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**"CHILD DIVORCE": A BREAK FROM PARENTAL RESPONSIBILITIES AND RIGHTS  
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BELIEFS OF THE PARENTS**

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## "CHILD DIVORCE": A BREAK FROM PARENTAL RESPONSIBILITIES AND RIGHTS DUE TO THE TRADITIONAL SOCIO-CULTURAL PRACTICES AND BELIEFS OF THE PARENTS

M Bekink \*

### 1 Introduction

The twentieth century has seen a dramatic shift in the law regarding the relationship between parents and children, both internationally and nationally. Whereas in the past the emphasis was on the rights and powers of parents (parental authority), the emphasis has moved towards a child-centred approach with the interest of children at the forefront.<sup>1</sup> Today parental authority is concerned more with parental responsibilities and duties, which should be exercised in the interest of children, rather than with parental rights and powers.<sup>2</sup> Internationally the *United Nations Convention on the Rights of the Child*<sup>3</sup> has set the stage for the enhancement of children's rights with the recognition of children as individuals worthy of protection in their own right. Nationally the new constitutional dispensation in South Africa, the ratification of the CRC and a recently-enacted *Children's Act*<sup>4</sup> have also given new meaning to the protection and the rights of children.<sup>5</sup> The *Constitution of the Republic of South Africa*, containing a comprehensive Bill of Rights, specifically protects and advances the rights of children in that it recognises that children, as a vulnerable group within society, have specific and unique interests different from those of adults, and that these interests deserve special and separate protection.

With the recognition of children as the holders of fundamental rights comes the possibility of conflict with the rights of other holders of human rights. This is possible especially within the family context, where different fundamental rights can come into

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<sup>1</sup> Heaton *South African Family Law* 271.

<sup>2</sup> Skelton "Parental Responsibilities and Rights" 62.

<sup>3</sup> This convention was passed by the General Assembly of the United Nations in 1989 and was ratified by South Africa in June 1994. Herein after referred to as the CRC.

<sup>4</sup> *Children's Act* 38 of 2005.

<sup>5</sup> Mahery "United Nations Convention on the Rights of the Child" 309.

conflict with one another, for instance between the parents' right to religious freedom and their children's rights to life and human dignity.<sup>6</sup> This requires a weighing or balancing act to determine which right must take preference. This balancing of interests often creates tension, which can have serious negative implications for those involved within the family context. The focus of this article is specifically directed at such a conflict of rights within the family unit between parents and their child.

In a recent ground-breaking case the South African courts were requested for the first time to use their discretion to interfere in the parent-child relationship, due to the *traditional socio-cultural beliefs* of the parents.<sup>7</sup> In what has been described as "every parent's nightmare; the fancy of many teenagers", a 16 year-old schoolgirl from Milnerton in the Western Cape asked to be "freed" from her parents to live semi-independently from them because of her unhappiness with the conservative manner in which her parents treated her. According to reports her parents come from a very conservative sector of South African society and kept her under constant supervision, barred her from talking to boys, communicating with friends on her cellular phone, reading what she likes (her parents find Harry Potter inappropriate) or even going out with friends after school.<sup>8</sup>

After considering the matter the judge assigned to the case granted her request to live semi-independently with a school friend and her family (called by the judge the host family) until she reaches the age of 18 (her majority). Her parents may have contact with her for two to three hours a week at a neutral venue and may phone her between 8:00 and 8:30 pm on a Tuesday and Friday. Holidays are to be shared between the host family and her parents, the first of which was to be taken with the

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<sup>6</sup> Bekink 2003 *THRHR* 246.

<sup>7</sup> Own emphasis added.

<sup>8</sup> Legalbrief TODAY, 10 June 2010 available at <http://www.legalbrief.co.za/article.php?story=20100610091458403> accessed on 15 June 2010. The said case was not reported, as only a declaratory order was handed down. Despite attempts by the author hereof to obtain copies of the legal arguments presented in court and the order given, the author was unable to obtain such documentation from the learned judge or the attorneys representing the girl. The reasons given were the sensitivity of the matter and the client's instructions. Reliance is therefore made on the media reports of the matter.

host family. Despite the fact that she will no longer be residing with her parents, they retain their responsibility to contribute to the maintenance of their child.<sup>9</sup>

This case represents an example of the difficulties involved when balancing the rights of a teenager<sup>10</sup> against those of the parents in matters of socio-cultural practice and belief. In a multi-cultural society such as South Africa the case raises numerous serious questions for other families. For instance, what standards will a court use to determine if parents are too conservative in bringing up their children and what factors will be taken into account? How much freedom and autonomy should children be given? How will courts prevent children from misusing the system just to get what their friends have? How bad must the situation be before children will be allowed to move out of their parents' home to live semi-independently? What role does the child's view play? And the ultimate question is are the rights of children superior to the traditional rights of parents in matters of socio-cultural practice with specific reference to their upbringing?

It is the aim of this contribution primarily to focus on the key questions mentioned above. They will be discussed not only from a South African point of view but also by taking into account regional and international conventions and legal requirements. Possible solutions for striking a balance between the rights of children and of parents will also be explored. Before these questions are explored a brief historical overview is provided of the development of parental responsibilities and rights in South Africa.

## **2 The historical development of parental responsibilities and rights**

### **2.1 Introduction**

In general the development of parental responsibilities and rights can be divided into two distinct eras. The first is the era before 1994 and the second refers to the era after 1994 when the African National Congress (ANC) came into power. The new ruling party introduced a new supreme Constitution with the enactment of the *Interim*

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<sup>9</sup> Legalbrief TODAY, 10 June 2010 available at <http://www.legalbrief.co.za/article.php?story=20100610091458403> accessed on 15 June 2010.

<sup>10</sup> Still legally a child. See s 28(3) of the Constitution.

*Constitution* of 1993<sup>11</sup> and thereafter the enactment of the *Constitution of the Republic of South Africa*, 1996.<sup>12</sup> Prior to 1994, parental responsibilities and rights were dealt with in terms of the common law and relevant statutes such as the *Divorce Act* 70 of 1979, the *Matrimonial Affairs Act* 37 of 1953, the *Child Care Act* 74 of 1983 and the *Guardianship Act* 192 of 1993. The era prior to 1994 is discussed first.

## 2.2 The pre 1994 disposition

Historically the relationship between parents and children in South Africa is one of parental authority or power and illustrates a distinctly paternalistic bias. Children simply had to respect the control and authority of their parents, because it was accepted that parents knew what was best for their children.<sup>13</sup> From the common law point of view the relationship between parent and child expressed itself primarily in the parental power over a minor child and in the mutual duty of support between parent and child.<sup>14</sup> This also included the right of parents to demand obedience from their children and to punish them in a reasonable and moderate manner.<sup>15</sup> The concept of parental authority thus entailed that parents had complete control over their children.

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<sup>11</sup> *Constitution of the Republic of South Africa Act* 200 of 1993.

<sup>12</sup> *Constitution of the Republic of South Africa*, 1996. Any reference hereinafter will be to the 1996 Constitution unless specifically stated otherwise.

<sup>13</sup> Robinson 2002 *Stell LR* 309. See also Van der Vyver and Joubert *Persone en Familiereg* 592, 595.

<sup>14</sup> Erasmus, Van der Merwe and Van Wyk *Family Things* 152.

