of stability. South African law, however, faces persistent systemic challenges in adhering fully to this procedural safeguard. South Africa inherited a court system from the Apartheid government based on segregation. The courts that had civil jurisdiction were mainly located in white areas, while black areas contained branch and periodical courts. However, the branch and periodical courts did not provide family law services. This manifested in a flawed court system that led to a clogged court system at the main courts.<sup>55</sup> These issues are still relevant today as the effects have led to a fragmented court system with overlapping jurisdiction in family-related disputes. The following courts have concurrent jurisdiction in family-related legal disputes:

- i. Traditional Courts, presided over by traditional leaders;
- ii. District Magistrates Courts presided over by Magistrates appointed by the Children's Act as dedicated presiding officers when adjudicating disputes in terms of the Act;
- iii. Regional Magistrates Courts; and
- iv. High Courts, the Supreme Court of Appeal, and the Constitutional Court presided over by Judges.<sup>56</sup>

In terms of the common law, the High Court is inherently the upper guardian of all children and has jurisdiction to hear any matter involving children. This stems from the common law doctrine of a superior court's inherent jurisdiction to hear any matter that comes before it.<sup>57</sup> The jurisdiction of the Regional Magistrates Court is derived the Jurisdiction of

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<sup>54</sup> See part 3.6.3 Of Chapter Three.

<sup>55</sup> Department of Justice and Constitutional Development *Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill* Briefing to the Justice Portfolio Committee on 6 February 2008 at para 4.

<sup>56</sup> SALRC, DP 130 102-103; See also SALRC Report on Family Disputes: Care and Contact para 4.2.1.

<sup>57</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909.

Regional Courts Amendment Act (JRCAA).<sup>58</sup> The JRCAA gives the court jurisdiction to hear family law matters related to civil marriages, civil unions, customary marriages related to the Recognition of Customary Marriages Act, and divorce.<sup>59</sup> The purpose of the JRCAA is to ensure access to justice in the lower courts for all aspects related to divorce, including issues regarding parental responsibilities and rights when brought with a divorce action. As a result of the JRCAA, the Regional and District Magistrates Courts have jurisdiction in almost all family law matters making these courts more accessible and affordable for families and ensuring that decisions are made timeously.<sup>60</sup>

The Children's Court is a special court dealing with children-related matters that derives its jurisdiction from the Children's Act.<sup>61</sup> Every Magistrates Court in South Africa is also a

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<sup>58</sup> Jurisdiction of Regional Courts Amendment Act 31 of 2008.

<sup>59</sup> The Jurisdiction of Regional Courts Amendment Act, s29(1)(B); s29(1)(B) provides that, '[a] court for a regional division, in respect of causes of action, shall, subject to section 28(1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.

(c) The presiding officer of a court for a regional division hearing a matter referred to in paragraph (a) may, in his or her discretion, summon to his or her assistance two persons to sit and act as assessors in an advisory capacity on questions of fact.

(d) Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), shall be deemed to have also been appointed in respect of any court for a regional division having jurisdiction in the area for which he or she has been so appointed.'

<sup>60</sup> J Sloth-Nielsen 'The jurisdiction of the Regional Courts Amendment Act, 2008: Some implications for child law and divorce jurisdiction' (2011) 36 *Journal for Judicial Science* at 14.

<sup>61</sup> See the Children's Act, s45(1) which provides that, subject to section 1(4), a children's court may adjudicate any matter, involving-

(a) the protection and well-being of a child;

(b) the care of, or contact with, a child;

(c) paternity of a child;

(d) support of a child;

(e) the provision of-

(i) early childhood development services; or

Children’s Court making this court more accessible to families and children. While the Children’s Act gives the Children’s Court jurisdiction in various matters involving children, this jurisdiction is limited and not applicable in matters related to children that arise from the Administration Amendment Act,<sup>62</sup> the Divorce Act,<sup>63</sup> the Maintenance Act,<sup>64</sup> the Domestic Violence Act,<sup>65</sup> and the Recognition of Customary Marriages Act.<sup>66</sup> The jurisdiction in these matters remains solely that of the Regional Court and the High Court. In addition, the Children’s Act provides that the High Court has exclusive jurisdiction in international child abduction matters and solidifies the inherent jurisdiction of the High Court as the upper guardian of all children.<sup>67</sup>

Although extending jurisdiction to the Children’s Court has likely improved accessibility and expedited decision-making, the overlapping jurisdiction of courts in family-related disputes remains confusing and lacks clarity. In her research, Sloth-Nielsen described the court system as a “schizophrenic” approach as many parental responsibilities and rights matters can be heard by the Children’s Court, while some parental responsibilities and rights matters are reserved for other courts.<sup>68</sup> There is also no articulation from the District Court to the Regional Court for more complicated matters or where an appeal is necessary. Instead, these are two courts with overlapping jurisdiction in family-related legal disputes of the same nature. The SALRC originally envisaged an articulation process between the lower courts which would expedite the resolution of family-related legal disputes. In its report on Family

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(ii) prevention or early intervention services;

(f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;

(g) the temporary safe care of a child;

(h) alternative care of a child;

(i) a child and youth care centre, a partial care facility or a shelter or drop-in centre, or any other facility purporting to be a care facility for children; or

(j) the adoption of a child, including an inter-country adoption;

(k) any other matter relating to the care, protection or well-being of a child provided for in this Act.

<sup>62</sup> See s1(4) of the Children’s Act.

<sup>63</sup> Administration Amendment Act 9 of 1929.

<sup>64</sup> Divorce Act.

<sup>65</sup> Domestic Violence Act 116 of 1998.

<sup>66</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>67</sup> See the Children’s Act, s45(3) and s45(4).

<sup>68</sup> J Sloth-Nielsen (2011) at 7.

Disputes, the SALRC noted that the Children’s Court was initially envisaged as a two-tiered child and family court of first instance. Depending on the complexity of family law matters, the two-tiered court structure envisaged a separate district and regional level. However, this was not done; instead, we have a single-tiered system for all matters related to the Children’s Act which may cause undue delays in the resolution of these disputes.<sup>69</sup>

Exacerbating the delays caused by the confusing jurisdiction of courts in family-related legal disputes, it has also become common practice for the legal representation of parents to intentionally delay the resolution of these disputes.<sup>70</sup> Although the Children’s Act prescribes that adjournments should only occur if good cause is shown for no more than 30 days, these delaying tactics are ongoing and seriously impact the children involved.<sup>71</sup> Moreover, while s 42(3) of the Children’s Act<sup>72</sup> provides for the appointment of dedicated presiding officers in the Children’s Court, in practice, presiding officers are frequently rotated. As a result, children and their families encounter a 'new' presiding officer each time they appear in court who are not familiar with the history of their case and often also lack specialised knowledge and experience in applying children's rights. Practices like this undermine procedural safeguards that are meant to ensure that decision-making occurs within the shortest possible time.

#### ***5.4.2 Accessible appeal and review mechanisms***

While timeliness is paramount, decisions must also be revisited as circumstances evolve, ensuring that earlier orders remain aligned with the child’s best interests and developing capacities. South African law provides certain avenues for appeals and reviews. The High Court, as the upper guardian of all children, can reconsider lower court decisions if brought before it, and the Children’s Act prescribes periodic reviews in certain contexts, such as alternative care placements.<sup>73</sup> This review mechanism is designed to ensure that the placement

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<sup>69</sup> SALRC Report on Family Disputes: Care and Contact para 4.2.9-10.

<sup>70</sup> SALRC Report on Family Disputes: Care and Contact para 4.2.41.

<sup>71</sup> Children’s Act s64(1)-(2).

<sup>72</sup> See s42(3) of the Children’s Act.

<sup>73</sup> Children’s Act s 159 provides that

“[a]n order made by a children’s court in terms of section 156 (i.e. orders for alternative care)

continues to serve the best interests of the child, taking into account any changes in their development or living conditions. Children's Courts are also empowered to withdraw, suspend or amend existing orders concerning, for example, custody or maintenance when significant changes in circumstances occur.<sup>74</sup> This flexibility allows the court system to respond to the evolving needs of the child and family dynamics.

The Children's Act also provides a procedural safeguard allowing any party involved in a matter before the children's court to appeal decisions made by the court.<sup>75</sup> For example, if a children's court grants custody to one parent or refuses to issue a protective order, any affected party, such as a parent, guardian, or the child, has the right to appeal that decision. The appeal process must be directed to the High Court, allowing decisions of the children's court to be reviewed by a higher judicial authority.<sup>76</sup> While this adds an important layer of accountability and oversight, it is highly impractical for children to access this review mechanism. It is unlikely that children could independently approach the High Court, and pursuing such an appeal through legal representation poses significant challenges.<sup>77</sup> Although sections 14 and 15 of the Children's Act<sup>78</sup> guarantee every child the right to participate in proceedings and provide a statutory basis for state-funded legal representation, empirical evidence shows that effective access remains uneven. Legal Aid South Africa's 2023 Annual Report records an average 11-week delay before a child matters file is allocated to counsel in the Gauteng region,<sup>79</sup> while the Centre for Child Law has documented several High-Court reviews where a *curator ad litem* had to act *pro bono* because Legal Aid funds were exhausted for that financial year.<sup>80</sup> Private representation, where available, can cost in excess of R25 000 per urgent

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(a) lapses on expiry of two years from the date the order was made; or such shorter period for which the order was made; and

(b) may be extended by a children's court for a period of not more than two years at a time."

<sup>74</sup> Children's Act s 46(2) provides that "A children's court may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order."

<sup>75</sup> Children's Act s 51(1).

<sup>76</sup> *Ibid.*

<sup>77</sup> H Van As 'Legal aid in South Africa: Making justice reality' (2005) 49(1) *Journal of African Law* 54-72, at 58.

<sup>78</sup> Children's Act ss 14-15.

<sup>79</sup> Legal Aid South Africa, Annual Report 2022/23 (Pretoria, 2023) 44.

<sup>80</sup> Centre for Child Law, "Children's Right to Legal Representation in Practice" (Briefing Paper, May 2022) 7-8.

motion,<sup>81</sup> a sum beyond the reach of most South African households. Against that backdrop, a child who is unassisted by a parent or guardian still faces formidable practical obstacles in approaching the High Court directly, despite the statutory framework.

The procedural route through which a child's case reaches court is usually dictated by the child's limited capacity to litigate under the common law. An *infans* lacks all capacity, while an *impubes* has only limited capacity, requiring assistance by a guardian or *curator ad litem*.<sup>82</sup> For that reason the High Court in *Soller NO v G and Another* appointed an independent legal practitioner to represent the fifteen-year-old, emphasising that the exact mode of participation must always serve the child's best interests.<sup>83</sup> Similarly, in *FB v MB*, Meyer J accepted the father's undertaking to fund representation for his sixteen-year-old son and emphasised that the court "may determine the way in which a child is to bring a matter forward."<sup>84</sup> These cases illustrate that children seldom appear *in person*, not because courts are disinclined to hear them, but because capacity rules and practical considerations favour representation. The concern, however, is how effectively that representative conveys the child's own views; neither *Soller* nor *FB v MB* sets out clear guidelines for eliciting and presenting the child's perspective. In the absence of such guidelines, the statutory promise of child participation in s 14 of the Children's Act and the constitutional right in s 28(1)(h) risk being realised only partially. What is needed is jurisprudence, and possibly rules of court, that require any appointed curator or legal practitioner to place the child's views before the court, unless the child is unable or unwilling to express them.

In a system where cost, formality, and a lack of simplified procedures pose substantial obstacles, children's meaningful participation in post-judgment processes is limited. There is a need for more systematic provisions. For instance, introducing mandatory guidelines for informing children (and their representatives) about available review mechanisms, providing child-friendly documents and explanations, and designating specialist legal practitioners or support workers who could make review and appeal processes genuinely accessible.

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<sup>81</sup> A Skelton "Children's Rights to Access to Justice and Remedy: Recent Developments" (2024) *Youth Justice* 24(1) at 8-12.

<sup>82</sup> LAWSA *Minors and Other Persons* (vol 17 part 1, 2023 update) para 88; Voet 1.7.6; cf. *Jooste v Botha* 2000 (2) SA 199 (T) 204H-I.

<sup>83</sup> *Soller NO v G and Another* 2003 (5) SA 430 (W) 436E-F.

<sup>84</sup> *FB v MB* 2012 (2) SA 394 (GSJ) para 39.

While the South African legal framework recognises the importance of timely and informed decision-making, as well as the need for periodic review, its implementation falls short of the ideal envisioned by both international standards and domestic reform proposals. Delays caused by systemic fragmentation, strategic adjournments, and insufficient judicial specialisation contradict the principle of ensuring the child's welfare without unnecessary postponement. Likewise, the reliance on adult initiation of appeals or reviews and the lack of standardised child-friendly practices hinders children's active participation in correcting or improving decisions that affect them.

## 5.5 CONCLUSION

This chapter set out to investigate the procedural safeguards in South Africa's legal framework, focusing on how these mechanisms protect the child's best interests in the decision-making process. By building on Chapter Four's discussion of substantive elements, this chapter completes the inquiry of the extent to which South African law incorporates the international recommendations, that require both substantive and procedural measures for advancing the child's best interests in decision-making.

A number of core themes emerged. First, the chapter demonstrated that while domestic law recognises children as active participants in proceedings, practical challenges inhibit meaningful child participation. Legal provisions for independent representation, the possibility of child-directed models, and the role of the Family Advocate and *curator ad litem* show significant alignment with international standards. However, the courts' reluctance to engage children's voices directly can reduce these measures to tokenistic gestures, falling short of fully realising the child's participatory rights.

Second, the chapter highlighted efforts to create child-friendly environments, such as specialised Children's Courts, inquisitorial procedures, and mediation, that shift away from purely adversarial models. Although some courts have successfully embraced these reforms, inconsistencies remain due to uneven training, infrastructural deficits, and the enduring influence of adversarial traditions in civil law.

Third, the chapter emphasised the importance of interdisciplinary collaboration with courts. While the Family Advocate can seek social workers, psychologists, and other expert perspectives in its assessment of the child's best interests, the lack of clear statutory guidelines means this process often rests on individual discretion. Without a mandated, standardised

framework, the child's best interests is at risk of being assessed in a piecemeal fashion, with courts relying on professionals who may not have the specialist expertise or training to address a child's unique circumstances holistically.

Finally, the chapter investigated the need for procedures that expedite judicial action and provide clear avenues of appeal or review. Although legal provisions allow children to seek a review or appeal of decisions, significant obstacles, such as reliance on adult initiation, a shortage of child-friendly materials, and systemic delays, can undermine the effectiveness of these remedies. While adults or curators must, as a rule, initiate appeals and reviews, the jurisprudence still offers little guidance on ensuring that the substance of the child's own voice reaches the court. Ultimately, the combined effect of fragmented jurisdiction, limited specialisation of the professionals involved, and tactical delays by parent's legal representation means that procedural safeguards often fail to deliver the timely, informed, and accessible processes expected by international standards.

Taken as a whole, the findings of Chapters Four and Five indicate that South Africa's legal framework conceptually aligns with international standards, both substantively and procedurally. Yet the practical application, particularly of procedural safeguards, may be inconsistent. The critical challenges identified here threaten the full realisation of the child's best interests in decision-making. In the next chapter, the thesis investigates how these procedures find expression in the domestic laws governing a specific family-related dispute context, namely in international child abduction.

## CHAPTER SIX

# SUBSTANTIVE ELEMENTS AND PROCEDURAL SAFEGUARDS IN INTERNATIONAL CHILD ABDUCTION DECISION-MAKING UNDER SOUTH AFRICAN LAW

### 6.1 INTRODUCTION

The previous chapter established that although the South African domestic law regarding decision-making in family-related disputes is consistent with the fiduciary and interest theories, as well as international standards, there are still gaps that exist, mostly in respect of the procedural safeguards necessary to protect the child's best interests in decision-making. This chapter investigates the extent to which the substantive elements and procedural safeguards find expression in domestic laws governing decision-making in the context of international child abduction. In order to do so, the chapter first, by way of background, provides a brief overview of the regulatory framework governing international child abduction in South Africa; and then evaluates the expression of certain substantive elements and procedural safeguards, discussed in earlier chapters, in domestic law that are necessary to protect the child's best interests in the decision-making process. This discussion is limited to decision-making in the context of international child abduction and the significant challenges it poses to the substantive and procedural aspects of a child's best interests, such as their identity and family connections, procedures for their meaningful participation and expedited decision-making with accessible mechanisms for review or appeal. These aspects were selected because previous chapters identified shortcomings in their implementation within the domestic framework and they are most relevant in the context of decision-making in international child abduction.<sup>1</sup>

International child abduction involves the removal of a child across international borders to South Africa, where the abducting parent often has established family ties.<sup>2</sup> Such actions, as

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<sup>1</sup> See Chapters Four and Five.

<sup>2</sup> Hague Conference on Private International Law *Hague Convention on the Civil Aspects of International child abduction* Hague XXVIII Hague Conference on Private International Law 25 October 1980 provides in article 3 that "The removal or the retention of a child is to be considered wrongful where -

well as decisions to return the child after they have formed bonds in South Africa, can have serious repercussions, disrupting the child's sense of identity, cultural heritage, and family connections.<sup>3</sup> These disruptions are particularly complex in the South African context, given the country's historical legacy under apartheid, where family separation and identity suppression were systematically enforced, leaving a lasting societal impact on identities and family connections.<sup>4</sup> The context of international child abduction was selected to enable a focused analysis of how the legal framework upholds the child's substantive rights amidst competing parental interests, while also ensuring that procedural safeguards are in place in the decision-making process.

