The best interests of the child in cases of deprivation of post-divorce parental contact

PPM MATIEA

28270959

Mini-Dissertation submitted in fulfilment of the requirements
for the degree *Magister Legum*
on the Potchefstroom Campus of the North-West University

Supervisor/Promoter: Miss. A J N Geduld

November 2016

It all starts here ™

NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT

ACKNOWLEGDMENTS

I would like to extend my sincere gratitude to my supervisor, Miss Allison Geduld for her determined guidance, assistance and patience throughout the process of writing this dissertation. A special thanks to Miss Chantelle Feldhaus for her expertise and suggestions towards the formulation of my topic, and for providing me with necessary study material that I could not have possibly discovered on my own.

To my parents and family members who have been supportive throughout my studies, this paper would not have been successfully completed without your prayers and constant encouragement to strive for excellence.

Finally, a special thanks to my classmates for their ideas and assistance in my writing. I am especially highly indebted to my friends Sentle Rathebe, Thatohatsi Sefuthi and Khulekane Ngidi for being constant sources of motivation and encouragement throughout my studies.

ABSTRACT

The standard of the best interests of the child has developed as a decisive factor in all matters affecting a child, including the determination of care and contact orders by the South African courts in divorce proceedings. While the courts always seek to protect the relationship of the child with both parents, contact with a parent may not always be in the best interests of the child where the parent is abusive to the child's custodian parent. The violence of a parent is inalienable to the parenting skills of both the abused and the abusive parent. Furthermore, exposing a child to spousal abuse has adverse effects on the child's welfare. The best interests of the child requires that decisions that affect the child must not override the child's welfare. This dissertation explores the consideration of the violence of a non-custodian parent as a factor when determining the contact of the parent with the child. It studies the legislative and judicial interpretation and application of the best interests of the child standard in the determination of the parent's contact with the child where there are allegations and evidence of spousal abuse. Both the law and judicial interpretation thereof have not effectively espoused spousal abuse in the determination of post-divorce parent and child contact. The direct and indirect adverse effects of spousal abuse on a child requires, therefore, the legislatures and courts to consider the violence of a parent more pertinently when determining whether it would be in the child's best interest to continue to have contact with an abusive parent.

Key words: Best interests of the child, contact, domestic violence

OPSOMMING

Dit wat in die beste belang van die kind is in veral gevalle van mishandeling en egskeidings, word deesdae beskou as 'n besliste faktor in alle aangeleendhede wat die belange van die kind raak, insluitende omstandighede wat in aggeneem moet word deur howe wat die belange van die kind kan affekteer wanneer besluit word oor beheer en toesig van kinders by egskeidings. Of dit tot die voordeel van die kind sal strek om na die egskeidding steeds kontak te behou met die ouer wat die kind mishandel het al dan nie. Terwyl howe normaalweg soek na aniere ander maniere om die verhouding tussen die ouers en die kindes en beide ouers te beskerm, is dit soms nie in die beste belang van die kind om die kind kontak te laat behou met een van die ouers wat die kind tydens die huwelik mishandel het. Dit kan ook baie nadelige nagevolge op die mishandelde kind hê as hy gedurig blootgestel word aan geweld tussen die ouers in sy teenwoordigheid. In die beste belang van die kind is dit noodsaaklik dat belsuite wat oor hom geneem word, nie weer omgegekeer word nie. Hierdie verhandeling ondersoek die oorweging van die mate van geweld van die nie-toesighouer ouer as n faktor wanneer kontak met 'n ouer oorweeg word. Dit bestudeer ondermeer die wetgewer en regsinterpretasie en toepassing van dit wat die in die beste belang van die kind is waar daar enigsins bewerings of bewyse van mishandeling en gesinsgeweld is. Beide die howe en die regsinterpretasie van gesinsgeweld is nog nie baie effek by die bepalings en toepassing van toekomstige kontak met ouer en kind in veral die geval van egskeidings nie. Toesig oor die situasie ná die egskeiding is noodsaaklik en moet gereeld uitgevoer word.

Trefwoorde: Beste belang van die kind, kantak, gesinsgeweld

TABLE OF CONTENTS

ABSTRACT I

OPSOMMING III

LIST OF ABBREVIATIONS VII

Chapter one 1

Chapter two: The best interests of the child 7

2.1 Introduction 7

2.2 Evolution of the best interests of the child concept 7

2.3 Best interests of the child under international law 9

2.4 Best interests principle in South Africa 15

2.4.1 A principle or a right? 17

2.5 Determining the best interests of the child in a parent-child relationship 18

2.5.1 The paramountcy of the best interests of the child 19

2.5.2 Balancing the best interests of the child with other rights 21

2.6 The best interests of the child in terms of the Children's Act 24

2.7 Conclusion 25

Chapter three: The application of the best interests of the child in the protection of children from spousal abuse 27

3.1 Introduction 27

3.2 The protection of children under international and regional law 27

3.2.1 The Hague Convention on the Civil Aspects of International Child Abduction 1980 28

3.2.2 The Convention on the rights of the child 30

3.2.3 The African Charter on the Rights and Welfare of the Child 31

3.3 Legislation in South Africa 31

3.3.1 The Constitution of the Republic of South Africa 1996..... 31

3.3.2 Domestic Violence Act 116 of 1998 32

3.3.3 Divorce Act 70 of 1979..... 34

3.3.4 Mediations in Certain Divorce Matters Act 1987 35

3.3.5 The Children's Act..... 38

3.4 Conclusion..... 41

Chapter four: Court's application of the best interests of the child in matters involving spousal abuse 42

4.1 Introduction..... 42

4.2 Conclusion..... 50

Chapter five: Conclusions and recommendations..... 51

5.1 Introduction..... 51

5.2 Outline of the chapters 51

5.3 Recommendations 54

BIBLIOGRAPHY..... 57

LIST OF ABBREVIATIONS

CILJSA	Comparative International Law Journal of South Africa
Fam. Con. Courts Rev.	Family and Conciliation Courts Review
FLQR	Family Law Quarterly Review
IJHSS	International Journal of Humanities and Social Sciences
IJLPF	International Journal of Law Policy and the Family
J Contemp. Roman Dutch L	Journal of Contemporary Roman-Dutch Law
MSJLR	Michigan State Journal of International Law
PELJ	Potchefstroom Electronic Law Journal
Prob. L J	Probate Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
STELL LR	Stellenbosch Law Reports
THRHR	*Tydskrif Vir Hedendaagse Romein-Hollandse Reg* (Journal of Contemporary Roman-Dutch Law)

Chapter one

Spousal abuse has for many years been a growing trend globally, and it is one of the major factors in divorce applications.[1] In more extreme cases spousal abuse results in death,[2] and South Africa has one of the highest rates of death by spousal abuse in the world, with an estimated spousal killing every six hours.[3] Owing to its much-hidden nature, cases involving spousal abuse go unreported by victims, and this means that there are probably more cases than have been reported.[4] The cross-fire between the parents, however, never escapes the children in the family. Spousal abuse affects children's psychological, spiritual and sometimes even physical development.[5] Children tend to lack self-esteem, school participation may drop, they experience negative behavioural changes and in some cases, children who grow up in violent families learn that violence is a way to handle problems.[6]

Often times many victims divorce their abusive spouses in an attempt to end the abuse, but abuse does not always end after divorce.[7] In fact, escalation of abuse is usually observed at the point of separation and the period immediately afterwards,[8] as abuse is a common response to a spouse's decision to separate from a relationship.[9] In June 2016, a man in Cape Town shot dead his wife and then turned the gun on himself after finding out that their divorce had been finalised.[10] It appears from the newspaper report that the husband had been abusive to the wife for many years, and had threatened that he would kill her if she contemplated divorcing him. The risk to children of abuse is also likely to increase after separation because the abuser may transfer the attention from the usual target of abuse who is now inaccessible, to the next most vulnerable targets, the

---

1 Preller 2012 http://voices.news24.com/bertus-preller/2012/01/top-10-reasons-for-divorce-in-south-africa/; Anon 1998 http://www.divorcesource.com/research/dl/domestic/98mar42.shtml.
2 Vetten 2014 https://www.issafrica.org/uploads/PolBrief71.pdf.
3 Morei 2014 *Mediterranean Journal of Social Sciences* 928; Burman 2005 – 2009 *FLQR* 435.
4 Van der Hoven 2001 *Acta Criminologica* 14.
5 Bensley *et al* 2003 *American Journal of preventive medicine* 38 - 40.
6 Van der Hoven 2001 *Acta Criminologica* 13.
7 Susser 1999 *Fordham Urban Law Journal* 877.
8 Kaye 1996 *Child and Family law Quarterly* 286.
9 Johnston 1995 *AJFL* 12.
10 Lepule 2016 http://www.iol.co.za/news/crime-courts/cop-kills-wife-himself-after-divorce-finalised-2034220.

children.[11] In 2013 at Alberton in Johannesburg, a 44 year old man, Paul Nothnagel shot and seriously wounded his ex-wife, and killed two of his children, girls aged 18 and 14 years old after he found out that his wife had been planning to get a restraining order against him because he had been threatening to kill her.[12] The couple had been divorced for only over a year, and Linda, the wife, had care of the children while Paul had contact with the children two days a week. It appears from the facts that killing the whole family was the way Paul was taking revenge against his wife. The *Nothnagel* incidence is a perfect example of the risk of exposing children to violent or abusive fathers even where the abuse was never initially directed at them. Studies also show that where courts have ordered unsupervised contact, sometimes children get killed.[13]

More importantly, abusive spouses can use contact as a means of continuing harassment or emotional abuse on their ex-partner by making unnecessary demands in matters affecting the child.[14] Contact can be used as a route to manipulate children by using them to get to their victimised parents.[15] Children are often used as scapegoats in fights by abusers who frighten their spouses with their children's safety, and where contact with an abusive parent occurs without supervision, children can become the prime focus of the violence.[16] Children can be used to convey abusive messages to abused ex-spouses,[17] abusers also tend to speak ill and make negative comments about their ex-spouses to children, and they inquire about their ex-spouses private lives or whereabouts from the children as means of controlling the custodial parents.[18] This may affect the abused parent's parenting where such a parent remains scared for her life and that of his or her children.

---

11 Pagelow 1990 *Mediator's Quarterly* 347.
12 Bolosankwe 2013 http://www.iol.co.za/news/crime-courts/alberton-dads-deadly-revenge-1549228.
13 Saunders 2004 "Twenty-nine child homicides" 6.
14 Kaye 1996 *Child and Family Law Quarterly* 284.
15 Mohaupt & Duckert 2016 *Nordic Psychology* 2.
16 Hart "Children exposed to domestic violence" 58.
17 Maddy Coy *et al* 2012 rightsofwomen.org.uk/wp-content/.../10/Picking_Up_the_Pieces_Report-2012l.pdf.
18 Maddy Coy *et al* 2012 rightsofwomen.org.uk/wp-content/.../10/Picking_Up_the_Pieces_Report-2012l.pdf.

Before the inclusion of the best interests concept in the South African law, the judicial and legislative emphasis on contact had in practice resulted in a situation where contact between the child and the non-custodial parent was granted in almost all instances of divorce,[19] and only denied in instances where the court in its discretion held that contact would be adverse to the best interests of the child.[20] Spousal abuse was nonetheless rarely used as a factor in determining care and contact with children.[21] It appears that the courts would draw a distinction between the abuse towards a spouse and abuse towards the child,[22] and they took preference in protecting the contact of the non-custodial parent with the child, notwithstanding the character of the abusive non-custodial parent towards the custodial parent. In *B v S*[23] for example, the court emphasised the importance of protecting the father-child bond and showed less regard to the father's violent behaviour towards the mother stating that

> [T]he accusations which the respondent made against the appellant were consistent with the breakdown of their relationship, not necessarily with his unsuitability as the father.

In *Katzenellebogen v Katzenellebogen and Joseph*[24] the court awarded contact to an abusive spouse because he was otherwise genuinely devoted to his child. The courts proved reluctant therefore to deprive a violent non-custodial parent contact, except in exceptional circumstances and if is in the best interest of the child.

The introduction of the best interests of the child principle in *McCall v McCall*,[25] which directs courts to consider the best interest of children in matters relating to contact and care orders, changed the perspective of the courts from that of the parents, to a child-centred approach when granting contact and a care orders. With the addition of the best interest of the child standard in the *Constitution of the Republic of South Africa* 1996 (hereafter the *Constitution*), which provides that the child's best interest are to be the paramount concern in all matters affecting the child,[26] the parents, legislatures and courts

---

19 Clark 2002 *CILJSA 225.*
20 Schafer *Law of access to children* 115.
21 Clark 2002 *CILJSA* 225.
22 Clark 2002 *CILJSA* 225.
23 *B v S* 1995 (3) SA 571.
24 *Katzenellebogen v Katzenellebogen and Joseph* 1947 (2) SA 528 para 15.
25 *McCall v McCall* 1994 (3) SA 201 at 203.
26 Sec 28 (1) of the *Constitution*.

have a duty to ensure that all decisions taken, which decisions affect the child, must be considerate of the child's best interests.

The introduction of the *Children's Act* 38 of 2005 has brought the reality of the constitutional provisions relating to children to reality. The act aims mainly at ensuring children's constitutional rights, particularly the rights of the child to family, parental or alternative care when removed from the family environment; to protect children from maltreatment, neglect, abuse, and to ensure that in all matters affecting a child, his or her best interests are of paramount concern.[27]

It is noteworthy that the *Children's Act* has also changed the terminology of the terms used under common law with regards to the care and contact of children. Before the enactment of the *Children's Act*, the position in South Africa in any matter affecting the child was that parents had the parental power to make all the decisions regarding the child.[28] The *Children's Act*, however, shifts from 'parental authority' to a more child-focused concept of parental responsibilities and rights.[29] In terms of the *Children's Act*, parental responsibilities and rights are to be shared between the biological parents of a child,[30] and this sharing continues whether the parents are married or divorced.[31] The concept of parental responsibilities and rights further includes four elements which are care, contact, guardianship and maintenance of the child.[32] The term 'care', has replaced 'custody' and it appears to have a broader scope than custody in that whereas custody referred to the residential and physical control of the child,[33] care not only embraces all that was understood by custody, it also adds more elements which were not explicitly part of 'custody'.[34] The term 'contact' has replaced 'access', and although it has the same properties, contact has elaborated the concept of access in that it now emphasises the

---

27 Sec 2 *Children's Act.*
28 Skelton "Parental Responsibilities and Rights"64.
29 Skelton "Parental Responsibilities and Rights"64.
30 This refers to children born in wedlock, and those born out of wedlock, but who's biological fathers have acquired parental responsibilities and rights under secs 20-21 *Children's Act*
31 *Rudolph v Van Zyl* 2003 JOL 10893 (T).
32 Sec 18 *Children's Act*.
33 South African Law Commission *The Review of the Child Care Act* discussion paper 103, project 1, 2001.
34 Schafer *Child law in South Africa Domestic and International Perspectives* 211.

importance of non-direct contact, which includes any contact that does not involve physical meeting, such as phone calls or emails.[35] The *Children's Act* drafted contact to be a responsibility and a right of the parent which should be exercised collectively with care and guardianship, and must be exercised within the best interests of the child. In other words, a parent who does not reside with the child still has the right and responsibility to maintain contact with, and consequently, care for the child.

