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For my beloved father

Mr. Clayton Thanda Bantu Sisilana

(25 May 1952- 7 September 2012)

Sokhulu, Mdlauzeli, Gida, Mnqabande, Nobhakada, Vundla. Ntonga ayikhethi,  
ayikhethi nomkhwekazi, imbethe imhlawule ngenkomo ecaba. Dimanda  
kamakhathulela.

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## ABSTRACT

South Africa has a history of human rights atrocities that have created an urgency to attend to the previously marginalised and vulnerable groups of society. The Constitution of the state as well as other international treaties have created provisions that entrench the commitment to protect the child. This has been done through the inclusion of the 'best interests of the child' principle in the instruments.

This study examines the development of the 'best interests of the child' principle. Furthermore, it analyses how and why the principle developed in the international and national context. The purpose is to come to the conclusion that the newly introduced Children's Act has created a better scope of protection than the previous common law precedent.

The focus of the study is a critique of the method of application of the 'best interests of the child' principle in South Africa. The author will specifically focus on section 7 of the Children's Act and prove why the courts should be applying this provision in child-related cases.

## List of abbreviations

ACRWR	African Charter on the Rights and Welfare of the Child
CRC	United Nations Convention on the Rights of the Child
SALRC	South African Law Reform Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations

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## CHAPTER I

### 1 INTRODUCTION

Over the years the rate of divorce has increased and has continued to impact on the lives of families. Various decisions must be made concerning new arrangements during and after the finalisation of divorce. This is a difficult and unpleasant experience, particularly when children are involved. The courts are then tasked to decide what the ‘best interests of the child’ are pending the finalisation of the divorce.

This thesis examines the application of section 7 of the Children’s Act<sup>1</sup> by South African High Courts when deciding child-related matters in divorce cases. Section 7 of the Children’s Act offers the court a list of factors (hereafter the section 7 list) which it may consider (if relevant) when deciding important child-related questions in the context of the post-divorce family, for example: with which parent will the child live? How will contact with the other parent be maintained? Which of the parents will be the primary decision-maker in day-to-day matters concerning the child? In the old-fashioned language of the Divorce Act,<sup>2</sup> such matters were referred to as ‘custody’<sup>3</sup> and ‘access’.<sup>4</sup> The Children’s Act uses the terms ‘care’ and ‘contact’ instead.

Both section 28(2) of the Constitution and section 9 of the Children’s Act provide a clear principle: ‘A child’s best interests are of paramount importance in every matter concerning the child.’<sup>5</sup> The section 7 list gives the courts guidance as to how to determine the ‘best interests’ of the child.

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<sup>1</sup> Act 38 of 2005. S 7 is also used outside the court in child-related proceedings, but for purposes of this paper, reference will be made to the court’s use of the list of factors in s 7.

<sup>2</sup> Act 70 of 1979.

<sup>3</sup> T Boezaart *Child Law in South Africa* (2009) 65. The definition of ‘care’ provided in the Act is much broader than the traditional understanding of ‘custody’ provided by RW Lee, T Honoré HJ Erasmus, CG Van Der Merwe and AH Van Wyk *Family, Things and Succession* 131 (1983). The authors defined child custody in terms of common law as follows: a parent is ‘entitled to the physical presence of the child and controls his daily life and education (both secular and religious); decisions on medical care for the child, the necessary reasonable discipline and the persons with whom the child may associate are also made by the custodian parent.’ See also *Governing Body, Gene Louw Primary School v Roodman* 2004 (1) SA 45 (C) paras 51-52; *Wheeler v Wheeler* [2011] 2 All SA 459 (KZP) 465 paras 26-28.

<sup>4</sup> The Children’s Act uses the word ‘contact’ instead of ‘access’ which was traditionally used in common law. Contact is primarily about maintaining a relationship between a parent and a child when they no longer share a home. See s 1(1) of the Children’s Act.

<sup>5</sup> S 28(2) of the Constitution of the Republic of South Africa 1996. (Hereafter the Constitution).

These new legislated factors were deliberately drafted in response to South Africa's constitutional obligations towards the child<sup>6</sup> and in response to the state's international obligations in terms of the United Nations Convention on the Rights of the Child<sup>7</sup> (hereafter CRC) and the African Charter on the Rights and Welfare of the Child<sup>8</sup> (hereafter the ACRWC). All three of these human rights documents require decision-makers to prioritise and protect the child's best interests. In addition, all three documents provide important protection for children's human rights.

The above international treaties did not introduce the 'best interests' principle into South African law. On the contrary, divorce courts have used the principle for a long time.<sup>9</sup> There is a large body of common law precedent on interpretation of the principle in the context of 'custody' and 'access'.<sup>10</sup>

The question then shifts to why the South African Law Reform Commission (hereafter SALRC) decided to legislate a list of factors in the new Children's Act. Why did it decide that the old common law precedent was inadequate and required improvement? It appears that some of the reasons were:

1. The common law precedent often failed to meet the demands of the new Constitution. For example, the children's right to human dignity,<sup>11</sup> equality<sup>12</sup> and the right to be in an environment that is not harmful.<sup>13</sup> Thus it would be useful to offer courts a fresh start with a list of constitutionally-compliant factors.
2. The common law precedent was insufficiently 'human-rights-based' and was not firmly grounded on children's rights. Thus it failed to meet the requirements of the Constitution, and also failed to meet the requirements of the international treaties.
3. The 'best interests' standard is inherently flexible and thus, also, inherently indeterminate. It is necessary to find a 'sweet spot' which allows for enough

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<sup>6</sup> As laid out in s 28 of the Constitution.

<sup>7</sup> United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989 available at [http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC\\_PRESS200910web.pdf](http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf) accessed 7 September 2015.

<sup>8</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) available at [http://www.unicef.org/esaro/African\\_Charter\\_articles\\_in\\_full.pdf](http://www.unicef.org/esaro/African_Charter_articles_in_full.pdf) accessed 7 September 2015.

<sup>9</sup> See *Simey v Simey* 1881 (1) SC 171; *Kramarski v Kramaski* 1906 TS 937; *Tabb v Tabb* 1909 TS 1033.

<sup>10</sup> To be discussed in detail in Chapter Two.

<sup>11</sup> S 10 of the Constitution.

<sup>12</sup> S 9 of the Constitution.

<sup>13</sup> S 27 of the Constitution.

flexibility for the uniqueness of every child and every family, while also reigning-in excessively arbitrary decision-making. The common law precedent did not offer enough guidance. The section 7 list was intended to offer far clearer guidelines and to ensure that child-related decisions were based on a constitutional and rights-based list of factors. The section 7 factors allow for flexibility while also restricting the ambit of an individual judge's decisions.

4. The common law precedent was inconsistent. This led to uncertainty. It encouraged litigation; it prolonged litigation. Excessive or prolonged litigation is not good for children (or their parents). Excessive litigation is, in itself, not in the child's best interests. Excessive litigation also clogs up the legal system. This is not in the interests of justice.
5. And, lastly, it was difficult to clearly define the legal position of children's rights. This was because there was an overlap between common law and statute law.<sup>14</sup> Therefore, a clear statutory list would guide courts when defining a legal position in child-related cases.

The section 7 list was designed to deal with these problems. The SALRC believed that if divorce courts based their child-related judgments on the section list 7 rather than on common law precedent, the decisions would best serve the 'best interests of the child' standard. The section 7 list would ensure that the decisions were constitutionally-compliant, would uphold and promote children's rights, and would ensure justice for children.

Section 7 of the Children's Act came into operation almost ten years ago on 1 July 2007.<sup>15</sup> Considering the numbers of years the provision has been operating in South Africa, the reaction by the divorce courts has been disappointing. In the majority of divorce cases, the courts have ignored the section 7 list when deciding child-related matters.

An empirical analysis by this author revealed that during the last five years (2010 to 2015) the courts used the section 7 list in only 31 percent of cases concerned with care and contact.<sup>16</sup> Instead, the courts have relied on old common

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<sup>14</sup> South African Law Commission Issue Paper 13 (Project 110) 'The Review of the Child Care Act First Issue Paper' (1998) para 6.2.

<sup>15</sup> S 7 of the Children's Act.

<sup>16</sup> To be discussed in greater detail in Chapter 4.

law precedent—the same common law that was criticised for relying on values that do not sufficiently protect children.

The reaction of the courts has been disappointing because the section 7 list was intended to help establish the best outcome for the child. It was intended to ensure that child-related decisions would be human-rights based and constitutionally compliant. It was intended to offer clear guidance which would help to make the ‘best interests’ standard more predictable and less indeterminate. Evidently, it would be of greater use to rely on a list that affords more protection to children.

The author discusses the drafting history of Section 7 in detail in Chapter Three of this paper. However, it is essential to remember that when drafting section 7, the SALRC was not operating in a legal, theoretical, jurisprudential or historical vacuum. Indeed, it was operating in a particularly rich legal, jurisprudential and historical environment. If there is to be an understanding of the drafting history and objectives of section 7 of the Children’s Act, it is essential to explore the legal and historical context in which the section was drafted.

Chapter Two explores this rich context. It examines the theoretical and historical development of the ‘best interests of the child’ principle. It examines the ways in which the principle has become incorporated into important human rights documents, with the result that the principle may now be understood as fundamentally human-rights-based. This Chapter also explores the history of the principle in the context of South African common law. In this context, jurisprudential development of the principle was not human-rights-based. Indeed, some of the decisions would have been inconsistent with the Constitution had they been heard in the constitutional era.

## I. Chapters Layout

The first part of Chapter Two examines the international context of the ‘best interests’ principle. It examines the history of the rights of the child and explains how the ‘best interests’ principle has evolved, as well as the various instruments that have been adopted internationally.

The next part of Chapter Two discusses the South African context and gives an analysis of how the Constitutional Court has interpreted the ‘best interests’ principle. This section has a particular focus on the meaning of ‘paramount importance’ as inferred from the following cases: *Minister of Welfare and*

*Population Development v Fitzpatrick*<sup>17</sup>, *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*<sup>18</sup> and *S v M (Centre for Child Law as Amicus Curiae)*<sup>19</sup> (hereafter *S v M*).

These cases were selected for two reasons: first, these cases have contributed to a better understanding of the ‘best interests of the child’ principle in their different circumstances. Secondly, the various interpretations by the Constitutional Court are used in the application of the section 7 list. This part of the chapter also examines the ‘best interests of the child’ principle as developed by the high courts in the pre-Constitutional era.

Chapter Three is very important because it lays the foundation for the primary argument of this thesis by examining the work that was invested in compiling the Children’s Act. The author explains how the SALRC worked on the ‘best interests’ principle. Furthermore, the paper will highlight the importance of using the Children’s Act as opposed to the referring back to common law.

Chapter four examines how South African divorce courts have used the ‘best interests’ standard. The author argues that the courts have failed to use the principle as set out in the Children’s Act, and explains why this is problematic. The fifth Chapter will be the concluding remarks and recommendations to remedy the current situation.

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<sup>17</sup> 2000 (3) SA 422 (CC).

<sup>18</sup> 2004 SA 406 (CC).

<sup>19</sup> 2008 (3) SA 232 (CC).

## CHAPTER II THE CONTEXT IN WHICH SECTION 7 WAS DRAFTED.

### 2.1 Introduction

Many courts have pronounced that the ‘best interests of the child’ principle forms an integral part of children’s law.<sup>20</sup> Determining the ‘best interests of the child’ entails considering the interests of the child prior to making decisions which affect the life of the child.<sup>21</sup> In South Africa, this standard was initially applied only in custody cases, but has since extended to being applied in all matters where children’s rights are deliberated.<sup>22</sup>

The ‘best interests of the child’ standard has been incorporated into many Constitutions. For example, the Constitution of the Republic of South Africa<sup>23</sup>, the Constitution of the Republic of Namibia<sup>24</sup> and the Constitution of the Republic of Uganda<sup>25</sup> have all included the standard.<sup>26</sup> The standard is also included in various child and family law statutes<sup>27</sup>, for example section 4 of the Ugandan Children’s Act<sup>28</sup>, section 2 of the Ghanaian Children’s Act<sup>29</sup> and the English Family Law Act 1996<sup>30</sup> to name a few. The inclusion of the principle in the different statutes is evidence of the common understanding by the different states that the principle helps in protecting children.

However, the best interests of the child principle has been criticised for creating difficulties in its application. It is deemed to be too ‘vague, indeterminate or overly susceptible to biased interpretation by decision-makers’<sup>31</sup>, and this has

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<sup>20</sup> *Kaiser v Chambers* 1969 (4) SA 224 (C); *Bethell v Bland* 1996 (2) SA 194 (W) at 208; *Nel v Byliefeldt* 2015 ZAGPPHC 386 at 26; *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O).

<sup>21</sup> Y Dausab ‘The “best interests” of the child’ (2010) in Ruppel O (ed) *Children’s Rights in Namibia* (2009) MacMillan, Windhoek 145.

<sup>22</sup> See *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

<sup>23</sup> Constitution of the Republic of South Africa 1996.

<sup>24</sup> Article 15.

<sup>25</sup> S 34.

<sup>26</sup> A Barratt and S Burman ‘Deciding the best interests of the child: an international perspective on custody decision-making’ (2001) 118 *SALJ* 556 fn 5.

<sup>27</sup> *Ibid.*

<sup>28</sup> 6 of 1996.

<sup>29</sup> 560 of 1998.

<sup>30</sup> Barratt and Burman op cit (n26) at fn 11.

<sup>31</sup> See Barratt and Burman op cit (n26) 118; W Domingo and A Barratt ‘Parent and child’ in Barratt (ed) *Law of Persons and the Family* (2012) 181; S Parker ‘The best interests of the child—principles and problems’ in P Alson (ed) *The Best Interests of The Child: Reconciling Culture and Human Rights* (1994) 27.

resulted in great criticism of the various decisions concluded by the courts in the application of the principle.<sup>32</sup>

In attempts to eradicate the confusion and inconsistency of the standard, the SALRC compiled the section 7 list. This new legislated list of factors would assist decision-makers decide the ‘best interests of the child’ in child-related cases. As stated earlier, the consistency of decisions will result in more predictable outcomes for the cases.

In order to have a holistic understanding of the section 7 list and how it adheres to its international obligation to protect children, it is essential to unpack how this principle developed in the international context.

## PART I: THE INTERNATIONAL CONTEXT

### 2.2 The history of children’s rights

The first time that children’s rights came to the attention of international law was post World War I<sup>33</sup> through the 1924 Declaration of Geneva<sup>34</sup> (hereafter 1924 Declaration).<sup>35</sup> The 1924 Declaration echoed great concerns relating to the rights of children that were infringed as a result of the atrocities of the ‘Great War’ and its aftermath.<sup>36</sup> Moreover, the era emphasised that the child ‘must have’<sup>37</sup> the necessary means for a normal growth. Such necessities included food, nursing facilities, special care for children with disabilities, and living quarters and support for the orphan and waif.<sup>38</sup>

However, the 1924 Declaration did not explicitly establish a ‘best interests’ standard. The Declaration merely maintained that the child should be of primary concern, not only in times of war, but should remain a priority at all times.<sup>39</sup> This

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<sup>32</sup> A more extensive discussion on this is made below in Part II of this chapter.

<sup>33</sup> MDA Freeman *The Rights and Wrongs of Children* (1983) 19.

<sup>34</sup> T Kaime ‘The foundations of rights in the african charter on the rights and welfare of the child: a historical and philosophical account’ (2009) 3 *AJLS* 121.

<sup>35</sup> C Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002) 77.

<sup>36</sup> MDA Freeman and P Veerman *The Ideologies of Children’s Rights* (1992) 4; S Detrick, JE Doek and N Cantwell *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Preparatoires* (1992) 24.

<sup>37</sup> Freeman and Veerman op cit (n36) 4.

<sup>38</sup> Ibid.

<sup>39</sup> ‘The child must be the first to receive relief in times of distress.’ Principle III of the 1924 Declaration.

period of international development is important because it initiated the notion of making the protection of children a primary concern in all matters.

Two additional non-binding declarations followed after the 1924 Declaration, namely the Universal Declaration of Human Rights (1948)<sup>40</sup> (hereafter UDHR) and the 1959 Declaration of the Rights of the Child (hereafter 1959 Declaration), which was introduced by the United Nations General Assembly, and is still an effective instrument today.<sup>41</sup>

The UDHR was adopted by the United Nations (hereafter UN) on 10 December 1948, and during that time, the South African government had abstained from the voting process of the UDHR.<sup>42</sup> The UDHR does not specifically deal with children's rights,<sup>43</sup> but the 1959 Declaration evidently gave more clarity on the shortcomings of children's rights in the UDHR.

The most significant change the 1959 Declaration brought was to shift the ideology from the idea of mere child protection, to a new focus on rights for children.<sup>44</sup> However, this Declaration was not legally binding and therefore merely assisted as a guideline. This meant that 'rights' for children were only moral entitlements.<sup>45</sup>

While the instrument was not legally binding, it nevertheless planted a seed that children were entitled to protection. Consequently, during the discussion of the 1959 Declaration, a proposal came forward that the UN should adopt a convention on the rights of the child. Following many years of discussions, it was only in 1989 that the CRC was agreed to by the UN.

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<sup>40</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948 available.

<http://www.unicef.org/turkey/pdf/gi17.pdf> accessed 7 September 2015.