<sup>15</sup> Visser and Potgieter *Introduction to Family Law* 199; Van Heerden *et al Law of Persons and the Family* 661; Van der Vyver and Joubert *Persone en Familiereg* 607. See also *R v Janke* 1913 TPD 385; *Vucinovich v Vucinovich* 1944 TPD 143; *Niemeyer v De Villiers* 1951 4 SA 100 (T); *Wolfson v Wolfson* 1962 1 SA 34 (SR); *Du Preez v Conradie* 1990 4 SA 46 (B) 5E-F. The married parents of a legitimate child and the mother of an illegitimate child automatically acquired all the elements of parental authority. Unmarried fathers of illegitimate children could not obtain any elements of parental authority but had to approach the High Court as the upper guardian to obtain an order granting them such rights. Finally parental authority could also be acquired by means of an adoption order. For more on the acquisition of parental authority see Skelton "Parental Responsibilities and Rights" 68; Louw *Acquisition of Parental Responsibilities and Rights*; *Van Erk v Holmer* 1992 2 SA 636 (W); *B v S* 1995 3 SA 571 (A); *Fraser v Children's Court Pretoria North* 1997 2 SA 261 (CC); and the *Natural Fathers of Children Born out of Wedlock Act* 86 of 1997. Section 21 of the *Children's Act* 38 of 2005 now allows for unmarried fathers to automatically acquire responsibilities in certain specified circumstances. See also Cronjé and Heaton *South African Family Law* 265.

This was, however, subject to the inherent authority of the High Court as the upper guardian to intervene in matters relating to parental authority. During the pre-constitutional period the High Court exercised this authority sparingly and only when required to do so.<sup>16</sup> Initially the court protected the sanctity of parental authority, as a good cause for intervention had to be shown.<sup>17</sup> This can be illustrated by the fact that it was initially held that special grounds, which *inter alia* included danger to a child's life, health, or morals had to be present before a court would exercise its discretion of interference.<sup>18</sup> The court later followed a more lenient approach that allowed for some interference in family life. In *Short v Naisby* the court held that each case had to be considered on its own merits, with the paramount consideration being whether the interest of the child demanded such interference.<sup>19</sup> The emphasis was thus shifted from "special grounds" to that of "the interest of the child".<sup>20</sup> The court in *S v L*<sup>21</sup> added that although it has a right as the upper guardian to interfere in family life the right was not limitless but should be exercised where the parents were unable to properly perform their duties themselves. The court also pointed out that it would not interfere with a parent's decision simply because it did not agree with the parents' decision.<sup>22</sup> Despite applying the principle of "the interests of the child" the pre-constitutional period of South African family law still tended to lean towards minimal state intervention.<sup>23</sup> Children were still not seen as members of a family with individual rights. This contributed *inter alia* to the vagueness of the concept of the "interest of the child" and the accepted viewpoint at the time that the integrity of the family and the autonomy of parents to raise their children as they saw fit should be respected.<sup>24</sup>

The parent-child relationship underwent a dramatic change, however, with the enactment of the Constitution and the recognition of children's rights in the Constitution itself and its Bill of Rights in particular.

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<sup>16</sup> See *Calitz v Calitz* 1939 AD 56; *Short v Naisby* 1955 3 SA 572 (D); and *Ex Parte D* 1958 2 SA 91 (GW).

<sup>17</sup> Clark 2001 *THRHR* 615.

<sup>18</sup> *Calitz v Calitz* 1939 AD 56 63.

<sup>19</sup> See also *Horsford v De Jager* 1959 2 SA 152 (N); *September v Karriem* 1959 3 SA 687 (C); and *Petersen v Kruger* 1975 4 SA 171 (C).

<sup>20</sup> Kruger *Judicial Interference with Parental Authority* 133.

<sup>21</sup> *S v L* 1992 3 SA 713 (E).

<sup>22</sup> *S v L* 1992 3 SA 713 (E) 701, 721E-J. See also Kruger 1994 *THRHR* 304.

<sup>23</sup> Kruger *Judicial Interference with Parental Authority* 497.

<sup>24</sup> Human 2000 *THRHR* 393-397.

### 3 Constitutional framework

With the enactment of first the *Interim Constitution* in 1993 and later the *Final Constitution* in 1996, South Africa's legal system changed dramatically from the previous system of parliamentary sovereignty to one of constitutional supremacy. This change also significantly impacted on the recognition of children's rights. One of the essential features of the new Constitution is the introduction of a comprehensive Bill of Rights as part of the Constitution, which Bill places a range of obligations on the state with regards to the promotion, protection and realisation of children's rights.<sup>25</sup> With the exception of the right to vote, children are entitled to all of the rights in the Bill of Rights. These include *inter alia* the right to equality, dignity, life, freedom, security of the person, housing, health care services, social security and education.<sup>26</sup> Apart from the rights afforded to everyone, children's interests have been given independent recognition in section 28 of the Constitution, which is tailor-made for children's needs and interests.<sup>27</sup> The duties that these rights impose operate within an uneasy triangular relationship between the child, the parents and the state. The primary duties of care rest on the parents, and pass to the state only when the parents are unable to perform such duties. Children's rights would therefore mostly apply horizontally between the child and parent before applying vertically between the child and the state.<sup>28</sup> The rights in the Bill of Rights are not absolute but are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.<sup>29</sup> The Bill of Rights further confirms that it applies to all law, and binds the state and natural and or juristic persons if, and to the extent that it is applicable, taking into account certain circumstances.<sup>30</sup> Finally, when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an

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<sup>25</sup> Section 7(2) of the Constitution.

<sup>26</sup> Chapter 2 of the Constitution.

<sup>27</sup> Section 28 of the Constitution.

<sup>28</sup> Bekink 2003 *THRHR* 253. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

<sup>29</sup> Section 7(3) of the Constitution. Although of particular significance the purview of this paper does not allow for a detailed discussion on the limitation of rights. For a more detailed discussion refer to Currie and De Waal *Bill of Rights Handbook* 145. Note also Woolman and Botha "Limitations" 34.

<sup>30</sup> Section 8(1)-(2) of the Constitution.

open and democratic society, must consider international law, and may consider foreign law.<sup>31</sup>

### **3.1 *The rights of everyone with particular significance to children***

The rights that are afforded to everyone, but that are of particular interest to children and the topic under discussion, include the right to equality,<sup>32</sup> and the rights to personal autonomy construed from the rights to privacy;<sup>33</sup> freedom of religion, belief and opinion;<sup>34</sup> freedom of expression;<sup>35</sup> and freedom of association.<sup>36</sup>

The right to equality is guaranteed in section 9 of the Constitution. Section 9(1) guarantees everyone the right to equality before the law and equal protection of the law. Sections 9(3) and 9(4) prohibit unfair discrimination by the state and by private entities on a non-exclusive list of grounds.<sup>37</sup> One of the grounds listed on which unfair discrimination is prohibited is age. Any discrimination between some children and others will thus be subject to scrutiny to determine if it complies with the prohibition on unfair discrimination.<sup>38</sup>

Like everyone else, children have the right to personal autonomy. Bekink and Brand raises the question of whether children have a composite right to individual self-determination under the Constitution.<sup>39</sup> If so, this would entitle them to choose their own lifestyle, friends, religion and opinions, regardless of the authority their parents are entitled to exercise towards them. They point out that the interest of children in maintaining their own autonomy should, however, be seen in the context of the relationship of dependence that of necessity exists between a child and his or her parents.<sup>40</sup> Bekink and Brand further argue, and rightly so, that the exercise of the

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<sup>31</sup> Section 39(1) of the Constitution. It is thus of significant importance to consider international law. Note also par 5 of this research for a more detailed discussion on the international law requirements relating to the topic under discussion.