The chapter also evaluates the domestic law's consistency with theoretical perspectives and international standards discussed in Chapters Two and Three. It demonstrates that the domestic laws reinforce the fiduciary and interest theories, as well as international standards for protecting the child's best interests in the decision-making process. By treating the child's best interests as paramount in international child abduction decision-making, domestic law recognises children's independent substantive rights through their identity and participation; and ensuring procedural mechanisms such as legal representation and expedited decision-making, the domestic framework mirrors international standards while reflecting the fiduciary obligation of decision-makers to act in the child's welfare. The integration of these theoretical perspectives and international norms in domestic law illustrate a commitment by the state to protect the child's well-being in the complex context of decision-making in international child abduction. However, despite this notable commitment, the chapter establishes some challenges in respect of procedural safeguards that are necessary to ensure the realisation of the child's substantive rights in decision-making.

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a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”

<sup>3</sup> A Dyer 'The Hague Convention on the civil aspects of international child abduction towards global cooperation its successes and failures' (1993) 1(1) *International Journal of Children's Rights* 273-292, at 276; See also M Freeman & N Taylor 'Domestic violence and child participation: contemporary challenges for the 1980 Hague International child abduction Convention' (2020) 42 *Journal of Social Welfare and Family Law* 154-175, at 154.

<sup>4</sup> See part 4.2 of Chapter Four.

## 6.2 OVERVIEW OF THE SOUTH AFRICAN FRAMEWORK FOR DECISION-MAKING IN INTERNATIONAL CHILD ABDUCTION

The rising rate of divorce, the increase in international travel for more favourable opportunities than those in South Africa and the increase in multinational relationships have led to the increased occurrence of international child abduction.<sup>5</sup> This phenomenon disrupts the child's life and infringes on the parental responsibilities and rights of the parent who was left behind, creating complex legal challenges that necessitate international cooperation.<sup>6</sup> The Hague Convention addresses these challenges by promoting the prompt return of abducted children to their country of habitual residence and protecting their rights as well as parental responsibilities and rights.

Before South Africa signed and ratified the Hague Convention, the common law position was less structured and largely reliant on general principles of private international law.<sup>7</sup> At this time, disputes involving international child abduction were approached through the lens of general legal doctrines such as wrongful removal and retention with a focus on parental interests; and with the doctrine of *parens patriae*,<sup>8</sup> courts had wide power to resolve these disputes. Accordingly, having no specific legal framework to facilitate the prompt return of abducted children led to inconsistencies in decision-making and a lack of uniformity in handling such disputes.

The legal framework that now regulates international child abduction in South Africa is shaped by the country's commitments under international law and its domestic legislative provisions. Central to this framework is South Africa's adherence to the Hague Convention, which the country signed and ratified in 1995. The Hague Convention seeks to protect children from the harmful effects of international child abduction by promoting their prompt return to their country of habitual residence and ensuring respect for rights of custody and access under

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<sup>5</sup> C Nicholson 'Can South Africa follow England's example and apply the strict interpretation of article 13(b) of the Hague Convention on the Civil Aspects of International child abduction?' (1999) 32 *De Jure* 248-258, at 251.

<sup>6</sup> Dyer (1993) at 276; See also Freeman & Taylor (2020) at 154.

<sup>7</sup> J Weideman & JA Robinson 'The interpretation and application of article 13(b) of the Hague Convention on the Civil Aspects of International child abduction' (2011) 22 *Stellenbosch Law Review* 71-93, at 72.

<sup>8</sup> See Chapter 2 part for a discussion of the doctrine of *parens patriae*.

the laws of contracting states.<sup>9</sup> This treaty establishes uniform principles and procedures for addressing cases of wrongful removal or retention of children across international borders, thereby facilitating cooperation between signatory states.<sup>10</sup> This is based on the premise is that the court in the child's habitual place of residence is best placed to resolve a dispute of this nature and ensure the child's best interests as this court will have access to the most current evidence related to the child's circumstances than a court in a different country.<sup>11</sup>

The incorporation of the Hague Convention into South African law was initially achieved through the Hague Convention on the Civil Aspects of International child abduction Act.<sup>12</sup> This legislation was later repealed and replaced by the Children's Act, which now serves as the primary domestic legal instrument regulating international child abduction and which must be interpreted and applied in a manner that is consistent with South Africa's constitutional obligations.<sup>13</sup> The Children's Act expressly incorporates the Hague Convention's principles and provisions, embedding them into South African law to ensure consistency with international obligations.<sup>14</sup>

### **6.3 THE PROTECTION OF SUBSTANTIVE ELEMENTS UNDER DOMESTIC INTERNATIONAL CHILD ABDUCTION LAW**

Chapter Three established that international standards require the consideration of substantive elements to guide decision-makers in protecting the child's best interests in the decision-making process. The international standards require decision-makers to consider the child's substantive rights to identity, family, and participation. Therefore, the following part of this

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<sup>9</sup> C du Toit 'The Hague Convention on the Civil Aspects of International child abduction' in T Boezaart (ed) *Child Law in South Africa* (2017) 2<sup>nd</sup> ed Juta 439-462, at 477; See also B Clark 'International child abduction - division P' in B Clark (ed) *Butterworths Family Law Service* (2008) para 1.

<sup>10</sup> DLA Modeste 'What is worth rewording is worth rewording well: an analysis of the implementation of the Hague Convention on the Civil Aspects of International child abduction in New Zealand' (2012) 38(4) *Commonwealth Law Bulletin* 653-672, at 657.

<sup>11</sup> See *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 3 SA 117 (SCA) 134C.

<sup>12</sup> Hague Convention on the Civil Aspects of International child abduction Act 72 of 1996.

<sup>13</sup> Constitution s 39(2) provides that "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

<sup>14</sup> Children's Act Chapter 17; See also Children's Act Regulations Relating to Children's Courts and International child abduction in terms of the Children's Act, 31 March 2010, GoN R250, G. 33067 s 17(1)(b).

chapter explores how the three key legal instruments, namely the Hague Convention on the Civil Aspects of International child abduction, the Children’s Act, and the Children’s Act Regulations, that establish the domestic legal framework for international child abduction express or fail to express the child’s substantive rights that are necessary to determine the child’s best interests in the decision-making process.

### ***6.3.1 The Hague Convention on the Civil Aspects of International child abduction***

While this chapter’s objective is focused on South African law, it is important to explore the Hague Convention as it is incorporated in the South African Children’s Act and therefore, forms a significant part of the domestic framework for decision-making in international child abduction matters.<sup>15</sup> The Hague Convention is primarily designed to provide a swift mechanism for returning a child who has been wrongfully removed or retained across international borders. The Convention’s objectives are first, to secure the prompt return of children to their habitual residence, and second, to protect custody and access rights under the laws of contracting states.<sup>16</sup> While these objectives undoubtedly serve to deter unilateral parental abductions, the Convention’s text largely focuses on parents’ rights and inter-state obligations, rather than an approach that protects the best interests principle.<sup>17</sup>

The substantive references to the child’s perspective appear mainly in Article 13, which allows a court or authority to refuse a return order if there is a “grave risk” of physical or psychological harm to the child if he or she is returned; or if the child is of sufficient maturity and objects to being returned.<sup>18</sup> However, international standards demand that children’s views are sought meaningfully and not solely based on their age or level of maturity.<sup>19</sup> Moreover, Chapter Four<sup>20</sup> established that under South African law, a child’s age and level of maturity is

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<sup>15</sup> Children’s Act s 275 provides that “The Hague Convention on International child abduction is in force in the Republic and its provisions are law in the Republic...”

<sup>16</sup> Hague Convention Art 1.

<sup>17</sup> J Atkinson “The meaning of habitual residence under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children” (2010) *Oklahoma Law Review* at 647.

<sup>18</sup> Hague Convention Art 13.

<sup>19</sup> See Part 3.5.1 of Chapter Three.

<sup>20</sup> See Part 4.5.1 of Chapter Four.

only relevant in respect of the weight to be given to the child's view and, thus, in the case of an abduction, it is only relevant to the weight to be given to the child's objection to being returned. This means, that regardless of a child's age, they must be permitted to participate in the decision-making process. whether directly or indirectly through a multidisciplinary team of experts.<sup>21</sup>

The Convention's expedited return mechanism overshadows a comprehensive assessment of the child's best interests, identity, or cultural ties in the decision-making process. The focus of the Convention remains mainly on rectifying a breach of "custody rights"<sup>22</sup> rather than recognising the child as an autonomous rights holder and ensuring a holistic review of the child's well-being. In fact, the Convention fails almost entirely, apart from Article 13, to recognise the child as a significant role player in the decision-making process, thereby demonstrating that the Hague Convention is more of a procedural instrument, ensuring state cooperation, than a child-centric one.

### ***6.3.2 The Children's Act***

As discussed in Chapter Four, the Children's Act expressly incorporates the child's best interests as paramount in any matter involving a child and contains a detailed best interests standard, which factors in the child's identity, cultural background, and need for security and stability.<sup>23</sup> Moreover, the Children's Act also expressly protects the child's right to participate

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<sup>21</sup> See The Hague Conference on Private International Law HCCH *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International child abduction Part VI Article 13(1)(b)* (2020) the Hague, the Netherlands at para 88 p 56-57.

<sup>22</sup> Hague Convention Art 3 defines "custody rights" as

"...rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

<sup>23</sup> Children's Act s 7; See also Part 4.4.2 of Chapter Four.

in decisions affecting them, reinforcing s 28(2) of the Constitution, which cements the best interest principle in South African law.<sup>24</sup>

Notably, Chapter 17 of the Children's Act contains provisions for international child abduction, dovetailing with the Hague Convention to facilitate cooperation with foreign jurisdictions.<sup>25</sup> Chapter 17 operates against the background of the Children's Act's general principles. Section 6(1)(b) stipulates that all proceedings under the Act must be guided by the "general principles set out in this section."<sup>26</sup> Consequently, the best interests benchmark in s 9, the participatory rights in ss 10 and 14, and the s 7 factors continue to inform the court's Chapter 17 applications. However, although the Children's Act stipulates that every child-related decision must account for the child's best interests, Chapter 17 fails to provide express protection for any of the child's substantive rights and instead triggers the Hague Convention framework, requiring decision-makers to revert to the Hague Convention's focus on the swift return of the child. This may limit a detailed inquiry into the child's views, identity, family connections or vulnerabilities and instead lead to mere tokenistic considerations of the child's best interests. Thus, while the Children's Act provides strong protection for children's substantive rights generally,<sup>27</sup> it seems that it yields to the Hague Convention's narrower objective of restoring the *status quo ante* in international child abduction matters.

### ***6.3.3 The Children's Act Regulations***

Closely linked to the Act itself, the Children's Act Regulations outline administrative procedures and guidelines for implementing the Children's Act's provisions. The Regulations provide details on how a return application should be filed, which documents must accompany the application, and who is responsible for liaising with Central Authorities in foreign states.<sup>28</sup> They also clarify certain timelines for processing cases, reflecting the urgency inherent in abduction matters.<sup>29</sup>

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<sup>24</sup> Children's Act s 10; See also Part 4.4.1 of Chapter Four.

<sup>25</sup> Children's Act Chapter 17.

<sup>26</sup> Children's Act, s 6(1)(b).

<sup>27</sup> See Chapter Four.

<sup>28</sup> See Children's Act Regulations 53-37.

<sup>29</sup> These timelines are explored in further detail under the discussion in Part 6.4 on the procedural safeguards for expedited decision-making.

However, the Regulations remain predominantly procedural, focusing on logistics, such as verifying the applicant's custody rights, and expediting hearings, rather than elaborating on the child's substantive entitlements. There is little explicit guidance on how decision-makers should address the child's identity and cultural continuity beyond immediate parental ties or any of the child's other substantive rights. As a result, the Regulations do not substantially strengthen the best interest principle when placed alongside the Convention's emphasis on swift return. As noted in Chapter 4, this highlights a gap in the framework between procedural efficiencies and the substantive goal of meaningfully accounting for the child's views and overall welfare.<sup>30</sup>

### ***6.3.4 Appraisal***

Collectively, the Hague Convention, the Children's Act, and the Children's Act Regulations demonstrate a dual dynamic in decision-making for international child abduction matters. On the one hand, the Hague Convention ensures a prompt-return mechanism, facilitating interstate cooperation and preventing one parent from unilaterally securing an advantage by wrongfully removing the child. This procedural expediency is central to the Hague Convention's objectives. On the other hand, the Children's Act firmly grounds decision-making in the child's best interests that embrace the child's rights to identity, family ties, and participation as required by the international standards.

However, this child-focused framework may not always be fully realised when abduction matters arise. Once Chapter 17 of the Children's Act triggers the Hague Convention's swift-return requirements, the emphasis on procedural efficiency may overshadow the substantive rights that the Children's Act otherwise protects. The child's meaningful participation, identity, and cultural continuity may be relegated to a secondary status while the Convention's overriding objective to quickly restore the *status quo ante* takes precedence.

Similarly, the Children's Act Regulations highlight a predominantly procedural focus. The Regulations outline how return applications are filed, which documents are required, and how authorities liaise with their international counterparts, rather than providing any guidance on substantive considerations of the child's well-being.

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<sup>30</sup> See part 4.5 of Chapter Four.

This tension between swift return and child-centric protection highlights that state cooperation and parental rights may at times supersede a thorough inquiry into the child's evolving capacities, cultural ties, or need for continuity with family and community. Having established the extent to which the domestic legal framework expresses the relevant substantive elements in international child abduction decisions, the discussion now shifts to consider the procedural safeguards that might mitigate or aggravate these shortcomings in the abduction context.

## **6.4 PROCEDURAL SAFEGUARDS UNDER DOMESTIC INTERNATIONAL CHILD ABDUCTION LAW**

Chapter Three established that procedural safeguards form a crucial framework for ensuring that substantive considerations, such as the child's identity, family ties, and right to be heard, are effectively and consistently incorporated into the decision-making process. Most relevant to the context of decision-making in international child abduction are the safeguards for child representation, child-friendly environments, expedited decision-making processes and accessible mechanisms for the appeal or review of decisions. Therefore, this part of the chapter explores how these procedural safeguards find expression in domestic law regulating decision-making in international child abduction matters.

### ***6.4.1 Legal representation for the child***

A foundational component of a decision-making process that recognises children's developing autonomy is ensuring that the child's perspective is not obscured by the interests of the abducting and left-behind parents. The Hague Convention itself offers little guidance on formal mechanisms for child representation. By contrast, the Children's Act highlights the right of children to participate in matters affecting them<sup>31</sup> and designates, in sections 275-276, the Chief Family Advocate as the Central Authority in abduction cases.<sup>32</sup> When a parent or guardian

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<sup>31</sup> See Part 4.5.1 of Chapter Four.

<sup>32</sup> Children's act ss 275-276; Children's Act s 276 provides

“(1) For the purposes of the Hague Convention on International child abduction, “Central Authority”-

submits an application for the return of a child to South Africa, or for access to a child retained in South Africa, the Family Advocate's Office bears the responsibility of verifying whether the removal or retention was wrongful under the Convention and whether custodial rights were indeed breached.<sup>33</sup>

In addition to Chapter 17 of the Act, the Children's Act Regulations make it clear that the Family Advocate "appears on behalf of the applicant"<sup>34</sup> meaning that the Family Advocate represents the "wronged parent" in international child abduction cases. In essence, the Family Advocate does not maintain a neutral role in this instance and does not represent the interests of the child involved. Unlike the Family Advocate's role in divorce matters,<sup>35</sup> in international child abduction contexts the Family Advocate's duties, in terms of s 276(2) of the Children's Act, are to locate a wrongfully removed or retained child, prevent additional harm or prejudice to the child through interim measures, encourage a voluntary resolution of the matter, and, if necessary, initiate judicial proceedings for the child's return.<sup>36</sup> They also provide general legal guidance, facilitate the exercise of access rights, and, where appropriate, offer legal aid to the wronged parent.<sup>37</sup> Thus, in this context, the Family Advocate does not have a duty to provide a report and recommendations on the child's best interests as it would under the Mediation in Certain Divorces Act.<sup>38</sup> Unlike its usually neutral, investigative function in domestic custody matters, the Family Advocate effectively assumes an adversarial stance in Hague-abduction proceedings, acting in support of the Central Authority's application for return.<sup>39</sup>

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(a) in relation to the Republic, means the Chief Family Advocate appointed by the Minister for Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act; or

(b) in relation to a convention country, means a person or office designated for such convention country under Article 6 of the Hague Convention on International child abduction;

(2) The Chief Family Advocate must perform the functions assigned by the Convention to Central Authorities."

<sup>33</sup> Children's Act Regulations 16-17.

<sup>34</sup> Children's Act Regulations 20.

<sup>35</sup> See Part 4.5 of Chapter Four.

<sup>36</sup> Hague Convention Art 7; See also Children's Act s 276-277.

<sup>37</sup> Children's Act Regulations 20(a) read with the Hague Convention Art 25 allow for the appointment of legal aid in South Africa, in terms of the Legal Aid Act 22 of 1969, for the applicant.

