

**THE UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW**

**THE DETERMINANTS OF THE CHILD'S BEST INTERESTS IN RELOCATION
DISPUTES.**

A mini-thesis submitted in partial fulfillment of the requirements for the degree
LLM in Children's Rights



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Declaration

I, **Miche Theresa Boyd**, declare that **THE DETERMINANTS OF THE CHILD'S INTERESTS IN RELOCATION DISPUTES** is my own work and that it has not been submitted before for any degree or examination at any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:

Miche Theresa Boyd

23 November 2015



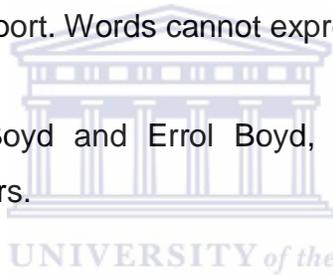
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Key words

Best interests

Care

Competing interests

Constitutional right

Contact

Divorce

Left behind-parent

Non-primary caregiver

Primary caregiver



List of acronyms

AAML	American Academy of Matrimonial Lawyers
ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
SALC	South African Law Reform Commission
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
US	United States
USA	United States of America



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Chapter 1

1.1. Introduction

Relocation cases arise where the parent who is the primary caregiver and with whom the child usually resides decides to leave the country to live elsewhere.¹ The relocation of a primary caregiver with his/her child seriously impairs a caring and concerned non-primary caregiver's access to the child.² South Africans are leaving the country at an alarming rate for a better lifestyle. The reasons for relocating are, *inter alia*, better service delivery, a better quality of life, improved employment prospects, less political uncertainty, the policy of affirmative action, HIV and AIDS and the high crime rate.³

A relocation dispute arises in a situation where the non-primary caregiver (who is going to be left behind) wants to prevent the primary caregiver from relocating with the children, and opposes such relocation. In such an event, the primary caregiver may approach the court to adjudicate on the matter.

Prior to the commencement of the Children's Act⁴, our courts have allowed primary caregivers to relocate unless the non-primary caregiver could prove that the relocation was motivated by a desire to defeat the non-primary caregiver's right of access or that the relocation would be detrimental to the child's best interests.⁵ The then Appellate Division in *Shawzin v Laufer*⁶ rejected this approach and provided that when dealing with the issue of custody, the key consideration which has to be given effect to is the best interests of the child.

The South African Constitution has taken the best interests concept further in terms of section 28(2) which provides that:

¹ Skelton A *Family Law in South Africa* (2010) 264.

² Barrie G 'The approach of the courts regarding South African custodian parents going into the diaspora' (2009) 3 *TSAR* 562.

³ Barrie G 'The approach of the courts regarding South African custodian parents going into the diaspora' (2009) 3 *TSAR* 562.

⁴ Children's Act 38 of 2005 came into operation on 1 July 2007.

⁵ Davel C and Boniface A 'Cross-border relocation of children and custodial parent' 2003 *THRHR* 139.

⁶ *Shawzin v Laufer* 1968 4 SA 657(A).

'A child's best interests are of paramount importance in every matter concerning the child.'⁷

Section 28(2) of the Constitution echoes international law on this matter with reference to the United Nations Convention on the Rights of the Child (hereafter UNCRC) article 3. Section 28(2) of the Constitution establishes a benchmark of children's rights which courts are obliged to enforce and interpret in a manner which favours the protection and advancement of children rights.⁸ In addition to the Convention, the African Charter on the Rights and Welfare of the Child 1990 (hereafter ACRWC), article 4 also plays a vital role in determining the best interests concept.

Since the Children's Act⁹ has been implemented, there are various provisions which could assist courts in deciding relocation disputes. Section 9 of the Children's Act provides that the best interest of the child is paramount. Section 7 sets out a list of factors which courts must take into account when determining what is in the best interests of the child.¹⁰ The problem which arises is that the Children's Act does not have a set criteria specifically dealing with relocation disputes and in particular what would constitute the best interests of the child; therefore courts are relying on reported cases to determine what factors to take into account.¹¹

1.2. Research problem

South Africa has no specific legislation dealing with relocation disputes which makes it especially difficult when there is no assistance as to what would be in the best interests of the child. The most difficult task in deciding a relocation dispute is the balancing of interests which needs to take place. Our courts have to weigh up the right of the child to

⁷ Section 28(2) of the Constitution of the Republic of South Africa of 1996.

⁸ Skelton A *Family Law in South Africa* (2010) 241.

⁹ 38 of 2005.

¹⁰ Domingo W 'For the Sake of the children: South African Relocation Disputes' *PER* (2011) 14(2) 150.

¹¹ Skelton A *Family Law in South Africa* (2010) 265.

maintain contact with both parents with the right to freedom of movement on the primary caregiver's part.¹²

This thesis explores the factors that our courts take into account in determining what would constitute the best interests of the child in granting or refusing relocation applications. This study deals with the formulation and interpretation of the best interests standard by South African courts in relocation cases.¹³ The courts are considering reported cases to determine which issues to take into account in determining the best interests of the child, due to the fact that the Children's Act does not have a set list of criteria. Therefore I will focus on case law in determining what factors are taken into account in order to determine what would be in the best interests of the child with regard to the relocation application.

The aim is to determine whether there is any consistent principle or policy which can act as a guideline to practitioners and our courts to direct jurisprudence in this area.¹⁴ The objective is to determine whether the Children's Act provides sufficient guidelines to assist the court in determining relocation disputes.¹⁵ Furthermore the thesis examines what the approach of our courts is and what constitutional dimensions may arise in relocation disputes. The research aims to explore whether relocation applications (and parenting roles) are disadvantaging women (primary-caregivers). The research investigates whether the courts are gender neutral and acutely sensitive to gender in relocation applications.

Since relocation has no set principles to govern it, it would be prudent to establish guidelines to better protect children by regulating relocation with a consistent policy.

¹² Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 70.

¹³ Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* 488.

¹⁴ Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* 488.

¹⁵ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* (2009) 74.

1.3. Methodology

The methodology which I will be adopting is termed 'desk' study and library research. This research comprises of the gathering and analysing of information, which is already available in print or published on the internet.¹⁶ The research method will focus on a case law analysis as the factors which the courts take into account not only influence the outcomes of the cases 'but their formulation and interpretation impacts on their decision to allow or disallow relocation'.¹⁷ A literature review was conducted from numerous research publications that were analysed, which highlighted a need for greater consistency in determining relocation applications.

1.4. Brief overview of Chapters

This mini-thesis comprises of 4 chapters. Chapter one introduces the topic, research problem and brief overview of Chapters. Chapter two deals with the international and regional instruments pertaining to the best interests principle and discusses the criticisms of the principle. Chapter three sets out the various factors used by the courts to determine relocation applications and identifies two approaches followed by South Africa courts. Furthermore, it highlights the disadvantages experienced by women (primary caregivers) and the consequences which the refusal of permission to relocate has on the primary caregivers. As a result, this leads to the submission that the courts need to be acutely sensitive to the issue of gender and equality in relocation disputes. The concluding chapter draws the conclusions and recommendations and asserts the need for a policy which regulates and achieves greater consistency in relocation disputes.

¹⁶ The Business Dictionary available at <http://www.businessdictionary.com/definition/desk-research.html> (accessed 19 August 2011).

¹⁷ Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 SAJHR 490.

Chapter 2

THE DEVELOPMENT OF THE BESTS INTERESTS OF THE CHILD PRINCIPLE

2.1 Introduction

The best interests of the child principle runs like a golden thread through the fabric of law relating to children.¹⁸ It is the fundamental principle in family law relating to contact, care and guardianship according to the Children's Act 38 of 2005 pertaining to children in South Africa. The courts use the 'best interests of the child' principle as a guiding factor in determining whether or not to grant a relocation order. In essence, the most important legal issue to be considered is whether the relocation is in best interests of the child.

However, the best interests of the child principle/standard has been described by legal scholars as vague, general and indeterminate as it had no fixed criteria which our courts could consult to determine whether a decision would be in the best interests of the child. The latter observation is correct as the standard has no set rules which could be applied to a case to determine how the best interests of the child would be achieved. This standard is an objective assessment based on the specific circumstances of each individual case.¹⁹ The best interests of the child principle is controversial as it varies according to different jurisdictions, users and the country the primary caregiver wishes to relocate to.

This chapter focuses on the international and regional instruments that deal with the protection of the best interests of the child. In addition, an overview of the historical development of the best interests of the child principle in South Africa will be ascertained. Furthermore, the Children's Act will be discussed with specific reference to the factors connected to the best interests of the child in relation to relocation disputes. Lastly, the chapter leads into a discussion highlighting the criticisms and advantages of the best interests principle.

¹⁸ *Kaiser v Chamber* 1969 (4) SA 224 (C) at 228 G.

¹⁹ Davel CJ *Introduction to Child Law in South Africa* (2000) 73.

2.2 International and regional documents pertaining to the best interests of the child

Children are particularly vulnerable (physically and mentally immature) and need rights to protect their integrity and dignity.²⁰ In effect, the treaties drafted by international and regional systems aim to ensure the protection of children against the inherent imbalance of power between the adult and the child.²¹

2.3 Declaration on the Rights of the Child 1924 and 1959

The Declaration on the Rights of the Child 1924²² is not binding on member States. However, the Preamble provides a duty that 'mankind owes to the child the best it has to give' and consequently, committed nations to the development, protection and raising of children.²³ Despite the limitations of this Declaration, it prepared the ground for the 'progressive development of international norms and standards with regard to the rights and well-being of the child'.²⁴

The Declaration of the Rights of the Child 1959²⁵ again stressed that mankind owes the child the best it has to give. Although the scope of this Declaration is wider than that of the 1924 Declaration, its emphasis was still on the protection and welfare of the child.²⁶ Despite the reference to rights, the principles of the Declaration could at best be regarded as moral rights, merely containing moral entitlements.²⁷ However, Basson

²⁰ Freeman M 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and Family* 55.

²¹ Levesque R 'International law on the rights of the child' (1995) 19.2 *Fordham International Law Journal* 832-834.

²² Geneva Declaration of the Rights of the Child, 1924 League of Nations O. J. Spec. Supp. 21 at 43(1924) adopted on 26 September 1924. This was the first international document to address the rights of children by an international governmental organisation.

²³ 'The Declaration did not really contain any rights but rather formulated ideals, aims and directives.' : De Villiers 'The rights of children in international law: Guidelines for South Africa' 1993 *Stell LR* 293. See also Freeman M 'Introduction: Children as persons' in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 1-2.

²⁴ De Villiers 'The rights of children in international law: Guidelines for South Africa' 1993 *Stell LR* 293.

²⁵ Declaration of the Rights of the Child, 1959 United Nations General Assembly Resolution 1386 (XIV) (1959) adopted on 20 November 1959.

²⁶ Freeman points out that 'there is no recognition of a child's autonomy, no understanding of the importance of a child's wishes and feelings and no appreciation of the value of empowerment. The child remains an object of concern rather than a person with self-determination.': Freeman M 'Introduction: Children as persons' in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 3.

²⁷ De Villiers 'The rights of children in international law: Guidelines for South Africa' 1993 *Stell LR* 293.

illustrates that this was great progress in the conceptual thinking of children's rights as the Declaration adopts a language of entitlement which is not prevalent in the 1924 Declaration. This proves that children were finally being recognised as holders of rights and not mere objects. Despite the fact that both Declarations are not legally binding on member States and have no specific reference to the best interests of the child principle, their true value lies in the awareness for rights and the welfare of the child.²⁸

2.4 The United Nations Convention on the Rights of the Child 1989

The United Nations Convention on the Rights of the Child²⁹ (hereafter UNCRC) is a comprehensive treaty on the rights of the child and the most universally accepted human rights document in history.³⁰ The UNCRC has been ratified by 196 countries which clearly demonstrates the wide level of acceptability of this Convention. Currently, the UNCRC enjoyed universal ratification in Africa, which contrasts with only partial adherence to the regional counterpart, the African Charter on the Rights and Welfare of the Child.³¹

The rights in the UNCRC concentrate heavily on participation, protection and on adults granting children everything considered to be in the child's best interests. Freeman argues that a child deprived of the rights in the UNCRC will grow up very differently from one who is afforded those rights.³² Article 3(1) of the UNCRC affords recognition to the best interests principle which lies at the heart of this chapter, and is arguably the most important provision in this Convention.³³ Article 3(1) provides that in all actions

²⁸ Basson L *Perspectives on the best interests of the child: Developments in the interpretation and application of the principle in South African law relating to custody* (unpublished LLM thesis, Stellenbosch University, 2004) 45.

²⁹ United Nations *Convention on the Rights of the Child*, 1989 United Nations General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

³⁰ Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 203.

³¹ The UNCRC has 197 states as parties, of which 196 countries ratified (Somalia having ratified in 2015). Viljoen F *International Human Rights Law in Africa* (2012) 133-137. The African Charter has 47 State parties (out of possible 54 AU states).

³² In order to improve the lives and status of children we need to enforce and implement the importance of children's rights: Freeman M 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and Family* 59.

³³ Freeman M 'Children's rights ten years after ratification' in Franklin B (ed) *The new handbook of children's rights* (2002) 98.

concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration.

Article 3(1) emphasises that 'governments and public and private bodies must ascertain the impact on the children of their actions, in order to ensure that the best interests of the child are a primary consideration, giving proper priority to children and building child-friendly societies'.³⁴ Therefore, the best interests of the child is the most important principle in all matters concerning the child and State members are bound to fulfil this obligation.³⁵

The Committee on the Rights of the Child has repeatedly stressed that the UNCRC should be considered as a whole and has emphasised its interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2, 3, 6 and 12).³⁶ Consequently, the principles of non-discrimination, survival and development and respect for the views of children are all relevant to determining what are in the best interests of the child as well as the best interests of children as a group.³⁷

'The inclusion of the best interests principle in the CRC has helped to crystallise the perception of the child as a real person in his or her own right, someone who must be considered autonomously. It has placed the child at the centre of the equation, on behalf of whom and because of whom decisions must be taken and be taken in a particular direction.'³⁸ Taking the best interests principle seriously has served as a basis

³⁴ UNICEF 'Implementation handbook for the Convention on the Rights of the Child' (2007) 35.

³⁵ Kurki-Suonio K 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective' (2000) 14 *International Journal of Law, Policy and the Family* 192-193.

³⁶ UNICEF 'Implementation handbook for the Convention on the Rights of the Child' (2007) 37.

³⁷ In addition, the considerations for the best interests must embrace both the short-and-long-term considerations for the child. UNICEF 'Implementation handbook for the Convention on the Rights of the Child' (2007) 37.

³⁸ Tun A, Cave G, Trotter D & Bell B 'The United Nations Children's Rights Convention: theory meets practice' (2007) 42.

for evaluating the laws, policies, practices and the budget decisions for State Parties which has helped to increase the visibility of children and their rights.³⁹

The UNCRC created a new status for the child based on the recognition that s/he is a person and has a right to live a life with dignity; since the UNCRC's promulgation in 1989, the child has been understood to be a subject of rights.⁴⁰ Zermatten argues further that 'through the combination of substantive rights and different principles, the CRC has unequivocally established this concept of the child as an individual entitled to the full span of human rights'.⁴¹

General Comment 14 of the UNCRC seeks to ensure the application of and respect for the best interests of the child by the States parties to the Convention.⁴² The full application of the best interests of child the requires the development of a rights based approach, which engages all actors in order 'to secure the holistic, physical, psychological, moral and spiritual integrity of the child and promote his/her human dignity'.⁴³ Strengthening the understanding and application of the right of children to have their best interests assessed and taken as a primary consideration or, the paramount consideration, is the main objective of this General Comment.⁴⁴

³⁹ Tun A, Cave G, Trotter D & Bell B 'The United Nations Children's Rights Convention: theory meets practice' (2007) 42.

⁴⁰ Zermatten J 'The best interests of the child principle: Literal analysis and function' (2010) 18 *International Journal of Children's Rights* 483.

⁴¹ 'The Committee on the Rights of the Child always holds the position that the respect for the best interests of the child is indivisible from any right of the CRC'. Doek J & Zermatten J 'The rights of the Child in International Law: Rights of the Child in a nutshell and in context: all about children's rights' (2012) 101.

⁴² Committee on the Rights of the Child: CRC General Comment on the Best interests of the Child/CRIN' available at <https://www.crin.org/en/library/publications/crc-general-comment-best-interests-child> (accessed 12 October 2015).

⁴³ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html> (accessed 12 October 2015).

⁴⁴ 'Committee on the Rights of the Child: CRC General Comment on the Best interests of the Child/CRIN' available at <https://www.crin.org/en/library/publications/crc-general-comment-best-interests-child> (accessed 12 October 2015).