The given definition of care includes 'protecting the child from maltreatment, abuse, neglect, degradation, discrimination and any other physical, emotional or moral harm or hazards'.[36] The term abuse is further defined to include 'exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally'.[37] Although the *Children's Act* does not specifically make mention of spousal abuse as a factor in determining care and contact in divorce settlements, the impact that spousal abuse may have on the child falls within the above definitions of abuse, even if the abuse is directed towards the spouse and not the child.[38]

In an effort to safeguard the welfare of children, in terms of section 6 (1) of the *Divorce Act* 70 of 1979, the court is prevented from granting a decree of divorce until it is satisfied that: "the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances".[39] The *Mediation in Certain Divorce Matters Act* 24 of 1987, allows for the appointment of Family Advocates who may request the court's permission to institute

---

35 South African Law Commission *The Review of the Child Care Act* discussion paper 103, project 1, 2001.

36 Sec 1 *Children's Act*

37 Sec 1 *Children's Act*.

38 Studies show that children who witness or have witnessed domestic violence exhibit problems in their social and emotional adjustments, (Graham-Bermann "The impact of woman abuse on children's social development: Research and theoretical perspectives" 23), increased behaviour problems and psychopathology, (Graham-Bermann "The impact of woman abuse on children's social development: Research and theoretical perspectives" 23) and increased fear and worry (Levendosky and Graham-Bermann 2001 *Journal of Family Violence* 185) among many other problems.

39 The court is further empowered to cause an investigation to be carried out and can order any person to appear before it in order to ascertain that the arrangements are indeed satisfactory, see sec 6(2).

an enquiry and furnish the court with a report and recommendations on any matter concerning the welfare of minor or dependent children of the marriage concerned.[40]

Although the above process appears to be somewhat favourable to the best interests of the child, the prevailing judicial sentiment gives the impression that parental contact is viewed as tantamount to a child's best interests. Against the background of the pervasiveness of spousal abuse in South Africa,[41] and the relationship between the contact with an abusive parent and the child's wellbeing, there is a question whether spousal abuse should constitute a justification for the deprivation of parental contact with a child. How should the increasing recognition of the negative effects of spousal abuse on children impact upon a decision relating to contact with a child under the best interests principle? This study will be a literature review. Sources will include relevant textbooks, case law, law journals, international conventions and legislation, social development and policy documents.

Chapter two of this paper will discuss the concept of the best interests of the child, particularly in a parent and child relationship. The aim in chapter two is to determine how the concept has been interpreted both under international law and domestic law; the application thereof, and how the courts balance the best interests of the child where the child's best interests conflict with the parents' interests. Chapter 3 will then explore the application of the best interests of the child in the protection of children from spousal abuse under the South African law. The emphasis in chapter 3 will be mainly on the legislative approach to the protection of children from family-related violence, where such violence affects the child, following which, the judicial application of the legislation towards the protection of children from abusive parents will be explored in chapter 4. Finally, conclusions as to the efficacy of the legislative and judicial application of the best interests of the child where the child is exposed to spousal abuse will be made in chapter 5.

---

40 She may hand in a memorandum to the court in which she sets out her misgivings and it is up to the court to decide whether to investigate more fully or not, see Sec 8 of *Divorce Act* 1979.

41 Burman 2005 *FLQR* 435.

Chapter two: The best interests of the child

2.1 Introduction

The best interests of the child means considering the child before making a decision that affects his or her life.[42] The past few decades have seen a trend in the application of the best interests of a child as a guideline when resolving care and contact disputes.[43] This chapter briefly explores the concept of the best interests of the child in a parent-child relationship. In that attempt, the influence of international law on the substantive content and application of the best interests of the child in the parent-child relationship under the South African legislation will be discussed. A brief overview on the historical evolution builds momentum to the current application of the best interests of the child in South Africa. Of particular interest is the balancing of the best interests of children, and the parental rights to contact after the divorce of the parents; the factors that assist courts and other institutions when attempting to balance these rights, and finally the application of the best interests of a child as a constitutionally entrenched right in South Africa and the effects of such constitutional provisions on parental rights to contact in other legislation.

2.2 Evolution of the best interests of the child concept

The best interests of the child is a construct that is central to legal decisions in matters affecting a child in family law disputes.[44] It is a notion that has developed over a number of years. Historically, the concept has been based on general societal ideas, beliefs and presumptive principles of what is considered to be in the best interests of children.[45] The conception of the best interests of the child dates back to Roman law from which much of the earliest colonies of the United Kingdom derive their common law.[46] In the early Roman law, children were viewed as the property of their fathers, and fathers had the

---

42 Dausab "The best interests of the child"147.
43 Burman 2005 *FLQR* 432.
44 Dias *Best Interests of the Child Principle in the Context of Parent Separation or Divorce* 17.
45 Dias *Best Interests of the Child Principle in the Context of Parent Separation or Divorce* 19.
46 Stiles 1984 *Prob J. L* 6.

absolute control over their children's upbringing.[47] The power of paterfamilias was based on several factors such as the father's greater ability to provide for the child financially, and his entitlement to benefit of the child's services.[48] Mothers had no legal rights with respect to their children, even after their father's death.[49]

Until the mid-nineteenth century, mothers had restricted rights to care of their children, especially after divorce, whereas fathers had an unlimited right thereto.[50] Around 1839, a 'tender-year' doctrine was advanced and incorporated into the 1839 British Act which directed courts to award care of children under the age of seven to mothers, and to award visiting rights to mothers for children seven years and older.[51] Stiles suggests that the maternal preference principle was brought about by the Industrial Revolution,[52] as it developed a general need for men to leave home to find employment. As a result, women would stay at home to take care of the family and the children.[53] This reshaping of the family structure resulted in the courts assuming that the mothers were the most suitable custodians because it had given women a domestic authority.[54] A father who brought an application for the care of his children then had to prove why he would make a better custodian than the mother by successfully discrediting her as a fit parent,[55] and this resulted in children's welfare being emphasised in decisions regarding children.[56] Bix opines that the transition could be seen as just a change from a paternal to a maternal presumption of care, but that most importantly, it changed the defence that paternal presumption was based on an interest to the child as the father's property, while a maternal presumption was grounded on what would be in the best interests of the child.[57]

---

47 Kelly 1994 *Children and divorce* 121.
48 Dias *Best Interests of the Child Principle in the Context of Parent Separation or Divorce* 21.
49 Kelly 1994 *children and divorce* 121.
50 Kelly 1994 *children and divorce* 121.
51 Kelly 1994 *children and divorce* 122.
52 Stiles 1984 *Prob J. L* 1984 5.
53 Stiles 1984 *Prob J. L* 1984 6.
54 Stiles 1984 *Prob J. L* 1984 6.
55 Kushner 2006 *Journal of Divorce and Remarriage* 19.
56 Dias 2014 *Best Interests of the Child Principle in the Context of Parent Separation or Divorce* 18.
57 Bix 2008 https://ssrn.com/abstract=1092544.

The best interests standard was first verbalised in the English case of *Chapysky v. Wood*[58] in 1881.[59] In this case, a judge ordered a five-year-old child to reside with her maternal grandmother instead of her biological father. The rationale for this decision was grounded on the fact that the child's welfare would be best served by placement with her grandmother despite the father's inherent right to care.

South African courts used to apply the maternal preference until recently.[60] It has been argued that this 'maternal preference' or 'tender years' principle was discriminating against parents on the grounds of gender, although this discrimination could be justified if it would be in the best interests of the child.[61] Due to social and economic developments more women entered the workforce and with women taking up work and no longer being stay-at-home mothers the primary maternal caretaker concept was weakened.[62] Finally, the maternal preference was abandoned in favour of gender-neutral laws.[63] Over time the 'best interests' concept changed into an authoritative legal principle, and post-divorce decisions must be justified by the best interests of the child.[64]

2.3 Best interests of the child under international law

The concept of the best interests of the child in the parent-child relationship under international law dates back to the UN 1959 Declaration on the Rights of the Child. The Declaration is the fore-runner of the UN Convention on Rights of the Child, and although it was not binding on states, it nevertheless influenced its inception.[65] It emphasised that the consideration of the best interests of a child in his or her upbringing lies firstly with the child's parents.[66] The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979 provides that parents are to place the best interests of their children as a 'primordial' consideration in the upbringing and development of

---

58 *Chapysky v. Wood* 26 kan 650 1981.
59 Pruett *et al* 2002 *Journal of Divorce and Remarriage* 47.
60 Walsh 2011 *MSJIL* 206; *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742; *Schwartz v Schwartz* 1984 4 SA 467; *Fortune v Fortune* 1995 3 SA 348.
61 *Van der Linde v Van der Linde* 1996 3 SA 509 and *V v V* 1998 4 SA 169 at 176 and 177.
62 Kelly 1994 *Children and Divorce* 122.
63 Kelly 1994 *Children and Divorce* 122.
64 Bix 2008 https://ssrn.com/abstract=1092544.
65 Walsh 2011 *MSJIL* 225.
66 Principle 7 of the Declaration on the Rights of the Child.

children.[67] The focus in this chapter will, however, be on two influential and legally binding documents: the Convention on the Rights of the Child 1986 and the African Charter on the Rights and Welfare of the Child 1990. The reason is that whereas all other international instruments concentrate on human rights law in general, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are the supranational instruments mainly focused on the promotion and protection of the rights of children.[68] For that reason, they are the main international instruments that bear most importance on the study in this dissertation.

a. The UN Convention on the Rights of the Child (hereafter CRC) 1989

The CRC was adopted in 1989 by the United Nations General Assembly,[69] and it came into force in 1990. South Africa ratified the CRC on June 16, 1995 before the enactment of its new *Constitution*.[70] As party to the CRC, South Africa has an obligation to comply with the provisions of the CRC and to take all legislative, administrative and judicial measures to ensure the protection and fulfilment of all the rights under the CRC.[71] Section 39 of the *Constitution* further obligates the judiciary and legislatures to consider international law in the application of the Bill of Rights under the *Constitution*.[72]

The CRC provides for legislative reform to laws of every state party which will realise all the rights afforded to children under the Convention. The provisions of the CRC were then included in the *Constitution* under section 28, while section 36 provides for the realisation of international law in the application of the provisions of the *Constitution* and other legislation. The objectives of the CRC as stated in the *preamble* include extending particular care and protection to children that is in accordance with the provisions of the Declaration on the rights of the Child 1959, and that will encompass all the civil, political, economic, and social rights of children collectively.[73]

---

67 Arts 5 (b) and 161(d) CEDAW.
68 Vijoen 1998 *CILSA* 198.
69 The *preamble* to the *CRC*.
70 Walsh 2011 *MSJIL* 225.
71 Art 3 CRC.
72 Sec 36 of the *Constitution*.
73 Ekundayo 2015 *IJHSS* 147.

The CRC does this by comprehensively addressing specific rights to children, and placing obligations on the signatory states to realise these rights. The CRC has four guiding principles that represent the underlying requirements for all rights to be realised: the survival and developmental rights;[74] equality rights,[75] participation rights,[76] and the best interests of the child.[77] Of interest is the principle of the best interests of the child.

Article 3(1) of the CRC reads:

> 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.

The UN Committee on the Convention on the Rights of the Child has highlighted the best interests of the child as a guiding principle in all matters affecting the child, and it underlines the best interests as a threefold concept:[78]

> a substantive right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child; a fundamental interpretative legal principle ensuring that the interpretation which most effectively serves the child's best interests should be chosen whenever a legal provision is open to more than one interpretation; and a rule of procedure that the decision process in any matter concerning a child must include an evaluation of the possibility of any negative or positive impact of the decision on the child.[79]

In its interpretation of the concept, the committee further recognises that the best interests should be determined on an individual basis, adjusted according to the specific

---

74 Sec 6; These are rights necessary for the survival and development of the child, such as the right to adequate food and shelter, primary health care, formal education and leisure.

75 Sec 2; Children cannot be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

76 Sec 12; Participation rights are rights of children to freely express their views in all matters that affect them, and to have those views considered, consideration had to the children's evolving capacities.

77 Sec 3; The rights of the child to have his or her best interests considered; Hammarberg has grouped the rights under the CRC into 3 classes, calling them the three "P's" of "provision" (the fulfilment of basic rights such as the right to health care, adequate food and shelter, food and education)," protection" (the right to protection from all forms of harmful practices such as sexual abuse), and "participation" (the right to be heard in all decisions affecting the child), See Hammerberg 1990 *Human Rights Quarterly* 58.

78 UN Committee on the Convention on the Rights of the Child General Comment 14 Para 6.

79 See also Toros, Valma and Tiko 2012 *Journal of Social Welfare and Human Rights* 290.

situation of the child concerned taking into consideration his or her personal situation and needs.[80]

Robinson argues that the CRC does not provide factors that would constitute the best interests of the child.[81] The committee, however, recognises that issues covered under the best interest of the child are continuously evolving, and that to list factors may limit its interpretation.[82] The committee suggests a non-exhaustive list of elements to be considered when assessing the best interests of the child which list includes, among other elements, the consideration of the child's views as provided under section 12, the preservation of the family environment and maintaining relations, the care, protection and safety of the child, the protection of the child's physical, emotional and mental health, and the child's situation of vulnerability (such as a child as a victim of abuse or child soldiers).[83]

Finally, the committee recognises the need to balance the elements of the best interests of the child with other competing rights by assessing the relevance of each element according to the different circumstances of every child in order to find the best decision for the child.[84] Robinson opines that article 3 of the CRC reflects a principle of interpretation that requires consideration in relation to every right in the Convention, and to all actions concerning children.[85] Where preservation of the family environment conflicts with the need to protect the child from the risk of violence, for example, all the elements will have to be weighed against each other so as to find a solution that would be best for the child.

b. The African Charter on the Rights and Welfare of the Child (ACRWC) 1990

The ACRWC was adopted in 1990 and was ratified by South Africa in 1995, it then entered into force in 1999.[86] The *preamble* to the ACRWC explains that the charter recognises

---

80 General Comment 14 Para 32.
81 Robinson 2002 *STELL LR* 316.
82 General comment 14 para 11.
83 Para 58, 71 and 78.
84 General comment 14 para 81.
85 Robinson 2002 *STELL LR* 315.
86 Ekundayo 2015 *IJHSS* 149.

the different and special cultural and social values of Africa in the family, community and society context.[87] The ACRWC has not deviated much from the CRC, and many of its provisions have been drawn from the CRC.[88] The ACRWC has, however, added more emphasis to the experiences of particular relevance to African children, such as the specific mention of harmful cultural practices and customs (such as female genital mutilation and child marriages),[89] the access of female, gifted and disadvantaged children to free and compulsory education,[90] and the rights of children to protection from exploitative economic exploitation.[91] The charter further assigns duties and responsibilities to the child to respect parents, superiors and elders, and to preserve African cultures and values.[92]

Like the CRC, Viljoen observes that the substantive rights under the ACRWC can be classified into the same categories as those of the CRC, and these are survival rights, self-asserting rights,[93] protection rights, and developmental rights.[94] In addition to these categories, however, The ACWRC has a fifth important category, and that is 'communal rights' which is the child's right to enjoy parental care and to reside with his or her parents.[95] The three main anchoring provisions that are to be considered in the application of all rights under the ACRWC are the best interests of the child, non-discrimination and primacy over culture.[96] Of particular importance under the ACRWC for this dissertation is the provision for the best interests of the child which provides that "in all matters concerning the child, the best interests of the child shall be the primary

---

87 It was claimed that the CRC was initiated by the western nations, and that it did not take account of the diverse issues of children in Africa; see Viljoen "The African Charter on the Rights and Welfare of the Child" 217.