<sup>38</sup> See Part 4.5 of Chapter Four.

<sup>39</sup> Du Toit (2017) 454 – 455; see also *Central Authority for RSA v B* 2012 (1) SA 428 (GSJ) para 20 (Family Advocate appearing as litigant in support of Central Authority).

Despite this, unlike the Hague Convention, the Children’s Act expressly provides for legal representation for the child involved in an abduction matter<sup>40</sup> and mandates the appointment of legal aid for children where the court is of the opinion that it would serve the child’s best interests.<sup>41</sup> In South Africa’s socio-political landscape, where economic disparities are widespread and access to justice can be uneven, this provision highlights both a progressive intention and a practical constraint. On paper, the Children’s Act takes a more child-focused stance than the Hague Convention by requiring that a child in an abduction matter have the benefit of legal representation when it is in their best interests. Although s 28(1)(h) of the Constitution entitles every child to state-funded representation where “substantial injustice would otherwise result”, the practical trigger is a judicial finding of potential prejudice and the availability of Legal Aid funds; accordingly, in most Hague-abduction matters the child’s family must finance a separate practitioner or *curator ad litem*.<sup>42</sup>

Consequently, while the Act aspires to protect and amplify the child’s voice, the real-life impact of this provision may depend on socio-economic status. Families who cannot afford private legal representation may rely on judicial discretion and the availability of limited state resources to secure representation. Thus, in a lived reality of pronounced income inequality, some children could miss out on the very safeguards intended to uphold their rights, signifying the tension between a well-intended legal framework and the systemic challenges of delivering equal access to justice in South Africa. Moreover, courts may not always deem separate representation to be in the child’s best interests unless a clear risk of harm emerges under Article 13 of the Hague Convention.<sup>43</sup> This narrow interpretation may also inhibit meaningful participation, especially where a child’s perspective is vital for deciding whether an exception to return the child to his or her habitual residence might be warranted. Thus, effective child representation in international child abduction matters often hinge on resources and judicial discretion. While the Children’s Act envisions representation to safeguard the child’s interests in the decision-making process, real-world application can be uneven and echoes the

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<sup>40</sup> Children’s Act s 279.

<sup>41</sup> Children’s Act s 279 read with s 55.

<sup>42</sup> Du Toit (2017) at 240 noting that Legal Aid is subject to a means test and court authorisation; See also Legal Aid South Africa, Legal Aid Guide (2024); and Chapter Four part 4.2.2.

<sup>43</sup> See Chapter Seven.

subsidiarity principle, discussed in earlier chapters,<sup>44</sup> that decision-makers must actively step in to protect the child's interests when parents fail to do so.

#### ***6.4.2 A child-friendly environment***

Once representation is in place, or even when it is not, how the child's views are sought and heard can profoundly affect the child's willingness and ability to share their experiences. Ideally, the High Court, which has jurisdiction to hear abduction matters,<sup>45</sup> would apply child-friendly measures reminiscent of those used in the Children's Court,<sup>46</sup> such as more informal proceedings or the use of specialised professionals trained to interview children.

However, the High Court lacks many of the child-sensitive processes mandated in lower courts, resulting in a formal and often intimidating environment for minors.<sup>47</sup> Unlike the Children's Court, High Court proceedings remain adversarial and rely on legal norms that may not facilitate direct, supportive engagement with children.<sup>48</sup> Decision-makers in the High Court also tend to not employ child-friendly techniques or age-appropriate questioning.<sup>49</sup>

In the context of decision-making in international child abduction, the Hague Convention permits courts to refuse return of the child if the child objects and possesses sufficient maturity.<sup>50</sup> However, there are no uniform protocols or guidelines for decision-makers to assess the child's maturity or ensure that the child's objection is gathered in a sensitive environment. The interest theory, discussed in earlier chapters, asserts that children have rights independent of their parents, but the absence of systematic procedures to create child-friendly environments for children to exercise their participation rights can make it difficult for the full realisation of these rights in the decision-making process. Moreover, some High Court cases demonstrate that parents frequently use children's rights arguments to shape judicial outcomes in ways that

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<sup>44</sup> See Chapter Two.

<sup>45</sup> Children's Act s 278; See also Children's Act Regulations 24-25.

<sup>46</sup> See Part 5.2.2 of Chapter Five.

<sup>47</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) paras 14–20.

<sup>48</sup> A Skelton 'Child justice in South Africa' (2018) 26(3) *The International Journal of Children's Rights* 391-422, at 391–394.

<sup>49</sup> J Sloth-Nielsen 'Children's rights in the South African courts' (2002) *The International Journal of Children's Rights* 137-156, at 142.

<sup>50</sup> Hague Convention art 13.

advance their own interests, effectively placing themselves at the forefront of children's rights cases and influencing the final decisions.<sup>51</sup> The domestic mechanism for giving effect to the child's objection ground under article 13 of the Hague Convention is provided by section 278(3) of the Children's Act, which directs the court, when considering a return order, to "give due consideration to the child's best interests" and, read with section 10, to the child's own views commensurate with age and maturity.<sup>52</sup> These statutory duties dovetail with the constitutional guarantee in section 28(1)(h), which requires the court to ensure that the child has an independent legal practitioner if substantial injustice would otherwise result. The interplay of article 13, ss 278(3) and 10 of the Children's Act and s 28(1)(h) of the Constitution therefore establishes both a substantive right (the opportunity to object) and a procedural safeguard (state-assisted representation) to ensure that the objection is meaningfully presented. South-African courts have applied this in *Central Authority v MV (LS Intervening)*,<sup>53</sup> where the court afforded a twelve-year-old an opportunity to express her objection through a *curator ad litem*. Similarly, in *Central Authority of the RSA v B*,<sup>54</sup> where Horn J emphasised that article 13 must be read with sections 278(3) and 10 of the Children's Act when assessing the child's stated preference.<sup>55</sup> According to section 279 of the Children's Act, the Court also issued ancillary directions to ensure the prompt enforcement of the return order, highlighting that Article 13 inquiries must be accompanied by practical, child-centred implementation measures.<sup>56</sup> Yet these cases also demonstrate the limits of a purely adversarial forum in terms of which the child's voice had to be filtered through adult intermediaries, the hearings were conducted in conventional courtrooms, and no specialised child-friendly procedures were employed. Accordingly, while the High Court possesses the legal tools to protect a child's participatory rights, the absence of child-specific accommodations still means that proceedings often revolve around the parents' competing claims rather than the child's authentic interests and perspectives.

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<sup>51</sup> See *Fraser v Children's Court Pretoria North* 1997 (2) SA 261 (CC), *Naude and another v Fraser* 1998 (4) SA 539 (SCA); *Fraser v Naude and Another* 1999 (1) SA I (CC); See also *K v K* 1999 (4) SA 691 (C) and *Jooste v Botha* 2000 (2) BCLR 187 (T).

<sup>52</sup> Children's Act, ss 278(3) & 10; Hague Convention on the Civil Aspects of International child abduction, art 13; Constitution, s 28(1)(h).

<sup>53</sup> *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP).

<sup>54</sup> *Central Authority of the RSA v B* 2012 (2) SA 296 (GSJ).

<sup>55</sup> *Central Authority v MV (LS Intervening)* paras 29–30; *Central Authority of RSA v B* paras 22–24.

<sup>56</sup> Children's Act, s 279

### 6.4.3 Expedited decision-making

The need for swift decisions in international child abduction cases is protected in the Hague Convention, which calls for proceedings to be concluded within six weeks.<sup>57</sup> This sense of urgency is echoed in the Children’s Act Regulations, which similarly urge courts to handle abduction matters promptly.<sup>58</sup> The process itself begins when the Family Advocate, as the Central Authority, receives a written request for return and must, within forty-eight hours, contact the foreign state’s Central Authority to secure a voluntary return or initiate judicial proceedings there. A similar emphasis on speed applies when the Family Advocate’s Office is informed of an application for access to a child retained in South Africa; the High Court must consider such an application “without delay,” ideally within fifteen days after the child is located.<sup>59</sup>

Expedited decision-making aligns with the principle of subsidiarity, which affirms that custody and care determinations ultimately belong in the jurisdiction of the child’s habitual residence, where a more detailed and accurate inquiry into the child’s circumstances can occur.<sup>60</sup> Yet, this drive for swift resolution may yield contradictory or inconsistent provisions within the Children’s Act Regulations, with one part calling for speed and another prescribing different or confusing timelines for the same process. For instance, Regulation 17 prescribes that the Family Advocate must initiate proceedings within ten days of locating the child, while Regulation 16 prescribes fifteen days.<sup>61</sup> Recent judgments confirm the trend towards expedited handling of Hague applications. In *Centre for Child Law v TS* the Constitutional Court stressed that “every month of delay perpetuates a potential rights violation”,<sup>62</sup> and in *YB v SB* the High Court shortened the usual time-frames on the basis that international-abduction matters demand urgency.<sup>63</sup> Nonetheless, the Hague Convention is clear that decisions in international child abduction matters must be made within six weeks from the date of commencement of

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<sup>57</sup> Hague Convention art 11.

<sup>58</sup> Children’s Act Regulations 16.

<sup>59</sup> Ibid.

<sup>60</sup> *Pennello v Pennello and Another* 2004 (3) SA 117 (SCA).

<sup>61</sup> Children’s Act Regulations 17.

<sup>62</sup> *Centre for Child Law v TS* 2023 (2) SA 15 (CC) para 31.

<sup>63</sup> *YB v SB* 2021 (4) SA 403 (GJ) para 25.

proceedings.<sup>64</sup> Moreover, the pursuit of prompt decision-making may overshadow a more holistic examination of the child’s emotional bonds, cultural integrations, or personal attachments, substantive elements that are essential in determining the child’s best interests in the decision-making process.<sup>65</sup> Consequently, while expedited timelines help avoid prolonged “limbo” for the child, they can also risk narrowing the inquiry into the child’s current and future well-being, as expediency in this context may not always be sufficiently thorough.

#### ***6.4.4 Appeal or review mechanisms***

Once the High Court decides whether to order the child’s return or deny it based on a recognised exception, access to review or appeal is vital for ensuring accountability of decision-makers as well as autonomy of children who have reasonable grounds to question the decision. The Children’s Act allows parties to appeal decisions made by the Children’s Court,<sup>66</sup> however, there are no provisions in the Children’s Act, Regulations or Hague Convention for the appeal or review of international child abduction decisions. However, ordinary rules of appeal can apply to international child abduction decisions where parties may appeal to the full bench of the High Court or to the Supreme Court of Appeal (SCA).<sup>67</sup>

However, the very urgency that underpins international child abduction proceedings may limit the practical feasibility of such appeals. On the other hand, prolonged court proceedings caused by appeals, leave the child in the host country for an extended period, allowing them to form stronger bonds and deeper connections there, which also risks entrenching the abducting parent’s position and ultimately make it harder to uproot the child later, thereby defeating the core rationale behind expedited proceedings.<sup>68</sup>

Moreover, children themselves rarely exercise an appeal, lacking both legal capacity and resources to do so. Although, the Children’s Act reinforces the child’s right to participate in decisions affecting them, there are no standardised guidelines ensuring that children’s voices factor into potential appeals or mechanisms permitting children to directly appeal decisions

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<sup>64</sup> Hague Convention art 11.

<sup>65</sup> T Kruger ‘The Hague Conventions and EU instruments in private international law’ (2021) *International Handbook on Child Participation in Family Law* at 76.

<sup>66</sup> Children’s Act s 51(1).

<sup>67</sup> Superior Courts Act 10 of 2013 s 16(1)(a)-(b).

<sup>68</sup> *Sonderup v Tondelli and Another* 2001 (1) SA 1171.

made. Thus, while the law provides for the re-examination of international child abduction decisions, the reality is that the expediency required in the decision-making process in international child abduction may discourage or limit an in-depth re-evaluation that a child's best interests might sometimes warrant.

#### ***6.4.5 Appraisal***

Collectively, the four procedural safeguards of child representation, child-friendly environments, expedited decision-making, and accessible review or appeal mechanisms are designed to ensure that the child's best interests are central to decision-making in international child abduction matters. At a conceptual level, they align with the theoretical perspectives and international standards established in the earlier chapters, namely, that decision-makers must step in where parents fail to protect the child, the child is an autonomous rights-holder deserving meaningful participation, and the ultimate responsibility for determining the child's best interests properly resides in the child's habitual residence, which is presumed to offer a more thorough and informed inquiry.

Yet, when these safeguards meet the realities of the domestic legal framework, tensions emerge. The principle of urgency, in both the Hague Convention and the Children's Act Regulations, can overshadow a thorough and true exploration of the child's needs, particularly in the High Court's procedurally formal and often intimidating setting. Although the Children's Act envisions representation for children, its implementation may falter under resource limitations and discretionary judicial practices, yielding inconsistent outcomes. The lack of universally applied child-friendly measures for abduction cases further risks relegating a child's unique circumstances and evolving capacities to the background. Lastly, while appeals and reviews ostensibly provide an avenue for accountability, the dominant narrative of swift resolution can deter the accessibility of this mechanism for children, as well as weakening the abduction framework's deterrent effect.

Taken together, these challenges highlight the same theme identified in Part 6.3.2, that in practice, the child's substantive rights can become subordinate to concerns of state cooperation and parental interests. While the safeguards are commendable in theory, their efficacy hinges upon consistent application, adequate resources, and a willingness to interpret urgency not as a justification for truncating the child's participation but as a call to ensure the child's interests remain truly at the fore.

## 6.5 CONCLUSION

This chapter set out to examine how South African domestic law expresses certain substantive elements and procedural safeguards to protect the child's best interests in the context of international child abduction decision-making. It began by presenting an overview of the South African framework, highlighting South Africa's ratification of the Hague Convention and its subsequent incorporation into domestic law in the Children's Act. The observations that follow are preliminary and function as working hypotheses; Chapter Seven tests them against the decided cases.<sup>69</sup>

The chapter found that while these steps firmly position South Africa within the inter-state cooperative scheme to limit unilateral removals of children, they reveal a tension between the prompt-return mandate of the Hague Convention and the broader, child-centric objectives of domestic law. Next, the chapter reviewed the substantive elements of the child's best interests, namely, identity, family ties, and participation, and evaluated their expression within the Hague Convention, the Children's Act, and the accompanying Children's Act Regulations. The chapter demonstrated that although the Children's Act incorporates the best interests principle and expressly recognises the child's right to participate in proceedings, these substantive rights may be overshadowed by the Hague Convention's procedural urgency, which focuses on restoring the *status quo ante* and emphasises parents' rights and inter-state cooperation.

Subsequently, the chapter explored procedural safeguards essential to realising those substantive rights in practice. Namely child representation, child-friendly environments, expedited decision-making, and accessible review or appeal mechanisms. It was shown that while each safeguard is formally included in the domestic legal framework, their effectiveness may be compromised by practical realities. The High Court's formal setting and lack of child-friendly measures, the limited provision of state-funded legal representation, and the overriding impetus for swift resolution can, in certain circumstances, dilute the protection these safeguards aim to provide. Consequently, parental interests and the state's cooperation obligations may obscure the meaningful participation and protection of the child's needs as recommended by international standards.

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<sup>69</sup> See Chapter 7, parts 7.2-7.3, where the hypothesis is evaluated against reported Hague-abduction judgments.

Finally, this chapter has demonstrated that domestic law, though commendably aligned with fiduciary and interest theories, as well as international standards in principle, encounter significant practical and procedural challenges in international child abduction decision-making. The discussion demonstrates that a child-centric approach, one that respects identity, family connections, and participation, may be limited by the drive for decision-making that is too swift. The consequence is that, despite a comprehensive theoretical and legislative foundation, some children may remain vulnerable to having their voices and well-being relegated to secondary importance.

Ultimately, whether the substantive elements and procedural safeguards effectively protect the child's best interests, in international child abduction decision-making, depends on the willingness of decision-makers and other stakeholders to protect a holistic assessment of the child's situation through the child's meaningful participation, often through representation, even under the pressure of strict timelines to return the child. Recent jurisprudence highlights the delicate balance the High Court must strike between expedition and the child's own interests. In *Penello v Penello* the Court, before deciding an article 13 objection, insisted on directly interviewing the child, demonstrating that a return order cannot be issued on paperwork alone when the child's perspective is potentially decisive. Conversely, *Central Authority v B* confirmed that while prompt return is the default position, it is presumptive rather than absolute, thereby foreshadowing the discretionary language later codified in section 278(3) of the Children's Act. Moreover, the constitutional guarantee in section 28(1)(h), which places a positive duty on the court to provide independent legal representation whenever the child would otherwise suffer substantial injustice. Together, these authorities reinforce that swift resolution must never eclipse the child's right to be heard through appropriately resourced procedures. Therefore, the next chapter extends this analysis by examining how the procedural challenges identified in the international child abduction context find expression in practice.

## CHAPTER SEVEN

# EXPEDITED DECISIONS AND CHILD REPRESENTATION IN INTERNATIONAL CHILD ABDUCTION DECISION-MAKING PRACTICES

### 7.1 INTRODUCTION

The previous chapter demonstrated that, in the context of international child abduction, domestic law is largely consistent with the framework proposed in this thesis for protecting the child's best interests during the decision-making process. Yet, practical and procedural gaps exist.

