

## CHAPTER 5

### THE PRINCIPLES UNDERPINNING THE NEW CHILDREN'S STATUTE, THE BEST INTERESTS OF CHILDREN-STANDARD, AND THE RIGHTS AND RESPONSIBILITIES OF CHILDREN

#### 5.1 Introduction

This Chapter flows from the preceding two chapters and poses the question whether, and if so, what principles should underpin the new children's statute. The Chapter further gives content to the best interests of the child-standard and enumerates the rights and responsibilities of children.

#### 5.2 The principles underpinning the new children's statute

The Child Care Act 74 of 1983 does not contain a list of principles to guide decision-makers in the implementation of its provisions, although it is provided that in adoption matters, the best interests of the child should play a determining role. It has been trenchantly argued that amendments to the Child Care Act proposed in the period after 1994 failed to adequately assimilate the important principles contained in the South African Constitution and the CRC, and that the objective of enshrining a children's right approach in municipal child protection legislation needed to be clearly identified.<sup>1</sup> In the light of both the constitutional imperative, and international law obligations, it has been mooted that law reform in this sphere should be accompanied by a clear articulation of the fundamental principles which form a backdrop to the vision of the statute.

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1 Julia Sloth-Nielsen and Belinda van Heerden 'Proposed amendments to the Child Care Act and regulations in the context of constitutional law developments in South Africa' (1996) 12 **SAJHR** 247, 'The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?' (1996) 12 **SAJHR** 649.

The trend in modern child legislation is increasingly towards the inclusion of central principles underpinning how decisions should be made in regard to children in domestic legislation.<sup>2</sup> Principles can be derived from international law such as the African Charter on the Rights and Welfare of the Child, from policy documents (such as the IMC's Interim Recommendations for the Transformation of the Child and Youth Care System), from South African common law and case law,<sup>3</sup> as well as from accepted social work practice.

In 1996, it was argued that, at minimum, the following key principles should play a central role in legislative reforms:

- **The best interests of the child** as the paramount consideration for administrative and judicial decisions involving children subject to proceedings under this legislation.
- **Non-intervention and de-institutionalisation**, based on the premise that except where it is in the best interests of the child, the child should not be separated from his or her parents and family, and that institutionalisation of children should be restricted to a step of last resort, and where possible, children should be returned to a family environment as soon as this is possible.
- **The child's right to participate in decision-making about his or her life**, which is a cardinal feature of the modern children's rights approach as evidenced in the provisions of article 12 of the UN Convention on the Rights of the Child.

A further consideration that impels legislative drafters towards the consideration of fundamental principles relates to the socio-economic and political realities facing South Africa at the present time. The Child Care Act 74 of 1983 has been described as heavily interventionist<sup>4</sup> and largely modelled on first world approaches which are not necessarily appropriate for a developing country. The 1983 Act followed a series of legislative enactments that commenced with the Child Protection Act 25 of 1913, which was based on equivalent legislation in Britain. The 1913 Act applied only to white and coloured children, however, and did not take the cultural differences which prevail in this country into account.<sup>5</sup> A strong need to Africanise legislation in

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2 See, for example, the UK Children Act, 1989; the Uganda Children Act, 1996; and Julia Sloth-Nielsen and Belinda van Heerden 'New child care and protection legislation for South Africa? Lessons from Africa' (1997) 8 *Stellenbosch LR* 261.

3 See, for example, *McCall v McCall* 1994 (3) SA 201 (C).

4 Issue Paper, par. 4.1.

5 B Mabandla 'Survey of child protection legislation in South Africa' in *International Conference on the Rights of the Child* (1992), Centre for Development Studies, 127. See, for example, section 33(3) of Act

this sphere has been articulated, and the Commission is of the view that the inclusion of culturally appropriate principles and values can further such goals.

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25 of 1913, which required white children to be kept separately from coloured children in government industrial schools.