<sup>41</sup> Detrick, Doek and Cantwell op cit (n36) 24.

<sup>42</sup> See M Olivier 'The status of international children's rights instruments in South Africa' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 197.

<sup>43</sup> Children were only referred to in Art 25(2) and Art 26, which deal with the right and access to education.

<sup>44</sup> J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: some implications for South African Law' (1995) 11 *SAJHR* 402.

<sup>45</sup> B de Villiers 'The rights of children in international law: guidelines for South Africa' (1993) 4 *Stell. LR* 289.

## 2.3 The Best Interests Principle in International Treaties

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

#### 2.3.1.1 Background of the CRC

The CRC is regarded as the watershed in the history of children.<sup>46</sup> It also made history by the speed in which states ratified the treaty.<sup>47</sup> South Africa became a signatory to the CRC on 29 January 1993 and ratified it on 16 June 1995.<sup>48</sup> This therefore placed an obligation on South Africa to create laws that were in line with the object and purpose of the CRC.<sup>49</sup>

In the South African context, Buck states that the CRC carries the potential to transform the lives of children because it covers a ‘full range of civil, political, economic, cultural and social children’s rights.’<sup>50</sup> Most importantly, the CRC recognises children’s rights as human rights. This means that the understanding and concept of the universality of human rights also relates to children’s rights.<sup>51</sup>

The reason for the special rights is because ‘the child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’<sup>52</sup> On the other hand, the CRC did not go without criticism. It was stated that children were adequately protected by existing human rights instruments, and therefore an additional treaty was unnecessary.<sup>53</sup>

In reply to the objections, those advocating for the CRC argued that there were specific needs and vulnerabilities of children that were not captured at the time that the global instruments were drawn up. Therefore it was necessary to make

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<sup>46</sup> Freeman and Veerman op cit (n36) 5; Sloth-Nielsen op cit (n44) 401; MDA Freeman ‘Introduction: children as persons’ in MDA Freeman (ed) *Children’s rights: A comparative perspective* (1995) 1.

<sup>47</sup> The CRC took effect on 2 September 1990 and by December 1994 it was ratified by 160 states. See Sloth-Nielsen op cit (n44) 403.

<sup>48</sup> JA Robinson *The Law of Children and Young Persons* (1997) 228.

<sup>49</sup> See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969 available <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed 10 September 2015. Article 18 of the Vienna Convention on the Law of Treaties (1969) obliges all States ‘not to defeat the object and purpose of a treaty prior to its entry into force.’; See also J Dugard *International Law* (1994) 53 ‘there is also a general rule of treaty law that, upon ratification, a State Party accepts an obligation to incorporate a treaty’s provisions in their national law.’

<sup>50</sup> T Buck *International Child Law* 3<sup>rd</sup> ed (2014) 87.

<sup>51</sup> A Lopatka ‘The rights of the child are universal: the perspective of the UN Convention on the Rights of the Child’ in MDA Freeman and P Veerman (eds) *The Ideologies of Children’s Rights* (1992) 48. See also Kaime op cit (n34) 126.

<sup>52</sup> Ibid.

<sup>53</sup> Detrick, Doek and Cantwell op cit (n36) 29. For example the UDHR in Article 25(2) and Article 26.

provision for additional needs.<sup>54</sup> Even with the above difficulties, the CRC overcame those issues and is recognised as the instrument that set the standard for the definition of human rights for children.<sup>55</sup>

The UN Committee on the Rights of the Child<sup>56</sup> recognised four articles that are the general principles of the CRC. The provisions include article 2 (non-discrimination), article 3 (best interests), article 6 (survival and development) and article 12 (freedom of expression).<sup>57</sup> For purposes of this paper, the author will focus on article 3– the ‘best interests of the child’.

### 2.3.1.2 *The ‘best interests of the child’ in terms of the CRC*

Article 3(1) of the CRC states the following;

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’<sup>58</sup>

Accordingly, the above section does not create any rights or duties; it merely serves as a principle of interpretation which needs to be considered in all child-related matters. It thus has the benefit of functioning as a principle to be considered in relation to each of the rights in the CRC and, essentially, in all proceedings concerning the child in South Africa.<sup>59</sup> This is because South Africa not only ratified this instrument, but it also allowed for the inclusion of the protection of children in section 28 of the Constitution as well as section 9 of the Children’s Act.

Furthermore, South Africa went even further than international law by creating the section 7 list in order to help decisions-makers reach a decision on which circumstances are best for the protection and development of the child. In *S v M*<sup>60</sup>, Sachs J notes the importance and influence of the CRC in the South African domestic law in the following statement:

‘[16]...section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has

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<sup>54</sup> Detrick, Doek and Cantwell (n36) 29.

<sup>55</sup> Olivier op cit (n42) 199.

<sup>56</sup> Monitoring body of the CRC.

<sup>57</sup> G Van Buren ‘The United Nations Convention on the Rights of the Child: An Evolutionary Revolution’ in CJ Davel (ed) (*Introduction to Child Law in South Africa* (2001) 202.

<sup>58</sup> Art 3 (1) of the CRC.

<sup>59</sup> Van Buren op cit (n57) 203.

<sup>60</sup> *S v M* supra (n19).

established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice.<sup>61</sup>

Evidently the 'best interests' is not a new concept. It is a concept that is included in influential global conventions. Furthermore, Sachs J adds that section 28 of the Constitution originated from international instruments, and thus plays an integral role when considering the 'best interests of the child' in divorce cases as well. What is more is that South Africa also has regional ties and obligations, and the next section discusses those ties.

### 2.3.2 The African Charter on the Rights and Welfare of the Child (1990)

#### 2.3.2.1 Background of ACRWC

The CRC was generally welcomed; however certain shortcomings were identified. In her book,<sup>62</sup> Kaime highlights loopholes regarding the diverse socio-cultural experiences of the regions. The CRC was criticised for carrying Eurocentric values, particularly regarding the obvious dependence on the Eurocentric idea of the family.<sup>63</sup> Thus, it was difficult to rely solely on the CRC for regulation of the protection and care of the child in the African context.<sup>64</sup>

Consequently, it became an essential part of transformation to introduce an instrument that would deal specifically with issues pertaining to children in the African context, which Kaime terms 'culturalisation'.<sup>65</sup> This is when the ACRWC was adopted in 1990, and came into force in 1999. Additionally, because of their vulnerability, children are more likely to be victims of human rights violations than adults, and in particular, African children.<sup>66</sup> This is because Africa has higher rates of poverty, warfare, HIV/AIDS and dangerous cultural practises than all the other continents.<sup>67</sup>

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<sup>61</sup> *S v M* supra (n19) para 16.

<sup>62</sup> T Kaime *The African Charter On The Rights And Welfare Of The Child A Socio-Legal Perspective* (2009).

<sup>63</sup> Sloth-Nielsen op cit (n44) 406; RT Nhlapho 'International protection of human rights and the family: African variations on common theme (1989) 3(1) *IJLPP* 2.

<sup>64</sup> Kaime op cit (n62) 2; D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *IJCR* 128; Sloth-Nielsen op cit (n44) 406; Nhlapho op cit (n63) 2.

<sup>65</sup> Kaime op cit (n62) 2.

<sup>66</sup> F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2001).

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

These facts alone saw the necessity to introduce an instrument that is more appropriate for the African idea of the family. Furthermore, African states did not play a prominent role at the time of the conclusion of the CRC. Thus, the birth of the ACRWC voiced child protection in the African context.<sup>68</sup>

It must however be noted that the CRC and ACRWC do not contradict each other. On the contrary, these two instruments complement each other and both equally provide the framework where children and their welfare are respected and discussed in Africa.<sup>69</sup>

Nevertheless, as discussed below, the ACRWC has created better protection measures for children.<sup>70</sup> South Africa became a signatory on 10 October 1997 and ratified it on 7 January 2000. After the CRC, the ACRWC is the second international and the first regional binding instrument that acknowledges children as bearers of special rights.<sup>71</sup>

#### 2.3.2.2 *The 'best interests of the child' principle in terms of the ACRWC*

The 'best interests' principle is one of the three main principles of the African Children's Charter.<sup>72</sup> Article 4 (1) African Children's Charter asserts that:

'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'<sup>73</sup>

Several authors have remarked on the difference in the wording between the two instruments; whereas the ACRWC uses the words 'the primary consideration' in all child-related matters, the CRC states that children are 'a primary consideration'.<sup>74</sup>

Parker makes the following analysis;

'I only need to emphasize that whilst [article 3(1)] binds a broader group of decision-makers than typically do the stronger formulations, the best interests of the

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<sup>68</sup> See TW Bennett *Human rights and African customary law under the South African Constitution* (1999) 98 where it was stated that the UNCRC was based on the Western context; Kaime op cit (n62) 2; Viljoen op cit (n66) 218; 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(2) *CILJSA* 205.

<sup>69</sup> Olowu op cit (n64) 128.

<sup>70</sup> See Viljoen op cit (n66) 224 for a comprehensive comparison of the ACRWC and the CRC.

<sup>71</sup> DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *IJCR* 157.

<sup>72</sup> See Viljoen op cit (n66) 219. The other two principles are non-discrimination and the primacy of the Charter over all harmful cultural practices and customs.

<sup>73</sup> Art 4 of ACRWC.

<sup>74</sup> Chirwa op cit (n71) 10, 160; Parker op cit (n31) 28.

child are only 'a primary' consideration. Clearly "a" is weaker than "the" and, arguably, "primary" is weaker than "paramount."<sup>75</sup><sup>76</sup>

There is no competition between the two instruments, but it is understandable that the African instrument would carry better protection— because, as stated above, there are greater dangers involved for children Africa than other parts of the world.

#### 2.4 Conclusion

The 'best interests of the child' principle has clearly come a long way. Even before the CRC and ACRWC, the 1924 and 1959 Declarations had respectively initiated and developed conversations about the importance of prioritising and giving children special rights. The 1959 Declaration's discussion particularly pushed for the CRC, which is recognised as the turning point in children's rights.

Because of its ratifications to the CRC and ACRWC, South Africa committed itself to carry the values of both treaties relating to the 'best interests of the child'. Domestic law has done so through the Children's Act and the Constitution. In addition, South African courts are encouraged in section 39(1)(b) of the Constitution to consider international law when interpreting the Bill of Rights. This means that the courts must take the CRC and ACRWC into consideration when interpreting section 28 of the Constitution.

Another important reason for the discussion of the development of the 'best interests' of the child in international law is to highlight the strong foundation and support the principle has from the various instruments. It is a well-respected and rich principle that works in favour of serving justice to child protection.

Furthermore, one of the Children's Act's objectives states that the Children's Act was passed in order 'to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.'<sup>77</sup> Therefore, international instruments have strong ties with section 7 of the Children's Act because the section 7 list embodies the culture of child welfare. Thus, the court's approach of honouring these international obligations would be to use the section 7 list, which the SALRC believed would assist in deciding the 'best interests of the child'.

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<sup>75</sup> 'Paramount' as mentioned in s 28 the South African Constitution.

<sup>76</sup> Parker op cit (n31) 28.

<sup>77</sup> S 2 (c) of the Children's Act.

Part Two of this paper gives a South African context. This is done in order to understand how section 7 of the Children's Act has considered and developed into the document that it is today.

## PART II: THE SOUTH AFRICAN CONTEXT

### 2.5 South African Constitutional Perspective of the Best Interests Principle

#### 2.5.1 Introduction

It is clear from Part One of this chapter that the commitment to the ‘best interests of the child’ is valued both regionally and internationally. In response, South Africa has included the principle in the Children’s Act<sup>78</sup> as well as section 28 of the South African Constitution, which will be discussed in greater detail below.

The ‘best interests’ of the child principle has been an essential part of South African common law for a relatively long time.<sup>79</sup> However, the law lacked a formal definition for the principle, as there were no specific guidelines setting out which factors should be considered in order to establish the principle.<sup>80</sup> It was only after the Children’s Act that factors were listed formally in legislation for courts to use as a guideline to ensure that the outcomes of court cases lived up to the obligation of treating children with paramount importance.<sup>81</sup>

#### 2.5.2 Meaning of the ‘Best Interests’ of the Child Principle

##### 2.5.2.1 Definition

*B v M*<sup>82</sup> gave a definition for the ‘best interests’ principle, where the court deduced the following meaning:

‘It is appropriate to have regard to the term “best” which introduces a comparative quality. The Shorter Oxford English Dictionary includes as definitions, “excelling all others in quality”, “most advantageous” and “most appropriate. Two distinctions are drawn: first between that which is considered to be consonant with the child’s welfare and that which is not; secondly, between those interests which are more advantageous to a child than others which are less advantageous. It may, of course, develop that a combination of factors – some neutral, some less advantageous, some more advantageous and even some seemingly disadvantageous – may together approximate or combine to form a child’s “best interests”’.<sup>83</sup>

This definition is extensive because it explains what the ‘best interests’ principle is and what it does. The definition explains that the principle is a mode of protection

<sup>78</sup> S 7 and 9 of the Children’s Act. The factors stated in this section will be discussed in chapter 3.

<sup>79</sup> K Kurki-Suonio ‘Joint custody as an interpretation of the best interests of the child in critical and comparative perspective’ (2000) 14 *IJLPF* 183.

<sup>80</sup> Domingo and Barratt op cit (n31)180.

<sup>81</sup> Ibid.

<sup>82</sup> 2006 BCLR 1034 (W), 1067 para 142.

<sup>83</sup> See also *J v C* 1970 AC 668, 710. In the United Kingdom case, per Lord MacDermott lays out a very detailed definition of what it means when the law speaks of the best interests of the child, and he says that it is; ‘a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.’

For example, in the *Van Deijl v Van Deijl*<sup>89</sup> case, Young J held that the ‘best interests of the child’ meant considering the child’s welfare. Considering the welfare included the economic, social, moral and religious considerations.<sup>90</sup> In *French v French*<sup>91</sup>, the court outlined four categories of factors that should be evaluated in order to determine the child’s best interests.

First, the court found that the child’s sense of security should be well preserved. This meant that the child should feel welcome, wanted and loved.<sup>92</sup> Secondly, the courts should investigate the suitability of the custodian parent. The investigation should include examining the character of the parent, as well as the religious and linguistic background of the child. In the same light, the courts should also look into the general capabilities of the parent to guide the child’s moral, cultural and religious development.<sup>93</sup>

And, lastly, the courts must consider the child’s upbringing and furthermore acknowledge the fact that the preferences of the child were very important.<sup>94</sup> These factors from the *French* case were used to guide decision-making in a number of custody cases.<sup>95</sup> Unfortunately, none of those attempted definition of the ‘best interests’ principle.

It was only in 1994 that a comprehensive list was compiled in the famous case *McCall v McCall*.<sup>96</sup> This case involved a divorced couple that settled a custody consent agreement out of court. The court made an order of the consent agreement and handed the custody of the child to the parent as per the agreement. The non-custodian parent then approached the court requesting a variation of the consent agreement.

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<sup>89</sup> 1966 (4) SA 260 (R).

<sup>90</sup> Robinson ‘Children and divorce’ in Davel *Introduction to Child Law in South Africa* 73.

<sup>91</sup> 1971 (4) SA 298 (W).

<sup>92</sup> At 298.

<sup>93</sup> Robinson op cit (n90) 73.

<sup>94</sup> This is also mentioned in the CRC in article 12 (1) which affirms that ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’ See also Robinson op cit (n90) 81.

<sup>95</sup> *M v R* 1989 (1) SA 414 (O); *Meyer v Gerber* 1991 (3) SA 650 (O). This case also contributed in to the *McCall v McCall* 1994 (3) SA 201 (C) case because the factors from *French* case appeared in the *McCall* case.

<sup>96</sup> *McCall v McCall* supra (n95) at 204J 205G.

for the welfare of the child. It has the benefit of sieving what is in the best welfare for the child, and what is not. Furthermore, in terms of what the principle does, the definition explains that the principle establishes which circumstances are most advantageous for the child. Thus, in order to determine what is more advantageous and/or less advantageous, the courts would have to turn to the aid of the section 7 list. A list which was created to serve the ‘best interests of the child’ principle.

Banach notes that by honouring the best interests of a child, the courts are helping with the physical, intellectual and emotional development of a child as the child matures into a well-judged adult.<sup>84</sup> Therefore, the application of the section 7 list is both a long-term and short-term solution of ensuring a protected environment for children. The courts unwillingness to use the section 7 list endangers the decree of facilitating with the development of the child.

### 2.5.3 The development of the ‘best interests’ standard in South Africa

As previously mentioned, the ‘best interests’ of the child had been applied in South Africa as early as the late 1800s. However, the 1948 case of *Fletcher v Fletcher*<sup>85</sup> is remarkable because the Appellate Division in that case established the principle as both a factor to be deliberated in custody cases, as well as a paramount and overruling factor.<sup>86</sup>

However, this case failed to set out and explain the meaning of the ‘best interests’ of children.<sup>87</sup> Rather; it set a judicial precedent for cases that followed—where other courts set to deduce their own interpretation of the ‘best interests’ principle depending on the circumstances of the case brought before the court.<sup>88</sup>

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<sup>84</sup> B Banach ‘The best interests of the child: decision-making factors. families in society’ (1998) 79 *JCSS* 331; 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) 145 where it was stated that it is important to remember that the decisions that are made concerning children are both short term and long term, and the decision may have an impact on a child’s life— both with children born in and out of wedlock.

