

Legal perspectives: Children, families and the state

Karabo Ozah and Ann Skelton

The South African Constitution recognises plurality of legal systems. This means that various officially recognised state laws coexist¹ and children may live day-to-day lives under different legal systems that regulate their relationships with family members². South African family law draws on a variety of sources as outlined in Figure 6.

The Constitution,³ common law and legislation place responsibilities on parents, families and the state to provide for the realisation of children's rights. This chapter considers the rights of children and the responsibilities of families and the state. This includes the intersection between the role of the family in providing for their children, and the role of the state in assisting the family to provide for children and stepping in when parental or family care is absent or failing. The chapter will address the following issues:

- The importance of family as a primary source of provision for and protection of children;
- Children as rights bearers and participants in matters concerning their care;

- Children as members of families and the obligations of the family to care for children; and
- The state's role in assisting families to provide for children and the obligation of the state to provide for children who are not in family care.

The importance of the family within regional and international law

Historically, children were viewed as property of their parents and treated as "mini-human beings" resulting in their protection being a quest for charity.⁵ The United Nations Convention on the Rights of the Child (UNCRC) confirmed, at an international level, a move away from this "charitable" approach to the protection of children. The UNCRC recognises children as rights bearers and in turn places an obligation on their parents/family and the state to fulfil those rights. The preamble recognises the family as the fundamental group of society and the natural environment for the growth and well-being of children, who should be

Figure 6: Sources of South African law⁴

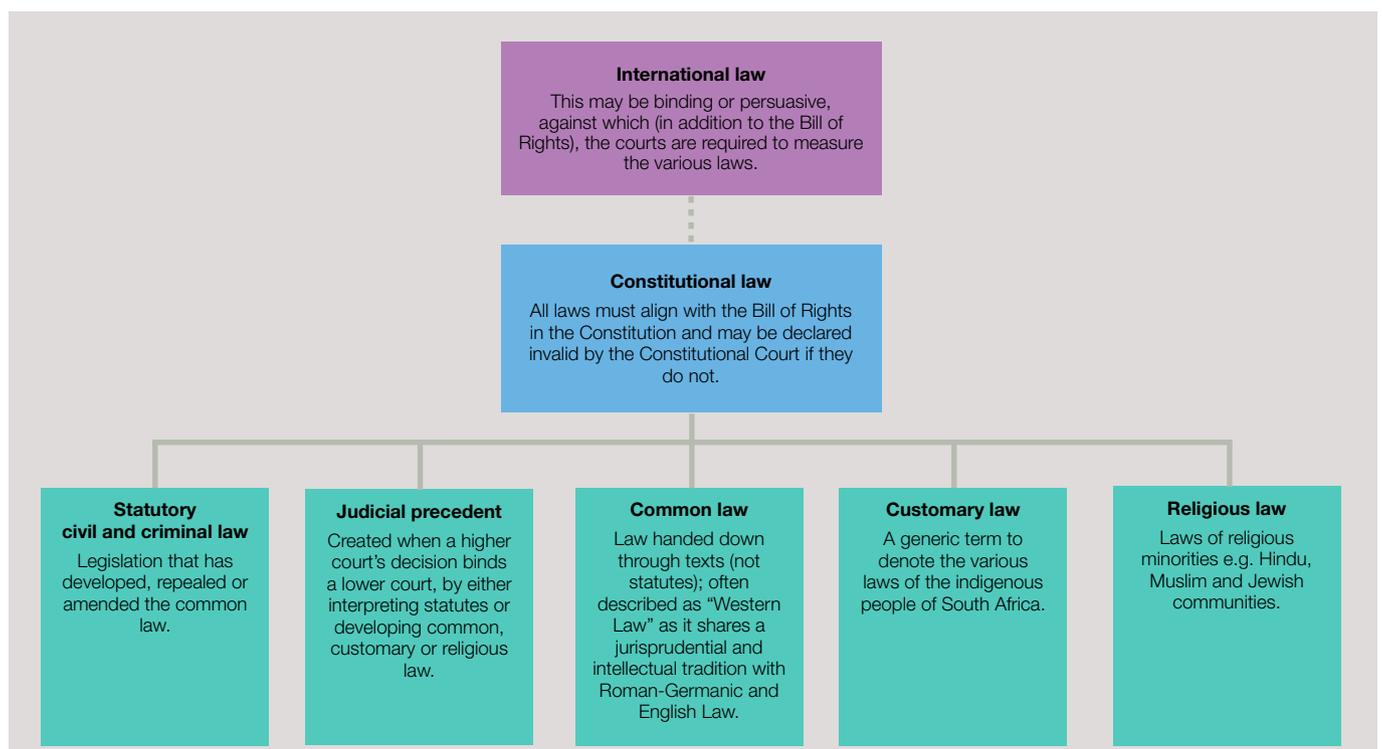


Table 5: Responsibilities of parents, families and the state

Article 20 of the ACRWC

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:
 - a. to ensure that the best interests of the child are their basic concern at all times;
 - b. to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
 - c. to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.
2. States parties to the Charter shall in accordance with their means and national conditions take all appropriate measures:
 - a. to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, education, clothing and housing;
 - b. to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
 - c. to ensure that the children of working parents are provided with care service facilities.

Article 18 of the UNCRC

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of the children.
3. States Parties shall take appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

afforded the necessary protection and assistance so that they can fully assume their responsibilities within society.⁶

The African Charter on the Rights and Welfare of the Child (ACRWC) also recognises the family as central to a child's upbringing and requires the state to protect and support the establishment of families as "the natural unit and basis of society".⁷ The ACRWC requires states to protect children by ensuring that both parents have equal rights and responsibilities, and ensuring that no child is deprived of protection and maintenance regardless of the parents' marital status as outlined in Table 5 below.⁸ Where a child is temporarily or permanently deprived of his or her family environment or cannot, in his or her best interest, be allowed to remain in that environment, then the state is obliged to provide special protection and assistance to that child.⁹

Both the UNCRC and the ACRWC are founded on four general principles: non-discrimination; the right to life, survival and development; child participation; and the best interests of the child.¹⁰ These general principles enjoin families and the state to ensure that all children are given maximum protection and opportunities to develop and reach their full potential. The best interests principle elevates the interests of the child above those of the family, where

it is necessary to protect the child and thus provides for a balanced approach to the protection of the individual rights of the child on the one hand and the obligation to support the family on the other hand. The right to non-discrimination includes the prohibition of discrimination against children's parents or legal guardians.