The skewed provisioning of welfare services in favour of privileged race groups and towards service provision in urban centres has been a signal feature of the child protection system in this country throughout the 20th century.<sup>6</sup> South Africa also faces widespread child poverty, and it is estimated that six out of ten children<sup>7</sup> grow up in poverty.<sup>8</sup> The escalating numbers of reported cases of child abuse and neglect in recent times,<sup>9</sup> as well as the crisis faced by South Africa as regards the HIV/AIDS pandemic also provide cogent reasons as to why clearly formulated principles are desirable in future child protection legislation. Not only can they serve to further the best interests of children, but, in addition, principles can guide decision-makers and encourage them to focus on the appropriate allocation of scarce social resources and services to those children who are most at risk of suffering harm, and to ensure that the needs of the most vulnerable groups of children are taken into account.

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- 6 Issue Paper, par. 4.3. See also S Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 **SAJHR** 232 at 234 - 237 for further statistics showing how poverty affects children.
- 7 S Robinson and M Sadan **Where Poverty hits hardest: Children and the Budget in South Africa** Cape Town: Idasa 1999 vii. Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 266 point out that during 1997 it was maintained that 14,3 million children under the age of 15 years were living with care-givers earning less than R800 per month.
- 8 See also Geraldine van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 **SAJHR** 52.
- 9 J Loffell 'Dilemma's and critical choices for child protective legislation in a developing country', unpublished paper presented at the ISPCAN Conference, Durban 2000, 3.

In Issue Paper 13, the question was posed how best the principles relating to children embodied in the various international instruments and in the Constitution can be incorporated in a comprehensive children's code. Further, it was suggested that the 'best interests of the child' principle could possibly be defined in legislation, and respondents were further asked to suggest how legislation could assure to children the right to participate meaningfully in all matters affecting them.

Numerous respondents to Issue Paper 13 provided suggestions as to principles that could be included in draft legislation. Mention was made of possibility of including a non-discrimination principle, specifically to protect children living with HIV/Aids.<sup>10</sup> Further Rev A Dwoyer referred to the best interests of the child and the right of the child to participate in decisions affecting him or her. The SA National Council for Child and Family Welfare submitted that principles should be woven into both the Preamble and to relevant clauses of the Act. These, they argued, should cover the primacy of the child's well-being and safety, safeguarding of the child's dignity and worth so as to ensure the protection and normal development of the child. The NICC, however, was of the view that principles (as opposed to basic rights for children) cannot be legislated for. Their view is that principles can be included in the Preamble, and can act as the overarching framework which informs the Act.

Disabled People South Africa was of the opinion that principles should be included in the primary legislation, in view of their educative effect. The ATKV expressed the view that certain basic principles were essential, and Mr DS Rothman, Commissioner of Child Welfare, Durban, submitted that the inclusion of principles will assist in achieving the stated objectives of law reform.

Widespread support was articulated for the inclusion in legislation of provisions concerning children's participation in matters affecting them. The NICC argued that clear provision should be made at all levels to ensure that there are opportunities for children to air their views on matters affecting them. The Natal Society of Advocates suggested that guardians ad litem should be appointed to assist children and thereby assure their right of meaningful participation in lower court matters. Professor C Davel, Department of Private Law, University of Pretoria, was optimistic that legislation could contribute to the voice of children being heard. Mr D Rothman and the Durban Committee of Family Lawyers both noted that the child should be capable of expressing his or her views, and the former respondent suggested that where a child

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10 Submission of the Department of Health: Directorate HIV/AIDS and STD's and Lawyers for Human Rights.

was not old enough to understand decision making processes, an appropriately qualified person should be appointed to speak on his or her behalf.