<sup>85</sup> 1948 (1) SA 130 (A). See also L Basson ‘Perspectives on the best interests of the child: development in the interpretation and application of the principle.’ LLM (Stellenbosch University) (2004) 143.

<sup>86</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) para 18.

<sup>87</sup> *Ibid.*

<sup>88</sup> B Van Heerden et al *Boberg’s Law of Persons and the Family* (1999); A Palmer ‘The best interests criterion: an overview of its application in custody decisions relating to divorce in the period 1985-1995’ in R Keightley (ed) *Children’s Rights* (1996) 98.

As the party who approached the court, the non-custodian parent had the onus to prove that the current custody arrangement was detrimental to the child and also prove that the alteration of the agreement would be an advantage to the child.<sup>97</sup> King J then listed a number of factors (hereafter *McCall*-list) that would be used by the court in order to determine what was best for ‘the physical, moral, emotional and spiritual welfare of the child.’<sup>98</sup>

The reason that the *McCall*-list was created was that the cases often had poor outcomes that left the non-custodian parent doubting their adequacy as a parent in the child’s life. Secondly, the courts often failed to unequivocally explain to the non-custodian parents the reasons for the court’s decision.<sup>99</sup> And, lastly, because of a lack of understanding on the reasons of the judgment, the parties often felt that the courts were unfair.

It was believed that the reason for the shortfalls of the courts before the *McCall* case was because the courts would focus on one factor to decide the best interests of the child, whereas the child’s needs required the investigation of more than one factor.<sup>100</sup>

By virtue of the above, for the first time since the acceptance of the ‘best interests’ principle, the courts were given listed guidelines on the factors to take into account in child-related decisions. These factors included:

- 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 of the child’s feelings;
- d) the capacity and disposition of the parent to give the child the guidance which he requires;
- e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs- generally speaking, the provision of economic security;
- f) the ability of the parent to provide for the education well-being and security of the child, both religious and secular;
- g) the ability of the parent to provide for the child’s emotion, 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;

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<sup>97</sup> At 2041.

<sup>98</sup> *Ibid.*

<sup>99</sup> Basson op cit (n) 154.

<sup>100</sup> *Ibid.*

- k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- l) the desirability or otherwise of applying the doctrine of same sex matching;
- m) any other factors which is relevant to the particular case with which the Court is concerned.<sup>101</sup>

Several judges found the *McCall*-list to be very appropriate for purposes of deciding cases involving children, and thus used the list of factors frequently since the *McCall* case was decided. Furthermore, it was also noted that the factors were not laid out in order of importance and many of them overlapped.<sup>102</sup>

However, even with the *McCall*-list in place, Bonthuys argued that the courts themselves were confused as to whether the 'best interests' of the child could be considered a rule, right or principle.<sup>103</sup> This confusion led the high courts to use the principle in extensively incoherent ways. Other courts went as far as overlooking the 'best interests' as a constitutional principle, but rather focusing on the understanding as a common law principle.<sup>104</sup>

The confusion and inconsistency of the common law understanding of the 'best interests of the child' principle is what directed the necessity to legislate the factors from the *McCall*-list and ensure that the principle was in line with the Constitution and international obligations.<sup>105</sup> Therefore, when the courts rely on the *McCall*-list, the decision-makers are leading the legal system back to an era of confusion and inconsistency, as well as some factors that are unconstitutional. Thus, failing for bring justice for the child.

Some of the factors in the *McCall*-list do conform to the 'best interests' standard, but others do not. For example, it appears that some of the courts used gender bias against the fathers of children based on the 'same sex matching' in the *McCall*-list. The South African courts previously applied the 'maternal preference' or 'tender years' principle,<sup>106</sup> where the mother<sup>107</sup> would usually be awarded the

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<sup>101</sup> *McCall v McCall* supra (n95) At 205/J-205 G. See Robinson op cit (n90) 74. Robinson states that the list in the *McCall*-list is very similar the statutory list laid out in s 1(3)(a) of the English Children Act 1989.

<sup>102</sup> Robinson op cit (n90) 60.

<sup>103</sup> E Bonthuys 'The best interests of children in the South African Constitution' (2006) 20 *IJLPF* 39.

<sup>104</sup> Ibid.

<sup>105</sup> To be discussed in greater detail in Chapter 3.

<sup>106</sup> South African Law Reform Commission Discussion Paper 103 (Project 110) at 14.4. See also *Potgieter v Potgieter* [2007] 3 All SA 9 (SCA) para 26; *Van Pletzen v Van Pletzen* supra (n20); *Ex parte Critchfield* [1999] 1 All SA 319 (W).

<sup>107</sup> RL Klaff 'The tender years doctrine: a defense' (1982) 70 *CLR* 335.

care of young children as opposed to the father.<sup>108</sup> It seems that it was only in cases where the mother was proven to be in too poor a state to care for the children that the father would be awarded the care of the children.<sup>109</sup>

In contrast, with teenage boys, the courts previously exhibited more enthusiasm to award care to the father.<sup>110</sup> For example, the *McCall* case awarded the custody of the male child to the father because the court was in favour of the 12-year old boy growing up in a male environment that had the father as a role model.<sup>111</sup> This was despite the fact that the father had a history of violence towards the child.

The case *Van der Linde v Van de Linde*<sup>112</sup> disagreed with the ‘maternal preference’ principle and declared that it was a form of prejudice to assume that mothers are more suitable to care for the children than fathers. The case held that a father possesses the same capacity for ‘mothering’ a child as a mother.<sup>113</sup>

Another case that received criticism<sup>114</sup> was *Van Rooyen v Van Rooyen*<sup>115</sup> which held that it was not in the best interests of children to occupy the same house as a parent’s same-sex partner.<sup>116</sup> This decision was unconstitutional because it displayed discrimination based on the sexuality of the parent. This kind of discrimination is also problematic because it shifts the focus from the child to the parent—an ideology which the ‘best interests’ principle has tried to eliminate.

All the above cases were concluded before the section 7 list. If the *Van Rooyen* and *Mohaud* cases had been decided in light of the new legislated factors, the courts would not have been as discriminatory. The courts would have honoured the ‘best interests’ of the child’ by focusing on the child and ensuring justice for the children. Even the *McCall* case would not have been favourable towards the father

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<sup>108</sup> See *Tabb v Tabb* supra (n9); *Dunsterville v Dunsterville* 1946 NDP 594; *Myers Leviton* 1949 (1) SA 203 (T); *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A); *Schwartz v Schwartz* 1984 (4) SA 467 (A); *Fortune v Fortune* 1995 (3) SA 348 (A).

<sup>109</sup> *Mohaud v Mohaud* 1964 (4) SA 348 (T).

<sup>110</sup> See *Tromp v Tromp* 1956 (4) SA 738 (N); *Manning v Manning* 1975 (4) SA 659 (T); *Stock v Stock* 1981 (3) SA 1280 (A); and *McCall v McCall* supra (n95).

<sup>111</sup> *McCall v McCall* supra (n95) at 208 E-H.

<sup>112</sup> 1996 (3) SA 509 (O).

<sup>113</sup> See also *Ex parte Critchfield* supra (n106) *Van Pletzen v Van Pletzen* supra (n20).

<sup>114</sup> See *V v V* 1998 (4) SA 169 (C) 204J-205G.

<sup>115</sup> 1994 (2) SA 325 (W).

<sup>116</sup> See Davel and Skelton (ed) *Commentary on the Children’s Act* 2-8. Davel states that the exclusion of the preference of ‘same-sex matching’ and a parent’s ability to care for the child demonstrates compliance to the ‘constitutional value of non-discrimination.’

because it would have been impossible to award a violent parent care of a child with the application of the section 7 list.<sup>117</sup>

Therefore, based on the above arguments, it is best for the courts to rather focus on a list of factors that holistically conform to the standard, and the section 7 list does so. The *McCall*-list clearly falls short in this regard.

#### 2.5.4 Constitutional Framework

The significance of rights cannot be overstated. Wasserstrom explains that a society without rights would be a society which closely resembles a relationship between a master and his slave—the one without power would not be able to make demands and this would result in a morally impoverished society.<sup>118</sup> Likewise, Bandman notes that rights are important because they ‘enable us to stand with dignity, if necessary to demand what is our due without having to grovel, plead or beg or to express gratitude when we are given our due, and to express indignation when what is our due is not forthcoming.’<sup>119</sup>

In light of this, it is imperative to contextualise the rights of children with the same connotation. That is to say that children should not be slaves without power that have to ‘grovel, pled or beg’ for the right to protection from possible harm. Such an act of ‘slavery’ would impair the child’s right to human dignity<sup>120</sup>.

The obligation to acknowledge and respect child protection is secured by the Constitution. Section 7(2) of the Constitution states that the state<sup>121</sup> has a duty to ‘respect, protect, promote and fulfil the Bill of Rights.’<sup>122</sup> In particular, the special rights of the children are laid out in section 28(1) of the Constitution, which, together with section 28(2), form the yardstick in protecting children’s rights in South Africa. Furthermore, section 28(2) advocates for the paramountcy of the best interests of the child in child-related cases.

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<sup>117</sup> The court held that both parents were fit to care for the child. However, the court would have awarded the care to the mother because of the history of violence.

<sup>118</sup> Freeman op cit (n33) 32.

<sup>119</sup> J Bandman ‘Do children have any natural rights?’ *Proceedings of 29<sup>th</sup> Annual Meeting of Philosophy of Education Society* (1973) 234-246; Freeman and Veerman op cit (n36) 29.

<sup>120</sup> S 10 of the Constitution.

<sup>121</sup> See *Bannatyne v Bannatyne* supra (n22) para 24 which states that ‘Children have a right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance. [29] While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents,[30] there is an obligation on the state to create the necessary environment for parents to do so.’

<sup>122</sup> See s 7(2) of the South African Constitution. Because the children’s rights are laid out in the Bill of Rights, the legal obligation extends to the respect, protection, promotion and fulfilment of the rights laid out in S 28 of the Constitution.

However, section 28(2) of the Constitution merely states that the best interests must be of paramount importance. It does not expand on what factors should be considered in order to determine the child's best interests. Reading this section alone does not give the courts the guidance the SALRC believed the section 7 list would give.

Therefore, another important objective of section 7 of the Children's Act is to assist the courts to decide what the best interests for the child are in light of section 28(2) of the Constitution. Thus, the application of section 28(2) and the section 7 list cannot be divorced from each other. The constant reluctance by the courts to adhere to the use of the best interests of the principle using the section 7 list is a clear defiance of the constitutional values of the Constitution.

As discussed in Chapter Four, there are cases that only mention the best interests of the child principle in light of section 28(2), but deviate from section 7 of the Children's Act. This means that the courts are to some extent doing 'half of the job'.<sup>123</sup> A 'full job' would entail stating the best interests of the child in terms of the Constitution, and subsequently apply the section 7 list to ensure that the courts adhere to the constitutional obligations.<sup>124</sup>

Another section that supports the use of the section 7 list is section 6(2)(a) of the Children's Act. This section states that 'all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act...'. Therefore, this adds to the support of applying section 28(2) of the Constitution– a provision in the Bill of Rights– with the section 7 list.

The question of the 'paramount importance' has often caused confusion in its interpretation. Below is a discussion of what is meant by section 28(2) of the Constitution, as well as how the courts have interpreted this section.

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<sup>123</sup> Chapter Four will expand on how the outcomes of the court would be different if the courts used the section 7 list.

<sup>124</sup> The joint application of s 28 of the Constitution and the section 7 list would also ensure that the parties in the cases understand the constitutional rights, and receive a fair explanation as to how the courts concluded their decisions.

#### 2.5.4.1 ‘Paramount importance’

The Constitution and the Children’s Act<sup>125</sup> both provide that the child’s best interests must be ‘paramount in every case concerning the child.’<sup>126</sup> As discussed below, the word paramount is very strong. However, a useful way in which to understand the principle is that, whenever necessary, all the significant interests in a given case need to be determined on the available evidence and these must embrace the interests of the child.<sup>127</sup>

The terminology of section 28(2) may perhaps imply that the child’s best interest must be supreme, and the interests of anyone else will not be of great concern in the cases.<sup>128</sup> Bonthuys disputes this claim by emphasising the fact that the ‘best interests of the child’ principle should not be treated as a competition between the rights of the child and other members of the family.<sup>129</sup> Rather, the focus should be on the relationship between those rights<sup>130</sup> because, in essence, ‘people do not understand their family lives as involving clashes of individuals or interests, but rather as a working though of relationships.’<sup>131</sup>

Bonthuys further analyses the use of the words ‘paramount importance’, mentioning the fact that it is different from the wording in the CRC, where the CRC used the words ‘primary consideration.’

‘This would literally suggest that children’s interests trump all other rights and interests and this interpretation has been adopted in some South African cases. However, such an interpretation is unpalatable to most commentators, who have suggested various reasons why it should not be followed. Some argue that ‘paramount importance’ does not necessarily mean that the best interests of the child is the only consideration. Moreover, such an interpretation would mean that it becomes pointless to even consider the rights and interests of other parties, thus defeating all rights claims and, with them, the purpose of including the best interests principles in human rights instruments and constitutions.’<sup>132</sup>

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<sup>125</sup> The Children’s Act will be discussed in greater detail in Chapter 3.

<sup>126</sup> Domingo and Barratt op cit (n31) 182.

<sup>127</sup> PJ Visser ‘Some aspects on the “best interests” on the child principle in the context of public schooling’ (2007) 70 *THRHR* 461. See also S Human ‘The theory of children’s rights’ in Davel (ed) *Introduction to Child Law in South Africa South Africa* (2000) 177, where it is stated that the rights and interests of children require special protection, in addition to the protection that they are entitled to as ordinary South Africans.

<sup>128</sup> Barratt and Domingo op cit (n31) 182.

<sup>129</sup> Bonthuys op cit (n103) 34.

<sup>130</sup> Bonthuys op cit (n103) 36.

<sup>131</sup> J Wallbank, S Choudhry and J Herring *Rights, Gender and Family* (2009) 266. It has been made clear that decisions that are taken affect others and not just single parties. This also relates to how decisions concerning children take into account other parties, because their rights too will be affected by the final decisions; See also Nedelsky ‘Reconceiving autonomy: sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 31.

<sup>132</sup> Bonthuys op cit (n103) 34.

Therefore, the words ‘paramount importance’ are not immune to limitation, and—just like all rights in the Bill of Rights—the best interests of the child may be limited by the courts. This is confirmed by section 7(3) of the Constitution, which states that ‘the rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill.’<sup>133</sup>

Many courts have used the limitation clause in cases where two rights have come into conflict with one another and they have to determine which right prevails in protecting the child from harm.<sup>134</sup> The discussion demonstrates how the courts have balanced and interpreted the ‘best interests of the child’ principle.

#### 2.5.5 Constitutional Court’s interpretation of section 28(2)

As the highest court in South Africa, the Constitutional Court has heard a number of cases concerning the ‘best interests’ of the child. These cases have ranged from conflicts about adoption<sup>135</sup>, child abduction<sup>136</sup>, possession of child pornography<sup>137</sup>, to cases about child offenders.<sup>138</sup> Furthermore, in all these cases, the court has given their interpretation of what they believe are the best interests of the child and when the rights of the child prevail against anyone else’s rights in court cases.

The following cases were decided before section 7 of the Children’s Act commenced. However, they are important to highlight because these cases gave an understanding of section 28(2) of the Constitution. And because of the strong ties between section 28(2) and the section 7 list, the findings of the Constitutional Court are relevant when applying the section 7 list today.

##### 2.5.5.1 *Minister of Welfare and Population Development v Fitzpatrick*<sup>139</sup>

The first case to be discussed is *Minister of Welfare and Population Development v Fitzpatrick*.<sup>140</sup> In this case a British couple had been absolutely barred by section 18(4)(f) of the Child Care Act from adopting a child born of a South African citizen. The court amongst other things looked at what would be best for the child if section 18(4)(f) of the Child Care Act remained unchanged. To do this, the court turned to

<sup>133</sup> S 7(3) of the Constitution.

<sup>134</sup> See *S v M* supra (n19); *Sonderup v Tondeli* 2001 (1) SA 1171 (CC). See also M Bekink “‘Child divorce’: a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents.’ (2012) 15 *PER* 191.

<sup>135</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17).

<sup>136</sup> *Sonderup v Tondelli* supra (n134).

<sup>137</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* supra (n18).

<sup>138</sup> *Centre for Child Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC).

<sup>139</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17).

<sup>140</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17).

section 28 of the Constitution. The court thus interpreted the best interests of the child in the following manner:

‘Section 28(1) is not exhaustive of children’s rights. Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).’<sup>141</sup>

Essentially, the Court explained that section 28(2) is not limited to the rights listed in section 28(1) of the Constitution.<sup>142</sup> In contrast, section 28(2) creates an independent right and should be interpreted in such an extensive context. Accordingly, the court held that provisions of section 18(4)(f) were declared to be ‘too blunt and all-embracing’<sup>143</sup> to the extent that they did not offer any opportunities for a child born to a South African citizen be adopted by non-South African citizens.

Consequently, this did not give paramountcy to the best interests of children and was therefore inconsistent with the provisions of section 28(2) of the Constitution and hence invalid.

