

**The sexual orientation of a parent as factor for consideration in the granting of care**

by

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## INDEX

LIST OF ABBREVIATIONS .....	1
1 Introduction .....	4
2 Care and the best interests of the child .....	13
2.1 Introduction .....	13
2.2 Care .....	14
2.2.1 Introduction .....	14
2.2.2 Care v Custody .....	15
2.3 Best interests of the child standard .....	18
3 International law .....	26
3.1 Introduction .....	26
3.2 United Nations Convention on the Rights of the Child .....	29
3.3 African Charter on the Rights and Welfare of the Child .....	35
4 Case law .....	40
4.1 Introduction .....	40
4.2 Pre-1994 .....	43
4.2.1 Van Rooyen v Van Rooyen .....	43
4.3 Post-1994 .....	47
4.3.1 V v V .....	47
4.4 Post-Children's Act .....	52
4.4.1 Introduction .....	52
4.4.2 Application of the concept of care .....	53
5 Conclusion .....	56
BIBLIOGRAPHY .....	lix

## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child, 1999
AHRLJ	African Human Rights Law Journal
ESR Review	Economic and Social Rights Review
IJCR	International Journal of Children's Rights
IJLPF	International Journal of Law, Policy and Family
JJS	Journal for Juridical Science
LDD	Law, Democracy and Development
SAJHR	South African Journal for Human Rights
SAJP	South African Journal of Psychology
SALJ	South African Law Journal
SAPR	South African Psychiatry Review
SAPR/PL	South African Public Law
UNCRC	United Nations Convention on the Rights of the Child, 1989

## **ABSTRACT**

### **THE SEXUAL ORIENTATION OF A PARENT AS A FACTOR FOR CONSIDERATION IN THE GRANTING OF CARE**

Section 28(2) of the South African Constitution determines that every child has the right to have their best interests considered of paramount importance in all matters concerning them. Section 9 further provides that every person is considered equal before the law and has the right to equal protection and benefit of the law. Several grounds are listed relating to the unfair discrimination of persons, including their sexual orientation. The concept of care is incorporated in the Children's Act, and it entails a comprehensive description of parents' daily life regarding their children and the powers and duties expected to ensure the general protection, well-being and best interests of the child. The study aims to research the legal position when the sexual orientation of a parent is a considering factor in the granting of care, and the extent of which courts can give consideration to that factor. I commence by examining relevant national legislation relating to the concept of care and the best interests of the child standard in the Children's Act to establish how the sexual orientation of a parent is interpreted by courts in the granting of care. I then proceed to examine relevant international and regional documents to determine the relevant rights relating to the interests of children in the granting of care to a parent in divorce proceedings. I then proceed to analyse landmark cases to establish ways in which the approach of the courts regarding homosexuality have changed since the beginning of the new political dispensation in 1994. Finally a conclusion will be reached on the nature and scope of the consideration of a parent's sexual orientation in the granting of care in the South African context.

#### **Keywords**

Sexual orientation; Parent; Care; South African Constitution; Child; Best Interests of the Child; Divorce; African Charter on the Rights and Welfare of the Child; Convention on the Rights of the Child; Children's Act.

## **OPSOMMING**

### **DIE SEKSUELE ORIENTASIE VAN 'N OUER AS 'N FAKTOR VIR OORWEGING IN DIE TOEKENNING VAN SORG**

Volgens artikel 28(2) van die Suid-Afrikaanse Grondwet het elke kind die reg om hul beste belange as van deurslaggewend geag te word in alle aangeleenthede wat hul raak. Artikel 9 bepaal verder dat elke persoon gelyk is voor die reg en die reg het op gelyke beskerming en voordeel van die reg. Verskeie gronde word gelys met betrekking tot die onbillike diskriminasie van persone, insluitend hul seksuele oriëntasie. Die konsep van sorg is vervat in die Kinderwet en dit behels 'n omvattende beskrywing van ouers se daaglikse lewe ten opsigte van hul kinders en die verantwoordelikhede en regte wat verwag word om die algemene beskerming, welsyn en die beste belange van die kind te verseker. Die studie het ten doel om die regsposisie rakende die seksuele oriëntasie van 'n ouer as 'n faktor vir oorweging in die toekenning van sorg te ondersoek, en die mate waarin howe oorweging kan skenk daaraan. Ek begin deur die relevante nasionale wetgewing aangaande die konsep van sorg en die beste belange van die kind standaard soos uiteengesit in die Kinderwet te ondersoek, om vas te stel hoe die seksuele oriëntasie van 'n ouer deur howe in die toekenning van sorg interpreteer word. Ek gaan voort deur die relevante internasionale en regionale dokumente te ondersoek, om die regte met betrekking tot die belange van kinders in die toekenning van sorg in egskeidingsgedinge vas te stel. Daarna gaan ek voort om die deurslaggewende sake te analiseer ter vasstelling van die wyse waarvolgens die howe se benadering ten opsigte van homoseksualiteit verander het sedert die begin van die politieke bedeling in 1994. Ten slotte sal 'n gevolgtrekking bereik word aangaande die aard en omvang van die oorweging van 'n ouer se seksuele oriëntasie in die toekenning van sorg in die Suid-Afrikaanse konteks.

#### **Sleutelwoorde**

Seksuele Oriëntasie; Ouer; Sorg; Suid-Afrikaanse Grondwet; Kind; Beste Belange van die Kind; Egskeiding; Afrika Handves op die Regte en Welsyn van die Kind; Konvensie op die Regte van die Kind; Kinderwet.

## 1 Introduction

Since the introduction of the constitutional democracy in 1994, South Africa has entered into an era that is characterised by values such as respect for the dignity and privacy of its citizens, a commitment to equality, the recognition of diversity of different groups in the society, and the inclusion of the most vulnerable members of society in the ambit of constitutional protection.<sup>1</sup>

Every child in South Africa is protected by the *Constitution of the Republic of South Africa*, 1996,<sup>2</sup> and more importantly, by means of the provisions as provided for in section 28. Section 28(2) of the Constitution states that:

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

The best interests of the child standard are also entrenched in section 9 of the *Children's Act*,<sup>3</sup> providing that:

In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.

In section 9 of the Constitution, the equality clause is contained, and it provides crucial provisions establishing the equality of all persons in South

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- 1 Sloth-Nielsen and Van Heerden 2003 *IJLPF* 121; Jivan 2007 LDD 44, In the pre-democratic era, individual gays and lesbians were denied any protection, nor were their relationships acknowledged or respected, and same-sex conduct was further criminalised. Since the rising of the new constitutional dispensation, legal protection of sexual orientation as an identity was introduced, and a transformation have taken place in the recognition of equality of gays and lesbians. Major changes can be noticed in several Constitutional Court decisions, leading to the enactment of the *Civil Union Act* 17 of 2006 (hereafter referred to as the *Civil Union Act*). These judgements include *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) (hereafter referred to as *Du Toit* (CC)) and *Minister of Home Affairs v Fourie and Other* 2006 1 SA 524 (CC) (hereafter referred to as *Fourie* (CC)). The above-mentioned judgements and passing of legislation have demonstrated the growing concern, understanding and sensitivity towards human diversity in general, and more in particular, to gays and lesbians.
- 2 *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the Constitution); Came into force on 4 February 1997.
- 3 *Children's Act* 38 of 2005 (hereafter referred to as the *Children's Act*).

Africa. According to it, everyone is considered equal before the law and has the right to equal protection and benefit of the law. Several grounds are listed in this provision relating to the unfair discrimination of persons, either directly or indirectly by the State or any natural person, including a person's sexual orientation.<sup>4</sup>

Further, section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>5</sup> It can be said that the constitutional protection of dignity reinforces the value and worth of all individuals and members of society.<sup>6</sup>

The rights specified in the Bill of Rights are not absolute, and can be limited in terms of the limitation clause in section 36 of the Constitution. Section 36 provides that the rights as contained in the Bill of Rights may be limited in terms of general application, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and with consideration to certain listed factors. The limitation clause however ensures that no right depicted in the Bill of Rights may be limited, unless the provisions as listed in section 36(1) is adhered to.<sup>7</sup> Thus, the right to equality, dignity and children's rights, as well as

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4 S 9 of the Constitution states that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures, designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No one may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

5 S 10 of the Constitution states that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

6 Jivan 2007 LDD 28.

7 S 36 of the Constitution states that:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general

any other provision entrenched in the Bill of Rights may not be limited unless it sufficiently complies with the provisions in the limitation clause.

The fundamental and guiding principle concerning care disputes and in all matters involving children is that a child's best interests are of paramount importance.<sup>8</sup> Determining what care arrangements will serve the best interests of the child involves the court making a value judgement, based on its findings of fact, in its exercise of inherent jurisdiction as the upper guardian of minor children.<sup>9</sup> In divorce proceedings where children are involved, it is the duty of the court to decide on the refuge of the children after the dissolution of the marriage. The final decision in the granting of care lies with the court, and is here where the best interests of the child principle is applied strictly. The decision taken by the court in the granting of care to a parent or other person has a significant impact on the lives of children, and can influence their future substantially, not only in the short term but also in the long term. The best interests of the child standard is a wide and diverse subject, and in *Corris v Corris*<sup>10</sup> emphasis is applied to the importance of this standard in the South African law. A difficult task is placed on the courts, as it is not easy to determine what specifically constitutes to the best interests of every individual child, and accordingly every case is settled on its own merits and circumstances.<sup>11</sup>

The best interests of every child cannot be determined absolutely, and several factors or criteria have been developed over time by means of case law and legislation, to be taken into account in a range of matters relating to the well-

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application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose, and;
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights.

8 *DM v SM* 2008 2 NR 704 (HC) at 705G-I (hereafter referred to as *DM v SM*).

9 2008 2 NR 704 (HC) at 705G-I.

10 *Corris v Corris* 1997 2 SA 930 (W) at 53A-B (hereafter referred to as *Corris v Corris*).

11 Mahlobogwane 2005 *Codicillus* 30.

being of children. In *McCall v McCall*,<sup>12</sup> a comprehensive, open-ended list of guiding factors or criteria is set out by King J that should be taken into account by courts in the determination of the best interest of the child. This includes factors such as the ability of a parent to provide the basic needs of a child, such as food, clothes, shelter and other material needs, and the love, affection and other emotional ties that exist between the parent and the child. Section 7 of the *Children's Act* further contains a closed list of factors to be taken into account in the determination of the best interests of the child. This list includes factors such as the nature of the relationship between the child and his or her parent's, the capacity of the parent to provide for the needs of the child, and the need of the child to grow up in a stable family environment, and where this is not possible, an environment that resembles a stable family environment as closely as possible.

A question that arises in the determination of the best interests of the child is whether equal attention should be given to every possible aspect and consideration pertaining to the child's life, or if certain considerations can be of less concern.<sup>13</sup> Should the court take into account factors such as a significant higher salary of one party, and therefore their ability to provide a better school, medical care and less dangerous environment? Or should other factors rather be considered, such as the parties' sexual orientation, race, religion or ethnical origin?<sup>14</sup>

The sexual orientation of a parent as a factor for consideration in the granting of care has over the years brought forward several problems. A range of rights are being prejudiced, and a possibility arises that there may be unfairly discriminated against a parent on one or more grounds, including their sexual orientation.<sup>15</sup> Contrasting, a child's best interests should also be taken into account, and they must be given the opportunity to be brought up in the best environment possible. Several positive as well as negative debates pertaining

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12 *McCall v McCall* 1994 3 SA 201 (C) at 205A-G (hereafter referred to as *McCall v McCall*).