88 Ekundayo 2015 *IJHSS* 149.

89 Art 21.

90 Art 11.

91 Art 15.

92 Art 31.

93 The child's right to active participation in matters that affect him or her.

94 Viljoen "The African Charter on the Rights and Welfare of the Child" 221.

95 Viljoen "The African Charter on the Rights and Welfare of the Child" 221.

96 Viljoen opines that in the recognition of the importance and high esteem of culture and traditions among the African nations, some of the best interests of children are often overlooked or under-valued, and for this reason, the ACRWC ensures its primacy over the enjoyment of such cultures and traditions where they are adverse to the welfare of the child. See Viljoen "The African Charter on the Rights and Welfare of the Child" 220.

consideration."[97] Article 20 of the ACRWC further provides that the primary responsibility for the upbringing of the child lies with the parents, and that their basic concern is to ensure the best interests of the child at all times.

It has been argued that the provision for the best interests of the child under the ACRWC has a 'firmer definition and higher standard' than that under the CRC.[98] The reason for this, as the UN Committee on the Rights of the Child recognises,[99] is to ensure a flexibility in the application of article 3 as it covers a wider range of situations wherein the best interests of the child might conflict with the interests or rights of others, calling for a balancing of all the rights involved.[100] In other words, the best interests of the child are to be considered with other competing rights and interests. The child's interests must, however, be the subject of active consideration.[101]

Finally, it is important to realise that both the ACRWC and the CRC play a pivotal role in the South African legislative, judicial, and administrative application of children's rights to have their best interests taken into consideration. South Africa, as a state party to both the ACRWC and the CRC, is obliged under both international instruments to enact laws that ensure formal processes and strict procedural safeguards designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for weighing the results.[102] Most importantly, both instruments allow for provisions in other international laws or national laws to take precedence, where such provisions afford more protection to the realisation of children's rights.[103] This means that where the provisions under the ACRWC give more protection to a child over those of the CRC, the provisions under the ACRWC should be followed. It is submitted, however, that both

---

97 Art 4.

98 Ekundayo argues that the use of the word 'the' implies that the best interests of the child must take priority over other rights; as opposed to the CRC requiring the best interests of the child 'a primary consideration', which, it is argued, reduces the standard against other principles; see Ekundayo 2015 *IJHSS* 149.

99 General comment 14 Para 39.

100 The balancing of the rights will be discussed later in this chapter.

101 General comment 14 Para 32.

102 General comment 14 para 87.

103 Art 1(2) of the ACRWC; art 41 of the CRC.

instruments play a significant role in the application of the best interests of the child principle in South Africa.

2.4 Best interests principle in South Africa

The principle of the best interests of the child in care and contact settlements predates to the years before South Africa attained independence from the British rule.[104] The Roman-Dutch legal system, which was introduced in South Africa by the Dutch as they started to form colonies in the Cape, viewed the father as the primary protector of the child's welfare, thus a father's interests and rights to the child were superior to the mother's.[105] This principle was usually applied in divorce, care and contact cases.[106] In 1795 the English, upon colonising the Cape, introduced the English Common Law system in South Africa, but the Roman-Dutch Law remained the basic common.[107] The court in *Van Rooyen v Wemer*[108] summarised the Roman-Dutch rule, providing that the father is the natural guardian of his legitimate children until they reach the age of majority. The court provided further that only the father is entitled to his children's care, has unchallenged control over consent to their marriages, administration of their property and education. In the 1907 case of *Cronje v Cronje*[109] the court shifted this view in care proceedings to the consideration of the best interests of the child. The Court opined that even though the father, as the natural guardian of the children, was entitled by law to their care upon divorce, such care orders were nevertheless subject to the Court's discretion, and that 'In all cases the main consideration for the court in making an order with regard to the care of the child is what is in the best interests of the children themselves'.[110]

Notwithstanding the shift in the considerations of a child's best interests, however, the father's rights were still viewed to be superior to those of the mother.[111] A definite

---

104 Walsh 2011 *MSJIL* 215.
105 Walsh 2011 *MSJIL* 214.
106 Hans 2007 *J Contemp. Roman Dutch L* 459.
107 Walsh 2011 *MSJIL* 214.
108 *Van Rooyen v Wemer* 1891 9SC 425.
109 *Cronje v Cronje* 1907 TS 871.
110 *Cronje v Cronje* 1907 TS 871 at 872.
111 *Calitz v Calitz* 1939 AD 56.

departure from this view was made in *Fletcher v Fletcher*,[112] wherein the care of two children aged 5 and 7 was considered in a divorce matter brought by the wife on the basis of the husband's adultery. The court recognised the rule that in all care matters 'the children's interests must undoubtedly be the main consideration'.[113] According to Bosman and Van Zyl, the courts would ascertain the needs of the child and then establish which parent would be entrusted with the day-to-day care of the child and the non-custodian parent's right to contact by assessing the parent's different individual and personal qualities.[114] The decision that would be considerate to the best interests of the children would then be made.[115]

Following the judgment, in 1953 a *Matrimonial Affairs Act* was enacted, and it pronounces that in proceedings for divorce or judicial separation, on application of either parent for the care or sole guardianship of a minor child, any court or judge hearing the matter may grant such order if it is proved that it would be in the best interests of the child.[116] The court in the 1994 case of *McCall v McCall* [117] listed criteria to be used as a reference by the courts when assessing the best interests of the child,[118] citing that the court must decide which of the parents is better able to promote and ensure the child's physical, moral, emotional and spiritual welfare.[119]

Upon the enactment of a new *Constitution*,[120] the application of the principle of the best interests of the child changed considerably. With the introduction of a comprehensive Bill of Rights, which Bill places a list of obligations on the state with regards to the protection, promotion and realisation of children's rights, the provisions of the Bill guarantees children all the rights in the Bill with the exception of the right to vote,[121] and it further provides specific rights that children are entitled to, to the exclusion of adults.[122]

---

112 *Fletcher v Fletcher* 1948 (1) SA 130.
113 134.
114 Bosman & Van Zyl "Children, young Persons and their parents" 59.
115 Bosman & Van Zyl "Children, young Persons and their parents" 59.
116 Sec 5(1).
117 *McCall v McCall* 1994(3) SA 301.
118 This criteria will be discussed later in this chapter.
119 As will be discussed later.
120 *Constitution of the Republic of South Africa* 1996.
121 Bekink 2012 *PELJ* 183.
122 S 28(1) of the *Constitution.*

Finally, as a general principle, section 28(1) provides that a 'child's best interests are of paramount importance in every matter concerning the child'.

2.4.1 A principle or a right?

The meaning and application of the best interests concept as stated above was expanded upon its inclusion into the *Constitution* under section 28(2), to all aspects of the law that affect children, including those outlined in section 28(1) of the *Constitution*.[123] This has caused a debate whether the inclusion of the best interests concept in the *Constitution* has elevated it to be a legal rule, a fundamental constitutional right or a principle of interpretation. Friedman and Pantazis identify three possible uses of the best interests principle: Firstly, to aid in the interpretation of children's rights in section 28; secondly to determine the scope of other fundamental rights, and thirdly, to be used as a fundamental right in itself.[124] Robinson argues that the best interests of a child is not a mere guiding principle, but a constitutionally entrenched fundamental right.[125] Currie and De Waal similarly argue that the inclusion of the best interests concept into the *Constitution* elevates it from a mere guiding principle to a self-standing right that also strengthens other rights.[126]

To the contrary, Bonthuys[127] questions the use of the best interests provision as a right. Bonthuys argues that when assessing the best interests of the child, South African courts do not follow the two stages as stated in *Ferreira v Levine*[128] that are normally followed when assessing the violation of other rights.[129] The application of the two stages in the case of the best interests assessment would involve an interpretation of the best interests criterion to determine whether the conduct or legal rule in question infringes on the right, while the second stage would test whether such infringement is justified. Bonthuys observes that the courts, instead of analysing and interpreting the contents of the best

---

123 As "in any matter concerning the child" under sec 28 (1).
124 Friedman and Pantazis "Children's Rights" 47-52.
125 Robinson 2013 *THRHR* 415.
126 Currie and De Waal *Bill of Rights Handbook* 619.
127 Bonthuys 2006 *IJLPF* 23 – 43.
128 *Ferreira v Levine NO* 1996 1 SA 984 para 44.
129 First it would have to be determined whether there has been an infringement of a guaranteed right, and if so, an enquiry as to whether the infringement can be justified.

interests as they would all other fundamental rights, simply assert that a particular rule or practice infringes the best interests of the child.[130] I approve of her argument that the inability of the Constitutional Court to deal with the best interests as it normally treats other rights creates the impression that the best interests concept is not really a fundamental right or a right like all other rights in the Bill of Rights. Consequently, the best interests of the child would serve as a mere guiding principle. This argument brings us to the application of the best interests principle in a parent–child relationship.

One factor that makes it difficult to get a clear meaning of the best interests provision is the terminology or the wording of the best interests provision in the *Constitution*, which suggests that the *interests* of the child, and not the *rights* of the child, should be given more favourable consideration over *rights* of other people.[131] This Bonthuys rightly contends that it means courts should weigh the rights of children and other parties over the interest of children in the attempt to limit the interests.[132] This spurs a great deal of confusion when dealing with the best interests of children within a parent-child relationship. Be that as it may, the inclusion of the best interests concept in the *Constitution* illustrates the importance of considering the best interests in every matter concerning the child.

2.5 Determining the best interests of the child in a parent-child relationship

The nature of the best interests of the child concept has continued to be evolved and fashioned by modern theories and beliefs about children and families.[133] The question of determining what exactly a child's best interests are is, however, a question of fact that should be determined by the circumstances of each case.[134] Guidelines that have been adopted by the judiciary over the years include the consideration of economic, emotional

130 Bonthuys 2006 *IJLPF* 28.
131 Bonthuys 2006 *IJLPF* 28.
132 Bonthuys 2006 *IJLPF* 29.
133 Currie and De Waal *Bill of Rights Handbook* 619.
134 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 para 43.

and moral needs of the child, including the ties of affection between the child and the parent.[135]

2.5.1 The paramountcy of the best interests of the child

The application of the best interests of the child has caused uncertainty when applied to the parent-child relationship. Currie and De Waal conclude that this is so because of the complexity of the issues raised by the best interests principle in the interaction between the rights of children, their parents and other family members.[136] Other than the best interests standard, the *Constitution* contains no indication of how this relationship is to be regulated in balancing the interests of the child and of the parents. The approach in *McCall v McCall*[137] is the following:

> In view of the unremitting enmity between the parties, it is as well to remind them that the Court is determining what is in the best interests of their child. The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child.[138]

To this effect, the court set criteria to be considered when determining the best interests of the child.[139] The criteria have been referenced by a number of courts in the attempt

---

135 Barrie 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 126.

136 Currie and de Waal *Bill of Rights Handbook* 620.

137 *McCall v McCall* 1994 (3) SA 201 at 203F.

138 *F v F* 2006 3 SA 42 (SCA) paras 8–10 and *Jackson v Jackson* 2002 2 SA. 303 (SCA) 318 para 2 per Scott JA.

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

to determine the best interests of children in different circumstances, more so when parental rights and the interests of children are to be weighed against each other. In the same context this view has been echoed in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*[140] where it was held that section 28(2) of the *Constitution* establishes that the fundamental rights of every child take first place in the balancing of conflicting rights of parties' claim to fundamental rights and the maintaining of such rights. According to Robinson, the determination of the best interests of the child is done purely independently from the child's point of view,[141] so that when applied, the rights and interests of the parents are only relevant in so far as they enhance the best interests of the child.[142]

Robinson[143] suggests that the apparent acceptance of the courts that the child's best interests take 'first place' is not in line with constitutional rules even though the *Constitution* does not contain any indications how the parent-child relationship is to be regulated.[144] He further argues that the best interests of the child do not occupy a hierarchically stronger position than other constitutional rights.[145] The Constitutional Court in *De Reuck v Director of Public Prosecution, WLD*[146] clarified that the word 'paramount' in s 28 (2) of the *Constitution* does not mean that children's best interests can never be limited, and it further opined that constitutional rights are "mutually interrelated and interdependent, and form a single constitutional value system".[147] The best interests of the child do not therefore undermine other rights contained in the Bill of Rights.

(k) The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
(l) The desirability or otherwise of applying the doctrine of same-sex matching;
(m) Any other factor which is relevant to the particular case with which the court is concern

140 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).
141 Robinson 2013 *THRHR* 415.
142 Robinson 2013 *THRHR* 417.
143 Robinson 2013 *THRHR* 415.
144 Robinson 2013 *THRHR* 410.
145 Robinson 2013 *THRHR* 410, See also *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232; *Jooste v Botha* 2000 2 SA 199.
146 *De Reuck v Director of Public Prosecution*, WLD 2004 1 SA 406.
147 *De Reuck v Director of Public Prosecution*, WLD 2004 1 SA 406 Para 55.