<sup>32</sup> Section 9 of the Constitution.

<sup>33</sup> Section 14 of the Constitution.

<sup>34</sup> Section 15 of the Constitution.

<sup>35</sup> Section 16 of the Constitution.

<sup>36</sup> Section 18 of the Constitution.

<sup>37</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 178.

<sup>38</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 178.

<sup>39</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 181.

<sup>40</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 181.

responsibilities of care and support a parent has towards a child limits a child's claim to self determination. This limitation can be justified by a parent's duty of care and support. However, as a child grows older and the duty of care and support diminishes, justification for such intrusion will become progressively more difficult to prove as the child's right to self-determination increases.<sup>41</sup>

Apart from the aforementioned general autonomy rights, Friedman, Pantazis and Skelton argue that section 28(2) is flexible enough to include autonomy rights for children. They find support for this notion in two cases.<sup>42</sup> Firstly, they note the courts' willingness in *MEC for Education, KwaZulu Natal v Pillay*,<sup>43</sup> to accept children's rights to autonomy, particularly in the case of adolescent children.<sup>44</sup> In the said case it was held that the wearing of a nose stud by a 16 year-old girl was an expression of her Hindu culture and religion, a practice with which she identified. It was subsequently held by the court that the school was able to reasonably accommodate her by way of an exception to its code of conduct, and should do so. The court further remarked that children of the girl's age should increasingly be taking responsibility for their own actions and beliefs.<sup>45</sup> Secondly, in *Christian Lawyers South Africa v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)*<sup>46</sup> the high court was concerned with the constitutionality of a law permitting girls below the age of 18 years to choose to terminate their pregnancies, provided they have the intellectual and emotional capacity for informed consent. The court found that the *Termination of Pregnancy Act*, which was based on the girl's capacity to decide rather than on a specific age, promoted the best interests of the child, as it was flexible and recognised that decisions taken to terminate pregnancy would depend on a girl's intellectual, psychological and emotional maturity, rather than her chronological age.<sup>47</sup>

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<sup>41</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 181.

<sup>42</sup> Friedman, Pantazis and Skelton "Children's Rights" 47-2.

<sup>43</sup> *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).

<sup>44</sup> Friedman, Pantazis and Skelton "Children's Rights" 47-2.

<sup>45</sup> *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 56.

<sup>46</sup> *Christian Lawyers South Africa v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 1 SA 509 (T) 528.

<sup>47</sup> *Christian Lawyers South Africa v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 1 SA 509 (T) 528.

The *Milnerton* case also serves as an illustration of the aforementioned acceptance of children's rights to autonomy. According to media reports the girl's parents suggested a boarding school as a solution to their current situation. The girl's request, however, not to be sent to a boarding school but to reside with a host family was granted by the judge assigned to the case.<sup>48</sup> This suggests that the court found the girl (aged 16) of sufficient intellectual, psychological and emotional maturity to express an autonomous opinion on her future.

### **3.2 Children's specific rights: section 28**

In recognition of children's vulnerability section 28(1) provides a range of rights which provide extra protection to children in certain areas, such as the right to a name and nationality, family or parental care, or appropriate alternative care when removed from the family. Section 28(2) provides further protection by stating that a child's interests are of paramount importance in every matter concerning the child.

With due regard to the underlying theme of this article, section 28 (1)(b) and (c) respectively affords every child the right to family or parental care, appropriate alternative care if removed from the family environment, and the right to basic nutrition, shelter, basic health care services and social services.

Section 28(1)(b) has three purposes. Firstly, it is aimed at the preservation of a healthy parent-child relationship and imposes an obligation on the state to respect existing family or parental care by limiting any interference to situations where it is justified.<sup>49</sup> It should be noted that it does so from a child-centred approach rather than a parent's perspective, as it is the right of the child that is at stake.<sup>50</sup> Moreover it is the child's right to family care or parental care that is protected and not the child's

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<sup>48</sup> Legalbrief TODAY, 10 June 2010 available at <http://www.legalbrief.co.za/article.php?story=20100610091458403> accessed on 15 June 2010.

<sup>49</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 185. An example of an infringement that would be justified would be in situations of ongoing child abuse.

<sup>50</sup> In *Patel v Minister of Home Affairs* 2000 2 SA 343 (D) the court held that in deciding whether to deport the second applicant from South Africa in terms of the *Aliens Control Act* 96 of 1991 the right of his children to family or parental care had to be taken into account. See also *Heystek v Heystek* [2002] JOL 9297 (T) and *F v F* 2006 3 SA 42 (SCA). For an analysis of the constitutional rights parents may have because they are parents, see Carpenter 2008 TSAR 397.

right to family life.<sup>51</sup> It has been argued that the Constitution deliberately did not include a "right to family life".<sup>52</sup> This absence was raised in *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996*.<sup>53</sup> The court found that this absence did not preclude certification because it allowed for flexibility in the recognition of multicultural and multi-faith family forms in a diverse society. The inclusion of the right to family life, according to the court, might have given rise to a dominance of one approach above that of another.<sup>54</sup> I agree with Sloth-Nielsen and Kruger that the fact that neither the children's clause nor the Bill of Rights affords parents or children the right to family life may hamper the development of a children's rights philosophy and will further undoubtedly have a negative effect on the institution of the family.<sup>55</sup> The importance of children growing up in a healthy environment where they can form strong psychological bonds with family members can hardly be over-emphasised. Kruger points out - and rightly so - that if children are not initially assisted within a stable family environment to develop into rational adults, there would be no point in attempting to safeguard their rights to autonomy and self-determination.<sup>56</sup>

Notwithstanding this *lacuna*, Bekink and Brand argue that the child's right to family or parental care shows a preference for care in the context of a family and places an obligation on the state to respect the institution of the family as the context within which the care can be provided. This would imply that the state should have regard to the protection of the cohesion of the family as a goal in itself.<sup>57</sup> Despite the non-inclusion of the right to family life, this right has been emphasized in several cases.<sup>58</sup> In *S v M (Centre for Child Law as Amicus Curiae)*<sup>59</sup> the Constitutional Court found that section 28(1) read with the best interest principle in section 28(2) requires the

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<sup>51</sup> Kruger *Judicial Interference with Parental Authority* 478.

<sup>52</sup> Skelton "Constitutional Protection of Children's Rights" 278.

<sup>53</sup> *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 4 SA 744 (CC).

<sup>54</sup> *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 4 SA 744 (CC) [96]-[103].

<sup>55</sup> Kruger *Judicial Interference with Parental Authority* 506; Sloth-Nielsen 1995 SAJHR 418.

<sup>56</sup> Kruger *Judicial Interference with Parental Authority* 507.

<sup>57</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 186

<sup>58</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); *B v M* [2006] 9 BCLR 1034 (W); and *Patel v Minister of Home Affairs* 2000 2 SA 343 (D).

