

**The role of intervention programs under  
the Children's Act 38 of 2005 in preventing the  
removal of a child from the family environment**

**Smit Z**

 **orcid.org/0000-0002-5634-9717**

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Supervisor: Zaida Essop

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## **DECLARATION**

I, Zandrie Smit , with identity number 9803040083089 and student number 29033209, hereby declare that this dissertation titled 'The role of intervention programmes under the Children's Act 38 of 2005 in preventing the removal of a child from the family environment' is my own original work. The dissertation is hereby humbly submitted to the North-West University (NWU) in partial fulfillment of the requirements for the degree LLM in International Child Law. This dissertation has not been submitted anywhere before.

\_\_Zandrie Smit\_\_

Date: November 2023

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*Zandrie Smit*

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## **ABSTRACT**

Title: The role of intervention programmes under the Children's Act 38 of 2005 in preventing the removal of a child from the family.

In terms of several international instruments and domestic legislation, each child has the right to be cared for by its family and to grow up within a family environment. The consequence of abusing or denying this right is removal of the child from the family. Due to the severity of this action, international instruments and regional legislation provide for prevention and early intervention programmes aimed at keeping the child within the family environment. These programmes require a social worker to evaluate the functioning of the family and make further recommendations according to the best interests of the child.

This dissertation investigated whether social workers implement the prevention and early intervention programmes correctly to prevent the removal of children from the family environment. The study further examined several case law studies to analyse the possible effects of these prevention and early intervention programmes when not implemented within the best interests of the child.

The chosen research methodology for this study entails a thorough examination of primary and secondary legal sources through desktop analysis. The investigation will encompass an exploration of both international and domestic law, inclusive of case law, alongside scholarly literature. The writer applied findings of several literature studies, case law studies, legislation, international instruments, and law journals in her study.

**Key terms:** best interests of the child, care and protection, family, family environment, investigation report, international instruments, prevention and early intervention programme, removal, social worker.

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## ***LIST OF ABBREVIATIONS***

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CCW	Chatsworth Child Welfare
CRC	Convention on the Rights of the Child
NGO	Non-Governmental Organization
PELJ	Potchefstroom Electronic Law Journal

## **Chapter 1 Introduction**

Children are amongst the most vulnerable groups in society, most often in need of care and protection.<sup>1</sup> To ensure that children are protected, there are legislative measures that deal specifically with the rights of children.<sup>2</sup> International and regional law has recognized the rights of children from as early as 1924.<sup>3</sup> The rights of children are comprehensively defined in instruments such as the *Convention on the Rights of the Child*<sup>4</sup> (hereafter referred to as the *CRC*) and the *African Charter on the Rights and Welfare of the Child*<sup>5</sup> (hereafter referred to as the *ACRWC*). The rights of children are protected in the *Constitution of the Republic of South Africa, 1996*<sup>6</sup> (hereafter referred to as the *Constitution*) and in the *Children's Act 38 of 2005*<sup>7</sup> (hereafter the *Children's Act*).

These international instruments and national legislation make provision for the rights of the child to be cared for by the family.<sup>8</sup> Family, in a general sense, refers to people who are related by means of birth, adoption, marriage, or a civil union.<sup>9</sup> It is a natural and fundamental unit of society that is entitled to protection by society and the state.<sup>10</sup> In South Africa, a family mostly consists of parents and their children, as they are related by blood (kinship), adoption, foster care or ties of marriage.<sup>11</sup> For purposes of this research, the term family is used when referring to the child as well as the parents, caregivers or guardians of the child.

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<sup>1</sup> Dutschke & Monson Children's Constitutional Right to Social Services 23.

<sup>2</sup> Children's Act 38 of 2005; Constitution, 1996.

<sup>3</sup> Degol & Dinku Notes on the Principle "Best Interest of the Child": Meaning, History and its place under Ethiopian law 322.

<sup>4</sup> Convention on the Rights of the Child (1989).

<sup>5</sup> African Charter on the Rights and Welfare of the Child (1999).

<sup>6</sup> Constitution of the Republic of South Africa, 1996.

<sup>7</sup> *Children's Act 38 of 2005*.

<sup>8</sup> Preamble of the *CRC*, Article 9 of the *ACRWC*, 39(1) of the *Constitution*, preamble of the *Children's Act*.

<sup>9</sup> Heaton and Kruger *South African Family Law* 3.

<sup>10</sup> Article 16(3) of the Universal Declaration of Human Rights 1948.

<sup>11</sup> GG 44799 of 2 July 2021.

With the right to family care, comes the risk of removal of the child from the family.<sup>12</sup> As stated in Section 152 of the *Children's Act* the removal of the child from the family should be the last resort.<sup>13</sup> The risk of removal of the child from the family is mostly due to neglect and/ or other factors.<sup>14</sup> Neglect may be the result of poverty and the family's inability to provide in the fundamental needs and physical care of the child, including clothing, food, shelter, and personal safety.<sup>15</sup> Sandberg<sup>16</sup> reiterates that poverty makes it difficult for parents to take proper care of their children. She explains that poverty forces parents to seek employment away from home, which may cause children to be left behind without proper care, causing emotional and psychological neglect to the child.<sup>17</sup>

Eamon<sup>18</sup> states that poverty is generally the main reason behind the abuse and neglect of children. The inability of parents to provide for the needs of their children causes feelings of hopelessness and stress, which may give rise to abuse and neglect, culminating in the removal of the child from the family.<sup>19</sup>

However, the international and regional instruments/treaties referred to earlier provides for intervention programmes that deal specifically with the risk of the child being removed from the family environment.<sup>20</sup> These programmes require an evaluation of the family situation by a social worker who then makes a recommendation about the possible removal of the child.<sup>21</sup> Although the final decision rests with the Children's Court, the report by the social worker plays a

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<sup>12</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 20.

<sup>13</sup> Section 152 of the *Children's Act*.

<sup>14</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 20.

<sup>15</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 20.

<sup>16</sup> Sandberg Children's Right to Protection Under the CRC 25.

<sup>17</sup> Sandberg Children's Right to Protection Under the CRC 25.

<sup>18</sup> Eamon Poverty and placement outcomes of Intensive Family Preservation Services 354.

<sup>19</sup> Eamon Poverty and placement outcomes of Intensive Family Preservation Services 354.

<sup>20</sup> Article 9(2) of the *CRC*, Article 19(1) of the *ACRWC* and Chapter 8 of the *Children's Act*.

<sup>21</sup> Section 157(1) of the *Children's Act*.

significant role in informing the court's decision.<sup>22</sup> Social workers are therefore the primary facilitators in the processes of statutory removal *Fletcher v Fletcher 1948 (1) SA 130 (A)* was the first case in South Africa to deal with the best interests of the child, and the court ruled that the best-interest criterion should at all times be the main consideration when dealing with the rights of children.<sup>23</sup> Henceforth the best-interest criterion was incorporated in international and regional instruments and legislation.<sup>24</sup>

The *CRC* has played a vital role in the implementation and protection of children's rights, as it is the most universally accepted human rights treaty.<sup>25</sup> The *CRC* was adopted by General Assembly Resolution 44/25 on November 1989.<sup>26</sup> South Africa signed the *CRC* on 29 June 1993, and ratified the same instrument on 16 June 1995.<sup>27</sup> Article 1 of the *CRC* states that child refers to every human being below the age of eighteen years unless - under the law applicable to the child-, majority is attained earlier.<sup>28</sup> The *CRC* acknowledges the importance of a family as it states in its preamble that a family is the fundamental group of society and the natural environment for the growth and well-being of all its members.<sup>29</sup> The *CRC* acknowledges that all children, for the full and harmonious development of his or her personality, must grow up in a family environment and in an atmosphere of happiness, love and understanding.<sup>30</sup>

In terms of Article 3 of the *CRC*, State Parties to this treaty undertake to ensure each child's protection and care according to his or her well-being.<sup>31</sup> The *CRC* specifically deals with the protection of children and their families, as it states in Article 7(1) that there is a duty upon State Parties to undertake to respect the right

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<sup>22</sup> Section 15(5) of the *Children's Act*.

<sup>23</sup> *Fletcher v Fletcher* 1948 (1) SA 130 (A).

<sup>24</sup> Article 9(1) of the *CRC*; Article 19(1) of the *ACRWC*; Section 28(1) of the *Constitution* and Section 142(1) of the *Children's Act*.

<sup>25</sup> Pretorius Intercountry adoptions and the best interests of the child 46.

<sup>26</sup> Preamble of the *CRC*.

<sup>27</sup> Boezaart 2011 THRHR 265-267.

<sup>28</sup> Article 1 of the *CRC*.

<sup>29</sup> Preamble of the *CRC*.

<sup>30</sup> Preamble of the *CRC*.

<sup>31</sup> Article 3(2) of the *CRC*.

of the child to a family and family relations.<sup>32</sup> In terms of Article 9(1) of the *CRC*, the separation of a child from his or her family must be the last consideration and should only happen when such separation is within the child's best interests.<sup>33</sup> The *CRC* specifically states in Article 3(1) that the best interest of the child should be the primary consideration in all matters when dealing with children.<sup>34</sup>

Where the risk of separation from the family occurs, the *CRC* makes provision for the intervention programme in Article 9(1)<sup>35</sup> which is put in place to determine whether such a separation will be in the best interest of the child or not. As seen in Article 9(2) of the *CRC*, social workers shall be given the opportunity to participate in the family proceedings and to make their views known.<sup>36</sup>

The *ACRWC* was adopted in South Africa on the 1<sup>st</sup> of June 1992<sup>37</sup> and was ratified on the 9<sup>th</sup> of July 1996.<sup>38</sup> Article 18 of the *ACRWC* deals with the "Protection of the Family" by which it also recognizes in subsection (1) that the family is the natural unit and basis of the society.<sup>39</sup> Article 19 of the *ACRWC* deals with the right of a child to reside with and to be cared for by his or her family and states in subsection (1) that no child may be separated from his or her family unless it is determined by a judicial authority that such separation will be within the child's best interests.<sup>40</sup>

South Africa has ratified both the *CRC* and the *ACRWC*.<sup>41</sup> By this ratification, South Africa binds itself to the obligations, goals, and standards of the *CRC* and *ACRWC*.<sup>42</sup> South Africa must thus incorporate the *CRC* and the *ACRWC* within its national law, which is the *Constitution*. The *Constitution* is the highest law in South Africa.<sup>43</sup> In

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<sup>32</sup> Article 7(1) of the *CRC*.

<sup>33</sup> Article 9(1) of the *CRC*.

<sup>34</sup> Article 9(1) of the *CRC*.

<sup>35</sup> Article 9(1) of the *CRC*.

<sup>36</sup> Article 9(2) of the *CRC*.

<sup>37</sup> The International Journal of Children's Rights 71.

<sup>38</sup> Preamble of the *ACRWC*.

<sup>39</sup> Article 18(1) of the *ACRWC*.

<sup>40</sup> Article 19(1) of the *ACRWC*.

<sup>41</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 332.

<sup>42</sup> Cornell Law School Ratify.

<sup>43</sup> Preamble of the *Constitution*.

terms of Section 39(1) of the *Constitution*, a court, tribunal, or forum must consider the values of international law and may consider foreign law.<sup>44</sup> South Africa is obligatory in terms Section 39(1) of the *Constitution* to provide for positive steps to ensure the protection of children and their families in South Africa.<sup>45</sup>

To harmonise and recognise the commitments contained in the *CRC* and *ACRWC*, the government of South Africa enshrined children's rights in its *Constitution* in Section 28.<sup>46</sup> Section 28(1)(b) of the *Constitution* stipulates that every child has the right to family care.<sup>47</sup> The *Constitution* also deals with the best interest of the child in Section 28(2), which states that decisive action be taken to act in the best interest of the child and that the best interest of the child is of paramount importance in all matters concerning the child.<sup>48</sup>

After the implementation of the *Constitution*, the *Children's Act* was enacted on the 1<sup>st</sup> of April 2010<sup>49</sup> to give effect to the rights contained in the *Constitution*<sup>50</sup> and protect the rights of all children in South Africa.<sup>51</sup> The *Children's Act* states in its preamble that children should be afforded with the necessary protection and assistance for the full and harmonious development of his or her personality.<sup>52</sup> The preamble of the *Children's Act* also makes it clear children should grow up in a family environment in an atmosphere of happiness, love and understanding.<sup>53</sup> With the risk of removal from the family, the Act provides for intervention programmes and risk assessments to ensure that should a removal take place, it would be in the best interest of the child.<sup>54</sup>

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<sup>44</sup> Section 39(1) of the *Constitution*.

<sup>45</sup> Section 39(1) of the *Constitution*.

<sup>46</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 332.

<sup>47</sup> Section 28(1)(b) of the *Constitution*.

<sup>48</sup> Section 28 (2) of the *Constitution*.

<sup>49</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 332.

<sup>50</sup> Boezaart Child Law in South Africa 226.

<sup>51</sup> Preamble of the *Children's Act*.

<sup>52</sup> Preamble of the *Children's Act*.

<sup>53</sup> Preamble of the *Children's Act*.

<sup>54</sup> Section 142(1)(c) of the *Children's Act*.

The foundation for the intervention programme is set out in Chapter 8 of the *Children's Act* in South Africa. Section 143(1)(b) states that the aim of the intervention programme is to protect and promote the well-being of children in the country.<sup>55</sup> Section 144(1)(i) provides that prevention and early intervention programmes focusses on avoiding the removal of a child from the family environment.<sup>56</sup> The main objective of these programmes is to identify and intervene in cases of child abuse, neglect, and exploitation, and to provide support and care to families in need.<sup>57</sup> The Act recognizes the importance of intervention is addressing the root causes of child abuse and neglect and to prevent its re-occurrence.<sup>58</sup> The intervention programmes in South Africa are based on a multi-disciplinary approach, which involves the collaboration of social workers, healthcare providers, educators and law enforcement agencies.<sup>59</sup>

This approach allows for a comprehensive and coordinated response to cases of child abuse, neglect, and exploitation, which might necessitate removal of a child from his or her family.<sup>60</sup> The aim of the intervention programmes is to strengthen the coping skills used by the family, to strengthen the functioning of the family and to seek solutions to their problems.<sup>61</sup> It is furthermore aimed at enhancing the capacity of the family to take care of their child and to prevent child maltreatment or neglect.<sup>62</sup>

One of the key components of the intervention programmes is the establishment of child protection committees.<sup>63</sup> These committees are tasked with ensuring the effective implementation of the *Children's Act* and promoting the rights of children.<sup>64</sup> They also play a critical role in the identification and reporting of child abuse and

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<sup>55</sup> Section 143(1)(b) of the *Children's Act*.

<sup>56</sup> Section 144(1)(f) of the *Children's Act*.

<sup>57</sup> Section 144(f) of the *Children's Act*.

<sup>58</sup> Section 144(g) of the *Children's Act*.

<sup>59</sup> Section 147(1) of the *Children's Act*.

<sup>60</sup> Section 144(i) of the *Children's Act*.

<sup>61</sup> Strydom 435.