**The Commission accordingly recommends the inclusion of the following objects and general principles and guidelines-provisions in the new children's statute:**

## **CHAPTER X: OBJECTS, GENERAL PRINCIPLES AND GUIDELINES**

### **Objects**

1. The objects of this Act are -
  - (a) to make provision for structures, services and means for promoting the sound physical, mental, emotional and social development of children;
  - (2) to utilize, strengthen and develop community structures which provide care and protection for children;
  - (c) to prevent, as far as possible, any ill-treatment, abuse, neglect, deprivation and exploitation of children;
  - (d) to provide care and protection for children who are suffering ill-treatment, abuse, neglect, deprivation or exploitation or who are otherwise in need of care and protection; and
  - (e) generally, to promote the well-being of children.

### **General principles and guidelines**

2. (1) (a) Any court or any person making any decision or taking any action under this Act in respect of any child must always ensure that such decision or action is in the best interest of the child.
  - (b) The best interest of a child must be determined having regard to all

relevant facts and circumstances affecting the child and having regard to the objects, principles and guidelines set out in this Act, in the Constitution and in any other law.

(2) Children should, whenever possible, be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a family environment.

(3) A child's family must, whenever appropriate, be involved in any decision-making affecting the child.

(4) Whenever a child is in a position to participate meaningfully in any decision-making affecting him or her, he or she must be given the opportunity so to participate and proper consideration must be given to the child's opinion, views and preferences, bearing in mind the child's age and maturity.

(5) A child's physical and emotional security and his or her mental, emotional, social and cultural development are important factors which must be given proper consideration whenever any decision is taken in respect of the child.

(6) It is the duty of everyone who performs any function in respect of a child or takes any decision affecting a child -

- (a) to respect the child's inherent dignity;
- (b) to treat the child fairly and equally;
- (c) to protect the child's fundamental human rights set out in the Constitution and in Chapter X;<sup>11</sup>
- (d) to protect the child from unfair discrimination on any ground, in particular

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11 See 5.4 below for the enumeration of the rights and responsibilities of children.

from unfair discrimination on the ground of the child's age, his or her health or HIV-status or that of his or her parents, the child's status with regard to his or her birth within or out of wedlock, or any disability from which the child may be suffering.

(7) In any proceedings relating to a child or any action taken in respect of a child, delay must as far as possible be avoided.

(8) Primary prevention and early intervention services should seek to -

- (a) enable and strengthen children and their families to function optimally;
- (b) prevent the removal of children from their families;
- (c) prevent the recurrence of problems in the child's family and reduce the negative consequences of risk factors;
- (d) divert children away from either the child and youth care or the criminal justice system.

(9) Whenever any major decision or action which may significantly affect a child or a child's life circumstances is contemplated in respect of that child, every person who is a parent or guardian or care-giver of the child, and where the child is capable of appreciating the significance of such decision or action, the child himself or herself, must be informed.

(10) In any proceedings or in any action taken in respect of any child under this Act an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

### 5.3 The 'best interests of the child'-standard

Section 28(2) of the Constitution, article 3(1) of the CRC, article 4 of the African Charter on the Rights and Welfare of the Child, and articles 16(1)(d) and (f) of the UN Convention on the Elimination of All Forms of Discrimination against Women enshrine the 'best interests of the



child' standard as 'paramount' or 'primary' consideration in all matters concerning children. However, it has been argued that the 'best interests' standard is problematic in that, inter alia, (i) it is 'indeterminate';<sup>12</sup> (ii) the different professionals involved with matters relating to children have different perspectives on the concept;<sup>13</sup> and (iii) the way in which the criteria is interpreted and applied by different countries (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.<sup>14</sup> Another factor which needs to be borne in mind in evaluating the best interests test is the importance of parental acceptance of the decision of the court.<sup>15</sup>

Nevertheless, as Van Heerden et al<sup>16</sup> have pointed out, the best interests standard is deepening its hold in domestic and international instruments and is certainly the standard which normally applies in guardianship, custody and access matters in South Africa and Western legal systems.