Families in South Africa operate within a complex legal system, comprising statutory law, common law, religious and customary law, all of which must be aligned with the Constitution.

Table 5 compares article 20 of the ACRWC and article 18 of the UNCRC and highlights the following differences:

- The ACRWC is more protective to children as it broadens the categories of persons who have responsibilities towards children to include parents and any person responsible for a child, while the UNCRC focuses on parents and those who have legal guardianship. Legal guardianship denotes

Case 1: Children's rights and the responsibilities of families and the state

Coughlan NO v Road Accident¹¹ Fund concerned three children whose mother was killed in a road accident. The Road Accident Fund (RAF) admitted that it was liable to compensate the children for 100 % of their proven damages. It was agreed that this amounted to R112,942. The RAF, however, refused to pay the children any compensation. It contended that the children were not entitled to any compensation because, after the death of their mother, their grandmother was appointed as their foster parent and received a Foster Child Grant (FCG) from the state. The RAF argued that the FCG was a benefit that the children received as a result of the death of their mother. In its view the children had already been fully compensated for their financial loss: if they received compensation for loss of support, they would receive "double compensation".

The Constitutional Court found that social grants for children must not be deducted from RAF compensation. This is important for many children whose parents die in road accidents as at the time there were just under 500,000 children receiving the FCG and more than

11 million children receiving the Child Support Grant (CSG). In the words of Tshiqi AJ:

"Like foster child grants, child support grants are not predicated on the death of a parent. The fact that the state assumed responsibility for the support of the children after the death of the breadwinner should not have been held to be a determining factor on whether the caregiver qualified for the child support grant or not. The purpose of the RAF is to give the greatest possible protection to claimants. A deduction of either foster child or child support grants would undermine that purpose."

The court remarked that the approach of the RAF failed to acknowledge the different roles that the state assumes when it makes the payments. In the case of the CSG, the state assumes the role of a caregiver as enjoined by the Constitution and when it pays compensation for loss of support through the RAF it steps into the shoes of the wrongdoer.¹²

that someone who has been appointed by a court would have responsibilities towards a child;

- The ACRWC provides a more detailed description of what is expected from parents and other persons responsible for the care of the child; and
- The state's responsibilities to assist parents or other persons responsible for children to meet the essential socio-economic needs of children are set out in the ACRWC, while the UNCRC provides a broad obligation that seems to focus on providing institutions and facilities to assist families rather than focus on assisting and strengthening families for the benefit of the child.

South Africa has ratified both the UNCRC and the ACRWC and thus is bound to promote and protect children's rights in line with both treaties.

Children as individual rights bearers in South Africa

The UNCRC and the ACRWC have promoted a rights-based approach to protect and provide for children. The Constitution clearly sets out the rights that children are entitled to in South Africa. In terms of section 28 of the Bill of Rights every child has the right:

- to a name and nationality from birth;
- to family or parental care, or to appropriate alternative

care when removed from the family environment;

- to basic nutrition, shelter, basic health care services and social services;
- to be protected from maltreatment, neglect, abuse or degradation;
- to be protected from exploitative labour practices;
- not to be required or permitted to perform work or provides services that are inappropriate for a person of that child's age or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- not to be detained except as a measure of last resort and for the shortest appropriate period of time and must, in case of detention, be kept separate from persons over the age of 18 years and treated in a manner that takes account of their age;
- to have a legal practitioner at state expense in civil proceedings affecting the child if substantial injustice would otherwise result; and
- not to be used directly in armed conflict; and
- to have their best interests be the paramount consideration in every matter that concerns them.

Apart from these child-specific rights, children are also entitled to all other rights in the Bill of Rights, except those

reserved for adults (such as the right to vote). The right to education and to social assistance, the right to human dignity, the right to equality and the right to life are some of the important rights that children are entitled to under the Constitution. The protection of these rights has been expanded in legislation such as the Children's Act, the Sexual Offences Act, the Schools Act, and the Child Justice Act – to name just a few. These rights of children are enforceable against the state, families and any other person who violates them as illustrated in Case 1.¹³ The Children's Act also provides for children to participate in any matter that concerns them.¹⁴ This includes the right to bring – or be assisted to bring – a matter to court¹⁵ where a right in the Bill of Rights or the Children's Act has been infringed or is threatened.¹⁶

Children as members of families and obligations of families to care for children

The Children's Act recognises children as members of families and the meaning of family has been expanded in South African law through the recognition of extended family members as well as unrelated people that children have a relationship with. Family members are defined in the Children's Act as:

- A parent of the child;
- Any other person who has parental responsibilities and rights in respect of the child;
- A grandparent, brother, sister, uncle, aunt or cousin of the child; or
- Any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.¹⁷

Defining parental responsibilities and rights

The Children's Act provides for the acquisition, suspension and termination of parental responsibilities and rights.¹⁸ These include the responsibilities and rights:

- to care for the child – which is defined very broadly in the Children's Act as outlined in Box 6 below;¹⁹
- to maintain contact with a child – which entails having a personal relationship with the child, and maintaining contact with the child through visits and other forms of communication in cases where the person doesn't live with the child;²⁰
- to act as a guardian of a child – which entitles the person to give consent to certain actions that relate to the child;ⁱ
- to contribute to the maintenance of the child.ⁱⁱ

Box 6: The Children's Act definition of care

Care, in relation to a child, includes, where appropriate:

- within available means, providing the child with –
 - a suitable place to live;
 - living conditions that are conducive to the child's health, well-being and development; and
 - the necessary financial support;
- safeguarding and promoting the well-being of the child;
- protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;

- guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- guiding the behaviour of the child in a humane manner;
- maintaining a sound relationship with the child;
- accommodating any special needs that the child may have; and
- generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

i Section 18 of the Children's Act provides that a guardian must administer and safeguard the child's property or property interests; assist or represent the child in administrative, contractual and other legal matters or give/refuse consent for the child's marriage, adoption, application for a passport, departure or removal from the Republic; and consent to the alienation or encumbrance of any immovable property.

ii Maintenance is not defined in the Children's Act.

Table 5: Parental responsibilities and rights

Automatic	Acquired by agreement or by court order
<ul style="list-style-type: none"> • Biological mothers (regardless of marital status) • Married biological fathers • Unmarried biological fathers (who comply with section 21 of the Children’s Act) • Limited parental responsibilities and rights (not including guardianship) are recognised by the law for caregivers of children. 	<ul style="list-style-type: none"> • Unmarried biological fathers (who do not comply with section 21 of the Children’s Act) • Family members and other caregivers including: <ul style="list-style-type: none"> • grandparents • aunts and uncles • siblings who are above the age of 18 years • Adoptive parents (when adoption order is granted) • Any other person to whom parental agreements have been granted by agreement or court order.