#### 2.5.5.2 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*<sup>144</sup>

This next case is important because it proves that the ‘best interests’ of the child are not the only rights or interests considered in cases, and therefore do not ‘trump’ all other rights. Thus, it is essential to understand that all constitutional rights are equally ‘interrelated and interdependent and form a single constitutional value system.’<sup>145</sup>

This case involved an applicant (De Reuck) who was a film producer and charged with the possession and importing of child pornography, which contravened section 27(1) of the Films and Publications Act.<sup>146</sup> De Reuck claimed that the above

<sup>141</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) para 17.

<sup>142</sup> See J Heaton *The Law of Divorce and Dissolution of Life-Partnerships in South Africa* 173. This approach has been followed by the courts in many instances, including in a decision where the court justified an expansive interpretation of the High Court’s review jurisdiction of a protection order in terms of the Domestic Violence Act 116 of 1998. See also *Bannatyne v Bannatyne* supra (n22); *Soller v Maintenance Magistrate Wynberg* 2006 (2) SA 66 (C).

<sup>143</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) para 20.

<sup>144</sup> 2004 (1) SA 406 (CC).

<sup>145</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* supra (n18) Para 57.

<sup>146</sup> Act 65 of 1996 ‘1) A person shall be guilty of an offence if he or she knowingly– (a) creates, produces, imports or is in possession of a publication which contains a visual presentation of child

provision infringed his rights to freedom of expression<sup>147</sup> and privacy<sup>148</sup>, as stated in the Constitution.<sup>149</sup> Furthermore, he stated that his right to equality<sup>150</sup> was infringed by the fact that the offence of possession is defined differently from other offences relating to distribution and broadcasting under the Act.<sup>151</sup>

The court held that persons who are in possession of materials that would be deemed child pornography create a ‘reasonable risk’ of harming to children. Therefore such individuals forfeit their right to freedom of expression and privacy rights in its entirety. As a result of such a forfeiture, this is one of the circumstances that justify the act of section 28(2) of the Constitution ‘trumping’ other provisions of the Bill of Rights.<sup>152</sup>

Langa DCJ disagreed with this finding— he stated that such harshness:

‘...would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. [The Constitutional] Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.’<sup>153</sup>

From this case, the focus was on the fact that section 28 (2) cannot be read alone.<sup>154</sup> There needs to be a balancing and limitation of rights in order to decide the best interests of the child. To this, the court brought an understanding that the ‘best interests’ provision is not absolute, and furthermore, does not ‘trump’ other provisions of the Bill of Rights.

#### 2.5.5.3 *S v M (Centre for Child Law as Amicus Curiae)*<sup>155</sup>

The next case that will be discussed is the case of *S v M*. Although this case was decided after the Children’s Act commenced, it is important to discuss it in this section because the Constitutional Court gave an important contribution to the understanding of the ‘best interests of the child’ principle.

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pornography; or (b) creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography.’

<sup>147</sup> S 16 of the Constitution.

<sup>148</sup> S 14 of the Constitution.

<sup>149</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* supra (n18) Para 3.

<sup>150</sup> S 9 of the Constitution.

<sup>151</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* supra (n18) para 39.

<sup>152</sup> *De Reuck v Director of Public Prosecutions, (Witwatersrand Local Division)* supra (n18) para 55.

<sup>153</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) Para 54-55.

<sup>154</sup> The court stated that ‘The “best interests” principle is the paramount consideration within a hierarchy or concatenation of factors but it is not always the only factor receiving consideration in matters concerning children’.

<sup>155</sup> 2008 (3) SA 232 (CC).

This case involves a mother of three children who was convicted for fraud in the Regional Court and sentenced to four years direct imprisonment.<sup>156</sup> On appeal, the sentence was changed to one of imprisonment for eight months, where she would be under correctional supervision as laid out in section 276(1)(i) of the Criminal Procedure Act.<sup>157</sup>

The main issue before the Court was the duty of the sentencing court in the light of section 28(2) of the Constitution. The reason that the best interests of the children was considered by the Court was because the imprisonment would mean that the three children would be without a caregiver for eight months.<sup>158</sup> Consequently, this would have the potential to be a violation of section 28(2).<sup>159</sup> Therefore, the most significant aspect of this case is that it gave an understanding of the fact that the ‘best interests’ of the child principle must be applied in cases of criminal activities committed by the caregiver(s) or parents.

There are several other cases that have given an understanding of the ‘best interests’ principle and each cases’ interpretation has contributed to the understanding of the principle.

## 2.6 Conclusion

In this chapter, the focus was on the nature and meaning of the ‘best interests’ principle and how it has developed in international law and in South Africa. It is a principle that has a strong foundation in both international law and South African law. This chapter proves that the ‘best interests’ of child principle was created to bring justice to the child.

In international law, the principle was inspired by human rights atrocities towards the child. In South Africa, the principle was linked to the need to protect the child in custody cases. Although both systems of law developed the principle in different contexts, they shared the intension of protecting the child from harm. Therefore, as stated earlier, this principle should be seen as a means of bringing justice to the child, and not a competition of rights with all the other parties involved.

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<sup>156</sup> *S v M* supra (n19) Para 2.

<sup>157</sup> 51 of 1977.

<sup>158</sup> *S v M* supra (n19) para 97.

<sup>159</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 77-78 held that the State must protect the child, where necessary, with the legal and administrative resources that will ensure that the child receives the protection that he/she is entitled to in terms of s 28 of the Constitution.

With the aid of Bonthuys<sup>160</sup> and the Constitution Court judgments<sup>161</sup>, the author has been able to determine what ‘paramount importance’ means in the Constitution. The judgments concluded that section 28(2) established independent rights. Secondly, that the application of the best interests principle does not mean that all the other rights are not considered, and, that the best interests of the child need to be considered in criminal cases as well.

These judgments have given other courts guidance on how they can interpret the constitutional obligation to consider the best interests of the child. This is important because these findings have to be considered in the application of the section 7 list.

The author also showed how the *McCall*-list has failed to achieve its intentions of creating less confusion for parties in the cases. It has failed to hand down judgments that are clear to the parties, and therefore the outcomes have been unsatisfactory. And what is more is that the *McCall*-list contains elements that are unconstitutional. The section 7 list, on the other hand, has the ability to eliminate all the above problems that have been brought by the *McCall*-list. And, most favourably, the section 7 list is constitutionally compliant.

In conclusion, as stated previously, if the courts honour the application of the best interests of the child, then they are aiding with the growth of the child. It is not only a short term solution, but long term. This is the justice to which children are entitled.

The next chapter will look into the common law development and how the section 7 list has incorporated section 28 of the Constitution.

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<sup>160</sup> Bonthuys op cit (n103).

<sup>161</sup> *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) ; *S v M* supra (n19).

## CHAPTER III

### CHAPTER THREE

#### 3 LEGISLATIVE PERSPECTIVE OF THE BEST INTERESTS OF THE CHILD

##### 3.1 Introduction

Children have always been part of society<sup>162</sup>; however, the attitude towards them has not always been what it is today.<sup>163</sup> As noted in the First Issue Paper on the Review of the Child Care Act<sup>164</sup>, many children were left in very vulnerable positions due to past apartheid policies that did not cater to their needs.<sup>165</sup>

Indeed, because of this, it was clear that new laws were required in order to include persons who were previously marginalised during the apartheid era. Much like the introduction of the ACRWC that was endorsed in order to accommodate the African law context and demands, South Africa also required new legislation that was in line with the newly introduced democratic laws.

The above factors gave compelling reasons for the dire need to change the previous laws affecting children<sup>166</sup> and codify the common law rules in order to create more strength in the ‘best interests’ standard. Below is a discussion of how the law has changed, looking specifically at the transition from the Child Care Act to the Children’s Act and the recommendations that came from the SALRC.

The discussion of the background of the Child Care Act is important because it shows the errors that were in the Child Care Act and how section 7 of the Children’s Act has served as a remedy for some of these errors.

##### 3.2 Background

The Child Care Act came into effect on 1 February 1987.<sup>167</sup> From the very beginning, the Child Care Act raised alarm amongst the ‘practitioners, social workers and child and youth care workers.’<sup>168</sup> The concerns were regarding the

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<sup>162</sup> E Verhellen *Convention on the Rights of the Child* (2000) 11.

<sup>163</sup> See Freeman op cit (n46) 19-25 for an in depth explanation of the how and the rights of children started being taken more seriously.

<sup>164</sup> SALRC Issue Paper 13 (Project 110) op cit (n14) at para 1.1.

<sup>165</sup> See Skelton and Proudlock in Davel and Skelton (ed) *Commentary on the Children’s Act 1-11* which highlights the fact that the Child Act was drafted during a time where the majority of children had not been entitled to any child protection rights because South Africa had not concerned itself with children’s right during that era.

<sup>166</sup> SALRC Issue Paper 13 (Project 110) op cit (n14) at para 1.1.

<sup>167</sup> SALRC Discussion Paper 103 (Project 110) op cit (n106) Chapter 6.

<sup>168</sup> SALRC Issue Paper 13 (Project 110) op cit (n14) para 1.2.

operation of, and principles underlying, the legislation.<sup>169</sup> Most importantly, the Child Care Act failed to create principles that could assist the court in the application of its provisions. The Act only made provision for the consideration of the ‘best interests of the child’ in adoption-related matters.<sup>170</sup>

Furthermore, even with the amendments that were made in the Child Care Act post-1994, it was argued that the statutes failed to adequately embrace the central principles and values set out in the Constitution and the international treaties.<sup>171</sup> Thus, South Africa was tasked to create a statute that was based on the fundamental principles of both the constitution and the international treaties.

The concerns about the Child Care Act were noted and a new draft Bill was published by the Department of Welfare for comment in June 1995. The draft Bill recorded regulations declaring intentions to proceed with urgent provisional reforms while awaiting a more inclusive amendment of child care law.<sup>172</sup> In September the following year, a conference was held by the parliamentary Portfolio Committee on Welfare and Population Development (hereafter Portfolio Committee) and the Community Law Centre. The agenda of conference was to review and redraft the Child Care Act.<sup>173</sup>

The agenda also included the review and redrafting of all South African statutes that affected children. The review would also consider and incorporate ‘common law, the customary law and religious laws’<sup>174</sup> affecting children.<sup>175</sup> From there, the Minister of Justice requested the SALRC to review the Child Care Act.<sup>176</sup>

### 3.3 The South African Law Reform Commission

The SALRC took on the mandate given by the Minister of Justice and conducted an investigation and evaluation of the Child Care Act.<sup>177</sup> The recommendations from the investigation were submitted to the Minister of Social Development in 1997.

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<sup>169</sup> Ibid.

<sup>170</sup> SALRC Discussion Paper 103 (Project 110) op cit (n106) Chapter 5 page 72.

<sup>171</sup> Ibid.

<sup>172</sup> SALRC Issue Paper 13 (Project 110) op cit (n14) at 1.2.

<sup>173</sup> Ibid.

<sup>174</sup> SALRC Issue Paper 13 (Project 110) op cit (n14) Paper at 1.2.

<sup>175</sup> Kruger “State intervention and child protection measures in Scotland — lessons for South Africa (2006) 39 *CILSA* 504

<sup>176</sup> SALRC Issue Paper (13 Project 110) op cit (n14) at para 1.2.

<sup>177</sup> SALRC Issue Paper (13 Project 110) op cit (n14).

Thereafter, in May 1998, an issue paper was published for the general public to give their comments and recommendations.<sup>178</sup>

During the investigation, the SALRC and the Portfolio Committee preserved a close relationship, where the SALRC was updated frequently on the developments of the investigation. In December 2001 a Discussion Paper (hereafter 2001 Discussion Paper) was released for comment, which contained the SALRC's preliminary recommendations and findings.<sup>179</sup>

The SALRC then agreed to deliver the draft legislation to the Minister for Social Development and the Portfolio Committee at the end of June 2002.<sup>180</sup> The deadline was met and a draft of the Children's Bill was submitted to the Minister and the Chairperson of the Portfolio Committee.<sup>181</sup> In December the same year, the SALRC compiled a final report with recommendations as well as the draft Children's Bill.<sup>182</sup>

### 3.3.1 The South African Law Reform Commission's mandate

From the outset, the SALRC understood that its mandate involved more than simply assessing the Child Care Act. The new law would have to include all statutory<sup>183</sup>, 'common law, the customary law and religious laws' affecting children. In the light of this, the SALRC narrowed down its vision with the hopes of creating one single statute that would encompass all rights concerning children.<sup>184</sup>

Furthermore, the intention was that this vision would not only be based on the constitutional obligations that were laid out in the South African Constitution, but also the state's international commitments (CRC and the ACRWC). Thus, this meant that the new laws would be in line with the new South Africa, as well as include any omissions that had been made by previous laws.<sup>185</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> SALRC Discussion Paper 103 (Project 110) op cit (n106).

<sup>180</sup> South African Law Commission (Project 110) 'Review Of The Child Care Act Report' (2002) 2.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> SALRC Discussion Paper 103 (Project 110) op cit (n106) 32. The SALRC recommended for the repeal and incorporation of these statutes; The Age of Majority Act 57 of 1972; The Children's Status Act 82 of 1987; The Guardianship Act 192 of 1993; Natural Fathers of Children born out of Wedlock Act 86 of 1997. However, in the same light, the SALRC recommended that the new Children's statute not to repeal the following; the Divorce Act 70 of 1979; the South African Schools Act 84 of 1996; the Maintenance Act 99 of 1998, and the Domestic Violence Act 116 of 1998.

<sup>184</sup> SALRC Report (Project 110) op cit (n155) 3.

<sup>185</sup> Ibid.

The change in law would also affect the ‘best interests’ principle. The SALRC would create and incorporate all laws pertaining to the child and align them with a constitutionally compliant list.

### 3.3.2 Principles underpinning the new Children’s Bill

As mentioned above, the Child Care Act had many problems. One of the identified shortfalls was the fact that the Act did not have a list of principles that could assist decision-makers in the application of its provision.<sup>186</sup> Therefore, in the December 2002 report, the SALRC provisionally recommended the inclusion of ‘an objects and general principles clause’ in the new Children’s Bill.<sup>187</sup>

Some of the guidelines that were included were that decision-makers must always ensure that child-related decisions or actions are in the ‘best interests’ of the child.<sup>188</sup> Secondly, the principle must be applied when determining the facts and circumstances which affect the child.

Furthermore, the best interests of the child should also be applied when ‘considering the objects, principles and guidelines set out in the proposed Act, the Constitution and in any other law relating to the “best interests” of the child.’<sup>189</sup> Additionally, the family of the child should, whenever necessary, be included in any resolutions made that will impact the life of the child. Many other principles were included which later were included in the final Children’s Act.<sup>190</sup>

These principle were created by looking at the context of international treaties, South African law (namely the previous law cases, the common law precedent), as well as the social practices of the state.<sup>191</sup>

## 3.4 The Children’s Act

### 3.4.1 Background

The Children’s Act is very lengthy and covers a range of different services. The length of the document was well anticipated considering the number of years that were invested in order to finalise the statute, as well as the different institutions that submitted recommendations and comments.

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<sup>186</sup> SALRC Report (Project 110) op cit (n155) 12.

<sup>187</sup> Ibid.

<sup>188</sup> SALRC Discussion Paper 103 (Project 110) op cit (n106) 76.

<sup>189</sup> Ibid.

<sup>190</sup> S 6 of the Children’s Act.

<sup>191</sup> SALRC Report (Project 110) op cit (n155)13.

Due to its voluminous nature, Parliament made the decision to divide the Children's Act into two parts before it began consulting with the public and finalising the new legislation.<sup>192</sup> The first half was called the Children's Bill and it deals with services that are the responsibility of national government.<sup>193</sup> Parliament completed the first Bill in December 2005. From there, the Bill was signed by the President of South Africa and officially became the Children's Act 38 of 2005.<sup>194</sup> However, the provisions of the Children's Act would only come into force on 1 July 2007.<sup>195</sup>

The other half of the Bill was called the Children's Amendment Bill and it focused on services that are provided by provincial governments.<sup>196</sup> Parliament completed the Amendment Bill in November 2007 and the President signed it the following year. It was called the Children's Amendment Act 41 of 2007.<sup>197</sup> The two Bills have since been combined into one single statute known as the Children's Act 38 of 2005.

### 3.4.2 Introduction

The Children's Act came into full operation in April 2010.<sup>198</sup> The section 7 list came into operation on 1 July 2007. In its Preamble, it affirms and endorses the rights laid out in section 28 of the Constitution.<sup>199</sup> The Children's Act has become one of the most important tools of protection for children in the area of the law of persons and family law in South Africa, and has also extended to affecting the law of parent and child.<sup>200</sup>

In addition, the Act advocates for a child to preferably be raised in a family environment and in 'an atmosphere of happiness, love and understanding.'<sup>201</sup> Therefore, if the courts are failing to follow the appropriate measures, they are

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<sup>192</sup> J Heaton *The Law Of Persons And Family Law* (2008) 885; P Mahery, L Jamieson and K Scott *Children's Act Guide for Child and Youth Care Workers. Edition 1.* (2011) Cape Town: Children's Institute, University of Cape Town and National Association of Child and Youth Care Workers 7.