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12 See e.g. J Heaton 'Some general remarks on the concept "Best interests of the child"' (1990) 53 **THRHR** 95; Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391 at 394; Vivienne Goldberg 'The right of access of a father of an illegitimate child: Further reflections' (1996) 59 **THRHR** 282 at 288 - 9; E Bonthuys 'Of biological bonds, new fathers and the best interests of children' (1997) 13 **SAJHR** 622 at 623 - 4, 636 - 7. As is pointed out by Helen Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 **Current Legal Problems** 267 at 286, the indeterminacy, value-laden nature and subjectivity of the 'paramountcy principle' has allowed other principles and policies, extraneous to the child's welfare, to 'smuggle themselves into children's cases'.

13 See e.g. E E A Lambiase & J W Cumes 'Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?' (1987) 104 **SALJ** 704; G Mudie 'Custody and access determination in divorce: A family and developmental approach' 1989 **De Rebus** 686 ; Elsje Bonthuys 'Epistemological envy: Legal and psychological discourses in child custody evaluations' (2001) 118 **SALJ** 329; Kirk Heilbrun 'Child custody evaluation: Critically assessing mental health experts and psychological tests' (1995) 29 **Family Law Quarterly** 63; Vivienne Roseby 'Uses of psychological testing in a child-focused approach to child custody evaluations' (1995) 29 **Family Law Quarterly** 97; S P Okpaku 'Psychology: Impediment or aid in child custody cases?' (1976) 29 **Rutgers LR** 1117-53.

14 See e.g. Philip Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8 **International J of Law and the Family** 1; B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 **International J of Law and the Family** 82; Savitri Goonesekere 'The best interests of the child: A South Asian perspective' (1994) 8 **International J of Law and the Family** 118 and of Stephan Parker 'The best interests of the child - Principles and problems' (1994) 8 **International J of Law and the Family** 26. See also Robert Pfennig 'The best interests of the child. Do the courts' subjective factors in determining "best interests" really benefit the child?' (1996) 17 **Journal of Juvenile Law** 117 at 128 - 9.

15 Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391 at 395: 'The best-interests tests involves a comparison of the parties as parents. In some cases the best-interests test may be the more just solution, but there is always the danger that a parent who has been, in the child's earlier years, the primary care-taker, perhaps to the detriment of his or her own material advancement, may well be prejudiced by such a test. The best-interests test is unpredictable and to some extent dependent on the subjective opinions of a judge'.

16 **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 503, with reference to Parker op cit (1994) 8 **International J of Law and the Family** 26.

In the Commission's consultation processes, a great majority of respondents supported the inclusion of the best interests standard and its elaboration to a certain extent,<sup>17</sup> even though there was an awareness that the decision as to what is in the best interests of a particular child is inevitably to some extent influenced by subjective factors. Only the Natal Society of Advocates and the Durban Committee of Family Lawyers disagreed with the proposition that the best interests of the child should be further defined, although the latter suggested that guidelines could be drafted to assist social workers, Family Advocates and other persons involved in decision-making.

In order to find ways in which the principle can be applied with some degree of 'predictable operation',<sup>18</sup> courts in South Africa have attempted to list the most important criteria which inform judicial decision-making in this regard. In **McCall v McCall**,<sup>19</sup> King J held:<sup>20</sup>

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17 See also Brigitte Clark 'An overview of the best interests of the child as applied in South Africa', paper presented at the Miller Du Toit Conference 'The changing concept of the best interest of the child', Breakwater Lodge, Cape Town, 28 - 29 January 1999 and the other papers presented.

18 Parker (1994) 8 **International J of Law and the Family** 26. See also John Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 **International J of Law and the Family** 42.

19 1994 (3) SA 201 (C). See also **Bethell v Bland and others** 1996 (2) SA 194 (W); J A Robinson 'Die beste belang van die kind na egskeiding - Enkele gedagtes na aanleiding van *McCall v McCall* 1994 (3) SA 201(K)' (1995) 58 **THRHR** 472.

In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy ... should be placed in the custody of his father; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned.