The Children’s Act moves away from the concepts of “custody” and “control” where the focus was always on the parents’ power over children, to an approach where parents first and foremost have responsibilities towards children and must exercise the rights in relation to their children in the best interests of the children concerned.²¹ It is for that reason that the Children’s Act refers to the “responsibilities and rights” of parents – in that order – to emphasise the fact that the parental responsibilities are more important than parental rights, and that parental rights should be exercised to protect the rights of children.²²

One aspect of parental responsibilities and rights is “care” which is defined in section 1 of the Children’s Act. Caregivers include other persons, too, not just parents or families. The definition of “care” emphasises the responsibility of those who care for a child to ensure the child’s health, well-being and development, and to protect the child’s constitutional rights – as outlined in Box 6.

Who has parental responsibilities and rights automatically, and who can acquire them?

Generally, there are two categories of people who can have parental responsibilities and rights in relation to a child. The biological parents have automatic parental responsibilities and rights by operation of law and there are other persons who can acquire such responsibilities and rights either by default, because of their role as caregiver, or through a written agreement with the other holders, or by approaching a court for an order granting them such responsibilities and rights. These categories are outlined in Table 5.

Biological mothers

The Children’s Act provides that a mother of a child has full parental responsibilities and rights from birth.²³ However, if a

mother is an unmarried child and does not have guardianship in respect of the child and the biological father of the child does not have guardianship, then the guardian of the child’s biological mother is also the guardian of the child.²⁴ This provision is controversial and may lead to disputes on two fronts:

- It dissolves the rights of the mother and may lead to contestation in respect to birth registration of the child. It also means that if the grandmother becomes the legal guardian, she may give up her grandchild for adoption without needing to get consent from the mother of the child.
- It excludes the biological father who does not have guardianship because he is either himself a child or he does not qualify for parental responsibilities and rights in terms of section 21, and it favours the maternal family over the paternal family of the child.

Married fathers

A father has full parental responsibilities and rights if he is married to the child’s mother or was married to the child’s mother at the time of the child’s conception; or birth; or any time between the conception and birth.²⁵ This is because there is a common law presumption that a man who is married to the mother is the father of the child.

Children born to parents living or married under religious law are also entitled to protection and their parents have responsibilities and rights that are recognised.ⁱⁱⁱ The Children’s Act defines a marriage as a marriage recognised in terms of South African law or customary law or concluded in accordance with a system of religious law subject to specified procedures.²⁶ Despite this, Hindu, Muslim and Jewish marriages are not formally recognised in South Africa.²⁷

iii Sections 15, 30 and 31 of the Constitution clearly recognises religious and cultural rights and the observance thereof, subject to such observance not being inconsistent with any provision of the Bill of Rights.

Case 2: Muslim marriages must be recognised to protect the rights of children and women

The need to recognise and regulate Muslim marriages has been recognised by the court in the matter of *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others*²⁸ where the following order was made:

- It is declared that the State is obliged by section 7 (2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of Sharia law ('Muslim marriages') as valid marriages and to regulate the consequences of such recognition.
- It is declared that the President and the Cabinet have failed to fulfil their respective constitutional obligations as stipulated in the paragraph above and such conduct is invalid.
- The President and Cabinet together with Parliament are directed to rectify the failure within 24 months of the date of this order.

The court recognised the negative impact that the failure to recognise and regulate Muslim marriages have on children in the following quote:

*The child's best interests are of paramount importance in every matter concerning a child. Children in Muslim marriages are therefore not provided with adequate protection as those in civil and customary marriages enjoy, upon dissolution of the marriage of their parents by way of divorce. In terms of section 6 of the Divorce Act, a decree of divorce shall not be granted until the court is satisfied as to the welfare of the minor or dependent children and it may call for an investigation to be undertaken and for any relevant person to appear before it. This all serves to indicate that there has been, and is, an ongoing infringement of the section 34 rights of persons in Muslim marriages, as well as the children thereof whose rights are stated in section 28 of the Constitution, to have any dispute that can be resolved by the application of law decided in a fair public hearing.*²⁹

In terms of traditional Jewish Law the legal obligations of maintenance towards children rests upon the father, irrespective of whether the child was born out of wedlock or not.³⁰ This obligation includes providing for all the child's needs, educating the child and ensuring that the child learns a profession.³¹

The Children's Act considers the payment of damages or inhlawulo as one of three factors in determining whether an unmarried father has automatic parental responsibilities and rights.

The duty of the father to maintain a child is independent of custody – so even if the child is in the care of the mother, the father has the obligation to maintain the child, as is the case with civil marriages. Both parents have rights to have contact with or access to the child unless such this is deemed harmful to the child.³² The default position is that guardianship rests with the father, and a mother does not have legal standing

over her children unless specifically appointed by a Jewish court.³³ The maintenance obligation of the father continues even after divorce and the High Court recognised the powers of an Orthodox Jewish Ecclesiastical Court to enforce its maintenance order against a father who had defaulted on his maintenance obligation following his divorce to the benefit of the child.³⁴ Similarly, although Muslim marriages are not recognised under South African law, the courts have recognised and upheld maintenance obligations flowing from such marriages.³⁵

The lack of formal recognition of some religious laws has a negative impact on the protection of rights of women and children.³⁶ Nonetheless, the courts have not shied away from intervening in matters to ensure that the Constitutional rights of children living under religious law are protected. In August 2018, the Western Cape High Court directed the state to introduce legislation to recognise Muslim marriages and to regulate the consequences of those unions (see Case 2).

Unmarried fathers

Section 21 of the Children's Act provides for the automatic acquisition of parental responsibilities and rights by unmarried fathers who comply with the following requirements:

- a. if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
- b. if he, regardless of whether he has lived or is living with the mother—
 - i. consents to be identified, or successfully applies in terms of section 26 to be identified, as the child's father or pays damages in terms of customary law;
 - ii. contributes, or has attempted in good faith to contribute, to the child's upbringing for a reasonable period; and
 - iii. contributes, or has attempted in good faith to contribute, towards expenses in connection with the maintenance of the child for a reasonable period.