13 Mahlobogwane 2005 *Codicillus* 31-32.

14 Mahlobogwane 2005 *Codicillus* 30.

15 S 9(3) of the Constitution.

to the idea of homosexuality has risen, and although a vast majority regards the religious aspects thereof, surveys have shown that the majority of the South African population is uncomfortable with the idea of homosexuality.<sup>16</sup> The traditional leader Zulu King Goodwill Zwelithini<sup>17</sup> described homosexuality as “un-African”, and stated that it confused children. It is also argued that the traditional family values that are essential in the communities are being diminished, and persons of the same sex living together are not the most suitable environments in which to raise a child.<sup>18</sup>

In the pre-1994 case of *Van Rooyen v Van Rooyen*,<sup>19</sup> the mother, who was involved in a lesbian relationship and also shared a home and room with her partner, approached the Court for an order granting her access to her children.<sup>20</sup> The children, at that stage, were living with their father, who was granted sole care in the divorce from their mother. The Court stated that the children were still of a young age and accordingly it was for the best if they did not get wrong ideas regarding sexuality and the ways upon which a man and a woman should live.<sup>21</sup> The Court stated further that their judgement did not regard the choice of the mother’s homosexuality, as she had an interest that they had to protect and respect, but that she had to choose between her lesbian lifestyle and the opportunity to be granted access to her children on a more regular basis.<sup>22</sup> Accordingly, the applicant was permitted to exercise reasonable rights of access to her minor children, subject to the condition that

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16 Wynchank D 2006 SAPR 69.

17 Wynchank D 2006 SAPR 69.

18 Lubbe 2007 SAJP 267.

19 *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) at 325H-J and 326H (hereafter referred to as *Van Rooyen v Van Rooyen*);

In several of the case law that will be discussed throughout the study, specifically *Van Rooyen v Van Rooyen* and *V v V* 1998 4 SA 169 (C) (hereafter referred to as *V v V*), the issue before the Court regards the right of a homosexual parent to access (right to contact) of their minor child. It is however noted that although the right of a parent to contact of their minor child falls beyond the scope of the study, it may serve as a useful indicator as to the objective of the study, as the best interests of the child principle applies equally to both care and contact matters. Further it is noted that certain terms in the *Children’s Act* has been substituted for previous common-law terms that existed in the amended *Child Care Act*, such as “custody” has been substituted with “care”, and “access” has been substituted with “contact”. Therefore, since the decision in *Van Rooyen v Van Rooyen* and *V v V* is dated before the new *Children’s Act* came into force, the courts still refer to the terms as ‘custody’ and ‘access’, instead of ‘care’ and ‘contact’.

21 1994 2 SA 325 (W) at 328I-329B and 329H-330D.

22 1994 2 SA 325 (W) at 329E-G.

the applicant would not share a room with her lesbian partner when her children slept over at their home, and that the applicant's partner would not share her residence or sleep under the same roof when the children spent school holidays with her.<sup>23</sup>

Since the introduction of the new political dispensation, changes in approach taken by courts in the making of care decisions have been significant. In the post-1994 case of *V v V*,<sup>24</sup> the issue before the Court related to the custody and access arrangements regarding the concerned parties. An order was sought by the plaintiff not only for custody of the children, but also to allow the defendant access under supervision and a provision granting that whenever the defendant exercised her access to the children, no third person would share the same residence or sleep under the same roof as the defendant and the children.<sup>25</sup> The reason for this condition only became apparent after the children became subjected to the allegedly harmful influence of a lesbian relationship between the mother and her partner.<sup>26</sup> The plaintiff's objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her lesbian companion shared, and stated that he does not wish to have his children exposed to what he regards as unhealthy practices in their mother's home.<sup>27</sup> The court stated that it was clear that the Court in *Van Rooyen v Van Rooyen* made a moral judgement about what is normal and correct insofar as sexuality is concerned, and that the judge clearly regarded homosexuality as being *per se* abnormal.<sup>28</sup> Further, the Court emphasised the fact that the present equality clause as found in section 9 of the Constitution, stated that the State may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. Therefore it was lawfully wrong to describe a homosexual person as being abnormal.<sup>29</sup> The Court concluded that the defendant was a good and suitable mother, and by compelling the mother to exercise access

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23 1994 2 SA 325 (W) at 331E-G-I.

24 1998 4 SA 169 (C) at 173H-I.

25 1994 2 SA 325 (W) at 173I-J and 174B.

26 1994 2 SA 325 (W) at 174C-D.

27 1998 4 SA 169 (C) at 174F-G.

28 1994 2 SA 325 (W) at 188F-H.

29 1994 2 SA 325 (W) at 188J-189B.

rights to her children in the position of a visitor to the father's home would be unjust.<sup>30</sup> The Court reasoned that the best protection they could give to the children was to allow a continuing lifestyle with both parents under joint custody and to allow them to decide for themselves whether the lifestyle of the mother or that of the father was more harmful.<sup>31</sup>

Since the *Children's Act* came into force, certain terms has been substituted for previous common-law terms that existed in the amended *Child Care Act*,<sup>32</sup> such as 'custody' which has been substituted with 'care', and 'access' which has been substituted with 'contact'. The term custody, before it was substituted for the term care, related to the parent's control and supervision over the person and day-to-day life of a child, and could moreover be described as the 'parental authority' a parent had over a child. It related to the control over the child in most areas of their life, such as the control of their religion and religious education, the restriction of the people the minor became associated with, and the occasional resort to reasonable and moderate chastisement of the child. The duties of a parent in terms of custody further entailed the providing of accommodation, food, clothing, proper medical care, to educate and train, to maintain and support as well as care for the physical and emotional well-being of the child. The term custody gave parents a broader discretion to act out their parental responsibilities and rights, and the High Court was reluctant to displace the authority vested in the parent.<sup>33</sup> The *Children's Act*, on the other hand, introduced the doctrine of 'parental responsibilities and rights' and it includes to a certain extent the common-law doctrine of 'parental authority'.<sup>34</sup> The doctrine of parental responsibilities and rights includes certain responsibilities that a parent has over a child, such as the duty to care, maintain contact, to act as the child's guardian and to contribute to the child's maintenance.<sup>35</sup> It is noticed that the *Children's Act* refers to the phrase parental responsibilities and rights, rather

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30 1994 2 SA 325 (W) at 192B-D.

31 1998 4 SA 169 (C) at 192D-E.

32 *Child Care Act* 74 of 1983 (hereafter referred to as the *Child Care Act*).

33 Schäfer "Young Persons" 43-44.

34 Schäfer "Young Persons" 26;

35 Schäfer "Young Persons" 26;  
S 18(2) of the *Children's Act*.

than parental rights and responsibilities. Skelton<sup>36</sup> argues that the reason for this less common construction of the phrase is to emphasise the importance of a parent's responsibilities towards a child first and only thereafter the importance of a parent's rights towards a child. Further, Skelton<sup>37</sup> states that unlike the concept of parental authority that was not located in statutes but rather in the common law, the *Children's Act* incorporates parental responsibilities and rights within its statutes, and therefore it has not been codified from the term parental authority. It can be said that the concept of care entails a more comprehensive description of a parent's daily life regarding the child, and the powers and duties that are expected to ensure the general protection, well-being and best interests of the child. All decisions and actions regarding the child should generally be done in the child's best interests, in a manner appropriate to the child's age, maturity and stage of development.

The object of this study is to research the legal position when the sexual orientation of a parent is a considering factor in the granting of care of children, and to which extent courts can give consideration to that factor. The question that arises is if the role of a parent's sexual orientation in determining the best interests of the child has changed since the change in concept from custody to care after the *Children's Act* came into operation. In accordance with section 9 of the Constitution, it would result in unfair discrimination to deny parents care of their children based solely on their sexual orientation. Equally important, the factors and criteria as set out in legislation and case law such as section 7 of the *Children's Act* and *McCall v McCall* need to be considered, to determine what would be in the best interests of the child. Taking into account legislation and case law, attention will also be given to international law, to determine the legal position as stated in certain international documents such as the *United Nations Convention on the Rights*

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36 Skelton "Parental Responsibilities and Rights" 63.  
37 Skelton "Parental Responsibilities and Rights" 63.

*of the Child, 1989,*<sup>38</sup> and the *African Charter on the Rights and Welfare of the Child, 1999.*<sup>39</sup>

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38 *United Nations Convention on the Rights of the Child, 1989* (hereafter the CRC).

39 *African Charter on the Rights and Welfare of the Child, 1999* (hereafter the ACRWC).

## 2 Care and the best interests of the child

### 2.1 Introduction

The effects divorce and care disputes have on children are enormous.<sup>40</sup> This is usually due to the fact that parents are motivated to protect their children's emotions, and as a result the antagonism between the parents often becomes so strong that they cannot reach consensus on the best interests of the children.<sup>41</sup> One might argue that when a parent's sexual orientation is an additional factor in child care disputes, this adds to the antagonism between parents and therefore also the impact such disputes have on children.

The guiding principle in all matters involving children is that the best interests of the children are paramount.<sup>42</sup> Courts are compelled to place emphasis on the best interests of the child standard, not only due to their role as upper guardian of all minors, but also due to the fact that this provision is entrenched in section 28(2) of the Constitution, as well as section 7 and section 9 of the *Children's Act*.<sup>43</sup> What is in the best interests of a specific child unfortunately cannot be determined with absolute certainty, and one needs to make use of guidelines and factors as set out in case law and legislation, such as in the case of *McCall v McCall* and section 7 of the *Children's Act*. Since this study is based on the consideration of a parent's sexual orientation in the granting of child care in divorce proceedings, as well as the concept change from 'custody' to 'care' in the *Children's Act*, the following chapter will include a comprehensive discussion of the definition of the new concept of 'care' and the old concept of 'custody', and the factors and criteria as is set out in case law and legislation regarding the best interests of the child standard.

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40 Mahlobogwane 2005 *Codicillus* 30.

41 Mahlobogwane 2005 *Codicillus* 33.

42 *HG v CG* 2010 3 SA 352 (ECP) at 354D-E (hereafter referred to as *HG v CG*).

43 Mahlobogwane 2005 *Codicillus* 31;

Section 28(2) of the Constitution states that:

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

Section 9 of the *Children's Act* states that:

In all matters concerning the care, protection and well-being of a child, the standard that the child's best interests are of paramount importance, must be applied.

## 2.2 Care

### 2.2.1 Introduction

It can be stated that children have become the main focus where parental responsibilities and rights are concerned.<sup>44</sup> The *Children's Act* introduced the doctrine of 'parental responsibilities and rights' in section 18 and it includes to some extent the common-law doctrine of 'parental authority'.<sup>45</sup> These two doctrines entail those rights vested in the parents in respect of the person of the minor child and his or her estate, and the parental rights and responsibilities can exist either partially or fully, which ever would be regarded as being in the best interest of the child and his or her rights.<sup>46</sup> Skelton<sup>47</sup> states that unlike the concept of parental authority that was located in the common law, the *Children's Act* incorporates the concept of parental responsibilities and rights within its statutes, and therefore it has not been codified from the term parental authority. It can further be noticed that the *Children's Act* refers to the phrase parental responsibilities and rights, rather than parental rights and responsibilities. Skelton<sup>48</sup> argues that the reason for this less common construction of the phrase is to emphasise the importance of a parent's responsibilities towards a child first and only thereafter the importance of a parent's rights towards a child. These rights should not only be regarded as in the best interest of the child, but should also be performed in his or her best interest, and no parental right will be enforced if it is in

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44 Skelton "Parental Responsibilities and Rights" 62.

45 Schäfer "Young Persons" 26;

In *V v V* 1998 4 SA 169 (C) at 176C-D, Foxcroft J stated the following:

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children had shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in S 28 of the *Constitution of the Republic of South Africa Act* 108 of 1996, not to mention a wide range of international conventions,

Foxcroft J, at 176E, further stated that:

...parental power...is made up of two distinct elements. The one is guardianship and the other is custody. Guardians take decisions regarding a child's property and person, whereas custodians have control over the day-to-day life of the child;

46 Schäfer "Young Persons" 26.

47 Skelton "Parental Responsibilities and Rights" 63.

48 Skelton "Parental Responsibilities and Rights" 63.

conflict with the child's interests.<sup>49</sup> The doctrine of parental responsibilities and rights includes the right of the parents to care for the child, maintain contact with the child, to act as his or her guardian and to contribute to his or her maintenance.<sup>50</sup>

### 2.2.2 Care v Custody

Since the object of the study is based on the granting of child care to a homosexual parent in divorce proceedings, it is required to establish a foundation of what is expected of parents from the old concept of 'custody' and the new concept of 'care' and what each term comprises of.