To establish what was in the best interests of the children involved in **Märtens v Märtens**,<sup>21</sup> a matter of disputed parental custody, the court relied on certain guidelines set out in earlier case law.<sup>22</sup> These were:<sup>23</sup>

- the sense of security of the children, involving an examination of the extent to which a parent makes the children feel wanted and loved;
- the suitability of the custodian parent, involving an examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
- material considerations relating to the well-being of the children; and
- the wishes of the children.

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21 (1991) 4 SA 287 (T). See also the discussion of this case by Brigitte Clark 'Custody: The best interests of the child' (1992) 109 **SALJ** 391.

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

23 At 292H - 293A.

While the Commission accepts that the application of the ‘best-interests’ standard does create problems in practice, the question to be determined is whether it should be left to the courts to develop the standard on a case-by-case basis or whether legislative intervention is necessary. In its report **For the Sake of the Children**,<sup>24</sup> the Canadian Special Joint Committee on Child Custody and Access recommended that decision makers, including parents and judges, should consider a list of criteria in determining the best interests of the child. The Special Joint Committee said that the list should include:

- The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
- The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
- The views of the child, where such views can reasonably be ascertained;
- The ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;
- The child's cultural ties and religious affiliation;
- The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
- The importance of maintaining and fostering relationships between the child and the child's siblings, grandparents and other extended family members;
- The parenting plans proposed by the parents;
- The ability of the child to adjust to the proposed parenting plans;
- The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
- Any proven history of family violence perpetrated by any party applying for a parenting order;
- There shall be no preference in favour of either parent solely on the basis of that parent's gender;
- Except in an emergency, the unilateral removal of a child from the family home without

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24 December 1998, recommendations 16, 21 and 39.

suitable arrangements for contact between the child and the other parent is contrary to the best interests of the child; and

- Any other factor considered by the court to be relevant to a particular shared parenting dispute.

In the case of divorce, the Canadian Special Joint Committee on Child Custody and Access<sup>25</sup> recommended that it is in the best interests of children that they have the opportunity to be heard when parenting decisions affecting them are being made; those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination; a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce; and that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.

Section 68F of the Australian Family Law Act 1975 (Commonwealth) is one of the legislative provisions which attempt to give guidance to the court in determining what is in a child's best interests. It reads as follows:

**68F How a court determines what is in a child's best interests**

- (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
- (2) The court must consider:
  - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
  - (b) the nature of the relationship of the child with each of the child's parents and with other persons;
  - (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    - (i) either of his or her parents; or
    - (ii) any other child, or other person, with whom he or she has been living;
  - (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on

- a regular basis;
  - (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
  - (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
  - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
    - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
    - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
  - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
  - (i) any family violence involving the child or a member of the child's family;
  - (j) any family violence order that applies to the child or a member of the child's family;
  - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
  - (l) any other fact or circumstance that the court thinks is relevant.
- (3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).
- (4) In paragraph (2)(f): Aboriginal peoples means the peoples of the Aboriginal race of Australia. Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

Section 68G of the Australian Family Law Act 1975 (Commonwealth) gives guidance on how the wishes of a child are to be expressed as is required as per section 68F(2)(a) quoted above. Section 68G(2) reads as follows:

- (2) The court may inform itself of wishes expressed by a child:
  - (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
  - (b) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Clearly, such a list can be adapted to South African circumstances with little difficulty. **The Commission therefore recommends that decision makers, including parents and judicial**

**officers, must have regard to a list of criteria in determining the best interests of a child. Such a list of criteria should be included in the new children's statute.** However, it is worth pointing out that it is also possible to give substance to the best interests criteria in an schedule or the regulations to the act.