The court in *S v M (Centre for Child Law as Amicus Curiae)* [148] attempted to expand the meaning of 'paramount importance', holding that the best interests of a child is a child-centred approach that should be determined on the circumstances of each case by giving an 'in-depth consideration of the needs and rights of the particular child in the precise real-life situation he or she is in'.[149] This does not mean that in the attempt to do what will be in the best interests of the child all other rights are to be disregarded, but that any decision taken must be such that it is considerate of the needs or interests of the child. For example, an order of divorce cannot be refused on grounds that it would not be in the best interests of the child for the parents to be divorced. What would be considered, however, would be the care, contact and maintenance of the child after the divorce. The interests of the child cannot work against the rights of other family members. A balance, therefore, has to be struck between the rights of the parent and the interests of the child so that all parties are considered.

2.5.2 Balancing the best interests of the child with other rights

The application of the best interests of the child as a constitutional right subjects it to section 36 (2) of the *Constitution*, which provides for limitation of a constitutionally protected right as long as such limitation complies with the prescriptions of section 36(1),[150] or with the dictates of any other provision of the *Constitution*. An example of the application of section 36 is seen in *Christian Education SA v Minister of Education.*[151] The applicant argued that section 10 of the *South African Schools Act* 84 of 1996 (which prohibits the use of corporal punishment in schools) violates the beliefs of Christian parents. The High Court, instead of using the limitation clause in section 36 of the *Constitution*, resolved the matter by attempting to restrict the scope of the applicant's right to practice their religious beliefs. It firstly questioned the sincerity of the applicant's belief, whether it formed part of the religious doctrine practised by the claimant. It then

---

148 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232.

149 Para 42, 43.

150 It must be sanctioned by law of general application; be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

151 *Christian Education SA v Minister of Education* 2000 (4) SA 757.

required the applicant to sincerely show that the conflict between the belief and the legislation was burdensome in their practice of their faith. With the use of these techniques, the High Court concluded that the issue of corporal punishment was not central to the exercise of the applicants' religion as they had failed to show that they had a sincere belief on religious grounds that schools should be empowered to administer corporal punishment.

On appeal, the Constitutional Court did not employ the techniques that had been used by the High Court, it instead made use of the limitation clause and held that corporal punishment in schools is a violation of the right to human dignity[152] and the protection against cruel, inhuman and degrading treatment or punishment.[153] It further employed section 31 in support of its holding that the *Constitution* did not protect the applicant's religious belief in corporal punishment. The Constitutional Court concluded that a limitation must be justified by serving the purpose, and appreciating the importance and effects of its provision. Such limitation must also be considerate of any alternative less-restrictive means that may help achieve the purpose thereof.[154]

Although the case above did not concern the balancing of interests and rights of parents and children, it shows the significant importance of the application of section 36 (1) where rights clash in such a way that the rights of one cause an injustice to the rights of the other. The application of the limitation clause to a parent-child relationship is, however, a particularly sensitive matter, considering the kind of a relationship it is, *qua consortium omnis minoritatis.*[155] Parents are the primary caregivers of children, and the interests of children are in most situations indivisibly interrelated with those of their parents.[156] Robinson rightly opines that this bio-ethical nature of the parent-child relationship calls for solutions that will in the event of a conflict of interest balance the interests and rights of both the parent(s) and the child so that the family relationship remains protected.[157]

---

152 Sec 10. *Constitution.*
153 Sec 12(e) *Constitution*.
154 *Christian Education SA v Minister of Education* 2000 (4) SA 757 para 31.
155 Robinson 2013 *THRHR* 418.
156 *Grootboom v Oostenberg Municipality* 2001 (1) SA 46 para 70.
157 Robinson 2013 *THRHR* 419.

The approach causing the least detriment for either parent or child is commendable. Robinson further argues that owing to the *qua consortium omnis minoritatis* relationship of a parent and a child, courts cannot always interfere in every conflict. For example, courts cannot and should not question the day to day decisions that a parent makes. If parents were to report to state institutions in respect of the day-to-day living of their children, the parent-child relationship would be treated as a legal relationship where parents would simply be relegated to secondary caregivers, the state then being the primary caregiver.[158]

Against the backdrop of the above argument, it is important to point out that parental rights exist for the performance of parental responsibilities and duties.[159] Consequently, these rights cannot be protected by law if the exercise thereof would be detrimental to the best interests of the child. The duty of the courts as the upper guardians of children is to outweigh the rights of the parents where the exercise of these rights would otherwise be detrimental to the best interests of the child. Where for instance a parent refuses life-sustaining medical intervention for her child on the basis that the Court would not find medically correct and justifiable, the court would then intervene in its own discretion within its jurisdiction as the upper guardian of the child and make any such decision that would benefit the child.[160] This is not to say that the best interests of the child are paramount in every decision that a parent makes concerning his or her child. Whatever decision a parent makes must however be justifiable and be within the confines of the law if it affects the child.[161] Robinson suggests that the decision of the court to outweigh a parent's rights would not necessarily terminate the parental privileges, but the parental privileges would be subservient to the paramount consideration of the courts, which would be the best interests of the child.[162]

---

158 Robinson 2013 *THRHR* 419.
159 *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.
160 *Hay v B* 2003 (3) SA 492.
161 Robinson 2006 *De Jure* 610 at 614.
162 Robinson 2003 *THRHR* 131 at 134.

2.6 The best interests of the child in terms of the Children's Act

The introduction of the *Children's Act*, which has helped tremendously in the focus of children's rights in South Africa, has emphasised a change in terminology from parental rights to parental responsibilities and rights. Whereas in the past the emphasis was on the rights and powers of parents, the *Children's Act* has emphasised a more child-centred approach in the application of the best interests of the child.[163] Parental authority is now more concerned with the interests of the child in the parent's exercise of his or her parental rights.[164] The responsibilities and rights that parents have towards their biological children are to be equally shared between them in terms of the *Children's Act*, or according to an order of the Court where the parents are not married.[165] The responsibilities and rights that parents have towards their children as outlined in section 18 include, *inter alia*, care, contact, guardianship and maintenance of the child. In other words, both parents are to have contact with their children after divorce.

In an attempt to determine what would be in the best interests of the child, section 7 sets out criteria to be used by the courts,[166] which criteria serve to promote the best

---

163 Skelton "Parental Responsibilities and Rights" 63, 64.

164 Bekink 2012 *PELJ* 1.

165 S 18 to 21 *Children's Act.*

166 (a) The nature of the personal relationship between (i) the child and the parents, or any specific parent; and
(ii)the child and any other caregiver or person relevant in those circumstances;
(b) The attitude of the parents, or any specific parent, towards-
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(c) The capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other caregiver or person, with whom the child has been living;
(e) The practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) The need for the child-
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) The child's-
(i) age, maturity and stage of development;
(ii) gender;

interests of children in all matters affecting the child. Significant discretion and indeterminacy, however, remain in the application of the best interests by the courts,[167] and the determination will be employed on a case by case basis depending on the facts of each case.

2.7 Conclusion

This chapter has attempted to espouse the meaning of the phrase "best interests of the child" as is adopted and used in South Africa. The importance of the inclusion of the best interests of the child principle into the *Constitution* is that it has elevated it to a constitutionally protected fundamental right. Despite the confusion in the application of this concept as a right, it cannot be ignored the effect it has on the application of all the rights of children both in the *Constitution* and in the *Children's Act*. Most importantly, it has emerged that in the application thereof, courts undertake to look at the surrounding circumstances that would otherwise affect the welfare of the child in order to propound the meaning to be attached to the phrase. Where the rights of the child clash with those of the parents, the bio-ethical character of the parent-child relationship calls for family-friendly solutions that will protect the family unit, but where these decisions may be contrary to the well-being of the child, then the best interests of the child must override the decisions. This brings us to the subject of the interpretation of the best interests as

---

(iii) background; and
(iv) any other relevant characteristics of the child;
(h) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) The need to protect the child from any physical or psychological harm that may be caused by
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) Any family violence involving the child or a family member of the child; and
(n) Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

[167] Sec 6 of the *Divorce Act* 70 of 1979 provides that the courts, before granting a divorce order, have to firstly ensure that the provisions of the decree satisfactorily protects the interests of the children of the marriage.

a paramount consideration in parent-child relationship, where the parent is abusive not to the child, but to the child's other parent, and the legislative interpretation of the best interests of the child where a child is brought into contact with an abusive parent. This position will be discussed in the next chapter.

Chapter three: The application of the best interests of the child in the protection of children from spousal abuse

3.1 Introduction

This chapter assesses the legislative application of the best interests of the child in the protection of children against violence in the family context in South Africa. As was established in the preceding chapters, the focus of this dissertation is on spousal abuse, whether the law takes reasonable account of the fact that a parent is abusive when deciding on the best interests of the child. The need for safety of children after divorce is an important factor that must be recognised in post-divorce proceedings, mainly because of the fact that divorce does not always end spousal abuse.[168] Shared parental responsibilities such as contact and joint care have been used by abusive ex-spouses as means of facilitating their abusive habits.[169] Domestic violence researchers have argued therefore that the more contact an abuser has, the more likely he will use it to continue abusing his or her ex-spouse, consequently exposing the child to more violence.[170]

In the effort to determine the protection of children against spousal abuse in South Africa, this chapter will explore the position under international law and the incorporation of the international law provisions in the South African domestic law. The second part of this chapter will discuss the relevant legislation pertaining to the protection of children from family violence. The purpose of this chapter is to explore the protection of children from abuse that may occur after the divorce of parents when children are in contact with the parent who was the perpetrator of abuse during the subsistence of the marriage, and possibly after the breakup of the marriage.

3.2 The protection of children under international and regional law

As was pointed out in chapter 2, There are two main supranational international instruments that are specifically aimed at the promoting and protecting children's rights;

---

168 Reihing 1999 *Family and Conciliation Courts Review* 393**.**
169 Walker L. E *et al The battered woman syndrome* 3rd ed 75.
170 Zorza 1995 *FLQR* 273 & 275.

the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. Before them, there were other international instruments that had provisions aimed at protecting children, such as the Declaration of the Rights of the Child 1948 which provides for the protection of children from 'extreme abuse' or neglect in the family context.[171] Article 24 of the International Covenant on Civil and Political Rights of the Child 1966 provides for all measures of protection for children by virtue of their status as minors. While these treaties do not refer explicitly to spousal abuse, they must be taken into account when interpreting domestic law pertaining to the protection of children against family violence. The protection should be such as is required for the child, in all circumstances.

3.2.1 The Hague Convention on the Civil Aspects of International Child Abduction 1980[172]

The Hague Convention creates a civil remedy for the return of abducted children below the age of 16 years from the kidnapping state to the place of their habitual residence.[173] This convention has been incorporated into the South African law by section 275 of the *Children's Act* 38 of 2005, and its purpose is to restore the *status quo ante* the child's unlawful removal or retention by the kidnapping parent so that issues pertaining to care and contact with the child may be adjudicated by the Courts of the habitual residence.[174] The convention is predicated on the assumption that the Court at the place of habitual residence would be in the best position to determine the best interests of the child by reason of the relationship between its jurisdiction and the child, as it will have access to the facts that would be relevant to the determination of care and contact matters.[175]

Article 13b of the Hague Convention is triggered in domestic violence cases. It provides:

> ... [T]he judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return

---

171 Art 3 of the Declaration on the Rights of the child 1948 provides for the intervention of a State in the parent/child relationship only in cases of extreme abuse or neglect by the parents of the child.
172 Hereafter the Hague Convention.
173 Art 1 of the Hague Convention.
174 *Central Authority for the Republic of South Africa and Another v B* 2012 (2) SA 296.
175 *Smith v Smith* 2001 (3) SA 845 at 850.

> establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The Hague Convention places an obligation on the courts to consider the impact of spousal abuse on the child by ensuring that the child's return to the country of habitual residence will not expose the child to a situation that would otherwise be devastating to the psychological or physical harm of the child. In *Sonderup v Tondelli and Another*[176], Goldstone J said the following when considering the application of article 13(b) of the Convention:

> [R]ecognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction ... where there is an established pattern of domestic violence, even though not directed at the child, it might very well be that return might place the child at grave risk of harm as contemplated by art 13 of the Convention.

Case law, however, shows a reluctance of the courts to accept the defence of spousal abuse for fear that defendants may use it as a litigation or re-litigation of the child's best interests.[177] The 'grave risk' must therefore be proved by the defendant to be more than an ordinary risk, and the harm must be serious. Most importantly, courts consider the question posed by article 13(b) from the child's point of view,[178] meaning that it is the child's best interests, and not the kidnapping parent's that the court must base its decision on. Courts have noted the increased risk of children to psychological and physical harm when they are in contact with spousal abusers.[179] *In re Marriage of Condon*[180] a Canadian father sought an order for the return of his children under the Hague Convention after the mother had taken the children to Australia and refused him contact. The Australian Court considered the ex-husband's physical violence, the couple's mutual verbal violence and the amount of time the children spent with their father. Although the Hague Convention does not refer to the determination of parent and child contact in divorce proceedings, its application by the courts shows that courts are aware that violence

---

176 *Sonderup v Tondelli and Another* 2001 (1) SA 1171 at 1185

177 *Penello v Penello* [2003] 1 All SA 716 at 727 ; *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465; *Sonderup v Tondelli and Another* 2001 (1) SA 117

178 *Pennello v Pennello* [2003] 1 All SA 716 at 727.

179 See the United Court of Appeals decision in *Walsh v Walsh* (F.3d 204) at 220-221

180 *In re Marriage of Condon* 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998).

between parents of a child may cause a 'grave risk' on a child's welfare. Spousal abuse should accordingly be a determining factor of the best interests of the child.

3.2.2 The Convention on the rights of the child

Article 19 of the CRC obliges States Parties to the Convention to take appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury and abuse while in the care of parents. The UN Committee on the Rights of the Child,[181] observes that exposure to 'domestic violence' falls under the category of 'mental abuse' as prescribed under article 19.[182] In its interpretation of article 19, the Committee has provided that exposure to domestic violence may have a devastating impact on the child's survival and development as it may result in physical health problems, cognitive impairment, psychological and emotional consequences, mental health problems, health-risk behaviours, and developmental and behavioural problems.[183]

The application of the CRC in matters concerning post-divorce contact of the child therefore obligates States Parties to take appropriate measures to protect children from exposure to spousal abuse that may occur after divorce, as the UN Committee on the Rights of the Child has interpreted the word ' concerning' to mean that all decisions which directly or indirectly affect the child,[184] including matters of divorce, care and contact orders. The protection of children from spousal abuse is further provided in article 9 (1) and (3), which warrants cutting off direct parent-child contact when the contact would not be in the child's best interests. Furthermore, the application of all the rights in the CRC are to be consistent with the right of the child to have his or her best interests taken as a primary consideration.

---

181 The body responsible for the interpretation, promotion and implementation of the CRC.

182 General Comment 13 2011 para 21.

183 General Comment 13 para 15. See also Browne & Hamilton-Giachritsis "Child abuse: defining, understanding and intervening" 49 – 68 who observe that exposure to family violence is another form of child abuse.