The common-law definition of the term 'custody' has been described by Schäfer<sup>51</sup> as "relating to the control and supervision of the daily life and person of the child".<sup>52</sup> A custodian parent had the power to control the religious education of the minor child, to restrict the persons with whom the child associated with and where necessary, could resort to reasonable and moderate corporal chastisement. Duties such as to provide the child with accommodation, food, clothing and medical care, the duty to educate and train the child, the duty to maintain and support the child, and the duty to care for the child's physical and emotional well-being flowed from custody. Similarly, the court in *Kastan v Kastan*<sup>53</sup> described custody of a child as the day to day decisions regarding children as well as decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how to ensure their good health, welfare and happiness.<sup>54</sup>

The definition of the term 'care' can be found in section 1 of the *Children's Act*.<sup>55</sup> The new definition of care includes what used to be referred to as

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49 Schäfer "Young Persons" 26.

50 Schäfer "Young Persons" 26;  
S 18(2) of the *Children's Act*.

51 Schäfer "Young Persons" 44.

52 *Engar and Engar v Desai* 1966 1 SA 621 (T) at 625A-B.

53 *Kastan v Kastan* 1985 3 SA 235 (C).

54 1985 3 SA 235 (C) at 236E-F.

55 S 1 of the *Children's Act* states that:

'custody', although defined more broadly.<sup>56</sup> In terms of this section, the person having care in relation to a child, should be able to provide the child with a suitable place to live, provide living conditions that are conducive to the child's health, well-being and development, as well as provide the necessary financial support as is needed by the child. The person should generally be able to safeguard and promote the well-being of the child, and to protect him or her from any maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards to which the child may be exposed. The person must not only ensure that the fulfilment of the child's rights as set out in the Bill of Rights in the Constitution and Chapter 2 of the *Children's Act*, are realised, but also guide, direct and secure the child's education and upbringing in a manner appropriate to the child's age, maturity and stage of development. The person must further guide, advise and assist the child in decisions that are taken by the child in a manner that is appropriate to the specific child's age, maturity and stage of development; guide the behaviour of the child in a humane manner, maintain a sound relationship with the child and accommodate any special needs that the child may have. The person must finally ensure that in general, the best interest of the child is the paramount concern in all matters affecting the child.

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- "care", in relation to a child, includes, where appropriate-
- (a) within available means, providing the child with-
    - (i) a suitable place to live;
    - (ii) living conditions that are conducive to the child's health, well-being and development; and
    - (iii) the necessary financial support;
  - (b) safeguarding and promoting the well-being of the child;
  - (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
  - (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
  - (e) 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;
  - (f) 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;
  - (g) guiding the behaviour of the child in a humane manner;
  - (h) maintaining a sound relationship with the child;
  - (i) accommodating any special needs that a child may have; and
- generally ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

56 Skelton "Parental Responsibilities and Rights" 65-66.

In *J v J*,<sup>57</sup> Erasmus J acknowledged the fact that 'care' appeared to have a broader scope than the term 'custody'. It is however noted that, although the concept of care entails a more detailed description of what is expected of a parent, both concepts are generally based on the same requirements. The concept of custody provides a general description of a parent's day to day power of decisions regarding their children, such as the supervision and control of the child, and the persons with whom the child may be associated. Further, certain basic duties is described, such as the duty to provide accommodation, food, clothing and other material necessities, the duty to educate and train the child, and the duty to maintain, support and care for the child's physical and emotional well-being. A parent could also resort to reasonable and moderate corporal chastisement.

The concept of care entails a more comprehensive description of a parent's daily life regarding the child, and the powers and duties that are expected to ensure the general well-being and best interests of the child. These include not only providing material necessities such as food, clothing and financial support, but also protection against all forms of maltreatment, abuse, neglect, degradation, discrimination, exploitation and other harms that may be hazardous to the well-being of the child. The parent must ensure that the child's rights as set out in the Constitution and the *Children's Act* are respected, protected, promoted and fulfilled, and to guide the child's upbringing and development. Further, all decisions relating to the child must generally be in the best interests if the child. It is noted that the concept of care does not provide for the resolving of reasonable and moderate corporal punishment, and that all decisions and actions regarding the child must be done in a manner appropriate to the child's age, maturity and stage of development. It has been said that the concept of care as provided for in the *Children's Act* is based on the concept of parental responsibilities and rights. As the name suggests, a parent's duties regarding the care over a child as in the *Children's Act* mostly involves responsibilities rather than a parent's rights toward a child, whereas custody moreover refers to the parental authority a

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57 *J v J* 2008 6 SA 30 (C).

parent has over a child.<sup>58</sup> Schäfer<sup>59</sup> however argues that it remains to be seen whether South African court's approach to the concept of 'care' will differ from their approach to the concept of 'custody'. He states that:

There is, it is submitted, likely to be a change: whereas courts were generally reluctant to displace a custodian parent's authority, except where a strong case was made for intervention, and, where parents were divorced, courts tended to prefer custody to remain with one parent, in view of the enhanced weight given to children's rights by the Bill of Rights and the *Children's Act* 38 of 2005, it seems unlikely that either approach will now prevail.

The best interests of the child standard will be discussed further.

### **2.3 Best interests of the child standard**

As previously stated, the fundamental and guiding principle concerning care disputes and in all other matters involving children is that a child's best interests are of paramount importance.<sup>60</sup> The best interests of the child standard originated and have formed part of the South African common law for a long period of time.<sup>61</sup> Being one of the most foundational rights of children, the best interests of the child standard has been enshrined in national legislation and international treaties, such as section 28(2) of the Constitution, sections 7 and 9 of the *Children's Act*, article 3 of the CRC and article 4 of the ACRWC. In several Constitutional Court cases, including *Minister for Welfare and Population Development v Fitzpatrick*<sup>62</sup> courts have held that the reach of the best interests of the child standard as provided for in section 28(2) of the Constitution cannot be limited to those rights that are enshrined in section 28(1) of the Constitution, and that it must be interpreted beyond those rights. In other words, the right of a child to have his or her best interests taken into account as a paramount consideration in all actions concerning them creates a constitutional right that is dependant of other

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58 Schäfer "Young Persons" 26-27.

59 Schäfer "Young Persons" 44.

60 2008 2 NR 704 (HC) at 705G-I.

61 Bonthuys 2005 *JLPPF* 24.

62 *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) par 17.

constitutional provisions.<sup>63</sup> The standard of a child's best interest has often been described as a golden thread that runs through the whole fabric of South African law relating to children.<sup>64</sup> The best interests of the child standard was strengthened significantly when it was incorporated in section 28(2) of the Constitution, and even further by means of section 7 of the *Children's Act*, whereby several specific elements are enlisted to be borne in mind when considering what is in a child's best interests.<sup>65</sup> The court will base its award of care on the facts and evidence before it and will make its award in accordance with the best interest of the minor children. This is a complex task to be faced by courts as there is no easy way to establish what these best interests are, and each case should be evaluated on its own unique circumstances and merits.<sup>66</sup> Several guidelines and factors have been formulated since 1994 in case law and legislation, which need to be taken into consideration in the determination of the best interests of the child.

A few challenging questions arise when deciding on the grant of care to a parent upon divorce. These include whether everything that affects the child should be taken into consideration, or if certain considerations can be of less concern; whether the child's best interests should be viewed from a short-, medium- or long term perspective and whether they should be viewed from an objective or subjective point of view.<sup>67</sup> Should the court take into account factors such as a significant higher salary of one party, and therefore their ability to provide a better school, medical care and less dangerous environment? Or should other factors rather be considered, such as the parties' sexuality, race, religion and ethnical origin?<sup>68</sup> Should the court consider factors such as the maternal preference of the mother, and that she would be in a better position to care for the child than the father? Even though, constitutionally, a person may not be discriminated against based

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63 Sloth-Nielsen 2002 *IJCR* 139.

64 Bekink and Bekink 2004 *De Jure* 21;  
Skelton "Parental Responsibilities and Rights" 62.

65 Skelton "Parental Responsibilities and Rights" 62-63.

66 In *Kotze v Kotze* 2003 3 SA 628 (T) at 630F-G the Court emphasised the fact that it must be remembered that the Court has extremely wide powers in establishing what the best interests of children are, be it in custody matters or otherwise.

67 Mahlobogwane 2005 *Codicillus* 30.

68 Mahlobogwane 2005 *Codicillus* 32.

solely on his or her sexual orientation, negative emphasis may be placed on the parent applying for the granting of care based solely on that specific factor.

In *McCall v McCall*, a comprehensive, albeit non-exhaustive list of guiding factors or criteria is set out by King J to be taken into account in the determination of the best interests of children in care disputes.<sup>69</sup> King J<sup>70</sup> stated that:

In determining what is in the best interest of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare.

This can be assessed with reference to certain factors or criteria,<sup>71</sup> such as the love, affection and other emotional ties that exist between the parent and the child; the capabilities, character and temperament of the parent and its impact on the child's needs and desires; the ability of the parent to communicate with the child and understand the child's feelings, and the

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69 1994 3 SA 201 (C) 204J-205G.

70 1994 3 SA 201 (C) 204I-J.

71 The list of criteria King J set out in *McCall v McCall* is namely:

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

any other factor which is relevant to the particular case with which the court is concerned.

capacity of the parent to give the child the guidance he or she needs. The list also includes the ability of the parent to provide for the basic physical needs of the child, such as food, clothing, housing, material needs and education; and the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development. The list further assesses the mental, physical health and moral fitness of the parent, the stability of the child's existing environment, the desirability to keep siblings together, and the taking into consideration of the child's preference. Lastly, the list includes any other factor that is relevant to the particular case in which the Court is concerned.<sup>72</sup>

Palmer<sup>73</sup> made reference to the decision of the court, stating that:

Although it will always be difficult to determine with exactitude what is in the best interests of a child in any particular case, given the infinite possibilities that may present themselves, the court now at least has a hand on guideline/framework in terms of which they can make an objective assessment on the case before it.

Although the sexual orientation of a parent or care-giver is not mentioned in the list of criteria set out by King J in *McCall v McCall*, one may argue that the open-ended list that is provided by King J makes it possible for a person's sexual orientation to be considered as a deciding factor in determining the best interests of the child in care disputes.

The *Children's Act* only recently came into operation,<sup>74</sup> and courts have since then made use of the list of factors as set out in section 7 of the Act to determine the best interests of a child in a wide range of issues regarding the well-being of children, including divorce disputes.<sup>75</sup> This list includes the

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72 In *V v V* at 188A-B, Foxcroft J stated that:  
The list of criteria provided in *McCall v McCall* is obviously not intended to be exhaustive. Indeed, para (m) is 'any other factor which is relevant to the particular case with which the Court is concerned'.

73 Palmer "The Best Interests Criterion" 28.

74 Certain provisions of the *Children's Act* came into operation on the 1 July 2005, and the Act came into full operation on the 1 April 2010.