<sup>59</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 20.

law to make the best possible effort to avoid where possible any breakdown of family or parental care that may put children at risk.

The second purpose of section 28(1) is to identify the parties who must furnish such care. According to the Constitutional Court, section 28(1)(b) has direct horizontal application in that the duties these rights impose rest primarily on the parents and family and pass to the state only if the child's parents or family fail(s) or are/is unable to care for the child. Moreover sections 28(1)(b) and (c) must be read together. The state is thus responsible for ensuring that there are legal obligations to compel parents and the family to fulfil their responsibilities towards children. As the state fulfils this duty it is also under an obligation to create the necessary environment for parents and families to provide proper care to a child.<sup>60</sup> In the absence of such care, where a child has been removed from the family, the state has a duty to provide alternative care. The fact that section 28(1)(b) has horizontal application between the parent and the child has a further implication in that South African law recognises that children can enforce fundamental rights against their parents. This undoubtedly raises the potential for conflict between the rights and interest of the parents and the rights and interest of the child, and the courts will have the task of balancing or weighing these competing rights. Thirdly, section 28(1) requires that care of a certain quality be provided.<sup>61</sup>

The particular recognition given in section 28(1)(d) of the Bill of Rights of children's rights not to be maltreated, neglected, abused or degraded is also of significance to the topic under discussion. This section imposes a duty on parents as well as the state to refrain from these forms of treatment. It also places a positive duty on the state to intervene in situations of ongoing maltreatment or abuse, for instance by removing a child from such a situation. This duty is given legislative effect by certain provisions of the *Children's Act* which empower police officers, social workers and other authorised persons to remove children from their homes to a place of safety

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<sup>60</sup> *Bannatyne v Bannatyne (Commissioner for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign 2* 2002 5 SA 721 (CC).

<sup>61</sup> Section 28(1)(c) of the Constitution. See also Heaton *South African Family Law* 273 for more on the scope of the care.

under certain circumstances.<sup>62</sup> To meet its positive duty to intervene in situations of ongoing abuse, the state acts in conflict with a child's right to family or parental care. This creates the need for a flexible test against which to decide if a decision to intervene is constitutionally sound.<sup>63</sup> Section 150 of the *Children's Act* provides some assistance by listing criteria for decisions for the removal of children from their family homes. What is of significance is that the *Children's Act* firstly specifically defines the terms abuse<sup>64</sup> and neglect<sup>65</sup> and secondly does so in a holistic way by also including in the definitions the responsibility placed on parents to provide for a child's basic physical, intellectual, emotional and social needs.<sup>66</sup> These needs (with the exclusion of the first, which is more visible) vary from child to child and are, due to the nature thereof, open to subjective interpretation by those involved. Caution should thus be taken by judges to do so on an informed basis and in the light of the individual child's position and circumstances.<sup>67</sup>

The Bill of Rights also recognises children's rights to legal representation in that section 28(1)(h) states "that every child has the right to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The obvious significance of section 28 is that it directly manifests and extends the right to legal assistance/representation by the state and at state expense, in civil proceedings in cases which would affect the child and if substantial injustice would otherwise result without such assistance. Section 28(1)(h) thus ensures the child a right to participate in matters affecting him or her. This affords a child an own representative and gives effect to article 12 of the CRC.<sup>68</sup> What would be regarded as matters which would

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<sup>62</sup> Chapters 9, 12 and 13 of the *Children's Act* 38 of 2005.

<sup>63</sup> Bekink and Brand "Constitutional and International Protection of Children's Rights" 188-189.

<sup>64</sup> "Abuse" in relation to a child means "any form of harm or ill-treatment deliberately inflicted on a child, and includes- (a) assaulting a child or inflicting any other form of deliberate injury on a child; (b) sexually abusing a child or allowing a child to be sexually abused; (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally".

<sup>65</sup> "Neglect" in relation to a child means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs.

<sup>66</sup> Chapter 1 of the *Children's Act* 38 of 2005.

<sup>67</sup> In this regard a report or recommendation from a social worker, the family advocate or suitably qualified person may be of significant value. See also Heaton 2009 *Journal of Juridical Science* 9.

<sup>68</sup> Refer to paragraph 5 for a discussion on article 12 of the CRC. See for example also *Lubbe v Du Plessis* 2001 4 SA 57 (C); *R v H* 2005 6 SA 535 (C) 539; *J v J* 2008 6 SA 30 (C); *De Groot v De*

affect the child and circumstances which would result in a substantial injustice if legal aid is not provided is an open question and would depend on the circumstances of each case.<sup>69</sup> Some guidance can be found in jurisprudence. In *Du Toit v Minister of Welfare & Population Development*<sup>70</sup> the Constitutional Court referred to this section in relation to the appointment of a *curator ad litem* for very young children. In *Centre for Child Law v Minister of Home Affairs*<sup>71</sup> the court reiterated the importance of legal representation for children in terms of section 28(1)(h) and subsequently ordered that a legal representative be appointed by the state for the child concerned. This section thus forms a platform for children to be directly involved in civil litigation and for their legal representatives to place the children's views before the court. In *Soller v G*<sup>72</sup> Satchwell J pointed out that there are:

... few proceedings of greater importance to a child/young adult of K's [the boys] age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his siblings.

In *Pillay*<sup>73</sup>, Langa CJ remarked that the need for a child's voice to be heard is perhaps even more acute when it concerns children who should be increasingly taking responsibilities for their own actions and beliefs (in this case a 16 year-old girl). The court's stance on "substantial injustice" is also of particular significance as it indicated that it referred to civil proceedings that are of crucial importance to a child's current life and future developments.<sup>74</sup> The *Children's Act* confirms this approach in that a child's views must be given due weight in accordance with his or her age,

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*Groot* (Unreported Case No. 1408/2009 (EC HC), 10 September 2009) where specific attention was given to article 12 of the CRC.

<sup>69</sup> For more on this point refer to Bekink and Brand "Constitutional and International Protection of Children's Rights" 193; Du Toit "Legal Representation of Children" 93; and Bekink and Bekink 2009 *Speculum Juris* 23. See for example also *Soller v G* 2003 5 SA 430 (W); *Rosen v Havenga* 2005 JOL 15235 (C); *F v F* 2006 3 SA 42 (SCA), and *Legal Aid Board v R* 2009 2 SA 262 (D).

<sup>70</sup> *Du Toit v Minister of Welfare & Population Development* 2003 2 SA 198 (CC); and *AD v DW (Centre for Child Law as Amicus Curiae, Department of Social Development as Intervening Party)* 2006 6 SA 51 (W); 2007 5 SA 184 (SCA); 2008 3 SA 183 (CC).

<sup>71</sup> *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (TPD) 581-59C/D.

<sup>72</sup> *Soller v G* 2003 5 SA 430 (W) 434-435 para 7.

<sup>73</sup> *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 56. In *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T) the children were joined as parties themselves in order to give them better opportunities for participation. Such a legal representative can be appointed by the Legal Aid Board and it is not necessary to approach the High Court in each case. See *Legal Aid Board v R* 2009 2 SA 263 (D).