Chapter Six has shown that recognising children as autonomous rights-holders with evolving capacities, in the context of international child abduction decision-making, requires a balancing of the child's meaningful participation and expedited decision-making. This is consistent with the fiduciary and interest theories discussed in Chapter Two, and international standards discussed in Chapter Three.

Therefore, the objective of this chapter is to examine the practical application of these two key procedural principles in international child abduction decision-making, namely expedited decision-making and the meaningful participation of children. The chapter begins by analysing how courts implement the domestic law's timelines for decision-making, focusing on whether they adhere to the six-week resolution guideline and identifying systemic factors contributing to delays, such as appeals or procedural complexities. This section also examines judicial reasoning regarding the balance between procedural urgency and the need for a comprehensive inquiry into the child's best interests in the decision-making process.

The chapter then turns to the role of child participation, exploring how courts incorporate children's voices into abduction decision-making. This includes examining the appointment of legal representatives or *curators ad litem* and the methods used to hear children's views. The analysis considers the extent to which courts effectively balance time constraints with substantive engagement with the child's evolving capacities and objections. Finally, the chapter synthesises these findings to explore the interplay between expedited decision-making and child participation. It examines whether the emphasis on swift decisions compromises children's participation rights or whether innovative judicial practices strike an appropriate

balance. This discussion, with Chapter Six, addresses the sub research question of the thesis on how domestic law and courts engage with both substantive and procedural safeguards in decision-making.

## **7.2 EXPEDITED DECISION-MAKING IN PRACTICE**

Chapter Six established that, under domestic law, courts are required to make expedited decisions in international child abduction cases to minimise disruption to the child's life and ensure that final decisions regarding custody and care are made in the child's habitual residence.<sup>1</sup> The Hague Convention sets a six-week resolution guideline for abduction cases and emphasises the importance of prompt decision-making to avoid prolonged uncertainty for the child.<sup>2</sup> However, this urgency must be balanced against the need for a thorough assessment of the child's best interests, particularly in the international child abduction context where the decision-making process involves inter-state cooperation, parental interests, and the child's evolving circumstances.

This part of the chapter examines how courts have approached the principle of expedited decision-making in practice. The cases selected for this analysis were chosen based on their relevance to this principle. Priority was given to appellate and Constitutional-level decisions, which offer more authoritative guidance in complex cases; and since the Children's Act, which forms the basis of the domestic framework for international child abduction decision-making, came into effect in 2010, the discussion that follows focuses on cases heard after 2010 to 2024.

Each case is discussed separately, focusing on whether the court adhered to the Hague Convention's timelines, particularly the six-week resolution guideline, and identifying factors contributing to delays, such as appeals and procedural complexities. Each case discussion also evaluates how courts balance the urgency of making decisions with the need for a thorough assessment of the child's interests. Notably, these are the same cases analysed in the next part of the chapter on child participation, providing continuity in evaluating how procedural safeguards operate in decision-making practice. Following the case discussions, the analysis will determine the systemic barriers to expedited decision-making, challenges in inter-state

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<sup>1</sup> See Part 6.4.3 of Chapter 6.

<sup>2</sup> Hague Convention art 11.

cooperation and parental interests overshadowing the child's interests, and the impact of protracted decision-making on the child's best interests.

### **7.2.1 The Koch cases**

*The Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another*<sup>3</sup> is the first international child abduction case decided by the Constitutional Court after the enactment of the new Children's Act. The case involved an appeal by the child's father against a decision of the Supreme Court of Appeal (SCA),<sup>4</sup> which itself was an appeal from the High Court's ruling.<sup>5</sup> The SCA had decided not to order the return of the child to her habitual residence, prompting the father's further appeal to the Constitutional Court. This case arose from the removal of a child, E, from her habitual residence in the United Kingdom to South Africa in 2019 when she was two years old.<sup>6</sup> E travelled with both parents, ostensibly so that the mother could receive treatment for terminal cancer.<sup>7</sup> Initially, the plan was for the family to return to the UK after the treatment. However, as the mother's condition worsened, she decided to remain in South Africa with E, causing a breakdown in her relationship with the father, who returned to the UK.<sup>8</sup> Following the mother's death in 2020, E remained in South Africa under the care of her maternal aunt, who became her primary caregiver.<sup>9</sup>

In response, the father initiated proceedings in 2020 under the Hague Convention, seeking E's return to the UK. He argued that her retention in South Africa was wrongful and violated his custody rights as E's habitual residence was in the UK. The maternal aunt opposed the application, raising a defence under the Hague Convention, which allows courts to refuse a return order if doing so would expose the child to grave risk of harm or place them in an intolerable situation.<sup>10</sup> The case progressed through the High Court, where the return of the

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<sup>3</sup> *The Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another* [2023] ZACC 37.

<sup>4</sup> *Heidi Nicole Koch N O and Another v The Ad hoc Central Authority for the Republic of South Africa and Another* (188/2021) [2022] ZASCA 60.

<sup>5</sup> *Ad Hoc Central Authority of the Republic for South Africa and Another v Koch N.O and Another* (2821/2021) [2021] ZAWCHC 53 (*Koch*).

<sup>6</sup> *Koch* para 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Koch* para 6.

<sup>9</sup> *Koch* para 7-9.

<sup>10</sup> Hague Convention art 13(b); See also *Koch* para 10-11.

child was ordered, to the Supreme Court SCA in 2022 where the High Court decision was overruled, and eventually reached the Constitutional Court in 2023.

The Hague Convention's mandate that international child abduction cases be resolved swiftly, ideally within six weeks, to minimise disruption to the child, was significantly exceeded in this case, with the resolution spanning nearly four years from the initiation of proceedings in 2020 to the Constitutional Court's judgment in 2023. Several factors contributed to the delays. First, the case involved appeals at multiple judicial levels, each requiring careful consideration of complex legal and factual issues. Second, the proceedings were complicated by the intersection of the Hague Convention's procedural framework with South Africa's constitutional obligation to protect the paramountcy of the child's best interests. Finally, the passage of time itself introduced evolving circumstances for E who by 2023 was six years old, as well as her integration into her new environment and her emotional attachment to her aunt, who by all intents and purposes was a maternal figure to her since the age of two.<sup>11</sup> This required courts to reassess the child's best interests at each stage of the process. This case demonstrates the inherent tension between the urgency in decision-making mandated by the Hague Convention and the practical challenges of ensuring that decisions in international child abduction matters are both thorough and just.

The Constitutional Court's judgment demonstrates the balancing act required between the procedural safeguards and the substantive elements afforded to children under South African law. While acknowledging the importance of swift decision making in international child abduction cases, the Constitutional Court emphasised that procedural efficiency must not come at the expense of the child's best interests; and therefore, cannot come at the expense of relegating or ignoring the child's substantive rights.<sup>12</sup>

The Constitutional Court also addressed the impact of the protracted litigation on E's circumstances.<sup>13</sup> By the time of its decision, E had lived in South Africa for over three years and was well integrated into her environment and "new family" with her aunt. The Court recognised that the passage of time had fundamentally altered E's circumstances, making a return to the UK more disruptive and potentially harmful. This demonstrates that while expedited decision-making is intended to minimise such disruptions to the child, delays can have the opposite effect and render the objectives of the Hague Convention less relevant or

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<sup>11</sup> *Koch* para 13-17.

<sup>12</sup> *Koch* para 41 and 44-45.

<sup>13</sup> *Koch* para 45, 52-53.

even counterproductive. In balancing these considerations, the Court favoured a thorough and evidence-based assessment of E's best interests over strict adherence to the Convention's procedural timelines. The thorough and evidence-based assessment by the Court will be further discussed later in this chapter where it is more relevant under the part on child representation.

The Koch case serves as a good example of the challenges of reconciling the procedural urgency mandated by the Hague Convention with the constitutional imperative to protect the child's best interests. While the case far exceeded the six-week timeline, the Constitutional Court clearly demonstrated a commitment to ensuring that decisions were informed by a comprehensive and individualised assessment of E's circumstances and substantive rights.

### **7.2.2 *KG v CB & Others***

*KG v CB & Others*<sup>14</sup> involved the wrongful removal of a child, T, from the United Kingdom to South Africa by her mother, KG, in February 2009.<sup>15</sup> The father, CB, initiated proceedings under the Hague Convention for T's return shortly thereafter, with the Central Authority in the UK transmitting the application to South Africa in March 2009.<sup>16</sup> Despite the urgency embedded in the Convention's framework, the application was only formally filed in the South Gauteng High Court in August 2009, nearly six months after T's removal.<sup>17</sup> The High Court issued its judgment in July 2010, and subsequent appeals extended the matter until its resolution by the SCA in March 2012.

The delays in this case far exceeded the six-week timeframe prescribed by the Hague Convention and reflected systemic inefficiencies. The initial delay in filing the return application highlighted administrative challenges and inefficiencies in coordinating cross-border cases. Additionally, litigation-related delays, including the High Court proceedings and subsequent appeal, compounded the timeframe. For instance, KG's appeal against the High Court's return order was delayed for over a year due to difficulties in obtaining the required transcripts, further extending the litigation.<sup>18</sup> These delays demonstrate the procedural and

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<sup>14</sup> *KG v CB & others (748/11)* [2012] ZASCA 17 (*KG v CB*).

<sup>15</sup> *KG v CB* para 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *KG v CB* para 16.

logistical barriers that can hinder swift decision-making in international child abduction cases, despite the law's emphasis on urgency.

Regarding the tension between adhering to procedural timelines and ensuring a thorough and just consideration of the child's best interests, the High Court mainly focused on returning T promptly to the UK, without much consideration of T's best interests.<sup>19</sup> However, as the case progressed, the appointment of a *curator ad litem* added a layer of complexity delaying proceedings further but ensured that T's perspective and well-being were considered to some extent.<sup>20</sup> The curator's involvement, which is further discussed later under Part 7.3, highlighted potential risks to T's emotional stability and well-being upon return, emphasising the court's need for careful deliberation even in the face of procedural urgency.

The SCA's ultimate decision to uphold the return order reflected a strong commitment to inter-state cooperation and the principle that custody related decisions should be made in the courts of the child's habitual residence. However, the protracted nature of the proceedings diluted the effectiveness of this principle, which the court expressly stated as being unacceptable.<sup>21</sup> By the time the case was resolved, T had been in South Africa for over three years, during which she had become settled in her new environment.<sup>22</sup>

### **7.2.3 *KLVC v SDI***

*KLVC v SDI*<sup>23</sup> arose when KL, the mother of the minor child, S, relocated him from South Africa to England in November 2012 without the consent of the father, SDI, or authorisation from a South African court as the parties had never been married.<sup>24</sup> SDI sought relief under the Hague Convention, initiating proceedings in the High Court of Justice in England, in May 2013.<sup>25</sup> The English court, however, deferred its decision and referred a legal question to the KwaZulu-Natal Local Division of South Africa for resolution, delaying the matter further.<sup>26</sup>

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<sup>19</sup> *KG v CB* para 45.

<sup>20</sup> *KG v CB* para 17 and 53-56.

<sup>21</sup> *KG v CB* para 58.

<sup>22</sup> *KG v CB* para 60.

<sup>23</sup> *KLVC v SDI* (20334/2014) [2014] ZASCA 222 (*KLVC v SDI*).

<sup>24</sup> *KLVC v SDI* para 1.

<sup>25</sup> *KLVC v SDI* para 2.

<sup>26</sup> *KLVC v SDI* para 5-6.

The South African High Court issued its judgment in February 2014, and the matter ultimately reached the SCA in December 2014.

This timeline significantly exceeded the six-week resolution guideline set by the Hague Convention. Delays stemmed from the referral process itself, which consumed several months with the English court formally transferring the question to the South African judiciary in August 2013, almost nine months after the child's removal and the father's initiation of the process. Additionally, the High Court proceedings in South Africa required detailed consideration of Section 21 of the Children's Act, which governs the rights and responsibilities of unmarried fathers as SDI and KL had never been married.<sup>27</sup> This evaluation necessitated a thorough factual inquiry into whether SDI had fulfilled the statutory requirements to acquire full parental rights toward the child, S, further extending the resolution process. Notably, very little of the court's reasoning for the decision taken was based on the child's interests.

Appeals also contributed to the protracted timeline in this instance, but the SCA ultimately upheld the High Court's finding that SDI had acquired full parental rights by November 2012, rendering the child's removal to England unlawful. The court held that KL's actions breached SDI's parental rights and responsibilities, as his consent or court authorisation was required for the relocation. However, the delays in reaching this conclusion diluted the effectiveness of the framework for international child abduction decision-making, as the prolonged litigation prevented the prompt resolution envisioned by the law and lacked consideration of the child's interests almost entirely.

#### ***7.2.4 L v The Ad Hoc Central Authority for the Republic of South Africa and Others***

*L v Ad Hoc Central Authority for the Republic of South Africa and Another*<sup>28</sup> arose in December 2019 when JEL, the mother, removed her three minor children from Thailand, their habitual residence, to South Africa without the consent or knowledge of their father, TCL.<sup>29</sup> The father, a British citizen, sought the children's return to Thailand under the Hague Convention,

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<sup>27</sup> *KLVC v SDI* paras 9-36.

<sup>28</sup> *L v The Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/21) [2021] ZASCA 107 (*L v AHCA*).

<sup>29</sup> *L v AHCA* paras 3-4.

initiating proceedings in the Western Cape Division of the High Court.<sup>30</sup> The case ultimately spanned nearly two years, with an appeal dismissed by the SCA in August 2021.

The resolution of this case exceeded the six-week timeline prescribed by the Hague Convention. The High Court issued its judgment in October 2020, almost ten months after the children's removal. Following the mother's application for leave to appeal, the matter was resolved by the SCA in August 2021, extending the timeline to over 18 months. Delays in the case were attributable to several factors. First, the mother raised a defence under Article 13(b) of the Hague Convention, alleging that the children would face a grave risk of harm if returned to Thailand.<sup>31</sup> This required the court to undertake a detailed inquiry into the mother's claims, which included allegations of sexual abuse and exposure to an intolerable environment. Additionally, the High Court imposed extensive protective conditions for the children's return, addressing logistical and best interest concerns such as financial support, therapeutic interventions, and accommodation arrangements in Thailand.<sup>32</sup> These measures, while necessary, added to the duration of the proceedings. Finally, the appeals process further delayed resolution, demonstrating the challenges of balancing procedural efficiency with thorough judicial scrutiny.

The judicial reasoning in the High Court focused on the importance of restoring the *status quo ante* by returning the children to their habitual residence but also recognised that procedural compliance alone could not outweigh the need to safeguard the children's best interests.<sup>33</sup> To this end, the court imposed significant protective conditions for the children's return, including arrangements for the mother to accompany them and financial support from the father to ensure their stability and access to therapeutic care in Thailand.<sup>34</sup> These measures reflected the court's commitment to mitigating potential risks to the children's best interests while adhering to the Convention's principles for decision-making. The SCA, in dismissing the appeal, affirmed that the children's best interests are ordinarily served by returning them to their habitual residence, where custody disputes can be resolved comprehensively and fairly.<sup>35</sup>

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<sup>30</sup> *L v AHCA* para 5.

<sup>31</sup> *L v AHCA* para 6.

<sup>32</sup> *L v AHCA* para 9.

<sup>33</sup> *L v AHCA* paras 11-13.

<sup>34</sup> *Ibid.*

<sup>35</sup> *L v AHCA* paras 15-16.

However, by the time the SCA dismissed the mother’s appeal, the children had been in South Africa for nearly two years. This protracted timeline risked complicating their reintegration into their habitual residence and reinforced the mother’s position as their sole caregiver, potentially straining their relationship with the father. This case serves as another example of how extended proceedings and delays can undermine the Convention’s objectives of minimising disruption to the child and preserving parental rights with swift decision-making.

### **7.2.5 *LD v Central Authority (RSA) and Another***

*LD v Central Authority (RSA) and Another*<sup>36</sup> involved a child, E, who was unlawfully removed from Luxembourg by her mother in October 2018, contrary to court orders in Luxembourg.<sup>37</sup> The father, supported by the Central Authority, sought E’s return to Luxembourg under the Hague Convention.<sup>38</sup> E’s mother opposed the return, arguing that returning the child would expose her to a grave risk of psychological harm or place her in an intolerable situation.<sup>39</sup> The matter progressed through the High Court, which ordered the child’s return in March 2019, but the mother appealed. This led to a protracted decision-making process, including the SCA hearing in January 2022.

Adherence to the six-week timeline prescribed by the Hague Convention was a significant issue in this case. The initial application under the Hague Convention was launched in January 2019, three months after the abduction. While the High Court delivered its judgment within two months, which still exceeds the six-week period but is better than years long delays, the mother’s appeal introduced substantial delays, extending the litigation for nearly three years before the SCA resolved the matter in January 2022. The timeline demonstrates that appeals, which, while legitimate, conflict with expeditious decision-making required to prevent harm caused by prolonged uncertainty for the child.

Factors contributing to further delays in this case included the complexity of the legal issues, the appointment of a *curator ad litem* to represent E, and the involvement of expert assessments to determine the potential psychological impact of a return.<sup>40</sup> These procedural

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<sup>36</sup> *LD v Central Authority (RSA) and Another* (Case no 803/2020 and 812/2020) [2022] ZASCA 6 (*LD v AHCA*).

<sup>37</sup> *LD v AHCA* para 6 and 8.