<sup>62</sup> Nhedz & Makofane The experiences of social workers in the provision of family preservation services 335.

<sup>63</sup> Section 212(p)(iv) of the *Children's Act*.

<sup>64</sup> Section 212(w)(v) of the *Children's Act*.

neglect cases, and in the provision of support and care to families in need.<sup>65</sup> The intervention programmes also require that designated social workers frequently make decisions that have a significant impact on children and their families.<sup>66</sup> These social workers are entrusted, both morally and legally, to always act within the best interest of children.<sup>67</sup>

Child Protection Services is a critical intervention programme under the *Children's Act*.<sup>68</sup> Social workers are responsible for investigating and assessing cases of child abuse, neglect, and exploitation.<sup>69</sup> Child Protection Services also provides immediate intervention and protection for children who are at risk of harm.<sup>70</sup> This programme is aimed at preventing issues from escalating and providing a safe environment for children with their families.<sup>71</sup>

Family Preservation and Reunification Services aim to prevent children from being placed in permanent alternative care by keeping families together.<sup>72</sup> The programmes provide counselling, support, and other services to families in crisis to help them overcome challenges and improve parenting skills.<sup>73</sup> This programme is critical in ensuring that children grow up in a safe and stable environment and families are preserved.<sup>74</sup>

According to Strydom, social workers first have a duty to focus on preventative services such as intervention programmes, then on statutory services-, which is the removal process of the child.<sup>75</sup> The intervention programme aims to preserve the

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<sup>65</sup> Section 174(2)(b) of the *Children's Act*.

<sup>66</sup> Benbenishty et al Decision making in child protection: An international comparative study on maltreatment substantiation, risk assessment and interventions recommendations, and the role of professionals' child welfare attitudes 1.

<sup>67</sup> Benbenishty et al Decision making in child protection: An international comparative study on maltreatment substantiation, risk assessment and interventions recommendations, and the role of professionals' child welfare attitudes 2.

<sup>68</sup> Section 105(5)(b) ;(c) of the *Children's Act*.

<sup>69</sup> Section 144(1)(f) of the *Children's Act*.

<sup>70</sup> Section 105(5)(d) of the *Children's Act*.

<sup>71</sup> Section 143 (1)(b) of the *Children's Act*.

<sup>72</sup> Section 157(1)(ii) of the *Children's Act*.

<sup>73</sup> Section 144(1)(b) of the *Children's Act*.

<sup>74</sup> Section 144(1)(f) of the *Children's Act*.

<sup>75</sup> Strydom Family Preservation services 435.

living circumstances of the child and to prevent the removal of the child from his or her family.<sup>76</sup> It is thus clear that intervention programmes in South Africa are crucial in ensuring the protection and promotion of the well-being of children.

In 2015, Sibanda and Lombard stated that misjudgements and prejudicial decisions by social workers in intervention programmes are traumatic for children and their families.<sup>77</sup> Hendricks and Tanga state that, even though progressive legislation on child protection has been implemented, South Africa still has millions of vulnerable children who still faces challenges in receiving adequate protection form child protection services.<sup>78</sup> Fortune states that social workers do not render sufficient services to children who are vulnerable and in need of care and protection.<sup>79</sup>In their study, Hope and Van Wyk found that children at risk of maltreatment and neglect still receive inadequate services from social workers in South Africa.<sup>80</sup>

When investigating the current situation regarding intervention programmes and the implementation thereof, the writer analysed applicable case law. In the case of *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others*,<sup>81</sup> the court dealt with the removal of children prior to court approval. In this case, social workers forcefully removed children from their parents who were using them to gain sympathy while begging on the streets.<sup>82</sup> The parents were denied access to their children and were refused information about the whereabouts of their children after they had been removed.<sup>83</sup> The removal procedure was

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<sup>76</sup> Strydom Family Preservation services 435.

<sup>77</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children’s Act 38 of 2005 336.

<sup>78</sup> Hendricks & Tanga Effectiveness of child protection services rendered to children and protection: a study of Childline South Africa 33.

<sup>79</sup> Fortune An overview of the foster care crisis in South Africa and its effect on the best interests of the child principle: A socio-economic perspective 6.

<sup>80</sup> Hope and Van Wyk Intervention strategies used by social workers in emergency child protection 421.

<sup>81</sup> *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others* (47723/2010) [2011] ZAGPPHC 75 (hereafter referred to as “Chirindza case”).

<sup>82</sup> *Chirindza* case para 4.

<sup>83</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children’s Act 38 of 2005 337.

challenged by the parents in the High Court of Gauteng.<sup>84</sup> The judgement in this case revealed that the *Children's Act* had failed to provide for satisfactory removal and reunification procedures.<sup>85</sup> In the judgment, the court stated that there should be a requirement and/or guideline that required that the social worker approach the Children's Court immediately after the removal to determine whether the removal of the child from the family environment was in the best interest of the child.<sup>86</sup>

In the case of *Centre for Child Law v Department of Health care and Social Development Gauteng and Others*,<sup>87</sup> the Constitutional Court also dealt with the removal of children from their families and held that there are far too many children removed from their parents' care.<sup>88</sup>

Although there are several international instruments and legislation in place to regulate intervention programmes, the implementation thereof remains a problem in South Africa. It is in light of this that the writer asked the question: How does intervention programmes specified in the *Children's Act* safeguard the child's right to remain within the family environment?

This study investigated the extent to which prevention and early intervention programmes prevents the removal of the child from the family environment based on the implementation of such programmes by social workers. While conducting the study, the writer evaluated international and regional instruments as well as domestic legal frameworks, which deal specifically with children's right to be cared for by their family, intervention programmes and the best interests of the child. The study also explored the intervention programmes followed by social workers before a child is removed from the care of his/her parents/ family to determine whether

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<sup>84</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 337.

<sup>85</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 337.

<sup>86</sup> Sibanda & Lombard Challenges Faced by social workers working in child protection services in implementing the Children's Act 38 of 2005 337.

<sup>87</sup> *Centre for Child Law v Department of Health care and Social Development Gauteng and Others* (2012) ZACC 1.

<sup>88</sup> *Centre for Child Law v Department of Health care and Social Development Gauteng and Others* (2012) ZACC 1.

these programmes are adhered to in accordance with the regulatory framework and the best interests of the children. The motivation behind the study was to examine the implementation of the intervention programmes provided for in Chapter 8 of the *Children's Act* 38 of 2005.

## ***Chapter 2 Legal Framework***

As children are one of the most vulnerable groups in society, they have the right to family care and to grow up within a family environment.<sup>89</sup> The family may be described as the central unit of human society.<sup>90</sup> As identified in many international instruments<sup>91</sup> and national legislation, the child- for full and harmonious development- should grow up in a family environment that consists of an atmosphere of love, happiness and understanding.<sup>92</sup> Several factors such as poverty, abuse, neglect, and exploitation are possible causes for removal of the child from the family environment. To prevent this removal, South Africa has put in place several pieces of national legislation that provide for prevention programmes aimed at keeping the child within the family environment.<sup>93</sup> The aim of this Chapter is to provide a discussion on the regulatory frameworks on international, regional, and national level, that deal with intervention programmes. The legislative framework is essential for helping social workers understand the procedures to be considered in cases of child abuse and neglect, and to generally protect children in South Africa.<sup>94</sup>

### ***2.1 International Legal Framework***

#### ***2.1.1 Convention on the Rights and Welfare of the Child***

As stated by Bruning and Doek, the adoption of the *CRC* was a huge and significant development for child protection.<sup>95</sup> The *CRC* was unanimously adopted by all

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<sup>89</sup> Dutschke & Monson Children's Constitutional Right to Social Services 23.

<sup>90</sup> Okon Towards defining the "right to a family" for the American child "374.

<sup>91</sup> CRC; ACRWC.

<sup>92</sup> Okon Towards defining the "right to a family" for the American child "374.

<sup>93</sup> Combrinck Family preservation services: experiences of families at risk iv.

<sup>94</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 42.

<sup>95</sup> Bruning & Doek Characteristics of an Effective Child Protection System in the

member states of the United Nations and came into force in 1990.<sup>96</sup> The *CRC* was the first international instrument that contained a variety of children's rights and was legally binding.<sup>97</sup> The *CRC* has been ratified by 196 countries, which requires these countries recognise their responsibility to implement the right of children to protection.<sup>98</sup> In effect, South Africa incurred the obligation of placing its domestic laws concerned with children in line with the principles and rights contained in the *CRC*.<sup>99</sup> It is therefore the duty of the South African government to provide for an effective child protection system.<sup>100</sup>

The right to family care is an important part of the *CRC*, as the preamble states that the family is the fundamental group of society and is the natural environment for the growth and well-being of the child.<sup>101</sup> The *CRC* emphasises the importance of the child growing up in a family environment, in an atmosphere of happiness, love and understanding, as this is essential for the full and harmonious development of the child's personality.<sup>102</sup> In its preamble the *CRC* further states that a family must be afforded the necessary protection and assistance in order for it to fully assume its responsibilities within the community.<sup>103</sup>

As the right to family care is so important to the development of the child, the *CRC* contains several Articles that refer to the protection of the child's family and family relations. In terms of Article 2 and 4 of the *CRC*, State Parties have an obligation to ensure the protection and care of the child's well-being and realisation of the rights set forth in the *CRC*.<sup>104</sup> Article 4 of the *CRC* compels State Parties to undertake

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European and International Contexts 232.

<sup>96</sup> Doek Child Abuse and Neglect 771.

<sup>97</sup> Mezmur "The United Nations Convention on the Rights of the Child" 404.

<sup>98</sup> Bruning & Doek Characteristics of an Effective Child Protection System in the European and International Contexts 232.

<sup>99</sup> Ramonyai Evaluating the best interest of a child as a factor influencing the sentencing of the primary caregiver 14.

<sup>100</sup> Bruning & Doek Characteristics of an Effective Child Protection System in the Europe and And International Contexts 232.

<sup>101</sup> Preamble of the *CRC*.

<sup>102</sup> Preamble of the *CRC*.

<sup>103</sup> Preamble of the *CRC*.

<sup>104</sup> Article 2 of the *CRC*.

all appropriate legislative, administrative, and other measures to ensure that their obligations are fulfilled.<sup>105</sup> With specific reference to the right of the child to family care and relations, Article 9 of the *CRC* states that no child shall be separated from his or her parents against their will, except when authorities deem such removal necessary, subject to judicial review and in terms of applicable law and procedures.<sup>106</sup> Article 3 of the *CRC* furthermore states that such removal from the family environment shall only be justified if it serves the best interests of the child.<sup>107</sup>

If the judicial review by authorities confirms that the removal of the child from his or her family is in the best interests of the child, Article 9 of the *CRC* provides that all interested parties shall be provided with the opportunity to participate in the proceedings and make their views known. Article 9 of the *CRC* furthermore provides that, if the child is separated or removed from the family, the child shall have the right to maintain personal relations and direct contact with his or her parents on a regular basis if it is considered to be within the best interests of the child.<sup>108</sup> In terms of Article 10 of the *CRC*, State Parties obligations regarding the child's right to family care extends to receiving applications by parents for family reunification and dealing with these in a positive, humane, and expeditious manner.<sup>109</sup> A child who is permanently or temporarily removed from his or her family for the sake of their own best interests is entitled to protection and assistance provided for by the State.<sup>110</sup>

Article 18 of the *CRC* places an obligation upon State Parties to use their best efforts to ensure the principle that the parents of the child have the primary responsibility towards the upbringing and development of the child and that the best interests of the child shall be the parent's basic concern.<sup>111</sup> To enable all parents to provide for their children's rights as contained in the present treaty, Article 18(2) of the *CRC* determines that State Parties must render appropriate assistance to families by way

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<sup>105</sup> Article 4 of the *CRC*.

<sup>106</sup> Article 9(1) of the *CRC*.

<sup>107</sup> Article 3 of the *CRC*.

<sup>108</sup> Article 9(2)-(3) of the *CRC*.

<sup>109</sup> Article 10(1) of the *CRC*.

<sup>110</sup> Article 20(1) of the *CRC*.

<sup>111</sup> Article 18(1) of the *CRC*.

of ensuring the development of institutions, facilities and services for the care of children.<sup>112</sup> Importantly, Article 19 of the *CRC* prescribes that State Parties shall ensure the development of institutions facilities and services for the care of children with the aim to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, and exploitation.<sup>113</sup> Article 19 furthermore states that such supporting institutions and services must include social programmes to provide necessary support for the child and the family. The support system provided for in Article 19 of the *CRC* also includes other forms of prevention, identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment and neglect.<sup>114</sup> Bruning and Doek<sup>115</sup> argues that Article 19 lays the foundation for the child protection system as it provides for a national coordinating framework on violence against children.

To emphasise the importance of Article 19 of the *CRC*, the Committee on the Rights of the Child strongly encouraged prevention programmes in *General Comment 13* (2011) - *The right of the child to freedom from all forms of violence*.<sup>116</sup> The Committee makes it clear that the family prevention services are the strongest starting point when dealing with abuse, neglect, and violence against children.<sup>117</sup> The Committee explained that such prevention services include measures to promote the child's well-being and development within the community and society.<sup>118</sup> To achieve this, the Committee places an obligation on State Parties to adopt all measures necessary to ensure that children are protected.<sup>119</sup> Sandberg<sup>120</sup> emphasized the importance of Article 19 of the *CRC* and *General Comment 13* when

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<sup>112</sup> Article 18(2) of the *CRC*.

<sup>113</sup> Article 19(1) of the *CRC*.

<sup>114</sup> Article 19(2) of the *CRC*.

<sup>115</sup> Bruning & Doek Characteristics of an Effective Child Protection System in the European and International Contexts 233.

<sup>116</sup> General Comment No.13 (2011): *The right of the child to freedom from all forms of violence* (hereafter referred to as "General Comment 13").

<sup>117</sup> Par. 46 of *General Comment No.13*.

<sup>118</sup> Par. 46 of *General Comment No.13*.

<sup>119</sup> Par. 73 of *General Comment No.13*.

<sup>120</sup> Sandberg Children's Right to Protection Under the CRC 22.

she states that without coordination of the efforts of State Parties, children may fall between the cracks and successful prevention may not be possible.

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

The *ACRWC* was the first binding instrument that proclaimed children's rights on a regional level.<sup>121</sup> The *ACRWC* explicitly provides for the protection of African children and their rights.<sup>122</sup> Gose<sup>123</sup> explains that the *ACRWC* "is a further means of securing children's rights in the international context". He states that this instrument supplements the *CRC* in the African regional context. Lloyd<sup>124</sup> emphasises the importance of the *ARWC* as providing a voice for Africa's children, offering human rights, guaranteeing, and safeguarding the rights of children and fulfilling its international obligations. Ramonyai<sup>125</sup> states that the *ACRWC* contains a stronger level of protection for children than the *CRC* as it has a more far-reaching approach to protecting the rights of children in Africa.