<sup>74</sup> *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 435d.

maturity and stage of development in any matter concerning that child.<sup>75</sup> The *Children's Act* also grants every child the right to bring or be assisted to bring a matter to court.<sup>76</sup>

Section 28(2) provides further protection for children by stating that a child's interests are of paramount importance in every matter concerning the child and thus entrenches the paramount principle as a right in itself.<sup>77</sup> From existing case law it has become clear that section 28(2) has become a significant principle in the Bill of Rights jurisprudence regarding the rights of children.<sup>78</sup> Despite being a right in itself it has also been used to develop the meaning of other rights in the Bill of Rights, and to determine the ambit of and limit other competitive rights.<sup>79</sup>

Section 28(2) elevates the child's best interests to the supreme issue in every matter that concerns the child. This does not mean, however, that it serves as a trump to automatically override other rights, or that other constitutional rights are unimportant and may simply be ignored. The correct approach is to apply the paramount principle in a meaningful way without unduly obliterating other valuable constitutionally protected interests/rights.<sup>80</sup> This is in line with the notion that there is no constitutional hierarchy of rights. The application of section 28(2) may thus also involve the weighing up of various competing interests/rights and the limitation of the right itself. The fact that the best interests of the child are paramount does not imply

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<sup>75</sup> Section 10 of the *Children's Act* 38 of 2005. This section came into operation on 1 July 2007. See also Kassan 2003 *De Jure* 164; Robinson 2007 *THRHR* 263.

<sup>76</sup> Section 14 of the *Children's Act* 38 of 2005.

<sup>77</sup> *Fraser v Naude* 1999 1 SA 1 (CC); *Jooste v Botha* 2000 2 SA 199 (T); *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Du Toit v Minister of Welfare & Population Development* 2003 2 SA 198 (CC); Heaton *South African Family Law* 276; Heaton 1990 *THRHR* 95; Bekink 2003 *THRHR* 254-255; Bekink and Bekink 2004 *De Jure* 21; Barrie 2011 *TSAR* 126.

<sup>78</sup> *Fraser v Naude* 1999 1 SA 1 (CC); *Jooste v Botha* 2000 2 SA 199 (T); *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Du Toit v Minister of Welfare & Population Development* 2003 2 SA 198 (CC); Heaton *South African Family Law* 276; Heaton 1990 *THRHR* 95; Bekink 2003 *THRHR* 254-255; Bekink and Bekink 2004 *De Jure* 21; Barrie 2011 *TSAR* 126.

<sup>79</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *Hay v B* 2003 3 SA 492 (W); *Bannatyne v Bannatyne (Commissioner for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SA 363 (CC).

<sup>80</sup> Heaton *South African Family Law* 277; Skelton "Constitutional Protection of Children's Rights" 280; Friedman, Pantazis and Skelton "Children's Rights" 47, 40-46.

that the right is absolute. Sometimes the best interests of the child or children in general, as odd as this may sound, may even limit a child's best interests.<sup>81</sup>

In *Centre for Child Law v Minister of Justice and Constitutional Development*<sup>82</sup>, Justice Cameron held that paramount means that "...the child's interests are more important than anything else, but does not mean that everything else is unimportant". In the scenario given on page 2 of the 16 year old Milnerton girl, this therefore does not mean that the child's interest are of such importance that the cohesion of the family becomes unimportant, but should also be a factor to be considered by the court before taking a decision to grant the girl her wish to live semi-independently. The paramount principle does, however, require a truly child-centred approach, which in turn "requires a close and individualised examination of the precise real life situation of the particular child involved".<sup>83</sup> This entails that when determining the child's best interests the courts must evaluate each individual case or situation in the light of the individual child's position and the effect that the situation is having or will probably have on the individual child.<sup>84</sup> This child-centred and individualistic approach will also serve as a valuable means to avert the possible misuse of the judicial system by children just wanting to get what their friends have. Applied to the given scenario of the Milnerton girl, a judge should thus not unquestioningly apply prevailing social and cultural norms or social theories of what is the best for children in general; nor should he or she simply apply his or her personal views, or those of society or of the child's parents.<sup>85</sup> This is not to say that social theories and norms and cultural values are not important. On the contrary, they are very relevant in terms of a contextualised approach to determining the best interests of the child. But the focus of such factors must be of relevance and must impact on the individual child.<sup>86</sup> Thus the question is whether or not the conservative manner in which the girl's parents treated her has relevance to her and has impacted either negatively or positively on the girl herself. The socio-cultural beliefs and opinions of the parents

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<sup>81</sup> Skelton "Constitutional Protection of Children's Rights" 282-283; Friedman, Pantazis and Skelton "Children's Rights" 47, 40-46; *Sonderrup v Tondelli* 2001 1 SA 1171 (CC); *Harris v Minister of Education* 2001 4 SA 1297(CC).

<sup>82</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para [29].

<sup>83</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 24.

<sup>84</sup> Heaton 2009 *Journal of Juridical Science* 9.

<sup>85</sup> Heaton 2009 *Journal of Juridical Science* 9.

<sup>86</sup> Heaton 2009 *Journal of Juridical Science* 9.

and their impact on the specific child should, however, be considered only if and to the extent that a parent's religious and cultural beliefs and practices and conduct are shown by reliable means to impact negatively on the development and happiness of the child concerned. Only then should any of these factors weigh with a court in making an order in respect of that child.<sup>87</sup>

It is accepted, however, that perceptions of morality and social standards of what is acceptable vary from time to time and from one society to another. This is also true of South Africa with its diverse society. The South African Constitution recognises this diversity and the Constitutional Court has repeatedly held that our constitutional values include tolerance of and respect for this diversity.<sup>88</sup> However tolerating this diversity demands a contextualised approach to the best interests of the child. The religion and culture in which the specific child is growing up must be taken into account. This is also recognised in section 7(1) of the *Children's Act* in that the child's need to remain in the care of his or her parents, family and extended family and to maintain a connection with that family, extended family, culture and tradition as well as his or her social and cultural development should be taken into account when determining a child's best interests.<sup>89</sup> This does not mean that the child's social and cultural development and background should be applied blindly when determining his or her best interests. In this regard section 12(1) of the *Children's Act* specifically affords every child the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. The challenge is thus to respect diverse social and cultural values but to do so without compromising the best interests of the child.

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<sup>87</sup> Van Heerden "Judicial Interference" 546. In this regard a report or recommendation from the family advocate, social worker or suitably qualified person may be regarded as reliable means. See s 29(5) of the *Children's Act* 38 of 2005.

<sup>88</sup> See the Preamble of the Constitution. See also for example *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 23, 24; and *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 1 SA 474 (CC) para 76.

<sup>89</sup> Subsections (1)(f), (g) and (h) of the *Children's Act* 38 of 2005.

#### 4 The role of the *Children's Act*

As was stated in the introduction, South Africa has also recently enacted a new *Children's Act*,<sup>90</sup> which sets out to give effect to certain rights of children as contained in the Constitution. This includes *inter alia* principles relating to care and protection; to partial care; to prevention and early intervention and definitions of parental responsibilities and rights and so forth.<sup>91</sup> Chapter 3 of the *Children's Act* has codified the common law regarding parental authority and has reconceptualised what was previously referred to as "parental authority" as "parental responsibilities and rights".<sup>92</sup> In terms of the *Children's Act* the parental responsibilities and rights that a person may have in respect of a child include the right to care for the child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child.<sup>93</sup>

The focus of this contribution is, however, on the clarification of the factors in the *Children's Act* that are to be considered in an application for the termination, suspension or restriction of parental responsibilities and rights in the best interest of the child. In this regard sections 7 and 28 of the *Children's Act* are of particular importance. They will be discussed in reverse order.