<sup>38</sup> *LD v AHCA* para 1.

<sup>39</sup> *LD v AHCA* para 2.

<sup>40</sup> *LD v AHCA* paras 16-17.

safeguards, while necessary for a thorough assessment of the child's best interests, inevitably prolonged the decision-making process. Additionally, the multi-jurisdictional nature of the case, involving cooperation between South African and Luxembourg authorities, added layers of complexity.

The High Court initially adhered to the default position favouring the child's return and emphasising that custody disputes should be resolved in the jurisdiction of habitual residence. The SCA, however, concluded that returning E to Luxembourg would expose her to psychological harm. While the delays in this case were inconsistent with the Convention's timelines, they were arguably necessary to ensure a decision that respected the child's evolving capacities and her substantive rights.

### **7.2.6 *CAR v The Central Authority and YR***

*CAR v The Central Authority and YR*<sup>41</sup> arose after YR retained the child, CJ, in South Africa during a family visit from Canada in July 2022, prompting the father, CAR, to initiate proceedings under the Hague Convention for CJ's return to Canada.<sup>42</sup> The procedural timeline in this case also extended significantly beyond six weeks. The Central Authority of Canada only submitted the necessary request to the South African Central Authority in November 2022, nearly four months after CAR's initial approach.<sup>43</sup> The application to the High Court in South Africa was subsequently filed in December 2022. Despite the requirement for swift decision-making, procedural delays ensued, partly due to the necessity of obtaining expert reports and the appointment of a legal representative and social worker for CJ. The High Court's judgment dismissing the application for CJ's return was delivered in 2023, nearly a year after the alleged wrongful retention occurred.<sup>44</sup>

The High Court gave considerable weight to CJ's developmental delays and health concerns, that had not adequately been addressed by Canadian medical practitioners. This consideration was informed by reports from South African experts who observed CJ after his

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<sup>41</sup> *CAR v The Central Authority of The Republic of South Africa and Another* (737/2023) [2024] ZASCA 103 (*CAR v AHCA*).

<sup>42</sup> *CAR v AHCA* paras 1-2.

<sup>43</sup> *CAR v AHCA* para 5.

<sup>44</sup> *CAR v AHCA* paras 7-8.

retention.<sup>45</sup> The SCA later overturned the High Court's decision, emphasising the need to adhere to the Convention's objectives while balancing the short-term and long-term best interests of the child.<sup>46</sup> It found that the High Court had erred by relying heavily on subjective evidence from the abducting parent and failing to consider ameliorative measures that could address concerns about CJ's best interests upon return to Canada.<sup>47</sup> The SCA crafted a detailed return order with protective measures, such as securing accommodations and support for YR and CJ in Canada, demonstrating an effort to mitigate the risk of harm to CJ and ensure his best interests while respecting the Convention's objective.<sup>48</sup>

While the delays in this case allowed CJ to develop deeper ties in South Africa, complicating the assessment of his best interests, judicial discretion played a pivotal role in balancing urgency with the recognition that a child's best interests can be safeguarded in another state when clear and detailed protective measures are implemented. This approach is commendable, reflecting an evolution in decision-making in this area since the 2023 *Koch* case. In *Koch* the Constitutional Court issued a detailed return order designed to ensure the child's short- and long-term best interests would be protected, even when returned to another jurisdiction. This is what the SCA in *CAR* reproduced in its order for the return of CJ. This progression reflects a maturing jurisprudence that upholds substantive fairness alongside the procedural obligation for swift decision-making, ensuring that the child's substantive rights, and ultimately their best interests, are not overshadowed in the decision-making process.

### ***7.2.7 N M v The Central Authority for the Republic of South Africa and Another***

*N M v The Central Authority for the Republic of South Africa and Another*,<sup>49</sup> the most recent decision made in international child abduction handed down on 19 December 2024, involved the return of the child, NEM, to Australia.<sup>50</sup> The proceedings began in December 2022 when

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<sup>45</sup> *CAR v AHCA* paras 11-12.

<sup>46</sup> *CAR v AHCA* para 29.

<sup>47</sup> *CAR v AHCA* paras 31-33.

<sup>48</sup> *CAR v AHCA* para 45.

<sup>49</sup> *NM v The Central Authority for the Republic of South Africa and Another* (1078/2024) [2024] ZASCA 178 (*NM v AHCA*).

<sup>50</sup> *NM v AHCA* para 1-2.

the Central Authority of Australia initiated the application.<sup>51</sup> The matter reached the South African Central Authority in March 2023, and the High Court eventually heard the case in November 2023, almost eight months later.<sup>52</sup> A judgment was only handed down in May 2024, resulting in an additional six-month post-hearing delay.<sup>53</sup> This timeline starkly contrasts with the six-week decision-making timeline required by law. The extended duration demonstrates the difficulty in meeting the Convention's urgency requirements, particularly in the South African context, where systemic inefficiencies and procedural complexities often hinder expeditious decision-making.

Several factors contributed to the prolonged resolution of this case. One significant delay arose from the eleventh-hour filing of a counter application by NM, challenging the constitutionality of Section 275 of the Children's Act and its incorporation of the Hague Convention.<sup>54</sup> This manoeuvre required the court to separate the constitutional challenge from the main application, adding procedural complications and deferring the resolution of the primary issue. Additionally, the High Court's own internal processes delayed the delivery of the judgment by six months, for which no justification was provided. The Central Authority's lack of consistent participation and logistical challenges in managing the multi-jurisdictional cooperation between South Africa and Australia further complicated the proceedings.<sup>55</sup>

The High Court's approach relied heavily on the precedent established in *Koch*, emphasising that the Hague Convention prioritises the prompt return of the child to their habitual residence. While recognising the importance of swift decision-making, the court also considered protective measures, much like the *Koch* and *CAR* cases, such as undertakings by the left-behind parent, to mitigate any potential harm to the child upon their return to Australia.<sup>56</sup> Despite the delays, the court attempted to balance procedural efficiency with substantive fairness by imposing detailed protective conditions for NEM's return.<sup>57</sup> These measures, including financial support and access to healthcare for NM and NEM, were designed to ensure a smooth transition and minimise disruption to the child's best interests

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<sup>51</sup> *NM v AHCA* para 4.

<sup>52</sup> *NM v AHCA* paras 6-9.

<sup>53</sup> *NM v AHCA* para 9.

<sup>54</sup> *NM v AHCA* para 8.

<sup>55</sup> *NM v AHCA* paras 20-24.

<sup>56</sup> *NM v AHCA* para 19.

<sup>57</sup> *NM v AHCA* para 48.

upon the return.<sup>58</sup> However, the delays undermined the objective of the swift resolution and inadvertently allowed NM to establish stronger ties with NEM in South Africa, complicating the assessment of his best interests and further delaying the decision-making process.

### ***7.2.8 Challenges to expeditious international child abduction decision-making***

The reported cases demonstrate a persistent gap between the objectives of the law's expeditious decision-making mandate and the realities of South African international child abduction proceedings. Despite clear directives to resolve such matters within six weeks, each of the decisions illustrate systemic barriers to expedited decision-making, inter-state cooperation challenges, and instances in which parental interests appear to overshadow the best interests of the child. These protracted timelines for decision-making raise questions about the efficacy of the legal framework in ensuring that a child's best interests remain paramount in international child abduction decision-making.

A consistent feature in the cases is the repeated failure to adhere to the six-week timeline. Several systemic impediments emerge. First, the appellate structure in South Africa extends the decision-making process significantly. Cases such as *Koch* and *KG v CB & Others* progressed through multiple judicial tiers, each consuming additional time and resources. Although appeals can safeguard due process, it may also produce counterproductive delays that run counter to the Convention's urgency provisions. Second, procedural and administrative inefficiencies, such as the late filing of return applications or the time-consuming appointment of experts and *curators ad litem*, often delay judgments. In *KG v CB & Others*, for example, significant delays occurred before the return application even reached the High Court. The complexity of multi-jurisdictional cooperation similarly hinders efficiency, as seen in *N M*, where communication between foreign and local Central Authorities proved slow and disjointed.

Third, courts face the challenge of integrating local constitutional standards, particularly the paramountcy of the child's best interests, within the strict procedural framework of the Hague Convention. In *Koch*, the Constitutional Court grappled with whether procedural expediency might compromise substantive fairness, highlighting the tension between constitutional imperatives and international obligations. While a thorough inquiry into the

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<sup>58</sup> Ibid.

child's best interests is vital, the resulting protraction often frustrates the key objective of minimising disruption in a child's life in international child abduction.

Efficient cross-border cooperation is critical in implementing the Hague Convention, yet the cited decisions reveal the difficulties inherent in coordinating judicial systems, administrative processes, and differing legal regimes. Instances such as *KLVC v SDI* demonstrate the added delay when courts must refer questions across jurisdictions or await clarifications from another country's legal system. These multi-jurisdictional referrals contribute to procedural fragmentation, where each court must navigate not only the factual complexities but also the interplay between varying legislative frameworks. Administrative bottlenecks exacerbate these challenges. In *CAR*, the significant gap between the father's initial approach to the Canadian Central Authority and the filing of the application in South Africa reflects a lack of prompt coordination. This coordination gap undermines the timeliness envisioned by the Hague Convention and weakens the overall goal of deterring wrongful removals by ensuring prompt judicial intervention.

Each case also demonstrates the delicate balancing act of adjudicating parental rights and obligations while preserving the child's best interests. The protracted litigation often allows parents, whether the left-behind parent or the removing parent, to entrench their positions. In *Koch*, by the time the Constitutional Court rendered its decision, the child had formed deep attachments to her caregiver and environment, diminishing the practicality of enforcing a swift return. Similarly, in *L v Ad Hoc Central Authority*, the mother's decision to remove the children from Thailand and then prolong litigation arguably benefitted her own preference to remain in South Africa, though the courts eventually sanctioned their return. The protracted process also risks allowing one parent to dominate narratives about the child's best interests. Where expert reports and *curators ad litem* are belatedly appointed, courts may rely heavily on a single parent's account for significant stretches of time. This dynamic surfaced in *CAR*, where the High Court's reliance on the removing parent's evidence led to a return order being dismissed and later overturned on appeal. When a parent's claims, including assertions of grave risk of harm, are not tested promptly, there is a real danger that the child's voice and best interests become secondary to parental strategies.

The extended timelines illustrated by these cases often produce outcomes contrary to the spirit of the Hague Convention's protective function. Children remain in flux for months or years, forming new attachments and routines before any final decision is made. By the time courts make determinations, the child's circumstances may have shifted to the extent that

returning them to their habitual residence is no longer straightforward or might engender further instability. In *KG v CB & Others*, the child's relationship with her father deteriorated considerably during the delayed proceedings, casting doubt on the efficacy of the eventual return order. Further, the psychological toll on a child caught amid protracted disputes is substantial. Multiple expert evaluations, administrative interviews, and court appearances can exacerbate stress and instability. These strains are evident in cases such as *LD v Central Authority*, where the child's potential exposure to psychological harm became a focal point. While courts must justly consider defences under Article 13(b), the very need for extensive investigation can inadvertently prolong the litigation, intensifying the child's uncertainty.

Despite the delays and procedural challenges in swift decision-making, the ultimate goal remains to protect the child's best interests by ensuring their voice is heard in the decision-making process. Against this backdrop, the next section turns to the practical implementation of child representation and participation, examining how courts manage these key principles in international child abduction decision-making.

### **7.3 CHILD REPRESENTATION AND PARTICIPATION IN PRACTICE**

Chapter Six established that domestic law mandates that legal representation must be appointed for a child involved in a Hague Convention application to safeguard the child's participation rights.<sup>59</sup> Furthermore, in cases where the absence of representation would compromise the child's best interests, the Act requires courts to appoint legal representatives or *curators ad litem* at the state's expense to ensure that the child's voice is effectively represented and their interests safeguarded.<sup>60</sup>

Against this backdrop, the discussion that follows evaluates the practical implementation of child representation and participation in international child abduction decision-making. Building on the theoretical and legislative foundations outlined in earlier chapters, this section examines whether courts effectively appoint legal representatives or *curators ad litem* for children, ensure that the child's views are given due weight, and adopt procedures responsive to the child's developmental stage and evolving capacities. To maintain continuity, this section revisits the same cases examined in Part 7.2 to evaluate how the Constitutional and appellate

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<sup>59</sup> See Part 6.3 of Chapter Six.

<sup>60</sup> See Part 6.4.1 – 6.4.2 of Chapter Six.

courts implement child representation and facilitate the child's participation in decision-making. However, to avoid repetition, the factual details of those cases will not be repeated except where essential to illustrate how courts have engaged with the child's voice in abduction decision-making.

### **7.3.1 The Koch cases**

In *Koch NO and Another v Ad Hoc Central Authority of South Africa and Another*, a curator *ad litem* was not appointed for the child. Instead, the court relied on multidisciplinary expert evidence in the form of reports submitted by a social worker, psychiatrist, educational psychologist and later, a Legal Aid practitioner. The Legal Aid practitioner was appointed by the Constitutional Court.<sup>61</sup> These reports were heavily relied on by the court in the decision making process and provided the court with a comprehensive evaluation of the child's circumstances, particularly regarding the potential psychological impact of a return order after having been retained in South Africa for four years during which her mother had died.<sup>62</sup> The multidisciplinary team assessed the child's emotional well-being, developmental needs, and adjustment to her current environment in South Africa. They also assessed the impact of her return on her well-being. This is consistent with domestic law principles to protect the best interests of the child in all matters concerning them. By incorporating these professional evaluations and observations extensively into its decision-making process, the court ensured that the child's voice was mediated and contextualised through expert insights which is consistent with international standards.<sup>63</sup>

However, the court critically evaluated the reports and their impartiality. The reports by the education psychologist, in particular tended to be less impartial than others and focussed heavily on the presumed serious impact that the child's return to her father would have on her psychological development. The court did not simply accept this view and instead agreed with the *court a quo* who found that the risk of psychological harm in returning the child was simply a risk of harm typically found and expected in child disputes of this nature.<sup>64</sup> If the court was

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<sup>61</sup> *Koch* paras 76, 92-113.

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

<sup>63</sup> See Chapter Three.

<sup>64</sup> *Koch* paras 115 and 159.

to decide that the child should remain in South Africa, the risk of harm caused by returning would have to extend further than the harm that naturally occurs as a result of return orders.<sup>65</sup>

This case presented circumstances that were exceptional, with the death of the child's mother occurring during the initial stages of the proceedings. The court's reasoning for the decision made demonstrated an understanding of how these circumstances were material in determining the circumstances of the child which had drastically changed since the initial application for her return.<sup>66</sup> Given the child's age, the court acknowledged that she lacked the capacity to articulate direct objections to being returned to the United Kingdom. However, the court carefully considered evidence of the child's attachments, psychological needs, and developmental trajectory as proxies for her views. These factors were particularly significant considering the child's exceptional circumstances and the strong bond she had developed with her aunt, as well as her integration into the South African environment. In the decision-making process the court balanced the developing capacity and autonomy of the child with the necessity of making a decision that was centred on her and not on inter-state cooperation or the rights of the left-behind parent.

This approach to decision-making in international child abduction cases is consistent with the fiduciary theory and international standards. In acknowledging the child's exceptional circumstances, the Constitutional Court recognised the impact that its order to return the child would inevitably have on her short-term interests and therefore included protective measures to mitigate the expected risks in its order. The decision-making process, in this case, demonstrates a commitment by courts to protect the child's best interests in a manner that is both procedurally sound and substantively just.

### ***7.3.2 KG v CB and Others***

A *curator ad litem* was appointed, in this case, to ensure that the five-year-old child's voice was heard in these proceedings.<sup>67</sup> The curator was appointed, from Legal Aid, by the court<sup>68</sup> ensuring the impartiality of the curator to truly represent the interests of the child. However, the role of the curator in this case was both enabling and limiting. While the curator's report

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<sup>65</sup> *Koch* para 159; See also *Sonderup* para 43.

<sup>66</sup> *Koch* para 156.

<sup>67</sup> *KG v CB* para 13.

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

provided valuable insights into the child's adjustment to her environment and attachment to her mother, it also functioned as the sole method of participation of the child. These observations were critical to the court's understanding of the potential harm of returning the child. However, the curator admitted that due to time constraints his report was based on only one interview that he had with the child. Most of his report relied on the circumstances of the mother and her immediate family as well as one conversation with the child's pre-school teacher.<sup>69</sup> As such, the curator's report provided that the child could "possibly retreat and become traumatised" if returned.<sup>70</sup>

Moreover, the court, relying on the curator's observations pieced together a picture of the child's lived reality. While this method may provide valuable context, it is inherently interpretative and shaped by the perspectives and biases of the adults involved in the curator's report. This raises a deeper question about whether the child's voice can ever be authentically represented in such cases where there is only a curator appointed and when faced with time constraints.

This case presents an example of where the appointment of *curators ad litem*, mandated by the domestic framework, has the potential to devolve into a simple procedural formality without meaningfully protecting the interests of children. The court in *KG v CB and Others* avoided this pitfall by extensively incorporating the curator's findings into its reasoning, setting a positive example of substantive engagement.

What is even more concerning is that the case involved allegations of sexual abuse against the child's father. Although these allegations were unsubstantiated, the court was quick to dismiss them, stating that if the allegations were later substantiated, they could be addressed by the courts in the returning state.<sup>71</sup> Dismissing allegations of abuse, whether substantiated or not, without a proper investigation compromises the fundamental principle of safeguarding the child's best interests in decision-making, which should be paramount in abduction decisions.