A more detailed discussion of children under customary law can be found in Chapter 4. However, it is notable that the Children's Act considers the payment of damages or *inhlawulo* under customary law as one of the three factors in determining whether an unmarried father has automatic parental responsibilities and rights, demonstrating how the Act recognises the need to protect the rights of children living under both civil statutory law and customary law.³⁷ Under customary law, the payment of damages is seen as an acknowledgment of paternity but is not considered

sufficient for the acquisition of parental responsibilities and rights. Usually, a father has to pay an additional beast (or cash equivalent) for *isondlo*, for the child's upkeep, in order to enable him to have a relationship with his child.³⁸ The approach of section 21 of the Children's Act is not irreconcilable with the customary law position as the purpose of *isondlo* relates to the other two requirements set out in section 21 which are that the father must have contributed to the child's upbringing and contributed towards the maintenance of the child for a reasonable period of time.

The law also recognises situations where the father has tried in good faith to contribute to the maintenance and upbringing of the child as outlined in Case 4.

Other recognised caregivers

The Children's Act recognises that children live in various types of families, often with people who do not have formal parental responsibilities and rights towards them. In order to create a default position that provides *de facto* caregivers with sufficient rights to care for children, section 32 of the Children's Act recognises persons who voluntarily care for a child either indefinitely, temporarily or partially. It provides that such persons must safeguard the child's health, well-being and development, and protect the child from maltreatment,

Case 3: Fulfilling the requirements of section 21 to acquire automatic parental responsibilities and rights

In the case of *KLVC v SDI [2015] 1 All SA 532 (SCA)* the court had to determine whether an unmarried father had acquired parental responsibilities and rights where the mother argued that he had not complied with section 21 (1)(b) in particular. The court found that the father had met the said requirements and stated as follows:

Section 21 the Act was specifically intended to provide for the automatic acquisition of parental rights by an unmarried father if he was able to meet certain requirements. Clearly, the intention was to accord an unmarried father similar rights and responsibilities in relation to his child to those of the father who was married to the child's mother. To my mind, this was intended to promote both the equality guarantee in s 9 and, more importantly, the right of a child to parental care as envisaged by s 28 of the Constitution.

It bears mention that s 20 of the Act, which accords automatic full parental responsibilities and rights to married fathers, makes no stipulation whatsoever

that such fathers should contribute towards the upbringing or expenses of their children. On the other hand, s 21 (1)(b) requires an unmarried father to contribute, or make an attempt in good faith to contribute, towards the upbringing and the expenses in connection with the maintenance of the child for a reasonable period. It is clear that the legislature draws a distinction between married and unmarried fathers. However, it is important in my view for the court whilst interpreting this section, not to unfairly discriminate against the unmarried father by demanding what the appellant refers to as 'significant or reasonable contributions'. There is a real danger of finding that an unmarried father has not automatically acquired rights and responsibilities in respect of a child due to factors entirely unrelated to his ability and commitment as a father.

This interpretation accords with the child-centred approach that the Children's Act takes in ensuring that children are cared for and have relationships with both parents.

Case 4: Court finds that caregivers who are family members can instruct attorneys for civil claims on behalf of a child

The North Gauteng High Court found that it was not necessary to appoint a *curator ad litem*^v for litigation on behalf of a child where the child has a family member as a caregiver and that such a family is empowered to instruct an attorney to pursue a claim against the Road Accident Fund. This was in the case of *Ex Parte T Molantoa obo O Moloantoa and other Applicants*³⁹ where various applicants sought to appoint *curators ad litem* for purposes of litigation despite the fact that the litigation had already advanced on instruction of the family members of the children. The Court found that:

- an adult caregiver who is a family member of a child is competent to assist the child with his or her claim against the Road Accident Fund
- the fact that the child's caregiver is a family member other than a biological parent is no ground on its own for the appointment of a curator, nor is the fact that the caregiver is poor or ill-educated.⁴⁰

The Court remarked as follows:

Section 32 (1) provides in terms that a person who voluntarily cares for a child must safeguard the child's health, well-being and development. In matters concerning a child, the child's interests are paramount. It must surely have been present to the collective mind of the legislature that the nuclear family (i.e. biological mother + biological father + biological children) was and is by no means the universal norm in this country. Why would the legislature impose a purely bureaucratic obstacle in the path of the vindication of children's rights? I can see nothing in the scheme of the Children's Act or its purposes which will be retarded if s 32 is interpreted to permit a child's caregiver to assist the child in an action against the Fund. An interpretation which recognises such a competence on the part of a caregiver will advance the purposes of the Act.⁴¹

abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards. These persons may exercise any parental responsibilities and rights reasonably necessary to comply with their obligations to protect the child, including consenting to the child's medical examination or treatment if such consent cannot be reasonably obtained from the parent or guardian of the child. Although these persons do not need a court order, a court may limit or restrict the parental responsibilities and rights that such persons may exercise.

The recognition of the role of persons, other than the biological parents of the child, as being significant for the child's care and well-being is also evident from the definition of "caregiver" in the Children's Act which includes:

- a foster parent;
- a person who cares for the child with the implied or express consent of a parent or guardian of the child;
- a person who cares for a child whilst the child is in temporary safe care;
- the person who is the head of a child and youth care centre where the child has been placed;
- the person at the head of a shelter;
- a child and youth care worker who cares for a child who

- is without appropriate family care in the community; and
- the child at the head of a child-headed household.

The recognition of these different caregivers indicates the role of persons other than the biological parents (including the state through the placement of children in foster care and in child and youth care centres) and outlines their responsibilities – including their right to consent to medical treatment of children.^{iv} In this way the law recognises the widespread practice of informal kinship care without formal documentation.

Acquiring shared parental responsibilities and rights by agreement

The Children's Act allows for the sharing of parental responsibilities and rights. This is not a requirement, but is an option available to those who wish to formalise care arrangements. The mother of a child, or any other person who has full parental responsibilities and rights in respect of a child is able to conclude a parental responsibilities and rights agreement which enables her or him to confer some of these responsibilities and rights on the unmarried father of a child who has not acquired such rights in terms of section 21 of the Children's Act or any other person who has an interest

iv Surgical treatment requires the consent of a parent or guardian. See: Children's Act 38 of 2010. Section 129 (4).

v A *curator ad litem* is a legal representative appointed by a court to represent the best interests of a person who lacks the capacity to make decisions for themselves.

in the care, well-being and development of the child.⁴² Such a parental responsibilities and rights agreement only takes effect if it is registered with the family advocate or made an order of the High Court, a divorce court or the children's court.⁴³

For example: Zitha and Sonwabo are married and have two children Buhle and Andile. When Zitha, the mother, dies, Sonwabo enters into a parental responsibilities and rights agreement with Zitha's sister, Thandi, to care for the children while he is away working in the city. This means that Thandi can care for the children on a day-to-day basis and make certain decisions such as which school they can attend, but with some limitations – for example, she cannot take them out of the country or consent to them undergoing surgery without Sonwabo's approval. Sonwabo does not lose any of his parental responsibilities and rights.