Section 28 of the *Children's Act* in particular deals with the court-ordered termination, extension, suspension or restriction of parental responsibilities and rights and states as follows:

- (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-
  - (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child;
  - or

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<sup>90</sup> *Children's Act* 38 of 2005.

<sup>91</sup> See the preamble and introduction of the *Children's Act* 38 of 2005.

<sup>92</sup> Skelton "Parental Responsibilities and Rights" 63.

<sup>93</sup> Section 18 of the *Children's Act* 38 of 2005. This entails that parents may in respect of the exercise of their parental responsibilities and rights *inter alia* decide where a child is to reside, with whom the child may associate, which school the child is to attend, what religious education a child may receive and in which language the child is to be brought up etc. See Heaton *South African Family Law* 284.

- (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights which a specific person has in respect of a child.
- (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.
- (3) An application for an order referred to in subsection (1) may be brought-
  - (a) by a co-holder of parental responsibilities and rights in respect of the child;
  - (b) by any other person having a sufficient interest in the care, protection, well being or development of the child;
  - (c) by the child acting with leave of the court;
  - (d) in the child's interest by any other person, acting with leave of the court; or
  - (e) by a family advocate or the representative of any interested organ of state.
- (4) When considering such application the court must take into account-
  - (a) the best interests of the child;
  - (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
  - (c) the degree of commitment that the person has shown towards the child; and;
  - (d) any other factor that should, in the opinion of the court be taken into account.

Section 28(1) authorises the suspension for a period or the termination of any or all of the parental responsibilities and rights a specific person has. While the first of these scenarios is extremely extensive ("termination of any or all") and should thus be used sparingly and with due consideration, the second is less restrictive in that it specifically states that such suspension of parental responsibilities and rights is for a specific period only and can therefore not operate indefinitely.<sup>94</sup> Applications for extending parental responsibilities and rights may be granted as well as applications to circumscribe (to limit or define) such rights. The aforementioned applications may be combined with an application for care and contact in terms of section 23. This entails that an application to terminate or suspend parental rights and responsibilities may be combined with an application to assign care and contact to another person.<sup>95</sup> The applicants who might possibly bring such an application include a co-holder of parental responsibilities and rights; any other person having a sufficient interest in the care, protection, wellbeing or development of the child; the child<sup>96</sup> himself or herself acting with leave of the court; any other person who has an interest in the child, acting with leave of the court; or a family advocate or the representative of any

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<sup>94</sup> Heaton "Parental Responsibilities and Rights" 3-23.

<sup>95</sup> I assume that this was the case with the 16 year-old Milnerton girl.

<sup>96</sup> This grants further recognition of a child's right to participation in matters concerning that child.

interested organ of state. It is noteworthy that social development authorities can also bring an application of the kind envisaged in section 28.<sup>97</sup>

When considering such an application the court must take the following factors into account: the best interests of the child; the relationship between the child and the person whose parental responsibilities and rights are being challenged; the degree of commitment that the person has shown towards the child; and any other factor that should in the opinion of the court be taken into account.<sup>98</sup> With reference to the topic under discussion "any other factor" may include the cultural, social and religious circumstances, interests and needs of the individual child as well as the child's specific wishes.

It is without doubt no coincidence that the requirement of the best interest is one of the factors that has to be considered by a court when exercising its discretion, as the standard has been described as the golden thread that runs through the whole fabric of the South African law relating to children.<sup>99</sup> The concept of "the best interests of the child" has, however, been widely criticised for its vagueness and indeterminacy.<sup>100</sup> Before the *Children's Act* was enacted, South African legislation did not provide a list of factors to be taken into account by courts when determining the best interest principle, and the courts had to rely on the common law. In this regard the most comprehensive list of factors was proposed in *McCall v McCall*<sup>101</sup>, in which thirteen factors were identified in an open-ended list specifically designed for resolving custody disputes.

Section 7(1) of the *Children's Act* is of significant value as it partly addresses this criticism by listing fourteen factors that must be taken into consideration whenever the best interests of the child are determined.<sup>102</sup> These include the nature of the personal relationship between the child and the child's parents;<sup>103</sup> the attitude of the

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<sup>97</sup> Sections 28(3)(e) and 135 of the *Children's Act* 38 of 2005.

<sup>98</sup> Section 28(4) of the *Children's Act* 38 of 2005. Own emphasis added.

<sup>99</sup> Clark 2000 *Stell LR* 3.

<sup>100</sup> Clark 2000 *Stell LR* 15; Bekink and Bekink 2004 *De Jure* 22; Heaton 1990 *THRHR* 95; Van Heerden "Judicial Interference" 503.

<sup>101</sup> *McCall v McCall* 1994 3 SA 201 (C) 205B-G.

<sup>102</sup> Section 7(1)(a)-(n) of the *Children's Act* 38 of 2005.

<sup>103</sup> Note: all references to the parents include "or any specific parent and any other care-giver or person relevant to the circumstances". See s 7(1) of the *Children's Act* 38 of 2005.

parents towards the child; the capacity of the parents to provide for the (emotional and intellectual) needs of the child; the likely effect of any change in the child's circumstances; the practical difficulty and expense of a child having contact with the parents; the need for the child to remain in the care of and to maintain a connection with his or her family, extended family, culture or tradition; the child's age, maturity, developmental stage, gender, background and any other relevant characteristics of the child; the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; any disability or any chronic illness that a child may have or may suffer from; the need for a child to be brought up within a stable (or nearly stable family environment; the need to protect the child from any physical or psychological harm; and the taking of actions or decisions that would minimise the exposure of a child to legal or administrative proceedings.

When evaluating the Act's list of fourteen factors two issues present themselves as being of concern. Firstly, although the act emphasises the needs of the child and his or her physical and emotional security, a child's preferences are excluded from the list. It can, however, perhaps be argued that this is catered for in section 10 of the *Children's Act*, which specifically allows for child participation in court proceedings.<sup>104</sup> Secondly, the list provided in the *Children's Act* is not an open-ended one, as was the case in *McCall v McCall*, where a court could consider any other factors which it considered to be relevant. This may be a limitation in practice, although judicial officers have the discretion to consider other factors where relevant.<sup>105</sup> The inclusion of "any other factor that should, in the opinion of the court be taken into account" in section 28(4)(d) of the *Children's Act* eliminates this problem for the application of section 28 at least. In addition it should be noted that although the fourteen factors give particular recognition to the well-being of the child, emphasis is also placed on the importance of the need for a child to remain in the care of and to maintain a connection with his or her parents, family and extended family, culture or tradition. A stable family environment should thus be protected where possible.<sup>106</sup>

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<sup>104</sup> Skelton and Proudlock "Interpretation, Objects, Application and Implementation" 2-8.

<sup>105</sup> In *B v S* 1995 3 SA 571 (A) the court held at 572 that an application for the variation of an existing access order really involves a judicial investigation into a child's best interest and may even allow a court to call evidence *mero motu*. The court should also if necessary call oral evidence from the parties themselves to enable it to form its own opinion.