184 General Comment 14 2013 para 19.

3.2.3 The African Charter on the Rights and Welfare of the Child

The ACRWC obligates States Parties to take all legislative, administrative, social and educational measures towards the protection of children from maltreatment, physical and mental abuse while in the care of their parents.[185] Article 19 (1) further provides that a child shall be separated from his or her parent(s) where such separation would be in the best interests of the child. In the interest of protecting the child's enjoyment to parental care, however, the ACRWC further provides that the child shall have the right to maintain personal relations and direct contact with the parent that he or she is separated from.[186] Nevertheless, as has been noted in chapter 1, the best interests of the child are to be the overriding consideration when the contact with a parent is to be determined.[187]

3.3 Legislation in South Africa

3.3.1 The Constitution of the Republic of South Africa 1996

The *Constitution* provides for the right to be free from all forms of violence.[188] The *Constitution* also gives special provision to the rights of children under section 28. Of importance in this chapter is section 28(1) (d) which provides for the right of every child to protection from maltreatment, neglect, abuse or degradation. 'Abuse' in relation to the child is not defined by the *Constitution*. It has however been defined under the *Children's Act*[189] to include "exposing or subjecting the child to behaviour that may harm the child psychologically or emotionally."[190] Subject to section 39 of the Constitution as was discussed in chapter 2, the courts must also be considerate of the provisions of the CRC together with its General Comments regarding spousal abuse and exposure of the child to abuse. This section must also be interpreted so as to give account of the child's

---

185 Art 16 (1).
186 Art 19 (2).
187 Art 4 (1).
188 Sec 12 (1).
189 Act 38 of 2005. The *Children's Act* has been enacted to give effect to the rights of children as contained under the *Constitution*. It is submitted therefore that the use of its interpretative guidelines are warranted.
190 Interpretation of abuse under section 1 of the *Children's Ac*t.

best interests when assessing the contact of the child with his or her abusive parent, subject to section 28 (2) of the *Constitution*.

3.3.2 Domestic Violence Act 116 of 1998

The act defines domestic violence as conduct constituting abuse, which harms or may cause imminent harm to the safety, health, or well-being of the complainant, including:

a) Physical abuse

b) Sexual abuse

c) Emotional, verbal and psychological abuse

d) Economic abuse

e) Intimidation

f) Harassment

g) Stalking

h) Damage to property

i) Entry into the complainant's residence without consent, where the parties do not share the same residence, or

j) Any other controlling or abusive behaviour towards a complainant

Emotional, verbal and psychological abuse means a pattern of degrading or humiliating conduct towards a complainant, including

a) Repeated insults, ridicule or name calling

b) Repeated threat to cause emotional pain

c) The repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of complainant's privacy, liberty, integrity or security

An important advantage under the *Domestic Violence Act* is that although spousal abuse is not criminalised, the act criminalises the breach of a protection order, and the perpetrator can be fined or imprisoned.[191] Also, when enforcing criminal proceedings, the

[191] Sec 17.

complainant is represented by the state and therefore incurs no costs for legal representation.[192]

The act defines a complainant as the person who is in a domestic relationship with the respondent. A domestic relationship includes spouses, whether married or divorced, and in any type of relationship.[193] A complainant of spousal abuse has the right under the act to lay a charge and apply for a protection order at the nearest police station or magistrate's court.[194] The act also expressly includes any child in the care of the complainant, who can apply for a protection order with or without his or her parent's consent.[195] Under the act, a magistrate's courts can give a protection order to a complainant or to any other person applying on behalf of the complainant with the complainant's consent[196] except where the complainant is a minor, then the minor's consent is not necessary for the consideration of the application.[197] For the protection order to be granted, there must be a *prima facie* evidence of spousal abuse.[198] The court may cause an investigation to be conducted by a family advocate subject to the provisions under the *Mediations in Certain Divorces Act* 1987.[199]

Of significance to the question of contact is section 7 (6) which affords courts the discretion to refuse the respondent contact with the child who is in the care of the complainant, or to place conditions on the contact that the respondent may have with the child if the court is satisfied that the contact would not be in the best interests of the child. This section however makes no reference to the interests of the complainant. Bonthuys rightly argues that this opens doors for the courts to disregard the adverse consequences of awarding contact to an abusive ex-spouse because the ex-spouse can use contact to continue harassing or abusing the other parent.[200] As was discussed in chapter one, an abusive parent is likely to use contact as a way of continuing abusive

---

192 Kruger 2004 *Journal for Juridical Sciences* 160.
193 Homosexual or heterosexual relationship.
194 Sec 22.
195 Sec 4 (3).
196 Sec 4 (1).
197 Sec 4 (3).
198 Sec 5 (2).
199 Sec 4 (1) (b).
200 Bonthuys 1999 *AJHR* 317.

acts towards the victim, consequently exposing the child to more violence, therefore this provision does little to protect the child from being exposed to violence between his or her parents.

One other important observation that Bonthuys makes is that the act makes no provision regarding the issue of parental responsibilities and rights.[201] This means that the parent, even when denied contact with the child, still retains the right of care and guardianship, and the custodian parent will still need the abusive parent's consent to deal with the property of the child or any other matters regarding the child. Moreover, the scope of the *Domestic Violence Act* only extends as far as protection orders are concerned, and a complainant cannot seek an order relating to his or her parental responsibilities and rights under the act, as magistrate courts are not competent to grant such a relief.[202] The inability of a complainant to seek an order restricting contact of a violent parent with a child under this act places children in a rather disadvantaged position as it fails to consider that the violence perpetrated by the parent on the child's custodian parent may endanger the child's safety where the court decides to grant contact.

3.3.3 Divorce Act 70 of 1979

The *Divorce Act* places an obligation on the divorce courts to consider first the best interests of the children to the marriage before issuing a decree of divorce.[203] The terms of the order regarding the contact of the child are to be in the best interests of the children concerned. In order to determine conditions that would safeguard the child's best interests, the court may order an investigation into the living circumstances of the applicants to be conducted by a family advocate as stipulated under the *Mediations in Certain Divorce Matters Act 1987,* and it will have to consider the reports and recommendations made by the family advocate before granting a decree of divorce.[204]

---

201 Bonthuys 1999 *AJHR* 317.
202 *B v B* 2008 (4) SA 535.
203 Sec 6(1) (a).
204 Sec 6(1) (b).

Family advocates are assisted by family counsellors[205] and may employ the services of psychiatrists, psychologists, social workers and other experts.[206] Reports obtained from family advocates, where questionable, are not appealable by the parties to the divorce, and the only way they can be dealt with is by obtaining further psychologists' reports.[207] It has been argued that this proliferation of expert reports may result in contradictory reports, and consequently cause confusion as to what would be in the best interests of the children involved.[208]

3.3.4 Mediations in Certain Divorce Matters Act 1987

The *Mediation in Certain Divorce Matters Act* creates the office of the family advocate, which plays an important role in the protection of the interests of children in divorce and related matters.[209] The family advocate assists the courts to determine the welfare of children, and its services are rendered after the institution of a divorce action, and after an application for rescission, suspension or variation of an order regarding the care, contact, guardianship or maintenance order of a child made in terms of the *Divorce Act* as has been discussed above. The court or any other party to the application may request the assistance of the family advocate.[210] The act also allows the family advocate to institute an investigation if it deems it necessary, and when authorised by the court.[211] Where there appear to be arrangements that the family advocate feels will not be in the best interests of the children, she may hand in a memorandum to the court in which she sets out her misgivings and it is up to the court to decide whether to investigate more fully or not.[212]

---

205 Sec 3 (1) defines as 'suitably qualified or experienced persons to be styled the family counsellor'.
206 In *P v P* 2007 (5) SA 94 the family advocate employed the services of three clinical psychologists, a psychiatrist and a family counsellor. See also Bonthuys 2001 *SALJ* 329.
207 Bonthuys 2001 *SALJ* 330. As cited by the South African Law Reform Commission issue paper 31 in *Family Dispute Resolution: Care of and Contact with Children* 2015.
208 Bonthuys 2001 *SALJ* 330.
209 Bosman & Van Zyl "Children, young persons and their parents" 65.
210 Sec 4 (1) (b).
211 Sec 4 (2).
212 Sect 8 of *Divorce Act*.

The role of the family advocate is threefold: to monitor, to mediate, and to evaluate.[213] The family advocate monitors all divorce and post-divorce pleadings issued in the family Court[214] to ensure that arrangements made in the pleadings are in the best interests of the children concerned. If he or she is of the opinion that they are not, the family advocate evaluates the situation in order to formulate a report and recommendations to the court.

Mediation involves the participation of parents in helping to find a lasting solution.[215] The family advocate facilitates the communication between the parents in order to identify the issues in dispute and to come to a conclusion that will best serve the best interests of the children.[216] It has been argued that mediated divorce is better than litigated divorce for children,[217] in that it reduces adverse effects of divorce by helping parents realise the harm that the hostility between them brings to the children. It is also asserted that mediation is more suited for parties who will still have a continued relationship of co-parenting after their dispute has been resolved.[218]

Even though the above arguments in support of divorce mediation are noteworthy, a number of disadvantages that cannot be ignored, especially when children are involved have been pointed out by a number of authors: The role of mediation in divorce has been criticised as being ineffective in ameliorating the adverse effects of domestic violence on children. Piper for example argues that mediators sometimes downgrade past parenting, and 'historicise' the problems that resulted in the divorce in order to move forward 'for the interests of the children'.[219] The argument is that mediators often fail to consider the past as 'relevant', but instead "characterise the allegation as relating only to the past and with no on-going or current relevance", and accentuate that a new start would be in the best interests of the children.[220] In the process, over-emphasis is on the

---

213 Burman, Derman & Swanepoel 2000 *SAJHR* 539.
214 Bosman & Van Zyl "Children, young persons and their parents" 65.
215 Robinson M and Parkison L 1985 *Journal of Family Therapy* 360
216 Parkinson *family law* 23.
217 Van Zyl *Alternative dispute resolution in the best interests of the child* 240.
218 Van Zyl *Mediation and the Best Interests of the Child* 195.
219 Piper "Mediation and vulnerable parents"116.
220 Piper "Mediation and vulnerable parents"118.

importance of contact of the child with both parents, so much that it is weighed over other possibly detrimental factors[221] such as the possibility of a continuous abusive behaviour of a violent parent on the other parent, and the adverse effects that it would have on the parenting skills of the victimised parent.

Furthermore, divorce mediation requires a disclosure of all the material information likely to influence the care and contact decision, including abuse and family violence.[222] These factors are however not always shared in mediation proceedings because victims of spousal abuse are not generally eager to disclose information of violence for fear of repeated abuse,[223] and this may result in a fruitless mediation because mediators are unlikely to know that violence has occurred.[224] Research has shown that mediators failed to recognise or report spousal abuse in at least 56.9% of cases where spousal abuse had in fact occurred,[225] this was compared to the court's screening form which indicated only 14.7% failure, significantly more effective than screening in mediation.[226]

Another problem with mediation is that there is always an imbalance of power between the abuser and the victim, such that the dominant spouse is able to assert greater control over the mediation proceedings, and consequently over the care and contact decisions, while the victimised spouse concedes to decisions taken for fear that the abuser might continue to be abusive.[227] The objective of the mediation to encourage both parties to decide what would be in the best interest of the child is thereby lost when the abused spouse fails to voice out his or her fears about the needs of the child if they are in opposition with those of the abuser. Bonthuys further rightly concedes that the family advocate's ability to act as an expert witness in court may cause him or her to force the abused spouse into a disadvantageous agreement for fear of coming out as "un-

---

221 Piper "Mediation and vulnerable parents"120.
222 Bonthuys 1999 *AJHR* 320
223 Hoven 2011 *Acta Criminologica* 14; *S v. Baloyi* and others (CCT29/99) [1999] ZACC 19, 2000 (1) BCLR 86; Bendall C 2010 *Women's Studies* 100.
224 Bonthuys 1999 *AJHR* 320.
225 Johnson, Saccuzzo & Koen 2005 *Violence against Women* 1022.
226 See also the South African Law Reform Commission issue paper 31 on *Family Dispute Resolution: Care of and contact with children* 107.
227 Johnson, Saccuzzo & Koen 2005 *Violence against Women* 1025.

corporative and unsuitable to parent a child".[228] Other relevant arguments are that mediation usually gives the abuser continued contact to the abused parent and to the child, as a result it fails to give the abused parent access to justice because decisions made through mediation that may be adverse to the best interest of the child are not appealable in a court of law.[229]

3.3.5 The Children's Act

Under the *Children's Act*, parents of a child share all the responsibilities and rights, including contact with the child after divorce.[230] Section 28 provides for the application of the termination, extension, suspension or restriction of parent's responsibilities and rights upon an application by a co-holder thereof or any other person having an interest in the child's best interests, protection, wellbeing and development.[231] Bonthuys observes that this provision seems to suggest a default position of joint care and contact of the child after the divorce[232] which can only be terminated upon application to the divorce court or any other court hearing the matter. An order under section 28 can only be made by the High Court, a divorce court or a children's court, and the court's jurisdiction to hear the matter is determined by the child's habitual residence.[233]

Section 28 (4) lists factors to be taken into account by the courts for the application:

a) The best interests of the child

b) The relationship between the child and the person whose parental responsibilities and rights are being challenged

c) The degree of commitment that the person has shown towards the child, and

d) Any other factor that should, in the opinion of the court, be taken into account

It is noteworthy that there is no specific mention of the abuse between the spouses as a factor to be considered. When assessing the best interests of the child, the act includes

---

228 Bonthuys 1999 *AJHR* 322.
229 Van Zyl *Mediation and the Best Interests of the Child* 207.
230 Sec 18 (2).
231 This includes the family advocate or any interested organ of the state, see Sec 28 (1) to (3).
232 Bonthuys 2006 *STELL LR* 470.
233 Schafer *Child Law in South Africa Domestic and international perspectives* 260.

protection of the child from physical or psychological harm, and exposing the child to abuse or any harmful behaviour towards another person as factors to be considered, in addition to the attitude of the parent towards the child, the child's physical and emotional security, and the need for the child to be brought up within a stable and caring family environment among other factors.[234] This means, therefore, that in the application for termination of parental contact, courts are mandated to consider these factors and to reach a conclusion that will be in the best interests of the child, even if it means terminating or suspending contact.

It is noteworthy that the application of the termination, suspension or restriction of a parent's contact does not terminate all other parental rights.[235] The parent's rights of guardianship will still be in force unless the court orders for suspension of all other rights that a parent may have. This means that the parent's consent to the removal of the child from the republic, the child's application for a passport, and any other necessary action pertaining to the child will still be needed.[236] As with the *Domestic Violence Act* which does not mention the termination of parental responsibilities and rights, this provision may similarly cause adverse consequences to the child's best interests in cases of spousal abuse, as it may open opportunity for the abusive spouse to use these rights in order to continue controlling and abusing the other parent.