<sup>193</sup> Mahery, Jamieson and Scott op cit (n172) 7.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</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) *EJCL* 1.

<sup>199</sup> Children's Act Preamble 'To give effect of certain rights to children as contained in the Constitution.'

<sup>200</sup> J Heaton op cit (n192) 885.

<sup>201</sup> Preamble of Children's Act. See also R Songca 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *CILSA* 344.

endangering the chances of living up to the expectations of the preamble of the Children's Act. This is specifically true for the cases that do not even care to address the section 7 list and merely make reference to section 28 (2) of the Constitution.

The Children's Act gives a detailed list of its objects and these include:

- a) 'to promote the preservation and strengthening of families;
- b) to give effect to the following constitutional rights of children, namely-
  - i) family care or parental care or appropriate alternative care when removed from the family environment;
  - ii) social services;
  - iii) protection from maltreatment, neglect, abuse or degradation; and
  - iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- e) to strengthen and develop community structures which can assist in providing care and protection for children;
- f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- g) to provide care and protection to children who are in need of care and protection;
- h) to recognise the special needs that children with disabilities may have; and
- i) generally, to promote the protection, development and well-being of children.<sup>202</sup>

These objects are covered throughout the Children's Act and they are connected to all the provisions in the Act. This means that all 312 sections of the Children's Act were passed with the above objects in mind. Therefore, the section 7 list too was passed to preserve and strengthen the family, provide children with their constitutional rights, and give effect to the international obligations and all the other objects in section 2 of the Children's Act.

With regard to constitutional rights, in addition to the right to human dignity mentioned in Chapter Two, the section 7 list also plays the significant role of protecting and promoting other constitutional rights of children. The section 7 list does this by placing the child in an environment that will best serve their constitutional rights. Through the application of the section 7 list, the following rights are protected: the right to equality<sup>203</sup>, health care, food and social security<sup>204</sup> and environment.

With reference to the right to equality, the application of section 7 of the Children's Act ensures that children are treated equally in all the cases. Secondly,

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<sup>202</sup> S 2 of the Children's Act.

<sup>203</sup> S 9 of the Constitution.

<sup>204</sup> S 27 (a) of the Constitution.

the right to health care, food and security is protected by the fact that the section 7 list includes factors that ensure that the child is placed in the best circumstances for their welfare and health care. And, lastly with regard to an environment, the section 7 list promotes for children to be placed in an environment that is not harmful to their health or well-being.

Thus, the courts' history of disregarding section 7 of the Children's Act, a provision that promotes and protects the constitutional and international obligations, do not uphold the protection of children. On the contrary, the actions lift this veil of protection of children and it risks the development of children. This is an injustice to children.

The next section is a discussion of the 'best interests' of the child in terms of the Children's Act. It also looks into whether this list has improved the situation for child protection in South Africa since the introduction of the Children's Act.

### 3.4.3 Best interests of child standard

As mentioned above, prior to the Children's Act, there were a number of concerns and a lack of faith in the application of the factors in the list from the *McCall*-case. Section 9 of the Children's Act corresponds with section 28(2) of the Constitution by stating that the best interests of the child are of paramount importance in all child-related matters.

Section 7 of the Children's Act takes it further by providing an extensive list of factors that are considered relevant in order to determine what the 'best interests' of the child are. The provision states the following;

- (1) 'Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
  - (a) the nature of the personal relationship between-
    - (i) the child and the parents, or any specific parent; and
    - (ii) the child and any other care-giver or person relevant in those circumstances;
  - (b) the attitude of the 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;
  - (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>205</sup>

Each factor must be taken into consideration where relevant, and the courts are given the discretion to determine which factors are relevant depending on the circumstances of each case.<sup>206</sup> Section 7 of the Children's Act states that the decision-makers 'must' take the factors into consideration when deciding the best interests in any provisions of the Children's Act. This means that even when a case is centred on parental responsibilities, as per section 18 of the Children's Act, the courts must use the section 7 list to help reach a conclusion on parental responsibilities which is in the best interests of the child.

Unfortunately, the courts are failing to adhere to this requirement. In the majority of the cases<sup>207</sup> that were investigated in Chapter four, the courts were investigating what is in the best interests of the child in light of parental responsibilities. However, the courts are continuously failing to adhere to the requirement of using the section 7 list to help reach the best solution for the children.

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<sup>205</sup> Section 7 of the Children's Act.

<sup>206</sup> Bekink op cit (n134) 191.

<sup>207</sup> See in Chapter Four.

Instead, the courts overlooked section 7 of the Children's Act in its entirety and decided to merely state section 28(2) of the Constitution— which does not provide guidelines as to how to determine the best interests of the child.

A great feature about the 'best interests' principle is the fact that it has the potential to centre on the needs of the child.<sup>208</sup> Maidment explains that a child-centred approach recognises the child as 'a substantive bearer of rights'<sup>209</sup> in the context of divorce proceedings—as opposed to being the 'object of the different parental rights.'<sup>210</sup>

Therefore, the child-centred nature of the 'best interests' principle involves both a focus on the interests of the child and on the rights of the child.<sup>211</sup> This is a feature the section 7 list promotes through binding courts to use the relevant factors to centre the interests of child in divorce cases.

Although the author does not dispute the list in section 7, this does not mean that the list is perfect— however, it is moving in the right direction. Davel affirms this by stating that the Children's Act has taken the 'best interests' standard to a new level in South Africa, thus, provided the system with more clarity about the factors that are significant to establishing the 'best interests' of the child.<sup>212</sup>

However, Davel criticises the fact that section 7 does not provide an open-ended list. Whereas, the *McCall*-list allowed the courts to consider other factors that may be relevant to the case<sup>213</sup>, the Children's Act does not give courts the discretion to consider other factors.<sup>214</sup> This provision is rather 'too strict' because the decision-makers are capable, and should be able to consider other factors where relevant.<sup>215</sup>

The author certainly agrees with this suggestion. Each family differs from the other and the list is looked at on a case-by-case basis Therefore, there might be a factor that would be important for the courts to look at and that factor might not be in the Children's Act.<sup>216</sup> Having a closed list might be to the detriment of the child,

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<sup>208</sup> J Heaton *South African Family Law* 3ed (2010).

<sup>209</sup> Maidment *Child Custody and Divorce: The Law in Social Context* (1984) 149.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Davel and Skelton op cit (n116) 2-12; SALRC Report (Project 110) op cit (n155) 16 where the SALRC stated it believed that the decision-makers and all members of society would benefit from a determined list of the 'best interests' of the child.

<sup>213</sup> At 205/J-205 G.

<sup>214</sup> Davel and Skelton op cit (n116) 2-8.

<sup>215</sup> Ibid.

<sup>216</sup> See Kurki-Suonio op cit (n79) 183 Suonio stated that an open-ended nature of the 'best interests' principle opens up room for an interaction between law and culture. This will promote the interests of the people, specifically the children who are parties to the cases. Although the Children's Act has

and will certainly not be in their best interest. Even so, generally, the list has been improved extensively from the previous common law confusion and this will be discussed below.

### 3.5 Difference between the section 7 list and the *McCall* list

Before comparing the two lists, it is important to highlight another reason why the SALRC felt it was important to legislate the list of the best interests of the child. The SALRC analysed that it was evident that following statutory provisions affecting children was challenging because of the problems within the Child Care Act.<sup>217</sup> Additionally, at times it had been difficult to establish the legal position because the common law and legislation overlapped. Consequently, it was important to establish common ground for what was expected of the courts in determining the best interests of the child.<sup>218</sup>

Also, as mentioned above, the *McCall*-list was highly influenced by English law, and the list of factors needed to be reviewed and legislated in terms of the South African constitutional values. Therefore, the SALRC felt that these reasons were sufficient to create more clarity into the principle by placing a formal list of factors that all courts ought to use in child-related cases.<sup>219</sup>

When analysing the statutory list with the one provided in *McCall*, it is clear that the section 7 list adheres to the constitutional values more than the *McCall*-list. For example, some courts previously applied ‘maternal preference’ principle<sup>220</sup> or desired same-sex matching.<sup>221</sup> Evidently, the exclusion of this factor has increased the likelihood of the courts focusing on the best interests of the child, as opposed to the sex of the parent or caregiver.

Another example is the *McCall* case that gave preference to awarding a father, with a history of violence, custody of the male child. In that case, the court may have reached a different outcome if the case had been decided in terms of the section 7 list, which adheres to constitutional values.

Furthermore, the section 7 list has extended its application to include caregivers or other person who play a relevant role in the child’s life. The advantage

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included the factor of culture, but there might be cases where there are other factors that need to be considered and might not be because they do not fall within the list in S 7.

<sup>217</sup> SALRC Issue Paper (13 Project 110) op cit (n14) at para 6.2.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> To be discussed in greater detail in Chapter Four.

<sup>221</sup> See *Ex parte Critchfield* 1999 (3) SA 132 (W).

of this is that it opens the scope for cases where the child may be in the care of persons that are not the parents of the child such as grandparents, extended family or foster parents.

As stated in *Government of the Republic of South Africa v Grootboom*,<sup>222</sup> the state must protect the child, where necessary, with the ‘legal and administrative resources’ that will ensure that the child receives the protection that the child is entitled to in terms of section 28 of the Constitution. The section 7 list is the resource stated in the above case, and it also extends to live up to the international obligations of the best interests principle.

Another difference between the two lists is that the section 7 list does not include the factor that there must be an ability of the parent to communicate effectively with the child, as was mentioned in the *McCall* list. However, the element of effective communication could be viewed as a prerequisite to being able to address a child’s emotional and intellectual needs; a criterion which is mentioned in section 7(1)(c) of the Children’s Act.<sup>223</sup> And lastly, the child’s preference is not mentioned in the section 7 list, but the child’s participation is provided for by section 10 of the Children’s Act.<sup>224</sup>

As mentioned in previously, not all of the *McCall* factors conform to the human rights standards. The section 7 factors do. Furthermore, there is also a lot of other common law precedent which fail to meet the human rights standards. This is evident through the inclusion of factors in the *McCall*-list that were declared unconstitutional. The South African legal system must ensure that human rights standards are met, and this can be achieved through the application of a legislation that has been specifically designed to ensure this outcome. The courts should not continue using old law which was created before the human rights standards were developed and which is now not acceptable. The author believes that these actions are undermining and dishonouring section 7 of the Children’s Act.

### 3.6 Does the section 7 list live up to International standards?

When a state ratifies a treaty, it binds itself to an obligation to apply national laws that are in line with the treaty itself. This is the commitment that South Africa made

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<sup>222</sup> *Government of the Republic of South Africa v Grootboom* supra (n137) para 77-78.

<sup>223</sup> Heaton op cit (n142) 179-180.

<sup>224</sup> Ibid.

when it ratified the CRC and ACRWC.<sup>225</sup> The South African system bound itself to designing legislation that would protect, promote and uphold children. The Children's Act complied with the obligation.

Indeed, as demonstrated earlier, the national law has gone further than international treaties by creating a list of factors that will help the courts decide what is in the best interests of the child. In this regard, South Africa's 'best interests' principle does live up to international standards, specifically looking at the refined list of factors in the Children's Act. However, the concern is with the application by the courts. The next chapter will therefore look into how the courts are using this principle in the context of divorce proceedings.

### 3.7 Conclusion

This Chapter has shown how the concept of the best interests of the child has, through the years, shifted. Previously, prior to the Children's Act, the attention in the parent-child relationship was solely on the parents and their rights. The law has since changed and now the emphasis is on the rights and interests of the child.<sup>226</sup>

The SALRC had worked tirelessly with several institutions to ensure that decision-makers cannot claim that the 'best interests' of the principle is vague and indeterminate. The effort involved the difficult task of combining many statutes about children into one document, and ensuring that there is clarity on the issues that were once declared indeterminate and vague. Furthermore, the process of creating section 7 has resulted in a longer and more detailed list than the previous common law list from the *McCall* case.

Moreover, the author shown that the section 7 list is more favourable to the intentions of the SALRC than the *McCall*-list. By not using this list in the new legislation, the courts are ultimately overlooking the core value of what the section 7 and section 9 are trying to achieve, which is to serve the best interests of the child, ensure that the decisions taken are constitutionally-compliant, and to give courts clear guidance on which factors they can use to determine the best interests of the child.

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<sup>225</sup> See Chapter 1.

<sup>226</sup> B Van Heerden 'Parental power' in B Van Heerden et al Boberg's *Law of Persons and the Family* 2ed (1999). 657-658.

The next chapter will focus on the criticism of how the courts are inconsistent in using the list. The chapter will provide further proof of how the courts are placing the child in danger by not using the section 7 list. It will look specifically at how the inconsistency is detrimental for all parties involved, including legal practitioners who prepare cases and cannot predict any outcome for the cases, therefore making it difficult to prepare their cases.

## CHAPTER FOUR

### 4 BEST INTERESTS OF THE CHILD IN DIVORCE PROCEEDINGS

#### 4.1 Introduction

Divorce brings about great pain to all parties involved, particularly to the children.<sup>227</sup> There are cases where divorce benefits some of the individuals. However, it is stated that divorce usually causes a momentary degeneration in a person's quality of life.<sup>228</sup> It has an impact on the parties as individuals, as well as the unity of the family. With regard to the individual, at times it places a person 'on a downward trajectory from which they might never fully recover' and with the family, it irreversibly weakens the family and the parent-child relationship.<sup>229</sup>

Fagan and Churchill<sup>230</sup>, have highlighted some of the emotions and consequences of divorce that people experience outside the court. These include a decline in religious practice, where the trauma reduces the regularity of devotion to God and praying; in education: where a child's learning ability and educational achievements are affected, as well as and health and well-being: where divorce has been known to weaken children's health and lifespan. It also increases behavioural, emotional, and psychiatric risks, including even suicide.

Given the fact that there is already an overwhelming flood of emotions and problems that people handle through the traumatic experience of divorce, the process of the court proceedings should not add to the heartache. As previously mentioned, the 'best interests' principle was created in order to help decision-makers reach a decision which is in the best interests of the child all in cases, and this also includes divorce cases.

Boezaart upholds that the law gives clear guidance for children's rights in divorce law and that the 'golden rule is that the best interests of the children

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<sup>227</sup> F Fagan and A Churchill *The Effects of Divorce on Children* (2012) 1; S Burman, L Derman and, L Swanepoel 'Only for the wealthy? Assessing the future for children of divorce' (2000) 16 *SAJHR* 535. Several investigations have been conducted to prove the problematic effect that divorce has on children. See ME Lamb, KJ Sternberg and RA Thompson 'The effects of divorce and custody arrangements on children's behaviour, development and adjustment' (1997) 35 *Family and Reconciliation Courts Review* 395-396; PR Amato and B Keith 'Parental divorce and adult well-being: A meta-analysis' (1991) 53 *Journal of Marriage and the Family* 43.

<sup>228</sup> PR Amato 'The consequences of divorce for adults and children' *JMF* 62 (2000) 1269.

<sup>229</sup> PR Amato and JM Sobolewski 'The effects of divorce and marital discord on adult children's psychological well-being' (2001) 66 *ASR* 917.

<sup>230</sup> Fagan and Churchill op cit (n206) 2; JJ Wood, RL Repetti and SC Roesch 'Divorce and children's adjustment problems at home and school: the role of depressive/withdrawn parenting' (2004) 35 *Child Psychiatry and Human Development* 121.

involved in the matter are of paramount importance.’<sup>231</sup> Sadly, that is not the situation in all cases that come before the court. There is inconsistency with the decision-makers in determining the best interests of the child. The inconsistency has left many parties distressed and there is a gap between the ‘clear guidance’ and the application of the guidance with the courts. Below is a discussion on such cases, but first, there will be a discussion on the laws pertaining to divorce and some of the procedures that are followed in court.

#### 4.2 Laws pertaining to divorce law

The Constitution and the CRC have been very clear about their stance on the parent-child relationship, both within the marriage and on divorce.<sup>232</sup> Section 28(2) of the Constitution provides that the ‘best interests of the child must be paramount importance’<sup>233</sup> and article 9 of the CRC states that State Parties are to safeguard children from being separated from their parents against their will, unless they have been authorised to do so.<sup>234</sup> Therefore, both sources of law advocate for the protection of children in the event of divorce.

In terms of national legislation, the children are protected by the Divorce Act.

Section 6(1) states that ‘a divorce shall not be granted until the court;

- (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and
- (b) if an enquiry is instituted by the Family Advocate in terms of s 4(1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4 (1).<sup>235</sup>

One important factor to note is that the above section pre-dates section 7 of the Children’s Act. This means that, prior to the section 7 list; there was no provision that mandated the courts to use the ‘best interests of the child’ principle in decisions

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<sup>231</sup> Heaton op cit (n142) 171.

<sup>232</sup> Robison op cit (n86) 65.

<sup>233</sup> S 28(2) of the Constitution. See Heaton op cit (n142) ‘Section 28 is South Africa’s response to international obligations as a party to various international legal instruments: international law also obliges states to adhere to the best interests standard when children are involved, inter alia in divorce.’

<sup>234</sup> Art 9 of the CRC ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.’

<sup>235</sup> S 6 of the Divorce Act.

concerning child custody. Also, the wording in s 6(1)(a) of the Divorce Act is exceptionally weak because it merely wants arrangements for the children that are satisfactory.<sup>236</sup> The material obligation comes from section 28 of the Constitution and section 9 of the Children's Act because these new laws have opened up room for the Divorce Act to compel the court to use section 7 of the Children's Act.