Ultimately, with heavy reliance on the curator's report, the court ordered the child's return along with some protective measures to mitigate any risk of harm to the child.<sup>72</sup>

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<sup>69</sup> *KG v CB* para 54.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *KG v CB* paras 60-62.

### 7.3.3 *KLVC v SDI and Others*

In *KLVC v SDI*, the absence of an appointed *curator ad litem* in the proceedings raises concerns about whether the child's voice was effectively heard and advocated for. Although the Family Advocate participated in the case, as discussed in the preceding chapter, their role in the decision-making process, as the Central Authority is typically advisory rather than representational.<sup>73</sup> This gap represents a missed opportunity by the court to appoint an independent representative solely focused on the child's interests.

The absence of a curator or legal representative capable of conducting an independent inquiry into the child's preferences, environment, and emotional state limits the depth of the court's understanding of the child's best interests in the decision-making process. Instead, the judgment relies heavily on the parent's interests and whether the father had parental responsibilities and rights in respect of the child.<sup>74</sup> While these considerations were important to the decision-making process, they cannot substitute for an independent analysis that centres on the child's voice and interests.

In this case, the court's decision-making process reflects no consideration of the child's participation rights and ultimately, interests. By focusing primarily on the father's rights under the Children's Act, the court sidelined the child's experiences and the broader implications of his removal. The court's approach in this case does not demonstrate sufficient procedural sensitivity to the child's developing and evolving capacities. At the time of the proceedings, the child was just over two years old, an age where direct participation in court processes is impractical. However, developmental psychology suggests that even very young children can express preferences and exhibit behaviours that provide critical insights into their emotional and psychological needs. These insights could have been elicited through a multi-disciplinary team of experts, as seen in other cases like *Koch*, but it was not.

A child-sensitive approach would have included a thorough examination of his attachment to each parent, his adjustment to life in England, and the potential impact of returning on his emotional development. Such an approach would align more closely with international standards. The decision-making process, in this case, reflects a primarily parent-focused framework. The emphasis on the father's parental rights overshadowed the need for a

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<sup>73</sup> See part 6.4.1 - 6.4.2 of Chapter 6.

<sup>74</sup> *KG v CB* paras 6-21.

comprehensive assessment of the child's interests. This approach risks treating the child as an extension of his parent, as seen in outdated theoretical perspectives like the property theory, rather than an autonomous rights-holder whose views and best interests must guide the court's decision.

### ***7.3.4 L v Ad Hoc Central Authority and Others***

Like the previous case, a significant procedural gap in this case is the absence of an independently appointed *curator ad litem* or legal representative specifically for the children. Although the Family Advocate was involved in the proceedings, like *KG v CB* its role was inherently focused on enforcing the Hague Convention's objectives rather than representing the children's individual interests. The lack of a dedicated *curator ad litem* left the children's perspectives largely mediated through their parents' assertions and the high court's analysis.<sup>75</sup> This absence is especially concerning given the serious allegations raised by the mother regarding the father's abusive conduct and the children's reported objections to returning to Thailand.<sup>76</sup> An independent legal representative could have provided a more child-focused lens, offering an impartial assessment of the children's emotional well-being, preferences, and attachments.

The high court dismissed the children's objections to returning to Thailand, attributing them to influence by the mother.<sup>77</sup> While parental influence is a legitimate concern in abduction cases, the court's cursory dismissal of the children's objections reflects a missed opportunity to critically engage with their views. At the time of the proceedings, the children were 12 and 9 years old, which are ages at which they would have some capacity to express their feelings and preferences directly or indirectly through a curator or legal representative.

The court's failure to independently ascertain the children's views diminishes the authority of its decision. While the Hague Convention emphasises the return of children to their habitual residence, it also requires that children's objections, if raised, be given appropriate consideration in line with their age and maturity in the decision-making process.<sup>78</sup> In this case, the court appears to have prioritised the procedural mandate of the Convention for swift

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<sup>75</sup> *L v AHCA* paras 3-5.

<sup>76</sup> *L v AHCA* para 12.

<sup>77</sup> *L v AHCA* para 8.

<sup>78</sup> Hague Convention art 13.

decision-making over a deeper exploration of the children's perspectives, undermining the child's best interests.

A more procedurally sensitive approach would have included child-friendly mechanisms to ascertain the children's views, such as interviews conducted by child psychologists or social workers trained in working with children in high-conflict cases. These insights could have provided a clearer picture of the children's emotional states, attachments, and fears, which are critical to understanding the potential risks of returning them to Thailand. While the high court imposed extensive protective measures to mitigate potential harm upon the children's return to Thailand, these measures do not address the underlying procedural flaws in how the children's voices were represented and evaluated. The court's reliance on protective conditions, such as securing therapy and suitable accommodation, demonstrates a reactive rather than proactive approach to safeguarding the children's interests.

### ***7.3.5 LD v Central Authority and Another***

In *LD v Central Authority and Another*, a *curator ad litem* was appointed for the child, E.<sup>79</sup> However, while the appointment itself is commendable, the process raises questions about the scope of the curator's role and the resources allocated to fulfil it effectively. The curator's initial report, submitted without direct consultation with the child, relied heavily on the broader context of the case rather than providing a detailed exploration of E's preferences and emotional state.<sup>80</sup> Only after a subsequent court order was a psychologist engaged to conduct an emotional assessment of E.<sup>81</sup> This fragmented approach reflects a systemic issue in the lack of clear guidelines to ensure that curators are equipped to provide comprehensive and timely input. A more structured framework could have ensured that the curator's involvement was proactive and integral to the proceedings from the outset.

The court's consideration of E's views reveals both strengths and limitations in balancing procedural requirements with the child's evolving capacities. At four years old, at the time of her removal from Luxembourg, E was too young to articulate mature objections directly.<sup>82</sup> Nonetheless, the court relied on indirect evidence, such as the psychologists report, to infer her

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<sup>79</sup> *LD v AHCA* para 15.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *LD v AHCA* para 31.

preferences and emotional needs. The psychologist found that E was securely attached to her mother and had established a sense of stability in South Africa. She also noted E's avoidance of discussing her father, suggesting emotional distancing.<sup>83</sup>

While the court engaged with these findings, it did not fully interrogate the unique factors influencing E's views. For example, the potential impact of the mother's actions on E's perceptions of her father was not explored in depth.<sup>84</sup> By focusing on the stability of E's current environment, the court risked conflating her immediate preferences with her long-term best interests. This highlights the importance of distinguishing between the child's views, whether direct or inferred, and broader considerations of their developmental and emotional trajectory. However, the process of hearing of E's voice suffered from delays and reactive measures, such as the late involvement of a psychologist, which may have hindered a deeper understanding of E's situation. Furthermore, child-sensitive methods, such as age-appropriate interviews or creative expression exercises, could have provided richer insights into E's emotional and psychological needs. These methods would also ensure that her voice was heard in a manner tailored to her developmental stage, rather than being mediated solely through adult interpretations.

In this case, the court decided that E's return would disrupt her established family unit with her mother, stepfather and half-brother, and thereby expose her to psychological harm, satisfying the grave risk exception to returning the child.<sup>85</sup> In applying the grave-risk exception, the court relied exclusively on the parents' affidavits and expert reports without facilitating either the child's direct participation or independent legal representation. Procedural time-limits were met, but the absence of these safeguards meant the child's own voice was never tested, illustrating that formal compliance with Hague timelines can come at the expense of the participatory guarantees that a best-interests determination requires.

### ***7.3.6 CAR v Central Authority and Another***

In *CAR v Central Authority and Another*, the high court appointed a *curatrix ad litem* for the child, a toddler, alongside an array of multidisciplinary experts appointed by the child's

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<sup>83</sup> *LD v AHCA* paras 16-17 and 60.

<sup>84</sup> *LD v AHCA* para 32-34.

<sup>85</sup> *LD v AHCA* paras 37-39.

mother.<sup>86</sup> The curatrix's report expressed serious, and somewhat unreasonable, concerns about the potential harm of returning the child, arguing that his development and the nurturing environment he had in South Africa would be disrupted.<sup>87</sup> Moreover, the curatrix has opined in her report that returning the child would place the mother in an agonising situation as she would have to return with the child.<sup>88</sup> While the mother's circumstances may be somewhat relevant to the child's best interests, curators and decision-makers must ensure that the child's interests remain the central focus. Courts must be vigilant against decisions that make the child's best interests secondary to the mother's challenges. Instead, they should carefully evaluate how the caregiver's circumstances tangibly impact the child's safety, stability, and overall best interests, without allowing the caregiver's preferences or hardships to unduly influence the outcome.

This was the position taken by the court *a quo* in *CAR v AHCA*. The court reasoned that the issue it needed to decide was whether the mother's mental health if returned would negatively impact on her parenting of the child and thereby create an intolerable situation for the child.<sup>89</sup>

However, the SCA found that the high court's reliance on the expert reports appeared inconsistent. While the court dismissed claims made by experts who had consulted with both parents, it tended to favour reports that were one-sided and mainly based on the mother's perspective with very little attention given to the interests of the child at all. The high court, therefore, decided that the child should not be returned.<sup>90</sup> The court acknowledged that time constraints and limited resources hindered a thorough investigation of the child's interests, which raises serious concerns about the depth and credibility of the decision that was made.<sup>91</sup> This indicates another systemic issue, that without adequate resources, time and clear procedural guidelines, the appointment of legal representatives risks becoming a tokenistic measure rather than a substantive mechanism to strengthen the child's voice.

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<sup>86</sup> *CAR v AHCA* para 6.

<sup>87</sup> *CAR v AHCA* paras 66-67.

<sup>88</sup> *CAR v AHCA* paras 28-29.

<sup>89</sup> *CAR v AHCA* para 32.

<sup>90</sup> *CAR v AHCA* para 40.

<sup>91</sup> *Ibid.*

Therefore, the SCA set aside the high court's decision, criticising its failure to adequately balance the Hague Convention's objectives with the evidence presented.<sup>92</sup> The SCA found that the high court had overly relied on the mother's allegations and her experts' reports, many of which were not substantiated by direct observations of the child's experiences. The SCA emphasised that while the child's inferred views and circumstances are important, they must be contextualised within the broader framework of the Convention, which prioritises returning children to their habitual residence for custody decisions.<sup>93</sup>

The decision-making process, in this case, reveals gaps in sensitivity to the child's evolving capacity and autonomy. As a toddler, the child's ability to directly participate in the proceedings was inherently limited, placing a greater burden on the court to adopt child-sensitive methods for assessing his best interests. However, the absence of a comprehensive developmental assessment indicate that the court's approach was reactive rather than proactive. For instance, the court accepted reports indicating that the child's developmental delays were linked to his upbringing in Canada but did not thoroughly interrogate alternative explanations or consider whether these delays could be addressed through protective measures in Canada. This diminished the court's ability to fully assess the child's needs, leaving critical aspects of his situation unresolved.

### ***7.3.7 NM v Central Authority and Another***

In *NM v Central Authority and Another*, the court did not appoint an independent *curator ad litem* or legal representative for the child. Instead, the court relied on the input of a social worker, whose report was intended to provide insights into the child's circumstances and the potential risks associated with his return to Australia.<sup>94</sup> However, this approach was problematic for several reasons. The social worker's report lacked the necessary balance, as it was based solely on the mother's perspective and observations during a single visit with the child. Importantly, the report did not include any engagement with the father or the extensive support services available to the child in Australia.<sup>95</sup>

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<sup>92</sup> *CAR v AHCA* para 45.

<sup>93</sup> *CAR v AHCA* para 44.

<sup>94</sup> *NM v AHCA* para 21.

<sup>95</sup> *NM v AHCA* paras 22-23.

The absence of an independent legal representative or *curator ad litem* is a significant procedural gap in this case. In cases like this, where allegations of harm are raised, the appointment of a *curator ad litem* is essential to ensure an impartial and thorough assessment of the child's best interests. By failing to provide independent representation for the child, the court missed an opportunity to gain a more comprehensive understanding of his emotional and developmental needs. This highlights the need for clearer procedural guidelines requiring the mandatory appointment of curators in international child abduction decision-making, particularly when young children are involved.

Given the child's age, two years and eight months at the time of the proceedings, the court relied on inferred preferences and attachments, as reported by the social worker and argued by the parents, in the decision-making process. The social worker's report emphasised the child's strong attachment to his mother and the psychological harm that could arise from their separation.<sup>96</sup> However, this assessment was flawed in its assumption that the child's return to Australia would necessarily involve separation from his mother. As the SCA pointed out, the mother's refusal to accompany the child was the primary factor creating this risk, not the return order itself.<sup>97</sup>

The court's reliance on the social worker's report, despite its limitations, reflects a broader challenge in considering children's views in abduction decision-making. Courts must balance inferred preferences with the broader context of the child's long-term best interests and the objectives of the Hague Convention. In this case, the court ultimately determined that the social worker's report did not meet the threshold required to establish a grave risk of harm if the child is returned.<sup>98</sup> However, the lack of an in-depth inquiry into the child's attachment patterns, developmental stage, and potential adjustment challenges undermines the strength of this decision. A more sensitive approach would have included a multidisciplinary assessment, incorporating input from child psychologists or other experts trained in working with young children in high-conflict situations.

The decision-making process in *NM v Central Authority and Another* reflects both the strengths and shortcomings of South African courts in handling international child abduction decision-making. While the court adhered to the procedural requirements of the Hague

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<sup>96</sup> *NM v AHCA* para 24.

<sup>97</sup> *NM v AHCA* para 28.

<sup>98</sup> *NM v AHCA* paras 46-48.

Convention, its approach to representing the child's interests, considering his views, and adopting child-sensitive procedures was insufficient to meet international standards.

## **7.5 TENSION BETWEEN EXPEDITED DECISION-MAKING AND CHILD PARTICIPATION**

Building on the analyses of expedited decision-making and child participation in the preceding parts of this chapter, this synthesis focuses on how decision-makers have navigated the tension between swift abduction decision-making and upholding children's participation rights. It examines whether the urgency demanded by law dilutes children's participation rights or whether courts have developed innovative practices, such as interim measures, conditional return orders, and detailed protective measures, that preserve timeliness without sacrificing the child's best interests in decision-making. The discussion also critically evaluates the implications for children's autonomy in the decision-making process.

### ***7.5.1 The tension between timeliness and participation***

A dominant theme emerging from the case law is the legal imperative to expedite decision-making, ideally resolving matters within six weeks. Courts routinely cite the Hague Convention's objective to deter wrongful removals by restoring children promptly to their habitual residence. However, the urgency so central to the Convention often collides with the constitutional paramountcy of the child's best interests, which includes meaningful participation. Several cases reveal how repeated appeals, administrative bottlenecks, and the complexities of coordinating interstate cooperation inevitably prolong proceedings. Although delays can stem from genuine efforts to protect the child's best interests, for instance, by commissioning expert reports or appointing *curators ad litem*, they weaken the objective of swift resolution and deepen the tension between expediency and thorough child participation.

Notably, the Constitutional Court in *Koch* highlighted that procedural urgency should not come at the expense of the child's substantive rights. Yet its own judgment, arriving almost four years after the initial application, illustrates that the tension between speed and substantive inquiry is difficult to reconcile in practice. Courts often find themselves navigating the paradox that enforcing a prompt return may safeguard the child from being entrenched in a new

environment but can also limit the depth of the participation process, as the child's voice may be neither fully heard nor critically engaged.

### ***7.5.2 Curators ad litem and child representation***

To mitigate the risk of overlooking children's voices, courts have increasingly turned to procedural safeguards such as appointing *curators ad litem* or legal representatives. These appointments facilitated the child's participation, albeit indirectly, through expert reports and curated observations. When carried out comprehensively, such representation enriched the evidentiary record with developmental, psychological, and emotional perspectives that might otherwise remain hidden behind parental interests and perspectives.

Nevertheless, the effectiveness of these safeguards varies. Some proceedings reflect a commendable effort to integrate children's experiences and to adjust protective measures accordingly. For example, by proposing logistical support or psychological interventions for the child upon return. Others highlight a more piecemeal approach, where curators are appointed late, or where the Family Advocate's role displaces a fully independent voice for the child. The inconsistent uptake and sometimes cursory nature of representation suggest that expedited timelines can overshadow a child's evolving capacities and genuine expression. In certain instances, courts operated without a dedicated *curator ad litem*, relying instead on parental submissions, thereby risking an incomplete understanding of the child's experiences.

### ***7.5.3 Innovative practices to balance timeliness and the child's best interests***

Despite systemic shortcomings, some decisions showcase innovative judicial practices aimed at reconciling urgent returns with participatory safeguards. Several courts now routinely incorporate conditional return orders and protective mandates, a development that reflects a more individualised protection of the child's best interests in abduction decision-making. For instance, in *CAR v Central Authority*, the SCA devised a comprehensive return order, attaching practical conditions, such as guaranteed accommodations, healthcare, or therapeutic support, to mitigate potential harm. By conditioning return on these measures, courts strive to address legitimate best interests concerns without indefinitely delaying the process.