The *Children's Act* mandates the children's court to adjudicate any matter involving the care of, or contact with the child,[237] the protection of the child from maltreatment, abuse, neglect, degradation and exploitation of the child,[238] to safeguard the wellbeing of the child and all other matters as listed under section 45. Abuse has been defined under the act to include exposing or subjecting the child to behaviour that may harm him or her psychologically or emotionally.[239] The act further defines a child who has been abused as a child in need of care and protection under section 150 (1) (i), and it mandates a

---

234 Sec 7 (1).
235 Sec 38 provides that the wishes and views of the other parent must be considered in any major decisions likely to affect the co-holder's parental responsibilities and rights.
236 Sec 18 (3).
237 Sec 45 (1) (b).
238 Sec 45 (1) (a) and (f).
239 Sec 1.

children's court to make orders regarding the granting or limiting of contact to such a child. As under the *Domestic Violence Act*, a children's court can grant a child protection order that would regulate the contact of the abusive spouse with the child.[240] The court may order the parent to be removed from the child's home;[241] it may allow limited contact with the child on conditions,[242] or it may even cut all contact with the child.[243] The limitation of contact may, however, not be indefinite, as the court may place conditions to be met by the abusive spouse in order to retain the lost contact, such as attending a rehabilitation programme or professional counselling.[244]

Section 47 (2) provides that if in the course of any proceedings in terms of the *Divorce Act* or the *Domestic Violence Act* the court forms the opinion that a child of the parties to the proceedings has been abused, the court may suspend the proceedings and cause an investigation into the question whether the child is in need of care and protection as contemplated under section 150 (1). The court may appoint a social worker who will investigate whether the child is in need of care and protection, and the social worker must compile a report within 90 days[245] and submit it to the relevant provisional department of social development.[246] If the social worker is of the opinion that the child is not in need of care and protection, he or she may recommend family counselling, mediation, intervention or rehabilitation.[247] Where the social worker finds the child to be in need of care and protection, the court may make an order as provided under section 155 (6)[248] until it has made a made a decision on the matter within 14 days. The court

---

240 Sec 46 (1).
241 Sec 46 (1) (h).
242 An example of a condition would be visiting a child at specific times and in the presence of another person.
243 Sec 46 (1) (h) (x) and (xi).
244 Sec 46 (1) (h).
245 Sec 155 (2).
246 Sec 155 (3).
247 Sec 155 (4) (b).
248 Sec 155 (6) provides that he court may order that the child must remain in temporary safe care at the place where the child is kept; be transferred to another place in temporary care; remain with the person under whose control the child is; be put under the control of a family member or another relative of the child; or be placed in temporary safe care.

may also cause an automatic review of a child before compilation of the report by the social worker when abuse has been alleged.[249]

Finally, Section 110 provides for the reporting of child abuse, and read with section 153, any police official who receives reporting of child abuse may issue the alleged abuser with a written notice to the effect that he or she must restrain from being in contact with the child, or that he or she must leave the home where the child resides.

3.4 Conclusion

The purpose of this chapter was to explore the legislative protection of the best interests of children where spousal abuse is concerned. Although the protection of the best interests of children is mentioned in all the legislations discussed above, none of these legislations has specifically emphasised the protection of children from abusive parents where this abuse is extended to the child's custodian parent. Although Sec 7(1) (*m*) of the *Children's Act* lists family violence involving a child as a factor when determining the best interests of the child, there is no actual provision that emphasises the need to protect children from abusive parents, where this abuse is directed at the parent. Furthermore, the *Children's Act* compels parties to seek mediation before approaching the courts, but as has been discussed, mediation is not always a right forum to handle matters relating to spousal abuse., and even though the *Children's Act* provides exceptions for matters that cannot be taken for mediation, the spousal abuse, even where it is of a serious nature, has not been provided under the exceptions.[250] The application of these legislative acts and the *Constitution* by the courts in the protection of children from spousal abuse will be discussed in the following chapter.

---

249 C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208.
250 Bonthuys 2006 *STELL LR* 487.

Chapter four: Court's application of the best interests of the child in matters involving spousal abuse

4.1 Introduction

As has been discussed in the preceding chapter, South Africa has implemented legislation in pursuit for the protection of children against exposure to spousal abuse. This chapter explores the judicial application of the best interests of the child in determining contact of children with abusive parents in the context of the discussed legislation. Of interest is the implementation and the efficacy of the application of the legislation in enforcing and protecting children's best interests. There has not been much case law dealing specifically with the contact of a parent and a child where the parent is abusive towards the other parent, as a result only a few cases involving spousal abuse and parent-child contact will be discussed.

According to Schafer, the South African Courts in the past generally denied contact to a non-custodial parent "only in unusual and special cases".[251] In *Dunscombe v Willies*[252]For example, the court observed that:

> Not infrequently, but perhaps more frequently than has been thought in the past, it is sometimes in the interests of the children to deprive them completely of access to the non-custodian parent. It is sometimes so violently upsetting to the children to see both parents that they are better off with one parent only. These are admittedly extreme cases.

The above view by the court emphasises the courts' awareness that contact with a non-custodian parent may not always be in the best interests of the child. There appears however to be no reported cases where the courts have denied contact outright or all together. Moreover, an order refusing contact has never been regarded as final.[253] Courts would rather deny contact and leave an opportunity open for the non-custodian parent to apply again subject to a few conditions that the court will have set for him or her, such

---

251 Schafer *The law of access to children* 115.
252 *Dunscombe v Willies* 1982 (3) SA 311.
253 Schafer *The law of access to children* 118.

as undergoing counselling. In *Rosen v Havenga and Another,*[254] for example, the court had to decide whether a non-custodial parent (defendant) who was suffering from paranoid personality disorder should be allowed contact with his child. It was contended by the plaintiff, the mother of the child, that the defendant's inappropriate behaviour and adverse comments about the child's mother during his contact with the child had resulted in the child showing signs of emotional trauma, and that the defendant had failed to see the adverse effects of his behaviour on the child. The plaintiff, therefore, sought an order suspending the defendant's contact pending his undergoing psychological or psychiatric treatment.

The court considered the best interests of the child, observing that what is implicit in the principle is that the parents of the child have the responsibility of ensuring the child's well-being, as well as his or her physical and mental health, spiritual, social and moral development.[255] In the case of divorce or separation, however, the parents are to agree on a parenting plan, which can be overridden by the courts as the upper guardian of children.[256] The court held that there was insufficient evidence to show that the defendant suffered from a paranoid personality disorder. It did, however, find the defendant's inappropriate dialogue with the child, wherein he made adverse comments to the child about the child's mother, caused the child to struggle to deal with the conflict between his parents, and consequently caused him emotional trauma.[257] For this reason, the court concluded that it would be in the child's best interests to suspend the defendant's right of contact with him until he underwent psychological and psychiatrist assessment and treatment in the event that he was diagnosed with mental problems.[258] After the treatment, the defendant could apply for contact again and the court would reconsider.

Although the *Rosen* case above does not deal with spousal abuse, it nevertheless gives an account where courts have recently denied contact to a parent where such contact proved to be against the best interests of the child. There however appears to be no

---

254 *Rosen v Havenga and Another* [2006] 4 ALL SA 199, hereafter the *Rosen* case.
255 *Rosen* case para 10.
256 *Rosen* case para 10.
257 *Rosen* case para 26.
258 *Rosen* case para 40.

South African reported case involving spousal abuse where courts have denied contact to an abusive parent. In *Blumenow v Blumenow*[259] the respondent had issued summons for divorce proceedings together with an interim protection order against his wife in terms of section 5(2) of the *Domestic Violence Act*, alleging that his wife, the applicant, had "uncontrollable emotional outbursts coupled with her threat to kill herself and the minor children".[260] The applicant approached the courts two weeks later seeking to obtain the contact of their two minor children. A psychologist was called in to give recommendations which the parties agreed to abide, and the applicant was given limited contact with the children in the matrimonial home. The applicant continued to cooperate with the psychologists and attended counselling sessions, but the respondent refused to do anything the psychologist suggested. In addition, the respondent completely refused the applicant contact with the children on the grounds of the interim protection order.

The couple fought over the children to a point where the respondent assaulted the applicant and removed the children from the matrimonial home so that she would not have any contact with them. In spite of the assault, the respondent obtained a second interim order against the applicant, and she was granted contact only on the written permission of the respondent.[261] It appears from the facts that the respondent was abusive and controlling, and that he had misrepresented the true facts and covered up the assault he had inflicted on the applicant in his applications for the interim protection orders in an effort to continue to harass the applicant by ensuring that she could not have contact with the children.[262] Furthermore, the report from the psychologist revealed that the children had on many occasions indicated that they wanted to go to the applicant; that the applicant was not a physical danger to herself or the children, and that the respondent was traumatising and frustrating the children by denying them contact with the applicant.[263]

---

259 *Blumenow v Blumenow* [2008] JOL 211382, hereafter *Blumenow* case.
260 *Blumenow* case para 7 the couple had two children, a boy of 5 years and a girl of 2.
261 *Blumenow* case para 16.
262 *Blumenow* case para 18 and 19.
263 *Blumenow* case para 27.

The court held that the applicant should be granted care of the children. Nevertheless, despite the court being aware of the respondent's intention to alienate the children from the applicant, and the continued assaults of the respondent on the applicant in the presence of their minor children, the court still granted him contact with the children.[264] The court did not place any conditions on the contact, such as the respondent attending counselling or any reasonable condition that would ensure that the best interests of the children were adhered to. The court seemingly insisted that contact with the respondent was in the children's best interests despite his obviously ill-mannered behaviour towards his spouse and the negative impact thereof on the children.

South African courts have shown awareness of the disturbing prevalence of spousal abuse in South Africa,[265] and one would assume that the astounding negative impact that this violence has on children will influence the courts, as the upper guardians of children, to extend more protection to children against spousal abuse. However even with the legislation that has been promulgated, courts are quick to condemn spousal abuse, but they seem to be unable to apply these laws in the best interests of the children. Question is whether it is the laws or the application thereof that lacks efficiency in protecting children.

A significant case in point is *S v Engelbrecht.*[266] The case did not deal with parental contact but it demonstrates the courts' failure to apply the *Domestic Violence Act* to protect children exposed to spousal abuse. This was a criminal law case wherein Mrs. Engelbrecht was accused of the murder of her husband whom she was married to for twelve years, and the couple had a daughter who was 5 years old at the time of the murder. The accused pled self-defense.

The facts reveal that the accused had been a victim of physical and psychological spousal abuse throughout her marriage life. She had unsuccessfully tried to escape her abusive

---

264 *Blumenow* case para 32.

265 *S v Baloyi* 2000 (2) SA 425 (CC) para 11 and 12 the constitutional court remarked that spousal abuse causes immeasurable ripple effects on the society and family life. It further observed that domestic violence usually goes unpunished because of its hidden nature; see also *The Director of Public Prosecutions v Larry Burt Phillips* [2011] ZASCA 192 para 25.

266 *S v Engelbrecht* 2005 JOL 13771.

husband more than two times, she had laid assault charges against him numerous times, all which were either withdrawn or not accepted by the police, and when she finally managed to lay a charge of assault, her husband was never arrested. The accused had further attempted and failed to divorce the deceased three times due to the sheriff's failure to serve her husband with divorce summons 6 times, and the family advocate's failure to compile required documentation to decide care of their daughter. She had attempted and failed countless times to call 10111 but the police never came to her assistance. The evidence further showed that the deceased had on numerous occasions took out his anger for the accused on their child, and had shouted at her and beaten her whenever the child cried when she saw him abuse her mother. In 2002, on the night of the murder, the deceased had assaulted both the accused and their daughter and had threatened to kill the accused. The accused handcuffed and killed the deceased in his sleep.

It appears from the facts that Mrs. Engelbrecht had made attempts and failed on three occasions to obtain a protection order against her husband under section 5 (2) of the *Domestic Violence Act*. On the first two occasions, she was not informed of the court dates for the matter to be heard, on her third attempt, the magistrate ordered the couple to go to counselling, opining that they "they are big people and [should] perhaps [make] a clean break".[267] The magistrate in the *Engelbrecht* case completely disregarded the fact that there was a child amidst the violence. She denies Mr. Engelbrecht a protection order without having made any enquiries about the safety of the child, nor did she cause any investigations into the living conditions of Mrs. Engelbrecht and her child.

It is submitted that one particular reason that the *Domestic Violence Act* fails in the protection of the best interests of children concerned is that its application is not child-centred. Magistrate courts have no power to make direct or 'stand-alone' orders denying contact to an abusive spouse unless they are administered under a protection order.[268] In *Moola v Deen*[269] the applicant applied in terms of section 6 (2) of the *Domestic Violence*

---

267 *Engelbrecht* case para 90.
268 *Narodien V Andrews* [2002] JOL 9420 para 31 and 32.
269 *Moola v Deen* application number 570/2011 (unreported).

Act at the Klipriver magistrates court (Ladysmith) for the termination of her ex-husband's contact with their minor children on grounds that he was abusive and violent towards her, that he had threatened to assault her in the children's presence, and that his behaviour affected the children's performance at school. Although the court found that the applicant had not proven her allegations against the respondent, it nevertheless held no discretion under the *Domestic Violence Act* to make a contact order without an application for a protection order.[270]

This position fails to apply the best interests of the child as an 'overriding provision', especially considering the serious adverse effects of exposing a child to violence. A magistrate who hears the matter is often apprised of enough facts and information to determine whether or not contact with the abusive parent would be in the best interests of the child, and it is submitted that to place procedural aspects before the protection of a child against an abusive parent is prejudicial to the child's best interests. Felder rightly argues that because children often become the contact point through which abusers can access and continue to abuse the victimised parents, this provision may fail to fulfil the objective of the *Domestic Violence Act* to protect victims of domestic violence.[271]

This position further fails to consider that protection orders are not always effective as there appears to be no mechanism in place to ensure the enforcement of the protection orders, so much that it is easy for abusers to contravene it. In *Omar v Government of the Republic of South Africa and Others*[272] Mr. Omar had been issued a protection order under the *Domestic Violence Act* prohibiting him from abusing his ex-girlfriend, Ms Joosab and their children. Mr. Omar subsequently contravened the protection order and continued to harass Ms Joosab. In *S v Qhekisi*[273] the accused had contravened the same protection order two times and had continued to abuse the complainant. These cases demonstrate that without an order suspending or terminating the abuser's contact with

---

270 *Moola v Deen* application number 570/2011 (unreported) page 10.
271 Fedler 1995 *SALJ* 241 - 242.
272 *Omar v Government of the Republic of South Africa and Others* 2006 (2) SA 289**.**
273 *S v Qhekisi* 2015] ZAFSHC 182.

the child, protection orders cannot always afford enough protection to both the abused parent and the child.