#### 4.2.1 Divorce procedure

The South African law has made attempts to provide divorce courts with mechanisms that will ensure that the courts obtain reliable information that will help the courts in making meaningful and informed decisions.<sup>237</sup> For example, with the intention of assisting the court in complying with its obligation to protect the interests of the child, the law established the Office of the Family Advocate in terms of the Mediation in Certain Divorce Matters Act.<sup>238</sup>

The Office of the Family Advocate consists of legal practitioners and social workers, who work collectively to ensure that a holistic and qualitative approach of the best interests of the child is followed all through the court proceedings.<sup>239</sup>

Prior to the Mediation in Certain Divorce Matters Act, there were complaints about the disappointing manner in which divorces were settled, particularly divorces that were unchallenged by the other partner.<sup>240</sup> For example, some cases would be concluded within three minutes after the court proceedings had commenced, whereas the parties invested long periods of time and money for legal and travelling costs.<sup>241</sup> It became clear that the parties left the court very disappointed and unhappy with the court proceedings because they did not fully understand the court's decision.<sup>242</sup>

Notably, there was an increasing fear that a great number of the decisions were taken concerning the welfare of the child based solely on the testimony of the plaintiff.<sup>243</sup> The reason for this was because the majority of divorces were

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<sup>236</sup> The provision instructs for arrangements for the children merely 'satisfactory', but if that cannot be done, then the best must be done.

<sup>237</sup> A Barratt *Law of Persons and Family* (2012) 369.

<sup>238</sup> Act 24 of 1987.

<sup>239</sup> B Preller *Everyone's Guide to Divorce and Separation* (2013) 53.

<sup>240</sup> Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983 para 8.10.1.

<sup>241</sup> Ibid.

<sup>242</sup> Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court RP200/1997 Third and Final Report, 111: 103.

<sup>243</sup> Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court RP200/1997 Third and Final Report, paras 7.3.1.3 and 7.3.1.5.

undefended or settled cases<sup>244</sup>, and the courts were therefore not given a full overview of the events leading up to the breakdown of the marriage.<sup>245</sup> Hence the court proceedings were concluded within three minutes.

The Family Advocate has thus bridged the gap and provided more understanding to the parties. Part of the assessment includes investigating the factors of the best interests of the child.<sup>246</sup> The investigation itself includes reviewing and monitoring the settlement agreements and court documents concerning the children in order to determine if the arrangement contained in the documents are *prima facie* in the children's best interests.<sup>247</sup>

Thus the recommendations that are made by the Family Advocate in his/her report must be considered by the courts before concluding any orders regarding the child.<sup>248</sup> On the other hand, the courts are not under any obligation to agree with the recommendations and should in essence make their own decisions on the welfare of children when concluding the case.<sup>249</sup>

Because of the strain and emotions of the divorce proceedings, Barratt states that it is not in the best interests of children to be exposed to a lengthy and hostile dispute between parents on matters concerning care, contact or maintenance.<sup>250</sup> As a result of this, the Children's Act guards against the divorce proceedings going on for long periods of time. Thus s 6(4) of the Children's Act therefore states that

‘In any matter concerning a child–

- a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- b) a delay in any action or decision to be taken must be avoided as far as possible.’<sup>251</sup>

### 4.3 Divorce Court application of the best interests of the child standard

First, it is important to note that it is usually in the child's best interests to have an ongoing relationship with each parent; post-divorce proceedings and during the

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<sup>244</sup> N Glasser ‘Custody on divorce: assessing the role of the Family Advocates’ in S Burman (ed) *The Fate of the Child: Legal decisions on children in the new South Africa* (2003) 109.

<sup>245</sup> Ibid. See also LJ van Zyl *Alternative Dispute Resolution in the Best Interests of the Child* LLD (Rhodes University) (1994) 132. Because of how fast the courts concluded the cases, it was impossible to pay enough attention to the best interests of the child.

<sup>246</sup> S 4(1)(b) of the Mediation in Certain Divorce Matters Act.

<sup>247</sup> Glasser op cit (n244) 110; Preller op cit (239) 54.

<sup>248</sup> S 6(1)(b) of the Divorce Act.

<sup>249</sup> There have been cases where the court has disagreed with the recommendations of the Office of the Family Advocate. For example *Pinion v Pinion* 1994 (2) 725 (D); *Ngobeni v Ngobeni* (39972/05) [2008] ZAGPHC 45.

<sup>250</sup> Barratt op cit (n237) 369.

<sup>251</sup> 6(4) of the Divorce Act.

separation period.<sup>252</sup> However, in cases where the one of the parents has victimised the child or the other parent, or cases of alcohol or drug abuse, most professionals recommend that such a violent parent should have limited time with the child or have access to the child under supervision. In extreme cases, the parent should be denied access to the child.<sup>253</sup>

#### 4.4 Divorce cases and section 7 of the Children's Act

This paper does not seek to dispute the list of factors compiled in section 7 of the new legislation; rather, it will have a critical look at how the courts are failing to use the section 7 list and their obvious reliance on the old common law list from the *McCall* case. Within the research, the author discovered that some of the courts do not use the section 7 list or the *McCall* list. Such cases merely mention section 28 of the Constitution and section 9 of the Children's Act.<sup>254</sup>

The following section explains and proves the inconsistency of the courts in establishing the best interests of the child by way of using the section 7 list. The author reviewed one hundred percent of divorce cases heard in all South African high courts for the past five years (from January 2011 to December 2015). The focus was specifically on cases that centred on the allocation of parental responsibilities and rights during and after the finalisation of the divorce— which includes issues such as care, contact and residence.

During the five year period, there were 54 cases in which the courts made decisions of this kind and applied the best interests of the child standard. The first court that was reviewed was the South Gauteng High Court Johannesburg. In the past five years, the court had heard 15 cases that dealt with the 'best interests' principle concerning parental responsibilities and rights. The court used the section

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<sup>252</sup> See a *Kok v Clifton* 1955 (2) SA 326 at 330 ©: 'It is a common-place that it is in the interests of the child of divorced parents that it should not be estranged from either parent; the child should not be placed in such a position as to lose affection for either of its parents, nor that either of the parents should lose affection for and interest in the child. It is of importance to this child, in my view, that the father should retain his affection for the child and his interest in him.' See also *Baloyi v Baloyi* (6208/2014) [2015] ZAGPPHC 728 'Ordinary human experience tells one that the continued involvement, companionship, love and support from both father and mother after separation and divorce, enhances a child's sense of security.'; *Chodree v Vally* 1996 (2) SA 28 (W).

<sup>253</sup> See *Klare v Klare* 2010 JOL 25922 (ECP); *Van Rooyen v Van Rooyen* 2001 2 All SA 37 (T).

<sup>254</sup> To be discussed in Chapter 4.

7 list in only four of the cases<sup>255</sup>, and the other eleven deviated from determining the best interests of the child in terms of the Children's Act.<sup>256</sup>

The second court that was reviewed was the North Gauteng High Court in Pretoria. This court heard 14 cases concerning the best interests of the child in divorce cases. Of the 14, only five cases<sup>257</sup> mentioned the section 7 list in order to determine the best interests of the child. The other nine cases<sup>258</sup> deviated from using the list.

Furthermore, in all the Eastern Cape cases combined, the court heard thirteen cases that concern parental responsibilities and rights. Of all those cases, it was only in three<sup>259</sup> cases that the section 7 list was used. Then other ten cases did not use the section 7 list.<sup>260</sup> In the Free State High Court in Bloemfontein, seven cases were heard and only two<sup>261</sup> used section of the Children's Act. The others chose to ignore the section 7 list.<sup>262</sup>

The Northern Cape High Court, Kimberley only heard two cases and neither used section 7 list.<sup>263</sup> The Kwa-Zulu Natal High heard six cases and only two<sup>264</sup>

<sup>255</sup> *R v M* (42335/2014) [2015] ZAGPJHC 183; *Caprari v Du Toit* (11120/2002) [2014] ZAGPJHC 286; *Celimene v Scholtz* (11/10778) [2011] ZAGPJHC 170; *Herbst v Ossemane* (2009/2024) [2011] ZAGPJHC 246.

<sup>256</sup> *Anspach v Opland* (2015/28396) [2015] ZAGPJHC 200; *Central Authority for the Republic of South Africa v K* (2013/47006) [2014] ZAGPJHC 373; 2015 (5) SA 408 (GJ); *G v G* (32377/12) [2015] ZAGPJHC 34; *J E v N M* (38571/2013) [2014] ZAGPJHC 175; *D v D* (2012/47100) [2014] ZAGPJHC 132; *F v R* (2013/24018) [2013] ZAGPJHC 221; *Central Authority for the Republic of South Africa v B* (2011/21074) [2011] ZAGPJHC 191; 2012 (2) SA 296 (GSJ); [2012] 3 All SA 95 (GSJ); *B v G* (2009/34223) [2011] ZAGPJHC 166; 2012 (2) SA 329 (GSJ); *B v B* (15073/210) [2011] ZAGPJHC 132; *Mabika v Mabika* (2011/10308) [2011] ZAGPJHC 109.

<sup>257</sup> *Baloyi v Baloyi sura* (n252); *K v M* (57613/2014) [2015] ZAGPPHC 335; *Central Authority (Republic of South Africa) v R* (28983/2014); *MS v NWB* (46820/201) [2013] ZAGPPHC 251' and *G C H v G N B* (35322/2012) [2012] ZAGPPHC 218.

<sup>258</sup> *Ramoloto v Ramoloto* (32403/2011) [2015] ZAGPPHC 877; *T v D* (64290/14) [2015] ZAGPPHC 314; *N v N* (14/29348) [2014] ZAGPPHC 588; *HS v WCS* (3524/09) [2012] ZAGPPHC 125; *O v O* [2011] ZAGPPHC 182; 35432/2008, 42644/2010, 40419/201; *Ncube v Duba, Ncube v Duba* (23010/2004, 51561/2010) [2011] ZAGPPHC 61; *Erasmus v Eksteen* (77910/10) [2011] ZAGPPHC 3; *R v T* (89753/14) [2015] ZAGPPHC 21.

<sup>259</sup> *Goliath v Hutchinson* (280/2011) [2011] ZAECGHC 12 (3 March 2011); *Ex parte Le Grange; Le Grange v Le Grange* (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) and *B v B* (902/2011) [2014] ZAECPEHC 82.

<sup>260</sup> *B v B* (4001/2015) [2015] ZAECPEHC 56; *W v W* (2875/2015) [2015] ZAECGHC 78; *H v H* (2262/2015) [2015] ZAECPEHC 45; *B v B* (1512/2015) [2015] ZAECPEHC 29; *Family Advocate v F; In re: F v F* (3245/14, 3454/14) [2015] ZAECPEHC; *Family Advocate v F; F v F* (3245/14, 3454/14) [2014] ZAECPEHC 93; *Heuer v Bruce-Alexander* (EL1426/20101) [2012] ZAECGHC 66; 2012 (6) SA 41 (ECG); *Duncan v Coetzee* (3888/11) [2012] ZAECPEHC 71; *Noqekwa v Noqekwa* (2456/2012) [2013] ZAECPEHC 1 and *Family Advocate v R* (2004/2012) [2013] ZAECPEHC 10.

<sup>261</sup> *R v R* (292/2014) [2014] ZAFSHC 190; *Mankalemeng v Ramathe* (3071/2011) [2011] ZAFSHC 101.

<sup>262</sup> *R v T* (3619/2014) [2015] ZAFSHC 228; *M v M* (5710/2010) [2014] ZAFSHC 170; *Kabagambe v Kabagambe* (3379/2013) [2013] ZAFSHC 180 and *Ramabolu v Mathibela* (2849/2012) [2013] ZAFSHC 79.

<sup>263</sup> *TMC v TC* (268/2013) [2013] ZANHC 25 and *S v JGS* (304/2006) [2011] ZANHC 29.

<sup>264</sup> *Paterson v Chinn* (14057/2014) [2015] ZAKZDHC 73 and *E v E* (3718/2013) [2014] ZAKZDHC 10.

used section 7—the others departed from the list.<sup>265</sup> In the North-West High Court, Mafikeng there were only two relevant cases for this study and neither made reference to section 7 list.<sup>266</sup> In the Western Cape High Court, Cape Town the court heard six cases and only one<sup>267</sup> used the section 7 list.<sup>268</sup> And in Limpopo, none of the cases were relevant for this paper.

Therefore, based on the investigation that was conducted, only 17 of the 54 cases used section 7 of the Children's Act. This is a disappointing 31 percent of the cases. The courts are clearly going in a direction that does not preserve the expectations of the SALRC when it brought the formal list of factors into the Children's Act.

It is important to remember that the section list 7 was created in order to aid with child protection, and to conclude that only 31 percent of divorce cases have used the section 7 list is worrying. The courts are clearly demonstrating carelessness in wanting to protect children. They are not considering the fact that they are using common law which predates constitutional and international obligations, therefore lacking a human-rights-based approach.

Indeed, there are provisions in common law which are relevant for the best interests of the child standard, but the courts do not have the authority to use such sources because such sources have been developed and legislated to reflect the values of the Constitution.

#### 4.5 The Contrast in the Cases

The above statistics have highlighted how the courts are not consistent with the provisions they use in establishing the best interests of the child. The next section is therefore an outline of how the outcomes of the courts can be affected by the inconsistency.

The first case to be discussed is *Caprari v Du Toit*<sup>269</sup>. This case concerns two parties who had previous court cases concerning the custody of their daughter. The

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<sup>265</sup> *Central Authority for the Republic of South Africa v Ashmore* (10839/14); *Central Authority For The Republic of South Africa v N* (1876/2014) [2015] ZAKZDHC; *M K v R K* (168413/2013) [2013] ZAKZDHC 51 and *Jones v De Lange* [2011] ZAKZPHC 31; AR458/2010.

<sup>266</sup> *T R M v E M* (2540/2007) [2013] ZANWHC 62 and *Pretorius v Pretorius* (168/2010) [2011] ZANWHC 46.

<sup>267</sup> *C M v N G* (8026/2011) [2012] ZAWCHC 37; 2012 (4) SA 452 (WCC); [2012] 3.

<sup>268</sup> *P P v C P* (15992/2012) [2012] ZAWCHC 322; *M M v A V* (2901/2010) [2011] ZAWCHC 425; *Sarantos v Sarantos* (7670/2011) [2011] ZAWCHC 199; *Nel v Nel* (1986/2011) [2011] ZAWCHC 113.

<sup>269</sup> *Caprari v Du Toit* supra (n255).

applicant (father) had a history of violence and as a result, the respondent (mother) denied him access and contact with their daughter. However, the father had made psychological progress by attending anger management classes.

The court looked at the case in light of section 7 of the Children's Act and many factors that could impact the outcome of the court. For example, the court looked into the needs of the child to be protected from harm in light of the fact that the father had received psychological help and would not be a threat to the child.

Secondly, the court analysed a very important element that the author had mentioned earlier in the paper, and that is; the 'best interests' of the child must be child-centred and not about depriving the other parent of custody of the child as a method of punishing the other parent. The court therefore concluded that the act of depriving the father from having contact with his daughter was an act of 'alienation parental syndrome'.<sup>270</sup> The case therefore concluded in allowing the father contact with the daughter because this was in the best interests of the child.

The case of *B v B*<sup>271</sup> may have had a different outcome if the courts had used the section 7 list to make a decision pending the outcome of a divorce. This case involved an appellant (mother) who approached the court seeking primary care for two minor children who were in the care of the respondent (father). The court analysed the case by looking solely at the fact that there was no evidence supporting the fact that the appellant was a bad mother. However, the court did not investigate the capabilities of the father for being a good parent.

There are many factors in the section 7 list that the court could have considered in order to ascertain which parent was more capable of protecting the welfare of the children, such as the attitude of the parents towards the children, the needs of the children to remain with whichever parent, whether it would be in the best interests for the children to be separated or both live with the custodian-parent<sup>272</sup> and the nature of the relationship of the father with the children.

This case is evidence of how the court's actions of not applying the section 7 list is reversing the progress of the 'best interests of the child' back to the passed

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<sup>270</sup> Ibid. para 11.

<sup>271</sup> (4001/2015) [2015] ZAECPHC 56.

<sup>272</sup> In *R v R* supra (n261) the Family Advocate addressed the issue in cases where there is more than one child, and therefore recommended that the children must not be separated. However, the court held analysed that the children formed different bonds with each parent, and therefore the children were separated where the applicant was given custody of the older minor and the respondent was given the younger minor.

inadequacies of the law. The *B v B* case clearly used the ‘maternal preference’ principle by their willingness to look into how fit the mother is and not the father, and if the mother was unfit then the court would have been in favour of the father.

Many other cases have resorted to merely stating that the matter should be assessed based on the best interests of the child, but the courts do not substantiate how they reach their conclusions.<sup>273</sup> The omission by the courts will result in creating further confusion with the parties involved in the cases.

*Ngobeni v Ngobeni*<sup>274</sup> is one of the cases that used the problematic *McCall*-list. This case involved a couple who approached the court on a number of issues. First, the parties sought for a decree of divorce, secondly, the plaintiff wanted the defendant to ‘forfeit benefits arising from the marriage in community of property’<sup>275</sup>; thirdly, the plaintiff wanted custody of the minor children as well as maintenance of the children. The other issues had not been mentioned in the case because the parties had agreed on a settlement for those issues.