In the preamble of the *ACRWC*, it is clearly stated that, due to their physical and mental development, all children require particular care in terms of their health, physical, mental, moral, and social development, which requires legal protection in conditions of freedom, dignity, and security.<sup>126</sup> Such care is provided to children by their family in terms of Section 28(1)(b) of the *Constitution*<sup>127</sup> and several other instruments such as the *CRC* and the *ACRWC*. In terms of Article 18 of the *ACRWC*, the family is regarded the natural unit and basis of the society and, as such, has the right to protection and support of the State for its establishment and development.<sup>128</sup> In *Archana Barthakur vs. Ranjit Barthaur Civil Revision*,<sup>129</sup> it was observed that

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<sup>121</sup> Skutjyte Rights of African children under the African Charter 22.

<sup>122</sup> Lloyd 2002 AHRLJ 12.

<sup>123</sup> Gose The African Charter on the Rights and Welfare of the Child 1.

<sup>124</sup> Lloyd 2002 AHRLJ 12.

<sup>125</sup> Ramonyai Evaluating the best interests of a child as a factor influencing the sentencing of the primary caregiver 16.

<sup>126</sup> Preamble of the *ACRWC*.

<sup>127</sup> Section 28(1)(b) of the *Constitution*.

<sup>128</sup> Article 18 of the *ACRWC*.

<sup>129</sup> *Archana Barthakur vs. Ranjit Barthaur Civil Revision* No. 84 of 1982 (01.06.1984 – GUHC).

children are the future hope of the country, and the full development and growth of their personality is of imperative necessity.<sup>130</sup> In *Dharmendrasingh Ramsevkar Rajput and Ors. Vs. State of Gujarat & Ors*<sup>131</sup> it was found that children require a safe, secure, and protective atmosphere to live in, where their talents can unfold, and their physical safety be ensured.<sup>132</sup> It is evident from the above cases that it is in the best interests of the child to grow up within the family environment, as the *CRC* and the *ACRWC* both safeguard the right to a family environment and emphasises the importance of a child growing up in an atmosphere of happiness, love and understanding for the full development of their personality.<sup>133</sup>

Article 18 of the *ACRWC* deals specifically with the protection of the family and states that this instrument requires the State to take appropriate steps to ensure that the child and the family are protected.<sup>134</sup> Article 19 of the *ACRWC* deals with parental care and protection and provides every child with the right to enjoyment of parental care and protection, which includes the right of the child to reside with his or her parents.<sup>135</sup> Article 19 further provides that no child shall be separated from his or her parents against their will, except in cases where it is determined by a judicial authority that such separation would be within the best interests of the child.<sup>136</sup> Nielson<sup>137</sup> explains that article 19 of the *ACRWC* accords state organs a front line position in the protection of children with family, and commits ratifying State parties to a range of actions and interventions to protect children, regardless of in whose care the child(ren) is placed. Nielson<sup>138</sup> continues by saying that actions may include the investigation and prosecution of various forms of child abuse and

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<sup>130</sup> Archana Barthakur vs. Ranjit Barthaur Civil Revision No. 84 of 1982 (01.06.1984 – GUHC).

<sup>131</sup> Dharmendrasingh Ramsevkar Rajput and Ors. Vs. State of Gujarat & Ors. SCA No. 6395 of 2017, GHC.

<sup>132</sup> Dharmendrasingh Ramsevkar Rajput and Ors. Vs. State of Gujarat & Ors. SCA No. 6395 of 2017, GHC.

<sup>133</sup> Preamble of the *CRC*, preamble of the *ACRWC*.

<sup>134</sup> Article 18(2) of the *ACRWC*.

<sup>135</sup> Article 19 of the *ACRWC*.

<sup>136</sup> Article 19(1) of the *ACRWC*.

<sup>137</sup> Nielson Modern African Childhoods: Does Law Matter? 6.

<sup>138</sup> Nielson Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead 655.

exploitation, as recommended by the African Children's Committee. Beyond the normative framework, the African Children's Committee regularly calls for an examination of 'root' causes to prevent child abuse, neglect, and the removal of the child from the family environment.<sup>139</sup>

The best interest of the child is dealt with in Article 4(1) of the *ACRWC*, which states that the best interest of the child must be the primary consideration in all cases concerning the child.<sup>140</sup> In the case where a judicial authority finds that the separation or removal of the child from the family environment is within the best interest of the child, the child will have the right to maintain personal relations and direct contact with his or her family on a regular basis.<sup>141</sup> In the case where the separation of the child is a result of the action of a State Party, the State Party is obligated to provide the family with essential information about the whereabouts of the child.<sup>142</sup>

## **2.2 National Legal Framework**

### *2.2.1 Constitution of the Republic of South Africa (1996)*

The *Constitution* is regarded as the highest law in South Africa, no other law or government action can supersede the provisions of the Constitution.<sup>143</sup> The *Constitution* represents a dramatic breakthrough in the realisation of human rights for all South Africans of all ages, classes, and colours<sup>144</sup>. The *Constitution* was adopted on 8 May 1996 and amended by the Constitutional Assembly on 11 October 1996.<sup>145</sup> As stated by Robinson, the *Constitution* recognises that children have specific and unique interests and are particularly vulnerable to rights violations.<sup>146</sup>

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<sup>139</sup> Nielson Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead 657.

<sup>140</sup> Article 4(1) of the *ACRWC*.

<sup>141</sup> Article 19(2) of the *ACRWC*.

<sup>142</sup> Article 19(3) of the *ACRWC*.

<sup>143</sup> Section 2 of the *Constitution*.

<sup>144</sup> Du Plessis The Constitutional Rights of Children to Bodily Integrity and Autonomy 1.

<sup>145</sup> Section 1 of the *Constitution*.

<sup>146</sup> Robinson Children's Rights in the South-African Constitution 11.

The *Constitution* is therefore seen as one of the most progressive laws as it contains a specific section which regulates the rights of children.<sup>147</sup> Section 28 of the *Constitution* provides for the rights of all children and guarantees the support and services needed to ensure that they develop to their full potential.<sup>148</sup>

Section 28 of the *Constitution* guarantees that the wellbeing of children is put first, and that they are protected from abuse, neglect, and exploitation.<sup>149</sup> Not only does the *Constitution* guarantee, protect, and promote the rights of children, it requires the prioritisation of public measures to realise children's rights.<sup>150</sup> Kofi Annan stated that there is no duty more important than ensuring that the rights of children are respected, their welfare protected, their lives are free from fear, and they grow up in peace.<sup>151</sup> The *Constitution* places an obligation on the state to respect, protect, promote and fulfil the rights contained in the *Constitution*.<sup>152</sup> Nielson<sup>153</sup> states that the final *Constitution* concerns the relevance of the right to family life. She explains that, although the *Constitution* does not protect the right to family life itself, the Constitutional Court has affirmed in a series of recent decisions that the right to family life is constitutional value that is worthy of protection.<sup>154</sup>

Section 28(1)(b) of the *Constitution* makes provision for the right of the child to family and parental care.<sup>155</sup> Ramonyai<sup>156</sup> explains that the aim of Section 28(1)(b) is to preserve a healthy parent-child relationship and, at the same time, protect the

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<sup>147</sup> Van Niekerk The status of child abuse and neglect policy and child protection practice in South Africa 2.

<sup>148</sup> Section 28 of the Constitution; Nielson The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa 323.

<sup>149</sup> Section 28(1)(d) of the *Constitution*.

<sup>150</sup> Section 7(2) of the *Constitution*.

<sup>151</sup> Abrahams & Matthews Promoting Children's Rights in South Africa 5.

<sup>152</sup> Section 7(2) of the *Constitution*.

<sup>153</sup> Nielson Too little? Too late? The implications of the Grootboom case for state responses to child-headed households 124.

<sup>154</sup> Nielson Too little? Too late? The implications of the Grootboom case for state responses to child-headed households 124.

<sup>155</sup> Section 28(1)(b) of the *Constitution*.

<sup>156</sup> Ramonyai Evaluating the best interests of a child as a factor influencing the sentencing of the primary caregiver 22.

children's family as a unit from unnecessary acts by organs of the state. This was also found in the case of *Jooste v Botha*,<sup>157</sup> of which Van Dijkhorst J remarked that Section 28(1)(b) has the primary aim of preserving a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts.<sup>158</sup> As stated by Bekink, Section 28(1)(b) of the *Constitution* has three purposes.<sup>159</sup> Firstly, Section 28(1)(b) is aimed at the preservation of a healthy parent-child relationship and imposes an obligation on the state to protect, respect, and promote the existing family care by limiting any interference with such care.<sup>160</sup> Bekink<sup>161</sup> explains that the second purpose of Section 28(1)(b) includes the duty to identify the parties responsible for the care of the child and states that the duty of care over a child is primarily imposed on the family of the child. Lastly, Section 28(1)(b) has the purpose of ensuring that the child shall not be maltreated, neglected, or abused while in the care of the family. The duty of care shall be passed over to the state if the family of the child fails to care for the child, are unable to care for the child, or when the child is maltreated, neglected, or abused.<sup>162</sup> It is therefore the duty of the state to ensure the right to alternative care when the child is separated from the care of the family.<sup>163</sup> Nielson<sup>164</sup> also comments on the duty of the state in terms of Section 28(1)(b) and explains that the state incurs an obligation to ensure parental care, which suggests that adult supervision, guidance and protection can be as important as material assistance.

Section 28(2) of the *Constitution* provides that the best interests of the child must in all matters concerning the child be of paramount importance.<sup>165</sup> A removal or separation from the family may therefore only happen when it is within the best

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<sup>157</sup> *Jooste v Botha* 2000 (2) BCLR 187 (T).

<sup>158</sup> *Jooste v Botha* 2000 (2) BCLR 187 (T) par.195,

<sup>159</sup> Bekink "Child Divorce": A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents (hereafter referred to as "Bekink") 186.

<sup>160</sup> Bekink 186.

<sup>161</sup> Bekink 188.

<sup>162</sup> Bekink 188.

<sup>163</sup> Bekink 189.

<sup>164</sup> Nielson Too little? Too late? The implications of the Grootboom case for state responses to child-headed households 123.

<sup>165</sup> Section 28(2) of the *Constitution*.

interests of the child.<sup>166</sup> When the child is removed from the care of the family, the child has the right to social services to help ensure that the best interests of the child are met.<sup>167</sup> The importance of the best interests of the child was dealt with in *S v M*<sup>168</sup> in which the Constitutional Court stated that Section 28(2) requires the law and the state to make the best possible effort to avoid any breakdown of the family or parental care.<sup>169</sup> This effort of the state includes to provide the family and the child with family prevention programmes which shall aim to keep the child within the care of the family.

### 2.2.2 *Children's Act 38 of 2005*

The legislation that best regulates prevention programmes is the *Children's Act*.<sup>170</sup> The *Children's Act* specifically deals with the family prevention programme in terms of Chapter 8. The *Children's Act* reflects a developmental approach to care and protection of children and gives effect to South Africa's responsibilities to children under the *CRC* and the *ACRWC*.<sup>171</sup>

This *Children's Act* specifically recognises that the family of the child are the primary duty-bearers in terms of care and protection towards children.<sup>172</sup> However, the *Children's Act* recognises that the family needs support to fulfil these duties, otherwise children may be deprived from the family environment and require higher levels of support.<sup>173</sup> The *Children's Act* therefore sets out the multiplicity of care arrangements that exist in South Africa and mandates and regulates the provision of a continuum of support to parents and families to safeguard the well-being optimal development and protection of all children.<sup>174</sup> The *Children's Act* provides

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<sup>166</sup> Article 3 of the *CRC*; Article 4(1) of the *ACRWC* & Section 28(2) of the *Constitution*.

<sup>167</sup> Section 28(2)(c) of the *Constitution*.

<sup>168</sup> *S v M* 2008 3 SA 232 (CC).

<sup>169</sup> *S v M* 2008 3 SA 232 (CC) 1 para 20.

<sup>170</sup> Chapter 8 of the *Children's Act*.

<sup>171</sup> National Child Care Policy 2019 39.

<sup>172</sup> National Child Care Policy 2019 39.

<sup>173</sup> National Child Care Policy 2019 39.

<sup>174</sup> National Child Care Policy 2019 39.

for several policies<sup>175</sup> and programmes that have been specifically developed to recognise, protect, and promote the realisation of children's rights.<sup>176</sup>

The objectives of the *Children's Act* is set out in section 2, and mainly supports a child's right to family care.<sup>177</sup> The first objection to removal in terms of section 2(a) is to promote the preservation and strengthening of families.<sup>178</sup> In terms of section 2(b)(b), the *Children's Act* is implemented to give effect to the constitutional rights of children such as family and parental care, social services, protection from maltreatment, neglect, and protection of their best interests in all matters concerning the child.<sup>179</sup> The *Children's Act* further aims to give effect to the state's obligations concerning the well-being of children in terms of international instruments that are binding on the Republic.<sup>180</sup> The *Children's Act* therefore makes provision for structures, services for the promotion and monitoring of all children's physical, psychological, intellectual, emotional and social development.<sup>181</sup> By providing such structures and services, the *Act* aims to assist in providing care and protection to all children.<sup>182</sup> Such structures and services include prevention and early intervention programmes that are regulated by Section 143 – 149 of the *Children's Act*.<sup>183</sup>

Prevention programmes are defined in section 143(1)(b) as a programme provided to families with children with the aim of strengthening and building their capacity and self-reliance. The prevention programme also aims to address problems that may or are bound to occur within the family environment which may lead to statutory intervention when left unattended.<sup>184</sup> Early intervention programmes are

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<sup>175</sup> At a national and provincial level these policies include the Child Rights Advisory Councils, championed by the President and the Premiers, to co-ordinate Children's Rights strategy and implementation.

<sup>176</sup> National Child Care Policy 2019 39.

<sup>177</sup> Section 2 of the *Children's Act*.

<sup>178</sup> Section 2(a) of the *Children's Act*.

<sup>179</sup> Section 2(b)(i)-(iv) of the *Children's Act*.

<sup>180</sup> Section 2(c) of the *Children's Act*.

<sup>181</sup> Section 2(d) of the *Children's Act*.

<sup>182</sup> Section 2(e) of the *Children's Act*.

<sup>183</sup> Chapter 8 of the *Children's Act*.

<sup>184</sup> Section 143(1)(b) of the *Children's Act*.

defined in section 143 (2)(b) as programmes also provided to families with children, but where the children are identified as being vulnerable to or at risk of harm or removal into alternative care.<sup>185</sup>

In 2004, the *Department of Social Development* defined family prevention programmes as a strategy that empowers families, encourages optimal development in children, and prevents statutory removal of children from their families.<sup>186</sup> Strydom<sup>187</sup> defines prevention programmes as a strategy to support and strengthen families with the aim to enhance the child's optimal development and to prevent statutory removal of the child from his or her family. Prevention programmes are defined by Berry<sup>188</sup> as family preservation services which are intensive, home-based, and family-centered. She further states that prevention programmes are aimed at doing "whatever it takes" to support and strengthen the family and prevent the statutory removal of a child from the family's care.<sup>189</sup>

Sallee and Sallee define family intervention programmes as a "safe alternative" to removing children from the care of their families.<sup>190</sup> According to them, prevention programmes are services rendered to at-risk families with the goal of keeping children safely in their family environment.<sup>191</sup> September describes prevention and early intervention programmes as the cooperation of various role players, such as social workers to prevent and intervene in child abuse and neglect. She adds that such participation by role players includes planning, reporting, assessing, monitoring, investing, treating, and offering support to children and their families.<sup>192</sup>

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<sup>185</sup> Section 143(2)(b) of the *Children's Act*.