It cannot be disputed that spousal abuse can be used as an excuse to abuse the legal system as a way to separate children from their non-custodial parents for adverse or selfish reasons. This practice has, however, often led some judges to dismiss cases without further investigating the allegations and failing to consider the children's best interests even in situations that could be potentially dangerous for them. The magistrate in the *Engelbrecht* case, for example, dismissed the couple to resolve their issues like grown-ups and make a 'clean break' or to go through counselling,[274] subsequently failing to consider the evidence of abuse, and completely ignoring that there was a child amidst the violence.

As it is the court's duty to ensure that the best interests of children are considered and protected in every matter that affects a child, and even in situations where courts opine that spousal abuse may not be proven, it follows that they must be held under an obligation to first cause an investigation into the situation of the child. In *Ex parte Van Niekerk and another: In re Van Niekerk v Van Niekerk*[275] for example, a mother of two, in an attempt to get the court to deny her ex-husband an order of contact to their two minor daughters, lied to the court alleging that the father was a violent person with a sick mind.[276] She further contended that the children had refused to visit their father for fear of his violent behaviour. The family advocate averred in her reports that the mother was unnecessarily negative towards the father, and that the father showed no signs of violence, nor did the children show any remorse or fear towards their father. To establish the truth of the mother's allegations, the court ordered that the couple's children be joined as parties in the application so that they would establish the truth or false of the allegations. The court therefore considered the best interests of the children by ordering

---

274 *Engelbrecht* case para 90.

275 *Ex parte Van Niekerk and another: In re Van Niekerk v Van Niekerk* [2005] JOL 14218, hereafter the *Van Niekerk* case.

276 *Van Niekerk* case Para 2.

that the children be given a chance to be heard, instead of arbitrarily dismissing the matter as was done by the magistrate in the *Engelbrecht* case.

A similar order was made in *Kahn v Kahn*[277] wherein the mother of a three-year-old girl had unreasonably refused contact to the father, which had been made an order of the court, basing herself on unfounded suspicions of a social worker that the child could have been sexually molested. There had been no suggestion or even evidence that the father had sexually molested the child. Instead of simply dismissing the allegations and granting contact, the court considered all other evidence including a report by another social worker who then subsequently denied the findings.[278] The court also considered a medical report of the child which indicated no physical signs of sexual abuse.[279] The court only made an informed decision after all the investigations into the allegations of abuse and held that the mother's refusal of contact with the father had been unreasonable. Both the *Van Niekerk* and *Kahn* cases illustrate the process that the courts are to take when considering contact applications involving allegations of spousal abuse, that to make informed decisions that take account of the best interests of the child requires that thorough investigations into the living conditions of the family must be undertaken, that the courts must consider the evidence brought forth by all parties concerned, and that the courts must cause further investigations into the allegations. Dismissing the matter without any further investigations may be detrimental to the safety of the children involved.

The right of the child to have his or her best interests taken as a paramount consideration means that where the welfare of the child is threatened, the courts must ensure that the application and interpretation of the law must be child-centered. That is, the child's best interests must be the overriding consideration. This position was espoused in the English case of *H (a child) (Contact: Domestic Violence), Ali v Hussain*[280] The issue that was to be decided by the court was the general approach that courts should take where the custodial parent's objection to contact is founded on spousal abuse on the part of the

---

277 *Kahn v Kahn* [2005] JOL 15142, hereafter the *Kahn* case.
278 *Kahn* case Para 6.
279 *Kahn* case Para 5.
280 *In Re L (A child) (Contact: Domestic Violence)* [2000] ALL ER 609.

parent seeking contact. The court held that there has to be a look into the circumstances of the violence, and where the court has found that domestic violence has taken place, it should not underestimate the potentially damaging effect of contact with a violent parent. The court further held that the attitude of the abusive parent towards his or her past violence, towards the other parent, and to his or her interest in changing his or her behaviour for the sake of the child must be considered. It is submitted that this approach is more considerate of the best interests of the child and should accordingly be adopted by the South African Courts.

4.2 Conclusion

The *Constitution* obligates the judiciary to make the best interests of the child a paramount consideration in its interpretation and application of the law in all matters affecting the child. It is noteworthy that there is not much case law on the application of the existing legislation such as the *Children's Act* in contact matters involving spousal abuse, so it is difficult to judge the judicial application of the act in these matters. The *Domestic Violence Act*, however, offers little consideration to the best interests of the child as it limits the scope of protection towards children. Also observed in the cases discussed above is that the allegations of abuse, and the evidence of a parent is often not considered when determining the best interests of the child. Courts tend to dismiss allegations of abuse and fail to cause any further investigations into the matter. It is submitted that this position does not in any way reflect positively on the courts and their use of the best interests of the child principle in matters involving spousal abuse.

Chapter five: Conclusions and recommendations

5.1 Introduction

Against the backdrop of the adverse effects of exposure to family violence and spousal abuse on children, the aim of this dissertation was to discuss the interpretation and application of the best interests of the child as a paramount consideration in cases of parental contact, where the parent is abusive to the custodial parent of the child. The aim is based on the premise that spousal abuse may not always end after divorce, and that children are likely to be exposed to more danger and violence, therefore parental contact with a child may not always be in the best interests of the child. This chapter is a brief summary of the chapters. The second part will give an overview of the interpretation of the best interests of the child in the protection of children from spousal abuse. Finally, a few recommendations that may help advance the protection of children will be made.

5.2 Outline of the chapters

The first chapter discussed the relationship between spousal abuse and contact in the context of the best interests of the child. What was highlighted was the effect of spousal abuse on children, and the resultant effect that exposing a child to an abusive parent would do to a child's overall development. The chapter introduced and interpreted the term 'contact' and 'care' as has been used in the *Children's Act* 2005.

Chapter 2 discussed the concept of the best interests of the child in a parent and child relationship. This chapter briefly explored the influence of international law towards the evolution of the best interests of the child standard in South Africa. The chapter further expounded on the interpretation of the best interests of the child as a constitutionally protected right. It was noted under chapter 2 that in the application of the best interests of a child standard, courts look at the surrounding circumstances that would otherwise affect the welfare of the child in order to propound the meaning that must be attached to the phrase in accordance with the surrounding circumstances of each case. It was also noted that whereas the paramountcy of the consideration of the best interests of the child does not place the best interests of the child in a hierarchically stronger position

than all other rights in the *Constitution*, the balancing of the best interests of the child with other competing rights means that the best interests of the child must nevertheless be an overriding consideration where a child's welfare may likely be prejudiced.[281]

Against the backdrop of the discussion of the balancing of the best interests of the child with the rights of the parents in parent-child relationships, chapter 3 assessed the legislative application of the best interests of the child in the context of family violence, particularly where a child's primary caretaker or parent is abused by the child's non-custodial parent. The aim of the chapter was to determine the protection of children against abuse that may occur after the divorce of the parent when the abusive parent has been afforded contact with the child. It is noted that international law recognises the psychological and physical harm that exposing a child to an abusive parent may cause on the child.[282]

The *Constitution* of South Africa protects children from abuse, including exposing a child to behaviour that may harm his or her psychological or emotional well-being,[283] and it provides that the provisions of the *Constitution* must be interpreted so as to give paramount consideration to the best interests of the child. Protection of children against the abusive behaviour of abusive parents is also provided under the *Domestic Violence Act,* which allows courts to refuse contact or place conditions on the contact of abusive spouses with the child who is in the care of the complainant.[284] It has been noted however that the *Domestic Violence Act* is not child-centred, that it aims at giving protection to the complainants of the direct abuse, and that it merely extends protection to the children by refusing contact with the abusive parent only when the contact is ancillary to the issuance of a protection order. Where the court does refuse contact to an abusive parent, it cannot make other orders regarding the other parental responsibilities and rights such

---

281 Robinson 2013 *THRHR* 415.

282 The *Hague Convention on the Civil Aspects of International Child Abduction* 1980 places an obligation on the courts to consider spousal abuse that may place a child at grave risk of psychological or physical harm in the application under the Convention, see *Sonderup v Tondelli* 2001 (1) SA 1175 at 1185. The committee on the rights of the child has also illustrated concern at the devastating impact of exposure of children to spousal abuse, and the CRC provides under art 9 (1) and (3) for the termination of parental-child contact where the contact would not be in the child's best interests.

283 Sec 1 of the C*onstitution*.

284 Sec 7 (6).

as guardianship, and the abusive parent can, therefore, use his other parental responsibilities and rights as a way of controlling the custodial parent.

The *Divorce Act* obligates courts to first consider the best interests of the child regarding the contact, care and guardianship of the child before issuing the decree of divorce.[285] The terms of the order regarding the contact of the child are to be in the best interests of the children concerned. The court may order an investigation to be conducted into the living conditions of the family by a family advocate in terms of the *Mediation in Certain Matters Act*. The court will have to consider the recommendations made by the family advocate. It was noted that because family advocates employ the services of many different experts such as psychiatrists, psychologists and social workers, the reports obtained by all these experts may be contradictory and may cause confusion as to what the best interests of the child would be in the circumstance.[286]

The *Mediation in Certain Matters Act* also provides that aside from conducting investigations into the living conditions of the family in divorce matters, the family advocate can mediate divorce matters where the matter is not litigated. It was noted, however, that mediation is not always an effective forum for matters involving spousal abuse and parental contact. The process of mediation often over-emphasises the importance of parent-child contact and weights it over other possibility adverse factors such as the effect of abusive behaviour on the parenting skills of the victimised parent.[287] Also, it was noted that because spousal abuse always asserts an imbalance of power between the spouses, the parties are not in equivalent bargaining power to reach a consensus regarding contact of the child.

Finally, the chapter briefly discusses the *Children's Act*, which provides for the application of the termination, suspension and restriction of a parent's responsibilities and rights by a co-holder.[288] It was noted that the *Children's Act* obligates courts to take into account the best interests of the child when considering the application, and it lists the exposure

---

285 Sec 6 (1) (a).
286 Bonthuys 2001 *SALJ* 330
287 Piper "Mediation and Vulnerable Parents" 120.
288 Sec 28 (1) to (3).

of the child to abuse or any harmful behaviour of the parent towards another person as a factor in consideration of the best interests of the child.[289] It was noted however that the *Children's Act* requires parties to seek mediation before approaching children's courts, and that mediation is not an appropriate forum in matters involving spousal abuse.[290]

Chapter 4 discusses the application of the legislation discussed in chapter 3 by the South Africa courts. It was noted that there is not much reported case law on matters regarding the question of parent-child contact in matters involving spousal abuse, and that the limited case law shows a reluctance of the courts to terminate completely the contact between an abusive parent and his or her child. It was noted, however, that courts have wholly suspended contact subject to conditions that are to be met by the parent seeking contact.[291] It was further noted that the existing legislature on spousal abuse limits magistrates' court's discretion to make independent orders regarding the contact of the child when granting protection orders to abused custodial parents, and that this does not serve the best interests of the child.

In conclusion, the growing knowledge of the risks involved when exposing a child to spousal abuse, and when granting contact of a child to an abusive parent requires decision makers to take great caution when determining contact orders in divorce matters that involve allegations and evidence of spousal abuse.

5.3 Recommendations

- To take the best interests of the child as a paramount consideration requires that a child-centred approach must be taken in matters that may be detrimental towards the welfare of the child. It is submitted that a child-centred approach demands that the interpretation of the existing laws must allow the courts to make independent considerations as to the best interests of the child instead of prejudicing the child's welfare for the sake of procedural aspects. It is also observed that the courts have had little or no training on matters dealing with

---

289 Sec 7 (1).
290 Bonthuys 2006 *STELL LR* 487.
291 *Rosen v Havenga and another* [2006] 4 ALL SA 19.

spousal abuse and parent and child contact, and this makes it rather difficult to apply the law to be most effective in the protection of children. Judges who do not have any understanding about the nature and effects of spousal abuse on children must not be given so much discretion to make decisions about the best interests of children concerned without any substantive or procedural guidelines. More awareness to the unique problems presented by spousal abuse and parental contact must be conducted in order to raise the consciousness of all role players participating in the judicial proceedings.

- There has to be set substantive and procedural guidelines on how the judiciary must handle the application of the termination, suspension or restriction of a parent's contact, and how they must interpret the best interests of the child where there have been allegations of spousal abuse. The lack of substantive guidelines results in the dismissal by the courts of such matters without the courts having satisfied themselves of the falsity of the allegations brought forth by the applicant, which practice places many children in physical, psychological and emotional danger.

- The *Domestic Violence Act* has to be re-evaluated to give magistrates courts the discretion to consider stand-alone applications of parent and child contact even in the absence of an application for protection order, as magistrate's courts are at a better position to determine the best interests of the child and to afford temporary contact orders where there are allegations of abuse. Also, there should be a magisterial discretion to issue temporary guardianship and maintenance orders in conjunction with protection and contact orders, so as to abate the use of these parental responsibilities and rights by abusive spouses as means of continued abuse on custodial parents.

- The violence of a parent must be made a determining factor in consideration of the best interests of the child. The quality of the relationships, both between the parent and the child, and between the custodial parent and the parent seeking contact are important in the determination of post-divorce parent and child contact arrangements when allegations and evidence of spousal abuse have been proven.

- Finally, divorce matters involving allegations of abuse must not be resolved through mediation. Abuse demands the intervention of the law, not discussion and compromise between the abusive spouse and the victimised custodial parent about what would be in the best interests of the child. Moreover, child contact disputes require an interventionist approach, and because mediators are generally supposed to be neutral and unbiased in their approach, only the courts, acting as upper guardians of children, can determine the best interests of children caught up in family violence.