The Committee does not stipulate what is in the child's best interests but provides a framework for assessing and determining the child's best interests.⁴⁵ General Comment 14 seeks to promote a real change in attitude leading to the full respect of children as rights holders; however, this has implications for:⁴⁶

- '(a) The elaboration of all implementation measures taken by governments;
- (b) Individual decisions made by judicial or administrative authorities or public entities through their agents that concern one or more identified children;
- (c) Decisions made by civil society entities and the private sector, including profit and non-profit organizations, which provide services concerning or impacting on children;
- (d) Guidelines for actions undertaken by persons working with and for children, including parents and caregivers.'⁴⁷

The Committee states that there is no hierarchy of rights in the UNCRC, all rights therein are in the 'child's best interests and no right could be compromised by a negative interpretation of the child's best interests.⁴⁸ According to General Comment 14 of the UNCRC, the child's best interests was aimed at ensuring both full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child.⁴⁹ The child's best interests is a threefold concept; in effect when analysing and explaining the best interests principle the following three conceptions should be understood:

⁴⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14, para 14 available at: <http://www.refworld.org/docid/51a84b5e4.html> (accessed 12 October 2015).

⁴⁶ 'Committee on the Rights of the Child: CRC General Comment on the Best interests of the Child/CRIN' available at <https://www.crin.org/en/library/publications/crc-general-comment-best-interests-child> (accessed 12 October 2015).

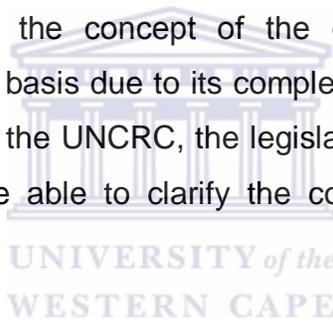
⁴⁷ 'Committee on the Rights of the Child: CRC General Comment on the Best interests of the Child/CRIN' available at <https://www.crin.org/en/library/publications/crc-general-comment-best-interests-child> (accessed 12 October 2015).

⁴⁸ Viviers A, UNICEF 'General Comments of the Committee on the Rights of the child: a compendium for child rights advocates, scholars and policy makers (2014) 153.

⁴⁹ The expectation is that States interpret development as a 'holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'. The UNCRC Committee's General Comment No.5 (2003) para 12.

'It is a substantive right : to have his / her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on an issue at stake, and to guarantee that this right will be implemented whenever a decision is to be made concerning a child. A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child.'⁵⁰

The Committee provides that the concept of the child's best interests must be determined on a case- by-case basis due to its complexity. As a result of article 3(1) in line with the other provisions of the UNCRC, the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof.⁵¹



When nations implement policies affecting children and their families, they must now consider children's best interests, take into account individual children's evolving capacities, and respect and ensure the inherent dignity of all children.⁵² The UNCRC has been ratified by 196 member States which illustrates its widely accepted recognition of the best interests of the child as a primary consideration in all matters concerning the child; this is a huge leap forward⁵³ for the recognition and establishment of a holistic

⁵⁰ UNCRC General Comment No.14 (2013) on the right of the child to have his/her best interests taken as a primary consideration para 6. See also Zermatten 'The best interests of the child principle: Literal analysis and function' (2010) 18 *International Journal of Children's Rights* 485 and Doek J 'The rights of the Child in International Law: Rights of the Child in a nutshell and in context: all about children's rights' (2012) 97-101.

⁵¹ UNCRC General Comment No.14 (2013) on the right of the child to have his/her best interests taken as a primary consideration para 32.

⁵² Levesque R 'International law on the rights of the child' (1995) 19.2 *Fordham International Law Journal* 832.

⁵³ According to Van Bueren, the UNCRC transformed the original best interests principle to a powerful principle of interpretation that has to be considered in every action concerning the child. Van Bueren G

approach to children's rights.⁵⁴ The UNCRC is invaluable as it recognises children as rights-holders and Article 3(1) seems to place the best interests of the child 'at the heart of international children's rights'.⁵⁵

2.5 The African Charter of the Human and Peoples Rights (1981)

The African Charter of Humans and People's Rights⁵⁶ (hereafter referred to as the Charter) does not contain any specific rights or duties for children. However, Article 18(3) provides for the protection of children. Moreover, the care of children, in the context of the family, is seen as a 'virtue' in the African 'historical tradition'.⁵⁷ As a result; in the traditional African context, children are of social and economical importance for the whole community; the whole community provides for the material and moral welfare of its children. It is evident that in the traditional African community, children are seen as an investment which ensures that the child's best interests will be adhered to.

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

The UNCRC inspired the drafting of the African Charter on the Rights and Welfare of the Child⁵⁸ (hereafter referred to as ACRWC), which is the first regional binding instrument which recognises a child as a possessor of rights.⁵⁹ The ACRWC has been described, in comparison with other regional treaties, 'as a pioneering treaty and the

'The United Nations Convention on the Rights of the Child: An evolutionary revolution' in Davel C (ed) *Introduction to Child Law in South Africa* (2000) 202-205.

⁵⁴ Sloth-Nielsen J 'Ratification of the United Convention on the Rights of the Child: Some implications for South Africa' (1995) 11 *SAJHR* 401-420.

⁵⁵ Parker S 'The best interests of the child-principles and problems' (1994) 8 *International Journal of Law and the Family* 27.

⁵⁶ OAU African Charter of Human and People's Rights, 1981 CAB/LEG/67/3/Rev.L, entered into force 21 October 1986.

⁵⁷ Viljoen F 'The African Charter on the Rights and Welfare of the Child' in Davel C (ed) *Introduction to Child Law in South Africa* (2000) 216.

⁵⁸ OAU *African Charter on the Rights and Welfare of the Child*, 1990 OAU Doc.CAB/LEG124.9/49 (1990) entered into force 29 November 1999. See also Chirwa DM 'The merits and demerits of the African Charter on the Rights and the Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127; Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 396.

⁵⁹ South Africa became a signatory to the ACRWC on the 10th of October 1997 and ratified it on the 7th of January 2000. Ferreira S (2010) 204.

most progressive of the treaties on the rights of the child'.⁶⁰ The ACRWC acknowledges the critical situation facing most children in Africa due to unique factors such as their socio-economic; cultural; traditional and developmental circumstances; natural disasters; armed conflicts; exploitation and hunger; and that on account of children's physical and mental immaturity, they need special safeguards and care.⁶¹

In comparison to the UNCRC, the ACRWC has a stronger level of protection for children as it expressly provides in Article 1(3) for its supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the ACRWC.⁶² The ACRWC plays a vital role in the best interests of the child principle insofar as it is expressly stated in Article 4 that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'⁶³ It is evident in comparing the UNCRC to the ACRWC that the ACRWC takes a more extensive approach to the protection of children rights in the African context in relation to the best interest's principle⁶⁴ and it echoes a unique African flavour to the Charter.⁶⁵ The ACRWC takes the best interests concept further than the UNCRC through ensuring that all its provisions must be implemented, first, in the child's best interests.⁶⁶

⁶⁰ Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* (2002) 130. The African Charter now has 47 ratifying states with a 2 further states expected within the next few weeks.

⁶¹ Lloyd A 'The African Regional System for the Protection of Children's Rights' in Sloth-Nielsen J (ed) *Children's Rights in Africa : A Legal Perspective* (2008) 35. See also Olowu D (2002) 128; Viljoen F (2012) 392.

⁶² Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 205. See also Gose M *The African Charter on the Rights and Welfare of the Child: an assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 26.

⁶³ Article 4(1) of *the African Charter on the Rights and Welfare of the Child*, 1990. See also Chirwa DM 'The merits and demerits of the African Charter on the Rights and the Welfare of the Child' (2002) 10 *International Journal of Children's Rights* (2002) 160.

⁶⁴ The ACRWC goes a step ahead of the UNCRC by stating that the best interests of the child must be 'the primary consideration', this offers better protection since the best interests principle under the ACRWC is the overriding consideration: Chirwa DM 'The merits and demerits of the African Charter on the Rights and the Welfare of the Child' (2002) 10 *International Journal of Children's Rights* (2002) 160.

⁶⁵ Lloyd A 'The African Regional System for the Protection of Children's Rights' in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 36.

⁶⁶ 'Although it has been observed that the supremacy of the best interests principle in the ACRWC, through maximizing the influence of this overriding principle over other considerations, tends to reflect Western culture rather than embracing genuine African spirit': See Lloyd A 'The African Regional

The ACRWC is a vital regional instrument which is useful for Africa to address the challenges it faces in relation to children's rights on the continent. The advent of the Charter recognised children as possessing rights and not merely that they are objects or extensions of their parents.

2.7 The development of the best interests principle in South Africa

'As long ago as 1969, the standard of the child's best interests was described by our courts as a golden thread which runs throughout the whole fabric of our law relating to children.'⁶⁷ During 1994 and for the first time in South African legal history, in the case of *McCall v McCall*,⁶⁸ Judge King put forth a list of thirteen criteria that could serve as a guide in determining the best interests of the child.⁶⁹ With the advent of the Constitution in 1996, the best interests of the child was given constitutional recognition. In addition, the Children's Act⁷⁰ is the most recent development in legislation in determining the best interests of the child so as to provide assistance to the courts.

2.7.1 *McCall v McCall*

King J in the *McCall* case laid down a comprehensive checklist of thirteen factors which decision makers could consider when trying to reach an outcome that would be in the best interests of the child.⁷¹ The criteria listed in the *McCall* decision are as follows:

- (a) 'the love, affection and other emotional ties which exists between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

System for the Protection of Children's Rights' in Sloth-Nielsen J (ed) *Children's Rights in Africa A Legal Perspective* (2008) 37.

⁶⁷ Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 202.

⁶⁸ *McCall v McCall* 1994 (3) SA 201(C).

⁶⁹ Bekink B & Bekink M 'Defining the standard of the best interests of the child: Modern South African perspectives' 2004 *De Jure* 23. See also Skelton A *Family Law in South Africa* (2010) 239.

⁷⁰ Children's Act 38 of 2005.

⁷¹ Skelton A *Family Law in South Africa* (2010) 239.

- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational, well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) any other factor which is relevant to the particular case with which the Court is concerned'.⁷²

The factors listed above should not be regarded as a *numerus clausus*, as the court stated that any other relevant factor may be brought before the court.⁷³ This list only serves as a guide. Nevertheless it has to a great extent assisted our courts in determining the best interests of the child.

2.7.2 The best interests of the child in the Constitution of South Africa, 1996

The Constitution of the Republic of the South Africa, 1996 transformed the best interests of the child into a constitutional imperative. Section 28(2) of the Constitution

⁷² *McCall V McCall* 1994 (3) SA 201 (C) at 205-206.

⁷³ Bekink B & Bekink M 'Defining the standard of the best interests of the child: Modern South African perspectives' 2004 *De Jure* 24.

was understood as a guarantee that the child's best interests must be the paramount consideration in every matter concerning the child.⁷⁴ The Constitution imposes a stricter requirement in section 28(2) in respect of the best interests of the child than that which had been applied in terms of article 3(1) of the UNCRC and article 4(1) of the ACRWC. These articles respectively render the child's best interests 'a primary consideration' and 'the primary consideration' in matters concerning the child.⁷⁵ Heaton concludes that the word 'paramount' contained in section 28(2) of the Constitution thus elevates the best interests of the child to be superior in any matter concerning the child.⁷⁶

Therefore, considering the wording used in section 28(2) of the Constitution at face value, it appears that the paramountcy principle can act as a 'trump card', outweighing all other factors.⁷⁷ Nonetheless, the rights of the child are not superior to other rights and they should not be, since it would represent 'positive discrimination' of children against other groups, for example women, workers, and the disabled, etc which would be contradictory to other principles in international treaties and to other constitutional claims.⁷⁸

In determining the child's best interests as paramount, the court must also take into account the rights of the parents; it does not mean that other constitutional rights may be ignored, or that limiting the best interests of the child is impermissible.⁷⁹ According to the Court in *S v M (Centre for Child Law as Amicus Curiae)* the correct approach is to apply the 'paramountcy principle in a meaningful way without obliterating other valuable and constitutionally-protected interests.'⁸⁰

⁷⁴ *Minister of the Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) and *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

⁷⁵ Heaton J 'An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34.2 *JJS* 4.

⁷⁶ Heaton J 'An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34.2 *JJS* 4.

⁷⁷ Skelton A *Family Law in South Africa* (2010) 241.

⁷⁸ Doek J & Zermatten J *The rights of the Child in International Law: Rights of the Child in a nutshell and in context: all about children's rights* (2012) 99-100.

⁷⁹ Heaton J *South African Family law* 3ed (2010) 165.

⁸⁰ Heaton J 'An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34.2 *JJS* 4. *S v M (Centre for Child Law as Amicus Curiae)* 2008(3) SA 232 (CC); 2007 (2) SACR 539 (CC) para 25.

According to Bonthuys, in order to make sense of what the courts have done with the best interests principle in the South Africa, it is necessary to determine whether the best interests is a value, a principle of interpretation, a rule or a right.⁸¹ Since 2000, with the cases of *Christian Education South Africa v Minister of Education*⁸² and *Minister for Welfare and Population Development v Fitzpatrick*⁸³, there has been a tendency to hold that the best interests creates a right independent of the other rights contained in section 28(1) of the Constitution.⁸⁴ Nonetheless, in some of the very same cases, the best interests of the child is also called a 'standard'⁸⁵ or a 'principle'.⁸⁶ The fact that the Constitutional Court has not dealt with the best interests principle as it normally treats other rights, creates the impression that, contrary to the rhetoric, the best interests is not really a fundamental right, or at least not a right like all the other rights in the Bill of Rights.⁸⁷ Bonthuys provides that in none of these cases was it actually necessary to use the best interests as a right, as other rights were more directly applicable.⁸⁸

In the *Christian Education* case, in addition to mentioning the best interests, the court held that the decision could have been decided on the basis of the child's rights to dignity and freedom and security of the person in order to limit the parent's rights to freedom of religion.⁸⁹ The *Fitzpatrick* matter could have been decided on the basis of the child's right to family or parental care, or to appropriate alternate care when removed from the family environment.⁹⁰ In the *Du Toit* matter, apart from focusing on legislation which infringed the best interests of the children,⁹¹ the court looked at the

⁸¹ Bonthuys E 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 5.

⁸² 2000 (10) BCLR 1051 (CC) para 41.

⁸³ 2000 (7) BCLR 713 (CC) para 17.

⁸⁴ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); *Du Toit Minister for Welfare and Population Development v Fitzpatrick* 2003 (2) SA 198 (CC) para 20; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 55.

⁸⁵ *Minister for Welfare and Population Development v Fitzpatrick* para 18.

⁸⁶ *Du Toit v Minister for Welfare and Population Development v Fitzpatrick* para 22.

⁸⁷ Bonthuys E 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 7-8.

⁸⁸ Bonthuys E 'The best interests of the children in South African Constitution' (2006) *International Journal of Law, Policy and the Family* 7.

⁸⁹ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) para 47.

⁹⁰ Section 28(1)(b) of the Constitution of the Republic of South Africa, 1996.

⁹¹ *Du Toit Minister for Welfare and Population Development v Fitzpatrick* 2003 (2) SA 198 (CC) para 21.22.

parental rights to equality and dignity. Bonthuys argues equally that this case could have been decided on the basis of child's rights to parental care.⁹² The *Bannatyne* case could have also been decided on child's right to parental care.

In *De Reuck*, in addition to the best interests right,⁹³ the rights to privacy and freedom of expression of an adult who was found in possession of child pornography were limited by children's rights to dignity.⁹⁴ The *Sonderup*⁹⁵ case was the exception to the cases discussed above, given that it challenged the Hague Convention directly, basing its argument on the fact that it did not give effect to the best interests of children.⁹⁶ According to Bonthuys, these Constitutional court cases highlight that the best interests principle does not have to be referred to as a right as there are other children's rights which are applicable more directly in these matters.

2.8 The Children's Act 38 of 2005

The promulgation of the Children's Act encompassed a long process before it became the Act it is today. The process of enacting the Children's Act began with the South African Law Reform Commission (hereafter SALC) acting on widespread responses in connection with the Child Care Amendment Act.⁹⁷ There was a call for a more comprehensive Child Care Act and a need to 'Africanise' child care which required more development.⁹⁸ In May 1998 the SALC published an Issue Paper⁹⁹ for general information. The next step in the drafting process was a Discussion Paper¹⁰⁰; followed

⁹² Bonthuys E 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 8.

⁹³ *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 55.

⁹⁴ *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 63. The children's rights to bodily integrity and to be protected from abuse and degradation, would have also limited the adults rights. Section 28(1)(d) of the Constitution of the Republic of South Africa, 1996.

⁹⁵ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

⁹⁶ Even in the *Sonderup* case it was not necessary to classify the best interests principle as a right in order to come to the conclusion that the Convention was intended to serve the children's interests in returning them to their countries of origin. Bonthuys E 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 8-9.