75 Section 7 of the *Children's Act* states that:  
(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-  
(a) the nature of the personal relationship between-

nature of the relationship between the child and his or her parents; the attitude of the parents towards the child and his or her duty to exercise parental responsibilities and rights towards the child; the capacity of the parent to provide for the needs of the child; the effect any separation from parents or siblings will have on the child and the need of the child to remain in the care or maintain a connection with his or her family, culture or tradition. The list

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- (i) the child and the parents, or any specific parent; and
  - (ii) the child and any other care-giver or person relevant in those circumstances;
  - (b) the attitude of the parents, or any specific parent, towards-
    - (i) the child; and
    - (ii) the exercise of parental responsibilities and rights in respect of the child;
  - (c) the capacity of the parents, or any specific parent, or of any other care-giver, to provide for the needs of the child, including emotional and intellectual needs;
  - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
    - (i) both or either of the parents; or
    - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
  - (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
  - (f) the need for the child-
    - (i) to remain in the care of his or her parent, family and extended family; and
    - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
  - (g) the child's-
    - (i) age, maturity and stage of development;
    - (ii) gender;
    - (iii) background; and
    - (iv) any other relevant characteristics of the child;
  - (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
  - (i) any disability that 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.
- (2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

also includes the child's age, maturity and stage of development, gender; background; intellectual, emotional, social and cultural development; any disabilities or chronic illnesses the child may have, as well as the need for the child to be brought up in a stable family environment and be protected from any physical or psychological harm. An important consideration to take into account is the list of factors in section 7 of the *Children's Act* differs from the list of guiding criteria given by King J in *McCall v McCall* in that it does not include a non-exhaustive provision such as the term 'and any other consideration that may be of importance'.

Although the list of factors provided for in section 7 of the *Children's Act* does not include the sexual orientation of a parent or care-giver, or a non-exhaustive list of factors, one may still be able to argue that the sexual orientation of a parent may be included as a deciding factor in care disputes, with reference to certain of the given factors. These factors may include the attitude of the parents toward the child and the exercise of parental responsibilities and rights in respect of the child; the capacity of the parent to provide for the emotional, intellectual and other needs of the child; and the likely effect on the child with regards to any changes in the child's circumstances, such as moving from a home with heterosexual parents to moving to a home with homosexual parents. Further, one may also include the child's age, maturity and stage of development; his or her gender and background. It is crucial to understand that the above-mentioned argument does not pertain to the sexual orientation of a parent or person to be considered as a sole factor detrimental to the well-being of the child *per se*, but when circumstances surrounding the sexual orientation of the parent is detrimental to the well-being of the child, arguably it may be included in certain of the factors. Bonthuys<sup>76</sup> argues that the indeterminacy and judicial discretion that the best interests of the child standard invites, can lead to prejudice and discrimination. This is due to a predominant focus on the rights of children and particularly their best interests and may lead to the obscuring of other parties' interests, with the result of unjust results in family law cases.<sup>77</sup>

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76 Bonthuys 2005 *JLPPF* 23.

77 Bonthuys 2005 *JLPPF* 24.

With regard to the study, this can be related to the fact that, if courts decide that a parent with a homosexual orientation would be prejudicial to the best interests of the child, that parent would be denied the right to exercise any care right towards the child. This would result in an infringement of the parent's right to non-discrimination as protected by section 9(3) of the Constitution.<sup>78</sup> A question that can be related to the best interests of the child

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78 S 231 of the *Children's Act* states that:

- (1) A child may be adopted-
- (a) jointly by-
  - (i) a husband and a wife
  - (ii) partners in a permanent domestic life-partnership, or
  - (iii) other persons sharing a common household and forming a permanent family unit.
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock; or
- (e) by the foster parent of the child;

In *Fourie and Another v Minister of Home Affairs and Others* 2005 3 SA 429 (SCA) at 434I-435F, a couple of the same sex successfully appealed to the Court to be allowed to marry. They applied to the Court for an order declaring their marriage be recognised as a legally valid marriage, directing the respondents to register their marriage and to develop the common law in accordance with the *Constitution of the Republic of South Africa*, 1996. This was due to the fact that their inability to marry hosted several practical and legal difficulties to their shared life, and that they further could not jointly adopt a child. The common law concept of marriage was to be developed to embrace same-sex partners by defining marriage as 'the union of two people to the exclusion of all others for life'. In the Constitutional Court case of *Du Toit and Another v Minister of Population Development and Others* (Lesbian and Gay Equality Project as *Amicus Curiae*) 2003 2 SA 198 (CC) at 214A-C, the Court confirmed the order as made by the High Court in *Du Toit and Another v Minister of Welfare and Population Development* 2001 12 BCLR 1225 (T), and found that the applicants, namely same-sex life partners, were suitable to jointly adopt a child, and that any omission from the relevant statutory provision that same-sex partners could jointly adopt a child was inconsistent with the Constitution and therefore invalid. This eventually led to the drafting of the *Civil Union Act*. According to article 231 of the *Children's Act*, persons of the same sex can jointly adopt a child. One can therefore conclude that the *Children's Act* clearly does not discriminate against the idea of homosexuality *per se* or of homosexual persons jointly adopting a child,

Further, section 23 of the *Children's Act* states that:

- (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-
  - (a) contact with the child; or
  - (b) care of the child.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
  - (a) the best interests of the child;
  - (b) the relationship between the applicant and the child, and any other relevant person and the child;
  - (c) the degree of commitment that the applicant has shown towards the child;

standard is whether the best interests of children can generally be limited by the public interest and other constitutional rights and values. Bonthuys suggests that the best interests of children are currently applied as subjected to the values of the public.<sup>79</sup> She explains that, for example, even though it may be in the best interests of a child to live in the best economic conditions, no rule requires care to be awarded to the wealthiest parent in a divorce.<sup>80</sup>

From the above-discussion, one can notice that, although the guidelines listed in *McCall v McCall* and section 7 of the *Children's Act* are very similar, it is clear that the *Children's Act* provides a more comprehensive list of factors to be taken into account. What is apparent from both lists is that the parent applying for the grant of care of a child should possess the necessary skills and responsibility to fulfil his or her role as parent in all aspects pertaining to the upbringing of the child, in such a manner as will be in the best interests of the child, and that no mention is given to the sexual orientation of a parent as a considering factor. Provided the applicant satisfies the Court that he or she complies with the criteria as set out in section 7 of the *Children's Act* to be a suitable parent, who is able to provide the child with the loving, caring and secure environment that he or she needs for a stable upbringing, the person or parent would be a suitable parent to care for the child. Although the best interest of the child standard recognises that the capacity of the parent to provide for the needs of the children is an important consideration, it is but one of a host of factors which together with others require evaluation,<sup>81</sup> and it can be argued that the welfare of a child can be met in a single, heterosexual or homosexual family environment.<sup>82</sup>

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(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(e) any other fact that should, in the opinion of the court, be taken into account.

What is interesting to note from S 23 of the *Children's Act* is that also makes no mention as to the sexual orientation of a parent when considering the factors listed in S 23(2), and thereby, as in S 231, also does not discriminate against homosexual parents to apply for care or access of a child.

79 Bonthuys 2005 *JLPPF* 35.

80 Bonthuys 2005 *JLPPF* 35.

81 2010 3 SA 352 (ECP) at 361H-I.

82 Mosikatsana 1996 *Acta Juridica* 120-121.

### 3 International law

#### 3.1 Introduction

Section 39(1) of the Constitution states that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) *must consider international law*;
  - (c) may consider foreign law.<sup>83</sup>

Section 233 of the Constitution further provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

When courts interpret the rights as set out in the Constitution, they are obliged to consider international law.<sup>84</sup> This is a significantly important measure, as it assures that all legislation is interpreted correctly in the same way, on national and international level. Further, when a state signs a convention, it indicates an intention to become a party to the treaty, and although the convention may not yet be legally binding, the state is obliged to refrain from acts that would defeat the object and purpose of such convention.<sup>85</sup> When a state ratifies a convention, it is bound under international law to respect the rights and duties as set out in the convention.<sup>86</sup>

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83 Own emphasis.

84 *S v Makwanyane and Another* 1995 3 SA 391 (CC) (hereafter referred to as *S v Makwanyane*) par 35; van Rensburg and Lamarche “The Right to Social Security and Assistance” 209; In *S v Makwanyane*, the Constitutional Court held that, in the context of section 39(1)(b) of the *Constitution*, the phrase ‘public international law’ refers to international law that is both binding and non-binding on South Africa. Further, the Court emphasised the fact that courts had to consider both ‘hard’ and ‘soft’ law in the interpretation of the Bill of Rights.

85 Rosa and Dutschke 2006 *SAJHR* 3.

86 Rosa and Dutschke 2006 *SAJHR* 3.

South Africa has ratified international and regional instruments, including the *United Nations Convention on the Rights of the Child*, and the *African Charter on the Rights and Welfare of the Child*. The CRC can be described as the most important and successful international convention when dealing with children's rights and was adopted unanimously by the General Assembly of the United Nations on 20 November 1989.<sup>87</sup> The CRC has thus far been ratified by 193 of 195 States that exist in the world, with the exclusion of Somalia and the United States of America. As was stated by Doek,<sup>88</sup> the former Chairperson of the UN Committee on the Rights of the Child:

...no other human rights treaty comes that close to universal ratification, and the CRC is at the same time the human rights treaty with the widest coverage.

The CRC represents a vast and comprehensive amount of children's rights, covering not only civil and political rights, but also economic, social and cultural rights. The central theme to this convention is that children need priority care as they are a vulnerable group and are in the developmental phase of their lives.<sup>89</sup> As is identified by the CRC Committee, the so-called 'four pillars' of the CRC are considered general principles of fundamental importance for the implementation of the CRC.<sup>90</sup> These four pillars accord children significantly important rights, such as the right against any discrimination in article 2, the right to have their best interests a primary consideration in all actions concerning them in article 3, the inherent right to life in article 6, and right of a child who is capable of forming his or her own views, to express those views in all matters affecting the child in article 12.<sup>91</sup> In considering the developments in the field of children's rights since 1990,

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- 87 Memzur 2008 *SAPR/PL* 3;  
Entered into force on 2 September 1990;  
Although the CRC is the youngest of seven human rights treaties, it is the most successful one, as it took less than ten months to enter into force and was ratified by 100 State Parties within two years.
- 88 Doek 2003 *Saint Louis University Public Law Review* 235;  
Van der Walt 2010 *OBITER* 715:  
"That the international community ratified this treaty so soon after its proposal is indicative of the fact that it considered this treaty as one of major importance".
- 89 Van der Walt 2010 *OBITER* 715.
- 90 Memzur 2008 *SAPR/PL* 3-4.
- 91 Memzur 2008 *SAPR/PL* 3-4.

one can characterise it with words such as awareness raising, training, change of laws, efforts to change attitudes and the development of national plans of action.<sup>92</sup>

Mezmur<sup>93</sup> emphasised the fact that it was in order to give the CRC specific application within the African context, and accordingly the ACRWC, the first regional treaty on the human rights of the child was adopted on the 11 July 1990 by the OAU Heads of State and Governments (now the African Union or AU). The ACRWC, which was adopted nine years after the CRC, has very similar provisions as the CRC, and are intended to be complimentary to other international and regional conventions. This is also applicable to other international conventions, thus they need to be read and interpreted together.<sup>94</sup>

When State Parties ratify the CRC as well as the ACRWC, they are required to undertake a review of their domestic legislation and administrative measures, to ensure that they are complying with the obligations as set out in the treaties.<sup>95</sup> These obligations are provided for in article 4 of the CRC and article 1 of the ACRWC. This process, which has been referred to as 'domestication', is performed under the country's constitutional provisions in the enacting and amending of legislation, and therefore gives international law the same status of domestic law.<sup>96</sup>

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92 Memzur 2008 *SAPR/PL* 4;  
Doek 2003 *Saint Louis University Public Law Review* 237.

93 Mezmur 2006 *AHRLJ* 550;  
Entered into force on 29 November, 1999;  
Memzur 2008 *SAPR/PL* 6;  
The ACRWC was however not quick to gather support from African countries, as it took nine years for 15 countries to ratify the Charter and bring it into force.