Section 4 of the Uganda Children Statute 1996, for instance, provides that the welfare principles set out in the First Schedule to the Statute shall be the guiding principles in the making of any decision based on the provisions of the Statute.<sup>26</sup> The relevant part of the First Schedule reads as follows:

- (1) Whenever the state, a court, a local authority or any person determines any question with respect to -
  - (a) the upbringing of a child or,
  - (b) the administration of a child's property or the application of any income arising from it,
 the child's welfare shall be the paramount consideration.
- (2) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.
- (3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of paragraph (1), the court or any other person shall have regard in particular to-
  - (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
  - (b) the child's physical, emotional and educational needs;
  - (c) the likely effects of any changes in the child's circumstances;
  - (d) the child's age, sex, background and any other circumstances relevant in the matter;
  - (e) any harm that the child has suffered or is at risk of suffering;
  - (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

**The Commission is convinced of the need to include guidance to the courts and other users of the new children's statute as to what exactly it means when it is said that a particular decision or action must be in the best interests of a particular child. In this regard, we recommend that such guidelines be included in the body of the substantive act, ideally following on the confirmation that in all matters concerning children, the best interests of**



**the child shall be paramount.<sup>27</sup> We accordingly recommend that the following provisions be included in the new children's statute:**

### **Best interest of children**

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 the paramount consideration.

### **Determining what is in a child's best interests**

- (1) Subject to subsection (3), in determining what is in the child's best interests by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the matters set out in subsection (2) must be considered.
- (2) Public or private social welfare institutions, the courts, administrative authorities and legislative bodies must consider:
  - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are relevant to the weight it should give to the child's wishes;
  - (b) the nature of the relationship of the child with each of the child's parents and with other persons;
  - (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    - (i) either of his or her parents; or
    - (ii) any other child, or other person, with whom he or she has been living;
  - (d) the practical difficulty and expense of a child having contact with a parent

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27 As is provided for in section 28(2) of the Constitution, 1996.

and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
  - (f) the child's maturity, sex and background (including any need to maintain a connection with the extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant;
  - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
    - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
    - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; or
    - (iii) inappropriate or harmful relationships;
  - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
  - (i) any family violence involving the child or a member of the child's family;
  - (j) that there should be no preference in favour of any parent or person solely on the basis of that parent or person's gender;<sup>28</sup>
  - (m) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
  - (n) any other fact or circumstance that is relevant.
- (3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from

it, is likely to be prejudicial to the welfare of the child.<sup>29</sup>

- (4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

Clearly the criteria listed here must be of general application. However, given the dynamics of family law and the endless range of possibilities it must be realised that this list of criteria by its very nature must remain an open-ended list. In some areas of family law, notably custody and access, the best interests of the child criteria has undergone (and will undergo) further refinement as we have seen above. In this regard we feel it is more appropriate to include such topic specific criteria in the new children's statute when dealing with that particular topic.<sup>30</sup>

#### 5.4 **The rights and responsibilities of children**

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29 As per section 4(2) of the Uganda Children Statute, 1996.

30 See Chapters 17 (Foster Care), 18 (Adoption) and 19 (Residential Care) below.

Obviously children are entitled, as persons, to all the other constitutional rights<sup>31</sup> and protections provided for by the Constitution. Children therefore have the right to human dignity, to life, to freedom and security of the person, the right to housing, health care, food, water and social security, education and so forth. However, the Constitution contains no express provision protecting the right to family life.<sup>32</sup> Families come in many shapes and sizes and the definition of family also changes as social practices and traditions change.<sup>33</sup> In terms of the Constitution, South Africa must nevertheless meet its obligations imposed by international human rights law. It is in this regard that it has been argued that the state must protect the institutions of marriage and family as important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.<sup>34</sup>

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31 Save the right to vote and to stand for political office, which are the sole right of 'adult' citizens. See section 19(3) of the Constitution.

32 **Dawood and another, Shalabi and another, Thomas and another v Minister of Home Affairs and others** 2000 (8) BCLR 837 (CC), par [28]; **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996** 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), par [97].

33 See **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), para [47] - [48]; **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996** 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), par [99].