⁹⁷ Sloth-Nielsen J & Van Heerden B 'Proposed amendments to the Child Care Act and Regulations in the context of constitutionalisation and international law developments in South Africa' (1996) *SAJHR* 247.

⁹⁸ SALC Discussion Paper 103 para 1.2 page 1.

⁹⁹ Project 110 Review of the Child Care Act Issue Paper (1998).

¹⁰⁰ SALC Project 110 Review of the Child Care Act Discussion Paper 103 (December 2001).

by a Report¹⁰¹ and a Draft Children's Bill.¹⁰² The discussion included recommendations as to how to determine the child's best interests which included direct participation of the child.¹⁰³

The Commission's intention was to comply with the children's rights enumerated in article 12 of the UNCRC and section 28 of the Constitution which is evident in the final report of the Commission.¹⁰⁴ The Children's Act was generally welcomed by society as it shifted from a parent-centred approach to a child-centred approach in which the rights of the child were enhanced.

Section 7(1) of the Children's Act lists fourteen factors which courts must consider when deciding the best interests of the child. These factors are similar to, but more detailed than, the *McCall* factors.¹⁰⁵ The factors listed in section 7(1) of the Children's Act are the following:

- 
- (a) the nature of the personal relationship between –
 - (i) the child and the parents or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances
 - (b) the attitude of the parents or any specific parent towards-
 - (i) the child and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or

¹⁰¹ SALC Project 110 Report on the Review of the Child Care Act (December 2002).

¹⁰² SALC Project 110 Draft Children's Bill Annexure to the Report on the Review of the Child Care Act (2002).

¹⁰³ SALC Discussion Paper 103 para 5.3 page 86.

¹⁰⁴ SALC Discussion Paper 103 paras 6.3.1, 6.3.3 page 100, 104 and Report dated December 2002 para 532 pages 34-37.

¹⁰⁵ Skelton A *Family Law in South Africa* (2010) 239.

- (ii) any brother or sister or other child, or any other caregiver or person, with whom the child has been living;
- (e) the practical difficulty and the expense of a child having contact with the parents, or any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family, extended family;
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) The child's –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that the child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

Although the factors contained in section 7 are similar to the list developed in the case of *McCall*, there are a few differences. First, section 7 has a wider application in comparison to the *McCall* list. Section 7's application is not limited to parents, but applies equally to a care-giver or any relevant person in the child's life. Secondly, unlike the *McCall* list, section 7 does not include 'same sex matching'.¹⁰⁶ Thirdly, section 7 does not specify the ability to provide economic security, but puts a strong emphasis on the emotional, intellectual and spiritual well-being and stability of the children.¹⁰⁷

The Centre for Child Law held that the *McCall* list contrasts with the Children's Act as section 7 does not contain the 'child's preference' as a factor to be considered.¹⁰⁸ However, 'section 7(g) does include the child's maturity and developmental stage, which are often the criteria to consider when taking children's wishes into account, but it does not specifically mention the wishes of the child'.¹⁰⁹ The final difference is that the *McCall* list was not exhaustive and the court could consider any other relevant factors, but section 7 does not state that the court may consider any other factors; it is not an open-ended list.¹¹⁰

¹⁰⁶ 'However, one still has to bear in mind that section 7(a) stipulates the importance of the nature of the personal relationship between the child and parent, any other care-giver or relevant person'. The Centre for Child Law 'The best interests of the child' available at <http://www.roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children> (accessed 17 January 2013).

¹⁰⁷ The Centre for Child Law 'The best interests of the child' available at <http://www.roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children> (accessed 17 January 2013).

¹⁰⁸ The Centre for Child Law 'The best interests of the child' available at <http://www.roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children> (accessed 17 January 2013).

¹⁰⁹ The Centre for Child Law 'The best interests of the child' available at <http://www.roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children> (accessed 17 January 2013).

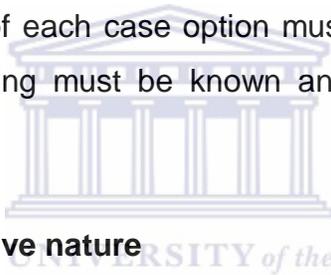
¹¹⁰ Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 212.

2.9 Criticisms against the best interests principle

2.9.1 Indeterminate

The main criticism with the best interests principle is that it is indeterminate.¹¹¹ The reason why the best interests principle is indeterminate rests on the premise that: 'while everybody agrees that the children's welfare should be paramount, nobody knows what children's welfare demands'.¹¹² Mnookin provides that even in the simplest child custody dispute in which the judge has to choose between the mother and the father, the judge needs to know the expected outcome of each option in order to make a rational choice.¹¹³

For a determinate answer as to what would constitute the best interests of the child, Parker argues that the following conditions are to be satisfied:¹¹⁴ all the options are known, all possible outcomes of each case option must be known, the probabilities of each possible outcome occurring must be known and the values attached to each outcome must be known.



2.9.2 Value-laden and subjective nature

The inherent indeterminacy of the best interests principle leads to the criticism that it has a value-laden nature.¹¹⁵ 'Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.'¹¹⁶

The criticism lies in the difficulty of identifying the criteria that should be used by the decision-maker to determine the best interests of the child. 'The choice of criteria is inherently value-laden; all too often there is no consensus about what values should

¹¹¹ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 95.

¹¹² Reece H 'The paramountcy principle: Consensus or construct? (1996) 49 *Current Legal Problems* 271.

¹¹³ Mnookin R 'Child –custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 255-257.

¹¹⁴ Parker S 'The best interests of the child- principles and problems' in Alston P (ed) *The best interests of the child: reconciling culture and human rights* (1994) 29.

¹¹⁵ 'Far from being a neutral criterion, the best interests-test is inherently value-laden. It is filled with ideas about the abilities of parents and the needs of children.': Bonthuys E 'Of biological bonds, new fathers and the best interests of the child' (1997) 13 *SAJHR* 636.

¹¹⁶ Mnookin R 'Child –custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 260.

inform this choice. Even if predictions were possible what set of values should a judge use to determine a child's best interests ...?'¹¹⁷

2.9.3 Subjectivity

The best interests principle has led critics to characterise the outcomes as being subjective. 'If the best interests of the child is approached from a subjective view, then the child's opinion on his best interests, his parents and other interested parties subjective opinions would be determinative'.¹¹⁸ However, the greater danger with this criticism lies with the opinion of the judge who makes the final conclusion on the best interests of the child and herein he will be influenced by his own opinion, background and prejudices.¹¹⁹

Bonthuys concludes that 'it is thus inevitable that the factors used to define the best interests of the child will reflect the judicial and community values and prejudices, and will vary over time, space and culture.'¹²⁰ In the *Fletcher* case, Schreiner JA implicitly recognised this fact when he provided that 'questions of custody may properly be decided in relation to human needs and values as they are assessed in civilised countries, generally at the present day.'¹²¹

2.9.4 Justifications

A further point of criticism against the best interests principle is that it is unjust towards the parents. Custody disputes involve three people who are directly affected and all of whom have a strong interest in the decision, yet the best interests principle only takes the child's interests into account.¹²² As Elster explains, the law does not take any

¹¹⁷ Alston P 'The best interests principle: Towards a reconciliation of culture and human rights' in Alston P (ed) *The best interests of the child: reconciling culture and human rights* (1994) 18.

¹¹⁸ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 97.

¹¹⁹ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 97. See also Reece H 'The paramountcy principle: Consensus or construct? (1996) 49 *Current Legal Problems* 273.

¹²⁰ Bonthuys E 'Of biological bonds, new fathers and the best interests of the child' (1997) 13 *SAJHR* 623.

¹²¹ *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 145.

¹²² Reece H 'The paramountcy principle: Consensus or construct? (1996) 49 *Current Legal Problems* 275, also Elster J 'Solomonic judgments: against the best interests of the child' (1987) 54 *University of Chicago LR* 16-21.

account of the needs and rights of the parents. Therefore, the best interests principle is unjust towards the parents as parental interests and rights ought also to be considered in tandem with the children's interests. The child is merely one participant in the custody dispute in which the interests of all the participants count.¹²³

2.9.5 Self-defeating

By promoting the interests of the child, the best interests principle has been criticised that it is self-defeating as it might work against the interests of children in general.¹²⁴ The argument is that this might create parental incentives or disincentives or expectations which may act against the best interests of the children in general. A court may, for example, in a number of custody cases of young children conclude that maternal custody would be in best interests of the child; the expectation might easily be created that all mothers will get custody of their young children and that could act as an incentive for mothers to be more neglectful of their parental responsibilities.¹²⁵ Heaton concludes that this may act as a disincentive for fathers as they might believe, no matter how much they do or care for the child, the mother would inevitably receive custody of the child.



2.10 The advantages of the best interests principle

2.10.1 The best interests standard is flexible and adaptable

The indeterminacy of the best interests standard guarantees that the standard remains flexible and adaptable to all circumstances regardless of the particular legal disputes at hand.¹²⁶ 'Where the principle originated as an exclusive measure to protect the welfare of children in custody and adoption proceedings, it has now evolved to an entirely inclusive concept affording paramountcy to the interests of children in a wide (in fact, the total) range of matters regarding children'.¹²⁷

¹²³ Reece H 'The paramountcy principle: Consensus or construct? (1996) 49 *Current Legal Problems* 303.

¹²⁴ Elster J 'Solomonic judgments: against the best interests of the child' (1987) 54 *University of Chicago LR* 21-26.

¹²⁵ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 98.

¹²⁶ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 95.

¹²⁷ Basson L *Perspectives on the best interests of the child: Developments in the interpretation and application of the principle in South African law relating to custody* (unpublished LLM thesis, Stellenbosch University, 2004) 78.

As Heaton points out, it is impossible and undesirable to try and give a comprehensive definition of the best interests principle because the principle cannot have a 'fixed meaning and content' that would be applicable for all communities and all circumstances.¹²⁸ Due to the flexibility and adaptability of the best interests principle as mentioned above, it ensures that the principle never becomes obsolete.¹²⁹

Children tend to benefit from multiple adult inputs in their lives. These people are called in to help and assist with other parental duties and roles (teachers, grandparents and friends). As a result the best interests of children may be better served if the notion of parenthood is expanded.¹³⁰ The adaptability of the best interests principle allows for the concept of parenthood to be expanded to achieve a more flexible approach which could be more advantageous for the children.

'Therefore it is possible to conclude that although the child's best interests are to be determined individually, in each single case, the act of legal interpretation does not happen in a vacuum. Rather, it reflects a particular cultural understanding of the child's interests. It is thus an effort to understand the interactive process between law and culture.'¹³¹

2.10.2 Child-centred approach

The fact that the best interests principle focuses on the child makes it an extremely valuable principle in children's rights. The best interests standard echoes a child-orientated approach as the child's well-being 'depends entirely on the current understanding of what is best for the children'.¹³² There has been a shift from the notion of parental rights vis-à-vis their children to the idea of children as bearers of their own

¹²⁸ Heaton J 'Some general remarks on the concept 'best interests of the child' (1990) 53 *THRHR* 98.

¹²⁹ 'It allows for changes in the application of the principle over time, while the concept itself is retained.'
Bonhuys E 'Of biological bonds, new fathers and the best interests of the child' (1997) 13 *SAJHR* 623.

¹³⁰ Du Toit L 'Integrating care and justice in South African family law: Dealing with maternal and parental vulnerabilities' 2002 *TSAR* 537. Du Toit L 'Integrating care and justice in South Africa Family Law: Laying the theoretical foundation' 2002 *TSAR* 46-59.

¹³¹ Kurki-Suonio K 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective' (2000) 14 *International Journal of Law, Policy and the Family* 184.

¹³² Maidment S *Child Custody and divorce* (1984) 149.

rights.¹³³ Therefore, the best interests principle allows for the acknowledgment of the child as a bearer of substantive rights and it acknowledges the child's vulnerability in the divorce proceedings.¹³⁴

2.10.3 Child- participation and a holistic approach

In terms of Article 12 of the United Nations Convention of the Rights of the Child,¹³⁵ a child who is 'capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'¹³⁶ The best interests principle allows for child participation which is beneficial in assisting the courts in determining the child's best interests. Child participation and the weight attached to the specific child's expression depends on the 'child's necessary intellectual and emotional maturity to give his expression of the preference, a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgement'.¹³⁷ The best interests principle in allowing child participation (although dependant on the age and maturity of child) in effect allows the child to express a view on a matter that affects his destiny in life.¹³⁸

The best interests principle acknowledges that the welfare of the child is inextricably wound up in the welfare of the entire family.¹³⁹ As a result, what is in the interests of the

¹³³ Human S 'The theory of children's rights' in Davel (ed) *Introduction to Child Law in South Africa* (2000) 150.

¹³⁴ The various maternal and paternal vulnerabilities are identified and how these vulnerabilities can be addressed through expanding the concept of parenthood in the application of the best interests of the child principle. Du Toit L 'Integrating care and justice in South African family law: Dealing with maternal and parental vulnerabilities' 2002 *TSAR* 537. Du Toit L 'Integrating care and justice in South Africa Family Law: Laying the theoretical foundation' 2002 *TSAR* 46-59. Basson L *Perspectives on the best interests of the child: Developments in the interpretation and application of the principle in South African law relating to custody* (unpublished LLM thesis, Stellenbosch University, 2004) 77.

¹³⁵ United Nations Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

¹³⁶ Article 12 of the United Nations Convention on the Rights of the Child, 1989.

¹³⁷ *McCall v McCall* 1994 (3) SA 201 at 207.

¹³⁸ Schafer I *The law of access to children* (2011) 163-166.

¹³⁹ Basson L *Perspectives on the best interests of the child: Developments in the interpretation and application of the principle in South African law relating to custody* (unpublished LLM thesis, Stellenbosch University, 2004) 83.

child must be in the interests of the parents and *vice versa*.¹⁴⁰ It is evident that the best interests principle has an added advantage as it recognises a holistic approach to the family.

Despite the fact that the disadvantages outweigh the advantages of the principle, they rarely constitute any theoretical fundamental objections.¹⁴¹ The best interests principle is unique as 'at the end of the day the thing that annoys me most about the welfare test is that, for all its flaws, I can't think of anything better.'¹⁴² The theoretical underpinnings of the best interests principle have been discussed. This was necessary to achieve a comprehensive understanding of its development and scope of application in relation to relocation disputes.

2.11 Summary

The best interests principle is the determining factor in all matters affecting children, including care, contact and guardianship. The best interests of the child concept has several advantages and criticisms attached to it. Despite the indeterminacy of the best interests principle, however, it continues to be an important and irreplaceable standard in the area of family law. There is no doubt however, that determining the best interests of the child is difficult generally; it can only be dealt with on a case-by-case basis.

The international and regional instruments aim to protect children against the inherent imbalance of power between adults and children to ensure that children are not abused. More specifically the UNCRC is the most comprehensive treaty on the rights of the child. The best interests principle in the UNCRC has helped to crystallise the perception of the child as an autonomous human being in his or her own right.¹⁴³ The Convention has created a new status for the child based on the recognition that the child has the

¹⁴⁰ Spiro E 'Custody and guardianship of children *stante matrimonio* and on the dissolution of marriage' 1983 *Acta Juridica* 118.

¹⁴¹ Reece H 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 271.

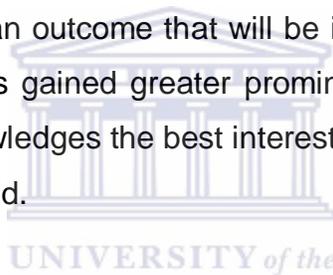
¹⁴² Norrie K 'The Children Acts in Scotland, England and Australia: Lessons for South Africa in rhetoric and reality' (2002) 119 *SALJ* 633.

¹⁴³ Tun A, Cave G, Trotter D & Bell B 'The United Nations Children's Rights Convention: theory meets practice' (2007) 42.

right to live a life of dignity and since its promulgation the child is understood to be a subject of rights.¹⁴⁴

The ACRWC is the first regional instrument recognising a child as a possessor of rights and not merely an object or extension of their parents. Article 4 provides that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. The ACRWC in comparison to the UNCRC is more extensive as it provides a stronger level of protection for children and echoes a unique African element to the best interests principle.

In 1994 the best interests principle attained a more explicit approach in South African jurisprudence when Judge King established a checklist which the decision maker could consider when trying to reach an outcome that will be in the best interests of the child. The best interests principle has gained greater prominence and protection as section 28(2) of the Constitution acknowledges the best interests of the child to be paramount in every matter concerning the child.



Since the enactment of the Children's Act, South Africa has received greater legal certainty regarding the factors used to determine the child's best interests. There can never be an all-encompassing list of factors that makes provision for all factors that could be considered to determine the best interests of the child.¹⁴⁵ However it must be reiterated that a decision about the best interests of the child must take account of all relevant facts and circumstances of each individual case. In determining the best interests principle one should weigh all the different points of view (subjective and objective) on what would be in the child's best interests in providing a balanced conclusion.¹⁴⁶ Ultimately, the best interests of the child is the paramount consideration

¹⁴⁴ Zermatten J 'The best interests of the child principle: Literal analysis and function' (2010) 18 *International Journal of Children's Rights* 483.