Co-holders of parental responsibilities and rights may choose to conclude a parenting plan to regulate the exercise of parental responsibilities and rights. The contents of such a plan includes where and with whom the child lives, maintenance of the child, contact between the child and the parties or any other person, and the schooling and religious upbringing of the child.⁴⁴

The Children's Act outlines the formal requirements for the conclusion of a parenting plan⁴⁵ and also provides guidance as to how co-holders of parental responsibilities and rights should exercise their rights and make decisions in relation to the child.⁴⁶ However a written parental responsibilities and rights agreement is optional, not mandatory. The day-to-day decisions about a child can also be arranged verbally, by people who are sharing aspects of the care of children.

Acquiring parental responsibilities and rights through a court order

Sections 23, 24, 27 and 28 of the Children's Act provide for a person who has an interest in the well-being or development of the child to approach the court for an order granting care, contact or guardianship of the child. The application for guardianship can only be made to the High Court, while for care and contact, a person may approach the Children's Court. The court would consider whether the order sought would be in the best interests of the child, taking into account the relationship between the child and the applicant, the applicant's commitment towards the child and the extent to which the applicant has contributed towards the expenses in connection with the maintenance of the child.

Adoption and surrogacy

The Children's Act also regulates adoption⁴⁷ and surrogacy⁴⁸, which are processes that also lead to the acquisition of parental responsibilities and rights. Once the legal requirements for these respective processes are complied with and a court order granting an adoption⁴⁹ or a surrogate motherhood agreement is confirmed by the High Court, the child is for all purposes the child of a person or persons in whose favour the order has been granted.⁵⁰ Customary law adoptions have been recognised by our courts for purposes of maintenance claims, inheritance and road accident fund claims where children's adoptive parents died in road accidents.⁵¹ Adoptions in terms of the Children's Act can be by family members, step-parents or any other persons who are not related to a child who comply with the requirements of the Act.⁵²

Foster care

Foster parents obtain limited parental responsibilities and rights which may be set out in the court order,⁵³ but guardianship remains with biological parents or any person who has been appointed as a guardian. A foster parent may not make any important decisions affecting the child without considering the views and wishes of the child, and of the parents or guardians of the child.⁵⁴ Children in foster care are wards of the state and where decisions need to be taken the state has to step in, for instance if the child has to undergo surgery or leave the country and does not have a legal guardian, the provincial head of social development has to give written consent.⁵⁵

Upholding the best interests of the child in disputes about parental responsibilities and rights

Where disputes arise in relation to parental responsibilities and rights, the Children's Act recommends a conciliatory approach and provides for the use of mediation.^{vi} The Children's Court has the power to refer matters to mediation and family group conferences, for possible dispute resolution.⁵⁶ Section 71 of the Children's Act provides that the children's court may, where circumstances permit, refer a matter to any appropriate lay forum, including a traditional authority in an attempt to settle the matter out of court. Significantly, the section precludes the referral of matters of alleged abuse or sexual abuse of a child to a lay forum.⁵⁷

The recognition of alternative dispute mechanisms and forums is a positive development in that it aligns with one of the general principles of the Children's Act which

vi Section 21 (3) of the Children's Act provides that an unmarried father and mother must be referred to mediation where there is a dispute about the acquisition of parental responsibilities and rights.

Box 7: The best interests of the child

Section 7 of the Children's Act outlines the factors that need to be considered in determining what is in the best interests of the child:

- 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 caregiver or person relevant in those circumstances;
- b. the attitude of the parents, or any specific parent, towards—
 - i. the child; and
 - ii. the exercise of parental responsibilities and rights in respect of the child;
- c. the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
- d. the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
 - i. both or either of the parents; or
 - ii. any brother or sister or other child, or any other caregiver or person, with whom the child has been living;
- e. the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- f. the need for the child—
 - i. to remain in the care of his or her parent, family and extended family; and
 - ii. to maintain a connection with his or her family, extended family, culture or tradition;
- g. the child's—
 - i. age, maturity and stage of development;
 - ii. gender;
 - iii. background; and
 - iv. any other relevant characteristics of the child;
- h. the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - i. any disability that a child may have;
 - j. any chronic illness from which a child may suffer;
- k. the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- l. the need to protect the child from any physical or psychological harm that may be caused by—
 - i. subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - ii. exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- m. any family violence involving the child or a family member of the child; and
- n. which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

requires that in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.⁵⁸ However, there is little published about how effective these processes are in practice. Section 28 (2) of the Constitution requires that the "best interests" standard be central to dispute resolution, and the Children's Act⁵⁹ provides guidance as to how to determine what is in the best interests of the child particularly where there is contestation of parental responsibilities and rights as outlined in Box 7.

In addition to the "best interests" criteria outlined in section 7 of the Children's Act, section 10 requires that the views and wishes of the child be considered, through enabling their participation in matters that affect them. Children's level

of participation is guided by their age and maturity and may also include participation through a legal representative.⁶⁰ Our courts have recognised the right of children to participate and be heard in matters where parental responsibilities and rights are in dispute.⁶¹ This is different from the role played by the Office of the Family Advocate which takes a role akin to mediation,⁶² whereas in this case a legal representative of a child stands squarely in the corner of the child and communicates the child's views and wishes to the court⁶³.

Very often disputes about children are between their parents and caregivers – typically parents arguing about care or contact. There are an increasing number of grandparent/parent disputes, particularly where one parent has died, and his or her parents exert their rights to remain caregivers

or to have contact with the child. Grandparents have a duty of support towards their grandchildren in common law. Nevertheless, this does not mean that they have any automatic responsibilities and rights in relation to a grandchild. The responsibility to maintain a grandchild also does not arise if there is a parent who is capable of doing so. Where parents refuse to allow contact between children and their grandparents, the courts have granted orders enabling such contact if it is in the child's best interests.⁶⁴

Disputes between parents, (or between grandparents and parents) about parental responsibilities and rights are considered to be part of "private law" – in other words, they are private matters in which the parties contesting rights have to try to resolve the dispute themselves, or through mediation, or ultimately a court. The state does not need to get involved in such disputes – except through the Office of the Family Advocate, which was established to provide mediation for free, and also to facilitate a separate avenue to determine the views and wishes of the child, and place these before the court.