94 Rosa and Dutschke 2006 *SAJHR* 7-10.

95 Memzur 2008 *SAPR/PL* 15.

96 Memzur 2008 *SAPR/PL* 15;  
Article 4 of the CRC states that:  
States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation;  
Article 1 of the ACRWC states that:  
(1) Member States of the Organisation of African Unity Parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their constitutional Processes and

The following section will focus on the similarities and, where applicable, differences between the provisions as stated in the CRC and ACRWC. It will also be attempted to investigate into the rights relating to the interests of children in the granting of care to a parent in divorce proceedings, where the sexual orientation of a parent plays a role in the consideration thereof. These will include certain rights such as the best interests of the child standard, the right of a child to non-discrimination, and the right of a child who is capable of forming his or her own views, to express those views freely in all matters concerning him or her.

### 3.2 *United Nations Convention on the Rights of the Child*

The adoption of the CRC has brought about a significant shift in how we think of and treat children, as the fundamental requirement for the implementation of the CRC can be described as the recognition of the child as a full human being and to have respect for the rights they hold.<sup>97</sup> Since the government ratified the CRC, it has committed itself to and assumed the responsibilities of achieving the goals as set out in the CRC.<sup>98</sup> By signing and ratifying a treaty such as the CRC, it establishes a presumption in international law that courts would not give rulings that are contrary to the international treaty obligations of the State, and that a State Party assumes an obligation to give effect to the treaty in domestic law.<sup>99</sup>

The preamble of the CRC mentions certain rights and freedoms that are of significant importance to the central theme of this study. These rights and freedoms are important as to establish the fact that children have certain

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with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions in this Charter.

(2) Nothing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

(3) Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

97 Memzur 2008 *SAPR/PL* 1.

98 Gallinetti 2002 *ESR Review* 12-14.

99 Sloth-Nielsen 2002 *IJCR* 138.

material-, emotional- and psychological needs, and should grow up in a family environment filled with an atmosphere of happiness, love and understanding. This should happen in an environment where everyone in the family is treated with equality, dignity and respect. These include:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of *all members* of the human family is the foundation of freedom, justice and peace in the world;<sup>100</sup>

And

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of *happiness, love and understanding*.<sup>101</sup>

The non-discrimination clause of the CRC is entrenched in article 2. Article 2(1) of the CRC provides that States Parties are obliged to respect and ensure the rights set forth in the Convention to each child, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child, of his or her parents or legal guardians. Article 2(2) further provides that States Parties are obliged to take all appropriate measures to ensure that a child is protected from discrimination based on the status, activities, expressed opinions or beliefs of the child's parents or legal guardians.<sup>102</sup> It is noticed that the CRC does not only mention that a child has the right to be protected from discrimination on the listed grounds, but also his or her parents or legal guardians. The non-discrimination clause makes provision for a non-exhaustive list of grounds by including the words 'or other status of the child,

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100 Own emphasis.

101 Own emphasis.

102 Article 2 states that:

- (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

of his or her parents or legal guardians'. It is further noticed that the CRC does not include a person's sexual orientation as a ground of non-discrimination, as in the Constitution. The Committee on the Rights of the Child has, however, dealt with this situation in its General Comment No. 4 of 2003.<sup>103</sup> The Committee emphasised the fact that according to article 2, States Parties have the obligation to ensure that all human beings under the age of 18 enjoy all the rights as provided for in the Convention, without any discrimination. These include non-discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The Committee further stated that these grounds also include adolescents' sexual orientation and health status.<sup>104</sup> The CRC further does not make any mention as to the gender of parents that would be in the best interests of the child, or detrimental to his or well-being, such as two different gendered parents or two parents with the same gender.

Since these rights are not only applicable to children but also to their parents, and the grounds of non-discrimination also include the sexual orientation of an adolescent, one may argue therefore that a parent's right to non-discrimination on the grounds of sexual orientation is also protected by the CRC.

In recognising the vulnerability of a child and the lack of provision for the protection of a child's rights in general, the best interest of the child standard is protected by means of article 3, and is described by Mezmur<sup>105</sup> as "the yardstick by which to measure all the actions, laws and policies affecting children". It can also be described as one of the most significant accomplishments of the CRC, as it applies to all actions concerning children, and thereby including both individually and groups.<sup>106</sup> It is an accepted fact that the best interests of the child standard underpins all decisions relating to

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103 General Comment No. 4 of 2003 2.

104 General Comment No. 4 of 2003 2.

105 Van der Walt 2010 *OBITER* 715;  
Memzur 2008 *SAPR/PL* 18.

106 Memzur 2008 *SAPR/PL* 18.

children, and the ratification of the Convention by South Africa and other countries further confirmed this. Article 3 provides that in all actions concerning children, the best interests of the child shall be a primary consideration, whether it is undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.<sup>107</sup> This importance of this standard is further reinforced in article 4 of the CRC, stating that all governments must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention.<sup>108</sup> The Convention does not directly provide any specific criteria to take into consideration to determine the best interests of the child, but the Committee on the Rights of the Child has emphasised the fact that it expects the ‘best interests standard’ to be written into legislation in a way that enables it to be invoked in a court”.<sup>109</sup> South Africa has done this by, not only including it in section 28(2) of the Constitution, but also in national legislation, namely in section 7 of the *Children’s Act*, and thereby obliging to their duty under article 4 to domesticate international law into national law. Over the years the court developed certain guidelines or factors to be considered when determining what is in the best interest of the child, and it was only later that the court in *McCall v McCall* established a comprehensive list of factors that was deemed relevant in determining the best interests of a child.

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107 Article 3 states that:

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
- (3) States Parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

108 Article 4 of the CRC states that:  
 State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

109 Van der Walt 2010 *OBITER* 716.

What is important to consider, is that the CRC makes provision in article 12 for a child who is capable of forming his or her own views, to express those views freely in all matters that concern them, and that those views be given due weight in accordance with the child's age and maturity. Further, the child shall be given the opportunity to be heard in all judicial and administrative proceedings affecting the child, either directly or by means of a representative body.<sup>110</sup> Therefore, in other words, children are empowered by this provision to express their views freely and to also communicate them in judicial and any other proceedings where their interests are at stake.<sup>111</sup> This provision creates certain standards against which the law can be measured and are of great importance in divorce litigation where it is necessary for courts to gain an understanding of the views and wishes of the children concerned in the particular matter.<sup>112</sup> The goal of hearing the voice of a child is not to particularly treat them as decisive factors in divorce decisions, but rather to take the views into consideration where possible.<sup>113</sup> Accordingly, it can be argued that in the divorce of their parents, children can express their views in the matter of which parent who they would want to reside with, either directly or by means of a representative, and the court can give consideration to those views with regards to the child's particular age and maturity.

Article 27 provides that States Parties recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Further, the parents or other persons responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's

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110 Article 12 states that:

- (1) States Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

111 Pillay and Zaal 2005 SALJ 684.

112 Pillay and Zaal 2005 SALJ 684.

113 Pillay and Zaal 2005 SALJ 684.

development.<sup>114</sup> Article 27 relates significantly to the best interest of the child provisions in section 7 of the *Children's Act*, including the capacity of a parent or care-giver to provide for the needs of the child, including emotional and intellectual needs,<sup>115</sup> the child's physical and emotional security and his or her intellectual, emotional, social and cultural development,<sup>116</sup> and the need for a child to be brought up within a stable family environment or an environment resembling as closely as possible to a caring family environment.<sup>117</sup>

The CRC clearly makes no mention as to the specific gender of parents that would be in the best interests of the child, such as two parents of a different gender contrary to two parents of the same gender, or that a parent's particular sexual orientation would be detrimental to the well-being of the child. Rather, it can be argued that, according to the CRC, a child should be provided a standard of living adequate for his or her physical, mental, spiritual, moral or social development. Furthermore, the parents or persons having parental responsibilities over the child should have the abilities and financial capabilities to secure such conditions of living as necessary for the child's development. Interpreting the CRC together with section 28(2) of the Constitution, it may be assumed that the decision taken relating to the granting of care of a child to a parent in divorce proceedings, should be in the child's best interests, regardless of the sexual orientation of the parent, and

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114 Article 27 states that:

- (1) States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
- (2) The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
- (3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and sport programs, particularly with regard to nutrition, clothing and housing.
- (4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the States Party and abroad, in particular, where the person having financial responsibility for the child lives in a state different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements as well as the making of other appropriate arrangements.

115 S 7(1)(c) of the *Children's Act*.

116 S 7(1)(h) of the *Children's Act*.

117 S 7(1)(k) of the *Children's Act*.

that the child should be given an opportunity to express his or her views regarding the decision in such a manner as is consistent with his or her age and maturity.

It can be argued that the preamble, read together with article 2 and article 3 of the CRC, constitutes to the argument that every child has the right to grow up in a family environment surrounded by an atmosphere of happiness, love and understanding. If one includes the sexual orientation of a person in the list of non-discrimination grounds relating to parents, one can further argue that not only the child, but also his or her parents have the right to be a family without any discrimination on the grounds of the sexual orientation of the parents.

### **3.3 African Charter on the Rights and Welfare of the Child**

The ACRWC mentions certain rights and freedoms in the preamble that is of significant importance to children, such as:

Recognising that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of *happiness, love and understanding*.<sup>118</sup>

This constitutes to the argument, such as previously mentioned in the discussion of the CRC, that children have certain material-, emotional- and psychological needs, and should grow up in a family environment filled with an atmosphere of happiness, love and understanding

The non-discrimination clause of the ACRWC is entrenched in article 3. Article 3 provides that every child shall be entitled to enjoy the rights and freedoms as set out in the Charter, irrespective of the child's *or his or her parent's or guardian's* race,<sup>119</sup> ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.<sup>120</sup> The

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118 Own emphasis.

119 Own emphasis.

120 Article 3 states that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised

non-discrimination clause makes provision for a non-exhaustive list of grounds by including the words 'or other status'. Again, as in the CRC, a person's sexual orientation is not listed in the grounds of non-discrimination. When taking into account the non-discrimination grounds as listed in the Constitution, as well as the fact that the Committee on the Rights of the Child mentioned in their General Comment No. 4 that the term 'or other status' does in fact include an adolescent's sexual orientation, one can argue that the ACRWC, due to its open-ended list of factors included for non-discrimination, thereby also includes the sexual orientation of a person, although not explicitly mentioning it.<sup>121</sup> The ACRWC does not accord these rights of non-discrimination only to children, but very clearly to their parents or guardians as well. Interesting to note is that the ACRWC does not, as in article 2 of the CRC, make any reference to the 'State' in describing the nature of the obligation. This is taken to imply that the obligation not to discriminate is binding not only on the State but other actors as well.<sup>122</sup>

Article 4(1) emphasises the best interests of children, providing that in actions taken by any person or authority concerning a child, the child's best interest shall be the primary consideration. One can note that the CRC only makes provision for the phrase 'a primary consideration', whereas the ACRWC makes provision for the phrase 'the primary consideration'.<sup>123</sup> Even though the difference is only one word, it creates a large difference in the amount of weight to be applied to the principle. Whereas 'a primary consideration' as provided for in the CRC implies the best interest of the child standard to be afforded equal weight along with other considerations, 'the primary consideration' as provided for in the ACRWC implies that the best interests of the child standard must carry a greater weight than with competing rights and

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and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

121 General Comment No. 4 of 2003 2.

The non-discrimination grounds as listed in the Constitution are as follows:

9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

122 Memzur 2008 SAPR/PL 18.

123 Memzur 2008 SAPR/PL 17.

provisions.<sup>124</sup> Further, in article 4(2), a child who is capable of communicating his or her views shall be afforded the opportunity for their views to be heard in all judicial or administrative proceedings concerning the child. This will be acquired either directly or through an impartial representative.<sup>125</sup> The participation rights of children has stemmed from the expanding recognition of the autonomy of every child, and the right to have a say in matters that concern them.<sup>126</sup> A positive aspect from the phrasing in the ACRWC is the fact that it does not include the internal limitation of ‘in accordance with the age and maturity of the child’, as phrased in the CRC.<sup>127</sup> The difference between the CRC and the ACRWC in the phrasing of a child’s participation right can also be noted. Whereas the CRC refers to a child who is ‘capable of forming’ his or her views, the ACRWC only refers to a child who is ‘capable of communicating’ his or her views. The effect of this difference is that the ACRWC is more restrictive than the CRC towards children who are not able to communicate their views.<sup>128</sup> It can therefore be argued that in the divorce of their parents, children can express their views in the matter of which parent who they would want to reside with, either directly or by means of a representative, and the court can give consideration to those views with regards to the child’s view, without the internal limitation of age and maturity.