¹⁴⁵ Ferreira S 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 212.

¹⁴⁶ Heaton, J 'Some general remarks on the concept Best Interest of the Child' (1990) 53 *THRHR* 93.

in every matter concerning children. As Reece suggests 'it seems that no-one would argue with the principle of prioritising a child's welfare.'¹⁴⁷



¹⁴⁷ Reece H 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 274-275.

Chapter 3

THE DETERMINANTS OF RELOCATION DISPUTES IN SOUTH AFRICA

3.1 Introduction

Relocation disputes most often arise in instances where the custodian parent wants to relocate with the child/children after divorce or separation, and the non-custodian parent opposes the application on the basis that his/her contact rights with the child may be restricted. The most difficult task in adjudicating a relocation dispute is balancing the right of the child to maintain contact with both parents with the right to freedom of movement of the primary caregiver.¹⁴⁸ In these instances it should be borne in mind that the best interests of the child is the most important principle in all matters concerning the children. The courts use the 'best interests of the child' principle as a guiding factor in determining whether or not to grant the relocation order.

Not only do the factors which the courts take into account influence the outcome of these disputes, but their formulation and interpretation impacts upon the decision whether or not to grant the relocation order.¹⁴⁹ As a result of the lack of legislation in South Africa to assist our courts in determining the outcome of relocation applications, it is imperative to consider the factors which courts usually take into account.¹⁵⁰

In order to determine how the 'best interests' of the child is applied in relocation disputes, South African courts determination of relocation both before and after the Constitution and Children's Act 38 of 2005¹⁵¹ (hereafter Children's Act) will be discussed briefly. This chapter will briefly summarise the key factors which are taken into account by our South African courts in determining the best interests of the child in relocation disputes. In addition, this chapter will provide a synopsis of the approaches used by South African courts in determining relocation applications.

¹⁴⁸ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 70.

¹⁴⁹ Bonthuys, E 'Clean Breaks: Custody, Access and the Parents rights to Relocate' (2000) 16 *SAJHR* 490.

¹⁵⁰ Domingo W 'For the sake of the children: South African Family relocation disputes' (2011) 14(2) *PELJ* 158.

¹⁵¹ The Children's Act 38 of 2005.

Relocation disputes are the most difficult to adjudicate as they usually involve two 'competent and committed parents, one with sound reasons for wishing to relocate, the other with equally valid reasons for resisting the application.'¹⁵² In the following paragraphs, the determination of relocation applications by the South African courts before the Children's Act will be discussed briefly.

3.2 The interpretation of relocation disputes

Prior to the Constitution of 1996¹⁵³ the interests of the child were considered but were not central in deciding relocation disputes. Relocation cases were approached from the premise that the primary caregiver had the right to decide where the child should live, unless the non-primary caregiver could show that the proposed move would be detrimental to the child.¹⁵⁴ In older relocation disputes, the applications by the primary caregiver for relocation were generally granted by our courts unless it was clear that the primary caregiver's decision to relocate was motivated by *mala fides*.¹⁵⁵ These approaches were rejected in the case of *Shazwin v Laufer*,¹⁵⁶ where the court held that the best interests of the child should be the test in relocation cases. Eventually, sometime after Constitution, the paramount consideration in relocation disputes became the best interests of the child principle.

The introduction of the Children's Act brought about some guidance as to the factors which could assist in determining the best interests of the children. The provisions in section 7 of the Children's Act could assist the courts in deciding relocation disputes. However we still need to look at case law to determine what factors need to be taken into account in deciding relocation cases. Due to the fact that South Africa does not have legislation specifically dealing with relocation disputes, the common factors which the courts take into account need to be established.

¹⁵² Boshier P 'Have the Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 10.

¹⁵³ Constitution of the Republic of South Africa, 1996.

¹⁵⁴ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 71.

¹⁵⁵ Bonthuys E 'Clean Breaks: Custody, Access and the Parents rights to Relocate' (2000) 16 *SAJHR* 488-490.

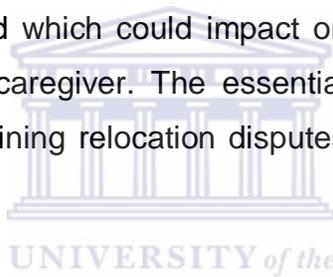
¹⁵⁶ *Shazwin v Laufer* 1968 (4) SA 657 (A).

3.3 Factors used to determine the best interests of the child in relocation applications

It was held that the courts are obliged to take account of the factors in section 7 of the Children's Act in determining the best interests of the child. 'The primary factors were the nature of the relationship between the child and his family and the attitude of both parents towards the child.'¹⁵⁷ The various factors used by the courts are the following *inter alia*:

3.3.1 Contact with the non-primary caregiver

One of the most important considerations in relocation disputes is the element of continued contact between the children and the non-primary caregiver. In instances where relocation applications are allowed, contact with the non-primary caregiver and the children would be restricted which could impact on the bond shared between the children and the non-primary caregiver. The essential factor which the courts must always be mindful of in determining relocation disputes is that the best interest of the child must be effected.



In deciding relocation applications, the right of contact of the non-primary caregiver is not ignored. The courts realise that restricting the movement of the primary caregiver is not the only way of ensuring continued contact with the children.¹⁵⁸ 'For many children, spending summers and vacation periods with a parent will allow the continuation and development of a vitally important relationship'.¹⁵⁹ In the *CG*¹⁶⁰ case the court held that through electronic methods of communication such as Twitter, Skype, Webcam contact with the non-primary could be maintained.¹⁶¹ The court held in *HS v WS*¹⁶² that exercising the contact rights of the non-primary caregiver could be managed by

¹⁵⁷ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 80.

¹⁵⁸ Wallerstein JS & Tanke TJ 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 319-320.

¹⁵⁹ Wallerstein JS & Tanke TJ 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 320.

¹⁶⁰ *CG v NG* 2012 JDR 1795 (GNP).

¹⁶¹ *CG v NG* 2012 JDR 1795 (GNP) page 21.

¹⁶² *HS v WS* 2012 JDR 1066 (GNP).

electronic devices such as Skype, sms and direct telephone calls.¹⁶³ In relocation applications in the draft order, the courts usually instruct continued contact between the children and the non-primary caregiver with means such as substituting short visits with generous block visits during school holidays, communication via telephone, mail, email, Skype etc.¹⁶⁴

3.3.2 The interests of the primary care-giver and children's relationship with the primary caregiver

The relationship with the primary caregiver and the children is very important, as they are in the care of the person who is best suited to care for their needs. As stated in *B v M*¹⁶⁵ our courts have emphasised the importance of the child's relationship with the primary caregiver.¹⁶⁶ The basis for linking the interests of the primary caregiver and children's interests rests on the research that after divorce the child's relationship with the primary caregiver is his/her most important source of nurture and security.¹⁶⁷ As a result, circumstances which negatively affect the primary caregiver will in turn also impact upon the welfare of the child. This provides the justification for taking the impact of the relocation upon the primary caregiver directly into account in determining the best interests of the child.

In addition the interests of the primary caregiver after the divorce must be considered as it is the reality that they must reconstruct their lives. It cannot be expected nor would it be possible to maintain cordial relations, remain in the same geographical area and raise the children together whilst rebuilding their lives.¹⁶⁸ It has been generally accepted that following a divorce our courts will not lightly interfere with the decision of the primary caregiver to relocate where it was shown to be in good faith and reasonable. The legal principle for this reasoning had been set out in *Jackson v Jackson*¹⁶⁹ which

¹⁶³ *HS v WS* 2012 JDR 1066 (GNP) para 43.

¹⁶⁴ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 441-442.

¹⁶⁵ *B v M* 2006 (9) BCLR 1034 (W).

¹⁶⁶ *B v M* 2006 (9) BCLR 1034 (W) para 40.

¹⁶⁷ Bonthuys E 'Clean Breaks: Custody, Access and the Parents rights to Relocate' (2000) 16 *SAJHR* 494.

¹⁶⁸ *F v F* 2006 (1) All SA 571 (SCA) at para 10.

¹⁶⁹ *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 2.

held that 'in most cases even if access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children'.¹⁷⁰

3.3.3 The relationship between the children and parents

In case of *HG* the parents were awarded joint custody of the children with the intention that the children spend an equal amount of time with each parent. In cases where joint custody was awarded the courts must be acutely aware of this consideration, where time of the parents is more equally spent with the children as this impacts on the parent-child relationship. Judge Chetty noted in the *HG* case that the courts have to be mindful in relocation cases of joint custody that where parents spend more or less an equal amount of time with the children, the relocation could have a more detrimental impact on the child and his or her relationship with the left-behind parent. The court in *Cunningham v Pretorius* held that the nature of the relationship between the child and his parents is an important factor to consider; insofar as it hinges on the element of the amount of time the parents spend with the child, this must be taken into account in determining the relocation application.

3.3.4 The motive for the relocation

'Relocations should be undertaken honestly, carefully and in good faith'.¹⁷¹ The reasons for relocating are numerous including improved employment opportunities, educational ambitions, family support, new spouse/partner, better standard of living and like. The motives of the primary caregiver to relocate are an important factor to be taken into account in determining the best interests of the child in relocation applications. As Judge Louw stated in *GCH v GNB* the primary caregiver's decision to relocate must be

¹⁷⁰ *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 9. Relocation judgements confirmed and relied on this legal principle in *Jackson* for example *F v F* 2006 (1) All SA 571 (SCA), *B v M* 2006 (9) BCLR 1034 (W) and *GCH v GNB* (35322/2012) [2012] ZAGPHC 218 (14-09-2012) etc.

¹⁷¹ Wallerstein JS & Tanke TJ 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 321.

bona fide and reasonable and not motivated by a desire to frustrate the non-primary caregiver's rights of access.¹⁷²

'The reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move ... must be carefully scrutinised by the court'.¹⁷³ Therefore the courts have to investigate whether the primary caregiver's reasons for relocating are *bona fide* and not just an attempt to frustrate the non-primary caregiver's rights. Reasons for the relocation that are frivolous or advanced out of anger or a desire for revenge that is aimed to prevent or diminish the child's contact with the non-primary caregiver do not count as good faith.¹⁷⁴

3.3.5 Conflict between the parents

Conflict between parents especially after divorce is very common. Research showed that frequent continued access in homes where high conflict existed between the parents had the unintended effect that the children would be exposed to further tensions which is not in their best interests.¹⁷⁵ However in circumstances where domestic violence had been a factor, this factor in determining the relocation application would be a relevant factor.¹⁷⁶ It is not in the best interests of the child to remain in a family environment where domestic violence is prevalent; it would have an adverse impact on the development of the child.

Many States in America such as Alabama, Louisiana, and Michigan added inter-parental conflict or a history of actual domestic violence as factor for consideration in

¹⁷² *GCH v GNB* (35322/2012) [2012] ZAGPHC 218 para 26.

¹⁷³ *F v F* (2006) 1 ALL SA 571 (SCA) para 13.

¹⁷⁴ Wallerstein JS & Tanke TJ 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 321.

¹⁷⁵ Wallerstein JS & Tanke TJ 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 314.

¹⁷⁶ Bonthuys E Clean Breaks: Custody, Access and the Parents rights to Relocate' (2000) 16 *SAJHR* 495.

relocation applications. To the extent that relocation would lessen the conflict, the child would benefit and feel more emotionally safe.¹⁷⁷

3.3.6 The views of the child

Courts are obliged to take into account the views of the children if they are of an age, maturity and stage of development that their views could be considered in terms of sections 10 and 31 of the Children's Act. Article 12 of the UNCRC also imposes a duty on States to ensure that a child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child, in accordance with the age and maturity of the child.¹⁷⁸

In the case of *GCH* the children were aged 13 years and 11 years and clearly expressed their wishes to relocate with their mother to Australia. The court held that section 10 of the Children's Act provides that 'every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration'.¹⁷⁹ Judge Louw held that the children were of such an age, maturity and stage of development to fully comprehend their situation and that they are and were able to participate in the matter which affected them.¹⁸⁰

In the case of *HG v CG*¹⁸¹ the children fully understood the extent of the potential relocation situation and were of an age and maturity to participate in the matter. However, the reports of the professionals in this case did not give due weight and consideration to the views and voices of the children.¹⁸² As illustrated in this case the courts have to be mindful of the reports of the Family Advocates and counsellors in that

¹⁷⁷ Elrod LD 'Moving on: Best interests of children in relocation cases' (2010) 1.2 *Journal of Family Law and Practice* 56-57.

¹⁷⁸ Kilkelly U 'Relocation: A children's rights perspective' (2010) 1.2 *Journal of Family Law and Practice* 25.

¹⁷⁹ Section 10 of the Children's Act 38 of 2005.

¹⁸⁰ *K v K* (17189/08) [2009] ZAGPJHC 13 (06-05-2009).

¹⁸¹ *HG v CG* (1408/2009) [2009] ZAECPHC 48 (10-09-2009).

¹⁸² *HG v CG* (1408/2009) [2009] ZAECPHC 48 para 17.

they are giving the voices of the children the proper weight and consideration where they are of the age and maturity to express their views.

The views of the children in court proceedings affecting their well-being are important but the courts must be mindful of the danger that they are not hearing 'a distorted broadcast laced with the static of a charged emotional atmosphere; or the voice may be delivering a script written by another'.¹⁸³

3.3.7 The gendered division of parenting roles in relocation disputes

In the case of *B v M* the court took into account the gendered nature of parenting roles in South Africa in the post-divorce family and noted that the non-relocating parent is usually the father and remained sensitive to the parent who is left behind.¹⁸⁴ On the other hand, women are clearly at a disadvantage particularly in their responsibilities for childcare. Nevertheless, the practical difficulties of motherhood have been recognised judicially:

'For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense'.¹⁸⁵

Unmistakably the burden of child-rearing places mothers at a disadvantage particularly as they are generally the primary caregivers of children.

¹⁸³ Warshak RA 'Payoffs and pitfalls of listening to children' 2003 *Family Relations* 382.

¹⁸⁴ *B v M* 2009 (9) BCLR 1034 (W) at page 1035 para D.

¹⁸⁵ *President of the Republic of South Africa v Hugo* at para 38. As one woman put it in Barrett et al *Vukani Makhosikazi: South African Women Speak* (CIIR, London 1985) at 135: 'Keeping a family, a home and a job going leaves most African women exhausted to the point of death'.

Moreover, Bonthuys sets out that a consequence of refusing the primary caregiver's application to relocate reinforces stereotypes about motherhood which disempowers mothers (women) by subjecting their interests to those of their children and the fathers (ex-husbands).¹⁸⁶ In effect the fathers (ex-husbands) have the power by choosing to oppose the relocation or not, to influence the domicile of the mothers (ex-wives).¹⁸⁷ This highlights the inequality experienced between the primary caregivers and non-primary care-givers in relocation disputes.

The refusal of permission to relocate means that the primary caregivers are forced to continue to live in relative poverty which reinforces the patterns of economic disadvantages as stated by Bonthuys. The case of *Van Rooyen*¹⁸⁸ provided a good example of the challenges often experienced by single mothers:

'In this country the mother was disadvantaged by reason of being a foreigner and also, in the country districts at any rate, by her inability to speak Afrikaans. The mother's financial position is not good, the joint estate of the parties having been sequestrated as insolvent. The mother received nothing when the marriage terminated ... The father is a dentist in private practice which he was able, with assistance from a friend, to buy back from the insolvent estate. He pays what maintenance he reasonably can ... but it is clear that the mother can barely make ends meet.'¹⁸⁹

Evidently the gendered division of parenting roles in relocation applications is visible and impacts more adversely on mothers due to their primary care giving role.

Professor Freeman points out quite eloquently a variation of the consequence of the refusal of permission of the mother to relocate in that:

¹⁸⁶ Bonthuys E 'Clean Breaks: Custody, Access and the Parents rights to Relocate' (2000) 16 *SAJHR* 505.

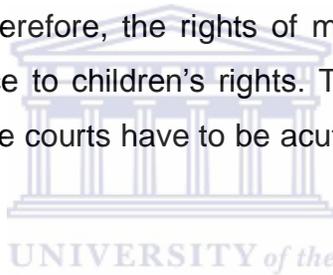
¹⁸⁷ LaFrance AB (1995-1996) 13-19 and Bowermaster JM (1992-1993) 842-49.

¹⁸⁸ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

¹⁸⁹ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 438 C-F.