<sup>186</sup> Department of Social Development, 2004:9, 32 & 33.

<sup>187</sup> Strydom The implementation of family preservation services 192.

<sup>188</sup> Mosoma The formulation of the manual on family preservation services in South Africa and the experiences of social workers regarding the formulation and implementation thereof 70.

<sup>189</sup> Mosoma The formulation of the manual on family preservation services in South Africa and the experiences of social workers regarding the formulation and implementation thereof 70.

<sup>190</sup> Sallee & Sallee Family Preservation Services to At-Risk Families 1.

<sup>191</sup> Sallee & Sallee Family Preservation Services to At-Risk Families 1.

<sup>192</sup> September A review of child protection services in South Africa 54.

The prevention and early intervention programmes are clearly stated to serve the purposes as set out in section 144 of the *Children's Act*. Section 144(1)(a)-(i) makes it clear that prevention and early intervention programmes must focus on preserving the child's family structure, developing appropriate parenting skills to help safeguard the child's well-being and best interests, promote the interpersonal family relations, provide for psychological and therapeutic programs and to prevent neglect, exploitation, abuse, and inadequate supervision of the child.<sup>193</sup> The programmes further aim to prevent the recurrence of problems in the family environment, to meet the needs of the child, and to divert the child away from the criminal justice system. The most important aim of the prevention and early intervention programmes as set out in section 144(1)(i) is avoiding the removal of the child from the family environment.<sup>194</sup>

Section 144(2) indicates that the prevention and early intervention programmes may include assistance to the family to obtain the basic necessities of life, the provision of information to enable families to access services, and support and assistance to families to promote the well-being of children and the realisation of their full potential. Section 144(3) states that prevention and early intervention programmes must involve and promote the participation of families, parents, caregivers, and children in identifying and seeking solutions to their problems.<sup>195</sup>

Article 31 of the *White Paper of Social welfare* (1997) states that child and family welfare services aim to strengthen the functioning of high-risk / vulnerable families.<sup>196</sup> The *White Paper of Social welfare* (1997) further states that such child and family services are implemented to improve the physical, social, and emotional development of the family and to prevent the statutory removal of the child from the care of the family.<sup>197</sup>

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<sup>193</sup> Section 144(1)(a)-(h) of the *Children's Act*.

<sup>194</sup> Section 144(1)(i) of the *Children's Act*.

<sup>195</sup> Section 144(2)-(3) of the *Children's Act*.

<sup>196</sup> Article 31 of the *White Paper of Social Welfare* (1997).

<sup>197</sup> Strydom The implementation of family preservation services 192.

Gandarilla is of the view that the primary goal of family prevention programmes is to decrease the number of children who are unnecessarily removed from their homes and placed in foster care.<sup>198</sup> She is of the view that prevention programmes are structured to help teach abusive or neglectful parents the necessary to keep their family together.<sup>199</sup> Gandarilla further states that the foundation of family-based prevention programmes is to help families in crisis whose children are at risk of being removed from the family<sup>200</sup> due to abuse or neglect.<sup>201</sup> She discusses the goals of the prevention programmes which are to prevent unnecessary separation of children from their families and to ensure higher quality of care to children and their families.<sup>202</sup> Ganarilla adds that prevention programmes are designed to increase the strength and stability of families, and to help parents increase their confidence and competence in their abilities to successfully nurture their children.<sup>203</sup>

Combrinck<sup>204</sup> acknowledges that the main aim of family preservation services, which is to keep the child in the care of the family. Combrinck further refers to various studies to emphasise the importance of preservation services, as it has many positive effects on the family; the improved functioning of the family in general, enhancement of parenting skills, better communication and increased resilience in parents and children.<sup>205</sup>

Section 148 of the *Children's Act* deals with the order of the court in terms of the removal of the child from the family environment. This section states that, before the decision regarding the removal is made, the court may order the family to first undergo in a prescribed family prevention or early intervention programme.<sup>206</sup> Such programmes may not exceed a period of six months.<sup>207</sup> After six months, the social

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<sup>198</sup> Ganarilla Family Preservation: A Content Analysis of Literature 1.

<sup>199</sup> Ganarilla Family Preservation: A Content Analysis of Literature 1.

<sup>200</sup> Ganarilla Family Preservation: A Content Analysis of Literature 2.

<sup>201</sup> Ganarilla Family Preservation: A Content Analysis of Literature 4.

<sup>202</sup> Ganarilla Family Preservation: A Content Analysis of Literature 4.

<sup>203</sup> Ganarilla Family Preservation: A Content Analysis of Literature 5.

<sup>204</sup> Combrinck Family Preservation services: experiences of families at risk 2.

<sup>205</sup> Combrinck Family Preservation services: experiences of families at risk 3.

<sup>206</sup> Section 148(1)(a)-(b) of the *Children's Act*.

<sup>207</sup> Section 148(2) of the *Children's Act*.

worker who conducted the programme must compile a social worker's investigation report that sets out the progress of the family and the child.<sup>208</sup> In terms of Section 148(4)(b) of the *Children's Act* this report must be submitted to the court. The question of the child's removal from the family environment is informed by the findings of the social worker's investigation report.<sup>209</sup> As a result, the court may order the removal of the child from the family environment, or the continuation of the prevention or early intervention programme for another six months.<sup>210</sup>

In terms of Section 47(1) of the *Children's Act*, every case before a court that involves a child in possible need of care and protection, must be referred to a social worker for an investigation, followed by an investigation report to the court.<sup>211</sup> These investigations are regulated by Section 149. Section 149 of the *Children's Act* states that the social worker's report to the court must contain a summary of the prevention and early intervention programme delivered to the child and the family. Section 194 further states that the report must make recommendations on the development of the family, parent, caregiver, and the child.<sup>212</sup>

Benbenishty states that the investigation report by social workers includes assessment, gathering of information, contact with the family and evaluation.<sup>213</sup> Krauss states that family assessments are now a mandated routine within prevention and early intervention programmes.<sup>214</sup> The social worker thus has a responsibility to use clinical skills to conduct a comprehensive evaluation and assessment of the family.<sup>215</sup> Krauss explains that the assessment must include an evaluation of the parent-child relationship, the family needs and priorities, and the functioning of the family.<sup>216</sup>

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<sup>208</sup> Section 149 of the *Children's Act*.

<sup>209</sup> Section 148(4)(b) of the *Children's Act*.

<sup>210</sup> Section 148(4)(b) of the *Children's Act*.

<sup>211</sup> Section 47(1) of the *Children's Act*.

<sup>212</sup> Section 149 of the *Children's Act*.

<sup>213</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 62.

<sup>214</sup> Krauss Family Assessment Within Early Intervention Programs 290.

<sup>215</sup> Froneman Criteria Social Workers Employ in making Child Custody 26.

<sup>216</sup> Krauss Family Assessment Within Early Intervention Programs 301 – 302.

When conducting the investigation, the *Children's Act* stipulates that the social worker must address the child in a language they understand and treat them with empathy, care and understanding.<sup>217</sup> The evaluation or assessment must take place in a child-friendly environment and the child must be accompanied by a support person of their choice, unless the child has the mental capacity to understand the reasons for the assessment or examination.<sup>218</sup> Krauss states that the reasons for the assessment of the family is to identify specific ways in which external help can be provided to the family with the aim of advancing the family's ability to stimulate, nurture, and support the development of the child.<sup>219</sup> In the case of *NM v Presiding officer of Children's Court*,<sup>220</sup> the court argued that the goal of the social worker's investigation is to identify the current living arrangements of the child, present and prospective caregivers, and the child's emotional and physical well-being.<sup>221</sup> This ensures that the child's best interests is always prioritised during any decision-making process with regards to their living arrangements. The purpose of investigating these circumstances is to evaluate the child's needs and the best way that they can be met by the parents in whose care the child is.<sup>222</sup> The sole purpose is to determine whether the child is in need of care and protection in terms of Section 150 of the *Children's Act* and whether the child should be removed from the care of the family.

Such a removal may have harmful effects on the child and may be detrimental to the child's social and psychological development if it was not in the best interests of the child.<sup>223</sup> Charlow<sup>224</sup> explains that the negative effects of the removal of the child from the family environment include that the child placed in alternative care may experience high rates of emotional, behavioural, and developmental problems.

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<sup>217</sup> Proudlock South Africa's progress in realizing children's rights 188.

<sup>218</sup> Proudlock South Africa's progress in realizing children's rights 188.

<sup>219</sup> Krauss Family Assessment Within Early Intervention Programs 290.

<sup>220</sup> *NM v Presiding officer of Children's Court*, Krugersdorp 2013 (4) SA 379 (GSJ).

<sup>221</sup> *NM v Presiding officer of Children's Court*, Krugersdorp 2013 (4) SA 379 (GSJ) para 22.

<sup>222</sup> Froneman Criteria Social Workers Employ in making Child Custody 26.

<sup>223</sup> Lerwick Causes of child abuse: What does the literature indicate? 9.

<sup>224</sup> Charlow Race, Poverty, and Neglect 782.

Charlow further explains that children need to bond with their family to develop a self-esteem, and that placements in alternative care disrupts such bonding, which may lead to negative emotional consequences for the child.<sup>225</sup> Combrink<sup>226</sup> also highlights the negative effects of alternative care has on the child and states that the child placed in alterative care are likely to experience a lack of stimulation, delayed social skills, behavioural problems, and are likely to experience physical and sexual abuse. Unlike Charlow and Combrink, Trivedi explains the trauma inherent to the act of the removal itself.<sup>227</sup> He explains that the act of the removal undoubtedly causes immense trauma to the child as they relive this horrible moment in their lives over and over again in their minds.<sup>228</sup> Because of these negative effects, removal and alternative care must to be regarded as the last resort and should be carefully reviewed by social workers<sup>229</sup>and must evidently not be taken unconscientiously.<sup>230</sup>

Section 148 of the *Children's Act* regulates that the court may make an order that the child may be removed from the family environment, or for the continuation of prevention and early intervention programs. As discussed, the order of the court shall be based on the findings of the social worker's investigation report.

### **2.3 Conclusion**

Chapter 2 established that every child has the right to family care. The importance of this right is acknowledged in several international instruments and national legislation, which emphasizes the need for the child to grow up in a family environment filled with love and happiness. Unfortunately, with the right to family care comes the possibility of the child being removed from the family due to abuse

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<sup>225</sup> Charlow Race, Poverty, and Neglect 783.

<sup>226</sup> Combrinck Family Preservation services: experiences of families at risk 16.

<sup>227</sup> Trivedi The Harm of Child Removal 530.

<sup>228</sup> Trivedi The Harm of Child Removal 531.

<sup>229</sup> Zaal and Matthias Urgent care removals and access to children's courts: An analysis of the implications of C v Department of Health and Social Development, Gauteng 107.

<sup>230</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 18.

and/ or neglect. Before such a removal may take place, social workers have a duty to perform a prevention and early intervention programme designed to keep the child in the family environment and to strengthen the functioning of the family. The prevention and early intervention programme obligate the social workers to investigate the circumstances the family faces and file a written report to the Children's Court with recommendations as to whether the child must be removed from the family. Such an investigation must be carried out subject to the regulatory framework as discussed in Chapter 2. This framework stipulates that the child may only be separated from the care of the family if such a separation is necessary and within the best interests of the child. Chapter 3 contains a comprehensive discussion on what is entailed by the best interests of the child.

## **Chapter 3 Best Interests of the Child**

### **3.1 Introduction**

To predict or determine the possible impact of the constitutionalism of children's rights in 1996, the best interests of the child principle became the benchmark for review of all proceedings in which decisions relating to children were taken.<sup>231</sup> The best interest of the child is emphasised in several pieces of international and national legislation. South Africa is bound by an obligation in terms of section 39(1) of the *Constitution* to adhere to international instruments when addressing issues pertaining to children.<sup>232</sup> This obligation is not only a matter of international legal compliance but is also deeply enshrined within the South African Constitution.<sup>233</sup> The South African legal framework mandates both state authorities and parents alike must consistently act in a manner that prioritises the paramount interests of the child when engaging in any matters involving them.<sup>234</sup> Particularly, when confronted with situations involving children who may be at risk of being removed from their family environment, it becomes imperative to scrutinise whether such action aligns with the child's best interests. Therefore, it is pertinent to scrutinise the best interest principle and its important role in the context of intervention and prevention programmes.

### **3.2 Best Interest of the Child Principle**

Article 3 of the *CRC* states that the best interests of the child shall be the primary consideration in all matters that concern the child, whether undertaken by public or social welfare institutions, courts of law, administrative authorities, or legislative bodies.<sup>235</sup> Article 4(1) of the *ACRWC* contains an article that is very similar to Article 3 of the *CRC*, as it states that the best interest of the child must be the primary

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<sup>231</sup> Nielson '2+2=5' Exploring the domestication of the CRC in South Africa jurisprudence 7.

<sup>232</sup> Section 39(1) of the *Constitution*.

<sup>233</sup> Section 39(1) of the *Constitution*.

<sup>234</sup> Article 3 of the *CRC*, Article 4(1) of the *ACRWC*, Section 28(2) of the *Constitution*, Section 9 of the *Children's Act*.

<sup>235</sup> Article 3 of the *CRC*.

consideration in all matters concerning the child.<sup>236</sup> Fortune<sup>237</sup> explains “primary consideration” in terms of Article 4 of the *ACRWC* means that the best interests of the child must be given a “heavier weighting” in cases where there are competing rights of children. The best interest of the child is also dealt with in Section 28(2) of the *Constitution* which states that the best interest of the child shall be of paramount importance in all matters that concerns the child.<sup>238</sup> The *CRC and the ACRWC* both places a strong emphasis on the best interests of the child.<sup>239</sup> However, it appears that the *ACRWC* is even more insistent on prioritising the best interests as primary consideration, which may potentially leave less room for other factors to supersede the best interest principle. The wording in terms of the best interests of the child in the *Constitution* is more similar to the wording of the *ACRWC*, as it requires that the best interests be of paramount importance in all matters relating to children. As per Section 9 of the *Children’s Act*, the best interests of the child shall be of paramount importance in all matters that concerns the care, protection, and well-being of a child.<sup>240</sup>

To determine what the best interest of the child is, the case of *McCall v McCall*<sup>241</sup> must be considered.<sup>242</sup> This case was the first to provide a comprehensive list of factors in terms of which a court must determine what will be within the best interest of the child.<sup>243</sup> This list of factors in the *McCall case* can be seen as a welcome development in law as it is now incorporated in Section 7 of the *Children’s Act*.<sup>244</sup> Section 7 of the *Children’s Act* lists the following factors:

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<sup>236</sup> Article 4(1) of the *ACRWC*.