Many disputes arise regarding the payment of maintenance for children. Although these are mostly cases brought by mothers against fathers,^{vii} grandparents have been successfully sued for maintenance.⁶⁵ These are also private law matters, but they contain an element of "public law" where the state gets involved by tracing defaulters and prosecuting cases where orders to pay maintenance are not complied with.

Disputes impacting on parental responsibilities and rights where the state is involved

Sometimes disputes arise because there are allegations that children are abused or neglected or are otherwise in need of care and protection. In these instances, the state becomes involved, and these cases are viewed by the law as being a hybrid of "private law" and "public law".

Section 110 of the Children's Act places an obligation on certain persons who engage with children on a professional basis to report cases where they reasonably conclude that a child has been physically or sexually abused^{viii} or wilfully neglected as outlined in Box 8. Members of the public may also report cases where they believe that a child is in need of care and protection. Social workers working for government and for child protection organisations designated by the state are then required to investigate allegations of abuse and neglect. The Act allows for such investigations to be

Box 8: Professionals' responsibility to report child abuse and neglect

Section 110 (1) of the Childrens Act outlines professionals' responsibility to report child abuse and neglect:

Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

In terms of section 305 (1)(c) a person who fails to comply with section 110 (1) is guilty of an offence and if convicted is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.

undertaken without removing the child. Removal of a child from his or her parents or caregivers is an extreme measure, and the Children's Act therefore circumscribes this power by requiring a court order prior to removal in all situations other than those where emergency protection is required.

In *C v Department of Health and Social Development*, the Constitutional Court found that when the state intervenes to remove children from the care of parents or family, such removal must be subject to automatic review as the need for emergency removal must be balanced with children's right to family and parental care and their right to have their best interests considered.⁶⁶ The facts of the matter were that when social workers and city officials carried out a planned operation to remove children from people found begging on the streets with their children, they found Mr C and Ms M were at a busy intersection in Pretoria. Both had their children with them. Mr C was repairing shoes by the roadside, and on that day he had taken his daughter with him because his partner

vii It does not matter if the parents are married or unmarried: *Peterson v Maintenance Officer*, Simon's Town Maintenance Court 2004 (2) SA 56 (C).

viii Reporting of sexual offences is obligatory for everyone, in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

was in hospital giving birth to the couple's second child. Ms M, who begs for a living, had her two daughters with her and an assistant because she is blind. Mr C and Ms M both had their children removed from them by the police and social workers and taken to places of safety without placing the matter before the Children's Court to review such immediate removal. This meant that the parents and children would only be heard by a court after a period of ninety days which the Children's Act provides for a social worker to investigate and submit a report to the Children's Court indicating whether a child is need of care or not. The Constitutional Court was of the view that the lack of immediate automatic review is unconstitutional. In the words of Yacoob J:

It is in the interests of children that an incorrect decision by a court made without hearing the child or the parents, or by a designated social worker or police official be susceptible to automatic review by a court, in the ordinary course, in the presence of the child and the parents. It follows from this that sections 151 and 152 do not provide for this and are therefore constitutionally wanting. Sections 151 and 152 of the Act, though their positive provisions are aimed at the best interests of children fall short of achieving this result. They carry the potential of being counterproductive because they fail to provide for a Children's Court automatic review in the presence of the child and the parents. In this sense, and to this extent, the laws are not in the best interests of children. They therefore limit the rights contained in section 28 (2).⁶⁷

The case was important in ensuring that the removal of children from parental care does not go unchecked. The facts of the case are indicative of the lived realities of many parents who have to make care decisions for their children and at the same time earn a living to provide for their families. Decisions that are viewed as potentially contrary to the best interests of the child, may in fact be in the child's best interests. For example, in the case of Mr C the only other option he may have had was to leave his child alone at home, which may have left the child more vulnerable.

There are other situations where the state separates children from families through executive action. One of these is through the imprisonment of parents. In the case of *S v M (Centre for Child Law as Amicus Curiae)*⁶⁸ the South African Constitutional Court set a precedent by requiring that, henceforth, all courts considering the sentencing of a primary caregiver must consider the impact that imprisonment would have on the best interests of the child.

In *S v M*, the Constitutional Court recognised the individuality of a child as a separate being from his or her parents and this is reflected in the following quote:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.⁶⁹

The Children's Act foresees that there may be conflicts in relation to the exercise of parental responsibilities and rights, not only between the parents or co-holders of parental responsibilities and rights but also between their interests and that of the child; and it therefore includes provisions to address these tensions by placing the child's interests at the centre. For example, where courts or the state override parents' refusal of medical treatment for a child based on religious or other beliefs, to ensure that when parents' interests are at odds with the interests of the child the courts or state can intervene to safeguard the child's best interests.⁷⁰

The state's role in supporting families to look after children

The South African Constitution provides for children's rights to "family care or parental care, or to appropriate alternative care when removed from the family environment".⁷¹ The provision further recognises the family as generally the unit that bears the primary responsibility to look after children, while the State must support families and in some instances step in to provide directly for children who are placed in the State's care. The right to a family is framed as a child's right and not as a right to family life, which is adult orientated. This is probably due to concern that parents could invoke a "right to family life" to limit state intervention in "family matters", and that this could be detrimental to the child in cases where the state needs to intervene or remove the child in cases of abuse or neglect.

Although the primary responsibility to care for children lies with the parents or caregivers of children, the state has an obligation to provide for the socio-economic rights of children thus assisting to ensure the realisation of children's constitutional rights. These rights include:

- The right to basic education;⁷²
- Access to health care services;⁷³
- Social services,⁷⁴ which includes the child care and protection system that obligates the State to support families in safeguarding the well-being of their children,

and provides for the removal of children into State care where this is in the child's best interests;^{viii}

- Social security,⁷⁵ which includes the provision of grants to support parents in providing for the daily essentials for their children, if they are unable to do so;
- The right to housing and shelter.⁷⁶

Section 7 (2) of the Constitution places an obligation on the state to respect, protect and fulfil each of these rights. While the realisation of most socio-economic rights is subject to progressive realisation and therefore limited by the extent of available resources, children's socio-economic rights outlined in section 28 (1)(c) of the Constitution are not subject to the same internal limitation.⁷⁷ This difference together with the best interest's principle and children's right to be protected from neglect and abuse, supports the argument that children should have a priority claim on state resources to ensure the prompt delivery of a basic, minimum level of socio-economic goods.⁷⁸ This approach has found traction when it comes to education as the Constitutional Court has stated that the right to basic education is not subject to progressive realisation.⁷⁹

Many parents have to make care decisions for their children and at the same time earn a living to provide for their families. Decisions that are viewed as potentially contrary to the best interests of the child, may in fact be in the child's best interests.