BIBLIOGRAPHY

Literature

Barrie 2011 *Tydskrif vir die Suid-Afrikaanse Reg*

Barrie G.N "The best interests of the child: Lessons from the first decade of the new millennium" 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 126 - 134

Bekink 2012 *PELJ*

Bekink M "Child Divorce a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents" 2012 *PELJ* 178 – 212

Bendall 2010 *Women's Studies*

Bendall C "The domestic violence epidemic in South Africa: legal and practical remedies" 2010 *Women's Studies* 100 – 118

Bensely *et al* 2013 *American Journal of Preventive Medicine*

Bensely L *et al* "Childhood Family Violence History and Women's Risk for Intimate Partner Violence and Poor Health**"** 2013 *American Journal of Preventive Medicine* 38 - 44

Bonthuys 1999 *AJHR*

Bonthuys E "Spoiling the child: domestic violence and the interests of children" 1999 *AJHR* 308 - 327

Bonthuys 2006 *IJLPF*

Bonthuys E "The Best Interests of Children in the South African Constitution" 2006 *IJLPF* 23 -43

Bonthuys 2006 *STELL LR*

Bonthuys E 2006 "Parental Rights and Responsibilities in the Children's Bill 70d of 2003" 2006 *STELL LR* 482 - 493

Burman, Derman and Swanepoel 2000 *SAJHR*

Burman S, Derman L, Swanepoel L "Only for the Wealthy - Assessing the Future for Children of Divorce" 2000 *SAJHR 535 - 557*

Bosman & Van Zyl "Children, young persons and their parents"

Bosman FJ & Van Zyl GJ "children, young persons and their parents" in Robinson JA *The law of children and young persons in South Africa* (Butterworths Durban 1997) 49 – 72

Browne & Hamilton-Giachritsis "Child abuse: defining, understanding and intervening"

Browne k & Hamilton-Giachritsis C "Child abuse: defining, understanding and intervening" in Wilson and James *The Child Protection Handbook* 3rd ed (Elsevier Limited UK 2007) 49 - 68

Burman 2005-2006 *FLQR*

Burman S "Allocating Parental Rights and Responsibilities in South Africa" 2005 - 2006 *FLQR* 429 - 439

Clark 2002 *CILSA*

Clark B "From rights to responsibilities? An overview of recent developments relating to the parent child relationship in South African common law" 2002 *CILSA* 216 – 235

Clark 1996 *SAJHR*

Clark B "Cold Comfort? A Commentary on the Prevention of Family Violence Act" 1996 *SAJHR* 587 - 604

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *Bill of Rights Handbook* 6th ed (Juta Cape town 2013)

Dias 2014 *Best Interests of the Child Principle in the Context of Parent Separation or Divorce*

Dias N *Best Interests of the Child Principle in the Context of Parent Separation or Divorce: As Conceptualised by the Community* (Degree Dissertation Edith Cowen University 2014)

Dausab "The best interests of the child"

Dausab Y "The best interests of the child" in Ruppel OC (eds) *Children's rights in Namibia* (Macmillan Education Namibia, Namibia 2009) 145 - 158

Ekundayo 2015 *IJHSS*

Ekundayo O "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" 2015 *IJHSS* 143 – 158

Felder 1995 *SALJ*

Felder J "Lawyering domestic violence through the Prevention of Family Violence Act 1993: An evaluation after a year in operation" 1995 *SALJ* 231 – 250

Friedman and Pantazis "Children's Rights"

Friedman A. and Pantazis A. "Children's Rights" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman *Constitutional Law of South Africa* (South African Law Journal 2nd ed (Juta Cape Town 2005) 40 – 47

Graham-Bermann "The impact of woman abuse on children's social development: Research and theoretical perspectives"

Graham-Bermann SA. "The impact of woman abuse on children's social development: Research and theoretical perspectives" in Holden GW, Geffner R, Jouriles E, (eds) *Children exposed to marital violence: Theory, research, and applied issues* (American Psychological Association Washington DC 1998) 21–54

Hammarberg 1990 *Human Rights Quarterly*

Hammarberg T 1990 "The UN Convention on the Rights of the Child – and how to make it work" *Human Rights Quarterly* 97–105

Hart 2006 *Children Exposed to Domestic Violence*

Hart A. *Children Exposed to Domestic Violence: Whose 'Best Interests' is it in the Family Courts?* (Degree of Doctor of Philosophy dissertation University of South Australia 2006)

Levendosky and Graham-Bermann 2001 *Journal of Family Violence*

Levendosky A and Graham-Bermann S "Parenting in Battered Women: The Effects of Domestic Violence on Women and their Children" 2001 *Journal of Family Violence* 171 - 192

Johnson, Saccuzzo & Koen 2005 *Violence Against Women*

Johnson NE, Saccuzzo DP & Koen W "Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a failure to Protect" 2005 *Violence Against Women* 1022 – 1053

Kaye 1999 *Child and Family Law Quarterly*

Kaye M "Domestic violence, residence and contact" 1996 *Child and Family Law Quarterly* 285 - 296

Kelly 1994 *Children and Divorce*

Kelly J "The determination of child custody" 1994 *Children and Divorce* 121-142

Kruger 2001 *THRHR*

Kruger JM "Emigration by a custodian parent after divorce" 2001 *THRHR* 452 - 458

Kushner 2006 *Journal of divorce and Remarriage*

Kushner M "Whose best interests: The ruling or the children" 2006 *Journal of Divorce and Remarriage* 17-29.

Mohaupt & Duckert 2016 *Nordic Psychology*

Mohaupt H & Duckert F "Parental reflective functioning in fathers who use intimate partner violence: Findings from a Norwegian clinical sample" 2016 *Nordic Psychology* 1 – 15

Morei 2014 *Mediterranean Journal of Social Sciences*

Morei N "Domestic Violence in South Africa: Women under siege" 2014 *Mediterranean Journal of Social Sciences* 928 - 940

Pagelow 1990 *Mediation Quarterly*

Pagelow M "Effects of domestic violence on children & their consequences for custody & visitation agreements" 1990 *Mediation Quarterly* 7 -14

Parkinson 1983 *Family Law*

Parkinson L 1983 "Conciliation: Pros and Cons" Family Law 22 – 25

Piper "Mediation and vulnerable parents"

Piper C "Mediation and vulnerable parents" in Herring J & Wallbank J (eds) *Vulnerabilities, Care and Family Law* (Routledge Oxon 2014) 115 - 137

Pruett et al 2000 *Journal of Divorce & Remarriage*

Pruett, M.K., Hogan Bruen, K., & Jackson, T. "The best interests of the child: Parents' versus attorneys' perspectives" 2000 *Journal of Divorce & Remarriage* 47-63

Reihing 1999 *Fam. Con. Courts Rev.*

Reihing KM "Protecting victims of domestic violence and their children after divorce" 1999 *Fam. Con. Courts Rev. 393* -410

Robinson 2003 *THRHR*

Robinson JA "On the sharpest horns of dilemma: what does the court do now? Re a: (Children) (Conjoined Twins) [2000] 4 All ER 961" 2003 *THRHR* 131 - 145

Robinson 2006 *De Jure*

Robinson JA "Parents Refusing their Children Medical Attention on Grounds of Religion: A Brief Constitutional Perspective" 2006 *De Jure* 610 - 619

Robinson 2013 *THRHR*

Robinson JA "Reflections on the Conflict of Interests of Children and Parents" 2013 *THRHR* 400-420

Robinson 2002 *STELL LR*

Robinson J "An introduction to the international law on the rights of the child relating to the parent-child relationship" 2002 *STELL LR* 308 – 320

Robinson and Parkison 1985 *Journal of Family Therapy*

Robinson M and Parkison L A family systems approach to conciliation in separation and divorce 1985 *Journal of Family Therapy* 357 – 377

Saunders "twenty-nine child homicides"

Saunders H. "twenty-nine child homicides" in 2004 Women's Aid Federation of England Report 4 - 37

Schafer *The law of access to children*

Schafer L *The law of access to children* (Butterworths Durban 1993)

Schafer *Child Law in South Africa Domestic and International Perspectives*

Schafer L *Child Law in South Africa Domestic and International Perspectives* (LexisNexis Durban 2011)

Skelton "Parental Responsibilities and Rights"

Skelton A "Parental Responsibilities and Rights" in Boezaart T *Child Law in South Africa* (Juta Durban 2009) 62 - 92

Stiles 1984 *Prob L.J*

Stiles J "Nineteenth-Century Child Custody Reform: Maternal Authority and the development of the 'best interests of the child' Standard" 1984 *Prob L. J* 5 - 32

Susser 1999 *Fordham Urban Law Journal*

Susser K "Weighing the Domestic Violence Factor in Custody Cases: Tipping The Scales In Favor Of Protecting Victims And Their Children" 1999 *Fordham Urban Law Journal* 875 – 907

Toros, Valma and Tiko 2014 *Journal of Social Welfare and Human Rights*

Toros K, Valma K and Tiko A "Interpretation of the Principle of 'Best Interests of the Child' in the Context of Inter-Parental Child Custody Disputes: Case of Estonia" 2014 *Journal of Social Welfare and Human Rights* 289 – 303

Van der Hoven 2001 *Acta Criminologica*

Van der Hoven A. "Domestic Violence in South Africa" 2001 *Acta Criminologica* 2001 13 - 25

Van Zyl *Alternative dispute resolution in the best interests of the child*

Van Zyl LJ *Alternative Dispute Resolution in the Best Interests of the Child* (PhD Dissertation Rhodes University 1994)

Van Zyl *Divorce Mediation and the Best Interests of the Child*

Van Zyl LJ *Divorce Mediation and the Best Interests of the Child* (HSRC Publishers, Pretoria 1997)

Viljoen "The African Charter on the Rights and Welfare of the Child"

Viljoen F "The African Charter on the Rights and Welfare of the Child" in Davel CJ (ed) *Introduction to child law in South Africa* (Juta Cape Town 2000) 215 – 231

Visser 2007 *J Contemp Roman Dutch L*

Visser H. "Some Ideas on the 'Best Interests of a Child' Principle in the Context of Public Schooling" 2007 *J Contemp. Roman Dutch L* 459 – 487

Walsh 2010 – 2011 *MSJIL*

Walsh T "Advancing the interests of South Africa's children: A Look at the Best Interests of a child in South Africa's Children's" Act 2010- 2011 *MSJIL* 202 - 249

Zorza 1995 *FLQR*

Zorza J "Recognising and protecting the confidentiality needs of battered women" 1995 *FLQR* 273-311

Case law

B v B 2008 (4) SA 535

B v S 1995 (3) SA 571

Blumenow v Blumenow [2008] JOL 211382

C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208

Calitz v Calitz 1939 AD 56

Central Authority for the Republic of South Africa and Another v B 2012 (2) SA 296

Chapysky v. Wood 26 kan 650 1981

Chapysky v. Wood 26 kan 650 1981

Christian Education SA v Minister of Education 2000 (4) SA 757

Cronje v Cronje 1907 TS 871

De Reuck v Director of Public Prosecution WLD 2004 1 SA 406

Dunscombe v Willies 1982 (3) SA 311

Ex parte Van Niekerk and another: In re Van Niekerk v Van Niekerk [2005] JOL 14218

F v F 2006 3 SA 42

Ferreira v Levine NO 1996 1 SA 984

Fletcher v Fletcher 1907 TS 871

Fletcher v Fletcher 1948 (1) SA 130

French v French 1971 (4) SA 298

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402

Grootboom v Oostenberg Municipality 2001 (1) SA 46 para 70

Hay v B 2003 (3) SA 492

In Re L (A child) (Contact: Domestic Violence) [2000] ALL ER 609

In re Marriage of Condon 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998)

Jooste v Botha (2000) (2) SA 199

Kahn v Kahn [2005] JOL 15142

Katzenellebogen v Katzenellebogen and Joseph 1947 (2) SA 528

Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys 2003 4 SA 160

McCall v McCall 1994 (3) SA 201

Minister of Police v Mboweni 2014 (6) SA 256

Minister of Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC)

Moola v Deen application number 570/2011 (unreported)

Narodien v Andrews [2002] JOL 9420

Omar v Government of the Republic of South Africa and Others 2006 (2) SA 289

P v P 2007 (5) SA 94

Pennello v Pennello [2003] 1 All SA 716 at 727

Rosen v Havenga and Another [2006] 4 ALL SA 19

Rudolph v Van Zyl 2003 JOL 10893

S v Baloyi 2000 (2) SA 425

S v Engelbrecht 2005 JOL 13771

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232

S v Qhekisi 2015] ZAFSHC 182

Smith v Smith 2001 (3) SA 845 at 850

Sonderup v Tondelli 2001 (1) SA 1171

Van Deijl v Van Deijl 1966 (4) SA 206.

Van der Linde v Van der Linde 1996 3 SA 509 and *V v V* 1998 4 SA 169 at 176 and 177

Van Rooyen v Wemer 1891 9SC 425

Walsh v Walsh (F.3d 204)

International instruments

African Charter on the Rights and Welfare of the Child 1990

Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979

Convention on the Rights of the Child 1989

Declaration on the Rights of the Child 1959

Hague Convention on the Civil Aspects of International Child Abduction 1980

UN Committee on the Rights of the Child General Comment 13 2011

UN Committee on the Rights of the Child General Comment 14 2013

Legislation

Children's Act 38 of 2005

Constitution of the Republic of South Africa 1996

Divorce Act 70 of 1979

Domestic Violence Act 116 of 1998

Mediations in Certain Divorce Matters Act 1987

South African Law Reform Commission issue paper 31 on *Family Dispute Resolution: Care of and Contact with Children* 2015

Internet sources

Anon 1998 http://www.divorcesource.com/research/dl/domestic/98mar42.shtml

Anon 1998 *Domestic violence as a factor in distributing property upon divorce* http://www.divorcesource.com/research/dl/domestic/98mar42.shtml accessed 1 November 2016)

Molosankwe 2013 http://www.iol.co.za/news/crime-courts/alberton-dads-deadly-revenge-1549228

Molosankwe B 2013 *Alberton dad's deadly revenge* http://www.iol.co.za/news/crime-courts/alberton-dads-deadly-revenge-1549228 accessed 20 October 2016

Bix 2008 https://ssrn.com/abstract=1092544

Bix B 2008 *Best Interests of the Child* https://ssrn.com/abstract=1092544 accessed 18 July 2016

Lepule 2016 http://www.iol.co.za/news/crime-courts/cop-kills-wife-himself-after-divorce-finalised-2034220

Lepule T 2016 *Cop kills wife, himself after divorce finalised* http://www.iol.co.za/news/crime-courts/cop-kills-wife-himself-after-divorce-finalised-2034220 accessed 20 October 2016

Maddy Coy *et al* 2012 rightsofwomen.org.uk/wp-content/.../10/Picking_Up_the_Pieces_Report-2012l.pdf

Maddy Coy *et al* 2012 *Picking up the pieces* Rights of Women Report rightsofwomen.org.uk/wp-content/.../10/Picking_Up_the_Pieces_Report-2012l.pdf accessed 18 October 2016

Preller 2012 http://voices.news24.com/bertus-preller/2012/01/top-10-reasons-for-divorce-in-south-africa

Preller B 2012 *the top 10 reasons for divorce in South Africa* http://voices.news24.com/bertus-preller/2012/01/top-10-reasons-for-divorce-in-south-africa accessed 20 October 2016

Vetten 2014 https://www.issafrica.org/uploads/PolBrief71.pdf

Vetten L 2014 *Domestic Violence in South Africa* https://www.issafrica.org/uploads/PolBrief71.pdf accessed 16 October 2016