<sup>237</sup> Fortune An overview of the foster care crisis in South Africa and its effect on the best interests of the child principle: a socio-economic perspective 6.

<sup>238</sup> Section 28(2) of the *Constitution*.

<sup>239</sup> Article 3 of the *CRC*; Article 4 of the *ACRWC*.

<sup>240</sup> Section 9 of the *Children’s Act*.

<sup>241</sup> *McCall v McCall* 1994 3 SA (C) (hereinafter referred to as the *McCall case*).

<sup>242</sup> Mahlobogwane Parenting plans in terms of the Children’s Act: Serving the best interests of the parent or the child? 221.

<sup>243</sup> Du Plessis The Constitutional Rights of Children to Bodily Integrity and Autonomy 16.

<sup>244</sup> Du Plessis The Constitutional Rights of Children to Bodily Integrity and Autonomy 17.

- a) The nature of the personal relationship between the child and his or her parents, caregivers, or any other relevant person. This includes the attitude of the parents, or any specific parent towards the child and the exercise of parental responsibilities or rights in respect of the child.
- b) The capacity of the parents, any specific parent, or any other caregiver or person, to provide for the child's needs which includes the emotional and intellectual needs.
- c) The probable effect any change in the child's circumstances would have on the child this includes the probable effect of the child's separation from both parents, or either parent, sibling(s), another child or any caregiver or any person with whom the child has been living with.
- d) The practical difficulty and expense of the child having contacts with his or her parents, or specific parent, and whether that difficulty or expense would considerably affect the child's right to maintain personal relations and direct contact with that parent on a regular basis.
- e) The child's need to remain in the care of his or her parents, family, and extended family, and to maintain contact with his or her parents, extended family, tribe, culture, or tradition.
- f) The child's physical and emotional security and intellectual, emotional, social, and cultural development. The child's age, maturity, stage of development, background, and any other relevant characteristics of the child.
- g) The child's need to be brought up within a stable family environment or, if this cannot be achieved, in an environment resembling a family environment as closely as possible.
- h) Any family violence involving the child or family member of the child.
- i) Which action or decision would avoid or minimise the further legal or administrative proceedings regarding the child.<sup>245</sup>

The factors as specified in the *McCall* case should not be regarded as a *numerus clausus*, as the court clearly pointed that any other relevant factors may be considered before the court.<sup>246</sup> The concept of the "best interests of the child" must

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<sup>245</sup> Section 7 of the *Children's Act*.

<sup>246</sup> Bekink Defining the standard of the best interest of the child: Modern South African perspectives 24.

thus be considered on a case-by-case basis.<sup>247</sup> As stated by Mahlobogwane,<sup>248</sup> “the judicial officers in South Africa are free to decide what is the best for a child’s welfare on a case-by-case basis”. The above statement by Mahlobogwane is also found in the case of *Short v Naisby*<sup>249</sup> in which the court held that each case must be considered on its own merits. The crux of the consideration by the court is based on the child’s own wishes, the physical, emotional, and educational needs of the child, the child’s age and gender as well as the desirability of present circumstances continuing.<sup>250</sup>

In the case of *French v French*<sup>251</sup> which was the first case to deal with the best interests of the child, the court set out in order of importance four categories of considerations to determine the best interest of the child. The primary consideration by the court is to determine how the sense of security of the child will be preserved. The second consideration concerns the character, religion, and language in which the child is brought up and the moral, cultural, and religious development of the child.<sup>252</sup> The third consideration of the court involves material considerations relating to the child’s well-being. Finally, the preference and the wishes of the child shall be of consideration.<sup>253</sup> Bekink stated that when the right of the child to remain within the family environment is in question the best interests of the child should be in accordance with the following considerations:

- (a) The relationship between the child and the person whose parental responsibilities and rights are being challenged;
- (b) The degree of commitment that the person has shown towards the child;

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<sup>247</sup> Fortune An overview of the foster care crisis in South Africa and its effect on the best interests of the child principle: a socio-economic perspective 6.

<sup>248</sup> Mahlobogwane Parenting plans in terms of the Children’s Act: Serving the best interests of the parent or the child? 221.

<sup>249</sup> *Short v Naisby* 1955 3 SA 572 (D).

<sup>250</sup> Bekink Defining the standard of the best interest of the child: Modern South African perspectives 23.

<sup>251</sup> *French v French* 1971 4 SA 298 (W).

<sup>252</sup> *French v French* 1971 4 SA 298 (W).

<sup>253</sup> *French v French* 1971 4 SA 298 (W).

(c) Any other factor that should in the opinion of the court be considered.<sup>254</sup>

In the case of *S v M*<sup>255</sup> the court had the task of defining what “paramount importance” means. Sachs J stated that there is no general formula to be used as the best interest standard is decided by the circumstances of each case.<sup>256</sup> Sachs J further stated that, although the best interest of the child is of paramount importance, it should be borne in mind that it is not an absolute right.<sup>257</sup> The best interest of the child can therefore be limited in cases where it is in conflict with any of the other rights contained in the *Bill of Rights*.<sup>258</sup> In *Centre for Child Law v Minister of Justice and Constitutional Development*<sup>259</sup> the court found that “paramount importance” means that the best interests of the child must be regarded more important than anything else, but that it does not mean that everything else is unimportant.<sup>260</sup> Moyo<sup>261</sup> refers to the case of *S v M* and explains that the paramountcy principle means that in the absence of other interests competing for protection, the best interest of the child shall prevail. Moyo continues by saying that the paramountcy principle does not necessitate overriding all other considerations, but rather, it calls for appropriate weight to be given to the best interests of the child in each case.<sup>262</sup>

As already mentioned, a child may only be removed from the family environment when it would be in the best interest of the child. As seen in the discussion above, legislation, case law and several scholars have different statements as to how to determine the best interests of the child. It is therefore of utmost importance that

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<sup>254</sup> Bekink “Child Divorce”: a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of parents 193.

<sup>255</sup> *S v M* 2008 3 SA 232 (C).

<sup>256</sup> *S v M* 2008 3 SA 232 (C) para 24.

<sup>257</sup> *S v M* 2008 3 SA 232 (C) para 26.

<sup>258</sup> *S v M* 2008 3 SA 232 (C) para 26.

<sup>259</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC).

<sup>260</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para 29.

<sup>261</sup> Moyo Reconceptualizing the ‘paramountcy principle’: Beyond the individualistic construction of the best interest of the child 149.

<sup>262</sup> Moyo Reconceptualizing the ‘paramountcy principle’: Beyond the individualistic construction of the best interest of the child 150.

social workers are familiar with Section 150 of the *Children's Act* before conducting their investigation, writing the report and determining the best interests of the child. Section 150 of the *Children's Act* deals with children in need of care and protection and sets out the circumstances that social workers must investigate when determining whether the child is in need of care and protection.<sup>263</sup>

In terms of this Section, a child is need of care and protection when the child:-

- (a) has been abandoned or orphaned and is without any visible means of support;
- (b) displays behaviour which cannot be controlled by the parent or caregiver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, care-giver, a person who has parental responsibilities and rights or a family care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.<sup>264</sup>

As per Section 150(2) of the *Children's Act* a child will also be found to be in need of care and protection when the child is a victim of child labour or when the child is raised in a child-headed household.<sup>265</sup>

Should the court be satisfied that the child is indeed in need of care and protection as per Section 150 of the *Children's Act*, based on the social workers

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<sup>263</sup> Section 159(1)-(4) of the *Children's Act*.

<sup>264</sup> Section 150(1)(a) – (i) of the *Children's Act*.

<sup>265</sup> Section 150(2) of the *Children's Act*.

investigation report, the court may order that the child be removed from the family's care.<sup>266</sup>

Kleijn<sup>267</sup> argues that there are also other grounds that can justify the removal of the child from the family's care. He states that the rationale for the removal of the child from the family is to remove the child from any situation that can endanger them physically or psychologically and to provide the child with healing from such situations. He further argues that the removal shall be justified if it takes place to meet the child's emotional needs in accordance with the age of the child and to provide the child with care, education, and nurture.<sup>268</sup> Eloff<sup>269</sup> also refers to certain circumstances that may justify the removal of the child from family care, these circumstances includes that the child will be provided with better alternatives after the removal takes place. The removal is also argued to be justified in circumstances where the damage of the removal of the child is likely to be outweighed by the harm that the child would be caused when staying in the care of the family.<sup>270</sup> The writer agrees with the statements by Kleijn and Eloff, as all these grounds for removal would justify the best interest of the child and would contribute to the positive development of the child.

Should the social worker find that the child is not in need of care of protection, Section 150(3) makes it clear that the social worker must take all necessary measures in order to assist the child by way of counselling, mediation, and prevention services in order to solve the problem that the family is facing.<sup>271</sup> Section 148 of the *Children's Act* regulates that the court may make an order that the child may be removed from the family environment, or for the continuation of prevention and early intervention programmes.<sup>272</sup> As discussed, the order of the court shall be based on the findings of the social worker's investigation report. However, in other

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<sup>266</sup> Article 150 of the *Children's Act*.

<sup>267</sup> Kleijn A developmental approach to statutory social work services, South Africa 21.

<sup>268</sup> Kleijn A developmental approach to statutory social work services, South Africa 21.

<sup>269</sup> Eloff A guide to foster care practice in South Africa 31.

<sup>270</sup> Eloff A guide to foster care practice in South Africa 31.

<sup>271</sup> Section 150(3) of the *Children's Act* 38 of 2005.

<sup>272</sup> Section 148 of the *Children's Act*.

situations, the social worker may remove the child from the family environment without a court order and without an investigation being done.<sup>273</sup> Such a removal is regulated by section 152 of the *Children's Act*. This section empowers the designated social worker to immediately remove the child from the family environment.<sup>274</sup> This removal without a court order would be justified in circumstances where there are reasonable grounds for believing that the child may be in need of instant emergency protection and that such removal would result in the best way of securing the safety and well-being of the child.<sup>275</sup>

De Villiers found that such "emergency" removals usually involve an extreme crisis situation in which it is difficult for the social worker to properly weigh up all appropriate aspects in a relaxed manner.<sup>276</sup> If the social worker removes the child from the family environment without a court order, the social worker has the duty to inform the family within 24 hours.<sup>277</sup> When dealing with "emergency" removals, it is important for social workers to have knowledge of when to accept a removal as an "emergency" removal as the removal will be considered illegal if actions of the social worker do not justify an "emergency" removal<sup>278</sup> or is not within the best interest of the child.

### **3.3 Conclusion**

The best interest of the child must be the main consideration in all matters that concerns the child. To determine the best interest of the child, different literature, case law and legislation can be considered such as the *McCall case*, *French v French case*, Section 7 of the *Children's Act* and the statements made by Bekink. As the

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<sup>273</sup> Section 152 of the *Children's Act*.

<sup>274</sup> Section 152 of the *Children's Act*.

<sup>275</sup> Section 152(1)(a)(i)-(ii) of the *Children's Act*.

<sup>276</sup> De Villiers The role of the social worker in the reunification of foster children with their biological parents 27.

<sup>277</sup> Section 152(2)(a) of the *Children's Act*.

<sup>278</sup> De Villiers The role of the social worker in the reunification of foster children with their Biological parents 28.

best interest of the child is determined on a case-by-case basis, each determination of the best interest of the child will differ.

The best interest of the child is primarily determined by the prevention and early intervention programmes as such programs preserve the child's family structure, develop appropriate parenting skills, and help to safeguard the child's well-being.<sup>279</sup> It can therefore be argued that, if social workers remove children from their family environment without proper consideration of prevention and early intervention programmes, they do not only fail to provide for the child's right to family care,<sup>280</sup> but also fail to act within the best interests of the child. Several pieces of legislations as discussed above makes it clear that the child has a right to grow up within a family environment for the full development of the child's personality. Therefore, social workers would be causing a great injustice to the children of South Africa if prevention and early intervention programmes are not performed in the best interests of the child. Chapter 4 investigates different case law studies to determine whether the state implemented the prevention and early intervention programs correctly and within the best interests of the child within these case law studies.

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<sup>279</sup> Section 144(1)(a)-(i) of the *Children's Act*.

<sup>280</sup> Preamble of the *CRC*, Article 18 of the *ACRWC*, Section 28(1) of the *Constitution*, Section 2 of the *Children's Act*.

## **Chapter 4 Case Law Discussion**

### **4.1 Introduction**

This Chapter examines various case studies to determine whether prevention and early intervention programmes are initiated in child removal cases. The aim is to showcase the role that prevention and early intervention programmes plays in preventing the removal of the child from the family environment.

In the case of *SS v Presiding Officer of the Children's Court*<sup>281</sup> it was found that the court is reliant on the reports of social workers who carry out investigations into the living arrangements of a child<sup>282</sup> in all matters where the removal of the child is of concern.<sup>283</sup> This investigation is regulated in terms of section 147 of the *Children's Act* and is the basis upon which the court makes important decisions regarding what actions to take to protect children from abuse, neglect and the possible removal from the family environment<sup>284</sup>. Such an investigation involves an assessment of the current living arrangements of the child and of the relationship of the child with the family members, as well as the child's emotional, physical and psychological wellbeing.<sup>285</sup> During this process the social worker performs a participatory process that seeks to understand the child and their situation, which includes notions of appraisal, making judgments and; forming opinions; however, most importantly, it sets the basis for planning how change or improvement can be achieved.<sup>286</sup> This investigation is referred to as the prevention and early intervention programme regulated by several international and domestic laws<sup>287</sup> which aims to better the

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<sup>281</sup> *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* (14/1/4 – 206/10, A3056/11) [2012] ZAGPJHC 149.

<sup>282</sup> Section 147 of the *Children's Act*.

<sup>283</sup> *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* (14/1/4 – 206/10, A3056/11) [2012] ZAGPJHC 149 para 29.

<sup>284</sup> Ndonga Assessment in child protection services: Challenges faced by social workers 1.

<sup>285</sup> *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* (14/1/4 – 206/10, A3056/11) [2012] ZAGPJHC 149 para 29.

<sup>286</sup> Bolger et al. Models of Assessment: An Introduction 190-205.

<sup>287</sup> CRC; ACRWC; Constitution and the Children's Act.

family situation and to indicate a projected plan to prevent the removal of the child.<sup>288</sup>

After the social worker has conducted the investigation, the social worker must submit a report to court that contains an assessment of the needs of the child, details of the family preservation services that have been considered or attempted and a statement as to whether the child is in need of care and protection.<sup>289</sup> Based on these assessments, the report of the social worker will also provide the court with recommendations as to what will be in the best interests of the child.<sup>290</sup> It is then the duty of the court to consider the findings of the social worker's report and to make an order in terms of section 6(2) of the *Children's Act* which states that:<sup>291</sup>

- (2) All proceedings, actions or decisions in a matter concerning a child must-
  - (a) Respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
  - (b) Respect the child's inherent dignity;
  - (c) Treat the child fairly and equitably;

Coman and Devaney<sup>292</sup> stated that children are still not receiving sufficient services from child protection services and are receiving poor outcomes. As stated by Travidì,<sup>293</sup> child protection services errors on the side of the removal and regularly fails to consider the harms associated with that removal. The statements of Coman, Devaney and Travidì has been proven in several cases as it was found that, although several pieces of legislation<sup>294</sup> regulate intervention programmes, children have been removed from the family environment without intervention programmes being initiated by social workers in which the court had to intervene. The case law discussed below demonstrates how social workers apply the prevention and early

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<sup>288</sup> Combrinck Family preservation services: experiences of families at risk iv.