However, the first cases which dealt tangentially with children's socio-economic rights met with a cautious approach by the Constitutional Court. In *Government of the Republic of South Africa v Grootboom*⁸⁰ which dealt, among other matters, with the question of whether families with children had an immediately realisable right to housing, the Constitutional Court overturned the finding of the High Court which had relied directly on section 28 (1)(c) in relation to children's right to shelter. According to the Constitutional Court this approach would mean that parents who have children have the right to access adequate housing in terms of section 26 (the right of access to adequate housing, which applies to everybody) as well as the right to claim shelter on demand in terms of section 28 (1)(c).⁸¹ The court found that section 28 (1)(b) and section 28 (1)(c) had to be understood together in

that section 28 (1)(b) outlines who has the responsibility for the care of children, those being parents, family or state – in that order.⁸² Section 28 (1)(c) outlines the essential elements of that care, thus if the child is in the care of parents, then they have the primary duty to provide for the basic needs of the child.⁸³ Therefore, only where the child is removed from their parents and is placed in state care would the state then have the obligation under section 28 (1)(c).⁸⁴

In *Minister of Health v Treatment Action Campaign*⁸⁵ the Constitutional Court cleared the ambiguity of the *Grootboom* case by explaining that it is not only when children have been removed from family care and placed in state care that the state bears an obligation to provide the care entitlements in section 28 (1)(c).⁸⁶ The court said that the duty extends even where the implementation of the right to parental or family care is lacking, as was the case here in so far as the parents lacked the financial resources to pay for health care services and thus the duty fell to the state.⁸⁷

In *Centre for Child Law v MEC for Education, Gauteng*,⁸⁸ which dealt with children who had been removed from their parents, the court found that the state must provide alternative care facilities that are appropriate and meet the children's basic needs.⁸⁹ The court stated that:

what is notable about children's rights in comparison with socio-economic rights is that section 28 contains no internal limitation subjecting them to availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate.⁹⁰

More generally, parents should be able to rely on the state for support through a range of programmes that support their parenting efforts. South African law allows for parental responsibility leave. Mothers who are in formal employment are entitled to have four months maternity leave and are able to draw benefits from the Unemployment Insurance Fund during that time. On 21 August 2018 the National Council of Provinces passed the Labour Laws Amendment Bill, which provides that employed fathers will be entitled to 10 days' parental leave on the birth of a child.⁹¹ The Bill also provides for 10 weeks' adoption leave for one parent when adopting a child under the age of two, and ten weeks "commissioning parent leave" when an employee's child is born by means of a surrogacy arrangement.

viii The Children's Act provide for the functioning of the care and protection system which includes the provision of prevention and early intervention services as well as the process for finding children in need of care and protection and placing them in alternative care.

Early childhood development (ECD) services (comprising health, care and education) have been a major focus of the government policy and implementation planning,⁹² and a site of increasing government spending despite the Children's Act stating that government "may" provide these services. Partial care facilities are developed at ECD level, but more after-school services are required.

The Constitution recognises the family as the unit that bears the primary responsibility to look after children, while the state must support families

Social assistance for parents or caregivers is provided through the Social Assistance Act,⁹³ and comprises the Child Support Grant (a means tested grant for all primary caregivers, including a parent), the Foster Child Grant (a grant for foster parents, who may be family members but not parents, and is not means tested), and the Care Dependency Grant, which is for caregivers caring for children with disabilities (including parents). The Children's Act also places an obligation on the state to support families and ensure family preservation through measures such as providing prevention and early intervention programmes that will provide families support to build their capacity and self-reliance.⁹⁴ Such programmes may include assisting families to obtain the basic necessities of life; assisting the families to obtain such necessities for themselves; providing families with information to enable them to access services; supporting and assisting families with a chronically ill or terminally ill family member, early childhood development and promoting the well-being of children and the realisation of their full potential.⁹⁵

Conclusion

Families in South Africa operate within a complex legal system, comprising statutory law, common law, religious and customary law, all of which must be aligned with the Constitution. The Constitution sets up a powerful set of rights and protections for children, including the best interests principle which must be paramount in all decisions concerning them. The law clarifies who acquires parental responsibilities and rights automatically, or by agreement or

court order. The Children's Act is flexible in terms of family forms which is a welcome approach as it recognises the diversity of customs and religion and expands the categories of people who can be recognised as caregivers of children, who in most instances have obligations towards children as a result of customary practices or religious law.

Disputes concerning children that occur between parents and other caregivers fall within the domain of private law, with minimal intervention by the state except through the Office of the Family Advocate, or in the enforcement of maintenance claims. Provision is made for the child to be heard in matters that affect him or her, including the provision of legal representation, and this an essential component of recognising children as rights-bearers.

Disputes where there are allegations of abuse or neglect move into the terrain of public law. The care and protection provisions in the Children's Act require social workers to conduct investigations, and there are legal constraints on the removal of children from parents and families. The emphasis is on strengthening families through the provision of prevention and early intervention services and only removing children from families in those instances where there is danger to the child.

The Constitution and other legislation place primary emphasis on parents and caregivers' obligations for the care of children, including the provision of basic needs. This approach has been endorsed by the courts, which have indicated that children should first look to their parents, families and caregivers for the fulfilment of their basic needs, and only where parental care is absent or "lacking" does the obligation to provide services arise. However, there are notable exceptions such as in relation to the right to education, which requires the state to provide for a system that enables parents and family to enrol their children, even where they may be lacking financial resources. This is in keeping with the fact that education is compulsory in South Africa.

The state is yet to meet its obligations towards ensuring that all children in South Africa enjoy the rights provided for in the Constitution, and in some instances it has taken the courts to ensure that the state meets its obligations. There is also a need for the state to strengthen its support to parents and families, who are the primary protectors of their children's rights.