'For mothers who are in countries which are not their homes, where they live because of the relationship with the father of their child which has now broken down, where they do not have family around them; where at times, they cannot work or access state support; a relocation decision which means that they have to remain in that jurisdiction could feel like the cruellest punishment being imposed on both them and their children.'¹⁹⁰

The refusal of the relocation order means severed relations between the mother and the children should she continue to move. In such circumstances the rights of the mother is better acknowledged as her desire to relocate is achieved but her contact rights are violated, therefore her rights are subjected to those of the child. Conversely if she remains with her children this may entail separation from her new partner, desired job and her extended family.¹⁹¹ Therefore, the rights of mothers in certain circumstances are violated in giving preference to children's rights. The gender division of parenting roles is clearly a factor which the courts have to be acutely mindful of when determining relocation applications.



The various factors discussed above are not a closed list of factors which our courts consider and take into account but they are the key and most common factors used by our courts. With the advent of the Children's Act, section 7 contains a comprehensive list of factors for our courts to consider when determining the best interests of the child in relocation applications.¹⁹²

Now that the factors for determining the child's best interests have been discussed, the chapter proceeds to look at the approaches to relocation that have been used by South African courts. The background for determining the best interests of the child in relocation applications had been established by looking at the various factors commonly

¹⁹⁰ Freeman M 'Relocation and the child's best interests' Conference paper 18 March 2010 at 4.

¹⁹¹ This affects the primary caregivers right to choose occupations and their right to freedom of association. Zafran R. 'Children's rights and relational rights: the case of relocation' (2010) 18(2) *Journal of Gender, Social Policy & the Law* 165.

¹⁹² See section 2.8 of the mini-thesis for the factors listed in section 7 of the Children's Act.

cited. As a result the approaches which the courts follow in deciding relocation applications need to be spelt out.

3.4 The approaches to relocation

There are various approaches to relocation disputes, but South Africa has two main approaches when solving relocation disputes. Generally, three approaches to relocation have been ascertained. The first is in favour of relocation and such a country will be referred to as the 'pro-relocation' jurisdiction.¹⁹³ The second approach is a more neutral one where neither a presumption in favour nor against the relocation exists. The third approach to relocation is against relocation; such jurisdictions are classified as 'anti-relocation' jurisdictions. The two approaches used in relocation in South Africa will be discussed in detail as this jurisdiction is my area of focus.

3.4.1 South Africa

3.4.1.1 The 'pro-relocation' approach

This approach has a presumption in favour of allowing the primary caregiver to relocate. The cases discussed in this section are limited to the most important cases, where the primary caregivers are favoured to the extent that the relocation applications are usually granted in their favour. This section will look at what factors were the deciding and main reasons for the presumption in favour of the primary caregiver.

An important case which depicts a presumption in favour of the primary care-giver is in *Van Rooyen v Van Rooyen*.¹⁹⁴ In this case, the mother was the primary caregiver and wished to relocate to Australia as her country of origin with her children but the father refused his consent. King J held that in matters of relocation there are two preliminary issues which arise. The first is how the courts approach such matters. In essence this entails that the court will evaluate, weigh and balance the considerations and competing factors relevant to the decision to determine whether the proposed move will be in the

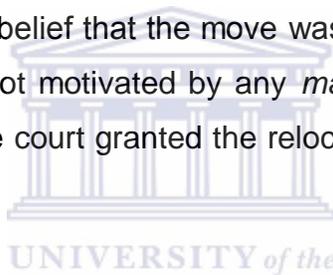
¹⁹³ 'Relocation' 2006 A report to the Attorney-General prepared by the Family Law Council 52.

¹⁹⁴ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

child's best interests.¹⁹⁵ Secondly in deciding the application, the motivation of the mother is a deciding factor to be determined by the courts.

In the event of allowing the children to relocate with the mother they will be in the care of a mother who will be happy and content and at peace within herself which will enable her to cope with the difficulties which will arise due to the children's change in circumstances.¹⁹⁶

Looking at the merits of the case, the Court held that the mother was and always had been the primary caregiver of the children. In addition, the children had always been in the custody of the mother and it is common cause that she was a competent and caring mother who had always been involved in raising her children.¹⁹⁷ The mother was genuine and reasonable in her belief that the move was in the children's best interests. The decision to relocate was not motivated by any *mala fides* to frustrate the father's rights of contact. As a result the court granted the relocation application in favour of the mother.



In *Schutte v Jacobs*¹⁹⁸ the daughter and the mother had a steady relationship and there was no reason to question the *bona fides* of the mother which facilitated the best interests of the child.¹⁹⁹ The factor acting in favour of the best interests of the child is that the mother had a reasonable and acceptable reason for relocating.²⁰⁰ The mother (primary caregiver) wanted to relocate with her four year old daughter to Botswana to live with her new partner.

In determining the best interests of child the court found that the daughter had a good relationship with both parents and that the mother had a steady long-lasting relationship with her new partner and it would be in the child's interest to have regular contact with

¹⁹⁵ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 437.

¹⁹⁶ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 439.

¹⁹⁷ *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 438.

¹⁹⁸ *Schutte v Jacobs* (Nr2) 2001 (2) SA 478.

¹⁹⁹ *Schutte v Jacobs* (Nr2) 2001 (2) SA at 485.

²⁰⁰ *Schutte v Jacobs* (Nr2) 2001 (2) SA at 487.

her father (non-primary caregiver). Arrangements had been made for the daughter to have reasonable access to her father which satisfied the factor of contact with the non-primary caregiver.²⁰¹

The factor acting in favour of the best interests of the child is that the mother had a reasonable and acceptable reason for relocating.²⁰² In light of these factors to determine the best interests of the child in relocating, the application was granted.²⁰³ This case is a clear example of a pro-relocation case where the relocation is decided in favour of the primary caregiver.

Nugent J, in *Godbeer v Godbeer*,²⁰⁴ held that the court should not impose its own subjective whims upon the children of the parties concerned. However, it cannot be expected that the mother 'tailor her life so as to ensure that the children and the father have ready access to one another. That would be quite unrealistic'.²⁰⁵

The mother (primary caregiver) wanted to relocate from South Africa with her two minor daughters to England. The father (respondent) refused to give his consent for his minor daughters to relocate with their mother to England. Judge Nugent found that neither parties was motivated by malice, ill will or bad faith in the approach which he and she had taken, but the question was whether the respondent's refusal to grant his consent was unreasonable in the circumstances.²⁰⁶

The court emphasised that it is primarily the primary caregiver that must decide upon the circumstances which she and the children should live despite the fact that the Court is the upper guardian of all minors. *Godbeer* is a good example illustrating the position of legal scholars who advocate that the primary caregiver cannot be expected to tailor their lives to ensure ready contact between children and the non-primary caregiver. This

²⁰¹ *Schutte v Jacobs* (Nr2) 2001 (2) SA at 485.

²⁰² *Schutte v Jacobs* (Nr2) 2001 (2) SA at 487.

²⁰³ *Schutte v Jacobs* (Nr2) 2001 (2) SA 481-487.

²⁰⁴ *Godbeer v Godbeer* 2000 (3) SA 976 (W).

²⁰⁵ *Godbeer v Godbeer* 2000 (3) SA 976 (W) at 982.

²⁰⁶ *Godbeer v Godbeer* 2000 (3) SA 976 (W) at 977.

case promotes the pro-relocation approach especially in focusing on the primary caregiver's right to move on with their lives after divorce. Consequently it is highlighted that relocation is important in some circumstances to enhance the lives of the primary caregiver after divorce and, in turn, indirectly the children's standard of living is improved.

In the matter of *H v R*²⁰⁷ the mother (primary caregiver) wanted to move the United Kingdom with the minor child but the father (non-primary caregiver) refused to consent to the relocation. In determining the best interests of the child the following factors were important in deciding the relocation.

The court was satisfied that the child had a close bond with both his parents and a good relationship with the father's wife and the mother's husband. The mother was a 'caring, sensible and responsible person.'²⁰⁸ She had carefully considered the consequences of the move and had done everything to ensure that the move was not contrary to the best interest of the child. The mother had taken steps to ensure that the move did not negate the relationship between the child and the father.²⁰⁹

The final factor that established that the move was in the best interests of the child was that the mother's decision was *bona fide* and reasonable. The court granted the relocation application. *H v R* is a typical relocation case where the presumption was in favour of the primary caregiver.

3.4.1.2 The neutral approach

The neutral approach has neither a presumption in favour of nor against the relocation but assesses the relocation application on its own merits.²¹⁰ As a result no presumptive right of either parent to move or to prevent a move is espoused.²¹¹ This of course

²⁰⁷ *H v R* 2001 (3) SA 623.

²⁰⁸ *H v R* 2001 (3) SA 628.

²⁰⁹ *H v R* 2001 (3) SA 626-527.

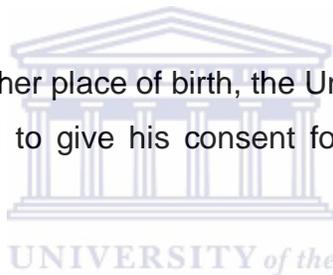
²¹⁰ Domingo W 'For the Sake of the children': South African Relocation Disputes' *PER* (2011) 14(2) 156.

²¹¹ Clark B 'Post-divorce relocation by a custodian parent: Are legislative guidelines for the exercise of judicial discretion desirable?' 2003 *SALJ* 87.

means that the law in the area of relocation is uneven between jurisdictions and that primary caregivers are treated differently according to the State they wish to relocate from.²¹² The important cases where the South African courts adopted a neutral approach will be discussed next.

In *F v F*²¹³ the court noted that, from a constitutional perspective, the rights of a custodian parent to pursue his or her own life or career involved the fundamental rights to dignity, privacy and freedom of movement which must be taken into consideration. The courts 'have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life'.²¹⁴ Thwarting a custodian in the exercise of those rights might well have a severe impact on the welfare of the child involved.²¹⁵

The mother wanted to return to her place of birth, the United Kingdom and take her child with her but the father refused to give his consent for the removal of the child from South Africa.



The court noted that refusing permission to emigrate with the child forces the custodian parent to abandon his or her potential life-enhancing opportunity. The feelings associated with such an order are directly linked to the parent's emotional and psychological well-being. The welfare of the child is best served by being raised in a happy and secure atmosphere; a bitter and unhappy parent cannot provide the child with such an environment.²¹⁶

Despite the genuine motivation of the primary caregiver, the court held that her decision to relocate was certainly not as well-researched and investigated as it should have been. This case realised the importance of the role of the primary caregiver in the

²¹² Boshier P 'Have the Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 11.

²¹³ *F v F* 2006 (1) All SA 571 SCA.

²¹⁴ *F v F* 2006 (1) All SA 517 SCA para 10.

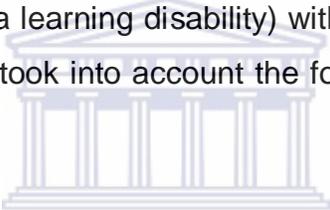
²¹⁵ *F v F* 2006 (1) All SA 517 SCA para 11.

²¹⁶ *F v F* 2006 (1) All SA 517 SCA para 11.

child's life, but the court will not set aside the child's best interests simply to allow the primary caregiver's desire to relocate.

The court in *F v F* exercised its judgement impartially and in an unbiased manner, it recognised the rights of primary caregivers to move on with her life but not at the expense of the child's best interests. Taking into account the lack of research on the primary caregiver's part, the relocation was not considered to be in the child's best interests and it was refused. The matter of *F v F* is a suitable example of the courts not having a presumption in favour of either parent but focusing its decision on the best interests of the child.

In the case of *Cunningham v Pretorius*²¹⁷ the court had to decide whether or not to grant the relocation of the child (with a learning disability) with the mother (primary caregiver) to the United States. The court took into account the following factors to determine the relocation application:

- 
- (a) 'the *bona fides* and reasonableness of the mothers decision and;
 - (b) the mother's freedom of movement. The Court held that she should not be compelled to choose between her child and second marriage'.²¹⁸

The fundamental rights of the parents are also given consideration although the best interests of the child are of paramount importance. In determining whether a decision is in the best interests of the child the courts must apply their mind fairly on the facts and implement an overall balance of the relevant factors. This includes the courts' assessing the opinions, circumstances and facts and adopting a structured value judgement as to what it considers will be in the child's best interests.²¹⁹ The court acknowledged that the rights of contact and access of the non-primary caregiver would be restricted by the relocation but the court would ensure that meaningful contact and access continued with the non-primary caregiver through ordering regular Skype communication,

²¹⁷ *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21-08-2008).

²¹⁸ *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 para 64-69.

²¹⁹ *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 para 9.

telephonic calls and regular contact during school holidays with shared the costs of the airline tickets. Based on this it appears that both parents' reasons and views were given equal weight and their interests were balanced fairly to achieve a value judgement which the court considered to be in the best interests of the child.²²⁰

This matter echoes the neutral approach as there was no presumption in favour or against the relocation consequently; both parents' rights were given due weight and consideration in the light of which outcome was in the best interests of the child.

In *Jackson v Jackson*²²¹ the question that had to be decided by the court was whether it was in the best interests of the children, at the present stage of their lives, to emigrate with their father to Australia, leaving their mother behind in South Africa.

The father (primary caregiver) had custody of the two minor daughters born from the marriage. The mother (non- primary caregiver) had very generous rights of access to the children. When the parties were still married they visited Australia and decided to settle there with their daughters. Six months after the parties were divorced the mother still wanted to emigrate to Australia but later changed her mind for personal reasons.²²² The father wanted to relocate to Australia with his two minor daughters but the mother refused to give her consent for the removal of the children.

In the majority judgement Scott JA argued that of particular importance in this case is the fact that there was no real separation between the mother and the children. Therefore the present case differed materially from those where the access of the non-primary caregiver was limited to something like alternate weekends.²²³

He also stipulated that generally, following a divorce, if a custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the

²²⁰ Domingo W 'For the Sake of the children': South African Relocation Disputes' *PER* (2011) 14(2) 157.

²²¹ *Jackson v Jackson* 2002 (2) SA 303 (SCA).

²²² Davel C & Boniface A 'Cross-border relocation of children and custodial parent' 2003 *THRHR* 140.

²²³ *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 321.

country, if the custodian parent's decision is reasonable and *bona fide*.²²⁴ The reason for this decision was not the so-called rights of the primary caregiver, but that it would not be in the best interests of the children that the primary caregiver be thwarted in his or her desire to relocate if the decision was *bona fide*.²²⁵

The majority court held that the move to Australia would damage the children's relationship with the mother and that it would not be in their best interests to relocate to Australia with their father. In addition, the evidence from the clinical psychologists and social workers highlighted that there was a real possibility that if the children were removed from their mother, they would suffer psychological harm.²²⁶ Of great importance is that Judge Scott stressed that no two cases are the same and that each case must be decided on its own particular set of facts.²²⁷

The court in this case had no presumptive right against or in favour of the relocation but took a neutral stance in the matter. A central reason why the court followed a neutral position in this case is that it differed materially from the other cases as the primary caregiver did not exercise a greater custodian role than the non-primary caregiver.²²⁸ Nor did the court favour the primary caregiver's decision to relocate although the decision was *bona fide* and reasonable. The interests of the primary caregiver and non-primary caregiver were carefully weighed and balanced to reach a decision that was in the best interests of the children. The *Jackson* case shows that no matter how good the motives of the primary caregiver were and notwithstanding the fact that Australia was allegedly a better country in which to raise the children, no presumption carried more weight than the best interests of the child.

²²⁴ *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 321. See also Davel C & Boniface A 'Cross-border relocation of children and custodial parent' 2003 *THRHR* 141.

²²⁵ *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 318.

²²⁶ *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 311.

²²⁷ Davel C & Boniface A 'Cross-border relocation of children and custodial parent' 2003 *THRHR* 141.

²²⁸ 'Post-divorce relocation by a custodian parent: are the legislative guidelines for the exercise of judicial discretion desirable?' (2003) *SALJ* 87.

In the case of *MK v RK*²²⁹ the father was the primary caregiver with whom the child lived and the father was seeking a variation of the custody agreement, as he wanted the minor child L, to relocate with him to Israel. In order for the applicant to succeed he had to show that his decision to relocate was *bona fide* and reasonably and genuinely taken and in the best interests of L.

This case presented no presumptive right in favour of or against the relocation. Instead the court applied its mind in an unbiased manner taking into account all the facts to determine the best interests of L.

The father had been thwarting attempts by the mother to rebuild her relationship with her daughter and he had been denying her access to her daughter. However the court was strongly of the opinion that the relationship between L and her mother needed to be rebuilt. As a result the court created an order that would ensure that the contact between the mother and daughter would be phased in over time.

The court heard the views of L that she believed that Israel would take away all her hurtful memories and solve her problems.²³⁰ This clearly showed that she was naive and unrealistic; therefore her views could not be decisive.²³¹

The court refused the relocation application and based its decision largely on the father's lack of research about where and when he would obtain employment, where L would attend school and how she would learn Hebrew which would be the method of instruction of her schooling.²³² The father had not provided sufficient information to persuade the court that the relocation would be in L's best interests.