<sup>289</sup> Section 157(1)(a)(i)-(iii) of the *Children's Act*.

<sup>290</sup> Section 50(3) of the *Children's Act*.

<sup>291</sup> Section 6(2)(a)-(c) of the *Children's Act*.

<sup>292</sup> Coman & Devaney Reflecting on Outcomes for looked-after Children: An Ecological Perspective 37.

<sup>293</sup> Travidì The harm of child removal 523.

<sup>294</sup> CRC; ACRWC; Constitution and the Children's Act.

intervention programmes in child removal cases. The aim of the discussion is to showcase the role that prevention and early intervention programmes plays in preventing the removal of the child from the family environment.

#### **4.2 *Swarts v Swarts en Andere 2002 (3) SA 451 (T)***

This case dealt with an urgent application in the High Court for the setting aside of a provisional order for the removal of two minor children from their mother's care to a place of safety. The minor children, respectively a girl of 9 years old and a boy of 5 years old, were born from the marriage of the applicant and first respondent.<sup>295</sup> The applicant was the mother of the two minor children and the first respondent was the father of the children.<sup>296</sup> As the parties had had a bitter divorce and was involved in an ongoing domestic violence case, interim control and custody of the minor children were awarded to the applicant.<sup>297</sup> The removal of the children from the care of the applicant followed from the following circumstances: The applicant had asked the first respondent to take care of the children as she had a crisis at work. The first respondent approached a registered social worker and requested that she investigate the circumstances of the children as they were allegedly exposed to conditions that may potentially damage their physical, mental, or social welfare.<sup>298</sup>

During the investigation by the social worker, she heard oral evidence under oath that the applicant made excessive use of sleeping pills or similar substances which often made her unfit to take care of the children after 19:00 in the evening, resulting in the little girl having to take care for her younger brother.<sup>299</sup> During the investigation, the little girl; also begged the social worker to not take her back home to the applicant. This led the social worker to report that it would

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<sup>295</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 36.

<sup>296</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 36.

<sup>297</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 37.

<sup>298</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 36.

<sup>299</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 41.

be in the best interests of the children to be removed from the care of the applicant.<sup>300</sup>

The applicant argued that the actions of the little girl had been encouraged by the first respondent and that there were no grounds for removing the children from her control and supervision in such a drastic manner and requested an order for the immediate return of the children to her care.<sup>301</sup> The applicant further argued that she should have been given the opportunity to be heard prior to the removal of her children.<sup>302</sup> However, the social worker stated in her investigation report that an immediate removal was necessary, and that this decision was reached in a *bona fide* and honest manner.<sup>303</sup>

It was concluded by the Court that the actions and statements of the little girl were sufficient reasons for immediate intervention in the matter.<sup>304</sup> The intervention programme during the time of this case was regulated by section 12 of the *Child Care Act* 74 of 1983.<sup>305</sup> In terms of section 12 of the *Child Care Act* a police officer or social worker may remove a child from any place and bring that child to a place of safety if that police officer or social worker reasonably believes that the child's safety or well-being is under threat.<sup>306</sup> The Court referred to section 14 of the *Child Care Act*, which deals with the implementation of the investigation during the intervention programme: the social worker must, after said investigation, submit a report to the court on the circumstances of the family.<sup>307</sup> The court shall then rely on this report by the social worker to determine whether the child is in need of care, as the child may only be removed from the family environment if he or she is found to be in need of care and protection.<sup>308</sup> As per Section 14(aB)(iv) of the *Child Care Act*,

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<sup>300</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 36.

<sup>301</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 41.

<sup>302</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 36.

<sup>303</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 37.

<sup>304</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 42.

<sup>305</sup> *Child Care Act* 74 of 1983 (hereafter referred to as "*Child Care Act*").

<sup>306</sup> Section 12(1) of the *Child Care Act*.

<sup>307</sup> Section 14 of the *Child Care Act*.

<sup>308</sup> Section 14(1),(2) & (4) of the *Child Care Act*.

referred to by the Court, a child shall be found in need of care in the instance where the child is found to live in or is exposed to circumstances that affects the child's physical, mental, or social development or that may seriously harm the welfare of the child.<sup>309</sup>

The Court specifically referred to the successful implementation of the intervention programme initiated by the social worker and stated that the social worker had conducted the intervention with a professional judgment, which led her to act within the best interests of the children. She had also noticed that the first respondent was displaying potentially problematic behaviour due to the ongoing domestic abuse case and, and that the little girl, Michelle, could be influenced by him if they were to stay with him pending the investigation. This was the reason is why she had suggested that the children be temporarily placed in a place of safety.<sup>310</sup> The social worker had also approached two other social workers who were aware of the family's situation before she decided on the removal of the children.<sup>311</sup>

The Court referred to the provision of section 28(1) of the *Constitution*, which stipulates that a child is entitled to family or parental care, basic nutrition, shelter, basic health, and protection from abuse and neglect.<sup>312</sup> The Court further made reference to section 28(2), which states that the best interest of the child is of decisive importance in all matters relating to children.<sup>313</sup> In consideration of the social worker's recommendation in her report, the children's right to family and parental care, the right to be protected from abuse and neglect, and the best interests of the children, the Court had to be satisfied that it would be in the best interests of the children to be placed in a place of safety. They were being neglected and in circumstances that adversely affected the physical, mental, or social development.<sup>314</sup> Judge Bertelsmann J considered the

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<sup>309</sup> Section 14(aB)(iv) of the *Child Care Act*.

<sup>310</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 42.

<sup>311</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 44.

<sup>312</sup> Section 28(1)(a),(b) & (d) of the *Constitution*.

<sup>313</sup> Section 28(2) of the *Constitution*.

<sup>314</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 44.

report of the social worker and, in light thereof, made an order that the children should be placed in a place of safety, and that the applicant's application for the immediate return of the children to her care is dismissed.<sup>315</sup>

In this case it has been proven that the intervention programme by the social worker had played a critical role in the decision of the Court on whether the children should be removed from their family environment as the courts have a duty in terms of section 6(2) of the *Children's Act* to rely on these reports before making a decision on the best interests of the child.

This intervention program by the social worker included the assessment and monitoring of problems that occurred in the family as per Section 143(1)(b) of the *Children's Act*. The intervention program further included the social worker performing intensive, home-based, and family-centered services to the family as well as involving the participation from other role players (social workers) before deciding what would be in the best interests of the children. This case also proved that the correct implementation of the intervention programme led the Court to truly consider and act in the best interests of the children.

#### ***4.3 C and Others v. Department of Health and Social Development, Gauteng and Others [2012] ZACC 1***

In this case, the North Gauteng High Court in Pretoria declared Sections 151 and 152 of the *Children's Act* unconstitutional to the extent that they provide that state officials may remove the child from the care of the family to be placed in temporary safe care without the matter being brought before the children's court for automatic review of the removal.<sup>316</sup>

The first applicant in this case trades as a shoe repairer in Sunnyside, Tshwane, at an intersection near a take-away restaurant.<sup>317</sup> On the day in question, the applicant

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<sup>315</sup> *Swarts v Swarts en Andere* 2002 (3) SA 451 (1) page 45.

<sup>316</sup> *C and Others v. Department of Health and Social Development, Gauteng and Others [2012] ZACC 1* para 1 (hereinafter referred to as "[2012] ZACC 1").

<sup>317</sup> [2012] ZACC 1 para 8.

had his three-year-old daughter with him because his partner was in hospital giving birth.<sup>318</sup> The second applicant in this matter was at the same intersection as the first applicant, as she made a living by begging for money. As she was blind, she was accompanied by an assistant and her two children – aged four and one, with the youngest still being breastfed by the second applicant.<sup>319</sup>

On the day in question, the social workers from the Tshwane Department of Social Development, together with city officials, “raided” these people on the streets who had children with them or near them, and the children of the first and second applicants were taken from them by the social workers without a court order.<sup>320</sup> The social workers placed the first applicant in a school for the blind, leaving her unable to continue breastfeeding her one-year-old child.<sup>321</sup> The social workers failed to notify any of the parents about the whereabouts of their children.<sup>322</sup> An urgent application was brought to the Court to restore the children to their parents.<sup>323</sup> The applicants further sought a declaratory order in regard to the conduct of the social workers and a declaration of constitutional invalidity of sections 151 and 152 of the *Children’s Act*, as they failed to provide for a judicial review of the removal of a child from the care of the family.<sup>324</sup>

The rights that were infringed or placed at risk in this particular case includes the right of the child to family and parental care,<sup>325</sup> the best interest of the child being considered as paramount consideration as per section 28(2) of the *Constitution*,<sup>326</sup> the breach of the state’s obligation in terms of Article 9 of the *CRC* - which is to ensure that the child is not separated from his/her parents unless it is in his/her best interest and subject to judicial review with an opportunity to participate in the

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<sup>318</sup> [2012] ZACC 1 para 9.

<sup>319</sup> Mokobane Children in need of care and protection and their right to family life 639.

<sup>320</sup> [2012] ZACC 1 para 10.

<sup>321</sup> Mokobane Children in need of care and protection and their right to family life 639.

<sup>322</sup> [2012] ZACC 1 para 10.

<sup>323</sup> [2012] ZACC 1 para 11.

<sup>324</sup> [2012] ZACC 1 para 12.

<sup>325</sup> Section 28 (1)(b) of the *Constitution*.

<sup>326</sup> Section 28(2) of the *Constitution*.

proceedings,<sup>327</sup> the right of the child to grow up within a family environment that is filled with happiness, love and understanding,<sup>328</sup> and the right in terms of section 148(1) of the *Children's Act* not to be removed from the family environment without a prevention and early intervention programme being implemented by a social worker.<sup>329</sup>

Judge Fabricius J found that sections 151 and 152 of the *Children's Act* are unconstitutional insofar as they do not make provision for automatic judicial review of the removal process and thereby lack a method for determining whether there was just cause for the removal.<sup>330</sup> Fabricius J further held that the removal without a judicial review does not constitute an adequate protective mechanism to children.<sup>331</sup> He also concluded that there is a duty on the state to have measures in place to ensure that the child's best interests are at all times considered, and that specific provision for the review of removals is a minimum requirement of that duty.<sup>332</sup>

Consequently, the Court decided that it is appropriate to read in a new subsection to be numbered (2A) into section 151 of the *Children's Act* as follows:

(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

- (i) The removal is placed before the Children's Court for review before the expiry of the next day after the removal; and
- (ii) The child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court.<sup>333</sup>

The Court also ordered that section 152(3)(b) of the *Children's Act* is deleted and replaced by the following:

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<sup>327</sup> Article 9 of the *CRC*.

<sup>328</sup> Preamble of the *CRC*.

<sup>329</sup> Section 148(1) of the *Children's Act*.

<sup>330</sup> [2012] ZACC 1 para 15.

<sup>331</sup> [2012] ZACC 1 para 14.

<sup>332</sup> [2012] ZACC 1 para 14.

<sup>333</sup> Government Gazette, 13 April 2012 No, 35246 bl.23.

(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:

- (i) The removal is placed before the Children's Court for review before the expiry of the next court date after the referral;
- (ii) The child concerned and the parents, guardian or caregiver as the case may be are, unless this is impracticable, present in court, and
- (iii) The investigation contemplated in section 155(2) is conducted.<sup>334</sup>

The Court made the above decision based on the consideration that the coercive removal of a child from his/her family environment is undoubtedly a deeply invasive and disruptive measure and that such a removal by the state threatens to rupture the integrity and continuity of family relations.<sup>335</sup> The Court also considered section 28(1)(b) of the *Constitution* which provides for alternative care when a child is removed from the family environment, and stated that this is a secondary right and not an equivalent alternative right.<sup>336</sup> Thus, the removal of a child from the care of the family is not constitutionally compatible with the primary right to family/parental care. If that were the case, the primary right would be legally meaningless and section 28(1)(b) would only provide for the right to appropriate care, irrespective of the environment.<sup>337</sup> This conclusion was based on the interpretation of section 28(1)(b) by Van Dijkhorst J in *Jooste v Botha*<sup>338</sup>, namely that it envisages:

a child in [the] care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of the family.<sup>339</sup>

The Court also made reference to section 39(1)(b) of the *Constitution* in terms of which international laws are bound to be considered.<sup>340</sup> The first instrument the court considered was the *ACRWC*- which states that every child shall enjoy parental care and protection and shall, whenever possible, have the right to reside with his

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<sup>334</sup> Government Gazette No. 301 (13 April 2012): *Constitutional Court Judgment 24*.

<sup>335</sup> [2012] ZACC 1 para 23.

<sup>336</sup> [2012] ZACC 1 para 23.

<sup>337</sup> [2012] ZACC 1 para 24.

<sup>338</sup> *Jooste v Botha* 2000 (2) SA 199 (T).

<sup>339</sup> [2012] ZACC 1 para 24.

<sup>340</sup> Section 39(1)(b) of the *Constitution*.

or her parents.<sup>341</sup> The second instrument considered by the Court was the *CRC* which guarantees every child the right to know and be cared for by his/her parents; to preserve his/her identity and family relations as recognised by law without unlawful interference.<sup>342</sup>

Reference was also made to the case of *Du Toit and Another v Minister of Welfare and Population Development and Others*,<sup>343</sup> which held that family life is important to the well-being of all children. In terms of the best interests of the child, the Court referred to section 28(2) of the *Constitution*, which states that the best interests of the child have paramount importance in all matters concerning the child.<sup>344</sup>

The Court further referred to the case of *S v M*<sup>345</sup> of which it remarked:

The paramountcy principle, read together with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.<sup>346</sup>

From these considerations, the court concluded that the removal of a child from the family requires adequate consideration, and - as a minimum - the family and the child in question must be given the opportunity to make representations on whether the removal is in the best interests of the child.<sup>347</sup> The removal must be done subject to a judicial review and must safeguard the best interests of the child.<sup>348</sup>

Based on the above, the Court stated that a legal framework for the removal of children from their family environment is significant to protect children from harm and to secure the rights of parents.<sup>349</sup> The Court referred to the current legal framework for the removal of a child, which states that, when a police officer or

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<sup>341</sup> [2012] ZACC 1 para 25; Article 19(1) of the *ACRWC*.

<sup>342</sup> [2012] ZACC 1 para 25; Article 8(1) of the *CRC*.

<sup>343</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20.

<sup>344</sup> [2012] ZACC 1 para 26; Section 28(2) of the *Constitution*.

<sup>345</sup> *S.v.M (Centre for Child Law)* [2007] ZACC 18.

<sup>346</sup> [2012] ZACC 1 para 27.

<sup>347</sup> [2012] ZACC 1 para 27.