References

- 1 Bekker JC & Rautenbach C (2014) *Introduction to Legal Pluralism*. 4th edition. Lexis Nexis. PP. 5-8.
- 2 Skelton A & Carnelley M (2010) *Family Law in South Africa: Private Law*. Oxford University Press Southern Africa. P. 9.
- 3 Constitution of the Republic of South Africa, Act 108 of 1996. Chapter 2.
- 4 Drawing on definitions from no. 1 and 2 above.
- 5 Mezmur B (2017) The United Nations Convention on the Rights of the Child. In: Boezaart T (ed) *Child Law in South Africa*. 2nd edition. Claremont: Juta. P. 403.
- 6 Office of the High Commissioner of Human Rights (1989) *Convention on the Rights of the Child, UN General Assembly Resolution 44/25*. Geneva: United Nations. Article 18.
- 7 Secretary General of the Organisation of the African Union (1990) *African Charter on the Rights and Welfare of the Child, OAU Resolution 21.8/49*. Addis Ababa: OAU. Article 18.
- 8 See no. 7 above. Article 18.
- 9 See no. 7 above. Articles 20, 21, 22, 25 and 26.
- 10 Sloth-Nielsen J (2017) The African Charter on the Rights and Welfare of the Child. In: Boezaart T (ed) *Child Law in South Africa*. 2nd edition. Claremont: Juta. P. 431.
- 11 *Coughlan v RAF* 2015(4) SA 1 (CC).
- 12 See no. 11 above. Para [57].
- 13 See no. 3 above. Sections 7, 8 and 38.
- 14 Children's Act 38 of 2010. Section 10.
- 15 See no. 14 above. Section 14.
- 16 See no. 14 above. Section 15.
- 17 See no. 14 above. Section 1.
- 18 See no. 14 above. Sections 22, 24, 27 and 28.
- 19 See no. 14 above. Section 1.
- 20 See no. 14 above. Section 1.
- 21 Heaton J (2017) Parental responsibilities and rights. In: Boezaart T (ed) *Child Law in South Africa*. 2nd edition. Claremont: Juta. P 77.
- 22 See no. 21 above.
- 23 See no. 14 above. Section 19 (1).
- 24 See no. 14 above. Section 19 (2).
- 25 See no. 14 above. Section 20.
- 26 See no. 14 above. Section 1.
- 27 See no. 1 above. P. 291.
- 28 *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109 (31 August 2018)
- 29 See no. 28 above. Para [139]-[140].
- 30 See no. 1 above. P. 336.
- 31 See no. 1 above. P. 336.
- 32 See no. 1 above. P. 336.
- 33 See no. 1 above. P. 336.
- 34 *Taylor v Kurstag* 2005(1) SA 362(W).
See also no. 1 above. P. 336.
- 35 *Hoosein v Dangor* (2010) 4 BCLR 362 (WCC);
Am v RM 2010 (2) SA 223 (ECP).
- 36 See no. 1 above. P. 59.
- 37 See no. 14 above. Section 21.
- 38 See no. 21 above. P. 86.
- 39 *Ex Parte T Molantoa obo O Moloantoa and other Applicants* Case no. 3798/18, Unreported.
- 40 See no. 39 above. Para [25].
- 41 See no. 39 above. Paras [18] and [21].
- 42 See no. 14 above. Section 22 (10).
- 43 See no. 14 above. Section 22 (3).
- 44 See no. 14 above. Section 33 (3).
- 45 See no. 14 above. Section 34.
- 46 See no. 14 above. Sections 30 and 31.
- 47 See no. 14 above. Chapter 15 and 16.
- 48 See no. 14 above. Chapter 19.
- 49 See no. 14 above. Section 242.
- 50 See no. 14 above. Section 297.
- 51 *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ);
Metiso v Road Accident Fund 2001 (3) SA 1142 (T);
Kewana v Santam Insurance Co Ltd 1993 (4) SA 771 (T).
- 52 See no. 14 above. Section 231.
- 53 See no. 14 above. Section 188 (1).]
- 54 See no. 14 above. Section 188 (2).
- 55 See no. 14 above. Section 169.
- 56 See no. 14 above. Section 49.
- 57 See no. 14 above. Section 71 (2).
- 58 See no. 14 above. Section 6 (4)(a)
- 59 See no. 14 above. Section 7.
- 60 See no. 14 above. Section 10.
- 61 *Ex Parte Van Niekerk: In re Van Niekerk* [2005] JOL 14218 (T);
Soller NO v G 2003 (5) SA 430 (W);
R v H 2005 (6) SA 535 (C);
Legal Aid Board v R 2009 (2) SA 262 (D); *FB v MB* 2012 (2) SA 394 (GSJ).
- 62 *Soller N.O. v G* 2003 (5) SA 430 (W).
- 63 See no. 62 above.
- 64 *FS v JJ* 2011 (3) SA 126 (SCA);
LH v LA 2012 (6) SA 41 (ECG).
- 65 Kruger H (2017) Maintenance of children. In: Boezaart T (ed) *Child Law in South Africa*. 2nd edition. Claremont: Juta.
- 66 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) paras [24], [27] and [31].
- 67 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) para [77].
- 68 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 203 (CC).
- 69 See no. 68 above.
- 70 See no. 14 above. Section 129 (10).
- 71 See no. 3 above. Section 28 (1)(b).
- 72 See no. 3 above. Section 29.
- 73 See no. 3 above. Section 28(1)(c).
- 74 See no. 3 above. Section 28 (1)(c).
- 75 See no. 3 above. Section 28 (1)(c).
- 76 See no. 3 above. Section 28 (1)(c).
- 77 Proudlock P (2017) Children's socio-economic rights. In: Boezaart T (ed) *Child Law in South Africa*. Claremont: Juta. p 364.
- 78 See no. 77 above. p 364.
- 79 *The Governing Body of Juma Masjid Primary School v Essay NO* 2011 (8) BCLR (CC).
- 80 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
- 81 See no. 80 above. Para [70]-[71].
- 82 See no. 77 above.
- 83 See no. 77 above.
- 84 See no. 77 above.
- 85 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).
- 86 See no. 77 above. P. 372.
- 87 See no. 77 above.
- 88 *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T).
- 89 See no. 88 above. Para. 228 F-G.
- 90 See no. 88 above. Para. 227 I-J.
- 91 See Labour Laws Amendment Bill (B29-2017). Viewed 30 October 2018: <https://png.org.za/bill/615/>
- 92 Department of Social Development (2015) *National Integrated Early Childhood Development Policy*. Pretoria: DSD.
- 93 Social Assistance Act 13 of 2004.
- 94 See no. 14 above. Section 143 (1)(b).
- 95 See no. 14 above. Section 144 (2).