Article 20 reaffirms the responsibilities of parents, providing that parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child, and to ensure that the best interest of the child is their primary concern at all times. Further they have the

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124 Skelton 2009 *AHRLJ* 482.

125 Article 4 states that:

(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

(2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

126 Gose *The African Charter on the Rights and Welfare of the Child* 124.

127 Gose *The African Charter on the Rights and Welfare of the Child* 127.

128 Gose *The African Charter on the Rights and Welfare of the Child* 125.

duty to secure conditions of living necessary to the child's development, within their abilities and financial capabilities.<sup>129</sup>

From the above-discussion on the ACRWC, it is clear of the importance of children to grow up in a family environment filled with happiness, love and understanding, and accordingly to have a full and harmonious development. If one includes the right to non-discrimination on the basis of sexual orientation, as was done in the Constitution and regarded as included in the General Comment by the Committee on the Rights of the Child, one will be able to argue that children have the right to grow up in a family environment without any discrimination, regardless of the sexual orientation of the parents. The ACRWC makes provision for the best interests of the child to be the primary consideration in all actions taken by an authority or person.<sup>130</sup> Further, a child who is capable of communicating his or her own views shall be afforded the opportunity to have his or her views heard in all judicial and administrative actions concerning the child, either directly or through an impartial representative. It can be argued that in the divorce of their parents, children can express their views in the matter of which parent who they would want to reside with, either directly or by means of a representative, and the court can give consideration to those views with regards to the child's view, without the internal limitation of age and maturity. As in the CRC, the ACRWC makes no mention as to a specific gender of parents that would be in the best interests of the child, such as two parents of a different gender, contrary to two parents of the same gender. The ACRWC also makes no mention as to the fact that a parent's particular sexual orientation would be detrimental to the well-being of the child. Rather, it can be argued that the parents of the child should have the abilities and financial capabilities to provide a child a

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129 Article 20(1) states that:

- (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 capabilities, conditions of living necessary to the child's development; and
  - (c) to ensure that domestic discipline is administered with humanity and in manner consistent with the inherent dignity of the child.

130 Own emphasis.

standard of living necessary for the child's upbringing and development. Furthermore, it can be argued that, interpreting the ACRWC together with the CRC and section 28(2) of the Constitution, that the decision taken by courts relating to the granting of care of a child to a parent in divorce proceedings, should be taken in the child's best interests, regardless of the sexual orientation of the parent, and that the child should be given an opportunity to express his or her views regarding the decision in such a manner as is consistent with his or her age and maturity.

## 4 Case law

### 4.1 Introduction

It is a commonly accepted fact that the best interests of children will be best served within the family environment.<sup>131</sup> Advances and changes in globalised culture compel people to take cognisance of the wide variety of ways in which families are formed and in which children grow up. Such new family arrangements are forcing a new definition of what is understood, meant and implied by the concept 'family'.<sup>132</sup> The Constitution does not contain family rights or parental rights explicitly, nor does it protect the family, particularly as a social institution.<sup>133</sup> The Constitutional Court has however pointed out in a number of cases that the family is indirectly protected by means of the rights to dignity of its members.<sup>134</sup> The *Children's Act* recognises that a wide range of family forms exist, and that different kinds of care arrangements can be made regarding children.<sup>135</sup> In the Supreme Court of Appeal case of *Fourie and Another v Minister of Home Affairs and Others*,<sup>136</sup> Cameron JA<sup>137</sup> stated that:

Family life as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constituted family life should change as social practices and traditions change.

Furthermore, the approach of courts as well as those of society towards homosexuality and the suitability of homosexuals as parents is progressively changing. This is clearly reflected in jurisprudence in which constitutional norms and values are applied to the issue of homosexuality.

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131 Robinson 2005 *JJS* 110

132 Lubbe 2007 *SAJP* 260-261.

One of these non-traditional family forms that has challenged society's traditional notion of what a family is, as she explains, is the same-gendered family.

133 Bonthuys 2005 *IJLPF* 24.

134 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) par 98-102; *Booyesen and Others v Minister of Home Affairs and Others* 2011 7 BCLR 654 (CC) par 3-4.

135 Skelton "Parental Responsibilities and Rights" 63.

136 *Fourie and Another v Minister of Home Affairs and Others* 2005 3 SA 429 (SCA) (hereafter referred to as *Fourie* (SCA)).

137 2005 3 SA 429 (SCA) at 439D-E.

The change to democracy in South Africa since 1994 has had a vast impact, not only on the political dispensation in the country, but also in the private law.<sup>138</sup> Several constitutional provisions have brought about changes in sexual orientation and the way in which courts will decide to grant child care to a parent in divorce proceedings where the homosexuality of a parent is a consideration. These important provisions include the equality and non-discrimination clause as found in section 9 of the Constitution.<sup>139</sup> The equality clause prohibits unfair discrimination by the State or any other person on several grounds, including sex, race, gender and sexual orientation, unless it is determined that the discrimination is fair. Further important provisions that have brought about change include sections 8, 36 and 39 of the Constitution. Section 8 provides that courts, when applying a provision of the Bill of Rights, must apply or develop the common law where legislation does not give effect to a certain right as provided for in the Bill of Rights.<sup>140</sup> Section 36 provides that the rights as provided for in the Bill of Rights may only be limited to the

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138 Robinson 2005 *JJS* 108.

139 S 9 of the Constitution states that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures, designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No one may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

140 S 8 of the Constitution states that:

- (1) The bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedoms, taking into account all relevant factors.<sup>141</sup> Further, section 39 provides that, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>142</sup> Accordingly, courts are obliged to reflect a different approach to the idea of homosexuality and the relationship between homosexual parents and their children.<sup>143</sup> As will be noted in the discussion of *Van Rooyen v Van Rooyen*, the views and decision of the court regarding the sexual orientation of a parent and consequently the best interests of the child would clearly be in conflict with the provisions of the Constitution, had the decision been made after the Constitution came into force. The different views of the court in *V v V*, as will be discussed further in the section, are clearly in line with the provisions of the Constitution, and are indicators of the change that has taken place in the legislature prior to 1994 and beyond.

The following section will focus on the transformation courts have undergone, dating from before 1994 and thereafter when the Constitution came into force, not only in the consideration of but also the extent in which courts can give

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- 141 S 36 of the Constitution states that:
- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
    - (f) the nature of the right;
    - (g) the importance of the purpose of the limitation;
    - (h) the nature and extent of the limitation;
    - (i) the relation between the limitation and its purpose, and;
    - (j) less restrictive means to achieve the purpose.
  - (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
- 142 Section 39 of the Constitution states that:
- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
    - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
    - (b) Must consider international law;
    - (c) May consider foreign law
  - (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
  - (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.
- 143 Robinson 2005 *JJS* 108.

consideration to a person's sexual orientation in the granting of child care in divorce proceedings.

## 4.2 Pre-1994

### 4.2.1 Van Rooyen v Van Rooyen

In *Van Rooyen v Van Rooyen*,<sup>144</sup> the applicant, who was a mother, was seeking a definition of her right to access her two minor children. The applicant had enjoyed a right of access liberally for a period of six years after the divorce from the respondent, who is the father of the children.<sup>145</sup> The issue before the Court arose after the respondent remarried and had a change of mind in terms of the access arrangements regarding the mother of the children.<sup>146</sup> The problem before the Court did not arise to the capability or the suitability of the applicant to be a mother to her children, but rather to the fact that she was a lesbian. She was not only involved in a lesbian relationship, but also shared a house and room with her partner.<sup>147</sup> Therefore the question before the Court related to the desirability of the lesbian mother to have access to her minor children. The Court stated that the issue simply came down to the fact of the style of living, the attitude towards living, the activities, the behaviour and whatever else is involved in the context of lesbianism.<sup>148</sup> This issue, according to the Court, did however raise certain difficulties. The first difficulty would be that the applicant could live in whichever way she liked. She had an interest that the Court should try to respect and protect. But,

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144 1994 2 SA 325 (W) at 325I-J.

145 1994 2 SA 325 (W) at 326G-H.

146 1994 2 SA 325 (W) at 327A.

147 1994 2 SA 325 (W) at 326G-327A.

The Applicant stated that:

....M...and myself have created a stable and secure *family* environment for the minor children....(own emphasis),

Flemming DJP replied to this statement that:

...many people... would frown upon the idea of calling the relationship created on the basis of two females a 'family'....Quite clearly she regards what she is doing...as *normal and acceptable* (own emphasis);

Mosikatsana 1996 *Acta Juridica* 114.

The author argued that the above-mentioned statement made by Flemming DJP clearly reveals the judicial attitudes in South Africa towards parenting by gay and lesbian persons.

148 1994 2 SA 325 (W) at 329E-F.

insofar as the interests of the children were concerned, she would have to make a choice between persisting in those activities or part thereof and having access on a wider basis than would otherwise be permitted. The Court stated further that the choice with regards to her bedroom life would remain that of the applicant, but she cannot make a choice that limited what should be appropriately done in regard to the children.<sup>149</sup> The second difficulty, as raised by the Court, was that the matter thus far has been on the basis of an undertaking to stay away from sexuality as far as the children is concerned, and therefore that certain things should not take place in their presence.<sup>150</sup> The Applicant argued that no explicit sexual intimacy has taken place in front or in the presence of the children, however the Court stated that confusing signals encompassed much more than that. The signals that are given to the two minor children, contrary to what they should be taught as normal and correct, is that two females share a bed and not obviously for reasons of lack of space on a particular night, but as a matter of preference and mutual emotional attachment.<sup>151</sup> The Court argued that it is detrimental to the children because it is the wrong signal, and that one should take cognisance of the inadvisability of wrong signals.<sup>152</sup> Further, Flemming DJP<sup>153</sup> stated that:

What the experts say to me is so self-evident that, even without them, I believe that any right-thinking person would say it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop.<sup>154</sup>

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149 1994 2 SA 325 (W) at 329E-H;  
In *V v V*, the Court referred to this position as separating the defendant's personal position from that of the children. The children's interests should therefore come first and the defendant's sexual orientation and lifestyle would come second. Only later in the judgement, it would become clear that by ordering the defendant to do this, would result in unreasonable limiting the right to non-discrimination against the mother, based solely on her choice of sexual orientation.

150 1994 2 SA 325 (W) at 329 G-H.

151 The Court described emotional attachment not only as kissing and hugging, but also by the way of speaking, the words of endearment used, and the manner in which there is a glance.

152 1994 2 SA 325 (W) at 330A.

153 1994 2 SA 325 (W) at 328I-329A.

154 In *V v V* at 188F-189B, Foxcroft J stated that:  
It is so that the Court (in *Van Rooyen v Van Rooyen*) made a moral judgement about what is normal and correct insofar sexuality is concerned...the learned Judge regarded homosexuality as being *per se* abnormal. The present equality clause (S 9) in the Constitution makes it quite clear that the State may not unfairly discriminate, directly or indirectly, against one or more grounds, including sexual orientation...In law, it is therefore wrong to describe a homosexual orientation as abnormal.