<sup>348</sup> [2012] ZACC 1 para 34.

<sup>349</sup> [2012] ZACC 1 para 47.

social worker removes a child from the family environment, the matter must be referred for investigation as provided for in section 155(2) of the *Children's Act*.<sup>350</sup> Such investigation requires a designated social worker to investigate the family matter and to file a report within 90 days, indicating whether the child is in need of care and protection as per section 151 and 152 of the *Children's Act*.<sup>351</sup> A child may not be removed unless a court concludes or the social worker reasonably believes that the child is in need of care and protection,<sup>352</sup> and without a prevention and early intervention programme being implemented as per Chapter 8 of the *Children's Act*.<sup>353</sup> Yacoob J stated that any removal of a child who is not in need of care and protection from the family environment would fall outside the ambit of the impugned provisions, and that these provisions cannot be invoked to justify the removal.<sup>354</sup>

Based on the above, the judgment read on 24<sup>th</sup> August 2010 was that the child of the first applicant must be immediately returned to his care. However, the child of the second applicant was ordered to remain in a place of safety for five weeks, pending investigation as to whether the child would require alternative care.<sup>355</sup> By order of the children's court, the children of the second applicant have since been returned to her care under the supervision of a social worker.<sup>356</sup>

In this case it was argued and proven that the removal of the child from the care of the family without judicial review before a court is unconstitutional and infringes on several rights of the child, such as the right to family and parental care<sup>357</sup> and the right of the child to have their best interest given paramount importance in terms of section 28(2) of the *Constitution*.<sup>358</sup> As section 39(1)(b) of the *Constitution* requires that international law be considered, such removal is also in this case confirmed to breach the States obligation in terms of Article 9 of the *CRC* - to

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<sup>350</sup> Section 155(2) of the *Children's Act*.

<sup>351</sup> Section 151 & 152 of the *Children's Act*.

<sup>352</sup> [2012] ZACC 1 para 66 -67.

<sup>353</sup> Chapter 8 of the *Children's Act*.

<sup>354</sup> [2012] ZACC 1 para 124.

<sup>355</sup> [2012] ZACC 1 para 11.

<sup>356</sup> [2012] ZACC 1 para 11.

<sup>357</sup> Section 28 (1)(b) of the *Constitution*.

<sup>358</sup> Section 28(2) of the *Constitution*.

ensure that the child is not separated from his/her parents unless necessary for the best interest of the child and subject to judicial review, with an opportunity to participate in the proceedings.<sup>359</sup> It is also proven that a removal without proper intervention breaches Article 19(1) of the *ACRWC* which states that every child shall enjoy the right to reside with his or her parents whenever possible.<sup>360</sup> The Court thus made an order that the children be returned to the care of their parents, as their removal was not in accordance with the legal framework and not in the best interests of the children.

In light of the discussion above, the writer wants to emphasise the difference that prevention and early intervention could have made in this case had it been implemented as required by law. It is the opinion of the writer that, if the social workers had implemented the prevention and early intervention programmes correctly as required by Chapter 8 of the *Children's Act*, the children would not have been unlawfully removed from their family environment. To support this statement, the writer refers to the grounds for removal: the child must be in need of care and protection or in an emergency situation before removal from the family environment is justified.<sup>361</sup> The removal of the child must also be in the best interest of the child.<sup>362</sup> The only way to determine these grounds for removal is by implementation of a prevention and early intervention programme by a social worker.<sup>363</sup> This case serves as evidence that the failure to implement prevention and early intervention programmes leads to unlawful and unnecessary removals of children. The writer argues that this violation of rights could have been prevented had the assessment of the family been done in terms of a prevention and early intervention programme, which would have demonstrated that the children in this case were neither in need of care and protection, nor were they in any emergency situation that would justify their removal.

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<sup>359</sup> Article 9 of the *CRC*.

<sup>360</sup> Article 19(1) of the *ACRWC*.

<sup>361</sup> Section 152 of the *Children's Act*.

<sup>362</sup> Section 28(2) of the *Constitution*.

<sup>363</sup> Section 143(1)(b) of the *Children's Act*.

As seen from the facts of this case, the social worker and police officials had not complied with the legal framework provided for the removal of children from the care of the family as no assessments or interventions were done. The social worker made no effort to determine nor act within the best interests of the child. The social worker neglected to apply the correct legal framework and perform a prevention and early intervention programme caused the social worker to wrongfully remove the child from the care of the father and infringe on several of the child's rights such as the right to family and parental care,<sup>364</sup> the right to paramount of the child's best interest<sup>365</sup> and the right to not be separated from his/her parents.<sup>366</sup>

#### **4.4 *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 (2 November 2017) Unreported***

In this case, the High Court had to determine whether to remove the child from the care of the biological parents pending an investigation into the possible need of care and protection as per section 150 of the *Children's Act*.<sup>367</sup> The Court stated that it would only remove the child from the care of the biological parents if there were an immediate necessity to protect the child.<sup>368</sup>

The applicant in this matter had no biological or legal ties with the minor child (8 months old) in question.<sup>369</sup> However, the applicant did take care of the child from time to time, as she had known the second respondent who is one of the parents of the child – since 2014.<sup>370</sup> As per the applicant's allegations, the parents of the child (first and second respondent) had an unhealthy relationship that was characterised by alcohol and drug abuse.<sup>371</sup> The applicant further informed the Court that the biological parents of the child had no interest in taking care of the child, as they would regularly leave the child in the applicant's care while they would go out

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<sup>364</sup> Section 28 (1)(b) of the *Constitution*.

<sup>365</sup> Section 28(2) of the *Constitution*.

<sup>366</sup> Article 9 of the *CRC*.

<sup>367</sup> *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 para 18.*

<sup>368</sup> *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 para 31.*

<sup>369</sup> *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 para 13.*

<sup>370</sup> *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 para 16.*

<sup>371</sup> *R v A and Another (2446/2017) [2017] ZAECCPEHC 54 para 26.*

to drink.<sup>372</sup> On top of that, the applicant stated that the child was abused and neglected, as she had seen a blister on the child's back, which, according to her, was a cigarette burn that had burnt holes in the child's clothing.<sup>373</sup> In turn, the respondents argued that the applicant had a troublesome history of mental illness and that she was obsessed with the child.<sup>374</sup>

To distinguish facts from allegations, the Court had ordered that several investigations be done.<sup>375</sup> The first investigation entailed a full physical examination of the minor child by a medical practitioner. The second investigation required a recommendation from the social worker as to whether the child was to be removed from the biological parents, and the last investigation required an examination by a different medical practitioner to determine the fitness of the applicant to serve, as place of safety for the minor, pending the outcome of the case.<sup>376</sup>

The medical practitioner who examined the minor concluded that the child was healthy, well-nourished and appropriately developed.<sup>377</sup> From her observation of the burn mark on the minor's back, the medical practitioner reported it unlikely to be the result of physical neglect and/or physical abuse, but an accident.<sup>378</sup> Her reasoning for this statement was that mark appeared to be a healing bruise and that the "epidermis" did not appear to be broken, as would have been the case if it had indeed been a burn wound.<sup>379</sup> The medical examiner stated that, from the medical evidence, the allegations by the applicant were highly exaggerated.<sup>380</sup> The report filed by the social worker after her investigation only stated that she was unable to determine whether the mark observed on the minor's back was indeed a cigarette burn.<sup>381</sup> The medical examiner who had inspected the applicant for her

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<sup>372</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 16.

<sup>373</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 20.

<sup>374</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 17.

<sup>375</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 18.

<sup>376</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 7(1)-(3).

<sup>377</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 23.

<sup>378</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 24.

<sup>379</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 24.

<sup>380</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 25.

<sup>381</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 21.

fitness to take care of the minor child, confirmed that the applicant did indeed suffer from bipolar spectrum disorder, adult attention deficit hyperactivity disorder, and panic disorder, however, it was also confirmed that she was under psychiatric treatment and that she responded well to medication.<sup>382</sup> Hence, the medical practitioner confirmed that the applicant was fit to exercise temporary care over the minor child.<sup>383</sup>

In terms of the best interest of the child, the Court stated that the child was only 8 months old and was still in the very earliest stages of bonding with his parents. Since the child was well nourished; healthy and showed no signs of physical abuse, it would be in the immediate best interest of the child to keep him in the care of his biological parents while investigating the matter.<sup>384</sup> In support of this decision, the Court referred to the case of *C v Department of Health and Social Development, Gauteng and Others*,<sup>385</sup> which states that a child may only be removed when, after investigation, the court, designated social worker, or police official concludes that the child is in need of care and protection.<sup>386</sup> In this case,<sup>387</sup> however, several investigations failed; to convince the court that the immediate removal of the child from the biological parents was justified.<sup>388</sup> However, the Court also pointed out that it would be in the best interests of the minor child to intervene in the present care arrangements and, as such, an intervention programme was implemented to secure the safety and well-being of the child.<sup>389</sup> It was ordered that independent experts be appointed for further investigation, and the matter was referred to Legal Aid South Africa.<sup>390</sup>

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<sup>382</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 26.

<sup>383</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 27.

<sup>384</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 36.

<sup>385</sup> *C v Department of Health and Social Development, Gauteng and Others* 2012(4) BCLR 329 (CC).

<sup>386</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 40.

<sup>387</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC.

<sup>388</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC para 39.

<sup>389</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC 54 para 40.

<sup>390</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC para 48(3).

In this case, the Court had the difficult task of determining whether the child must be removed from the care of the family. What made this case challenging was the allegations and possible proof of abuse and neglect towards the minor child, and the serious allegations the parties made towards each other.<sup>391</sup> To determine the truth behind these allegations as well as the best interests of the child, the court ordered several investigations and assessments by a social worker and medical examiners.<sup>392</sup> The investigation reports submitted to the Court enabled the Court to decide what would serve the best interests of the child. It was decided that the child's interest would not be best served by immediate removal from the parent care pending further investigation and intervention by a social worker.<sup>393</sup> It is clear from this case that, with the application of the correct legal framework, social workers and the Court are enabled to act within the best interest of the child and not infringe on any of the child's rights.

***4.5 S v Ishwarall and Another (CC 103/2015) [2018] ZAKZDHC 55; [2018] 4 All SA 799 (KZD) (8 November 2018)***

In this case, the accused abused and neglected her four minor children. Brendan Pillay, the first witness in the case, and Ward Councillor for Havbesidem, where the accused resided, testified that the children in question raised complaints about being abused and neglected.<sup>394</sup> According to Brendan Pillay, the complaints had not received the urgent attention and necessary support and assistance from the social worker, teachers, family members or community members to whom the complaints were made which resulted in the death of one of the children. The second witness the Court called was Ms Mahashee Naidoo (hereafter referred to as "Ms Naidoo"), a social worker employed by the Department of Social Development as deputy director in Chatworth, who testified that she was responsible for the three minor

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<sup>391</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC para 16 & 26.

<sup>392</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC para 18.

<sup>393</sup> *R v A and Another* (2446/2017) [2017] ZAECCPEHC para 36.

<sup>394</sup> *S v Ishwarall and Another (CC 103/2015) [2018] ZAKZDHC 55; [2018] 4 All SA 799 (KZD) (8 November 2018)* (hereafter referred to as "S v Ishwarall and Another").

children of the accused after the death of their sister, J.<sup>395</sup> Ms Naidoo stated that the children had been placed in foster care.<sup>396</sup>

Ms Naidoo explained that she had been mandated to file a report with the focus on what the best interests of the children would be and confirmed that her report complied with that mandate.<sup>397</sup> Ms Naidoo told the Court that after the children had been placed in foster care, there was a responsibility on Chatsworth Child Welfare (hereafter referred to as "CCW") - an NGO overseen by the Department of Social Development - to monitor the children. Ms Naidoo further explained that the CCW employed qualified social workers, a manager and a supervisor who reported to the Department of Social Development.<sup>398</sup> Ms Naidoo added that the Department of Social Development oversaw the statistics and functions of the CCW but that there was no supervision of specific cases or case details.<sup>399</sup> According to the Department of Social Development, all social workers must receive supervision while in practice.<sup>400</sup> Supervisors have a duty to ensure that social workers are educated on the guidelines of the *Children's Act* to make proper assessments during the prevention and early intervention programmes.<sup>401</sup> Ms Naidoo told the Court that the Department of Social Development exercised no supervision over specific cases or case details, a complaint corroborated by many social workers who alleged that their investigation reports were countersigned without supervision during the course of investigations.<sup>402</sup>

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<sup>395</sup> *S v Ishwarall and Another* para 7.

<sup>396</sup> *S v Ishwarall and Another* para 7.

<sup>397</sup> *S v Ishwarall and Another* para 7.

<sup>398</sup> *S v Ishwarall and Another* para 8.

<sup>399</sup> *S v Ishwarall and Another* para 8.

<sup>400</sup> Rossouw The experiences and perceptions of newly qualified social workers on the significance of social work supervision in child protection services in Cape Town (herein after referred to as "Rossouw") 87.

<sup>401</sup> Rossouw 24.

<sup>402</sup> Hope and Van Wyk *Intervention strategies used by social workers in emergency child protection* 422. Hope and Van Wyk conducted a study with 38 social workers in the Western Cape Province of South Africa to determine whether they received supervision during their assessments in child protection cases in which only one out of 38 social workers confirmed to have received supervision.

Ms Naidoo went on to testify that she removed the three children A, D, and I, from the care of the accused and placed them in the Arayan Benevolent Child Youth Care Centre in terms of the *Children's Act*.<sup>403</sup> In her testimony she stated that the youngest child, I, was assessed by the district surgeon at the time of removal and found to be malnourished and underweight. The child (I) was initially afraid during the removal, but slowly adjusted into a comfortable routine and developed appropriate behaviour.<sup>404</sup> D was fearful and ambivalent during the removal from the family environment, but improved to satisfaction.<sup>405</sup> At the time of the removal, A was 4 years old and mainly expressed sorrow and despair during the removal. However, he also expressed relief when he was finally removed from the care of the accused.<sup>406</sup> During the court proceedings it came to light that a social worker had conducted an investigation at A's school in 2015. The educator stated that A had arrived at school with marks in his face. When questioned, he told the teacher that he had been burnt by his grandmother. When the school summoned the grandmother, she failed to respond.<sup>407</sup> It was clear Ms Naidoo's statements that the accused had placed the children into high-risk situations that caused serious harm to their physical, mental and social well-being.<sup>408</sup> In her report, Ms Naidoo made it clear that it would be in the best interests of the children to remain in the care of the facility they had been placed in.<sup>409</sup>

In the argument of the Court, specific reference was made to A, who had told teachers and friends that he had been assaulted, despite a threat from the accused. He received no assistance beyond a perfunctory request that the grandmother present herself, which was ignored. The school authorities did not follow through with the matter, which was unacceptable behaviour as per the Court.<sup>410</sup> The Court stated that, if the abuse had been investigated at that point, the tragic outcome

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<sup>403</sup> S v Ishwarall and Another para 9.

<sup>404</sup> S v Ishwarall and Another para 10.

<sup>405</sup> S v Ishwarall and Another para 11.