34 Per O'Regan J in **Dawood and another, Shalabi and another, Thomas and another v Minister of Home Affairs and others** 2000 (8) BCLR 837 (CC), par [31]. See also A van der Linde 'Die (moontlike) erkenning en beskerming van fundamentele regte ten aansien van die gesin - Omskrywing van die begrippe "gesin" en "gesinslewe"' (2000) 33 **De Jure** 1; J A Robinson 'The child's right to parental and family care: Some brief remarks' (1998) **Obiter** 329; P J Visser 'Die moontlike uitdruklike erkenning en beskerming van fundamentele regte ten aansien van die huwelik en gesin (familie) in die finale Grondwet van Suid-Afrika' (1996) 29 **De Jure** 351.

While children are afforded constitutional rights, **the Commission considers it necessary to, in addition, formulate for inclusion in the new children's statute certain rights and responsibilities for children.** In this regard, the Commission took care not to repeat or duplicate the existing provisions of Chapter 2 of the Constitution, 1996, but to include only supplementary rights (and responsibilities) in the new children's statute.

**The Commission also decided to include a provision on the responsibilities of children in the new children's statute.<sup>35</sup> This was done with hesitation** as the Commission is of the opinion that the corollary of any right is the responsibility or duty to respect the rights of others. The Commission's sense of reluctance to include a provision on the responsibilities of children was further strengthened by the simple fact that neither the Constitution nor any of the international instruments such as the CRC and the African Charter on the Rights and Welfare of the Child impose a similar obligation on adults. Providing for the responsibilities of children, however, is a feature of the African Charter on the Rights and Welfare of the Child. It is on the strength of this instrument and the need to Africanise the new children's statute that the Commission was swayed to include the provision. The Commission would appreciate comment on the wisdom of its approach in this regard.

**The Commission accordingly recommends the inclusion of the following children's rights and responsibilities in the new children's statute:**

## **CHAPTER XY : CHILDREN'S RIGHTS AND RESPONSIBILITIES**

1. The rights which a child has in terms of this Chapter are supplementary to any rights which a child has in terms of the Bill of Rights contained in Chapter 2 of the Constitution.

### **Unfair discrimination prohibited**

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35 See clause 15 below. See also A Domanski 'Stemming the blood-dimmed tide of lawlessness: The rediscovery of duties' (2000) XXXIII **CILSA** 248.

2. (1) No state institution, state official or any person may unfairly discriminate directly or indirectly against any child on the ground -

(a) of the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth of the child or of his or her parents, legal guardian, primary care-giver or any family member of the child; or

(b) of the family status, health status, socio-economic status, HIV-status, or nationality of the child or of his or her parents, legal guardian, primary care-giver or of any of his or her family members.

(2) Discrimination on any of the grounds listed in subsection (1) is presumed to be unfair unless it is established that the discrimination is fair.

### **Best interest of children**

3. (1) Every child has the right that in any action or decision taken in respect of him or her by any person in authority over him or her or by the state or a state official or by a court of law, his or her best interest shall be given prime consideration as being of paramount importance.

(2) Every child who is capable of participating meaningfully in any judicial or administrative decision-making affecting him or her has the right to be given the opportunity so to participate and his or her opinion or views must be given due consideration, regard being had to the child's age and maturity.

### **Right to name, nationality and identity**

4. (1) Every child has the right to have his or her name registered as soon as possible after his or her birth, in accordance with the Births and Deaths Registration Act 1992 (Act No. 51 of 1992);

(2) Subject to the provisions of this Act relating to adoption, every child has the right that his or her identity and nationality be preserved.

### **Family relationship**

5. (1) Every child has the right not to be separated from his or her parents against their will and against the will of the child where such child is capable of expressing his or her will, except where a court of law or a commissioner of child welfare determines, in accordance with the provisions of this Act, that such separation is in the best interests of the child.

(2) The child, in person or through a representative, and all parties having an interest in the matter, must be given the opportunity to participate in any proceedings which may result in the separation of the child from his or her parents.