#### ***7.5.4 Implications for the child's autonomy***

From a children's-rights perspective, the child's participation is central to upholding their autonomy in decision-making processes. Under theoretical perspectives, like the fiduciary and interest theories, children are neither passive extensions of their parents nor merely the objects of family-related disputes; they are rights-holders with evolving capacities and needs. Where courts gather the child's views indirectly, through multidisciplinary experts and curators, and give them due weight, the resulting decisions carry greater moral and legal authority.

However, decisions delayed by years of litigation can render even well-intended participation procedures less impactful. As in *Koch*, the child's circumstances may fundamentally change by the time the final ruling is delivered, at which point returning to the original jurisdiction may introduce further disruption. This demonstrates a broader risk, that when courts fail to make decisions promptly, the child's best interests can shift, complicating the remedy initially sought. In that sense, the authority of abduction decisions relies not just on abstract participation, but on participation that is timely, age-appropriate, and context-sensitive.

### **7.6 CONCLUSION**

This chapter set out to examine the practical application of two key procedural principles that protect the child's best interests in the decision-making process. Namely, expedited decision-making and the meaningful participation of children. The chapter critically evaluated how South African courts implement these principles in the context of international child abduction decision-making, focusing on whether they adhere to the six-week resolution guideline mandated by domestic law and whether the urgency inherent in such cases is balanced with substantive engagement with the child's participation rights. The general observation is that while domestic law incorporates these principles in theory, significant gaps persist in their practical realisation in decision-making, contributing poorly to decisions that impact the best interests and autonomy of children.

With regard to the practice of expedited decision-making in the context of international child abduction, the chapter found that although the six-week resolution guideline is a clear procedural safeguard mandated by law, systemic delays often arise due to logistical inefficiencies, complex inter-state cooperation, and appeals. Cases such as *Koch* and *KG v CB* highlighted that these delays are compounded by the competing imperatives of the Hague

Convention's swift-return mandate and South Africa's constitutional commitment to the child's best interests. While thorough inquiries can justify some delays, protracted timelines in the decision-making process risk creating new attachments, disrupting the child's stability, and undermining the effectiveness of expedited decision-making. This analysis demonstrated the paradoxical effects of delays in that they may allow for deeper engagement with the child's participation rights but can also often frustrate the Hague Convention's core objective of minimising disruption to the child's life.

With regard to how courts incorporate children's voices into decision-making, evaluating the appointment of legal representatives and *curators ad litem* and the use of child-sensitive methods in hearing the child's voice, the chapter found that while some cases demonstrated promising practices, such as the comprehensive involvement of a multidisciplinary team of experts in *Koch*, others revealed inconsistencies in ensuring children's meaningful participation. The absence of appointed representatives in cases like *KLVC v SDI* demonstrate a systemic gap in safeguarding the child's right to be heard. Moreover, even where representation is provided, delays in appointing curators or resource constraints can dilute the substantive engagement with the child's evolving capacity. These findings demonstrate that meaningful participation is often compromised by procedural urgency, despite its foundational role in ensuring the legitimacy of decisions.

Synthesising these findings, the chapter demonstrated that the tension between expedited decision-making and meaningful participation reflects a broader challenge within the South African framework. Which is the difficulty in balancing the procedural demands for expedited decision-making with the substantive protections of the child's meaningful participation, guaranteed under domestic law and necessary to protect the child's best interests. The balancing required for meaningful participation, which requires sufficient time to engage with the child, and the nature of abduction decision-making, which requires swift decisions to protect the child's long-term interests, poses a significant challenge to ensuring the child's best interests in abduction decision-making. While innovative practices, in abduction decision-making, such as conditional return orders and protective measures show potential for addressing this challenge, its inconsistent application limits its impact; and also risks dismissing genuine concerns about the child's best interests by adopting a simplistic and dismissive attitude that relegates responsibility to the courts of the returning state, effectively "passing the buck" rather than addressing the issue comprehensively.

The next chapter concludes the thesis and answers the main research question. In addition, it provides some recommendations.

## CHAPTER EIGHT

### CONCLUSION

#### 8.1 SUMMARY OF FINDINGS

The thesis set out to examine the extent to which South Africa complies with international standards regarding the application of the best interests of the child in decision-making processes.<sup>1</sup> The crux of the issue is the extent to which the decision-making process implements procedural safeguards that protect the child's substantive elements and respect the developing autonomy of the child to protect their best interests ultimately. The foregoing chapters reveal three systemic patterns that cut across the constitutional, statutory and jurisprudential areas analysed in this thesis. Although each chapter addressed a research sub-question, the composite picture that emerges highlights structural issues.

First, the participation gap. South Africa's legal framework contains a comprehensive suite of participation clauses, including Section 28(1)(h) of the Constitution and Sections 10 and 14 of the Children's Act; yet, the empirical review in Chapters Six and Seven reveals that these safeguards are applied only sporadically. In the expedited environment of Hague-abduction litigation, courts routinely comply with statutory timelines, but seldom appoint an independent representative or *curator ad litem* unless pressured to do so by counsel. The result is a procedural façade in which the child's voice is acknowledged in principle, but seldom heard in fact. A stand-alone constitutional amendment, or at the very least a uniform Practice Directive requiring the court to consider a curator appointment in every international abduction matter, would close this gap.

Second, the procedural and substantive disconnect. Chapter Four demonstrated that the general principles in sections 6–10 of the Children's Act and the *McCall* factors ensure that the substantive elements of the best-interests standard, i.e. identity, family environment, protection from harm, health and education, are generally provided for. However, Chapters Five to Seven evidence a far less consistent engagement with the procedural counterparts of those elements. Namely, a multidisciplinary assessment, timely adjudication and, most noticeably, meaningful child participation. The disconnect suggests that courts regard procedure as an administrative

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<sup>1</sup> See part 1.4 of Chapter One.

adjunct rather than an integral component of the best-interests enquiry. Judicial training on the procedural content of CRC General Comment 14, combined with more explicit legislative guidance on curator appointments and time limits, could foster a genuinely holistic approach.

Last, the international and domestic alignment. South African law has internalised most of the substantive and procedural standards found in the CRC and the African Children's Charter. However, two areas for improvement exist. First, the right to identity in relation to the continuity of family relations relies almost exclusively on Article 8 of the CRC, with no mirror clause in the Children's Act. Secondly, disability-specific safeguards outlined in Articles 23 of the CRC and 13 of the African Children's Charter are only intermittently referenced in domestic jurisprudence. Targeted amendment to section 7 of the Children's Act, inserting continuity of family relations and disability-sensitive assessment as express factors, would achieve fuller normative congruence. With these issues identified, the discussion that follows will revisit the thesis's principal findings and consider their broader implications.

### ***8.1.1 Theoretical perspectives that guide decision-making in family-related disputes***

The thesis has demonstrated that the application of theoretical perspectives is crucial in ensuring that decisions in family-related disputes are consistent with the best interests of the child. Among the various theories examined, the property<sup>2</sup> and will<sup>3</sup> theories were found inadequate for safeguarding children's rights in contemporary legal contexts, whereas the interest<sup>4</sup> and fiduciary<sup>5</sup> theories offer sound frameworks for decision-making. These latter theories balance the child's inherent rights and developing autonomy with the parental duty of care, providing a contextualised approach to complex family disputes.

The property theory, while historically significant, lacks the capacity to address modern family-related disputes effectively. Rooted in outdated conceptions of children as possessions, this theory prioritises parental control over the recognition of children as autonomous rights-holders. Its premise, which relegates the child's best interests to parental authority, is inherently

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<sup>2</sup> See part 2.2 of Chapter Two.

<sup>3</sup> See part 2.3 of Chapter Two.

<sup>4</sup> See part 2.4 of Chapter Two.

<sup>5</sup> See part 2.5 of Chapter Two.

incompatible with contemporary legal standards and children's rights frameworks.<sup>6</sup> Consequently, its application in decision-making undermines the evolving autonomy and individual interests of the child, rendering it irrelevant in advancing the best interests of the child.<sup>7</sup>

In contrast, the will theory offers a framework for understanding decision-making based on the capacity for rational choice. However, its reliance on cognitive maturity to justify the recognition of rights fails to account for the inherent vulnerabilities of children. This theory presupposes that children's inability to make rational decisions excludes them from meaningful participation in matters that affect them.<sup>8</sup> As a result, it risks marginalising the child's voice and neglecting their developmental needs. While protective in intent, the will theory inadequately addresses the importance of fostering a child's autonomy within the framework of their evolving capacity.<sup>9</sup>

The interest theory, on the other hand, represents a significant advancement in recognising children as rights-holders whose interests warrant protection, irrespective of their capacity to assert those rights. This theory emphasises the importance of safeguarding both the child's fundamental and developmental interests while respecting their autonomy as it evolves.<sup>10</sup> In decision-making, the interest theory shifts the focus from decisions that are in the interests of parents, to the child's well-being, ensuring that decisions prioritise their immediate needs and long-term potential. By placing the child's interests at the forefront, the theory provides a foundation for balanced and holistic decision-making.<sup>11</sup>

Equally compelling is the fiduciary theory, which conceptualises the parent-child relationship as one of trust and responsibility rather than authority or control. This theory recognises the inherent vulnerability of children and the corresponding parental duty to act in their best interests. Unlike the property or will theories, the fiduciary model highlights the moral and legal obligations of parents to guide their children toward independence while protecting their current best interests.<sup>12</sup> This perspective acknowledges that parental authority

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<sup>6</sup> See part 2.2.1 of Chapter Two.

<sup>7</sup> See part 2.2.2 of Chapter Two.

<sup>8</sup> See part 2.3.1 of Chapter Two.

<sup>9</sup> See part 2.3.2 of Chapter Two.

<sup>10</sup> See part 2.4.1 of Chapter Two.

<sup>11</sup> See part 2.4.2 of Chapter Two.

<sup>12</sup> See part 2.5.1 of Chapter Two.

is not absolute but contingent on the fulfilment of fiduciary duties that prioritise the child's rights and evolving autonomy. The fiduciary theory thus ensures that children are viewed as individuals with inherent dignity and not merely as extensions of their parents.<sup>13</sup>

When parents fail to meet these fiduciary obligations, the state's role as *parens patriae* becomes critical. The doctrine of *parens patriae* empowers the state to act as a "super parent" in safeguarding the best interests of children, intervening when parental decisions threaten the child's well-being.<sup>14</sup> However, this authority must be exercised carefully, guided by the principle of subsidiarity, which limits state intervention to circumstances where parental decision-making is insufficient. Subsidiarity ensures that parents remain the primary decision-makers in children's lives, with the state stepping in only as a last resort to protect the child's best interests.<sup>15</sup> Together, these doctrines create a framework that respects the balance between child and parental autonomy, as well as the state's protective role.<sup>16</sup>

Thus, the thesis has established that the most effective theoretical perspectives for guiding decision-making in family-related disputes are those that recognise the child as an autonomous rights-holder while balancing their evolving needs and vulnerabilities.<sup>17</sup> The interest and fiduciary theories provide the necessary legal and moral grounding for ensuring that the best interests of the child are prioritised in decision-making processes, while the doctrines of *parens patriae* and subsidiarity guide the state's role in safeguarding these interests. These frameworks collectively uphold the principles of child-centred decision-making, ensuring that decisions are just, equitable, and consistent with the rights and welfare of children.<sup>18</sup>

### ***8.1.2 The substantive elements and procedural safeguards that should be incorporated in domestic law***

As part of understanding the substantive elements and procedural safeguards necessary for ensuring the best interests of the child in family-related disputes, the thesis examined

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<sup>13</sup> See part 2.5.2 of Chapter Two.

<sup>14</sup> See part 2.6.1 of Chapter Two.

<sup>15</sup> See part 2.6.2 of Chapter Two.

<sup>16</sup> See part 2.6.3 of Chapter Two.

<sup>17</sup> See part 2.7 of Chapter Two.

<sup>18</sup> *Ibid.*

international children's rights law, particularly the CRC and the African Children's Charter, alongside their supporting jurisprudence.<sup>19</sup> It established that elements such as child participation, identity preservation, and access to health and education, combined with comprehensive procedural safeguards, are essential to a legal framework that consistently protects the best interests of the child in the decision-making process.<sup>20</sup> These findings align with the central tenets of the fiduciary and interest theories discussed in earlier chapters.<sup>21</sup>

The thesis demonstrated that ensuring the best interests of the child requires incorporating these substantive elements into domestic legal frameworks.<sup>22</sup> First, it established that child participation is a fundamental requirement.<sup>23</sup> Children must have the right to express their views freely in all matters affecting them, with those views given due weight according to their age and maturity.<sup>24</sup> This right, enshrined in both the CRC and the African Children's Charter, supports the recognition of children as active participants in decisions that shape their lives. Ensuring meaningful participation necessitates creating safe, child-friendly environments where children can articulate their perspectives without fear or undue influence.<sup>25</sup>

Second, the thesis highlighted the importance of preserving the child's identity and family connections as key components of their best interests.<sup>26</sup> The right to identity, which includes cultural, linguistic, and familial ties, is critical for fostering a sense of belonging and supporting a child's emotional and psychological well-being.<sup>27</sup> The thesis highlighted that maintaining these connections, whenever possible, ensures continuity and stability in the child's life, thereby promoting their holistic development. This approach emphasises the interconnectedness of the child's well-being and the broader support structures provided by their family and community.<sup>28</sup>

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<sup>19</sup> See part 3.3 of Chapter Three.

<sup>20</sup> See part 3.4 of Chapter Three.

<sup>21</sup> For a discussion of the theories, see parts 2.3 and 2.4 of Chapter Two.

<sup>22</sup> See part 3.4.1 of Chapter Three.

<sup>23</sup> See part 3.5.1 of Chapter Three.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> See part 3.5.2 of Chapter Three.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*; See also See part 3.5.3 of Chapter Three.

The thesis further demonstrated that access to health and education is integral to safeguarding the child's best interests.<sup>29</sup> Health encompasses not only the child's physical well-being but also their mental and emotional welfare, while education serves as a foundation for personal growth and empowerment.<sup>30</sup> Courts, therefore, must consider the potential impact of decisions on these critical areas of a child's life, ensuring that they contribute positively to the child's current and future development.<sup>31</sup>

In addition to substantive elements, the thesis established that procedural safeguards are indispensable for implementing the best interests principle effectively.<sup>32</sup> It demonstrated that representation for the child is crucial in ensuring their participation rights are protected and their voices are conveyed in the decision-making process.<sup>33</sup> The appointment of legal representatives, *curators ad litem*, and other experts is essential for maintaining a focus on the child's welfare and addressing potential conflicts of interest.<sup>34</sup>

The thesis also emphasised the need for interdisciplinary expertise in assessing and determining the child's best interests.<sup>35</sup> A multidisciplinary approach, involving professionals such as psychologists, social workers, and educators, ensures that decisions are informed by a comprehensive understanding of the child's unique circumstances and developmental needs.<sup>36</sup> This collaborative approach promotes objective, evidence-based decision-making that prioritises the child's well-being.<sup>37</sup>

Finally, the thesis highlighted the importance of timely decision-making in family-related disputes.<sup>38</sup> Delays can significantly impact a child's development and emotional stability, making it imperative for courts to resolve cases expeditiously. Mechanisms for reviewing and revisiting decisions were also highlighted as essential safeguards, allowing courts to adapt to the child's evolving needs and circumstances over time.<sup>39</sup>

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<sup>29</sup> See part 3.5.6 of Chapter Three.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> See part 3.4.2 of Chapter Three.

<sup>33</sup> See part 3.6.1 of Chapter Three.

<sup>34</sup> *Ibid.*

<sup>35</sup> See part 3.6.2 of Chapter Three.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> See part 3.6.3 of Chapter Three.

<sup>39</sup> *Ibid.*

Accordingly, the thesis established that domestic legal frameworks must incorporate these substantive elements and procedural safeguards to ensure the consistent application of the best interests principle in decision-making. Such integration not only aligns with international standards but also reinforces the recognition of children as rights holders whose well-being, autonomy, and development must be central to all decision-making in family-related disputes.<sup>40</sup>

## **8.2 ASSESSMENT OF THE SUBSTANTIVE ELEMENTS AND PROCEDURAL SAFEGUARDS GOVERNING DECISION-MAKING UNDER DOMESTIC LAW**

### ***8.2.1 The child's best interests and extent to which substantive elements are incorporated in domestic law***

Chapter Four of the thesis established that South Africa's post-apartheid legal framework has positioned the child's best interests as a central and transformative principle in all matters affecting children.<sup>41</sup> This commitment is reflected in the Constitution, which enshrines the child's best interests as paramount in section 28(2), exceeding the "primary consideration" standard of international instruments like the CRC and the African Children's Charter. This elevated standard signifies South Africa's deliberate prioritisation of children's rights within a legal system shaped by historical injustices and systemic neglect. The Children's Act builds on this constitutional foundation, implementing the principle through detailed provisions that incorporate both substantive elements and procedural safeguards.<sup>42</sup> Together, these instruments represent a progressive and child-centred framework aimed at advancing the welfare, autonomy, and holistic development of children within a transforming society.<sup>43</sup>

With regard to substantive elements, as mentioned earlier the thesis demonstrated in Chapter Three that the domestic legal framework must incorporate principles that ensure child participation, preserve family ties, protect identity, guarantee access to health and education,

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<sup>40</sup> See part 3.7 of Chapter Three.