This case shows that the court did not assume that the primary caregiver had the child's best interests at heart and would therefore haphazardly allow the relocation. Instead the

²²⁹ *K v K* (17189/08) [2009] ZAGPJHC 13 (06-05-2009).

²³⁰ *K v K* (17189/08) [2009] ZAGPJHC 13 para 18.

²³¹ *K v K* (17189/08) [2009] ZAGPJHC 13 para 18.

²³² *K v K* (17189/08) [2009] ZAGPJHC 13 para 17.1-17.7.

court questioned the motives of the father for withholding and denying the daughter access to her mother. The father's reasons for wanting to relocate were not genuine and the court will not make a decision based on an unreasonable decision. The court in this regard took an impartial stance and reached a decision in the best interests of the child notwithstanding the bad faith of the primary caregiver.

In *CG v NG*²³³ the applicant (mother) and the respondent (father) were previously married but they were divorced. Two sons were born of the marriage, B, who was presently 13 years old, and T, who was 11 years. The primary residence of the children was awarded to the applicant but both parents retained parental responsibilities and rights in respect of the care of the children. The applicant applied for consent to remove the children to Australia with her.

The applicant was a hairdresser and since the divorce had been struggling to make ends meet. She had a life partner, C who had been contributing to the joint household for the past two years. The respondent's financial position had deteriorated and he wanted to reduce the children's maintenance from R14000 to R5000.²³⁴

C received an employment offer from Australia which presented a secure and more stable and financially secure future for them and the boys. He accepted the offer and it was their intention to get married soon. The children's relationship with C was good and B stated that he treated them like 'his own precious children'.²³⁵

The applicant and the children would reside with C's parents pending the securing of accommodation and both boys would have their own rooms.²³⁶ The applicant's support system would have included C's parents and his sister and sister-in-law. His sister indicated that she would look after the children after school if the applicant's work hours

²³³ *CG v NG* 2012 JDR 1795 (GNP).

²³⁴ *CG v NG* 2012 JDR 1795 (GNP) page 2-3.

²³⁵ *CG v NG* 2012 JDR 1795 (GNP) page 5.

²³⁶ *CG v NG* 2012 JDR 1795 (GNP) page 7.

did not permit her to be at home in the afternoons.²³⁷ C's income in Australia would have been sufficient to cover them as a family.²³⁸

Section 10 of the Children's Act was applied as the children were aged 11 and 13 and therefore were regarded as of a sufficient age and maturity for due consideration to be given to their views. On three occasions the children expressed their views to accompany their mother to Australia.²³⁹ The applicant had since the separation been the primary caregiver of the children. She indicated if she was not allowed to take the children with her to Australia she would not go alone, which would inevitably terminate her relationship with C. This would cause some frustration and bitterness which would not have contributed to a healthy and secure atmosphere for the children.²⁴⁰

The applicant had made extensive proposals to ensure that the children would have as much contact with the respondent and also kept the respondent updated of all the aspects of the children's physical, emotional wellbeing, their progress at school and activities.²⁴¹ Her decision was alleged to be *bona fide* and reasonable and not motivated by malice or a desire to frustrate the respondent's contact. The views of the children to relocate with their mother, bearing in mind that they are of an age and maturity to participate in decisions concerning them, carried much weight and had to be respected.²⁴² The court allowed the mother to relocate with the two minor children.

The court gave due consideration to both parents views and concerns with no presumptive right in favour of either parent. The relocation was viewed in terms of the children's welfare and interests. The court looked at the factors in sections 7 and 10 of the Children's Act which illustrates the shift away from the primary caregiver's right to choose where the children should live. The views of the children were that they had decided that they wanted to go to Australia with their mother and they expressed those

²³⁷ CG v NG 2012 JDR 1795 (GNP) page 8.

²³⁸ CG v NG 2012 JDR 1795 (GNP) page 8.

²³⁹ CG v NG 2012 JDR 1795 (GNP) page 10.

²⁴⁰ CG v NG 2012 JDR 1795 (GNP) page 16.

²⁴¹ CG v NG 2012 JDR 1795 (GNP) page 17.

²⁴² CG v NG 2012 JDR 1795 (GNP) page 17-18.

views to Judge Louw, the family advocate and the family counsellor.²⁴³ The fact that the court relied heavily on the views of the children, who in this case were of sufficient age and maturity, echoes the neutral approach.

In *HS v WS*²⁴⁴ the plaintiff (mother) was seeking consent to remove her two minor children to Australia. The court had to determine whether the move to Australia would be in the children's best interests. The mother was the breadwinner of the family and she had received an attractive job opportunity and relocation prospects for her and her family.

She took the job opportunity and they moved to Australia, four years later and the children were happy scholars at the educational facility.²⁴⁵ The mother and father (defendant) were unsettled about whether to settle permanently in Australia. The mother was adamant that they would settle there and made preparatory steps with the view to obtaining permanent residence.²⁴⁶

The defendant took the children to South Africa during the festive season for a holiday and to visit their grandparents as the plaintiff had to work. While on holiday he expressed his reservations about his future in Australia; he averred the children were not adapting and he cancelled their return tickets to Australia and they remained in South Africa.²⁴⁷ During this period the defendant had an affair, admitted this and said it was a mistake. These facts cannot be overlooked as they cast doubt over the defendant's commitment to keeping the family together.

Weighing up the circumstances of the plaintiff, she understood and tried her best to ensure the continued contact between the children and their father. She demonstrated the qualities of a committed and loving parent.²⁴⁸ The mother could offer them an

²⁴³ *CG v NG* 2012 JDR 1795 (GNP) page 17.

²⁴⁴ *HS v WS* 2012 JDR 1066 (GNP).

²⁴⁵ *HS v WS* 2012 JDR 1066 (GNP).

²⁴⁶ *HS v WS* 2012 JDR 1066 (GNP) page 14.

²⁴⁷ *HS v WS* 2012 JDR 1066 (GNP) page 16.

²⁴⁸ *HS v WS* 2012 JDR 1066 (GNP) page 25.

improved, comfortable and more secure life in Australia. This inquiry echoed the factors listed in section 7 of Children's Act which needed to be taken into account in determining the best interests of the child.

Considering the defendant's circumstances during the three year period while the children were living in Australia with the mother, the defendant did not visit the children except for when he fetched the children to accompany them on a flight.²⁴⁹ He did not contribute his fair share of the household expenses or any meaningful contribution to the relationship.

The clinical psychologist paid careful attention to the factors listed in section 7 and section 10 of the Children's Act in making his motivated recommendation. The court held that based on all the considerations stated above it would be in the best interests of the children to relocate with their mother to Australia.

The court evaluated the children, mother and father's interests and gave due consideration to all their interests. The factors listed in section 7 of the Children's Act were taken into account. Section 10 did not apply as the children were too young. The court followed a neutral approach as it adopted no presumptive right of either parent but considered the case *de novo* based on the circumstances.

In *E v E*²⁵⁰ the applicant (mother) sought to relocate with the minor child J to Luxemburg but the respondent refused permission. The applicant and respondent had two children born of the marriage (J and A) but were divorced. The applicant was living with her fiancé in Luxemburg. In terms of the divorce settlement both parents had custody of children but primary residence was awarded to the applicant.

All the professional reports recommended that the relocation would not be in J's best interests except 'K's' report which showed signs of partiality. 'K' was employed by the

²⁴⁹ *HS v WS* 2012 JDR 1066 (GNP) page 22.

²⁵⁰ *E v E* (3718/2013) [2014] ZAKZDHC 10 (26-03-2014).

applicant and had nothing good to say about the respondent, she made lame excuses for the applicant, made incorrect inferences from the facts and tweaked recommendations to suit the applicant.²⁵¹ These clearly evince that 'K' was not impartial which detracts from the value of the expert evidence as held in the *Jackson* case.

In determining whether the relocation was in the best interests of J, section 7(1)(b), 7(1)(d), 7(1)(f), 7(1)(g), 7(1)(h) and section 9 of the Children's Act were referred to by the Family Advocates. J's view initially was to be with her mother in Kwa-Zulu Natal but her mother now lived overseas.²⁵² J was under the impression that she could return to South Africa whenever she wanted; however her initial wishes were based on immature considerations and mis-information.²⁵³

In deciding the relocation application, the court was mindful that the children were living with the respondent in South Africa, and they were well cared for. The applicant left J in her father's care, so it cannot be argued that she would not be well cared for, and relocated on her own to Luxemburg. J had improved in her academic performance and received an A-aggregate for grade six which was not the position while in the applicant's care.²⁵⁴ She was flourishing intellectually, physically, emotionally and socially.²⁵⁵ J had friends, a father, a brother, extended family and her old school in South Africa, which is evidence of a stable and structured environment to be raised in.²⁵⁶

The court held that the applicant's decision to relocate is not unreasonable and could be *bona fide*, but it is not in the best interests of J. Acting Judge Msani held that the applicant had not properly considered the real advantages and disadvantages of the relocation on J. The applicant had moved nearly a year ago and to uproot J from her stable environment (which is known to her) to the unknown in Luxemburg, could not be

²⁵¹ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 17.

²⁵² *E v E* (3718/2013) [2014] ZAKZDHC 10 para 26.

²⁵³ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 28.

²⁵⁴ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 31.

²⁵⁵ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 31.

²⁵⁶ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 28.

in her best interests.²⁵⁷ The relocation application was refused. The court applied a neutral approach and weighed up the interests of the father, mother and the real considerations of the relocation on J. A well rounded decision was reached by taking into account factors which were in child's best interest without unduly favouring any parent. This is the overall balanced approach which should be followed by the courts when deciding the relocation application.

In *G v G*²⁵⁸ the applicant sought an order to relocate with the two minor children from Johannesburg to Cape Town. The respondent refused his consent. The application was brought on an urgent basis as the children had to attend school shortly in Cape Town. The court referred the matter to the Family Advocate for a report and urged the parties to assist the Family Advocate with all the relevant documents as this was an urgent matter.²⁵⁹ The Family Advocate supplied the report, supported by the report of a social worker as requested by the court.

The relocation must be in the best interests of the children as prescribed in the Children's Act; in addition to this the applicant can relocate with her minor children provided that it is reasonable and *bona fide*.²⁶⁰ But each case must be considered on its own merits. As a result the court held that two questions arise:

1. Is the proposed relocation in the best interest of the minor children?
2. Is the applicant's intended move *bona fide* and reasonable?

The applicant and respondent had been married living in Johannesburg and continued to do so; however they had become estranged.²⁶¹ She believed it would benefit her to be near her family in Cape Town, together with the emotional support which she lacked in Johannesburg. The applicant was the custodian parent of the children and she did

²⁵⁷ *E v E* (3718/2013) [2014] ZAKZDHC 10 para 31.

²⁵⁸ *G v G* (32377/12) [2015] ZAGPJHC 34 (29-01-2015).

²⁵⁹ *G v G* (32377/12) [2015] ZAGPJHC 34 para 13-14.

²⁶⁰ *G v G* (32377/12) [2015] ZAGPJHC 34 para 22.

²⁶¹ *G v G* [2015] (32377/12) [2015] ZAGPJHC 34 para 24-25.

not see herself being separated from them as it would prejudice their relationship.²⁶² The court held that the relocation of the minor children meant that their father would have to seek accommodation in Cape Town, transport and time off work which would reduce his only source of income.²⁶³ As the applicant was unemployed and fully dependant on the monthly maintenance from the respondent, his ability to generate income if reduced would have enormous consequences for both of them and the minor children.²⁶⁴

The court held that, weighing all the factors, it would be in the best interests of the children to refuse the application. The court applied a fair mind to the considerations of the father's and mother's interests in light of the children's best interests without favouring any parent. The children were in an environment where they were beginning to settle and they had a good relationship with their father, it could not be seen to be in their best interests to uproot them. The court took the real advantages and disadvantages of the relocation into account and applied an overall assessment when making its decision which echoes the neutral approach.

In case of *Paterson v Chinn*²⁶⁵ the applicant sought an order to authorise her to relocate with her minor children JMC and JJC, born from a love relationship with the respondent, to the United Kingdom. The applicant's parents were retired and wished to relocate to the United Kingdom.²⁶⁶ The court held that the two questions which needed to be asked were whether the applicant's decision was *bona fide*, reasonable and genuinely taken and whether it was in the best interests of the children to emigrate to England.

Section 7 and 9 of the Children's Act must be considered when determining the best interests of the children. The applicant was the custodian parent and she had a duty to provide the children with accommodation, food, clothing, education and care for their

²⁶² *G v G* [2015] (32377/12) [2015] ZAGPJHC 34 para 27.

²⁶³ *G v G* [2015] (32377/12) [2015] ZAGPJHC 34 para 29.

²⁶⁴ *G v G* [2015] (32377/12) [2015] ZAGPJHC 34 para 30.

²⁶⁵ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 (18-09-2015).

²⁶⁶ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 21.

overall well-being.²⁶⁷ When determining the best interests of the children the court held that 'a child's future must be balanced against the great benefits to be obtained if the child does not emigrate with the custodian parent to a foreign country'.²⁶⁸ The Family Advocate held that in weighing up all the factors, the best interests of the children would be better served if they remained resident in South Africa.

The first reason advanced by the Family Advocate was that the applicant had not secured employment in England. Judge Madondo indicated that the evidence showed she had previously been employed for eight years and the agency assured her employment opportunities which she is suitably qualified for if she relocated.²⁶⁹ Secondly, the Family Advocate held that in addition to her and her minor children, her parents and brother who would be relocating to England would rely on her brother in England for accommodation and support. Judge Madondo held that nothing indicated that her brother would rely on the other brother already in England and her parents had their own pensions to support them.²⁷⁰ The Family Advocate contested that it would be difficult for young minor children to adapt to the new environment; however he tendered no evidence to show he was qualified to make this opinion without an expert report. Judge Madondo pointed out that the Family Advocate held that alternatives for the applicant were available but did not specify those alternatives.²⁷¹

The court held that as a single mother in South Africa, the applicant had concerns about her and the children's safety; however in England there would be a safer environment. A further point in determining the relocation was the fact that she was not in a position to continue maintaining her minor children. The applicant's parents always assisted her financially which was her only alternative to providing the subsistence of the children. In England there is family support, free schooling, healthcare and a number of other social assistance benefits available which would improve the lives of the children.²⁷² Another

²⁶⁷ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 24.

²⁶⁸ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 26.

²⁶⁹ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 36.

²⁷⁰ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 37.

²⁷¹ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 37.

²⁷² *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 47.

advantage for the relocation was that education in England was of a good quality which would provide the children with better opportunities for the future.²⁷³ In England the children would have a stable home environment whereas the respondent in South Africa did not have a home.

The applicant also experienced a shortfall for her monthly expenses; due to her lack of tertiary qualifications in South Africa she would not be able to increase her earning capacity so she may not be able to honour her primary duty of caring for the children's socio-economic needs.²⁷⁴ These were all considerations the court carefully considered in determining whether the relocation was in the best interests of the children. The court took into account the fact that the children had a very close maternal bond with their maternal grandparents who provided the applicant with a support system, which put them in a happy and secure environment in which to be raised.²⁷⁵

Weighing up the respondent's circumstances, he had no fixed residence, cannot provide a stable family environment for the minor children and has various other commitments like hunting.²⁷⁶ Due to his commitments and employment as a reptile breeder it rendered him unable to spend quality time or take time off during the festive season to spend with the children.²⁷⁷ This showed that the respondent cannot provide for the care, well-being and future of his minor children.

In effect the court must weigh and evaluate the circumstances impacting directly and immediately on the basic care, well-being and education of the children.²⁷⁸ This required a balancing of factors and taking into account all the information. This is synonymous with the neutral approach in relocation applications.

²⁷³ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 41.

²⁷⁴ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 42.

²⁷⁵ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 44.

²⁷⁶ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 43.

²⁷⁷ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 43.

²⁷⁸ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 38.

Weighing the circumstances of the father and mother in light of the best interests of the child, it was evident that the relocation with the mother would best serve the interests of the children. This case showed that judicial officers must not readily accept that the recommendations and reports of the professionals but must make their own inquiry as the Family Advocate's reasoning was not justified in this case. Judge Madondo made an important point that when deciding relocation applications it must be determined which parent is better able to promote and ensure their physical, moral, emotional and spiritual welfare, and here section 7 of the Children's Act could be of assistance in this determination.²⁷⁹ The court correctly applied a neutral stance where it weighed the real advantages and disadvantages of the relocation without favouring a particular parent.

The various approaches to relocation that have been used by South African courts were discussed above. Based on the analysis of the cases above, South African courts before the Children's Act preferred a pro-relocation approach but appear to have moved to a more neutral approach after the adoption of the Children's Act.