(3) A child who has in terms of the provisions of this Act been separated from his or her parents has the right to maintain personal relations and contact with his or her parents on a regular basis, unless a court of law has determined that such relations or contact would be contrary to the best interests of the child.

(4) Unless the court orders otherwise, the provisions of this section do not apply to a child in relation to his or her biological parents if the child is being or has been adopted.

### **Property**

6. Every child has the right to have his or her property administered in a just and fair manner by his or her legal guardian.

### **Protection of children from maltreatment, abuse, neglect, exploitation and other harmful practices**

7. (1) Every child has the right to be protected, through administrative, social, educational, punitive or other suitable measures and procedures, from -

(a) all forms of torture, physical violence, mental harassment, injury, maltreatment, neglect, sexual abuse, degradation, and sexual exploitation;

(b) inducement, coercion or encouragement to engage in-

(i) prostitution or any other form of sexual activity;

(ii) pornographic activity or any form of pornographic performance.

(2) Every child who has been molested, abused, maltreated or neglected has the right to have access to support services and, where appropriate, to medical treatment, if needs be, at state expense.

### **Protection of children from harmful social and cultural practices**

8. (1) Every child has the right to be protected from harmful social and cultural practices which affect the welfare, health or dignity of the child.

(2) No child-marriage or the engagement of girls and boys below the minimum ages set by law for a valid marriage shall be permitted.

(3) Female genital mutilation and the circumcision of female children are prohibited.

### **Protection of children from exploitative labour practices**

9. Every child has the right to be protected from economic exploitation and from performing any work-

(1) that is inappropriate for a person of that child's age; and



(2) that places the child's well-being, education, physical and mental health, or spiritual, moral or social development at risk.

### **Education**

10. (1) Every child has the right to -
- (a) basic education; and
  - (b) access to further or higher education on the basis of equal opportunities for all;
  - (c) access to educational and vocational information and guidance; and
  - (d) receive education and information through a medium which makes such education and information accessible to him or her, having regard to his or her personal circumstances and any disability from which he or she may suffer.
- (2) The education of a child must be directed to-
- (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) the development of respect for human rights and fundamental freedoms;
  - (c) the development of respect for his or her parents, his or her cultural identity, language and values, and for the national values of his or her country;

- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples and ethnic, national and religious groups; and
- (e) the development of respect for the natural environment.

(3) Every child has the duty to make full use of opportunities created for his or her physical, mental and emotional development and to respect the fundamental human rights of others.

### **Refugee children**

11. Every child who is seeking refugee status or who is considered to be a refugee in accordance with international or domestic law shall, whether he or she is unaccompanied or accompanied by his or her parents or by any other person, have the right to receive protection and humanitarian assistance in order to enjoy appropriate rights set out in this Chapter, and in particular, assistance, if he or she was separated from his or her parents or family, to be re-united with his or her parents or family.

### **Children with disabilities**

12. (1) Every child with a physical or mental disability has the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate his or her active participation in the community.

(2) Every child with a physical or mental disability has the right to receive special care and such financial assistance for which he or she may qualify.

### **Leisure and recreation**

13. Every child has the right to rest and leisure and to engage in play and recreational

activities appropriate to his or her age.

### **Representation of children in civil proceedings**

14. Every child has the right to have a legal practitioner assigned to him or her at state expense in civil proceedings affecting him or her, if substantial injustice would otherwise result.

### **Responsibilities of the child**

15. (1) Every child shall have responsibilities towards his or her family and society, the state and other legally recognised communities and the international community.

(2) The child, subject to his or her age and ability, and such limitations as may be contained in this Act and other legislation, shall have the duty to support family life.

### **Limitation, enforcement and interpretation of rights**

15. Sections 36, 37, 38 and 39 of the Constitution apply with regard to the limitation, enforcement and interpretation of the rights set out in this Chapter.