A Family Advocate was appointed by the court to investigate the case in order to determine the issue of care and contact. The court then ordered that the children should remain in the care of the mother (defendant) pending the outcome of the report of the Family Advocate.

Msimeki J disregarded the report of the Counselling Psychologist because she had not interviewed the Plaintiff, and the Family Advocate shared the same concerns as the court with regard to the report. Furthermore, the court also found that the Family Advocate’s report was immaterial to the case because it the report took into account past circumstances, whereas the court was looking into present circumstances

Rather, the mother’s unchallenged evidence revealed that her new home was nearby one of the minor’s school, and the other minor’s crèche was close to her workplace. Furthermore, she added in her testimony that it took her less than 10 minutes to reach the children should there be a crisis. The court went on to assess other aspects of the defendant’s life and found no evidence that the child would be in danger if they were left in her care. At the same time, the court found that both parents were good parents and it was upon the court to determine what is best in the

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<sup>273</sup> *G v G* supra (n256); *JE v NM* supra (n256); *B v B* supra (n256) and a majority of the cases cited in the investigation of the various cases that did not use the section 7 list.

<sup>274</sup> See also *D v D* supra (n256).

<sup>275</sup> *Ngobeni v Ngobeni* supra (n249) para 1.

interest of the children by assessing which parent who was better suited to ‘promote and ensure the physical, moral, emotional and spiritual welfare of the minor children.’<sup>276</sup>

The most important aspect of this case came when the courts had to decide on the welfare of the child and how the court had decided to assess the welfare. It is important to note that this case was heard after the commencement of section 7 of the Children’s Act and yet the court neglected to use the list of factors in section 7 in order to decide the best interests of the child. Rather, the case made reference to the common law interpretation of ‘the best interests’ principle.

‘I have duly considered the cases of *Van Pletzen v Van Pletzen* 1998(4) SA 95 (OPD), *McCall v McCall* (supra) and *Fletcher v Fletcher* 1948(1) SA 130 (A) to which [the Plaintiff’s representative] referred me.’<sup>277</sup>

Remarkably, the Court had made reference to sections 18<sup>278</sup>, 19<sup>279</sup> and 20<sup>280</sup> of the Children’s Act– all sections that commenced on the same day as sections 7 of the Children’s Act.<sup>281</sup> Several other cases were also selective in which sections of the Children’s Act to apply, with particular reliance on section 9 and section 18 of the Act.<sup>282</sup>

Therefore, the court had disregarded the Children’s Act provisions for the best interests of the child, whereas these courts have been instructed that they ‘must’ use the section to decide on matters concerning the child. The court then held that the children should remain in the care of the defendant because the plaintiff could not prove that the status quo was detrimental to the children.

Another case that disregarded section 7 of the Children’s Act is *Blumenow v Blumenow*.<sup>283</sup> This case concerned an applicant (mother) and respondent (father) who had a pending divorce case and approached the court to determine the best interests of the child pending the finalisation of the divorce case. The children had

<sup>276</sup> *Ngobeni v Ngobeni* supra (n249) para 12.

<sup>277</sup> *Ngobeni v Ngobeni* supra (n249) para 14.

<sup>278</sup> Parental responsibilities and rights.

<sup>279</sup> Parental responsibilities and rights of mothers.

<sup>280</sup> Parental responsibilities and rights of married fathers.

<sup>281</sup> Commenced 7 July 2007. See also *N v N* (926/13) 2014 ZAECPHC 6.

<sup>282</sup> *Anspach v Opland* supra (n256); *G v G* supra (n256) only mentions the fact that the relocation must be in the best interests of the Children’s Act– which is in terms of s 9 of the Act; *Ramoloto v Ramoloto* supra (n258) this case looked at s 28(2) and 29(1) of the Constitution, and sections 8(2) and 3 of the Children’s Act; *T v D* supra (n258) mentioned s 36 of the Children’s and *Family Advocate v F ; F v F* supra (n258) mentioned the best of the child in terms of section 9 of the Children’s Act.

<sup>283</sup> [2008] JOL 21382 (W).

been temporarily placed in the care of the father and the mother wanted the children placed in her care.

The father stated that the mother had a history of outbursts, and was therefore not a person who could be trusted with the children because of previous threats to commit suicide and kill the children as well. The mother denied these allegations, and the court went on to attempt to determine the ‘best interests of the child’ based on the evidence brought before the court.

This case is different from the previously discussed case because this case mentions section 7 of the Children’s Act, but does not use it to determine the best interests of the child.<sup>284</sup> Rather, Moshidi, J used the *McCall* case to decide the case, and mentioned all the factors from the *McCall* list and none from section 7 of the Children’s Act. The attitude shown by the court towards section 7 of the Children’s Act clearly demonstrates a lack of faith in resolving the dispute between the parties; as the Judge found better comfort in common law than in legislation.<sup>285</sup>

Another area of divorce law that has become of great concern in deciding the best interests of the child is with the relocation of a parent. In such cases, the court is left to decide which situation is better suited for the child’s best interest. Relocation is in essence when the custodian parent decides to relocate after or during divorce proceedings, and the relocation limits or eliminates the rights of the non-custodian parent to have contact and access to the child.<sup>286</sup>

Unfortunately, there is an omission in this area of relocation because the Children’s Act does not make provision for consent procedures for relocation. Rather, the courts apply section 18 of the Children’s Act in order to justify the fact that a parent who wishes to relocate outside of South Africa should have consent of the other parent.<sup>287</sup>

In *J v J*<sup>288</sup> the court held that it is generally in the best interests of the child to remain with the custodian parent, and therefore the child would reside where the primary caregiver resides. This is particularly the case if the parent was initially awarded the custody. Thus, in spite of the refusal from a co-holder of parental

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<sup>284</sup> *Blumenow v Blumenow* supra (n271) para 25. The Moshidi, J does not even list the factors from the Children’s Act.

<sup>285</sup> See also *R v R* 1452/2008 (2009, GNP) unreported.

<sup>286</sup> W Domingo ‘“For the sake of the children”: South African Family Relocation Disputes’ (2011) 14 *PER/PELJ* 1. See section 18(2)(a) of the Children’s Act, which provides that the parents have the right to care for the child.

<sup>287</sup> Domingo op cit (n286) 4.

<sup>288</sup> 2008 6) SA 30 (C) para 31.

responsibilities and rights, a primary caregiver's reasonable choice to relocate will generally be approved by the court.<sup>289</sup>

However, section 31(2) of the Children's Act, states that before major decisions are made concerning the child, the co-holder of parental responsibilities must consider the effect the new arrangements will have on the co-holder of responsibilities and rights.<sup>290</sup> Therefore, in relocation cases, it means the court must consider the rights of the co-holder guardian who will be left behind, as well as the impact of the relocation to the child. Therefore, when evaluating the child's best interests, the courts must not automatically conclude that the proposed relocation is essentially compatible with the welfare of the child.<sup>291</sup>

Thus, the courts should be turning to section 7 of the Children's Act in order to determine the best interests of the child. There is however some inconsistency: some courts look at section 7 and other courts blatantly ignore the provision. The courts that have used the principle include *De Groot v De Groot*<sup>292</sup> and *AC v KC*<sup>293</sup>, but *MK v RK*<sup>294</sup> chose to rely on past cases in order to determine the best interests of the child instead.

The impact of the inconsistency affects all the parties involved. First, prior to approaching the court, the legal representatives of the parties refer to all sources, including international law, the Constitution, legislation, common law and case law. When looking at case law, the purpose is attempting to ascertain the views of the courts so that they can prepare a case for the courts. Therefore, if the cases are unpredictable and inconsistent in their interpretation of the interests of the child, it becomes almost impossible for the legal representatives to prepare a good case for their client.

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<sup>289</sup> A Skelton 'Parental responsibilities and rights' in Boezaart (ed) *Child Law in South Africa* 88. See also *HG v CG* 2010 (3) SA 352 (ECP) the court refused permission to a mother who wished to emigrate with her children. The court held that the relocation would not be in the best interests of the children, particularly because it would interfere with their relationship with their father.

<sup>290</sup> This is important because, as was mentioned earlier, children's rights are not the only rights which are considered in child-related cases.

<sup>291</sup> Skelton op cit (n289) 88.

<sup>292</sup> 1408/2009 ZAECMHC unreported. See Skelton op cit (n289) 90. Skelton states that the judgment focused more in the best interests of the child than the issue of whether the applicant has a coherent plan. *Paterson v Chinn* supra (n264) and *E v E* supra (n256).

<sup>293</sup> (A389/08) [2008] ZAGPHC 369. The case even complained that the lower court did not deal 'with all the aspects that the legislature regarded as important as contained in section 7'.

<sup>294</sup> 17189/08 ZAGPJHC 2009 unreported. See also *Central Authority For The Republic of South Africa v N* supra (n265); *Central Authority for the Republic of South Africa v Ashmore* supra (n265); *Central Authority for the Republic of South Africa v MA* (11/39798 (2012/1096)) [2012] ZAGPJHC 45; *P P v C P* supra (n269) relied on a factor from the *McCall* case relating to the preference of the child; *B v B* supra (n256).

Evidently, the result of poorly prepared cases will result in the parties being robbed of a fair trial because the courts are failing to do their job accordingly. The impact of an unfair trial not only affects the parents or caregivers, but the children too. The conclusion of an unfair cases might not be what is best for the child because the cases are not considering the relevant factors, and the child may not be placed in the best conditions for his or her welfare.

Some authors state that there is not a checklist that could possibly eliminate the indeterminate nature of the ‘best interests’ standard. But at the same time Ferreira<sup>295</sup> acknowledges the fact that the list in section 7 has given clearer dimensions for the best interests of the child and it goes a long way in assisting with the application of the best interests of the child standard.

The clear guidelines of the section 7 list make the task of determining the best interests of the child much easier. It therefore does not make sense why the courts are still relying on common law in determining what is best for children in divorce cases.

Furthermore, various professionals that work in the field of children have different views and understandings on the best interests of the child<sup>296</sup>, and this may cause confusion in the application of the standard in court. This is understandable because value systems of the decision-makers may also influence the interpretation of the standard<sup>297</sup> and all the professions have different value systems. This may possibly be contributing to the inconsistency in deciding which source of law to use in child-related cases.

#### 4.6 Conclusion

As shown in this chapter, there is clearly an alarming confusion in the divorce court. The Chapter started by mentioning the difficulties that are attached to the breakdown of a family through divorce. The children and parents experience many emotions of heartache and strain and therefore, the court proceedings of divorce should not add to the difficulties. That is to say, the courts must apply the correct laws and ensure that the court proceedings are not prolonged.

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<sup>295</sup> Bainham *Children: The Modern Law* (3<sup>rd</sup> ed. 2005) at 42; S Ferreira ‘The best interests of the child; from complete indeterminacy to guidance by the Children’s Act (2010) 73 *THRHR* 212-213.

<sup>296</sup> EEA Lambiase and JW Cumes ‘Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?’ (1987) 104 *SALJ* 706–707.

<sup>297</sup> P Alston ‘The best interests principle: Towards a reconciliation of culture and human rights’ (1994) 8 *JLPPF* 21.

The author has proved that the courts are failing to apply the correct laws to bring justice to the children in divorce cases. Through the comparison of the cases that have used the section 7 list and those who have not, the author has shown that the courts reach decisions that are well balanced when they apply the section 7 list.

For example, the *Caprari v Du Toit* applied the section 7 list by balancing all the relevant factors in the case; the mental and physical state of the father, the mothers selfishness of depriving the father parental rights, and most importantly, the case looked carefully at how the father had improved and to deprive him parental rights would not be in the best interests of their daughter.

The 69 per cent of the cases that did not use the section 7 list failed to explain the reasoning of their decisions. As mentioned earlier, the best interests of the child is supposed to make the parties understand the reasons for the outcomes of the courts, bring justice to the life of the child, promote their constitutional rights and ensure that the cases do are not prolonged. And poor outcomes of cases fail to do this. The courts need to use the section 7 list and halt from referring back to the common law precedent that will not ensure children the justice they are entitled to.

In the same light, it is also important to note the consequences of the courts inconsistency do in essence interfere with the fairness of the cases. The Constitution warns against the unfair trials in court proceedings.<sup>298</sup> If the parties are repeatedly confused with the decisions and do not receive justifiable reasons for the findings, then the courts are creating unfair outcomes in the divorce court. Furthermore, an unfair trial also impacts the child because then it means that the courts not fully committed to protect the child. If the courts proceed with this behaviour, it will result in more unfair cases in divorce proceedings.

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<sup>298</sup> S 35(3) of the Constitution.

## CHAPTER FIVE

### 5 CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

The aim of this paper was to bring clarity into the development and growth of the best interests of the child in light of international law, legislation, common law and case law. The purpose of going into detail with the different sources of law was to bring focus to the understanding of the importance of protecting the children in all matters concerning the child, thereby highlighting how important it is for the courts to take note of the significance of this principle.

The author used the reasons and intentions of the section 7 list throughout the paper to prove why the courts need to be turning to the section 7 list as opposed to turning to common law. The reasons have been clear from the first chapter of this paper. The section 7 list was created because the common law precedent repeatedly failed to meet the Constitutional demands.

The author went further and emphasised the fact the section 7 list promotes other constitution such as the child's human dignity, right to equality, health care, food and social security and the right to an environment that will is not harmful for their health and wellbeing. These are some of the rights the *McCall*-list failed to uphold because of its unconstitutionality and lack of human rights based factors.

The *McCall*-list did play a significant role because some parts of the list do conform to the protection of children, however; not all the sections were constitutional or promoted the protection of children's rights as envisaged in the international treaties. The author also proved how the application of the *McCall*-list was reversing the hard work that was invested in creating a list that would help the courts reach decisions that were in the best interests of the child.

The intentions of the section 7 list also proved why and how the application of the section 7 list was the appropriate method. The intention was to serve the best interests of the child. The author proved this by contrasting the different outcomes of the cases. This verified that some of the cases would might have had a different and more constitutional outcome if the courts had used some of the section 7 factors.

Apart from the criticism that the best interest is vague, some have also declared the standard to be indeterminate.<sup>299</sup> This is not necessarily a disadvantage because it is the indeterminacy that makes it flexible and adaptable. In the case of

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<sup>299</sup> *S v M* supra (n19) para 23.

*Minister of Welfare and Population Development v Fitzpatrick*<sup>300</sup> the court stated that ‘it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.’

Furthermore *S v M*<sup>301</sup> states that ‘the contextual nature and inherent flexibility’ of the standard constitute ‘the source of its strength.’ The flexibility and adaptability of the principle is what ensures that it never gets outdated. Therefore, the very same aspects that make the best interests problematic, have also made it a concept trouble-free.<sup>302</sup>

Furthermore, section 9 of the Children’s Act also echoed section 28 of the Constitution by stating that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance. The section 7 list connects to these sections by guiding the courts to decisions that are in line with the constitutional obligations of child protection.

The real focus of this paper was proving that the application of these sections should be applied in divorce cases as well. Unfortunately, this has not been the case in all cases that appear before the court. This has therefore contributed to some authors finding section 7 rather disappointing.<sup>303</sup>

When the SALRC compiled their report, they did so with the intention of creating a statute that would protect children and create a method that would make it easier for the courts to follow. As much as the courts analyse parental rights and responsibilities in terms of the Children’s Act extensively, the courts cannot ‘pick and choose’ which sections to use and which to disregard in the Act itself.

There is a mandate to serve the best interests of the child and to ensure justice to child. The courts need to adhere to this mandate by applying the correct legislation that has proved to carry those values of protection.

## 5.1 RECOMMENDATIONS

The Children’s Act has a few problems in itself. First of all, as identified earlier in the paper, the section 7 list is a closed list and it does not allow for other factors to be looked at when assessing the best interests of the child. This can be corrected by

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<sup>300</sup> See *Minister of Welfare and Population Development v Fitzpatrick* supra (n17) para 18.

<sup>301</sup> *S v M* supra (n19) para 24.

<sup>302</sup> Ibid.

<sup>303</sup> See Heaton op cit (n142) 180; L Shafer *Child Law in South Africa: Domestic and International Perspectives* (2011) 159.

an amendment of the section 7 list, and this would hopefully discontinue the courts reluctance to use section 7 of the Children's Act.

Secondly, the Children's Act should make provision for cases where one of the parties decides that they wish to relocate. This is a very complex situation because it impacts all the parties involved; the child will have to adjust to being away from the other parent, as well as deal with the challenges of moving to a new location, the parent that is left behind will not be able to have parent time with the child as frequently, especially in cases where the relocation is to another country that is far from the place of origin. Therefore, the Children's Act must attend to this grey area of child law

The next recommendation is with reference to the court and its application of the best interests of the child principle in light section 7 of the Children's Act. From the literature and cases that were used in this case, the author did not encounter any complaints from the court that could explain why they are adamant in using common law as their main reference of law. The courts are demonstrating an undermining attitude toward section 7 of the Children's Act, and all the work that has been invested in compiling the list of factors.