3.5 Analysis of the approaches used in relocation disputes by the South African courts

Based on the research of this study, it is evident that South African courts previously adopted the pro-relocation approach, but have since moved towards a neutral approach in deciding relocation. Is this the best possible solution for solving relocation disputes in South Africa?

As stated in *Shawzin v Laufer*²⁸⁰ to take the children from their mother, who had looked after them since birth, would inevitably have serious psychological consequences on them.²⁸¹ Conversely, circumstances which would affect the primary caregiver would have an adverse impact on the children. This provides the motivation for taking into account the impact of the relocation upon the primary caregiver into account in determining the best interests of the child in deciding the application.

²⁷⁹ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC 73 para 39.

²⁸⁰ *Shawzin v Laufer* 1968 (4) SA 657 (A).

²⁸¹ *Shawzin v Laufer* 1968 (4) SA 657 (A) at 669.

If we allow the rights of the primary caregiver to carry more weight and focus on the primary caregiver/child relationship we are diminishing the benefits of the non-primary caregiver's involvement, when in fact, a great deal of research has found that the non-primary caregiver's relationship with the child carried many benefits.²⁸² The presumptions in favour of the primary caregiver should be discarded and each case must be decided on its own facts and circumstances.²⁸³

'Courts would be mistaken to assume ... that children benefit from moving with their custodial parent whenever the custodial parent wishes to make the move ... [T]here is no empirical basis on which to justify a legal presumption that a move by the custodial parent to a destination she plausibly believes will improve her life will necessarily confer benefits on the child she takes with her'.²⁸⁴

South Africa courts are following the correct approach in moving away from the pro-relocation approach and applying the more neutral approach to deciding relocation applications. The trend is moving in the direction of adopting a neutral 'best interests' of the child test placing the burden equally on both parents to show the child's best interests.²⁸⁵ The neutral approach ensures that each case is decided on its own facts and circumstances, and involves a more detailed time-consuming fact finding process.²⁸⁶

3.6 International research trends on post relocation disputes

The need for certainty and guidance in deciding relocation cases has been researched and post relocation outcomes have been identified to guide parents, lawyers, judges

²⁸² Kowalski D 'Rush to relocate: are the presumptions in favour of relocating parents in the children's best interests?' (2008) *American Journal of Family Law* 32.

²⁸³ Kowalski D 'Rush to relocate: are the presumptions in favour of relocating parents in the children's best interests?' (2008) *American Journal of Family Law* 28. See also *Jackson v Jackson* 2002 (2) 303 (SCA).

²⁸⁴ Braver S, Ellman I & Frabicius W 'Relocation of children after divorce and children's best interests: New evidence and legal considerations' (2003) 206 *Journal of Family Psychology* 214-215.

²⁸⁵ Elrod LD 'Moving on: Best interests of children in relocation cases' (2010) 1.2 *Journal of Family law and Practice* 54.

²⁸⁶ Kowalski D 'Rush to relocate: are the presumptions in favour of relocating parents in the children's best interests?' (2008) *American Journal of Family Law* 29.

and family law professionals to assist them in determining the best interests of the child. The next section focuses on international post relocation research, findings and recommendations. New Zealand and Australia will be discussed as they are countries with empirical research on the after effects of relocation applications.

3.6.1 New Zealand

New Zealand does not have specific legislation dealing with relocation but the Court of Appeal previously held the position in the case of *Bashir v Kacem*²⁸⁷ that a court must consider the relevance of six principles as set out in section 5 of the Care of Children Act 2004 and apply them in determining the best interests of the child. New Zealand research shows that is difficult to predict the possible effects on different children in different circumstances if they stay or relocate.²⁸⁸ The law on relocation has moved to some kind of visible framework which takes the approach of a 'discipline'. The aim of the 'discipline' was designed to reduce and restore predictability in relocation law.²⁸⁹

Research has led to proposing a guideline based on social science and a degree of normative reasoning which prioritises the values at stake in relocation applications.²⁹⁰ This model starts with asking the degree of actual responsibility taken for the child, then gives priority to a child's emotional and physical safety and to the child's views.²⁹¹ Further it has been viewed that as long as safety is not an issue, the attitude of the applicant parent towards the other parent is given emphasis²⁹² 'because where parents work together, children inevitably benefit'.²⁹³

²⁸⁷ *Bashir v Kacem* [2010] NZCA 96.

²⁸⁸ N Talyor, M Gollop & M Henaghan *Relocation following parental separation: The welfare and best interests of children: Research report* (The New Zealand Law Foundation, Dunedin, 2010).

²⁸⁹ Henaghan M 'Creating a discipline in relocation cases: Lord Justice Thorpe's contribution to relocation law' (2013) 4.2 *Journal of Family Law and Practice* 19.

²⁹⁰ George R *Relocation Disputes: Law and practice in England and New Zealand* (2014) 151.

²⁹¹ Henaghan M 'Relocation cases: The rhetoric and the reality of a child's best interests: A view from the bottom of the world' (2011) *Child and Family Law Quarterly* 247.

²⁹² George R *Relocation Disputes: Law and practice in England and New Zealand* (2014) 151.

²⁹³ Henaghan M 'Relocation cases: The rhetoric and the reality of a child's best interests: A view from the bottom of the world' (2011) *Child and Family Law Quarterly* 247.

Robert George identifies five questions which judges should consider in determining relocation cases. The proposed approach is as follows:

- (1) 'How are the care-giving responsibilities for the child currently being discharged?
- (2) Why does parent A wish to relocate, and why does parent B oppose the relocation?
- (3) Taking into account the answers to question (2), what scope is there for either parent to change their plans so that the child can remain in close proximity to both?
- (4) If the options in question (3) are either impractical or undesirable (meaning that parent A is going to relocate and parent B is not), what would be the likely effect on the child either of relocating with Parent A, or remaining in the current location with parent B?
- (5) What are the wishes and feelings of each child involved?'²⁹⁴

The questions posed by Robert George are not exhaustive and determinative as circumstances vary and change with regard to families. As he points out 'these questions are certainly not exhaustive, and the weight that would be attached to the answers would likely vary considerably from case to case. At the end of the process, the judge will be required to bring all of the answers together and make whatever decision she believes is likely to advance the child's welfare'.²⁹⁵ Mark Henaghan proposed using a discipline which is based on the principle that those who are fulfilling the majority of the caregiving for the children should be able to make geographical movements which best suit their childcare arrangements.²⁹⁶ According to this discipline, the relocation application is less likely to succeed if parents are having shared care of the children.²⁹⁷

Equal or near–equal shared care is more frequent in New Zealand which would affect the views of courts on what arrangements best meet the child's best interests.²⁹⁸ The

²⁹⁴ George R *Relocation Disputes: Law and practice in England and New Zealand* (2014) chapter 6.

²⁹⁵ George R *Relocation Disputes: Law and practice in England and New Zealand* (2014) chapter 6

²⁹⁶ Henaghan M 'Creating a discipline in relocation cases: Lord Justice Thorpe's contribution to relocation law' (2013) 4.2 *Journal of Family Law and Practice* 21.

²⁹⁷ The discipline could be found in Henaghan M 'Creating a discipline in relocation cases: Lord Justice Thorpe's contribution to relocation law' (2013) 4.2 *Journal of Family Law and Practice* 22.

²⁹⁸ George R 'Practitioners views on children's welfare in relocation disputes: Comparing approaches in England and New Zealand' (2011) 23 *Child and Family Law Quarterly* 201.

judgement in *K v K* held that courts must be mindful of relocation applications where shared care of the children were being exercised as different factors come into play.²⁹⁹ In *Re C and M (Children)*³⁰⁰ it was stated that in such cases in which the children are so reliant upon a division of their lives between two adjacent homes the child's sense of security is heavily dependent on the ready availability of each of those homes. Relocation in these cases would adversely affect the best interests of the children. Another important factor to take cognisance of with New Zealand would be that the relocation normally involves a long haul flight and the New Zealand courts seem willing to stop even very short relocations.³⁰¹

'At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served'.³⁰² No presumption favouring either of these interests could be made as relocation applications entail a fact finding process where each case must be determined on its own merits. The Attorneys at Smith and Partners noted the importance of careful planning and preparation for a successful relocation defence.³⁰³ The discipline is intended to provide a framework for making relocation decisions more visible and predictable, guiding lawyers, clients and judges to make more consistent decisions in relocation applications.³⁰⁴

²⁹⁹ *K v K* (Relocation: Shared Care Arrangement) (2011) EWCA Civ 793, [2012] 1 FLR.

³⁰⁰ 30 July 1999 (EWCA) para 18.

³⁰¹ See *Brown v Argyll* (2006) NZFLT 705 (NZHC); many New Zealand participants had experience of similar cases, including relocation refusals between different suburbs in Auckland.

³⁰² *Kacem v Bashir* (2010) NZSC 112 2 NZLR 1 para 23.

³⁰³ Smith and Partners 'Child relocation disputes – what happens when one parent wants to move' available at <http://www.smithpartners.co.nz/library/articles/family-law/child-relocation-disputes-what-happens-when-one-parent-wants-to-move/> (accessed 22 October 2015).

³⁰⁴ The aim was derived from the unpredictability in relocation cases seen over the past 10 years as highlighted by Robert George in Chapter 5 of his 2014 book.

3.6.2 Australia

There are no specific statutory provisions regulating relocation but the best interests of the child is the paramount consideration.³⁰⁵ The best interests of the child involves judgments about values, not just facts.³⁰⁶ In relocation, it is hard to know what is in the best interests of child without knowing the how the mother, or father, will react to whatever the decision is.³⁰⁷ Based on the research conducted there is a need for reality testing by family law professionals. The main questions which need to be addressed are: 'can the travel be sustained –emotionally and financially?; will the grass be greener?; how important is the father to the children?; how important are they to him? ; could the father move?; can the father offer something meaningful and important to the child, and how stable is the relationship with the mother's new partner?'.³⁰⁸ The important points to note post relocation was that 'father-child contact diminished over time. The central issue was to evaluate the relationships especially the father-child relationship'.³⁰⁹

The field research indicates that 'consideration needs to be given to the father's practical involvement with the child both before and subsequently, whether the father's motivation for opposing the relocation is driven by a need to possess or control; whether the hostilities between the parents predate the emergence of the relocation issue; whether there are any concerns for the safety and well- being of the children in the care of either parent; the extent to which the mother is concerned to support the children's relationship with their father in the absence of any concerns; and whether there are issues concerning the justice of the case in terms of the parent's behaviour towards one

³⁰⁵ Family Law Act 1975, Australia, section 60 CA and section 65 AA.

³⁰⁶ Cashmore J & Parkinson P 'Relocation Disputes' 14th *Australian Family Lawyer's Conference*, Phuket 23 May 2013 57. A 5 year longitudinal study on post relocation was conducted in Australia with 80 parents. The participants were 39 mothers wanting to move, one opposing the father's move and 40 father's opposing their ex-partner's move. The study included important post relocation information such as the continuity and change after the relocation, costs, stress, burden of travel, children's reactions, adjustment and parent-child relationship etc.

³⁰⁷ Cashmore J & Parkinson P 'Relocation Disputes' 14th *Australian Family Lawyer's Conference*, Phuket 23 May 2013 57.

³⁰⁸ Cashmore J & Parkinson P 'Relocation Disputes' 14th *Australian Family Lawyer's Conference*, Phuket 23 May 2013 58.

³⁰⁹ Cashmore J & Parkinson P 'Relocation Disputes' 14th *Australian Family Lawyer's Conference*, Phuket 23 May 2013 59.

another that is likely to impact upon the mother's reactions if she is not allowed to move.³¹⁰ Taking these factors into account will greatly assist judges in their decision making process and improve the quality of the best interests of the child assessment.

3.7 Recommendations on international jurisdictions

There have been a number of attempts to agree on a common standard for the resolution of relocation disputes internationally. The following section discusses the attempts by countries to try and solve the uncertainty within the area of relocation globally.

3.7.1 American Academy of Matrimonial Lawyers draft Model Relocation Act 1997

In recognising this problem, the American Academy of Matrimonial Lawyers drafted a Model Relocation Act for consideration by state legislatures. The Academy explicitly states that the proposed Act is meant to serve as a template for those jurisdictions desiring a statutory solution to the relocation quandary across the 50 states.³¹¹ The Model Act lacks in taking into account the importance of the thwarted primary caregivers interests which deserve their own due weight and consideration. The purpose of solving the relocation conundrum has been captured by the Model Act and it serves as a great starting point for the South African legislature specifically as it provides a definition for relocation, but it should merely be used as a guide.

3.7.2. National Conference of Commissioners on Uniform State Law 2008

In the United States of America there had been numerous attempts to achieve consistency in the approach to relocation within their 50 states over the years. In the United States of America in 2008, the National Conference of Commissioners on Uniform State Laws drafted a Relocation of Children Act. This Act provided a list of factors the court should consider in determining the best interests of the child namely:

³¹⁰ Parkinson P and Cashmore J 'When mothers stay: adjusting to loss after relocation disputes' (2013) 47.1 *Family Law Quarterly* 95-96

³¹¹ The AAML was only taken up by Louisiana and no other American state has passed this legislation.

- (a) 'the quality of relationship and frequency of contact between the child and each parent;
- (b) the likelihood of improving the quality of life of the child;
- (c) the views of the child (depending on the child's age and maturity); and,
- (d) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child'.³¹²

Unfortunately, this attempt was not implemented as no agreement could be reached, and each state continues to apply its own law.

3.7.3 International Family Justice Judicial Conference 2009

Lord Justice Thorpe hosted the International Family Justice Conference for Common Law and Commonwealth Jurisdictions in 2009, and together with his office they provided several resolutions relating to relocation disputes. Paragraph 8 of the Conclusions and Resolutions from the Conference stated that:

- (a) the search for common principles should be applied in the judicial resolution of relocation disputes both nationally and internationally in the best interests of the children;
- (b) participating jurisdictions should use their best efforts and resources to ensure that relocation disputes are resolved as promptly as possible; and,
- (c) more research and longitudinal studies should be carried out into the impact of relocation decisions on the children and parents concerned, whether relocation is permitted or not (including comparative studies on the impact of the non-custodial parent's decision to relocate).³¹³

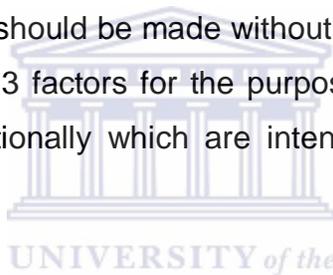
³¹² Taylor N & Freeman M 'Relocation: The international context' (2010) 1.2 *Journal of Family Law and Practice* 25.

³¹³ Taylor N & Freeman M 'Relocation: The international context' (2010) 1.2 *Journal of Family Law and Practice* 25-26.

3.7.4 The International Conference on Cross-Border Family Relocation 2010

The Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, with the support of the US Department of State, hosted The International Conference on Cross Border Family Relocation in Washington DC, USA in 2010.³¹⁴ The purpose of the conference was to develop a better understanding of the dynamics of relocation and the factors which are relevant in judicial decision making, to investigate the possibility of developing a more consistent judicial approach towards relocation cases and to examine the potential for closer international judicial co-operation in relocation cases.³¹⁵ The conference created the 'Washington Declaration on International Family Relocation'.

The Declaration in clause 3 states that the best interests of the child should be paramount and determinations should be made without any presumptions for or against relocation. Clause 4 contains 13 factors for the purpose of promoting a more uniform approach to relocation internationally which are intended to guide judicial discretion namely:



- I. 'the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest
- II. the views of the child having regard to the child's age and maturity;
- III. the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- IV. where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- V. any history of family violence or abuse, whether physical or psychological;

³¹⁴ Conference held in March 2010 was attended by 50 judges and experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, the United Kingdom and USA.

³¹⁵ Taylor N & Freeman M 'Relocation: The international context' (2010) 1.2 *Journal of Family Law and Practice* 26.

- VI. the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- VII. pre-existing custody and access determinations;
- VIII. the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- IX. the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- X. whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
- XI. the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- XII. issues of mobility for family members; and
- XIII. any other circumstances deemed to be relevant by the judge³¹⁶

The exercise of judicial discretion should be guided by these factors as they are based on concrete research findings concerning the needs and development of children in the context of relocation. The Declaration provides a more neutral and balanced approach to relocation and follows a non-presumptive approach, in which each case has to be decided on its own facts.³¹⁷ The Declaration is a welcome move towards assisting judicial discretion as it follows the neutral approach in determining relocation cases; it should nevertheless be recalled that the principles merely serve as a guide.

3.7.5 Virtual visitation in relocation disputes

Virtual visitation refers to electronic visitation through the use of email, instant messaging, Webcam, Skype and other internet tools.³¹⁸ International courts have ordered virtual visitation in several relocation cases. In New Jersey, US received its first endorsement for virtual visitation in the case of *Chen v Heller* where the court ordered that each party set up computer-assisted video conferencing in their respective homes

³¹⁶ Clause 4 of the 'Washington Declaration on International Family Relocation'.