The Court ordered the Respondent to permit the applicant to exercise reasonable rights of access to her minor children, subject to the condition that, when the children slept at the Applicant's residence, the Applicant was not to share a room with her partner. The Court further ordered that when the children spent school holidays with the applicant, the mother's partner was not to share the same residence or sleep under the same roof as the applicant and the children.<sup>155</sup>

Although the decision of the Court in *Van Rooyen v Van Rooyen* was made in the pre-1994 period, it has been severely criticised, mainly on the grounds that the court made a moral judgement as to what was correct and normal in so far as the sexuality of the mother was concerned,<sup>156</sup> and that it promoted homophobic bias by basing its findings on false stereotypes or perceiving community intolerance.<sup>157</sup> The decision has also been described as bearing the notion that the legal prescriptions in the pre-1994 period had become outmoded.<sup>158</sup> Pertaining to the fact that the Court regarded the homosexuality of the mother as abnormal, it can be argued that the Court's pre-conceived conviction led to their decision that the children would be negatively affected if they were to be exposed to it.<sup>159</sup> If section 8 of the Constitution is read with section 39(2) of the Constitution, it can further be argued that the views of the court in *Van Rooyen v Van Rooyen* would have been in clear conflict with their Constitutional obligation to develop the common law and accordingly to bring it in line with the provisions of the Constitution, had the decision been made after the Constitution came into force.<sup>160</sup> Van Heerden<sup>161</sup> explains that:

In the absence of any empirical evidence that supports the notion that children who are raised by gay or lesbian parents are exposed to a greater danger and will be more likely to suffer from psychiatric, social, gender-identity or other disorders than children that are raised by heterosexual parents, this judgement smacks of blatant homophobia.

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155 1994 2 SA 325 (W) at 331E-I.

156 Robinson 2005 *JJS* 109.

157 Mosikatsana 1996 *Acta Juridica* 118.

158 Robinson 2005 *JJS* 108.

159 Robinson 2005 *JJS* 109.

160 Robinson 2005 *JJS* 110.

161 Van Heerden *et al* *Boberg's Law of Persons and Family* 545.

Lubbe<sup>162</sup> argues that “people automatically assume that being gay means being sexual”. A line of argument that clearly runs in the course in *Van Rooyen v Van Rooyen* is the assumption that sexual activity takes place in the presence of the children. One can argue that, to assume that homosexual couples would automatically act any differently from any heterosexual couple due to their sexual orientation also relates to a homophobic stance.

In the Supreme Court of Appeal case of *Fourie* (SCA),<sup>163</sup> Cameron J<sup>164</sup> stated that:

Permanent same-sex life partners are entitled to found their relationships in a manner that accord with their sexual orientation; such relationships should not be subjected to unfair discrimination. Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms. They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; *and of providing physical care, financial support and assistance in running the common household.* They have in short the same ability to establish a *consortium omnis vitae*. Finally, they are capable of *constituting a family*, whether nuclear or extended, and of *establishing, enjoying and benefiting from family life* in a way that is not distinguishable in any significant respect from that of heterosexual spouses.

Furthermore, one can refer to a comment made by O'Regan J in *Dawood and Another v Minister of Home Affairs and Others*:<sup>165</sup>

Families come in different shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.

One can clearly derive a homophobic stance from the Court's views and judgement regarding the homosexuality of the mother, and the desirability to have her children exposed to it. The Court's views did not only give judgement to the mother's choice of sexual orientation, but its decision was also solely based on the grounds of her abnormal sexual orientation and the wrong

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162 Lubbe 2007 SAJP 271.

163 2005 3 SA 429 (SCA).

164 2005 3 SA 429 (SCA) at 439E-440C.

165 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at 960B-D (hereafter referred to as *Dawood v Minister of Home Affairs*).

signals that will be given to her children. This is a clear infringement of the mother's right to non-discrimination, as it would have been under section 9(3) of the Constitution, had the decision been made after the Constitution came into force. The Court further would have failed to promote the spirit, purport and objectives of the Bill of Rights by developing the common law or legislation, as obliged to in terms of section 39(2) of the Constitution.

The following case will give a clear indication as to the change certain provisions have brought to parents in divorce proceedings, where their sexual orientation is a considering factor in the grant of child care.

### **4.3 Post-1994**

#### **4.3.1 V v V**

In the case of *V v V*, the issue before the Court related largely to the divorce of the parties, the custody of the children and the access arrangements.<sup>166</sup> The plaintiff, namely the father of the children, sought an order for custody of the children, and was prepared to allow the defendant, namely the mother of the children, access under the supervision of the plaintiff or his nominee. The plaintiff claimed a further provision granting that whenever the defendant exercised her access to the children, that no third person would share the same residence or sleep under the same roof as the defendant and the children.<sup>167</sup>

The reason for this condition became apparent after the children became subjected to the allegedly harmful influence of a lesbian relationship between the mother and her partner. The other reason for this condition made by the plaintiff was the state of mind of the defendant.<sup>168</sup> A number of medical specialists supported his view that she suffered from a condition known to psychiatrists as 'borderline personality disorder', pertaining from trauma

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166 1998 4 SA 169 (C) at 173H-J.

167 1998 4 SA 169 (C) at 173I-174C.

168 1998 4 SA 169 (C) at 174C-E.

experienced in her teenage years.<sup>169</sup> The plaintiff's objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her companion shared.<sup>170</sup> He further made it clear several times during the trial that he is concerned that his children may grow up with a homosexual orientation if subjected to the influence of a home where their mother openly lives with a lesbian partner, and stated that he does not wish to have his children exposed to what he regards as unhealthy practices in their mother's home.<sup>171</sup> It is for that reason that he insists upon free access to the children by their mother, when her lesbian companion is not physically present.<sup>172</sup>

The Court considered several decisions in the course of arguments, two of them being *McCall v McCall* and *Van Rooyen v Van Rooyen*.<sup>173</sup> With regards to *McCall v McCall*, the Court referred to the list of criteria that King J had set out in the concerned matter, to make a decision that would be in the best interests of the child. The Court stated that a number of similar 'checklists' were used in situations such as the present, but that they represented accumulated case law and therefore only served as guidelines.<sup>174</sup> Each case was different and had to be determined on its own facts. The court stated that it was clear that the Court in *Van Rooyen v Van Rooyen* made a moral judgement about what is normal and correct insofar as sexuality is concerned, and that there can be no doubt that the judge regarded homosexuality as being *per se* abnormal.<sup>175</sup> Further, the Court emphasised the fact that the

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169 1998 4 SA 169 (C) at 174G-H; Foxcroft J stated that:  
In the end, it became clear that the plaintiff's prime objection to joint custody was his wife's sexual orientation.

170 1998 4 SA 169 (C) at 174F-G.

171 1998 4 SA 169 (C) at 174C-D and 181F-G.

172 1998 4 SA 169 (C) at 181F-G.

173 *Van Rooyen v Van Rooyen*, as discussed above, regarded a decision that was given before the interim *Constitution* came into force. Flemming DJP, who presided in the matter, commented as follows in a situation very similar as the present one, as to what he perceived as the 'wrong signals':  
...The signals are given by the fact that the children know that, contrary to what they should be taught as to what they should be guided as to be correct (that is male and female who share a bed), one finds two females doing this...as a matter of preference and as a matter of mutual emotional attachment...It is detrimental to the child because it is a wrong signal...

174 1998 4 SA 169 (C) at 187E-F.

175 1998 4 SA 169 (C) at 188F-G.

present equality clause found in section 9 of the Constitution, clearly stated that the State may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. Therefore it was lawfully wrong to describe a homosexual person as being abnormal.<sup>176</sup> Equally important, the Court mentioned that the difficulty in cases relating to custody of children were that one was only indirectly dealing with the rights of parents. The child's rights were of paramount importance and needed to be protected, and certain situations would arise where the best interest of the child required that action is taken for the benefit of the child, effectively cutting across the parent's rights.<sup>177</sup> De Vos<sup>178</sup> reasons that:

There is nothing inherently wrong or abnormal about a lesbian relationship. But while the child is growing up, there will be strong recrimination from peers and other parents against the child as it becomes known that his or her mother is a lesbian. The child might also become confused and distressed by his or her mother's unwillingness to conform to a generally accepted norm. It might therefore be in the best interest of the child to discriminate against the lesbian mother, because that will be the only way in which her children could be spared unnecessary suffering.

The Court referred to the article of De Vos, stating that there may well be situations where a court will override the equality clause in the best interest of protecting the child, but that would only be in cases regarding the meaning of the reasonableness of such limitation, such as in the Canadian case of *R v Oakes*.<sup>179</sup> The Court further referred to the conclusion as made by De Vos, namely:<sup>180</sup>

A discriminatory order by the Court against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass Constitutional muster. In the same way that the court cannot take cognisance of racism or religious intolerance when it decides on the access of a mother to her children, the Court cannot take cognisance of prejudice in our society. To do that would be to unreasonably limit, or perhaps to even negate the essential content of the right not to be discriminated against on the ground of sexual orientation.

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176 1998 4 SA 169 (C) at 188J-189B.

177 1998 4 SA 169 (C) at 189B-E.

178 De Vos 1994 SALJ 691.

179 *R v Oakes* 1998 4 SA 169 (C) at 189I-190 (hereafter referred to as *R v Oakes*).

180 De Vos 1994 SALJ 691.

Against this background, the Court came to the conclusion that there is no doubt from the evidence before the Court, that the defendant was a good and suitable mother, and by compelling her to exercise access rights to her children in the position of a visitor to the father's home would be unjust. The image of a mother only being permitted to visit her children under supervision would be unfair to her and also to her children, and the children would feel that their mother was being punished because of the underlying risk that her lifestyle would influence them in the wrong direction. The Court reasoned that the best protection they could give to the children was to allow a continuing lifestyle with both parents under joint custody and to allow them to decide for themselves whether the lifestyle of the mother or that of the father was more harmful.<sup>181</sup>

Robinson<sup>182</sup> explains that one can discern three standards of how the homosexuality of a parent should be applied by a court in making care decisions. The first standard is the so-called '*per se*' approach, and generally holds that a homosexual parent is unfit as a matter of law.<sup>183</sup> The second standard would be the 'presumption of harm' or middle ground' approach. A court following this approach would not be able to declare a lesbian mother unfit as a matter of law, but would have to also consider other factors affecting the best interests of the child. Generally, even though the homosexual parent would not be regarded as unfit to be a parent *per se*, the court presumes that the child will suffer due to the social stigma attached to the homosexuality of the parent, and therefore condemning the homosexual conduct and not the homosexual person.<sup>184</sup> The third standard would be the 'nexus' approach, taking the parent's sexual preference into consideration as one of many other

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181 1998 4 SA 169 (C) at 192B-E

182 Robinson 2005 *JJS* 116.

183 The court would not have to consider any factor concerning the child's best interests, and can therefore automatically deny care to the homosexual parent. This standard will however be regarded as unconstitutional, with specific regards to the equality clause as found in S 9.

184 In *Van Rooyen v Van Rooyen*, the court appears to reflect a 'middle ground' approach, as they did not condemn the lesbian mother, but did however condemn her lesbian lifestyle and protected her children from being exposed to it.

factors.<sup>185</sup> Therefore homosexuality would only be held against the person if a nexus exists between the parent's sexual orientation and possible harm to the child.<sup>186</sup> The nexus standard further does not consider the homosexuality by itself a valid consideration to deny a parent care of a child, and it will only be considered in the case of it having a negative and harmful effect on the child's best interest.<sup>187</sup>

In the Supreme Court of Appeal case of *P v P*,<sup>188</sup> Van Heerden JA<sup>189</sup> made a statement that was agreed with by four other judges:

In determining what care arrangement will best serve the children's interest in a case such as the present, a Court is not looking for the 'perfect parent'-doubtless there is no such being. The Court's quest is to find what has been called 'the least detrimental available alternative for safeguarding the child's growth and development.