The decision-makers should express their problem with section 7 and state what needs to be fixed in order to make it easier for them to depart from using the *McCall*-list of factors to determine the best interests of the child. And in some cases, the courts do not use the *McCall*-list.

Therefore, there is clearly confusion that needs to be cleared with regard to the best interests of the standard principle in South Africa. If this is not done, then the courts will continue to dishonour the best interests of the child. And this will continue to bring injustice to children.

## BIBLIOGRAPHY

### Primary Sources

#### *International Instruments*

Geneva Declaration of the Rights of the Child of 1924, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations.

United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969.

#### *Statutes*

##### **South Africa**

Age of Majority Act 57 of 1972

Children's Act 38 of 2005

Children's Status Act 82 of 1987

Criminal Procedure Act 51 OF 1977.

Divorce Act 70 of 1979

Domestic Violence Act 116 of 1998

Films and Publications Act 65 of 1996

Guardianship Act 192 of 1993

Maintenance Act 99 of 1998

Mediation in Certain Divorce Matters Act, 1987

Natural Fathers of Children born out of Wedlock Act 86 of 1997

South African Schools Act 84 of 1996.

**England**

English Family Law 1996

**Ghana**

Ghanaian Children's Act 560 of 1998

**Uganda**

Ugandan Children's Act 6 of 1996

**Cases**

*AC v KC* (A389/08) [2008] ZAGPHC 369

*Anspach v Opland* (2015/28396) [2015] ZAGPJHC 200

*B v B* (15073/210) [2011] ZAGPJHC 132

*B v B* (1512/2015) [2015] ZAECPEHC 29

*B v B* (902/2011) [2014] ZAECPEHC 82

*B v B* (4001/2015) [2015] ZAECPEHC 56

*B v G* (2009/34223) [2011] ZAGPJHC 166; 2012 (2) SA 329 (GSJ)

*B v M* 2006 (9) BCLR 1034 (W)

*Baloyi v Baloyi* (6208/2014) [2015] ZAGPPHC 728

*Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC)

*Bethell v Bland* 1996 (2) SA 194 (W)

*Blumenow v Blumenow* [2008] JOL 21382 (W)

*Caprari v Du Toit* (11120/2002) [2014] ZAGPJHC 286

*Celimene v Scholtz* (11/10778) [2011] ZAGPJHC 170

*Central Authority (Republic of South Africa) v R* (28983/2014)

*Central Authority for the Republic of South Africa v Ashmore* (10839/14)

*Central Authority for the Republic of South Africa v B* (2011/21074) [2011] ZAGPJHC 191; 2012 (2) SA 296 (GSJ); [2012] 3 All SA 95 (GSJ)

*Central Authority for the Republic of South Africa v K* (2013/47006) [2014] ZAGPJHC 373; 2015 (5) SA 408 (GJ)

*Central Authority for the Republic of South Africa v MA* (11/39798 (2012/1096) [2012] ZAGPJHC 45

*Central Authority for the Republic of South Africa v N* (1876/2014) [2015] ZAKZDHC

*Centre for Child Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC)

*Chodree v Vally* 1996 (2) SA 28 (W)

*CM v NG* (8026/2011) [2012] ZAWCHC 37; 2012 (4) SA 452 (WCC)

*D v D* (2012/47100) [2014] ZAGPJHC 132

*De Groot v De Groot* 1408/2009 ZAECMHC

*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 SA 406 (CC)

*Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC)

*Duncan v Coetzee* (3888/11) [2012] ZAECPEHC 71

*Dunsterville v Dunsterville* 1946 NDP 594

*E v E* (3718/2013) [2014] ZAKZDHC 10

*Erasmus v Eksteen* (77910/10) [2011] ZAGPPHC 3

*Ex parte Critchfield* [1999] 1 All SA 319 (W); 1999 (3) SA 132 (W)

*Ex parte Le Grange; Le Grange v Le Grange* (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG)

*F v R* (2013/24018) [2013] ZAGPJHC 221

*Family Advocate v F; In re: F v F* (3245/14, 3454/14) [2015] ZAECPEHC 93

*Family Advocate v R* (2004/2012) [2013] ZAECPEHC 10

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

*Fortune v Fortune* 1995 (3) SA 348 (A)

*French v French* 1971 (4) SA 298 (W)

*G v G* (32377/12) [2015] ZAGPJHC 34

*GCH v GNB* (35322/2012) [2012] ZAGPPHC 218

*Goliath v Hutchinson* (280/2011) [2011] ZAECGHC 12

*Governing Body, Gene Louw Primary School v Roodtman* 2004 (1) SA 45 (C)

*H v H* (2262/2015) [2015] ZAECPEHC 45

*Herbst v Ossemane* (2009/2024) [2011] ZAGPJHC 246

*Heuer v Bruce-Alexander* (EL1426/20101) [2012] ZAECGHC 66; 2012 (6) SA 41 (ECG)

*HG v CG 2010* (3) SA 352 (ECP)

*HS v WCS* (3524/09) [2012] ZAGPPHC 125

*J v C* 1970 AC 668

*JE v NM* (38571/2013) [2014] ZAGPJHC 175

*Jones v De Lange* [2011] ZAKZPHC 31; AR458/2010

*K v M* (57613/2014) [2015] ZAGPPHC 335

*Kabagambe v Kabagambe* (3379/2013) [2013] ZAFSHC 180

*Kaiser v Chambers* 1969 (4) SA 224 (C)

*Klare v Klare* 2010 JOL 25922 (ECP)

*Kok v Clifton* (2) SA 326 (W)

*M K v R K* (168413/2013) [2013] ZAKZDHC 51

*M v M* (5710/2010) [2014] ZAFSHC 170

*M v R* 1989 (1) SA 414 (O)

*Mabika v Mabika* (2011/10308) [2011] ZAGPJHC 109

*Mankalemeng v Ramathe* (3071/2011) [2011] ZAFSHC 101

*Manning v Manning* 1975 (4) SA 659 (T)

*McCall v McCall* 1994 (3) SA 201 (C)

*Metiso v Padongelukfonds* 2001 (3) SA 1142 (T)

*Meyer v Gerber* 1991 (3) SA 650 (O)

*Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC)

*MK v RK* 17189/08 ZAGPJHC 2009

*MM v AV* (2901/2010) [2011] ZAWCHC 425

*Mohaud v Mohaud* 1964 (4) SA 348 (T)

*MS v NWB* (46820/201) [2013] ZAGPPHC 251

*Myers Leviton* 1949 (1) SA 203 (T)

*N v N* (14/29348) [2014] ZAGPPHC 588

*Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A)

*Ncube v Duba, Ncube v Duba* (23010/2004, 51561/2010) [2011] ZAGPPHC 61

*Nel v Byliefeldt* 2015 ZAGPPHC 386

*Nel v Nel* (1986/2011) [2011] ZAWCHC 113

*Noqekwa v Noqekwa* (2456/2012) [2013] ZAECPEHC 1

*Nugent v Nugent* 1978 (2) SA 690 (R)

*O v O* [2011] ZAGPPHC 182; 35432/2008, 42644/2010, 40419/201

*P v CP* (15992/2012) [2012] ZAWCHC 322

*Paterson v Chinn* (14057/2014) [2015] ZAKZDHC 73

*Pinion v Pinion* 1994 (2) 725 D

*Potgieter v Potgieter* [2007] 3 All SA 9 (SCA)

*Pretorius v Pretorius* (168/2010) [2011] ZANWHC 46

*R v M* (42335/2014) [2015] ZAGPJHC 183

*R v R* (292/2014) [2014] ZAFSHC 190

*R v R* (1452/2008) 2009, GNP

*R v T* (3619/2014) [2015] ZAFSHC 228

*R v T* (89753/14) [2015] ZAGPPHC 21

- Ramabolu v Mathibela* (2849/2012) [2013] ZAFSHC 79
- Ramoloto v Ramoloto* (32403/2011) [2015] ZAGPPHC 877
- S v J G S* (304/2006) [2011] ZANCHC 29
- S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)
- Sarantos v Sarantos* (7670/2011) [2011] ZAWCHC 199
- Schwartz v Schwartz* 1984 (4) SA 467 (A)
- Soller v Maintenance Magistrate Wynberg* 2006 (2) SA 66 (C)
- Sonderup v Tondeli* 2001 (1) SA 1171 (CC)
- Stock v Stock* 1981 (3) SA 1280 (A)
- T M C v T C* (268/2013) [2013] ZANCHC 25
- T v D* (64290/14) [2015] ZAGPPHC 314
- Tabb v Tabb* 1909 TS 1033
- TRM v E M* (2540/2007) [2013] ZANWHC 62
- Tromp v Tromp* 1956 (4) SA 738 (N)
- V v V* 1998 (4) SA 169 (C)
- Van Deijl v Van Deijl* 1966 (4) SA 260 (R)
- Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O)
- Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W)
- Van Rooyen v Van Rooyen* 2001 2 All SA 37 (T)
- W v W* (2875/2015) [2015] ZAECGHC 78
- Wheeler v Wheeler* [2011] 2 All SA 459 (KZP)

#### Secondary Sources

##### ***Books and Chapters in books***

Bainham A *Children: The Modern Law* 3<sup>rd</sup> ed. (2005) Family Law, Bristol.

Barratt A ‘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) Juta, Cape Town.

- Bennett TW *Human rights and African Customary Law under the South African Constitution* (1999) Juta, Cape Town.
- Boezaart T *Child Law in South Africa* (2009) Juta, Cape Town.
- Breen C *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002) Nijhoff, The Hague.
- Buck T *International Child Law* 3<sup>rd</sup> ed. (2014) London, Routledge, Taylor & Francis.
- Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2002) Juta, Cape Town.
- Dausab, Y 'The best interests of the child' in Ruppel O (ed) *Children's Rights in Namibia* (2009) MacMillan, Windhoek.
- Davel CJ (ed) *Introduction to Child Law in South Africa* (2001) Juta, Cape Town.
- Davel CJ and Skelton A *Commentary on the Children's Act* (2007) Juta, Cape Town.
- Detrick S, Doek J, and Cantwell N *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (1992) Nijhoff, Dordrecht.
- Domingo W and A Barratt 'Parent and child' in Barratt A (ed) *Law of Persons and the Family* (2012) Pearson, Cape Town.
- Dugard J *International Law* (1994) Juta, Cape Town.
- Freeman MDA and Veerman P *The Ideologies of Children's Rights* (1992) Nijhoff, Dordrecht.
- Freeman MDA *The Moral Status of Children: Essays on the Rights of the Child* (1997) Nijhoff, Dordrecht.
- Freeman MDA *The Rights and Wrongs of Children* (1983) Pinter, London.
- Glasser N 'Custody on divorce: assessing the role of the Family Advocates' in S Burman (ed) *The Fate of the Child: Legal decisions on Children in the New South Africa* (2003). Juta, Cape Town.
- Heaton J *The Law of Divorce and Dissolution of Life-Partnerships in South Africa* (2015) Juta, Cape Town.

- Heaton J *The Law Of Persons and Family Law* (2008) Lexis Nexis, Durban.
- Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) Pretoria University Law Press, Pretoria.
- Lee RW and Honoré T *Family, Things and Succession* (1983) Butterworths, Durban.
- Lopatka A 'The rights of the child are universal: the perspective of the UN Convention on the Rights of the Child' in MDA Freeman and P Veerman (eds) *The Ideologies of Children's Rights* (1992) Nijhoff, Dordrecht.
- Maidment S *Child Custody and Divorce: The Law in Social Context* (1984) Croom Helm, London.
- Palmer A 'The best interests criterion: an overview of its application in custody decisions relating to divorce in the period 1985-1995' in R Keightley (ed) *Children's Rights* (1996) Juta, Cape Town.
- Parker S 'The best interests of the child- principles and problems' in Alson (ed) *The Best Interests of The Child: Reconciling Culture and Human Rights* (1994) Clarendon Press, Oxford.
- Robinson JA 'Children and divorce' in Davel *Introduction to Child Law in South Africa* (2000) Juta, Cape Town.
- Robinson JA *The Law of Children and Young Persons* (1997) Butterworths, Durban.
- Shafer L *Child Law in South Africa: Domestic and International Perspectives* (2011) Lexis Nexis, Durban.
- Skelton A 'Parental responsibilities and rights' in Boezaart T (ed) *Child Law in South Africa* (2009) Juta, Cape Town.
- Van Buren G 'The United Nations Convention on the Rights of the Child: an evolutionary revolution' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town.
- Van Heerden B et al *Boberg's The Law of Persons and the Family* (1999) Juta, Cape Town.
- Verhellen E *Convention on the Rights of the Child* (2000) Nijhoff, Dordrecht.
- Viljoen F 'The African Charter on the Rights and Welfare of the Child' in CJ Davel. (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town.

Wallbank J, Choudhry S and Herring J *Rights, Gender and Family Law* (2009) Routledge, New York.

### ***Journal Articles***

Alston P ‘The best interests principle: towards a reconciliation of culture and human rights’ (1994) 8 *International Journal of Law Policy and the Family* 1.

Amato PR ‘The consequences of divorce for adults and children’ (2000) 62 *Journal of Marriage and Family* 1269.

Amato PR and Keith B ‘Parental divorce and adult well-being: a meta-analysis’ (1991) 53 *Journal of Marriage and the Family* 43.

Amato PR and Sobolewski JM ‘The effects of divorce and marital discord on adult children’s psychological well-being’ (2001) 66 *American Sociological Review* 917.

Banach B ‘The best interests of the child: decision-making factors. families in society’ (1998) 79 *The Journal of Contemporary Social Services* 331.

Bandman J ‘Do children have any natural rights?’ *Proceedings of 29<sup>th</sup> Annual Meeting of Philosophy of Education Society* (1973) 234.

Barratt A and Burman S ‘Deciding the best interests of the child: an international perspective on custody decision-making’ (2001) 118 *South African Law Journal* 556.

Bekink M ‘“Child Divorce”: a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents.’ (2012) 15 *PER* 191.

Bonthuys E ‘The best interests of children in the South African Constitution’ (2005) 20 *International Journal of Law, Policy and the Family* 23.

Burman S, Derman S and, Swanepoel L ‘Only for the wealthy? Assessing the future for children of divorce’ (2000) 16 *South African Journal on Human Rights* 535.

Chirwa D ‘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.

de Villiers B 'The rights of children in international law: guidelines for South Africa' (1993) 4 *Stellenbosch Law Review* 289.

Domingo W "'For the sake of the children": South African family relocation disputes' (2011) 14 *PER* 1.

Ferreira S 'The best interests of the child: from complete indeterminacy to guidance by the Children's Act (2010) 73 *THRHR* 203.

Kaime T 'The foundations of rights in the African Charter on the Rights and Welfare of the Child: a historical and philosophical account' (2009) 3 *African Journal of Legal Studies* 121.

Klaff RL 'The Tender years doctrine: a defense' (1982) 70 *California Law Review* 335.

Kruger JM 'State intervention and child protection measures in Scotland — lessons for South Africa' (2006) 39 *Comparative and International Law Journal of Southern Africa* 504.

Kurki-Suonio K 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective' (2000) 14 *International Journal of Law, Policy and the Family* 183.

Lamb ME, Sternberg KJ and Thompson RA 'The effects of divorce and custody arrangements on children's behaviour, development and adjustment' (1997) 35 *Family and Reconciliation Courts Review* 395.

Lambiase EEA and Cumes JW 'Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?' (1987) 104 *South African Law Journal* 704.

Nedelsky J 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 31.

Nhlapho RT 'International protection of human rights and the family: African variations on common theme (1989) 3 *International Journal of Law Policy and the Family* 2.

Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2001) 10 *International Journal of Children's Rights* 128.

Sloth-Nielsen J '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.

Sloth-Nielsen J 'Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401.

Songca R 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *Comparative and International Law Journal of Southern Africa* 344.

Viljoen F '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 *Comparative and International Law Journal of Southern* 205.

Visser PJ 'Some aspects on the "best interests" on the child principle in the context of public schooling' (2007) 70 *THRHR* 461.

Wood JJ, Repetti RL and Roesch SC 'Divorce and children's adjustment problems at home and school: the role of depressive/withdrawn parenting' (2004) 35 *Child Psychiatry and Human Development* 121.

Dausab Y 'The "best interests" of the child' (2010) 2 *Namibia Law Journal* 5.

### ***Other Publications***

Basson 'Perspectives on the best interests of the child: development in the interpretation and application of the principle.' LLM (Stellenbosch University) (2004)

Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court RP200/1997 Third and Final Report.

Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983.

Fagan P and Churchill A *The Effects of Divorce on Children* (2012) available from the Family Research Council (US) at <http://downloads.frc.org/EF/EF12A22.pdf>.

Mahery P, Jamieson L and Scott K (2011) *Children's Act Guide for Child and Youth Care Workers. Edition 1*. Cape Town: Children's Institute, University of Cape Town and National Association of Child and Youth Care Workers.

South African Law Commission (Project 110) 'Review Of The Child Care Act Report' (2002).

South African Law Commission Discussion Paper 103 (Project 110) 'Review of the Child Care Act' (2001).

South African Law Commission Issue Paper 13 (Project 110) 'The Review Of The Child Care Act First Issue Paper' (1998).

South African Law Reform Commission *Thirty Fourth Annual Report 2006/2007*.

Van Zyl LJ *Alternative Dispute Resolution in the Best Interests of the Child* LLD (Rhodes University) (1994).