<sup>41</sup> See part 4.4 of Chapter Four.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

and address the needs of vulnerable children.<sup>44</sup> These elements reflect international standards and are central to recognising children as autonomous rights holders.

On the issue of child participation, the thesis demonstrated that international standards require that all children, regardless of age, have the opportunity to express their views in matters that affect them, with the weight accorded to those views determined by their evolving capacities. The South African framework aligns broadly with this requirement, particularly through the provisions of the Constitution and the Children's Act.<sup>45</sup> However, it was shown that the reliance on developmental criteria, in courts, to determine participation often excludes younger children or those perceived as less articulate. This practice fails to fully realise the inclusive standard set by international law, which mandates meaningful participation for all children, ensuring their voices are heard and valued in decisions that shape their lives.<sup>46</sup>

The preservation of family ties was also identified as a critical substantive element. The thesis established that the family environment plays a pivotal role in a child's emotional, psychological, and cultural development. International standards emphasise that family separation should only occur when it is in the child's best interests and should always be a measure of last resort. South Africa's legal framework reflects this principle, with constitutional and legislative provisions that protect the preservation of familial connections.<sup>47</sup> However, the thesis highlighted that systemic challenges, such as socio-economic disparities, can undermine efforts to preserve family environments, particularly in cases involving vulnerable children.<sup>48</sup>

The thesis further established the importance of protecting the child's identity, including their name, nationality, and cultural heritage. It was demonstrated that identity forms the foundation for recognising children as individuals with unique needs and circumstances. South African law, through the Constitution and the Children's Act, recognises the child's right to identity and provides mechanisms such as birth registration to operationalise this right.<sup>49</sup> However, systemic barriers, including administrative inefficiencies and socio-economic inequities, often impede the realisation of these protections. The thesis highlighted the

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<sup>44</sup> See part 3.5 of Chapter Three.

<sup>45</sup> See part 4.5.1 of Chapter Four.

<sup>46</sup> Ibid.

<sup>47</sup> See part 4.5.3 of Chapter Four.

<sup>48</sup> Ibid.

<sup>49</sup> See part 4.5.2 of Chapter Four.

consequences of such barriers, particularly for children from marginalised communities, who may face challenges in accessing their rights due to lack of formal recognition of their identity.<sup>50</sup>

Further, the thesis also demonstrated that the rights to health and education are foundational to a child's development and autonomy and must be integrated into decision-making processes to safeguard the child's best interests. South Africa's legal framework, particularly through constitutional provisions and the Children's Act, reflects these protections.<sup>51</sup> The thesis argued that decision-makers must adopt a holistic approach that ensures health and education considerations are central to their assessments.<sup>52</sup>

Finally, the thesis addressed the specific needs of vulnerable children, recognising that international standards mandate tailored approaches to decision-making that account for the unique circumstances of such children. South Africa's legal framework provides for the protection of vulnerable children, including those with disabilities, refugee children, and children in situations of abuse or neglect.<sup>53</sup> However, the thesis highlighted practical challenges, such as inadequate funding and systemic discrimination, which often limit the effectiveness of these protections. It was shown that meaningful decision-making must go beyond formal compliance with the law to address the lived realities of vulnerable children and ensure their best interests are upheld.<sup>54</sup>

Thus, the thesis has established that while South Africa's legal framework demonstrates significant alignment with international standards in incorporating substantive elements, challenges in implementation often undermine these protections.<sup>55</sup> Procedural safeguards are, therefore, essential to bridging this gap, ensuring that substantive rights are applied effectively and consistently to protect the best interests of the child in all family-related disputes.

### ***8.2.2 The extent to which procedural safeguards are incorporated in domestic law***

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<sup>50</sup> Ibid.

<sup>51</sup> See part 4.5.4 of Chapter Four.

<sup>52</sup> Ibid.

<sup>53</sup> See part 4.5.5 of Chapter Four.

<sup>54</sup> Ibid.

<sup>55</sup> See part 4.6 of Chapter Four.

Chapter Five of the thesis demonstrated that domestic law reflects a strong commitment to procedural safeguards that ensure the child's best interests are upheld in decision-making processes. These safeguards, embedded within the Constitution and the Children's Act, are consistent with international standards and aim to protect children's participatory rights, ensure timely and informed decision-making, and provide avenues for review and appeal.

One of the central procedural safeguards is the recognition of children as active participants in family-related disputes.<sup>56</sup> South Africa's domestic law provides for independent legal representation, enabling children to voice their perspectives and have their views considered in decisions that affect them. The appointment of legal practitioners or *curators ad litem* under the Children's Act marks a progressive alignment with international standards by ensuring that children's voices are represented, either through direct client-directed models or best-interests-focused approaches.<sup>57</sup> Nevertheless, the thesis has shown that these measures are inconsistently applied in practice. Courts often rely on indirect methods to ascertain the child's views, and younger children or those perceived as less articulate are frequently excluded from meaningful participation.<sup>58</sup>

The establishment of child-friendly environments is another significant procedural safeguard that supports meaningful participation. The Children's Act mandates the creation of specialised Children's Courts designed to be less intimidating and more accessible to children.<sup>59</sup> Features such as informal settings, the inclusion of a "comfort person," and inquisitorial procedures align with international standards that prioritise the child's comfort and engagement.<sup>60</sup> However, the thesis has revealed that these measures are unevenly implemented, with adversarial traditions and infrastructural limitations persisting in some courts. Mediation and the role of the Family Advocate further contribute to fostering child-sensitive environments, but these mechanisms are not uniformly integrated into all family-related legal disputes, leading to variability in their impact.<sup>61</sup>

Interdisciplinary collaboration is another procedural safeguard highlighted in the thesis. International standards recommend the involvement of a multidisciplinary team to assess the

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<sup>56</sup> See part 5.2.1 of Chapter Five.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> See part 5.2.2 of Chapter Five.

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

<sup>61</sup> *Ibid.*

child's best interests holistically, considering their physical, emotional, psychological, and cultural needs.<sup>62</sup> While South African law acknowledges the value of expert input, the lack of statutory guidelines on the appointment and role of such professionals undermines the effectiveness of this safeguard. The thesis has found that the reliance on individual discretion, rather than a mandated framework, results in inconsistent engagement with experts and a fragmented approach to assessing the child's best interests.<sup>63</sup>

In addition, timeliness in decision-making and accessible avenues for review and appeal are critical procedural safeguards to protect the child's best interests.<sup>64</sup> The thesis has demonstrated that delays in decision-making, caused by systemic fragmentation, tactical adjournments, and insufficient judicial specialisation, can have detrimental effects on a child's well-being and development.<sup>65</sup> Although the Children's Act provides mechanisms for expedited decision-making and periodic reviews, these are often undermined by practical challenges such as resource constraints and overlapping court jurisdictions.<sup>66</sup> The reliance on adults to initiate appeals or reviews further limits children's abilities to challenge decisions that do not serve their best interests. The absence of child-friendly materials and simplified procedures exacerbates these barriers, leaving many children without meaningful recourse.<sup>67</sup>

Overall, Chapter Five of the thesis established that South Africa's domestic framework incorporates procedural safeguards that align with international standards, but their practical application is inconsistent and often inadequate. The findings reveal that while children are formally recognised as rights holders with participatory and procedural entitlements, systemic challenges hinder the realisation of these rights.<sup>68</sup>

### ***8.2.3 Expedited decision-making and child representation***

The findings in this part synthesise insights from Chapters Six and Seven, addressing the two primary procedural principles that emerged, in Chapter Six, as pivotal in South African

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<sup>62</sup> See part 5.3.1 of Chapter Five.

<sup>63</sup> Ibid.

<sup>64</sup> See part 5.4.1 of Chapter Five.

<sup>65</sup> Ibid.

<sup>66</sup> See part 5.4.2 of Chapter Five.

<sup>67</sup> Ibid.

<sup>68</sup> See part 5.5 of Chapter Five.

international child abduction decision-making. Namely, representation and expedited decision-making. These principles were selected due to their centrality to the child's best interests and the challenges identified in their implementation in international child abduction decisions.<sup>69</sup> Moreover, these principles are pivotal in international child abduction decision-making processes, because representation ensures the child's meaningful participation, while expedited decision-making addresses the need to minimise disruption to the child's life. This section critically examines the extent to which these principles are realised in practice, focusing on how they find expression in international child abduction decision-making.

#### 8.2.3.1 Representation and the child's meaningful participation in practice

Chapter Six, which reviewed the regulatory framework for international child abduction decision-making, established that the principle of representation, supported by domestic law and international standards, safeguards the child's participation in abduction decision-making.<sup>70</sup> The Children's Act mandates the appointment of legal representatives or *curators ad litem* to amplify the child's voice, particularly where procedural urgency might otherwise overshadow substantive engagement with the child.<sup>71</sup>

Chapter Seven revealed inconsistencies in the appointment and effectiveness of child representation in practice. In cases like *Koch NO and Another v Ad Hoc Central Authority of South Africa and Another*, courts demonstrated a child-sensitive approach by integrating multidisciplinary expert assessments to mediate the child's views.<sup>72</sup> This ensured that even a very young child's voice, inferred through expert evaluations, informed the decision-making process.<sup>73</sup>

However, other cases, such as *KLVC v SDI*, highlighted systemic shortcomings where the absence of *curators ad litem* left the child's perspective largely unexamined.<sup>74</sup> Similarly, in *L v Ad Hoc Central Authority and Another*, the dismissal of children's objections without a thorough inquiry into their authenticity or underlying causes highlights the need for impartial

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<sup>69</sup> See part 6.3 and 6.4 of Chapter Six.

<sup>70</sup> Part 6.4.1 of Chapter Six.

<sup>71</sup> *Ibid.*

<sup>72</sup> Part 7.3.1 of Chapter Seven.

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

<sup>74</sup> Part 7.3.3 of Chapter Seven.

representation.<sup>75</sup> These inconsistencies reveal that while the legal framework provides for representation, its practical implementation often falters, particularly in cases where time constraints, resource limitations, or judicial discretion result in procedural gaps.

#### 8.2.3.2 *Expedited decision-making and its tensions*

Expedited decision-making is a procedural cornerstone of the Hague Convention, which mandates the resolution of abduction cases within six weeks. Chapter Six established the importance of minimising disruption to the child's life by promptly restoring the *status quo ante* and allowing custody disputes to be resolved in the child's habitual residence.<sup>76</sup> However, the domestic framework must balance this urgency with the constitutional paramountcy of the child's best interests.<sup>77</sup>

As found in Chapter Seven, systemic delays frequently undermine the procedural efficiency required by domestic law. Cases such as *Koch* and *KG v CB* illustrated the difficulties courts face in reconciling the need for swift decision-making with the substantive inquiry required to safeguard the child's welfare.<sup>78</sup> Delays in appointing curators or obtaining expert reports, as seen in *LD v Central Authority and Another*, further exacerbate this tension, prolonging uncertainty for the child and diminishing the utility of expedited timelines.<sup>79</sup>

The *Koch* case demonstrated how courts can navigate this tension by incorporating protective measures into return orders. The Constitutional Court emphasised that procedural efficiency must not override the child's substantive rights, illustrating a layered approach to balancing urgency with fairness.<sup>80</sup> However, other cases revealed that procedural delays could create new attachments between the child and the primary parent, family and environment, or entrench the abducting parent's position, thereby complicating the decision-making process and undermining the objectives of the Hague Convention.<sup>81</sup>

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<sup>75</sup> See part 7.3.4 of Chapter Seven.

<sup>76</sup> See part 6.4.3 of Chapter Six.

<sup>77</sup> *Ibid.*

<sup>78</sup> See part 7.2.1 of Chapter Seven.

<sup>79</sup> See part 7.2.5 of Chapter Seven.

<sup>80</sup> See part 7.2 of Chapter Seven..

<sup>81</sup> *Ibid.*

### 8.2.3.3 *Balancing the two principles*

The findings of Chapter Seven highlight a critical tension between representation, enabling the child's participation, and expedited decision-making.<sup>82</sup> Meaningful participation often requires time for courts, representatives, curators and other multidisciplinary experts to engage with the child's unique circumstances, while the urgency of abduction cases limits the scope for thorough participatory procedures.<sup>83</sup> In cases such as *CAR v Central Authority*, the reliance on incomplete or one-sided reports demonstrated how procedural constraints could dilute the effectiveness of representation, highlighting challenges regarding the adequacy of safeguards in protecting the child's autonomy.<sup>84</sup>

Despite these challenges, some practices have emerged in practice to address the inherent tensions. Courts increasingly adopt conditional return orders and protective measures, as seen in *CAR* and *L v Ad Hoc Central Authority*. These mechanisms provide a middle ground, allowing for expedited decisions while addressing legitimate concerns about the child's welfare. However, the inconsistent application of such practices limits their broader impact.<sup>85</sup>

Overall, the thesis demonstrated that while South Africa's domestic framework incorporates the principles of representation and expedited decision-making, significant gaps persist in their implementation in practice. Representation, though essential to ensuring the child's meaningful participation, often suffers from procedural delays, resource constraints, and inconsistent application.<sup>86</sup> Similarly, the emphasis on expedited decision-making, while aligning with international obligations, risks overshadowing the child's substantive rights when procedural urgency is prioritised over comprehensive inquiries into the child's circumstances and welfare.<sup>87</sup>

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<sup>82</sup> See part 7.5 of Chapter Seven.

<sup>83</sup> *Ibid.*

<sup>84</sup> See part 7.3.6 of Chapter Seven.

<sup>85</sup> See part 7.5 of Chapter Seven.

<sup>86</sup> See part 7.6 of Chapter Seven.

<sup>87</sup> *Ibid.*

## 8.4 CONCLUSION

The findings of the thesis do not recommend any major amendments to South Africa's legal framework governing decision-making in international child abduction. The legal framework, anchored in the Hague Convention, the Children's Act, and associated regulations, adequately provides the procedural and substantive tools necessary to protect the child's best interests in theory. However, the thesis has shown that systemic barriers and practical inconsistencies limit the framework's effectiveness in practice. The findings emphasise the need for targeted refinements in implementing these safeguards to enhance their practical impact on children's welfare and autonomy.

The thesis has demonstrated that child representation is a cornerstone of ensuring meaningful participation in international child abduction decision-making. The Children's Act and its regulations expressly mandate the appointment of *curators ad litem* or legal representatives for children in abduction matters where it serves their best interests. However, the findings reveal gaps in the consistent and timely appointment of such representatives. Courts often rely on multidisciplinary reports or indirect evidence of the child's circumstances instead of prioritising direct engagement through legal representation. This approach risks diluting the child's voice and overlooking their evolving capacities.

To address this, it is recommended that clear procedural guidelines be introduced, mandating the appointment of a *curator ad litem* or legal representative in all international child abduction cases, as mandated by the Children's Act. The feasibility of mandating the appointment of a *curator ad litem* or legal representative in all international child abduction cases, may be a challenge. While this would align more closely with international standards and ensures consistent protection of children's participation rights, its implementation may face resource constraints, training gaps, and potential delays that conflict with the Hague Convention's emphasis on expedited decision-making. To ensure feasibility, the guidelines must include streamlined appointment procedures, adequate funding for state-supported representation, and the creation of a readily available panel of qualified professionals. These measures would strengthen the child-focused nature of abduction decisions while maintaining procedural efficiency. Such guidelines should also outline the qualifications, training, and scope of the curator's role, ensuring that they are equipped to assess and advocate for the child's best interests effectively. Additionally, it is recommended that multidisciplinary teams should be routinely engaged, in the decision-making process, to provide holistic assessments of the

child's circumstances and welfare, but only as a complement to, rather than a substitute for, independent legal representation.

Expedited decision-making remains an essential procedural safeguard in international child abduction cases, ensuring that children are not subjected to prolonged uncertainty or forced into situations of further disruption. While the six-week timeline prescribed by the Hague Convention is laudable, this study has shown that systemic inefficiencies, appeals, and delays often render this safeguard aspirational rather than practical. Protracted decision-making can entrench the abducting parent's position, disrupt the child's stability, and risk undermining the Hague Convention's objectives.

To strengthen adherence to expedited decision-making standardised guidelines should be adopted to refine the approach to abduction decision-making. Such guidelines would ensure that protective measures, for the child, are explicitly outlined, including mandated financial support or logistical arrangements by the left-behind parent to facilitate a smooth transition for the child. Requirements for psychological evaluations or therapeutic support during this period would also address the child's emotional well-being, ensuring that their immediate needs are met. Additionally, clear timelines and accountability mechanisms for executing the decision would enhance procedural clarity and prevent unnecessary delays.

Monitoring and follow-up mechanisms should be established to ensure compliance with protective conditions outlined in decisions by South African courts. Tracking the child's welfare post-return would provide an essential layer of accountability, ensuring that commitments made during proceedings are upheld in practice. Designating a point of contact in both jurisdictions to address disputes or emerging issues related to the child would further strengthen the effectiveness of these measures and provide recourse for ensuring the child's well-being is maintained.

Finally, incorporating age-appropriate participation rights at the interim stage is vital to ensuring that children's views are adequately represented and not overlooked, even in expedited proceedings. Together, these measures would enhance the procedural and substantive protections afforded to children in abduction cases, balancing the need for swift resolution with the paramountcy of the child's best interests. These targeted refinements will strengthen the child-centred approach envisioned by the legal framework, ensuring that procedural safeguards translate into meaningful protection in practice.

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