Lubbe<sup>190</sup> states that:

This challenges society to disregard the stigmas of the past. Is it inherently important if the mother of a family changes a light bulb or services the car? Or if the father cooks, minds the children or takes care of the garden? Or indeed if all these functions are efficiently performed in a same-gendered family in which the children are loved, nurtured, cared for and protected? What can be earned from this is that parental roles, duties and functions can be performed in a wide variety of ways that are not linked to gender stereotypes. If people

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185 The 'nexus' standard' was clearly used by the Court in *Ex Parte Critchfield and Another* 1999 3 SA 132 (W) (hereafter referred to as *Ex Parte Critchfield*). The applicants approached the Court for a variation of the custody order that existed between them. The Court held that, in the making of an order as to the custody of young children, it would not amount to unfair discrimination if the Court gave regard to maternity as a considering factor. The Court did however state that it would amount to unfair discrimination if undue weight was given to maternity as a factor, when balancing it against all other concerned factors. The Court further held that, the consequence of the when it came to custody disputes, was that maternity can never be the only consideration of any importance in determining the custody of young children, and with regard to the award of custody, the best interest of the child must prevail (at 143B- C/D). One can clearly see the nexus standard being applied, as maternity was only regarded as one factor between all other factors. One can further argue that, in care disputes, a person's sexual orientation also should only be taken into consideration as only one of many other factors, and that giving undue weight to a person's sexuality would result in unfair discrimination.

186 Robinson 2005 JJS 116.

187 The Court in *V v V* appears to reflect partly between the 'nexus'- and the 'middle ground' approach, with the inclusion of comments of De Vos and the Canadian judgement of *R v Oakes* in their decision.

188 *P v P* 2007 5 SA 94 (SCA) at 101J-102B (hereafter referred to as *P v P*).

189 2007 5 SA 94 (SCA) at 101J-102B.

190 Lubbe 2007 SAJP 274-275.

are willing to relinquish their traditional dogmas and stereotypes about gender and sexuality, one will realise that certain things are less important than the quality of care given to the children.

#### **4.4 Post-Children's Act**

##### 4.4.1 Introduction

The change of concept from custody in the *Child Care Act* to the concept of care in the *Children's Act* provides the court with a more comprehensively detailed description of what the duty of care requires of a parent. When one interprets section 1 of the *Children's Act* which defines the concept of care with section 7 of the *Children's Act* which defines the best interests of the child principle, courts have a detailed list of factors to work with when determining the granting of child care to a parent.

Also as was previously mentioned, the concept of care can be described as the person having care in relation to a child and their underlying suitability to provide the child with a suitable place to live, provide living conditions that are conducive to the child's health, well-being and development, as well as provide the necessary financial support as is needed by the child. The person should be able to safeguard and promote the well-being of the child, and to protect him or her from any maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards that the child may be exploited to. The person must not only ensure that the fulfilment of the child's rights as set out in the Bill of Rights in the Constitution and Chapter 2 of the *Children's Act*, are realised, but also guide, direct and secure the child's education and upbringing in a manner appropriate to the child's age, maturity and stage of development. The person must further guide, advise and assist the child in decisions that are taken by the child in a manner that is appropriate to the specific child's age, maturity and stage of development; guide the behaviour of the child in a humane manner, maintain a sound relationship with the child and accommodate any special needs that the child may have. The person must finally ensure that in

general, the best interest of the child is the paramount concern in all matters affecting the child.

Even though the decisions of the court in *Van Rooyen v Van Rooyen* and *V v V* were made before the *Children's Act* came into operation, the following will focus on applying the facts of both cases to the concept of care as it is currently defined in the *Children's Act*, to reach a conclusion as to if the parents in both cases would have been regarded as suitable parents by the court to care for their child.

#### 4.4.2 Application of the concept of care

In the cases of *Van Rooyen v Van Rooyen* and *V v V*, one can argue that there was no dispute between the parties as to the ability of the mother to provide the children with a suitable place to live or the ability to provide the necessary financial support; to ensure and secure the fulfilment and guard against infringement of the child's rights as set out in the Bill of Rights and the principles as set out in section 2 of the *Children's Act*; to guide, advise and assist the child in decisions taken in a manner appropriate to the child's age, maturity and stage of development, to guide the behaviour of the child in a humane manner, to maintain a sound relationship with the child and to accommodate any special needs that the child may have, as the mother in both cases did enjoy access previously until a certain point in time.

One can however argue that the arguments before the Court in both cases did involve the ability of the mother to provide living conditions that are conducive to the child's health, well-being and development; protecting the child from emotional or moral harms or hazards, guiding, directing and securing the child's education and upbringing, including religious and cultural upbringing, in a manner appropriate to the child's age, maturity and stage of development, and ensuring that the best interests of the child is the paramount concern in all matters affecting the child. This is due to the fact that the Court in *Van Rooyen v Van Rooyen* explicitly stated that the problem before them did not arise to the capability or the suitability of the applicant to be a mother to her

children, but due to the fact that she was a lesbian and shared a home and room with her partner.<sup>191</sup> The Court further emphasised the issue being the style of living, the attitude towards living, the activities, behaviour and whatever else was involved in the context of lesbianism.<sup>192</sup> The approach of the Court regarded the signals of two females living together as contrary to what should be taught as normal and correct, and further argued it to be detrimental to the children because it is the wrong signals.<sup>193</sup> The issue before the Court in *V v V* also related to the children's subjection to the alleged harmful influence of the mother and her partner's lesbian relationship.<sup>194</sup> The second reason for the issue before the Court related to the state of mind of the defendant, due to the fact that she suffered from a condition known as 'borderline personality disorder', pertaining from trauma experienced in her teenage years.<sup>195</sup> It did however later become apparent that the plaintiff's prime objection to joint custody with the mother was due to his wife's sexual orientation.<sup>196</sup> The plaintiff's objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle their mother and her companion shared.<sup>197</sup> He was further concerned that his children would grow up with a homosexual orientation if they were to grow up in a home where their mother lived in an open lesbian relationship.<sup>198</sup> Furthermore, he made it clear that he regarded the practices in his wife's home as unhealthy, and that he did not wish to have his children exposed to it.<sup>199</sup>

In the light of the previous discussion, constitutional provisions of equality, human dignity and the *Children's Act*, it is now clear that a parent may not be regarded as unable to care for a child based solely on their sexual orientation. When one applies the current definition of care as provided for in the *Children's Act* to the case of *Van Rooyen v Van Rooyen* and *V v V*, one may

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191 1994 2 SA 325 (W) at 325G-I and 326G-H.  
192 1994 2 SA 325 (W) at 329E-F.  
193 1994 2 SA 325 (W) at 328I-329A and 329D-330D.  
194 1998 4 SA 169 (C) at 174C-E.  
195 1998 4 SA 169 (C) at 174G-H.  
196 1998 4 SA 169 (C) at 174C-E.  
197 1998 4 SA 169 (C) at 174F-G.  
198 1998 4 SA 169 (C) at 174C-D and 181F-G.  
199 1998 4 SA 169 (C) at 181F-G.

argue that the Court in both cases would have perceived the mother as a good and suitable parent to care for their children, regardless of their sexual orientation. One may also argue that in the light of the facts of both cases and the criteria required of a parent to care for a child, the court would not have been able to deny any of the mothers to be granted care over their children. Both parents were able to provide their children with living conditions that are conducive to the child's health, well-being and development; to protect the child from any type of harm, including physical, emotional and moral harms and hazards; to guide, direct and secure the child's education and upbringing in a manner appropriate to the child's age, maturity and stage of development, and to ensure the best interests of the child is of paramount concern in all matters affecting the child. From the views and judgement of the court, one can clearly notice the transformation the Constitution and its provisions of equality has brought to homosexual parents, and the extent in which courts can give consideration to their sexual orientation in the granting of childcare. It has also been shown that courts in general view the best interests of the child as interlinked with the rights of other members of the family and the society as a whole.<sup>200</sup> One can also further notice that the role of a parent's sexual orientation in determining the best interests of the child has changed in a great extent due to the coming into operation of the Constitution, and not as much due to the change of concept from custody to care since the coming into operation of the *Children's Act*. It can be said that the change of concept did not change matters for the sexual orientation of a parent to be regarded as a consideration in the granting of care of a child, but that it rather only simplified the court's task in establishing what the duty of care comprises of.

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200 Bonthuys 2005 *IJLPF* 35.

## 5 Conclusion

It has been said that the object of this study is to research the legal position when the sexual orientation of a parent is a considering factor in the granting of care of children, and to establish to which extent courts can give consideration to that factor. The question that arose from the study is if the role of a parent's sexual orientation in determining the best interests of the child has changed since the change in concept from custody to care after the *Children's Act* came into operation.

Section 9 of the Constitution very clearly prohibits the unfair discrimination of persons, either directly or indirectly by the State or any natural person on several grounds. Most importantly to this study is the right not to be discriminated against on the ground of a person's sexual orientation. Further, section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.

Since the *Children's Act* came into operation, certain terms has been substituted for previous common-law terms that existed in the amended *Child Care Act*. These terms include the concept of care, which was previously known as custody. The concept of care entails a more comprehensive description of a parent's daily life regarding the child, and the powers and duties that are expected to ensure the general protection, well-being and best interests of the child.

The best interests of the child is one of the most foundational values of children, and has been enshrined in national legislation and international treaties, such as section 28(2) of the Constitution, section 7 and section 9 of the *Children's Act*, article 3 of the CRC and article 4 of the ACRWC. Although the different provisions in legislation refer to the best interests of the child standard in different ways, it all relates to the simple fact that a child's best interests are of paramount importance in all actions concerning the child. This standard has specific importance in care disputes, as it would be a guiding and fundamental principle, and most probably the basis on which the decision

of the court will be made. The best interests of the child standard makes no mention as to the specific sexual orientation of a parent that would be in the child's best interests. It is argued that even though a parent applying for the care of a child is homosexual, his or her sexual orientation as a sole factor would not carry any weight in the light of the guiding factors as provided for in section 7 of the *Children's Act*. Provided the applicant satisfies the Court that he or she complies with the criteria as set out in section 7 of the *Children's Act*, the person would be regarded as a suitable parent to care for the child.

The decision of the Court in *V v V* was clearly in line with the provisions of equality and dignity as provided for in the Constitution. The Court gave consideration to the list of factors provided for in section 7 of the *Children's Act* to determine what would be in the best interests of the child. The Court emphasised the fact that the judgement of the Court in *Van Rooyen v Van Rooyen* was one of a moral nature about what is normal and correct insofar as sexuality is concerned, and that there can be no doubt that the judge regarded homosexuality as being *per se* abnormal. Further, the Court emphasised the fact that the present equality clause found in section 9 of the Constitution clearly stated that the State may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. Therefore it was lawfully wrong to describe a homosexual person as being abnormal. The Court regarded the mother as a good and suitable mother to her children, despite the fact that she was homosexual, and allowed the children to decide for themselves whether the lifestyle of the mother or that of the father was more harmful. The decision in *V v V* can be regarded as a landmark case, sketching the transformation the Constitution and its provisions of equality has brought to homosexual parents, and the extent in which courts can give consideration to their sexual orientation in the granting of childcare.

Accordingly, with regards to the non-discrimination clause as found in section 9 of the Constitution, the right of every person to inherent dignity and the judgement as was given in *V v V*, one can come to the conclusion that courts can no longer deny a parent care and contact to their children based solely on their sexual orientation. When one interprets section 1 of the *Children's Act*

which defines the concept of care with section 7 of the *Children's Act* which defines the best interests of the child standard, courts have a detailed list of factors to work with when determining the granting of child care to a parent. It is argued that the role of a parent's sexual orientation in determining the best interests of the child has changed in a great extent due to the coming into operation of the Constitution, and not as much due to the change of concept from custody to care since the coming into operation of the *Children's Act*. It is further argued that the change of concept did not change matters for the sexual orientation of a parent to be regarded as a consideration in the granting of care of a child, but that it rather only simplified the court's task in establishing what the duty of care comprises of.

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