<sup>406</sup> S v Ishwarall and Another para 12.

<sup>407</sup> S v Ishwarall and Another para 13.

<sup>408</sup> S v Ishwarall and Another para 15.

<sup>409</sup> S v Ishwarall and Another para 16.

<sup>410</sup> S v Ishwarall and Another para 50.

may have been pre-empted. This led the Court to the question how many other children seek assistance and are failed by educators who are meant to be *in loco parentis* while the children are in their care.<sup>411</sup>

The Court made reference to the importance of reporting child abuse to a social worker, as such instances must be investigated to determine whether the child is in need of care and protection<sup>412</sup> or in an emergency situation, which are the only conditions that justify the removal of a child.<sup>413</sup> As per the Court, a child shall be in need of care and protection when that child is in a state of physical or mental neglect. Physical abuse may be identified in a grossly underweight child who displays stunted growth and clear signs of malnutrition.<sup>414</sup> The Court further stated that the child shall be deemed in need of care when he/she is being maltreated, abused or intentionally neglected. Abuse in this case would include inflicting deliberate harm to the child, sexually abusing the child or allowing behaviour towards the child that may harm the child psychologically or emotionally.<sup>415</sup>

The Court emphasised the importance of the designated social worker implementing the early prevention and intervention programmes to deal with the problem before approaching the court, and stated that this step must be immediately initiated when the alleged abuse is reported.<sup>416</sup> The Court pointed out that, when a possible case of child abuse and neglect is reported to a designated social worker, that social worker must investigate that report in accordance with a broad risk assessment that consists of the following framework of indicators:

The presence of indicators of physical abuse include the following:-

- (i) Bruises or grasp marks on the arms, chest, face or other parts of the body.
- (iii) Variations in bruising colour. The presence of many injuries at various stages of healing makes it obvious that injuries did not occur as a result of one incident.

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<sup>411</sup> S v Ishwarall and Another para 50.

<sup>412</sup> S v Ishwarall and Another para 53.

<sup>413</sup> Section 28(2) of the *Constitution*.

<sup>414</sup> S v Ishwarall and Another para 53; Section 150 of the Children's Act.

<sup>415</sup> S v Ishwarall and Another para 53; Section 150 of the Children's Act.

<sup>416</sup> S v Ishwarall and Another para 53.

- (iv) Black or blue eyes.
- (v) Belt marks.
- (vi) Swollen areas or broken bones.
- (vii) Missing patches of hair.
- (viii) Torn tissue or cuts around or behind the ears.
- (ix) Cigarette or other burn marks.
- (x) Cuts, lacerations, welts, fractures, head injuries.
- (xi) A child's behaviour might signal that something is wrong. Victims of physical abuse may display withdrawal or aggressive behavioural extremes, complain of soreness or uncomfortable movements, wear clothing that is inappropriate to the weather, express discomfort with physical contact or become chronic runaways.<sup>417</sup>

What struck the Court was the fact that all these indicators resonated with Dr. Ntsele's findings in his post-mortem report on J's body. Also, the Court stated that there was evidence that complaints had been lodged by neighbours, and a social worker had visited the home of the accused. The social worker had only spoken to the accused and then left the residence.<sup>418</sup> The Court thus pointed out the evidence of the social worker's failure to institute the necessary prevention and early intervention programme, as all the signs of abuse had been visible on J's body.<sup>419</sup> In this regard, the Court made the following statement:

Following the guidelines in the manual I have quoted, she was a textbook case of abuse and deliberate neglect, which the social worker failed to observe or deliberately ignored.<sup>420</sup>

The Court argued that, during this time, A and D were both old enough to be interviewed, but the social worker had failed to do so. Even if there had been no place of privacy, the social worker neglected to make the necessary arrangements to interview them under circumstances more conducive to full disclosure.<sup>421</sup> This

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<sup>417</sup> S v Ishwarall and Another para 53(a).

<sup>418</sup> S v Ishwarall and Another para 55.

<sup>419</sup> S v Ishwarall and Another para 55.

<sup>420</sup> S v Ishwarall and Another para 55.

<sup>421</sup> S v Ishwarall and Another para 56.

led to the Courts conclusion that the tragic waste of J's life and the sustained abuse of all the children could have been prevented. The Court further pointed out that the unfortunate reality of this case was that there were many more children who were not receiving the interventions necessary to rescue them from similar fate.<sup>422</sup> In terms of the judgment in the case, the Court relied on the report submitted by Ms Naidoo and made an order that it would be in the best interests of the children to remain in care facilities where they could benefit from stability, were well nourished, and had settled into respective schools.<sup>423</sup>

In this case, the importance of Chapter 8 of the *Children's Act* was brought to light. This case serves to prove that prevention and early intervention as regulated by section 147 of the *Children's Act* plays a critical role in the removal process of children from their family environment. It was proven in that the social worker's failure of this step could lead not only to unlawful and unnecessary removals of children, but is also the reason for continuous abuse among children, and the reason for fatal abuse cases. The writer agrees with the arguments made by the Court. If the social worker had thoroughly investigated the family situation when visiting the home of the accused, she would have been able to prevent the death of J and the ongoing abuse of A and D. The case also proved that, when prevention and early interventions are implemented timeously and within the correct framework, it helps the court to truly consider the best interests of the child and to act accordingly. The investigation report of Ms Naidoo was of utmost importance in the proceedings of the Court, as this was the main consideration as to what would be in the best interests of the children.

#### **4.6 Conclusion**

As seen from the cases above, prevention and early intervention programmes in terms of Chapter 8 of the *Children's Act* are of utmost importance in determining whether children must be removed from the family environment. The ignorance of such programmes has proven to result in unlawful and unnecessary removals of

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<sup>422</sup> S v Ishwarall and Another para 56.

<sup>423</sup> S v Ishwarall and Another para 64.

children from their families. In the case of *S v Ishwarall and Another*, failure to implement the prevention and early intervention programme led to the death of a minor child due to abuse. In the case of *C v Others v. Department of Health and Social Development, Gauteng and Others*,<sup>424</sup> it was established that the ignorance of a prevention and early intervention programme before a child's removal from the family environment results in harm. Such removals are deemed contrary to the child's best interests, constituting an infringement of the right to grow up in a family environment, to have their best interests protected, and to be shielded from abuse and neglect.

Unnecessary removals exacerbate further difficulties within the already strained system, which leads to other new harms such as overfull courts that cannot provide hearings.<sup>425</sup> It is thus required that a comprehensive "risk assessment" as regulated by section 147 of the *Children's Act*<sup>426</sup> be done to ensure that the best interest of the child is considered and that courts act accordingly. This risk assessment includes the risk of harm to the child in terms of the removal from the parent's care and the placement in alternative care.<sup>427</sup> The main aim of such an assessment is to determine whether the child is in need of care and protection and whether the child must be removed from the family environment. As the court relies on the investigation report of the intervention process, it is regarded as an important step that must be taken before the child is removed from the care of the family. The importance of the intervention process can clearly be seen in the case of *R v A and Another*. In this case, the intervention was instituted within the legal framework and before any removal was done. Thus, the Court could rely on the social worker's investigation report, consider the best interests of the child, and make an order accordingly. As a result, no unlawful or unnecessary removal was performed by the

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<sup>425</sup> Chill BURDEN OF PROOF BEGONE The Pernicious Effect of Emergency Removal in Child Protective Proceedings 542.

<sup>426</sup> Section 147 of the *Children's Act*.

<sup>427</sup> Liebmann What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, And Compassionate Removal Standards 164.

social worker, and the rights of the child to family and parental care, the right to be protected from abuse and neglect and the right to have the child's best interests protected was upheld by the Court.

## ***Chapter 5 Conclusion and Recommendations***

Through literature studies and examination of legal resources, this study investigated the role of prevention and early intervention programmes under the *Children's Act* to prevent the wrongful removal of a child from the family environment. As children are amongst the most vulnerable groups of our society, they have the right to grow up within a family environment and in an atmosphere of love, happiness and understanding. In terms of several international instruments<sup>428</sup> and domestic legislation.<sup>429</sup> The state has a duty to protect this right of the child to family and parental care. With the right to family care comes the risk of the child being removed from the family environment.

As discussed in Chapter 2, a child may only be removed from the family environment if the child is found to be in need of care and protection in terms of section 150 of the *Children's Act* or is in an emergency situation that requires an immediate removal of the child.<sup>430</sup> To determine whether the child is in need of care and protection and whether the removal of the child shall be in his/her best interests, the social worker must first initiate a prevention and early intervention programme

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<sup>428</sup> Article 9 of the *CRC*; Article 18 of the *ACRWC*.

<sup>429</sup> Section 28(1)(b) of the *Constitution*; Chapter 8 of the *Children's Act*.

<sup>430</sup> Section 150 of the *Children's Act*.

as regulated by Chapter 8 of the *Children's Act*.<sup>431</sup> During the prevention and early intervention programme, the social worker shall investigate the circumstances of the family, consider the harms of the removal, and make a recommendation on the removal of the child to the court by way of an investigation report.<sup>432</sup> However, in other situations, the social worker may immediately remove the child from the family environment without performing a prevention and early intervention program. Such removals are regulated by Section 152 of the *Children's Act* which provides for emergency removals in instances where there are reasonable grounds to believe that the child needs immediate protection.

As discussed in Chapter 3, Section 28(2) of the *Constitution stipulates* that the best interests of the child must be of paramount importance in all matters concerning children.<sup>433</sup> It is therefore important that the social worker makes her recommendation to the court with consideration of the best interest of the child. The social worker would therefore have to consider Section 7 and Section 9 of the *Children's Act* which sets out the factors to be considered when determining the best interests of the child.<sup>434</sup> Some of these factors includes the potential impact of the removal on the child's emotional and intellectual needs, the need for the child to be brought up within a stable family environment, and the nature of the relationship between the child and the family.<sup>435</sup>

As seen in Chapter 4, the court has a duty to consider the findings in the social workers investigation report and to make an order with regards to the removal of the child accordingly. The consideration of the court must in all matters be in line with Section 6(2) of the *Children's Act*, which states that, in all matters concerning children, the court must respect, protect, promote, and fulfil the rights of the child as set out in the Bill of Rights and respect the child's inherent dignity.<sup>436</sup> In the case of *C and Others v. Department of Health and Social Development, Gauteng and*

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<sup>431</sup> Chapter 8 of the *Children's Act*.

<sup>432</sup> Section 148(4) of the *Children's Act*.

<sup>433</sup> Section 28(2) of the *Constitution*.

<sup>434</sup> Section 7 of the *Children's Act*.

<sup>435</sup> Section 7 of the *Children's Act*.

<sup>436</sup> Section 6(2) of the *Children's Act*.

*Others*, the court had no investigation report to rely on to make an order that respected, protected, promoted, and fulfilled the rights of the child as set out in the *Bill of Rights*. The rights of these children had already been breached before the matter even went to court, as social workers had failed to perform the intervention programmes. As a result, the social workers removed several children from their families unlawfully, unnecessarily, and against their best interests.<sup>437</sup> This case<sup>438</sup> is proof that, had the prevention and early intervention programme been performed before the removal of the children, the children would never have been removed from the family environment in the first place. This confirms the statement of Trividi, that child protection services errors on the side of the removal and regularly fails to consider the harms that are associated with that removal.<sup>439</sup>

The importance of the need to implement a prevention and early intervention programme before the removal of a child from the family environment was highly emphasised in the case of *S v Ishwarall and Another*. The High Court clearly laid down the steps to be followed by social workers during the prevention and early intervention programme.<sup>440</sup> In this particular case, a minor child died from abuse due to the failure of the social worker to conduct a proper investigation in the matter. The Court made it clear that, if the social worker had implemented a prevention and early intervention programme, the death of the minor child could have been prevented. All the signs of abuse and neglect were physically visible on the minor's body and several allegations of abuse had been brought to the attention of the social worker, who deliberately ignored them.<sup>441</sup>

It is clear from the above that the role of the prevention and early intervention programmes play a critical role in the removal of the child from the family. Evidence from the case law discussions above has proven that, when the social worker neglects to implement the prevention and early intervention programme, it has

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<sup>437</sup> [2012] ZACC 1.

<sup>438</sup> [2012] ZACC 1.

<sup>439</sup> Trividi The harm of child removal 523.

<sup>440</sup> *S v Ishwarall and Another* para 53.

<sup>441</sup> *S v Ishwarall and Another* para 55.

detrimental effects on the children in question. These effects include the breach of several children's rights, and in some cases, may even lead to the death of the children<sup>442</sup>. This raises the question as to what can be done to promote the implementation of prevention and early intervention programmes amongst social workers? In light of this question, the writer refers to the statement of Ms Naidoo in the case of *S v Ishwarall and Another*, where there had been no supervision by the Department of Social Services to the specific cases or case details of the CCW.<sup>443</sup> The writer also refers to the study conducted by Hope and Van Wyk where only one out of 38 social workers stated to have received supervision during the implementation of the intervention process. During this study it was brought to light that investigation reports had been countersigned by the supervisor, who had performed no supervision during the assessments. Failure to supervise social workers during the assessment process has proven in case law to lead to unnecessary and unlawful removals of children from the family environment. Such removals breach the right of the child to family care and to have their best interests protected. It is clear from the case law that, if prevention and early intervention programmes are implemented correctly, the courts won't have to intervene. The writer thus recommends that adequate supervision be provided to social workers during their assessments as this would ensure that the prevention and early intervention programs are implemented in accordance with the correct legal framework as provided for in Chapter 2. It is recommended that a structured and an ongoing system of training and supervision be recognised for social workers engaging in child assessments. This could involve regular training sessions to inform social workers on the latest legal professions and guidelines related to the child protection system. Additionally, a system of continuous supervision, wherein experienced professionals regularly review and provide feedback on social workers' assessments, should be implemented. This would help to enhance the accuracy and legality of assessments. To guarantee the implementation of the above measures

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<sup>442</sup> *S v Ishwarall and Another*.

<sup>443</sup> *S v Ishwarall and Another* para 8.

by the state, a multifaced approach that encompasses policy advocacy, institutional commitment and ongoing oversight is required.

In the case of *S v Ishwarall and Another* the Court provided a detailed list of indicators according to which a social worker must assess a possible case of abuse and neglect. The framework of indicators includes bruises or grasp marks on the body, variations in bruising colour, black or blue eyes, belt marks, swollen areas or broken bones, missing patches of hair, torn tissue or cuts around the ears, cigarette or other burn marks, cuts, lacerations, welts, fractures, and head injuries.<sup>444</sup> This Chapter 8 of the *Children's Act* fails to set out a detailed list of factors that must be considered when implementing the assessment of abuse and neglect. The writer propose that the list as provided for in the case of *S v Ishwarall and Another*, or a similar list of indicators be incorporated in Chapter 8 of the *Children's Act*. This would make the assessment process more effective as social workers would know exactly what to look for during their assessment. The writer is of opinion that if these two changes are made within the framework that regulates the prevention and early intervention programmes, children would not be removed from the family environment unlawfully and unnecessarily.

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<sup>444</sup> S v Ishwarall and Another para 53(a).

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