³¹⁷ Freeman M & Taylor N 'The Reign of Payne II' (2013) 4.2 *Journal of Family Law and Practice* 32.

³¹⁸ Knoetze L 'Not so far apart: Virtual visitation in relocation disputes' (2013) *De Rebus* 24.

at their own cost to facilitate continued contact between the children and each parent.³¹⁹ In the Ontario Superior Court of Justice the court considered proposed contact through virtual visitation of the mother; the judge increased the physical visitation and ordered that visitation be supplemented with 'reasonable telephone and webcam access'.³²⁰ Virtual visitation is the way forward to promote and enhance the continued contact between the child and parent on a more private face-to-face-basis level.

3.8 Summary

Judges have difficulty deciding these cases because so little is known about what is good for children generally, how to assess the strengths and weaknesses of the parent-child relationship and how to predict what impact any decision will have on any particular child and the members of that child's family.³²¹ In effect the best approach in determining the relocation applications would be that each case be decided on its own individual facts.

It is evident from this chapter that South African courts have approached relocation disputes differently in the periods before and after the Constitution. In re-examining this chapter, it is apparent that in dealing with relocation applications, courts have established various factors which need to be taken into account in determining the best interests of the child in these applications. However, each factor must be applied only where it is relevant to the particular case, and it is up to the court to determine which factors are relevant.

The research has shown that the women who are mostly primary caregivers are being disadvantaged which directly impacts on the best interests of the children. With the division of parenting roles in South Africa, what is vital to the issue of relocation is consideration of the gendered division of labour which routinely assigns childcare to

³¹⁹ *Chen v Holler* 759 A.2d 873 (N.J. Super Ct App Div 2000).

³²⁰ *Cochrane v Graef* 2010 ONSC 4479, OJ No 3756.

³²¹ Elrod L 'Moving on: Best interests of children in relocation cases' (2010) 1.2 *Journal of Family law and Practice* 52.

women in custody after divorce or separation.³²² As LaFrance points out 'parents are not instruments of state policy. It would be demeaning to consider them only as caretakers and not possessing all the normal liberties and interests of free citizens in a free society. The impact on their liberty and autonomy of any state policy or judgement cannot be constitutionally ignored'. Consequently, the courts need to be more mindful and sensitive of the factor of gender when determining relocation applications.

Generally there are three approaches to relocation disputes however; South African courts previously followed a 'pro-relocation' approach but the Supreme Court of Appeal case of *Jackson* created precedent by providing that the standard of the best interests of the child would be the deciding factor in determining relocation applications. The chapter recommends that an important consideration in determining relocation applications is that the child's future must be balanced against the great benefits to be obtained if the child does not relocate with the custodian parent to a foreign country.³²³

The chapter further showed that when deciding relocation applications it must be determined which parent is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the children.³²⁴ Nonetheless our courts must be mindful of the importance of the role of the primary caregiver which must be given its due weight and consideration. The common trend is moving in the direction of adopting a neutral 'best interests' of the child approach. The best approach would be no presumptive approach as relocation applications involve a fact finding process, in which each case must be decided on its own circumstances.

The next chapter provides the final the conclusions and discusses the possible recommendations for relocation applications in South Africa.

³²² Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* 501.

³²³ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC para 22.

³²⁴ *Paterson v Chinn and Another* (14057/2014) [2015] ZAKZDHC para 39.

Chapter 4

CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

The frequency of parental disputes over relocation has become a modern problem in the realm of international family law. South Africa does not have legislation specifically dealing with relocation disputes although section 7 of the Children's Act contains factors which need to be applied when determining the best interests of the child in relocation. As a direct result, not only do the factors which the courts take into account influence the outcomes of the cases, but their interpretation impacts upon the decision to allow or disallow the relocation, resulting in uncertainty in relocation disputes. Conversely, there is a clear lack of legislative guidelines to assist the courts in dealing with relocation.³²⁵

This Chapter lays down the conclusions and recommendations culminating from the substantive discussions in chapters 2, and 3. Furthermore this chapter provides an overall conclusion to the research findings.



4.2. Conclusions

Chapter 2 sets the background of the legal instruments drafted by international and regional systems which aim to protect children against the inherent abuse of power from adults. It is, therefore important to assess these treaties and how they implement the protection of the rights of the child, through investigating the best interests of the child which serves as the cornerstone in this jurisprudence. This Chapter focuses on the best interests of the child principle which is the central factor running through relocation disputes. The research in Chapter 2 shows that the best interests of the child must be the paramount consideration in all matters concerning the child. Due to this, it was stated that the rights of the child are not superior to other rights and do not act as a trump card outweighing all other interests. It is important to note that as shown earlier, there are many criticisms which are prevalent with the best interest's standard, but they rarely constitute any theoretical fundamental objections, and it remains the most effective standard in the area of family law.

³²⁵ Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* 490.

As shown in Chapter 3 there are no specific guidelines for determining the best interests of the child in relocation applications but the courts use various factors to assist them, especially those contained in section 7 of the Children's Act. The research provides that relocation decisions can be of a gendered nature, in effect the primary caregivers are at a disadvantage and their interests and rights are frustrated as opposed to the non-primary caregiver. This chapter highlights that three approaches to relocation disputes are prevalent but South Africa only focuses on two main approaches. The research has shown that South Africa tended previously to focus more on the pro-relocation approach in effect allowing the primary caregiver to relocate. The research then concludes that there should be no presumptive approach to relocation disputes, as these applications involve a fact finding process in which each case must be decided on its own merits.

4.3 Recommendations for South Africa

Disputes between divorced parents involving relocation of children and its impact on families, especially the children, have significantly increased in frequency and complexity.³²⁶ Recommendations to assist South Africa with relocation applications could be drawn from case law, legal academic's writings and international law. Section 7 of the Children's Act provides useful guidance to the legal profession in South Africa by enacting various listed factors to be taken into account when the courts are determining the best interests of the children in relocation cases.

Section 7 of the Children's Act provides a good starting point for factors to be considered when dealing with relocation cases. However, it has been recommended that with society becoming so mobile today, legislation be implemented that specifically deal with relocation.³²⁷ Section 7 of the Children's Act stands as a closed list for the factors to be taken into account when the courts are determining the best interests of the children in relocation disputes, although case law showed that sometimes the

³²⁶ American Academy of Matrimonial Lawyers draft Model Act at <http://www.aaml.org/sites/default/files/model%20relocation%20act-article.pdf>.

³²⁷ Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* 96, Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 84 and Domingo W 'For the Sake of the children': South African Relocation Disputes' *PER* (2011) 14(2) 162-165.

factors listed will be sufficient.³²⁸ In other circumstances, however, other factors identified by the judges have to be taken into account to determine the best interests of the children in the relocation application, comprise factors which are not listed in section 7.³²⁹

As Thorpe LJ provides, I would propose following an approach which could serve as a commencement guide in determining relocation applications which could operate in tandem with the Children's Act, in relocation law:

- (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate'.³³⁰

In light of the above, the importance of the factor of the primary caregiver's emotional and psychological well being deserved its own weight and due consideration. Thorpe LJ guidelines are based on the principle that primary caregivers who are facilitating the

³²⁸ *Campher v Cushing* (113/2009) [2009] ZAECGHC (09-06-2009) 35.

³²⁹ *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258.

³³⁰ *Payne v Payne* (2001) EWCA Civ 166, (2001) 1 FLR 1052 at 40 and 41.

majority of the care giving for the children should be able to determine the geographical movements appropriate to their own childcare arrangements.³³¹ I ultimately believe that following a discipline such as the one provided by Lord Justice Thorpe could lead the way to best start the relocation investigation to determine the best interests of the child.

The most important recommendation would be to define relocation in light of the definitions in the Children's Act between 'departure' and 'removal'.³³² The American Academy for Matrimonial Lawyers in the proposed Act defines relocation as 'a change in the principal residence of a child for a period of sixty days (60) or more, but does not include temporary absence from the principal residence'.³³³ South Africa could draw on this definition provided for by the proposed Act to develop a definition which would assist with relocation law.

The legislation implemented should contain factors listed by case law which should be used in tandem with factors listed in section 7 of the Children's Act.³³⁴ The research has shown that relocation applications differ according to each case; they are fact specific therefore each case has its own factors to be considered when determining the application. The main guiding principle in deciding relocation cases remains the best interests principle. A further recommendation would be that the proposed legislation determines whether there would be a difference in an application for temporary relocation.³³⁵ It should suggest that the rules be applied in the same manner regardless

³³¹ Henaghan M 'Creating a discipline in relocation cases: Lord Justice Thorpe's contribution to relocation law' (2013) 4.2 *Journal of Family Law and Practice* 21. See Henaghan M 'Relocation Cases: The rhetoric and the reality of a child's best interests: A view from the bottom of the world' (2011) *Child and Family Law Quarterly* at 250.

³³² Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 85.

³³³ American Academy of Matrimonial Lawyers draft Model Act at <http://www.aaml.org/sites/default/files/model%20relocation%20act-article.pdf>, at 4.

³³⁴ The factors taken into account by our South African courts are *inter alia* the existence or non-existence of a court order prohibiting the removal of the child from the court's jurisdiction; the access rights of the non-primary caregiver; the child's need for stability; the child's preferences; bona fides of the primary caregiver; reasons for the relocation etc. See Bonthuys E 'Clean Breaks: Custody, Access and Parents Rights to Relocate' (2000) 16 *SAJHR* and Kruger JM 'Emigration by a custodian parent after divorce' (2001) *THRHR*.

³³⁵ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 85.

whether it's a temporary relocation or whether the rules would be more relaxed in circumstances of temporary relocation.

An important assessment inquiring the impact of the refusal of the relocation on the mother is proposed. The impact of the refusal of the mother's proposal to relocate and the consequent impact on the child's welfare have consistently been stressed³³⁶ and which lead to judicial utterances that this is a 'major question'.³³⁷ 'This risks preventing a proper analysis of the degree to which the child's welfare will actually be impacted by the mother's reaction to refusal. Given the importance of this factor to the court's decision, a careful assessment free from generalisations is vital in reaching a decision in the child's best interests'.³³⁸

Due to the gendered nature of parenting roles, where the research showed the primary caregivers are mostly mothers, relocation applications impact more significantly on women than men. The research has shown how adversely the refusal of the relocation applications affects the mothers; as a result it is recommended that the courts need to be more mindful of the gender issue prevalent in relocation. Judge Satchwell stated that 'careful consideration needs to be given to applying the best interests principle in a manner which does not create adverse effects on a discriminatory basis – in this case gender discrimination'.³³⁹ It is proposed that the courts should be more acutely sensitive to the factor of gender when applying the best interests principle in relocation applications.

A further proposal would be that the courts implement in the draft orders made in relocation applications 'mirror orders', which would promote and maintain the continued contact between the children and the non-primary caregiver after the relocation. The Washington Declaration noted this recommendation as a factor where it held that 'the

³³⁶ Powell O 'In whose best interests? Reconsidering the judicial approach adopted in relocation disputes' (2013) 1.2 *UK Law Students Review* 3.

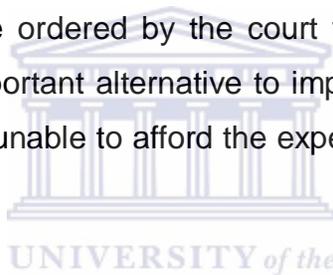
³³⁷ *Re G (Removal from Jurisdiction)* (2005) EWCA Civ 170 (CA) 19.

³³⁸ Powell O 'In whose best interests? Reconsidering the judicial approach adopted in relocation disputes' (2013) 1.2 *UK Law Students Review* 3-4.

³³⁹ *B v M* (2006) 3 All SA 109 (W) para 162. See also *F v F* (2006) 3 SA 42 (SCA) para 12, the courts were also sensitive to the issue of indirect gender discrimination.

enforceability of contact provisions ordered as a condition of relocation in the State of destination' should be enforced to promote the best interests of the children in relocation applications.³⁴⁰

Furthermore it has been recommended that the legislation contains a mediation process which includes a parenting plan. As stated in section 33(1) of the Children's Act, the co-holder's of parental responsibilities and rights may agree on a parenting plan that sets out how they will exercise these responsibilities and rights. Conversely, in terms of relocation disputes, a mediator will set out a parenting plan that governs the procedure to be followed, contact arrangements, travelling costs, variation of the order etc.³⁴¹ While mediation is not the solution for solving all disputes, the feedback on Reunite's mediation services indicates that agreements reached in mediation have a better prospect of working than those ordered by the court without the input of the parents involved.³⁴² Mediation is an important alternative to implement in relocation cases as it is beneficial to parties who are unable to afford the expensive litigation costs involved in the court process.³⁴³



Virtual visitation is recommended as a support system which the courts have implemented as a method to promote continued contact between the children and parents after relocation. It includes the use of e-mail, instant messaging, Webcams and other internet tools to provide regular contact between the children and the left-behind parent.³⁴⁴ Knoetze provides that relocation cases are those instances where 'the court could be requested to make an order to regulate virtual visitation rights and thereby enabling the non-custodian parent to stay in contact with the child via the use of computer technology'.³⁴⁵

³⁴⁰ HCCH 'International Judicial Cross-border Family Relocation: Washington Declaration on Family Relocation' at factor (j).

³⁴¹ Albertus L 'Relocation Disputes: Has the long winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 85.

³⁴² Carter D The Judges Newsletter- Special Edition No.1-'International Child Protection: Mediation and Relocation' (2010) 78.

³⁴³ Messitte PJ and Kreeger JL 'Relocation of Children: Law and Practice in the United States' (2010) *Journal of Family Law and Practice* 65.

³⁴⁴ Knoetze L 'Not so far apart: Virtual visitation in relocation disputes' (2013) *De Rebus* 24.

³⁴⁵ Knoetze L 'Not so far apart: Virtual visitation in relocation disputes' (2013) *De Rebus* 24.

In the case of *HS v WS*, the court highlighted the use of visual electronic tools and applications. In this case the court granted access to the children via Skype, the court made an order directing the plaintiff and defendant to install an internet landline, ADSL at their homes and ordered that the plaintiff load Skype on the children's I-pods.³⁴⁶ Judge Prinsloo further encouraged the plaintiff to correspond and contact the defendant and facilitate communication via Skype, sms and direct telephone calls as far as reasonably possible to promote the contact rights of the defendant.³⁴⁷

In the case of *CG v NG* the court made a draft order regarding communication via twitter, Skype, Webcam and telephonic calls as reasonably possible.³⁴⁸ Judge Louw held that contact rights of the left-behind parent could be maintained through the use of electronic devices as mentioned. Similarly, the use of visual electronic and telephonic tools were also ordered to be implemented to maintain the contact rights in cases of *RC v CS* (2011) JDR 1583 (GSJ), *DV v SO* (2010) JDR 1038 (GNP) , *K v K* (2009) JDR 0419 and *Scheepers v Scheepers* (2009) JDR 0911.

Internet connections and Webcams are becoming a prominent feature in South African homes and they are affordable as Knoetze points out. 'Virtual visitation has the added advantage of enabling children to enjoy private, unrestricted telephone and video access to parents ...Virtual visitation can provide more meaningful development of a parent-child relationship than mere telephone conversations'.³⁴⁹ Virtual visitation rights are the way forward to enhancing the continued between the children and left-behind parent on a more personal, 'face-to-face' basis.

4.4 Overall conclusion

What has been put forth in this research is the need for a policy for relocation which protects the needs of children and the importance of maintaining the links between the child and their parents especially the primary caregiver. Although a policy which covers

³⁴⁶ *HS v WS* (2012) JDR 1066 (GNP) para 42.

³⁴⁷ *HS v WS* (2012) JDR 1066 (GNP) para 42.

³⁴⁸ *CG v NG* (2012) JDR 1795 (GNP).

³⁴⁹ Knoetze L 'Not so far apart: Virtual visitation in relocation disputes' (2013) *De Rebus* 25.

all eventualities will not be possible, one which achieves greater certainty within the area of relocation globally is extremely necessary for the way forward to accomplish uniformity within this area of jurisprudence. However, greater legal consistency can only be sought, and achieved, once we have a proper understanding of the issues, in particular the outcomes and effects of relocation on the children and the families concerned.³⁵⁰ The main focus of the policy should encapsulate a concern which would be the best interests of the child which is central to the inquiry of the relocation application.

As Prof Taylor stated, there is every reason for favouring a common standard adopted internationally to resolve the issue of child relocation. Therefore the best imperative at this stage is to conduct urgent large scale collaborative international research, specifically investigating the outcome of relocation and the effects of relocation on the children to effectively achieve a child-centered approach to this extremely difficult family law issue.



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³⁵⁰ Taylor N & Freeman M 'Relocation: The international context' (2010) 1.2 *Journal of Family Law and Practice* 27.

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