<sup>106</sup> Sections 7(1)(f) and (k) of the *Children's Act* 38 of 2005.

Finally, an evaluation of the topic under discussion would not be complete without taking account of regional and international standards. A brief analysis of the most important international and regional instruments will thus be given.

## 5 The influence of international and regional law

In terms of section 39(1), when interpreting the rights set out in the Bill of Rights, such as the best interests of the child, a court, tribunal or forum must consider international law and may consider foreign law. The importance of international law is therefore self-evident and has been entrenched in the new Constitutional context. With reference to the topic under discussion, the following international provisions are of importance.

- (a) **Universal Declaration of Human Rights (UDHR) (1948)**: Article 16 sees the family as the natural and fundamental group unit of society, which is entitled to protection by society and the state. Families should enjoy a standard of living adequate for their health and wellbeing. Under article 12 of the UDHR no one shall be subject to arbitrary interference with his privacy, family and home. Special recognition is also afforded to mothers and children in terms of article 25 in that they are entitled to "special care and assistance". The UDHR's provisions also include the right to freedom of religion, thought and conscience and the right to freely participate in the cultural life of the community.<sup>107</sup> Other associated rights include *inter alia* the right to equality and dignity.<sup>108</sup>
- (b) **International Covenant on Economic, Social and Cultural Rights (ICESCR) (1967)**: The covenant in article 10(1) particularly recognises that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children". In addition article 10(3) places an

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<sup>107</sup> Articles 18 and 27 of the UDHR.

<sup>108</sup> Articles 7 and 1 of the UDHR respectively. See Mtshaulana, Dugard and Botha *Documents on International Law* 172. It should be noted that at the time of adoption by the United Nations General Assembly in 1948, South Africa abstained from voting in favour of the Declaration.

obligation on states not to discriminate for reasons of parentage or other conditions, when assisting and protecting children and young persons.<sup>109</sup>

The Covenant's provisions also include *inter alia* the right to self-determination,<sup>110</sup> the right to equality,<sup>111</sup> the right to health,<sup>112</sup> the right to education<sup>113</sup> and the right to a cultural life<sup>114</sup>.

- (c) ***Convention on the Rights of the Child (CRC)(1989)***: In its preamble the CRC proclaims that children are entitled to special care and protection and that the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all of its members and particularly children, should be afforded the necessary protection and assistance. This underlines the notion that although the CRC is child-centred it also places a high value on the family as a unit. Articles 5 and 18 of the CRC are of particular importance here, as they set out the responsibilities, rights and duties of parents. The rights of parents and other legal guardians are to provide "appropriate direction and guidance" in the exercise of rights by children. This should be done with the necessary recognition of children's evolving capacities. Parents and the family are therefore not entitled to unlimited discretion in the exercise of their responsibilities and rights. Although article 18 recognises parents as the primary caregivers, it places an obligation on state parties to assist parents in performing their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.<sup>115</sup> In line with this, article 3 of the CRC states that in all actions concerning children, the best interest of the child shall be a primary consideration. Where parents and the family fail to protect the child or to

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<sup>109</sup> Article 10(3) of the ICESCR. See Dugard *International Law* 246. South Africa signed the ICESCR on 3 October 1994, but has yet to ratify it.

<sup>110</sup> Article 2 of the ICESCR.

<sup>111</sup> Article 3 of the ICESCR.

<sup>112</sup> Article 12 of the ICESCR.

<sup>113</sup> Article 13 of the ICESCR.

<sup>114</sup> Article 15 of the ICESCR.

<sup>115</sup> Article 18 of the CRC. South Africa signed the CRC on 29 January 1993 and ratified it on 16 June 1995.

act in his or her best interest the state has to intervene and may even separate the child from his or her family.<sup>116</sup>

The CRC also recognises that children generally can play a more active role in decision-making within the family life. Article 12 specifically recognises that children are individuals in their own right and should be afforded the opportunity to express their own views in matters affecting them. These views should be given due weight in accordance with the age and maturity of the child.<sup>117</sup>

Finally the CRC also recognises the rights to freedom of expression<sup>118</sup>, freedom of thought, conscience and religion<sup>119</sup> and the right to the promotion of the social, spiritual and moral wellbeing of children.<sup>120</sup>

The position expressed in international instruments is echoed in most regional human rights instruments. For example section 18(1) of the *African Charter on Human and Peoples Rights*<sup>121</sup> recognises the family as the natural unit and basis of society and places a duty on state parties to assist and protect the family. The family is also seen as the custodian of moral and traditional values recognised by the community.<sup>122</sup> The *African Charter on Human and Peoples Rights* also recognises that every individual has duties towards his or her family and society, the State and other legally recognised communities and the international community. Furthermore the rights and freedoms of each individual should be exercised with due regard to the rights of others, collective security, morality and the common interest.<sup>123</sup>

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<sup>116</sup> Article 9(1) of the CRC.

<sup>117</sup> This has bearing on the approach of *Gillick v West Norfolk Area Health Authority* 1985 3 All ER 402.

<sup>118</sup> Article 13 of the CRC.

<sup>119</sup> Article 14 of the CRC.

<sup>120</sup> Article 17 of the CRC.

<sup>121</sup> The OAU Assembly of the Heads of State and Government adopted the Charter in 1981. It entered into force in 1986 and has been ratified by all fifty-three member states.

<sup>122</sup> Article 27 of the *African Charter on Human and Peoples Rights*.

<sup>123</sup> Articles 27, 28 and 29 of the *African Charter on Human and Peoples Rights*.

The *African Charter on the Rights and Welfare of the Child* (commonly referred to as the *African Children's Charter*),<sup>124</sup> like the *African Charter on Human and Peoples Rights*, also places emphasis on the family as the natural unit and basis of society. Children are therefore entitled to enjoy parental care and to reside with their parents.<sup>125</sup> This Charter furthermore reaffirms states' responsibility to protect and assist families. These responsibilities include *inter alia* material assistance, support programmes and care services and facilities for the children of working parents.<sup>126</sup> Special protection is afforded to children in terms *inter alia* of the right to survival and development,<sup>127</sup> to education,<sup>128</sup> health and health services,<sup>129</sup> and protection from child abuse and torture.<sup>130</sup> In addition, children are also afforded the rights to freedom of expression, thought, conscience and religion.<sup>131</sup> The overriding principle of the Charter is that in all matters, the best interests of the child shall be the primary consideration.<sup>132</sup> Member states of the *African Charter on Human and Peoples Rights* and the *African Children's Charter* are furthermore under an obligation to undertake legislative and other measures to give effect to the rights and freedoms protected in the Charters.<sup>133</sup>

Apart from the rights afforded to children in this Charter, certain duties are placed on the child as in the *African Charter on Human and Peoples Rights*. This stems from the view of the child as being part of a community.<sup>134</sup> Children have duties towards their parents, family and society, the state and other legally recognised communities and the international community. The child therefore has to work towards the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need, for example.<sup>135</sup> These duties are qualified, however, in that they are subject to a child's age and ability and such limitations as may be

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<sup>124</sup> The Charter was adopted in 1990, but came into force only on 29 November 1999.

<sup>125</sup> Article 19 of the *African Charter on the Rights and Welfare of the Child*.

<sup>126</sup> Articles 18(1) and 20(2) of the *African Charter on the Rights and Welfare of the Child*.

<sup>127</sup> Article 5 of the *African Charter on the Rights and Welfare of the Child*.

<sup>128</sup> Article 11 of the *African Charter on the Rights and Welfare of the Child*.

<sup>129</sup> Article 14 of the *African Charter on the Rights and Welfare of the Child*.

<sup>130</sup> Article 16 of the *African Charter on the Rights and Welfare of the Child*.

<sup>131</sup> Articles 7 and 9 of the *African Charter on the Rights and Welfare of the Child*.

<sup>132</sup> Own emphasis added. Whilst the CRC sees the best interest principle as "a" consideration the African Children's Charter places an even higher regard hereto by making it "the" primary consideration.

<sup>133</sup> Respectively a 62 and a 42 of the *African Charter on Human and Peoples Rights* and the *African Charter on the Rights and Welfare of the Child*.

<sup>134</sup> Viljoen "African Charter on the Rights and Welfare of the Child" 339.

<sup>135</sup> Article 31(a) of the *African Charter on the Rights and Welfare of the Child*.

contained in the Charter.<sup>136</sup> A child's duties to respect his or her parents and elders "at all times" have to be reconciled with a child's right to freedom of expression, association and thought, and ultimately the best interests of the child, which shall be the primary consideration.

## 6 Conclusion

The significance of the family as the natural unit and basis for society and the importance of children growing up in a stable family environment where strong psychological bonds between family members can be formed can hardly be overemphasised.<sup>137</sup> This idealism, contained in international and regional legal instruments, is mirrored in the Constitution and **Children's Act** of South Africa.<sup>138</sup> These documents, however, also recognise that although children are part of the family unit they are at the same time bearers of individual rights. The possibility of potential conflict between the interests of children and adults is thus also foreseen. Despite the sanctity of the family unit this does not mean that families are above public scrutiny. It can generally be accepted that situations may arise where the welfare of the child may demand that the child be deprived of the opportunity to maintain an established relationship, for instance where a child has been abused by parents.

When confronted with problematic situations and balancing or weighing competing rights and interests concerning children the best interests principle is still the most important factor to be taken into account.<sup>139</sup> The best interests principle, the founding principle of children's rights, however, is anchored in the family<sup>140</sup> and any break between the child and the family should be carefully considered. In an attempt to resolve disputes between parents and their children, the relevant provisions of the Constitution and *Children's Act* must be carefully considered and must be balanced and tested in relation to each other for constitutional consistency and compliance.<sup>141</sup> Courts should do so from a child-centred approach which entails a close and

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<sup>136</sup> Article 31 of the *African Charter on the Rights and Welfare of the Child*.

<sup>137</sup> Kruger *Judicial Interference with Parental Authority* 507.

<sup>138</sup> Section 28 of the Constitution and ss 7 and 28 of the *Children's Act* 38 of 2005.

<sup>139</sup> *Hay v B* 2003 3 SA 492 (W).

<sup>140</sup> *McCall v McCall* 1994 3 SA 201 (C) 205B-G.

<sup>141</sup> Own emphasis added.

individualised examination of the precise real-life situation of the child involved.<sup>142</sup> The child's views should also be heard and given respectful and careful consideration as children's interests do not always correlate with those of their parents.<sup>143</sup> The focus should thus be on the impact that the socio-cultural beliefs and practices of the parents have on the specific child. This should be considered only if it can be shown by reliable means to impact negatively on the development and happiness of the child concerned.<sup>144</sup>

The relationship between parents and their children is a very personal and sometimes fragile one. This domain forms part of the world of morality and not even the state should interfere in this inner sanctity unless the parents' conduct towards the child is harmful, abusive or amounts to unlawfulness. When the conduct is not in the best interests of the child or contravenes any other of the rights afforded to the child in the Constitution, which is the supreme law of the Republic, such conduct is inconsistent with the principles of the Constitution and thus invalid to the extent of its inconsistency.<sup>145</sup> A court adjudicating such a matter must declare such inconsistency to be invalid and may make an order that is just and equitable.<sup>146</sup> Such an order may include the removal of a child from his or her family environment.<sup>147</sup> Possible less restrictive solutions should, however, at least also be considered.<sup>148</sup>

The fact that disagreement is part of life and occurs even in a healthy, normal family relationship should not be left out of the equation. Children and parents will disagree on certain "family rules". When parents are acting within the boundaries of the law, even though they are conservative, and their actions do not reflect any abuse or neglect, their responsibilities and rights will take preference above the rights of their children, for without this recognition the value of the family unit as the natural and fundamental unit of society will not be recognised. Children's mere dislike and

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<sup>142</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 24.

<sup>143</sup> Section 28(1)(h) of the Constitution.

<sup>144</sup> See Van Heerden "Judicial Interference" 497.

<sup>145</sup> Sections 2 and 172 of the Constitution.

<sup>146</sup> Sections 2 and 172 of the Constitution.

<sup>147</sup> Section 28(1)(b) of the Constitution and Chapter 9 of the *Children's Act* 38 of 2005.

<sup>148</sup> In the scenario given on page 2 of the 16 year-old Milnerton girl, one may argue that the order given is quite extreme, as very restricted contact between the child and her parents is allowed. Unfortunately information on the case is very restricted, as explained in note 8. The only alternative to the removal of the child that was considered but rejected by the child was the possibility of a boarding school, according to news reports.

personal preferences in their upbringing cannot alone and should not tip the scales of justice in their favour. Caution should be taken in the interpretation of the legislative framework not to encourage children to break the parent-child relationship on a mere whim, as an overemphasis of children's rights may result in the destruction of the family.<sup>149</sup>

It should also be remembered that although the best interests principle is still the most important factor to be taken into account when balancing competing rights regarding children, this right can be considered as a temporary right which exists to protect the child during his or her vulnerable stages. This right ends when a child reaches 18 years of age. The relationship between parents and a child, however, does not end when a child reaches adulthood. It is therefore suggested that the principle of the best interests of the child should be extended into the principle of the best interests of the person (although the latter principle is not an enforceable right under the Constitution).<sup>150</sup> This entails that the important relationship between parents and their child is continued on an ongoing basis to the benefit of all of those involved in the family relationship. The long-term effect of the break in the parent-child relationship should thus also be considered, for a break now may have serious detrimental consequences for the future relationship not only between the parent and the child but also in future between grandparents and their grandchildren. The family should therefore be kept intact, if that is at all possible.

To conclude, the task of deciding what is in the best interests of the child is a very arduous and complex one and more often than not requires the Wisdom of Solomon. Any care or maintenance order made by a court is in itself an act of clairvoyance. No one can predict the future; hence the caution. Every effort should therefore be made by all of those involved to jealously search for the best interests of the child.

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<sup>149</sup> It is therefore argued that line with s 150 of the *Children's Act* the situation should be of a serious nature before the removal of a child is considered.

<sup>150</sup> For example, a parent's duty of support towards his or her 19 year-old "child" may continue if the "child" is not yet self-supporting and if such a duty is found to be in the best interest of the "child".

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### **List of abbreviations**

CRC	Convention on the Rights of the Child
ICESCR	International Covenant on Economic, Social and Cultural Rights
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaags Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights